ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 53

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1860
TO
JUNE TERM, 1862
INCLUSIVE.

BY
HAMILTON C. JONES
(VOL. 8.)

ANNOTATED BY
WALTER CLARK
(2 ANNOTATED ED.)

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1 " Eq.	"	36	"
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3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
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" Eq.	"	45	"
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3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
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Phillips Law	"	61	"
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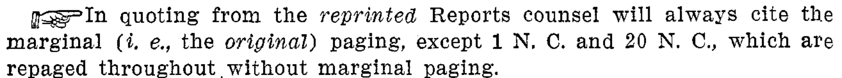
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CASES REPORTED

A — PAGE

Adams v. Clark.................. 56
Adams v. Smallwood........... 258
Airey, Stokes v................ 66
Albea, Chipley v............... 204
Albright v. Tapscott............ 473
Andrews, Thompson v.......125, 453
Anthony, Hunter v............. 385
Arledge, Ledbetter v........... 475
Arnold, Buis v. 233
Arnold, Lash v................. 206
Ashe v. Streator................ 256
Ashe v. DeRosset 240
Askew, Hayes v............... 226

B

Baines, Drake v............... 122
Ballard v. Mitchell............ 153
Bannerman, Pridgen v.......... 53
Barnes v. Barnes.............. 366
Barnes v. Haybarger........... 76
Beaty v. Gingles............... 302
Bell, Borden v................. 294
Bell, Styron v................. 222
Bennett v. Taylor.............. 281
Billups, Bond v................ 423
Billups v. Riddick............. 163
Bland v. Scott................. 100
Bond v. Billups................ 423
Bond v. Hall................... 14
Bond v. Warren................ 191
Borden v. Bell.................. 294
Bowles, McDowell v............ 184
Brandon, S. v.................. 463
Brannen, S. v.................. 208
Brooks v. Walters.............. 428
Brown, Roughten v............ 393
Brown, S. v. 443
Brown v. Smith................ 331
Bryan v. Enterprise............ 260
Bryan, Odom v................ 211
Buchanan v. McKenzie...90, 93, 95
Buchanan, McLean v........... 444
Buffkin, Scaff v................ 161
Buie, Covington v............. 31
Buis v. Arnold................. 233
Bumgarner, Childers v......... 297
Burfoot, Shaw v............... 344
Burgess, Moffitt v............. 342

C — PAGE

Carter, Cowles v............... 381
Castrix, Pearce v.............. 71
Cates v. Whitfield.............. 266
Cherry, Cooper v.............. 323
Cherry, Myers v............... 144
Childers v. Bumgarner......... 297
Chipley v. Albea............... 204
Chisholm, Herrington v........ 4
Clara, S. v. 25
Clark, Adams v................ 56
Clark v. Latham............... 1
Clay, Morris v................. 216
Collins v. Creecy.............. 323
Commissioners v. Patterson..... 182
Cooper v. Cherry 323
Cooper, White v............... 48
Cornish, Wiseman v........... 218
Council, Williams v. 229
Covington v. Buie............. 31
Cowles v. Carter............... 381
Cox v. Cox.................... 487
Cox, Thompson v............. 311
Creecy, Collins v............. 333
Critcher, Hudson v............ 485
Crump v. McKay.............. 32
Currie, Short v. 42

D

Davis v. Golston............... 28
Davis, Harrell v............... 359
Davis, Parker v............... 460
Davis, Rodman v.............. 134
Debrule v. Scott............... 73
Debnam, Hughes v............. 127
DeRosset, Ashe v. 240
Dixon v. Warters.............. 449
Drake v. Baines............... 122
Dobson v. Finley.............. 495
Dowell v. Jacks............... 387
Dunbar, Norman v............. 317

E

Edney, Reynolds v. 406
Edwards, Jones v............. 336
Edwards v. Kelly.............. 69
England, S. v. 399
Enterprise, Bryan v............ 260
Eure, Willey v................ 320

CASES REPORTED.

F — PAGE

Fagan v. Williamson........... 433
Finley, Dobson v............... 495
Foard, Griffin v................ 337
Foard v. R. R. 235
Foster, Griffin v................ 337
Foust v. Trice 290, 490

G

Gardner v. Klutts.............. 375
Gibbs v. Williams.............. 391
Gingles, Beaty v. 302
Golston, Davis v............... 28
Graham, In re 416
Graham, S. v. 397
Gray, S. v. 170
Gregory v. Richards............ 410
Griffin v. Foster................ 337
Griffin v. Hadley............... 82
Griffith, March v............... 264
Griffin v. Tripp.................. 64

H

Haden v. R. R. 362
Hadley, Griffin v............... 82
Hall, Bond v.................... 14
Hanna v. Ingram............... 55
Hanna, Jackson v.............. 188
Harnett, McCoy v.............. 272
Harrell v. Davis................ 359
Harrington v. Wilcox........... 349
Harris, S. v. 136
Haybarger, Barnes v........... 76
Hayes v. Askew 226
Hedrick v. Wagoner............ 360
Herring v. Utley............... 270
Herrington v. Chisholm......... 4
Hinson, Kron v................ 347
Hobbs, Little v................. 179
Hockaday v. Parker............ 16
Houston v. Nav. Co............ 476
Howell v. Troutman............ 304
Hudson v. Critcher............. 485
Hughes v. Debnam............. 127
Hunter v. Anthony............. 385

I

Ingram, Hanna v............... 55
Inman, Powell v............... 436
Ireland, Wilder v.............. 85

J

Jackson v. Hanna.............. 188
Jacks, Dowell v................ 387
Jim, S. v. 459
Johns, McDaniel v............. 414
Jones v. Edwards.............. 336
Jones, Kinsey v................ 186
Jones v. Willis.................. 430

K

Kelly, Edwards v............. 69
Kinsey v. Jones................ 186
Klutts, Gardner v.............. 375
Koonce v. Perry................ 58
Kron v. Hinson................. 347

L

Lander v. McMillan............. 174
Lane v. Washington............ 248
Lash v. Arnold................. 206
Latham, Clark v............... 1
Latta v. Russ.................. 111
Laughlin, S. v. 354, 455
Ledbetter v. Arledge........... 475
Leggett, McCormic v. 425
Little v. Hobbs................. 179
Long, Tomlinson v............. 469
Luther v. Skeen................ 356

M

McCaskill, McDonald v.......... 158
McCormic v. Leggett............ 425
McCoy v. Harnett.............. 272
McDaniel v. Johns............. 414
McDaniel v. Nethercut 97
McDaniel, S. v. 284
McDonald v. McCaskill.......... 158
McDowell v. Bowles............ 184
McDugald, McLean v............ 383
McElwee, Sharpe v............. 115
McKey v. Neill.................. 214
McLean v. McDugald........... 383
McLean v. Murchison........... 38
McLean v. Buchanan........... 444
McKay, Crump v............... 32
McKenzie, Buchanan v. ..91, 93, 95
McMillan, Lander v............ 174
McNeill, Morrison v............ 45
Madden v. Porterfield.......... 166
March v. Griffith............... 264
Marcus, Taylor v............... 402
Mason v. White................ 421
Mason v. Williams.............. 478
Maynard, Sparrow v........... 195
Melvin, Willis v................ 62
Mendenhall v. Mendenhall...... 287
Mendenhall v. Parish.......... 105
Mitchell, Ballard v............ 153

CASES REPORTED.

	PAGE
Moffitt v. Burgess	342
Moore, Townsend v.	147
Morrison v. McNeill	45
Morris v. Clay	216
Morse v. Nixon	35
Murchison, McLean v.	38
Myers v. Cherry	144
Murray, Patterson v.	278

N

Neal v. R. R.	483
Neill, McKey v.	214
Nav. Co., Houston v.	476
Nethercut, McDaniel v.	97
Nixon, Morse v.	35
Norman v. Dunbar	317
Norman, S. v.	220

O

Odom v. Bryan	211
Oldham, Pritchard v.	439

P

Pannell v. Scoggin	408
Parish, Mendenhall v.	105
Parker v. Davis	460
Parker, Hockaday v.	16
Parker v. Richardson	452
Parker v. Ricks	447
Patterson, Commissioners v.	182
Patterson v. Murray	278
Payne, Tomlinson v.	108
Pearce v. Castrix	71
Perry, Koonce v.	58
Peter, S. v.	19
Peter, S. v.	346
Poindexter, Reeves v.	308
Poole v. Railroad Co.	340
Porterfield, Madden v.	166
Powell v. Inman	436
Pritchard v. Oldham	439
Pridgen v. Bannerman	53

R

R. R., Foard v.	235
R. R., Haden v.	362
R. R., Neal v.	482
R. R., Poole v.	340
R. R. v. Vinson	119
Reeves v. Poindexter	308
Reid, Winchester v.	377
Reynolds v. Edney	406
Richardson, Parker v.	452
Richards, Gregory v.	410

	PAGE
Ricks, Parker v.	447
Riddick, Billups v.	163
Rodman v. Davis	134
Roughton v. Brown	393
Russ, Latta v.	111

S

Sam, S. v.	150
Scaff v. Buffkin	161
Schimmerhorn, Williams v.	104
Scoggin, Pannell v.	508
Scott, Bland v.	100
Scott, Debrule v.	73
Sharpe v. McElwee	115
Shaw v. Burfoot	344
Short v. Currie	42
Skeen, Luther v.	356
Sleight v. Watson	10
Smallwood, Adams v.	258
Smith, Whitehead v.	351
Smith, Brown v.	331
Smith, S. v.	132
Sparrow v. Maynard	195
S. v. Brandon	463
S. v. Brannen	208
S. v. Brown	443
S. v. Clara	25
S. v. England	399
S. v. Graham	397
S. v. Gray	170
S. v. Harris	136
S. v. Jim	459
S. v. Laughlin	354, 455
S. v. McDaniel	284
S. v. Norman	220
S. v. Peter	19
S. v. Peter	346
S. v. Sam	150
S. v. Smith	132
Stokes v. Airey	66
Streator, Ashe v.	256
Styron v. Bell	222
Suttle v. Turner	403

T

Tapscott, Albright v.	473
Tatum, Wilson v.	300
Taylor, Bennett v.	281
Taylor v. Marcus	402
Thompson v. Andrews	125, 453
Thompson v. Cox	311
Tomlinson v. Long	469
Tomlinson v. Payne	108

PAGE

Townsend v. Moore.............. 147
Trice, Foust v.................. 290
Trice, Foust v.................. 490
Tripp, Griffin v................ 64
Trotter, Welch v................ 197
Troutman, Howell v............ 304
Turner, Suttle v. 403

U

Utley, Herring v............... 270

V

Vinson, R. R. v................. 119

W

Walters, Brooks v.............. 428
Warren, Bond v................. 191
Washington, Lane v............ 248
Warters, Dixon v. 449

PAGE

Wagoner, Hedrick v............ 360
Watson, Sleight v.............. 10
Welch v. Trotter................ 197
White v. Cooper................ 48
White, Mason v................ 421
Whitehead v. Smith............. 351
Whitfield, Cates v.............. 266
Wilcox, Harrington v........... 349
Wilder v. Ireland............... 85
Willey v. Eure.................. 320
Williams v. Council............. 229
Williamson, Fagan v............ 433
Williams, Gibbs v............... 391
Williams, Mason v.............. 478
Williams v. Schimmerhorn...... 104
Willis, Jones v................. 430
Willis v. Melvin................ 62
Wilson v. Tatum................ 300
Winchester v. Reid............. 377
Wiseman v. Cornish............. 218

CASES CITED

A

Case	Citation	Page
Academy, Church v.	9 N. C., 233	348
Adams v. Turrentine.	30 N. C., 147	321
Albritton, Pitt v.	34 N. C., 74	126
Alexander v. Torrence.	51 N. C., 260	87
Allen, Mills v.	52 N. C., 564	32
Armistead v. Harramond.	11 N. C., 339	424
Armfield v. Tate.	29 N. C., 258	427
Arrington v. Battle	6 N. C., 246	74, 75
Arrington v. Short.	10 N. C., 71	462
Ashbee v. Cowell	45 N. C., 158	314
Ashe v. DeRosset	50 N. C., 301	247
Askew, Hays v.	50 N. C., 63; 52 N. C., 272	228
Askew v. Reynolds	18 N. C., 267	495
Aycock v. R. R.	51 N. C., 231	341

B

Case	Citation	Page
Bailey v. Shannonhouse	16 N. C., 416	330
Baker v. McDonald	47 N. C., 244	41
Balfour v. Davis	20 N. C., 443	493
Bank v. Williamson	24 N. C., 147	283
Banner, S. v.	44 N. C., 257	478
Battle, Arrington v.	6 N. C., 246	74, 75
Beaty, Hardin v.	20 N. C., 516	156
Bell, Reeves v.	47 N. C., 254	326
Benton, Bird v.	13 N. C., 179	480
Benton v. Sanders	44 N. C., 360	427
Bethea v. McLemore	23 N. C., 523	389
Betts v. Franklin	20 N. C., 602	117, 118, 233
Bibb, Houston v.	50 N. C., 83	269
Biles v. Holmes	33 N. C., 16	376
Bird v. Benton	13 N. C., 179	480
Bland v. Whitfield	46 N. C., 132	99
Bledsoe v. Snow	48 N. C., 99	117
Boner v. Steamboat Co.	46 N. C., 211	238
Boyle v. Reeder	23 N. C., 607	239
Brady v. Wilson	11 N. C., 93	68
Brig Marcellus, Cameron v.	48 N. C., 83	6, 262
Briley v. Cherry	13 N. C., 2	269
Britton, S. v.	33 N. C., 110	113
Brocket v. Foscue	8 N. C., 64	106
Brodie, Jones v.	7 N. C., 594	325
Brooks, Marsh v.	33 N. C., 409	262
Brooks, Taylor v.	20 N. C., 273	113
Brown v. Dula	7 N. C., 574	196
Brown, Hampton v.	35 N. C., 18	63
Brown, Morehead v.	51 N. C., 267	301
Brown, Scott v.	48 N. C., 541	34
Brown, White v.	47 N. C., 403	213
Brownrigg, Vines v.	18 N. C., 239	268
Buchanan, Williams v.	23 N. C., 535	41
Burnett, Mizell v.	49 N. C., 249	71

Butler v. Durham .... 38 N. C., 589.................... 43
Bynum v. Carter .... 26 N. C., 310.................... 53

C

Caldwell, McConnell v. .... 51 N. C., 469.................... 117
Cameron v. Brig Marcellus .... 48 N. C., 83....................6, 262
Campbell v. McArthur .... 9 N. C., 33.................... 348
Carter, Bynum v. .... 26 N. C., 310.................... 53
Carter v. Sams .... 20 N. C., 321.................... 157
Carter, Spencer v. .... 49 N. C., 288.................... 408
Cherry, Briley v. .... 13 N. C., 2.................... 269
Christmas v. Mitchell .... 38 N. C., 535.................... 462
Church v. Academy .... 9 N. C., 233.................... 348
Claywell v. McGimpsey .... 15 N. C., 89.................... 66
Cobb v. Fogleman .... 23 N. C., 444.................... 16
Cobb v. Hines .... 44 N. C., 343.................... 82
Coble v. Wellborn .... 13 N. C., 388.................... 190
Cohoon v. Morton .... 49 N. C., 256.................... 207
Collier v. Poe .... 16 N. C., 55.................... 61
Cook, Jones v. .... 14 N. C., 112.................... 302
Corbit, Wallace v. .... 26 N. C., 45.................... 265
Cotten v. Davis .... 48 N. C., 355.................... 303
Couch v. Jones .... 49 N. C., 402....................341, 365
Council, Williams v. .... 49 N. C., 216.................... 230
Cowan v. McNeely .... 32 N. C., 5.................... 84
Cowell, Ashbee v. .... 45 N. C., 158.................... 314
Cowles, Martin v. .... 19 N. C., 102.................... 88
Craig v. Miller .... 34 N. C., 375.................... 126
Crawley v. Timberlake .... 36 N. C., 346 39 N. C., 460...106, 485
Crittenden, Jones v. .... 4 N. C., 55.................... 369
Crouse, Henderson, v. .... 52 N. C., 623.................... 310
Cunningham v. Howell .... 23 N. C., 9....................74, 75

D

Daughtry, In re .... 28 N. C., 155.................... 279
Davis, Balfour v. .... 20 N. C., 443.................... 493
Davis, Cotten v. .... 48 N. C., 355.................... 303
Davis v. Marcom .... 57 N. C., 189.................... 442
Davis v. Ramsay .... 50 N. C., 236.................... 286
DeRosset, Ashe v. .... 50 N. C., 301.................... 247
Dickens v. Person .... 18 N. C., 406.................... 280
Dobson v. Murphy .... 18 N. C., 586.................... 348
Dowell v. Jacks .... 58 N. C., 417.................... 388
Dozier, Gregory v. .... 51 N. C., 4.................... 263
Drake v. Merrill .... 47 N. C., 368.................... 149
Dudley v. Winfield .... 45 N. C., 91.................... 337
Duke v. Ferebee .... 52 N. C., 10.................... 113
Dula, Brown v. .... 7 N. C., 574.................... 196
Duncan v. Hill .... 19 N. C., 291.................... 476
Durham, Butler v. .... 38 N. C., 589.................... 43

E

Eaton v. Eaton .... 43 N. C., 102.................... 85
Ellis v. Long .... 30 N. C., 513.................... 32
Enloe v. Sherrill .... 28 N. C., 212.................... 409

F

Case	Citation	Page
Farley v. Lea	20 N. C., 307	494
Ferrebee, Duke v.	52 N. C., 10	113
Fessenden v. Jones	52 N. C., 14	462
Fisher v. Pender	52 N. C., 483	30
Fletcher, Leary v.	23 N. C., 257	315
Fogleman, Cobb v.	23 N. C., 444	16
Foscue, Brocket v.	8 N. C., 64	106
Fox. v. Wood	33 N. C., 213	97
Francis v. Welch	33 N. C., 215	99
Franklin, Betts v.	20 N. C., 602	117, 118, 233
Freeman v. Morris	44 N. C., 287	210, 489
Fulbright v. Tritt	19 N. C., 491	56

G

Case	Citation	Page
Gant, Rippey v.	39 N. C., 443	462
Gaskins, Hyman v.	27 N. C., 267	149
Gaylord, Whitley v.	48 N. C., 286	93
Glover v. Riddick	33 N. C., 582	99
Godley v. Taylor	14 N. C., 178	325, 330
Gooch, Taylor v.	49 N. C., 436	231
Goodman v. Smith	15 N. C., 450	325, 326, 328, 330
Governor v. Matlock	8 N. C., 425	322
Gray v. Mathis	52 N. C., 502	82
Green v. Harris	25 N. C., 210	61
Green, Noblet v.	13 N. C., 517	486
Green v. Thornton	49 N. C., 230	30
Gregory v. Dozier	51 N. C., 4	263
Gregory v. Perkins	15 N. C., 50	99
Grist v. Hodges	14 N. C., 200	87, 246

H

Case	Citation	Page
Hailey v. Wheeler	49 N. C., 159	303
Hall v. Robinson	56 N. C., 349	166
Hammond v. McCorkle	47 N. C., 444	380
Hampton v. Brown	35 N. C., 18	63
Hampton, Harris v.	52 N. C., 597	97
Hampton, Marsh v.	50 N. C., 382	495
Harden, Martin v.	19 N. C., 504	60
Hardin v. Beaty	20 N. C., 516	156
Harnett, McCoy v.	49 N. C., 180	178
Harper, Lassiter v.	32 N. C., 392	394
Harramond, Armistead v.	11 N. C., 339	424
Harris, Green v.	25 N. C., 210	61
Harris v. Hampton	52 N. C., 597	97
Hassell v. Latham	52 N. C., 465	472
Hays v. Askew	50 N. C., 63; 52 N. C., 272	228
Haywood v. Long	27 N. C., 438	365
Haywood v. McNair	19 N. C., 283	350
Heathcock v. Pennington	33 N. C., 640	364
Henderson v. Crouse	52 N. C., 623	310
Henderson, Hoke v.	15 N. C., 1	372
Herring, Niblet v.	49 N. C., 262	213
Herring v. R. R.	32 N. C., 402	341

CASES CITED.

Case	Citation	Page
Higdon, Phillipse v.	44 N. C., 380	257, 283
Hill, Duncan v.	19 N. C., 291	476
Hill v. Hughes	18 N. C., 336	61
Hilliard v. R. R.	51 N. C., 434	483
Hines, Cobb v.	44 N. C., 343	82
Hodges, Grist v.	14 N. C., 200	87, 245
Hoke v. Henderson	15 N. C., 1	372
Holmes, Viles v.	33 N. C., 16	376
Hoskins, Wall v.	27 N. C., 177	68, 196
Hough, Ingraham v.	46 N. C., 49	339
Houston v. Bibb	50 N. C., 83	269
Howell, Cunningham v.	23 N. C., 9	74, 75
Hoyle v. Stowe	19 N. C., 320	427
Hughes, Hill v.	18 N. C., 336	61
Hunter, S. v.	27 N. C., 369	286
Huntley, S. v.	25 N. C., 418	466
Hurdle v. Richardson	49 N. C., 16	213
Hyman v. Gaskins	27 N. C., 267	149
I		
Ingraham v. Hough	46 N. C., 49	339
Inman, Powell v.	52 N. C., 28	437
Ireland, Wilder v.	53 N. C., 85	453
Isaac, S. v.	13 N. C., 47	347
J		
Jacks, Dowell v.	58 N. C., 417	388
Jarrott, Wall v.	25 N. C., 42	207
Jessup v. Johnson	48 N. C., 335	380
Johnson, Jessup v.	48 N. C., 335	380
Johnson, S. v.	30 N. C., 381	113
Johnston, Love v.	34 N. C., 355	409
Jolly, S. v.	20 N. C., 108	376
Jones v. Brodie	7 N. C., 594	325
Jones v. Cook	14 N. C., 112	302
Jones, Couch v.	49 N. C., 402	341, 365
Jones v. Crittenden	4 N. C., 55	369
Jones, Fessenden v.	52 N. C., 14	462
Jones v. Judkins	20 N. C., 591	99
Jones v. McLaurin	52 N. C., 392	267
Jones v. Physioc	18 N. C., 172	280
Jones, Sharpe v.	7 N. C., 306	395
Jones, S. v.	23 N. C., 129	187
Judkins, Jones v.	20 N. C., 591	99
K		
Kello v. Maget	18 N. C., 414	43
Kent v. Robinson	49 N. C., 529	30
Kerns v. Peeler	49 N. C., 226	82
King, S. v.	23 N. C., 22	478
Kirkland v. Mangum	50 N. C., 313	489
Kornegay, Musgrove v.	25 N. C., 71	379
L		
Lane v. Wingate	25 N. C., 326	107
Lanier, Williams, v.	44 N. C., 30	299

Lassiter v. Harper .... 32 N. C., 392.................... 394
Latham, Hassell v. .... 52 N. C., 465.................... 472
Latham v. Respess .... 44 N. C., 138.................... 262
Laughlin, S. v. .... 53 N. C., 455.................... 460
Lea, Farley v. .... 20 N. C., 307.................... 494
Leary v. Fletcher .... 23 N. C., 257.................... 315
Lenoir, S. v. .... 11 N. C., 194.................... 186
Louis, S. v. .... 10 N. C., 410.................... 45
Linn v. McClelland .... 20 N. C., 596.................... 435
London v. Parsley .... 52 N. C., 313.................... 380
Long, Ellis v. .... 30 N. C., 513.................... 32
Long, Haywood v. .... 27 N. C., 438.................... 365
Long, S. v. .... 30 N. C., 415.................... 32
Long, S. v................ 52 N. C., 24.................... 302
Long, Tomlinson v. .... 53 N. C., 469.................... 473
Love v. Johnston .... 34 N. C., 355.................... 409
Love, Robbins v. .... 10 N. C., 82.................... 107
Lowe, v. Weatherley .... 20 N. C., 353.................106, 486

M

Mabe, Rogers v. .... 15 N. C., 180.................... 348
Madre, Sutton v. .... 47 N. C., 320.................... 16
Maget, Kello v. .... 18 N. C., 414.................... 43
Mangum, Kirkland v. .... 50 N. C., 313.................... 489
Marsh v. Brooks .... 33 N. C., 409.................... 262
Marsh v. Hampton .... 50 N. C., 382.................... 495
Marcom, Davis v. .... 57 N. C., 189.................... 442
Martin v. Cowles .... 19 N. C., 102.................... 88
Martin v. Harden .... 19 N. C., 504.................... 60
Mathis, Gray v. .... 52 N. C., 502.................... 82
Matlock, Governor v. .... 8 N. C., 425.................... 322
McArthur, Campbell v. .... 9 N. C., 33.................... 348
McBee, Simpson v. .... 14 N. C., 531.................... 74
McClelland, Linn v. .... 20 N. C., 596.................... 435
McConnell v. Caldwell .... 51 N. C., 469.................... 117
McCorkle, Hammond v. .... 47 N. C., 444.................... 380
McCoy v. Harnett .... 49 N. C., 180.................... 178
McCraw, Shipp v. .... 7 N. C., 466.................... 196
McCullough, Woolard v. .... 23 N. C., 432.................... 286
McDaniel v. McDaniel .... 58 N. C., 352.................... 166
McDonald, Baker v. .... 47 N. C., 244.................... 41
McDonald, S. v. .... 49 N. C., 19.................... 467
McElwee, Sharpe v. .... 53 N. C., 115.................... 120
McGimpsey, Claywell v. .... 15 N. C., 89.................... 66
McIntosh, Wallace v. .... 49 N. C., 434.................... 376
McKay v. Royal .... 52 N. C., 426.................... 303
McLaurin, Jones v. .... 52 N. C., 392.................... 267
McLemore, Bethea v. .... 23 N. C., 523.................... 389
McMillan v. Turner .... 52 N. C., 435.................... 41
McNair, Haywood v. .... 19 N. C., 283.................... 350
McNair v. Ragland .... 13 N. C., 42.................... 259
McNair, University v. .... 37 N. C., 605.................... 362
McNeely, Cowan v. .... 32 N. C., 5.................... 84
Merrill, Drake v. .... 47 N. C., 368.................... 149

Miller, Craig v. .... 34 N. C., 375.................... 126
Mills v. Allen .... 52 N. C., 564.................... 32
Mizell v. Burnett .... 49 N. C., 249.................... 71
Mitchell, Christmas v............... 38 N. C., 535.................... 462
Monday, Yarborough v................ 14 N. C., 420.................... 30
Moore, S. v......................... 24 N. C., 430.................... 187
Morehead v. Brown................... 51 N. C., 267.................... 301
Morgan, S. v........................ 25 N. C., 186.................... 467
Morris, Freeman, v.................. 44 N. C., 287.................210, 489
Morse v. Nixon...................... 51 N. C., 293.................... 36
Morton, Cohoon v.................... 49 N. C., 256.................... 207
Moss v. Peoples..................... 51 N. C., 140.................... 343
Murphy, Dobson v.................... 18 N. C., 586.................... 348
Murphy, Strickland v................ 52 N. C., 242.................... 424
Murray v. Shanklin.................. 20 N. C., 431.................... 427
Musgrove v. Kornegay................ 52 N. C., 71.................... 379

N

Newland v. Newland.................. 46 N. C., 463.................... 166
Niblet v. Herring................... 49 N. C., 262.................... 213
Nixon, Morse v...................... 51 N. C., 293.................... 36
Noblet v. Green..................... 13 N. C., 517.................... 486

O

Osborne v. Toomer................... 51 N. C., 440.................... 234

P

Parsley, London v................... 52 N. C., 313.................... 380
Patterson, S. v..................... 24 N. C., 346.................... 151
Peeler, Kerns v..................... 49 N. C., 226.................... 82
Pennington, Heathcock v............. 33 N. C., 640.................... 364
Pender, Fisher v.................... 52 N. C., 483.................... 30
Peoples, Moss v..................... 51 N. C., 140.................... 343
Perkins, Gregory v. .... 15 N. C., 50.................... 99
Person, Dickens v................... 18 N. C., 406.................... 280
Phillipse v. Higdon .... 44 N. C., 380.................257, 283
Physioc, Jones v.................... 18 N. C., 172.................... 280
Pitt v. Albritton................... 34 N. C., 74.................... 126
Powell v. Inman..................... 52 N. C., 28.................... 437
Powell v. Powell.................... 21 N. C., 379.................... 61
Poe, Collier v...................... 16 N. C., 55.................... 61
Pugh, S. v.......................... 52 N. C., 61.................... 173
Pugh, Van Pelt v.................... 18 N. C., 210.................... 131

R

Radford v. Rice..................... 19 N. C., 39.................... 152
Ragland, McNair v. .... 13 N. C., 42.................... 259
Ragsdale v. Williams .... 30 N. C., 498.................... 99
Ramsay, Davis v..................... 50 N. C., 236.................... 286
Reeder, Boyle v..................... 23 N. C., 607.................... 239
Reeves v. Bell...................... 47 N. C., 254.................... 326
Respess, Latham v................... 44 N. C., 138.................... 262

Case	Citation	Page
Reynolds, Askew v.	18 N. C., 267	495
Rice, Radford v.	19 N. C., 39	152
Richardson, Hurdle v.	49 N. C., 16	213
Riddick, Glover v.	33 N. C., 582	99
Rippey v. Gant	39 N. C., 443	462
Robbins v. Love	10 N. C., 82	107
Robinson, Hall v.	56 N. C., 349	166
Robinson, Kent v.	49 N. C., 529	30
Rogers v. Mabe	15 N. C., 180	348
Roulhac v. White	31 N. C., 63	376
Royal, McKay v.	52 N. C., 426	303
R. R., Aycock v.	51 N. C., 231	341
R. R., Herring v.	32 N. C., 402	341
R. R., Hilliard v.	51 N. C., 434	483

S

Case	Citation	Page
Sams, Carter v.	20 N. C., 321	157
Sanders, Benton v.	44 N. C., 360	427
Scott v. Brown	48 N. C., 541	34
Scott, S. v.	8 N. C., 24	466
Shanklin, Murray v.	20 N. C., 431	427
Shannonhouse, Bailey v.	16 N. C., 416	330
Sharpe v. Jones	7 N. C., 306	395
Sharpe v. McElwee	53 N. C., 115	120
Sherrill, Enloe v.	28 N. C., 212	409
Shipp v. McCraw	7 N. C., 466	196
Short, Arrington v.	10 N. C., 71	462
Simpson v. McBee	14 N. C., 531	74
Skinner v. White	18 N. C., 471	68, 196
Slocumb v. Washington	51 N. C., 357	253, 255
Sluder, S. v.	30 N. C., 487	97
Small, S. v.	33 N. C., 571	23, 24
Smith, Goodman v.	15 N. C., 450	325, 326
Smitherman, S. v.	23 N. C., 14	210
Snow, Bledsoe v.	48 N. C., 99	117
Southard, Tate v.	10 N. C., 119	348
Spencer v. Carter	49 N. C., 288	408
S. v. Banner	44 N. C., 257	478
S. v. Britton	33 N. C., 110	113
S. v. Hunter	27 N. C., 369	286
S. v. Huntley	25 N. C., 418	466
S. v. Issac	13 N. C., 47	347
S. v. Johnson	30 N. C., 381	113
S. v. Jolly	20 N. C., 108	376
S. v. Jones	23 N. C., 129	187
S. v. King	23 N. C., 22	478
S. v. Laughlin	53 N. C., 455	460
S. v. Lenoir	11 N. C., 194	186
S. v. Lewis	10 N. C., 410	45
S. v. Long	30 N. C., 415	32
S. v. Long	52 N. C., 24	302
S. v. McDonald	49 N. C., 19	467
S. v. Moore	24 N. C., 430	187
S. v. Morgan	25 N. C., 186	467

S. v. Patterson.................... 24 N. C., 346.................... 151
S. v. Pugh......................... 52 N. C., 61.................... 173
S. v. Scott........................ 8 N. C., 24.................... 466
S. v. Sluder....................... 30 N. C., 487.................... 97
S. v. Small........................ 33 N. C., 571..................23, 24
S. v. Smitherman................... 23 N. C., 14.................... 210
S. v. Tilly........................ 25 N. C., 424.................... 466
S. v. Tom.......................... 44 N. C., 214.................... 23
S. v. Williams..................... 31 N. C., 151.................... 300
S. v. Williams..................... 47 N. C., 257.................... 133
Steamboat Co., Boner v............. 46 N. C., 211.................... 238
Stephenson v. Stephenson........... 49 N. C., 472.................... 210
Stowe, Hoyle v..................... 19 N. C., 320.................... 427
Strickland v. Murphy............... 52 N. C., 242.................... 424
Sutton v. Madre.................... 47 N. C., 320.................... 16

T

Tate, Armfield v................... 29 N. C., 258.................... 427
Tate v. Southard................... 10 N. C., 119.................... 348
Taylor v. Brooks................... 20 N. C., 273.................... 113
Taylor, Godley v................... 14 N. C., 178.................325, 330
Taylor v. Gooch.................... 49 N. C., 436.................... 231
Thornton, Green v.................. 49 N. C., 230.................... 30
Tilghman, West v................... 31 N. C., 163.................... 481
Tilly, S. v........................ 25 N. C., 424.................... 466
Timberlake, Crawley v.............. 36 N. C., 346; 37 N. C., 460....106, 486
Tom, S. v.......................... 44 N. C., 214.................... 23
Tomlinson v. Long.................. 53 N. C., 469.................... 473
Toomer, Osborne v.................. 51 N. C., 440.................... 234
Torrence, Alexander v.............. 51 N. C., 260.................... 87
Tritt, Fulbright v.................. 19 N. C., 491.................... 56
Turner, McMillan v................. 52 N. C., 435.................... 41
Turrentine, Adams v................ 30 N. C., 147.................... 321

U

University v. McNair............... 37 N. C., 605.................... 362

V

Van Pelt v. Pugh................... 18 N. C., 210.................... 131
Vines v. Brownrigg................. 18 N. C., 239.................... 268

W

Wade, Warren v..................... 52 N. C., 494.................... 132
Wall v. Hoskins.................... 27 N. C., 177..................68, 196
Wall v. Jarrott.................... 25 N. C., 42.................... 207
Wallace v. Corbit.................. 26 N. C., 45.................... 665
Wallace v. McIntosh................ 49 N. C., 434.................... 376
Warren v. Wade..................... 52 N. C., 494.................... 132
Washington, Slocumb v.............. 51 N. C., 357.................253, 255
Weatherley, Lowe v................. 20 N. C., 353.................106, 486
Welch, Francis v................... 33 N. C., 215.................... 99
Wellborn, Coble v.................. 13 N. C., 388.................... 190

West v. Tilghman.................. 31 N. C., 163.................... 481
Wheeler, Hailey v................ 49 N. C., 159.................... 303
White v. Brown.................... 47 N. C., 403.................... 213
White, Roulhac v. .... 31 N. C., 63.................... 376
White, Skinner v. .... 18 N. C., 471..................68, 196
Whitfield, Bland v. .... 46 N. C., 132.................... 99
Whitley v. Gaylord .... 48 N. C., 286.................... 93
Wilder v. Ireland .... 53 N. C., 85.................... 453
Williams v. Buchanan .... 23 N. C., 535.................... 41
Williams v. Council .... 49 N. C., 216.................... 230
Williams v. Lanier .... 44 N. C., 30.................... 299
Williams, Ragsdale v. .... 30 N. C., 498.................... 99
Williams, S. v. .... 31 N. C., 151.................... 300
Williams, S. v. .... 47 N. C., 257.................... 133
Williamson, Bank v. .... 24 N. C., 147.................... 283
Wilson, Brady v. .... 11 N. C., 93.................... 68
Winfield, Dudley v. .... 45 N. C., 91.................... 337
Wingate, Lane v. .... 25 N. C., 326.................... 107
Wood, Fox v. .... 33 N. C., 213.................... 97
Woolard v. McCullough .... 23 N. C., 432.................... 286
Worth v. York .... 35 N. C., 206.................... 379

Y

Yarborough v. Monday .... 14 N. C., 420.................... 30
York, Worth v. .... 35 N. C., 206.................... 379

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

DECEMBER TERM, 1860

JOHN N. CLARK v. CHARLES LATHAM.

1. No appeal will lie from the county to the Superior Court which must necessarily be ineffectual for the purpose for which it was prayed.
2. The costs allowed against bail, notwithstanding a surrender, etc. (Rev. Code, chap. 11, sec. 10), do not include such as are incurred on account of an improper and ineffectual appeal.
3. Whether the provision in chapter 10, section 6, Rev. Stat., requiring a trial of the pleas, entered by bail, to be had at the first term, is not altered by Rev. Code, chap. 11, sec. 4, *quere*.

SCIRE FACIAS against bail, tried at the last term of HERTFORD, before *Howard, J.*

The following case agreed was submitted for the judgment of the court: At May Term, 1856, of the county court of Hertford, the plaintiff recovered a judgment in *assumpsit* against one S. S. Simmons for $375 and costs. The original writ in the case was issued to (2) Charles Latham, sheriff of Washington, who returned it "Executed," but without taking any bail bond for the appearance of the said Simmons, whereby he became special bail for him. A *scire facias* against the defendant (the said Latham) was issued, asking to subject him as such bail, and was returned to May Term, 1860, of Hertford County court, "Executed." At that term the defendant, by his attorney, tendered the pleas, *"Non tiel record,"* "sickness of principal," "surrender of principal." The plaintiff, through his counsel, moved for a trial

of the pleas at that term, insisting that the law required a trial at the first term, and that unless the pleas were then verified he was entitled to judgment. That motion was refused by the court, and the cause was continued. From which ruling the plaintiff appealed to the Superior Court. Upon consideration of the case agreed in the Superior Court, his Honor ordered the appeal to be dismissed at the costs of the plaintiff. From which judgment plaintiff appealed to this Court.

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

BATTLE, J. An order for the continuance of a cause is regarded as a discretionary one, from which no appeal can be taken. Such is, undoubtedly, the general rule, and we cannot discover anything in the present case which makes it an exception. The plaintiff, indeed, contended in the county court that he had a right to have his cause tried at the first, or appearance term, and insisted that he was entitled to a judgment, unless the pleas of the defendant were then verified and found to be true by a jury. The court refused his motion for a judgment and made an order for the continuance of the cause, but whether that was done for the reason that in the opinion of the court the plaintiff was not entitled to a trial at that term, or because the defendant was not then prepared with his proof, does not appear. It is merely stated that the plaintiff's motion for a judgment was refused and the cause was continued. Supposing that the order for a continuance ought not to (3) have been made, how could it be corrected in the Superior Court upon an appeal? The term of the county court at which the plaintiff insisted upon his right to have a trial must necessarily have been passed before the cause could be disposed of in the Superior Court, and it was, therefore, out of the power of the court to correct the error, supposing one to have been committed; hence, we conclude that no appeal will lie from an order of the county court, where the appeal must necessarily be ineffectual for the purposes for which it is prayed. We, therefore, approve of the order of the Superior Court by which the appeal was dismissed. And we think it was properly dissmissed at the costs of the plaintiff. The costs which the bail are required by section 10, chapter 11, Rev. Code to pay on the *scire facias,* notwithstanding they may be afterwards discharged by the death or surrender of the principal or otherwise, could never have been intended to include such as are incurred by the plaintiff on account of an improper and ineffectual appeal.

We have considered the case as if the plaintiff were entitled to a trial at the term at which the *scire facias* is returned as having been made known to the bail; such was his right, undoubtedly, by the express terms of Rev. Stat., chap. 10, sec. 6; but in the Rev. Code the phrase-

ology is altered; section 4, chapter 11, enacting that "where any *scire facias* against bail shall be returned 'Executed,' they may appear and plead as in other cases." This seems to put cases of this kind upon the same footing with issues in other actions, which, by virtue of chapter 31, section 57, rule 13, Rev. Code, shall be tried at the term next succeeding that at which they were made up. The decision of this question is unnecessary to our judgment in the present case, and we allude to it only for the purpose of preventing the conclusion that our opinion upon it favors the view taken of it by the plaintiff.

PER CURIAM. Affirmed.

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(4)

JESSE HERRINGTON v. SCHOONER HUGH CHISHOLM.

The meaning of the statute, Rev. Code, chap. 7, secs. 27 and 28, concerning liens on vessels for repairs, etc., is that the attachment given for the enforcement of the lien must be issued so as to have the vessel seized before she is allowed to depart from the port or place of repairs.

ATTACHMENT tried before *Howard, J.*, at the last term of WASHINGTON.

The attachment was taken out under sections 27 and 28, chapter 7, Rev. Code, and levied upon the schooner *Hugh Chisholm,* for repairs done on that vessel. The repairs were done in the county of Washington during 1857, and the attachment was taken out on 4 May, 1858. The vessel was owned by one G. L. Moore, a citizen of Martin County, in this State, during the time she was undergoing repairs, and in the course of trade he sent her to Norfolk, in the State of Virginia, where she was seized under an attachment issued by the circuit court of Norfolk County, Va., upon a personal obligation of the said Moore, and judgment having been rendered thereon for the plaintiff, execution issued and she was sold at public auction to one Webb. After this, on the return of the schooner to North Carolina, this attachment was issued.

These facts were agreed and were submitted for the judgment of the Court; and it was agreed, further, that if his Honor should be of opinion with the plaintiff on the law governing the case judgment should be rendered for $159, with interest; but otherwise that the proceeding should be dismissed.

The court, on consideration, gave judgment for the plaintiff, and the owners of the vessel prayed and obtained an appeal.

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

PEARSON, C. J. The case turns on the construction of the statute, Rev. Code, chap. 7, secs. 27 and 28, title, "Attachment," and the (5) question is, within what time must the attachment be issued?

No time is expressed in the statute, and several constructions were contended for on the argument, for the purpose of fixing the time:

1. The time is unlimited and the lien continues, and the attachment may be issued at any time after the work is done or the provisions furnished—or at least until there be a presumption of payment—to wit, ten years; or the claim is barred by the statute of limitations applicable to the action of *assumpsit,* to wit, three years.

2. The attachment may be issued within a reasonable time, to be judged of by the court, according to circumstances.

3. The lien is *in presenti,* and the attachment must be issued before the vessel leaves the port or the place where the work is done.

4. The attachment must be issued before the vessel leaves the State and goes out of the jurisdiction of its courts, or at all events, if the vessel goes out of the jurisdiction and passes into the hands of a purchaser for valuable consideration, the lien is gone and the attachment cannot rightfully issue, should the vessel happen to return to the State.

The first construction leads so manifestly to an absurdity and to injustice that it cannot be entertained. Suppose a vessel is repaired in Wilmington and goes to New Bern, where provisions are furnished; then to Washington, where she is again repaired; and so continuing from time to time, and at different places to be repaired, furnished, equipped, and stored, until she is covered over with liens, as numerous as the barnacles on her bottom. The statute does not make the priority of lien depend on the priority of suing out the attachment, but provides, "such debts shall have a lien on the ship, etc., and shall be preferred to all other liens thereon, except mariners' wages." Can each and every one of these different liens be preferred to all other liens? the first to all the others? the last to all the others? and the intermediate ones to all the others? Or, suppose the vessel be encumbered with liens, is sold to a purchaser for valuable consideration, so as to give him, (6) not a mere lien, but the absolute ownership, does he take, subject to all of these liens, in regard to the existence of which no means of information are afforded to him? This would be manifestly unjust, and yet it must be so, if the liens continue, and can be enforced by attachment at any indefinite time; for it is decided that a third person cannot interplead, on the ground that in a proceeding under the statute the creditor has a right to have his debt satisfied out of the vessel attached, let it belong to whom it may. *Cameron v. Brig Marcellus,* 48 N. C., 83. To meet this absurdity and injustice, the counsel admitted that the statute was defective and ought to be amended, the failure to

fix a time being, as he supposed, an oversight; but he insisted that, as the law now stands, the time is indefinite. We certainly cannot adopt this construction, if there be any other by which to escape from such gross absurdity and injustice; for we are not at liberty to adopt the suggestion of an oversight and suppose that the Legislature forgot to insert a provision in respect to time. Our duty is to take the statute as it is, and to assume that it contains all that the lawmakers intended.

2. The remedy by attachment must be pursued within a reasonable time. When the common law imposes an obligation, as for the holder of a bill to give notice; or one contracts to do a thing, as to execute a deed, and no time is fixed, the law implies that it must be done within a reasonable time; but we know of no rule of construction by which the words of a statute can be added to and a time fixed by an implication of law. The time must be fixed by the words on the construction of the statute, and the implication of a reasonable time is inadmissible. So this suggestion is as untenable as that in respect to the ten years, or the three years as a statute of limitations; but if we were at liberty to interpolate, "such lien shall continue, provided the attachment be issued within reasonable time," it would not aid the attaching creditor in our case, because the facts are not set out so as to enable the Court to see that the attachment did issue in reasonable time. The work was done some time in 1857, and the attachment issued in May, 1858. (7) We are inclined to think this was not in reasonable time, considering the circumstance that the vessel had gone out of the State.

In this connection it may be well to dispose of the fourth suggestion, that the lien ceases and the attachment cannot be issued after the vessel has gone out of the jurisdiction of our courts, particularly, if she passes into the hands of a third person as a purchaser for valuable consideration. To this the same objections are applicable, as above pointed out in respect to reasonable time. The statute contains no provision, and these words cannot be added by implication, however reasonable it may seem to be that such a clause should have been inserted. Consequently, either the time is unlimited, or is restricted to the present, *i. e.,* when the work is done, or the articles are furnished; so that if the vessel is allowed to leave the port or place, the lien and right to attach cannot be afterwards resorted to.

3. We are of opinion that the latter is the proper construction.

Several considerations sustain this conclusion: If the lien must be enforced on the spot, that is, before the vessel leaves the port or place of repairs, etc., the absurdity and injustice, which form an inseparable objection to the other constructions, are avoided; for the provision, "such debt shall be preferred to all other liens, except mariners' wages," is then sensible, and is consistent with justice; because persons having a prior

lien by mortgage or hypothecation are benefited by having the vessel repaired or furnished, so as to enable her to proceed on the voyage, as well as the ultimate owners; and the work may very properly be considered as done for the benefit of all who are concerned in her; in fact, the very nature of a lien, "preferred to all other liens," by necessary implication must be enforced *instanter*.

By comparing the statute of New York (Revised Statutes 1829, part 3, ch. 8, tit. 8, sec. 1) with the statute under consideration, the first section is worded so precisely like the 27th section of ours, as to show that the one was copied from the other. The second section of (8) the statute of New York restricts the lien to twelve days, where the vessel departs from the port of repairs to any other port of the State, and it is to cease when the vessel leaves the State. In place of this, the 28th section of our statute is substituted, giving the right to issue an attachment, and no restriction as to time is inserted. It is true, that the statute of another State cannot be used in aid of the construction of ours, by adding to or taking from its words, but reference may be made to it for the sake of an inference; and it is, obviously, a fair inference that the restriction in respect to time was not omitted by an oversight, but because it was considered unnecessary, the necessity for it being superseded by the provision allowing an attachment, which follows, as a matter of course, provided the attachment was required to be issued on the spot, and is a *non sequitur* if the attachment could be issued at any future indefinite time.

This construction is also sustained by a consideration of the object of the statute and the mischief to be remedied. The words of the statute are, "any ship, etc., within this State," making no distinction between foreign and domestice vessels. In regard to the former, the persons making repairs, etc., had a lien on the vessel for a prescribed time, according to the general maritime law, and the object of the statute was to give this lien a preference over all other liens, except mariners' wages, and to give as a cumulative remedy the right to sue out an attachment against the vessel, which was a quick mode of proceeding in the courts of the State. In regard to the latter, or domestic vessels, which is our case, the general maritime law had no application, "as to repairs, etc., in a port in the State to which the vessel belongs; the case is governed altogether by the local law of the State, and no lien is implied, unless to be recognized by that law"; *The General Smith*, 4 Wheat., 438; *Peyroux v. Howard,* 7 Peters, 341. The common law principles of lien in favor of bailees, *e. g.,* common carriers, inn-keepers, tailors, millers, etc., did not apply, for that is founded on a bailment, where the party has the thing in possession, and is allowed to retain it until (9) the charges are paid; whereas, one who makes repairs on a

vessel or furnishes her with provisions, coal, etc., has not the thing in possession, and therefore has no lien according to the local law, and is forced to sue the owner or master, as for a personal debt. So, in regard to domestic vessels the object of the statute took a wider scope than simply to make a lien, which was already recognized by law, preferable to all other liens, and to give a summary remedy, the main purpose being in respect to domestic vessels to create a lien by the local law, by extending to such cases the principle of common law in respect to property which is in possession by bailment, on the ground that one who furnishes provisions or repairs a vessel, although not in possession, comes within the like reason as an inn-keeper, who feeds a horse, or a tailor who makes or mends a coat, and the remedy is to allow the vessel to be taken by attachment, so as to compel payment. So the question is narrowed to this: How far did the common doctrine, in respect to bailees, extend? For there is no ground to assume that the Legislature intended to go beyond it. The extent of the common law doctrine is settled; such bailees have a lien which is "preferred to all other liens," but it must be enforced on the spot. *Jones v. Thurloe,* 8 Mod., 172. "By the custom of the realm of England if a man lie in an inn one night, the inn-keeper may detain his horse until he be paid for the expenses; but if he give him credit for that time and let him depart without payment, then he has waived the benefit of that custom by his own consent to the departure, and shall never afterwards detain the horse for that expense." The law has been considered settled ever since; see Leigh's Nisi Prius., sec. 1495, and other textbooks. So that the object of the statute, and the mischief to be remedied, which, according to a well-established rule of construction, is of great weight in fixing its meaning (Dwarris on Statutes, 695), show the meaning to be to give a lien which is preferred to all other liens, with an exception in favor of mariners' wages (which stands on peculiar grounds), which kind of lien, from its nature implies that it shall be enforced *instanter,* consequently the attachment must be issued so as to (10) have the vessel seized before she is allowed to depart from the port or place of repairs.

This construction obviates all difficulty and complication in which the subject must otherwise be involved.

The judgment in the court below is reversed, and upon the case agreed the proceeding is

PER CURIAM. Dismissed.

FRANCES SLEIGHT v. JOSHUA WATSON.

1. Where A. sent to B. a letter, stating that if B. and C. wished to hire any negroes for the next year, he would assign as their security, it was *Held*, that the plaintiff having hired certain slaves to B. and C. on the faith of this letter, A. was liable on his refusal to sign a note for the hire, and that B. and C. having failed to pay at the end of the credit (having become insolvent), the measure of damages was the price agreed to be paid for the hire.
2. *Held further*, that no demand on B. and C. was necessary previously to bringing suit. Nor was one necessary to be made on A.
3. *Held further*, that the plaintiff's having received a note for the hire from B. and C. after A.'s refusal to sign was no discharge of the latter.

ASSUMPSIT tried before *Dick, J.*, at Spring Term, 1860, of WASHINGTON.

The plaintiff produced in evidence the following paper-writing:

"This is to say if Mr. John T. Phelps and Mr. John B. Golett should wish to hire any negroes for the next year, that I will assign as their security for such hire. 26 December, 1855. JOSHUA WATSON."

This instrument was written at Hilliardstown, in the county of Nash, on the day it bears date and sent my mail to J. B. Golett.

The plaintiff then showed that on 1 January, 1865, he hired to Phelps and Golett three slaves for the ensuing year, at the price (11) of $495; that at the time of hiring said slaves the above instrument was shown to her, and that she hired the slaves on the faith of it. In the month of January Phelps and Golett prepared a bond, of which the following is a copy:

$495. On 1 January, 1857, we promise to pay Frances Sleight or order four hundred and ninety-five dollars, value received in hire of negro men, Jordan, Nelson, and Harry, for the year 1856, and we promise to furnish said negroes with the usual clothing.

Witness our hands and seal this 1 January, 1856.

JOHN B. GOLETT. [SEAL]
JOHN T. PHELPS. [SEAL]

Some time in the same month (January) the defendant wrote his name on the back of this bond, but on the next day, hearing that Phelps had made a deed of trust, he obtained the paper from Golett and erased his name. Afterwards, during the same month, the note was tendered to the plaintiff, who objected to receiving it on account of the erasure of

the defendant's name, but on hearing from her son that a gentleman of the bar had said the defendant was liable, she took it. Golett paid on this bond $185. When the note fell due it appeared that Phelps and Golett had both become insolvent and have remained so ever since.

William C. Sleight, the agent of plaintiff, testified that he told defendant before this suit was brought that either Phelps or Golett had paid plaintiff and that he would have to do so; to which he replied, "Plaintiff must get it by law." The defendant contended:

1. That in order to entitle plaintiff to recover, she had to prove a demand for the money on Phelps and Golett.
2. That no sufficient demand on the defendant had been made.
3. That the note given by Phelps and Golett should have been tendered the defendant before suit.
4. That plaintiff had not shown that she had called on the defendant to sign the paper as surety for Phelps and Golett, and that he refused.
5. That there was no consideration for the promise sued on. (12)
6. That the taking of the bond with the name of the defendant erased discharged the defendant.

These objections were overruled by the court, and the defendant excepted.

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

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

MANLY, J. The letter of the defendant sent to John Golett, under date of 26 December, 1855, was a general letter of credit in behalf of Phelps and Golett for any slaves they might think proper to hire for the year 1856. It is similar to a well-understood commercial paper, whereby the person who gives it is bound to each and every one who may trade with the person accredited upon the faith of it. The specific undertaking, through this paper, is to sign with Phelps and Golett for any slaves they might hire; which is, in substance, and undertaking on the part of Watson to make himself responsible for such hire, by executing with Phelps and Golett a promissory note or notes for the same. The case discloses that the slaves, in point of fact, were hired from the plaintiff by Phelps and Golett and delivered to them upon the faith of this paper, and afterwards, when the note was presented for the signature of Watson, he declined executing it. This was a breach of his undertaking, and we think he is responsible in this action for the damages.

It is further stated as a fact in the case, that at the time the hire

fell due, viz., on 1 January, 1857, Phelps and Golett were both insolvent and have so continued ever since; and upon this state of the case, it is clear that measure of damages is the amount of the sum agreed to be paid by Phelps and Golett for the hire, less the amount actually paid by the latter. This balance was the amount for which the recovery was effected, and we see no error in it.

The first objection to the recovery, raised by the defendant, (13) is that a demand ought to have been made of Phelps and Golett before suit was brought. This, we think, untenable. Defendant violated his engagement and was in default when he refused to sign and thus secure the stipulated hire. The measure of the injury, arising from this default, was full and complete, when the hirers became insolvent and unable to pay within the period of credit. It was not necessary, either as a preliminary to the suit or as proof of the amount of damages, to show a demand and refusal.

The second objection is also untenable. No demand of defendant Watson was requisite. A demand or notice of claim is requisite where the party stands in a fiduciary relation to another and, in that capacity, has the money or property of the other, in some cases of public offices, and between cosureties, when the relation is changed by the payment of the debt by one; but no one of these relations, nor any similar one, subsists between the parties here. The defendant is bound to keep in mind his default, of which he had full coznizance, and has no right to complain that he has not been reminded of it.

But if a demand in such case were requisite, it seems to be fully established in this case by the proofs. The agent of the plaintiff called upon the defendant and informed him that the principals had not paid the debt, and he, Watson, would have it to do. This is all that is necessary to constitute a demand.

We do not think there is anything in the position assumed in the third objection. Watson was not a party to the note, and could not entitle himself to its possession as a matter of legal right by a satisfaction of it. A tender therefore was not obligatory, and, after the answer made by the defendant to the demand, would have been wholly impertinent and useless.

The proofs in the cause leave the fourth objection without any ground to rest on. The note was presented for the defendant's signature, and he refused to give it, for the specific reason that one of the (14) principles had made a deed of trust. The objection is not that the application did not come from the proper source. He is willing to sign and does sign, and only takes the paper back and erases it when he heard that Phelps had made a deed. Under the circumstances, the principal obligors to the contract of hiring may

well be regarded as the agent of the others to get the note promised and hand it over to the obligee. At any rate, Watson, upon that occasion, recognized him as the agent, and it is not proper for him now to dispute it. He dealt with him as such.

The principles involved in the other two objections cannot be maintained. The right to the use of the slaves for a year was parted with by the plaintiff upon the faith of the defendant's promise, and this constituted a sufficient consideration for the promise; no other was necessary. The taking of the note afterwards in the condition in which it was did not waive the legal effect of the promise to sign it, especially as it was accepted with an express repudiation of any such inference. The plaintiff was informed by her agent that the defendant would be still bound, and thereupon and with that understanding she took the note. This amounts to no discharge of the defendant's liability. There is

PER CURIAM. No error.

A. H. BOND, ADMINISTRATOR, v. J. H. HALL.

1. **To leave a question to the jury, without some evidence bearing upon the matter and upon which they might base their verdict, is error.**
2. **The presentment and collection of an order by one to whom it was not endorsed, *prima facie*, makes the collector a debtor to the payee.**

ASSUMPSIT tried before *Howard, J.*, at last Fall Term of CHOWAN.

There were several exceptions to the ruling of his Honor in this case, but as only one, to wit, the fourth, stated in the bill is considered by this Court, the others are omitted. That exception is as follows: "That there was no evidence to rebut the presumption (15) that the order collected by plaintiff's intestate was still unaccounted for." The plaintiff had made out a *prima facie* case by the evidence for a considerable sum of money, all of which, except $59, was met by evidence that the parties had had a settlement, and the plaintiff's intestate had taken a note for the amount referred to by the proof. As to the overplus, it was attempted to be met by the evidence of one Skinner. He testified that in the fall of 1859 the plaintiff's intestate, Clayton, presented to him for acceptance an order drawn on him by one Rogerson, in favor of defendant Hall for $80; that he accepted the order, and about 1 January, 1860, he called at the store of said Clayton, when the same order was produced and he paid it to him (Clayton); that this order had never been indorsed by the defendant.

His Honor, in respect to this order, charged that it not having been indorsed, and having been presented and collected by the plaintiff's intestate, the law presumed that he was acting as agent of the defendant, the payee, and therefore they must allow it and find for the defendant, unless the evidence in the case satisfied them that the plaintiff's intestate had already accounted for it. This was excepted to, as above stated.

Verdict for the plaintiff, and on judgment being rendered, the defendant appealed.

H. A. Gilliam for plaintiff.
Hines and Johnson for defendant.

MANLY, J. In considering this case, we have confined our attention to a single exception, the fourth in order, which objects to the instruction of the court below, in respect to the money paid on the order for $80. The order was drawn by one Rogerson in favor of Hall upon T. S. Skinner, and the latter testified that it was presented unindorsed to him by the intestate, A. W. Clayton, and that he paid it to the said (16) Clayton. This raised *prima facie* an indebtment to that amount from Clayton to Hall. We have examined the statement of proofs in this case and do not find any evidence of a payment, of a credit on account, or other settlement of the same. When his Honor therefore submitted it to the jury to say whether it had or had not been accounted for, it was error. To leave a question of fact to the jury, without some evidence bearing upon the matter and upon which they might base their verdict, is to invite them to wander into the field of conjecture and to act upon the uncertain suggestions there met with.

The case was admitted to turn in one aspect of it upon the point whether the money received by Clayton upon the draft payable to Hall was ever accounted for by Clayton with Hall, and this being left to the jury without evidence vitiates the finding. *Cobb v. Fogleman,* 23 N. C., 444; *Sutton v. Madre,* 47 N. C., 320. There must be a

PER CURIAM. *Venire de novo.*

BENNET HOCKADAY, ADMINISTRATOR OF NORMAN MATTHEWS, v. ANSON PARKER.

Where the land of one of two sureties of a third person was sold under execution for the debt, and the other surety bid it off, it was *Held,* that an agreement for the owner of the land to pay the debt and take an assignment of the bid to him was not affected by the statute of frauds.

ASSUMPSIT tried before *French, J.,* at last Fall Term of HARNETT.

The plaintiff declared for money paid by his intestate as cosurety with defendant for one Strickland. A judgment had been obtained on the debt against Strickland and the two sureties, Matthews and Parker (plaintiff's intestate and the defendant), and execution thereon was levied on Matthew's land, which was sold and bid off (17) by Parker and one Stewart. They, after this, came to an agreement that Matthews should take the whole debt on himself and should satisfy the execution; in consideration of which understanding they assigned their bid for his land to him.

The counsel for the plaintiff requested the court to charge the jury:

1. That the agreement of the intestate (Matthews) to satisfy the execution upon the assignment of the bid of Stewart and the defendant, not being reduced to writing, was void under the statute of frauds. The court declined to give this instruction.

2. The plaintiff then asked his Honor to instruct the jury, that if they believed the evidence for the defendant there was combination and fraud on the part of Stewart and the defendant, and the plaintiff could not recover.

3. That if the jury believed that the promise of the plaintiff was merely to satisfy the execution, and not to discharge the defendant from his liability as surety, the plaintiff was entitled to recover.

The last two instructions the court declined giving, for the reason that there was no evidence to sustain them. Plaintiff's counsel excepted.

Verdict for defendant. Judgment and appeal by plaintiff.

Neill McKay for plaintiff.
No counsel for defendant.

MANLY, J. An analysis and proper understanding of the facts of this case will show, as we conceive, that the instruction first asked for by the plaintiff is based upon an erroneous view of their substance and effect. The engagement of the plaintiff's intestate to pay the whole judgment against himself and Parker, as the sureties of Strickland, is not a promise to pay the debt of another, but an undertaking on the part of Matthews, for a consideration, to make that debt (18) his own in respect to his cosureties.

It was competent for Matthews to make this arrangement, which was simply a mode of making a payment for the assignment of the right to call for a title to the land. His promise to pay a specific sum to Parker for the right would have been obligatory as a promise based upon a sufficient consideration moving from one party to the other. It does not change the nature or binding force of the promise, that it is to

extinguish a debt which Parker owes to another. It is still a mode by which Matthews pays his own debt, and the promise on his part is simply to that purport and effect. The provision, therefore, of the Revised Code (chap. 50, sec. 15) opposes no obstacle to the legal efficacy of the intestate's agreement. Nor does the eleventh section stand in the way; for the Court has repeatedly held that an assignment of a bid at a sale of lands under a *fi. fa.* is valid without writing.

The view which we have thus taken of the promise of Matthews disposes of the merits of the case in respect of all redress in a court of law. The promise of Matthews being to pay his own debt, it follows when he paid it, it was not money paid as the cosurety of Parker and to his use, for which the statute gives the remedy at law, Rev. Code, chap. 110, sec. 2. The substance of the court's instruction, therefore, was correct, viz., that upon the evidence the plaintiff could not recover.

The dubious aspect of the case has arisen out of the unexplained and surprising folly of a man, who, being able to pay, suffers his land to be sold at a sacrifice and immediately buys it back at a great advance. We are unable to understand this from anything stated in the case. Whether it may not have been effected by combination and fraud between Parker and Stewart and others, as suggested in the second prayer for instruction, we cannot say. Such fraud might account for it, but we find no proof to sustain the suggestion.

The instruction asked for, therefore, in the second place, was properly refused by the court, because it was hypothetical and without evidence to sustain it. If there had been evidence, the remedy would probably have been held to be in another forum, where the parties might be (19) regarded as still standing in the relation of cosureties, notwithstanding the agreement and promise to the contrary.

The instruction asked for, in the third place, stands upon the same footing with the last, resting upon no foundation in the proofs. It also was properly refused by the Court. There is

PER CURIAM. No error.

Cited: Peele v. Powell, 156 N. C., 558; *Handle Co. v. Plumbing Co.,* 171 N. C., 503.

STATE v. PETER, A SLAVE.

1. The inference arising against the truth of a charge of rape, from a long silence on the part of the female, is not a presumption amounting to a rule of law, but is a matter of fact, to be passed on by the jury.

2. The word, "person," in section 5, ch. 34, Rev. Code (punishing rape), includes slaves, free negroes, and free persons of color, as well as white men.

RAPE, tried before *French, J.*, at last term of NEW HANOVER.

The rape was alleged to have been committed by the defendant, who is a slave, on the body of Narcissa Craig. There was also a count for an assault with an intent to commit rape.

Narcissa Craig swore that about the first of the preceding May, about daylight in the morning, the prisoner came to her room and had carnal knowledge of her person, forcibly and against her will; that she had on her nightclothes at the time, and they were made bloody by the act of the prisoner; that her father went to Smithville before day, and she was left alone; that she told no one of it until about two weeks afterwards, and then told her aunt, Mrs. Spiver; that her father returned home the next day after the offense was committed and she saw him every day for two or three weeks; that when the (20) prisoner was committing the act she cried aloud; that her cousin, Mr. Howard, resided one or two hundred yards distance from her father's house and her aunt, Mrs. Spiver, about half a mile; that she and Mrs. Howard were not on friendly terms; that Peter had a wife at Mrs. Howard's; that she did not like him nor his wife, because they were saucy to her; that four or five days after the offense was committed, Peter came to the house where she and her father and brother were and, sitting down familiarly in the piazza, had a conversation with her father and brother; that she did not tell her father, because she was afraid and ashamed to do so; that her father was drinking when he came home; that she had never had any monthly sickness.

Mrs. Spiver testified that Narcissa came to her house about the middle of May, and told her of the offense committed by the prisoner, as she had narrated it before the court; that she showed her her night clothes, and they were bloody; she stated further, that the witness Narcissa had never had her monthly sickness.

Joseph N. Burroughs stated, that he arrested the prisoner on 6 June, and tied him in his kitchen; that he overheard a conversation between the prisoner and a negro woman, in which the latter said to the former: "What did you do it for? Did you know it would carry you to the gallows?" To which the prisoner replied, "I am sorry for it." There was some other testimony, not necessary to be stated.

The counsel for the defendant, insisted that the witness, Narcissa Craig, was not to be believed; that the act, if committed at all by the prisoner, was with her consent and that her motive in charging the prisoner was to conceal her disgrace.

The court charged the jury, that if Narcissa was to be believed the

prisoner was guilty, and they might inquire what motive she had to charge such an offense to have been committed on her person by a slave, if it were not true. The court further charged the jury, that in passing on the credibility of the witness, they should take into consideration the length of time between the alleged commission of the offense and the accusation against the prisoner; that within four or five days after (21) the time stated by the witness, the prisoner went to the house of the witness's father and there conversed familiarly with the father and brother in her presence, and that the place where the offense was alleged to have been committed was within one or two hundred yards of Mrs. Howard's house, where, also, the wife of the prisoner resided; that in passing upon the motive which the girl had to make the accusation and as to the allegation that she did so to conceal her shame, they would inquire what evidence there was that she would have been disgraced if she had not made the accusation. To this charge the prisoner's counsel excepted. He also moved in arrest of judgment on the same grounds relied on in this Court.

Verdict, guilty. Judgment and appeal by the prisoner.

Attorney-General for the State.
Baker for defendant.

PEARSON, C. J. The fact that the witness Narcissa did not make known or complain of the outrage which had been perpetrated on her for two weeks was presented to the jury by his Honor as a circumstance which affected her credibility. This portion of the charge is excepted to, on the ground that he ought to have gone further and told the jury that her not making an earlier disclosure raised a presumption of falsehood, to be acted on by the jury in the absence of any proof to rebut it.

It is not a rule of law that silence, under such circumstances, raises a presumption that the witness has sworn falsely. The passages in the books to which reference was made on the argument use the word, "presumption," not as a rule of law, but an inference of fact, and treat of silence as a circumstance tending strongly to impeach the credibility of the witness, on the ground that a forcible violation of her person so outrages the female instinct that a woman not only will make an outcry for aid at the time, but will instantly and involuntarily, after its perpetration, seek some one to whom she can make known the (22) injury and give vent to her feelings. The want of this demonstration of feeling or "involuntary outburst" is treated of as a circumstance tending to show consent on her part; but it is nowhere held that this female instinct is so strong and unerring as to have been made the foundation of a rule of law, as distinguished from a rule in respect to

evidence and the weight to which it is entitled, which is a matter for the jury. So that, although we think his Honor would have been sustained by the authorities in presenting this circumstance to the jury more forcibly than he did, still the omission is not an error in law which this Court has the power to review.

The motion in arrest of judgment cannot be sustained. It is based upon the idea that the word "person" in the statute, in respect to the crime of rape, Rev. Code, chap. 34, sec. 5, does not embrace a slave, and that the case of slaves is only provided for in the statute, Rev. Code, chap. 107, sec. 44, which enacts, "Any slave or free negro, or free person of color, convicted by due course of law of an assault with an intent to commit rape upon the body of a white female, shall suffer death." If this position was granted the conclusion would not follow; for still it would seem that a verdict finding a slave guilty of rape upon the body of a white female would authorize a judgment, on the ground that a rape must of necessity include an assault with an intent to commit it; the greater includes the less.

But this Court is of opinion that the word "person" in chapter 34, section 5, does embrace a slave. The word "person" and the word "man," in their ordinary signification, include slaves, free negroes, and free persons of color, as well as white men, and are to be taken in that sense in construing statutes, unless there is something showing that it was not the intention of the lawmakers to use these words in their ordinary signification, and that it was not intended to apply to slaves. It is said that the intention not to include slaves, in our statute, is to be inferred from the fact that by the other, even assault (23) with an intent, subjects the slave to the penalty of death, and it was a matter of supererogation to include him also in the former. This argument proves too much; for it excludes free negroes and free persons of color, as well as slaves, from the operation of the former statute, and it is a *non sequitur* that the latter statute makes the former a matter of supererogation. It is clear the intention was to denounce the penalty of death against any person, no matter to which of the classes he belonged, who was guilty of rape, and in respect to the last three classes the intention was to go further, and to denounce the penalty of death against all who even committed an assault on a white female with an intent to ravish her.

That it was the intention to include a slave by the word "person" in section 5, is manifest from the sections which immediately precede and follow it—section 4: "if any person shall castrate," etc.; section 7: "if any person shall burn the statehouse, any courthouse," etc.; section 8: "if any person shall enter any dwelling house with intent," etc., "he shall suffer death." Can it be seriously contended that, as our statute

law now stands, a slave may commit any and all of these deeds without being guilty of a criminal offense?

The counsel for the prisoner rested his position mainly on the authority of *S. v. Tom,* 44 N. C., 214. It is there decided that the word "person," as used in the act of 1819, Rev. Code, chap. 34, sec. 60, forbidding any person passing counterfeit bank bills, did not embrace a slave. The decision is put on the authority of *S. v. Small,* 33 N. C., 571. That was an indictment under the statute, Rev. Stat., chap. 34, sec. 46, which provides that "when any man shall take a woman into his house, or a woman a man," "and bed and cohabit together," and it was held that from the subject matter and from the punishment, to wit, a fine not exceeding $200, it was to be inferred that the lawmakers did not use the words "man" and "woman" in ordinary sense; for if so, all of our slaves could be indicted, as none of them are married according to law, and there is no law by which they can be married, and (24) the idea of intending to fine a slave was absurd; as slaves have no property.

S. v. Tom was governed by this authority, and it was conceived that the reasoning on which it was decided applied with full force, taken in connection with the sections which immediately precede and follow it, providing against forgery and making counterfeit bank bills, which slaves are not usually able to do, and in which sections the same word "person" is used. From the two cases this legal principle may be adduced: Where a statute uses the word "man" or the word "person" in creating an offense, it embraces slaves as well as white persons and all others, unless from the nature of the subject matter and the punishment imposed it appears not to have been the intention to embrace slaves. It is true, the Chief Justice who delivered the opinion, in arguing the question, uses the expression "in carrying out this humane policy the courts, in putting a construction upon penal statutes, have adopted the principle that slaves are not embraced unless mentioned; they are not embraced for punishment, but they are for protection. This principle was declared by the Court in *S. v. Small,* 33 N. C., 571." It is obvious the learned Judge had in his mind the principle that, by our law slaves are treated as "property," *civiliter,* but are treated as persons *criminaliter,* and it was not his intention to lay down any rule of construction, other than that established by *S. v. Small,* and although his words may seem to go further, the correct principle is that stated above as deducible from the two cases. There is

PER CURIAM. No error.

Cited: S. v. Starnes, 94 N. C., 981; *S. v. Smith,* 138 N. C., 704.

STATE v. CLARA, A SLAVE.

1. A judge cannot be required to give instructions to the jury upon an assumption of facts not supported by evidence.

2. Where there are several possibilities of fact, different from the inference intended to be drawn from the evidence offered, a judge is not required to note one such possibility and specifically bring it to the attention of the jury.

MURDER, tried before *French, J.*, at last Fall Term of MONTGOMERY.

The defendant in this case was indicted with her son Jim, a slave, as an accessory before the fact, for killing their master, John E. Chambers, and they were put on trial together. Jim was convicted, and as to the defendant, the evidence of a slave by the name of Sarah was that on the Sunday morning before the murder (which was on Wednesday night) the prisoner, who belonged to the deceased and usually cooked for him, looked into a sideboard drawer for bullets, but did not find any; she then told the witness that if she would get some bullets, or if she could not get bullets, if she would get some caps and lead for some person she would be well paid for it; that witness asked the prisoner what she wanted with these things, to which she answered, "never mind; no harm." That on Saturday night of the same day, Jim, the principal in the murder, asked her for the caps and asked her if his mother did not tell her to get the caps and lead for him. The witness replied that Clara did not call any names. Witness then told Jim there were no caps in the house; to which Jim said, "Hush your lies, for he saw some in Mass. Robert's room, on the mantel-piece." That witness got the caps and gave them to Jerry, another slave of the deceased, to give to Jim. That on Monday night following, she gave Jim a piece of lead. That on Tuesday morning following (the day before the murder) the prisoner asked witness if she had given the things to Jim; to which she returned answer that she had. It was further in evidence, that on the Monday morning before the murder, the prisoner Clara said (26) to the witness that "she felt sorry for her master; that he was going to die soon, and asked witness if she did not hear the hen crow in the blackjack every morning when he came out." The witness said she had not heard it.

It was further in evidence that after the murder had been committed, the prisoner said to the witness, if Jim did kill his master or had it done it was no harm; for it was life for life, and she had often heard that when it was life for life it was no harm. That Jim was her child and she would not speak against him. This witness asked her what she wanted with the caps and lead? To which she answered, never mind, she knew.

There was evidence that the deceased died of gunshot wounds, and a physician stated that the wound was made by shot of the size of squirrel shot.

There was evidence that the deceased was found with a bag drawn over his head; that the bag was bloody, and that on Sunday week after the murder the prisoner was seen washing the bag.

The court, after giving instructions applicable to the case of Jim, to which there were no exceptions, charged the jury that if they were satisfied from the testimony, under the rules laid down, that Jim was guilty of the murder of the deceased, and that the prisoner, not being present when the act was done, procured, counselled, commanded, or advised Jim to do it, she would be guilty under this indictment; but, that before they could convict her they should be satisfied beyond a reasonable doubt that Jim committed the murder; and that before the act was done Clara procured, counselled, commanded, or advised Jim to do the act.

The counsel for the prisoner then asked the court to instruct the jury, that, if they believed Clara's design was to furnish the ammunition to kill meat or for any unlawful purpose other than the killing of the deceased, upon this evidence they could not be warranted in convicting Clara.

The court declined to give the instruction prayed for, and (27) the counsel for the defendant excepted.

Verdict, guilty. Judgment and appeal.

Attorney-General for the State.
Blackmer for defendant.

MANLY, J. The instructions asked for were properly refused. There was evidence to satisfy the jury that the homicide was inflicted by gunshot wounds and by the hands of Jim, the son of Clara. Assuming that lead and gun caps were furnished by the direction of Clara, there is a purpose for furnishing them disclosed by the use immediately made of such articles by Jim. There was no evidence that he used such ammunition for any other purpose, and the instruction asked for, therefore, had no basis to rest upon in the proofs. It involved an unsupported assumption of fact.

There are possibilities different from the inference intended to be drawn, which surround every evidentiary fact in a cause; but for a judge to note one such possibility and specially call it to the attention of the jury would be giving it weight to which it is not entitled, and inviting the jury to draw from the fields of conjecture the material for making up a verdict.

The instruction asked for in any sense which may be ascribed to it was hypothetical and therefore improper; but if the language in which the prayer is couched be considered, another objection to the specific prayer will be apparent. Interpreting the language used, viz., "upon this evidence the jury would not be warranted in convicting Clara," to mean not only the evidence assumed and noted in the hypothesis, but also all other facts in the cause bearing upon her guilt, it is clear the instruction ought not to have been given. There was other evidence besides Clara's agency in procuring ammunition, and if that had been eliminated from the proofs altogether, there was still evidence upon which the jury ought to have been permitted to pass. Had the judge, therefore, given the instruction asked, he would have superseded the jury in their proper province—a province made exclusively their own by the legislation of the State. Rev. Code, chap. 31, (28) sec. 130.

Upon the whole, the instruction asked for ought not to have been given; and the entire record being considered by us, we are of opinion there is

PER CURIAM. No error.

JOHN Z. DAVIS v. G. W. GOLSTON, ADMINISTRATOR.

1. **According to the general understanding of the profession, where parties have gone into trial without a formal declaration, the plaintiff is to be taken to have relied on one suited to the case made by the proof.**
2. **Where an obligation was signed and sealed by one of two partners and signed only by the other, it was *Held*, to be the deed of the former, and the simple contract only of the other, and that the latter might be sued in *assumpsit* alone on this contract.**

ASSUMPSIT, tried before *French, J.*, at last Fall Term of HARNETT. The plaintiff declared on the following promissory note:

"$545. On or before 1 January, 1856, we or either of us promise to pay John Z. Davis, or order the sum of five hundred and forty-five dollars, for the hire of the following negroes, viz.: Buck, Samp, Bockra, and Charles, for the present year; and we further promise to clothe them and furnish them with shoes, hats, and four blankets, and pay doctors' bills. This 2 January, 1855.

R. C. BELDEN, [SEAL.]
R. W. PALMER."

There were also memoranda of counts for the hire of slaves, and on a special promise to pay, but no formal declaration was filed in the court below.

The plaintiff having proved the execution of the instrument declared on, the defendant offered evidence to show that this paper (29) writing was signed by the defendant Golston's intestate, Robert W. Palmer, in blank, and by him delivered to Belden, to be used in hiring slaves for the two, and that they were partners. That Belden hired the plaintiff's slaves and filled up the paper writing, so as to constitute the instrument above set out, his own name having affixed to it a seal.

The defendant's counsel requested the court to charge the jury, that if they believed from the evidence that Belden and the intestate were partners and that the paper writing was signed and sealed by Belden after it was filled up, then the simple contract of the intestate was merged in the bond made by Belden, and that the plaintiff could not recover in this action. Also, that the defendant being sued on the individual liability of the intestate, and the proof being that Belden and the intestate were partners and jointly liable, that the plaintiff could not recover on account of the variance.

The court declined giving the instruction asked, and the defendant's counsel excepted.

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

Strange for plaintiff.
Neill McKay for defendant.

BATTLE, J. Section 84, chapter 31, Rev. Code, which was originally taken from the act of 1797 (chap. 475, sec. 2, of Revised Code of 1820), declares that "in all cases of joint obligations or assumptions of copartners in trade or others suits may be brought and prosecuted on the same against all or any number of the persons making such obligations, assumptions, or agreements." According, then, to the express terms of this enactment, one of two or more joint obligors or partners may be sued alone, and, of course, the declaration in the action may be so drawn as to be supported by the proof which must necessarily be offered. In the present case no formal declaration was filed, and, according to the general understanding of the profession, the plaintiff is to be (30) taken to have relied upon one suited to his case as established by his testimony.

The objection, then, that there was upon the trial a variance between the proof and the declaration is not well founded. From the copy of the instrument upon which the suit was brought it appears that it was

signed and sealed by Belden, but only signed by the defendant's intestate, Palmer. There can be no doubt that one partner may bind himself by a seal, if he intended to do so, though he cannot so bind the firm, unless he has authority, under seal, for that purpose; *Fisher v. Pender,* 52 N. C., 483; *Elliott v. Davis,* 2 Bos. & Pul. 338.

It is equally clear, we think, that if an instrument be signed and sealed by one partner and signed only by another, it will be the deed of the first and the simple contract only of the second. See *Green v. Thornton,* 49 N. C., 230. There is no more inconsistency in such a case than there is in holding that an executory agreement between two persons, if sealed by one and only signed by the other, will be the covenant of the first party and the simple contract of the second. The latter case is well settled, and upon a breach of the agreement, one of the parties would have to be sued in an action of covenant and the other in *assumpsit; Yarborough v. Monday,* 14 N. C., 420; *Kent v. Robinson,* 49 N. C., 529; 1 Chit. Pl., 119.

PER CURIAM. Affirmed.

Cited: Burwell v. Linthicum, 100 N. C., 149.

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(31)

THOMAS J. COVINGTON v. ARCHIBALD BUIE, EXECUTOR.

A receipt signed by a sheriff for a sum of money, "to be applied to the payment of a judgment" obtained against the defendant at a previous term of a court of the county in which the defendant lived, and of which the maker of such receipt was sheriff at the time, is no evidence that an execution was in his hands when the money was paid to him.

SCIRE FACIAS to revive a judgment, tried before *Saunders, J.,* at last term of RICHMOND.

The material question arose upon the plea of payment. The defendant's testatrix lived in Richmond County, and had paid the amount of the judgment in question to one William Buchanan, then the sheriff of Richmond County, to whom an execution would have ordinarly issued had one been put in force, who gave her the following receipt: "Received of Christian D. Calhoune three hundred dollars and thirty cents, to be applied to the payment of a judgment in the Superior Court of Richmond, in the suit of Thomas J. Covington against her," dated 17 March, 1857. This money was not paid to the plaintiff. There was no evidence that an execution had issued to the sheriff returnable to the next term after the receipt, but the defendant's counsel insisted that that

fact was inferable from the receipt itself, and called on the court so to charge the jury; but his Honor declined giving such instruction and instructed them that there was no evidence before them that the sheriff had such an authority. The defendant's counsel excepted.

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

Ashe for plaintiff.
Leitch for defendant.

BATTLE, J. The plea of payment being a plea by way of confession and avoidance, the burden of the proof in support of it was upon the defendant. He, accordingly, for the purpose of showing that the judgment in question had been paid, introduced the receipt of one (32) Buchanan, who was the sheriff to whom the writ of *fieri facias* would have been properly directed. A payment to him, however, availed nothing, unless at the time when he received the money he was authorized to do so by virtue of a *fieri facias,* commanding him to levy it. *S. v. Long,* 30 N. C., 415; *Ellis v. Long, ibid.,* 513; *Mills v. Allen,* 52 N. C., 564. The question, then, was narrowed down to the point whether the receipt afforded any evidence that the sheriff had the writ of execution in his hands when the money was paid to him. We agree with his Honor in the court below that it did not. It does not purport that the amount paid was in satisfaction of an execution, but that he, the sheriff, received it "to be applied to the payment of a judgment," etc. These terms exclude the idea that he then had any execution in his hands, and show that the defendant had failed to offer any testimony which the court could submit to the jury as tending to support his plea.

The testimony introduced by the plaintiff being only of a rebutting character, it is, of course, unnecessary to notice it in an inquiry, whether any evidence had been offered by the defendant in support of an issue, the affirmative of which he was bound to sustain. For, if he had offered any such testimony, the jury must necessarily have been called upon to decide between it and the opposing testimony of the plaintiff.

PER CURIAM. Affirmed.

SOLOMON CRUMP v. WILLIAM J. McKAY.

In an action against a ferryman for negligently carrying plaintiff's wife across his ferry, whereby she was injured, it is not necessary that the wife should be made a party plaintiff.

CASE, tried before *French, J.*, at last Fall Term of RICHMOND. (33)
The declaration was in case for negligence in the defendant's ferryman, whereby plaintiff's wife and child were thrown into the Cape Fear river from the defendant's boat and injured.

The court intimating an opinion that the action could not be sustained without making the wife a party plaintiff, the plaintiff submitted a nonsuit and appealed.

No counsel for plaintiff.
Strange for defendant.

PEARSON, C. J. If one slanders a married woman or commits an assault and battery upon her, the action for injuring her must be in the name of husband and wife, although, in the latter instance, if there be any damage besides the pain suffered by the wife, as a loss of service, or an injury to clothes, or medical bills, the husband may sue alone and allege special damage.

So, if one drive his carriage so negligently as to run against a married woman, in an action for the personal injury to her she is a necessary party, and the husband cannot sue alone without alleging special damage.

From the argument made in this Court, we suppose his Honor intimated the opinion that the wife was a necessary party in this action, upon the idea that it fell within the principle stated above, and did not have his attention directed to the fact that the ground of the action was not a simple *tort,* or personal injury to the wife and child of the plaintiff, but originated in contract. The plaintiff, either in person, or by his wife, as an agent, made an agreement with the defendant by which he undertook to carry the wife and child of the plaintiff across the river with ordinary care. It is assumed by the case that the defendant was guilty of negligence, by reason of which the wife and child were thrown into the river. This was a breach of the agreement, whereby an action accrued to the plaintiff, and, as a matter of course, he was entitled to recover damages to some amount.

The writ is "trespass on the case," and it does not appear by (34) the record whether the plaintiff declared in contract or in *tort,* He had his election to declare in either form of action. If the declara-

tion was on contract, of course the wife was not a necessary party; and it is equally clear if the declaration was in *tort*, the wife was not a necessary party. There was no more reason for making her a party plaintiff than for making a child a plaintiff in order to enable the husband and father to recover the damages which he had sustained by reason of the wrongful breach of the contract on the part of the defendant.

If the defendant had undertaken to carry a horse of the plaintiff's across the river, and it was drowned through negligence, all the authorities show that the plaintiff might have sued either in contract or in *tort* for breach of the contract of bailment; and the same doctrine applies to a contract to carry persons, which is in the nature of a contract of bailment.

A distinction between a case of the kind before us and those which we presume his Honor had in view is this: The one is a simple *tort*, without any connection whatever with a contract, and the other, although sued for as a *tort*, arises *ex contractu* and, being based on contract, the rules in regard to the nonjoinder and misjoinder of parties in actions *ex contractu* are applied to it; for instance, if two purchase a horse jointly, and one of them sue alone in deceit, the nonjoinder of the other may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error, if the matter appears in the record; if it does not so appear, then by nonsuit, because of the variance, which is the rule for the nonjoinder of parties plaintiff in actions *ex contractu;* whereas, according to the rule in actions *ex delicto*, the nonjoinder could only be taken advantage of by plea in abatement, and in the absence of such plea the plaintiff recovers his *aliquot* part of the damages. This is settled. *Scott v. Brown*, 48 N. C., 541. On the same principle it is settled, if one hires a horse to an infant and the horse is injured by neglect or by being driven too hard, the action may be either in (35) contract or in *tort*, but the party, by bringing an action in *tort*, cannot avoid the plea of infancy, which is a bar to an action on the contract, for the *tort* arises out of a contract and the rule in respect to actions *ex contractu* is applied.

The distinction between actions for simple *torts* and *torts* arising *ex contractu*, or *"quasi ex contractu"* as they are styled in the books, is so clear and the reason for making a difference is so obvious, when attention is called to it, that it seems unnecessary to elaborate the subject.

PER CURIAM. Reversed.

Cited: Moore v. Horne, 153 N. C., 415.

SOLOMON W. MORSE v. JAMES M. NIXON.

Where a sow, having a bad reputation for devouring young poultry (which was known to her owner), was seen with a duck in her mouth, and on being chased dropped it, but immediately again ran after it and was shot by the owner of the duck while in such pursuit, it was held that he was justified in so doing.

TRESPASS *vi et armis,* tried before *French, J.,* at last Fall Term of NEW HANOVER.

Pleas: General issue, jurisdiction.

It was evidence that a sow, belonging to the plaintiff, was seen with a duck in her mouth in the public road near the residence of the defendant. The witness chased the hog and she dropped it. The hog immediately chased the duck again, and while in hot pursuit the defendant shot her.

The defendant offered to prove several acts of "chicken-eating" by this hog, but the testimony was ruled out by the court.

There was much evidence going to show that the hog was well known in the neighborhood and bore general reputation as "a chicken-eating hog." It was in evidence that the plaintiff, at the time (36) he purchased this animal, was apprised of her bad character.

The court held that the plea of justification was not sustained. Defendant's counsel excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Baker for plaintiff.
W. A. Wright for defendant.

BATTLE, J. The facts of this case, as now presented to us in the defendant's bill of exceptions, are materially different from those which were reported on a former trial. Then, there was no evidence that when the defendant shot the plaintiff's sow she was in the act of doing anything to injure him or his property. Now, it appears that she was in hot pursuit of one of the plaintiff's fowls when he killed her. Then, nothing was proved as to the plaintiff's knowledge of the chicken-eating propensity of his hog. Now, it seems that when he purchased her he was fully apprised of her fierce appetite for young fowls. Upon the facts as reported to have been proved on the former trial, we held that the defendant was not justified in killing the sow as a public nuisance which any person had a right to abate. The case, we think, is altogether different when the sow is turned loose by her owner, with a full knowledge of her evil habits, and is killed by the owner of a fowl

to save his property from destruction. Besides the leading case of *Wadhurst v. Damme,* Cro. James, 45, which was referred to when this case was before the Court, 51 N. C., 293. *Leonard v. Winkins,* 9 Johnson, 232, is very strong in favor of the defendant's plea of justification. In that case the plaintiff sued the defendant for shooting his dog. Upon not guilty pleaded it appeared that the plaintiff's dog was running with a fowl in his mouth, on the land of the defendant, when the latter fired at and killed him. It was testified by several witnesses that the same dog had worried and injured their fowls and (37) geese, and that there was an alarm in the neighborhood respecting mad dogs. The jury found a verdict against the plaintiff, and thereupon he was adjudged to pay the costs. The Court, consisting of Kent, Chief Justice, and Thompson, Spencer, Van Ness, and Yates, Judges, approved the verdict and judgment, saying: "The verdict below was not against law. The dog was on the land of the defendant, in the act of destroying a fowl, and the defendant was justified in killing him in like manner as if he was chasing and killing sheep, deer, calves, or other reclaimed and useful animals. This principle has been frequently and solemnly determined (Cro. Jac., 45; 3 Lev., 25). It was for the jury to determine whether the killing was justified by the necessity of the case and as requisite to preserve the fowl; and the fowl being on the land of the defendant was enough, without showing property in the fowl." The duck, in the case before us, being in the public road, was not necessarily on the land of the defendant, but it was near his residence, and it may be inferred that it belonged to him, and if so, he had a right to kill the hog, as, under like circumstances, he would have had a right to kill a dog, if such killing were necessary to the protection of his fowl. The knowledge which the plaintiff had of the bad character of his sow ought to have induced him to keep her up, and the damage which he sustained in consequence of not having done so was caused by his own default, and was, therefore, *damnum absque injuria.*

It is to be regretted that the verdict was not taken subject to the question of law, so as to have enabled us to put an end by our judgment to a litigation the expense of which must be greatly disproportioned to the value of the matter in controversy. As it is, we are obliged to award a

PER CURIAM. *Venire de novo.*

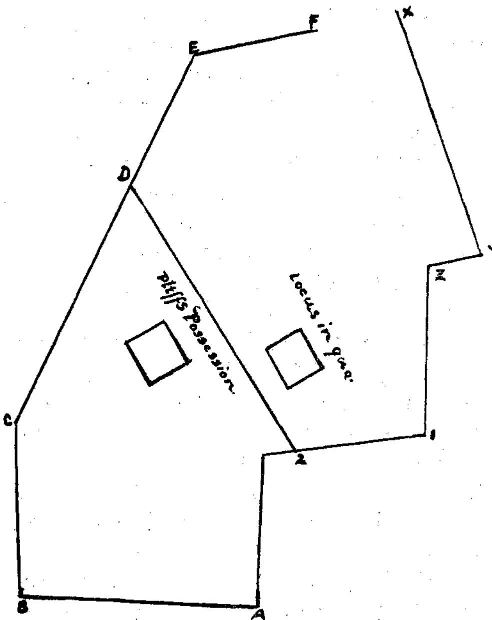
Cited: Runyan v. Patterson, 87 N. C., 345.

D. C. M'LEAN ET UX. ET AL. v. KENNETH MURCHISON ET AL.

In trespass q. c. f., the principle that where neither party has possession of a lappage the superior title draws to it the constructive possession and excludes the constructive possession of the inferior title, may be asserted by one who is a stranger to such superior title, against the suit of one claiming under the inferior title.

TRESPASS, *q. c. f.*, tried before *French, J.*, at last Fall Term of HARNETT.

The plaintiffs claimed title to the land in dispute, under a grant to one Morrison, and by him conveyed to their ancestor. So much of the



claim as is necessary to the understanding of this case is represented by the lines A, B, C, D, E, F, X, Y, Z, 1, 2. They occupied that portion of this area which was southwest of the line D, 2 (see diagram), but whether their occupancy embraced the *locus in quo* (39) was a question.

The defendants, for the purpose of showing title out of the plaintiff, offered in evidence a grant to John Gray Blount, of older date than that under which the plaintiffs claimed, which covered a large space of country, including, as they insisted, that portion of plaintiff's claim lying northeast of the line D 2, including the *locus in quo*.

The court charged the jury if the plaintiffs were not in possession at the time of the alleged trespass, they must rely upon the constructive possession which arises from the title, and they had shown title; and if they had also satisfied them of the trespass being committed on the Morrison grant by the defendants, or any of them, within three years before the commencement of the suit, the plaintiffs were entitled to recover, unless the defendants had so located the Blount grant as to cover the land on which the trespass had been committed, and that in this event it was not necessary that the defendants should connect themselves with the Blount grant; that it was sufficient to show title out of the State, older than the grant to the plaintiffs, for this takes away their constructive possession. The court further instructed the jury, that if the plaintiffs were in actual possession at the time of the alleged trespass above the line D, 2, and they were satisfied from the evidence that the trespass was committed by the defendants, or any one of them, on any portion of the tract within three years, it made no difference whether the Blount grant is so located as to cover the Morrison tract or not, for the reason that the defendants have not connected themselves with the Blount grant. The defendants' counsel excepted.

The defendants' counsel asked the court to instruct the jury, that if they should be satisfied that the Blount grant was located as contended by the defendants, and the plaintiffs had no possession of the lappage, but that their only possession was below the line D, 2, and that the trespass, if any, was upon the land covered by the Blount grant above the line D, 2, that the plaintiff could not recover. The court declined giving the instruction; but told the jury that if the Blount grant (40) was located as contended by the defendants, and the trespass, if any, was committed upon the land covered by the Blount grant above the line D, 2; then, if at the time of said trespass the plaintiffs had no possession above the line D, 2, upon the lappage, but that their only possession was upon that part of the grant below the line D, 2, which would not be upon the lappage, the plaintiffs would be entitled to their verdict, as the defendants had not connected themselves with the Blount grant. Defendant excepted.

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

No counsel for plaintiffs.
Strange and Neill McKay for defendants.

MANLY, J. We think there was an error on the part of the court below in refusing the instructions asked for. The action of trespass *quare clausum fregit* is a possessory action and can only be maintained by one who has possession, either actual or constructive; and the inquiry,

therefore, as to who had the possession of the *locus in quo* is material, and happens in this case to be the turning point. In the case of lapping grants, when neither proprietor is in actual possession of the part common to both, the constructive possession of that part is with the superior title. Actual possession (the *pedis positio* of the law) by one who has the inferior title, outside of the part that is common, however extended his claim or long continued as to time, will not diminish the strength of the superior title. The reason is: Such a possession does not expose the party to the other's action, or afford him an opportunity of asserting at law the superiority of his title. The parties consequently remain unaffected as to their respective rights in the part common to both the grants as long as they remain in this condition; and as to possession, he has it by construction who has the superior title. But if the party with the inferior title take possession anywhere in the part that is common, such possession is held coextensive with the entire part, and in such case the constructive possession which follows the better title is repelled, and the law adjudges him who has the *pedis positio* (41) to be in exclusive possession, for the reason that wherever he may have planted himself in the disputed part, he is alike exposed to the action of the adverse claimant; and therefore his possession should be held, in accordance with the general principle, commensurate with his claim. *Williams v. Buchanan,* 23 N. C., 535; *Baker v. McDonald,* 47 N. C., 244; *McMillan v. Turner,* 52 N. C., 435. These rules of law present and explain the apparent inconsistency, that while in the present condition of the respective claimants to these grants the possession is construed to be in the heirs of Blount, yet if their grant had covered more of the plaintiff's land, *i. e.,* had extended south of the line D, 2, so as to embrace the actual possession of the plaintiff, the possession of the whole lap would have been in the plaintiff. In the former case the plaintiffs could not maintain this action, in the latter they could.

The principles here laid down were fully recognized by his Honor below in the first part of his instructions to the jury, but in the latter part he seems to hold them inapplicable to the trespass of a stranger or mere wrong-doer. We are not aware of such an exception. This action cannot be maintained by one who has neither the actual nor constructive possession of the *locus in quo,* against an intermeddler. There must be a

PER CURIAM. *Venire de novo.*

Cited: Kitchen v. Wilson, 80 N. C., 197; *Simmons v. Box Co.,* 153 N. C., 262.

STATE ON THE RELATION OF B. H SHORT ET AL. V. ANGUS CURRIE ET AL.

1. A registered copy of a clerk's bond may be read without other proof, and of course the original, when proved and registered as the law provides, may also be read thus without being proved at the trial.
2. It seems at common law, official bonds were not subjected to the same tests of strict proof and cross-examintion as instruments between private persons.

DEBT on a clerk's bond, tried before *French, J.*, at last Fall Term of MOORE.

Plea: General issue.

The bond declared on was in the usual form and had a subscribing witness to it, who was not present; it was endorsed with the certificate of W. D. Dowd, chairman of Moore County court, before which court it was taken, that the execution of it had been acknowledged in open court, also, with the certificate of the register that it had been registered in his office. To prove the execution of the bond, the plaintiff introduced the clerk of the Superior Court, who stated that the paper-writing in question had been filed in his office as the official bond of the clerk of the county court; that it had been there kept, and had been taken from the file for the purposes of this trial. W. D. Dowd was then introduced, who stated that at the time of the date of the instrument he was chairman of the county court of Moore County; that the parties thereto acknowledged its execution before him in open court, and that he endorsed on it the certificate above described, signed by him as chairman.

Upon this evidence, the plaintiffs proposed to read the bond to the jury, but the defendants' counsel objected, on the ground that there was a subscribing witness to the paper, and that, therefore, the proof was insufficient.

The court sustained the objection, and the plaintiffs' counsel excepted.

The plaintiffs' counsel then offered a registered copy of the bond declared on, which was also objected to by the defendants' counsel (43) and ruled out by the court. The plaintiffs again excepted.

In deference to the opinion of the court, the plaintiffs submitted to a nonsuit, and appealed to this Court.

Neill McKay for plaintiffs.
Person and McDonald for defendants.

BATTLE, J. We are clearly of the opinion that his Honor in the court below erred in rejecting the testimony offered on the part of the relators to prove the execution of the bond declared on. It being the

official bond of Alexander C. Currie, as clerk of the county court of Moore, the rule of evidence, which requires the production of the subscribing witness to prove the execution of a private instrument, did not apply to it. In *Kello v. Maget,* 18 N. C., 414, it was held by the Court, in relation to a guardian bond, that "when a suit is brought, its execution may be denied by a plea, for it does not import absolute verity. But it is yet a document partaking of a public nature, taken by public authority, having a high character of authenticity, and it requires not that it should be verified by the ordinary tests of truth applied to merely private instruments, the obligation of an oath and the power of cross-examining witnesses on whose veracity the truth of such instruments depend. Confidence is due to it, because of the authority of the court by whom it was taken, and whom the State, in the discharge of the parental duties which it owes to orphans, has empowered to take it." This rule seems to be founded in reason and good sense, and applies with as much, if not more, force to the official bonds of clerks, sheriffs, and other public officers, as to those of guardians. See Starkie on Evidence, 195. In coming to the conclusion that the rule thus laid down in *Kello v. Maget* is a sound one and ought to be followed, we have not overlooked an expression which fell from *Nash, J.,* in delivering the opinion of the Court in *Butler v. Durham,* 38 N. C., 589. It was that "a guardian bond is not a record, and before it can be used as evidence in any case it must be proved, like all other instruments (44) of a similar kind, by the subscribing witness, if there be one." The point decided, and the only one necessary to be decided, was that the mere certificate of the clerk that a certain paper was the copy of a guardian bond was no proof of the fact that it was a guardian bond; for, says the judge, "we know of no law authorizing the clerk to certify a paper and thereby authenticate it under his private seal." In the case now before the Court, there was no question as to the identity of the obligors, and we think the bond ought to have been read in evidence upon the proof introduced by the relators, without requiring the production of the subscribing witness. That proof, however, was not conclusive, and it was open to the obligors to rebut it by showing that what purported to be their obligation had never in fact been executed by them.

If there were any doubt about the rule laid down in *Kello v. Maget,* as to the proof of official bonds at common law, there can be none that it has been established by statutory enactments. By section 9, chapter 19, Rev. Code, taken from section 8, chapter 19, Rev. Stat., it is declared that "the courts of pleas and quarter sessions shall cause all bonds taken before them of the clerks of their respective courts to be acknowledged or proved in open court, and indorse thereon a certificate

of such acknowledgment or probate, which certificate shall be signed by the justice who presides in the court at the time such acknowledgment or proof is made," which bonds are then required to be deposited in the office of the clerk of the Superior Court of the respective counties. By the next two succeeding sections, it is made the duty of the clerks of the Superior Courts to have these bonds registered in the register's office of their respective counties, and then to keep the originals in the same manner as they keep the records of their office. In connection with this, section 16, chapter 37, Rev. Code, taken from acts 1846, chap. 68, sec. 1, provides "that the registry or duly certified copy of the record of any deed, power of attorney, or other instrument, required or (45) allowed to be registered or recorded, may be given in evidence in any court, and shall be held to be full and sufficient evidence of such deed, power of attorney, or other instrument, although the party offering the same shall be entitled to the possession of the original and shall not account for the nonproduction thereof." The general words of this section will certainly embrace official bonds, which are required to be proved and registered, and we have no doubt that it was intended to embrace them, because a clause in section 9, chapter 19, Rev. Stat., which said that "on the destruction or loss of the original a certified copy of the said bond shall be received in evidence," is omitted in the corresponding section and chapter of the Revised Code. It can hardly be supposed that such a statutory provision would have been omitted in one part of the Code, unless it was intended and believed to be contained in another. If, then, the certified copy of the bond in question was sufficient evidence of its execution on the trial, without other proof, of course the original, which had been proved and registered as required by the statute, could not be less so. *S. v. Lewis,* 10 N. C., 410.

PER CURIAM. Reversed.

Cited: *Love v. Harbin,* 87 N. C., 254; *Battle v. Baird,* 118 N. C., 860.

JOHN MORRISON v. NEILL McNEILL.

Where one owned and possessed slaves for fifteen ears, and they were run out of the State secretly by the owner, into another State, and then taken in hand by the defendant, who carried them into a distant State, sold them, and received the money about the time the plaintiff's judgment was obtained against the owner, it was *Held,* that this was some evidence of a secret trust, for the use and benefit of the debtor, to enable him to defraud his creditors.

SCIRE FACIAS, alleging a secret trust, etc., tried before *French, J.*, at last Fall Term of MOORE. (46)

Several issues were made up and submitted to the jury, to wit:

1. Whether Neill McNeill held any property, etc., by secret conveyance from Dugald McDugald, and in trust for him, prior to the filing of his (defendant's) answer in this cause.

2. Whether he held any slaves or any property, etc., by secret delivery to him by said McDugald, in order to enable him to avoid the payment of his debts.

The plaintiff showed in evidence a judgment and execution in his favor against Dugald McDugald, at October Term, 1854, and a return of *nulla bona,* to April Term, 1855, and this *sci. fa.,* issued 12 May, 1855, returnable to the July Term of Moore County court.

The plaintiff further showed in evidence that a negro woman named Nancy was in possession of McDugald for ten or fifteen years; that she came to him by marriage with the sister of the defendant, and that since the marriage the woman had had three children; that McDugald had possession of Nancy and her children in the latter part of the fall, 1854; that he was largely indebted, and that he had been sold out in 1842; that one John McNeill, the nephew of the defendant, by the direction of McDugald, and with the knowledge of the defendant, met with these slaves on the road, about 9 o'clock at night about half a mile from the defendant's residence, and carried them to the house of one Pegues (defendant's father-in-law), in the State of South Carolina, where they were delivered to Pegues; that in the following winter or spring, Neill McNeill left home to go to the residence of Pegues, and then took the slaves from the house of Pegues and sold them in the State of Mississippi.

The court charged the jury, that there was no evidence to sustain either of the issues, and they should find for the defendant. Plaintiff's counsel excepted.

Verdict and judgment for the defendant, and appeal by the plaintiff. (47)

Person and Strange for plaintiff.
Neill McKay and McDonald for defendant.

MANLY, J. This Court is of opinion that there was error in the court below, in holding there was no evidence to support the affirmative of either of the issues.

It may be assumed as a fact, in deciding the matter now before us, that in the latter part of the fall of 1854, Dugald McDugald was the owner of certain slaves, Nancy and her children. Having acquired them by

his marriage, he had been in continued possession of them for 14 or 15 years, up to that time. The plaintiff's judgment was obtained against him at October Term, 1854, and in that fall he employs John McNeill, a nephew of his wife and a nephew of defendant McNeill, to conduct these slaves to the house of one Pegues, who was a brother-in-law, residing in the State of South Carolina.

The slaves are taken charge of by John McNeill at 9 o'clock at night, about half a mile from Neill McNeill's house, with the knowledge of McNeill, but under instructions from McDugald.

It is further in evidence that Neill McNeill afterwards took the negroes from the house of Pegues, carried them to Mississippi, and sold them. At what time the latter occurrence took place does not certainly appear, but it is in evidence that Neill McNeill went to the house of Pegues in the winter of 1854-'55 or spring of 1855, and there is no evidence of any other visit.

Taking the evidence thus detailed all together it seems to us to afford, to say the least of it, some evidence that the slaves in question were taken off by Neill McNeill, the defendant, to the State of Mississippi and sold before the Fall Term, 1855, of the county court, when his answer was put in; and, consequently, between the time of the judgment against McDugald and the answer to the *scire facias,* he, McNeill, had the proceeds of the sale of the slaves in his hands, and in contemplation of law, these proceeds were the property of McDugald, the debtor. (48)

It is not proper for us to say how much this evidence weighs in establishing the affirmative of the issues, or either of them; but we think it is of some weight and ought to have been submitted to the jury.

We decline discussing the case in any other aspect or upon any other point of the evidence. The facts now in proof are different from those presented by the pleadings and which were assumed to be true on a former discussion of it in this Court, *Morrison v. McNeill,* 51 N. C., 450, and we content ourselves with simply declaring that, according to the proofs reported, it was erroneous to hold there was no evidence in support of the affirmative of either of these issues. There should be a reversal of the judgment of nonsuit, and a

PER CURIAM. *Venire de novo.*

THOMAS WHITE v. DAVID COOPER.

1. Where a defendant in an action of ejectment has been evicted under a judgment and writ of possession, he is not estopped, on making an actual entry on the premises, from maintaining an action of trespass *q. c. f.*, and on showing title, he may recover for trespasses committed after the termination of the former suit.
2. Where one having title enters upon one who has evicted him by a judgment in ejectment and writ of possession, the former, by the *jus post liminii*, notwithstanding the presence of the other, will be considered to have been in possession all the time from and after the date of the eviction.

TRESPASS *quare clausum fregit,* tried before *Howard, J.,* at last Fall Term of TYRRELL.

The following statement of the case was sent to this Court by his Honor: "The plaintiff gave in evidence a grant from the State and a deed from the grantee to himself, and there was much (49) evidence as to whether these covered the *locus in quo* or not. It was then shown that in September, 1854, the plaintiff being in possession and cultivating a crop, the sheriff of Tyrrell County, by virtue of a writ of possession, dispossessed the plaintiff of the *locus in quo* and put the defendant in possession of the same; that the defendant gathered the crop and exercised full dominion over the premises; that after the crop was gathered and just before this suit was instituted, the plaintiff went upon the land with a couple of witnesses and, in the yard of the premises of the defendant, took out of his pocket a paper and said, 'that it was his deed for the land, and that the land was his and he claimed it'; that he and the witnesses then left the premises, leaving the defendant still in possession of the same. A transcript of the proceedings in a former suit between the same parties, including the writ of possession under which the sheriff acted, as above set forth, was then given in evidence, and the *locus in quo* proved to be within the description of the declaration and writ of possession."

The counsel for both parties coinciding that the testimony was satisfactory on all matters of fact, except whether the plaintiff's patent and deed covered the *locus in quo* or not and the amount of damages, provided the plaintiff was entitled to recover, and also agreeing that those questions might be submitted to the jury, and, upon the finding, that the court might pass such judgment, as, upon a consideration of the whole case, the court might deem right and proper, the court reserved the question of law, and submitted these facts to the jury, directing them, in finding their verdict, to take into consideration the admissions made by the plaintiff in the former suit.

The jury found that the grant and deed covered the *locus in quo*, and assessed the damages at $272.

Afterward, upon consideration of the whole case, the court, being of opinion that plaintiff was not entitled to recover, ordered a nonsuit to be entered and gave judgment against the plaintiff for costs, from (50) which judgment the plaintiff appealed.

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

PEARSON, C. J. The statement of the case is so defective, that, but for verbal explanations made at the bar, it would have been impossible for this Court to conjecture what was the question of law reserved by the court, upon which the verdict was set aside and a nonsuit entered. We feel constrained to call attention to the fact, that owing to the loose mode of making up cases there is more difficulty in putting a construction on the case than in deciding the points of law, which greatly embarrasses the judges of this Court, and sometimes, we fear, prevents justice from being done.

It seems that the jury found the only facts about which the parties did not agree, in favor of the plaintiff, under instructions from his Honor, "to take into consideration the admissions made by the plaintiff in the former suit." So, the defendant had all the benefit of these admissions which he had any right to expect, and the action of the court could not have been predicated on them.

We are left, therefore, to infer that his Honor put his decision upon the supposed effect of the judgment in the action of ejectment.

It is set out in the statement of the case: "The *locus in quo* was proved to be within the description in the declaration and writ of possession; from which, by a suggestion at the bar, an implication is to be made, that it was not within the description in the grant under which the defendant claimed; in other words, the defendant's title does not cover the *locus in quo*, and the question intended to be presented is, Does the judgment in the action of ejectment operate as an estoppel and conclude the plaintiff in this action, in respect to the title, or can the plaintiff maintain an action of trespass *q. c. f.*, before he has regained (51) the possession of his land by an action of ejectment and a writ of possession?

Adopting this construction of the case, which we feel at liberty to do, as we can give it no other meaning, the opinion of this Court differs from that of his Honor.

The judgment in ejectment is conclusive in respect to the title for the purposes of that action and of the action of trespass *q. c. f.* for the

mesne profits, when the latter is used merely as a continuation of the former, and the plaintiff confines his demand for damages to the time covered by the demise in the declaration in ejectment. If he goes out of it, the question of title is open on the ground that it has only been considered by the court with a view to deciding that the lessor had such a title as enabled him to make the demise for the purpose of bringing the action of ejectment. This is well settled, and, accordingly, it is very common for a second action of ejectment to be brought. Indeed, one of the principal benefits growing out of its substitution for real actions is the fact that the judgment does not operate as an estoppel in respect to the title, but leaves it to be tried a second or a third time, so as to have it satisfactorily settled.

So, it is agreed, that if the plaintiff had brought ejectment he could have maintained it, as his title covers the *locus in quo,* and the defendant's does not, and the judgment in the first action of ejectment could have no bearing on the second. It is also agreed, that had the plaintiff brought ejectment and recovered, he could then have maintained an action of trespass *q. c. f.* for *mesne* profits during the time for which the present action is brought. The question, therefore, is narrowed to this: Is there any ground upon which the question of title is concluded, where a defendant in ejectment, after being evicted by a writ of possession, makes an actual entry and brings trespass *q. c. f.,* that would not apply to an action of ejectment brought by him?

We have seen that the question of title is not concluded in the second action of ejectment, for the reason that the judgment in the first action only decides that the lessor had such a title as enabled him to make the demise for the purpose of that action. This reason applies with equal force to the action of trespass *quare clausum fregit,* and excludes the idea that the question of title, outside of the first action, is (52) concluded in any other action.

Accordingly, it is settled that if the title of the lessee does not reach back to the date of the demise the objection is fatal; but it makes no difference whether the lease is for five, ten, or twenty years, because the court does not pass on the title beyond the termination of the action; Buller Nisi Prius, 106; *Atkyns v. Horde,* 1 Burr, 114; where *Lord Mansfield* says: "The recovery in ejectment is a recovery of the possession, without prejudice to right as it may afterwards appear, even between the same parties. He who enters under it is only possessed according to his right. If he has a freehold, he is in as a freeholder. If he has no title, he is in as a trespasser. If he had no right to the possession, then he takes only a naked possession."

It may be conceded, that if the plaintiff in ejectment after judgment follows it up by an action for the *mesne* profits and recovers, the defend-

ant cannot afterwards recover back such profits, although in a second action of ejectment he has succeeded in establishing title in himself. So it may be conceded that for the entry, under the writ of possession, the plaintiff in the first action is protected by the judgment and writ, although it turns out the land did not belong to him. This is on the ground that the judgment in ejectment concludes the title for the purposes of that action; hence, we find many writs of error to reverse a judgment in ejectment, and it is held that the pendency of a writ of error operates as a *supersedeas* to the action for *mesne* profits, *Demford v. Ellys,* 12 Mod., 138, and it would seem, if the judgment in ejectment did not conclude the question as to *mesne* profits and the entry under the writ of possession, every purpose would be answered by a second action of ejectment, and there could be no motive for bringing a writ of error.

There is no intimation in the books, and no reason can be given, for carrying the effect of a judgment in ejectment beyond the point (53) here conceded. After the termination of the action and the execution of the writ of possession, if he have no title, in the words of *Lord Mansfield,* "he (the lessor) is as a naked trespasser," and, of course, may be sued as such and made to pay damages to the real owner for every act done thereafter.

Having disposed of the estoppel, it does not admit of a question that the real owner may maintain an action of trespass, if he regains the possession without bringing ejectment. The plaintiff in this case, by making an actual entry on the land by force of his title, was then in possession, notwithstanding the presence of the defendant; for it is settled that when two are on the land, the law adjudges the possession to be in the party who has the title; and the plaintiff, being thus in possession by the doctrine of relation or the *jus post liminii,* is considered by law as having been in possession all the time from and after the date of the eviction, and may maintain trespass *q. c. f.* with a *continuando,* and recover damages for the trespasses done during that period. *Bynum v. Carter,* 26 N. C., 310.

There is error. Judgment reversed, and judgment in this Court for the plaintiff according to the verdict.

PER CURIAM. Reversed.

Cited: Pope v. Mathis, 83 N. C., 174; *Roberts v. Preston,* 106 N. C., 421.

HANNAH S. PRIDGEN ET AL. v. GEORGE W. BANNERMAN ET AL.

1. Where a fact, proposed to be proved by a party, is admitted by the opposite side, it is not error in the court to refuse to let it be proved by witnesses.
2. On an issue before the court, there is no error in refusing to give particular weight to a rebutting fact, and where the judge thought the testimony preponderating against said fact, it was not error to say of such fact that it was immaterial.
3. Whether there was a necessity for a public road between given *termini*, is a matter which cannot be reëxamined in this Court.

PETITION for a public road, heard before *French, J.*, at last (54) Fall Term of BLADEN.

The prayer of the petition was for a public road, running from Mount Zion Church, in Bladen County, to Lake Creek, in the same county, as near as practicable to the line of an old road now closed, said road to be seven miles long. It was in evidence that a road had lately been established by the county court of Bladen, between the *termini* of the proposed road, running most of the way about half a mile from the line of the old road, and the counsel for the petitioners offered to prove by the records of the county court that such road was not laid out according to law.

The court refused to hear such testimony, saying it was immaterial, that the pleadings did not raise that point. After the testimony was all in, the petitioners offered again to prove that the road, now used as a public road between the *termini* of the road prayed for, was not laid out according to law. The defendant admitted the fact alleged, but the court said it was immaterial, and if it were proven it would not affect his decision, as he did not think the road prayed for necessary. Judgment against petitioners, and appeal by them.

Baker for plaintiffs.
M. B. Smith for defendants.

BATTLE, J. We are unable to discover any error in the record of which the plaintiffs can complain. The fact which they offered to prove by testimony was admitted by the defendants to be true, and the remark made by the judge, that it was immaterial, meant, in the connection in which he used it, that it was immaterial to the decision of the cause in the view which he took of it. A road was in use by the public, and, whether it had been originally laid out according to law or not, his Honor thought that another public road running so near the

same line could not be necessary. The plaintiffs, then, had the benefit of his Honor's judgment upon the weight to be allowed to the fact that the road already in public use had not been laid out according (55) to law. Admitting the fact, he decided that he could not change his opinion, because he thought the road proposed by the plaintiffs was unnecessary anyhow. It is conceded that the question of the necessity for the new road was one, the decision of which in the Superior Court is not the subject of reëxamination in this Court.

PER CURIAM. Affirmed.

JAMES HANNA v. JOHN N. INGRAM.

Where a writ in slander was issued, returnable to a term of the court, and no *alias* issued from such return term, but a writ issued from the next term thereafter, it was *Held*, that the latter writ was the commencement of the suit, and the limitation to the action must be determined accordingly.

SLANDER, tried before *French, J.*, at Fall Term, 1860, of ANSON.

It appeared on the trial that a writ issued 14 February, 1857, returnable to March Term, which was returned "Not found," and that no writ issued to the next ensuing term thereafter, but that one issued returnable to the second term, which was March, 1858, which was marked as an *alias*, and pursued the language peculiar to that writ.

The court intimated an opinion that the latter writ was the commencement of the suit, and as the words were spoken more than six months prior to the date of its issuing, the action was barred. In deference to this intimation the plaintiff took a nonsuit and appealed.

McCorkle for plaintiff.
R. H. Battle for defendant.

MANLY, J. The power to bring an action for words is limited (56) by Rev. Code, chap. 65, sec. 3, to six months after the speaking of them, and the question presented here is: At what time was this action commenced? When the first writ was issued or when the last?

We concur with his Honor below, that it was at the issuing of the last writ—the one from the Fall Term, 1857, to the following spring. This latter, although denominated an *alias*, does not connect itself with the other, so as to make one continuous suit, a term having intervened

from which no process was issued. In *Fulbright v. Tritt,* 19 N. C., 491, it was held that such a failure, under precisely similar circumstances, worked a discontinuance of the suit, and the issuing of a writ, purporting to be an *alias,* at the subsequent term was the beginning of a new suit. *Fulbright v. Tritt* is in point, and is satisfactory to us. It decides the cause before us in accordance with the opinion of the judge below, and his judgment should, therefore, be

PER CURIAM. Affirmed.

Cited: Etheridge v. Woodley, 83 N. C., 13; *Webster v. Laws,* 86 N. C., 180.

JOHN Q. ADAMS ET AL. v. HENRY S. CLARK.

That holograph script was seen among the valuable papers and effects of the decedent eight months before his death is no evidence that it was found there at or after his death.

DEVISAVIT VEL NON, tried before *Howard, J.,* at Fall Term, 1860, of BEAUFORT.

The propounders proved by one Martin Manning that he was working for the decedent, Charles A. Clark, from about the last of December, 1856, to the last of February, 1857; that said Clark was unmarried and without children; that on an evening in February, 1857, after supper, in the house of the said Clark, he was engaged in writing at a desk; that he got up and, going to a trunk, opened it and took (57) out a small tin trunk, from which he took a red pocketbook, and from out of that he took the paper-writing now propounded as a holograph will; that he read it to the witness and told him to take notice of it as he might see it again; that he then put it back in the pocketbook, and, raising the lid of the desk, placed the pocketbook in the desk; that he never saw the paper afterwards until shortly before the trial in the county court; that the decedent usually carried bank bills in that pocketbook, and he several times took money out of it to pay witness; that no white person lived, during this time, with the decedent, except the witness; that Clark died in November, 1857. There was other evidence, but none as to the point on which the case is decided in this Court. The counsel for the caveators contended that there was no evidence that the script was found among the valuable papers and effects of the decedent, and asked the court so to instruct the jury; and his

Honor being of that opinion, so instructed the jury. Plaintiffs' counsel excepted.

Verdict for caveators. Judgment and appeal by the propounders.

Rodman and Warren for propounders.
McRae and Shaw for caveators.

BATTLE, J. Chapter 119, section 1, Rev. Code, requires for the proof of a holograph will that it "be found among the valuable papers and effects" of the deceased, or that "it shall have been lodged in the hands" of some person for safe keeping, etc. In the present case, it is not pretended that the script was lodged in the hands of any person for safe keeping, but it is sought to be established as the will of the deceased upon the ground that it was found among his valuable papers and effects. Found when? Certainly at or after the death of the alleged testator. The paper could not become a will until the death of the alleged testator, and to show that he intended it to operate as his (58) will, it must be proved that it was found lying among his valuable papers and effects; for from that circumstance it is to be inferred that he regarded and had kept the script as a valuable paper also. The only testimony offered by the propounders upon this all-important point was that of a witness who had seen the deceased put the script in a red pocketbook about eight months before his death. What became of it afterwards does not appear, either from his testimony or that of any other person, nor does it appear where it was found, at or after the death of the deceased. It would, to a great extent, defeat the protection thrown around holograph wills if the fact that a script was seen among the valuable papers and effects of the deceased several months before his death could be submitted to a jury as any evidence that it was found there, at or after his death.

Thinking that there was no evidence in support of that essential point, it is unnecessary for us to inquire whether the red pocketbook spoken of by the witness was a place of deposit for the valuable papers and effects of the deceased.

PER CURIAM. No error.

Cited: Brown v. Eaton, 91 N. C., 29.

SIMON E. KOONCE v. GEORGE W. PERRY.

Where a bailment is once established, a mere possession under a claim of title, with the use of the property as his own, unaccompanied by an act upon the part of the bailee, changing the nature of his holding, will not set the statute of limitations in motion.

TROVER, tried before *Bailey, J.,* at last Fall Term of JONES.

The declaration was for the conversion of two slaves who had belonged to one Hargett, who for the recited consideration of $......, in 1835, conveyed them to the plaintiff, who was the son of the defendant's intestate. At the time of this conveyance plaintiff was under the (59) age of twenty-one, and for a portion of the time, between 1835 and 1850, lived with his father. It did not appear how much of this time he lived with his father, but he was there in 1850. In that year the father of the plaintiff, wishing to exchange one of these slaves for one belonging to one Hill, made a proposal to the latter to do so. Hill objected to the exchange, on the ground that the slave which intestate offered to let him have was one of the Hargett negroes, and that he could not make title to him because he had been conveyed to his son, the plaintiff. To this the father replied that he was aware that the right of these negroes was in his son, but he would get him to make the bill of sale. The exchange was made, and the son executed the bill of sale for the slave, which the father subscribed as a witness, and afterwards proved it in court. The Hargett negroes, as they were called, continued in the possession of the father from the date of the conveyance to the son in 1835 till his death, which took place in 1858, during all which time he (the father) exercised the same control over them as he did over his other property, and upon one or two occasions said that they belonged to him.

The defendant, as administrator of the father, took possession of these slaves, claiming them as the estate of his intestate. The plaintiff made a demand, and, on refusal, this suit was brought. The defendant relied on the lapse of time as making his intestate a good title.

The court charged the jury that if, when the father took possession of the negroes, he took them as his own, the plaintiff could not recover because of the length of possession, but that if he received them as the property of his son, it constituted a bailment between him and his son, and the fact that he used them as his own and claimed them as his own did not destroy that bailment, and that the plaintiff would, in that case, be entitled to recover. Defendant's counsel excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant. (60)

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

MANLY, J. There was no error on the trial of this case below of which the appellant can justly complain. Of the instruction given in the alternative, that the father took possession of the negroes as his own, the appellee might have complained, for, as the case is presented to us, there was no evidence upon which such instruction could have been based.

The slaves went into the possession of the defendant's intestate upon the execution of a deed to his son, then a minor and living with him, and the taking and holding of the same should be presumed to be in conformity with the right. In its origin, therefore, the possession of the intestate was a clear bailment, without evidence of any kind to the contrary. The court below was entirely correct in the instruction, that if possession were accepted, in the beginning, in the right of the son, it was a bailment which could not be terminated or converted into an adverse holding by the fact proved, that intestate, through a number of years, had used them as his own and called them his own; something more is necessary to convert a holding of the kind supposed into an adverse one. It does not appear, indeed, that the calling them his own was in the presence of, or that it came to the knowledge of, the son, and the use of them as his own was not inconsistent with a bailment. Therefore, there was nothing to put the plaintiff on his guard and excite him to demand a recognition of his rights. The only occasion when a question as to their respective rights in this property was made was upon the exchange of one of the slaves in 1850, when, instead of setting up a claim to them, the right of property in the plaintiff was distinctly recognized by the intestate.

In *Martin v. Harden,* 19 N. C., 504, it was held by this Court that a demand by the bailor and refusal by the bailee would operate to change the nature of the possession and convert it into an adverse one.

(61) In *Powell v. Powell,* 21 N. C., 379, where there had been a parol gift of slaves, the death of the donee, a division among the next of kin, and taking possession of the slaves in question by one as his share, it was held that such possession, so taken, was adverse to the original donor; but in *Hill v. Hughes,* 18 N. C., 336, although the bailee not only claimed and used the slaves as his own, but conveyed them by deed of trust for the payment of his debts, yet, as the trustee did not take possession, but the bailee kept it as before, it was held the bailment was not determined. So, in *Collier v. Poe,* 16 N. C., 55, where a slave was loaned in 1804, the death of the lender in 1807, an open claim during the lifetime of the lender by the defendant to hold them as his own

right, and a continued possession under that claim until 1824, it was held the statute of limitations did not protect the defendant.

The principles to be deduced from these cases are, that while an abortive attempt to regain possession, as by demand and refusal, or some act by the bailee, changing the nature of his profession, as in *Powell v. Powell,* will put the statute of limitations in action; yet, no length of possession under claim of title and use of the property as one's own will. In *Green v. Harris,* 25 N. C., 210, it was held by this Court, that where it was manifest there was no purpose or wish on the part of the bailor then to resume possession, a mere naked declaration of right in himself by the bailee, although made in the presence of the bailor, unaccompanied by any act upon the part of the former, changing the possession, would not set the statute of limitations into immediate action. This latter case is believed, indeed, to be fully sustained by the principle decided in *Hill v. Hughes.* Something more than a mere claim of right, made known to the adverse party, is necessary.

His Honor, therefore, in the instruction given in the case before us, was entirely within the principles of cases decided in this Court. For if the construction be put upon it that intestate declared the (62) slaves belonged to him, in the presence of plaintiff, which is not the proper construction, yet the directions to the jury would be justified by *Hill v. Hughes* and *Green v. Harris.*

Upon the facts of the case before us now, we hold that a bailment, established as it is by proof of the transaction between the parties in 1850, the subsequent possession of defendant's intestate until 1858, claiming the slaves in his own right and using them as his own, was not an adverse holding so as to make title in behalf of the intestate by lapse of time. There must be something more, as an effort on the part of the bailor to regain possession, or some act by the bailee changing the nature of his holding.

PER CURIAM. No error.

Cited: Linker v. Benson, 67 N. C., 155.

JOHN S. WILLIS v. W. A. MELVIN.

The statute, Rev. Code, chap. 31, sec. 114, authorizing a reference in suits upon the bonds of sheriffs and other public officers, does not embrace the case of a bond given by a deputy sheriff for the indemnity of his principal.

MOTION for a reference, heard before *French, J.*, at last Fall Term of BLADEN.

The action was in debt, brought by the sheriff of Bladen on a bond given by the defendant, as his deputy, conditioned faithfully to collect taxes and perform all the duties of his said office of deputy sheriff. The breaches assigned were the nonpayment of money collected for taxes and under various processes.

The cause having been put to issue at this term, the counsel for the plaintiff moved that the same be referred to the clerk to state an account. This was objected to on the other side, and refused by the court (63) on the ground that he had no power to do so. From which ruling the plaintiff appealed.

M. B. Smith for plaintiff.
Baker for defendant.

MANLY, J. His Honor below was correct in holding there could be no compulsory reference for an account between the parties to this suit under the provisions of the Rev. Code, chap. 31, sec. 114. That section authorizes a reference in suits against executors, administrators, and guardians, or upon the bonds of sheriffs or other public officers.

The deputy sheriff is not a public officer within the purview of this section. He is not appointed by the public nor by virtue of any special public authority. He does not give a bond to which the public can resort; nor is he amenable to them for his defaults. There is no method of induction or oath of office prescribed. His appointment is made by the sheriff, by virtue of the general legal power in all ministerial officers of deputing their powers, and arises out of the necessity, in his particular case, of having deputies. They are responsible to him, and he to the public. They give bond and are appointed and dismissed by him at pleasure. He would seem, therefore, to be no more than an agent or servant of the sheriff. *Hampton v. Brown,* 35 N. C., 18. The term, "deputy," implies this, and no more; for its definition is, one who is "appointed, designated, or deputed to act for another." Tomlin defines it "one who exercises an office, etc., in another's right, having no interest therein, but doing all things in his principal's name, and for whose mis-

conduct the principal is answerable." Whereas, office clearly embraces the idea of tenure in one's own right, and public office is tenure by virtue of an appointment, conferred by public authority.

There is no error in the court below, and this opinion will be certified to the court, to the end that it may proceed.

We have had some doubt as to whether this case is rightfully before us. It is an appeal from the judgment of the Superior Court declining to make an interlocutory order, no special leave from the court appearing upon the record, while the whole record seems to be (64) certified as in case of a judgment disposing of the entire cause. As no objection to this has been taken here, we assume that the appeal has been brought up by leave, and take jurisdiction of the question presented, calling the attention of the clerks below to Rev. Code, chap. 4, secs. 23, 24.

PER CURIAM. No error.

Cited: Piland v. Taylor, 113 N. C., 3.

GRIFFIN & ACHEN v. W. R. TRIPP.

A naked declaration of a debtor in embarrassed circumstances that an assignment of a note, theretofore made by him, was *bona fide* and for valuable consideration, is no evidence, as against creditors, that such was the fact, and such assignment was held to be void.

THIS was an issue growing out of an attachment sued out against W. R. Tripp, tried before *Heath, J.,* at January Special Term, 1860, of BEAUFORT.

Henry A. Ellison was summoned as garnishee, who answered that he had given a note to W. R. Tripp, dated 19 November, due 1 January, 1858, for the sum of $936.67; that he had been informed by letter from T. K. Archibald that he had bought this note; that if the note is the property of the defendant, he owes him that sum of money, but if the note is not his property, he owes him nothing; and issues were made as follows: Whether the said Ellison, at the time of the service of the attachment, was and still is indebted to the said W. R. Tripp by bond for $936.37, bearing date, etc. On the trial it was proved on the part of the plaintiffs, by John A. Stanly, Esq., that some time in October, 1857, before the institution of this suit, William R. Tripp handed him a note, made by H. A. Ellison, payable to said Tripp, to be col-

(65) lected by him as attorney at law; that said note, at the time, bore the endorsement in blank of said Tripp; that at the time of handing him this note Tripp said it was the property of Thomas K. Archibald, of Tennessee; that he (Tripp) had sold it to Archibald some months before; that Archibald requested him to bring the note here for collection; that at Tripp's request he gave a receipt for the note as having either been received from Archibald, or from Tripp as the agent of Archibald, and that he had the note in his possession at the time of this trial. The execution of the note was admitted. The plaintiff then, to prove Tripp's insolvency, produced divers judgments of record against him, which were still unsatisfied. He proved that Tripp had resided in Beaufort County until about 1855, when he left the county and was absent when the attachment in the case issued; that Archibald was his brother-in-law, having married his (Tripp's) sister. It was proved, also, that Archibald was a man of property.

The judge charged the jury that there was no evidence that the note had ever been delivered to Archibald, and that the endorsement did not convey to him a vested title to the note, and that if they believed the evidence they should find for the plaintiff. Defendant's counsel excepted.

Verdict for the plaintiff, judgment of condemnation against Ellison, from which he appealed to this Court.

Rodman and Shaw for plaintiffs.
Warren for defendant.

PEARSON, C. J. A debtor in embarrassed circumstances cannot divest himself, as against his creditors, of the title to any portion of his estate by a voluntary conveyance. To make the transfer valid against creditors it must be *bona fide* and for a valuable consideration.

If a debtor executes a bill of sale for a slave and admits therein the receipt of the purchase money, such admission is not evidence against a creditor of the payment of the consideration. *Claywell v.* (66) *McGimpsey,* 15 N. C., 89.

This principle is settled. In our case, the assignment of the note does not purport to be for value, and there is not even an admission by the debtor at the time of the supposed transfer that the price was paid. The only attempt to prove a valuable consideration was by showing the naked declaration of the debtor at the time he handed the note to Mr. Stanly, when he said the note was the property of Archibald, and that he had sold it to him some months before. If the admission of a debtor at the time he executes a conveyance, and as a part of it, that he had received a valuable consideration is not evidence of that fact,

as against a creditor, of course a naked declaration made by him some months afterwards is no evidence of the fact.

It follows that the alleged assignment of the note was void as to creditors. There is

PER CURIAM. No error.

Cited: Tredwell v. Graham, 88 N. C., 214.

WILLIAM STOKES v. RICHARD T. AREY.

1. The words, "You as good as stole the canoe of J. H.," are not actionable, *per se.*
2. Where the court erroneously submitted a matter of law to the jury, and they, by their verdict, decided the matter correctly, it was *Held,* not to be ground for a *venire de novo.*

SLANDER, tried before *French, J.,* at last Fall Term of STANLY.

Plaintiff declared in two counts:

First. "You stole old John Henly's canoe."

Second. "You as good as stole old John Henly's canoe."

Plea: General issue.

Evidence was submitted to the jury on both counts. The (67) counsel for the plaintiff requested the court to charge the jury that the second count was actionable *per se.* His Honor declined giving the instruction asked, but told them that the first count was actionable *per se,* but as to the second count, he submitted it to the jury as actionable, or not, as they might find that the defendant did, or did not, intend to charge the plaintiff with stealing the canoe. Plaintiff's counsel excepted.

Verdict and judgment for defendant. Plaintiff appealed.

McCorkle and Strange for plaintiff.
Ashe for defendant.

MANLY, J. The law has been substantially administered in this case, and the appellant has no just ground of complaint. We are clearly of opinion that the words in the second count ought not to have been pronounced actionable *per se* by the court. And whether they ought to have been submitted to the jury as a doubtful idiom, depending upon local usage, or determined by the court as matter of judicial construction, is

indifferent to the appellant, for *quacunque via data,* the result to him is the same.

Upon a submission of the point in dispute to the jury, they found correctly, that the words did not impute the offense of larceny; and, therefore, any error committed by his Honor in turning the matter over to them was, under the circumstances, innocuous.

The words, taken in their most defamatory sense, mean nothing more than that the plaintiff had dealt with the canoe in some way that was equivalent to stealing it. By implication, the idea of the precise offense of stealing is excluded. For it was something like it, but not the felony itself, and as things like are not the same, it follows it was not stealing with which the plaintiff was accused. It is well settled in North Carolina that defamatory words, actionable *per se,* must impute an offense for which the accused, if convicted, would suffer punishment of an infamous nature; a matter of moral taint short of this would not do. (68) No such offense is imputed by the terms used, and therefore the words of themselves are not actionable. *Brady v. Wilson,* 11 N. C., 93; *Skinner v. White,* 18 N. C., 471; *Wall v. Hoskins,* 27 N. C., 177.

We have treated of the words in question, in deciding upon their import intrinsically, as they are found in the declaration, without the help of explanatory averments of any kind. As they have not been helped by *colloquium* and *innuendo,* whose office it is to give an actionable meaning to words otherwise uncertain or innocent, we suppose they could not be so aided. Indeed, we take it, the words constitute a form of expression frequently resorted to by persons not precise or definite in their use of terms, to indicate a trespass or breach of trust, involving a moral guilt equal to theft. No such imputation constitutes legal slander in North Carolina, as will be seen by reference to the case above cited.

The cases in the early English Reporters which have been brought to our attention are not all reconcilable with each other, but this general principle runs through and governs most of them, that the words must charge a crime directly, or by necessary implication. Thus in *Halley v. Stanton,* Croke Charles, 269, these words, "He was arraigned for stealing hogs, and if he had not made good friends, it had gone hard with him," were held actionable, because the latter words, "if he had not made good friends," etc., showed that the speaker believed the truth of the accusation; while in *Bayly v. Churrington,* Croke Eliz., 279, the words, "thou wert arraigned for two bullocks," were held not to be actionable, because the words do not charge stealing, but only an accusation of it. So, in a later case of *Curtis v. Curtis,* 25 E. C. L., 206, the words, "you have committed an act for which I can transport you," are

held actionable, for it shall be intended he had committed some crime for which he was liable to transportation. The case is said to be similar in principle to *Donnes' case,* Croke Eliz., 62, where the following words were held to be actionable: "If you had your desserts, you had been hanged before now." It shall be intended that the speaker (69) meant he had committed a crime for which he deserved to be hanged.

Drummond v. Leslie, 5 Blackford (Ind.), 453, is in conflict with the current of English cases, and, certainly, with ours.

Whatever fluctuation of opinion the cases abroad may present, we think the law is settled in North Carolina to be as above stated: That words are not actionable *per se,* except they impute an offense subject to infamous punishment, directly, or by intendment, to be made manifest by proper averments.

PER CURIAM. No error.

GABRIEL EDWARDS ET AL., TRUSTEES, v. JAMES KELLY.

Where a remainder in slaves, during the particular interest, was offered for sale at auction, when certain written terms were proclaimed by the crier, and the defendant was the last and highest bidder, but the property was not delivered to him, in a suit for not complying with the terms of sale: *Held,* that the contract was within the statute of frauds, so far as the bidder was concerned, and no action would lie against him.

ASSUMPSIT, tried before *Saunders, J.,* at June Special Term, 1859, of WAYNE.

The plaintiff declared in three counts:

First. For the price of the slaves.

Second. For breach of the contract in not complying with the terms of sale.

Third. For the difference between the price at the first and second sales.

The plaintiffs, as trustees, under a deed of trust from one John D. Pearsall, had title to a remainder in certain slaves after the life estate of Mrs. Pearsall, who was still living. As trustees, they (70) offered the estate vested in them (to wit, the said remainder) for sale at public auction, on which occasion the crier made known as the terms of sale, which were in writing and publicly read by him, that the property would be sold on a credit of three and six months, and the purchaser would be required to give a note with two approved sureties,

with interest from date, before the property changed; and that if any one bid off the property and failed to comply with the conditions it was to be resold, and the first purchaser was to be liable for the deficiency in the price at the second sale, if any, and the property was not to be delivered until after the death of Mrs. Pearsall, the tenant for life. The defendant, James Kelly, was the last and highest bidder for the property at the price of $600, but he subsequently refused to give note and security; whereupon, it was again exposed to sale in the presence of the defendant and knocked off to one Kornegay at $275.

The court intimated an opinion that the plaintiff could not recover, whereupon he submitted to a nonsuit and appealed.

Dortch and Strong for plaintiffs.
McRae for defendant.

MANLY, J. The contract which is the subject of this suit falls within the provisions of the statute of frauds, incorporated in our Code, chap. 50, sec. 11, and in no part thereof can be enforced without a memorandum in writing signed by the party to be charged therewith. It is not divisible and exempt from the operation of the law in some of its parts, as, for instance, in the penalty for noncompliance with the terms of the sale, as insisted in the argument.

Such a construction would render the provisions of the law referred to inoperative. For, except in cases where a specific performance may be compelled, the relations to each other of the parties to such a contract would not be changed by the law. Anterior to its passage the (71) party charged had the power to refuse compliance and run the hazards of an action for damages, and the construction now sought to be put upon it gives him that option—nothing more. It would be a palpable inconsistency to declare the contract void and of no effect, which is done by the statute, and still to hold the party responsible in damages for its nonfulfillment.

In a case recently decided, *Mizell v. Burnett,* 49 N. C., 249, general principles are enunciated which have a direct bearing upon this case, viz., that no part of a contract, falling under the provisions of the law, is binding upon a party who does not sign the writing, while others who do sign may be bound.

The opinion of his Honor below, that the contract was not binding upon the defendant, in submission to which plaintiff suffered a nonsuit, was clearly correct.

PER CURIAM. Affirmed.

Cited: Love v. Atkinson, 131 N. C., 547.

WILLIAM H. PEARCE *v.* RAYMOND CASTRIX.

Debts on a deceased person, assigned to one after the death of such person, do not constitute the assignee such a creditor as to entitle him to administration under Rev. Code, chap. 46, sec. 2.

CONTEST *for* letters *of administration* on the estate of John Brissington, heard before *Bailey, J.,* at last Fall Term of CRAVEN.

The decedent was a native of England, and died in this county intestate and without leaving widow or children. The decedent did not owe the plaintiff Pearce anything at the time of his death, but after that event Pearce purchased notes and accounts from sundry persons to whom Brissington was indebted, and these exceeded in amount the debts due to the opposing applicant, Castrix. The latter resided in the State at the time of the decedent's death, and all his debts were (72) due and owing at the time. These debts he proved by his own oath. Upon this state of facts his Honor awarded the administration to Castrix, on the ground that he was the highest creditor residing in the State, within the meaning of this statute. From this order Pearce appealed.

Hubbard for plaintiff.
J. W. Bryan and Washington for defendant.

PEARSON, C. J. Upon failure of the widow or next of kin to make application, the statute requires administration to be granted "to the highest creditor residing within the State, proving his debt upon oath before the court granting the same."

The requirement that the debt shall be proved by the oath of the creditor confines the right to have administration to creditors between whom and the intestate there existed a personal privity of contract, for, in the absence of this privity, the creditor cannot, by his oath, prove the debt; for instance, one who claims as assignee cannot thus prove the debt; he may, by his oath, prove the assignment, but he cannot swear to the debt; for that originated in a transaction between the assignor and the intestate, in regard to which he had no privity, and must make proof *aliunde.*

The policy of the statute, obviously, is to require a creditor, applying for administration, to swear of his own knowledge that the debt is just and true. This is not satisfied by an oath of the alleged creditor that he believes the debt to be just and true and an offer to prove it by witnesses. The only mode of proof provided by the statute is the oath of the party. It was adopted, not merely for the sake of convenience,

but because it is reasonable that the right of administration should be thus confined to creditors who are cognizant of the existence of their debts, as, after administration granted, the right of retainer attaches without further proof. In England the form of the oath is, "the deceased was at the time of his death justly indebted to the applicant." 4 Chitty Gen. Prac., 147 (note). The wisdom of this provision of the statute, according to the construction we put on it, is strikingly illustrated by the facts disclosed in the case now under consideration. The applicant, Pearce, after the death of the intestate purchased sundry notes and accounts alleged to be due by the intestate, for the purpose of thereby acquiring the right to administer. Whether these notes and accounts are just debts or not, he does not know. But it is certain he was under a strong temptation, for the purpose of accomplishing his object, to admit without investigation every claim that was offered to him for sale, and the larger its amount the better it suited his purpose; thus opening wide the door for admitting false claims, to which unfortunately the estates of dead men are too much exposed, even without any undue collateral influence.

(73)

We concur with his Honor, that Castrix, the other applicant, having proved his debts by his own oath according to the requirement of the statute was entitled to the administration.

PER CURIAM. Affirmed.

Cited: Wallis v. Wallis, 60 N. C., 79; *Williams v. Neville,* 108 N. C., 561; *Boynton v. Heartt,* 158 N. C., 495.

DOE ON THE DEMISE OF GEORGE S. DEBRULE v. BENJ. SCOTT ET AL.

Where a cause pending in court is, by rule of said court, referred to arbitrators, who proceed to act and make an award as to all the matters in controversy in favor of one of the parties, without saying anything as to the costs the successful party has no right to have a judgment of the court for the recovery of his costs.

EJECTMENT, tried before *Bailey, J.,* at last Fall Term of JONES.

(74)

After this cause had been put to issue, it was, by a rule of court, referred to arbitrators, who returned for their award that they found "all the issues in favor of the defendant," but made no mention as to the costs; on the coming in of the award, the plaintiff filed various exceptions. These were overruled by his Honor, who gave

judgment according to the award, in favor of the defendant; also, that he recover all costs against the plaintiff. The plaintiff appealed to this Court.

J. W. Bryan and Washington for plaintiff.
McRae and Haughton for defendant.

PEARSON, C. J. The only ground insisted on in this Court was in respect to that part of the judgment which subjects the plaintiff to the payment of all the costs.

In support of the decision of his Honor, *Simpson v. McBee,* 14 N. C., 531, and *Cunningham v. Howell,* 23 N. C., 9, were relied on. These cases establish the doctrine that in this State, where a case, after issue joined, is referred by a rule of court and the award is filed, the court, for the purpose of enforcing it, enters judgment according to the award and does not simply order an attachment; and the argument is, as the court renders a judgment, the costs follow the judgment as an incident, according to the provisions of the statute, Rev. Code, chap. 31, sec. 75. "In all actions, whatsoever, the party in whose favor judgment shall be given shall be entitled to full costs."

We confess there is much force in this reasoning, especially as in *Cunningham v. Howell* it is decided that the action of the court upon an award is a judgment of the court for the purpose of charging bail, and yet we feel bound, upon the authority of *Arrington v. Battle,* 6 N. C., 246 (which is directly in point, and which, we presume, was not called to the attention of his Honor), to hold that the court erred in giving judgment against the plaintiff for costs. The award found all issues in favor of the defendant, but did not dispose (75) of the costs, and the judgment ought to have been that "the plaintiff take nothing, and the defendant go without day." This was all that the award authorized, and, according to the case cited, that was the judgment which the court ought to have rendered.

It was suggested that *Arrington v. Battle,* as reported, was not a reference under a rule of court, but was simply a reference by an agreement of parties. But upon an examination of the record in this Court we find it was a reference "as a rule of court," and that judgment was entered "according to the award." So it is directly in point, and we do not feel at liberty to overrule it. For, when a rule of practice is fixed, the courts should adhere to it, unless some new matter occurs or there be some decisive objection. In this case there is no suggestion of either; on the contrary, the practice of adhering strictly to the award in rendering judgment, so as to give no judgment for costs unless the

award so directs, has uniformly obtained in all of the courts of this State up to the present instance, so far as we are informed.

Cunningham v. Howell cannot be considered as conflicting with *Arrington v. Battle,* for the two may well stand together, the result being that a judgment according to an award is an anomaly introduced by the practice of our courts in order to enforce awards in a milder manner than by attachment, which exposed the party to process of contempt. So, although it is a judgment for the purpose of charging bail, yet it is not a judgment for the purpose of carrying costs *proprio vigore,* within the meaning of the statute. In other words, being a mere creature of the court, there is no reason why it may not be so fashioned as to obviate the effect of discharging the bail on the one hand, and on the other still leave to the arbitrators the right to dispose of the costs, which is done by treating it as an anomalous or *quasi*-judgment, which character has been impressed upon it by the cases referred to and the uniform practice in this State. Judgment reversed, and judgment for the (76) defendant, but without costs below. Of course, in this Court, the successful party is entitled to costs.

PER CURIAM. Reversed.

Cited: Harralson v. Pleasants, 61 N. C., 367.

DOE ON DEM. OF DAVID W. BARNES v. ROBERT HAYBARGER.

1. Where the intention of the parties to a deed is manifest on its face, the Court in giving a construction to doubtful provisions, will, if possible, effectuate such intention.

2. Where a wife, after marriage, supposing the whole interest in her land was in her, made a conveyance to a trustee for her sole and separate use, to which the husband signed as a party, and by various clauses manifested a concurrence in her act, but did not profess directly to convey any estate, in which deed it is recited that ten dollars was paid by the trustee to the wife, it was *Held,* that this raised a use from the husband to the trustee, which was executed by the statute, and in that way the husband's interest passed to the trustee.

EJECTMENT, tried before *Bailey, J.,* at last Fall Term of WILSON.

The only question in this case arises on the following deed:

"An indenture tripartite made and entered into this 4th day of August, 1858, between Robert Haybarger, of the first part, Nancy Haybarger, of the second part, and David W. Barnes, of the third part, all

of the county of Wilson and State of North Carolina: Whereas, the said Nancy Haybarger is seized and possessed of certain lands, tenements, and hereditaments, situate, lying, and being in the county of Wilson and State aforesaid: Whereas, it is agreed upon by and between the said Robert Haybarger and Nancy Haybarger, that the said Nancy Haybarger should, notwithstanding, have, hold, enjoy, and possess all her said property above described, with all and every the rights, interest, and profits of, to, and out of the same, free and separate from all the claims and demands of the said Haybarger, arising from the consummation of their marriage, and whereas, the said Nancy Haybarger might, in the perfecting their marriage, be entitled to by virtue (77) of dower or in any other way whatsoever. Now, this indenture witnesseth, that in consideration of the said marriage, and in pursuance and perfecting of the said hereinbefore mentioned agreements, and in consideration of the sum of ten dollars, good and lawful money of North Carolina, to the said Nancy Haybarger, in hand paid by the said David W. Barnes, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, she, the said Nancy Haybarger, with the consent and approbation of the said Haybarger, testified by his being a party to and sealing and delivering these presents, hath bargained, sold, assigned, and transferred and set over, and by these presents doth bargain, sell, assign, transfer, and set over unto the said D. W. Barnes, his executors, administrators and assigns, all the property belonging to, and in possession of, the said Nancy Haybarger, both personal and real, consisting of one house and lot, situate, lying, and being in the county of Wilson and State aforesaid, near the railroad at Joyner's depot, adjoining the lands of W. G. Sharpe and others, one negro woman, Matilda, and child, Caroline, and increase, household and kitchen furniture, consisting of three feather beds and furniture, fourteen chairs, one chest, one trunk, one buggy and harness, one safe, one cooking stove and fixtures; to have and to hold the said property hereby conveyed unto the said David W. Barnes, his executors, administrators and assigns. But, nevertheless, upon the trust and for the intent and purpose hereinafter expressed and declared of and concerning the same, that he, the said D. W. Barnes, his executors, administrators, and assigns, shall hold and manage the said property, and all and every part and parcel thereof, to and for the sole and separate use, benefit, and disposal of the said Nancy Haybarger, their marriage notwithstanding, and that the same, in no manner whatsoever, shall be subject to the direction, control, or disposition of the said Robert Haybarger, her intended husband, or be liable for his debts; and upon this further trust, that he, the said D. W. Barnes, his executors and administrators,

(78) shall and will pay, transfer, and deliver unto the said Nancy Haybarger, or unto such person or persons, and at such time or times, and in such proportions, manner, or form as she, the said Nancy Haybarger, may direct, by her request or order, made in writing, attested by three or more credible witnesses, all the rents, issues, and profits of the said property so conveyed as aforesaid, and that all the said separate and distinct estate and produce and increase thereof shall be had, taken, held, and enjoyed by such person and persons, and for such use and uses as the said Nancy Haybarger shall at time or times hereinafter, during her life, limit, devise, or dispose of the same, or any part thereof, either by her last will and testament in writing, or by any other writing whatever, signed with her hand, in the presence of three or more credible witnesses, or certified by an acting justice of the peace of Wilson County, State of North Carolina; and the said R. Haybarger, for himself, his executors, administrators, covenant, agree, and promise to and with the said D. W. Barnes, his executors, administrators or assigns, by these presents, in manner following: He, the said R. Haybarger, shall and will permit and suffer the said Nancy Haybarger to give, grant, and dispose of her said separate estate as she shall think fit in her lifetime, and to make such will or other writing, as aforesaid, and thereby give, order, devise, limit, and appoint her said separate estate to any person or persons, for any use, intent, or purpose whatsoever; and that he, the said Haybarger, shall and will permit and suffer such will or other conveyance in writing to be duly proven, as the law has made and provided in such cases, and the probate of such will or other conveyance to be taken and had as in such cases is usual and customary; and also allow the executor named to proceed to discharge his duty, and that the person or persons to whom the said Nancy Haybarger shall give or dispose of any part of her said estate, by her will or any other writing that shall be signed, sealed, and executed by her as aforesaid, shall and lawfully may peaceably and quietly have, hold, use, occupy, possess, and enjoy the same, according to the (79) true meaning of such gift or conveyance, devise or appointment, without any hindrances or interruption by the said Robert Haybarger or his executors, administrators or assigns, or any of them; and that he, the said Haybarger, shall and will, from time to time and at all times, upon any reasonable request and at the proper cost and charge of the said D. W. Barnes, or his executors or administrators, make, do, and execute all and every such further act and acts and thing and things, for the better settling, recovering, and receiving money, goods, and the estate of the said Nancy Haybarger, allotted and allowed for her support, use, benefit, and disposal as aforesaid, as by the said D. W.

Barnes or his executors and administrators, them or any of their counsel, learned in the law, shall be reasonably devised, advised, and requested.

"Witness whereof, the said parties have hereunto set their hands and affixed their seals, the day and year above written.

R. H. HAYBARGER. [SEAL]
NANCY HAYBARGER. [SEAL]
D. W. BARNES. [SEAL]"

This deed was executed after the marriage, and the only point in the case is, whether it passed the legal estate in the land to the trustee, Barnes; and it was agreed that if his Honor should be of opinion with plaintiff on this point that judgment should be entered for the sum of $......, but otherwise the judgment should be for the defendant.

On consideration of the case agreed, the court gave judgment for the defendant and the plaintiff appealed.

Strong for plaintiff.
Dortch and Lewis for defendant.

BATTLE, J. The indenture, upon the proper construction of which this controversy depends, was manifestly framed upon the idea of a settlement of the wife's estate before marriage, to her sole and separate use; the execution of it by the husband, as a party, being intended to show that it was done with his approbation, and therefore no fraud upon his marital rights. Upon that supposition there (80) were very properly no words of conveyance from the husband, because, had the marriage not been consummated, he would not have had any interest in the estate to be conveyed. But, in fact, the parties were married at the time when the instrument was executed, and the husband had a legal interest in the wife's land; but that fact did not alter the manifest intention of the husband and wife to convey her estate to a trustee for her sole and separate use. The question is, can the deed, by any fair rules of interpretation, be construed to transfer the husband's interest in the land to the trustee, and thus give effect to that intent, or, in failing to do so, must the purpose to provide a separate estate for the wife be almost, if not entirely, defeated? The intention of all the parties to the deed being clear beyond all doubt, upon its face, we have the highest authority for saying that it ought, if possible, to be effectuated. In *Smith v. Parkhurst,* 3 Atk., 135, *Lord Chief Justice Willes* said: "Another maxim is, that such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor; the words are not the principal thing in a deed,

but the intent and design of the grantor; we have no power, indeed, to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. Those maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale, and the law commends the *astutia*—the cunning—of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may show the ingenuity of, but is very ill-becoming a judge." In the case before us the husband and wife are both named in the deed as parties thereto, and both executed it, and it was the intention of both, as expressly declared, that the wife's land should be conveyed to the trustee. Under a mistaken supposition that the sole interest was in her, the granting words purport to be from her alone, but the law will allow them to (81) operate on his interest, if it be possible to give them that effect; thus, in one instance out of many which might be cited, there was an instrument which purported to be a release, grounded on a lease for a year, but there was not any evidence of the lease, and the deed was in consideration of money and of marriage theretofore had, etc.; and *Lord Hardwicke* held that the deed might operate as a covenant to stand seized. *Brown v. Jones,* 1 Atk., 190. In 2 Shep. Touch., 514 (see 31 Law Lib., 403), it is said that "the mere circumstance that the party intended to pass the property in another manner is not always decisive of the effect of an instrument. The rule, *cum quod ago, non valet ut ago, valeat quantum valere potest,* interferes with the mode and directs its force to the effect, and therefore it seems necessary to discard the intention as to the mode and resort to the general intention; therefore, whatever may be the words, the instrument will operate according to the effect which the parties intended to give to it." The learned author adds that "this position necessarily admits of the exceptions which arise from instruments requiring particular circumstances to give them operation." These exceptions, however, do not apply to the present case, and we shall not give them any further notice.

In the instrument now under consideration, the intended mode of its operation was to transfer the land to the trustee from the wife, because she was supposed to be solely seized of it, but, to give it complete effect, the interest which the husband actually had in the land must also be transferred to the trustee. The instrument is a deed of bargain and sale, which, it is well known, operates by having an use first raised upon the valuable consideration, and then, by the statute of uses, transferring the possession to the use raised and declared in favor of the bargainee. (See 1 Saunders on Uses and Trusts, 49, 79, 80.) In the

present deed the ten dollars recited as paid to the wife was in legal effect paid also to the husband, so that a use was raised from him, and it was declared in favor of the bargainee, Barnes, by the wife for her husband, as expressly authorized by him in the same instru- (82) ment. In this way his interest in the land was as effectually conveyed to the plaintiff in this suit as if it had been done directly and in express words. *Cobb v. Hines,* 44 N. C., 343.

Kerns v. Peeler, 49 N. C., 226; *Gray v. Mathis,* 52 N. C., 502, and the other cases therein referred to, which are relied upon by the defendant's counsel, are not at all opposed to this construction. In *Kerns v. Peeler* the name of the wife was not inserted in the deed from her husband as a party to it, and she did not sign and seal it until long after it had been delivered by the husband. In *Gray v. Mathis* the name of the husband was not contained in the instrument executed by his wife, so that he was not a party to it, notwithstanding his having added his signature and seal to those of his wife. The same remark is applicable to the other cases referred to in those; but in the case now before us the husband was named in the deed as a party and executed it as a party, which makes an essential difference between it and the other cases. The judgment must be reversed, and a judgment must be entered upon the case agreed for the plaintiff.

PER CURIAM. Reversed.

RUFFIN GRIFFIN v. THOMAS HADLEY.

1. Where an arbitrator disposes of matter which was referred to him and also of matter not referred and the two are in their nature separable, it is the duty of the court to give judgment for that which is within the terms of the submission and reject that which is without.

2. An arbitrator has no right to award himself a fee for his services, unless the power to do so is expressly contained in the submission.

APPEAL from *Saunders, J.,* at Spring Term, 1860, of JOHNSTON. (83)

After pending for several terms, the following rule of court was entered in the cause, to wit: "All matters in dispute referred to E. G. Haywood." The arbitrator reports his proceedings and the evidence laid before him, and thereupon awards as follows: The arbitrator, therefore, awards to the plaintiff $93.83, with interest on $62.50 from the first day of this term until paid. He further awards that the defendant shall pay the costs of this suit, and also the costs of the refer-

ence, including $25 to be paid to the arbitrator for four days or parts of days engaged in this arbitration, and that the clerk of the Superior Court of Johnston County do tax the costs accordingly, and do issue execution for the said costs and for the sum aforesaid." The defendant excepted to this award.

1. Because the arbitrator has not allowed him opportunity to procure witnesses.

2. Because he has not allowed the defendant's account as a set-off.

3. Because he has not allowed credits, stated and admitted by the plaintiff.

The cause was argued on the exceptions to the award, and his Honor gave judgment as follows: "In this case the award is confirmed. Judgment according to the award for $93.83, of which sum $62.50 is principal and carries interest from 22 March, 1858." From which the defendant appealed.

Miller and A. M. Lewis for plaintiff.
Moore for defendant.

MANLY, J. This cause, by a rule of the court below, was referred to an arbitrator, whose award was to be a judgment of the court. An award was, in due time, reported to the court in favor of the plaintiff for $93.83, principal and interest, and for his costs to be taxed, including a fee to the arbitrator. Three exceptions were taken by the defendant to the award in the court below, viz.:

First. Because the arbitrator had not allowed the defendant (84) opportunity to procure witnesses.

Second. Had not allowed defendant's account as a set-off.

Third. Had not allowed credits stated and admitted by the plaintiff.

A judgment was given, according to award, for $93.83, without noticing the award in respect to costs or making any special disposition of them. In this Court it is moved, in addition to the grounds below, to set aside the award for defects appearing upon its face, our attention being particularly called in this connection to the award of the fee to the arbitrator.

We have considered these various grounds of objection to the award and approve the judgment of the court thereon. The compensation to himself did not lie within the terms of the matter submitted, and, consequently, was not within the scope of the arbitrator's powers. But for that reason the arbitrament is not void *in toto.* It may be bad in part and good in part. And where an arbitrator disposes of the matter which was referred, and also of other matters not referred, and the two are in their nature separable, it is the duty of the court to distinguish them,

to give judgment for that which is within the terms, and reject that which is without. *Cowan v. McNeely,* 32 N. C., 5. It will be perceived by reference to the judgment of the court that it does not embrace the compensation in question or, indeed, any costs at all. It is a judgment simply for $93.83, awarded to plaintiff, which is precisely the judgment which ought to have been given, with the addition of the costs, that were taxable by law, against the defendant.

We did not understand the matters of exception in the court below to be pressed in this Court. They are clearly matters which might have been addressed in proper time to the arbitrator's discretion, but form no ground for the court's interference. It is not alleged that any fraud or imposition was practiced upon the arbitrator or that he was corrupt or partial, which might form a ground of exception to an award made under a rule of court; but the allegation is merely of certain matters in which the arbitrator mistook facts or law, or else exercised his discretion to the prejudice of the defendant. This does not (85) constitute ground for setting aside an award. *Eaton v. Eaton,* 43 N. C., 102.

Upon the whole, the judgment below does the defendant no legal wrong. It was based upon a part of the award clearly valid, and the only defect in it is the omission to embrace the costs awarded, which were within the powers of the arbitrator, *i. e.,* the taxable costs, which may now be done, the fee to arbitrator excluded.

PER CURIAM. Affirmed.

Cited: Stevens v. Brown, 82 N. C., 463; *Knight v. Holden,* 104 N. C., 111; *Kelly v. R. R.,* 110 N. C., 432.

WILLIAM WILDER v. JOHN IRELAND.

1. Where one devised, in 1828, to a trustee, to the use and benefit of a woman, for her life, remainder to the use of all her children, it was *Held,* that by force of the statute of uses, the legal estate for life was executed in the woman, and that it made no difference that chattel property was conveyed to the trustee by the same will. *Held further,* that the legal estate in the remainder by force of the same statute, passed to the children she had at the time of the devise, subject to the participation of such as she might thereafter have.

2. Where a vendee brought an action against an intruder and failed to recover, but not on account of a defect of the vendor's title (which was sufficient to sustain the action), it was *Held,* in an action on his covenant for quiet enjoyment that this did not amount to a breach of the covenant.

3. A covenant of quiet enjoyment in a deed conveying a fee is not broken if the covenantor had the title to a life estate, though his title failed as to the remainder.

Held further, that withholding of his title deed on the occasion of the trial, by the covenantor (it not having been registered), was no breach of the covenant.

Note the alteration of the phraseology of the statute of uses in Rev. Stat. chap. 43, sec. 4, and in Rev. Code, chap. 43, sec. 6, and *quere* as to its effect.

COVENANT, tried before *Saunders, J.*, at Spring Term, 1860, of FRANKLIN.

The plaintiff declared for a breach of the following covenant, (86) contained in a deed from the defendant to him, dated 16 February, 1858, conveying to the plaintiff and his heirs the land in question: "And for the better security, I do agree to warrant and defend the same, both in law and equity."

The plaintiff was put into possession of the premises, and after he had remained thereon for about four months one Perry entered and ousted plaintiff and retained the possession. The plaintiff brought an action of ejectment against Perry to regain possession, of which he gave notice to the defendant. The defendant in reply said he had a deed for the land in question from Benjamin Cook and Elizabeth, his wife, but no such deed was produced on the trial of this action of ejectment, and none such had at that time been registered in Franklin County; and from a supposed defect of the plaintiff's title a verdict and judgment were rendered for the said Perry. The record of this suit is filed as part of the case.

The defendant, at the time of his conveyance, did have a deed of bargain and sale from Benjamin Cook and Elizabeth Cook, his wife, dated 16 February, 1858, purporting to convey the land in question to him, the defendant, for the consideration of $555, which it was admitted was paid to said Cook. After the commencement of the present action, to wit, in 1860, Cook and his wife acknowledged the deed to defendant, in due form of law, before a judge of the Superior Court, who certified it with privy examination of the wife and ordered it to be registered, which was immediately done.

Cook and his wife claimed title to the land in question under the will of John Perry, which was executed on 27 November, 1828, and was proved at March county court of Franklin, 1829. The following is the clause of the will bearing on the point: "I will and bequeath unto my worthy friend, Matthew Strickland, his heirs and assigns, the following property, on trust, for the use and benefit of my daughter Elizabeth, the tract of land whereon she now lives, one negro woman named

Clarissa, her three children, to wit, Toney, Adam, Berget, and (87) their future increase; after the death of my daughter Elizabeth it is my wish and desire that the above property be equally divided between all my daughter's children, except John P. Cook."

The foregoing is the substance of the facts agreed on by the counsel on both sides and submitted to his Honor, with an agreement that if he should be of opinion with the plaintiff a judgment should be rendered for $555, with interest, and the costs of the action of ejectment.

There was a further agreement for the recovery of a lesser sum, as damages, according as his Honor might decide as to certain other points submitted in the case agreed, but the statement as to this matter is made immaterial by the view taken of the case in this Court.

His Honor in the court below being of opinion with defendant, a judgment was entered accordingly, from which the plaintiff appealed.

J. J. Davis and B. F. Moore for plaintiff.
Miller for defendant.

PEARSON, C. J. We concur in the conclusion of his Honor that, upon the facts agreed, the plaintiff was not entitled to recover.

To maintain the action, it was necessary for the plaintiff to show that the deed of the defendant contained a covenant of quiet enjoyment, and that he was evicted by reason of a title paramount.

Let it be assumed that the deed contains a general warranty or covenant of quiet enjoyment.

Let it be also assumed that the failure of the plaintiff to recover in the action of ejectment brought against Perry amounted to an eviction; for this, see *Alexander v. Torrence,* 51 N. C., 260; *Grist v. Hodges,* 14 N. C., 200.

The case is thus narrowed to this: Was the eviction by reason of a title paramount? In other words, was there a defect in the title of the defendant, in consequence of which the plaintiff was unable to regain possession of the land? It is settled that where a vendee (88) is sued in ejectment and a recovery is effected, in his action against the vendor on the covenant of quiet enjoyment, the judgment in ejectment is no evidence of a defect in the title of the vendor, and it is necessary for the plaintiff to establish that fact by distinct proof. *Martin v. Cowles,* 19 N. C., 102. Such being the law, where a recovery in ejectment has been effected against the vendee, and he has been put out of possession as a matter of course, it is likewise so where the vendee fails to maintain an action of ejectment and relies on such failure to establish his allegation of an eviction. Indeed, in *Grist v. Hodges, supra,* it is assumed as a matter beyond question, where the vendee had

failed in maintaining an action of ejectment, "the event of that suit proves nothing in the action on the covenant."

Our case, therefore, turns upon the construction of the will of John Perry: Did the devise to his daughter, Elizabeth, vest in her a mere trust estate, or did the legal title pass to her by force of the statute of uses? 27 Hen., VIII. We think it is clear that the limitation of the use came within the operation of the statute. By force of the devise, Matthew Strickland was seized in fee simple, to the use of the said Elizabeth for life, and then in remainder to the use of all of her children (except John P. Cook) in fee. Where one person is seized to the use of another, the statute carries the legal estate to the person having the use. But three classes of cases are made exceptions to its operation, *i. e.*: 1. Where a use is limited on a use. 2. Where the trustee is not seized, but only possessed of a chattel interest. 3. Where the purposes of the trust make it necessary for the legal estate and the use to remain separate, as in the case of land conveyed in trust for the separate use and maintenance of a married woman. This is familiar learning. See Black. Com.

By the will under consideration the testator gives to Strickland and his heirs "the following property, in trust, for the use and benefit of my daughter Elizabeth, the tract of land whereon she now lives, and a negro woman and her children; and after the death of my daugh- (89) ter Elizabeth the above property to be equally divided between all her children, except John P. Cook." This is the limitation of an ordinary use. There is no trust for the "separate use" and maintenance of a married woman. Indeed, it does not appear by the will that the testator's daughter, Elizabeth, was at that time under coverture, and we should have been at a loss to conceive of a reason why it had been supposed that the case did not fall within the operation of the statute, except for the suggestions made on the argument.

It was suggested that the statute did not operate, because a negro woman and her children were embraced in the same clause, in respect to which property the trustee was not seized but only possessed, and as the statute did not apply to the slaves, it was argued that it could not apply to the land. We are unable to perceive the force of this reasoning. It is certain that the trustee was seized of the land for the use of the daughter. So the case is within the words of the statute, and it does not fall under any of the excepted cases, and no authority was cited to sustain the idea of a fourth exception, that is, when chattel property is conveyed to the trustee by the same deed or will. In fact, it is certain that the books do not recognize this "fourth exception."

It was also suggested that the statute could not execute the life estate in the daughter, because it could not execute the remainder in the chil-

dren, inasmuch as the intention was to give the use in the remainder to all of the children—those that might afterwards be born as well as those then *in esse*. If it were admitted that the use in the remainder was not executed, it would by no means follow that the use in the life estate was not executed. But, in truth, the use in the remainder was executed. It is a familiar instance of a springing or shifting use, which is fed by a *scintilla juris* left in the trustee, according to the doctrine in *Chudleigh's case,* Coke Reports. The effect of the statute was to vest the legal estate in Mrs. Cook for life, and to vest the legal estate in remainder in her children then living, except John, leaving a *scintilla juris* in the trustee in the event of her having any child (90) or children born afterwards.

This disposes of the case; for, as Mrs. Cook had the legal estate for life, which passed to the plaintiff, it follows there is no defect in the title by reason of which he could not recover the possession. So, the covenant for quiet enjoyment has not been broken, and the eviction was not by reason of a title paramount, but was simply tortious.

It is true, there is a defect of title in respect to the remainder; but that does not amount to a breach of the covenant of quiet enjoyment, which is the only covenant which the plaintiff had the precaution to take for his protection. It is his misfortune that he did not have the deed drawn by a lawyer, who would also have inserted a "covenant of seizin," *i. e.,* that the defendant had a title in fee simple and could convey in fee. Such a covenant is broken whenever there is a defect in the title, and its office is to provide for a case like ours, where the defect is in respect to the remainder or reversion.

It was stated at the bar, and, in fact, it is manifest from the case agreed, that the position that Mrs. Cook had the legal estate for life was not taken in the court below. However that may be, the point is presented by "the facts agreed" and is decisive of the case; it is, consequently, unnecessary to notice the several phases which are stated, bearing on the question as to the amount of damages.

The position, that supposing the title to be good for the life of Mrs. Cook, still the plaintiff was entitled to recover the costs of the action of ejectment, is untenable; for, certainly the fact that the vendor did not furnish the deed from Cook and wife at the trial, and that the deed had not been registered, was no breach of the covenant of quiet enjoyment, which must depend on a defect in the title and right of possession.

PER CURIAM. Affirmed.

Cited: Parker v. Richardson, post, 453; *Kirby v. Boyette,* 118 N. C., 263; *Eames v. Armstrong,* 142 N. C., 515; *Jones v. Balsley,* 154 N. C., 66, 70.

NOTE.—After the opinion was filed, our attention was called to the fact, that in the Rev. Stat., chap. 43, sec. 4, and the Rev. Code, chap. 43, sec. 6, the words used in 27 Hen. VIII., chap 10—i. e., "When one person or persons stand, or be seized, or at any time hereafter shall happen to be seized of land, etc., to the use of any other person, persons, or body politic, by reason of any bargain, sale, feofment, etc., or otherwise, by any manner or means whatsoever it be, the persons, etc., having the use, shall have the legal estate, etc.," are omitted, and the provision is simply "By deed of bargain and sale, lease and release and covenant to stand seized, the possession shall be transferred to the bargainee, releasee, covenantee, etc." This may have a very important effect on the title to land in many cases, but our case is not affected by it, because the will of John Perry was executed in 1828, and was proved in 1829.

After the Statute of Wills, 32 Hen. VIII., a question was made, whether 27 Hen. VIII., applied where one was seized to the use of another by force of a devise. The question, however, has long been at rest. Mr. Blackstone, in his learned commentaries, classifies the exceptions to the operation of the statute under three heads, and does not allude to the fact that the question referred to had ever been started, but passes it over as one of "the refinements and niceties suggested by the ingenuity of the times." 2 Black. 336. See also *Broughton v. Langley*, Salk. 679, where *Lord Holt* treats the question as settled. The curious reader will find the subject treated of in Powell on Devises, 211-13-14.

It is conceded on all hands that the statute of uses, 27 Hen. VIII., chap. 10, was in force and in use in this State up to the passage of the Revised Statutes (1836). Indeed, all of the conveyances of land adopted and used in this State are based on, and take effect by, the operation of that statute.

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(91)

WILLIAM BUCHANAN ET AL., PLAINTIFFS IN ERROR, V. B. B. M'KENZIE, DEFENDANT IN ERROR.

1. The fact that a county court, by a special statute, cannot hold jury trials does not deprive a party of his common law right to have issues of fact tried by a jury.
2. Where on a writ of error, a judgment of the county court, refusing to let a party plead, was reversed in the Superior Court for error, the proper course was to send the case back to the county court, that the plaintiff in error might be restored to all things which he had lost, and it was *Held*, to be error for the judge to give leave to the party to enter his pleas in the Superior Court.

WRIT OF ERROR, *coram vobis*, before *Saunders, J.*, at June Special Term, 1860, of RICHMOND.

The plaintiffs in error were the sheriff of that county and his sureties. They were summoned at the instance of the county trustee, by written notice, to appear at a term of the county court, to show cause why

judgment should not be entered against them, on motion, for the (92) county taxes collected by the said sheriff for the year covered by their bond. At the term aforesaid, the defendants (plaintiffs in error) appeared by their counsel and objected to a summary judgment, for that they had a right to enter pleas and have them submitted to a jury. It appearing that, by a special act of Assembly applicable to Richmond County, no jury trials could be had in the county of Richmond, the court overruled the defendants' objection, and gave judgment for the plaintiff (defendant in error). This was the matter assigned on the hearing of the writ of error, and his Honor held there was error in the court below in this particular, and adjudged that the defendants (plaintiffs in error) have leave to enter the pleas "general issue, payment, etc.," in that court. From which the plaintiff (defendant in error) appealed to this Court.

Leitch, Fowle, McDonald, and Blue for plaintiffs in error.
Strange and R. H. Battle for defendant in error.

PEARSON, C. J. The plaintiffs, who were defendants in the county court, there insisted "upon a right to plead and have a trial by jury, in which the court overruled them, and rendered judgment on the bond."

We agree with his Honor in the court below; there is error in the proceeding of the county court. The statute authorizes judgment to be entered upon motion in a summary manner, without a writ or declaration, or other formal pleadings, so as to avoid the delay incident to ordinary jury trials, but it was not the intention to deprive the defendant in the county court of his right to put at issue any matter of fact, to wit, the execution of the bond, the amount received by the sheriff, the amount which he may have paid over, and the balance due, and have these matters of fact tried by a jury.

As the county court for the county of Richmond, under a statute applicable to that county, had no power to institute a trial by jury, the proper course was to have the case transmitted up to (93) the Superior Court for the trial of issues of fact, and it was manifest error to refuse to allow such issues to be made. In other words, the fact that the county court of Richmond cannot hold jury trials does not deprive a party of his common law right to have issues of fact tried by a jury. *Whitley v. Gaylord,* 48 N. C., 286.

But we do not concur in the judgment which his Honor rendered. After reversing the judgment of the county court, he gives leave for the plaintiffs in error to enter their pleas. There is no precedent for this mode of proceeding in a writ of error, and his Honor was misled by treating it as an appeal, which brought up the whole case. Such is not

the effect of a writ of error; its office is merely to present for review errors of law appearing on the face of the record, to have the judgment reversed and the party restored to all things which he has lost by occasion of such erroneous judgment and the proceedings thereon. *Jacques v. Cæsar,* 2 Saunders, 101z. (in note).

There should be judgment to that effect.

PER CURIAM. Reversed.

Cited: S. v. Sanders, 153 N. C., 626.

WILLIAM BUCHANAN, PLAINTIFF IN ERROR, v. B. B. MCKENZIE, DEFENDANT IN ERROR.

A judgment for the penalty authorized by the latter clause of section 5, chapter 29, Rev. Code, against a delinquent sheriff, etc., is only an incident to the main judgment against him and his sureties, authorized by the former part of the same section. Upon a reversal, therefore, of the latter, the former falls with it.

WRIT OF ERROR, before *Saunders, J.,* at June Special Term, 1860, of RICHMOND.

The error assigned in this case was the granting of judgment (94) of $100 by the county court of Richmond against the sheriff. Under the provision of statute, chap. 29, sec. 5, which, after authorizing a summary judgment against a delinquent sheriff, clerk, etc., and their sureties to be had, on motion, for the amount of public money due from such delinquent officer, provides that "every sheriff, clerk and master, and clerk aforesaid, against whom judgment is so rendered, over and above all arrearages, shall forfeit and pay the sum of one hundred dollars, to be recovered at the same time, for the use of the county." The judgment in the preceding case (*ante,* 91) having been entered, as therein explained, this motion for the penalty was made, and judgment for the same was entered by said court.

The court below adjudged that there was no error in the records of the county court and ordered a *procedendo,* to have execution issued on the judgment in said court, from which the plaintiff in error appealed to this Court.

Leitch, Fowle, Blue, and McDonald for plaintiff in error.
Strange and R. H. Battle for defendants in error.

PEARSON, C. J. As the judgment against a delinquent sheriff for the forfeiture of $100 is a mere corollary or incident to the judgment against him and his sureties for damages, it follows that if the principal judgment be erroneous the latter must be also; and if the principal judgment be reversed and held for naught so must the incident, on the ground that the delinquency of the sheriff, on which the latter judgment is predicated, has not been established.

There is error in the judgment of the Superior Court, and the same is reversed. There is error in the judgment of the county court, and there will be judgment reversing the same and restoring the plaintiff in error to all things which he has lost by occasion of said erroneous judgment and the proceedings thereon. 2 Saunders, 101z. (in note); 2 Bacon's Abrdgt., 229.

PER CURIAM. Reversed.

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(95)

WILLIAM BUCHANAN, PLAINTIFF IN ERROR, v. B. B. McKENZIE, DEFENDANT IN ERROR.

1. The statute, Rev. Code, chap. 29, sec. 5, intends that motions for summary judgment against delinquent sheriffs, etc., shall originate in the county courts.
2. Where a statute requires that a proceeding shall originate in the county courts, and matters of fact are involved therein which cannot be tried in the county court, because jurisdiction to try issues of fact has been taken away by special act of Assembly, the proper course is for the issues to be made up in the county court and transmitted, by an order or by a *certiorari* to the Superior Court for trial.

WRIT OF ERROR, before *Saunders, J.*, at June Special Term, 1860, of RICHMOND.

The matter assigned for error in this case is the same as in the case between the same parties (*ante,* 91), except that in this case the record does not show that the defendants below moved in the county court to be allowed to enter pleas and have the same transmitted to the Superior Court for trial.

The Superior Court decided that there was no error in the judgment of the county court, and ordered a *procedendo,* from which the plaintiff in error appealed to this Court.

In this Court it was insisted that the provision in chapter 29, section 5, Rev. Code, requiring the county trustee to move for judgment "at the first court held for his county after the first day of January in each and every year," meant the first court having jurisdiction of the subject-

matter; and as this proceeding involved matters of fact, and jury trials had been abolished by the special statute for Richmond County, the county court had no jurisdiction, and the judgment therein entered is void.

Leitch, Blue, Fowle, and McDonald for plaintiff in error.
Strange and R. H. Battle for defendant in error.

PEARSON, C. J. In this cause, the plaintiffs, who were defendants in the county court, so far as the record shows, did not move to be allowed to enter pleas or to make up issues of fact to be tried by a jury; (96) it therefore differs from the case between the same parties in which an opinion is filed at this term (*ante,* 91). The only question presented is as to the jurisdiction of the county court of Richmond.

For the purpose of this question, it may be conceded that a motion against the sheriff and his sureties on his bond stands on the same footing as an action on the bond, the only difference being that the proceedings on the motion are to be summary, the writ, declaration, and formal mode of proceeding being dispensed with, to avoid unnecessary delay. So, the question turns on the construction of the statute, chapter 29, section 5.

It is contended for the plaintiffs in error that by this statute the motion is to be made by the trustee at the first court (having jurisdiction) held for his county after the first day of January in every year; that as jurisdiction is taken from the county court of Richmond by an act relating to that county, passed in 1814, in all cases where a jury may be necessary, it follows that the county court could not entertain the motion, and the judgment is void for the want of jurisdiction.

We do not concur with the counsel as to the construction of the statute. Taken in connection with the other sections, it is evident that the statute intended that all of these matters in respect to the county revenue should be instituted in the county courts; by section 1, the justices of the county court are to appoint a county trustee; by section 5, the trustee is to make a motion against the sheriff at the first court held for his county after, etc.; by section 6, the trustee shall settle, etc.; where there is no trustee, the court shall settle with their sheriff, etc.; by section 7, the court of pleas and quarter sessions shall allow the trustee reasonable pay, etc., and by section 8, at the first court which shall be held after 1 January in every year, the trustee shall make settlement with the court, etc. The whole shows that the court meant is the county court, and section 5 shows "the motion shall be made by the county trustee at the first term of said court which shall be held (97) for his county after, etc.

It is clear, we think, that the motion must be made in the *county court. But it is asked,* What is to be done in those counties where the county court cannot try jury cases, and no jury is in attendance? The reply is obvious: Wherever issues of fact are made up the case must be transmitted to the superior courts, as in the case of the probate of wills, or after issues are made up on proceedings under a *ca. sa.,* or in a bastardy case, the principle being that where, by law, a matter is to originate in the county court, that court has exclusive jurisdiction in the first instance, notwithstanding its jurisdiction for trying issues of fact is taken away by statute; and it is only after issues of fact are made up that the case is to be transmitted to the Superior Court by order of the county court or by *certiorari.* See the case of *Harris v. Hampton,* 52 N. C., 597, in which *S. v. Sluder,* 30 N. C., 487, and *Fox v. Wood,* 33 N. C., 213, are referred to, and the question in regard to nonjury county courts is fully explained.

Per Curiam. Affirmed.

FARNIFOLD L. McDANIEL v. JOHN H. NETHERCUT.

Where a constable, by levy and actual seizure of a slave, had acquired a right to the property for the satisfaction of executions in his hands, and delivered such slave to the jailer of the county for safe-keeping, a refusal of the jailer to redeliver the said slave, by command of his superior, the sheriff, was *Held,* in an action of *trover* by the constable against the sheriff, to be evidence of a conversion.

Trover, for the conversion of a slave, tried before *Bailey, J.,* at last Fall Term of Jones.

The plaintiff was a constable of Jones County, and by virtue of certain executions in his hands levied one of them on 4 September, 1859, and one other on the 12th of the same month, on a female (98) slave, as the property of one Andrews, and delivered her to the jailer of the county, who put her in the common jail of said county. Afterwards, and before this suit was brought, McDaniel, the plaintiff, called on the jailer for the slave in question, and he refused to deliver her. It appeared in evidence that this refusal was occasioned by the command of the defendant, who was at that time sheriff of Jones County. The defendant, as sheriff, had certain executions in his hands, tested of June Term, 1859, of Jones County court, against one William F. Huggins, which were levied on 12 September, 1859, on the said slave, and he had various court executions against Andrews, tested of the

same term, but none of them levied on the slave. The defendant showed in evidence a bill of sale from Andrews to said Huggins and one Smith, dated in 1856, which was absolute on its face, but was intended as an indemnity to Huggins and Smith as surety for said Andrews in certain debts which had been subsequently paid by Andrews, and said bill of sale was not intended to defraud any one. The defendant, under the executions in his hands, sold the slave in question, the plaintiff being present, forbidding the sale. The writ was brought after the demand, but before the sale.

The court charged the jury that the plaintiff, having levied his execution first and having the negro in his possession, was entitled to recover, provided there was a conversion on the part of the defendant, and that there was evidence as to a conversion, which was left to their consideration. He also charged that the sale to Huggins and Smith, by bill of sale absolute on its face, but intended as a mortgage, was null and void as to the plaintiff. Defendant's counsel excepted.

Verdict and judgment for plaintiff for $1,000.

Defendant appealed to this Court.

McRae for plaintiff.
Haughton for defendant.

(99) BATTLE, J. In the argument here it is conceded, and properly conceded, by the defendant's counsel that the plaintiff had, by his levy and taking possession of the slave, acquired the right to her for the purposes of his execution, as against the defendant. See *Jones v. Judkins,* 20 N. C., 591. The counsel properly conceded, also, that the bill of sale from Andrews to Huggins and Smith was void as against the plaintiff (*Gregory v. Perkins,* 15 N. C., 50), but he contended that the plaintiff's action could not be sustained because there was no evidence of a conversion of the slave by the defendant. In support of this position, the counsel referred to several cases to show that a mere levy upon a personal chattel, without seizure of it, is not a trespass, and therefore is neither a conversion nor any evidence of it. See *Bland v. Whitfield,* 46 N. C., 122; *Ragsdale v. Williams,* 30 N. C., 498; *Francis v. Welch,* 33 N. C., 215; *Glover v. Riddick, ibid.,* 582.

This may all be true, but the defendant in the present case did much more. The jailer of his county, who is his officer, and into whose possession the plaintiff had placed the slave to keep for him, refused upon demand to deliver her to the plaintiff, and did this by the order of the defendant. The refusal was then, in legal effect, the refusal of the defendant himself; and a demand and refusal has always been considered as evidence of a conversion; and if unexplained, a conversion may,

and ought to be, inferred by a jury from them. The subsequent sale of the slave by the defendant, as sheriff, having been made after the commencement of the suit, could not be relied on as the ground of the action, but it was proper to be considered as evidence tending to show the purpose for which the refusal was made by the sheriff's officer.

The question of damages was not made (so far as the transcript shows) in the court below; and there is nothing stated from which we can discover that the amount of the executions in the hands of the plaintiff was not the full value of the slave.

PER CURIAM. No error.

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(100)

JOSEPH BLAND ET AL., ADMINISTRATORS, v. JOHN W. SCOTT.

Where the plaintiff, the defendant, and another, shipped produce on the same boat, consigned it to a factor, who sent the defendant a draft on New York for the whole amount, which he sold and, receiving the money for it, endorsed it in his own name, but the paper coming back to him dishonored, the defendant refunded the money, and was unable to get it from the factor, after using due and proper diligence, it was *Held*, that the defendant was in no wise liable for the loss of the debt.

CASE, tried before *Saunders, J.*, at Fall Term, 1860, of CHATHAM.

The following statement, signed by counsel, was sent to this Court as the case tried below, viz.:

"The evidence was as follows: "William Bland, the plaintiffs' intestate, through the defendant, who acted without commissions, shipped from Haywood to Wilmington, in February, 1857, a lot of cotton worth $290. At the same time the defendant shipped, in the same way, produce for himself and for Elias Bryan. J. S. Banks was the consignee of this produce, and, by direction of the plaintiffs' intestate, the cotton also was forwarded to him. In March, 1857, Banks remitted to the defendant a draft on a house in New York for $750, which, having been sold for the money and endorsed by Scott to one Lambeth, was, on due presentment, dishonored and returned through Lambeth and Scott to Banks. By agreement between Banks, Lambeth, and the defendant a second draft given in substitution of the first was made payable directly to Lambeth. Upon this only $363.08 was received of the drawees, the draft having been duly dishonored for the rest. Lambeth, on having the second draft returned to him, carried it to Scott and demanded of him the difference between the $750, for which it called, and the $363.08 which he had received upon it. Scott paid it with

(among other money) $290, which he produced in a roll from his pocket, saying, 'This is Bland's money for his produce; I have already paid Elias Bryan more than his share.' It was shown that the draft for $750 was remitted, in part, for the purpose of paying off the debt to Bryan and that to Bland. It was also shown that the debt to Bryan (101) was $396.96, and that he received it of Scott on 20 March, 1857. The following is a copy of the second draft, which was produced by the defendant at the trial:

"'WILMINGTON, N. C., 18 April, 1857.

"'$750. Ten days after date, acceptance waived, please pay to the order of A. T. Lambeth, Esquire, seven hundred and fifty dollars, for value received; which please charge to the account of your ob't serv't,

J. S. BANKS.

"'To Messrs. B. B. Blossom & Son, New York.'

"Upon this were the following endorsements: 'A. T. Lambeth.' 'Money received on acp., $353.08, of the within debt.' 'Pay the balance to the order of J. W. Scott—A. T. Lambeth.' Just after the second draft was returned Banks failed, and it did not appear that anything further was ever received by Scott for the cotton, except some salt and a safe. After Banks failed, upon Scott's being about to visit Wilmington, Bland desired him to try and save something for him. Whether this was done did not appear. It was shown that afterwards the defendant received of Banks the lot of salt and a safe above mentioned, a part of which he offered to Bland, who refused it. It appears, also, that Scott and Bryan each lost several hundred dollars by Banks. The plaintiffs showed a demand on Scott for the value of the cotton a short time before the suit was brought, and that the latter refused to pay, saying that as he had failed to receive the money from Banks it would be hard for him to have to pay it."

His Honor charged the jury that upon the evidence they should find a verdict for the plaintiff for $290, with interest from 1 April, 1857.

Verdict and judgment for plaintiffs. Appeal by defendant.

Howze for plaintiffs.
Phillips for defendant.

(102) MANLY, J. After digesting as well as we can the facts of this case, we are unable to perceive the ground on which the defendant was held liable for the value of Bland's produce. It seems that William Bland, the intestate of plaintiffs, the defendant Scott, and a person by the name of Bryan, sent produce down the Cape Fear River on the

same boat. The defendant, in putting the freight on board at Haywood, the place of departure, acted as the agent of Bland. The produce was consigned, by the agreement of all concerned, to J. S. Banks, of Wilmington, as a factor, to dispose of it for the benefit of each consignor. The produce was transmitted in February, and in the month of March a draft on B. B. Blossom & Son, of New York, was sent to Scott for the entire proceeds. This draft was discounted by A. T. Lambeth, at the instance of Scott, and on 20 March Bryan's proportion of it was paid to him by Scott, viz., $396.96. The draft was dishonored and returned, and an arrangement was then made by Banks with Scott and Lambeth to draw again for the amount of $750 on the same house in New York, in favor of Lambeth, which was accordingly done, and on this draft $353.08 was received by Lambeth. It seems that Scott then refunded to Lambeth the proceeds of the draft, less the $353.08 received on the same, saying, as he produced a part of the money, viz., $290, that it was Bland's money.

Thus it will be seen that of the common adventure in this enterprise Bryan has received the proceeds of his produce; Bland has not received anything, and Scott, the defendant, has not only not received anything but has suffered a loss over and above of $43.88, except he derived some indemnity from the salt and safe referred to in the evidence.

The case states that Scott acted as the agent of Bland in starting the produce to Banks, but after that it is not stated that he was to be responsible. Banks is the consignee and factor alike of all, and upon the delivery of the produce he became responsible to each. That is our conclusion on the state of the facts presented to us in the record.

The question then is, Did the defendant's interference in the matter, as a volunteer in respect to Bland and Bryan, without any interest in the transactions except to the extent of his part of the proceeds of sale, make him responsible to the others? We think not. (103)

If it be assumed that, having accepted a bill payable to himself for the whole proceeds and having attempted its collection, he has made himself liable for ordinary care and diligence, we think these have been exerted. It is clear the defendant is not at all liable for the delinquencies or want of fidelity in Banks. The latter was as much the factor of the plaintiffs as of the defendant, and the latter can only be subjected to the responsibility in case some act or omission on his part in relation to the fund sent him was contrary to the course of a man of ordinary prudence in the management of his own affairs. What, then, is his conduct in this respect? He takes the draft sent, embracing the sum due himself as well as the sums due Bryan and Bland. He procures it to be discounted, and is proceeding to distribute the proceeds when the draft

is returned dishonored by the drawee. Another draft is then taken from Banks, and upon this is paid $353.08. It is dishonored as to the balance. Banks fails, and the defendant, being liable upon his endorsement, refunds the money in hand arising from the discount of the bill. By reference to the dates of these transactions it will be perceived that all this was done from about the middle of March to the middle of April.

It seems to us, after the false step of consigning to an untrustworthy factor, for which defendant is not responsible, due diligence was used in endeavoring to make available the fund sent, and defendant is not responsible for the failure.

Upon the state of facts reported, therefore, we differ from his Honor as to the personal responsibility of the defendant to make good the loss. What may be the rights of the parties, respectively, in the funds actually received we are not now called upon to say. There should be a

PER CURIAM. *Venire de novo.*

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(104)

BENJAMIN C. WILLIAMS, ADMINISTRATOR, v. URIAH SCHIMMERHORN.

A judgment on a *ca. sa.* bond, during the term at which it is rendered, is *in fieri*, and may be set aside on motion; and an appeal from the county to the Superior Court from an order setting aside such judgment is erroneous and will be dismissed on motion.

APPEAL from the county court, on a motion to set aside a judgment, before *French, J.*, at last Fall Term of MOORE.

The defendant had given a bond for his appearance at the July Term, 1860, of Moore County court, to take the benefit of the act for the relief of insolvent debtors. Not making his appearance in the forenoon of Monday of the term, he and his sureties were called, and judgment was rendered against them for the amount of the judgment and costs. Subsequently, in the term of that court, the defendant made an affidavit that he was sick and unable to get to the courthouse on Monday before he was called. On this affidavit the court ordered the judgment to be set aside, and the plaintiff appealed to the Superior Court. In the Superior Court his Honor, deeming that the plaintiff had no right to appeal from the order of the county court, dismissed it and ordered a *procedendo,* from which plaintiff appealed to this Court.

Neill McKay and McDugald for plaintiff.
McDonald for defendant.

PEARSON, C. J. There is no error; the proceedings of every court are said to be *in fieri* until the term expires; that is, its actions are not considered in law as completed or done, but as being held in suspense, under consideration, until the end of the term; consequently the county court had power, in our case, to set aside the judgment. Its exercise was a mere matter of discretion, and the plaintiff had no more ground for an appeal than he would have had from an order of the court allowing a continuance.

It follows there is no error in the order of the Superior Court dismissing the appeal. After which that court should have nothing more to do with the case, and a *procedendo* properly issued. (105)

PER CURIAM. Affirmed.

C. P. MENDENHALL ET AL. v. THOMAS C. PARISH.

An acknowledgment by the bargainor in a deed that he has received the consideration money is a bar in a court of law to any action for the recovery thereof.

ASSUMPSIT, tried before *Shepherd, J.*, at January Special Term, 1860, of GUILFORD.

The plaintiffs were the owners of a patent right for a machine called Elliott's Corn Sheller and Separator, and the defendant wrote to them from St. Louis that if they would send him a deed for the patent in question for the State of Arkansas he would give them $600 in three months, offering, in the meantime, to give them a note and security for that sum. The deed was accordingly sent and received by the defendant in due season, but the note for the money was not sent, nor was the money paid at the end of the credit stipulated for.

The deed, reciting the plaintiffs' ownership of the patent right in question, proceeds as follows: "Now, know all men by these presents, that we, the said Adams, Hiatt, and Mendenhall, for and in consideration of the sum of six hundred dollars, to us in hand paid, the receipt of which is hereby acknowledged, have transferred, sold, etc." The release here set forth was pleaded and relied on at the trial.

By consent a verdict was entered for the plaintiffs for $600 and interest, subject to the opinion of the court on the question as to the sufficiency of the release. His Honor afterwards set aside the verdict and ordered a nonsuit. Plaintiffs appealed. (106)

Morehead and McLean for plaintiffs.
Fowle and Gorrell for defendant.

MANLY, J. This is an action of *assumpsit,* in which the plaintiffs allege a liability of the defendant upon an undertaking that he would, in consideration of a deed for a certain patent right to be used in the State of Arkansas, pay therefor $600 at three months credit, and make a good note for it. The declaration is in two counts:

1. For not making the note.
2. For not paying the money.

The case turns upon the effect of a release, pleaded as a bar to the recovery and which is found in the deed, for the right to use the patent above referred to, and dated 12 October, 1857. We concur with his Honor that the release in the deed is a bar at law to the plaintiffs' recovery on either count. In either aspect it is an action for the consideration expressed in the deed. The consideration is there declared to be paid, and the plaintiffs, who are the grantors in the deed, are estopped to deny it in this action.

This question was brought directly into judgment in the case of *Brocket v. Foscue,* 8 N. C., 64, and it was there held that when a deed contains an acknowledgment by the bargainor of the receipt of the consideration money, with an exoneration therefrom, it amounts to a bar to the action for the purchase money, and that parol evidence shall not be received to contradict the averment of payment in such case.

The same principles are decided in *Lowe v. Weatherley,* 20 N. C., 353; and are again recognized in *Crawley v. Timberlake,* 36 N. C., 346, and 37 N. C., 460, where equity takes jurisdiction and relieves from the legal effect of such release upon a case made of ignor-
(107) ance and misapprehension.

Our attention has been called to *Robbins v. Love,* 10 N. C., 82, and *Lane v. Wingate,* 25 N. C., 326. There is no conflict, as we think, between these cases and *Brocket v. Foscue* and *Lowe v. Weatherley.*

The first, *Robbins v. Love,* was an action of *assumpsit* for a balance of $1,000 due for merchandise sold. The defendant was permitted to introduce a deed for a house and lot, in which the consideration was stated to be $1,000 in hand paid, and to prove by the subscribing witness that it was paid by an agreement to consider the debt for the goods extinguished. This was held not to be a contradiction of the deed, but proof of a distinct fact only as to how the money came, of which the defendant acknowledges the receipt, in his deed to the plaintiff. Thus, without contradicting his deed, the defendant was enabled to show distinct facts, which amounted to an accord and satisfaction and which furnished, of course, a complete answer to the plaintiff's action of *assumpsit.*

The other case, *Lane v. Wingate,* was an action of *assumpsit,* also, upon a parol obligation, not under seal, with condition for the support of an aged woman slave. No consideration was stated in the writing, and the plaintiff resorted to evidence *dehors* the instrument, and showed that upon a sale of negroes by plaintiff to defendant he wished to purchase, besides those the plaintiff was willing to sell, a boy by the name of Daniel. Plaintiff's objection to the sale of Daniel was that he wanted him to wait on the old woman referred to in the condition of obligation. And thereupon the defendant agreed, if the plaintiff would sell him Daniel, he would maintain the woman for life, and accordingly entered into the obligation on which the action was brought. Defendant, in answer to the action, introduced the deed of sale of Daniel and other slaves, in which plaintiff acknowledges that he had received a sum in full for the said negroes, and contended that plaintiff was estopped by the said deed from recovering under the said agreement. But the Court held otherwise, upon the ground that the agreement was a distinct obligation, growing out of the sale of Daniel, and that it was (108) not any part of the money consideration, the receipt of which was acknowledged in the deed, and there was, therefore, no estoppel.

Both these cases were put upon peculiar grounds, and were not supposed by the learned judges who then presided in the Court to impugn at all the doctrine of estoppel by deed, and cannot, therefore, be rightfully invoked for that purpose.

In the case now before us the action is for the recovery of the consideration mentioned in the deed, the purchase-money of the patent. For we do not perceive that it varies the matter or object of the action whether the recovery be had upon the count for $600, the price of the patent, which was to be paid after three months time, or for the $600 as damages for not giving a good note, in the meantime, for the price aforesaid. It is equally an action for the recovery of the consideration money of the deed, and this the plaintiffs have acknowledged by their deed to be paid. They are concluded in a court of law by this acknowledgment under seal.

PER CURIAM. Affirmed.

Cited: Lawson v. Pringle, 98 N. C., 452; *Shaw v. Williams,* 100 N. C., 280; *Barbee v. Barbee,* 108 N. C., 584.

WILLIAM TOMLINSON v. JOSEPH PAYNE.

1. At law, the rule is that fraud never is presumed, and he who alleges it must prove it.
2. It may be taken as a general proposition, that every man is presumed to be honest in his dealings until the contrary is proved.

CASE for a deceit in the sale of a sawmill, tried before *Bailey, J.*, at last term of WILSON.

The defendant, being a part owner of the mill in question, sold an interest therein (one third part) to the plaintiff for $600. The (109) plaintiff said of the mill, before he bought it, that he did not know whether it was a good one or otherwise. The defendant said the mill was a good one, and that it had no deficiencies that he knew of. There was evidence, also, that the property was as the defendant represented it to be.

The judge, in charging the jury, explained to them the difference between an action for a warranty and an action on the case for a deceit; that in the former, recovery could be effected by showing a breach of the warranty only, and that whether the defendant was an honest man or otherwise, but in the latter he could not recover unless it was shown that the defendant was guilty of moral fraud; that in this case, as the plaintiff had declared that the defendant was guilty of practicing a fraud upon him in the sale of the mill, he was bound to prove it; that the burden of proof was upon him to establish his allegation to the satisfaction of the jury, for the law presumed that every one was honest in his dealing until the contrary was proved. Plaintiff excepted.

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

Strong and A. M. Lewis for plaintiff.
Dortch and B. F. Moore for defendant.

PEARSON, C. J. His Honor very properly instructed the jury that as the plaintiff alleged the defendant had practiced a fraud on him, he (the plaintiff) was bound to prove the allegation, and if he had failed in making the proof, as a matter of course, the issue should be found against him. Here he might have stopped, but, in truth, what he adds, taken in connection with the preceding sentence, is simply the expression in different words of the same idea, to wit, that the burden of proof was on the plaintiff. Fraud is presumed in some instances by a court of equity, *e. g.*, where one deals with another who is dependent on him from the relation existing between them; but at law the rule is, (110) fraud is never presumed, and he who alleges fraud must prove it.

This disposes of the case; but, as an isolated proposition, we take it to be true that every one is presumed to be honest in his dealings until the contrary is proved, in the same sense that every one is presumed to be *compos mentis;* that is, we take it for granted he is so until the contrary is proven; for instance, one who alleges the execution of a deed or will impliedly alleges that the maker had mental capacity, and on proof of the formal execution of the instrument the capacity is taken for granted, in the absence of evidenee to the contrary. It is, however, unnecessary to enter upon this question as it is a mere matter of speculation, for in our case the onus of proof being on the plaintiff, it was for him to satisfy the jury that a fraud had been practiced by the defendant. There certainly is no presumption of law that every man is dishonest in his dealings until the contrary is proved, and without the aid of such a presumption the plaintiff could not be subjected to the *onus probandi,* which is the principle of law that governs all cases where the evidence does not preponderate on the one side or the other. There is

PER CURIAM. No error.

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(111)

THE STATE ON THE RELATION OF W. W. LATTA, ADMINISTRATOR DE BONIS NON CUM TES., V. CHARLES E. RUSS, ADMINISTRATOR, ET AL.

1. Where an administrator with a will annexed died, having in his hands money arising from the sale of land decreed to be sold for the payment of debts, being a surplus over and above the sums required to pay such debts, which money belonged by law to persons to whom the land was devised, it was *Held,* that the administrator *de bonis non cum tes. an.* of the original intestate was the proper person to bring suit for such money, and not the devisees.
2. Where an administrator petitioned for the sale of his intestate's land, setting forth the number and amount of the debts existing against the estate, and a decree passed for such sale, in a suit by an administrator *de bonis non* to recover a surplus over and above the debts, such decree was held not to be conclusive as to such debts, although the persons to whom the land was devised were made parties.
3. Moneys paid by an administrator for the support of his intestate's minor children are not proper vouchers for him in the settlement of such estate.

DEBT, on an administration bond, tried before *Dick, J.,* at June Special Term, 1860, of ORANGE.

Richard Crabtree made his will, by which he devised certain lands to Thomas J. Latta and wife, William Hopkins and wife, William Crabtree, Moses Crabtree, Clement Crabtree, John Crabtree, Richard

Crabtree, Arthur Crabtree, Kemp Crabtree, and Lucy Ann Crabtree, the last six of whom are minors. He devised a certain other tract of land to be sold for the payment of debts, and that the rents, issues, and profits of the other land should be applied to the support of his minor children. The executors named in the will having renounced the office, his widow, Parthenia Crabtree, was appointed administratrix with the will annexed, and gave the bond on which this suit is brought. The administratrix filed petitions in the county court of Orange, to which the devisees were made parties, setting forth that she had exhausted all the personal estate, and that there remained a certain amount of debts (stating them) unpaid, and prayed that the lands devised to said parties should be sold for the purpose of satisfying these debts. Decrees were entered accordingly, and the debts all paid out of the proceeds (112) of the land. Mrs. Crabtree having died, this suit was brought by the plaintiff, who was appointed administrator *de bonis non* with the will annexed of Richard Crabtree, and her administrator was made a party defendant with the other obligors, her sureties. It appears by the report of Mr. Laws, to whom it was referred to state an account of Mrs. Crabtree's administration of her husband's estate, that, taking the amount of debts to be as made out by the vouchers, and rejecting charges made by her for supporting the minor children, there remained in her hands $882.22, which the commissioner thinks is the true balance. But he says, in an alternative view of the subject, that if these charges be allowed against the children, and the debts against the estate be taken to be as stated in the decrees for sale of land, that then there will be in the hands of the administratrix unadministered only $252.45. The defendants' counsel insisted:

First. That as the act of Assembly gives the surplus arising from the sale of land, made assets, to the persons who would have taken the land itself had it not been sold, the devisees themselves should have brought the suit as relators, and not the administrator *de bonis non* of Richard Crabtree.

Second. That the decrees by which the land was sold and to which the devisees were parties concluded them as to the amount of the debts due and owing by Mr. Crabtree's estate.

Third. Also, that the charges for supporting the minor children were correct, and that, therefore, only the smaller sum above mentioned could be recovered.

By the consent of the parties, *a pro forma* verdict was entered for the smaller sum, subject to be set aside and a verdict and judgment entered for the larger sum, according as his Honor should be of opinion on the points of law above stated in the second and third positions taken by the defendants.

On consideration of the questions reserved his Honor, being of opinion with the defendants, gave judgment for the smaller sum, and the plaintiffs appealed.

Graham for plaintiff. (113)
Norwood and Phillips for defendants.

PEARSON, C. J. The objection made in this Court, that the action cannot be maintained by the administrator *de bonis non* with the will annexed of Richard Crabtree, and should have been brought on the relation of the devisees, is not tenable.

In respect to the personal estate, it is settled that if an administrator die before he has completed the settlement of the estate, by paying debts and making distribution, an administrator *de bonis non* must be appointed for the purpose of completing the settlement, for the reason that there is no privity between the distributee of the intestate and the personal representative of the deceased administrator, and, consequently, both of the deceased persons must be represented. *Duke v. Ferebee,* 52 N. C., 10; *Taylor v. Brooks,* 20 N. C., 273; *S. v. Johnson,* 30 N. C., 381; *S. v. Britton,* 33 N. C., 110.

The statute which authorizes the sale of real estate on the petition of an executor or administrator for the payment of debts makes the proceeds of sale assets for the payment of debts, and directs that the excess shall be paid by the executor or administrator to such persons as would be entitled to the land had it not been sold (Rev. Code, chap. 46, secs. 50, 51), thus putting the excess of the sale of real estate on the same footing in respect to the devisees and heirs, and imposing on executors and administrators the same duties in regard thereto as existed in relation to the rights of legatees and distributees to the excess of the personal estate and the duties of executors and administrators in regard thereto.

When, therefore, an administrator dies before he has completed the settlement of the assets derived from real estate, by paying debts and paying over the excess to the devisees or heirs at law, this unfinished duty cannot be performed by his administrator, for there is no privity between him and the devisees and heirs at law, and it is, consequently, necessary that both of the deceased persons should be represented, so that the representative of the administrator should pay over the fund to the representative of the first intestate, whose duty it is (114) made to complete the administration by paying off all the debts and paying over the excess to such persons as would be entitled to the land had it not been sold. In other words, between the administrator *de bonis non* of the first intestate and the creditors and devisees or heirs there is a privity, whereas there is no privity between the latter and the

administrator of the first administrator. So the action is properly brought on the relation of the representative of the testator, Richard Crabtree, and it is his duty to receive the fund and complete the settlement of the estate.

We do not concur with his Honor in the view taken by him of the question reserved in respect to the effect of the decree, giving the administratrix license to sell the land. That decree was an adjudication that it was necessary to sell, and is conclusive in favor of the title acquired by the purchaser, but it is not conclusive of the question of debt or no debt, as against or in favor of creditors, or as against or in favor of the heirs. It is certainly not so in respect to creditors, because they are not parties to the proceeding, and is, consequently, not so in respect to the heirs or devisees, for an estoppel must be mutual. To make it so would be going beyond the necessity of the case, the object being simply to establish *prima facie,* that the personal estate is not sufficient to pay the debts, as a foundation for the action of the court in granting a license to sell the real estate, the proceeds of which are made assets to be accounted for in the settlement of the estate, when the executor or administrator must, as a matter of course, discharge himself by the production of proper vouchers.

We think it clear, therefore, that in making the settlement in this case it was the duty of the court to go behind the decree allowing the administratrix license to sell, and it is likewise clear that her charges for the support of the minor children of the testator were not proper vouchers. They were not debts of the testator, and are directed to be paid out of the rents, issues, and profits of the land. The fund raised by such rents, issues, and profits up to the time of the sale are not charges against the administratrix, and neither of these matters should have been brought into the settlement, either as items of charge or discharge.

(115)

Whether the minor children will not be entitled to the interest of the fund received by the plaintiff as excess of the proceeds of the sale of the land, the profits of which are devoted by the will for their support, is a question that will arise when he is required to make distribution, but is not now presented.

The judgment of the court below will be reversed, and judgment entered for the sum of $882.22 with interest, according to the case agreed.

PER CURIAM. Reversed.

Cited: *Finger v. Finger,* 64 N. C., 186; *Allison v. Robinson,* 78 N. C., 224, 231; *Ham v. Kornegay,* 85 N. C., 121; *Temple v. Williams,* 91 N. C., 91; *Austin v. Austin,* 132 N. C., 264.

THOMAS A. SHARPE v. J. N. M'ELWEE.

1. Where a petition for a *certiorari* sets out that the petitioner was detained at home by violent sickness when his cause came up in the county court for trial, and afterwards, during the whole of the term, and that after judgment his counsel prayed and obtained an appeal to the Superior Court, upon condition of his giving security for the appeal, which he failed to do by reason of his detention at home, it was *Held,* that these facts were sufficient to rebut the idea of his having abandoned his right to appeal, and entitled him to a *certiorari.*
2. Where a judgment had been rendered against a surety on a bail bond in the county court, and he filed a petition for a *certiorari* in the Superior Court, stating that he expected to be able to discharge himself from liability by the next term of the court by a surrender of his principal, it was Held, that this statement did not render him obnoxious to the charge of appealing merely for delay.

APPEAL from an order dismissing a petition for a *certiorari,* heard before *Dick, J.,* at last Fall Term of MECKLENBURG.

The petition discloses the following facts: The petitioner and one Cook were special bail for one James Whitesides. A judgment was obtained against Whitesides in the county court of Mecklenburg, upon which execution issued and was returned *"nulla bona."* (116)

A *scire facias* then issued against the petitioner and Cook. When the *scire facias* was executed upon the petitioner he employed counsel, who appeared and entered his pleas at January Term, 1859. The cause was then continued until April Term, 1859, when petitioner attended court and spoke to his counsel about his said cause. This occurred on Tuesday of the term; on Tuesday evening he returned home, intending to return to the courthouse during the week to attend to the said cause; that on the same evening he was taken violently sick, and was unable to return to town or attend to any business during the remainder of the week; that when his cause was reached his counsel was not informed of his sickness, and, being compelled to try the cause, judgment was obtained against petitioner and Cook; that his counsel prayed an appeal from this judgment to the Superior Court, which was granted and entered of record, but that petitioner failed to give security on account of his absence, and that his said absence was occasioned solely by the sickness aforesaid. The petition further states that petitioner expected to be able to discharge himself as bail by surrendering his principal by or before the next term of court.

Upon the return of the writ the defendant moved to dismiss the petition. Motion allowed. Petitioner appealed to this Court.

Wilson for petitioner.
Lowrie for defendant.

PEARSON, C. J. Where an appeal is not prayed for, the *certiorari* is not a matter of course, and the court will exercise a discretion in regard to the application. In such cases the petition must account for the fact why an appeal was not prayed, and there must be an (117) affidavit of merits, setting out the facts on which the party founds his belief that he has a good defense, so as to satisfy the court that his belief is well founded. Where an appeal is prayed for, and the court refuses to allow it, or the party is unable to give the security required by law, the *certiorari* is granted as a matter of course; *Bledsoe v. Snow,* 48 N. C., 99; *McConnell v. Caldwell,* 51 N. C., 469. It is, in effect, a mere application to be allowed to file an appeal bond *nunc pro tunc.*

In our case, an appeal was prayed for and granted upon giving an appeal bond according to law, and the case did not come up, because the bond was not given. So, the only question is, did the party fail to give the bond because he had abandoned his right to appeal, or because he was unable to procure the security required by the law, so as to acquit him of laches? Upon this point, the petition and affidavit are entirely satisfactory, for the petition sets forth that the defendant "attended court, and went home, intending to return during the week and attend to his case, but was taken violently sick and was unable to return or attend to any business during the rest of the week." This accounts for his not giving the bond, and excludes all idea of his having abandoned his right to appeal, and fully acquits him of any imputation of laches. As a matter of course, the party ought to be put in the same condition as if the appeal had been brought up in the regular way.

It was objected on the argument that the petitioner, by his own showing, had no defense at the time the judgment was rendered against him, and took the appeal because he expected to be able to discharge himself as bail by surrender of his principal by or before the term of the Superior Court to which the appeal was prayed, and this, as was insisted, proved that the appeal was taken merely for delay, and should, therefore, be made an exception to the general rule above stated. In support of this position, *Betts v. Franklin,* 20 N. C., 602, was relied on. It is true the petitioner admits he had no defense at the time the judgment was rendered in the county court, but it does not follow that the (118) appeal was taken merely for delay. On the contrary, the avowed object for appealing was because the party expected to have a good defense in the Superior Court, and to be then and there able to avail himself of his right to be discharged by the surrender of his principal, according to the provision of the statute made in favor of bail. So, the appeal was not for delay, and no reason can be suggested why one who is not in default should be deprived of an opportunity to

make available a defense which is given to him by law, and should not be at liberty to extend the time by appeal or *certiorari* as a substitute for an appeal, as far as he is entitled to do, according to the course of the courts, without being obnoxious to the charge of appealing merely for delay.

Betts v. Franklin is not in point. No appeal was prayed in that case, and being on a *ca. sa.* bond, the party could not afterwards discharge himself by a surrender of his principal. So, he did not expect to be able to make a defense in the Superior Court, and the *certiorari* could answer no other purpose but to delay judgment. The general remarks made by the Court in that case must be referred to circumstances then presented, and have no application to the case now under consideration, which is peculiar, because of the right given to bail to make a surrender at any time before he is fixed with the debt.

There is error. The judgment dismissing the *certiorari* is reversed, and the case should be put upon the trial docket.

PER CURIAM. Reversed.

Cited: Vinson v. R. R., post, 120; *Watson v. Pearson,* 83 N. C., 311.

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(119)

JAMES A. VINSON v. THE NORTH CAROLINA RAILROAD COMPANY.

Where the president of a railroad company was informed that a suit was about to be brought against his company, before a justice of the peace, and believing that a recovery in such suit would be unjust, gave instruction to the most convenient station agent to attend the trial, and in case of a recovery against the company to appeal to court, and such was a diligent and faithful officer, but from ignorance of the law, failed to procure security for the appeal, it was *Held*, that there was no such laches on the part of the president as deprived the company of a right to a *recordari*.

PETITION for a *recordari*, heard before *Heath, J.*, at last Fall Term of JOHNSTON.

The facts appearing from the pleadings and proofs are: That Charles F. Fisher, who is the president of the North Carolina Railroad Company, having been informed that suit was about to be brought before a justice of Johnston County against the company by the plaintiff Vinson for damages to stock, and being of opinion that the said Vinson had no just right to recover damages for the alleged injury, gave directions to one Millinder, who was a station agent, in case the suit was

brought and decided against the company by the magistrate, to take an appeal; that Millinder attended the trial before the justice of the peace and resisted the claim on behalf of the company, but that the justice, nevertheless, gave judgment against the company for ninety dollars, damages and costs, whereupon, Millinder prayed an appeal to the next county court, but from ignorance of the law in this respect he failed to give security for the prosecution of the appeal, and after the expiration of ten days execution issued on the justice's judgment for the amount recovered. Millinder was the officer of the company on whom notice was served to institute the action, and attended the trial in person. Mr. Fisher, the president, lived in a distant county and was so much engrossed with the more important duties of the company as not to be able to attend in person to matters of this kind, but left them usually to the agents most convenient to the scene of the transaction; he had been informed and was warranted in believing that (120) Millinder was a faithful and diligent agent in his management of the business of the company intrusted to him.

The prayer of the petition is for a *recordari,* and for a *supersedeas* to stop the collection of the execution.

The order for these writs having been made and the case brought up, and motion being made to place it on the trial docket for a new trial, his Honor disallowed the motion, and the defendant appealed.

G. W. Haywood and Strong for plaintiff.
B. F. Moore and Dortch for defendant.

PEARSON, C. J. An appeal having been prayed for, the case falls within the principle of *Sharpe v. McElwee, ante,* 115, "where an appeal is prayed, and the party accounts in a satisfactory manner for his failure to prosecute it, so as to repel the inference of an intention to abandon it and acquit himself of laches, the writ of *certiorari* or *recordari* will issue 'as a matter of course' in order to give him the benefit of his right of appeal."

By the affidavit of Mr. Fisher, it is clearly established that it was the intention of the North Carolina Railroad Company to contest the alleged right to recover damages. So, the inference of an intention to abandon the right of appeal is repelled. In this connection, the "affidavit of merits," which is full, though not absolutely necessary (as an appeal was prayed), is relevant and has a convincing effect.

The question, then, is, Does the railroad company acquit itself of laches, by the matter set out in the petition and affidavit of Mr. Fisher? In other words, does Mr. Fisher, who is the president of the company and had notice of a claim, which he believed not to be well founded and

was fit to be controverted by the company, acquit himself of laches, by the fact that he gave positive instructions to Millinder, the station agent, to attend the trial before the justice and take an appeal on behalf of the company, if judgment should be rendered (121) against it?

The petition sets forth the fact, that Millinder had the reputation "of being a faithful and diligent agent," and this Court is of opinion that Mr. Fisher was well warranted in taking it for granted that Millinder was aware of the fact that it was necessary in all appeals to give security, and, consequently, he was not guilty of laches in omitting to tell Millinder, in so many words, that he must provide security for the company, in case he had to take an appeal.

The fact that Millinder, being an officer of the company, had imbibed the impression that the North Carolina Railroad Company was an institution of such importance that it was not required to give security for an appeal like an ordinary individual was a matter which President Fisher, in the exercise of ordinary diligence, could not be expected to have anticipated.

The objection that ignorance of the law is no excuse, however applicable it may be in reference to Millinder, tends to relieve Mr. Fisher from the charge of laches. For it is based on the presumption that every one knows the law, and, therefore, he was justified in presuming that Millinder knew that it was necessary for the company to give security, and as the law allows ten days to give security, he was also justified in presuming that if Millinder found any difficulty in procuring security he would be duly notified of the fact.

As there was a *bona fide* intention to appeal, and no laches on the part of the president, the company should not, under the circumstances, be deprived of the right. There is error. Judgment dismissing the petition reversed. This opinion will be certified to the end that the case may be transferred to the trial docket.

PER CURIAM. Reversed.

Cited: *Wade v. New Bern,* 73 N. C., 319; *S. v. Griffis,* 117 N. C., 714.

(122)

JOHN H. DRAKE v. ABSALOM B. BAINS.

Upon a question of warranty or no warranty, it was *Held* to be error in a judge to charge that the fact that the alleged warrantor was acting in the capacity of an executor was not a matter for consideration of the jury.

CASE tried at JOHNSTON Fall Term, 1860, *Heath, J.,* presiding, and in which plaintiff declared in deceit and false warranty, on the sale of a slave by defendant to plaintiff.

One Drake testified that prior to the institution of this suit he was at a public place, at which plaintiff and defendant were both present; that speaking of the alleged sale, plaintiff said to defendant, "Bains, you know you warranted that slave to me"; to which defendant replied, "What if I did," or, "If I did, it makes no difference, as my lawyer tells me an executor cannot warrant a slave."

Another witness swore that on another occasion he heard plaintiff say to defendant, "You have acknowledged to me that you warranted Jack to be sound," or, "That you told me he was sound," and defendant replied, "Yes; I have always admitted that."

The slave Jack was proved to have been in the possession of defendant for some time prior to September, 1856, at which time he passed into plaintiff's possession.

One Thorn swore he heard Drake tell the defendant on the day of the sale that he would take Jack at $900 and his wife and children at $1,900; to which proposition defendant assented. Drake said, "I am in a hurry; I cannot settle now; we can do that at any time." Drake then turned to the slave, in defendant's presence, and said, "Get your things, your wife, etc., and go to my house"; he heard nothing said of any warranty.

One Harrison swore that he was called upon on the day of the sale to value the slave and that he valued him at $900.

One Strickland swore that he was present on the day of the sale, and heard plaintiff tell defendant he would take Jack at the valu- (123) ation of $900. He heard nothing said about warranting his soundness.

Defendant further proved, that at the time of the alleged sale he acted as the executor of one Sherrod; that it was his duty, and that of a coexecutor who qualified to Sherrod's will, to sell the slave after the expiration of a life estate, which had just expired after an existence of seven or more years, and that his coexecutor was present at the time of the alleged sale; there was no evidence that it was made known to the plaintiff that defendant was acting as executor.

There was much testimony tending to prove the slave unsound at the time of the sale.

The judge charged the jury, among other things, that "if there was no sale, or if there was a sale and no warranty of soundness, then their verdict must be for defendant, and in this connection and under the circumstances, they need pay no attention to the fact that the defendant was acting as executor." Defendant excepted.

There was a verdict for plaintiff. Judgment. Appeal by defendant.

Miller, Moore, A. M. Lewis, and Rogers for plaintiff.
Dortch and Strong for defendant.

PEARSON, C. J. The evidence in support of the allegation that the defendant, at the time of the sale and as a part of it, warranted the slave to be sound (for, if made afterwards, it was *nudum pactum*), was very slight. Two witnesses, who were present at the time of the sale, say "they heard nothing said about a warranty," and one of the two witnesses who depose to the conversations which are relied on as furnishing an inference that there was a warranty recites the words in the alternative, and, in one aspect, they do not furnish any evidence of a warranty, *i. e.,* "You have always acknowledged to me that you warranted Jack to be sound," or, "that you told me he was sound."

This evidence is referred to for the purpose of showing that, in respect to the question, did the defendant, at the time of the sale, warrant the slave to be sound, it was of the highest importance that no room should be given for misapprehension on the part of (124) the jury.

This Court is of opinion that the defendant has good ground of complaint against that part of his Honor's charge, in which he says, "And in this connection and under the circumstances they need pay no attention to the fact that the defendant was acting as executor." We confess we are unable to apprehend the idea his Honor meant to convey by these words. An executor may bind himself individually by a warranty of soundness in selling a slave of the estate; there is no doubt of that; and it only required direct words to express it. "In this connection," that is, in reference to the allegation of a warranty, "and under the circumstances"—What circumstances? All the circumstances attending the dealing? If so, in the opinion of this Court it is very needful that the jury, in passing on the question of warranty or no warranty, should take into consideration the fact that the defendant was acting as executor, for it was a circumstance having an important bearing on the question. One circumstance was that the warranty was not proved by direct testimony, and was left as a mere matter of inference, to be drawn from a recital of conversation, in respect to which (however

truthful the witness might be) there was danger of misapprehension. Another was, that the price of the slave had been fixed by a previous valuation, and there was no enhancement of the price by reason of the supposed warranty. Another was, that the coexecutor of the defendant was not required to join in the warranty. "Under the circumstances," therefore, it was a matter for the most serious consideration of the jury, why should the defendant have volunteered to make himself personally liable by adding a warranty as a part of the trade. There is

PER CURIAM. Error.

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(125)

D. F. THOMPSON v. JOHN ANDREWS.

Where the plaintiff delivered a quantity of wheat to the defendant, with an injunction to keep it until called for, to which he assented, it was *Held*, in an action of *trover*, brought to recover its value, that it was a valid defense for the defendant to show that the title to the wheat was in a third person, to whom he had delivered it before the plaintiff's demand and suit.

TROVER, tried before *Dick, J.*, at June Special Term, 1860, of ORANGE.

The facts material in this case are as follows: The action was brought to recover the value of forty-two bushels of wheat. The plaintiff introduced a witness, one Wright, who testified that in 1854 he was told by the plaintiff to take his (plaintiff's) thresher and go and thresh out one Pickard's wheat; that he went and threshed out the wheat on Pickard's land, and on the following day, in obedience to the plaintiff's instructions, he carried the wheat to defendant's mill and told him to keep it until plaintiff called for it, to which the defendant assented.

The defendant then offered a witness to prove that Pickard was the owner of the wheat in question, and that it had been ground into flour, by his order, and taken from the mill by him, and that this occurred before any demand was made by the plaintiff on the defendant for the same. The plaintiff objected to this evidence, upon the ground that the defendant, having accepted the wheat as a bailment from the plaintiff, was estopped to deny the plaintiff's title to it. His Honor being of opinion with the plaintiff, rejected the evidence. Defendant excepted.

The defendant denied the contract of bailment with the plaintiff as sworn to by Wright, and offered to show that the title was in Pickard, as evidence from which the jury might determine with whom the contract of bailment had been made by defendant. His Honor ruled out the evidence, upon the ground that evidence of the title could furnish no aid to the jury upon the question of bailment. Defendant excepted.

Verdict for plaintiff. Judgment. Appeal by defendant.

Graham for plaintiff. (126)
Phillips for defendant.

BATTLE, J. We are clearly of opinion that his Honor erred in rejecting the testimony which was offered on the trial, to show that Pickard, and not the plaintiff, was the owner of the wheat in controversy, and that he had demanded and received it from the defendant before the plaintiff's demand and suit. If Pickard were the real owner of the article, could the plaintiff's act of bailing it to the defendant prevent Pickard from claiming it and recovering its value, if it were withheld from him by the defendant? Surely not. No man can be thus deprived of the right of demanding his property from any person who has possession of it and retains it against his will. The refusal of the possessor to deliver it upon such a demand would be evidence of a conversion, for which, if unexplained, the owner would be entitled to recover the full value of his property. If, then, the possessor cannot upon the ground of his being the bailee of another person, resist the claim of the true owner, his surrender of the article to the owner must necessarily be a defense against the action of the bailor, founded upon the charge of a conversion of the property. It may be that the bailor might recover something in an action of *assumpsit* for the breach of the contract of bailment, but the law cannot be so hard as to render the bailee liable for the full value of the article, both to the owner and bailor, upon the ground of a conversion as to both. The true doctrine on the subject is announced in *Pitt v. Albritton,* 34 N. C., 74, and is in accordance with the view which we have taken of the present case.

There are, indeed, some cases, in which the true owner is not known and where there is no probability of his appearing and making claim, where the courts would sustain the action of *trover* in favor of a bailor against a wrongfully recusant bailee. See *Armory v. Delamere,* 1 Stra., 505; *Craig v. Miller,* 34 N. C., 375. In such cases, to allow the *jus tertii* to be set up as a defense to the action of the bailor would enable the bailee to keep the property without accounting for its value to anybody, and thus be rewarded for his breach of faith. But (127) the rule of law must necessarily be different where the owner comes forward and demands the article and is ready to prove a title which cannot be gainsaid or resisted. Such was the present case, and the judge ought to have permitted the defendant to show, if he could, that he had delivered the article to the true owner, and, consequently, had not converted it as against his bailor.

PER CURIAM. *Venire de novo.*

Cited: Skinner v. Maxwell, 66 N. C., 47.

WILLIAM H. HUGHES v. JOHN B. DEBNAM.

1. Where the charge of a judge is in favor of a party, such party cannot make it a ground of objection.
2. Where there is doubt whether or not a subscribing witness to an instrument signed it before the donor, it was *Held*, that in the absence of proof to the contrary, the presumption is that the donor signed it first.
3. Slight and immaterial mistakes in the registration of a deed of gift will not avoid it.
4. A square piece of paper affixed with a wafer to an instrument, opposite to the name of the donor, in the place where the seal is usually placed, will, in the absence of proof that the donor intended otherwise, be valid as a seal.
5. Where, in an action brought to recover the value of certain slaves, the plaintiff sought to set aside a conveyance of them to a daughter, and offered evidence to show that the donor had grandchildren who were poor and in need of her bounty, it was held competent for the defendant to introduce in evidence, in order to rebut this testimony, a conveyance by the donor of other property to these grandchildren.
6. Section 16, chapter 37, Rev. Code, makes a certified copy of a registered deed competent evidence.
7. It is sufficient if a subscribing witness, at the execution of the instrument, had mind enough to understand the obligation of an oath and to prove the capacity of the donor and his execution of the deed.

TROVER for the value of certain slaves, tried before *Saunders,* (128) *J.*, at Fall Term, 1860, of GRANVILLE.

The plaintiff offered evidence, tending to show that the slaves in controversy were the property of his intestate, Lucy Coghill, and were in her possession at the time of her death, and that the defendant converted the same after her death, and that they were of a certain value.

Defendant claimed the slaves under a gift from the intestate, Lucy Coghill, to his wife, who was the daughter of intestate, and in support of his claim offered a writing, dated 25 February, 1850, purporting to convey the slaves for love and affection to defendant's wife, and to have been executed by intestate and attested by one William J. Andrews. To prove the said writing, defendant called one Kittle, who testified that the signature purporting to be Lucy Coghill's was genuine, and that William J. Andrews was dead, and that the signature purporting to be his was genuine. There was upon the paper-writing, just under the name of the attesting witness Andrews an appearance that something had been written and cut off. The witness Kittle, on his examination by defendant, stated that the remains of what had been cut off were, in his opinion, the top of the letters of the name of Lucy Coghill, the donor,

and defendant's counsel insisted that such was the fact. Plaintiff insisted that, if that was true, it was a spoliation and avoided the instrument, unless the defendant could explain it away. Defendant's counsel insisted, for explanation, that supposing it to be so, the name was put there by mistake and cut off before the execution of the paper.

The judge charged the jury that it was all supposition, and that there was no evidence that any name ever had been there or ever had been cut off, except what had appeared from the face of the paper itself, but that if the jury should believe, from their inspection of the paper, that there had been a name to the paper, put there as a witness, and that it had been cut off, that would be such a spoliation as would destroy the instrument, and that was a fact for the jury. (129)

Plaintiff contended that Andrews' name was the first under the attesting clause, and that some other name was put under his, and that the presumption was that the lower name was last in order of time, and that if that name was Lucy Coghill, as insisted on by defendant, then the presumption was that Andrews attested before Lucy Coghill executed it, and that that was not a sufficient attestation, and asked his Honor so to instruct the jury, which he declined to do. Plaintiff excepted.

When this paper-writing was offered, plaintiff objected that it had not been registered. Defendant introduced the public register and his book, from which it appeared that the writing had been correctly copied upon the book, except that the word "said," preceding the word "property," was not upon the book, and was in the writing, and except that at the end of Lucy Coghill's name on the book, there was written the word "seal," with a scroll around it. The writing, when offered, had not the word "seal" and the scroll, but in its place had a piece of paper about three quarters of an inch square pasted on with a wafer. His Honor admitted the writing in evidence. Plaintiff further contended, that the square piece of paper and wafer were not a seal, and asked his Honor so to charge, which he refused to do. But charged the jury, that the square piece of paper and wafer were, themselves, a seal, if they believed it had been so intended by the donor. Plaintiff excepted.

Defendant had asked the witness Kittle if Lucy Coghill was not much attached to defendant's wife. He answered, yes. Plaintiff then asked if she had not other children and grandchildren to whom she was equally attached, some of whom, especially her McCraw grandchildren, were poor, and whether the defendant was in easy circumstances. To both of these questions he answered, yes. Defendant then offered in evidence a copy from the register's book of a deed of gift of other property by Lucy Coghill to certain of her McCraw grandchildren, dated 5 March, 1850. Plaintiff objected to this evidence upon the two grounds:

(130) First, that the original would not be evidence, and, second, even if the original would be, a copy was not. His Honor admitted the evidence. Plaintiff excepted.

The plaintiff offered evidence, tending to show that the attesting witness Andrews was, before and at the time of the attestation, of insane mind, and asked his Honor to instruct the jury, that if he was insane at the time of attestation, then he had not attesting capacity and was not a competent attesting witness; and further, that if the jury believed from the evidence that the mind of Andrews, at the time he subscribed the paper-writing, was diseased and unsound, then he was incompetent as a subscribing witness, and the paper-writing was void, even though he might have understood the obligation of an oath and been able, if then examined as a witness, to tell that Lucy Coghill signed the paper writing and he subscribed it as a witness; and still further, that if he was insane, he had not legal capacity to attest the paper-writing, no matter what else he could or could not do. His Honor refused the instructions, and charged the jury as follows: "The act of Assembly requires a gift of slaves to be in writing, signed by the donor, and subscribed by a credible witness. That if the witness had capacity to understand the obligation of an oath, so as to be capable of proving the execution of the instrument and the capacity of the donor, he would be a competent witness. But if the jury should believe the mind of the witness to have been so far affected at the time as to have rendered him incapable of understanding the obligation of an oath, then he was not a competent witness, and they should find against the deed. Plaintiff excepted.

Verdict and judgment for defendant. Plaintiff appealed.

Gilliam, Lanier, and Reade for plaintiff.
Miller, Graham, and Eaton for defendant.

BATTLE, J. It is a matter of regret with us that we have not been favored with an argument for the plaintiff, for by the aid of such an argument we might have been enabled to perceive more force in his exceptions than we have ourselves as yet discovered. The errors (131) assigned in the bill of exceptions have all been considered by us, and in not one of them do we find anything of which the plaintiff has any just cause of complaint.

The exception, founded upon the supposition that there were two subscribing witnesses to the alleged deed of gift, and that the name of one of them had been cut off by the defendant, cannot be made a ground of objection, because upon it the charge of his Honor was in favor of the plaintiff. The other objection urged in connection with the first,

that from the inspection of the instrument it is to be presumed that the name of the subscribing witness Andrews was put there before the execution by the donor, is equally unavailing to the plaintiff, because the presumption was just the reverse, to wit, that in the absence of proof to the contrary, all things connected with the execution and attestation were rightly done. *Omnia presumuntur rite este acta.*

The exception that the deed was not registered because there were some mistakes in the registration is completely met and answered by *Van Pell v. Pugh,* 18 N. C., 210, where it was held that slight and immaterial mistakes in the recording of a grant will not avoid it. Here, the mistakes were both slight and immaterial, and we know of no difference of principle in this respect between the recording of a grant and the registering of a deed of gift.

The objection to the piece of square paper and wafer being taken as a seal has no foundation whatever. It is certainly as much a seal, when intended by the party as such, as a scroll with the word "seal" written in it can be; and there was no evidence that it was not put there as the seal of the donor when she signed the instrument. In the registration of the instrument the register could do no more than make a symbolical seal, to stand as a copy of the actual seal annexed to the original deed.

The original deed of gift from the donor to some of her grandchildren would have been competent as evidence in reply to the proof offered by the plaintiff that they were poor and needed the aid of their grandmother's bounty. In *Warren v. Wade,* 52 N. C., 494, (132) similar evidence was held to be admissible to repel an inference sought to be raised, that the deceased, whose will was offered for probate, had been induced to execute the script, by the exercise of undue influence over him, because he had given his property away from the person for whom he was under a primary duty to provide. As the original deed would have been competent, chapter 37, section 16, Rev. Code, makes a duly certified copy from the register's books also competent as evidence.

As to the exception in relation to the insanity of the subscribing witness at the time of the execution of the instrument, we hold that the charge of his Honor was substantially correct. If the witness had at that time mind enough to understand the obligation of an oath and to be able to prove the capacity of the donor and her execution of the deed, it was all that the law required; see 1 Green. on Ev., sec. 365; Archbold Crim. Pl., 135. There is

PER CURIAM. No error.

STATE v. MOSES SMITH.

The maxim of law, "*falsum in uno, falsum in omnibus*," does not prevail in courts of law, the fact of the witness having sworn falsely as to one matter going to the credibility and not to the competency of his testimony as to other matters.

MURDER, tried before *Saunders, J.*, at last Fall Term of FORSYTH.

It appeared upon the trial, that the prisoner and deceased had been quarreling during the morning of the day on which the fatal (133) blow was given. A witness, one Martin, was introduced as a witness for the State, who testified as to facts occuring between the prisoner and deceased in the morning, when he, witness, left; he further swore that he returned in the evening, just before the commission of the homicide, and that he witnessed it. Evidence was offered by prisoner, tending to show that the witness swore falsely as to his witnessing the homicide. The counsel for the prisoner asked the court to instruct the jury, that if they should believe that the witness had sworn corruptly falsely as to his presence, they should reject his testimony altogether.

The court charged the jury, that having heard the whole of the witness' testimony, it was for them to decide as to the credit they would give him. Should they be satisfied that he had not been present, and had sworn corruptly falsely in that particular, they would have to decide whether they could confide in anything he had sworn to. Defendant excepted.

Verdict, guilty. Judgment. Appeal by defendant.

Attorney-General and W. L. Scott for State.
McLean and Starbuck for defendant.

PEARSON, C. J. The charge of his Honor in the court below is in strict accordance with the principles announced in *S. v. Williams*, 47 N. C., 257.

Upon the reëxamination of the subject, which was elicited by the discussion of the case now under consideration, we are entirely satisfied that the conclusions there arrived at are fully sustained by authority, analogy, and principle.

The maxim, "*falsum in uno*," etc., which obtains in the civil law, and which is acted upon by the ecclesiastical courts and the courts of admiralty and the courts of equity, which are fixed tribunals for the decision of questions of fact as well as questions of law, has not been adopted in the common-law courts, where all issues of fact are tried by a jury, and where a plain line of demarcation is kept up between

matter which affects the competency and that which affects the (134) credibility of witnesses. It is the exclusive province of the jury to pass on the credit of a witness. So, if he has made a different statement when not on oath and when on oath, or if he is contradicted by other witnesses on the same trial, or if he admits that he has committed murder or burglary or larceny, as when an accomplice is examined, the principle is the same; such matter goes to his credit and not to his competency; his testimony is, therefore, to be weighed by the jury, and they may convict upon it, provided it carries to their minds full and entire conviction of its truth.

The subject is so fully discussed in the case referred to as to make it unnecessary to enter upon it again; we are convinced that such is the rule of law.

There is

PER CURIAM. No error.

Cited: *S. v. Brantley,* 63 N. C., 519; *S. v. Hardee,* 83 N. C., 622; *Horah v. Knox,* 87 N. C., 492; *Terrell v. Broadway,* 95 N. C., 559; *Ferebee v. R. R.,* 167 N. C., 301.

JOHN F. RODMAN v. D. A. DAVIS.

A suit at law cannot be removed into this court by consent.

PETITION for a *certiorari,* heard before *Dick, J.,* at Fall Term, 1860, of ROWAN.

Upon the hearing of the petition, answer, and affidavits, his Honor dismissed the petition. It was agreed that the plaintiff should have until 1 January, 1861, to file affidavits. Both the counsel of the plaintiff and defendant agreed to transfer the case to the Supreme Court, upon the facts as contained in the petition and answer.

In the view of this case taken by the Court, it is deemed unnecessary to set out the contents of the petition and answer.

Miller and Kittrell for plaintiff. (135)
Blackmer for defendant.

MANLY, J. This case seems to have been brought into this Court under a double misapprehension—first, as to the analogy between it and a case in equity, and, secondly, as to the rule in equity for removing cases in this Court.

The case, after judgment below, has been sent here by consent. This cannot be done. If it were a case in equity, a removal by consent, after a decree below, for the purpose of revising that decree would be inadmissible. An appeal is the remedy.

Our jurisdiction in law cases is entirely appellate, and with respect to a case like the one before us, the propriety of the judgment in the Superior Court would be tested by a consideration of the evidence before that court alone. We have no means of knowing what that evidence was. No case is sent up by the court, and inasmuch as it was consented that petitioner might file affidavits until the first of January, 1861, we are unable to say which affidavits were filed before and which after the judgment below. But independently of this difficulty, we consider the mode itself by which the case has been brought into the Court irregular, and this forbids our taking jurisdiction of it. A case at law cannot be sent here by consent, before judgment, nor after judgment.

In the latter case (after judgment) it is brought up by appeal, or by proceedings in the nature of an appeal. The statute giving law jurisdiction to this Court, Rev. Code, chap. 33, sec. 6, uses the language, "All questions of law brought before it by appeal or otherwise from the Superior Court." The word "otherwise," in this connection, has been practically held to mean nothing more than proceedings in the nature of an appeal, such as a *"certiorari."*

No instance is known, as I am informed, of a case brought (136) here in any other way.

To hold that questions could be brought up by the consent of parties, irrespective of the coöperation of the court, would be totally inconsistent with its dignity, and with the true, orderly, and congruous character of its records.

Another difficulty in the course pursued in this case is that the judgment of the Superior Court is not vacated, and, but for a faithful adherence to some understanding of the parties to the contrary, the case might be finally disposed of while we are considering in this Court the questions of law said to be involved in it.

PER CURIAM. Petition dismissed.

Cited: Rush v. Steamboat Co., 68 N. C., 73.

STATE v. WILLIAM HARRIS.

Where, upon the arraignment of one for murder, it was suggested that the accused was a deaf-mute, and was incapable of understanding the nature of a trial and its incidents and his rights under it, it was *Held*, proper for a jury to be empaneled to try the truth of these suggestions, and on such jury responding in the affirmative to these suggestions, for the court to decline putting the prisoner on his trial.

PRELIMINARY ISSUE on a case for murder, tried before *Bailey, J.*, at Spring Term, 1860, of GRANVILLE.

The defendant was indicted for the murder of one Richard Fowler, and upon his arraignment it was suggested that the prisoner was mute by the visitation of God, having been deaf and dumb from his birth. This fact was admitted by the counsel for the State, who moved the court to direct the clerk to enter his plea of "not guilty," and that the trial should proceed on that issue. The defendant's (137) counsel then objected, that he was not able to plead to the indictment and was insane, and, on argument, the court refused the motion of the solicitor for the State, and ordered that a jury inquire: First, whether the prisoner, William Harris, is able to plead to the indictment preferred against him. Secondly, whether the said prisoner, William Harris, is now sane or not. On the trial of the issues directed to be submitted to the jury in this case the prosecution called sundry witnesses, who testified, in substance, that the prisoner had been a deaf-mute from his infancy; that he was then between fifty and sixty years of age, and had a comfortable estate, which had always been under the management of a guardian. That when the prisoner was about fourteen years of age, his mother, with whom he lived, intermarried with one Moody Fowler, by whom she had a family of children, among whom was Richard Fowler, the deceased; that the prisoner continued to reside at the house of his step-father after he arrived at the age of majority, and the guardian of his estate paid for his board; that Richard Fowler, his half-brother, was an inmate of the same house, and at the time of the homicide, and for some years before, was a married man, and his wife, after the death of his mother, some ten years since, had been the housekeeper of the family; that some three or four years before the homicide, prisoner ceased to lodge in the house of Moody Fowler, and of his own accord, first took lodging in a neighboring barn, then in a shelter, which he erected by the side of a log, and afterwards, about two years before the homicide, he constructed a small hut about the fourth of a mile distant from the house of Moody Fowler, in which he lodged until brought to prison for the alleged murder; that these lodgings were all very rude and uncomfortable, and especially the first

two had exposed him to severe suffering from cold; that during all this time he continued to get his food at the house of said Fowler, and either ate it there or carried it with him to his lodgings; that he was not required to work, but sometimes had worked on the farm and (138) did his work intelligently; that he spent much of his time in fishing, both with hooks and traps, the latter of which he constructed and placed in the water himself, and in hunting with a gun; that he could stock guns skillfully, and did work of that kind for himself and several neighbors, from whom he received compensation in money, and varied his charges according to his opinion of their ability to pay; that he had also made intelligent and useful suggestions to millwrights when engaged in the mechanical work of their trade, and one of these, a witness, testified that, in his opinion, if the prisoner had been educated, he would have made one of the first mechanics in the country. These witnesses all testified that they considered him a sensible person; that, in their opinion, he knew right from wrong and that it was a crime to take the life of another person. His step-father, Moody Fowler, testified that himself and others had learned to communicate with the prisoner by means of signs; that prisoner knew it was wrong to take life, and that witness himself had signified it to him very often before the homicide, and that the prisoner had a sign to indicate putting to death by hanging, which he often signified would be inflicted on a person who should kill another. He also stated that he was a man of violent temper, and generally carried his gun, even when he came from his hunt to the house for his food, and some four or five weeks before he had attempted or offered to shoot the deceased in the dining room of his house, when the witness interposed and prevented him. Charity Fowler, the widow of the deceased, stated that on the evening of the homicide, her husband, with a friend, had taken supper in the dining room and walked into another apartment of the house, leaving her at the table; that the prisoner soon afterwards came in with his gun, seeming to be very angry; that he sat down and declared to her, by a sign, that he would shoot deceased; that she remonstrated with him that he must not, but he persisted in his declaration. She then called to her husband, in the other room, and told him not to come in there; that the prisoner said he would shoot him; that the deceased inquired what she said, and she repeated her language, (139) as he walked into the dining room, when the prisoner fired and the deceased fell and died immediately; that prisoner went off then to his hut and did not come to the house in all the next day for his food, which he never failed to do before; that on the day following he came, when he was arrested, deprived of his gun, and carried to prison.

The witnesses, also, severally testified that they believed the prisoner

knew that he was then in court, because of having killed Richard Fowler. When asked whether they believed he could be made to understand the contents of the bill of indictment, some of them answered that they believed he could, but no one professed to be able to communicate them for him; others doubted as to his ability to understand this, and none of them supposed that it could be communicated to him that he had the rights of challenge allowed by law, and that he could be made to comprehend the testimony of the witnesses and cross-examine or contradict them.

The prisoner's counsel also called several witnesses, who testified that the prisoner had never been educated in any school for deaf-mutes—seemed to have no idea of responsibility to the Supreme Being—never was known to attend church or to have any sense of religious duty; spent the Sabbath frequently in fishing and hunting, and had no idea of moral responsibility. The witnesses, with the exception of two, stated that they believed that he knew right from wrong, and that it was wrong to kill the deceased. They did not believe that he could be made to understand the contents of the indictment, or why he was brought into court.

Mr. Cooke, the principal of the asylum for the deaf and dumb in this State, was examined, and said that he had endeavored to communicate with the prisoner by natural signs, and found him capable of narrating occurrences which he had witnessed, but could not discover that he had any idea of moral or religious responsibility; that, in his opinion, he could not be made to comprehend the indictment or his rights of challenge or cross-examination; that deaf-mutes were very rarely idiotic, and he believed the prisoner had the capacity of ordinary (140) uneducated deaf-mutes.

The counsel for the State moved his Honor to instruct the jury: First, that if, in their belief, at the time of the homicide the prisoner knew right from wrong and that it was wrong to take the life of the deceased, that they should find both issues against him. Secondly, that if at this time they believed the prisoner knew right from wrong and it was wrong to take the life of the deceased, they should find both issues against him.

The prisoner's counsel moved the court to charge the jury, that if they believed from the evidence, that the prisoner is now of unsound mind, so that he cannot understand the charge against him in the indictment and cannot understand, or be made to understand, the nature and purpose of the trial and of his rights therein, they should find the issues in his favor.

The court refused the instructions prayed by the State, and gave those prayed by the prisoner's counsel. The solicitor excepted. And the jury, under the instructions aforesaid, found both issues in favor of the defendant.

Whereupon, the court reciting that it appeared to him that the said Harris was incapable of being brought to trial, ordered that this finding of the jury should be certified to the county court of Granville, to the end that provision should be made for his safe-keeping in the asylum for the insane or otherwise, according to law. From this order, the solicitor appealed.

Attorney-General, with whom was Graham for the State.
Miller and Reade for defendant.

BATTLE, J. The proceedings in this case are a novelty in the adminis tration of criminal justice in this State, and but for the light which is thrown upon them by some recent decision in that country from which our common law is derived, we might find a difficulty in dealing (141) with them.

In *Rex v. Dyson,* which is reported in 2 Lewin Cr. Cas., 64, and also in a note to *Rex v. Pritchard,* 32 Eng. C. L., 518, the prisoner was indicted for the murder of her bastard child, by cutting off his head. She stood mute; and a jury was impaneled to try whether she did so by malice or by the visitation of God; and evidence having been given of her always having been deaf and dumb, the jury found that she stood mute by the visitation of God.

The learned judge then examined a witness on oath, who swore that he was acquainted with her, and that she could be made to understand some things by signs, and could give her answers in the same way. The witness was then sworn as follows: "You swear, that you will well and truly interpret, and make known to the prisoner at the bar, by such signs, ways, and methods, as shall be best known to you, the indictment wherewith she stands charged; and also, all such matters and things as the court shall require to be made known to her; and also, well and truly to interpret to the court the plea of the said prisoner to the indictment, and all answers of the said prisoner to the said matters and things so required to be made known to her, according to the best of your skill and understanding. So help you, God."

The witness then explained to her by signs what she was charged with, and she made signs, which obviously imported a denial, and which he explained to be so. This being done, the judge directed a plea of "not guilty" to be recorded. The witness was then called upon to explain to her that she was to be tried by a jury, and that she might object to such as she pleased; but he and another witness stated that it was impossible to make her understand a matter of that nature; though upon common subjects of daily occurrence which she had been in the habit of seeing she was sufficiently intelligent. One of the witnesses had instructed her

in the dumb alphabet, but she was not so far advanced as to put words together, and the witness swore that, though she was then incapable of understanding the nature of the proceedings against her, and making her defense, yet he had no doubt that with time and (142) paints, she might be taught to do so by the means used for the instruction of the deaf and dumb.

The judge (Mr. Justice J. Parke) then directed the jury to be impaneled and sworn to try whether she was sane or not; whereupon, the same witnesses were sworn and examined, and proved her incapacity, at that time, to understand the mode of her trial or to conduct her defense.

The judge, in charging the jury so impaneled, referred to Lord Hale, who, in his Pleas of the Crown, Vol. I, page 34, says: "If a man, in his sound memory, commits a capital offense, and, before his arraignment, he becomes absolutely mad, he ought not, by law, to be arraigned during such phrensy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot, advisedly, plead to the indictment. And if such person, after his plea and before his trial, become of nonsane memory, he shall not be tried; or if, after his trial, he becomes of nonsane memory, he shall not receive judgment; or if after judgment, he become of nonsane memory, his execution shall be spared; for, were he of sound memory, he might allege somewhat in stay of judgment or execution. But, because there may be great fraud in this matter, yet if the crime be notorious, as treason or murder, the judge, before such respite of trial or judgment, may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit." The judge then told the jury, that if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her "not sane," which they accordingly did. His Lordship, thereupon, ordered her to be kept in strict custody, under the 39 and 40 Geo. III., chap. 94, sec. 2, till his Majesty's pleasure should be known.

A similar cause occurred afterwards, before Baron Alderson (See *Rex v. Pritchard,* 7 Car. & Payne, 303; 32 Eng. C. L., 517), when he referred to *Rex v. Dyson,* and said the course which Mr. Justice Parke had pursued had been approved of by several of (143) the judges, and that he should follow it. He accordingly had a jury impaneled, and told them that there were three points to be inquired into: "First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defense; to know that he may challenge

any one of you to whom he may object, and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you think there is no certain mode of communicating the details of the trial to the prisoner so that he can clearly understand them, and be able properly to make his defense to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters." The jury returned a verdict that the prisoner was not capable of taking his trial.

We have stated these cases with more than usual particularity, because they set forth clearly the true grounds upon which a deaf and dumb prisoner, whose faculties have not been improved by the arts of education, and who, in consequence thereof, cannot be made to understand the nature and incidents of a trial, ought not to be compelled to go through, what must be to him, the senseless forms of such a trial. Whether arising from physical defect or mental disorder, he must, under such circumstances, be deemed "not sane," and of course according to the great authority of Lord Hale, he ought not to be tried. The allowance to prisoners in this State full benefit of counsel in everything connected with their trial has not been deemed sufficient to change the law as to one mentally insane, and we think it cannot have that effect in a case, like the present, of a defect of the physical faculties. The proceedings in the present case, including the instructions given to the jury by the presiding judge, are substantially the same as those in the English cases to which we have referred, and we now declare our approbation of them.

(144) It will be borne in mind, however, that when a jury is impaneled in this State, in the case of a deaf and dumb prisoner, there is no need of an issue to inquire whether he stands mute of malice, because, even if he could speak, and yet stood mute designedly, the court must order the plea of "not guilty" to be entered for him, as required by Rev. Code, chap. 35, sec. 29.

PER CURIAM. Affirmed.

Cited: S. v. Haywood, 94 N. C., 854.

JOHN R. MYERS v. S. B. CHERRY.

Where the question between the parties was, whether the plaintiff had agreed with a third party to take him for the performance of the contract sued on, instead of the defendant, and the tender of a sum of money by such third party and its refusal and the concomitant expressions of the plaintiff were relied on against him, it was *Held,* that a receipt prepared by him and offered as the condition on which he would receive the money was competent evidence.

ASSUMPSIT, tried before *Howard, J.,* at last Spring Term of BEAUFORT.

The action is brought against the defendant as surviving partner of the firm of Braswell & Cherry, and the plaintiffs declared: First, upon a special contract to pay plaintiffs for carrying the mail, as set forth in the evidence, from 1 July, 1856, to 1 October, 1856, and also in the common counts for work and labor done. Braswell & Cherry obtained a contract from the general government to carry the mails from Washington to Wilson via Greenville for the four years commencing 1 July, 1855, and ending 1 July, 1859, and they were, by terms of the contract, to carry them from Washington to Greenville by steamboat.

Plaintiffs owned a steamboat running between these points, (145) and they contracted with Braswell & Cherry to carry the mails, each way six times a week for four years, commencing 1 July, 1855, for the sum of $1,250, to be paid quarterly. Plaintiffs complied with the contract up to 1 October, 1856, and Braswell & Cherry paid up regularly each quarter for the first four quarters, but refused to pay for the fifth. Braswell died in May, 1856.

The defendant then introduced J. J. B. Pender, who testified that on 1 July, 1856, he bought of Cherry, surviving partner of Braswell & Cherry, all the horses, coaches, etc., belonging to the mail line from Washington to Wilson, and gave Cherry a bond to faithfully execute the contract with the general government; that he wrote to the plaintiffs stating the purchase, and proposing to continue the contract; that plaintiffs sent him word that they would be up and see him; that he wrote to the plaintiffs several letters and received answers, one of which letters, was as follows:

"GREENVILLE, 1 July, 1856.

"Mr. John Myers—Dear Sir: Yours of the 2d instant is received; in reply, I wish you to continue carrying the mails as heretofore, until I see you, which will be soon as I can get my business arranged here, and in the meantime, please inform me whether or not you will do so. Direct yours to this place. Yours respectfully,

"JOS. JNO. PENDER."

The witness further swore, that between 8 and 15 July, one of the plaintiffs, R. L. Myers, came to Tarboro, the residence of the witness, and submitted to him a contract in writing to carry the mail for the balance of the four years; that he refused to bind himself for any particular time, but told Myers to go on as they had been doing; that he seemed to get angry, and told him that he should go to Washington City, and oppose the transfer of the contract to him, Pender, and immediately left; that at the time of the payment for the quarter, he went to plaintiffs and offered to pay, but did not, because they (146) would not give him a receipt in his own name, and insisted on his receiving a paper which he did not like. The plaintiffs' counsel then showed the witness a receipt, in words and figures following, viz.:

"Received, Washington, D. C., 8 October, 1856, of Mr. T. R. Cherry, surviving partner of Braswell & Cherry, by the hands of J. J. B. Pender, three hundred and twelve dollars and 59 cents in full for mail service by steamboat 'Governor Morehead,' for one quarter, ending 30 September, 1856, $312.59. JOHN MYERS & SON."

And asked him if the plaintiffs did not offer to accept the money and give him that receipt? Witness answered, that they offered to receive the money and to give him a paper, perhaps that, but that he could not identify it. Thomas Myers testified that the receipt produced was the paper offered; that he was present at the time it was offered, made a memorandum on it and preserved it.

The defendant's counsel objected to the production of the receipt, to the questions about it, and to its being read to the jury, but the court overruled the objection. Defendant's counsel excepted.

Verdict and judgment for plaintiffs. Appeal by defendant.

Rodman for plaintiffs.
Warren and Donnell for defendant.

MANLY, J. Upon the trial before the jury in the Superior Court, the case was made by the parties to turn upon the inquiry, whether J. J. B. Pender had been substituted for defendant in his contract with the plaintiffs, and, consequently, whether Pender was the debtor instead of defendant. To establish the affirmative of this inquiry, the defendant introduced Pender, who in the course of his testimony stated that he had offered to pay the quarter's dues, for which this action is brought, but he had not paid it, because plaintiffs were unwilling to give him such a receipt as he wished.

Upon the cross-examination, the receipt was produced and (147) identified as the one in question. The defendant objected to its

introduction, and the overruling of this objection is the ground for the single exception which appears upon the record.

The evidence is clearly admissible. The defendant attempted to show that Pender was accepted as the debtor, by showing that the plaintiffs negotiated with him. It was surely competent for plaintiffs to show in reply, in what capacity they treated with him. The receipt was competent for that purpose, as the declaration made at the time, and constituting a part of the *res gestæ,* and is also competent as the best evidence of a matter which the defendant had attempted to prove, viz., the purport of the receipt. In either point of view, the evidence was admissible, and there is no ground for the exception.

PER CURIAM. Affirmed.

ALEXANDER TOWNSEND, ADMR., v. ROBERT S. MOORE ET AL.

Before a will can be received by our courts, as having been established by a tribunal in another State, it must appear by the record that such will was duly passed on by it, and that such tribunal was the court of probate of the domicil.

MOTION in the county court of Robeson to have recorded a paper writing, purporting to be a copy of the last will and testament of Robert Pittman. The order was made accordingly, and the defendants appealed to the Superior Court, where *Saunders, J.,* refused the motion, with costs, and the plaintiffs appealed to this Court.

The decedent, according to the language of the paper writing offered, had lived in Robeson County, North Carolina, but then was of St. Clair County, Alabama. The basis of this application was this certificate:

STATE OF ALABAMA, ST. CLAIR COUNTY. (148)

"Personally appeared before me, James Rogan, judge of the county court of said county, John F. Dill and C. C. Farrar, two of the subscribing witnesses to the within will, who, being duly sworn, deposeth and saith that they were present at the time said will was signed, and that they saw the same signed and acknowledged by Robert Pittman, for the purposes therein contained, and that the said Robert Pittman was, at the time of signing the same, of sound mind.

JOHN F. DILL,
C. C. FARRAR.

"Sworn to, and subscribed before me,
This 30 June, 1838.

JAMES ROGAN,
Judge of County Court."

Also, this further certificate:

"State of Mississippi, Carroll County—Probate Court, October Term, 1838.

"Then was this will admitted to probate, and ordered to be recorded.
THOMAS RHODES, *Clerk.*"

"State of Mississippi, Carroll County:

"I, A. M. Nelson, clerk of the probate court of said county, hereby certify that the foregoing is a true and correct copy of the last will and testament of Robert Pittman, deceased, as the same appears of record in my office in Book A, page 13. Given under my hand and the seal of office, at Carrollton, 21 February, 1857."

Then comes the certificate of the judge of the probate court, 11 July, 1857, to the effect that Mr. Nelson was the clerk, "duly commissioned, and that full faith and credit should be given to his official acts." Signed by Joseph Drake, judge of the Carroll probate court.

Upon this evidence the court refused to have the paper-writing admitted to record. Whereupon the plaintiff appealed.

No counsel for plaintiff.
Fowle for defendants.

(149) MANLY, J. Under the provisions of Rev. Code, chap. 119, sec. 17, the will of one, domiciled in another State, admitted to probate there according to the requirement of the law, will be admitted in the courts of this State, as proved in respect to personalty, and put upon the records. To entitle a case to this comity, it is necessary, however, that the will should be proved at the place of the domicil, and that an exemplification of the will and probate should be duly certified to us by the proper officers of the court, with the information that it is in due form. It will then become the duty of any court in this State, where there are goods of value belonging to the deceased, to spread it upon its records and issue letters thereon. The law in respect to such matters, in view especially of our statute law upon the subject, was fully discussed in *Hyman v. Gaskins,* 27 N. C., 267, and in *Drake v. Merrill,* 47 N. C., 368. We deem it unnecessary, therefore, to say more at present.

Referring to the documents now before us, it will be seen that the testator was of St. Clair County, Alabama, where a probate is first had of his will. It then seems to have been propounded in some form in Carroll County, Mississippi, where it was admitted to probate, also. The copy which we have is from Mississippi, and is certified by the clerk of the probate court for Carroll County, to be a true copy. We

are unable to discover from its contents, whether the original or a copy was sent to Mississippi, but in either case the exemplification sent us is not a compliance with the law. In the absence of the original (which we suppose might have been brought into North Carolina and proved), it is proper that we should have a copy and an exemplification of the proceedings, properly certified from the court of probate at the domicil. At best, we have only a certificate from the court of Carroll County that certain matter was certified to that court. A copy of a copy, in record evidence, is inadmissible. Whether it be duly proved according to the law of the domicil we are not informed. It is indispensable that the probate court in Alabama should adjudge the paper, upon the proofs, to be the last will and testament of the deceased, and that this should be certified directly to us. (150)

PER CURIAM. Affirmed.

STATE v. SAM (A SLAVE).

1. **In order to show that a witness in a cause was excited at the horrible crime alleged against a slave, and was, therefore, not fully relied on, it was held competent to ask him, on cross-examination, whether he had not taken up and whipped other negroes.**
2. **In order to weaken the force of a witness's evidence on cross-examination, it was held competent to show his temper and feeling towards the cause, independently of any prejudice or ill-will towards the accused, personally.**

MURDER, tried before *Howard, J.*, at last term of BERTIE.

The prisoner was indicted and put on trial with two others, Noah and Perry, for the murder of one George Askew, by burning the house in which he was asleep. There was a count charging the death to have been produced by a blow from a stick.

On the trial, one Joseph B. Ruffin gave testimony as to the confessions of Sam. Upon his cross-examination, Ruffin was asked by the prisoner's counsel, "if he had not taken up and whipped other negroes in the neighborhood?" This question was objected to by the counsel for the State.

The court asked: "What is the purpose of the question?"

Defendant's counsel answered: "To show that he has been very active about the matter."

The court rejoined, "If he has, it is nothing to his discredit."

The testimony was ruled out, and the prisoner's counsel excepted.

There were many other exceptions on the trial, but as this is the only one treated of by this Court it is not deemed proper to set them out.

A *nolle prosequi* was entered as to Noah. Perry was acquitted, (151) and a verdict of guilty as to Sam, who, upon judgment being given against him, appealed.

Attorney-General for the State.
Winston, Jr., for defendant.

PEARSON, C. J. Any evidence is competent, which tends to show the feeling or bias of a witness in respect to the party or the cause; for the jury ought to be put in possession of every fact which will enable them to form a proper estimate of the witness, not merely in reference to his honesty, but to the degree of reliance that can be placed on his accuracy, and to what extent allowance should be made for the probability of misapprehension, or the danger that the witness had received wrong impressions, owing to an excited state of feeling. Every one, no matter how honest he may be, is more apt to fall into error after he has "taken sides" in feeling or in action, than while he remained neutral. On this account, every witness was required by the common law to give his testimony in the presence of the jury, and to be subject to cross-examination, so that they could look at him, note his demeanor, and have every opportunity of testing whether he was under the influence of feeling, and thus be able to form an opinion how far he was to be relied on. Indeed, the chief excellence of a trial by jury consists in the fact that, being judges of human nature, when put into possession of all the circumstances that may be calculated to influence the feelings of a witness, or to show a bias either for or against a party, or in reference to the one side or the other of the case which is on trial, the jury can better "weigh his testimony" and pass on the degree of credit to which a witness is entitled, than any one man, no matter how learned he may be in the law. It is on this principle that the rule above stated is based. It is to be met with in all the textbooks, and in *S. v. Patterson,* 24 N. C., 346, it is held that although a witness cannot be contra- (152) dicted as to matters merely collateral, drawn out on cross-examination, yet, when the cross-examination is as to matters which, although collateral, tend to show the temper, disposition, or conduct of the witness in relation to the cause or the parties, the witness may be contradicted. Both kinds of evidence are admissible on cross-examination, but the latter is put on higher ground than the former, for it enters into and forms a part of the issue; *Radford v. Rice,* 19 N. C., 39. On the cross-examination of the witness Ruffin, the prisoner's counsel, for the purpose of showing that he had been very active in regard to the prosecution, proposed to ask him, "if he had taken up and whipped other negroes in the neighborhood." The solicitor for the State objected. The court said, "If he has, it is nothing to his discredit," and rejected

the evidence. In this there is error. By the word "discredit" we do not understand his Honor to have expressed an opinion as to the degree of credit to which the witness was entitled, but to have used the word in the sense of not being censurable, or to be blamed, if he had taken up and whipped other negroes in the neighborhood, touching the crime then under investigation. Whether such conduct was censurable or praiseworthy is not a question of law, and is a matter about which there may be a difference of opinion. So, we lay no stress upon it, further than to say such remarks should not come from the bench, because they are apt to betray feeling.

His Honor fell into error, either because he had misconceived the extent of the rule, or in making an application of it. If he supposed the rule required that the question, in order to be relevant, should tend to show the disposition or feeling of the witness towards the prisoner individually, he was mistaken as to its extent, for it embraces the feeling of the witness in respect to the cause as well as the party. When a witness has become so much excited, by reason of a horrible crime that has been committed, as to be induced "to take up and whip negroes," for the purpose of ferreting out the offenders, his excited state of feeling certainly would have a tendency to make his testimony less reliable, because he would be more apt to misapprehend conversations, (153) imbibe wrong impressions, and jump to conclusions on insufficient premises, and both the principle of the rule and the terms in which it is laid down require that the fact of his having become so excited should be made known to the jury, and the circumstance that he had no previous ill-will or bad feeling towards the prisoner in particular can only have the effect of showing a less degree of bias, in the same way that a feeling, both in relation to the cause and against the prisoner, would tend to show a greater degree of bias.

If his Honor had a correct idea of the extent of the rule, then he certainly erred in making the application, for it is manifest that the testimony of a witness who has become excited in respect to a particular subject and has taken an active part in respect to a particular subject and has taken an active part in respect to a prosecution, is not so much to be relied on in reference to its accuracy as that of a witness who had not taken sides or been active in the matter. Consequently, the evidence was relevant and ought to have been received, so as to allow the jury to pass on the weight to which it was entitled. For this reason, the prisoner must have another trial; for although he may be guilty, his guilt has not been proved according to law.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Goff,* 117 N. C., 761; *Burnett v. R. R.,* 120 N. C., 519.

M. B. BALLARD v. WALDO AND MITCHELL.

1. Where an action of trespass, *q. c. f.*, was referred to arbitrators, and they found the title to the *locus in quo* in the plaintiff, and assessed damages, it was held a sufficient finding, and that it was not necessary for them to fix the boundaries between the parties.
2. Where a suit was referred to arbitrators, and they awarded damages and costs to the plaintiff, this was held to include a finding of all issues in his favor.

(154) TRESPASS *quare clausum fregit,* brought to Spring Term, 1860, of MARTIN.

The following pleas were entered: "General issue, license, accord and satisfaction, and statute of limitations." At the same term the following entry was made on the docket: "Referred to arbitration, order of survey, each party to choose his own surveyor, or to unite upon one, at their election." The arbitrators were selected, and at the same term the following notice issued to them:

"To Ameleck C. Williams and William R. Brown, Greeting:

"Ordered that the three above causes be referred to you with an umpire to be chosen by you, if necessary, to hear and decide all matters in controversy therein, and your award shall be a rule of court, and the parties bind themselves not to revoke this reference.

"Witness, W. W. Anderson, clerk of our said court at office, in Williamston, on the last Monday of February, 1860.

W. W. ANDREWS, C. S. C."

There were on the docket, besides this one, two other cases, in which the present plaintiff was defendant, and the present defendants were plaintiffs, and these are the cases included in the reference. They are designated in the award as cases Nos. 1 and 2, and were also actions of trespass, involving the title to the same land as the present suit. The following is the award as returned to this Court:

"The undersigned referees, in obedience to the above order of the court, met on Monday, 20 August, 1860, to hear and determine the above causes referred to us, and all the above causes were continued over until Tuesday morning, 9 o'clock, on affidavit of Henry Mitchell. On Tuesday morning, 9 o'clock, we met upon an island, called High Island, and proceeded to hear and determine the above causes referred, when both parties announced themselves as ready for trial, and after a patient and thorough investigation of the title, and evidence on both sides, we, referees, are of opinion, and so adjudge and award, that the plaintiffs,

in causes No. 1 and No. 2, are not entitled to any damage, and (155) that the land in question, from our best judgment, is the property and estate of Martin B. Ballard, and that the boundary of Briery Branch, beginning at the road, runs down said branch to a gum and cypress, and then down to and around a high island at the lower end of Stephens' hole, to a cypress stump on a drain, standing about ten or twelve feet from the creek, which is shown to be the corner of the Whitley and Monk land. In No. 3, we are of opinion that the plaintiff, Martin B. Ballard, is entitled to recover of the defendants, Waldo and Mitchell, the sum of five hundred and seventy-seven dollars and fifty cents ($577.50); and that the said Waldo and Mitchell pay the costs of the above referred suits.

"We further certify, that before the trial of the above causes, we, the referees, selected by consent of all parties, Shepherd R. Spruill as umpire, who acted with us in the investigation of the same. All of which is respectfully submitted. Signed by the arbitrators and the umpire."

The award was returned to fall term, 1860, *Heath, J.*, presiding, and plaintiff moved for judgment pursuant to the award. Defendants' counsel resisted the motion, and filed exceptions to the award, of which the following only are necessary to be set out:

"6. The award is not full; it does not cover all the matters in controversy; especially, it does not determine the boundaries of the lands of plaintiff and defendants, nor fix the boundaries between the parties."

"7. The award does not pass on all the issues in the causes between the parties."

The court, upon consideration of the premises, confirmed the award in *Ballard v. Waldo,* the award as to the other two cases having been set aside by consent of plaintiff, on motion of defendant.

Judgment for plaintiff. Appeal by defendants.

Winston, Jr., for plaintiff.
Rodman for defendants.

BATTLE, J. Most of the objections to the award made in the (156) court below were addressed to the discretion of the judge presiding in that court, and are admitted by the counsel not to be the subject of review in this Court. The only exceptions to which our attention has been called in the argument here are said to be apparent upon the award itself, considered in connection with the manner and terms of the reference. It is contended for the defendants that the reference, having been made of a cause pending in court and by a rule of that court, the award does not dispose of all the matters which were thus referred, and

that it is not responsive to all the issues made by the pleadings. The argument fails, as we think, upon both the points to which the exception relates.

The counsel insists that as the reference embraced "all matters in controversy" in this and two other suits in which the present plaintiff was defendant and the present defendants were plaintiffs, the arbitrators were bound to determine by their award the boundaries of the lands of the parties and to fix the dividing line between them. The action in the case before us is the only one necessary for us to consider, as the other two have been disposed of in the court below. It was an action of trespass *quare clausum fregit* to which the defendants pleaded the general issue of not guilty, license, accord and satisfaction, and the statute of limitations. The submission to arbitration being by a rule of court, "embraced the matter and that only which the pleadings of the parties brought into contestation before the court," as was expressly said in *Hardin v. Beaty,* 20 N. C., 516. The land upon which the trespass was alleged to have been committed was necessarily described in the plaintiff's declaration, and as the verdict of a jury in favor of the plaintiff need not have set out the boundaries of the land, nor have fixed the dividing line between the parties, neither was it necessary for the award of the arbitrators to have done so. Here, however, the (157) arbitrators seem to have gone further than was necessary and to have done everything for which the defendants have contended.

The other ground of exception that the arbitrators have not disposed of all the issues raised by the pleadings is equally untenable. The award, after finding that the title of the land, which was a matter of dispute in all the three cases, was in the plaintiff in the present suit, proceeds to assess the amount of damages to which he is entitled and directs the defendant to pay them, together with all the costs. This is, in legal effect, the same as the verdict of a jury, finding all the issues in favor of the plaintiff and thereupon assessing the amount of his damages. In *Carter v. Sams,* 20 N. C., 321, it was said that the Court will always intend everything in favor of an award, and will give such a construction to it that it may be supported, if possible. There, the action was trespass on the case for a malicious prosecution, to which the defendant pleaded, "Not guilty." It was referred by a rule of court to arbitration, and the referees returned an award, stating that "we agree that the defendant pay all costs and assess the plaintiff's damages to one hundred dollars." The Court held the ward to be sufficient, and that it meant that the defendant was awarded to pay to the plaintiff one hundred dollars, and also his costs expended in the cause referred. In that case, there was no direct finding on the issue "not guilty," but it was taken to be included in the award which assessed damages for the

plaintiff. Upon the same principle, the award of damages and costs to the plaintiff in the present case must be held to include a finding of all the issues in his favor, and of course, against the defendant.

PER CURIAM. Affirmed.

Cited: *Millinery Co. v. Ins. Co.,* 160 N. C., 139.

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(158)

DOE ON DEM. OF MARTIN McDONALD v. ALLEN McCASKILL.

Where a witness testified that a certain unmarked pine had been pointed out to him as the corner of a grant by an old man, at the time of the trial deceased, and there were five particulars in which the description in the grant were supported by the facts proved, it was *Held,* erroneous to charge the jury that there was no evidence of the location of the grant.

EJECTMENT, tried before *French, J.,* at last Fall Term of RICHMOND.

The plaintiff read in evidence a grant from the State to himself, dated 1 January, 1858, conveying the land in controversy.

The defendant offered in evidence a grant from the State to one David Allison, dated in 1795, which is as follows:

"North Carolina. No. 815.

"Know ye, that we have granted unto David Allison, six hundred and forty acres of land in Richmond County, beginning at a pine, between Hitchcock Creek and Mountain Creek, and on the east side of George Collins's, and on the north side of the Grassy Island road, and runs east 320 poles to a pine below McCall's mill; thence north 320 poles to a pine above said mill, then west 320 poles to a corner, then south 320 poles to the beginning. Dated 23 April, 1795."

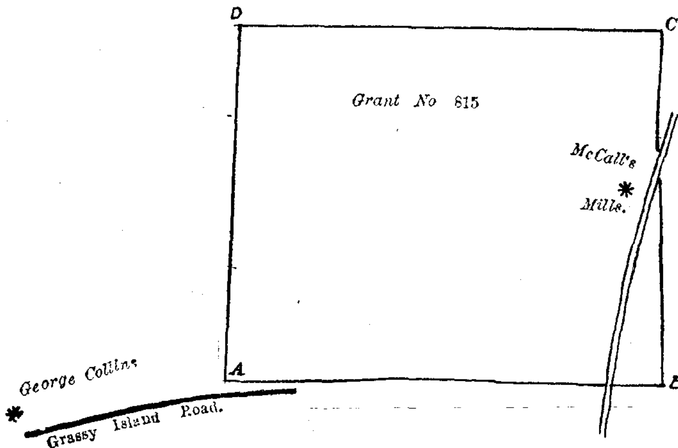
It was in evidence, that Hitchcock Creek and mountain Creek were each fifteen or twenty miles long and eight or ten miles apart, and between these two streams was, generally, a pine country. It was further in evidence that the Grassy Island road was eight or ten miles long.

One Gillis testified, that about twenty years ago one McCaskill, now deceased, pointed out to him a pine, then green and forked about three or four feet from the ground, as the corner of the Robinson and Harrington land, and represented on the annexed diagram as letter A. The witness heard nothing said about the beginning corner. The pine is between the streams above named, on the edge of the Grassy Island road

and about a half mile southeast of George Collins's. McCaskill, spoken of above, was a native of Scotland and came to the United States (159) in 1802, and to the neighborhood of the land in controversy in 1820.

Gillis stated that the pine pointed out to him by McCaskill had no marks of any kind on it.

Assuming the pine, above mentioned (A), as the beginning of the Allison grant and, running course and distance, the first line would end about 160 poles below McCall's mill and the second line about 160 poles above it, and, pursuing the calls of course and distance, the *locus in quo* would be within the Allison grant.



The defendant further offered a deed from Sheriff Cole to Toddy Robinson and Henry Harrington, dated in 1796, containing several tracts, each containing 640 acres, and among them was tract "No 815, granted to David Allison on 23 April, 1795."

The court charged the jury, that there was no evidence to be submitted to them of the location of the Allison grant. Defendant's counsel excepted.

(160) Verdict and judgment for plaintiff. Appeal by defendant.

Cameron and Strange for plaintiff.
Ashe for defendant.

PEARSON, C. J. The sheriff's deed to Robinson and Harrington, dated in 1796, for a tract of 640 acres of land, granted to David Allison, "by grant, No. 815, dated 23 April, 1795," we think, makes a link sufficiently strong in the chain of title to connect the land covered by this grant

with the title of "Robinson and Harrington," so as to establish that it was the Robinson and Harrington land referred to in the hearsay evidence of Alexander McCaskill, derived through the testimony of the witness Gillis. That evidence was competent on a question of boundary, and, indeed, was not objected to on the trial; consequently, there was some evidence to be submitted to the jury of the location of the Allison grant; for the fact, that by beginning at the pine pointed out by McCaskill as "the corner" of the Robinson and Harrington land and running thence according to the calls of the grant, five general discriptions fit in and concur to prove the accuracy of the witness, and make out a remarkable coincidence, which was well calculated to satisfy the jury that it was the true location of the grant. At all events, in the opinion of this Court, the jury ought to have been allowed to take these several matters into consideration. In aid of the hearsay evidence, we have the facts that it fits the grant in this: First, it is a pine between Hitchcock Creek and Mountain Creek. Second, it is east of George Collins's. Third, it is on the edge of the Grassy Island road. Fourth, running course and distance, the first line crosses the creek below McCall's Mill. Fifth, the second line terminates above McCall's mill. It is true, these descriptions are very general, and neither, taken by itself, would amount to much, but taken together like many small circumstances all pointing the same way, they were fit to be submitted to the jury, and might have enabled them to arrive at a satisfactory conclusion. (161)

PER CURIAM. *Venire de novo.*

Cited: Williams v. Kivett, 82 N. C., 115.

PALIN SCAFF v. M. W. BUFKIN, ADMINISTRATOR.

1. **Courts of pleas and quarter sessions have power to set aside a verdict and judgment, and to order a new trial during the term.**
2. **The power of the courts of pleas and quarter sessions to set aside a verdict and order a new trial is entirely discretionary, and the propriety of its exercise cannot be inquired into upon appeal.**

APPEAL from an interlocutory order of the county court of Pasquotank, heard before *Howard, J.,* at Fall Term, 1860, of PASQUOTANK, upon the following case agreed:

At June Term, 1860, of the court of pleas and quarter sessions of Pasquotank County, the plaintiff issued his writ against the defendant,

as administrator of one Susan Jennings, and service of the same was accepted by the defendant; at the same term the pleas of the defendant were entered, and by consent the cause was tried. A jury was impaneled, witnesses examined by plaintiff, and the cause submitted to the jury, who returned a verdict in favor of plaintiff for $228, and that there were debts of higher dignity. Upon which verdict a judgment "*quando*" was rendered by the court. Some days after this verdict and judgment, but during the term of the court, James Jones and Amanda, his wife, parties not of record, came into court by their attorney and asked the court to set aside the verdict and judgment and direct a new trial; this application was resisted by the plaintiff, but the court ordered the verdict and judgment to be set aside and a new trial to be (162) had, from which order the plaintiff appealed.

Two questions were submitted to his Honor:

First. Had the county court the power to set aside the verdict and judgment and grant a new trial?

Secondly. Had the county court the power upon the application of parties not of record to set aside the verdict and judgment and direct a new trial?

His Honor being of opinion against the plaintiff upon both of the questions, ordered the appeal to be dismissed, and the plaintiff appealed.

Johnson for plaintiff.
Hinton for defendant.

PEARSON, C. J. This Court concurs with his Honor on both of the questions presented by the case. The power of granting "new trials" has been exercised by the courts of pleas and quarter sessions in this State as far back as the recollection of any member of this Court reaches. We have never heard of its being drawn in question before. This long user, without objection on the part of the profession and without interference on the part of the Legislature, creates so strong a presumption in favor of the existence of the power that we should not feel at liberty to deny it, except on the most convincing proof. The suggestion that the power is liable to abuse, because the members of which the court is composed may be continually shifting, addresses itself to the legislative department, and would, we have no doubt, have been attended to had any serious practical evil resulted from it.

Independently of the argument drawn from long user, we are of opinion that the county court has the power. It is true, an inferior court has not the power to grant a new trial, and as soon as it acts becomes *functus officio* in respect to the case decided. For instance, a single justice of the peace cannot grant a new trial, except under the

circumstances where the power is specially conferred by statute. (163) But the county court is not an inferior court, within the meaning of this rule. It is a court of record, and has general original jurisdiction "to hear, try, and determine all causes of a civil nature at the common law within their respective counties, where the original jurisdiction is not, by statute, confined to one or more magistrates out of court, or to the Supreme or Superior courts." Rev. Code, chap. 31, sec. 5.

As the court has the power, it follows that its discretion, in the exercise of it, cannot be reviewed. Whether the discretion be exercised *ex mero motu* or at the instance of a stranger to the proceedings is a matter which does not at all affect the validity of its action, and cannot be inquired into. In this particular instance, however, we will say, from what appears on the record, the discretion was very properly exercised in setting aside a judgment which had been confessed (for it amounted to that in fact) at the first term by one who had no personal interest to contest the claim, as a want of assets was admitted.

PER CURIAM. Affirmed.

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*JOSEPH R. BILLUPS AND WIFE v. WILLIS D. RIDDICK AND WIFE.

1. Where a petition was filed for partition of slaves and money, and there was no answer, no judgment *pro confesso*, no issue made up, and no order made for setting the case for hearing, it was *Held* erroneous for the court to pass a decree.
2. The jurisdiction of the county court to render a partition among tenants in common, does not extend to money.
3. A petition against an executor for a filial portion, etc., will not lie for money or other property delivered by him to a legatee for life.

PETITION for partition of slaves, and for an account of money, etc., tried before *Howard, J.,* at Fall Term, 1860, of PERQUIMANS.

The petition was filed in the county court of Perquimans (164) against Willis D. Riddick and wife, and sets forth "That one Jesse Stallings, the father of your petitioner, Sophia, died in the county of Perquimans, having made a last will and testament, by the provisions of which a large amount of property, consisting of negroes and money, was left to Priscilla Stallings during her life, and after her death the same to be equally divided between your petitioner, Sophia, and her sister, Mary Riddick, wife of Willis D. Riddick." . . . "That Willis D. Riddick, one of the executors named in the said will, took upon him-

*The Reporter is requested to state that this case was never seen by Judge Howard, but was made up by the counsel and a *pro forma* judgment entered as they agreed.

self the duties of his office, and that he assented to the legacies of the said will and placed the property given to the said Priscilla during her life into her possession." . . . "That Priscilla Stallings has lately died in the said county, leaving a large estate, the gift to her for life, consisting of a large number of slaves (naming them), and also a large amount of money (about four thousand dollars) and other property, which, by the terms of the said will, now belongs equally to your petitioners and to the said Willis D. Riddick and wife, Mary." The prayer is for the appointment of commissioners to divide the slaves and for an account of the money. The petition was served upon Riddick, and at August Term, 1860, of the said county court is this record: "Decree of the court in favor of the plaintiffs for partition and an account." From which the defendant Riddick appealed to the Superior Court. In the Superior Court is this record: "It is ordered and decreed by the court, that the plaintiffs are entitled to a division and partition of the negroes in controversy, and that five commissioners be appointed according to law to divide the slaves. It is also ordered and decreed that the plaintiffs are entitled to an account of the remaining personal property of Jesse Stallings on hand at the death of his widow, comprising the capital of the said fund and not the interest accrued on the same during the life of his widow." There is no other record in either court. The will of Jesse Stallings is filed, and it is deemed that the provisions (165) of that paper are sufficiently set out in the opinion of the court, for all the purposes of this case.

The defendants appealed.

Albritton and Jordan for plaintiffs.
Hines for defendants.

PEARSON, C. J. The decree in the court below is erroneous and must be reversed, and the petition dismissed.

There are so many fatal objections that we are at a loss on which to put our decision.

1. It does not appear by the transcript that an answer was filed; there is no judgment *pro confesso;* no issue is made, either of law or fact, and there is no order setting the case for hearing.

2. There is no allegation that the slaves, which are to be divided, or the money, of which an account is prayed, are in the possession of either the plaintiffs or the defendants.

3. The jurisdiction of the county court to order partition among tenants in common on petition is confined to a division of slaves or other chattel property. This does not embrace money, and the court had no jurisdiction to order an account to be taken. That branch of equity jurisdiction is not conferred on the county courts, and has never been

assumed before this case, except on petitions for legacies, filial portions, and distributive shares. But our case does not fall under either of these heads, the executor having long since assented and passed the property, money, etc., to the legatees.

4. The petition alleges that Priscilla Stallings was, by the will of Jesse Stallings, entitled to an estate for life in the slaves and other property and effects, and after her death the same was to be equally divided between the petitioner, Sophia, and the defendant, her sister Mary. Whether this be the legal effect of the will, is a question which cannot now be decided. The slaves, property, money, etc., are given to Priscilla Stallings, Sophia White, and Mary Riddick, to be equally divided between the three. This vests in Mrs. Stallings an absolute estate, just as it does in Mrs. White and Mrs. Riddick, (166) and we suppose, from the argument before us, that the purpose of the petition was to have a construction of the will as to whether the subsequent clause, in which the testator desires all that part of the property given to his wife "that shall be remaining at her death," to be equally divided between his two daughters, has the effect of cutting down the estate given to the wife, so as to make room for the limitation over; or is inoperative because inconsistent with the estate before given to her. This depends upon the application of the doctrine discussed in *McDaniel v. McDaniel,* 58 N. C., 352; *Hall v. Robinson,* 56 N. C., 349; *Newland v. Newland,* 46 N. C., 463, and other cases.

As a matter of course, this question cannot be decided except in some proceeding to which the personal representative of Mrs. Stallings is a party, and as the decree in this case is based upon a decision of that question it is erroneous.

PER CURIAM. Reversed, and petition dismissed.

QUINCY MADDEN v. JAMES PORTERFIELD.

1. Where plaintiff had contracted to serve defendant for ten months, for a certain sum, and, before the expiration of that time, defendant wrongfully dismissed him, and plaintiff sued upon the common count in *assumpsit,* it was *Held,* that he could recover upon this count for the time he had actually worked.

2. *And it was further Held,* that, had the plaintiff inserted a count upon the special contract, he might have recovered for the whole time.

3. It is the province of a jury, to affix a value to services, according to their nature and extent, as proved; and it is not necessary for witnesses to estimate their value in money.

4. Where it was sought to prove the value of plaintiff's services, during a term of seven months, it was held an immaterial question for the defendant's counsel to ask witness the value of such services for half an hour, during which witness saw plaintiff at work.

(167) ASSUMPSIT, tried before *Dick, J.*, at June Term, 1860, of ORANGE.

The action was brought upon an open account for work and labor done by the plaintiff for the defendant and was commenced before a single magistrate. Plaintiff alleged that he had worked seven or eight months for the defendant on his farm, and that his services were worth eight or nine dollars per month. He first examined Woods McDade, who stated that plaintiff worked seven or eight months on defendant's plantation. Plaintiff's counsel asked witness if plaintiff was a good hand on a plantation. This question was objected to by defendant's counsel, but was admitted by the court. Witness then answered that plaintiff was a very good hand to work on a plantation. Defendant's counsel then asked witness what work he knew of plaintiff doing for defendant. Witness replied that he was present on the farm of defendant two days with plaintiff, engaged with him in rolling logs, splitting rails, etc., on a new-ground, and that the labor of plaintiff for these two days was worth two dollars. Defendant's counsel then asked witness what other work he knew of plaintiff's doing for defendant. Witness replied that he lived a neighbor to defendant; that he frequently passed his plantation, perhaps as often as twenty times during the time the plaintiff was at work for him, and each time he passed he saw the plaintiff at work on the farm. Defendant's counsel then asked witness how long he saw him at work each time he passed; witness said he could not say with certainty, but he probably saw him at work as much as half an hour sometimes when he passed. Defendant's counsel further asked him what his work for the half hour he saw him at work was worth. Plaintiff's counsel objected to the last question, and the objection was sustained by the court.

J. McDade was then examined. He stated that he frequently saw plaintiff working on the farm of defendant for the space of six (168) or eight months, and that plaintiff was engaged in grubbing, farming, etc.

John Smith was next examined for plaintiff. He stated that he lived on an adjoining farm to defendant; that plaintiff began to work for defendant in the month of November and continued to work until harvest following; that for two months of the time he saw plaintiff at work on the farm of defendant every work day, and that he was a good hand and worth at least eight dollars per month.

Defendant's counsel contended that plaintiff was not entitled to

recover, because he had made a special contract with defendant to work for him on his farm for the term of ten months for the sum of seventy-five dollars, and had not performed his contract. Defendant's counsel then introduced a witness by the name of James Porterfield, who stated that he heard the plaintiff say he was to work for the defendant ten months for seventy five dollars.

The plaintiff then examined one G. Allison. She said that after plaintiff had left defendant's house she was working for defendant and heard him say that it was well for Quincy that he left, or it might have been bad times for him, but said he was sorry now that he made an interruption with Quincy and drove him off.

The court charged the jury that if the evidence satisfied them that the plaintiff had contracted to work for defendant for ten months for seventy-five dollars he was not entitled to recover, unless the defendant had put it out of the power of the plaintiff to perform his contract by discharging him from his employment.

If they believed no special contract was made, and they further believed plaintiff had worked for the defendant at his instance and request, it was for them to say how much work he had done and what was the value of that work, or if they believed a special contract had been made, as alleged by defendant, and that plaintiff had been prevented by defendant from performing his contract, the plaintiff was entitled (169) to recover for such work as he had done for the defendant.

The defendant's counsel asked the court to charge the jury that if the plaintiff was entitled to recover at all he could only recover for the amount specially proved by his witness, and that was the sum of two dollars. The court refused so to charge.

Verdict and judgment for plaintiff. Appeal by defendant.

Norwood for plaintiff.
Miller for defendant.

MANLY, J. Action of *indebitatus assumpsit,* brought by a hired servant to recover compensation for work and labor.

Three questions are presented upon the record. The principal one is, whether in case of a special contract to labor for ten months and a wrongful dismissal, plaintiff can recover upon an *indebitatus* count for work and labor.

The action seems not to have been framed with a count on the special contract, in which case, by force of the discharge without cause, plaintiff might have recovered the stipulated sum for the whole time, but the plaintiff has relied upon a single count, as above stated, and although in such action he cannot recover his whole wages for the entire term

of hiring, as for a constructive service, yet, we are of opinion he may recover, regarding it as a rescinded contract, for his service up to the time of his dismissal. See 1 Parsons on Contracts, 521, note j, and the cases there cited.

The second point, viz., that upon the admissibility of evidence, was also ruled correctly by his Honor below.

It did not tend at all to aid the jury in their inquiry as to the value of a man's labor for seven months, to know what the half hour of his time when witness was with him on a certain occasion was worth. The question was immaterial.

The instruction asked for and refused, which constitutes the third point of exception to the trial, is based upon the idea that all (170) evidence as to the nature and extent of the service of plaintiff was to be excluded from the view of the jury, unless the witness themselves made estimates of their value in money. This is not correct. It is the appropriate province of the jury to affix a value to services, according to their nature and extent as proved; and with the data afforded by the proofs in this case, we see no difficulty in the performance of that duty.

PER CURIAM. No error.

STATE v. WESLEY GRAY.

In an indictment under our statute, Rev. Code, chap. 34, sec. 5, for carnally knowing and abusing an infant female under the age of 10 years, it was *Held*, error in the judge to charge the jury that proof of emission of seed was not necessary in order to convict the prisoner.

INDICTMENT under the statute against the defendant for carnally knowing and abusing a female infant under the age of ten years, tried before *Saunders, J.*, at the last Fall Term of GUILFORD.

The indictment charged that the defendant did carnally know and abuse one Louisa E. Wheeler, alias Louisa E. Stack, a female under the age of ten years. It appeared in evidence that she was between the ages of eight and nine years at the time of the commission of the offense; that she was of ordinary size, and of more than ordinary intelligence. She testified that she was sent to Jamestown to carry dinner to her father, who was at work there, it being about a mile from where she lived, and that she walked on the track of the railroad; that her father was engaged in digging a well there; she saw the prisoner at the well; that he was not at work; that after her father finished his dinner he

ordered her home; that when she started the prisoner followed her and overtook her in less than a quarter of a mile; that he (171) was fifteen years old, and as she did not like to travel with him she stopped at one Jackson's who lived near the road, to get some water; that prisoner proposed to wait for her and called her two or three times; that she supposed he was gone, but on getting into the road again, he again joined her; that going a short distance, they met his sister and her husband, who proposed that he should go back with them, which he declined; she went on, and he soon overtook her again and began to talk "nasty words"; that she picked up a rock or stone and told him if he touched her she would throw it at him; that he thereupon seized her by her shoulders, pushed her a few steps out of the road, pulled up her clothes, threw her down and got on her, and tried to stop her mouth; that she hollowed as loud as she could; that he remained on her some five minutes; that he hurt her very much when he entered her person, and made her private parts bleed; that he then got off her, got some switches and threatened to whip her if she did not promise not to tell her mother; that he whipped her until she promised, and then left her; that she went on home, and going into the house told her mother that prisoner had nearly killed her. Her mother was examined, and testified to what the child had stated.

Dr. Pugh testified that he was called the next day, examined the child, and found her private parts very much swollen, torn, and lacerated; that there had been a penetration, certainly, as much as three-fourths of an inch, or perhaps an inch and a half; that he was decidedly of opinion that the entry had been as far as it was possible in a child of her age. The father also testified to having seen the prisoner at the well when the girl left, but did not see him afterwards.

The Court charged the jury, that if the testimony of the girl was to be believed, and the doctor was correct in his opinion, and the jury believed it, the offense was made out, and that it was the duty of the jury to convict. The penetration was sufficient, and emission not necessary to be proven. Defendant's counsel excepted. (172)

Verdict for the State. Judgment. Appeal by defendant.

Attorney-General for the State.
Gorrell for defendant.

BATTLE, J. The main question in this case, and the only one which we deem it necessary to notice particularly, is, whether upon an indictment, under our statute, for carnally knowing and abusing a female child under the age of ten years, it is necessary to prove the emission of seed, in addition to the proof of penetration. This question has not

hitherto been before the Supreme Court of this State for adjudication, either with regard to this crime or that of buggery. We are under the impression, however, that on the circuits, proof of both penetration and emission have been, generally, deemed necessary, and have been required for the conviction of prisoners charged with either of these offenses.

In England, the contrariety of opinion, as to the law on this subject, among her greatest writers and judges, is remarkable. Lord Coke, 3 Inst., 59-60, says that penetration only is necessary to consummate the offense, while in his 12 Rep., 37, proof of both penetration and emission was held to be indispensable for the conviction of the offender. Lord Hale seems likewise to have entertained different opinions at different times; see 1 Hawk. P. C., chap. 4, sec. 2; chap. 41, sec. 1, and 1 Hale P. C., 628. In 1721, a case was brought before eleven judges upon a special verdict, when six of them thought both penetration and emission were necessary, while the other five deemed penetration, only, to be sufficient. The judges being divided, it was proposed to discharge the special verdict and indict the prisoner for a misdemeanor; see 1 East P. C., 437. After that time, for about sixty years, the weight of judicial authority seemed to be in favor of requiring proof of penetration only. But in 1781 a case occurred before *Buller, J.,* in which the jury found there was penetration, but no emission, whereupon the learned judge respited the prisoner until he could obtain the (173) opinion of the other judges. Two of them, to wit, *Lord Loughborough and Heath, J.,* held with him, that the offense was complete; but eight others, including *Lord Ch. B. Skynner* and *Lord Mansfield,* were of a contrary opinion, upon the ground that carnal knowledge must include both penetration and emission. They held, however, that the latter might be inferred from the former, unless the contrary appeared probable from the circumstances; as, for instance, where the offender was frightened away by the approach of other persons before he had his will of his victim. The opinion of the majority of the judges in this case prevailed, without much question, until 1829, when, by the statute of 9 Geo. IV, chap. 31, it was declared (after the recital that many offenders had escaped on account of the difficulty of the proof in such crimes) that "it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon the proof of penetration only."

We have already stated our belief of what has been the prevailing opinion in this State, and in that opinion we entirely concur. Our statute law with regard to these offenses is now, and has been heretofore, the same as that which existed in England prior to the statute of 9 Geo. IV, above referred to, and the adjudications upon their statute have, no

doubt, influenced our judges to adopt the same construction as to ours. It is an argument of no little weight in favor of that construction that a boy under the age of 14 years cannot be guilty of the offense of rape, because until he arrives at about that period of life he is incapable of emitting seed. Such has always been considered to be the law of England, and it has very lately been decided to be the law of this State. See *Rex v. Elderslaw,* 14 Eng. C. L., 367; *S. v. Pugh,* 52 N. C., 61.

In the case now before us the presiding judge might have submitted the facts to the jury and left it to them to make the inference that there was emission, if they believed that there was penetration. If the facts were found to be as testified by the witnesses, then the (174) jury would have been justified in rendering their verdict, that the complete offense had been committed; but as our Legislature has not yet passed an act similar to that of 9 Geo. IV, his Honor erred in telling the jury that proof of emission was not necessary. For this error the prisoner is entitled to

PER CURIAM. *Venire de novo.*

Cited: S. v. Hodges, 61 N. C., 232; *S. v. Hargrave,* 65 N. C., 467.

STATE UPON THE RELATION OF WILLIAM LANDER, SOLICITOR, v. A. B. MCMILLAN ET AL., JUSTICES OF ALLEGHANY.

1. Where an act of Assembly, establishing a new county, appointed commissioners, by name, to ascertain a site and purchase a tract of land for a county town, and required the justices of the county to appoint commissioners to lay off lots and sell them, it was *Held,* not to be a sufficient return to an alternative mandamus to compel the justices to the performance of their duties to allege that the locating commissioners in discharging their duties were prompted by improper motives.

2. Where an act of assembly, establishing a new county, made it the duty of certain commissioners to purchase a tract of land, and, having taken a deed for it, to file such deed in the office of the county court, and then for the justices of the county to do certain acts prescribed, it was *Held,* that the justices were not entitled to any other notice that the commissioners had acted than the filing of such deed; especially as no notice is required by the act to be given them.

3. The proper way for the justices of a county to make return to a mandamus is for them to convene, and, a majority being present, to fix upon the facts they mean to rely on by way of defense, and appoint some one of their body to make affidavit, and to do all other things required by the proceeding.

(175) MOTION for a peremptory *mandamus*, heard before *Osborne, J.*, at Spring Term, 1860, of ASHE.

The petition sets forth the act of Assembly laying off and establishing the county of Alleghany, and that by a supplemental act passed at the same session (1858), five persons, naming them, were appointed commissioners to locate the county-seat of said county at or near the geographical center of the said county, as to them should seem practicable, which was to be called "Sparta," where the courthouse and other public buildings were to be erected; and they were required to purchase, or receive by donation, a tract of land to contain not more than 100 acres, and to take a conveyance therefor to the chairman of the county court. The petition sets forth further, that the commissioners appointed by the said act performed their duty by causing a survey to be made of the new county, and having thus ascertained the center, they fixed upon a point near thereto, on the land of one James H. Parks, and took a deed from the said Parks and two others, conveying to the chairman of the county court of Alleghany County, and his successors, 50 acres of land for the purposes declared in the said act of Assembly, and delivered the same to Allen Gentry, clerk of the county court of said county, in whose hands it still is.

The petition further states that by section 8 of the said act of Assembly the justics of the county court, at the first session, a majority being present, are required to appoint five commissioners to lay off the lots of the said town, and after designating such as shall be retained for public use, shall expose to public sale the residue of the said lots, at such time and in such manner as the court may direct, taking bonds and directing the justices to apply the proceeds to the erection of the public buildings.

The petition sets forth that the justices of the county court, naming them, appointing the commissioners required, but gave them no instructions in what manner and in what time to make the sale of the lots, and at the next term of the court, a majority being present, they revoked the appointment theretofore made, and directed them not to pro- (176) ceed in the business, and that they have failed and refused, and still refuse, to appoint any other commissioners or to give any instructions to those appointed touching the laying off and selling the lots and laying off streets of the said town, or to do any other act in the discharge of such their duty.

The petition avers that the said justices were fully aware of the proceedings of the locating commissioners in surveying the county, fixing on a site, and taking a deed for the land purchased, and of its existence in the hands of the clerk of the county court.

The prayer is for a *mandamus* commanding the justices to discharge their duty in the premises or show good cause to the contrary.

The petition was verified in proper form, and the writ of alternative *mandamus* issued, and was served on the justices of the said county of Alleghany. At Spring Term, 1860, of Ashe Superior Court, which had jurisdiction of the case, several of the justices of the peace made return that they were willing and anxious to proceed in the discharge of their duty according to the requirements of the act of Assembly, but that they were overruled and prevented by the other justices of the county, who constituted a majority. The other justices, being the majority, without having called a session, professed to make return through A. B. McMillan, and alleged for their return that the commissioners appointed to fix upon a site for the county town, in performing that duty did not consult their own judgments, but left it to a vote of the people of the new county, who determined on the place now insisted on, and, secondly, that the locating commissioners had never notified the justices of their action in the premises.

The court decided that the return was insufficient, and ordered a peremptory *mandamus* to issue, from which the defendants appealed.

Crumpler for plaintiff.
Boyden for defendants.

BATTLE, J. The relators having heretofore obtained a writ of (177) alternative *mandamus* against the defendants from the judge of the Superior Court of Law for the county of Ashe, to which the defendants made their return, in which they set forth the reasons why they had not performed the duties required of them, and upon that return the court having made an order for a peremptory *mandamus,* the defendants took an appeal therefrom to the Supreme Court.

The proceedings are founded upon sections 7 and 8, chapter 4, Laws 1858, entitled "An act supplemental to an act to lay off and establish a county by the name of Alleghany, passed by the present session of the General Assembly." Section 7 required of certain persons therein named as commissioners to select and locate a site for the county town at or as near the geographical center of the county as practicable, and for that purpose to purchase, or obtain by donation, a tract of land of not more than 100 acres, "to be conveyed to the chairman of the county court and his successors in office, for the use of the said county." This duty, the relators alleged in their petition, had been performed, and the object of the *mandamus* prayed for was to compel the defendants to appoint five commissioners "to lay off the lots of the said town" and to perform the other duties required of them by section 8 of the act.

The only facts set out in the return of the defendants upon which their counsel relied in the argument here in opposition to the order for the peremptory *mandamus* are, first, that the commissioners who were appointed to locate and select a town for a county-seat did not, in performing that duty, act upon their own judgments, but upon the result of a vote of a majority of those citizens of the new county, who voted upon the subject; and, second, that the said commissioners had never notified the defendants, as justices, either in writing or verbally, that they had selected a site for the county town, and purchased, or obtained by donation, the land upon which it was to be located.

We are decidedly of opinion that neither of these objections can avail the defendants. The justices of the county court have, (178) clearly, no right to go behind the action of the locating commissioners and inquire by what motives they were prompted in the performance of their duty. The commissioners did precisely what they were authorized and required by law to do, and it would be singular, indeed, if the validity of their act depended upon the motives, good or bad, by which they were actuated in doing it.

With regard to the second objection, it is admitted by the defendants that the commissioners had taken a deed, by which the grantor conveyed 50 acres of land to the chairman of the county court, for the use of the county, in which deed, however, one acre was excepted. It is admitted that this deed was deposited in the office of the clerk of the county court, and the defendants knew that fact. That act of the locating commissioners, so far as we can see, was all that the law contemplated in order to make it the duty of the defendants to appoint commissioners for performing the duties enjoined by section 8 of the act. We cannot discover that the locating commissioners were required to give any kind of notice to the defendants of what they had done, it being supposed that when the deed for the land which they were required to procure was filed in the office of the clerk of their court, they would know it, and would thereupon immediately proceed to appoint commissioners for laying out the lots and streets of the town, selling lots, etc., so that the public buildings of the county might be erected as soon as practicable.

We have considered the case as if all the proceedings were proper; but in truth, it was irregular that two returns should have been made, one by a majority and the other by a minority of the justices of the county. As we said in *McCoy v. Harnett,* 49 N. C., 180: "A *mandamus* to 'the justices of a county' issues against them as a body, and not as separate individuals; so they must make a return as a body. To this end it is proper for the justices to convene, and, a majority being present, as for the transaction of any other county business, to agree

upon the facts that are to be set out for their return. In this, as in other cases, a majority of those present will govern. They (179) will then appoint some one of their body who, as their agent, is to make the proper affidavit and do all other acts and things which may become necessary in the course of their proceeding." But, notwithstanding the irregularity to which we have alluded, as the parties and their counsel have treated the return of a majority of the justices as "the return of the justices of the county," we have regarded it as such, and, so regarding it, we find nothing in it to prevent the relators from having an order for a peremptory *mandamus* against them. The judgment of the Superior Court to that effect must, therefore, be

PER CURIAM. Affirmed.

HUGH LITTLE v. G. B. HOBBS, ADMINISTRATOR.

Though a covenant be with two or more, jointly, yet if the interest and cause of action of the covenantees be several, the covenant shall be taken to be several, and each of the convenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint.

COVENANT, tried before *Dick, J.*, at Fall Term, 1860, of LINCOLN.

The instrument declared on was executed by most of the children of William Little, who had then lately died, possessed of a large estate, and certain of his children had exhibited a script, which purported to be a will, but which was denied by the parties to this covenant. The covenant recites the invalidity of the will, and binds the parties interchangeably to employ counsel and to bear an equal share of the expense of controverting the will. The covenant then proceeds as follows: "And it is further expressly stipulated and agreed upon by all the contracting parties, that if the will is set aside, and the estate is to be divided between the heirs at law and distributees of the said (180) William Little, deceased, and Hugh Little and Patsey or Martha Little, the two oldest children of the said William Little (who are said to have been born out of wedlock), shall have an equal and full share of the said estate of William Little." Hugh Little and Patsey both signed the bond and contributed to carry on the suit, which resulted in setting aside the script and a division of the estate among the heirs at law and next kin, from which the two oldest, Hugh and Patsey, were excluded on account of their illegitimacy. Hobbs, the defendant, after the execution of the covenant, married one of the coöbligors, Polly Sherrill, and as her husband and administrator (she having died in the mean-

time) received a large amount of money and estate, say, $2,500, but refused to contribute anything to Hugh and Patsey; on account of which refusal each of them brought suit separately against him on the covenant. In this case the counsel for the defendant objected to the form of the action because the two had not sued jointly. The court, upon the point reserved, ruled that the action was well brought, and the defendant appealed.

Boyden for plaintiff.
Thompson for defendant.

MANLY, J. Several objections were made to plaintiff's recovery in this case, all of which have been abandoned in this Court except the second in order, viz., that there were two convenantees in that part of the instrument, the breach of which is assigned as the ground of this action, and that these should have joined. We do not think this objection can be sustained.

The parties to this covenant other than Hugh and Patsey Little, bind themselves, each separately, to the two latter in the sum of $5,000, to allow the said Hugh and Patsey a full share of their father's estate. The interest of the covenantees in this stipulation is manifestly (181) several. Damages for its violation result to each, irrespective of the other, and, consequently, each may maintain an action, according to the destinction taken in *Eccleston v. Clipsham,* 1 Saun., 153. In a note to that case it is stated that though a covenant be with two or more, jointly, yet if the interest and cause of action of the convenantees be several, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint, and for this there are cited a number of authorities.

The law now seems to be settled that the insertion or omission of words of severance, such as "with them and each of them," can make no difference as to the covenantees, but that the action will in all cases follow the interest, without regard to the words of the covenant.

The paragraph cited on the argument from 1 Chitty Pleading, 12, is based upon *Petrie v. Bury,* 10 E. Com. L., 108, and the language of the author is to be interpreted with reference to the principles decided in that case. It was a covenant with three persons that if covenantor's wife survived him, that his heirs, executors, and administrators should pay to them an annuity for her. Here a joint action was held necessary, for the reasons as stated by the judges who delivered the opinions, that it was a trust, and the covenantee's trustees, who were not to have any part of the money to their own use, but jointly receive the same as a

security for the executiton of the trust, like a trust conferred, in a similar way, upon executors.

This case recognizes the distinction taken by Williams in his notes to Saunders, referred to above, viz., that the rights of covenantees as to actions upon the covenants will depend upon the nature of their interests, whether joint or several.

PER CURIAM. Affirmed.

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(182)

COMMISSIONERS OF CONCORD v. PATTERSON & KESLER.

The Legislature may delegate a portion of the general taxing power to incorporated towns for corporation purposes, and it was held that the statute, Rev. Code, chap. 111, sec. 13, empowering the commissioners of incorporated towns to levy a tax of $25 upon retailers of spirituous liquors by the quart measure or under was a proper exercise of their power.

DEBT upon a town ordinance, submitted to *Dick, J.*, at last Fall Term of CABARRUS upon the following case agreed:

By an act of the General Assembly passed at the session of 1850-'51, chapter 329, the plaintiffs are constituted a corporation with all the necessary and usual powers and provisions of principal corporations. Section 30 provides that the county court of Cabarrus shall grant no license to retail spirituous liquors by the small measure within said town, unless the applicant shall have first obtained from the board of commissioners their certificate of their assent to the same, and for which they are authorized to demand the sum of $10 for the benefit of the town.

In April, 1857, among other ordinances passed and duly published was one entitled "Town taxes," which incorporated a provision of the general law entitled "Towns" (Rev. Code, chap. 111, sec. 13), and levied a tax of $25 for a revenue "on all persons (apothecaries and druggists excepted) retailing liquors or wines of the measure of a quart or less."

The defendants were the owners of a grocery in said town and sold liquors and wines by the measure of a quart. They had no license to retail. They refused to pay the tax of $25 thus levied, and this suit was brought by a warrant to recover the same.

The only question intended to be submitted to this Court was whether the defendants were liable to this tax of $25.

On the foregoing facts, his Honor being of opinion with the plaintiffs, gave judgment *pro forma* accordingly. Defendants appealed to this Court. (183)

Fowle for plaintiffs.
V. C. Barringer for defendants.

MANLY, J. We are not informed upon what ground the recovery is resisted in this case, and are unable to discover any. The general law empowering our incorporated towns to raise a revenue by taxing certain specified objects provides that a tax not exceeding $25 may be levied on all persons (apothecaries and druggists excepted) retailing and selling liquors and wines of the measure of a quart or less. The tax in question seems to be in strict conformity with this power. The power of the Legislature to tax dealers in spirituous liquors at will, restrained only by their sense of justice and the interests of the country, we take to be unquestionable. The legislative authority to delegate this power has been exercised from the foundation of the Government, and is equally well fixed. We are not aware of anything in the laws by which these powers have been parted with or abridged.

The indictable character of retailing in quantities less than a quart without license does not at all touch the taxing power.

By the general revenue law a tax in behalf of the State of 5 per cent is levied on capital invested by dealers in liquors, etc.; Rev. Code, chap. 99, sec. 24.

This exercise by the Legislature of the power to tax, and the delegation of it at the same time within certain limits, in respect to the same objects, is of frequent occurrence in the Code of the State.

The two taxes are imposed for different purposes. It would be perfectly competent for the Assembly to do both: to tax an object to a certain extent for one purpose, and again to tax it in a similar way for another purpose. And we see no good reason why it may not divide and delegate a portion of this power when it is necessary (184) or expedient to do so.

The government of North Carolina, in respect to the power of taxation, has been conducted in this way from the beginning.

The Legislature exercises directly a portion of the taxing power for State purposes, the county court, under authority from the Legislature, exercises another portion for county purposes, and incorporated towns still another portion for corporation purposes, all upon the same objects of taxation.

We are of opinion that the *pro forma* judgment below, for the plaintiff, is correct.

PER CURIAM. Affirmed.

ABNER C. McDOWELL v. WILLIAM BOWLES.

It is not actionable *per se* to charge a white man with being a free negro; and it does not alter the case that such man was a minister of the gospel.

Slander, tried before *Dick, J.*, at last Fall Term of Surry.

The plaintiff declared that he was a clear blooded white man, and a regular licensed minister of the Baptist Church; that the defendant said of him at a constable's election, where plaintiff came forward to vote, that he (plaintiff) had no right to vote; that he (plaintiff) was a free negro, and said, "If you let free negroes vote here, let Zach. Warden (who is a free negro) vote also." There was no special damage laid or proved.

The defendant moved to nonsuit plaintiff, upon the ground that the words alleged to have been spoken were not actionable. His Honor being of that opinion, ordered a nonsuit, from which plaintiff appealed.

Crumpler for plaintiff.
Boyden for defendant. (185)

Manly, J. We are not aware of any class of defamatory words, which are held to be actionable, that would embrace the language complained of in this case. The three classes most usually found in elementary books are:

1. Words that impute a crime or a misdemeanor punishable by an infamous penalty.
2. Words that impute any contagious disease by which the party impugned would be excluded from society.
3. Words derogatory to one in respect to his office, profession, or calling.

The case before us is not embracing in any of these classes.

It is obviously not in the first. It is not in the second, for the reason that this class has been strictly confined to the imputation of certain diseases of a loathsome or pestilential nature. It is not in the third, because the offensive language is not spoken of the plaintiff in respect to his calling, which is indispensable to the actionable character of words in that class. It is stated in the declaration that the plaintiff was a minister of the gospel. Conceding this to be one of the callings falls within the rule of law in respect to slander (which is by no means certain), yet its sacred character will not make language actionable which would not be if used of a private person, unless such language be of and concerning him in his capacity of minister.

Thus stands the law, as we conceive, in respect to words alleged to be actionable of themselves; with respect to all other disparaging words, outside of the limitation prescribed, special damage must be alleged and proved.

Concurring with the court below, that the words are not subject to an action without an allegation and proof of special damage, the judgment of nonsuit in the court below is

PER CURIAM. Affirmed.

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(186)

WILLIAM C. KINSEY v. THE MAGISTRATES OF JONES.

The justices of a county are not responsible to the owner of property for injuries to it occasioned by defects in public bridges under their control.

CASE submitted to *Bailey, J.*, at Fall Term, 1860, of JONES, upon the following case agreed:

The plaintiff's negro, with a mule and cart, while crossing over a bridge in the county of Jones, were precipitated into the river Trent by the breaking in of the bridge, and in consequence thereof the mule and cart were lost. It was admitted that the bridge was dangerous, and that the magistrates knew it; but it was also admitted that they had entered into a contract with a person fully competent to repair said bridge, as soon as they were aware of its dangerous condition, but that he had neglected to do so. It was agreed that if the court should be of opinion that the defendants are liable in this action, judgment should be rendered for the plaintiff for the sum of $170; if contrary, that judgment of nonsuit should be entered. The court being of opinion that the action could not be sustained, judgment of nonsuit was accordingly entered. Plaintiff appealed to this Court.

J. W. Bryan for plaintiff.
Washington for defendant.

MANLY, J. We concur with the court below in the opinion that this action cannot be sustained. The justices cannot be held responsible, either in criminal prosecutions or civil actions, for deficiencies in the public highways and bridges. They are charged with certain duties in respect to them, but when these are performed their office ceases, and the overseers and contractors are responsible to the county and to citizens.

That they are not criminally responsible except for the nonperformance of the specific duties assigned them by law is decided by *S. v.*

Lenoir, 11 N. C., 194; and that they are not responsible at all in civil actions to the citizens of the county is also settled by authority and the uniform practice of the State. (187)

We content ourselves with referring to the work of Angel and Durfee on Highways, sec. 286, and the cases there cited, which were called to our attention by the defendant's counsel in the argument.

In some of the States it seems provision has been made, subjecting parishes, townships, counties, and the like *quasi* corporations to a limited responsibility by civil action, but it is well settled that there is no such redress at common law. The reasons given are, that it is a public matter and ought to be performed by presentment, and that corporations of that class have no treasury at their disposal out of which they could pay damages and no power to provide any.

The justices, as a municipal body in our system, act only through the medium of a majority of its members, and their actions, when done, bind the body as such, and not the individuals of whom it is composed. So their refusal or neglect to act would be the refusal or neglect of the body, and render it alone responsible. How is satisfaction of a judgment against such a body to be obtained?

Heretofore, in North Carolina, redress against the justices for misconduct or omission of duty has been sought through the writ of *mandamus.* Resort to this process is based upon the assumption that there is no other legal remedy, for it is only proper in that case, as is shown in *S. v. Jones,* 23 N. C., 129, and *S. v. Moore,* 24 N. C., 430. The many cases of *mandamus* found in our reports, to compel justices to perform their duties are, therefore, so many judgments of our courts, by a necessary implication, that the remedy by private action was not open to the citizen.

The novelty of this action is evidence against it. Although, as alleged, it belongs to the common-law rights of action, it is without precedent so far as we know.

PER CURIAM. Affirmed.

Cited: White v. Comrs., 90 N. C., 439.

(188)

EMANUEL JACKSON v. PETER HANNA, ADMINISTRATOR.

1. Where a grantor of land in another State entered into a covenant of quiet enjoyment, and after his death his widow recovered of the grantor a sum certain in lieu of her dower (the law of that State subjecting all lands to dower of which the husband was seized during coverture), it was *Held*, that such recovery was an eviction, and the covenantee was entitled to recover the amount paid.

2. Where a convenantee sued on his covenant for quiet enjoyment, on an account of a recovery of a sum certain off of him by the widow of the covenantor for her dower, and it appeared that only a part of the recovery was paid when the suit was brought, and the remainder afterwards and before the trial, it was *Held*, that the covenantee was entitled to recover the whole sum.

3. The action on a covenant of quiet enjoyment is transitory, and, though entered into in another State, may be sued on in this State.

COVENANT, tried before *Saunders, J.*, at June Special Term, 1860, of RICHMOND.

The plaintiff declared on a covenant contained in a deed to him from the defendant's intestate, one Eli Meekins. The covenant is in these words: "And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Emanuel Jackson, his heirs and assigns, against myself and my heirs, and against all persons whomsoever, lawfully claiming or to claim the same or any part thereof."

The plaintiff entered into possession of the land, which is in South Carolina, during the lifetime of the covenantor, and has continued in possession ever since. After the death of the covenantor his widow filed a petition for dower in the courts of South Carolina. It was proved that by the laws of that State the widow of one dying intestate is entitled to her dower in all the land of which her husband was seized during the coverture, and that the jury may lay off her dower in the land, or may, in their discretion, if in their opinion such assignment cannot be made without injury to the interests of the parties concerned, ascertain the value of her dower, and direct the value of the same to be paid in money. In this case the jury ascertained the value of (189) the dower interest, and there was a verdict and judgment against the plaintiff in this case for $590.68, with interest on $516.66 until paid, and costs, $52.33, and an execution issued for the same. Before the bringing of this suit the plaintiff paid the costs of the proceeding for the dower, to wit, $52.33, and during the pendency of the suit, and before the trial, he paid the whole judgment, amounting to $712.17.

There was a verdict for the plaintiff for the whole amount, subject to the opinion of the court upon the law of the case, with leave to set aside the verdict and enter a nonsuit in case it should be against the plaintiff, or otherwise should give judgment for whatever the plaintiff was entitled to.

His Honor, on consideration, gave judgment for the amount of the costs paid, $52.33, and the plaintiff appealed.

R. H. Battle for plaintiff.
Strange for defendant.

MANLY, J. We interpret the warranty in the deed of Eli Meekins, of 7 October, 1851, a covenant for quiet enjoyment, and after some reflection conclude that the recovery by the widow of Meekins of the judgment of $590.68, the suing out of the execution, and enforcing the collection of the same, is, under the circumstances, an eviction, which entitles the plaintiff to his action of covenant on the warranty.

It seems by the law of South Carolina the widow is entitled to dower in all lands of which her husband was seized during the coverture, and that the jury may either assign dower by an allotment of a portion of the land, or, where the interests of all concerned require it, by an assessment of the value of the same, to be paid her in money. Dower was assigned in the latter mode, a judgment was rendered against Jackson for the same, a *fieri facias* sued out, and the moneys made thereon. If dower had been assigned by an allotment of land, followed on the part of the widow by an action of ejectment, and writ of possession executed, the case would have been free from all doubt. The case (190) before us does not differ substantially from this. Dower is assigned in the land in a different mode, by force of the law, and the plaintiff makes satisfaction for the same under the compelling process of the law. This is the same, in all essential particulars, as a dispossession under a superior title *pro tanto,* both being, in substance, a disturbance of the possession by process of law.

It has been held in our State, in *Coble v. Wellborn,* 13 N. C., 388, that the purchase of an outstanding title established by an action of ejectment was not an eviction. The case differs from the one before us in the important particular that the purchase was voluntary and for the sake of peace—there being no actual coercion or enforcement of the superior title. The plaintiff has lost a part of the thing bought, occasioned by the right or claim of a third person enforced at law. This is eviction, and the judgment of the court below, in that particular, was correct.

We think there was error, however, in respect to the damages held

by the court to be recoverable in the action. The part of the judgment paid after the suit and before the trial was also recoverable. With respect to damage, we apprehend the law to be that proof of such may extend to all facts which occur or grow out of the injury, even up to the day of the verdict—excepting those facts which not only happened since the commencement of the pending suit, but do of themselves furnish sufficient cause for a new action. Indeed, it is upon this general principle that interest is computed up to the time of the verdict in an action for the nonpayment of a sum of money. Mr. Sedgwick in his work on damages says (page 104, 6): "It is agreeable to the principles of the common law that whenever a duty has been incurred pending the suit, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given in the action already depending." The enforcing of the judgment which constituted the eviction having been partly accomplished before the suit, it follows upon the principles laid down that all the damage resulting from the (191) eviction should be given in the present suit.

There are two cases in the Massachusetts reports which appear to be somewhat analogous to this, upon the present point: *Leffingwell v. Elliott,* 10 Pick.; *Brooks v. Moody,* 20 *ibid.,* 474, where it is held, in actions upon covenants of warranty against encumbrances, the plaintiffs may recover the amounts fairly and justly advanced to remove the encumbrances, although paid after the suit begins.

A question has been raised whether this be a local or transitory action, and, therefore, whether it be well brought in this State. The action being upon contract, is transitory, and is well brought. This point is fully discussed and settled in *Thursley v. Plant,* 1 Saun., 241, *b.,* note 6.

There should have been a judgment below according to agreement, with respect to the points reserved, for the entire amount of damage incurred to the trial, and this judgment will be accordingly rendered here.

PER CURIAM. Reversed.

Cited: Hodges v. Wilkinson, 111 N. C., 61.

SAMUEL T. BOND v. THOMAS D. WARREN.

Juries are at liberty to infer the motives of parties from their conduct: Therefore, where in an action for an assault and battery it was proved that the defendant came to the house of the plaintiff, with whom he had been before on friendly terms, and said to him: "How dare you send a letter to my house!" and immediately assaulted him, it was held error in the judge to charge the jury that there was no evidence that the letter was offensive or insulting, and that they could not infer that it was so.

TRESPASS *vi et armis,* tried before *Howard, J.,* at Fall Term, 1860, of CHOWAN.

The plaintiff introduced a witness, his daughter, who testified that in November, 1859, the defendant came to the store of the plaintiff, walked up to him, and said: "How dare you send a letter to my (192) house?" that the plaintiff replied, "What do you mean, sir!" and that the defendant then committed the trespass complained of. The witness further testified that the store of plaintiff and dwelling of defendant were both in Edenton; that the defendant was a widower, with a daughter, just returned from school, a young lady living with him; that she had never seen the defendant in plaintiff's store before this time, and that she had never heard of any difference or difficulty between them; that so far as she knew, and as she believed, they were on friendly terms before this. The defendant's counsel argued that a letter had been sent to defendant's house, that it was offensive or insulting, and might have been directed to defendant's daughter.

The court charged the jury that although they might infer from the evidence that the plaintiff had sent a letter to defendant's house, there was no evidence that the letter was sent as directed to defendant's daughter, or that the letter was offensive or insulting; that if the fact was so, the defendant should have shown it, and that as he had not done so, they must not so consider in making up their verdict. Defendant's counsel excepted. Verdict and judgment for plaintiff. Appeal by defendant.

Johnson and Hines for plaintiff.
Badger, Collins, and H. A. Gilliam for defendant.

BATTLE, J. This was an action for an assault and battery, committed by the defendant upon the plaintiff, in which the plaintiff sought to recover, and did recover, what is called vindictive or punitory damages or smart money. In such an action it is generally if not always important to ascertain, as far as possible, by what means the wrong-doer was actuated; for, upon the character of these motives the amount of the

damages must materially depend. If the attack upon the person of the plaintiff be cool and deliberate, wanton and unprovoked, the jury will be justified in assessing very high damages; while, on the con- (193) trary, if the defendant commit the battery under the influence of passion, excited by an actual or supposed injury done, or insult offered to him by the plaintiff, the damages ought to be comparatively low. Motive, then, being an essential ingredient in the offense, is certainly a proper subject of proof. It frequently happens, however, that this proof cannot be made by any direct testimony, and each party is necessarily driven to rely upon the indirect or presumptive evidence arising from the conduct of the opposite party. That such presumptions are allowable, and why they are so, is very well explained by Mr. Starkie in his excellent "Practical Treatise on the Law of Evidence." (See 1 Stark. Ev., m., 50 and 51.) He says: "Presumptions, and strong ones, are continually raised upon knowledge of the human character, and of the motives, passions, and feelings by which the mind is usually influenced. Experience and observation show that the conduct of mankind is governed by general laws, which operate, under similar circumstances, with almost as much regularity and uniformity as the mechanical laws of nature themselves do. The effect of particular motives upon human conduct is the subject of every man's observation and experience, to a greater or less extent, and in proportion to his attention, means of observation, and acuteness, every one becomes a judge of the human character, and can conjecture, on the one hand, what would be the effect and influence of motives upon any individual under particular circumstances, and, on the other hand, is able to presume and infer the motives by which an agent was actuated from the particular course of conduct which he adopted. Upon this ground it is that evidence is daily adduced in courts of justice of the particular motives by which a party was influenced, in order that the jury may infer what his conduct was, under those circumstances; and, on the other, juries are as frequently called upon to infer what a man's motives and intentions have been, from his conduct and his acts. All this is done because every man is presumed to possess a knowledge of the connection between motives and conduct, intention and acts, (194) which he has acquired from experience, and be able to presume and infer the one from the other."

The direct bearing of these remarks upon the case now before us is obvious. The defendant being upon friendly terms heretofore with the plaintiff, went to his store and beat him in his own house, in the presence of his daughter. What motive prompted him to commit so lawless and violent an act? The jury, who were called upon to decide upon the questions connected with that act, had a right to infer the

motive from his conduct, which being *pars rei gestæ,* was evidence for him. What, then, was his conduct? The witness stated that he came to the store of the defendant, and, walking up to him, said, "How dare you send a letter to my house?" What motive can fairly and reasonably be inferred from such conduct but that a letter was sent by the plaintiff to the defendant's house which was, or which the defendant supposed to be, offensive in its terms. It is impossible to suppose that a sane man would have acted towards one with whom he was on friendly terms as the defendant did towards the plaintiff, unless he in some way felt himself aggrieved by the act of the other. If such an inference, then, was a fair and reasonable one, the jury had a right to draw it, and his Honor erred in instructing them otherwise. Nor was that error cured by the failure of the defendant to produce the letter and offer it in evidence, so that the jury might see the contents and judge for themselves whether they were offensive or not. It did not appear that the defendant had the letter in his possession. He may have refused to receive it, or may have sent it back. But even if he had the possession of it, his nonproduction of it was only evidence for the consideration of the jury as to the character of its contents, but did not justify the court in withdrawing from the jury the right to make their own inferences from the conduct of the defendant. His Honor very properly said that there was no evidence that the letter was sent or directed to the defendant's daughter; but he went too far in instructing the jury that they could not infer that it was offensive or insulting to the defendant himself. His conduct showed clearly that it was so, or that he thought it was so, and though his nonproduction of the letter (supposing that he had it) may have weakened the testimony, it (195) did not entirely destroy it.

PER CURIAM. *Venire de novo.*

THOMAS G. SPARROW v. ROBERT C. MAYNARD.

In a declaration for slander, in charging the plaintiff with perjury in another State, it must be averred that by the laws of such other State perjury is an offense to which is annexed an infamous punishment.

ACTION for slanderous words spoken, tried before *Bailey, J.,* at Fall Term, 1860, of CRAVEN.

The words complained of are elaborately set out in a declaration, and the substance of them is that on an indictment in a criminal court in Baltimore, in the State of Maryland, against one Thomas B. James for obtaining goods under false pretenses the plaintiff, who appeared as a

witness for the said James, committed willful and corrupt perjury. The declaration, however, nowhere averred that by the laws of Maryland perjury was, or now is, punishable with an infamous punishment.

Exception was taken on the trial to this defect in the declaration, and was sustained by his Honor, who nonsuited the plaintiff, from which he appealed to this Court.

McRae for plaintiff.
Haughton and Miller for defendant.

(196) MANLY, J. The question presented for our consideration is whether the declaration sets out matter that, in law, constitutes slander; for if it does not, according to *Brown v. Dula,* 7 N. C., 574, the plaintiff was properly nonsuited in the court below.

Words actionable *per se*—that is, say, where no special damages is alleged—must impute an infamous offense. This is well settled by *Skinner v. White,* 18 N. C., 471, and *Wall v. Hoskins,* 27 N. C., 177. The infamy of the punishment seems to be the criterion by which the effect of words to degrade, socially, is judged, and by which their actionable character is determined.

If the words do not of themselves import such offense, they must be helped out by the averment of matter to give them their proper and the requisite signification.

Where words charge an act committed in another State, we cannot certainly know, without aid, that any offense against law is imputed. That depends upon the law of the State, of which we do not take judicial cognizance. It is necessary, therefore, to complete information as to the character of such words, that it should be averred, and, of course, proved what the law of the State is where the act is located.

The principle with regard to words of the class we are now considering is settled by *Shipp v. McCraw,* 7 N. C., 466, and *Wall v. Hoskins,* 27 N. C., 177. It is thus settled, not upon the ground that peril to the plaintiff must be shown as an ingredient in slander, for peril is not necessary, but because the law, where no special damage is alleged, has thought proper to annex social loss only to charges of that class. Contumely is said to be the *gravamen* of the action, and a legal inference of that can only be drawn from the imputation of felonious or other infamous offenses.

We do not wish to be understood as saying that the inference of social loss will be drawn in this State from every charge of an offense committed in another State which by the laws of that State is punished infamously. That will depend upon the light in which it is (197) regarded here. But upon that discussion we do not enter.

We are of opinion, therefore, that in a declaration for slander in charging the plaintiff with perjury in the State of Maryland it must be averred that by the laws of Maryland perjury is an offense to which is annexed an infamous punishment. What it is necessary to aver, it is necessary, according to a well established principle of pleading, to prove. Allegations without proofs, and proofs without allegations, are equally unavailing.

PER CURIAM. Affirmed.

Cited: Harris v. Terry, 98 N. C., 134; *Gudger v. Penland,* 108 N. C., 599.

DOE ON THE DEMISE OF EDWARD WELCH ET AL. v. WILLIAM TROTTER.

1. Where an Indian, under the treaties of 1817 and 1819, after having his reservation allotted to him, voluntarily abandoned it and reunited himself with his tribe, west of the Mississippi, it was *Held,* that his children, after his death, were not entitled to any estate in such reservation.
2. A treaty in its effect is an executory agreement, and where an estate was limited by treaty to one for life, with a remainder to others on a condition extending to both estates, it was *Held,* that on breach of such condition both estates were defeated without entry.

EJECTMENT, tried before *Heath, J.,* at Spring Term, 1860, of MACON.

The lessors of the plaintiff, in this case, are the children and widow of John Welch, a native Cherokee Indian. By the eighth article of the treaty of 1817 it is provided that "To each and every head of any Indian family residing on the east side of the Mississippi River, on the lands that are now or may hereafter be surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of 640 acres of land, in a square, to include their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate, with (198) a reversion in fee simple to their children, reserving to the widow her dower, the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty: *Provided,* that if any of the heads of families for whom reservations may be made shall remove therefrom, then in that case the right to revert to the United States."

By the second article of the treaty of 1819 it is provided that "The United States agree to pay according to the stipulations contained in

the treaty of 8 July, 1817, for all improvements on land lying within the country ceded by the Cherokees which add real value to the land, and do agree to allow a reversion of 640 acres to each head of any Indian family residing within the ceded territory (those enrolled for the Arkansas excepted), who choose to become citizens of the United States in the manner stipulated in the said treaty."

Welch made application for a reservation, having had his name registered for that purpose, and accordingly the land in question, on which he was residing with his family at the date of the treaties, was duly surveyed and laid off to him as a reservation. He continued to reside on the premises until February, 1822, when he voluntarily delivered them to one Benjamin S. Brittain, and removed to the Cherokee Nation, beyond the Mississippi. He subsequently claimed and received compensation, under the treaty of 1835, for his improvements on the land in question, and claimed and received his share of the *per capita* and removal fund secured to the Cherokees under the treaty.

The full particulars of the defendant's title are set out in the case agreed; but as the whole case turns upon the want of title in the lessors of the plaintiff, it is not deemed important to report them.

These facts were agreed upon by the counsel of the parties, and submitted for the judgment of the court, who, *pro forma,* decided (199) in favor of the plaintiff, from which the defendant appealed.

This cause was argued by *Gaither* for the plaintiff and *N. W. Woodfin* for the defendant, at Morganton, and upon an *advisari* and removal to this Court was again argued by

No counsel for plaintiff.
Phillips for defendant.

PEARSON, C. J. The case depends upon the construction of the treaties of 1817 and 1819 between the United States and the Cherokee Indians.

By article 8 of the treaty of 1817 it is stipulated that "To each and every head of any Indian family residing on the east side of the Mississippi River, on lands that now are or may hereafter be surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of 640 acres of land, to be surveyed," etc., "in which they shall have a life estate, with a reversion in fee simple to their children, reserving to the widow her right of dower, and the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open, etc.: *Provided,* that if any of the heads of families for whom reservations may be made shall remove therefrom, then in that case the right to revert to the United States."

The second article of the treaty of 1819 merely reiterates and confirms the right in the manner stipulated in the previous treaty.

Prior to these treaties the Cherokee Indians lived on and were in possession of a large body of land, of which the tract in controversy was parcel, within the limits of this State, but it was conceded that the title to the land was in the State, subject to the right of occupancy on the part of the Indians. That is, the ultimate title was in the State, and the Indians had only a "base or qualified fee" so long as they should continue to occupy the land.

The object of the treaty was to extinguish the Indian title for the benefit of the State, by inducing the Indians to remove; and in order to meet objections which were made against entering into (200) the treaty, by some individuals of the trible, it was agreed that any "head of a family" who did not wish to remove, but desired to live where he was, should have a tract of 640 acres allotted to him in severalty, in lieu of the share of the whole to which he was entitled in common with other members of the tribe.

It was foreseen that the effect of an allotment or reservation (as it was termed) to a particular Indian would simply be to give him a parcel in severalty in the same form, plight, and condition in which he was before entitled to the whole in common as a member of the tribe; that is, that he would have a right of occupancy, or a base or qualified fee. This was objected to on the part of the Indians, who desired that the reservation should confer an absolute estate in fee simple. This demand could not be yielded to on the part of the United States, because, among other reasons, it would give to the Indians taking a reservation a right to alien, and it was apprehended that a great many Indians would be thus induced to take reservations and afterwards sell, and then remove and become reunited to their tribe—a mode of proceeding which would greatly prejudice the rights of the State of North Carolina, by taking from her the benefit of selling the land, and conferring it on the Indians. A compromise was then effected by which it was agreed that in case any Indian taking a reservation should live on the land during his lifetime, his children should have an estate in fee simple and his wife dower; but if the Indian should remove from the land, the reservation should be void and of no effect. In this way it was supposed that a fraudulent abuse of the right to have reservations was sufficiently guarded against. This explains what, at first, seems singular, that the estate is divided, and a life estate is given to the head of the family, and a remainder is given to his children in fee simple. Whether this stipulation to give the children an absolute fee simple was valid in respect to the State of North Carolina, or whether, having taken benefit under the main provisions of the treaty, she was not bound by all

(201) its provisions, is a question into which we will not enter, but will assume, for the purposes of this case, that the stipulation was valid. It was certainly reasonable to impose this condition in order to prove that the reservation was taken *bona fide* by the head of the family, and give some assurance that his children would remain on it. They had no ground to complain, for, as the reservation was acquired by the mere act of the head of the family, it was for him to stipulate upon what terms he would take it, and, in truth, the stipulation that in case he complied with the condition his children should have a fee simple absolute, was a gratuitous concession to them.

The statement made above in reference to the condition of things at the date of the treaty, the relation of the parties, and the purposes for which the treaty was made, taken in connection with the words used in the clause now under consideration, make it manifest that it was the intention only to allow the children of such of the Indians who took reservations, as continued to live on the land during their lives, to have estates in the land.

In the construction of treaties the intention of the parties is the governing principle, and the courts will not permit it to be defeated because of an omission to insert technical words, or of an improper use of them. If by the operation of any rule of law the "little savages," who may happen to be the children of an Indian, who, after having his reservation allotted to him, voluntarily abandoned it and reunited himself to his trible, are entitled to the land after his death, the result will do violence to the plain intention of the contracting parties, and must be attributed either to a want of foresight or of intelligence on the part of the commissioners who made the treaty, or their inability to use words proper to express the meaning of the parties.

1. It is insisted for the plaintiff that the children of John Welch do not claim under him by descent, but claim as purchasers, by force of the remainder which is limited to them in fee simple, according to the provisions of the treaties; and it is a well settled rule of law, (202) "Where a remainder is limited a condition annexed to the particular estate is void, for it is unreasonable that the grantor, by entry to defeat the particular estate, should defeat the estate in remainder, which he had absolutely granted away." (Ferne on Remainders, 271.) The rule of law is admitted, but it has no application to our case; for the condition is not annexed to the life estate only, but is also annexed to the estate in remainder, "*Provided,* that if any of the heads of families for whom reservation may be made should remove therefrom, then, in that case, the right to revert to the United States." What right? The right to the land; which, of course, includes the estate in remainder as well as the estate for life. So the condition is annexed to the whole

estate, and authority need not be cited to show that if the condition is annexed to the whole estate it makes no difference in respect to the efficacy of the condition to defeat it, whether the whole is granted to one person or the estate is divided and a part is given to one and the remainder to another person. The life estate in the case under consideration was obviously a matter of minor importance, and the idea that the purpose of the condition was to defeat that estate only, and leave the remainder in fee simple to take full force and effect, leads to an absurdity.

2. It was insisted for the plaintiff: Admit that the condition applies as well to the remainder as to the life estate, it is a well settled rule of law, "When freehold estate vests, it can only be defeated by force of a condition, by the entry of the grantor, or some act equivalent to entry." It is a principle that "an estate that begins by livery can only be defeated by entry." (Co. Lit., 218; *Broadway v. Beston,* Plow., 131; *Doe v. Pritchard,* 5 B. and Ad., 765.) And it is contended that the estate which vested in the children of John Welch by the limitation of the remainder has never been divested by entry or any equivalent act. This rule of law is also admitted, and it is likewise conceded that had the treaty contained a provision that it should be carried into effect by a grant to such Indians as took reservations for life, with remainder to their children and their heirs, and a grant to that effect had accordingly been issued by the State of North Carolina, with the (203) condition annexed to the whole estate, the remainder in fee simple having thereby vested in the children, would not have been divested by any act that has been done, notwithstanding the breach of the condition.

But no such grant was required by the treaty to be issued, and no such grant has, in fact, been issued. The rights of the children depend merely on the stipulations of the treaty. Their estate was never executed, but remains and depends on an executory contract. So all the learning in respect to what is necessary to be done in order to defeat a freehold estate which has been created by feudal investiture, or by the grant of the sovereign, or by the feoffment and livery of an individual, or any conveyance having the like effect, has no application, and the authorities which were cited operate against the plaintiff, because they show that in matters of contract executory in respect to chattels personal, and likewise chattels real (see notes to *Dumpor's case,* 1 Smith's Leading Cases, 50), a condition that the contract, or a conveyance of a chattel, or a lease for years shall be void, has in law the effect of making the contract, conveyance, or lease for years void *ipso facto,* on breach of the condition. All the learning in respect to conditional limitations rests on the principle that a use may be defeated by breach of condition without entry.

Our case, then, is narrowed to this: The United States stipulates and agrees that, provided the head of an Indian family, who has taken a reservation, continues to live thereon, he shall have a life estate, and his children shall have the reversion (meaning the remainder) in fee simple; and the Indian stipulates and agrees that in case he removes therefrom the reservation shall be void and of no effect. A treaty in its legal effect is an executory agreement. It is clear, therefore, the act of voluntary removal operated, *ipso facto,* to defeat the whole reservation.

The fallacy of the argument upon which the claim of the plaintiff is put arises from a failure to distinguish the case of a remainder, created by an executed conveyance, such as a grant or feoffment, and the (204) case of an interest in remainder, which rests on mere treaty stipulations or an executory agreement (which is our case), where the rules of law are not so rigid and greater latitude is allowed in order to effectuate the intention of the contracting parties. The well established distinction between an executed and an executory trust, *i. e.,* one resting on articles, furnishes an analogy, and an apt illustration.

The opinions of Attorney-General Legaré and of Attorney-General Clifford, vol. 4, Opinions of Attorneys-General, at pages 180 and 619, will be found to sustain our conclusion, and also *Kennedy v. McCartney,* 14 Ala., 142.

It has been considered unnecessary to discuss the count on the demise of the widow, as her title rests on the same questions, and is further complicated by the fact that a widow has no estate until her dower is assigned to her.

Judgment in the court below is reversed, and judgment of nonsuit on the case agreed.

PER CURIAM. Reversed.

THE STATE TO THE USE OF G. W. CHIPLEY v. JAMES M. ALBEA ET AL.

Where a debtor delivered to his creditor, without indorsement, a bond on a third person as collateral security, with an agreement that it should be returned if not collected, and the creditor took from a constable a receipt for the paper for collection, as being received from him (the creditor), it was *Held,* in a suit against the constable on his official bond for failing to collect, that the creditor was the proper person to declare as relator.

DEBT on a constable's bond, tried before *Dick, J.,* at last Fall Term of IREDELL.

The breach of the bond alleged was the noncollection of a debt off of one Lazenby. The suit was brought on the relation of G. W.

Chipley, and the facts were that one Wilson owed Chipley a (205) debt, and gave him, without indorsement, a bond payable to him by Lazenby for a balance of $55, as collateral security, with an understanding that if he, Chipley, could not collect it he was to return it to Wilson. Chipley gave the note to the defendant Albea, and took from him the following receipt: "Received of G. W. Chipley one note on James S. Lazenby for $80, drawn six months after date, with interest from date, and due 21 April, 1858, with a credit on 17 February, 1859, of $25, which I am to collect or return as an officer. 21 February, 1859." At the same time he gave the constable a warrant filled up in the name of Wilson, to the use of Chipley, on which judgment was taken. There was no question as to the officer's negligence in failing to collect the money, but the defendant's counsel took the ground that Chipley was but the agent of Wilson, and that the latter should have been the relator. Of this opinion was his Honor, and in deference thereto the plaintiff took a nonsuit and appealed.

Mitchell for plaintiff.
W. P. Caldwell for defendant.

PEARSON, C. J. This Court is of opinion that the action can be maintained on the relation of Chipley, for two reasons:

1. The contract to collect the debt was made with Chipley. The receipt is evidence of this fact. The note was received from him, and the undertaking to collect, on the part of Albea, was made with him.

2. The beneficial interest in the debt vested in Chipley by the dealing between him and Wilson. He received the note as collateral security, and was entitled to whatever sum could be realized out of it. Had the officer, by the exercise of proper diligence, collected the money, Chipley had a right to receive it, and it became his money. So, as a matter of course, the negligence of the officer affected his interest, and he was the "party grieved." The circumstance that he had the (206) right to fall back on Wilson in the event that the money was not collected does not vary the question, because he had a right to receive money, in the first instance, for his own use, and cannot be treated merely as an agent of Wilson.

PER CURIAM. Reversed.

LASH & MOORE v. ANDERSON ARNOLD ET AL.

A judgment, in favor of "L. & M.," trading as a firm, is valid, and is competent evidence in a suit brought by the constituents of such firm in their individual names set out in full.

ACTION of debt, tried before *Saunders, J.*, at last Fall Term of STOKES.

The plaintiffs declared against the defendants, as the sureties of one Matthew Mabe, on his bond given as the administrator of one Abner Mabe, and the breach assigned was the nonpayment of two judgments which the relators had recovered against the administrator, Matthew. The judgments were produced in evidence, and appeared to be in the name of "Lash & Moore" on warrants in favor of "Lash & Moore" against the administrator. The plaintiffs in these warrants were William A. Lash and Edward H. Moore, trading under the name and style of Lash & Moore, and this suit is brought in their names, set out in full as trading under that commercial style. These judgments were objected to as evidence: first, upon the ground that they were null and void; secondly, because they were no evidence in a suit brought by William Lash and Edward H. Moore. The evidence was admitted, and the defendants excepted. Verdict and judgment for the plaintiffs.
(207) Appeal by the defendants.

Fowle for plaintiffs.
Morehead for defendants.

BATTLE, J. We concur with his Honor upon both the points made by the defendants in the court below. The judgments obtained by the plaintiffs before a single magistrate in the name of "Lash & Moore" were by no means nullities, as is clearly shown by *Wall v. Jarrott,* 25 N. C., 42. When the warrant was served upon the defendant in those judgments he might have availed himself by a plea in abatement, or by an exception in the nature of a plea in abatement, of the defect in the warrant, that it was not brought in the proper names of the plaintiffs; but not having done so, the imperfection was cured after judgment by our statute of amendments. See Revised Code, ch. 3, sec. 5.

The second objection is equally untenable. If the plaintiffs had brought suit on the judgments, they would have been at liberty to set forth in their declaration, their true names of William A. Lash and Edward H. Moore, trading under the name and style of Lash & Moore, and in support of that declaration might have given in evidence the judgments in favor of Lash & Moore. Such would undoubtedly have been the case in an action of debt on a bond made payable to Lash &

Moore, and we cannot perceive any difference between such an action and one upon a judgment obtained in the name of Lash & Moore. See *Wall v. Jarrott, ubi supra.*

Our attention has been called to *Cohoon v. Morton,* 49 N. C., 256, in which the court refused to permit the plaintiffs, P. A. R. Cohoon and R. H. McIntosh, partners in trade, trading under the firm and style of "Cohoon & McIntosh," to take judgment upon a bond given for his appearance by an insolvent debtor, and made payable to "Cohoon & McIntosh."

We are free to confess that the case is in direct opposition to the previous one to which we have alluded, *Wall v. Jarrott,* and we think that upon principle it cannot be supported. In the argument of it, *Wall v. Jarrott* was not referred to by the counsel for the plaintiffs, and we were led into a mistake by not adverting to the rule which allows the plaintiffs in such cases to aver and prove that they are the same persons who, as partners, are known and called by the name of the firm. (208)

PER CURIAM. No error.

Cited: Daniels v. R. R., 158 N. C., 427; *Rosenbacher v. Martin,* 170 N. C., 237.

STATE v. JOHN BRANNEN ET AL.

1. **Only those who bet, and those who play at a game of cards where there is betting, at some of the prohibited places, are liable to be indicted under the statute, ch. 34, sec. 75, Rev. Code.**
2. **Where a court refuses to quash a defective indictment, upon the ground that they deem it sufficient, an appeal will lie, and the judgment will be reversed and the cause sent back, that the court may proceed with the motion according to its discretion.**

MOTION to quash an indictment against the defendants for playing at a game of cards, made before *Saunders, J.,* at Fall Term, 1860, of GUILFORD.

The indictment charged that the defendants, at a house of entertainment in the town of Greensboro, Guilford County, kept by one Albright, "unlawfully did play at a game of cards," without charging that they bet against each other for anything, or that any one present bet on them, or either of them. A motion was made in the county court, where the proceeding originated, to quash the indictment on account of this defect, but the motion was disallowed, and the defendants appealed to the

Superior Court. A motion was made in the Superior Court to quash the bill upon the ground that it did not charge any criminal offense, but the court held that the indictment was sufficient, and refused on that ground to quash. From this ruling defendants appealed to (209) this Court.

Attorney-General, with whom was Scott, for the State.
McLean for defendants.

MANLY, J. We think the judgment of the court below in respect to the sufficiency of the indictment is erroneous. Both counts in the bill charge a playing only in the forbidden places, without betting either by the players or by any others on the game, and the question presented is whether a game of cards, of itself—that is to say, in which there is no money, property, or other thing of value bet—is forbidden by the Code, ch. 34, sec. 75. This section is as follows: "If any person shall bet money, property, or other thing of value, whether the same be in stake or not, at any game of cards, which shall be played in any ordinary or house of entertainment, or in any house where spirituous liquors are retailed, or in any part of the premises occupied with such ordinary, tavern, or house of entertainment, or house wherein spirituous liquors are sold as aforesaid, or shall play at such game of cards, the person so offending shall be deemed," etc. The question turns upon the construction of the latter part of the section, viz., "or shall play at any such game of cards."

We are clearly of opinion that the adjective "such" defines a class of games of cards, and limits the purview of the clause to games in the forbidden places at which there should be bets. If this effect be not given to the word, it must be stripped of all meaning; for there is no more reason for referring its qualifying import to the bets than to the localities, and if it be referable to neither, there is no limitation to the phrase, "game of cards"; all are alike forbidden—the game in a private dwelling, in which nothing is hazarded but the reputation for skill of the players, as well as a game in a grog-shop, in which the unhappy victims of drink will often stake their all upon the turn of (210) a card. The clause has never been supposed to have such an operation.

Mr. Webster, in his dictionary, has defined the word "such" to mean: (1) "Of the like kind"; (2) "The same that"; (3) "The same as what has been mentioned"; (4) "Referring to what has been specified."

If we take any of these definitions, the view which has been here taken of its meaning and operation, in the portion of The Code in question, is strongly corroborated.

It will be seen by reference to the law as it stood prior to 1856, Revised Statute, ch. 34, sec. 69, expounded by *S. v. Smitherman,* 23 N. C.,

14, that betting was the offense prohibited by the law. It made no difference that the accused did not play; if he bet, he was guilty of the law, and, on the other hand, however actively he might participate in the game, if he did not bet, he would not be guilty. This was felt to be a defect in the statute, and hence, as we suppose, the change of phraseology in The Code—the purpose being to subject the players at a game where others are betting, as well as the betters, to the penalty of indictment.

We hold, therefore, that only those who bet and those who play at a game of cards where there is betting, in some of the prohibited places mentioned, are amenable to indictment under the law as it now stands. The indictment, therefore, manifestly charges no offense against the law.

But the question as to the sufficiency of the indictment arose in the court below upon a motion to quash, and we are thus brought to the inquiry whether, as it is a discretionary power, we can reverse it in this Court. The rule is well settled that where the court below, in the exercise of its discretion, adjudges a matter, this Court will not interfere; but where the judgment is not put upon that ground, but upon a want of power, it is otherwise. *Freeman v. Morris,* 44 N. C., 287; *Stephenson v. Stephenson,* 49 N. C., 472. A motion to quash is not usually resorted to, or sustained by the court, except in cases where the defects are gross and the offenses of minor grade; but (211) the accused will be left to his demurrer, motion in arrest of judgment, or writ of error, according to the regular mode of proceeding. It is not necessary for us to say how the motion, viewing it as a matter of discretion, should have been disposed of; but where the court below adjudges the indictment to be sufficient, and, therefore, refuses the motion, that is to say, refuses it for a defect of power, it is an error that may be reversed in this Court.

Wherefore, let the judgment be reversed and this opinion certified to the Superior Court, to the end that it may proceed with the motion according to its discretion.

PER CURIAM. Reversed.

JEREMIAH ODOM v. WILLIAM BRYAN.

Where a slave was hired, by *parol*, for a sum certain, and before the expiration of the term the owner took the slave out of the hirer's possession against his will, and the hirer brought an action of *trover* against the owner, and recovered and received the value of the slave's services for the unexpired part of the term, it was *Held*, in an action brought by the owner against the hirer to recover the price stipulated, that the hirer, having got the full benefit of the contract, could not treat it as rescinded, and thereby avoid his obligation under it.

ASSUMPSIT, tried before *Heath, J.*, at Fall Term, 1860, of EDGECOMBE, to recover hire of a certain slave, Dave, from 5 November, 1857, to 1 January, 1859.

The defendant, as plaintiff alleged, was to pay for such hire the sum of $100 on 1 January, 1858, and $187.50 on 1 January, 1859. The plaintiff showed in evidence that he was the general owner of (212) slave, Dave, prior to the alleged hiring, and afterwards up to the bringing of this suit, and introduced evidence which, if believed, tended to show the hiring of said slave, Dave, by the plaintiff to the defendant on the terms alleged, and for the time aforesaid, and that he went immediately into the defendant's possession.

The defendant then introduced evidence which, if believed, tended to show that said slave, Dave, went back into plaintiff's possession at Old Christmas next after the hiring, and so remained in his possession to the bringing of this suit; and further introduced evidence which tended to show that there were some writings to be drawn about the hiring of Dave, and that plaintiff took possession of him because, as he alleged, the terms of hiring were not complied with, and that on defendant's demand of Dave plaintiff refused to deliver him unless he would give him a forthcoming bond, which defendant agreed to do; but plaintiff did not deliver said slave.

The plaintiff then offered to show a recovery of damages by the defendant of the plaintiff in an action of *trover* for the conversion of said Dave for the time between the period or time of Old Christmas and 1 January, 1859, and that the plaintiff had paid the recovery prior to bringing this suit; the defendant objected. The evidence was admitted. Defendant excepted.

The plaintiff then showed in evidence such recovery of him by the defendant, and a payment thereof prior to bringing the present action. The recovery was for the sum of $185.

The judge charged that if the evidence on the part of the plaintiff was believed, though they might believe the evidence on the part of the defendant, the plaintiff was entitled to their verdict for the hire of

Dave, provided the defendant had affirmed the original contract of hiring as an executed contract by bringing an action of *trover* for the recovery of damages for the conversion of Dave for the time aforesaid, and by a recovery therefor, and the defendant had paid the same; otherwise, the verdict must be for the defendant. And that if they found for the plaintiff, they might give him interest on the hire.

There was a verdict for the plaintiff. Judgment. Appeal by (213) defendant.

Dortch and Moore for plaintiff.
J. L. Bridgers and Conigland for defendant.

BATTLE, J. If a slave be hired for a year, or any other certain time, for a stipulated price, secured by a bond, the contract will be one executed by both parties, and the owner may recover the full amount of the bond, though he take back the slave before the end of the year against the will of the hirer, the latter being entitled to sue for and recover damages against the owner for his breach of the contract. *Hurdle v. Richardson,* 49 N. C., 16. The hirer might also sustain an action of *trover* for the taking and conversion of the slave for the unexpired term of the hiring, and thus recover the value of the slave for such term. But in a case of hiring for a certain time, at an agreed price, not secured by a bond or note, the contract is a continuing executory one, and the owner who shall take away his slave against the hirer's consent cannot recover, either upon the special contract or on a *quantum meruit* for the time during which the slave was in the hirer's service. *White v. Brown,* 47 N. C., 403; *Niblet v. Herring,* 49 N. C., 262.

In the case now under consideration the contract of hire was like those in the cases last mentioned, of an executory character, and upon the plaintiff's retaining his slave from the defendant, without his consent, the latter might have treated the contract as broken and put an end to by the plaintiff, and in consequence thereof might have refused to pay anything for the time the slave was in his service. He declined to take that course, but, on the contrary, he proceeded to act as if the contract were an executed one, by bringing an action of *trover,* in which he recovered from the owner, as damages, the value of the slave for the time unexpired of the term of the hiring. The amount of this recovery was afterwards, but before the bringing of this suit, paid by the plaintiff to the defendant. Supposing it doubtful whether the (214) recovery was a proper one, the defendant thereby got the full benefit of the contract for the hire of the slave, and he cannot be heard to say that he got it under an erroneous judgment of a court which had jurisdiction of the subject. Having thus obtained the full benefit of

the contract of hiring, on his part he cannot repudiate his obligation under it. He must be considered as if he had had the services of the slave during the whole period for which he had hired him, and of course he must pay for him according to his contract. The verdict and judgment against him was for the amount of the agreed price, with interest thereon, and for that the judgment must be

Per Curiam. Affirmed.

JOHN MacKEY v. WILLIAM NEILL.

All the arbitrators must concur in making an award, unless it is provided otherwise by the terms of submission.

Debt upon an award, tried before *Heath, J.*, at Special Term, June, 1860, of Iredell.

The following is a copy of the submission:

State of North Carolina—Iredell County.

Know all men by these presents, that we, William Neill and John MacKey, are held and firmly bound unto the State of North Carolina in the sum of $1,000, to the true and faithful payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and (215) severally, firmly by these presents signed with our hands and sealed with our seals.

The condition of this is such that whereas the above bounden William Neill and John MacKey having selected John W. Long, William Niceler, and Henry Cleninger to settle a matter of controversy in regard to the damages sustained by the said MacKey in a piece of land whereon W. T. Kerr now resides: Now, if the said parties abide by the decision of the above referees, this obligation to be void; otherwise, to remain in full force and effect. Given under our hands and seals this 1 April, 1859.

John MacKey. [seal]
William Neill. [seal]

The award fixed MacKey's damages at $200, and was signed by only two of the arbitrators, viz., William Niceler and Henry Cleninger.

It was proved by the plaintiff that the other referee, to wit, John W. Long, who did not sign the award, was present at the arbitration, took part in the deliberations, but disagreed with the majority in their finding as to the amount.

His Honor was of opinion that the suit could not be sustained upon the award signed by two only, when the submission was to three, but reserved the question. Verdict for the plaintiff, subject to the question reserved. Afterwards, upon consideration, his Honor set aside the verdict, and directed a nonsuit to be entered. Plaintiff appealed.

W. P. Caldwell for plaintiff.
Mitchell for defendant.

PEARSON, C. J. It is a well settled rule of law that all of the arbitrators must concur in making an award, unless it is provided otherwise by the terms of the submission, by inserting, "Their award, or the award of any two of them, shall be binding," etc., which is the usual form.

No authority was cited, and no reason was suggested, for disturbing this principle of the law, and it is not necessary to enter (216) into a discussion of the subject.

PER CURIAM. Affirmed.

Cited: Oakley v. Anderson, 93 N. C., 112.

WILLIAM MORRIS ET UX. v. JOHN H. CLAY, ADMINISTRATOR.

The modern decisions have qualified the old doctrine that a man shall not be heard to allege his own lunacy or intoxication, and these are now held to be a defense to acts done under their prevalence.

DEBT, before *Saunders, J.*, at last Fall Term of PERSON.

The bond declared on was made by Long, the defendant's intestate, as a means of giving to the plaintiff's wife (his sister) the sum called for in it, $500. The proof of its execution was unquestioned, but it was alleged that the intestate, at the time he made the bond, was *non compos mentis,* arising from extreme drunkenness and mental debility ensuing therefrom. There was evidence *pro* and *con* as to the state of Long's intellect, and the only question in the case is as to his Honor's instruction as applicable to this evidence. The case states that the "court charged that the law did not consider drunkenness alone a sufficient reason to invalidate, except when carried to such an excess as to deprive the party of all consciousness as to what he was then doing, and whatever may have been the law, the party was never allowed to stultify himself by showing he was not capable, from drunkenness, of under-

standing the act which he had done. In the present case, if the jury believed the bond had been written at the request of the deceased for the $500, with the view of making his sister a present, no matter what may have been his motive, and that he understood what he (217) was doing, and did what he intended to do when he executed the bond, the jury should find for the plaintiffs. But, on the other hand, if he did not have capacity of understanding what he was doing from the effects of hard drink or paroxysm of *delirium tremens,* or any other cause, they should find for the defendant." Defendant's counsel excepted to the charge.

Verdict for plaintiffs. Judgment and appeal by defendant.

Reade for plaintiffs.
Fowle and Hill for defendant.

PEARSON, C. J. The charge of his Honor, when he comes to make the application of the law to the case then being tried, is supported by all the modern authorities, and he gives the defendant the full benefit of the law as it is now understood to be, in opposition to the exploded dogma of the old law, "that a man could not be heard to stultify himself." Indeed, the only matter which has at all embarrassed this Court arises out of the general remarks at the commencement of the charge, in which his Honor is made to say, "Whatever may have been the law, the party was never allowed to stultify himself." This is inconsistent with the peculiar charge in reference to the case before him, but may be reconciled by the suggestion that the word "never" was inserted by misprision in place of the word "now," which, on examination, was the word first written by the clerk, and is crossed out. So we are satisfied it ought to read, whatever may have been the law, the party was now allowed to stultify himself; which is in exact accordance with what is said by *Parke, B.,* in *Gore v. Gibson,* 13 Mees. & Wels., 623: "The modern decisions have qualified the old doctrine that a man shall not be allowed to allege his own lunacy or intoxication; and total drunkenness is now held to be a defense." See 1 Parsons on Contracts, 310, note *m.*

(218) We feel warranted in understanding from the whole record that such was the charge of his Honor. There is

PER CURIAM. No error.

Cited: Mason v. Miles, 63 N. C., 565; *Smith v. R. R.,* 114 N. C., 759.

JAMES WISEMAN, CHAIRMAN COUNTY COURT, EX REL. OF WILLIAM KESLER, v. JAMES CORNISH.

1. Where in a suit upon an apprentice bond the question was whether the relator was of age at the bringing of the suit, and his mother was introduced to testify as to his age, it was *Held*, that a record of births made in the family Bible under the dictation of the mother, by one since deceased, several years after the birth of the relator but before he was bound out, was admissible as evidence to corroborate the mother's statement.

2. There is no rule of law that the fact of a witness's standing in the relation of mother to one of the parties naturally gives a bias to her statement by affecting her recollection, but such relation is a matter for the consideration of the jury alone.

COVENANT on an apprentice bond, tried before *Osborne, J.*, at a special term, July, 1860, of DAVIDSON.

The only question in the case was whether the relator was 21 years of age at the time the action was brought.

The mother of the relator swore that the relator was born on 10 March, 1837. The writ in this case was issued on 20 April, 1858. In her examination in chief the mother gave the day of the birth of each of her children in order. To confirm the accuracy of her recollection, the plaintiff offered in evidence a record of births of her children, made in the family Bible, in 1842, some years before the date of the apprentice bond on which this suit is brought. This record, it was proved, was made by a man, now deceased, by the name of Tow, at the dictation of the witness. Two witnesses proved that it was in the handwriting of Tow, and that they had seen it in 1842. The testimony was objected to on the part of the defendant, but was admitted by the (219) court in confirmation of the statement of the mother.

There was other testimony tending to show that the relator was born on 10 March, 1838.

In the course of the argument defendant's counsel insisted that the relation of the mother to the relator would naturally give a bias to her statements, and moved the court so to charge, but also admitted that he did not impeach her veracity or her integrity, but only the accuracy of her recollection. The court submitted to the jury the question of fact as one for their consideration, whether the relator was 21 years of age at the time the suit was brought, which it was admitted depended on the question whether he was born on 10 March, 1837, or on 10 March, 1838; that in the investigation the family record was not evidence of itself of the fact in controversy, and only evidence so far as they might suppose it tended to confirm the accuracy of the recollection of the

mother, it having been made before the relator was bound out, was to be regarded as in the nature of a statement made by her before the controversy arose. The court made no remarks to the jury on the relation of the mother to the relator. For this reason, and because of the admission of the testimony, the defendant moved for a new trial, the verdict being for the relator, and upon this being refused, defendant appealed to this Court.

Scott for plaintiff.
McLean and Kittrell for defendant.

PEARSON, C. J. The record of births in the family Bible was admissible for the purpose of corroborating the testimony of the mother, and the necessary explanation was made by his Honor.

There is no rule of law that the relation of mother to the party "naturally gives a bias to her statements, so as to affect the accuracy of her recollection."

(220) We concur with his Honor that it was unnecessary to allude to this subject in the charge. The defendant having had all the benefit of it to which he was entitled by the remarks of his counsel, and it was a consideration peculiarly fit for the jury, who are supposed to be judges of human nature, and capable of making due allowance in consequence of the relation of witnesses to the parties in the same way they do for the behavior of witnesses on the stand, without having their attention particularly called to it by the judge. There being no rule of law in regard to it, the matter must be left to the discretion of the judge; it is for him to decide, even although requested by the counsel, whether, under the circumstances, the due administration of the law required any special reference to such matters. There is

PER CURIAM. No error.

Cited: S. v. Hardee, 83 N. C., 622; *Buxley v. Buxton,* 92 N. C., 484; *Ferrall v. Broadway,* 95 N. C., 559; *S. v. Byers,* 100 N. C., 518; *Berry v. Hall,* 105 N. C., 165; *Ferebee v. R. R.,* 167 N. C., 301.

STATE v. NEHEMIAH NORMAN.

One to whom a free negro is hired by a court for the payment of a fine (Rev. Code, ch. 107, sec. 75) has no right to beat him for an unlawful object, or of malice.

ASSAULT AND BATTERY, tried before *Dick, J.*, at Spring Term, 1860, of WASHINGTON.

The offense is alleged to have been committed on the body of one Richard Fisher, a free man of color, and the jury found a special verdict to the effect "that the said Fisher had before that time been convicted of larceny, in the county court of Washington, and by the court was ordered to be sold for the fine imposed, to cover the costs, and was so sold for five years to one Peacock. Before the expiration of this time, Fisher was taken up on the charge of killing one Hussell, who was found dead in his yard, and the defendant gave him five licks to make him show where the gun was with which he killed Hussell. Peacock was present when Fisher was whipped, and gave his consent to it, and said "it ought to be done." Upon this finding, his Honor was of opinion that the defendant was not guilty, and so adjudged; from which judgment the State appealed. (221)

Attorney-General for the State.
Winston, Jr., and *H. A. Gilliam for defendant.*

MANLY, J. The judgment of the court below upon the special finding of the jury was erroneous. The leading facts of the finding are, that the man Fisher, upon whom the battery was committed, had been hired to one Peacock, to pay the penalty in a case of misdemeanor, and therefore stood by the terms of the law, Rev. Code, ch. 107, sec. 75, in the relation of apprentice to Peacock. Peacock assented to the battery. The battery was committed to compel Fisher to furnish evidence of his own guilt, upon an accusation of homicide.

No free person of whatsoever color can, according to law, be thus coerced. It cannot be done by the person who stands in the relation of master, and his assent, therefore, cannot legalize it. It is unnecessary, as we think, to enter upon a general discussion of the relation between master and apprentice under this law of the Code; for, however it may be as to their respective rights and duties in other respects, we are clear the master cannot whip for an unlawful purpose. If the apprentice, under the law, be in the condition of one who can be whipped for correction, and we hold the man may be whipped for such an object, still, the power of punishment in this way would be restricted to lawful

objects, and if, under pretense of correction, the master whipped of malice, or, which we regard as equivalent, for an illegal object, it would be a violation of law. Where one has a discretionary power of (222) whipping for correction and resorts to it in good faith, the law will not hold him to an account for any error of judgment in respect to the need for it, or in respect to the amount, unless it be grossly excessive. But it is different where the whipping is inflicted for an unlawful object or of malice. In such cases every blow is an unlawful battery. It has been thought proper by the Legislature to place the negro convict who is sold for the pecuniary penalty annexed to his offense in the condition of an apprentice. This relation we find regulated by general principles, and to the benefit of them the man is entitled in this case. The five blows inflicted under the circumstances make it a case of minor importance; but, nevertheless, we think, for the reasons given, that it is technically an indictable battery.

The judgment below should be reversed, and judgment entered on the verdict for the State.

PER CURIAM. Reversed.

ROBERT STYRON v. J. W. BELL.

A *parol* agreement between an executor and a purchaser of the property of the estate, that the latter shall pay all of a particular class of debts due by the testator, does not entitle one of that class of creditors to sustain a suit against such purchaser.

ASSUMPSIT, upon a special contract, tried before *Howard, J.*, at last Fall Term of WASHINGTON.

The declaration was that defendant promised and undertook to pay a debt, which one Pettijohn owed the plaintiff.

It was proved that Pettijohn owned the schooner *J. T. Davenport,* and having died, his executor exposed the vessel to sale at public (223) auction, when the defendant became the last and highest bidder, at a price much below her value. A condition of this sale was that the purchaser should pay all the debts due by Pettijohn on the said schooner's account. Among other debts thus due was that of the plaintiff, which had been contracted for lighterage. There was no evidence that the plaintiff was present at the sale, or that the debt was mentioned specifically, or that the plaintiff and defendant after the sale had any understanding about the matter.

The defendant's counsel said that if the Court was of opinion that the promise to Pettijohn's executor would support the declaration of

a promise to the plaintiff, and that the statute did not require the promise to be in writing, then he admitted the plaintiff was entitled to a verdict.

"The Court being of opinion that the money paid at the sale and the amount of debts really constituted the price of the schooner, and the arrangement made resolved itself into a deposit by the vendor of the amount of the debts with the defendant, held that the statute did not apply, and that the promise was well pleaded." Defendant's counsel excepted.

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

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

MANLY, J. According to the view which we take of this case, the true question is whether there has been a valid substitution of one debtor for another. By the purchase of the schooner the defendant Bell became bound to the executor of Pettijohn for the sum bid and also undertook to pay the debts due from the testator on account of the schooner, including the debt in question.

Considering this transaction in the most favorable light for the plaintiff, we have the defendant indebted for the schooner to the executor in sundry amounts, including plaintiff's debt, and an agreement between executor and defendant, that the latter should pay these (224) debts to the various creditors.

Such a substitution of one debtor for another is practicable without writing, but it cannot be effected, except by clear and unequivocal assent on the part of the creditor, and a discharge by him of the original debtor and an acceptance of the substituted one. There must be a mutual agreement between all the then parties (the creditor, his immediate debtor, and his intended new debtor) to the substitution. For, if the original debt continues to subsist, there is no consideration. Addison on Contracts, 1004-5; *Cuxon v. Chadley,* 10 E. C. L., 191.

The question then is, has the creditor, Styron, made himself a party to this arrangement, by assenting to it—discharging the original debtor and accepting the defendant Bell in his stead, so as to establish a consideration, a promise, and the relation between the parties of creditor and debtor in respect to this demand due from Pettijohn's estate?

It seems from the statement of facts in the case, that Styron was not present at the sale of the schooner or at the agreement, as above stated; that the debt to him was not mentioned particularly, and that plaintiff and defendant had neither interview nor understanding about the matter since the sale.

Upon this state of facts there seems to be no evidence of an assent on the part of Styron to the extinguishment of his demand against the executor of Pettijohn or of his purpose to accept Bell instead of the other. All that can be reasonably inferred from the fact that he has instituted suit against Bell is that he is willing to look to him as a collateral source from which the money may be obtained. The case of *Cuxon v. Chadley,* above referred to, raised mainly the question whether the original debtor had been discharged, so as to raise a consideration. It was proved that the creditor had made a transfer on his books of the debt to the account of the new debtor, but nothing else appearing, it was held insufficient. "It must," says the Court, "be expressly agreed to discharge the original debtor. There is nothing in the case (225) from which such an agreement may be even inferred. The demand of the money, if one had been made, would not justify such inference, for that is entirely consistent with his taking it as collateral security. Supposing it to be merely an indicative or collateral source of payment, it would be strange to hold that a demand accompanied by refusal would be a discharge of the prior debtor. A suit is no more decisive evidence of a substitution than a demand, and the bringing of a suit cannot be considered an act of assent to the contract and thereby support the action; for by the supposition, there was no contract until the suit was brought."

There is a class of cases in which a promise to one is held to inure to the benefit of another, but all these cases, it is believed, turn upon the idea of principal and agent and have no bearing on the one now before us. The construction which we put upon the admission of the defendant's counsel leaves open the question which we have here discaused, viz., the sufficiency of a consideration as between the parties to support a promise by implication from the one to the other. There is no evidence that Bell was ever looked to by Styron, as an indicative or collateral source for payment, or that there was, by arrangement, an extinguishment of his claim upon the estate of Pettijohn, and, consequently, there was no consideration between them for the promise alleged as the basis of this suit.

The view taken of the case by the court below does not at all affect our conclusions. Assuming that the substance of the transaction between the executor and Bell was the leaving of a sum of money in the latter's hands to pay Styron and other creditors of Pettijohn, it will follow, upon principle and authority, that it cannot be recovered by Styron, except by a novation or substitution of one debtor for the other, in the manner already stated. *Butterfield v. Hartshorn,* 7 N. H., 345, was a case precisely of the kind supposed, and it was there held the (226) action could not be sustained.

The statute of frauds, making void promises to pay the debt of another without writing, would be an obstacle to the recovery in other points of view, but we think it unnecessary to enter upon that. There should be a

PER CURIAM. *Venire de novo.*

WILLIAM HAYS v. JOHN O. ASKEW.

1. Whether the rule, applicable in questions of boundary, where an unnavigable stream or a public highway is called for, that is, to run to the middle of the stream or road, is applicable to a private way, *quere.*
2. Where the beginning corner of a deed is on a private avenue, and the other calls of the deed come back to the mouth of the avenue, and "thence down the said avenue to the beginning," "reserving forever 20 feet for my avenue," it was *Held,* that this reservation explained the meaning of the grantor to be to run to the middle of the avenue, and thence down it in the middle to a point opposite the beginning, thence to the beginning.

TRESPASS *quare clausum fregit,* tried before *Howard, J.,* at last Fall Term of HERTFORD.

The plaintiff introduced a deed from the defendant to him, containing the following clause descriptive of the land conveyed, viz.: "Beginning at a small sweet gum on my avenue, thence along an old path to a pine, thence by a small black gum (fore and aft) to a small sweet gum, a corner; thence a southern course to a dead white oak; thence to a white oak; thence to a dead red oak; thence to another dead red oak; thence to a small black gum; thence from black gum, a continued straight line to Lenton landing road; thence down said road to my avenue, leading to my dwelling house; here, I reserve the width of twenty feet for my avenue; thence down said avenue to the sweet (227) gum, the first station; still reserving forever the width of twenty feet for my avenue to my house."

A surveyor testified that the land was on the north side of the avenue; that the "sweet gum, beginning corner," was on the same side; that after running around the land and coming back to the avenue, if the line ran down the side of the avenue to the "sweet gum, the beginning corner," the deed did not cover the *locus in quo;* but that if it went to the center of the avenue, and then to the beginning corner, that it would include it.

The Court instructed the jury, that the proper construction of the

deed was to run the line along the side of the avenue. In submission to this opinion, the plaintiff took a nonsuit and appealed.

Garrett for plaintiff.
Winston, Jr., for defendant.

BATTLE, J. When this case was before this Court on former occasions, it was taken for granted that the deed from the defendant to the plaintiff conveyed the soil of a part of the grantor's avenue, reserving an easement thereon, and the only question then made, related to the form of the action and the amount of damages. Now, the question is, whether the deed conveys any part of the soil over which the defendant's avenue extends, the defendant contending that the boundary of the land commences on, and the last line runs along the edge of the avenue, and that the land conveyed lies entirely outside of it. As it is a question of boundary, it is to be regretted that the land was not surveyed, showing, among other things, the width of the avenue before and at the time of conveyance, and a plat made of it and sent up as a part of the case. We might thus have been enabled to understand more clearly the precise question in dispute, and might possibly have come to a different conclusion from what we have upon the merits of the case.

The first call of the deed is the beginning "at a small sweet gum (228) on my avenue," which, it stated, stands at the edge of the avenue.

After several calls, about which there is no dispute, the Lenton landing road is called for, and the boundary is "thence down said road to my avenue leading to my dwelling house (here I reserve twenty feet for my avenue); thence down said avenue to the sweet gum, the first station; still reserving forever the width of twenty feet at least for my avenue to my house." In calling for the avenue, the plaintiff contends that the line runs to the middle of it, and thence along the middle until it gets opposite the sweet gum, when it turns and goes straight to that. For this, his counsel cites 2 Smith's Lead. cases (p. 216, Am. Ed.), where it is said that a call in a deed for a highway carries the line to the middle of the highway, in analogy to the well-known rule which extends to a line *usque ad filum aquæ,* where an unnavigable river or other stream is called for. The defendant's counsel admits the law to be as contended for by the plaintiff when a highway or public road is called for, but insists that as the beginning corner is a tree standing on the edge of the avenue, and the last line runs down the avenue, it must run along the edge or margin to the beginning. There would be much force in this argument were it not repelled by the reservation, twice mentioned, of twenty feet for the avenue to the grantor's house. This, we think, must be taken as explanatory of the grantor's intention, that the last line

should go to the middle of the avenue, and thence down the middle, so as to include a part of it. This construction is confirmed by the fact that the parties have always considered it heretofore as the true one. See *s. c.*, 50 N. C., 63; 52 N. C., 272.

PER CURIAM. Reversed.

Cited: Rowe v. Lumber Co., 133 N. C., 437; *Whitaker v. Cover,* 140 N. C., 284.

(229)

DOE ON THE DEMISE OF BENJ. C. WILLIAMS v. JOHN T. COUNCIL.

1. A sale of land by a decree of a court of equity is in effect a sale by the owner of the land through the agency of the court.

2. Where the land of an infant was sold by a decree of a court of equity and the purchaser went into possession, but no deed was made by the master during his continuance in office, it was *Held,* that during this time the purchaser was in as a tenant of the former owner, and that his taking a deed from the master after his going out of office did not change that relation. *Held further,* that the purchaser's making a deed of trust to secure debts, but still remaining in possession, did not change the relation, and make the holding adverse. *Held further,* that an agreement on the part of such purchaser to sell the land thus bid off by him, absolutely, and entry and possession of the party contracting to buy, he acknowledging himself the tenant of the person who bid off the land, did not make the holding adverse to the original owner.

EJECTMENT, tried before *Shepherd, J.,* at Spring Term, 1860, of MOORE.

Previous to 1834, Benjamin C. Williams, the lessor of the plaintiff, was the owner of the land sued for, and Council, the defendant, was in possession when the suit was brought.

The defendant proved that Josiah Tyson, in 1834, purchased the land in dispute at a sale by the clerk and master in equity of Moore County, under a decree of the court, as the property of Benjamin C. Williams, and went into possession and so continued for five or six years, when one William Watson took possession. Tyson did not take a deed from the clerk and master until 9 January, 1841, when one was made to him by Bryan Burroughs, who was in office when the sale was made, but was not when the deed was made. In 1842, Tyson agreed to sell the land to the said Watson for $3,500, and the payment was to be made from the proceeds of the estate of Watson's wife in the hands of J. B. Cox, her trustee, and he entered into bond to make title to said Cox, as trustee, when the purchase money should be paid.

Watson at that time entered into the possession as the tenant of Tyson and continued to hold possession as such for ten or twelve years, viz., till March, 1853, when he left without surrendering the possession (230) to him or any one for him. The purchase money was paid about 1846, principally by J. B. Cox, the trustee, but partly by Moses Cox, a brother of Mrs. Watson. In 1852, Watson called on Tyson to make a deed for the land to J. B. Cox, which was done on 17 February, 1852. The defendant also offered in evidence a deed from the said Cox, dated 17 February, 1853, and he took possession of the land not long after Watson left, viz., some time in March, 1853.

Previously to the sale to Watson, to wit, on 9 February, 1841, Tyson executed a deed of trust to one Roberts, to secure the payment of debts therein named, but no sale was ever made under it and no action taken upon it, and Tyson's possession was continued as above stated.

It was admitted that Benjamin C. Williams became af age on 20 September, 1842. This suit was commenced on 29 December, 1857.

Upon these facts, his Honor being of opinion that plaintiff could not recover, the plaintiff took a nonsuit and appealed.

B. F. Moore for plaintiff.
Winston, Sr., and Strange for defendant.

PEARSON, C. J. This suit is for the same land which was the subject of controversy in *Williams v. Council*, 49 N. C., 206. But the facts now presented are not the same. The deed of trust executed by Tyson to Roberts, 9 February, 1841, was not then in evidence, and the Court is not now in possession of the fact, which was then in evidence, that Benjamin C. Williams had commenced an action of ejectment against William Watson, on 20 June, 1845, which pended until Spring Term, 1853. So we have one fact added and one fact omitted.

On the facts now submitted for our consideration, we are of opinion the plaintiff is entitled to recover.

A sale in a case of this kind by a decree of a court of equity is, in effect, a sale by the owner of the land through the agency of the (231) court; *Smith v. Brittain*, 38 N. C., 351. So, our case is the same as if Benjamin Williams had, in 1834, contracted to sell the land to Tyson, who entered under Williams and held possession by virtue of the contract. Tyson's possession, consequently, was not adverse at its commencement, and the question is, did anything take place afterwards to make it adverse.

1. On 9 January, 1841, it is admitted, Tyson was in possession under the contract of sale. At that date he took a deed for the land from Burroughs, who was not authorized to make it. So the title did not

pass out of Williams, and the deed was but color of title. There certainly is no principle on which the fact of taking the deed could alter the character of Tyson's possession. He had color of title, but his possession was not adverse.

2. On 9 February, 1841, Tyson executed to Roberts a deed of trust to secure the payment of certain creditors, but he continued in possession. There is no principle on which the fact of his making this deed of trust could alter the character of his possession. Suppose the effect of this deed was to pass his color of title to Roberts and as between them, to make him hold under Roberts, still he was not thereby relieved from his obligation to Williams and, having entered under him and held possession for him, there was nothing he could do, or say, so long as he continued the possession thus acquired, to make his possession adverse, without the concurrence of Williams, or some act done by Williams to put an end to the relation which existed between them. If he wished to assume an adversary position, he could only have effected it by surrendering back the possession. Our ordinary notion of fairness shows that this must be so. As against Roberts, Tyson was entitled to a resulting trust, after satisfying the debts secured in the deed of trust, and as against Williams he had an equity, on paying the purchase money, to call for the legal title, but, in the meantime, he was holding under and for Williams. *Taylor v. Gooch,* 49 N. C., 436.

3. In 1842, Tyson contracted with William Watson to sell (232) the land for $3,500, to be paid out of the trust estate of Watson's wife, and when the purchase money was paid he agreed to make the title to Cox in trust for Mrs. Watson. "Watson, thereupon, entered into possession as the tenant of Tyson, and remained in possession until March, 1853, when he left without giving up the possession to any one." Here, then, is Watson taking possession under Tyson and holding as his tenant, and Tyson bound to hold for Williams; of course, Watson's possession, being the possession of Tyson, could not be adverse to Williams.

So, upon the facts before us, there was no possession adverse to Williams, until after March, 1853. This action was commenced December, 1857; consequently, his title could not have been divested by the color of title in Tyson or Roberts, as there was only, at most, some five years adverse possession and it is unnecessary to pursue the matter further.

What would have been the result, had the fact that in 1845 Williams commenced an action of ejectment against Watson been put in evidence, we are not at liberty to say. Did he, thereby, put an end to the congeable relation previously existing between himself and Tyson and Watson, so as, by his own act, to make the possession adverse, as when a

bailor makes a demand of the bailee, and the bailee refuses to give up the thing bailed? or did the obligation imposed on Tyson and his tenant to hold possession for Williams still continue? These are questions into which we will not enter.

The record does not present this as a "case agreed," so as to authorize this Court to give judgment for the plaintiff.

PER CURIAM. Reversed, and *venire de novo*.

Cited: S. c., 65 N. C., 10.

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(233)

A. W. BUIS v. S. S. ARNOLD AND E. C. COOLEY.

Where the principal obligor in a *ca. sa.* bond was called, and, failing to appear, judgment was rendered against his surety, it was *Held,* that the fact that the principal was sick and unable to attend at the term for which he was bound did not entitle the surety to a *certiorari* to have the case removed into the Superior Court.

PETITION for a *certiorari,* heard before *Dick, J.,* at Fall Term, 1860, of ROWAN.

The petition discloses the following state of facts. The defendants, Arnold and Cooley, recovered a judgment in the county court of Rowan against one Wilson Williams, upon which judgment a *ca. sa.* issued against him, and the petitioner Buis became surety upon the *ca. sa.* bond, which bond was returnable to August term of the court. At that term the cause was continued to November term, at which last mentioned term the principal Williams being called and failing to appear, judgment was rendered against the petitioner upon the *ca. sa.* bond. It was proved by the deposition of Williams' wife that he was confined to his bed by sickness during the whole of November term of Rowan County court. Williams lived in Charlotte, where he was during his sickness. Upon the hearing of the petition, and upon consideration of the case of *Osborne v. Toomer,* 51 N. C., 440, the court was of opinion with the defendants and, accordingly, dismissed the petition. Petitioner appealed.

Boyden for petitioner.
Blackmer for defendants.

BATTLE, J. *Betts v. Franklin,* 20 N. C., 602, is a direct authority in support of the order of the Superior Court dismissing the *certiorari.* In that case, the parties to a *ca. sa.* bond, conditioned for the appearance of the principal obligor in the county court, to take the benefit of the act for the relief of insolvent debtors, were called, and failing to appear, judgment was entered against them, and it was held that

the sureties were not, upon the allegation of having been prevented by the fraud of the plaintiff's agent from making a surrender of their principal in discharge of themselves, entitled to the writ of *certiorari,* to enable them to make it in the Superior Court. That case was a stronger one in favor of the applicants for the *certiorari* than the present, because the failure of the principal obligor to attend and surrender himself or be surrendered by his sureties, was alleged to have been caused by the fraudulent conduct of the plaintiff's agent; and this Court intimated that the county court might possibly in such a case be authorized to give relief by vacating the judgment. But in the present case, where the principal was prevented from attending the county court by sickness, no such relief can be given. Sickness of the principal obligor may be such as to excuse his nonattendance and furnish a good cause for the continuance of the suit, but if he and his surety neglect to have the suit continued, and a judgment be regularly entered up against them, on account of the failure of the principal obligor to appear, it cannot be vacated at a subsequent term. Such was the decision of this Court in *Osborne v. Toomer,* 51 N. C., 440, in which it appeared that both the principal and his surety were sick and unable, on that account, to attend the term of the court at which the judgment was rendered. We admit that the present may be a hard case, and so said the Court was that of *Osborne v. Toomer.* But, however hard the case may be, the Court does not perceive any ground on which the surety can be relieved. The extreme sickness of the principal at the time would have excused his nonappearance, and entitled him and his surety to a continuance under section 10 of the statute, if that had appeared to the Court. (Rev. Code, chap. 59, sec. 10.) But that was not made to appear, and therefore the court could not properly have continued it. That was the fault of the party; for although the sickness might have excused the debtor for not appearing and the surety for not bringing him in, yet it furnished no reason for not appearing by attorney and showing by witnesses their inability to attend in person. They might, in that manner, have shown their right to a continuance, and having failed in that, there is now no help for them.

(234) (235)

PER CURIAM. Affirmed.

O. G. FOARD v. THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

1. Where machinery was consigned to the agent of a railroad, to be forwarded to the plaintiff over such road, and it was negligently detained for a time, it was *Held,* that the defendants were not liable as common carriers for this neglect, but only as bailees.

2. Where several pieces of machinery were shipped to the defendant's agent to be forwarded to plaintiff, and they were described in the bill of lading as "three pipes in one bundle, and two single pipes," and they were delivered by the ship's agent to the defendant's agent, who had a copy of the bill, and by some means the direction on one of the single pipes became illegible, and it was not forwarded, it was *Held,* that these facts were sufficient to subject the defendant for negligence as a bailee.

3. Where part of machinery was consigned to defendant as plaintiff's agent, to be forwarded to him, and defendant negligently detained it, whereby the whole machinery was kept idle, it was *Held,* that the measure of damages was not what might have been made by the machinery during the time it was idle, but the legal interest on the capital invested, the price of the hire of hands necessarily unemployed during the time, the cost of sending for the missing machinery, and all other damages that resulted, necessarily, from defendant's negligence.

MANLY, J., being a stockholder in the railroad company, took no part in the decision of this case.

CASE tried before *Osborne, J.,* at Spring Term, 1860, of ROWAN.

The plaintiff, who was the owner of a steam flouring mill in (236) the county of Rowan, declared against the defendants as common carriers upon the custom, and for negligence as bailees, in failing to forward a piece of machinery, to wit, a large steam pipe, whereby, and in consequence of which neglect, his mill was delayed in its operations, and he thereby deprived of its profits.

The following bill of lading was exhibited, in evidence:

"Shipped, in good order and well conditioned, by Dibble & Bunce, on board this schooner called the Howard, whereof———is master for this voyage, now lying in the port of New York, bound for New Bern, N. C., to say:

O. G. Foard, Salisbury.	"Three pipes in one bundle, two single pipes, marked and numbered as in the margin; to be delivered in the like good order and condition, at the port of New Bern, N. C. (the dangers of the seas, only excepted), unto Atlantic & N. C. Railroad agent, or to his assigns, he or they paying freight for the said articles as customary, with primage and average accustomed. In witness whereof, the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Dated in New York 15 September, 1858. Per Master. E. HOLMES."

It was proved by one Taylor that the schooner Howard arrived at

New Bern on 19 September, 1858, and he, in pursuance of general instructions given by the agent of the railroad, put the goods on board a dray and sent them to railroad depot, and that he, Taylor, was the known agent of the masters and owners of the schooner Howard and resided in the town of New Bern. It was further proved that all the articles forwarded to the plaintiff, except one of the single pipes, which was a large one, seven feet long, on which the direction had been obliterated, so that no part of it was at first legible, but that by rubbing it with a rag, saturated with oil, the word "Salisbury" could be read. The agent of the railroad swore that the pipe in question was not forwarded, because he could not tell to whom it belonged. (237) Mr. Fisher, the agent of the plaintiff, swore that on the 22d of September, aforesaid, he received notice from plaintiff that the pipe had not come to hand, and directions to inquire for it; that he went on the same day to the depot and made known his instructions to the agent of the depot, who informed him that he knew nothing about it. He was directed to call in the morning, when another agent, the regular one, would be at home; that he did call and looked at the pipe in question and saw others, but neither he nor the agent could ascertain to whom it belonged, and that no further search was made on either of these occasions. Mr. Taylor also swore that if he had been applied to at any time after the delivery of the articles at the depot, he could have identified the one spoken of, as the property of Mr. Foard. Mr. Aldrich, machinist, swore that on 29 October ensuing, he went to the depot of the defendant at New Bern in search of the missing pipe and found it lying in the depot and knew it immediately. He said he knew the article from the number and description mentioned in the bill of lading produced by the agent of the depot and from his knowledge of the article wanted; that the pipe in question was a very important part of the machinery, without which the mill could not go at all, and for the want of which it was stopped for six weeks. He further swore that he did not believe that such an article could be supplied nearer than the city of New York, and that he took possession of it and carried it to the mill immediately upon his finding it. The counsel for the defendant asked the court to charge the jury, that if the missing pipe could have been supplied, it was the duty of the plaintiff to have got another pipe, and that he was not entitled to recover for the stoppage of his business for any longer time than he could have sent and got another pipe. The Court declined to give the instruction, but charged the jury that the rule of damages was the net profits of the mill which had been lost by the delay in getting the pipe. Defendant excepted. (238)

On the trial the question of defendants' liability in point of law was reserved by his Honor, with leave to set aside the verdict, in case plaintiff should get one, and enter a nonsuit. Verdict for plaintiff. Afterwards, on consideration of the question of law, his Honor, being in favor of the defendant, ordered the verdict to be set aside and a nonsuit entered. Plaintiff appealed to this Court. The defendant also appealed, on his exception as to the measure of damages.

Jones and Love for plaintiff.
Boyden for defendant.

BATTLE, J. Upon the trial it seems to have been conceded that the defendants were not liable as common carriers, for their neglect to send on, in proper time, the pipe in question. It was decided in *Boner v. Steamboat Company,* 46 N. C., 211, that a company whose ordinary business was to transport goods by water for freight was not bound, as to the time of delivery, as common carriers, but as mere bailees for hire; and we think the same rule must be applied to a company which carries goods for freight on a railroad. The rule of negligence in such cases makes the bailee bound for ordinary care, and, of course, makes him responsible for ordinary neglect. Applying this rule as a test to the facts of this case, we differ from his Honor in the court below, as to the result. It is our decided opinion that the agent of the company was guilty of at least ordinary, if not gross neglect in not forwarding the pipe to the plaintiff. It was, under the instructions from the agent, put on a dray, together with another single pipe and a bundle of three pipes, to be carried to the company's depot. When it arrived there it was, or ought to have been, put with the other articles with which it had come, as shown by the bill of lading. If it had been so placed, the agent, who had been furnished with the bill of lading, would not have left it behind when he sent on the other articles. A man of ordinary prudence, in the management of his own affairs, would not have (239) permitted, while he had the bill of lading in his own hands, one pipe to be separated from the others, and would not, therefore, have neglected to send them on as he had received them, all together. Besides, when he learned that one of the articles had not been forwarded, he would have applied to the ship's agent to assist him in finding it out, as soon as he ascertained that there was some difficulty in identifying it. Mr. Fisher, the plaintiff's agent, had no other means of ascertaining which it was than any other person, but Mr. Taylor, the ship's agent, had; and he testified that if he had been applied to he could easily have pointed it out, so that the greater part of the delay might have been avoided.

As a verdict was taken for the plaintiff, subject to the opinion of the court as to the legal liability of the defendant, we might, upon reversing his Honor's opinion as to that question, direct a judgment to be entered upon the verdict for the plaintiff but for the objection of the defendant to his Honor's ruling upon the question of damages. Upon that question, we also differ from his Honor. When he made the decision, we presume that *Boyle v. Reeder,* 23 N. C., 607, was not called to his attention. That was a case where the plaintiff declared for the breach of a covenant, in which the defendant had bound himself to furnish machinery for a steam saw mill by a stipulated time. He claimed, as damages, the estimated value of the profits, which he alleged that he might have made, if the covenant had been complied with. The Court said, through *Ruffin, C. J.*, who delivered the opinion, that "very certainly damages are not to be measured by any such vague and indeterminate notion of anticipated and fancied profits of a business or adventure, which, like this, depends so much on skill, experience, good management, and good luck, for success. That would make the defendant an insurer against losses from any cause in a business of hazard, and even against the plaintiff's want of management. The gains of the business the plaintiff might have done, or probably would have done, cannot be correctly estimated; and, therefore, evidence offered with a view of estimating them as the standard of damages was (240) properly excluded, as being irrelevant and tending to mislead the jury." The proper measure of damages, the Court said, was to give the plaintiff "a fair rent for the time, or compensation for the capital invested and lying idle." This rule, we think, will apply to the present case, and being one which we find to have been adopted by this Court after full consideration, we feel no inclination to disturb it. In our opinion, then, the plaintiff will be entitled to recover from the defendant, on another trial, a compensation for his capital invested, while it was lying idle for the want of the pipe not forwarded in proper time, that is, the legal interest on such capital, also for any workmen or hands necessarily unemployed for the same cause, and also for the expenses of sending the machinist after the missing pipe; besides any other damages which were the direct and necessary result of the defendant's negligence.

The effect of the error committed by his Honor in respect to the question of damages is that the judgment must be reversed, and a

PER CURIAM. *Venire de novo.*

Cited: Mace v. Ramsay, 74 N. C., 15; *Whitford v. Foy,* 65 N. C., 271; *Roberts v. Cole,* 82 N. C., 294; *Willis v. Branch,* 94 N. C., 149; *Spencer v. Hamilton,* 113 N. C., 52; *Reiger v. Worth,* 127 N. C., 236;

Sharpe v. R. R., 130 N. C., 615; *Extinguisher Co. v. R. R.*, 137 N. C., 282; *Lewark v. R. R., ib.*, 385; *Machine Co. v. Tobacco Co.*, 141 N. C., 294; *Stone v. R. R.*, 144 N. C., 224; *Furniture Co. v. Express Co.*, 148 N. C., 90; *Lumber Co. v. R. R.*, 151 N. C., 25; *Brown v. R. R.*, 154 N. C., 305; *Tomlinson v. Morgan*, 166 N. C., 561.

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(241)

WILLIAM S. ASHE v. ARMAND J. DEROSSET, ADMINISTRATOR.

1. Where in a suit for the loss by fire of a quantity of rice, deposited at a mill to be beaten, it was proved that the general custom of the mill was to give a receipt to the owner of the rice delivered, expressing the quantity and the terms of deposit, it was *Held*, in the absence of proof that the custom was departed from in this particular instance, that there was a presumption that such a receipt was delivered to the plaintiff.
2. Where a receipt was given, on the delivery of a quantity of rice at a mill, setting forth the quantity and terms of deposit, it was *Held*, in an action for the loss of the rice by fire, that the plaintiff could not resort to proof of the quantity *aliunde*, without proof of his inability to produce the receipt.
3. Where the owner of a rice mill, who had a turn at his own mill, agreed to let a customer have it, and there is no particular inducement shown or other explanation given, it was *Held*, that the agreement was a *nudum pactum*.
4. Where the owner of rice, which had been burned at a mill, went to a partner, who was not cognizant of the state of the business, and demanded a given quantity of rice, to which he replied that "it was nothing more than he expected," it was *Held*, that this was no admission as to the quantity.
5. Where a verdict was rendered for more than the amount claimed in the writ, in a case where the measure of damages was certain, and there was no certain criterion by which to show a mistake or misapprehension, it was *Held* not proper to allow an amendment to the writ.

ASSUMPSIT, tried before *French, J.*, at last Fall Term of NEW HANOVER.

The plaintiff declared in two counts:

First. For the loss of 2,300 bushels of rice, which was destroyed by fire by the negligence of the defendant.

Secondly. On a special contract, that the plaintiff should have the turn of the defendant, at the defendant's rice mill, by a breach of which, the rice of the plaintiff was destroyed by fire.

It was proved that Potter and Wade were partners.

James Pettiway testified that Wade was the active partner and superintended the mill. The mill was burned in February, 1844. In October, 1844, at the request of plaintiff, he demanded of Potter 2,300 bushels of rice, to which the latter replied, "It was nothing more than he expected."

Thomas D. Meares testified, that the custom at the mill was that each planter had a turn at the mill of 1,500 bushels, and to secure this, a deposit of 200 or 250 bushels was necessary; that on the morning after the fire, he had a conversation with Wade, and he said that he (witness) had in the mill, at the time of the fire, 1,300 or 1,400 bushels, and that plaintiff had lost much more than that, and that Potter had lost about 15,000 bushels.

Plaintiff's counsel asked witness what Wade said as to the (242) cause of the fire. The defendant's counsel objected to the question, but the objection was overruled, and defendant excepted.

The witness proceeded; that Wade said the fire originated from the journals, and that these were of wood, and were on the upper floor; that Wade said further, he was in the habit of going over the mill every night to see that all was right before closing, but on the evening before he had neglected to do so, as he was much fatigued; that the journals, as he said, had caught on fire before. He further stated that Wade was mistaken as to the quantity he (the witness) had in the mill, for that it was only 800 or 900 bushels; that clean rice was worth, at that time, $2.25 to $2.75 per 100 pounds, and rough rice about one-fourth as much; that the general custom was to give receipts, and that the rice was at the risk and control of the owner; that this was expressed in the receipt.

The counsel of the defendant read in evidence a notice served on the plaintiff, to produce the receipt he had received from the mill for the rice deposited.

The defendant was a rice planter, and was entitled to his turn in the mill. The toll charged for beating was 10 per cent. This mill was run by steam power. The principal risk in mills of this kind was from fire. The wooden journals are liable to take fire if neglected. Mr. Quince testified that he had been familiar with rice mills for thirty years; that they are much subject to fire, and great care has to be used to prevent fire; that according to the custom in this business the rice is at the risk of the owner, and subject to his control; that it was usual to make a small deposit at the mill to secure a "turn," and just before it came round to deposit the remainder, say 1,500 bushels; this course was pursued on account of the danger of fire; that the owner of a mill, if a planter, had a turn.

Stanton Spooner testified that he was employed in the mill at the

time the fire occurred; that there was no negligence; that on the (243) evening before the fire, on closing the work of the day, Wade went through the mill and carefully examined the mill, and saw that everything was right; that Potter did give Ashe one turn, and that Ashe only had about 500 bushels of rice in the mill when the fire occurred; that it was the uniform custom to give receipts to persons bringing rice to the mill, expressing the quantity and the terms on which the rice was received.

The counsel for the defendant contended that the contract to give the plaintiff his turn at the mill was but a *nudum pactum,* also that the nonproduction of the receipt given by the mill-owner to the plaintiff created a presumption against his claim. The court declined giving the instruction asked, upon the ground, in the latter instance, that there was no evidence that such receipt had come to the hands of the plaintiff. The defendant's counsel excepted.

The Court charged the jury that if they were satisfied that there was a contract that the defendant was to give his turn, and that this agreement was made in contemplation of the imminent risk of fire, and the defendant did not give his turn and his rice was destroyed by fire, then, the plaintiff was entitled to recover the value of the rice destroyed. If they found that the contract was made, not in contemplation of the imminent risk of fire, and there was a breach of it, and the plaintiff's rice was destroyed by fire, the plaintiff was entitled to nominal damages.

If they were satisfied from the evidence that beating rice was attended with great risk from fire, and that the fire originated in the journals, and that the defendant did not see that all was right before closing on the night before the fire, then, the defendant was guilty of gross negligence, and the plaintiff was entitled to recover the value of the rice destroyed by the fire. Defendant's counsel excepted to the charge. Verdict for $2,930.20. The writ, in the case, claimed damages to the amount of $1,500, but his Honor permitted the writ to be amended without (244) costs, so as to correspond with the verdict, and the court gave judgment accordingly.

Defendant appealed.

Person, Strange, and W. A. Wright for plaintiff.
Fowle for defendant.

PEARSON, C. J. The case is complicated by the fact that, in respect to the count against the defendant as owner of the mill, Wade, who was a partner, has a direct interest, being liable to the defendant for contribution; whereas, in the other count against the defendant, on his collateral individual promise, "to give plaintiff his turn," Wade had no interest.

The verdict being general, an error as to either count is ground for a new trial, and according to the view taken of the case by this Court there are many fatal errors in regard to each of the counts.

FIRST COUNT.

1. His Honor was of opinion that there was no evidence that "a receipt" for the rice had ever come to the hands of the plaintiff. There was proof of a general custom at the mill to give a receipt, "stating the quantity of rice, and that it was at the risk and under the control of the owner," whenever rice was delivered. In the absence of any evidence showing that, for some cause or other, the custom was departed from in the instance of the plaintiff, there is a violent presumption that he did take "a receipt."

2. The purpose of these receipts was to fix the quantity of rice delivered at the mill by the respective customers. It was what is called in the books, "preordained evidence," that is, evidence agreed on by the parties as the mode of proof in respect to the quantity of rice and the terms on which it was delivered—like a subscribing witness to a bond. In such cases, this preordained evidence is not merely the primary, but it is the only evidence to which either party can resort, without proof of his inability to produce it. In the case of a subscribing witness, the principle is of every day's occurrence; to prove a bond or other instrument the subscribing witness must be produced; if that be impossible, then his handwriting must be proved, (245) and the party is not at liberty to disregard this preordained evidence and prove that the obligor or maker of the instrument had admitted that he executed it, unless such admission be what is called "an admission in the cause," made expressly for the purpose of dispensing with the production of the subscribing witness.

According to this principle of evidence, the plaintiff ought not to have been allowed to proceed with his case by attempting to show *aliunde* the quantity of rice, until proof was made on his part of his inability to produce the receipt. In this case, out of abundant caution, the defendant had given him notice to produce it, and still he was allowed to proceed, and, in effect, attempt to prove the contents of the receipt, to wit, the number of bushels of rice that he had delivered at the mill.

3. His Honor was of opinion that the demand for 2,300 bushels of rice, and the defendant's reply, "it was nothing more than he expected," was evidence of the quantity. Apart from the considerations above stated, we do not agree with his Honor in this view of the evidence. It is very difficult to draw a line between slight evidence and no evidence at all; but taken in connection with the fact, deposed to by the witness, Pettiway, who made the demand and proves the reply, taht Wade was the

active partner and superintended the mill (so that the defendant could not be supposed to know the quantity of rice delivered by the customers), it seems to us to be a strained construction to give these words of the defendant any reference to the quantity of rice, and they are fully satisfied when taken in their ordinary sense, to mean that the defendant was not surprised by the fact of a demand being made as preliminary to an action against him; for that the intention of the plaintiff to sue him "was nothing more than he expected."

In this connection, it is proper to remark that, although the power of the court to allow an amendment after verdict, so as to increase the amount of damages claimed by the writ, is conceded, still in (246) most cases it should be sparingly exercised. Where, by the long pendency of the suit, an amendment becomes necessary, as in ejectment, where the term, laid in the demise, expires, or in debt, or in *assumpsit,* where the interest exceeds the damages laid in the writ, the amendment is matter of course. In actions where there is no particular measure of damages, as slander, assault and battery, and new matter occurs to aggravate the offense, *e. g.,* a repetition of the slander after suit brought, or relying on the plea of justification, where there is no ground for it, or where the wound inflicted takes a dangerous turn, and the plaintiff is likely to lose a limb, or the like, the discretion of the court may be properly appealed to; but in actions where there is a fixed measure of damages, as in our case—the value of the rice—a case rarely occurs where the purposes of justice require the exercise of this power; for every man is presumed to know best his own business, and to claim all that he thinks he is entitled to. In such cases this presumption ought to be rebuted, and something offered for the court to amend by; as by the production of the receipt and showing thereby beyond all question a mistake in regard to the quantity of rice. The usual course, however, is to allow the plaintiff to remit so much of the damages found as exceed the amount claimed, so as to make the verdict fit the writ; *Grist v. Hodges,* 14 N. C., 203.

SECOND COUNT.

1. In addition to the above, which applies to both counts, Wade, the partner of the defendant in the mill, had no interest in this count, as it was for the breach of a collateral promise. So, he was a competent witness for either party in respect to it, and of course his admissions or declarations, were not admissible as evidence against the defendant. There was no test of truth, as in this respect they were not against his interest, and did not tend to subject him to liability; and this produces the incongruity of joining the two counts.

2. The alleged promise of the defendant was to let the plaintiff have "his turn." The witnesses state that a turn was 1,500 (247) bushels of rough rice. So, under this count the plaintiff could not recover for any larger amount.

There is no *evidence of a consideration to support the promise*. It was suggested on the argument that the promise was made by the defendant, in order to induce the plaintiff to send his rice to the mill, or in order to keep him from taking it away after it had been delivered, as he had a right to do by the terms of the receipt, and thus the defendant, being a part owner of the mill, had a direct interest. It is true, if the defendant made the promise for either of these purposes, there would be a consideration; but we are unable to see any evidence of the fact, either that the plaintiff did not intend to send his rice to the mill or intended to take it away, and that the promise was made to induce him to change his purpose. On the contrary, if permitted "to guess" about the matter, we should suppose that the promise was a voluntary offer of kindness on the part of the defendant to let the plaintiff have his turn, in order to accommodate him by enabling him to get a portion of his crop that much sooner into market.

4. His Honor leaves it to the jury to say whether the promise was made "in contemplation of the imminent risk from fire." There was no evidence of this as a matter of fact, and this Court had decided, when this case was before it at June Term, 1858 (50 N. C., 301), that it could not be inferred from the nature of the transaction "that the contingency that the rice might be burnt, if left in the mill, was in contemplation of the parties." On what ground could the jury, or any one else, infer that the defendant made the promise because he knew there was great risk from fire, and if any rice was to be burnt he preferred that it should be his own, rather than the plaintiff's? Or that the plaintiff intended, and was willing, in accepting the offer of the defendant's turn, to take advantage of such unheard-of generosity? So, notwithstanding the opinion of the jury, as it is a mere matter of opinion, and there is no evidence in regard to it, we are disposed to adhere to the opinion previously expressed by us. (248)

The usual practice of this Court is to put its decision on some one point presented by the case, and to refrain from the expression of an opinion in regard to others that may appear in the record. This was the course taken when the case was here before, and the result is that it comes back now with more points than ever. On which account, we have seen proper to make an exception to our usual practice, and to pass on several of the exceptions, presented by the record, with the hope of "lopping off some of the points," thereby relieving the next judge who

tries the case from the embarrassment incident to the joinder of the two counts.

PER CURIAM. Error.

Cited: *Mace v. Ramsey,* 74 N. C., 15; *Spencer v. Hamilton,* 113 N. C., 50, 52; *Extinguisher Co. v. R. R.,* 137 N. C., 281; *Tomlinson v. Morgan,* 166 N. C., 561; *Bank v. Wilson,* 168 N. C., 560.

WILLIAM K. LANE v. JOHN C. WASHINGTON AND J. D. BURDICK.

Where a plaintiff declared upon a special contract to provide slaves, hired to work upon a railroad, with good accommodations, also on the implied contract of bailment to provide them with ordinary accommodations, it was *Held,* that the lodging of the slaves, in the dead of winter, in huts built of poles and railroad sills, without door shutters and without chinking in the cracks, which were large, and which huts were proved to be inferior to others ordinarily used for such purposes on railroads, was a breach of the contract as alleged in both counts, and entitled plaintiff to recover.

CASE tried before *Saunders, J.,* at Fall Term, 1860, of WILSON.

The plaintiff declared in five counts, as follows:

First. For a breach of contract in taking the slaves Jack, George, Wright, and Abram, below Bear creek.

Second. For a breach of contract in not taking good care of said slaves and furnishing them with good accommodations.

Third. For breach of the implied contract, arising on the (249) bailment, to take ordinary care of the said slaves.

Fourth. For the hire of said slaves, Wright, Jack, and George, nine days each, at eighty cents per day, and for the hire of Abram, six days, at eighty cents per day.

Fifth. For the hires of said slaves for the times mentioned in the fourth count, for what they were worth.

The title of the plaintiff to the slaves in question was admitted. The plaintiff introduced one Raiford, who testified that prior to the heavy snow storm of January, 1857, as the agent of the plaintiff, he hired said slaves to the defendants, who were partners in a contract for making the Atlantic Railroad, at the rate of eighty cents per day; that they were not to be carried below Bear creek, a point on the line of said railroad; that the above contract was made with the defendant Burdick;

that on the next day, Burdick told him that he wished to take the said slaves below Bear creek, into the edge of Dover swamp, below Kinston; that he (witness) told him that if they were well taken care of, he would as soon they should work there as anywhere; that Burdick replied that they should be well taken care of, as defendants had good accommodations there for a hundred hands; that he (witness) replied that on those terms they might go; that the slaves were carried off by Burdick on that or the next day; that they were gone some eight or ten days, when Wright, George, and Jack came home frostbitten; that Wright died of pneumonia, about ten days thereafter, and the other two were laid up about two months; that he never saw Abram after the hiring, but learned that he died in Kinston; that this was about 29 January, 1857, a short time after the heavy snow storm which occurred in that month. The witness further testified that during the week succeeding the return of the slaves, he went down to the place where the slaves had been at work, in the edge of Dover swamp; that he examined the shanties erected by the defendants for the accommodation of the hands; that there was one at the Heritage place, where the overseer stayed, near where the county road crossed the railroad and on the right hand side of the county road going to New Bern; that this was a (250) square pen, made of pine poles, with large cracks, through which one might thrust his double fists, and scarcely seven feet high; that there was no shutter to the door; that the top was flat and covered with plank, and that it would not shed water; that there was no chimney and no floor, no bed clothing and no cooking utensils, and that the fire was made in the middle of the house. The witness further swore that there was another shanty, above the Heritage place, at Tracey swamp; that this one was some thirty or forty feet long, and from sixteen to eighteen feet wide, built of pine poles; that there were large cracks between the poles not half stopped, and loose planks laid down for flooring; that along the center of this cabin, and at the distance of a few feet from each other, logs were placed on the ground, and earth placed between them as a place for building fires; that it had no chimney, but instead thereof, there was an aperture, three feet wide, at the top of the roof for the escape of smoke, but that this shanty had a door to which there was a shutter. Witness further stated that there were other shanties for the accommodation of the hands, just below the Heritage place, at the distance of a mile or a mile and a half; that these latter were made of cross ties or sills of pine timber, eight feet long, and from eight to ten inches square, used in the construction of the railroad track; that these ties were placed on top of one another, to the height of some six feet, on three sides, thus leaving one end or side entirely open, that the covering was also composed of these ties, placed near together, and he

saw no other shanties for the accommodation of hands; that those above described were nothing like as good as are ordinarily used on works of the kind, and were nothing like as good as an ordinary horse stable. Witness further stated that he saw during this visit at the Heritage place, one Parrott, an overseer of the defendants on this work; that Parrott told him that if he had been well, the slaves in question would have been better attended to; "that it was a bad chance there anyhow"; that Parrott also told him that the slaves stayed "just below there," pointing in the direction of the shanties last described. The witness fur- (251) ther stated that he had seen other shanties on the Wilmington and Weldon railroad.

Dr. C. F. Dewey testified that he was called to see the boys, George, Wright, and Jack, on 21 January, 1857; that they were frostbitten—George badly—Wright not so badly, and Jack slightly; that Wright died in about two weeks, of typhoid pneumonia, and that he complained of having suffered from excessive cold for two weeks. He further stated that the other two would be more liable to be frostbitten after this. Wright had no cold that he could see, at his first visit.

One Robertson testified that he had been traveling through there some time previous to the snow aforesaid; that he had seen the crosstie shanties, and one, which he supposed to be the Tracey swamp shanty, which was at the Heritage place on the right hand side of the stage road leading to New Bern; that none of the chinks were shut; that it had no chimney and had a flat roof; and that it lacked a great deal of being as good as ordinary, and would be a very poor horse stable; that these shanties were about ten steps from the road, and that he had never been nearer than this to them; that the only other shanties he had ever seen for such purposes were on the North Carolina railroad.

John C. Slocumb stated the conversation between Raiford and Burdick to have been as follows: Burdick said he would like to take the slaves below Kinston, into the edge of Dover swamp. Raiford asked if they had good accommodations. Burdick replied, yes, for a hundred hands. Raiford replied, if the accommodations were good and the hands would be well taken care of he would let them go.

Another witness testified to the same conversation, giving as Raiford's last reply that he did not wish the hands so far from home, but would not object to their going down for two or three weeks, provided the accommodations were good.

William C. Loftin testified that he lived in Dover, about four miles below the Heritage place, and had seen these shanties; that he (252) had never seen any as poor (sorry) anywhere else, and that they were not as good as an ordinary stable; that the Tracey swamp shanty, on the west side of the swamp, had a roof with an opening along

the top, some three feet wide, that it had large cracks, was made of pine logs, and was twenty-five or thirty feet long and fifteen or eighteen feet wide; that the crosstie shanties were about a mile and a half below the one just described; that he had four negroes in the defendants' employment, who stayed at these shanties, and that two of them were frostbitten, though he had heard that one of them had fallen into a ditch and remained there some time; that at the time of the snow storm the hands of defendants were at work on the road, a quarter of a mile below the Heritage place, in the edge of Dover swamp. On cross-examination he stated that these shanties did not deserve the name. He further stated that the only other buildings of a like nature he had ever seen was as he passed along the line of railroads after their completion, and, also, that he did not examine these shanties till after this suit began. He further stated that the defendants had no other accommodations for hands at or near the edge of the swamp. He also stated that the Tracey swamp shanty could not be seen from the stage road so as to be examined, and that he did not go near enough to it to see how the logs were laid for building the fire or how the planks were laid for sleeping.

None of the witnesses knew whether the slaves in question had remained at the shanties during the snow, nor when they had left the employment of the defendants, nor which of the shanties they occupied, except from the conversation between Raiford and Parrott.

The defendants' counsel was proceeding to state the defense, when his Honor announced that he should instruct the jury, that, upon the plaintiff's own evidence, there was no breach of the contract declared on in the first, second, and third counts, and no want of ordinary care. That on the fourth count, there was a special contract of hiring, and the plaintiff was entitled to recover at the rate of eighty cents per day for each slave while in the defendants' employment, if the (253) witnesses were to be believed. The case was then put to the jury, when his Honor charged them as above set forth. Plaintiff excepted to this charge. The jury found for the defendants on the first, second, and third counts, as also on the fifth, and for the plaintiff on the fourth ($25). There was a judgment for the plaintiff for $25, from which he appealed to this Court.

Strong and Dortch for plaintiff.
McRae for defendants.

BATTLE, J. The second count of the plaintiff's declaration was for a breach of the contract, alleged to have been made by the defendants, to take good care of certain slaves whom they had hired, and to

furnish them with good accommodations. And the third was for a breach of the implied contract, arising from the bailment, to take ordinary care of the slaves. Upon this testimony given on the part of the plaintiff in support of these counts, the presiding Judge held that, taking it to be all true, it did not prove a breach of either of them, and that, therefore, the plaintiff could not recover upon either of them. The opinion of his Honor, expressed thus generally in relation to the testimony given by all the witnesses who were examined for the plaintiff, cannot be sustained, if any one or more of them testified to a statement of facts which in law made out a case of a neglect of the defendants to take good care of, and furnish good accommodations to, the slaves in question, as applicable to the second count; or of a want of ordinary care, as applicable to the third count.

A critical examination of the statements of each of the witnesses who testified as to the kind and condition of the huts or shanties in which the slaves lodged at the time when they were injured has brought us to the conclusion that at least two, if not more of them, prove a breach of both the counts. The only case relied on by the counsel for the defendants in support of his Honor's opinion is that of *Slocumb v. Washington*, 51 N. C., 357. A reference to the questions discussed and decided in that case will show that, if it does not actually oppose, it at least yields no support to the proposition for which it is cited. In the course of the trial in that case the second count of the declaration, which was for want of proper care in keeping and providing for certain slaves hired to work on a railroad, the defendants offered to prove "that the nature of the railroad work kept the hands but a short time at any one place; that the shanty assigned to the hands at the place in question was as good as those usually erected for the business," which testimony was rejected by the presiding judge. This Court held that the testimony ought to have been admitted, giving therefor the following reasons: "The defendants were bound to ordinary care, that is, such care as prudent men generally, under the same circumstances and engaged in the same business, take of their own slaves. Hence, it became material in this case to show what was the degree of care generally practiced by the persons engaged in making railroad embankments and excavations, in respect to the lodging of their own slaves employed in the work. For, certainly, one who hires himself or his slave to serve in a particular employment must be supposed to understand the usages and ordinary risks in that employment and to contract in reference to them." In the case now before us, the witnesses were permitted to describe the kind and condition of the huts or shanties in which the plaintiff's slaves were lodged, and each one who speaks on that subject says they were inferior to those ordinarily provided for

(254)

slave laborers on railroads. Mr. Raiford says that the accommodation for the railroad hands "were nothing like as good as are ordinarily used on works of the kind, and were nothing like as good as an ordinary horse stable." Mr. Robinson says that those he saw at the Heritage place "lacked a great deal of being as good as ordinary—they would be very poor horse stables." He said further that they did not look to be as good as those he had seen on the North Carolina Railroad. Mr. Loftin states that "he never saw any shanties anywhere else as poor (sorry) as those at the Heritage place—that the latter were not as good as an ordinary horse stable." On cross-examination, he said that (255) the shanties did not deserve the name. It is stated in the bill of exceptions that none of the witnesses knew whether the slaves in question had remained at the shanties during the snow, or the time when they had left the employment of the defendant, nor which of the shanties they occupied, except from the conversation between Raiford and Parrott. In these respects, this case differs materially from that of *Slocumb v. Washington,* above referred to, in which it appeared affirmatively that the plaintiff's slaves were frostbitten and injured, not by remaining in their hut, where other slaves were proved to have remained during the snow storm, and thereby kept themselves unharmed, "but on their journey to their master's in another county, undertaken and performed without the direction of the defendants and against the orders of the manager." In this case W. C. Loftin stated that he had four hands in the defendants' employment who stayed at these shanties during the snow, and that two of them were frostbitten, though he had heard that one of these two had fallen into a ditch and remained there some time.

The result of our examination of the testimony is that the lodging of the plaintiff's slaves in any of the shanties described by the witnesses was not the taking such care of them as a man of ordinary prudence would take of his own slaves employed in similar business, much less, was it the taking good care of them and furnishing them with good accommodations. For the error committed by his Honor in his instructions in relation to the second and third counts there must be a reversal of the judgment and the grant of a *venire de novo,* and this renders it unnecessary for us to notice particularly the other points made in the case. The reversal of the judgment in the plaintiff's favor, on the fourth count, follows necessarily from the grant of a new trial to him on the second and third.

PER CURIAM. *Venire de novo.*

(256)

THOMAS S. ASHE AND JOHNSON R. HARGRAVE v. EDWARD H. STREATOR ET AL.

1. All courts have the inherent power to revise and amend their records and make them conform to the truth.
2. The power of the county courts to amend their records is a discretionary power, subject to be reviewed by the Superior Court on an appeal; but the Supreme Court has no power to examine into the correctness of the exercise of such discretion in the courts below.
3. Where, however, the Superior Court erroneously decided that a county court had no power to make an amendment, it was *Held*, that this court, on appeal, would correct such error.

APPEAL from a motion to amend, heard before *French, J.*, at last Fall Term of ANSON.

This was a motion in the county court of Anson, for leave to amend the record of that court, made at April Term, 1859, in the case of Thomas S. Ashe and Johnson R. Hargrave v. Edward H. Streator, Benjamin C. Hutchinson, Thomas W. Kendall, Charles E. Smith, and George A. Smith. It appeared by the records of the said county court that the plaintiffs at that term obtained a judgment against all these defendants, from which they all appealed. In the Superior Court, at Fall Term, 1859, the judgment was affirmed, and an execution issued to March Term, 1860. The execution was stayed in the Superior Court, and has not yet been satisfied. At April Term, 1860, of Anson County court, Thomas W. Kendall, Charles E. Smith, and George A. Smith, through their counsel, moved to amend the record of the April Term, 1859, of that court so as to show that only Edward H. Streator and Benjamin C. Hutchinson appealed to the Superior Court. The county court, after hearing testimony and the argument of counsel on both sides, allowed the motion, and Samuel Smith, Jr., and John Stacy, the sureties to the appeal from the county to the Superior Court, prayed an appeal to the Superior Court.

His Honor, in the Superior Court, disallowed the motion, on the ground that the county court had no power to make the amendment, from which ruling defendants Kendall, George A. Smith, and (257) Charles E. Smith, appealed to this Court.

McCorkle and Strange for plaintiffs.
R. H. Battle for defendants.

MANLY, J. The question made in the case is as to the power of the county court to amend its records of a previous term.

Upon an appeal to the Superior Court from the court below, the former, without revising the discretion of the county court, held that that court did not have the power and, consequently, reversed its judgment, and from this decision of the Superior Court, there was an appeal to this Court. There is error in the decision of the Superior Court.

No facts are stated in the case that would deprive the county court of the discretionary power, inherent in all courts, to revise its records and make them conform to the truth. In *Phillips v. Higdon,* 44 N. C., 380, the power of amendment residing in the courts of North Carolina is fully and distinctly stated, and the case now before us falls clearly within the limits of the power there defined.

It is a mistake to suppose that interests have vested under the record as it stands that prevent an amendment. The persons whose interests are affected are parties to the record. They are bound to know the truth of the transactions as to which the record speaks—to act upon the truth, as it happened, and upon the expectation that the record will be made to speak truly. No party has a right to complain, and no other person has an interest that will be prejudiced.

So much for the power of the county court. Whether they have exercised the power with discretion it is not our province to say, nor have we the means of knowing.

Instead, therefore, of dismissing the application for the want of power, the Superior Court ought to have entertained jurisdiction of it, and considered it as a matter addressed to its sound legal discretion. The exercise of discretionary powers in the county courts is subject to be revised in the Superior. In this Court we have no such revising power, and have taken cognizance of this case only in consequence of the error in law of the court in holding it had no (258) power.

This opinion should be certified to the Superior Court, that it may proceed to adjudge the matter before it by the appeal, according to its discretion, and the course of the court.

PER CURIAM. Reversed.

Cited: *Bennett v. Taylor, post,* 283; *Bank v. McArthur,* 82 N. C., 109; *Perry v. Adams,* 83 N. C., 267; *S. v. Warren,* 95 N. C., 676.

PETER ADAMS v. PYLADES SMALLWOOD.

Where two *fi. fas.* had been issued to different counties on the same judgment, and one had been satisfied before the return term, it was *Held*, in order to vacate a sale made of the defendant's land on the return day, under the second execution, to be competent for the court to quash and set aside such second execution.

MOTION to set aside an execution, before *Saunders, J.*, at last Fall Term of GUILFORD.

The facts are these: Peter Adams obtained a judgment against Pylades Smallwood and Joab Hiatt at February Term, 1860, of Guilford County court, for $285. Two *fieri faciases* issued upon said judgment, returnable to May Term, 1860, one directed to the sheriff of Halifax where the defendant Smallwood lived, which was returned on Wednesday of the return term "satisfied," and the money paid into office; the other issued to the sheriff of Guilford, who levied the same on a house and lot, and having advertised the same according to law, exposed it to sale as the property of Smallwood on Monday of May Term, 1860, when M. D. Smith became the last and highest bidder, at the price of $560.

On Saturday of the said term, Adams, having received his debt on the execution to Halifax, moved the court to set aside and vacate the *fi. fa.* directed to the sheriff of Guilford.

(259) This motion was opposed by Smith, who had purchased the property under it, but was allowed by the Court. Smith was permitted to appeal to the Superior Court, and in that court the same motion was made and allowed by the court, from which ruling, Smith appealed to this Court.

Morehead and Gorrell for plaintiff.
Scott for defendant.

MANLY, J. It is believed to be within the power of a plaintiff who has judgment to sue out a writ of *fieri facias* and before return day, nothing being done, to return it into the office and sue out another, but it is not within his power to take two writs at the same time, without special leave from the court. It was, therefore, irregular and without any warrant of law, that the two writs of *fieri facias* were sued out in this case. All that is decided, as we conceive, in *McNair v. Ragland,* 13 N. C., 42, is in conformity with the above.

It was competent, therefore, for the court, upon its own motion, to have quashed at least one of the writs. It was especially proper for it

to do so after one was satisfied. The judgment thereby became extinct, and the *fieri facias* was consequently deprived of all legal vitality.

It might, occasionally, conduce to the ends of justice to be allowed to take out more than one execution at a time; and, upon proper suggestions as to its expediency and satisfactory assurances that it would not be urged for the purposes of oppression or fraud, the court would allow it. The writs in such case would be put into action upon the responsibility of the party suing them out, but this responsibility would not dispense the court from the duty of seeing that the objects were apparently legitimate and from guarding, as far as possible, against a misuse of the process. It is a power, in other words, which the Court ought to put into the hands of the plaintiffs sparingly and with caution.

PER CURIAM. Affirmed.

Cited: Bennett v. Taylor, post, 283.

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(260)

ELIAS BRYAN v. THE STEAMER ENTERPRISE.

1. Where an attachment was sued out against the owner of a vessel, under sections 27 and 28, of chapter 7, Revised Code, it was *Held*, that a prosecution bond, made payable to the "owner" of the vessel, by that description, was sufficient.
2. Section 6 of chapter 7, Revised Code, authorizing the sale of perishable articles levied on under an attachment, applies only to cases of original attachment, and not to those against vessels authorized by sections 27 and 28, chapter 7, Revised Code; and it was *Held*, therefore, that a sale, by the sheriff, of a vessel so levied on under this act was void, and did not discontinue the suit.

ATTACHMENT under the statute, Rev. Code, ch. 7, secs. 27 and 28, to subject a vessel to the payment of a debt for work done by plaintiff on said vessel, tried before *Bailey, J.*, at Spring Term, 1860, of CHATHAM.

The following is a copy of the affidavit and the prosecution bond:

NORTH CAROLINA—CHATHAM COUNTY.

Elias Bryan maketh oath before me, one of the justices of the said county and State aforesaid, that the steamer *Enterprise* is indebted to him in the sum of $190.47, to the best of his knowledge and belief, for work and labor done upon, and provisions furnished to, the steamer *Enterprise*.

Sworn to and subscribed before me this 6 August, 1857.

NORTH CAROLINA—CHATHAM COUNTY.

Know all men by these presents, that we, Elias Bryan and John W. Scott, are held and bound unto the owner of the steamer *Enterprise* in the sum of $380.95, to be paid to him, his heirs, executors, administrators, and assigns. The condition of the above obligation is such that, whereas, the above bounden Elias Bryan hath this day prayed an attachment in his favor against the steamer *Enterprise* for the sum of $190.47, and hath obtained the same, returnable to the Superior (261) Court of Law, to be held at the courthouse in Pittsborough on the third Monday in September, 1857. Now, if the said Bryan shall prosecute his said suit with effect, or in case he fail therein, shall well and truly pay and satisfy to the said defendant all such costs and damages as shall be recovered against said plaintiff, his heirs, executors and administrators, in any suit or suits which may be hereafter brought for wrongfully suing out said attachment, then this obligation to be void; otherwise to remain in full force and virtue.

The attachment issued and the sheriff returned it with an endorsement thereon, setting out that he had levied the same upon the steamer *Enterprise,* and that the vessel having remained in his possession for thirty days unreplevied, he had, upon the certificate of three freeholders that the said vessel was perishable property, sold the same to the highest bidder.

Upon the return of the writ and bond to the Superior Court at Fall Term, 1858, one William P. Elliott intervened for his interest in the vessel and filed a plea in abatement, praying to have the attachment quashed, for the reason that the same "had been issued without bond taken and returned according to the provision of the act of Assembly in such case made and provided."

To this plea in abatement there was a replication by plaintiff, setting out the substance of the above recited bond. There was a demurrer to the replication and a joinder in demurrer by the plaintiff.

Upon the argument it was adjudged by the Court that the demurrer be sustained, the plea held good, and attachment quashed. Plaintiff appealed to this Court.

Cantwell and Howze for plaintiff.
Phillips for defendant.

BATTLE, J. The last two sections of our attachment law, as contained in chapter 7, Rev. Code, were intended to give a lien "on any ship, steamboat, or other vessel, for or on account of any work done or (262) materials furnished," etc., in favor of those who might do the

work or furnish the materials, etc., and to provide the mode of proceeding by which that lien should be made effectual. Rev. Code, ch. 7, secs. 27 and 28. Among the provisions for this end, it is declared that any creditor who intends to avail himself of the remedy shall, by himself or his agent or attorney, before suing out his attachment, "first verify his debt and the manner in which it was contracted, by affidavit, and shall enter into bond, conditioned for the indemnity of the defendant in the manner provided by law." The plea in abatement put in by the owner of the steamboat, who intervenes to protect his interest, brings up for consideration the question as to whom this bond for the indemnity of the defendant shall be made payable.

It is manifest that the proceeding under this statute is one *in rem,* and we, accordingly, so held in *Cameron v. Brig Marcellus,* 48 N. C., 83. It is equally clear that the owner of the vessel or steamboat, or any other person claiming an interest in her, may intervene and have himself made a party defendant, for the purpose of protecting that interest, as we held in the same case. The person who came in and was made party in this case contends that he is the proper defendant and that the bond which the plaintiff gave upon taking out his attachment should not have been made payable "to the owner of the steamer *Enterprise,*" but "to the defendant," or, perhaps more properly, "to the person who shall become defendant." It is very certain that the bond cannot be made payable to any particular person by name, because the proceeding being *in rem,* there is no such person to receive it, or for whom the magistrate who issues the attachment can accept it. To make it payable as contended for by the defendant involves a technical difficulty which, if possible, ought to be avoided. A bond, being a deed or instrument under seal, must be made to some obligee, to whom or for whom it may be delivered. *Marsh v. Brooks,* 33 N. C., 409; *Latham v. Respass,* 44 N. C., 138; *Gregory v. Dozier,* 51 N. C., 4. Now, in (263) a case like the present, the bond when it is given cannot be made to "the defendant" as a certain obligee because there is no defendant who can be described by his Christian and surname or simply by the description of "defendant." But there is always some person who is the owner of the vessel or steamboat, and to him by the description of "owner" the bond may be made payable, and for him the magistrate may accept the delivery of it from the plaintiff. Should the absolute owner intervene, he may, of course, have a remedy on the bond in case of its breach, and we think that any person who can show a sufficient interest in the vessel or steamboat to be permitted by the court to intervene for that interest will be taken to be "the owner," for the purpose of a remedy on the bond. Our opinion, then, is this that the plea in abatement cannot be sustained.

But the defendant through his counsel has raised an objection in the argument here, that the plaintiff's action was discontinued by the sale of the boat, upon the ground that the thing attached being gone there was nothing to keep the case in court. We are satisfied that the sixth section of the attachment law, which provides for the sale of perishable articles, applies only to cases of original attachment and not to those against vessels and steamboats, authorized by the 27th and 28th sections of the act. The sheriff, therefore, had no authority to sell, and his sale was, consequently, null and void and left the boat in the same condition in which it was before. It does not appear that the sale was made at the instance of the plaintiff, but if it had been, it could not, being void, have the effect to discontinue the proceeding. The judgment must be reversed, and a *procedendo* issued.

PER CURIAM. Reversed.

Cited: *Scott v. Elliott,* 61 N. C., 104; *s. c.,* 63 N. C., 217.

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(264)

WILLIAM B. MARCH v. DANIEL GRIFFITH ET AL.

Where upon an appeal from the county to the Superior Court the suit pended for three terms in the latter court, when a motion was made to dismiss the appeal for defects in the appeal bond, it was *Held,* that the appellant might, as a matter of right, file a sufficient bond and prosecute his appeal, and that an order of the court below dismissing the appeal was a proper subject for the revision of this Court.

PETITION for the portion of land among several tenants in common, brought up by appeal from the county court, and heard before *Dick, J.,* at Fall Term, 1860, of DAVIE.

The petition was filed at June Term, 1858, of Davie County court, where it pended till December Term, 1858, of that court, when, upon a hearing of the cause, the court ordered the petition to be dismissed, and from this ruling plaintiff appealed to the Superior Court, and filed an appeal bond, with D. M. Furches as his security, but which was not signed by the appellant. The cause pended in the Superior Court until Fall Term, 1860, when defendants moved to dismiss the appeal for the above recited defect in the appeal bond, together with other defects. The appellant then offered to put in any bond the court might require, but his Honor adjudged the bond void and dismissed the petition, from which order petitioner appealed to this Court.

Thomas J. Wilson for petitioner.
Clement for defendants.

MANLY, J. The question in this case is whether the dismissal of the case in the Superior Court was matter of discretion in that court, for if so, we cannot revise it in this.

The appeal was taken at the December Term of Davie County court, 1858. The appeal, therefore, was to the Spring Term of the Superior Court, 1859.

The motion to dismiss for defects in the appeal bond was made at Fall Term, 1860. The plaintiff met the motion by an offer to put in such a bond as the court might require. But the court held the (265) bond that had been given void, and refused to accept another.

With regard to bonds for appeals, the appellate court has an unquestioned right to require that they shall be in form, of sufficient amounts to cover the accumulating costs, and that there shall be responsible sureties to the same; and if at any stage of a cause a deficiency in any of these respects be discovered, it is in the power of the court to have them amended or renewed; and questions as to the sufficiency of the bond, in respect to the amount, the solvency of the sureties, or as to the occasion and time or manner of putting in another security, are purely matters of discretion. But there are boundaries to this discretion, and we take it, when a suit is permitted to go up to the Superior Court with an insufficient bond, and to pass three terms of the court in that condition, the appellant has a right, upon a decision of the court against the bond, then and there to put in another, such as the court may approve. To hold otherwise would lead to absurdity; for, if we suppose the objection to the bond to be on account of some technicality about which counselors differ, or because the sureties have become insolvent, the first knowledge which appellant could have of the soundness of the objections would be the judgment of the court declaring the same, and dismissing his suit. He would, therefore, be put out of court without laches or default on his part. The most stringent requirement in such case would be to declare the insufficiency and require a proper bond *instanter*.

The plaintiff had a right to have such an opportunity tendered him.

We think there was error, therefore, in refusing to accept the plaintiff's bond when it was offered. The range of the court's discretion in that particular was transcended.

The case may be presented in another point of view. In *Wallace v. Corbit*, 26 N. C., 45, we find the principle established that an appeal bond is not necessary to give jurisdiction to the appellate court; that such bond may be waived expressly or impliedly, and the court in such case will proceed without it. The plaintiff by putting (266) in an instrument which he considered and which was taken as a bond, showed his purpose to prosecute the suit. Defendants acquiesce,

and put in pleas in the Superior Court, and it is afterwards continued at two terms. A peremptory dismission of the suit, it seems to us, is a violation of the rights of the parties under this waiver of the bond. It is a surprise which it would be highly unjust to permit—which cannot be done, as we think, except upon notice and opportunity offered the parties to put themselves, in respect to each other, upon their strict legal rights.

With respect to the merits of this petition, we express no opinion. What may be the respective interests of the parties in the land, and what the effect of an actual partition upon these interests, we leave to the consideration of the court below, upon the proofs.

There is error in the order of the Superior Court, and it should, therefore be reversed, and the court should take a proper bond for securing the defendants' costs, and proceed in the cause according to the course of the court.

PER CURIAM. Reversed.

JAMES H. CATES v. JEFFERSON WHITFIELD.

Where an action of *detinue* was brought for a female slave, and the case coming to the Supreme Court by appeal, a judgment was rendered here for the recovery of such slave, it was *Held*, that the plaintiff was entitled to a *scire facias* from this Court for the defendant to show cause why execution should not issue for a child of such female slave, born after the commencement of the suit and before the final judgment.

(267) SCIRE FACIAS issuing from this Court for the defendant to show cause why the plaintiff should not have execution for the recovery and delivery of a slave named Henry. An action of *detinue* has been begun in behalf of the plaintiff against the defendant in the Superior Court of the county of Person for the detention of certain slaves, and amongst others, a female named Eliza, which, after pending several terms below, was brought to this Court by appeal, and the plaintiff, at June Term, 1860, had a judgment that he have and recover the said slaves, including the said female slave, Eliza. The *scire facias* sets out that during the pendency of this suit in the said Superior Court of Person, and before the judgment in this Court, the female slave, Eliza, was delivered of the said Henry, and the process is for the purpose of having execution for the delivery to the plaintiff of this slave. On the return of the *sci. fa.* to this Court the defendant appeared and contested the plaintiff's right to this remedy, contending that if he was entitled to the slave at all, it could only be recovered in another action commenced in the courts below.

Graham for plaintiff.
Reade and Fowle for defendant.

BATTLE, J. We are clearly of opinion that the plaintiff is entitled to recover the infant slave, who was born after the commencement of the action of *detinue,* in which he had judgment in this Court against the defendant, for the mother; and that a *scire facias* issued against the defendant is the proper remedy. It is not denied that in a proper case the Supreme Court may issue a *scire facias,* as the power to do so is expressly conferred by section 6, chapter 33, Revised Code. The enforcement of one of its own judgments must be admitted to be a proper case for the issuing of the writ by the court, and we shall show presently that the object of the *scire facias* in the present case is only to make effectual and complete the enforcement of a judgment which it has heretofore rendered. *Jones v. McLaurin,* 52 N. C., 392, has no bearing, because that was a *scire facias* against bail, which was (268) an original proceeding against persons who had not been theretofore before the court, and which, therefore, as an original proceeding, could not be commenced in a court which, in relation to that matter, had only appellate jurisdiction.

That the issue of a female slave which is born after the commencement of an action of *detinue* for the mother is embraced in the judgment which may be obtained for the mother, appears from what was held by the Court in *Vines v. Brownrigg,* 18 N. C., 239. It was there decided that if upon a judgment in *detinue* for slaves the execution is satisfied by the payment of the assessed value by the defendant and its receipt by the plaintiff, the title to the property will be transferred to the defendant by relation to the time of the verdict and judgment; and the issue born of said slaves between the rendition of the judgment and the satisfaction of the execution will, of consequence, belong to him. And why would the issue belong to the defendant, who had paid the assessed value of the slaves to the plaintiff, who had received it instead of the slaves themselves, unless they were embraced in the judgment? This being so, if the plaintiff, instead of receiving the value of the slaves, had insisted upon his right to have the slaves themselves delivered under his execution, and the mother, only, had been taken by the sheriff and delivered to him, he certainly could have issued a *scire facias* with a view to the enforcement, by another execution, of the residue of his judgment. In the case now before us the issue was born before the judgment, though after the commencement of the suit, but we cannot see how that can differ this case in principle from the case where they are born after the judgment. In either case the issue must be regarded

as incidental to the subject-matter of the litigation, and as such must follow the principal.

In *Vines v. Brownrigg* it was said by the Court that the plaintiff, if he had not received satisfaction in the payment to him by the defendant of the assessed value of the slaves mentioned in the writ and (269) judgment, might have sustained an action of *detinue* for the issue. No doubt that is true, but it is not said by the Court, nor does it follow, that the plaintiff might not also have proceeded by a *scire facias* to recover the issue; and if there be any force in reasoning by analogy, he had his choice to adopt either remedy. In *Briley v. Cherry,* 13 N. C., 2, the plaintiff brought *detinue* against a person who had purchased a slave during the pendency of a former action of *detinue,* and the defendant's counsel contended that he was not bound by the former judgment against his vendor, because the plaintiff had not issued a *scire facias* whereby to gain the fruit of his former judgment, by which mode he admitted he would have been bound. See 3 Black. Com., 413. The Court did not sustain the objection, but said "that a verdict and judgment in an action of *detinue* are conclusive between the parties and their privies." It appeared, however, that the defendant in that suit was a purchaser under an execution against the defendant in the first suit, which prevented his being a privy. Had he purchased from the defendant in the first suit, during the pendency of the litigation, otherwise than under execution, it was clearly the opinion of the Court that there was no distinction as to the binding effect of the first judgment, whether the plaintiff proceeded against the purchaser by another action of *detinue* or by a *scire facias.* So, we think, in the present case the plaintiff had his election to bring an action of *detinue* in the court below, or to issue a *scire facias* from this Court.

In coming to this conclusion we have not overlooked *Houston v. Bibb,* 50 N. C., 83, which was cited and relied on by the counsel for the defendant. That was an action of *replevin,* instead of *detinue,* and the Court founded its opinion upon the express words of the Revised Statutes, ch. 101, sec. 5, which was then in force, that the children of the female slave born during the pendency of the action were not embraced in the recovery. Our opinion, then, is that the plaintiff is entitled (270) to a judgment and execution, according to his *scire facias.*

PER CURIAM. Judgment according to the *scire facias.*

Cited: *Dancy v. Duncan,* 96 N. C., 116.

JOHN F. HERRING v. WILLIAM R. UTLEY.

1. Where in an action against the owner of a dray in the town of Wilmington, brought to recover the value of a trunk lost from the defendant's dray, it was sought to charge the defendant as a common carrier, it was *Held* competent for the plaintiff to prove that it was the duty of draymen in Wilmington to carry baggage.
2. Whether the owner of a lost trunk can be admitted to prove by his own oath the contents of the trunk lost, *quere*.

CASE against the defendant as a common carrier, to recover damages for the loss of the plaintiff's trunk, tried before *French, J.*, at Fall Term, 1860, of NEW HANOVER.

It was in evidence that the defendant had two licensed drays in the town of Wilmington and one unlicensed dray. It was further in evidence that plaintiff asked defendant what he was going to do about his trunk, which was lost out of his dray; that defendant said he was willing to pay him $40, and that the offer was rejected by the plaintiff.

Plaintiff offered to prove that it was the duty of draymen in Wilmington to carry baggage. Defendant objected to this testimony, and the court sustained the objection. Plaintiff excepted.

The counsel for the defendant then offered to introduce the plaintiff to prove the contents of the trunk. Defendant objected. The objection was sustained by the court. Plaintiff excepted.

The court having intimated the opinion that there was no evidence to charge the defendant as a common carrier, plaintiff submitted to a nonsuit and appealed. (271)

Baker for plaintiff.
Strange for defendant.

MANLY, J. Without deciding, at present, the other question of evidence appearing upon the record, there is one which was erroneously ruled below, and upon which plaintiff is entitled to a *venire de novo*.

It was proposed on the part of the plaintiff to prove that it was the duty of draymen in Wilmington to carry baggage. It is not stated how it was to be proved, but supposing it to be by competent testimony, it was certainly pertinent and proper.

The case states as a fact that defendant had three drays in the town, two licensed and one unlicensed, and there was evidence tending to show that plaintiff's baggage had been lost from some dray of defendant. It was the point, therefore, in the cause whether drays, licensed or unlicensed, in Wilmington are accustomed to carry baggage, or hold themselves out as common carriers of the same. If accustomed to carry,

it was their duty, and if their duty, they are common carriers, and subject to the responsibility of that class of public servants.

By the term baggage, used in the case, we understand the ordinary outfit of a trunk or bag or both, of a traveler, as distinguished from sacks, bales, casks, and boxes of produce and merchandise appertaining to the trade of the town. It is possible that draymen may be used as common carriers in one of these departments of service only, or in both. These are proper subjects for proof.

Our attention has been directed to the statement that two of the defendant's drays were licensed. We are not informed what is the purport of the license spoken of, and are unable, therefore, to see the full significance of the statement. If the license be to carry for the public, on the streets of Wilmington, it would seem to present, then, a (272) question whether their range of duties was restricted or unrestricted, as already suggested.

With respect to the other questions of evidence, as to the competency of plaintiff to prove the contents of his trunk, we prefer not to decide it, except it comes necessarily into judgment. It is a new and important application of a principle, viz., of evidence from a party made proper, *ex necessitate,* and ought to be engrafted upon the jurisprudence of the State, if at all, by the courts after full consideration.

Per Curiam. Reversed.

PASCHAL McCOY v. THE JUSTICES OF HARNETT.

1. A contract for erecting a public building, made with a committee appointed by the justices of a county, when performed by the contractor, must be fulfilled by the justices, although early in the progress of the work they had dismissed the committee, and endeavored to rescind the order appointing it, and had given notice to the contractor not to proceed.

2. Where a contractor to erect a public building, after the dismission of the committee through whom the contract was made, and a rescission of the order appointing it, and a notice by the justices not to go on with the building, still continued to act under such committee, and by its directions made material departures from the specifications in the contract, it was *Held,* that though he completed the building within the time specified, yet he was not entitled to recover the price agreed to be paid.

Mandamus heard before *French, J.,* at the last Fall Term of Cumberland.

The application was to compel the justices of Harnett to pay the plaintiff for building a jail. The cause was before this Court at June

Term, 1858 (50 N. C., 265), and again at June Term, 1859 (51 N. C., 488), on which occasion several points referring to the pleadings were decided, and by reference to which reports a full history of the case may be gathered. The contract made by the plaintiff with (273) the defendants, the several orders made by the justices, and many other facts not material to the view finally taken of the case, are there set out. The facts upon which the case is determined are fully recited and commented on in the opinion delivered by the *Chief Justice,* and therefore need not be repeated here. In the court below certain issues which had been previously made up were submitted to a jury. These were:

1. Was there a valid and legal contract made on the part of the county of Harnett, by the committee of public buildings, with the petitioner, for the building of a jail for the said county?
2. Was the jail built according to contract?
3. If not built according to the specifications and terms of contract, was the departure in the plan or arrangement of the work allowed and directed by persons authorized to make a change?
4. Was the jail received by the committee of public buildings?

The jury responded to the first, third, and fourth interrogatories, in the affirmative, and to the second in the negative.

Exceptions were taken to the testimony offered, and to the charge of the judge, but the matters involved in these issues being looked upon by this Court as questions of law, and improperly submitted to a jury, it is not deemed necessary to report the exceptions.

The court ordered a peremptory *mandamus* to issue, and the defendants appealed.

Person and Neill McKay for plaintiff.
Strange for defendant.

Pearson, C. J. No material fact is disputed, and the controversy depends entirely on questions of law.

1. At June Term, 1855, the justices appointed a building committee, with authority to let out the building of a courthouse and jail.
2. In August, 1855, the building committee made a contract (274) with the petitioner for building a jail according to certain specifications, for an agreed price, to be paid by installments as the work progressed.
3. The petitioner immediately commenced the work by collecting materials, employing workmen and hands, and laying the foundation of the jail.
4. At September Term, 1855, the building committee made a report,

setting forth the contract; whereupon the justices disapproved of the contract, discharged the committee, and rescinded the order of June term by which the committee was appointed, and notice was given of these orders to the petitioner, and he was informed that the justices did not wish the jail to be built.

5. Notwithstanding these orders, the building committee continued to act, and the petitioner under their directions went on with the work, and had the house done by the time specified in the contract, 1 November, 1856.

6. At December Term, 1855, the following order passed: "Ordered, that the treasurer of jublic buildings be authorized to borrow $10,000." Also, "Ordered, that the treasurer of public buildings pay over to Mr. Paschal McCoy, $2,000," which he accordingly did.

7. During the progress of the work the building committee, after the orders of September and December terms, made several material alterations in the plan of the building (which they reserved a right to do by a clause in the contract), and the house varies in these particulars from the specifications set out in the original contract.

8. The building committee received the house, and gave a certificate that it was built according to contract as modified.

9. The justices refused to receive the house or to pay for it.

After "a return" was made by the justices, the petitioner made three "pleas," as they are termed; neither of these pleas traverse any matter of fact, but thereby set out positions of law, from which, as was contended, it followed that the petitioner was entitled to an order for (275) a peremptory *mandamus*—that is:

1. The contract made by the building committee was valid.

2. The committee had the power to make the changes in the plan of the jail.

3. The committee had power to receive the jail.

On the face of the record, no matter of fact being put in issue, the intervention of a jury was uncalled for, and it was the duty of the court to give judgment on the facts stated. So the issues which were afterwards made up and the action of the jury may be treated as surplusage, and the question is, Did his Honor err in the conclusion that the petitioner was entitled to a peremptory *mandamus?* This Court is opinion there is no error.

1. The contract was certainly valid for the committee had full power and authority to make it under the orders of June term, and notwithstanding the subsequent action of the justices, if the petitioner had done the work and built the jail according to contract, the justices would have been bound to pay for it; for, according to an old adage which expresses the law very forcibly, "It takes two to make a bargain, and two

to unmake it." It was not in the power of the justices to repudiate the contract, and the consent of the petitioner was necessary to rescind it.

2. The jail was not built according to contract, and the petitioner is forced to rely on the action of the committee, after the order of September term discharging it and rescinding the order for its appointment, in order to show that he was authorized to depart from the specifiactions in the original contract, and thus establish the allegation that he has performed the contract on his part.

This raises the question on which the case turns, Had the justices power to discharge the committee and revoke its authority? For, if they had, the subsequent action of the committee, in spite of the justices, was wrongful, and the alterations of the original plan were without authority and void. As the petitioner was unwilling to rescind the contract, and was determined to insist on his legal right to hold (276) the justices bound, although he was notified of their unwillingness to proceed with the building, it behooved him to see to it that the contract was strictly performed on his part, and it is his misfortune to have failed to do so under a mistaken idea that the committee still had power to authorize him to depart from the specifications.

That a principal has power to discharge an agent and revoke his authority is a proposition too plain to admit of discussion.

On the argument, several distinctions were suggested in order to take this case out of the general rule:

Where a contract is entered into by two individuals, if one attempts to repudiate or does an act by which he is disabled from performing his part, the other may pursue one of three modes: he may concur in the repudiation and treat the contract as rescinded, or he may go on and perform his part and bring an action for the stipulated price, or he may forthwith bring an action to recover unliquidated damages for breach of the contract. In the case of a *quasi* corporation like the justices, the party may agree to rescind, or he may go on and do the work and by *mandamus* compel the payment of the price, but he cannot recover unliquidated damages, as the writ of *mandamus* does not apply. Under the terms of this contract a building committee was necessary in order to inspect the work as it progressed, and give certificates for the monthly installments; therefore, the justices had no power to discharge the committee unless they appointed another within a reasonable time, for they would thus disable themselves from performing their part of the contract, and yet no remedy could be had against them to recover unliquidated damages.

Admitting the premises, it shows that the remedy against an individual by action is more ample than the remedy against a *quasi* corporation by *mandamus*; but we are unable to see how it proves that a principal

cannot discharge an agent. If by the terms of the contract a building committee was necessary, the petitioner could by a writ of (277) *mandamus* have compelled the justices to appoint another set, within reasonable time after the first was discharged; or he might have proceeded to do his work according to the contract, and compelled payment of the price, as the justices would not have been at liberty to take advantage of their own wrong in failing to appoint another committee.

Another suggestion on the argument was that by the terms of the contract it is to be implied that the petitioner placed reliance on the discretion of the individuals who composed the committee, and, therefore, the justices had no right to discharge them.

Suppose this to be so, or suppose it had been expressed in the contract that the individuals composing the committee should not be discharged by the justices and others put in their places, it would not have had the effect of preventing the justices from discharging their agent, although probably their doing so would have given the petitioner good ground for refusing to proceed with the contract.

It was also contended on the argument that the orders at the December term recognized the existence of the committee, and ratified and confirmed their action.

We are unable to see how either order is connected with the building committee which had been discharged at the preceding term, or how it could have the effect to resuscitate them or recognize the existence of such a committee. The treasurer of public buildings was ordered to borrow $10,000, and he was ordered to pay the petitioner $2,000. How could this resuscitate the defunct building committee? And, so far from having the effect of ratifying and confirming the alterations which were afterwards made in the plan of the jail, it only furnishes an inference that the $2,000 was considered by the justices as an amount proper to be paid in satisfaction of the unliquidated damages which the petitioner had incurred by what work he had done on the foundations, and his outlay in materials and hire of hands up to the time when he was notified that the justices did not wish to proceed with the work, and had discharged the building committee. He then had (278) his election, either to accept it in satisfaction and rescind the contract or accept it under protest, as a part payment, and proceed to do the work and claim the balance of the price. He elected the latter, but failed to comply with the contract, by departing, without authority, from the original specifications. The third plea is merely a corollary or deduction from the second, and falls with it.

Per Curiam. Reversed, and petition dismissed.

WILLIAM PATTERSON v. WILLIAM J. MURRAY.

A contested sheriff's election before the justices of a county court is not an action within the meaning of Revised Code, ch. 31, sec. 75, which entitles the successful party to recover costs.

MOTION for the taxation of costs, before *Howard, J.*, at the last Fall Term of ALAMANCE.

The defendant Murray received, apparently, a majority of the legal votes for the office of sheriff in the county of Alamance, and at the next term of the county court made application to qualify, but was opposed in this by the plaintiff Patterson, who had given notice previously and specified the grounds of his opposition. Witnesses were examined and the matter heard at length, and in the conclusion the contest was decided in favor of Murray, who gave bond and was qualified. Thereupon the county court awarded costs against the plaintiff Patterson, who appealed to the Superior Court, and the same judgment was given in that court, whereupon Patterson appealed to this Court.

No counsel for plaintiff.
Graham and Hill for defendant. (279)

MANLY, J. The case turns upon the point whether a contested election to the sheriff's office (which, according to the Revised Code, ch. 105, sec. 13, is to be decided by the county court, a majority of the justices being present) is an action before that tribunal, within the purview of The Code, ch. 31, sec. 75. We think not. The Court has had occasion often to remark that costs are given in all cases by virtue of express legislative provisions. The costs in a controversy of the kind now before us is not specially given in the chapter and section of The Code which establishes the tribunal for deciding it, and they must, therefore, be awarded, if at all, by virtue of the general provisions on the subject, in section 75, chapter 31, above referred to.

That section declares "that in all actions whatsoever the party in whose favor judgment shall be given shall be entitled to full costs." Is our case, then, an action within the provisions of this section? Practically, the term "action" is now exclusively appropriated to those forms of judicial remedy which are ranked under the threefold division of real, personal, and mixed actions. But it is not necessary, as we conceive, to restrict the meaning of the term to this technical sense, in order to exclude a contested election from being intended by its use. Burrill, in his Law Dictionary, title, "Actions," defines that term to mean, "The formal means or method of pursuing and recovering one's right in

a court of justice." It is synonymous with "suit." If there be any distinction, it is that the former is applied exclusively to proceedings in a court of law, while the latter is applied indiscrimitately to proceedings in law and equity. In the use of either, the plain import would seem to be some one of the ordinary proceedings, conducted by the usual formula for establishing and enforcing rights in a court of justice; which this clearly is not.

In *Daughtry, ex parte,* 28 N. C., 155, it is decided that the case of a contested election of clerk in the county court is not subject to (280) an appeal to the Superior Court. This must be upon the idea either that it is not like an ordinary suit and subject to its rules, or that it is not before the justices in their judicial capacity; for if it be a suit, and before them as a court, a right of appeal would follow under the general provisions of law regulating appeals.

If our Code of laws be consulted as to the duties prescribed for the county court, it will be seen that these duties are not confined to those which are strictly judicial, but are of the nature, occasionally, of executive or legislative duties. The passing upon the election of sheriff seems to pertain to one of these latter departments in governmental affairs, and belongs to the functions of the county court which are not judicial.

Jones v. Physioc, 18 N. C., 173, and *Dickens v. Person,* 18 N. C., 406, are not opposed to our conclusions in this case. The first involved simply an inquiry whether one as to whom costs are asked was a party. The statute gave costs expressly against any one who should make himself a party. The second was a case of *mandamus,* dismissed, and costs taxed against the petitioners as upon a rule *nisi.*

We are of opinion the contested election, before the county court in this case, was not an action which entitled the successful party, by virtue of the statute, to costs. The judgment, therefore, of the county court directing costs to be taxed was erroneous, and such judgment, under the general law, was the subject of appeal, which lies from any sentence, judgment, or decree of that court.

The judgment of the Superior Court, which likewise gave costs upon the election controversy, should, therefore, be reversed with costs, both in this Court and in the Superior Court, against the appellee.

PER CURIAM. Reversed.

(281)

MARTHA BENNETT v. JOHN R. TAYLOR.

Where a *fi. fa.* on a justice's judgment was levied on land, and the regular proceedings had in the county court for the subjecting the land, and a sale made by virtue thereof, it was *Held,* that the county court, at a subsequent term, has no authority on motion to set aside the *fi. fa.* on the justice's judgment.

APPEAL from *Bailey, J.*, at last Fall Term of GRANVILLE, on an order setting aside a *fieri facias.*

An action of ejectment was brought by John R. Taylor and wife, of Wake, to recover an undivided part of a tract of land in Granville, in the possession of Joseph H. Gooch, who by an order of Court was made defendant, which action is still pending in Warren. Mrs. Bennett, the nominal plaintiff in this case, was a witness for Taylor and wife in that suit, and assigned her witness tickets to Gooch, who took out a warrant on them to his use and obtained a judgment before a justice of the peace of Wake. This judgment was removed to Granville in the way directed by act of Assembly (Rev. Code, ch. 62, sec. 20) and a *fieri facias* was issued thereon, which was levied on the defendants' interest in the land for which the action of ejectment had been brought. Notice of this levy was given to the defendants and an order of sale made by the county court of Granville at May Term, 1859. Pursuant to this order a writ of *venditioni exponas* issued, directed to the coroner (Gooch being the sheriff of Granville), and the land was exposed to sale and bought in by the said Gooch at a nominal sum. While the *venditioni exponas* was in the hands of the coroner, the defendants sent to the clerk of the county court of Granville the full amount of the judgment as it had been furnished to them by the clerk, with interest on the same up to June, 1859, and the costs, and this amount was paid to the coroner on 21 May, 1859, when he made known that he claimed $2.74 for commissions. This amount was sent to the clerk on the —— day of July, and tendered to the coroner, who refused it, saying that he had sold the land on the first Monday of that month. (282)

The counsel for the defendants, on these facts, moved in the county court to set aside the *fieri facias* levied on the land, which the court refused. The defendants appealed to the Superior Court, and in that court the counsel moved to set aside the justice's execution levied on the land and returned to May Term, 1859, of the county court, and to set aside the judgment given at that term for the plaintiff, and to set aside the order for the issuing of the *venditioni exponas,* and set aside that writ itself, and to vacate the sale made under it on the ground of surprise, and because the judgment was satisfied by the payment of the money to the coroner.

The court set aside the *fieri facias* but denied the other motions. From this judgment plaintiff appealed.

Fowle for plaintiff.
Winston, Sr., for defendants.

MANLY, J. We think the court had no power upon motion to set aside the *fieri facias* as invoked to do in the county court, and of course the appellate court has none. It was issued, it seems, on a justice's judgment, *Bennett v. Taylor and wife,* which had been transferred from Wake to Granville, under the provisions of the Revised Code, ch. 62, sec. 20. It was levied upon the interest of the defendants in a parcel of land returned to the county court with notice of the fact to the defendants. The judgment of the justice was then affirmed, a *ven. ex.* ordered, issued, executed, and returned. The county court was then moved to set aside the *fieri facias* on the justice's judgment. The motion was overruled and appeal taken to the Superior Court, the motion being there renewed and sustained and appeal taken to this Court.

We are not aware of any principle upon which such a motion can be sustained. The *fieri facias* complained of is part of the case that (283) belonged to the jurisdiction of the justice. It was not returned to the court for review as upon a writ of error, but placed there in consequence of the levy on land and in obedience to a statute which, in such case, required proceedings to subject land to the payment of debts to be of record. The proceedings, therefore, up to the levy are the complete and unreversed proceedings of a separate tribunal. They are placed in the court not for the purpose of being reviewed, but to put on record ulterior proceedings.

The motion, therefore, in substance, is to amend in one court the process of another. This is obviously improper. If upon return of the levy to court the justice's proceedings could be considered *in fieri* and unfinished, yet before the motion was made there was again a complete record, a judgment, writ of *venditioni exponas,* sale, and return; and then there was no power in the court to amend the process, upon motion, and thus to affect interests that had sprung up under it. This was held in *Bank v. Williamson,* 24 N. C., 147, and laid down as an established principle in *Phillipse v. Higdon,* 44 N. C., 380.

The case manifestly differs from one in which the amendment is to make the record conform to the truth, which a court has at all times power to do in respect to its own records. It also differs from the power exercised to quash a writ that has been issued improperly, leaving a person whose interest is supposed to be affected to look for redress to the party who wrongfully sued it out. *Ashe v. Streator, ante,* 265,

falls under the former class, and *Adams v. Smallwood, ante,* 258, under the latter.

We have considered the case only as a motion to set aside or vacate the *fieri facias* on the justice's judgment, which was the motion made in the county court and from the decision of which the appeal was taken. In the Superior Court, it seems, other motions were made, viz., to set aside (1) the judgment then of record, (2) the order for a *venditioni exponas,* and (3) the *venditioni exponas* itself. (284)

Assuming that the motions were overruled, which does not expressly appear, there was no appeal by Taylor and wife, and the decisions as to them, therefore, has not been brought here for reëxamination. They are no part of the case now in this Court. It may not be improper to say, however, that they are manifestly subject to the objections already noticed in respect to the other motion.

It will be perceived, also, that we have considered this case simply in relation to the power of amendment, and not as to the force and effect of the proceedings and the sale in pursuance of them, or as to the effects of the payments which are alleged to have been made in satisfaction of the judgment before the *venditioni exponas* was executed. These are questions not properly before us upon this record, and we do not consider them.

The judgment of the Superior Court should be reversed and that of the county court affirmed.

PER CURIAM. Reversed.

STATE v. A. P. McDANIEL.

A road only one mile long and from 10 to 15 feet wide, leading from a public highway to a church, and used by the people of the neighborhood for sixty years in going to and from the church, and which is connected with a country road leading to a mill in the neighborhood, and to a railroad station, but which had never been under the charge of an overseer nor worked as a public highway, is not a public highway so as to subject one to indictment for obstructing it.

INDICTMENT for obstructing a public highway, tried before *Saunders, J.,* at Fall Term, 1860, of GUILFORD.

The following is a special verdict found by the jury in the case: (285)

"We find that the road described in the bill of indictment hath been used for sixty years by the people of the neighborhood of Bethel Church in passing from an established and admitted highway to and from Bethel Church; that the distance from the admitted highway to the

church is one mile; that this road is connected with other roads leading to different places in the neighborhood, and with another country road used by the neighbors in getting to a mill in the neighborhood, and to the McLean Station, on the North Carolina Railroad, for the last four or five years; that the road was from ten to fifteen feet wide, not wide enough at some places for wagons to pass each other on the path, and was never, to the recollection of any one, under the charge of an overseer or worked on as a public road as charged in the bill. If the Court should be of opinion that from the foregoing facts the defendant is guilty in law, we find the defendant guilty; otherwise, we find him not guilty."

The court being of opinion with the defendant, gave judgment accordingly. Solicitor for the State appealed to this Court.

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

MANLY, J. The special verdict in this case presents the inquiry whether mere use of a way or road by the people of a neighborhood for a long lapse of time to go to church and other neighboring places makes it a public road. The road does not appear to have been laid off agreeably to the provisions of our statute law; it is not of the width prescribed for our highways, and it has not been treated as a highway by the appointment of an overseer with laborers to keep it in repair. Upon no principle, therefore, of which we are aware can it be classed among the public roads of the country which it becomes indictable to obstruct.

The Code declares that all roads laid out or appointed by (286) the General Assembly or by order of court are public roads, and roads which have been used by the public through a sufficient length of time to justify the presumption of a lawful origin have been held by this Court to be public roads upon the principles of the common law. *Woolard v. McCullough,* 23 N. C., 432; *S. v. Hunter,* 27 N. C., 369; *Davis v. Ramsay,* 50 N. C., 236.

But we take it, in respect to this latter mode of testing the character of a road, that the use by the public must be of such nature as to apprise the proprietor of the land that it is claimed by the public as a matter of right; as, by an assumption of jurisdiction over it by the court which is charged with the repair of the public ways, or at least, by some other unequivocal act or acts which shall guard the owner of the assertion that the use is not from him "of special favor."

The verdict excludes the inference that this way was used by the public at large in any sense, and declares it was used by the people of a neighborhood to get to church, etc. It is not, therefore, a public road, and we concur with the Superior Court in the judgment that the obstruction of it is not indictable.

From the finding of the jury, we suppose the road terminated at the church, and was, therefore, what is called in French phrase, a *cul de sac.* It is difficult to conceive of a highway a mile long and closed up at one end, for the public at large cannot be in use of it; and if a road be for the accommodation of particular persons only it cannot be a public road. An indictment which should charge the stopping *communem viam ad ecclesiam pro parochianis* would clearly be bad, for then the inquiry would extend no further than to the parishioners, which is a private grievance according to what is said by *Lord Hale,* in *Thrower's case,* 1 Ventris, 208.

This opinion is irrespective of the rights of the Church or of the people worshiping at that place to this way as a private easement, or to the rights of others to the road upon a similar principle. Of this we say nothing because a violation of such rights is redressed by (287) private actions, and not by public prosecutions.

PER CURIAM. Affirmed.

Cited: Boyden v. Achenbach, 79 N. C., 542; *S. v. Purify,* 86 N. C., 682; *Kennedy v. Williams,* 87 N. C., 8; *Stewart v. Frink,* 94 N. C., 488; *S. v. Wolf,* 112 N. C., 894; *S. v. Haynie,* 169 N. C., 282, 283; *S. v. Fisher,* 117 N. C., 739; *S. v. Gross,* 119 N. C., 870; *S. v. Lucas,* 124 N. C., 806.

DELPHINA E. MENDENHALL v. JAMES R. MENDENHALL.

Where a widow qualified as executor of her husband's will it was *Held* that she could not afterwards dissent from the will and claim dower.

PETITION for *dower* heard before *Saunders, J.,* at Fall Term, 1860, of GUILFORD.

George C. Mendenhall died in March, 1860, leaving a last will and testament in which the petitioner Delphina is named as executrix. She qualified at the term of the county court next after the death of her husband, which was May Term, 1860. At August Term, 1860, she filed her dissent from the will. The testator died possessed of a large real estate, and this petition is filed against the defendant as heir-at-law, and prays that she be allowed dower in said lands.

Upon the hearing of the petition and answer, his Honor being of opinion with petitioner gave judgment that the writ issue. From this judgment the defendant appealed.

Graham and Fowle for plaintiff.
Morehead and McLean for defendant.

PEARSON, C. J. A husband dies leaving a last will and testament in which he appoints his wife sole executrix. She offers the will for probate and qualifies as executrix. The question is, Does she by doing so waive her right to dissent from the will? or Can she afterwards enter her dissent and claim dower, a year's provision and distributive (288) share, as if her husband had died intestate?

This Court is of opinion that by qualifying as executrix and taking on herself the burden of executing the will she waived her right to dissent.

Our conclusions are based on several considerations, all or any one of which, it seems to us, are sufficient to sustain it.

The act of qualifying as executrix and undertaking upon oath to carry into effect the provisions of the will is irrevocable. She cannot now renounce and discharge herself from the duties thereby assumed. This is settled law. It follows that she thereby waived any right which she before had which is inconsistent with the act done and the duties assumed.

The right to dissent is inconsistent with her act of qualifying as executrix, and the duties thereby assumed in this:

1. The appointment and qualification of one as executrix operates as an assignment in law, and vests the whole personal estate in such executor. If one executes a writing by which he appoints A B his executor, that is a will. A B thereby becomes the owner of the estate, and after paying off the debts is by the common law entitled to the surplus.

If one executes a writing by which he disposes of his property after his death without appointing an executor that is a testament. If he does both, that is, appoints an executor and also disposes of his estate or a part thereof, that is "a last will and testament." The executor becomes the owner of the estate, and after paying off the debts and legacies is entitled by the common law to the surplus. Thus it is seen that the office of executor is deemed in law of great importance; it draws to it the ownership, control, and management of the entire personal estate, and gives right (at common law) to the surplus. It is, therefore, manifestly inconsistent for a widow to claim the office and its rights and incidents under the will and at the same time to enter her dissent and claim dower, a year's provision and a distributive share as if her husband had died intestate; in other words, there is an inconsistency in claiming (289) the office under the will and at the same time claiming rights as if there was no will.

2. Upon qualifying she assumes the duty and undertakes on oath to carry into effect the several provisions of the will, and it is inconsistent afterwards to do an act which defeats or in a great degree deranges the provisions of the will and disappoints the intention of the testator therein expressed.

3. A husband, having entire confidence in his wife, appoints her the executrix of his will and thereby assigns to her the title to and the right to control and manage his whole estate; can she in good faith accept the trust and afterwards set up a claim adverse and which of necessity prevents the execution of the trust confided to and assumed by her?

4. We will not say that a wife is called on in the lifetime of her husband to make known to him that she is not satisfied with the provisions of his will, for the law confers on her the right to dissent after his death; but we do say that if she intends to dissent and wishes to avoid all imputation of a design to take advantage of the confidence reposed in her, she should renounce the right to qualify under the will; for by doing so she enables the court to appoint an administrator, with the will annexed, who will represent and take care of the interest of the estate when she sets up claim to a year's provision and when she claims to have her distributive share allotted; whereas by accepting the appointment and qualifying as executrix she gets the whole matter in her own hands and, while undertaking to represent and take care of the interests of the estate under the will, she will be "led into temptation" to take care of her own interest against it.

PER CURIAM. Reversed and petition dismissed.

Cited: Jones v. Gerock, 59 N. C., 195; *Harrington v. McLean,* 62 N. C., 260; *Hinton v. Hinton,* 68 N. C., 104; *Simonton v. Houston,* 78 N. C., 410; *Syme v. Badger,* 92 N. C., 712; *Allen v. Allen,* 121 N. C., 331; *Norwood v. Lassiter,* 132 N. C., 56; *Tripp v. Nobles,* 136 N. C., 104, 110; *McCullers v. Cheatham,* 163 N. C., 64.

Distinguished: Yorkly v. Stinson, 97 N. C., 240.

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(290)

DOE ON THE DEMISE OF DANIEL FOUST v. GEORGE W. TRICE ET AL.

Where the question was whether B., who occupied the land in controversy, did so as the tenant of A., the plaintiff, and B. testified that he was carried upon the premises and left there fraudulently and treacherously, in order to get him off of another tract of land, and that he never held as the tenant of A., it was *Held,* competent for him to state, also, in order to strengthen his testimony, that his occupation was as the tenant of the defendants.

EJECTMENT tried before *Dick, J.,* at Special Term in June, 1860, of ORANGE.

The plaintiff's lessor exhibited no title, but alleged that one James Pender, the actual occupant of the land, was his tenant, and insisted that the defendants, who came in as the landlords of Pender, were estopped to deny his (plaintiff's) title. He called a witness, one Hugh Kirkpatrick, who testified that he rented the land, described in the declaration as containing 366 acres, from plaintiff's lessor, from year to year, from 1853 to 1856, inclusive; that there were about twelve acres of it cleared, and within this space were the walls of a log cabin without a roof; that he was to pay, as rent, one-third of the crops produced thereon, and had the privilege of clearing more land, and in the event of his doing so, was to have the use of the place cleared for two years, with the surplus of the wood therefrom; that at the end of the year 1856, he gave up his lease, and then rented six acres, only, of the cleared land for 1857; that in January, 1854, he (witness) carried Pender in his wagon from a house in which he had previously resided (of which witness had a lease) to and upon the land in dispute and placed him in the woods thereof, about 500 yards from the cleared part; that he then told Pender that he might erect a house and remain there, and if he would clear any of the land for him he would pay him for it; that Pender assented to this and built a cabin at this spot, witness sending his negroes to assist him; and that he had remained there ever since.

On his cross-examination he stated that he did not know that Pender was aware where he was to be carried when his household goods (291) were put into the wagon; that he (witness) had proposed to him a week or two before that time, that he should remove to the roofless cabin aforesaid, to which Pender said nothing. He further stated, that Pender had paid no rent to himself or to plaintiff's lessor to his knowledge; that he had done a little clearing, but witness had never paid him anything for it.

The defendants then called Pender, who testified that prior to 1854 he had resided in a house leased from said Kirkpatrick which belonged to one Woods; that Kirkpatrick informed him, he wanted this house for another tenant and if he would give it up he would let him have another house on his (Kirkpatrick's) own land the situation of which was known to him; that he assented to this, and Kirkpatrick's wagon moved the other tenant, with his goods, to the house where he was living, and took in those of him (Pender), Kirkpatrick being along; but, instead of carrying him to the house promised, in spite of his remonstrances, he carried him to the tract of land in dispute; that witness then requested to be taken to the roofless cabin, above described, but this was refused, and his family and goods were put out in the woods, at the place described by Kirkpatrick, and left there on 17th of January, 1854; that witness and his sons made boards and built the cabin, in which he has since

lived, without any aid from Kirkpatrick; that about a month or more afterwards, Kirkpatrick proposed to him to clear land for him, and that he would pay him for it; that he had done some clearing, but had never received any pay for it; that when Kirkpatrick put him on the land, he said to him: "Here is a place to which there is no good right; if you will build a house you may be able to stay here, perhaps, five, six, or ten years, or your lifetime"; that he never had any communication with Foust nor Kirkpatrick, except as above stated, in relation to the occupation of the land.

The defendants offered to prove title to the land in themselves, but this was objected to and ruled out. Defendants' counsel excepted. They then offered to show that Pender, subsequently to being placed on the land, became their tenant, which was also objected to and ruled out. Defendants again excepted. The writ was issued in No- (292) vember, 1857.

His Honor instructed the jury, that if the witness Pender was carried by Kirkpatrick upon the land in question and left there with his consent or if after he was there, he agreed to be the tenant of Kirkpatrick, either would estop him and the defendants from denying the plaintiff's right to recover, and that in passing on the question of his consent, they might consider as evidence for the plaintiff, the fact of his having remained on the land.

His Honor declined giving any other instructions. Defendant's counsel excepted to the charge.

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

Phillips for plaintiff.
Graham for defendant.

BATTLE, J. It is stated in the bill of exceptions, that on the trial of the case the lessor of the plaintiff did not show any title in himself, but put his right to recover the land sued for upon the ground that James Pender, the tenant in possession, was his tenant, and that the defendants had been admitted to defend the suit as landlords and of course were bound by the estoppel. The defendants denied that James Pender ever had been the tenant of the plaintiff's lessor, and the question whether he had ever been so, was the first and main point in the cause. To prove that he had, the plaintiff's lessor examined one Hugh Kirkpartick, who, if believed, clearly proved the tenancy of Pender; but to rebut his testimony the defendants examined Pender himself, and contended that if his testimony were taken to be true, then he never was the tenant of the lessor of the plaintiff. For the purpose of strengthening their position, the defendants offered to prove that after Kirk-

patrick had carried Pender on the land in dispute, the latter had consented to become their tenant, and had thenceforward continued to occupy the land as such; this testimony was objected to, and (293) ruled out by the court, and upon the propriety of that ruling, depend, in our opinion, the merits of the defendant's application for a reversal of the judgment, and the grant of a *venire de novo.* The counsel for the plaintiff's lessor contends with much ingenuity, that it being stated by both the witnesses that Kirkpatrick had carried Pender upon the premises, and that he remained there continuously until the declaration in ejectment was served on him, he was necessarily either a tenant or licensee of the plaintiff's lessor, and that, therefore, he could not, until he surrendered or restored the possession to the lessor, become the tenant of another, and that consequently, the testimony offered to show that fact, was immaterial, and as such, was properly rejected. In order to ascertain the force of this argument, it is necessary to examine the testimony in relation to the manner in which Pender was carried upon the land by Kirkpatrick, and as the defendants had the right to have the credibility of Pender's account of the transaction submitted to the jury it is sufficient for us to examine his testimony alone. He states expressly that he was carried on the land and left there against his will. Can that be called an entry by him as a tenant or licensee of Kirkpatrick, who is admitted to have been the tenant of the plaintiff's lessor? We think not. It is a perversion of terms to say that one entered upon the land, or into the house of another by the license of that other, when, in fact, he was carried there by fraud or violence? To become the tenant or licensee of the person who had perpetrated the fraud or violence upon him, he must afterwards have willingly consented to do so. If it could be proved that he consented to remain on the land, not with the consent or permission of the person who had so improperly carried him there, but with the permission, and as the tenant, of some other person who claimed to be the owner of the land, we think the idea of his having become the tenant or licensee of the first, would be completely repudiated. Why not allow such proof? It certainly could not be rejected upon the ground upon which a lessee is barred from disputing his lessor's (294) title. That is founded upon the principle of good faith and privity between the parties. Certainly no such principle can apply between persons whose apparent connection has been brought about by violence and treachery. And it would be particularly inapplicable to a case where the person who committed the wrong told his victim that the land upon which he had placed him, had no owner, and he might probably remain upon it five, six, or ten years, or perhaps his lifetime. The testimony offered and rejected, was alleged to have a tendency to show that Pender had agreed to become the tenant of the defendants,

and if admitted, might have shown that he never did voluntarily become the tenant or licensee of anybody else. If it had shown that, then the judge could have instructed the jury that Pender's continuance on the land was evidence from which the jury might infer that he had agreed to become the tenant of the plaintiff's lessor.

There was error in the rejection of the testimony, for which a *venire de novo* must be awarded.

PER CURIAM. Error.

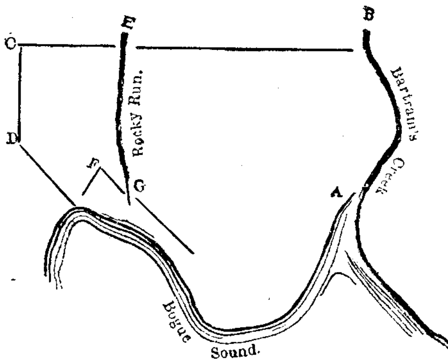
Cited: *Whissenhunt v. Jones,* 78 N. C., 361; *Clifton v. Wynne,* 81 N. C., 160.

DOE ON THE DEMISE OF LUCRETIA BORDEN v. WILLIAM F. BELL.

Where one rented a plantation for a year, and having joined the fences of another plantation, owned by him, to the fences of the rented place, and then at the end of the year quit without removing the fence placed there, and after five years entered again, it was *Held,* that he was not entitled to notice to quit before bringing suit against him.

EJECTMENT tried before *Bailey, J.,* at Fall Term, 1860, of CARTERET.

The land in dispute is comprised within the lines E, C, D, F, on the west side of Rocky Run. See diagram. The defendant had purchased from Barclay Borden a tract of land called the Deer Neck Plantation A, B, E, G, which he for a while contended ran across Rocky Run and embraced the disputed land; but afterwards, he, in 1852, (295)



rent the land E, C, D, F, from the guardian of the plaintiff's lessor, Lucretia, the heir-at-law of the said Barclay Borden. While in this

occupation, he extended the fences of the Deer Neck tract across Rocky Run, and joined them to the fences of the disputed land. He quitted the possession of the land in question, at the end of 1852, but left the fences, as above stated, extending across the run, in which situation they remained until 1858, when he took possession again, and held it until he was sued by the plaintiff in that year. The plaintiff's title to the land in question was established, and the question was whether there was such a tenancy of the disputed land, as entitled the defendant to a notice to quit, before a suit could be brought. The Court charged the jury, that there was not, and defendant excepted.

(296) Verdict and judgment for plaintiff. Appeal by defendant.

Hubbard and Green for plaintiff.
Haughton, J. W. Bryan, and Henry C. Jones for defendant.

MANLY, J. The only question which seems to be presented by this record is, whether there was a tenancy of the disputed land, on the part of the defendant, which entitled him to notice before suit. We concur with the court below that there was not.

It seems the land was rented to defendant in 1852. After that it does not appear whether it was occupied until 1858, when it was taken possession of by the defendant. The defendant's fence, in 1852, extended across Rocky Run upon the land in dispute and joined the fence on that side, and so continued from that time to 1858.

From the facts stated we assume that the land in dispute was not occupied from 1852 to 1858 by any tenant, but the defendant's fence was left extended across the run as in the former year, and the question is, What effect had this fence upon the relations and rights of the parties? We do not perceive that it had any. The superior title being in the plaintiff's lessor, she was in constructive possession of the land and fence until 1858, when defendant again entered and exposed himself to an action. There was no tenancy of the land by defendant after 1852, and the court properly declined giving any instructions upon that supposition.

PER CURIAM. No error.

(297)

DOE ON THE DEMISE OF JAMES R. CHILDERS ET UX. ET AL. V. SIMON BUMGARNER.

1. Where the ancestor of a married woman died seized and possessed of a tract of land, it was *Held*, that the descent cast, and the title derived from her ancestor, according to the law of this State, gave her an actual seizin; and having had children during her coverture, her husband became tenant by the curtesy initiate, and was subject to the bar of the statute of limitations. A *fortiori* is such the case where one of the wife's coheirs made an actual entry; for his possession was that of all the heirs.
2. The children of one entitled to an estate as tenant by the curtesy are allowed seven years from the death of their father before they are barred by the statute of limitations.
3. Where there were two counts in an action of ejectment on the demises of several heirs at law, and a general verdict was rendered giving nominal damages, but on a point of law reserved, it was determined that the lessor in one of the counts was barred by the statute of limitations, it was *Held*, that the other lessor was, nevertheless, entitled to his judgment.

EJECTMENT tried before *Dick, J.*, at Fall Term, 1860, of ALEXANDER. The first count in the declaration was upon the demise of James Childers and his wife Margaret, the latter of whom is the daughter of William Munday, and the second count is on the demise of Margaret Jolly, Allen Jolly, Jane Jolly, and John Jolly, the children of Jane Jolly, another daughter of William Munday. The ancestor of the plaintiff's lessors had title to the land in question, and died seized thereof in 1833, and one or another of his children cultivated the premises until 1835, when the defendant entered, and has had adverse possession ever since, with a color of title reaching back to March, 1856. Both Mrs. Childers and Mrs. Jolly were married, and had children in the lifetime of their father, and the latter has had none since his death. Mrs. Childers is still living, but Mrs. Jolly died in 1841, and her husband, John Jolly, died in May, 1853.

This suit was brought 16 March, 1860. It was insisted by the defendant that the lessor, Childers, could not recover because he had forborne to sue the defendant who was in, under a color of title, for more than seven years after his estate by the curtesy began, and as to (298) the second count, that as the defendant was in the adverse possession of the premises in 1841, when Mrs. Jolly died, John Jolly, the husband, acquired no estate by the curtesy, and that there was nothing to prevent the statute of limitations from running against the heirs of Mrs. Jolly, also.

A general verdict was rendered for the plaintiff on the facts of the

case for sixpence damages, his Honor reserving the question of law as to the right of the lessors of the plaintiff under the rules of law, with leave to set aside the verdict and enter a nonsuit in case he should be against the plaintiff on the points reserved.

Afterwards, on consideration of the case, his Honor gave judgment for the plaintiff, and the defendant appealed.

Boyden and Mitchell for plaintiff.
W. P. Caldwell for defendant.

PEARSON, C. J. William Munday died in 1833; one of his sons entered and continued in possession until 1835; since that time the defendant and those under whom he claims have been in the adverse possession under color of title.

James Childers and his wife, Margaret, who is the daughter of William Munday, were married and had children at the time of his death. It is clear that Childers became entitled to an estate as tenant by the curtesy initiate at the death of William Munday, the ancestor of his wife. The descent cast, and the title derived from her ancestor gave his wife the actual seizin, and not a mere constructive possession, according to the established doctrine of our courts; but, in addition to this, one of the heirs at law entered and held possession for two years after the death of their ancestor, and it is settled that the possession of one tenant in common is the possession of all in respect to third persons. So James Childers acquired an estate as tenant by the curtesy initiate in 1833, and being afterwards evicted in 1835, a right of action then accrued to him, which was barred by the subsequent adverse (299) possession of the defendant, according to the distinction between an eviction before coverture, where the right of action is that of the wife, and an eviction after coverture, where the right of action is that of the husband, and he is not allowed, by joining his wife, to protect himself from the operation of the statute of limitations. *Williams v. Lanier,* 44 N. C., 30. It follows that the plaintiff was not entitled to recover on the count laying the demise in the names of Childers and wife.

The same reasoning and authority shows that upon the death of William Munday, Jolly, who had married one of his daughters, and had children by her who are the lessors of the plaintiff in the other count, became tenant by the curtesy initiate, and upon her death in 1841 became tenant by the curtesy, and his estate did not determine until his death in May, 1853, at which time the right of entry of her children, the lessors of the plaintiff, first accrued, and the statute of limitations did not begin to run as against them until that date, and the action,

having been commenced in March, 1860, is within time. It follows that the plaintiff is entitled to recover on the count laying the demise in their names.

An objection was made in this Court that as the verdict is general, finding the defendant guilty on both counts, and the plaintiff was not entitled to recover on one of the counts, the judgment ought to be arrested. It is true, where a declaration contains several counts, one of which is defective, and there is a general verdict for the plaintiff, the judgment must be arrested, although all the other counts be good; whereas, if one count in an indictment be good and there is a general verdict, judgment will not be arrested, although all of the other counts are bad. The reason of this difference is that in an indictment the jury merely finds the issue, and the punishment is fixed by the court, and in so doing the court is presumed to reject the bad counts and regulate the sentence in reference to the good count alone; but in a civil suit the jury not only finds the issue, but assesses the damages, and in doing so the defective counts are considered, and influence the verdict as much as the good. This principle has no bearing on the (300) present case, for both counts are good, and the damages are nominal, so that the judgment and the amount recovered are exactly the same as the plaintiff would have been entitled to had there been but one count, and the verdict in respect to the other may be treated as surplusage.

The conclusion of the Court in *S. v. Williams,* 31 N. C., 151, is strictly applicable: "It was manifestly of no consequence whether the conviction was upon any one or all of the counts, since the offenses were of the same grade and the punishment the same." Here the damages are the same, and the judgment is the same, and it is manifestly of no consequence whether the verdict was upon one or both counts. There is

PER CURIAM. No error.

Cited: *Morris v. Morris,* 94 N. C., 617; *Taylor v. Taylor,* 112 N. C., 138; *Richardson v. Richardson,* 150 N. C., 551.

JOHN WILSON v. ELIJAH TATUM.

1. Words charging one with an attempt to commit a felony, however odious, are not actionable *per se.*
2. Where a declaration contains two counts, and testimony is given as to both, and the judge charges as to both, and a general verdict is given for the plaintiff, if one of the counts be defective, or an error has been committed as to one of them, the defendant is entitled to a new trial.

SLANDER and malicious prosecution, tried before *Bailey, J.,* at Fall Term, 1859, of WATAUGA.

The declaration contained two counts, one for words spoken, charging the plaintiff with an attempt to commit bestiality, and the other for taking out a warrant against the plaintiff for an attempt to commit bestiality.

The plaintiff produced a warrant, charging as stated in the declaration, which was issued on the affidavit of the defendant. The said (301) warrant had been returned "Executed," and the plaintiff brought before a magistrate and tried. It was shown that on examination he was discharged and the defendant ordered to pay the costs. There was evidence that on divers occasions he spoke the same charge against the plaintiff and attempted by the production of evidence to establish the truth of the charge.

The defendant's counsel took the ground that the warrant did not charge any offense, but was a nullity, and what was done under it did not amount to a prosecution. Also, that the words spoken were not slanderous, and called on the court to so instruct the jury.

The court declined so to charge the jury, but went on to lay down the rules applicable to slander and malicious prosecution generally, and particularly as to a question of fact, whether in a vague use on one occasion of the words set forth the defendant meant the plaintiff; which question he left to the jury. Defendant's counsel excepted. Under these instructions the jury found a verdict against defendant for $500. Judgment, and appeal by defendant.

Folk for plaintiff.
Fowle and Crumpler for defendant.

BATTLE, J. The plaintiff's declaration contains two counts: one for words spoken and the other for a malicious prosecution. Testimony was given on the trial tending to support both these counts, and the instructions given by his Honor to the jury may be referred, in part, at least, to both the counts, and the verdict of the jury is general. Such being the case, if either of them cannot be supported, or if an error has been committed with respect to either, the defendant is entitled to a new trial. *Morehead v. Brown,* 51 N. C., 267. Now, a mere attempt to commit a felony, no matter how heinous the felony may be, is only a misdemeanor, the punishment of which is not deemed infamous; therefore, an accusation against a man, of such an offense, is not (302) deemed actionable *per se,* and cannot be made so except by alleging and proving special damage. The count for words spoken cannot, then, be supported, because the record does not show any allega-

tion or proof of such special damage. It follows that the verdict, which is general, must be taken to have been rendered on both the counts, and the judgment thereon rendered is, therefore, erroneous, and must be reversed. Had there been no evidence, nor instructions given, applicable to the first count, then the verdict and judgment, though general, would be regarded by us as having been rendered on the second count only, and we should have affirmed the judgment. *Jones v. Cook,* 14 N. C., 112; *S. v. Long,* 52 N. C., 24. But as the case stands, the judgment must be

PER CURIAM. Reversed.

RUFUS J. BEATY v. CHARLOTTE GINGLES ET AL., EXECUTORS.

An action against a person as "executor" for an act done, or a contract made by him after the death of his testator, cannot be sustained, and the words "as executor" rejected as surplusage; as may be done where the action is for the party on his own possession, and these words are improperly inserted.

CASE tried before *Dick, J.,* at Fall Term, 1860, of GASTON.

The plaintiff declared for a deceit and false warranty in the sale of a slave against the defendants as executors of Edley Gingles. The proof was that after the defendants qualified as executors of said Gingles, that they offered the slave in question at public sale, and that plaintiff became the purchaser. He also gave evidence of the unsoundness of said negro, and that the defendants were aware (303) of it at the time of the sale.

Defendants' counsel asked his Honor to charge the jury that plaintiff could not recover against them in their representative capacity, but that if they had practiced a fraud or deceit on the plaintiff in the sale of the said negro, they were personally responsible for it, and that the estate of their intestate could not be charged therewith. His Honor refused so to charge, but told the jury that if they believed from the testimony that the negro was unsound at the time of the sale, and that defendants were aware of it, and did not disclose it to the purchaser at that time, the action was well brought, and the plaintiff was entitled to recover.

Verdict and judgment for plaintiff. Appeal by defendants.

No counsel for plaintiff.
L. E. Thompson for defendants.

BATTLE, J. Where an executor sues upon the possession of his testator, he must sue as executor, because he must make profert, in his declaration, of his letters testamentary; but if he sue upon his own possession, he must sue in his own name, because his possession has fixed him with assets. If, however, he sue "as executor" when the action is brought upon his own possession, the words "as executor" are considered as mere surplusage. *Hornsey v. Dimocke,* Ventris, 119; Com. Dig. Pleader (I. D. I.); *Cotten v. Davis,* 48 N. C., 355. But an action against a person "as executor" for an act done or a contract made by him after the death of his testator cannot be sustained; for in such an action he must be sued in his individual and not in his representative capacity, and the words "as executor" cannot be rejected as surplusage. This is well settled by *Hailey v. Wheeler,* 49 N. C., 159, where the subject is fully discussed; and that case has since been referred to and confirmed (304) by the very recent one of *McKay v. Royal,* 52 N. C., 426.

PER CURIAM. *Venire de novo.*

Cited: *Kessler v. Hall,* 64 N. C., 61; *Kerchner v. McRae,* 80 N. C., 223; *Banking Co. v. Morehead,* 116 N. C., 412; *s. c.,* 122 N. C., 323; *Hall v. R. R.,* 146 N. C., 347.

JULIUS A. HOWELL ET AL. v. HENRY TROUTMAN.

Where an alleged testator, in a paper-writing propounded as his will, devised and bequeathed certain property to the child of his housekeeper, a white woman, which child was proven to be a mulatto, but which the mother had induced him to believe was his, it was *Held,* that this furnished no evidence to support the allegation that the will was obtained by fraud and undue influence.

DEVISAVIT VEL NON, tried before *Osborne, J.,* at Spring Term, 1860, of ROWAN.

The paper-writing purporting to be the last will and testament of Jacob Troutman, deceased, contained the following bequests and devises:

"Item 3. I will and bequeath to Ann Allmond $250, provided the said Ann shall live with my wife, Polly, and assist her in health and in sickness; and if the said Ann shall faithfully perform her duty to my said wife during the life of my wife or widowhood, then at the death of my said wife I will bequeath to the said Ann $5 more.

"Item 4. All the balance of my estate and property of every kind and description, including my gold mine and everything else, I will and

bequeath to Lucy, the infant child of the said Ann Allmond, and if the said Lucy should die without lawful children or child, then it is my will that all I have willed to the said Lucy shall be divided between the children of my brothers, David Troutman, John Troutman, and my sister, Sarah Earnhart's children."

The propounders of the alleged will are Ann Allmond and the children of David Troutman, John Troutman, and Sarah Earnhart, mentioned in the will. The caveator is a brother, and one of the (305) heirs at law and next of kin of Jacob Troutman, the decedent.

The formal execution of the paper-writing by the said Jacob Troutman was duly proved by the three subscribing witnesses, who also testified that in their opinion he was of sound mind, in which opinion all of the witnesses concurred on the trial.

It was in proof that Jacob Troutman and his wife were childless, and that the legatee, Ann Allmond, had lived in his house from 1849 to 1859, in the fall of which year she died.

One of the subscribing witnesses testified that Lucy, the child of Ann, died during the life of Jacob Troutman; that, in his opinion, she was a mulatto; that Allmond, the mother, is a white woman; that Jacob Troutman told him that the child was his, both before and since her death, and accounted for the color from a fright which Ann Allmond had received while *enciente;* that she was about three years old when she died; that he had done much business for Jacob Troutman, and drafted this paper-writing; that when it was done, Jacob Troutman sent her, Ann, out of the room; that he urged upon him to leave Henry, the present caveator, something, which he declined doing, for the reason that Henry would spend it in litigation. The witness stated that Jacob had become displeased with Henry because of some lawsuit they had had.

James Montgomery, also one of the subscribing witnesses, swore that he had no doubt the child was a half-blood mulatto; that he judged from its color; that he was a neighbor, and had frequent opportunities of seeing the child; that Jacob Troutman believed the child was his, said he knew it was, and that he intended to make a lady of it.

Dr. J. P. Cunningham testified that he was a practicing physician in the vicinity of Jacob Troutman's residence; that on one occasion he was called upon by Troutman to visit the child spoken of; that when he arrived, he found her in his arms; that he called her (306) "daddy's baby," and that the child was unquestionably a negro.

Dr. John R. Wilson, a practicing physician of the same vicinity, testified that the child was, in his opinion, a mulatto, and that Jacob Troutman had once remarked to him that he loved the child as much as if it was his own; that Ann had gone out and picked it up somewhere.

J. C. Barnhart swore that when Ann Allmond was pregnant with the child, he was a justice of the peace in the county, and issued a warrant for her to make her swear to the father, or give bond as prescribed by law; that she gave the bond, and Jacob Troutman either became her surety or procured some one to do so, he did not remember which; he also said that Jacob Troutman was a man of sound mind, though very illiterate.

J. M. Long, Esq., the draftsman of the will, proved that after the death of the child the testator applied to him to know whether another will was necessary to dispose of the part he had left for the child; that he advised him that it was not, but that the property would go over to his relations under the provisions of the existing will.

The counsel for the caveator insisted that there was testimony to be submitted to the jury that the will was procured by the false representations and undue influence of Ann Allmond.

The court charged the jury that there was no evidence of such influence as would invalidate the will, and if they believed the testimony, the decedent was of sound mind; also, that the paper-writing was properly attested and executed. Caveator's counsel excepted.

Verdict for propounders. Appeal by caveator.

Boyden for propounders.
Love for caveator.

BATTLE, J. We concur in the opinion of his Honor who tried this cause that there was no evidence of the will having been procured (307) by the fraud and undue influence of Ann Allmond or any other person. It was abundantly proved, and is conceded, that the alleged testator was of sound and disposing mind and memory when he executed the script which is propounded for probate as his will. The only circumstance from which it is sought to be inferred that he executed it under the effect of fraud, or under the exercise of undue influence, is that Ann Allmond, his housekeeper, a white woman, induced him to believe that he was the father of her mulatto child. Supposing that he did believe the child was his, and that the mother of it told him so, there is not the slightest testimony to show that she ever even asked him to make a will in favor of her and the child, or that she knew, before the will was made that he intended to make one, or, afterwards, that he had made it. An eminent judge in the ecclesiastical courts in England (*Sir John Nichol*) said in *Williams v. Gaude,* 1 Hagg., 581, "That the influence to vitiate an act must amount to force or coercion, destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another; for

that would be a very strong ground of support of a testamentary act." In the present case, what influence is it shown that Ann Allmond had over the alleged testator, amounting to force or coercion, and destroying his free agency? None whatever. At most, it is said that she made him believe that he had begotten a child by her which everybody but himself could see was a mulatto. Surely, that alone cannot destroy a will which the mother is not shown to have had the slightest agency in procuring. It has been said by a satirical writer that many a married man fondles children as his own which his wiser wife knows to belong to another. Would a will in favor of such children be set aside upon the ground that the trusting husband had been imposed upon, and had, on that account, acted under undue influence? Certainly not; and yet, to set aside the present will for the cause assigned would be almost as bad. The truth is, that the old man, being childless by his wife, took a strange fancy to the child of his housekeeper, and whether it were his or not, he had a father's love for it, and our law imposes (308) no prohibition upon a man to prevent him from bestowing his property upon the object of his affection. Affection or attachment, as *Sir John Nichol* said, "would be a very strong ground of support of a testamentary act."

PER CURIAM. No error.

R. E. REEVES ET AL. v. D. A. POINDEXTER.

Where A swears that B, C, and D had an important conversation together, and D swears that no such conversation took place, it was *Held*, that the rule giving preference to affirmative over negative testimony does not apply; for there being a direct contradiction, the jury must be guided by other tests in ascertaining the truth.

CASE for a deceit in the sale of a horse, tried before *Dick, J.*, at last Fall Term of SURRY.

The plaintiffs proved by a witness, who was present at the trade, that the defendant told plaintiffs the horse eyes were good; that he would not warrant the horse, but that his eyes were good; that at one particular time, which he mentioned, there was something the matter with his eyes, or they were hurt, but they had got well and were good, and that he woulld not take a cent less for the animal on account of his eyes. It was proved that at the time of the trade the horse's eyes were unsound, and that the defendant knew it, though the eyes at that time looked well. It was also proved that a short time after the trade the horse became totally blind. The defendant introduced two witnesses, who swore that they were present at the trade, and that they heard the defendant in the

course of the conversation between the parties about the horse, tell plaintiffs that the horse's eyes were unsound, that they were subject to (309) bad spells, and he would not warrant them; that if the plaintiffs took the horse, he must do so at his own risk. The witness for the defendant swore that the witness for the plaintiffs, mentioned above, participated in this conversation about the horse's eyes. The witness for the plaintiffs was then recalled, and swore that he was present all the time; that he did not hear any such conversation as to the unsoundness of the horse's eyes as deposed to by defendant's two witnesses; that he did not believe it occurred; that if it had occurred, he thought he would have heard and recollected it, and that he did not participate in any conversation of the character stated by these witnesses.

His Honor, in response to a request for special instructions from the defendant's counsel as to this testimony, said, "It was a rule of law that where two witnesses, of equal respectability, testified to a fact—one that he heard or saw a thing and the other, who was present, that he did not see or hear such thing, that the testitmony of the witness who testiefid affirmatively was to be preferred." To this part of his Honor's charge the plaintiffs' counsel excepted.

Verdict and judgment for defendant. Appeal by plaintiffs.

Crumpler for plaintiffs.
Boyden for defendant.

MANLY, J. Waiving any discussion as to the terms in which the rule is laid down by the judge below, we think that the rule itself was not properly applicable to the facts before the court. According to the interpretation which we put upon them, they do not raise the question between affirmative and negative, but between contradictory witnesses; and the true question was, which class of witnesses judging of the testimony of each by the ordinary tests, the jury would believe. With respect to the rule, it is clear that its applicability to any state of facts must depend upon whether the negative testimony can be attributed to inattention, error, or defect of memory. 1 Stark., 517. If two persons admit (310) they were in a room together, and one swears that while there he heard a clock in the room strike, and the other swears he did not hear it, it is a case for the application of the rule, according to all elementary writers. But in the case supposed, if two persons were placed in a room where a clock was, for the express purpose of ascertaining by their senses whether it would strike or not, a variance between their testimony could not be well attributed to mistake or inattention, and the real question would be as to the credit of the witnesses. In the case before us the defendant proves by a witness that the parties held a certain con-

versation, in which a witness, previously introduced by the plaintiffs, participated, and plaintiffs' witness, being recalled, denies that any such conversation was held; this is not a question between affirmative and negative testimony, wherein the latter may be ascribed to inattention, but it is a question between witnesses who contradict each other, and the question is to which side, under all the circumstances, is credit due. It is the duty of a jury to reconcile testimony, if possible; especially if it comes from credible sources. Hence, when one declares under oath that he heard a thing, and another, who was present, that he did not hear it, if the matter in question occurred under such circumstances as to account for the negative testimony upon the theory of inattention, the jury will be able to reconcile the two, and both being credited, it will be taken that the matter occurred, and was heard by one and not by the other.

This is the basis of the maxim that affirmative testimony is entitled to more weight than negative. At the last term of this Court the maxim was recognized and approved in its application to a state of facts somewhat like the case last supposed: A class of witnesses swore that a slave had been seen by them on crutches and limping; another class, with only the same opportunities of observation, for aught that appeared, swore that they had not seen him on crutches or limping; instructions that the positive were entitled to more weight than the negative were approved. Both being equally credible, they were thus reconciled. *Henderson v. Crouse,* 52 N. C., 623. (311)

But in our case the witnesses are not reconcilable. A swears that B, C, and D held a conversation together. D swears that no such conversation was held. The negative cannot be accounted for on the score of a want of observation, any more than the positive. The witnesses are in contradiction, and their credibility mnst decide it.

PER CURIAM. Error.

Cited: S. v. Horan, 61 N. C., 575; *S. v. Campbell,* 76 N. C., 263; *S. v. Murray,* 139 N. C., 542; *Rosser v. Byner,* 168 N. C., 343.

WILLIAM THOMPSON ET AL. v. WILLIAM T. COX ET AL.

1. Notice is not required to be given to the creditors of a deceased person on an application by the administrator or executor to sell the real estate for the payment of debts. Rev. Code, ch. 46, sec. 45, etc.
2. Nor is the fund raised by such sale under the control and direction of the court making the order of sale.
3. After passing the order for the confirmation of a sale, made by virtue of the statute, Rev. Code, ch. 46, sec. 45, etc., the jurisdiction of the court is at an end, and a petition to open the biddings under such sale will not be sustained.
4. The county courts have no jurisdiction, by bill, at the suit of creditors, to convert a purchaser of land into a trustee, on the allegation of fraud and collusion.
5. The powers of a court of limited jurisdiction cannot be enlarged by implication.
6. One who is not a party to a bill in equity cannot appeal on petition to rehear or file a bill for a review.

PETITION filed in the county court of Johnston, in the names and at the instance of the creditors of one Micajah Cox against his administrator, William T. Cox, and against Nathan B. Cox, to set aside an (312) order confirming a sale of land as assets to pay debts.

The petition sets forth that the petitioners are creditors of the defendants' intestate, Micajah Cox; that he was indebted to them largely beyond the value of his personal estate; that the sale made by the defendant William T. Cox under the order obtained for that purpose was made by collusion with his brother, to other defendant, Nathan, at much less than its real value; that sufficient notice was not given of the day of sale, and very few persons attended, and no one bid except the said Nathan, and that two tracks of land, worth at least $10,000, were bid off by him, Nathan, at $2,500, and that there was an understanding between the brothers that the administrator was to have one of them at the price at which it was bid off; that it was falsely represented by the said administrator to the county court of Johnston that the said land had been sold for its full value and he had by such false assurance induced the said court to confirm the sale; that if the said sale shall stand, the plaintiffs will lose most if not all their debts, as it is understood that most if not all the means of the said estate, including the amount received on the sale complained of, are exhausted. The petition concludes as follows:

"Your petitioners, therefore, pray, for the reasons above stated, and others which they will present at the hearing of this petition, that the order confirming the said sale may be set aside and resale directed, with full and fair opportunity given to the creditors and sureties of the

said intestate to attend such sale and make the said lands bring a fair and reasonable price. To this end they pray that a copy of this petition to rehear and set aside the said order or decree may be served on the defendants, and that your petitioners may have such other and further relief as their case requires," etc.

The defendants answered the petition, and both parties took testimony, but as the consideration of the case in this Court is confined entirely to the merits set forth in the petition, the matters therein disclosed are deemed immaterial. The county court *pro forma* dismissed the petition, and the plaintiffs appealed. The Superior Court also (313) ordered petition to be dismissed, and the plaintiffs appealed to this Court.

Miller for plaintiffs.
Strong and Fowle for defendants.

PEARSON, C. J. The statute, chapter 46, sec. 47, Rev. Code, requires that "the heirs and devisees or other persons interested in said estate" shall be made parties to the petition of an executor or administrator to sell real estate. We think it obvious that the words "or other persons interested in said estate" were intended to embrace the assignees of an heir or devisee, that is, their heirs or devisees or persons taking by purchase or alienation within two years after the qualification of an executor or letters of administration granted; which conveyances are made void against creditors or executors and administrators by section 61, and do not embrace the creditors of a deceased debtor; for:

1. They are represented by the executor or administrator who made the application for the license to sell the real estate for their benefit, and the only adversary interest is that of the heir or devisee, or their assignees.
2. The creditors may not be known or their debts ascertained.
3. Creditors have no direct interest in the estate, and can only reach it by charging the executor or administrator with the proceeds of the sale as assets.

There is no express provision in the statute requiring the sale made by an executor or administrator to be reported to the court and be confirmed. It may be that section 49, which omits the word "license" and substitutes that of "decree," and requires "that the title shall be made to the purchaser by such person, and at such time as the court shall prescribe," furnishes sufficient ground for the inference that the sale ought to be reported to and confirmed by the court; yet, in the absence of some express provision, we are not at liberty to carry the construction further, and infer that the fund, in respect to its collection and (314)

mode of application, is to be under the control and direction of the court; for by section 51 it is provided, "the proceeds of the sale shall be assets in the hands of the executor or administrator for payment of debts, etc., and applied as though the same were the proceeds of personal estate." It follows that after granting a license or decree of sale, and the order confirming the sale, and to make title to the purchaser is passed, the court has nothing more to do in the matter, and its jurisdiction is at an end.

Having arrived at these conclusions in regard to the construction of the statute, the application to the case under consideration shows that the proceeding cannot be sustained.

Viewed in the light of a petition to open the biddings, there are two fatal objections. No responsible specific offer is made in respect to the amount, and no assurance given that the price will be increased. After the term at which a sale is confirmed, a court of equity in the case of a decree of sale or for partition of an infant's land and the like, where the fund, in respect to its collection, distribution, and application, is still under its control, will not open the biddings; *Ashbee v. Cowell,* 45 N. C., 158; *a fortiori* the court cannot do so in a case where, after passing the order of confirmation, etc., its jurisdiction is at an end.

Viewed in the light of a petition to rehear, it cannot be entertained, because the petitioners were not and ought not to have been parties to the original proceeding. One who is not a party cannot appeal, or petition to rehear, or file a bill of review. This is settled, according to the practice of the courts, and no precedent to the contrary can be found.

Viewed in the light of a bill in equity to convert the purchaser into a trustee, on the allegation of a fraudulent collusion between him and the administrator to suppress competition—buy the land at a sacrifice and divide the spoils, and on the footing of fraud, to hold them liable for the actual value of the land, instead of the price at which it was sold, the proceeding cannot be entertained; because the county court, in (315) which it originated, had no such equity jurisdiction. It has general original jurisdiction in causes of a civil nature at the common law; its equity jurisdiction is limited, and depends on specific statutory provisions (*Leary v. Fletcher,* 23 N. C., 257), *e. g.,* "petitions for filial portions, legacies, and distributive shares, matters relating to orphans, idiots, and lunatics, and the management of their estates." Revised Code, chap. 31, sec. 5.

Whether by force of section 53 of the statute under consideration, which subjects to sale, on the application of an executor or administrator, "all rights and interests in land which may be devised or would descend to the heirs, and all such other interests in real estate as would be liable in a court of equity, to be applied in discharge of debts," has the

effect of giving jurisdiction to the county court in such cases, is a question not now presented; but it is certain that these matters are peculiarly fit to be dealt with by a court of full equity powers, and the interests of all parties will be best protected by having the rights declared by a decree in a court of equity before the land is exposed to sale. This section, however, has no application to the case before us; the powers of a court of limited jurisdiction cannot be enlarged by implications.

PER CURIAM. Affirmed.

Cited: *Evans v. Singletary,* 63 N. C., 206; *Lovinier v. Pierce,* 70 N. C., 171; *Peterson v. Vann,* 83 N. C., 120; *Bevers v. Park,* 88 N. C., 459; *Dickens v. Long,* 109 N. C., 171; *Austin v. Austin,* 132 N. C., 266.

NOTE.—Since the last term, HON. M. E. MANLY, who had received the appointment of judge of the Supreme Court from the Governor, *ad interim,* was permanently elected to that office by the Legislature.

HON. GEORGE HOWARD, JR., and HON. R. S. FRENCH, who had been appointed *ad interim* to the Superior Court bench, by the Governor, were permanently elected to that office by the Legislature.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1861

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(317)

HENRY B. NORMAN v. JOHN DUNBAR.

An action against a guardian for the penalty of $200 for hiring the property of his ward privately is not required to be brought in the name of the State, but is properly brought in the name of an individual undertaking to sue for the same.

DEBT for penalty, tried before *Heath, J.*, at last Spring Term of TYRRELL.

This action was brought to recover from the defendant $200 for having, as guardian, hired the property of his ward at private hiring, instead of hiring it publicly, as required by the Revised Code, ch. 54, sec. 26, and ch. 46, sec. 20, and the only question made was whether the action was rightly brought in the name of the present plaintiff or should have been in the name of the State of North Carolina. (318)

A verdict was permitted to pass for the plaintiff, subject to the opinion of the court on the question above stated, with leave to set aside the verdict and enter a nonsuit if his Honor should be of opinion against the plaintiff on the question reserved. And on consideration of the question of law, the court was of opinion that, according to the provisions of the Revised Code, ch. 35, secs. 47 and 48, the action should have been in the name of the State. The verdict was, therefore, set aside and a nonsuit ordered, from which judgment the plaintiff appealed.

Winston, Jr., for plaintiff.
No counsel for defendant.

BATTLE, J. We do not agree in the opinion expressed by his Honor in the court below, that the suit ought to have been brought in the name of the State. Section 26, chapter 54, Revised Code, prescribes that "all sales, hirings, or rentings by guardians shall be made and conducted in the same manner and under the same rules and regulations, and the same penalties for disobedience as prescribed for sales made by administrators." It is admitted that a penalty was incurred by the defendant, as guardian, for a violation of the provisions of this section, and the only question is, In whose name is it to be recovered? We think the reference to the act in relation to administrators makes that the rule, not only as to the amount of penalty, but also as to the person who is to sue for the same, and the use to which he is to apply the recovery. By turning to that act, then, we find that the penalty given for its violation is $200, which is to be forfeited and paid "to any person suing for the same." The forfeiture thus prescribed clearly creates an action popular, which has always been brought in the name of the person who thought proper to sue for the penalty. If the recovery were for his sole use, his name alone appeared as plaintiff in the suit; but if part of (319) the recovery were given to the State, then the action, although in his name, was called a *qui tam* action, because it was stated in the writ and declaration that he sued as well for the State as for himself. *Qui tam* actions for usury have always been so brought, because the statute gives the penalty, "the one moiety to the State and the other to him who will sue for the same."

The rule thus established for the manner in which suits for penalties are to be brought is not varied by the new provisions contained in sections 47 and 48, chapter 35, Revised Code. These sections prescribe that "Where a penalty may be imposed by any law passed or hereafter to be passed, and it shall not be provided by the law to what person the penalty is given, it may be recovered by any one who will sue for the same and for his own use," and "Whenever any penalty shall be given by statute, and it is not prescribed in whose name suit therefor may be commenced, the same shall be brought in the name of the State." We cannot believe that these provisions were intended to apply to actions popular, that is, to actions expressly "given to any one who will sue for the same." The rule applicable to cases of this kind was, as we have already seen, well established and uniformly adopted in practice. There was another class of cases where a penalty was annexed to a specified violation of the law, without saying to whom it should be forfeited and paid, or who might recover it. Instances of both classes are to be found in the act contained in Revised Code concerning "marriage." Section 6 of the act (see chapter 68) gives a penalty of $200 for the offenses therein mentioned, "one-half to the use of him who will sue for the same,

and the other half to the use of the county wherein the offense is committed"; while section 13 says that for the offense therein referred to, "the person so offending shall forfeit and pay $1,000." Under the latter section the suit must, undoubtedly, be brought in the name of the State, but the person who brings it will, by virtue of sections 47 and 48, chapter 35, Revised Code, recover the penalty for his own use (see *Caroon v. Rogers,* 51 N. C., 240). It is equally clear, in our opinion, (320) that the penalty given by section 6, chapter 68, must be brought in the name of the person who sues for it, inserting, though, the *qui tam* clause, because a part of the recovery is given to the county wherein the offense was committed.

The result of our opinion is that the judgment of nonsuit must be reversed and a judgment entered in favor of the plaintiff for the penalty of $200, according to the verdict of the jury.

PER CURIAM. Reversed.

Cited: Duncan v. Philpot, 64 N. C., 480; *Maggett v. Roberts,* 108 N. C., 177.

Overruled: Middleton v. R. R., 95 N. C., 169.

STATE ON THE RELATION OF JOHN WILLEY v. MILLS H. EURE ET AL.

In an action of debt on a sheriff's bond for the escape of a debtor imprisoned under a *ca. sa.*, the jury are not bound to give the whole sum due from such debtor, but should give the damages really sustained by the escape.

DEBT on the official bond of a sheriff, tried before *Heath, J.,* at last Spring Term of GATES.

The suit was brought against the sheriff and his sureties, for the escape of one Eure, who had been arrested by the defendant Eure on a *ca. sa.* The plaintiff proved the bond declared on, showed in evidence a judgment at his instance against said Eure—a *ca sa.* corresponding with the judgment—an arrest by the sheriff under the *ca. sa.,* and a subsequent escape. There was evidence on the part of the defendants that Eure, the defendant in the *ca. sa.,* was at the time of such escape, and has been ever since, wholly insolvent. A verdict was permitted to pass for the amount of principal, interest, and costs of the judgment, subject to the opinion of the court whether more than (321) nominal damages could be recovered, with leave to the court to

set aside the verdict if he should be of opinion with the defendants, or to direct a verdict for nominal damages; and that the plaintiff be permitted to submit to a nonsuit.

On consideration of the question reserved, the court ordered the verdict to be reduced to sixpence, upon which the plaintiff submitted to a nonsuit and appealed.

W. N. H. Smith for plaintiff.
W. A. Moore for defendants.

BATTLE, J. The remedy at common law against a sheriff for the escape of a person taken by him under a *capias ad satisfaciendum* is by an action on the case, in which the jury may give such damages as upon the proofs they may think the plaintiff entitled to. This rule prevails whether the escape be voluntary or negligent; the only difference between the two kinds of escape being, so far as the liability of the sheriff is concerned, that when sued for a negligent escape, he may, if he can, allege and prove a recaption upon fresh pursuit. The statute of 13 Ed. I., ch. 11, which was in substance reënacted by our act of 1777 (ch. 118, secs. 10 and 11, Revised Code of 1820), gives an action of debt against the sheriff who shall take the body of any debtor in execution and shall willfully or negligently suffer such debtor to escape, and the plaintiff in such action shall recover all such sums of money as are mentioned in the execution, and damages for detaining the same. See Rev. Code, ch. 105, sec. 20. It is clearly settled that in the action of debt, thus given, the recovery shall be the same, whether the escape be voluntary or negligent. See *Adams v. Turrentine,* 30 N. C., 147, where the subject is fully discussed. The action of debt given by the statute does not take away the common-law right of suing in case, but is a cumulative remedy, which, however, from its greater efficiency, has almost, if not entirely superseded the other in practice. Such being the responsibility of the sheriff, when sued in debt for the escape of a (322) debtor taken in execution, it is contended for the plaintiff in the present case that it ought to be the same when the action is brought upon the bond of the sheriff against him and his sureties, because the bond is given as a security to the public against his official delinquencies, and the remedy on it should be commensurate with the utmost extent of his responsibility. In aid of this argument it insisted that if the action of debt be sued against a sheriff and a recovery had which he fails to pay, a suit may then be brought upon his bond, in which such default of payment may be assigned as a breach, and that his sureties may be thereby made liable for the debt of the escaping debtor; and it is inferred that to avoid such circuity of action a full recovery ought to be allowed

at first in an immediate suit upon the bond. Whether the plaintiff can have full redress upon the sheriff's bond by this circuity of action we shall not at present undertake to decide, but we are precluded by authority from holding him entitled to it by a suit in the first instance upon the bond. In *Governor v. Matlock,* 8 N. C., 425, it was decided that in a suit upon a sheriff's bond the plaintiff must assign breaches thereof under the statute of 8 and 9 Will. III., ch. 11, sec. 8 (see Rev. Code, ch. 31, sec. 58), and that the jury should "consider the damages really sustained by the escape, and were not bound to give the whole sum due from the original debtor, as in debt upon the statute of West, 2."

The judgment in the court below was in accordance with this decision, and must be

PER CURIAM. Affirmed.

Cited: Tharington v. Tharington, 99 N. C., 125.

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(323)

JOSEPH COOPER, CHAIRMAN, *v.* J. B. CHERRY ET AL.

1. Where a chairman of the board of superintendents of common schools, on going out of office, gave his own note, instead of money, to his successor, and after a lapse of two years, being reappointed, received the same note back as part of the school fund, and gave a release in full to his predecessor, it was *Held,* that on his subsequent failure and inability to pay such note, he and his sureties were liable on the bond last given.
2. The statute of 1789 barring claims not sued for in two years, does not protect an administrator unless he has paid over the assets to the distributees and taken refunding bonds, as well as advertised in conformity with the act.

PROCEEDING under chapter 66, section 50, Revised Code, tried at Spring Term, 1861, of BERTIE, before *Heath, J.*

It was a motion on the bonds of Joseph B. Cherry as chairman of the board of superintendents of common schools of Bertie, against him and his sureties. The motion was based on three bonds, one given on 10 February, 1852, another on 18 May, 1856, and the other on 17 April, 1858. Cherry continued in the office until April, 1861, when he resigned, and Joseph Cooper, the plaintiff, was appointed and gave bond.

One of the principal questions arising in the case was as to the sum of $1,500, which Cherry had used of the school fund. He had been chairman several years previous to 1853. In that year Jonathan S.

Tayloe was appointed to the office, and in lieu of cash he took Mr. Cherry's individual note for $1,500, without security, but it was admitted at that time Mr. Cherry was abundantly good for that sum, and remained so until 1860. Mr. Tayloe retained this note until 1856, when Cherry was again appointed chairman of the board of common schools, and on a settlement with Mr. Tayloe he received his own note as so much cash, and gave Tayloe a release in full. It was in proof that Tayloe had been empowered by the superintendents to loan out this sum. The defendants' counsel contended that neither Cherry nor his sure- (324) ties were liable for the sum of $1,500 on either of the bonds above described.

Alfred Eason, one of the sureties of Mr. Cherry, died in August, 1858, and the defendant Mary Eason qualified as his administratrix at November term of Bertie County court; she advertised at the courthouse door and two other public places in the county for all persons to present their claims against the estate of her intestate. This was done within two months from the date of her qualification.

It was admitted that no settlement had been made by Mrs. Eason with the distributees of her intestate; that no refunding bond had been taken, but that the estate was still in her hands. It was insisted that as to Alfred Eason's estate the demand was barred by the act of 1789. His Honor being of opinion that the $1,500 was covered by the bond of 1856, gave judgment accordingly against all the defendants.

Defendants' counsel excepted and appealed.

Winston, Jr., for plaintiff.
Barnes for defendants.

PEARSON, C. J. The position assumed by the defendants, that in respect to the sum of $1,500 there was no breach of the bond of 1856, because the default occurred in 1852 and was covered by the bond of that year, is not tenable. It is true that the default in respect to this $1,500 was a breach of the bond of 1852. It is also true that Tayloe, who was appointed chairman in 1853, committed a breach of his bond by receiving as cash the note of Cherry, without security, in payment of the $1,500 for which Cherry was in default; but it is, nevertheless, true that the breaches were cumulative and continuing, so that when Cherry was again appointed chairman in 1856, and then received the same note as cash, and executed to Tayloe "a release in full," it was a breach of the bond then executed. No argument is necessary to prove that a trustee violates his duty by receiving his own note as cash (which (325) note is still unpaid), and executing a release in discharge of the amount due to him as trustee, and the question is not at all affected

by the circumstance that the note had been given because of a previous default; for, viewed in any light, it comes within the express words of his bond, and he thereby "abused the trust which had been confided to him by his appointment as chairman," and for the consequences of this breach of trust those who vouched for him as sureties on his bond are clearly liable. By their act he was placed in a position which enabled him to subtract from the school fund the amount in question, and they have no ground to complain because they are required to indemnify the fund and bear the loss.

The position assumed on the part of the defendant Eason, that as the action was not commenced until more than two years after she qualified as administratrix, she is protected by section 4 of the act of 1789 (according to the construction adopted in *Goodman v. Smith,* 15 N. C., 450), although she has not paid over the assets to the distributees and taken refunding bonds as required by the second section, is likewise untenable. If the authority of that case were admitted, and the fourth section treated as wholly unconnected with the second and third, and as strictly a statute of limitations, it would not apply to this case, because Cherry, by his several appointments, was chairman continually from 1856 up to 1861, and there was no cause of action, or rather, the cause of action was suspended until shortly before the present proceeding was commenced; for the statute in relation to the school fund makes it the duty of the chairman to receive and sue for the fund, and during that time no proceeding could be had, as Cherry could not sue himself, and it is settled doctrine that no statute of limitations can begin to run and become a bar until the cause of action accrues, for the plain reason that the Legislature cannot be supposed to intend to require a creditor to do an impossible act under pain of having his right of action barred; *Jones v. Brodie,* 7 N. C., 594; *Godley v. Taylor,* 14 N. C., 178, where the doctrine is discussed and applied to ch. 48, Laws 1715, barring the (326) claim of all creditors who do not sue within seven years after the death of the debtor, which words are as direct and positive as those used in the section under consideration, *i. e.,* "who fail to bring suit within two years from the qualification of the executor or administrator."

We will not, however, put the decision on that ground, because a distinction may be suggested, inasmuch as the bond is payable to the State, and the circumstance that Cherry continued in office may have only had the effect to suspend the summary proceeding provided by the statute, and for the additional reason that *Goodman v. Smith* is opposed by *Reeves v. Bell,* 47 N. C., 254, and it is a matter of great practical importance that the construction of the statute should be settled, as cases under it occur on the circuits almost every day.

The fact of there being these opposing cases in respect to the con-

struction of the act of 1789 shows that the question is of some difficulty, and by a perusal of the opinion delivered in *Reeves v. Bell* it is obvious that the attention of the court had not been called to *Goodman v. Smith.* We have, therefore, felt it to be our duty to give the subject a serious reconsideration, and after doing so are satisfied that the construction established by *Reeves v. Bell* is the true one, and is supported by principle and also by authority.

In *Reeves v. Bell* it is decided that by a proper construction of the act of 1789 an administrator cannot protect himself against a recovery by a creditor who has failed to sue within two years from his qualification, unless he has delivered the assets to the distributees and taken refunding bonds, so as to give the creditor a remedy over, by which he may reach the assets in their hands.

The opinion takes a comprehensive view of the subject, assuming that the several enactments of the same statute are all to be taken together, and to be so construed as to effect the general purpose for which the statute was made; that this general purpose was to remedy an (327) evil growing out of the delay of executors and administrators in settling up estates and paying over the assets remaining in their hands under the pretext of debts still outstanding, on account of which they were, in order to protect themselves, justified in retaining the assets, and that this prominent purpose of the statute required the administrator, in order to claim the protection of the statute given to him by section 4, to aver, and be able to prove, that he had complied with the duty imposed on him by the second section, and not only paid over the assets, but had taken a refunding bond, so as to enable the creditor, under the provision of section 3, to fix the amount of his debt and recover the same by *scire facias,* according to the proceeding thereby provided.

This general view may be extended and made more particular by the suggestion of several positions, all of which support and confirm the construction established by that case, and are by implication made a part of the argument:

1. One who claims the benefit of any instrument must aver and prove that he has performed all the acts required to be done by him for the benefit of the other party. This is a general principle of justice, applicable not only to contracts between individuals, but the construction of statutes, and to treaties between independent nations. The second section of the act of 1789 requires executors and administrators, after the expiration of two years from their qualification, to pay over the undisposed of assets to the legatees or distributees, and to take a refunding bond with condition to pay any debt of the deceased "which shall be afterwards sued for and recovered or otherwise duly made to appear."

The third section enacts that when an administrator pleads "fully administered," and the fact is found in his favor, the plaintiff may fix the amount of his demand, and sign judgment, and thereupon issue a *scire facias* in order to discharge the parties to the refunding bond. The fourth section enacts that any creditor who fails to sue within two years from the qualification of the executor or administrator "shall be forever barred from the recovery of his debt." When, *therefore*, an administrator seeks to protect himself from a recovery on the (328) ground that the creditor had failed to sue within two years after his qualification, it would seem, as a matter of course, to be necessary for him to aver that he had paid over the assets and taken refunding bonds, so as to give the creditor a remedy over by *scire facias*, according to the provisions of the statute. An administrator is required to take refunding bonds for the benefit of the creditor, and surely it is with an ill grace that he asks to be protected from a recovery by them when he has neglected to do what the law expressly requires him to do for their benefit.

2. The evil intended to be remedied by the act of 1789, as is manifest from its enactments as well as the preamble, was the delay on the part of executors and administrators in settling up estates. The construction adopted in *Reeves v. Bell* tends to induce a discharge of duty, and thus to effect the main purpose of the statute, whereas the construction adopted in *Goodman v. Smith* actually holds out an inducement to executors and administrators not to perform their duty by giving them assurance that they will be protected whether they settle and take refunding bonds or not.

3. When the act of 1789 was passed there were two statutes of limitation—the general statute and the act of 1715, barring claims against the estates of deceased persons after seven years. So it would seem there was no particular occasion or necessity for another statute of limitations. Yet, the construction adopted in *Goodman v. Smith* has the effect of making the act of 1789 a mere statute of limitations, and the fourth, which is clearly a subsidiary section, is allowed to override all the others, and allowed to become the only operative provision of the statute.

4. The Court, in *Goodman v. Smith,* seems to be impressed with the general words of the fourth section, but, nevertheless, refuses to allow them to be qualified by considering them in connection with the other sections, when, in truth, that was the only way of solving the difficulty, and was not only authorized by the rules of construction, but, in this instance, was actually demanded, because the third section (329) fixes the mode in which the executor and administrator should plead in order to protect himself against the recovery of a creditor, that

is, he should plead "fully administered," and his plea is established by proof that he had settled at the expiration of two years and taken refunding bonds as required by the act. Whereupon the creditor is barred of his recovery against the executor or administrator, and must poceed by *scire facias* on the bond.

By a careful analysis of the elaborate opinion delivered in *Goodman v. Smith* it will be seen that the conclusion is put on two grounds, neither of which, as it seems to us, is tenable. The creditors are classed into the diligent and the dilatory, and it is assumed that the refunding bonds are not required for the benefit of the latter; consequently, in regard to them, whether a refunding bond had been taken or not is immaterial, and so no averment in regard to it was necessary.

For whose benefit are refunding bonds to be taken? Not for the benefit of the diligent creditors, one who sues within the time allowed by the statute, for he does not require it. He recovers against the executor or administrator, and cannot be barred and turned over to seek relief on the refunding bond. As to him, the fact that the assets have been paid over and refunding bonds taken, does not establish the plea of "fully administered." The same remarks apply to the limited description of creditors mentioned in the proviso to the fourth section. They belong to the class of diligent creditors, and as they sue within the time allowed by law, are entitled to recover against the executor or administrator. So the refunding bonds were not intended for their benefit. But the matter is not left to conjecture or construction, for the words of the statute and of the bonds required to be taken by the second section are express, "giving bond with two or more able sureties, conditioned that if any debt truly owed by the deceased shall be afterwards sued for and recovered or otherwise duly made to appear." The other ground is that the protection given to administrators and executors by the fourth (330) section would be nugatory, because "an administrator or executor who has faithfully administered the assets, and who, by force of such administration, is adequately protected, stands in no need of this additional shield." The position here assumed is that an executor or administrator, in respect to creditors who bring suit within the two years, does "faithfully administer," and can protect himself by showing the fact that, pending the suit, at the expiration of two years he paid over the assets to the legatees or distributees. Is this position tenable? Can the executor or administrator protect himself against a recovery by bringing forward this matter under a plea *puis darrein continuance?* Assuredly he cannot, and the question seems to have been misapprehended; for the protection given by the fourth section was in respect to creditors who fail to sue within two years, and so far from being nugatory, it required this express provision to enable executors and

administrators to protect themselves against creditors who had not sued within the two years, and their liability to creditors who had sued within the time allowed was not interfered with or altered in any respect, but was left as at common law.

The research which this conflict of cases has given rise to brings to the notice of the Court two authorities which seem not to have occurred to the Court in *Goodman v. Smith,* but which settle the construction of the act of 1715, and furnish a direct analogy and authority for the construction of the act of 1789. The cases are *Godley v. Taylor,* 14 N. C., 178, and *Bailey v. Shannonhouse,* 16 N. C., 416; and it is settled that, notwithstanding the broad terms of the act of 1715, an executor or administrator cannot protect himself from a recovery by a creditor who had failed to sue until after the expiration of seven years, unless he avers and proves that he has paid over the surplus assets to the treasury as required to do by the act of 1784, or to the trustees of the University by the act of 1809, and the court adopted the principle that in the construction of the act of 1715, the ninth section of that act, and the act of 1784 and 1809, are to be taken into consideration, and that one who fails to do an act which the law requires of him for the (331) benefit of another cannot bar the recovery of the latter, because he has not provided him with the remedy, which the law contemplated, and made it his duty to do as an implied condition precedent to the protection which he claims.

We now consider the question settled, both on principle and authority, and concur with his Honor in the opinion that the plaintiff's right to recover against the defendant, Mrs. Eason, was not barred, as she still retains the assets.

PER CURIAM. Affirmed.

Cited: Rowland v. Windley, 82 N. C., 134; *McKeithan v. McGill,* 83 N. C., 518; *Cox v. Cox,* 84 N. C., 142; *Rogers v. Grant,* 88 N. C., 444; *Morris v. Syme, ib.,* 456; *Little v. Duncan,* 89 N. C., 419; *Glover v. Flowers,* 95 N. C., 59; *Smith v. Brown,* 101 N. C., 351; *Bobbitt v. Jones,* 107 N. C., 662; *Self v. Shugart,* 135 N. C., 197.

DOE ON THE DEMISE OF WILSON BROWN v. CALVIN E. SMITH.

1. Where land has been sold as the property of A., under execution, and he has received a portion of the sum raised, which was over and above the call of the execution, he cannot be a witness for the purchaser in an action for the recovery of the land.
2. Where both parties in an action of ejectment claim title under the same person, the defendant cannot defeat the action by showing title in a third person, unless he has acquired such outstanding title or connects himself with it.

EJECTMENT, tried before *Howard, J.*, at last term of ORANGE.

The lessor claimed title under a deed from the sheriff, executed on 28 October, 1858, by virtue of a sale under execution and judgment against one Turner for a debt contracted by him in January, 1854. He then showed a deed for the same land, executed by Turner to the defendant Smith, dated September, 1854, and then showed by Turner that the money recited in such deed as having been received by him had, in fact, not been paid; that no money or other thing of value had been (332) given to him by Smith for the land in question; that the deed had really been executed in August, 1855, during the session of Orange County court, and was antedated in order to defeat a judgment (in a bastardy case) that was rendered in that court on the day before. The defendant excepted to the competency of Turner, but the exception was overruled.

To prove title of Turner at the date of the judgment and execution, under which the plaintiff claimed, the defendant showed that at a sale under the judgment in the bastardy case the land in question had been bought by one Miller, and a deed executed to him on 26 July, 1856, that at such sale the land brought more money than was necessary to satisfy the execution, and the overplus was paid by Miller to Turner, who gave a receipt for the money.

In reply to this the plaintiff proved that Miller, at the sale above mentioned, had acted as the sheriff's deputy, and had employed one McCauley to buy the land for him; that McCauley bid off the land accordingly and assigned the bid to Miller.

His Honor charged the jury that the sale and purchase by Miller was, for the purpose of this action, a nullity, and that the admitted good character of Smith was not to be considered by them. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Phillips for plaintiff.
Norwood for defendant.

PEARSON, C. J. The exception to the competency of Turner as a witness on the side of the plaintiff is well taken. The witness had a direct interest to support the title of Brown, because of his liability to him in the event of his losing the land by the provision of the statute, Rev. Code, chap. 45, sec. 27. It does not appear from the case as made out that the deed of Turner to Smith contained a warranty, and in the transfer of land a warranty is not implied; consequently, there was no corresponding liability of the witness to Smith so as to (333) bring the question within the rule of a witness having an interest on both sides. For this error there will be a *venire de novo,* and we are not at liberty to enter upon the question discussed at the bar and on which the case seems to have turned on the trial in the court below.

We will suggest, however, that there seems to be nothing to prevent the application of the principle that when both parties claim title under the same person the defendant cannot defend an action by showing title in a third person unless he has acquired such outstanding title or connects himself with it. This suggestion seems called for to prevent a repetition of what has occurred at this term—a point was fully argued, and yet upon examination the Court found that it was excluded by a preliminary matter.

PER CURIAM. Error.

Cited: Caldwell v. Neely, 81 N. C., 116.

E. A. COLLINS v. AUGUSTUS CREECY.

The statute, Rev. Code, ch. 101, sec. 14, gives the overseer of a road (acting in good faith) power to cut pines, etc., on any land adjoining his section, and he is not confined to the land immediately adjoining the spot where the work is to be done.

TRESPASS *quare clausum fregit,* tried before *Heath, J.,* at last Spring Term of CHOWAN.

The plaintiff declared for an entry by the defendant on her enclosed lands and cutting and carrying away some oak trees therefrom. She proved that she was in the possession of an enclosed field in one end of which there was an oak grove, which field and grove abutted on the public road; that no one was permitted to cut trees there save her own hands, and they none but dead trees; that the defendant entered thereon and cut down five oak trees of small size; that witness told the de-

(334) fendant he had better not cut any more of these trees, else he might get into trouble about them; that he then cut no more.

The defendant then proved that he was the duly appointed overseer of the road on which the enclosure and grove abutted, and to some considerable distance beyond the premises described; that as such overseer, he was making and repairing some bridges on the road where they were necessary; that these bridges were at a considerable distance beyond the plaintiff's land and opposite to that of other persons, and that the said timber was used for the purpose of repairing a bridge on the road.

The plaintiff then proved that there was other timber on uninclosed ground opposite to this grove, but it was described as being large pine, and not so good as oak for the purpose intended, and that further off—opposite to points where the bridges were, on the lands of other persons, there was timber fitting for such purposes, but it was in a swamp and difficult to be got; that between this last described place and the site of the bridges one McCoy had a small oak grove. It was further in proof that these bridges had been formerly constructed of pine timber.

The judge charged the jury: first, if the overseer entered, cut down and carried away the timber for the purpose of making and repairing the bridges in the road under his charge, and he acted in good faith, the defendant was entitled to their verdict. But, secondly, if they believed the occasion was used as a pretext, and he entered, cut, and carried away the timber maliciously, with an intent to injuire, harass, and vex the plaintiff, the plaintiff was entitled to their verdict for the actual damage done her; to which, punitive damages might be added. Plaintiff excepted.

Verdict for defendant. Judgment and appeal.

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

(335) PEARSON, C. J. The statute requires overseers of roads to make and repair bridges and causeways, and to enable them to do so, they are authorized to cut poles and other necessary timber, and provision is made for compensation to the owner of the land by an application to the county court; Rev. Code, ch. 101, secs. 14, 15, 16.

This is an instance of the exercise, on the part of the sovereign, of the right to take private property for the use of the public, making compensation.

No question is made in regard to the right; but as the property is taken without the consent of the owner, it is proper that the statute should be construed strictly, so as not to carry its operation further than is sufficient to meet the public necessity which called for the enactment.

Giving the plaintiff the benefit of this principle, we are of opinion that the statute gives the overseer power to cut poles, etc., on any land adjoining his section of the road, and that he is not confined to the land immediately adjoining the spot where the work is to be done. The words of the statute are general, and do not point out the place where poles may be cut. So, while, on the one hand, we do not adopt the construction that the overseer may cut poles on any land where he pleases within the county, because so large a power is not necessary for the purpose of the statute, on the other, we do not restrict its operation to the very spot where the causeway or bridge is to be made, because that might defeat the purpose of the statute. For instance, suppose the place where a causeway is needed to be in a lane and no woods within half a mile.

As the land of the plaintiff adjoined the defendant's section of the road, he had the power, according to the true construction of the statute, to cut poles, and the question turned on the manner in which he exercised it. Did he abuse the power? or did he act *bona fide* with a single eye to the discharge of his duty? We entirely approve of the manner in which this question was left to the jury.

PER CURIAM. No error.

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(336)

W. Z. Y. JONES ET AL. v. ISAAC C. EDWARDS ET AL.

Where real estate, belonging to an infant, has been converted into personalty by a sale, under the decree of court for a division, the fund will continue to have the character of realty, and be transmissible according to the law of descents until a different character is impressed upon it by some act of the owner.

PETITION for a distributive share of the estate of Clarinda Joyner, against the personal representative, heard before *Osborne, J.*, at last Spring Term of GREENE.

Upon the facts of the case as set forth in the pleadings (which are sufficiently stated in the opinion of this Court), his Honor below dismissed the petition, and the plaintiffs appealed.

No counsel for plaintiffs.
J. W. Bryan for defendants.

MANLY, J. We gather the following facts from the pleadings: Charles Joyner, by his last will, left a parcel of land to be equally divided between his family of children, viz., Caroline, wife of the defendant Edwards; Eliza A., John F., Lavinia, and Clarinda Joyner. By the subsequent

death of two of the children, under age and intestate, that is, Eliza and Lavinia, the remaining three became entitled to the land as tenants in common. These three presented a petition to the court of equity of Greene, to have the land sold for a division, which was accordingly decreed, and the proceeds divided between them, each receiving $1,361.18. The case now before us, sets forth that another of the children, viz., Clarinda, is now dead, under age and intestate, and that the petitioner Jones, in right of his wife, Mary, who is the mother of the children, is entitled to a distributive share of this fund. This, we think, is a mistake of right.

By reference to the law, under which the proceedings for the sale were conducted, Rev. Code, ch. 82, secs. 6 and 7, it will be found (337) where real estate is converted into personalty for a division, the latter, if belonging to an infant, will continue of the character of realty, so as to be subject to the law of descent governing the transmission of real estate; and such will be the case, we take it, until a different character is impressed upon it by some act of the owner, according to what is said in *Dudley v. Winfield,* 45 N. C., 91.

In the case before us, the real estate had been converted by a sale in equity into personalty, and paid to the guardian of Clarinda; upon her death, therefore, intestate and under age, it would descend to her real representative, and not to her next of kin, under the statute for distributing personalty.

The petitioner Mary, therefore, who is the mother of the decedent, is not entitled to any portion of this fund, but it goes to the heirs-at-law according to the canons of descent regulating inheritances, to wit, to the brother and sister.

The jugment of the court below should be affirmed, and the petition dismissed with costs.

PER CURIAM. Petition dismissed.

Cited: *Lyon v. Akin,* 78 N. C., 260; *Hall v. Short,* 81 N. C., 277.

JOSEPH GRIFFIN v. PETER G. FOSTER.

1. The continuance of an overflow of land by the ponding back of water for twelve years does not justify the presumption of the grant of an easement.
2. It is not competent, either as a bar to the action, or in mitigation of damages, for the defendant to show that for twelve years neither the plaintiff nor the party from whom he purchased had complained of the overflow of his land.

PETITION to recover damages for ponding back water upon the plaintiff's land, tried before *Heath, J.*, at Fall Term, 1860, of MARTIN.

The case was brought up by appeal from the finding of a jury of view.

On the trial below it appeared that the dam in question had (338) been erected twelve years theretofore, and the water kept up to its then height by one Williams, who, about two years before, had sold to the defendant. When the dam was erected the plaintiff's land was owned by one Harman Griffin, who some six years before sold it to the plaintiff. The defendant offered to show that before the present petition was filed no complaint was made of the overflowing by either the plaintiff or Harman Griffith, and no suit was brought. This evidence was offered in bar and in mitigation of damages.

The court held that it was not competent in either point of view. Defendant's counsel excepted.

Verdict and judgment for plaintiff, and appeal by defendant.

Warren for plaintiff.
Winston, Jr., for defendant.

MANLY, J. Two questions are presented in the case transmitted to this Court:

1. Whether the continuance of the pond of water on the petitioner's land for twelve years would justify the presumption of a grant of the easement.

2. Whether it was competent to prove in bar or in mitigation of damages that no complaint had been made prior to the filing of the petition.

Both questions were properly ruled against the defendant below.

The provisions of the Revised Code, ch. 65, secs. 18 and 19, raising a presumption of payment or abandonment upon judgments, decrees, contracts, equities, or redemptions, and other equitable interests after the lapse of ten years, do not embrace cases of the kind before us; so that the presumptive bar in favor of a private easement stands as at common law. In England twenty years seems to have been adopted by judges by analogy to the statute, 21 James I., which makes an adverse enjoyment for that time a bar to an action of ejectment. A less time than this does not seem to have been held, in any instance, of (339) itself sufficient to justify the presumption.

In North Carolina we have followed the English rule, and have held twenty years necessary and sufficient. The cases upon this point are collected in the opinion of the Court delivered in *Ingraham v. Hough*, 46 N. C., 49. Since that case, it may be regarded as settled that twenty

years enjoyment of an easement, uninterrupted and unexplained, will raise the presumption of a grant. Nothing less than this will do. The eleven or twelve years, therefore, set forth in the case as the period during which the pond of water has been kept up, is not sufficient to create a presumptive bar to the right of redress of the owner of the land covered.

The evidence offered and rejected by the court was inadmissible for either of the objects avowed, or for any other that we are aware of. No demand of damages or notice of the petition, prior to the filing of the same, was necessary. Previous complaint, therefore, not being a prerequisite, the want of it was not a bar to the suit. So we cannot perceive how or in what way it can have a legitimate effect upon the amount of damages. Suffering can rarely be measured, with truth, by amount of complaint indulged; and the absence of the one cannot be inferred, with any reasonable certainty, from the absence of the other. Such matters depend so much on temperament and education that they cannot be relied upon as indices from which a jury may infer facts upon which to base a verdict.

PER CURIAM. No error.

Cited: Power Co. v. Navigation Co., 152 N. C., 493.

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(340)

WILLIAM T. POOLE v. THE NORTH CAROLINA RAILROAD COMPANY.

Where a deaf-mute slave, who was walking on a railroad track from the direction of an approaching train, was killed by the train, it not appearing that the engineer knew of the slave's infirmity, and it appearing that the usual warning was given by the steam whistle for one endowed with hearing to have made his escape, it was held that the company was not liable for the loss.

CASE to recover damages for negligence in running defendant's train, tried before *Bailey, J.*, at last Spring Term of WAKE.

The plaintiff declared against the defendant for so negligently running a train on their railroad track as to strike and kill a negro man-slave belonging to him.

It appeared in the case that the slave Guilford, who was the subject of this suit, was a deaf-mute, and was walking on the railroad track with his back to a gravel train which was approaching him. The engineer in charge of the train had been going at the rate of fifteen or twenty miles an hour, when he saw smoke ahead of him in a cut, and,

believing it to be from an approaching train, he slackened speed to about four miles an hour; but perceiving that the smoke was from a coal-kiln, he put on steam, and as he was clearing the smoke for the first time he saw the negro man in question on the track about seventy five or one hundred yards distant. When the engineer first saw the slave, the engine was gaining speed, and was going at the rate of about from eight to twelve miles per hour. He could have stopped the train when he first saw the slave, but made no effort to do so, because he took it for granted that he would hear the noise of his approach and get out of the way; but, on coming to within thirty yards of him and finding he did not quit the track, he gave the signal to put on the brakes and when within fifteen or twenty steps, gave the alarm whistle, and continued to blow loud and quick until the negro was struck. It appeared that if the slave could have heard he had time to have escaped after the whistle first sounded the alarm. The engineer had no knowledge of the slave's (341) deafness.

Guilford was a blacksmith, and was worth $1,000.

The court instructed the jury that the plaintiff could not recover. Verdict and judgment for the defendant, and appeal by the plaintiff.

Miller and G. W. Haywood for plaintiff.
B. F. Moore for defendant.

BATTLE, J. We approve the instruction given to the jury by his Honor that the plaintiff was not entitled to recover.

The engineer who had the management of the defendant's train, did not know that the plaintiff's slave was a deaf-mute. In the absence of such knowledge he had the right to presume that the slave had the ordinary faculties of hearing and sight, and that he was endowed with such an instinct of self-preservation as would prompt him to leave the railroad track, and thus escape the danger of being knocked down and run over by the approaching cars; see *Herring v. R. R.,* 32 N. C., 402; *Couch v. Jones,* 49 N. C., 402. Had the engineer omitted to give the ordinary signals for warning persons to leave the track of the road, it would have been deemed negligence for which the defendant might have been held responsible. But it appears from testimony that he did everything to avoid the catastrophe which prudence or humanity could dictate, and his efforts proved vain only because the infirmity of the slave prevented his profiting by them. See *Aycock v. R. R.,* 51 N. C., 231.

PER CURIAM. No error.

(342)

HUGH T. MOFFITT v. JOHN C. BURGESS.

1. Where a party, with his horse and buggy, carried a debtor to a railroad station, and there procured the money to enable him to leave the State, with the intent to assist him in the purpose of avoiding his creditors, it was held to be a fraudulent removal within the statute.
2. The declaration of a debtor fraudulently removed, that "he intended to get the defendant into a scrape," was held to be immaterial.

CASE for fraudulently removing a debtor, one Alred, tried before *Howard, J.*, at last Superior Court of RANDOLPH.

Mrs. Kersey, a cousin of the defendant and of Alred, testified that the defendant and Alred, his brother-in-law, came one Sunday evening to the residence of her husband in Greensboro in the buggy and with the horse of the defendant; that the defendant asked for her husband and said that he had bought Alred's growing crop and wished to get the money to pay him for it; that Alred was broke—was out collecting money, and was going to Missouri; that the night before Alred came to his house and told him that his crop was under execution, and wanted him to buy it; that he was going away; that Alred could not go unless the defendant could get the money from witness's husband; that witness asked defendant, "What is to become of Sally?" Alred's wife, to which he replied that she did not know her husband was going away until the night before; that she was not going until further orders, and that in the meantime he (defendant) was to take care of her; that he didn't reckon that witness would ever see Alred again; that on Monday her husband let defendant have the money, $150, which he paid over to Alred, who took the next train for the west.

One witness testified that when defendant returned he stated that Alred had gone to High Point or Greensboro to get work. Another, that he said on his return that Alred was in a quandary, when he left him, whether to go to Beaufort or Missouri.

Kersey stated that he lent the defendant the sum of $150, which was paid to Alred; that defendant then endeavored to persuade (343) Alred to give up his purpose of going, and offered to furnish him a house free of rent if he would give up the idea of going.

In the course of the trial the defendant's counsel asked a witness if he did not hear Alred say, sometime before he went away, that he intended to get the defendant into a scrape. Plaintiff's counsel objected to this question, and the testimony was ruled out, whereupon the defendant excepted.

The court charged the jury that although a debtor may be embarrassed, and may be preparing to leave the country to avoid his creditors, yet, if

a person simply purchase his property for value, or to save his debt, and with no other purpose or intent, he would not be made liable for the debts of such debtor; but if he knows that the debtor is insolvent or embarrassed, and is preparing to avoid his creditors, and he furnish him means of transporting either himself or his property, then the law presumes he intended the consequences of his act, and unless he shows that such was not his intent, he will be held responsible. Therefore, if the jury were satisfied that the defendant knew of Alred's embarrassment before he left home, and that Mrs. Kersey's statement was true, plaintiff was entitled to recover. But if the defendant simply purchased the crop and went to Greensboro for the money, and with no other intent, then they should find for the defendant. Defendant's counsel excepted to the charge.

Verdict and judgment for plaintiff. Appeal by defendant.

Long, Scott, and Phillips for plaintiff.
Gorrell for defendant.

BATTLE, J. Taking the whole of his Honor's charge together, and applying it to the facts stated by the witnesses, Mr. and Mrs. Kersey, it is correct in principle, and is fully sustained by *Moss v. Peoples,* 51 N. C., 140. If the defendant with his horse and buggy carried the debtor to Greensboro and there procured the money to enable him to leave the State, and if this were done with the intent to assist him (344) in the purpose of avoiding his creditors, it was a fraudulent removal of the debtor within the meaning of the statute, and the defendant must abide the consequences.

The testimony which was offered on the part of the defendant as to the declaration of the debtor that "he intended to get him into a scrape," was properly rejected on the ground of its immateriality. The debtor did not get him into a scrape, and it was a matter of no consequence on the trial of the issue whether he did it designedly or not.

PER CURIAM. No error.

H. M. SHAW AND B. M. BAXTER v. JOHN F. BURFOOT.

Two or more separate proprietors of land cannot sustain a joint petition for a ditch to drain their lands, without alleging that a common ditch would drain the lands of all the petitioners.

PETITION for commissioners to lay off a ditch for drainage, heard before *Heath, J.,* at last term of CURRITUCK.

The case came up from the county court by appeal to the Superior Court.

The petitioners set forth that they are owners of certain lands on the east side of Indian Ridge which are subject to being overflowed and that their value is thus greatly impaired; that they have no means of draining them except through the lands of the defendant and of others (naming them), who are made defendants but who did not appeal; that said ditch ought to be upon and over the lands of these defendants, beginning with that of plaintiff Shaw.

The prayer is for commissioners to view the premises to ascertain whether such ditch or drain be necessary—to direct of what size (345) and at what points it shall be cut and prescribe the amount of work that each person over whose lands it shall pass and who may desire to drain into it shall do in cutting and keeping the same in good order, and to assess the damage each party may sustain by such ditch.

The defendant Burfoot alone answered, taking exception to the form of the petition, especially to the fact that the plaintiffs had joined in the petition without setting out any joint interest in the contemplated work.

The court gave judgment confirming the order of the county court and appointed commissioners to go upon the land and inquire and report; from which judgment the defendant Burfoot appealed.

W. A. Moore for plaintiffs.
Hinton for defendant.

MANLY, J. The allegations of the petition are not such as to warrant proceedings in the names of the petitioners jointly. To make a petition by two or more separate proprietors of land proper in a case of the kind before us, it ought to be alleged that a common ditch (the one which they seek) would drain the land of all, and that in that way all have a joint interest in the object of their suit. No such allegation is made, nor is that state of facts inferable at all from the contents of the petition.

There are other substantial defects in the framework of the petition which are objected to in the answer, and which the draftsman will at once perceive by comparing the petition with the method of procedure pointed out in the Code.

The judgment of the Superior Court appointing commissioners was erroneous, and should be reversed, and the defendant's motion to dismiss sustained.

PER CURIAM. Reversed and petition dismissed.

Cited: Porter v. Armstrong, 134 N. C., 451.

(346)

STATE v. PETER, JESS, AND MILES (SLAVES).

The master of a slave committed to jail on the warrant of a justice of the peace for an offense cognizable in the Superior Court is liable for jail fees, although the grand jury, upon an inquiry, may have refused to make presentment against such slave.

MOTION for the taxation of costs heard before *Heath, J.,* at Special Term of CURRITUCK.

The slaves Peter, Jess, and Miles, the property of George T. Wallace, were committed to the jail of Currituck County by justices of the peace under a criminal charge which was not bailable. They remained in jail until 14 January, 1861, when the Court of Oyer and Terminer was held for the said county, and then the cases of these slaves was submitted to the grand jury, who, after a careful examination, reported "that they found nothing against them, and therefore declined to make any presentment against them."

Thereupon the said slaves were discharged at the expense of their owner, excluding the jail fees, the court declining to render judgment for these. From which judgment the solicitor for the State appealed.

Attorney-General for the State.
Hinton for defendants.

MANLY, J. Revised Code, ch. 107, sec. 69, subjects the owner of a slave to costs in all cases of Superior Court jurisdiction where the slave if a free man would be liable.

Chapter 87, sec. 6, provides that every person committed to a public jail by lawful authority for any criminal offense or misdemeanor against the State shall bear all reasonable charges for carrying and guarding him to jail, and also for his support therein until released.

These two sections of the Code make the owner of the slaves in the case before us liable, it seems to us, for the jail fees, and we think they ought to be included in the taxed costs. *S. v. Isaac,* 13 N. C., 47, is direct authority for this view. There is error, therefore, in (347) the judgment below. It should have been for the costs, including the jail fees.

PER CURIAM. Reversed.

DOE ON THE DEMISE OF ADELAIDE AND ELIZABETH KRON v. MARTIN HINSON.

A grant from the State, purporting to be made in obedience to acts of the General Assembly providing for the relief of persons whose title deeds had been destroyed by the burning of the courthouses, etc., of Hertford and Montgomery counties, was held to be color of title.

EJECTMENT tried before *French, J.*, at Fall Term, 1860, of MONTGOMERY.

The lessors of the plaintiff offered in evidence a grant from the State, dated on 14 December, 1849, which purported to have been issued "in obedience to an act of the General Assembly of this State, passed at the session of 1844-45, chap. 53, ratified 1 January, 1845, entitled, 'An act to extend the provisions of an act passed at the General Assembly of 1830-31, entitled an act for the relief of such persons as may suffer from the destruction of the records of Hertford County, occasioned by the burning of the courthouse and clerk's office, to the counties of Montgomery and Stanly.'" To entitle themselves to the benefit of said acts of Assembly, the lessors of the plaintiff produced evidence to show that the title deeds under which they claimed the land in question were consumed by the fire which burned the courthouse of Montgomery County in 1843; that they had made advertisement of a survey in 1849, setting forth their boundaries, and the grounds on which they claimed a right to an entry and grant for the said land. They also proposed to (348) show the entry made in 1849, and which is recited in the said grant. They further proved that they had had seven years possession of the land in question, and insisted that at least the grant offered by them was color of title. The court rejected the evidence, and the plaintiff took a nonsuit, and appealed.

Ashe for plaintiff.
No counsel for defendant.

MANLY, J. We do not think it necessary to discuss other questions presented upon this record. There is one ruled erroneously, without doubt to the prejudice of the appellant, and for that he is entitled to a *venire de novo;* the grant of 14 December, 1849, to Adelaide and Elizabeth Kron, is color of title. We perceive no reason why it is not so. The public authorities decided upon the evidence before them that the grantees were entitled under the provisions of the acts of Assembly, and accordingly they made the grant. It in form purports to convey title—emanates from proper and the highest officers of the State, and is, therefore, of a character to induce a man of ordinary capacity to confide in

it as sufficient to secure the enjoyment of the land. This is all that is necessary to constitute color; *Dobson v. Murphy,* 18 N. C., 586; *Tate v. Southard,* 10 N. C., 119.

Many forms of conveyance, much less imposing than this, have been held to be color; as, for instance, an unregistered deed—an unconditional act of this Legislature—a deed without consideration, and intended merely, as color; *Campbell v. McArthur,* 9 N. C., 33; *Church v. Academy,* 9 N. C., 233; *Rogers v. Mabe,* 15 N. C., 180.

The nonsuit should be set aside.

PER CURIAM. *Venire de novo.*

(349)

W. D. HARRINGTON, ASSIGNEE, v. GEORGE WILCOX AND W. NASH, EXECUTORS.

Money paid by B., the surety of A., is a good set-off against a note payable to A., which was indorsed after it fell due.

CASE AGREED, submitted to *French, J.,* at Fall Term, 1860, of MOORE.

The bond on which this action was brought was made by George Wilcox, testator of the defendants, dated 26 November, 1856, for $286, due one day after date, and made payable to William P. Wilcox, his son. Prior to the making of this bond W. P. Wilcox borrowed of John Murchison about $400, and gave two notes, with his father, the said George, as his surety for the amount. W. P. Wilcox removed to Mississippi in the fall of 1856, and on the day he started, delivered the bond now sued on to the plaintiff with a request that he should carry it to John Murchison and get him to accept it, and credit the amount on the notes which he held on him and his father. This request was made in the presence of George, the father, but Murchison refused to come into the arrangement, saying that "the one he had was good enough." Subsequently, after the death of the said George, the whole amount of the two notes and interest ($483) was collected, by suit, from the defendants, his executors. The plaintiff afterwards sent the note in question to W. P. Wilcox, who endorsed it to the plaintiff, who knew that the executors of George had paid the two notes as stated. The defendants insisted on this payment by surety as a set-off.

To meet this plea of set-off the plaintiff set out the following clauses in the will of George Wilcox, which was made 18 December, 1856: "Item. I will and bequeath to W. P. Wilcox, for the use and benefit of his child William the sum of five hundred dollars; this sum to his son and one dollar to himself, with the amount of money I shall have to pay him, I consider a fair and equitable portion of my estate."

By a codicil made on 8 January, 1857, the testator bequeathed to William, the infant son of W. P. Wilcox, a negro boy. These (350) legacies have been assented to by the executors. Not including the legacies to the son of W. P. Wilcox, a distributive share of the estate of George Wilcox would have exceeded the sum paid Murchison.

On the consideration of the case agreed, his Honor being of opinion with the plaintiff on the question of set-off, gave judgment for the full amount of the note with interest and costs, from which the defendants appealed.

No counsel for plaintiff.
Phillips for defendants.

MANLY, J. We do not perceive why the money paid by the executors of George Wilcox on their testator's liability as surety of William P. Wilcox is not a good set-off in this action. The case states that the note sued on was transferred by endorsement, after it became due, and, moreover, at the time of the transfer, that the endorsee knew of the existence of the counter demand, and so, the debts being mutual, it will follow that, in all points of view, it was a proper case for set-off. The doctrine upon the subject of set-off, under circumstances like the present, was discussed and explained in *Haywood v. McNair,* 19 N. C., 283, and has been considered, we think, settled since that day.

We suppose, indeed, it was not intended to renew here the questions settled by that case, but to bring forward, through the clauses of the will quoted, a question as to the effect of that instrument upon the set-off proposed.

We have examined the clauses and do not find anything in them to affect the rights of the parties in this suit. There is no recognition of the testator's liability as surety for William P. Wilcox upon the notes to Murchison, and of course no release to him of his responsibilities to testator which might arise from that liability.

The testator's opinion as to the fairness of the division of his estate, however erroneous and unjust to the son William, does not affect the question as to what is given in the will or what exemptions are (351) secured thereby. There is no ambiguity in the instrument. The testator admits his liability to pay a sum of money to William, which we take to be the note in suit (as none other appears), but nowhere expresses an expectation of becoming a creditor of William, either by reason of suretyship or otherwise, and consequently nowhere adds such contingent amount to the legacy left him.

The money then paid by the executors of George, by reason of testator's suretyship for his son William, was a subsisting claim against William

P. at the time of the transfer of the bond, and is therefore a proper set-off in the action.

We are of opinion, upon the case agreed, that the judgment below is erroneous and should be reversed and judgment entered for the defendant.

PER CURIAM. Reversed.

WHITEHEAD & SUTHERLAND v. GEORGE SMITH ET AL.

Appeal bonds sent from the county to the Superior Courts are made by sections 1 and 10 of chapter 4, Revised Code, a part of the record sent up, and cannot be questioned by plea and proof, at the instance of the sureties.

MOTION for judgment on an appeal bond, before *Osborne, J.*, at last Spring Term of DUPLIN.

The action was begun in the county court, where a judgment was taken against Smith, and he prayed an appeal to Superior Court. The record of the case was accompanied by the appeal bond on which this motion is predicated, which is in proper form and purports to have been executed by the defendants Howard and Monk as the sureties of Smith. On judgment being rendered against the appellant in the Superior Court, Howard and Monk filed an affidavit stating that the paper-writing filed in this case as an appeal bond was signed in blank by them; that no amount was inserted nor was any name mentioned as a payee, (352) and that all the written matter inserted in the said bond has been inserted since the blank form was signed by them. The counsel for the affiants then asked for an issue to be made up and tried, offering to prove the facts set out in the affidavits.

His Honor was of opinion that the court did not have power to grant the motion of the defendants, and that the record certified from the county court was conclusive as to the execution of the bond, and therefore refused the motion. From which judgment the defendants Howard and Monk appealed.

W. A. Wright for plaintiffs.
Strong for defendants.

BATTLE, J. The decision of the question presented in this case depends upon the construction of the first and tenth sections of chapter 4, Revised Code. The first section gives an appeal to the Superior Court to every free person, whether plaintiff or defendant, who shall be dissatis-

fied with the sentence, judgment, or decree of the county court, but requires the appellant, before obtaining the same, to give bond with sufficient security for prosecuting the appeal with effect and for performing the judgment, sentence, or decree which the Superior Court may render against him. The tenth section enacts that "bonds taken for the prosecution of appeals, shall make a part of the record sent up to the Superior Court, on which judgment may be entered against the appellant and his sureties in all cases where judgment shall be rendered against the appellant." The question is, whether upon a motion in the Superior Court for a judgment upon the appeal bond it has the effect of a record the verity of which cannot be disputed, or is it to be taken as a bond the execution of which, though official, may be denied by plea and proof?

We are clearly of opinion that by force of the words "shall make a part of the record sent up to the Superior Court," appeal bonds can (353) no more be disputed or have their verity inquired into than any other part of the record sent up from the county court. By being made "part of the record," they acquire all the sanctity of the record, and the parties to them are conclusively bound by them. Being given in the county court, it must be presumed as a matter of law that that court took them properly, and when they are certified as part of the record the law no more intended that the truth of that part of the record should be a subject of question than that anything else which the court had placed upon its records should be questioned.

It is a strong argument in favor of this construction that, with regard to bail bonds, which are taken by the sheriff out of court but which are, nevertheless, when returned to court, so far made a record that a *scire facias* must issue upon them, the obligors are permitted to deny the execution of them by the plea of *non est factum,* supported by an affidavit.

If the defendants never, in fact, executed the appeal bond, their remedy was by an application to the county court to have the records as to the bond corrected and then to have the transcript of the perfected record sent to the Superior Court. Whether the county court would act at the instance of parties attempting to set up such a defense as that stated by the surety defendants in the affidavit, may well be doubted. The bond may have been, and probably was, made perfect before it was delivered, and, if so, the obligors have no cause of complaint. At all events, the court might properly, in the exercise of a sound discretion, refuse to listen to an application at the expense of the substantial merits and justice of the case.

Our conclusion is that upon the transcript of the record before him his Honor, in the court below, decided right in refusing the plea of the defendants in denial of their bond, and the judgment must therefore be

PER CURIAM. Affirmed.

(354)

STATE v. LAUGHLIN, A SLAVE.

1. The willful and malicious setting fire to the house of another, the burning of which is only a misdemeanor, will become a capital felony if the dwelling-house or barn, with grain in it, is thereby burned where such burning is the probable consequence of the first illegal act.
2. Upon indictment for the felonious burning of a barn with grain or corn in it, a prisoner cannot be convicted upon proof that he burned a crib with corn in it.

INDICTMENT for felonious burning, tried before *Saunders, J.*, at Spring Term, 1861, of ROBESON.

The indictment charged that the defendant "feloniously, willfully, and maliciously did set fire to and burn a certain barn then having corn in the same." The proof was that the prisoner maliciously and willfully did set fire to a stable with fodder in it, and that a crib with corn and peas in it, which stood within twenty-six feet of the stable, was partially consumed, but by great exertion was saved from total destruction.

The court charged as to the crib (which he sometimes in the alternative calls a barn), "that if satisfied of the burning of the stable by the prisoner, as it was an unlawful act, the prisoner was responsible for the consequences; and if they (the jury) were satisfied beyond a reasonable doubt that the stable was likely to and did communicate to the crib, and it was thereby burned, they should convict; but they were to be satisfied that by the burning of the stable the burning of the crib was a reasonable probability to follow; in which case the prisoner would be answerable." The defendant's counsel excepted.

Verdict, "guilty." Sentence was pronounced, and defendant appealed.

Attorney-General for the State.
Fowle for defendant.

BATTLE, J. The bill of exceptions presents for consideration (355) two questions, both of which are of great importance to the community, as well as to the prisoner. The first is, whether the willful and malicious setting fire to the house of another, the burning of which is only a misdemeanor, will become a capital felony if a dwelling-house or barn with grain in it be thereby burned, where such burning is the probable consequence of the first illegal act. Upon this question we concur in the opinion given in the court below, that in such a case the prisoner is guilty of the felonious burning of the dwelling-house or barn, upon the principle that he is to be held responsible for the natural and probable consequence of his first criminal act. In support of this proposition, the burning of one's own dwelling-house with a malicious and

unlawful intent, furnishes a strong argument from analogy. Such burning is of itself only a high misdemeanor; but if the dwellings of other persons be situated so near to the one burnt that they take fire and are consumed as an immediate and necessary consequence of the first illegal act, it will amount to a felony. See 2 East's Pl. Cr., 1030 and 1031, and *Rex v. Probert* and *Rex v. Isaac,* there cited.

The second question is, whether upon an indictment for the felonious burning of a barn with grain or corn in it the prisoner can be convicted upon proof that he burnt a crib with corn in it. He certainly cannot, unless a barn and a crib mean in law the same thing or the testimony shows that they are in fact the same. The bill of exceptions does not set forth any proof that they are the same, and we are unable to find any authority in the law which pronounces them to be the same. In Webster's Dictionary, a "barn" is said to be "a covered building for securing grain, hay, flax, and other productions of the earth." It is a word known to the English law, and is mentioned in the statute, 23 Hen. VIII, chap. 1, sec. 3, as a house the willful burning of which, while it has grain or corn in it, shall be a felony without the benefit of clergy. A crib, according to Webster, means, in the United States, "a small building raised on posts for storing Indian corn." We are not aware that it is now or ever has been used in that sense in England, and we have not, as (356) yet, seen it used in any of the acts of our Assembly. From this, it seems that a barn and a crib are houses of a different kind, and used, ordinarily, for different purposes, and we learn, unofficially, that they are so known throughout the greater part, if not the whole, of this State. The burning of a crib with corn in it is, then, a different offense from the burning of a barn with corn in it, and a prisoner charged with the latter cannot be convicted, upon proof of his having committed the former. Indeed, the burning of a crib, though it may have grain or corn in it at the time, is not made a felony at all, and it will be for the Legislature to consider whether such a building should not, under similar circumstances, have the protection which is now extended by sec. 2, chapter 34, Revised Code, to barns. This case may, possibly, also suggest to that honorable body that the willful and malicious burning of stables, with the intent to consume and destroy the horses that may be in them, is an offense quite as flagrant as and much more cruel than the burning of either cribs or barns, no matter how much corn or grain they may contain.

PER CURIAM. *Venire de novo.*

(357)

ISHAM LUTHER v. NOAH R. SKEEN.

1. Reports that the plaintiff swore to a lie or lies in a distant county cannot properly be submitted to a jury in an action of slander as elements from which a jury are to make up an estimate of their own of the character of the plaintiff.
2. A jury in estimating character is to take the testimony of witnesses who are supposed to be able or capable of reflecting in general terms the judgment of the public.
3. Matters elicited on a cross-examination which are only admissible to weaken the force of the testimony in chief ought not to go to the jury for a different purpose.

SLANDER tried before *Howard, J.,* at last Spring Term of DAVIDSON.

The action was brought for charging the plaintiff with having trumped up and sworn to an account.

The following is the case sent to this Court: The plaintiff introduced several witnesses to prove his general character, who said his character was good. The defendant's counsel then asked them if they had not heard that plaintiff had sworn to a lie in Randolph; to this plaintiff's counsel excepted. The court then said to defendant's counsel, "You must not ask the witness questions as to any particular offense, or what any particular person had said, but you may ask if there was a current report in the neighborhood that plaintiff had sworn to lies while living in Randolph." To this question plaintiff's counsel excepted. All of the witnesses answered that there was. Upon being further questioned by plaintiff's counsel, some of them said the report was confined to a particular suit with one Nance; others, that the report covered at least two instances of false swearing. Each of these witnesses said he did not remember to have heard the report from more than three or four persons, but that he heard those persons speak of it before the dispute between plaintiff and defendant arose. The plaintiff moved from Randolph to Davidson four or five years ago.

The court charged the jury that the testimony was permitted to go to them, not as a justification, but for their consideration in awarding damages; that it was for them alone to say what damages ought to be given to the plaintiff, either for the injury to his character, or as an example to deter others from slandering their neighbor, and that it was right and proper that they should know the exact standing of plaintiff, as it was supposed that they would give greater damage for an imputation upon the character of a man above suspicion or reproach than for an imputation upon one whose character was not so fair; (358) but that was a matter about which they were allowed to exercise their own discretion." Plaintiff's counsel excepted to the charge.

Verdict for plaintiff for $2. Judgment and appeal by plaintiff.

McLean for plaintiff.
Kittrell for defendant.

BATTLE, J. Upon the case presented to this Court, we think there is error in this: His Honor allowed matters elicited on a cross-examination and which were only admissible to weaken the force of the testimony in chief, to go to the jury for a different purpose.

The evidence in regard to the reports in Randolph County, were improperly submitted to the jury as elements from which they might make up an estimate of their own of the character of the plaintiff. That is not the way in which juries are informed as to character. They take the testimony of a witness who is supposed to be capable of reflecting in general terms the judgment of the public, and rely upon that. Any other mode would but multiply occasions for scandalous strife and prove impracticable in its results. A current report and general character are not equivalent and convertible terms. The one may be evidence of the other, but is not conclusively so.

While, therefore, the evidence of the report in Randolph might be properly brought out on cross-examination with a view to analyze and test the foundation of the witness's testimony, and might be used by the jury in estimating the weight of such testimony, it was not proper it should be used in any other connection. It was not proper it should be used as direct evidence of general character.

PER CURIAM. *Venire de novo.*

Cited: S. v. Laxton, 76 N. C., 218; *S. v. Brown, ibid.,* 225; *Lord v. Beard,* 79 N. C., 13; *S. v. Gee,* 92 N. C., 760; *S. v. Holly,* 155 N. C., 492.

Distinguished: S. v. Lanier, 79 N. C., 624.

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(359)

NATHAN HARRELL ET AL. v. SMITHY DAVIS.

A deed of gift of slaves made in 1823, to a married woman for her natural life, and after her death to the heirs lawfully begotten of her body, passes the absolute property in such slaves to her husband.

TROVER tried before *Osborne, J.,* at Spring Term, 1861, of GREENE.

This action was brought for the conversion of certain slaves, and the title of the plaintiffs depends upon the construction of the following deed of gift, viz.:

NORTH CAROLINA, GREENE COUNTY:

Know all men by these presents, that I, Lewis Harrell, of the State aforesaid and county of Lenoir, for and in consideration of the love and good will and natural affection I have and bear to my daughter-in-law, Laney Ayton Harrell, wife of Joseph Harrell, doth lend unto the said Laney Ayton Harrell one negro girl by the name of Nance, about sixteen years of age, and her daughter Phillis, about four months old, them and their increase to the said Laney Harrell, during her natural lifetime, and after her death, I give the said negro girl Nance and her daughter Phillis and their increase to the heirs of my daughter-in-law, lawfully begotten of her body, to them and their assigns forever. In witness whereof I have hereunto set my hand and seal, this 12 May, 1832.

LEWIS HARRELL [SEAL.]

Witness present:
Isaac Ward.

The plaintiffs are the children of Mrs. Harrell, wife of Joseph Harrell, who was living at the time of the making of the deed. They contended under the limitation contained in the deed to the heirs of Mrs. Harrell, lawfully begotten, that they are entitled to the slaves and their increase, she being now dead.

The defendants claimed title under a conveyance from Joseph Harrell, the husband of Laney Ayton Harrell, made in her lifetime.

By consent, the jury rendered a verdict for the plaintiffs, sub- (360) ject to the opinion of the court as to the legal effect of the deed of gift, and the court, on consideration of the point reserved, being of opinion with the defendant, set aside the verdict and ordered a nonsuit, from which plaintiff appealed.

Strong for plaintiffs.
J. W. Bryan for defendant.

PEARSON, C. J. The legal effect of the deed of gift is too plain to admit of argument. The absolute estate vested in Mrs. Harrell by the application of two well-settled principles of law, both of which exclude the plaintiffs from any benefit under the deed.

At the date of the deed, 1823, the common law was applicable as well to the transfer of slaves as of other personal property, and according to an established principle a life-estate consumed the entire estate, and a limitation over was inoperative, except in a will or deed of trust.

In the second place, it is clear that the "rule in *Shelley's case*" applies. So that the whole estate vested in Mrs. Harrell by the deed, and passed to her, and then to her husband *jure mariti.*

PER CURIAM. Affirmed.

CASPER HEDRICK v. HENRY WAGONER, EXECUTOR.

Where a parent put a slave into the possession of his child, with an intention to make it an advancement, but afterwards changed his mind and took it back, it was *Held*, that the law implied no obligation on the part of the parent to pay for keeping, feeding, and clothing the slave.

ASSUMPSIT tried before *Howard, J.*, at last Spring Term of DAVIDSON.

Joseph Wagoner, the defendant's testator, in 1839, placed in the (361) possession of his daughter, then a widow, a certain negro woman slave. The daughter was afterwards married to the plaintiff, who took charge of the woman and kept her and her children, of which she had several, until the year 1858, in the meantime feeding and clothing them. In that year the testator went to plaintiff's house and, complaining that plaintiff was about to run the slaves from the country, demanded, as the condition upon which he would let them remain, that plaintiff should give bond and security not to remove them, which the latter declined doing, and so the bailment terminated. Hedrick said he ought to have pay for his trouble, to which Wagoner replied, he would give him $50 if that would satisfy him. This the plaintiff refused. Wagoner then said, "Pick out two men, and whatever they say, I will pay you"; but this was never done, and shortly afterwards this suit was brought.

By the consent of the counsel on both sides, the question of damages was submitted to the jury, the court reserving the question of plaintiff's right to recover, with leave to set aside the verdict and enter a nonsuit, should the opinion of the court be adverse to plaintiff's cause of action. The jury found damages to the amount of $300.

Afterwards the court set aside the verdict and ordered a nonsuit, from which plaintiff appealed.

Kittrell for plaintiff.
Gorrell and McLean for defendant.

MANLY, J. The view taken of this case in the court below was clearly correct. It is the ordinary case of a slave put into the possession of a child and intended by the parent as an advancement, but with respect to which he changes his mind and takes the slave away.

The law implies no obligation in such a case on the part of the parent to pay for keeping, clothing, feeding, and the like. The negroes (362) were not kept upon any such expectation, much less upon any mutual understanding to that effect.

There was no legal or equitable obligation to allow them to remain under any circumstances, and the law will not raise an *assumpsit* to pay

damages for doing what the party had a right to do, nor will it interpolate upon the transaction a liability not contemplated by either party during its continuance. The principle of the case falls within *University v. McNair,* 37 N. C., 605.

The proposition on the part of defendant's testator to pay $50 (which was rejected by the plaintiff) was in furtherance of a negotiation for peace, and does not in any way affect the rights of the parties, and of the same character is the proposition (not carried into execution) to submit it to men. The judgment should be

PER CURIAM. Affirmed.

Cited: Everitt v. Walker, 109 N. C., 132.

JAMES H. HADEN v. NORTH CAROLINA RAILROAD COMPANY.

Where a hired slave was taken ill with typhoid fever, and the hirer, not knowing the nature of the disease, sent him on the railroad cars, in pleasant weather, 40 miles, to a place deemed more favorable to the patient, where he remained one day in proper hands without a physician being called in, and was then sent 3 miles further to the care of his master, it appearing that the ascertainment of the existence of that disease was a matter of skill, and not within the scope of ordinary intelligence, it was *Held,* that although the disease was aggravated by the treatment of the patient, yet that these facts did not show such a want of proper care and prudent management as to subject the hirer to damages for the death of the slave.

CASE for negligence in taking care of a slave, Dick, hired to defendant, tried before *Howard, J.,* at Spring Term, 1861, of DAVIDSON.

The plaintiff hired to the defendant a healthy, ablebodied slave (363) for the year 1858, without any special stipulation as to his management, to work as a section hand on the railroad. He was located on a section about six miles from Charlotte, and on Sunday previous to the time in question had been permitted to go on a train to see his master. On Wednesday morning he reported himself to the section master (defendant's agent) as too unwell to work, whereupon he was directed to go to the shanties, about two hundred yards from the road. In the evening the section master went to see him and found him sitting up. He complained of pain in the head and breast and said he had been taken with a headache on Monday. The master gave him a teaspoonful of laudanum and put a mustard plaster to his head. On next morning the slave was in bed, where he remained all day. He expressed

an anxiety to go home, and on the next morning was permitted to do so. He walked down to the road and went on the train to Holtsburg, forty miles from where he had worked, taking with him a note from the section master to station agent at Holtsburg, directing him to send word to the owner of the negro, who lived near there, to come for him. The train arrived about 10 o'clock that morning. The station agent first saw the slave after his arrival, standing near the track, very weak, and scarcely able to stand. He was coughing and spitting blood, and complained of severe pains in his head and breast. The station agent had him assisted to a shanty, and after getting through his business went to see him, and had some coffee made for him; he said he had not been able to eat for two days. About 11 o'clock the agent sent a messenger to plaintiff's mother, who lived about three miles off, to send for Dick. About sunset, a servant came with a buggy and took the boy to the house of Mrs. Haden, plaintiff's mother. Doctor Shemwell was sent for early that night, and found the patient with high fever, a low, quick pulse, and very much prostrated. It was a case of fully-developed typhoid fever, complicated with an affection of the liver, and he thought there was hardly a hope of the boy's recovery. Dr. Whitehead, of Salisbury, came to see the patient. He said he thought the case was well nigh hopeless, (364) but he did all he could for him. His testimony agreed with that of the other physician as to the symptoms. The slave died that night.

Dr. Payne testified that from the description of the slave's condition on Friday morning before he started for Holtsburg, a man of ordinary intelligence would not have been able to discover that he had typhoid fever, though a physician would.

The court submitted to the jury the question whether they believed that the condition of the slave when he arrived at Holtsburg was the ordinary developments of disease, or whether the disease was materially aggravated and the danger to the slave's life increased by the ride. He also submitted to the jury the question of damages, reserving, with the consent of both parties, the question of negligence. The jury found that the disease was materially aggravated and the danger increased by the ride. They assessed the damages to $800.

The court being of opinion that there was such negligence on the part of the defendant's agents, both in sending the slave by railroad and in not sending for a physician while the slave was at Holtsburg, and sending him off in the buggy, as to make them liable, gave judgment for the plaintiff, and the defendants appealed.

Kittrell for plaintiff.
B. F. Moore and Gorrell for defendants.

BATTLE, J. The question, whether the defendant was guilty of ordinary neglect in taking care of the slave hired from the plaintiff, was one of law, which his Honor properly undertook to decide; but upon the facts stated in the bill of exceptions, we do not concur in the opinion which he pronounced upon it. Ordinary neglect is the want of ordinary care, and that, as applied to a hired slave, signifies such a degree of care as a person of ordinary prudence would take of him under similar circumstances; *Heathcock v. Pennington,* 33 N. C., 640; (365) *Couch v. Jones,* 49 N. C., 402. Whether, where a slave is sick, the hirer is bound, without an express agreement to that effect, to procure, at his own expense, medical attendance for him, has been a subject of dispute in this State, and has not yet been settled by any direct adjudication, though it has been decided that if he call in a physician, he, and not the owner of the slave, is bound to pay the bill; *Haywood v. Long,* 27 N. C., 438. But supposing that the ordinary care which the hirer must take of the slave includes the duty of procuring the advice and assistance of a physician when necessary, as we are inclined to think it does, yet we cannot find any want of due care in the circumstances of the present case. The agents of the defendant may possibly not have acted for the best, but they seem to have been desirous of doing so, and we cannot but think the owner would have pursued the same course in a similar conjuncture of circumstances. It was testified by a physician that the agent under whom the slave was working at the time when he was taken sick could not have discovered that the disease was typhoid fever, and we are not informed that he knew or had any reason to suppose that the sending him on the cars to Holtsburg in the cool of the morning would aggravate the symptoms. After the arrival of the patient at Holtsburg, it was a question, admitting of some doubt, whether it was better to keep him at a country depot, at which we are not told that there were proper accommodations for a sick person, or to send him in the cool of the afternoon three miles to the house of the plaintiff's mother, where he was sure to have the kindness and care of a woman's ministrations. Supposing that the agent erred, was his error so obvious a one that a man of ordinary prudence would not have fallen into it? We certainly cannot say that it was. The standard of ordinary prudence and care is, from its very nature, an indefinite one, and the want of it is frequently very difficult to ascertain. In the present case we cannot say that the slave would probably have recovered had the course contended for on the part of the plaintiff been pursued, nor can we see any necessary consequence of his death from the manner in which he was treated. We are strongly inclined to the opinion that the disease was one of those which not infrequently seize the most hardy and vigorous (366)

persons and bring them to the grave in spite of the kindest attentions and the ablest medical skill.

Differing from his Honor upon the question of ordinary neglect, as applied to the circumstances of the present case, we must order

PER CURIAM. *Venire de novo.*

JOHN BARNES v. JOHN T. BARNES ET AL.

The provision of the act of Assembly passed 11 May, 1861, commonly called the "Stay Law," forbidding jury trials and trials before justices of the peace, and the issuing of executions and sales under executions and deeds of trust, held to be unconstitutional and void.

DEBT tried before *Heath, J.*, at last Spring Term of WILSON.

During the pendency of this case in the Superior Court the defendants pleaded, since the last continuance, the following act of Assembly:

AN ACT TO PROVIDE AGAINST THE SACRIFICE OF PROPERTY AND TO SUSPEND PROCEEDINGS IN CERTAIN CASES.

SEC. 1. 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 no execution of *fieri facias* or *venditioni exponas* founded upon a judgment in any suit or action for debts and demands due on bonds, promissory notes, bills of exchange, covenants for the payment of money, judgments, accounts, and all other contracts for money demands, or contracts for specific articles, other than those upon official bonds or in favor of the State, or against nonresidents, shall be issued (367) from the passage of this act, by any court of record or magistrate, for the sale of property, until otherwise provided by law; nor shall there be any sales under deeds of trust or decrees, unless by the consent of parties interested until otherwise provided by law.

SEC. 2. Where such executions have issued, and are now in the hands of officers, whether levied or not, the officer having such executions shall return the same to the magistrate or court from whence they issued, without further execution thereof, and executions upon the same judgments shall not issue again until the operation of this act ceases: *Provided,* That this act shall not be construed to discharge the lien which has already been acquired by the taking out such execution.

SEC. 3. There shall be no trials of any cases requiring the intervention of a jury, nor upon warrants before a justice of the peace in any suit or action for debts or demands due on bonds, promissory notes, bills of exchange, covenants for the payment of money, judgments, ac-

counts, and all other contracts for money demands, or contracts for specific articles.

SEC. 4. This act shall not apply to liabilities upon the part of public officers, either to the State or counties, corporations, or individuals, nor to State, county, or corporation taxes, nor to debts hereafter contracted, nor to debts due the State nor to debts due from nonresidents, nor to the annual collection of interest; *Provided,* that no note, bill of acceptance, or other obligation, the consideration of which is any debt or obligation at present existing, shall be held or considered as a debt hereafter contracted.

SEC. 5. The interest which has accrued since the first day of January, 1861, or which may hereafter accrue upon any bond or promissory note which was payable before the passage of this act, may be collected by action of debt or *assumpsit* before any justice of the peace, if the amount of interest sued for be within his jurisdiction, and if not, then in the county or Superior courts; *Provided,* however, that no warrant or suit shall be brought except for the interest of one year or more (always making an even number) by computing the time from the day when the interest upon such bond or promissory note began to (368) accrue.

SEC. 6. That any person who is about to remove his property out of the State without the consent of his creditors, shall not be entitled to the benefit of this act.

SEC 7. That all mortgages and deeds in trust for the benefit of creditors hereafter executed, whether registered or not, and all judgments confessed during the continuance of this act, shall be utterly void and of no effect.

SEC. 8. The time during which this law is in force shall not be computed in any case where the statute of limitations comes in question.

SEC. 9. That this act shall be in force from and after its ratification.

Read three times and ratified in General Assembly, this 11 May, 1861.

And on the cause being called for trial, defendant's counsel urged the provisions of the said act as a reason why he should not go to trial and why judgment should not go against him. His Honor overruled the objection and ordered the trial to proceed, and on a verdict being rendered for the plaintiff, passed a judgment and ordered execution, from which the defendants appealed to this Court. Questions involving the constitutionality of the Stay Law arose at this term on motions for the issuing of executions on judgments in this Court, which are all considered in the opinion of the Court.

B. F. Moore for plaintiff.
Strong for defendants.

PEARSON, C. J. The plea since the last continuance, by which the defendants claim the benefit of what is commonly called the "Stay Law," presents for our decision the question of the constitutionality of an act of the last session of the General Assembly, entitled "An act to (369) provide against the sacrifice of property and to suspend proceedings in certain cases." The same question was raised in every case decided at this term, where the judgment in the court below is affirmed, by motions for judgment, and that execution shall be issued.

Whether in the present condition of the country the statute be expedient, is a question of which we have no right to judge. Our province is to give judgment on the question of the constitutional power of the Legislature to pass the statute.

In the discharge of this duty we are relieved by the fact that a question of such importance is not now presented for the first time, so as to put upon us the responsibility of making a decision on the strength of our own convictions; for we find that the line has been plainly marked, in fact, "blazed out," by many previous adjudications, so that it can be easily followed, and all we have to do is to make our application of well-established principles.

The right and the duty of this Court to give judgment on the constitutional power of the Legislature in making statutes is established by so many elaborate opinions of this Court and of the Supreme Court of the United States, and of our sister States, as to make a further discussion of citation of authorities a useless attempt at a display of learning; so we assume that question to be settled.

Our opinion is that the statute under consideration, so far as it opposes the right of the plaintiff to judgment in the court below, or the motions for a judgment in this Court and for execution, is void and of no effect, because it is in violation of the Constitution of the United States and of the Constitution of the Confederate States, which in this respect is the same, and, also, of the Constitution of this State.

First, it is patent, by the face of the statute, that it does "impair the obligation of contracts." This is settled. *Jones v. Crittenden,* 4 N. C., 55. In that case the argument is exhaustive, and we only add "we concur in it."

(370) It is suggested that this case is distinguishable on the ground that when the statute in question was passed the country was in a state of established revolution, or in a state of "contemplated revolution" in reference to which the Legislature acted, which revolution has been carried out and consummated by a subsequent ordinance of the Convention, by force of which all acts done in reference to and in anticipation of the revolution are ratified and confirmed as incidents thereto.

This proposition, however much weight it may be entitled to in a

political forum, cannot, by reason of its generality, be appreciated by a legal tribunal, and a mind accustomed to the investigation of questions of law "grasps at it as at a shadow." But to avoid a complication of our question, we pass over the legal difficulty of the maxim, "That which is void cannot be confirmed," and let it be admitted that on 20 May, when the ordinance of the Convention by which this State was withdrawn from the Government of the United States went into effect, the statute under consideration was in full force and effect so far as restrictions by the Constitution of the United States were concerned, in the same manner and to the same extent as if the State of North Carolina had never been a member of or in any way connected with the Government of the United States, so as to bring up the naked question, What was the legal effect of the ordinance adopting the Constitution of the provisional government of the Confederate States, made on the same day, but some few hours after, the ordinance above referred to? The ordinance afterwards passed by the permanent Convention was adopted. Here was a period, say, of seven hours, during all of which time the State of North Carolina, in reference to her connection either with the United States or with the Confederate States, was absolutely sovereign, and the *statute in question*, by the admission made for the sake of argument, was in full force and effect. Is it not clear, to the certainty of demonstration, that the effect of the ordinance adopting the Constitution of the Confederate States, which in express words provides, "No State shall pass any law impairing the obligation of contracts," was to abrogate or make void and of no effect this short-lived statute, on the ground that it was inconsistent with and in violation of the (371) Constitution then adopted?

The position that the words of the Constitution are "No State shall pass any law," using the word in the future tense, therefore any law which had already passed, although it impaired the obligation of contracts, was to be allowed to continue in operation, is a play upon words, and is not worthy of the gravity of the subject.

The evil which the Constitution intended to guard against at present was not the act of passing the law, but the effect incident to the operation of such a law, and in respect to this, whether it was passed before or after the adoption of the Constitution was immaterial. In illustration, suppose during its unfettered existence of seven hours the State had passed a law making tobacco a legal tender in the payment of debts: after the adoption of the Constitution of the Confederate States, would tobacco have still continued to be a legal tender? Most assuredly not, for the time of the passage of the law was immaterial. If all laws opposed to the express provisions of the Constitution then adopted were to continue in operation because they had been passed beforehand,

all of the acts of the General Assembly should have been subjected to rigorous scrutiny before the State was admitted into the Confederacy.

It is a well-illustrated principle of constitutional law that upon the adoption of a new Constitution, or an amendment of the Constitution, any and all laws previously existing are *ipso facto* annulled, and become void as far as they are opposed to and conflict with the new or amended Constitution—on the same reason that the statute repeals all statutes previously enacted inconsistent with its provisions, and a will revokes all former wills, or an order from headquarters countermands one previously given, so far as it conflicts with its meaning and intention and obvious policy.

(372) Second. But, apart from the Constitution of the Confederate States, we are of opinion that the statute is in plain violation of the Constitution of the State, on two grounds:

1. "The declaration of rights" fixes the principles of free government by affirming, in section 12, "No free man ought to be deprived of his life, liberty, or property but by the law of the land."

It is settled that, by force of this section, the Legislature has not the power to deprive A. of his horse and give it to B., or to deprive E. of his office and give it to C., or D. of his debt and give it to F.—in other words, the Legislature cannot deprive a citizen of his vested rights of property. See *Hoke v. Henderson,* 15 N. C., 1, and the cases there cited. So the question is, Can the Legislature deprive a citizen of his debt, which is a vested right, and a part of his estate or property, in the broad sense in which the word is used in the section above cited, including all rights of person and rights of property, either by conferring the right on a third person or by releasing it to the debtor, or by taking from the creditor the right to have a judgment and execution for his debt according to the course of the courts? Manifestly, if a creditor is deprived of his right to have judgment and execution for his debt, he is thereby deprived of the right to his debt, which consists in his right to enforce payment, and the ground of hope that this deprivation is not to be absolute and perpetual, but only "until otherwise provided by law," which is held out by the wording of the statute, does not at all vary the question of power, because the power to deprive one of his debt for an indefinite time is the same as the power to deprive him of it absolutely, and, so far as the creditor is concerned, it makes no difference whether the debt be given to a third person or be released to the debtor; the violation of the rights of the creditor is the same, and the power that can do the one can do the other.

2. The statute is unconstitutional because it violates the fourth section of the "declaration of rights,": "The legislative, executive, and

Supreme judicial powers of government ought to be forever separate and distinct from each other."

Suppose the Legislature should pass a statute that the Governor, in the recess of the General Assembly, shall not embody the militia of the county of Rowan, or shall not embody the militia of the (373) State, or shall not do any act of his office, would "the legislative and executive powers of the government be kept separate and distinct from each other?" Or, suppose the Legislature should pass a statute, that the Supreme Court shall not give judgment and issue execution in *Barnes v. Barnes* (this action), or shall not give judgment and issue execution in any actions for debts due on bonds, promissory notes, etc., where in the trial of the case in the court below the intervention of a jury was required, or shall not give judgment and issue executions in any suit for action founded either on contract or tort brought before it by appeal from the Superior Court, would the legislative and supreme judicial powers of government be kept separate and distinct? In other words, would not the assertion and exercise of this power on the part of the Legislature destroy the independence of the executive or supreme judicial powers of the government and subvert the government established by the Constitution by centering all powers in the legislative department, and making a despotism, instead of a free government where the powers are divided and given to separate departments, each acting in its appropriate sphere as a check on the other?

Such, it seems to us, would be the result of the concession of the power assumed by the Legislature in the passage of the statute under consideration.

The result is not avoided by the fault that the restraint on the courts is confined by the statute to actions for debts and matters of contract, and that it is not absolute but merely "until otherwise provided by law"—for it is a question of power. If the Legislature has the power to impose this restraint on the courts until otherwise provided by law, it has the power to do so without the provision to remove the restraint when we have better times and it shall be easier for men to pay their debts; and, if it has the power to impose this restraint on the courts in respect to matters of contract, it has the power to extend it to matters of tort, and then a man who is stronger than I, may take (374) away my negro or my horse, or drive me out of my house, and the laws of my country will give me no redress, because the temple of justice is closed. A power to suspend or to abolish the administration of justice cannot exist in a free government. Without law and tribunals to administer it, there can be no government; it is anarchy, which is worse than despotism; and yet the power involved in the passage of the statute necessarily and by logical deduction leads to that result.

If there be such a power in the Legislature, we are, with all our boasted free institutions, infinitely behind the monarchy of England in respect to the protection of our rights of person and rights of property. Blackstone, the learned commentator on the Constitution and laws of England, in Vol. I, page 102, says, "A third subordinate right of every Englishman is that of applying to the courts of justice for the redress of injuries." Since the law in England is the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject and the law be duly administered therein. The emphatic words of Magna Carta, are these, "*Nulli negabimus aut differemus rectum vel justitiam,* and therefore every subject for injury done to him, *in terris, in bonis, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, fully without sale, freely and without any denial and speedily without delay."

Upon the whole, we are satisfied that without reference to the Constitution of the United States or to that of the Confederate States, our State Constitution gives ample protection to its citizens against all encroachments on the part of the Legislature upon the rights of property, and the reason why such prominence has been given to that clause of the Constitution of the United States which prohibits laws impairing the obligation of contracts is that the courts found there a provision, expressed in direct and positive terms, upon which it was more convenient to put their decision than it was to refer to fundamental (375) principles embraced in the Constitutions of the several States, although not expressed in words so direct and positive; for, in truth, no government can be free, unless the Constitution provides for the protection of property, the due administration of the law, and the independence of "the supreme judicial department." Let the several motions for judgment and executions be allowed.

PER CURIAM. Affirmed.

Cited: Lipscombe v. Cheek, 61 N. C., 333; *Jacobs v. Smallwood,* 63 N. C., 117; *Hill v. Kessler, ibid.,* 451; *Harrison v. Styres,* 74 N. C., 294; *Lyon v. Akin,* 78 N. C., 261; *Varner v. Arnold,* 83 N. C., 207; *Morrison v. Watson,* 101 N. C., 346; *Russell v. Ayer,* 120 N. C., 200; *Wilson v. Jordan,* 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215; *Board of Education v. Henderson,* 126 N. C., 694.

DOE ON THE DEMISE OF JOHN GARDNER ET AL. v. JAMES KLUTTS.

The declarations of a woman made shortly after the birth of a child that it had been born alive, are not competent to prove her husband's title to an estate by the curtesy.

EJECTMENT, tried before *Osborne, J.*, at Spring Term, 1860, of ROWAN.

The lessors of the plaintiffs were admitted to be the heirs-at-law of ——— Klutts, lately the wife of James Klutts, the defendant, who claimed as tenant by the curtesy. To establish his title, the defendant proved by a witness that she was called in as a midwife to Mrs. Klutts on her confinement; that when she arrived she found that the woman had been delivered of a child, which was then dead. The defendant offered to prove by this witness the declarations of the mother to the effect that the child had been born alive; that it had cried and survived its birth a few minutes; and that the conversation occurred shortly after the birth of the child. The evidence was objected to and excluded by his Honor, and the defendant's counsel excepted.

Verdict and judgment for plaintiffs. Appeal by defendant.

Fleming and Kerr for plaintiffs. (376)
Boyden and B. R. Moore for defendant.

PEARSON, C. J. A wife is not a competent witness for or against her husband; *S. v. Jolly,* 20 N. C., 108. It follows that her declarations cannot be evidence for or against him; otherwise, more weight is given to what she says when not on oath than to what she would say on oath, which is absurd.

The declarations in this case were made shortly after the birth of the child and, we will suppose, as soon as the midwife arrived, at which time the act of delivery was over—"a fact accomplished." So, whether the child was born alive or dead could in nowise affect or have any bearing upon that fact. The suggestion, therefore, that this declaration of the wife was admissible as a part of the *res gestœ* is not supported.

The position that the declarations of the mother in respect to her child is "natural evidence," and admissible on that ground, is also untenable.

This kind of evidence is not based upon the competency of the witness, for it is the evidence of facts, as distinguishable from the testimony of witnesses, as is said in *Biles v. Holmes,* 33 N. C., 16. "The actions, looks, and barking of a dog are admissible as natural evidence upon the question as to his madness; so the squealing and grunting or other

expressions of pain made by a hog are admissible upon a question as to the extent of an injury inflicted on him. This can in no sense be called the testimony of a hog or dog"; so the declarations and looks of a slave are admissible upon a question as to the condition of his health; *Roulhac v. White,* 31 N. C., 63; *Wallace v. McIntosh,* 49 N. C., 434. But the declaration offered as evidence in this case clearly does not fall within the principle of natural evidence. Instantly after the delivery the existence and presumed individuality of the child was distinct from and had no further connection with the mother. So, although expressions of pain and declarations showing her own bodily condition, on the part of the wife, would have been admissible if material to the issue, (377) yet what she said in regard to the condition of the child was collateral and had no natural guaranty of truth. It may have been the voluntary expressions of a mother's grief; but, on the other hand, the declaration may have been made under the influence of her husband, whose estate as tenant by the curtesy depended upon the fact of the child's having been born alive. There is

PER CURIAM. No error.

DOE ON THE DEMISE OF THOMAS D. WINCHESTER v. DAVID N. REID.

Where a father, who was largely indebted and insolvent, made a deed for his land to his son, who was under age, and received from him money, which he had earned as day wages, in part payment, and his note for the remainder of the price, such deed was held to be voluntary and void as against creditors.

EJECTMENT, tried before *French, J.,* at last Spring Term of UNION.

The plaintiff's lessor claimed title under a purchase at sheriff's sale, made in 1843 by virtue of judgments and executions against Robert Porter in favor of H. M. Houston and others, creditors of the said Robert.

The defendant claimed title to the premises in controversy under a deed made by Robert Porter, dated 25 October, 1842, to Hugh Porter, who conveyed to David Moore, and he to his daughter Clarinda, the wife of the defendant Reid.

John N. Porter, a witness for the defendant, testified that he was the son of Robert Porter and the brother of Hugh Porter, another son of the said Robert; that at the time the said deed was made by Robert Porter to Hugh Porter the latter was over twenty years of age, but under twenty-one; that he (Hugh) paid his father $250 in money and gave his note for $50, the residue of the purchase money; that the said

Hugh, prior to the execution of this deed, had worked at a (378) gold mine for some two or three years at from seventy-five cents to a dollar per day, and that he had no property other than these earnings; that after the deed was made it was agreed between Hugh and his father that the latter, with his wife, might live with Hugh on the premises until he (Robert) could get a place for himself, or until Hugh might sell the land; that Hugh took immediate possession and worked the land for four years, his father and mother living with him, at the end of which time he sold to Moore. This witness gave it as his opinion that the land was not worth more than $300. Another witness stated that the land was worth $400.

It was in evidence that the debt to Houston, who was the plaintiff in one of the executions under which the land was sold, was in existence at the time the deed to Hugh bears date (October, 1842), and that, independently of the land in question, the said Robert was insolvent.

The counsel for the plaintiff contended that the facts of the relation of the parties, the minority of the son, that only $250 was paid for land worth between $300 and $400, the note for $50 having no validity, the possession of the land by the debtor after the sale and his insolvency rendered the deed fraudulent and void, and asked the court so to instruct the jury.

The court instructed the jury that if John N. Porter was not believed, there was a presumption of fraud, and this fraud was not rebutted, so that the plaintiff would be entitled to a verdict; that if John N. Porter was believed, the estate of Robert Porter in the land passed by the deed, unless they were satisfied from the evidence that there was fraud, of which, in that event, they were the sole judges. Defendant's counsel excepted.

Verdict and judgment for defendant, and appeal by plaintiff.

Wilson for plaintiff.
No counsel for defendant.

PEARSON, C. J. What amounts to fraud is a question of law. (379) His Honor erred in declining to explain to the jury what is considered, in law, such a fraud as makes a deed void against creditors, and in telling them, on the contrary, that "if John N. Porter was believed the deed was valid, unless they were satisfied that there was fraud, of which, in that event, they were the sole judges," which was saying, in effect, that if John N. Porter was believed they should find for the defendant.

A father is entitled to the services of his child until he arrives at the age of twenty-one; *Musgrove v. Kornegay,* 52 N. C., 71. It is true, a creditor cannot make his debtor work in order to pay the debt, nor can

he force him to make his children work, or sell under execution the valuable interest which a father has in the services of his child, or which a master has in the services of an apprentice. But if, in fact, a child does work and earn wages, the proceeds of his labor belong to his father, and if the father invests the money so earned in the purchase of land, taking the title in the name of the child, the father being insolvent, his creditors can subject the land to the payment of their debts; *Worth v. York,* 35 N. C., 206. Therefore, when Hugh Porter worked at the gold mine, his wages belonged to his father, and he was bound, as an honest man, to have taken the money and applied it to the payment of his debts, instead of attempting, under the color of this money, which was his own, to pass his land into the hands of his son, so as to secure a home for himself and wife and put the land out of reach of his creditors. A father, who is not in debt or who retains property "amply sufficient to pay his debts," may give his child the proceeds of his labor before he is twenty-one years of age. So he may give him money or land. But if the father be insolvent, that alters the case, for the law requires men "to be just before they are generous." So he has no right to give his son money, although his son may have earned it as day wages, and if he pretends to sell him land for this money, it is, in legal effect, handing to the son the father's own money, so as to let him hand it back (380) again in the presence of witnesses as the consideration of the deed. In other words, the deed is voluntary and void against creditors.

So, if a father who is about to fail conveys property to an infant child and takes his notes for the consideration, the conveyance is treated as voluntary and void against creditors, for the child may avoid his notes, and therefore, in legal effect, they amount to nothing; *Hammond v. McCorkle,* 47 N. C., 444.

In the case under consideration, the defendant's witness John N. Porter proved that his father was insolvent; that his brother Hugh was under age and had no property; that he had worked at the gold mine two or three years, by which he earned seventy-five cents or a dollar a day, and handed his father $250 in money and gave his note for $50, the residue of the price agreed on, and that his father and mother continued to live on the land with him until he sold it.

Upon this evidence, we think the plaintiff was entitled to the instructions prayed for in respect to the question of fraud. Indeed, his Honor could not have more accurately and aptly conveyed to the minds of the jury the idea of what, in law, amounts to fraud against creditors than by telling them that the evidence, if believed, raised a presumption of fraud, and there being no evidence to rebut this presumption, it was their duty to find the deed fraudulent. As a precedent for a charge of this character, several recent as well as older cases would have fully

sustained him, *e. g., Jessup v. Johnson,* 48 N. C., 335; *London v. Parsley,* 52 N. C., 313, in which cases, this direct and pointed mode of instructing a jury on questions of fraud, as upon a demurrer to evidence, is approved and recommended.

PER CURIAM. *Venire de novo.*

Cited: McCanless v. Flinchum, 89 N. C., 375; *Helms v. Green,* 105 N. C., 259; *Grant v. Grant,* 109 N. C., 417; *Banking Co. v. Whitaker,* 110 N. C., 348; *Hobbs v. Cashwell,* 152 N. C., 191.

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(381)

DOE ON THE DEMISE OF JOSIAH COWLES v. W. H. CARTER.

Laws 1856, chapter 14, does not authorize a defendant in ejectment where the plaintiff has filed an affidavit that such defendant entered as his tenant, to plead without giving security for costs or filing an affidavit that he is unable, on account of poverty, to do so.

EJECTMENT, pending in YADKIN, before *French, J.,* Spring Term, 1861.

The action was brought in the county court. The declaration having been served on the defendant Carter, it was returned to the first county court thereafter, whereupon he filed an affidavit that he was unable to give security for the costs of the suit on account of his poverty, and filed a certificate of his counsel that, in their opinion, he had a good defense. The plaintiff, at the same time, filed an affidavit stating that Carter had entered as his client, and that his tenancy had expired before the commencement of the suit, and moved the court to require the defendant to file a bond for the costs of the suit and to make affidavit that his tenancy had not expired, before being allowed to plead, which motion was refused and the defendant allowed to plead. The plaintiff moved the court to call the casual ejector and that he might have judgment by default. This motion was also refused, and the plaintiff prayed an appeal, which was granted. In the Superior Court the same motions were made and refused, and the appeal from the county to the Superior Court was dismissed, whereupon the plaintiff appealed to this Court.

Clement for plaintiff.
No counsel for defendant.

MANLY, J. We do not concur with the court below in its interpretation of the statute of 1856, ch. 14. Instead of taking away any security

for the rights of plaintiffs, it adds another to those then existing— (382) or, rather, it extends a part of the provision made for a class of ejectment cases in Rev. Code, ch. 31, sec. 48, to the action generally. It is an unusual provision of our law to require defendants to give security for costs. Plaintiffs are only so required. When, therefore, the Legislature concluded to put defendants in ejectment upon the same footing with plaintiffs in this respect, it was but fair and proper they should be equalized in other respects, and be allowed, in case of poverty, to defend without giving security. This is all, as we suppose, that was intended by the act of 1856. It was to provide security for costs from defendants in ordinary cases of ejectment, and not to interfere with the legislation in respect to such actions when between landlord and tenant. It is hardly possible to suppose, if so material an interference had been intended, it would have been left by the Legislature to an implication uncertain in its nature.

If the statute of 1856 had simply required defendants in ejectment to secure costs without adding the proviso in favor of poor persons, it would not have touched section 48, chapter 31, Rev. Code, and the right of the landlord to require a bond for damages as well as costs would have remained. This would be because of a manifest intention to legislate in the last enactment for a class of cases not provided for in the former. It follows, if that restricted application of the statute of 1856 would have been made, had it been left without the proviso, the proviso itself must also be understood in the same limited sense as held to apply to ordinary cases of ejectment, and not to the action between landlord and tenant.

This Court being of opinion, then, that the statute of 1856 does not apply to actions of ejectment between landlord and tenant, holds, consequently, it was erroneous in the court below to allow the defend- (383) ant to plead without the affidavit and bond required by the Rev. Code, ch. 31, sec. 48.

PER CURIAM. Reversed.

HUGH McLEAN v. NEILL McDUGALD, ADMINISTRATOR.

1. It is no objection to the indorsement of a bond that the presumption of payment from the lapse of time was applicable to it, when the indorsement was made.

2. An assignment, without consideration, passes the title, and where such assignment was made to evade the law regulating the *venues* of action, the objection, to be good, must be taken by plea in abatement.

DEBT on bond tried before *Saunders, J.*, at last Spring Term of HARNETT.

The pleas were *non est factum,* payment and no assignment. The following case agreed sets out the facts:

The note on which the action was brought purported to have been executed by the defendant's intestate more than ten years before the suit was brought. After ten years from the execution of the note elapsed, it was assigned by the payee therein by indorsement and transmitted to the indorsee by the hands of a third person; the indorsee assigned the note to plaintiff by indorsement and delivery, and the suit was then commenced.

The plaintiff proved the execution of the note, and that it had not been paid. The assignment to the first endorsee was made without consideration, and in order to enable the plaintiff to sue in Harnett County, the defendant residing in Cumberland. It was agreed that if the foregoing facts amounted to a transfer to the plaintiff of the legal interest in the note, there should be a judgment in favor of the plaintiff for $800, of which sum $285 is principal. Otherwise, there should be judgment for the defendant. The court gave judgment for the plaintiff, and the defendant appealed. (384)

N. McKay for plaintiff.
Phillips for defendant.

MANLY, J. We concur with his Honor below in his opinion upon the case agreed. The objection to the validity of the assignment seems to be two-fold: first, because of the presumption of payment which attached to it, when assigned; secondly, because of the purpose thereby to evade the operation of law as to jurisdiction. Neither ground is tenable.

1. The lapse of time is not a nullification of the bond, as cancellation would be, but is only presumptive evidence of payment. The statute of presumption is of no greater force or effect than a receipt upon the paper would be. In both cases, the fact of payment being *prima facie* only, and questionable, an indorsee would take title subject to the inquirers of fact.

2. The indorsement being good to pass the title and only invalid to give a fraudulent venue to the action, it will follow that the second ground of objection is to the legality of the venue. This must be taken advantage of by plea in abatement, Rev. Code, ch. 31, sec. 37. An indorsement without consideration is effective to pass title, simply. Upon the supposition that the purpose to evade the law regulating the venue of actions is unlawful, the indorsement would be invalid for such purpose, and the right of venue would consequently remain unchanged.

If the action had been brought in the county of Cumberland, where the defendant resides, it might have been brought, we take it, in the name of the indorsee, and, if so, this is a test which shows that the principle of the ground is the illegality of the venue.

PER CURIAM. Affirmed.

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(385)

JAMES T. HUNTER v. WILLIAM ANTHONY.

Where an instrument is susceptible of two contructions, by one of which it will take effect and by the other it will be inoperative for the want of a subject-matter to act on, it shall receive that construction by which it will take effect; for it cannot be supposed that the parties intended to do a nugatory act.

ASSUMPSIT, tried before *Howard, J.*, at last Spring Term of ORANGE.

The plaintiff declared on the following order, in writing, and the acceptance thereon, to wit:

MR. WILLIAM ANTHONY:—Please pay to James T. Hunter, constable, all the executions in his hands for collection as they come due against me and brother; this 4 March, 1857. J. W. HOLT.

Indorsed thereon was the following: "The within order this day accepted by William Anthony; 4 March, 1857.

"WILLIAM ANTHONY."

The plaintiff then offered in evidence sundry justices' judgments in favor of divers persons against J. W. Holt and brother, Sterling W. Holt, rendered upon warrants which had been served by the plaintiff as constable, and also showed that executions had issued on the same, which had been stayed by the parties, and that the papers containing these judgments, executions, and stays of execution were in his hands at the date of the order, to wit, on 4 March, 1857. The aggregate amount of these papers in the hands of the plaintiff was $725.85.

The defendant objected to the admission of these papers because, as he insisted, they were not executions at the date of the order and the date of his acceptance, and called on the court to instruct the jury that they did not sustain the plaintiff's cause of action.

(386) His Honor charged the jury that if they believed from the evidence that the judgments and executions issued and stayed as above stated were in the hands of the plaintiff at the time the order

was given, and that the order was intended to apply to them, and was so accepted by the defendant, they should find for the plaintiff. The defendant's counsel excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Phillips and Norwood for plaintiff.
Graham for defendant.

PEARSON, C. J. The papers which were in the hands of the plaintiff can be made to fit the description given in the acceptance of the defendant by aid of the maxim, "*Ut res magis valeat quam pereat,* which means that instruments should be liberally construed, so as to give them effect and carry out the intention of the parties, and when an instrument is susceptible of two constructions, one by which it will take effect and the other by which it will be inoperative for the want of a subject-matter to act on, it shall receive that construction which will give it effect. This rule is based on the presumption that when parties make an instrument the intention is that it shall be effectual, and not nugatory.

"Executions in the hands of an officer," taken literally, would apply to process in his hands which was then in a condition to be acted on, and would not fit judgments in the officer's hands on which execution had been stayed; but by aid of the words "as they come due," we see that the word "executions" is not to be taken literally, for the papers to which reference was made were some that were about to become due at different times; and taking the whole description, they as aptly point out judgments on which were entered "executions issued and stayed" as any other terms of description that could have been used.

The suggestion that these words ought to be considered surplusage has nothing to support it. That is sometimes done in order to give effect to an instrument in which repugnant words are used, but is never applied for the purpose of defeating an instrument. There is (387)

PER CURIAM. No error.

Cited: Pass v. Critcher, 112 N. C., 408; *Torrey v. Cannon,* 171 N. C., 521.

PRISCILLA DOWELL v. RICHARD JACKS ET AL.

Where a writ of lunacy was issued by a county court, and a trial had before a jury, and a verdict rendered finding the subject party *non compos*, which was confirmed by the court issuing the writ, and a guardian appointed, all in the absence of the said party and without notice to such party, and it appeared that the party immediately applied to a judge for a *certiorari*, which was refused on an erroneous ground, and the party under advice of counsel instituted a suit in equity, which failed for the want of jurisdiction, and the party swears to merits, it was *Held*, on a petition setting forth these matters, that the petitioner was entitled to a *certiorari* to have the case taken into the Superior Court.

PETITION for a *certiorari*, heard before *French, J.*, at last Spring Term of WILKES.

The facts of the case are stated so fully in the opinion of the Court that it is deemed entirely unnecessary to set them forth in this connection.

His Honor in the court below decided that the *certiorari* theretofore issued was proper; that the petitioner was entitled to a new trial, and ordered the case to be put on the trial docket; from which orders the defendants appealed.

Barber and Mitchell for plaintiff.
Boyden for defendants.

MANLY, J. We are at a loss to conceive how any one having ordinary respect for the rights of others could resist the prayer of the petitioner. We are quite sure it could not be done by any one having the compassionate feelings which should characterize a kinsman or guardian for the person of an old, feeble, and distressed woman. (388)

The facts of the case appear to be these: At the July sessions, 1859, of Wilkes County court, upon the application and petition of the defendant Jacks, an inquisition of lunacy was held in respect to the petitioner, and she was declared at that term to be *non compos mentis*. This was done in the absence of the petitioner, without notice to her of the proceedings, and without any opportunity being offered the jury to examine her personally touching her alleged insanity.

As soon as she had information of this transaction in the county court, a petition was laid before a judicial officer of the State for a writ of *certiorari*. This writ was refused on the ground that there was no appeal and no right to a *certiorari* in a case of the kind, but that the application must be made to the county court for another inquisition, whereby the verdict in the former one might be reversed, or to a court of equity, which was supposed to have a jurisdiction in such matters.

A suit in equity was accordingly brought to the Fall Term, 1859, of the court for Wilkes, and after remaining there until the Spring Term, 1860, was transferred to this Court at Morganton. It was there held by us that the courts of equity for North Carolina had no jurisdiction in cases of inquisition of lunacy; *Dowell v. Jacks,* 58 N. C., 417.

This petition for a *certiorari* was then preferred, the *certiorari* ordered, and returned into Wilkes Superior Court at its Fall Term, and, upon a hearing in that court, the verdict of the jury and the judgment of the court confirming the same were set aside and a new trial granted, and the case ordered on the trial docket. The appointment of guardian was also revoked, and a *supersedeas* ordered to issue to him. From these orders the defendant Jacks appealed.

We regard as of no importance, connected with the merits of the petitioner's case, that attorneys were employed by a friend to attend, in her behalf, to the inquisition of lunacy at July Term, 1859. She had no notice, was not legally represented, and, what is of still greater importance, was not present, to be seen and examined by (389) the jury.

The question, then, is whether under these circumstances, she is entitled to a *certiorari* and, upon the merits of her case, to a reversal of the judgment of the county court and to a new trial. We are clearly of opinion she is. Although at one time the matter seems to have been regarded as doubtful, it is now conceded that there is a right of appeal from the county court to the Superior Court upon the inquisition of lunacy. A *certiorari* is a substitute for an appeal where the right of appeal has been lost by accident or fraud, and it will be entertained as such in all cases where the complaining party has by the contrivance or culpable inaction of the other been deprived of the opportunity to appeal—where the complainant shows probable merits, and has been guilty of no unreasonable delay in preferring his petition.

The petitioner's case, tested by all these requisites, is a proper one for relief. We have already noticed her absence and want of notice as a sufficient excuse for not appearing. This was by the culpable omission of the person upon whose motion and under whose management the inquisition was conducted. For although notice and the presence of the party to be affected are not indispensable to give validity to the judgment of the court (*Bethea v. McLemore,* 23 N. C., 523) yet, the person whose liberty and property is to be taken away should be there. It was the duty of the defendant Jacks to notify the petitioner to be there, and the action of the court without either presence or notice entitle her to a rehearing and to a reversal of the former judgment of the court, if found against truth and right.

As to merits, it is only necessary for us to say that the allegations of the petition set them forth sufficiently and the affidavits abundantly support the allegations.

There has been no delay attributable to the petitioner; as soon as she heard of the judgment had in the county court against her she commenced such proceedings as she was advised were proper. She has continued to prosecute these in some shape or other with the utmost (390) diligence, and any delay which has attended the attainment of her rights, has been attributable to the inherent infirmity of human tribunals and judgments, and not to any lack of zeal and activity in the pursuit. The delay, therefore, is not in the way of the present assertion of her rights.

The appointment of J. O. Martin, guardian, was incidental to the proceedings instituted by Jacks in the county court of Wilkes. Should the verdict and judgment rendered thereon, upon the petition of Jacks be reversed on *certiorari,* the connection of Martin with the petition may be abrogated incidentally. A direct proceeding against him for such purpose is not necessary. All that is necessary is notice, and he already has that by reason of his connection with the petitioner.

We repeat that the treatment of the unfortunate subject of this legal strife has been harsh and calculated to alarm and distress the nervous temperament of persons at her time of life. She should have a fair investigation of her rights and, if found a proper subject for custody, should be put into kind and gentle hands; otherwise, be permitted to go free and do what she will with her property.

The judgment of the Superior Court is correct, and should be

PER CURIAM. Affirmed.

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(391)

ELISHA GIBBS v. J. R. WILLIAMS.

(Construction of a written instrument upon its peculiar phraseology and concomitant circumstances.) Where one agreed to become surety for another, on condition that the creditor should bring suit within a reasonable time, and he did so shortly after the expiration of the credit, but was nonsuited on the ground of not appearing by counsel or otherwise, it was *Held*, that another suit brought immediately after such nonsuit was sustainable.

ASSUMPSIT, tried before *French, J.*, at last Spring Term of DAVIE.

The suit was brought in the county court against the defendant and one William F. Miller, and the plaintiff failing to recover against Williams, appealed to the Superior Court as to him. The declaration

was in two counts: first, on the following written agreement executed by the defendant:

MR. ELISHA GIBBS:—I will stand as security for William F. Miller for one hundred and twenty-five dollars until 25th of this instant, and if he fails to make payment by that time, and you fail in commencing suit against both of us at the time above specified, I will then be released as security. This 7 January, 1860. J. R. WILLIAMS.

Second count, for five beeves delivered to W. F. Miller by the plaintiff.

The plaintiff proved that during the second week of January, 1860, William F. Miller delivered to him the above written agreement of J. R. Williams, upon which plaintiff delivered to Miller five beeves of the value of $125.

It was further proved that the plaintiff sued out a writ against the defendant and W. F. Miller, which was duly executed on them, and returned to March Term, 1860, of Davie County court, the same being the first court held in said county after 25 January, 1860, upon which the plaintiff was nonsuited for the reason that he failed to employ counsel at that court. This writ was issued after 25 (392) January.

The writ in the present suit was 5 May, 1860.

The defendant's counsel resisted plaintiff's right to recover on the ground that he had failed to bring suit on 25 January, 1860, and the court intimating an opinion that the objection was valid, the plaintiff took a nonsuit and appealed.

T. J. Wilson for plaintiff.
Clement for defendant.

BATTLE, J. The decision of the case depends upon the construction of the instrument of writing set forth in the bill of exceptions. The circumstances under which that instrument was given by the defendant Williams must be considered in order to arrive at a proper understanding of its meaning. It was presented to the plaintiff by the defendant Miller at the time when the latter was purchasing from the plaintiff a number of beef cattle. Of course then it must have been intended as a security to the plaintiff in the credit which he was giving to Miller; for if the purchase were for cash, the instrument was entirely unnecessary. In the light of a security, why was a time fixed for its termination? Certainly because the credit was to expire at that time, for in no other way can we affix any sensible meaning to it. Understood in that sense, the plaintiff could not sue Miller before nor on that day;

neither could he, according to the terms of the agreement, sue the other party until he was prepared to sue both. When was he to sue them? The answer is within a reasonable time after the expiration of the credit; and a writ returnable to the next term of the court in which process was duly executed after that time must, we think, be deemed a reasonable time within the contemplation of the parties.

But it is said that such writ was of no avail because the plaintiff, by his neglect in not employing counsel, was nonsuited. That is true, but the nonsuit was on the motion of the defendants, and they cannot now be heard to object to what was done at their instance. This latter objection does not seem to have been relied upon by the defendant Williams in the court below and we only notice it because, from (393) the facts stated, it has been presented and has been urged in the argument before us.

His Honor erred in the construction which he put upon the written instrument. The judgment of nonsuit is

PER CURIAM. Reversed.

J. L. ROUGHTON AND WIFE v. ISAAC T. BROWN.

1. **A writ of error *coram nobis* lies from any court of record returnable to itself, and not from a superior to an inferior court.**
2. **Only the parties to a judgment as to whom there is error of fact need join in a writ of error *coram nobis*.**
3. **The husband of a *feme* covert against whom judgment has been taken must join with her in an application for a writ of error *coram nobis*.**

PETITION for a writ of error *coram nobis* heard before *French, J.*, at last Spring Term of YADKIN.

The petition was filed in the name of the husband and wife in the county court of Yadkin, upon due notice given, praying for a writ of error to reverse a judgment rendered against the petitioner Amelia and others at a former term of the said court, upon the ground that she was at the time of the rendition of such judgment a *feme covert*. The county court granted the prayer of the petition and ordered the writ of error to issue from which the defendant, in error, appealed to the Superior Court. It appeared in the Superior Court that said Amelia was a *feme covert* at the time the judgment was rendered; that she had joined her husband and others in the bond on which the judgment was

taken, that execution had issued on such judgment, and that the (394) land of the said Amelia had been sold under it.

His Honor in the Superior Court, being of opinion against the petitioners, refused the writ asked for; from which the petitioners appealed to the Supreme Court.

Clement for plaintiffs.
Mitchell for defendant.

BATTLE, J. The reasons which induced the judge in the court below to reject the application for the writ of error *coram nobis* are not stated, but in this Court the objection to it is based upon two grounds:

First, that it ought to have been brought in the Superior Court and not in the county court; and,

Secondly, that all the defendants in the judgment ought to have been parties in the petition for the writ. In our opinion, neither ground of objection is tenable.

1. The distinction between an ordinary writ of error and a writ of error *coram nobis* is that the former is brought for a supposed error in law apparent upon the record, and takes the case to a higher tribunal, where the question is to be decided and the judgment, sentence, or decree is to be affirmed or reversed; while the latter is brought for an alleged error of fact, not appearing upon the record, and lies to the same court, in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice. A writ of error of this kind will lie to any court of record, and as our county courts are courts of record we cannot conceive of a reason why one of them may not correct an error of fact in its judgment, upon a writ of error brought before itself. See 2 Tidd Practice, 1136, and *Lassiter v. Harper,* 32 N. C., 392.

2. As to the second ground of objection, we are aware that an ordinary writ of error must be brought in the names of all the parties to the judgment, and if one or more of them be unwilling to join in (395) it there must be a summons and severance of such objecting party or parties; *Walter v. Stokoe,* 1 Ld. Raymond, 71; Carth., 8; *Sharpe v. Jones,* 7 N. C., 306. Without stopping to inquire whether this rule in relation to writs of error for matter of law may not be altered by an equitable construction of section 27, chapter 4, Rev. Code, which gives to one or more defendants the right to appeal, alone, from a judgment against him or them and others, we do not find any direct authority that the rule ever has been applied to writs of error *coram nobis,* and we do not perceive any reason why it should be so applied. The usual instances of error in fact requiring the intervention of this writ are those of

judgments against infants and *femes covert* where the fact of such infancy or coverture does not appear on the record. In such cases it is manifest that the judgment, if otherwise proper, will be erroneous only as to them, and not as to the other defendants. Why, then, should the other defendants be parties to the writ, when they cannot have any interest in reversing the judgment? We cannot preceive any necessity for it, and in our practice shall not require it. In the case of coverture the husband must be joined with the wife because she, as a general rule, cannot sue or prosecute any legal proceeding without him.

Our conclusion is that the order appealed from must be reversed in order that a *procedendo* may be issued to the county court.

PER CURIAM. Reversed.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT MORGANTON

AUGUST TERM, 1861

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(397)

STATE v. WALTER C. GRAHAM.

Where a party has neither possession nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence therefrom, raise a question as to a right of entry, nor is it any defense to him that he did the act to bring on a civil suit in order to try the title.

INDICTMENT for unlawfully removing a fence, tried before *Osborne, J.*, at Fall Term, 1860, of CLEVELAND.

The following special verdict was found by the jury: "The fence removed was part of a fence that surrounded a cultivated field in possession of the prosecutor. A grant for the tract of land of which the field in question formed a part had issued to the ancestor of the defendant, who was his heir at law, and who, as his heir, acquired his title; that the prosecutor had been in the adverse possession of this tract for more than seven years with color of title; that the prosecutor, (398) with a part of his fence, inclosed a piece of ground belonging to the defendant of which the prosecutor had not had seven years possession, but that no part of the fence removed was on this piece; that the defendant, claiming title to the whole land covered by the prosecutor's deed, gave him notice of his intention to remove the fence on a certain day, so that an action of trespass might be brought against him to try the title to the land, and on that day, in the absence of the prosecutor and without his consent, the defendant with his slaves removed the fence."

On this verdict, the court gave judgment against the defendant, from which he appealed to this Court.

Attorney-General for the State.
Gaither for defendant.

MANLY, J. It appears from the special verdict in this case that the portion of the land from which the fence was removed was not only in possession of the prosecutor, but belonged to him by virtue of possession under color of title. No question, therefore, can be raised upon the case as to the power of the defendant in an indictment of this character to exculpate himself by showing that he had title to the land, and consequently a right of entry. Whatever may have been intended, the record fails to raise any such question, and we do not think proper to express an opinion upon it.

The only question actually presented is whether a trespass committed by the removal of a fence from land of which the defendant had neither possession nor right of possession is in case of an indictment under The Code, ch. 34, sec. 103, defensible upon the ground that it was committed with a view to provoke a civil action only, and to try the title. The question involves no difficulty. An act in itself indictable, done by one capable of committing crime, is not exempt from criminal cognizance in our courts by the failure of the perpetrator to foresee or expect indictment. The object in committing the act can make no difference. (399) All the consequences which the law annexes to it will follow, notwithstanding inadvertence or ignorance in the perpetrator.

The section of The Code in question declares: "If any one shall unlawfully and willfully remove any fence or part of a fence surrounding a cultivated field every person so offending shall be deemed guilty of a misdemeanor." The special verdict against the defendant affirms all the facts necessary to constitute an offense, and there is nothing stated to excuse him from the consequences. If he desired to invite a civil suit to test the rights to the *locus in quo,* he should have taken care to confine himself to such acts as would subject him only to an action of that nature.

The judgment of the Superior Court upon the verdict is correct and should be

PER CURIAM. Affirmed.

Cited: *S. v. Piper,* 89 N. C., 553; *S. v. Fender,* 125 N. C., 651; *S. v. Ruffin,* 164 N. C., 417.

STATE v. SAMUEL P. ENGLAND.

Where the prosecutor lost a carpetbag on the public highway, and directed one to get it for him, and he did so as his bailee, but concealed the article, and denied having it, it was held that this was but a breach of bailment, and not larceny.

LARCENY in stealing a shirt, tried before *Osborne, J.*, at last Fall Term of MCDOWELL.

The jury found the following facts as a special verdict, viz.: "The defendant is indicted for stealing a shirt; the article alleged to have been stolen was with other articles in a carpetbag which was lost by the prosecutor on the highway leading from Morganton to Marion; the defendant resided on the highway, and the prosecutor, in passing his residence, informed the defendant that between his house and that of one William Murphy, who lived on the same road about a mile (400) and a half from the defendant's, he had lost his carpetbag, and requested him to get it and give it to one Halliburton, who lived in the village of Marion; the defendant found the carpetbag and took it into possession, and on application to him for it stated that he did not have it and had not found it; on search being made, it was found concealed in a bag, which was tied up and secreted on his premises; some of the articles contained in the carpetbag were missing, but whether they were taken out by the defendant did not appear."

His Honor being of opinion on the special verdict that the defendant was not guilty of larceny, gave judgment that he be discharged, from which the solicitor for the State appeared.

Attorney-General for the State.
Gaither for defendant.

BATTLE, J. It is conceded, and, as we think, properly, by the Attorney-General, upon the facts found by the special verdict, the defendant is not guilty of stealing the shirt of the prosecutor, as charged in the bill of indictment. The taking of the carpetbag in which the shirt and other articles were contained was not a trespass, because it was done by the express directions of the owner, and the defendant, instead of being a trespasser by such taking, became a bailee of the article for the purpose of carrying and delivering it to a certain person in the village of Marion. The subsequent concealment of the carpetbag before the trust created by the bailment was performed, even if done *animo furandi,* was not a larceny, but only a breach of trust. This doctrine has been established by many decisions, of which a collection may be found in Roscoe's Criminal Evidence, beginning at page 596 (3 Am. Ed.).

We have assumed that the carpetbag was taken by the defendant under a bailment because the special verdict finds such to have been the fact, and no intendment can be raised that the defendant formed the (401) design before he found the article to take and appropriate it to his own use. Whether the testimony would have justified the jury in taking the latter view, and finding accordingly, and if so, what would have been the legal consequences of it, is not our province to decide.

The terms of the special verdict preclude another view of the case which might have been adverse to the defendant: It seems that the carpetbag, when found concealed on the defendant's premises, had been rifled, and a part of its contents taken out and carried away; but whether the shirt was one of the missing articles is not stated, though it is stated as a part of the verdict that it did not appear that the missing articles were taken by the defendant. Had the jury found that they were taken *animo furandi* by him, it might have been contended that he was guilty of larceny, upon the distinction thus stated by *Lord Hale:* "If a man deliver goods to a carrier to carry to Dover and he carry them away, it is no felony; but if the carrier have a bale or a trunk with goods in it delivered to him, and he break the bale or trunk and carry the goods away *animo furandi,* it is a felonious taking"; see 1 Hale's P. C., 504, 505; Ros. Crim. Ev., 598. The grounds upon which this distinction is based, and many of the cases given in illustration of it, may be found cited and commented upon in the latter work, but it is unnecessary for us to pursue and inquire here, for the reason already stated that the terms of the special verdict prevent the question from being presented.

There is no error in the judgment from which the appeal is taken.

PER CURIAM. Affirmed.

Cited: S. v. Fann, 65 N. C., 319; *S. v. McRae,* 111 N. C., 666.

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(402)

HENRY TAYLOR v. SERUG MARCUS ET AL.

1. A defendant, by going to trial before a justice of the peace on the merits of his case, without making objection to the want of service by a proper officer, is not at liberty to take the objection in an appellate court.
2. Where there was a trial before a justice of the peace, and an appeal, and no objection appears on the face of the proceeding to the service of the warrant, it will be assumed in the appellate court that the objection was waived below.

TAYLOR v. MARCUS.

DEBT tried before *Osborne, J.*, at Fall Term, 1860, of WATAUGA.

The action was commenced by warrant before a justice of the peace. The warrant was directed to one N. C. Shull, who was not an officer nor the deputy of an officer, and was by him executed and returned. The parties went to trial on the merits, and a judgment was rendered against the defendants for the plaintiff's demand, from which they appealed to the Superior Court. In that court a motion was made to dismiss the warrant for the defect of service, but his Honor was of opinion that the objection was not taken in apt time, and refused to dismiss, from which judgment defendants appealed to this Court.

Neal for plaintiff.
No counsel for defendants.

MANLY, J. We concur with the view which his Honor took of the case in the court below. If the defendants wished to avail themselves of the irregularity that the warrant was not executed by a person having authority of law to do so, it ought to have been brought to the attention of the justice when they appeared before him. Having appeared and contested the plaintiff's demand on the merits, they are not at liberty in the appellate tribunal to fall back upon the want of a proper service of the process. The exception to the service, if taken before the justice, would have been good, but it is an irregularity which is waived by a failure to except at that time and by going to trial upon the merits. One may become a party to a suit without a service of any process. (403) He may accept service or he may actually appear and contest the rights in dispute, which is equivalent to acceptance of service, and after a trial upon the merits in any such case it is too late for a contestant to say he was not properly brought into court.

No formal pleadings are requisite in a justice's court; the warrant is the declaration, and memoranda of the objections to the recovery are the pleas. And if there is a trial of the case without objections appearing to the service or form of the warrant, it will be assumed that these were waived, as pleading in chief in a court of record is regarded as a waiver of matters, which might have been made available by plea in abatement. Defense must be brought forward by pleas or what are considered in our practice equivalent to pleas made in order and in apt time; else they cannot be heard.

We are of opinion, therefore, in this case that the defendants, by going to trial before the justice on the merits of their case and without making objection to the want of service by a proper officer, waived that defect of service, and were not at liberty to resort to it in a subsequent stage of the cause.

PER CURIAM.   Affirmed.

GEORGE W. SUTTLE AND WIFE v. FIELDING TURNER.

Wherever a deceased person has left a will and omitted to appoint an executor, or the person appointed has refused to qualify, the court of ordinary has a discretionary power to appoint any proper person administrator with the will annexed.

PETITION to revoke letters of administration, heard before *Dick, J.*, at Spring Term, 1861, of RUTHERFORD.

(404) At November Term, 1859, of Rutherford County court, the will of Martha Haye was duly proved, and the executor therein named having renounced, the defendant, Fielding Turner, was appointed administrator with the will annexed. In May following, the plaintiffs, George W. Suttle and his wife, Mary, petitioned the county court of Rutherford, stating the probate of the will and the appointment of defendant, and that the renunciation of the executor was irregular and void, praying that said Turner be removed and the persons appointed by the will be qualified, and in case they refuse to qualify that some proper person be appointed to the office of administrator with the will annexed. The petition sets out that the plaintiff Mary Suttle "is the only heir-at-law of Martha Haye, deceased, and thereby entitled to administer on her estate."

The answer of the defendant Turner insists that the renunciation of the executors was duly and formally entered, and that the court cannot inquire into the validity of their renunciation unless they were made parties. On the hearing of this petition the county court revoked the letters of administration granted to the defendant, ordered a reprobate of the will, and at the instance of the plaintiffs appointed one Washburn administrator with the will annexed. The county court having refused the defendant an appeal, the case was brought up by *certiorari* to the Superior Court, and there the judgment of the county court was affirmed, the letters of administration granted to the defendant were revoked and a *procedendo* ordered by the county court, from which judgment the defendant appealed to this court.

Logan for plaintiffs.
Gaither for defendant.

BATTLE, J. This is a petition filed in the county court of Rutherford for the purpose of having letters of administration *cum testamento annexo* on the estate of Martha Haye, which had been previously granted to the defendant by that court, and thereupon that the executors (405) named in the will, or some of them, should qualify thereto, or in

the event of their renunciation that letters of administration should be granted to the petitioners or to some discreet person. Among the allegations upon which the petition is sought to be sustained is the main one that when the letters of administration were granted to the defendant the execuors had not legally renounced their right to the office conferred upon them by the will, and that therefore the grant was improvidently made and ought to be revoked. In the petition the *feme* petitioner is alleged to be "the only heir-at-law" of the testatrix, and on that ground the right of administration is claimed for her.

The answer of the defendant alleges that the renunciation of the persons named as executors was properly made and entered of record by the court before the letters of administration were granted to him, and he insists that his letters, even if they were erroneously granted, cannot be revoked except in a proceeding by the executors themselves for the purpose, or at least in one to which they shall be made parties.

We are clearly of opinion that this objection is fatal to the petition.

Assuming that by the term "the only heir-at-law" the *feme* petitioner meant to allege that she was the only next of kin of the testatrix, that does not give her any right to the administration *cum testamento annexo*. The right of any person to the grant of administration upon the estate of a decedent depends upon the statute on that subject, which applies only to the cases of persons dying intestate. Whenever the deceased has left a will, the courts of ordinary have a discretionary power, in the event of there being no executor named in the will, or if those nominated die or refuse to qualify, to appoint any proper person to administer with the will annexed. In the exercise of this discretion they usually appoint the residuary legatee or some other person interested in the estate, their object being thus to secure on behalf of a faithful administration of the office the interest of the appointee. In the present case the *feme* petitioner does not appear to have even this recommendation of (406) interest in her favor, for it is not stated in the petition that she took anything whatever under the will of the testatrix. The petitioners are therefore to be regarded as strangers, interfering in matters in which they have no concern, and as such they cannot be permitted to interpose in behalf of the executors, by a proceeding to which the latter are not parties and in which they cannot be heard.

The judgment of the Superior Court must be reversed and the petition dismissed with costs.

PER CURIAM. Reversed.

Overruled: Little v. Berry, 94 N. C., 436; *Williams v. Neville,* 108 N. C., 564; *In re Meyers,* 113 N. C., 549.

J. D. REYNOLDS v. B. M. EDNEY.

It is a rule of law that one liable in case another does not pay is entitled to notice of the default of the primary debtor before suit can be brought against him, and it forms no exception to the rule that such primary debtor was insolvent at the date of the original transaction, or became so afterwards.

CASE tried before *Dick, J.*, at Spring Term, 1861, of HENDERSON.

The action was brought on the following undertaking, indorsed on a judgment rendered in favor of the plaintiff against one John B. Woodfin, to wit:

"I guaranty the within judgment in consideration of six months forbearance from 12 October, 1855. B. M. EDNEY."

The judgment and the written agreement above set out were both made at the same time, to wit, 12 October, 1855. It was not paid by Woodfin, who died insolvent in Tennessee before the suit was brought against the defendant, and in fact was insolvent, at the date of the judgment; (407) but no notice was proved to have been given the defendant of Woodfin's failure to pay previously to the suit's being brought. The insolvency of Woodfin was insisted on by the plaintiff's counsel, as an exception to the general rule as to notice in such cases. The court held the position well taken and instructed the jury accordingly, who found a verdict for the plaintiff. Defendant's counsel excepted. Judgment for plaintiff, and appeal by the defendant.

No counsel for plaintiff.
Gaither for defendant.

PEARSON, C. J. It is a general rule that one who undertakes collaterally to pay a debt is not liable to an action unless he has notice of the failure to pay by the party who is primarily liable, as in the case of a guarantor, or the maker of a bill of exchange, or the endorser of a bill or promissory note, or a surety in respect to a cosurety.

This rule is founded not merely on the consideration that the party thus secondarily liable is entitled to notice in order that he may take measures to indemnify or secure himself, but on the further ground that one ought not to be sued or subjected to the payment of costs unless he is in default by neglecting or refusing to pay a debt after he has received notice of the default of the party who was bound to pay in the first instance; for until notice he may reasonably presume that the debt has been paid, and consequently is not in default.

We are not aware of any authority for making an exception to this

rule where the party primarily liable is insolvent either at the date of the original transaction or becomes so afterwards, and it is clearly against principle and in conflict with one of the grounds on which the rule is founded. Indeed, in all of the cases the necessity of giving notice is treated as a condition precedent to the liability of the party who is to become bound in the second instance, which is in no case dispensed with except on the ground of fraud; as if one draws a bill without having funds in the hands of the drawee; Parsons on Contracts, (408) 504; *Spencer v. Carter,* 49 N. C., 288.

This Court is of opinion that the plaintiff could not sustain his action without proof that he had given notice to the defendant of the default of John B. Woodfin, so as to have offered an opportunity to the defendant of paying the debt without cost and putting him in default by failing to do so.

PER CURIAM. Error.

DAVE PANNELL, EXECUTOR, v. LEWIS SCOGGIN ET AL.

Under the act of Assembly, Revised Code, ch. 119, sec. 9, one named as executor in a script, propounded as a will, though named as plaintiff in an issue *devisavit vel non,* may be examined as a witness for the caveator as well as for the propounder.

DEVISAVIT VEL NON, tried before *Osborne, J.,* at Fall Term, 1860, of RUTHERFORD.

One of the questions presented on the trial was whether the person named in the script as executor and who propounded the will for probate, and as such was stated on the record to be the plaintiff, could be a witness for the caveators, who are stated as defendants. His Honor rejected the witness, and the caveators excepted.

There was evidence adduced on the trial to the effect that certain provisions dictated by the decedent to the draftsman in behalf of some of the caveators had been omitted from the script by mistake, and it was contended on this account that the will was not that of the decedent, on which point his Honor instructed the jury that, though they might believe that particular provision had been omitted by the draftsman by mistake, yet if the testator had published the will as it (409) was, and had the capacity required by law as had been explained to them, they should find for the plaintiff.

The caveators again excepted.

Gaither for propounder.
Logan for caveators.

BATTLE, J. In the instructions given to the jury upon the question set out in the bill of exceptions we entirely concur, and we do not deem it necessary to add anything to the remarks made by his Honor on those questions.

But upon the point of the rejection of the executor as a witness for the defendants we think his Honor fell into an error. The script propounded for probate bears date 16 August, 1858, which is since the Revised Code went into operation, and by section 9 of chapter 119 of that Code a person named as an executor is made competent to be examined as a witness either for or against the alleged will. The words of the enactment are that "no person, on account of his being an executor of a will, shall be incompetent to be admitted as a witness to prove the execution of such will or to prove the validity or invalidity thereof." Here the executor was offered by the defendants as a witness to prove the invalidity of the alleged will, and the statute, in express terms, makes him competent for that purpose unless his being a party plaintiff to the issue is sufficient to exclude him. If that were so, the object of the statute might always be defeated by making the person named as executor a party to the issue, a result which the courts are not at liberty to allow. Indeed, it is said that to the issue of *devisavit vel non* there are, strictly, no parties, it being in the nature of a proceeding *in rem.* See *Enloe v. Sherrill,* 28 N. C., 212; *Love v. Johnston,* 34 N. C., 355, and other cases. Hence the declarations of persons appearing on the record as codefendants are admissible or not, according to their interest, and not according to the side of the issue on which they are placed. It is certainly (410) within the power of the Legislature to make one who is a party to the issue, in the strict sense of the common law, a witness either for or against himself in a civil case, of which we have instances in the book-debt law, and in issues of fraud made up under the insolvent law. See Revised Code, chap. 15, and chap. 59, sec. 13. Much more, then, can an executor be made competent as a witness in an issue to which, though he may be a party in some sense, he is not so in the strict common law sense. This consideration makes it easier for us to adopt a construction of the act which was intended to give the benefit of an executor's testimony to every person who should be interested either in the establishment or defeat of a paper writing propounded as a will. In the present case the executor was offered as a witness against his interest, and we think the act referred to makes him competent, and it was therefore error in his Honor to reject him.

PER CURIAM. *Venire de novo.*

Cited: Vester v. Collins, 101 N. C., 117.

SANFORD B. GREGORY v. WILLIAM RICHARDS.

1. Possession of a stolen article raises a presumption of theft by the possessor only in case such possession is so recent after the theft as to show that the possessor could not well have come by it otherwise than by stealing it.
2. It is not proper in a court to base instructions on a hypothesis not sustained by the record of the judge's case sent up.

SLANDER tried before *Dick, J.*, at Spring Term, 1861, of LINCOLN.

The writ was issued on 23 February, 1857.

The declaration sets forth that the defendant accused the plaintiff of stealing his bridle. Pleas, general issue, statute of limitations, and justification. (411)

The plaintiff proved that he was a man of good character, and that the defendant on 19 February, 1857, said of and to the plaintiff: "You stole my bridle, and I can prove it"; also that he, the plaintiff, "stole his (defendant's) bridle, and he could prove it."

The defendant introduced a witness by the name of Huffman, who stated that defendant in 1854 was engaged in working on the plank road near Brevard's iron works, and had procured from Mr. Brevard a stable, where he kept his horses and bridles; that in the month of December, 1854, Mr. Brevard made a public sale of a part of his personal property which continued for several days, and that a number of persons attended the sale, and the plaintiff amongst the others; that the plaintiff had a one-horse wagon with some articles for sale; that on Tuesday morning of the sale a sorrel horse was found in the stable of defendant above mentioned, which the defendant locked up; that on the night of that day the staple of the stable door was drawn and the horse removed; that the defendant's bridle was left in the cutting-room of the stable on the evening of the night when the stable was broken open, and that the same was missing on the next morning, and that he never saw it again until he found it in the possession of the plaintiff at Dallas, at April court, 1855, on the same sorrel horse that had been locked up in defendant's stable; that the defendant demanded the bridle of the plaintiff, who said that he had got a negro at Brevard's to put up his horse, and that when it was brought out by the negro this bridle was on it; that he had tried at the sale to get his own bridle but could not do so, and he said further that on his (witness's) stating that the bridle in question was the property of the defendant, the plaintiff gave it up to him. The witness further stated that the plaintiff and defendant were very unfriendly at the time of the sale aforesaid and continued so up to the time then present.

The plaintiff proved by one Dellinger that he saw the plaintiff at

(412) Brevard's sale with an old blind bridle in his hand, saying that he had lost his own bridle and had got that in its place; that he had got a negro to put up his horse, who had brought it out with this bridle on it; that plaintiff inquired for Brevard's overseer, and on being informed where he was, went off in the direction indicated.

He also proved by one Cloninger that witness heard a conversation between plaintiff and defendant about the bridle in which the former stated that he had his horse put up at Brevard's sale, and that a negro had brought it out with the bridle in question on it; to which the defendant replied: "You or the negro stole the bridle, and I don't know which is the worse, you or the negro." This conversation was in 1855, some time after the bridle was found at Dallas.

The defendant's counsel asked the court to charge the jury that the bridle being found in the possession of the plaintiff at Dallas, four months after it was lost, the law raised a presumption that he was the thief.

The court charged the jury that when an article of personal property had been stolen and was proved in the possession of a person soon after the theft, the law raised a presumption that the possessor was the thief, but where several months had elapsed before the property was found, as in the present case, no such presumption was raised. Defendant's counsel excepted.

The defendant's counsel excepted further, because the court had admitted evidence of the speaking of words more than six months before the bringing of the suit. Also, because the court had omitted to bring to the attention of the jury a point made by him, which was: that "if the plaintiff had got the bridle from the negro unlawfully, and knew that it was not his own, and took it away to appropriate it to his own use, it would be larceny." His Honor said he did not remember that the instruction was asked in the argument, and on being assured by the counsel that it was, he asked why he was not reminded of it at the close of (413) his charge; to which the counsel replied that he did not think proper to do so.

The jury, under the instructions of the court, found a verdict for the plaintiff for $900. Judgment for plaintiff. Appeal by defendant.

Gaither for plaintiff.
Thompson for defendant.

MANLY, J. The principal point of the case is under the plea of justification, and upon the instructions given as to the presumption arising from the possession of a stolen article. The instructions are in clear accordance with the law. Possession of a stolen article raises a pre-

sumption of a theft by the possessor only in case such possession is so recent after the theft as to show that the possessor could not well have come by it otherwise than by *stealing it himself. In all other cases,* the question is an open one, to be decided upon the whole testimony and the fact of possession in the latter class of cases is of greater or less cogency according to the length of time intervening, the nature of the property, and other circumstances. The difference is that the recent possession of which we speak throws upon the accused the burden of explaining it, else he will be taken to be the thief. In other cases there is no such conclusion, but the fact of possession is, with the other facts, left to the jury as evidence upon the question of guilt. Thus, we distinguish between evidence raising a presumption of guilt, and evidence tending to establish guilt.

By adverting to the definition which we have given of a recent possession, from which the presumption will be made, it will be at once and clearly seen that the case before us does not admit of an application of the rule, and the court very properly declined applying it.

Other points made below upon a rule for a new trial are not sustained by the record or by the judge's case. There was no evidence offered or received of the speaking of the words more than six months before the bringing of the action, and it was not necessary, therefore, for the court to distinguish between the purposes for which such (414) evidence should be admissible and the purposes for which it would not.

So, in the second place, supposing the bridle to have been obtained from a negro in the manner stated by the prosecutor, there was no evidence tending to show a felonious intent on the part of plaintiff at the time of obtaining it, and it would not have been proper, therefore, for the court to base any instructions upon the hypothesis of such felonious intent.

Whether such instructions were or were not asked for, then, is not material.

PER CURIAM. No error.

DRURY McDANIEL *v.* JOHN JOHNS.

Where an executor gave a part of a standing crop for hauling the remainder to the crib it was held not to subject him to the penalty imposed for selling a deceased person's estate otherwise than at public auction.

DEBT for a penalty, tried before *Osborne, J.,* at Fall Term, 1860, of RUTHERFORD.

The action was brought for the penalty of $200, which it was alleged the defendant had incurred by selling the goods of his testator at private sale. It was proved that on entering upon the duties of his office the defendant found a crop of corn standing in the field and hired one John Covington to haul it to the crib, and as a compensation gave him for his wagon and team two dollars and fifty cents per day, to be paid in corn at 50 cents per bushel, and that the corn thus paid was a part of that stated as standing in the field and belonging to the estate of the testator.

The court being of opinion on this state of facts that the plaintiff was not entitled to recover, so instructed the jury, who found for the defendant. Plaintiff appealed.

(415)

No counsel for plaintiff.
Logan for defendant.

PEARSON, C. J. We concur with his Honor in the opinion that this case does not come within the operation of the statute which forbids the sale of the property of deceased persons except by "public vendue or auction."

The transaction was not a sale of any portion of the corn, but only a covenient mode of getting the crop of corn hauled to the crib by allowing a part to be taken as commissions in payment for the price of hauling. It may be that this was the only mode in which the executor could have procured the work to be done. It does not appear that he had any cash of the estate in hand, and certainly he was not required to advance funds of his own or to pledge his individual credit. In short, the case does not fall within the meaning of the statute or within the evil which it was intended to guard against.

PER CURIAM. No error.

APPENDIX

In the Matter of HAMILTON C. GRAHAM.

Habeas Corpus.

1. A soldier who is under arrest and in confinement for a violation of orders cannot procure his discharge by means of a writ of *habeas corpus* on the allegation that he was an infant at the time of enlistment. Nor can he or his guardian raise that question before the civil authorities while he is in custody and amenable for trial before a military tribunal.
2. Whether a minor of the age of 20 years, who enlisted under the provisions of the act entitled "An act to raise 10,000 State troops," and has taken and subscribed the oath prescribed for enlistment, is entitled to his discharge on the ground of his nonage, and that he enlisted without the consent of his guardian, *quere.*

Habeas corpus returned before his Honor, the Chief Justice, who called to his assistance the other two judges of the Supreme Court. The application was on the petition of Hamilton C. Graham and his guardian, E. G. Haywood.

The petitioners alleged that the said H. C. Graham, in May, 1861, was enlisted as a private soldier by Major Stephen D. Ramseur into the company called the Ellis Light Infantry; that he was then an orphan, without father or mother, and but twenty years old, and that such enlistment was made without the consent of his said guardian, and that the said orphan had an estate in the hands of his guardian which was sufficient to support him without resorting to such service, and that the said H. C. Graham was detained by the S. D. Ramseur against his will at the encampment of the said military company near the city of Raleigh.

The prayer is that the said H. C. Graham should be brought before his Honor, the Chief Justice, by the said S. D. Ramseur, with the cause of his detention. (417)

Major Ramseur brought forward the body of the said H. C. Graham, and made return as the cause of his detention that the said Graham had enlisted for the war into the company of artillery under his command, and had taken and subscribed an oath (set forth as part of the return) and on the 15th of the then current month was placed by him, as the commanding officer, in the guard-house for a violation of orders, and was then in such custody, and awaiting a trial by a court martial, for said offense.

E. G. Haywood for petitioners.
Attorney-General for Major Ramseur.

PEARSON, C. J. Upon the return of the writ, I requested Judges BATTLE and MANLY to assist me, and after hearing arguments on both sides, and giving to the subject full consideration, they concur with me in the opinion that the petitioner Graham is not entitled to his discharge.

It is admitted that Graham voluntarily enlisted as a private soldier on 24 May last, and the oath was taken and subscribed by him according to the forms required by law. The application is put on the ground that he was at the time under the age of twenty-one years, to wit, of the age of twenty, and enlisted without the consent of his guardian.

The return meets the application *in limine* by the fact that on the 15th instant "Graham, by the order of the commanding officer, was put in the guard-house for positive violation of orders, to await his trial before a court martial, where he has remained until brought here in obedience to the writ."

To meet this preliminary objection two positions were relied on:

1. The statute gives authority to raise by enlistment ten thousand "men"; Graham was not a man, being under the age of twenty-one years; consequently, the recruiting officer had no power to make a contract of enlistment with him, and the contract is void and of no effect.

If the agent acting for one of the parties exceeds his power, the consequence contended for would follow; for instance, if a woman was enlisted; but I do not adopt this very restricted construction of the (418) statute. The word "men" must be understood in reference to the purpose for which it is used, and obviously the purpose was not to indicate the sort of person, but to fix the number, in the sense of "ten thousand soldiers or troops." So I think there was no defect of power on the part of the recruiting officer and the contract cannot be treated as a nullity.

2. By a general rule of law, contracts made with one under the age of twenty-one years may be avoided by him; the exceptions are contracts for necessaries—of marriage and apprenticeship, on the ground of benefit to the infant, and there is no special benefit to an infant, arising out of a contract to enlist as a soldier to authorize the court to take it out of the general rule and make it an exception in the absence of some legislative provisions, such as are to be met with in the acts of Congress of the United States.

This position may be admitted for the sake of argument, and it does not meet the objection, for the contract, not being void but merely voidable, had the legal effect of establishing the relation of officer and soldier which existed at the time Grahan was guilty of disobedience of orders; consequently his act was unlawful, and his arrest and imprisonment lawful, and he cannot avoid the consequences by going behind his act and be allowed to impeach the validity of his enlistment until he has

been discharged by the court-martial. This is clear; otherwise, there would be no difference between a void and a voidable contract, whereas, the latter has legal effect, and continues until it is avoided, and in this instance, the contract had the legal effect of putting Graham in the condition of a private soldier and making him amenable as such to military law, and that having attached to him he must be discharged by it before he can be allowed to raise the question before the civil authorities as to his further detention being unlawful. If such were not the law, all order and discipiline in the army would be subverted. Would it be tolerated that one should insinuate himself into the condition of a soldier, and when by the disobedience of orders or other violation of duty the safety of the whole army has been endangered, evade the military jurisdiction by being heard to impeach the validity of his enlistment?

For these reasons, neither the petitioner Graham nor the other (419) petitioner, his guardian, can be allowed to raise the question whether the contract of enlistment can be avoided by him. I do not, therefore, feel at liberty to enter into the subject or intimate any opinion in respect to it.

It is considered by me that the petitioner Hamilton C. Graham be remanded and put in possession of Major Stephen D. Ramseur, and that the latter recover his costs of the petitioners, to be taxed by the clerk of the Supreme Court at Raleigh.

Cited: *In re Wyrick,* 60 N. C., 375; *Cox v. Gee, ib.,* 518.

CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1862

EDWARD MASON v. THOMAS WHITE AND WIFE ET AL.

1. A legacy given immediately to a class vests absolutely in the persons composing that class at the death of the testator; and a legacy given to a class subject to a life estate vests in the persons composing that class at the death of the testator, but not absolutely, for it is subject to open so as to make room for all persons composing the class, not only at the death of the testator but also at the falling in of the intervening estate.
2. Where one thus included in a class with an intervening estate died before the falling in of such estate, there is no ground for holding that his estate was divested by this event.

PETITION for division of slaves, which came up from the county court, and was tried before *Heath, J.*, at Spring Term, 1861, of PERQUIMANS.

The case is this: In 1838, Henry Hollowell died, leaving a last will, which was duly proved and recorded. In the said will, after (422) a trifling legacy to his brothers and sisters, occurs the following clause: "I give and bequeath to my beloved wife, Elizabeth Hollowell, the remainder of my estate, both real and personal, during her natural life, and at her death to be equally divided among her children."

At the time of the death of Henry Hollowell his wife, the said Elizabeth, had three children by a former husband, to wit, Sarah, who intermarried with the plaintiff, Edward Mason; Edward B. Sutton, and Anne, intermarried with Thomas H. White. Mrs. Mason was alive at the death of the testator, Hollowell, but died before the death of her

mother, the said Elizabeth, and her husband took letters of administration on her estate, and filed this petition for her share of certain slaves which passed under the said will.

The surviving brother and sister contested the right of the plaintiff to have a share of these slaves.

His Honor in the court below decided in favor of the plaintiff, and the defendants appealed to this Court.

Winston, Jr., for plaintiff.
No counsel for defendants.

PEARSON, C. J. The question presented is too plain to admit of discussion; a legacy given to a class immediately vests absolutely in the persons composing that class at the death of the testator; for instance, a legacy to the children of A, the children *in esse* at the death of the testator take estates vested absolutely, and there is no ground upon which children who may be born afterwards can be let in.

A legacy given to a class subject to a life-estate vests in the persons composing that class at the death of the testator; but not absolutely, for it is subject to open, so as to make room for all persons composing that class, not only at the death of the testator, but also at the falling in of the intervening estate. This is put on the ground that the testator's bounty should be made to include as many persons who fall under (423) the general description or class as is consistent with public policy; and the existence of the intervening estate makes it unnecessary to settle absolutely the ownership of the property until that estate falls in. For instance, a legacy to A for life and then to her children, or "then to be divided among her children," vests in the children who are *in esse* at the death of the testator, but it vests subject to open and make room for any children who may afterwards be born before the falling in of the life estate, so as to include as many as possible until it becomes necessary on the ground of public policy to fix the ownership absolutely.

In our case, the plaintiff's intestate was one of the class at the death of the testator, and although the legacy vested subject to open and let in any persons who might come into existence afterwards and answer the description, yet there is no ground on which it can be contended that the death of one of the legatees divested her legacy in favor of the surviving legatees. To this effect, there must be words of exclusion, *e. g.*, to the children of A, living at the time of her death.

PER CURIAM. Affirmed.

Cited: Chambers v. Payne, 59 N. C., 278; *Robinson v. McDiarmid,* 87 N. C., 461.

STATE ON THE RELATION OF R. H. L. BOND v. JOSEPH R. BILLUPS, ADMINISTRATOR.

In an action against an administrator, on his administration bond, for the nonpayment of a judgment previously rendered against him, such judgment is conclusive evidence against him, both as to the debt and the existence of assets.

DEBT on an administration bond tried before *Heath, J.,* at Spring Term, 1861, of PERQUIMANS.

The action was originally brought in the county court, and the writ was taken out against the defendant Billups, and the sureties to the administration bond, but the records states that only the defendant came and pleaded and he only appeared to the Superior Court. (424)

The plaintiff offered in evidence a judgment which had been recovered against the defendant as administrator of one T. Billups at May Term, 1860, of Perquimans County court, the nonpayment of which judgment was the breach of the bond declared on.

The defendant pleaded fully administered and no assets at the time of the original judgment and fully administered and no assets in this suit. And on the trial he offered to show that at the time of the judgment in the county court, at May Term, 1860, he had paid all the assets of his testator upon debts of equal dignity with that of plaintiff, and, further, he offered to show that he had no assets of his testator at the time of the commencement of this suit. His Honor excluded the evidence, and the defendant's counsel excepted.

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

Winston, Jr., for plaintiff.
No counsel for defendant.

BATTLE, J. *Armistead v. Harramond,* 11 N. C., 339, is direct authority in support of the opinion expressed by his Honor in the court below. That was a suit upon an administration bond against the administrator and his sureties, and although it was held that a previous judgment against the administrator in which he was fixed with assets was not evidence against his sureties as to the assets, yet it was evidence against him both as to the debt and assets. That the judgment against the administrator is conclusive appears as well from that case as from the recent one of *Strickland v. Murphy,* 52 N. C., 242. Whether it was so as against the sureties we need not inquire, for in the case now before us they were not parties to the record in the Superior

Court. It is true that in the county court the writ had been (425) issued against and served upon them, but they did not appear and plead, and the judgment in that court was rendered against the administrator alone, from which he appealed, and was of course the only party defendant to the record in the Superior Court. The evidence which he offered for the purpose of showing that at the time of the previous judgment against him he had fully administered all the assets which had come into his hands was, therefore, properly rejected, and the judgment must be affirmed.

PER CURIAM. No error.

Cited: *Brown v. Pike,* 74 N. C., 534.
Modified: *Badger v. Daniel,* 79 N. C., 387.

DOE ON THE DEMISE OF LEANDER McCORMIC v. ROBESON LEGGETT.

1. An infant who has executed a deed for land cannot make the deed void or valid by any act of his done while under age.
2. To make the deed of an infant valid, he must, after coming of age, do some deliberate act by which he takes benefit under the deed or expressly recognizes its validity.
3. Matter which does not affect the title, but only affords an objection to the further prosecution of the suit, as it is then constituted, as marriage or death, or the plaintiff's taking possession, must be pleaded or otherwise specially brought to the notice of the court; but matter that goes to affect the title, as the confirmation of an infant's deed, may be given in evidence under the general issue.

EJECTMENT tried before *Saunders, J.,* at Spring Term, 1861, of ROBESON.

The following case agreed was made out by the counsel for the respective parties and signed by them. The lessor for the plaintiff showed first a deed from Gilbert W. McKay to himself for the land in controversy; next a deed from King, sheriff of Robeson, to Sherrod F. Leggett, upon a judgment and execution against John A. Rowland and Gilbert W. McKay for the same land, the said McKay being the same who first sold to the lessor of the plaintiff. Plaintiff then proved that Robeson Leggett went into possession as the tenant of (426) Sherrod F. Leggett, and was in possession when the declaration was served on him. The sheriff's deed is dated 7 February, 1854, reciting a judgment and execution from the court of pleas and quarter

sessions of New Hanover county against John A. Rowland and the said Gilbert W. McKay. The deed from the said McKay to the plaintiff's lessor for the same land is dated 31 August, 1850. The defendant then put in evidence a deed from McCormic, the lessor of the plaintiff, to Gilbert W. McKay for the same land, bearing date 15 April, 1852. The lessor of the plaintiff replied to this by showing that he was under age at the time this deed to McKay was made, also at the time of bringing his suit, and the defendant offered evidence further that, in December after the suit had been brought, McKay, the bargainee, made a payment on account of the land which the lessor accepted (admitted then to be of full age).

Upon these facts the court directed the jury to find the defendant guilty, which was done, and from a judgment according to the verdict the defendant appealed to this Court.

Shepherd for plaintiff.
W. L. McKay for defendant.

Pearson, C. J. The statement of the case made up and signed by the counsel for the parties is not as clear as it should be, but from it and the admissions on the argument these points are presented:

1. Can an infant who has executed a deed for land make void the deed by any act while he is under age? For instance, by bringing an action of ejectment, before he arrives at age, against the bargainee?

This Court considers that the law is settled. While under age he cannot affirm or disaffirm, confirm or repudiate any act or deed, for the obvious reason that he is supposed to have the same want of discretion on account of which his first act or deed is voidable. (427)

2. If an infant sells and makes a deed for a tract of land and before coming of age commences an action of ejectment against the vendee, and after he arrives at age, pending the action of ejectment, receives the purchase money from the vendee, does the fact of receiving the purchase money confirm the deed, and, if so, can such confirmation be taken advantage of by the defendant without a plea since the last continuance?

We consider it settled that the deed of an infant is not void, but is voidable by him after he arrives at age; that, in order to avoid the deed, mere words are not sufficient, but there must be some deliberate act done by which he takes benefit under the deed or expressly rcognizes its validity, *e. g.*, if he takes a deed from the vendee for a part of the land which he had before conveyed or if he receives the whole or a part of the purchase money due to him by force and in pursuance of the contract under which the deed was executed. See *Hoyle v. Stowe,* 19 N. C.,

320; *Murray v. Shanklin,* 20 N. C., 431; *Armfield v. Tate,* 29 N. C., 258; *Benton* v. *Sanders,* 44 N. C., 360.

In regard to the question whether this act of confirmation can be given in evidence under the general issue or must be pleaded as a plea since the last continuance, the distinction is this: When matter occurs pending the suit which does not affect the title, but merely affords ground for an objection to the further prosecution of the suit as it is then constitued, such matter must be pleaded or be in some other mode specially brought to the notice of the court, as when a party dies or marries or the plaintiff takes possession of the thing sued for. But where the matter affects the title it may be given in evidence under the general issue; indeed, in the action of ejectment the pleadings are so much at large that an estoppel may be taken advantage of under the general issue, notwithstanding the general rule that estoppels must be pleaded specially. In our case the act of receiving the purchase money affected the title, for by it the deed was confirmed, and the confirmation (428) related back so as to give effect to the deed from the time of its execution. See the cases cited above.

Upon these facts, this Court is of opinion that the judge below erred in directing the jury to find the defendant guilty.

PER CURIAM. *Venire de novo.*

Cited: *Ward v. Anderson,* 111 N. C., 117; *Cox v. McGowan,* 116 N. C., 132; *Weeks v. Wilkins,* 134 N. C., 521.

LARKIN BROOKS v. ASA J. WALTERS.

Where it appeared that the plaintiff, who lived in Virginia, had put a note into the hands of the defendant, who collected it, and at the time of employing another to make demand plaintiff stated that he had once before sent the defendant's receipt over and had got nothing, it was *Held,* that this did not amount to proof that a demand had been made more than three years before the bringing of the suit, so as to put the statute of limitations in motion.

ASSUMPSIT on the common counts, tried before *Heath, J.,* at Spring Term 1861, of WASHINGTON.

The plaintiff proved that in 1855 he placed in the defendant's hands for collection a note of one Griffith for about $85, and that some time thereafter the defendant received the money. The defendant rested his defense on the statute of limitations. By the plaintiff's witness it appeared that within three years thereafter and within three years prior

to the bringing of this suit the plaintiff, who lived in Virginia, handed to a witness in Bertie County, in this State, the defendant's receipt for the note, and that this witness demanded payment immediately, which the defendant refused. This took place after the defendant had received the money. This witness also stated that at the time of handing him the receipt the plaintiff said he had sent the receipt over once before and had got nothing on it. At what time this occurred the plaintiff did not state, nor did he state anything more of that transaction than that recited. (429) The defendant relied on this as evidence, that there had been a former demand for the money and a refusal more than three years prior to the bringing of this suit, and called on his Honor to instruct the jury that plaintiff's claim was barred by the statute of limitations. His Honor declined so to charge, but told the jury, among other things, that as to the first alleged demand, if it was made (which was a question for them), the defendant knew when, where, and by whom it was made, and the fact that he gave no such evidence might be considered by them as tending to show that no such demand was made, or, if made, was made within the limit of the statute. The defendant's counsel excepted to this part of the charge.

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

No counsel for plaintiff.
Winston, Jr., for defendant.

MANLY, J. In order to sustain the plea of the statute of limitations, relied upon in the defense, it is necessary there should be proof of a demand and refusal of the money more than three years previous to the bringing of the action.

We have considered the matter relied on as proof in this particular, and concede it ought not to have any weight or tendency to establish it. To allow the inference of a demand and refusal to be drawn from proof that the claim had once before been sent to this State and nothing collected on it, would be leading the jury into the field of conjecture for matter to found their verdict upon. His Honor below, therefore, might have told the jury that there was no legal proof tending to establish the allegation of a demand and refusal more than three years before the bringing of the action and that the plea should be found therefore in favor of the plaintiff.

The result has been attained under the instructions actually given, which makes it unnecessary to discuss their propriety. No injustice has been done the defendant, and the judgment against (430) him should therefore be affirmed.

PER CURIAM. No error.

DEN ON THE DEMISE OF E. W. JONES v. E. H. WILLIS.

1. Where a tenant entered into the occupation of premises under an express lease from month to month, and he continued the occupation for more than two years, there is no reason why he should be considered as a tenant from year to year, and thus be entitled to six months notice to quit.
2. What notice a tenant from month to month is entitled to, *quere.*

EJECTMENT tried before *Heath, J.,* at Spring Term, 1861, of WASHINGTON.

The only question in this cause was on the necessity of notice to quit. The premises sought to be recovered was a room in a warehouse in the town of Plymouth. The plaintiff proved that he let the premises to the defendant on 18 December, 1856, at ten dollars for the first month and five dollars for every succeeding month that he should hold them; that the defendant then took possession and has ever since occupied the room, the lessor of the plaintiff having possession of the other part of the building. He then proved by a witness that he demanded possession prior to the commencement of the suit, but the witness could not say how long prior it was. On this demand the defendant refused to surrender the premises, saying: "The door of the room is on my (defendant's) lot and I am willing to compromise with the lessor." The writ was issued 18 January, 1859, and there was no other evidence of a demand than that above stated.

On an intimation from the court that the facts disclosed a tenancy from year to year, requiring six months' notice to quit, the plaintiff submitted to a nonsuit and appealed.

(431) *B. F. Moore for plaintiff.*
Winston, Jr., for defendant.

PEARSON, C. J. This Court does not concur in opinion with his Honor on the point upon which he saw proper to have the case put in the court below.

The lease was in express terms one from "month to month." To a plain mind, the process of reasoning by which such a lease could be converted into a tenancy from year to year, and thereby make six months' notice necessary, before either party could determine the relation of landlord and tenant, would not readily occur.

Mr. Winston took the position that the courts favor tenancies from year to year, and that in this case, such a holding would be inferred from the fact that the defendant entered in December, 1856, and continued in possession up to January, 1859. This position is not tenable.

The fallacy of the argument grows out of a failure to distinguish between a lease at will or a tenancy at will, which the courts incline to convert into a tenancy from year to year, and a lease like that under consideration, which in so many words is one from month to month.

A tenancy at will may be determined by either party on short notice—that is, reasonable time for the tenant to pack up and leave.

A tenancy from year to year can only be determined by six months' notice prior to the expiration of the current year, which notice must be given either to the landlord or the tenant, as the case may be, in order to determine the relation. The latter, therefore, is the better relation for both parties—for the landlord, because he will have six months' time to look out another tenant; for the tenant, because he has that time to look out another place, and this conduces to the public good by having all premises occupied and kept in cultivation. Upon these considerations, where there is a tenancy at will, in the first instance, if the possession continues for more than one year, inasmuch as the parties have not fixed on any precise time, the courts incline to imply, from the fact of entering under the second year, that the holding is to be from year to year. (432)

This reasoning, however, has no application to a case like ours, which was, in the first instance, a tenancy from month to month.

In respect to a tenancy from month to month, whether a full month's notice should be given, or half a month's notice would be sufficient, we are not called on now to decide. In *Doe v. Hazell,* 1 Esp., 94, and in *Doe v. Ruffan,* 6 *ibid.,* 4, it is held that in a tenancy from week to week a full week's notice is certainly sufficient; and in a tenancy from month to month a full month's notice was, of course, sufficient. Whether by analogy to the doctrine of tenancies from year to year notice for half of the week or month prior to its expiration would not be sufficient is not decided; but it is certain that the analogy is not complete; for leases from month to month or from week to week must, of course, be confined to the rent of rooms to live in, or keep stores, and the conclusion that six months was reasonable time to give notice in case of a tenant from year to year was adopted because of the course of husbandry and time necessary for crops to be planted and matured.

Mr. Winston, in the second place, took the ground that, supposing his Honor to have erred in respect to six months notice, yet the decision ought to be sustained because notice for a month or, at all events, for half a month was required in order to determine the lease, and there was no proof of such notice.

When the judge interrupts the usual progress of a trial by an intimation of his opinion on a particular point, and the counsel submits to a nonsuit, and appeals, with a view of trying that question, and it turns

out that his Honor was in error, the case should be sent back for another trial, because it may be that but for this intimation additional evidence would have been offered or other points taken, as, in this instance, further evidence, in order to fix the precise time of the demand of possession, or raising the question whether the defendant's (433) saying that "the door of the room was on his lot, and he was willing to compromise," was not taking an adverse position, inconsistent with a tenancy, and by such a disavowal dispensing with the necessity of any notice.

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

Cited: Simmons v. Jarman, 122 N. C., 198.

F. F. FAGAN TO USE OF J. H. HAMPTON v. LEWIS WILLIAMSON.

1. The right to bring an action on the case against a sheriff for money collected by virtue of his office is expressly reserved in the act of Assembly (Rev. Code, ch. 78, secs. 1 and 2) giving an action of debt on his official bond for the same cause of action.
2. An action of debt on a sheriff's official bond for money collected, and a nonsuit therein, is a sufficient demand to enable the plaintiff to sustain an action on the case for the same cause of action.
3. An error in a judge's charge to the jury which works no injury to the appellant is no ground for a *venire de novo.*

ASSUMPSIT tried before *Heath, J.,* at Spring Term, 1861, of WASHINGTON.

The plaintiff declared against the defendant for money had and received, and on the common counts. He proved that he recovered a judgment in the county court of Washington against one Jackson, for $...., and that execution issued thereon from May to August terms, 1857; another execution issued to November term, and came to the hand of the witness who testified as to this part of the cause, who was instructed to place it in the hands of the defendant, sheriff of Columbus. Witness saw the defendant a short time after 17 October, 1857, and tendered him the execution, to which he replied that it was unnecessary to take it, as he had collected the money on the former execution; had inclosed it in an envelope, and directed it to the clerk of Washington County (434) court. He added that he had handed it to the deputy postmaster at Whitesville, Columbus County, with instructions to register it and forward it by mail. The plaintiff proved by the postmaster at

Plymouth, where the court aforesaid sits, that no registered letter from Whiteville had been received at his office for the clerk of Washington County court between May and August terms, 1857. The clerk proved that no such execution or money had been returned to his office.

The plaintiff further proved that he had formerly brought an action of debt for this same amount, in which he declared against the defendant and certain others as sureties on his official bond, and that he had taken a nonsuit in that case. This suit was brought after the return term of the second execution.

The defendant contended:

1. That a recovery could not be had on this claim in this form of action.

2. That the former action of debt was not a sufficient demand, a demand being necessary.

3. That the mailing of the money raised a presumption that it was received at the office where it was demandable, and that there was no evidence sufficient to overcome the presumption.

The judge charged the jury that the form of the action did not preclude a recovery in this suit; that if a demand was necessary, they were at liberty to find one, if they found the former suit as aforesaid for the same cause of action and a nonsuit; that the mailing of the money raised a presumption that it came to hand, and it was for the jury to say whether that presumption was overcome by the other evidence in the case, and that if it was overcome, and they were satisfied the money did not reach Washington County, whence the writ issued, they should find a verdict for the plaintiff; otherwise, for the defendant. The defendant's counsel excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Winston, Jr., for plaintiff. (435)
No counsel for defendant.

MANLY, J. The judgment ought not to be reversed for any of the causes appearing in the case transmitted to this Court.

The record does not inform us as to the ground upon which the exception to the form of action is based; but taking it to be as was suggested in the argument, that there was a higher security (that is, the official bond), by an action on which the sheriff could be made to answer for the delinquency complained of, we are of opinion it cannot avail the defendant. The Legislature in providing this higher and more sure security has expressly guarded against the inference that the action upon the case, as at common law, was merged therein, and no longer to be used. This will be seen by a reference to Rev. Code, chap. 78, secs. 1

and 2. In the proviso of the second section the form of the action before us is specially noted and declared to be still open to the citizen, notwithstanding the remedy upon the bond given. Thus, we think, whatever might have been the law, without some saving clause (into which inquiry we do not now enter), yet, by virtue of such clause the action in question is clearly open to resort at the election of persons injured.

The case states that an action of debt had been instituted for the same cause against the defendant and others, and a nonsuit suffered previously to the commencement of this suit, and that the court below instructed the jury that this, of itself, was a demand. This is the subject of the second exception. The instruction was undoubtedly correct. It might be gravely questioned whether, at the time and under the circumstances under which this action was brought, a demand was at all necessary, a former suit for the same cause of action and a nonsuit would clearly satisfy the requirement. *Linn v. McClelland,* 20 N. C., 596.

The instructions in respect to the transmission of the money by mail, and the presumption arising therefrom, which is the ground of the third exception, does not furnish a proper subject of complaint on (436) the part of the appellant. He had the benefit of instructions on this point, the soundness of which by no possibility could have wrought him any injury.

No error having been committed in the case of which the appellant can justly complain, the judgment must be affirmed.

PER CURIAM. No error.

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

A bond given as a pretext to enable one person to set up a claim to the property of another, so as to defraud the creditors of that other, is void even as between the parties to the same.

DEBT tried before *Saunders, J.,* at Spring Term, 1861, of COLUMBUS.

The action was upon a bond, executed by Robert Inman to Jesse Inman, and indorsed to the plaintiffs. The defendant pleaded general issue, fraud, illegal consideration.

The plaintiff proved the execution of the bond by the defendant and the indorsement to the obligee, which was after it became due.

The defendant then offered the evidence of the subscribing witness, who testified that he was present at the time the bond was executed, and Jesse Inman stated that the bond was given to defraud his creditors, and that there were then executions out against him in the hands of

the sheriff; that the consideration for the bond was a raft of timber, a quantity of corn, cows and calves, about fifteen hundred pounds of bacon, horse and buggy, sows and pigs, ox and cart, and a quantity of fodder; and that when the sheriff went to levy on the property it was to be claimed by Robert Inman, the defendant; but, in fact, the property was to remain in the possession of Jesse Inman; that the bond was not to go beyond the ditch near where they were, but was to be destroyed. The witness further testified that Robert Inman was (437) present and said nothing. The plaintiffs proved that they had paid Jesse Inman a valuable consideration for the note; also, that the property, above referred to, remained in the possession of Jesse Inman, and that when the sheriff of Robeson went to levy on it as his property, Robert Inman claimed it, and said that he had purchased it from his brother Jesse.

There was other testimony on the question of fraud, all of which was submitted to the jury under the charge of the court.

His Honor instructed the jury that if they believed the declarations of Jesse Inman, that the bond was given for the purposes and upon the consideration stated by him, the plaintiff could not recover.

The plaintiff's counsel excepted to the charge. Verdict for defendant. Appeal by plaintiff.

Shepherd, Strange, and W. A. Wright for plaintiff.
Leitch and M. B. Smith for defendant.

BATTLE, J. This case is brought before us again, for the purpose, as we are informed, of having reviewed the decision which we made in it at December Term, 1859, 52 N. C., 28. In the argument now submitted by the counsel for the plaintiff he admits the correctness of the general principle 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. He also admits that the fact of the contract's being under seal does not preclude the illegality of the consideration from being inquired into, and urged as a defense. See Broom's Com., 91; Law Lib., 280, and several pages following. But he contends that a bond for the payment of money, though made for the express purpose of defrauding the obligor's creditors, is valid as against him, by force of the Stat. Eliz., chap. 5, sec. 2; Rev. Code, chap. 50, sec. 1. By reference to that statute it will be seen that bonds are mentioned along with several kinds of conveyances made with the (438) intent to delay, hinder, and defraud creditors, however, as against those persons who are hindered, delayed, and defrauded of their debts; and it is inferred that bonds as well as conveyances of property, are

good and valid against those who execute them in favor of the obligee and grantee. This argument confounds the distinction between the nature and effect of a bond and an executed conveyance. The former is a chose in action, which may require the aid of a court, through the means of an action or suit, to give the obligee the benefit of it, while the latter transfers at once the title of the property granted or sold to the grantee or bargainee. Hence, to the former the well-established maxim of *Ex dolo malo non oritur actio* may apply, while it is entirely inapplicable to the latter, which does not require the aid of a court to transfer the property. The fraudulent grantee or bargainee has, then, the advantage of his grantor or bargainor, because, having the property by force of the conveyance, the grantor or bargainor will be met, when he applies to be relieved against it, with the objection that "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Holman v. Johnson,* 1 Cowp., 343. The statute of frauds, 13 Eliz., in making void and of no effect conveyances intended to defraud creditors, as to the creditors only, and leaving them in full force in other respects as between the parties, does not contravene that rule. But if the statute is to be construed as to its effect upon fraudulent bonds in the manner contended for by the plaintiff's counsel, it will violate the rule, and produce the strange and unnecessary anomaly that while the obligee in a bond founded upon the illegal consideration of compounding a felony, gaming, usury, restraining trade, restraining marriage, and the like, he may do so if the consideration were that of a most gross and outrageous attempt to cheat and defraud creditors. But the words of the statute may be satisfied without the necessity of adopting any such construction. A voluntary bond, executed without any actual (439) intent to defraud creditors, may be avoided by them under the statute, if such an avoidence be necessary to secure their debts, but as between the parties the statute leaves it still in force. By giving to the statute such an operation and no more, the very salutary maxim to which we have referred, of *Ex dolo malo non oritur actio,* will be left in its full integrity, to prevent a recovery by the obligee of a bond conceived and executed by the parties with the actual intent to hinder, delay, and defraud the creditors of the obligor.

That the distinction which we have endeavored to point out between bonds and executed conveyances does exist is, as we think, established by adjudicated cases. *Roberts v. Roberts,* 2 Barn. and Ald., 366 (4 Eng. C. Law, 545), cited by the plaintiff's counsel, and all those referred to by Roberts in his work on Fraudulent Conveyances, which were held to be valid as between the parties, are cases of executed conveyances, while not a single instance of a bond made for the express

purpose of defrauding creditors has, to our knowledge, been upheld as good between the obligor and obligee.

The judgment of the court below being in accordance with the views which we have now expressed, must be affirmed.

PER CURIAM. No error.

EASON PRITCHARD ET AL. v. ALLEN OLDHAM.

Where a person was appointed by court a commissioner to sell a slave for partition, and the surety taken by him, although reputed good at the time of the sale, turned out to be insolvent before the note could be collected, it was *Held*, that an attachment for a contempt for not paying the money into the court, under a rule for that purpose, was not a proper remedy, if, indeed, there were any.

RULE on the defendant to show cause why an attachment for a contempt should not be issued against him, which came up from the county court of Orange, and was heard before *Howard, J.* (440)

The defendant had been appointed a commissioner by the county court of Orange, to sell for partition a certain negro slave under certain proceedings had in that court in the names of the plaintiffs. The slave was offered for sale, and first bid off by Easom Pritchard, one of the petitioners for the sale; but he failing to give bond for the whole sum bid by him, the slave was put up again and cried off to one Jolly at the price of $1,282. The case states that a respectable gentleman told the defendant that Jolly was totally insolvent; that after he bid off the slave he, Jolly, proposed to take the slave to Pittsboro, where he lived, and in the next week, if he would come to that place, he would give him a bond with John A. Hanks and Wesley Hanks. The defendant inquired of Dr. Davis whether a note given by Jolly and the two Hankses would be good, who replied that it would be perfectly so; thereupon the defendant permitted Jolly to take the slave to Pittsboro. During the next week defendant went to Pittsboro, and took the bond of Jolly and John A. Hanks as principals, and Wesley Hanks as surety. The case further states that Jolly and John Hanks were partners in merchandising and trading generally, and now and then purchased a negro or two on speculation, sending the negroes purchased out of the State for sale. The general reputation of Jolly, at the time, was that he was insolvent; that of John A. Hanks was that though he had property about him, he was greatly embarrassed and doubtful; but as to Wesley Hanks, that he was worth $10,000 or $12,000, principally in real estate; that he was economical and discreet, and as safe as any one for the amount of the

note. A week or two after the note was given, Jolly carried the slave out of the State and sold him. The note was, on falling due, put in suit, and a judgment obtained without delay, but the parties had all, in the meantime become insolvent, and the execution returned unsatisfied. The matter was specially reported by the defendant to the (441) county court of Orange, and upon a notice to that effect duly served on the defendant, a rule was obtained and made absolute for him to pay into the office of the clerk of Orange County court the amount of the bond, $1,282, with interest, or that an attachment for a contempt should be issued against him. From this ruling the defendant appealed to the Superior Court, where the order below was reversed, and the plaintiffs appealed to this Court.

Graham for plaintiffs.
Phillips and Norwood for defendant.

BATTLE, J. It cannot be doubted that a person appointed by a decretal order of a court, in the progress of a cause, a commissioner to sell property, and to make a report thereof to the court, is either an officer or a person against whom, in a proper case, an attachment may issue under the provisions of Rev. Code, chap. 34, sec. 117. If, then, the defendant in the present case had collected the money for which the slave mentioned had been sold, and had disobeyed an order of the court to pay it into the clerk's office, an attachment against him would have been proper, because a willful disobedience to such order would have been a contempt of the court. But as he had not collected the money for the reasons stated in his second report, was there anything of criminality or even negligence or unskillfulness in the discharge of the duties of his appointment to justify the court in issuing the summary process of attachment against him? We think not. He was ordered to sell the slave in question on a credit of six months, taking a bond and good security for the price. He did right in offering the slave for sale again, after Pritchard had refused to comply with the terms of the sale. He did wrong, and ran a risk of loss, by permitting Jolly to take the slave to Pittsboro before he had given bond and security for the purchase money; but the wrong was repaired as soon as the bond with security was given; for the matter then stood as it would have done had the transaction been completed on the day of sale. The sole inquiry, (442) then, is, Was it negligence in the commissioner to take the bond which he did as security for the price of the negro? In *Davis v. Marcom,* 57 N. C., 189, we held that where an administrator was ordered by the court to sell slaves for distribution, on a credit, taking bond with sureties for the purchase money, he was only responsible, in respect to

the sufficiency of the bond, for willfully or negligently taking such sureties as were not good or such as he had not good reason to believe were sufficient. As we are not aware of any rule of law which holds a commissioner appointed by the court to sell property to a stricter accountability than what is applicable to administrators, that case must govern the present. Here the commissioner had very good reason to believe that the bond which he took was sufficient. Dr. Davis, a respectable gentleman, who resided in the neighborhood of the obligors, said the bond would be good, and it was proved that at the time when it was given, though one of the principals was reputed to be insolvent and the other doubtful, yet the surety was worth $10,000 or $12,000, principally in real estate, and was regarded as economical and discreet, and as good as any person for the amount of the bond.

Under these circumstances, it may well be doubted whether the defendant can be held responsible for the loss of the purchase money of the slave in any form of action, but certainly he cannot be so held in a mode of proceeding which is somewhat criminal in its nature, and which, it would seem, therefore, ought not to be adopted unless there were something of criminality in the person against whom it is directed. See 4 Black. Com., 484, and the references contained in notes 7 and 8 of Chitty's edition.

The order of the Superior Court is

PER CURIAM. Affirmed.

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(443)

STATE v. ENOCH S. BROWN.

An indictment charging the stealing of a bank note of a certain denomination and value, without setting forth by what authority such note was issued, is not sufficient to authorize judgment on a conviction.

INDICTMENT for stealing a bank note, tried before *Howard, J.*, at Fall Term, 1861, of MONTGOMERY.

The indictment is as follows:

"The jurors, etc., present, that Enoch Brown, late, etc., on, etc., at and in, etc., one banknote for the payment of $20, and of the value of $20, the property of one Benjamin F. Steed, then and there being found, feloniously did steal, take, and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

On conviction, under this indictment, the defendant's counsel moved for an arrest of judgment, which was ordered by the court, whereupon the solicitor for the State appealed.

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

MANLY, J. Bank notes not having any intrinsic value, are not the subject of larceny at common law, *Cayle's case,* 8 Co., 33; 1 Hawk, P. C., ch. 33, sec. 25; but have been made so by the legislation of most commercial nations.

The statute on this subject now in force in North Carolina is found in Rev. Code, chap. 34, sec. 20, from which it will appear that only those bank notes that have been issued by corporations of the State, or some other of the United States, are now the subject of larceny within our State courts.

Whether this limited application of the law of larceny to bank notes may not have suffered still further restriction by the political condition of the country, and by the act of the Legislature of 1861-2, extra session, chapter 23, is not in this case material to inquire.

The bill of indictment charges the thing stolen to be a bank note, (444) without further description, while bank notes of certain classes, to the exclusion of others, only are the subject of larceny.* This is not such a description as will enable the Court to see that a felony, under our law, has been committed. It may have been a bank note as well without the purview of the statute as within; and as the rule of construction is that every conclusion will be made against the bill which has not been excluded by the pleader, either expressly or by necessary implication, we are bound to hold it to be a note of some bank not embraced by the statute. This is simply requiring certainty to a certain intent in general, which is the rule applicable to indictments.

There could be no judgment against the defendant upon the verdict, under this indictment, and it was, therefore, properly arrested in the court below.

PER CURIAM. Affirmed.

Cited: *S. v. Banks,* 61 N. C., 578.

*NOTE.—All bank notes are now the subject of larceny. Rev. 3251.

STATE ON RELATION OF JOHN McLEAN v. WILLIAM BUCHANAN ET AL.

1. **The ceremony of acknowledgment in open court, and registration, are not essential to the validity of a sheriff's bond.**

2. **Where a debtor lived in one county and had places of business in two other counties adjoining, and it appeared that a sheriff who acted as a collecting officer went three times during three months to such residence, at the end of which time the debtor became insolvent, although it appeared that the debtor was most usually absent from home during this time, it was *Held*, that the officer was guilty of such laches as to render him and his sureties liable on his official bond.**

DEBT on official bond of a sheriff, tried before *Saunders, J.*, at Spring Term, 1861, of RICHMOND.

The breaches assigned were for failing to collect, and for collecting and failing to pay over the money on a note put into his hands on one David A. Boyd for collection. (445)

The plaintiff introduced a paper-writing, which was one file in the office of the county court of Richmond County, as the official bond of the sheriff for 1856, to which R. S. McDonald is a subscribing witness. He testified that in his office, outside of the courtroom, on the day on which the bond purports to have been executed, all the defendants either signed the bond or acknowledged their signatures in his presence, and he signed it as a witness, but they did not acknowledge it in open court, and, further, that he was not clerk of the county court at that time.

Louis H. Webb was then introduced, who testified that at October Term, 1856, he was clerk of the county court of Richmond County, and that during that term the bond in question was offered by William Buchanan as his official bond as sheriff, and accepted by the court, but that no one of the sureties therein named either signed the bond or acknowledged it in open court. His Honor decided that this proof established the paper in question to be the official bond of the defendant as sheriff of Richmond, and allowed the same to be read; to which ruling the defendants' counsel excepted.

The claim above described was put into the hands of an acting deputy of the defendant Buchanan on 4 December, 1856, and it was proved that Boyd, the debtor, was in possession of sufficient property to satisfy it; that the said deputy, on or about 15 December in that year, went to the usual place of Boyd's residence to serve a warrant on him, but could not find him; also, that he went to the same place two other times between that time and 27 February, 1857, on neither of which occasions could he find him.

W. M. Bost testified that he was an officer, and lived within 2 miles

of Boyd; that he had claims in his hands against him for collection between 4 December, 1856, and 27 February, 1857, and that he went to his usual place of residence several times without finding him; and during that time Boyd had places of business in the counties of Montgomery, Cumberland, and Anson; that his residence was in (446) Richmond County, near the line between that county and Montgomery, and that he was, during that time, most frequently absent from home.

It was also proved that on 27 February, 1857, Boyd conveyed all his property by a deed of trust to satisfy other claims.

His Honor charged the jury that if they believed this testimony, it established such laches in the deputy as rendered the sheriff and his sureties liable on the bond in question.

Defendants' counsel again excepted.

Verdict for plaintiff. Judgment and appeal by defendants.

McDonald and Shepherd for plaintiff.
Leitch for defendants.

MANLY, J. Two exceptions were taken on the trial below to the rulings of the court, neither of which can avail the appellant.

No particular formalities are prescribed by law for the execution of the sheriff's bond. If a bond, executed according to the requirements of the common law, be accepted by the court, and the sheriff thereupon inducted into or continued in office, the bond is obligatory on the parties, although the duty of the court to have it acknowledged and recorded be omitted. The ceremony of acknowledgment in open court, and the recording of the bond, are important provisions of law for authenticating the execution of the instrument and preserving evidence of its existence and contents, but are not essential to its validity as an office bond. See Revised Code, ch. 105, sec. 13, and ch. 44, sec. 8. The signing, sealing, and delivering of a bond according to the requirements of the common law were proved upon the trial. It is nowhere provided that registration is necessary to make it admissible in evidence, and whether, therefore, it was a bond taken in conformity with the statute seems not to have been material. It was admissible and (447) obligatory between the parties as a common-law bond, and no rule of law appertaining to an action upon it, as such, has been violated. So, in whatsoever character it be regarded, no error has been committed to the prejudice of the defendants.

We fully concur with his Honor below in the view he took of the question of laches. It seems from the statement of the case that the debtor, Boyd, had sufficient means to satisfy the demand, down to the

time of making a general assignment, viz., on 27 February, 1857; the claim was put into the hands of the defendants' deputy on 4 December, 1856. The deputy, with a view of executing process on the debtor, visited his place of residence on 15 December, and on two other occasions between that and 27 February, 1857, but failed to find him at home on any of the occasions. The debtor resided in Richmond, but had three other places of business in adjoining counties, and spent the greater part of his time away from his place of residence. It does not appear that the officer made any effort to find the debtor, except the three visits stated, and no process was ever executed nor other means used to collect the debt from 4 December to 27 February, a period of nearly three months. This was not ordinary care and diligence. For aught that appears in the facts of the case, due care and watchfulness would have secured a different result.

PER CURIAM. No error.

Cited: *Graham v. Buchanan,* 60 N. C., 93.

SABRA J. PARKER v. WILLIE B. RICKS.

Where A. handed over a sum of money to B. for the use of C., and took from B. a certificate, in writing, expressing that it was the sum given to C. in A.'s will, and obliging B. to pay the interest annually to C., it was *Held,* that A. had no right to demand and recover the money from B.

DEBT tried before *Bailey, J.,* at Spring Term, 1861, of EDGECOMBE. (448)

CASE AGREED.

The action was brought on the following article of writing, given by the defendant to the plaintiff:

This is to certify that Mrs. S. J. Parker has placed in my hands the sum of $1,000, for the use and benefit of Miss C. P. Battle during her life, and also after her death to remain in my hands until called for by the said C. P. Battle, the interest to be paid annually to the said C. P. Battle for her own use, this being the sum given in her last will and testament to C. P. Battle. 31 May, 1856. W. B. RICKS.

On which paper the following credit is indorsed: "31 May, 1857. Received $60 in full for the interest up to day and date above written."

It is admitted that plaintiff demanded the sum above mentioned ($1,000) before suit brought; also, that C. P. Battle was living when the action was commenced.

It is agreed that if the court should be of opinion with the plaintiff on the case agreed, judgment should be rendered in her favor for the sum above mentioned, with interest from 31 May, 1858; otherwise, for the defendant. The court gave judgment of nonsuit, and plaintiff appealed.

B. F. Moore for plaintiff.
Strong for defendant.

MANLY, J. We can see no reason for reversing the judgment rendered in the court below. Indeed, the case seems to us so entirely free from any question that we regret the appellant has not furnished us with the grounds of her appeal.

The certificate under date of 31 May, 1856, is evidence of a purpose on the part of the plaintiff to set apart the sum of money therein mentioned for the use of Miss Battle absolutely; the words are plainly such as would be used between persons making a voluntary and unconditional transfer of property from one to the other. This is the (449) definition of a gift.

A gift is no more revocable, in its nature, than a conveyance or transfer of property in other modes. The possession being given with the intent to part with the property in the thing, the right of dominion for all purposes goes with it. This is too plain to admit a difference of opinion. The fact disclosed by the instrument of writing, that the money in question was the sum given to Miss Battle in the will of the plaintiff, does not affect the case. The donor could make a gift of the money *in presenti,* notwithstanding the provision in her will. The will being ambulatory and revocable, either in whole or in part, it was competent for Mrs. Parker, in her lifetime, to make any disposition of the money which she might think proper. Such disposition would be obligatory and the legacy be adeemed. The putting the money in the hands of a trustee during the life of the donor does not alter the irrevocable nature of the transaction. It might answer the purpose of securing more certainly the enjoyment of her bounty to the object of it, but cannot operate to impair it. The recall of gifts once validly made is not among the resources of those who may be excited by passion or seized with an extraordinary spirit of gain.

PER CURIAM. Affirmed.

RICHARD DIXON v. JAMES R. WARTERS.

A report by a commissioner, in equity, dividing slaves among tenants in common, followed by a decree confirming the same, passes the right of property from the date of the report, and will enable a party acquiring such right to maintain *trover* for a conversion between the date of such report and the final decree. *Held further,* that all the parties to a suit for the partition of property are estopped to deny the right of their fellow takers under such decree.

TROVER for the conversion of a female slave, tried before (450) *Osborne, J.,* at Spring Term, 1861, of GREENE.

Benajah Dixon, by his last will and testament, gave all his property to his wife, Mary, to divide among his children, and it is admitted that the slave in question was a part of that property. Mary, the widow, under the provision of the will above mentioned, divided the estate, consisting of slaves, money, etc., among the several children of the said Benajah, under which division the slave in question was, by deed, assigned to the defendant's wife; but after Mrs. Dixon's death a bill in equity was filed by Robert Dixon and others, children of the said Benajah, against the defendant and his wife, who was one of the said children, and other children of the same, to set aside the division that had been made by Mrs. Dixon in her lifetime, on the ground that it was unequal between the children. The defendant and his wife were regularly made parties to this suit. Under an order of the court commissioners were appointed to divide the said property, and it was ordered that the slaves should all be brought forward for that purpose. This was done, and the slave in question in the new apportionment was assigned to the plaintiff. The report of the commissioners was made to the court and confirmed. After the apportionment was made, but before the term of the court at which the report was confirmed, the defendant sold the slave for the purpose of defeating the plaintiff's claim.

There was evidence of a demand and refusal. The court was of opinion, and instructed the jury, that the defendant was estopped by the proceedings in the court of equity, and that on the testimony offered the plaintiff was entitled to recover. Defendant's counsel excepted.

No counsel for plaintiff.
J. W. Bryan and McRae for defendant.

MANLY, J. It will be seen by reference to the case transmitted to this Court, and to the papers therein referred to, that a controversy in relation to the division of the estate of Benajah Dixon (451) arose among the legatees which was settled by a bill in equity. To this bill both the plaintiff and defendant were parties as legatees.

The slave in question had been a part of the estate of the said Benajah, and was decreed, upon the final hearing of the bill, to belong to the plaintiff. The parties are unquestionably estopped by the decree. The rights of property as declared under it are conclusive upon them until it is reversed; *"res adjudicata est, et interest reipublicæ ut finis sit litium."*

We do not now enter into any examination of the justice and propriety of the proceedings and decree in equity. These cannot be inquired into in this action as upon a bill of review.

The other point raised by the case is whether the action was sustained by proper proof of a conversion. It seems after the division of the slaves was made by the commissioners under the decree, and after the same was reported to the court, but before the confirmation thereof, the defendant refused to deliver up the slave upon demand, and with a view to defeat the plaintiff's claim sold her. This was unquestionably a conversion as against him who had the right of property, and the consequent right of possession at the time, and the question resolves itself into this, Was the plaintiff vested with these rights? We think he was.

Where a decree or judgment of court is rendered declaring rights of property in tenants in common of things capable of division, and partition is ordered, made, and reported, an inchoate right of property is raised, which the subsequent judgment of confirmation perfects. In such case the title has relation back to the division, and starts from that time, in like manner as the right of property in an administrator is held to relate back to the death of the intestate, for the more complete protection of estates. There is

PER CURIAM. No error.

Cited: *Branch v. Goddin,* 60 N. C., 496; *Carter v. White,* 131 N. C., 17; *Weston v. Lumber Co.,* 162 N. C., 193.

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(452)

SAMUEL PARKER v. PURDIE RICHARDSON, EXECUTOR.

In an action on a covenant for quiet enjoyment it is no defense that the covenantor had a life estate in the land at the time of making the deed, if such life estate be fallen in and the convenantee has been evicted by title paramount.

COVENANT tried before *Howard, J.,* at Fall Term, 1861, of HARNETT.

The action was brought on a covenant of quiet enjoyment, which is contained in a deed to plaintiff from the defendant's testator, one Haines Richardson, and is in the usual form.

The land described in the deed had belonged to one William Smith, from whom it descended to his daughter Flora Ann, who intermarried with the said Haines, the testator. He (Haines Richardson) took possession of the land in question and conveyed it in fee simple to the plaintiff by the deed above set forth, containing the covenant sued on, and he entered into possession under it and held it for several years. Haines Richardson had issue of the marriage with Flora Ann, to wit, one William S. Richardson. She and her husband both died, and the said William S. then demanded the premises, and having instituted an action of ejectment against the plaintiff, recovered the same upon his paramount title, and the plaintiff was turned out of possession by a writ issuing on such judgment.

The defendant contended that inasmuch as Haines Richardson had a life estate in the land described in his deed, by the curtesy, at the time he made his conveyance, although there was a defect in the remainder, there was no breach of the covenant.

There was a verdict by consent for the purchase money and interest, also for the costs of the suit in ejectment by which the plaintiff was evicted, subject to the opinion of the court on the point of law raised by the defendant's counsel, with leave to set it aside in case he should be of opinion against the plaintiff. On consideration of the point reserved, the court gave judgment for plaintiff, and defendant (453) appealed.

J. H. Bryan, Neill McKay, and Buxton for plaintiff.
Strange for defendant.

PEARSON, C. J. There is no ground on which the correctness of the conclusion of his Honor in the court below can be drawn in question.

It was said at the bar that the counsel of the defendant had, on the trial below, relied on *Wilder v. Ireland, ante,* 85.

In that case the life estate was outstanding; in this case the life estate had fallen in, and the remainderman had made an eviction by a recovery in ejectment and a writ of possession. The distinction is too plain to admit of further explanation. There is

PER CURIAM. No error.

DANIEL F. THOMPSON v. JOHN ANDREWS.

1. Where a person bid off a parcel of wheat at an auction sale, and another person came forward and gave his note for it, in compliance with the terms of the sale, it was properly left to the jury to determine whether the latter intended to become the purchaser or to become the surety of the bidder.

2. In order to constitute a pledge, there must be evidence that the property was delivered for that purpose to the pawnee.

TROVER tried before *Bailey, J.*, at Fall Term, 1861, of ORANGE.

Smith, the administrator of one Minnis, made a sale, and cried off to Henry Pickard a quantity of wheat standing in the field unharvested. Pickard named the plaintiff as his proposed security to a note (454) he was required by the terms of the sale to give. Thompson, when called on to sign the note as surety, said that he signed as surety for no one but his father, and asked no one but his father to sign for him, but said he would give his own note for the wheat with his father as surety, or he would pay the money for it. The administrator took plaintiff's note at nine months credit without surety, which was paid by him at maturity.

The administrator deposed that the wheat was threshed with a portable thresher belonging to the plaintiff, on a tract of land recently purchased by Pickard, and carried to the mill of the defendant with the wagon, horses, and driver of plaintiff, Pickard being along; that the driver, on delivering the wheat at the mill, told the defendant that the plaintiff sent him word to keep the wheat until he called for it or sent him an order for it. Also, that the plaintiff demanded the wheat or the flour made from it previously to the bringing of the suit.

The defendant alleged that Pickard was the purchaser of the wheat, and offered evidence tending to show that Pickard had harvested it and hauled it from the place where it grew to the place above described, and was with the wagon at the delivering of it at the mill, and that he, defendant, had accounted to Pickard for it previously to the demand. His Honor instructed the jury that if they believed the plaintiff, when he gave his note, intended to become himself the purchaser of the wheat, their verdict should be for the plaintiff; but if he designed to carry out the contract of Pickard, according to the bid, then their verdict should be for the defendant.

Plaintiff's counsel excepted. Verdict and judgment for the defendant. Appeal by plaintiff.

Graham for plaintiff.
Phillips for defendant.

MANLY, J. The part which the plaintiff seems to have taken (455) (through his agents) in threshing and conveying to the mill the wheat in question casts some doubt on the ownership, and especially upon the true intent of the parties in the negotiation which resulted in the giving of the plaintiff's note for the wheat.

We think, however, the question of property was fairly put to the jury, and, in the absence of any request for more specific instructions, was sufficient.

Supposing the right of property to have once been in Pickard, as found by the jury, there was then no evidence to show a pledge of the wheat to secure the plaintiff in respect to the note which had been given; an actual delivery for such purpose would be necessary to constitute a pledge, and there was nothing to show this.

PER CURIAM. No error.

STATE v. LAUGHLIN, A SLAVE.

A house 17 feet long and 12 wide, setting on blocks in a stable yard, having two rooms in it—one quite small, used for storing nubbins and refuse corn to be first fed to the stock, and the other used for storing peas, oats, and other products of the farm—is not a barn within the meaning of the statute, Rev. Code, ch. 34, sec. 2, the burning of which is made a felony.

ARSON tried before *Howard, J.*, at Fall Term, 1861, of ROBESON.

The indictment charged the defendant with burning a barn then having corn in the same. The jury found a special verdict as follows, to wit: "That the prisoner did burn, as charged in the bill of indictment, a house, sitting on blocks, built of logs and roofed in, with good floor, and door fastened with padlock, 17 feet long by 12 wide, with two rooms, one about three times as large as the other—the small room used for storing the nubbins or refuse corn, to be first fed (456) away to the stock, and at the time of the fire containing 5 or 6 bushels; the other used for storing the peas, oats, or other products of the farm, and containing at the time of the fire 20 or 30 bushels of peas, some fodder, and other things; the said house being situate in the stable lot 27 feet from the stable, with two similarly built houses in the same lot, just back of it—one smaller, used in storing the good corn raised on the farm, and the other, the seed cotton, and say if the court should be of opinion that the said house was a barn, then they find the prisoner guilty of the arson and felony as charged; otherwise, not guilty."

The court remarked, in giving his judgment in the case, "The statute is highly penal and must be strictly construed. The purpose of the act was to preserve the crops of corn and grain. The house must be a barn, used in part for storing corn or grain, and must have therein, at the burning, the corn or grain for the storing of which it is used. Peas are not grain. Did the fact, then, that the refuse corn was placed therein, to be first fed to the stock, make it a barn for storing corn? The witnesses speak of it, some as a barn, others a waste-house. The statute being highly penal, the punishment the severest known to our law, the court holds that it is not clearly within the purview of the act. It is, therefore, adjudged that the prisoner be released"; from which judgment the solicitor prayed an appeal to the Supreme Court, which was granted.

Attorney-General and Winston, Sr., for the State.
Shepherd for defendant.

BATTLE, J. When this case was before the Court at June Term, 1861, one of the questions presented was whether a building, properly called a barn, was the same with one properly called a crib, and it was decided that it was not, and that, therefore, an indictment for arson in burning a barn with grain in it could not be supported by proof that the building burnt was a crib with grain in it. Upon the new trial which (457) took place in consequence of that decision a special verdict was rendered, in which the building was particularly and minutely described, and it was submitted to the court to decide whether it was a barn or not, within the meaning of the statute. So that, upon the present appeal, that is the only question presented to us.

Arson, at common law, is defined by *Lord Coke* to be "the malicious and voluntary burning the house of another by night or by day." See 1 Hale P. C., 566.

The house burnt, in order to be a felony, must be a dwelling-house, including, however, all outhouses that were parcel thereof, though not contiguous to it or under the same roof, as, for instance, the barn, stable, cow-house, sheep-house, dairy-house, and mill-house; or if the house were not parcel of the dwelling, it must have been a barn having hay or corn in it. *Ibid.*, 567. In England the offense of burning houses and other property is now provided for by various statutes, among which the most prominent are 7 Will. IV. and 1 Vict., ch. 89 sec. 3, which reënacts, with some variations, 7 and 8 George IV., ch. 30, sec. 2. This statute makes it a felony to burn or set fire to "any house, stable, coach-house, outhouse, warehoue, office, shop, mill, malt-house, hopoast, barn, or granary," etc. In this State, also, the offense of arson depends mainly, if not altogether, upon the statute law. Thus, by section 2, chapter 34,

Revised Code, it is made a capital felony to burn, willfully, "any dwelling-house, or any part thereof, or any barn, then having grain or corn in the same, or store, or warehouse, grist- or sawmill house, or any building erected for the purpose of manufacturing any article whatever; and by sections 7 and 30, other provisions are made for the protection from burning of the State house and other public houses, and houses belonging to any incorporated town or company in the State. It will be seen that our statute does not mention several of the kinds of houses embraced in that of Great Britain; as, for instance, outhouses, stables, coach-houses, offices, granaries, and some others. In the construction of the English statute it is settled that it must be proved (458) on the part of the prosecution that the house burnt comes within the meaning of the statute and of the description given in the indictments, and as the statutes are highly penal, the construction of them, in these particulars, is very strict. For cases on the subject, see Roscoe's Crim. Ev., p. 276 *et seq.* Our statute, upon which the indictment in the present case is founded, is as highly penal as any known to our law, and must, therefore, receive a construction which will prevent the possibility of the prisoner's losing his life for an offense not within the contemplation of the Legislature. He is charged with burning a barn, and the special verdict finds that he burnt a house of the description therein particularly set forth. If such a house be a barn, he is guilty; if not, he is not guilty. In Webster's Dictionary a "barn" is said to be "a covered building for securing grain, hay, flax, and other productions of the earth." Bouvier, in his Law Dictionary, defines it to be "a building on a farm, used to receive the crop, the stabling of animals, and other purposes." The house described in the special verdict certainly does not come within the meaning of either of these definitions; but it does come within the meaning of a crib, which, according to Webster, is a term used in the United States to signify "a small building, raised on posts, for storing Indian corn," or a granary, which, according to same authority, is "a storehouse or repository of grain after it is threshed; a corn-house." We have seen that in the English statute, above referred to, a granary is mentioned as a different house from that of a barn, and we believe that in many parts of this State, and perhaps in the greater part of it, there is a well known distinction between a barn and a granary or a crib, corresponding in the main with the above definitions. Many of the wealthy planters have both kinds of houses, while most of the farmers in moderate circumstances have only one.

Our conclusion is that the building as described in the special verdict was not a barn within the meaning of the statute; and that not being a barn in itself, it was not made so by having been used for keeping the refuse Indian corn, and for storing peas, oats, and (459)

other produce of the farm. The statute requires that the house shall be a barn, and shall, besides, have corn or grain in it, to make the burning of it a capital felony.

The judgment in favor of the prisoner upon the special verdict must be
PER CURIAM. Affirmed.

Cited: S. v. Jim, post, 455; *S. v. Cherry,* 63 N. C., 496.

STATE v. JIM, A SLAVE.

A house 118 feet long, 15 feet wide, built of logs notched up, the cracks covered inside with rough boards, roofed with rough boards, with a good plank floor, and a door about 4 feet high, containing, at the time of the burning, a quantity of corn, peas, and oats, though the only building on the farm used for storing the crop, is not a barn within the meaning of the statute, Rev. Code, ch. 34, sec. 2.

ARSON, tried before *Howard, J.,* at Fall Term, 1861, of LENOIR.

The facts of the case are so fully stated in the opinion of the Court that it is unnecessary to set them out here.

Attorney-General and Winston, Sr., for the State.
J. W. Bryan for defendant.

BATTLE, J. This is an indictment under the statute, Rev. Code, ch. 34, sec. 2, for arson, in burning a barn having corn in it. Upon the trial it was proved that the house burnt was 18 feet long and 15 feet wide, was built of logs notched up, and the cracks were covered inside with rough boards; the house was roofed with rough boards, had a (460) good plank floor, and a door about 4 feet high, of the usual width, which opened to within a log or two of the floor, and was fastened with a padlock. At the time when it was burnt the house contained a quantity of corn, peas, and oats, and it was the only building on the farm used for storing the crop. The witnesses stated that it was called sometimes a crib, but generally a barn. The presiding judge charged the jury that the house was a barn within the meaning of the statute; whereupon a verdict of guilty was rendered against the defendant, and from the judgment thereon he has appealed to this Court.

We differ from the opinion expressed by his Honor, that the house as described by the testimony was a barn. The description of it does not differ materially from that set forth in the special verdict rendered by the jury in *S. v. Laughlin* (*ante,* 455), in which we have decided

at the present term that the house burnt was not a barn, but was either a crib or a granary. For the reasons given for our opinion in that case, we hold that the house burnt, as proved on the trial in the present case, was not a barn, and that, consequently, the prisoner is entitled to a

PER CURIAM. *Venire de novo.*

D. A. PARKER v. HENRY DAVIS.

An inquisition of lunacy is not conclusive against a person dealing with a supposed lunatic; but he may show that at the time of the contract such supposed lunatic had sufficient capacity to make it.

ASSUMPSIT for goods sold and delivered, tried before *Saunders,* (461) *J.*, at Spring Term, 1861, of STANLY.

The defendant pleaded specially that he had a guardian regularly appointed under a commission of lunacy. There was no contestation as to the sale and delivery of the goods, nor the price; and it appeared that they were of a proper kind and useful for the subsistence of defendant and his family.

The defendant's counsel produced the record of the inquisition of lunacy finding the defendant a lunatic and appointing to him a guardian, which was regular in form and not questioned.

The plaintiff then proposed to show by witnesses that at the time of the dealings in question the defendant was of sound mind. The evidence was objected to by defendant, but admitted by the court; to which defendant's counsel excepted.

It was then stated by the witnesses that the defendant had for years been in the habit of drinking spirits to great excess; that when sober he was a man of ordinary intelligence, capable of understanding what he was about, and of making a contract; that for the last ten years he generally came to town sober and went away drunk; that he had a large family of children, and that the articles in question had been purchased either by his wife or some one of his children, or by himself when sober, and that they were family articles; that the account had been drawn off and given to the defendant, who, after taking it away, returned and said, "All was right."

The defendant's counsel objected that the suit could not be maintained against the defendant, as he had a regular guardian, and cited *Fessenden v. Jones,* 52 N. C., 14.

His Honor charged the jury that if they were satisfied the articles had been purchased by the defendant, or by his family with his knowl-

edge and approbation when he was sober and had sufficient capacity to understand the nature of the transaction, that the account had been examined by him and admitted to be correct, he then having (462) sufficient capacity to understand, they should find in favor of the plaintiff; but if the evidence failed to satisfy them as to the capacity of the defendant, their verdict should be for the defendant. Defendant's counsel excepted to the former part of the charge.

Verdict and judgment for plaintiff. Appeal by defendant.

McCorkle for plaintiff.
Ashe for defendant.

BATTLE, J. We concur in the opinion expressed by his Honor in the court below. An inquisition of lunacy is not conclusive, and a person who deals with the supposed lunatic may show that at the time when the contract was made he had sufficient capacity to make it. This was expressly decided by the Court in *Arrington v. Short,* 10 N. C., 71, and that decision has been confirmed by the subsequent cases of *Christmas v. Mitchell,* 38 N. C., 535, and *Rippey v. Gant,* 39 N. C., 443.

The counsel for the defendant has referred us to Revised Code, ch. 57, sec. 1, which enacts that guardians of lunatics shall have like powers and be subject to like remedies on their bonds as guardians of orphans, and he contends that all contracts for articles or for services intended for the benefit of lunatics, like those for infants, ought to be made with their guardians, and that if made with the lunatics themselves they are no more binding than such contracts would be if made with minors. *Fessenden v. Jones,* 52 N. C., 14. The analogy will not hold in cases like the present, because infants most necessarily remain such until they arrive at full age, when the guardianship of them terminates; but a lunatic may become of sound mind, and be capable of contracting for himself, and yet the guardianship may continue until another inquisition is found by which he is declared to be of sound mind again. Besides, the provision in Revised Code to which reference has been made was taken from the act of 1784 (ch. 228, Rev. Code of 1820), (463) which was long before the decision to which we have referred was made. The finding of an inquisition and the appointment of a guardian for the defendant as a lunatic not being conclusive upon the plaintiff, the testimony offered by him to show the capacity at the time when the goods were purchased was properly admitted, and as no valid objection can be urged against the charge made thereupon by the presiding judge, the judgment must be affirmed.

PER CURIAM. No error.

Cited: Sprinkle v. Welborn, 140 N. C., 180.

STATE v. WILLIAM L. BRANDON.

1. No declarations of a prisoner made after the commission of a homicide as to the manner of the transaction, that are not part of the *res gestæ*, are admissible for him.
2. If a party deliberately kill another to prevent a mere trespass to property he is guilty of murder.
3. The law does not recognize any moral power as compelling a man to do what he knows to be wrong.
4. The insanity which takes away the criminal quality of an act must be such as amounts to a mental disease and prevents the accused from knowing the nature and quality of the act he is doing.

MURDER, tried before *Bailey, J.*, at Fall Term, 1861, of CASWELL.

The defendant was indicted for the murder of one William J. Connelly, his father-in-law. He was living on a place belonging to the deceased, some 6 miles from the residence of the latter, under an agreement that he should have all he made over and above what was required to support his children and three daughters of the deceased, who lived in the house with the defendant. The corn had been gathered and was in a pen on the premises. On the day before the homicide, as was stated by one Jackson, the defendant was in his granary with his gun and two dogs. On being asked what he was doing there, he said (464) that Connelly had gone to Squire Richmond's to get a writ and have him put out and divide the corn, and if he came there he intended to kill him; that Connelly had taken his daughter Jane to Richmond's, and she had sworn to one lie against him, and he didn't intend to stand it any longer.

John Moore swore that he lived with the prisoner; that the crop of corn, made in 1860, was gathered and put in a pen near the granary; that Connelly came there Friday, ... day of November, and put his horse in the stable, and the usual salutations passed between Connelly and the prisoner; that the defendant was sitting in the door of the granary with his gun inside, near him; that Connelly got on the corn in the pen and threw a few hands full of corn into the wagon, when the prisoner said to him, "Old man, get down off that pen and go out of the lot, or I will hurt you"; that Connelly got down from the pen, saying something that witness did not hear distinctly; that at that time the prisoner came out of the door of the granary with his gun in his hands, and they walked a few steps towards each other; the prisoner then raised his gun, took aim at the deceased, and shot him; that the deceased was also going in the direction of the stable, where his horse was, and had nothing in his hands when the gun was fired; that he was about 63 years of age.

Dr. Brooks, after testifying as to the extent of the wound, stated that the father of the prisoner was deranged, at one time, for about two months; that the prisoner had a sister, an uncle, and an aunt, who had been deranged. He also testified to the singular conduct of the prisoner when drunk, but did not consider him deranged at that time.

Mr. Warf stated that he saw the prisoner in the granary with his gun, and Connelly on the pen; that prisoner ordered him down; that Connelly threw several hands full of corn into the wagon, and told John Moore to get the measuring tub; John said it was locked up and prisoner had the key; he told Moore to burst the door open and (465) bring it to him; that everything there belonged to him. Prisoner then said: "Old man, get down from there and go out of the lot, or I will hurt you; you are meddling with that that does not concern you or yours." Connelly replied, "I will show you, you villain, to whom it belongs." Connelly got off the pen quickly, and the boys got down at the same time; that the witness then turned towards the gate, and presently heard the report of the gun; that he then returned, and found Connelly lying with his head within 3 feet of the post of the granary and a stick lying near the body of the deceased, and blood upon the hand of the prisoner; that shortly afterwards he examined the hand of the prisoner, and the skin was off for about the size of a 10-cent piece. This witness, and several others, testified as to the conduct of the prisoner prior to the commission of the act, tending to show that he was deranged, and that his ancestors were deranged.

The prisoner then offered to give in evidence what he said to Dr. Brooks shortly after the homicide was committed, to wit, that the wound on his hand was caused by a blow given by deceased with a stick, which caused the blood on his hand. This evidence was rejected by the court, and defendant's counsel excepted.

The prisoner's counsel insisted: first, that although the prisoner knew it was wrong to kill the deceased, yet, if he was impelled to the act by a moral power which he could not resist, he was excusable. Second, that if the deceased committed a trespass in attempting to take away the corn, and the prisoner, in order to protect his property, shot and killed the trespasser, it would be manslaughter, and not murder.

The court charged the jury that if the prisoner was insane at the time of committing the homicide they should acquit him; that every one was presumed to be sane until the contrary was shown; that the prisoner must satisfy them of that fact. Defendant's counsel excepted to the charge.

Verdict, Guilty of murder. The court pronounced judgment (466) of death, and the defendant appealed.

Attorney-General and Winston, Sr., for the State.
No counsel for defendant in this Court.

MANLY, J. The first question which the record presents is whether the declarations of defendant were competent in his behalf to show how he received a certain wound.

It is stated that the declarations were made shortly after the homicide. There is no principle upon which these can be held admissible except as a part of the *res gestæ,* and the statement of the case excludes the idea that they were of this nature. The declarations were after the act was past and done. This question has been brought under review in this Court on several former occasions, which will be seen by a reference to *S. v. Scott,* 8 N. C., 24; *S. v. Huntley,* 25 N. C., 418; *S. v. Tilly, ibid.,* 424. The professional idea seems to have been that a narrative given by a person who has committed a homicide, as to how it happened, immediately after the act and when the first proper opportunity offered should be admitted. But this evidence, though dictated by what in divers supposable cases might be deemed a necessity, is so clearly against principle, and entitled in the greatest number of instances to so little credit, and is so well calculated to obscure rather than elucidate a transaction, that the courts have uniformly adhered to their original judgment by which it was excluded. It has been nowhere, that we are aware of, interpolated as a rule of evidence upon the common law, by legislation or otherwise. In the case before us the circumstances under which the declarations in question were made are so vaguely stated as not to bring them within any proposed or reasonable rule. But we make no question about this. Take the statement of the case in any sense, and the declarations are plainly excluded by the well settled law of evidence in North Carolina. They must be a part of the *res gestæ,* and come in as explanation of an act being done when they were made, or (467) not at all.

The second question arises upon a position taken by the prisoner's counsel that if the killing was to protect prisoner's property from the trespass of the deceased, it would be an extenuated case of homicide. In this position, it seems, the court did not concur. The matter involved in this point has been before this Court heretofore on more occasions than one. It seems to have been first carefully considered in the case of *S. v. Morgan,* 25 N. C., 186, and again in *S. v. McDonald,* 49 N. C., 19. In these two cases it is fully settled, if a party deliberately kill to prevent a mere trespass to property, he is guilty of murder.

The third and last question made upon the record arises out of proofs in respect to the mental condition of the prisoner. The record states the prisoner's counsel insisted that, although the prisoner knew it was

wrong to kill the deceased, yet, if he was impelled to the act by a moral power which he could not resist, he was excusable. The words "moral power" may mean threats, duress of imprisonment, or an assault imperiling life, which is the usual sense of the phrase, or it may mean some supernatural agency. The former construction would make the position of the counsel entirely inapplicable to the case; we, therefore, adopt the latter. The position, thus interpreted, does not fall within any approved definition of a *non compos mentis.*

It assumes that the accused knew the nature of his act, and that it was wrong. The law does not recognize any moral power compelling one to do what he knows is wrong. "To know the right and still the wrong pursue," proceeds from a perverse will brought about by the seductions of the evil one, but which, nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome, otherwise it would not seem to be consistent with the principles of justice to punish any malefactor. There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons, indeed, deem themselves incapable of (468) exerting strength of will sufficient to arrest their rule, speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions. To excuse one from criminal responsibility the mind must, in the language of the judge below, be insane. The accused should be in such a state of mental disease as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong, and this should be clearly established. This test, a knowledge of right and wrong, has long been resorted to as a general criterion for deciding upon legal accountability, and with a restricted application to the act then about to be committed, is approved by the highest authorities. But we do not undertake to lay down any rule of universal application. It seems to be chimerical to attempt to do so from the very nature of things, for insanity is a disease, and, as is the case with all other diseases, the fact of its existence is not established by a single symptom, but by a body of symptoms, no particular one of which is present in every case. Imperfect as the rule may be, it covers a great variety of cases, and may aid the tribunals of the country in judging of this most difficult subject. The case put of a criminal act committed under the belief that it was commanded by God, would fall under the rule. The perpetrator in such case would not know he was doing what was wrong, but, on the contrary, would believe he was doing what was right in obeying a power which had a right to command him. This condition of mind would constitute insane

delusion in respect to the particular act committed, and if clearly established by proof of preëxisting facts, would excuse from responsibility.

It will thus be seen that instructions in conformity with the argument of prisoner's counsel ought not to have been given. If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it against all supernatural agencies and holds him amenable to punishment. There is no error in the instructions actually given upon this subject, and in the absence of any prayer for other specific instructions, there is no omission of which the (469) prisoner has a legal right to complain.

PER CURIAM. No error.

Cited: *S. v. Myerfield,* 61 N. C., 111; *Mayo v. Jones,* 78 N. C., 406; *S. v. Reitz,* 83 N. C., 637; *S. v. Mills,* 91 N. C., 596; *S. v. McNair,* 93 N. C., 630; *S. v. Potts,* 100 N. C., 465; *S. v. Rhyne,* 109 N. C., 795; *S. v. Edwards,* 112 N. C., 909; *S. v. Scott,* 142 N. C., 585; *S. v. Cooper,* 170 N. C.. 724.

JOHN H. TOMLINSON v. W. W. LONG.

1. The sheriff's return on process in his hands, "Not to be found in my county," implies that the person to be reached by the process was not to be found after due search, and if the fact thus implied be untruly stated the return is a false one.
2. Where a person to be summoned by a subpœna was at his home, in the sheriff's county, for fifteen days preceding the day of the return of the process, though the sheriff lived 25 miles from him, and though he was informed that such person would continue out of the county during all that time, it was held he was liable for the penalty for making a false return in saying that he was not to be found.

DEBT for a penalty, tried before *French, J.,* at Spring Term, 1861, of IREDELL.

The declaration was for the penalty of $500, for a false return to a subpœna placed in defendant's hands, to be by him executed, as sheriff of Yadkin County.

A suit in equity was pending in the court of equity of Iredell County, between John H. Tomlinson, plaintiff, and B. B. Benham and W. H. A. Speer, defendants, which had been referred to W. P. Caldwell, Esq., clerk and master of the said court, to state an account between the parties. It was proved by Mr. Caldwell that on or about 18 November,

1859, he issued a subpœna, in due form, directed to the sheriff of Yadkin County, commanding him to summon J. S. Claywell, witness for (470) plaintiff, to be and appear in Statesville, N. C., on 10 January, 1860, and that about the time of issuing said subpœna he either gave it to defendant Long or mailed it to him, directed to Yadkinville, the county seat of Yadkin County, of which the said Long was sheriff, and that the same was returned to him at Statesville on 10 January, 1860, indorsed, "Not to be found in my county." The day when the subpœna came to the hands of the defendant had not been indorsed on the process. J. S. Claywell testified that he had been a citizen of Yadkin County for ten years past, and was personally well known to the defendant; that he lived some fourteen miles from Yadkinville and was at home throughout December, 1859, except some five days immediately preceding Christmas day; that he returned home on Christmas day, and remained at home, about one mile from Jonesville, in Yadkin County, during January, 1860. The witness stated that he often crossed the river into Surry, but did not recollect that he was out of the county from 25 December, 1859, till 10 January, 1860.

R. M. Allison testified that he was in Yadkin County during the first week in January, 1860, and saw the witness Caldwell.

B. B. Benham, for the defendant, testified that the defendant Long came to his house, in Jonesville, in December, 1859, while Claywell was absent from the county, and told him he had a subpœna for Claywell to give evidence in behalf of Tomlinson in the suit aforesaid, and he told Long that Claywell had left on that day and would not return to Yadkin for two or three weeks. This evidence was objected to by plaintiff's counsel, but admitted by the court.

The defendant introduced E. C. Roughton, one of the deputies, who testified that on the day before the return day of the subpœna he went to the residence of the witness Claywell, but did not find him at (471) home; that Long's postoffice is Huntsville, ten miles from Yadkin, and twenty-five miles from Claywell's.

On this state of facts, his Honor intimated that the plaintiff could not recover, in deference to which he took a nonsuit and appealed.

Barber for plaintiff.
Fowle and Boyden & Mitchell for defendant.

MANLY, J. After some reflection upon the facts of this case, we arrive at a different conclusion from that of the court below.

It does not appear definitely upon what day in December the defendant received the subpœna. It was either delivered to him personally or

transmitted through the mail from Iredell to Yadkin on the 10th; and as the distance is short, and we are certainly informed that he received it in that month on some day previous to Christmas, it is fair to conclude he received it as early as the 15th. Claywell, the individual to be summoned, had an established and well known residence in the county, and was absent from the county for five days only, immediately preceding Christmas day.

We attach but little importance to the distance between the sheriff and witness's residence. The sheriff must be able, either by himself or deputies, to discharge his duty in all parts of the county with proper official dispatch.

In like manner, we attach but little weight to the misinformation derived from Benham. The sheriff should assure himself of a fact upon which he bases a return by something more certain than the conjectures of wayside men.

Without criticising the words in which the return "Not to be found" is couched, but putting a construction on them most favorable to defendant, viz., that witness had not been found after due search, and our opinion still is that it amounts to a false return. It was not true thus to say by implication that proper search had been made.

If the sheriff desires to avoid the heavy penalty of the statute for a false return, he should in all cases of doubt return the facts, and not merely his conclusions. By doing so, if it should appear that (472) he has erred, he will have subjected himself to the penalty of $100 for not duly executing and returning, but not to the higher penalty for a false return. This last penalty is imposed only for returns false in fact, and not for those which are false only by way of inference (the facts being truly stated). This distinction is taken in the late case of *Hassell v. Latham,* 52 N. C., 465.

The law, as well as Christian morality, abhors falsehood. It is especially mischievous and odious in a public officer, and hence the severe penalty imposed upon it in The Code, ch. 105, sec. 17. It is not necessary there should be a criminal intent. This characteristic is probably absent from the present case. Falsehood, in fact, is the mischief guarded against. The rigor of the rule is essential to secure on behalf of the public a corps of officers diligent, circumspect, and truthful, qualities which will be regarded the more indispensable when we consider the numerous important and sacred interests committed to their charge.

We repeat that this is no hardship to the sheriff. If he be in any doubt as to the legality of his conclusions in making a return, let him return the facts and throw himself upon the judgment of the court. He can, in that way, avoid the penalty of a mistatement of fact, while

he will fall, at worst, on the penalty for negligence, which is comparatively venial.

In the present state of the sheriff's return, we think it is false.

The nonsuit must, therefore, be set aside and a *venire de novo* ordered.

PER CURIAM. Reversed.

Cited: *Albright v. Tapscott, post,* 473; *Harrell v. Warren,* 100 N. C., 264; *Campbell v. Smith,* 115 N. C., 499.

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(473)

JOHN G. ALBRIGHT v. JOHN TAPSCOTT.

1. A return made by a sheriff that is false in fact, although the officer was mistaken in the matter as to which he made his return, will nevertheless subject him to the penalty for a false return.
2. In an action of debt for a penalty in which *nil debit* is pleaded a verdict finding all issues in favor of the plaintiff and assessing his damages to $500 will not sustain a judgment of recovery.

DEBT against the defendant, as sheriff of ALAMANCE, for making a false return, tried before *Bailey, J.,* at Fall Term, 1861.

The action was brought for the penalty of $500. A subpœna came to the hands of the defendant, as sheriff of Alamance County, commanding him to summon one Cynthia Randleman, etc., as a witness for the plaintiff. The sheriff's deputy, to whose hands the process came, summoned one Julia Randleman, the wife of the defendant in the suit, and did not summon Cynthia Randleman, and did not have an opportunity of doing so, for she was not in the county during the period prescribed for the execution of the writ. The writ was nevertheless returned as "executed."

The court was of opinion that on this state of facts the plaintiff was entitled to recover, and so instructed the jury, who returned a verdict for the plaintiff, and judgment being given thereon for plaintiff, the defendant appealed.

No counsel for plaintiff.
Graham for defendant.

MANLY, J. The return of the sheriff, which is the subject of this action, is certainly untrue. We have held at this term in *Tomlinson v. Long, ante,* 469, that it is not necessary the officer should be convicted of any criminal intent.

It follows, therefore, that the return is false in the sense of the statute, Rev. Code, ch. 105, sec. 17, and that the defendant, in the present state of the return, is subject to the penalty of $500. We refer to what is said in *Tomlinson v. Long* as containing the reasons that (474) control our judgment in this.

The great importance of securing for these returns absolute verity, being *quasi* records, and the strong temptations which exist to cover over omissions by the technical form of a return, lead us to adopt the stringent rule that every untrue return, in fact, is a false return within the purview of the statute.

It is not difficult to conceive of cases in which the sheriff might be deceived into a false return without laches on his part. In such cases the power of allowing amendments so as to state the facts of the case should be liberally indulged by the court. By such means any surprise into which the officer might have fallen would readily be obviated.

We concur, therefore, entirely with the court below in its judgment as to the character of this return.

But there is an irregularity in the verdict for which the judgment must be arrested. The action is properly one of debt. The plea is *nil debit.* The verdict finds all issues in favor of the plaintiff and assesses his damages at $500 and interest.

This is not such a verdict as consists with the pleadings. It would have been technical and proper in an action upon the Case for damages, which are secured by the same statute that gives the penalty, but is insensible as a finding in an action upon the statute for the penalty. It is not responsive to the issues, and there can be no judgment upon it; Archbold's N. P., 350.

PER CURIAM. Let the judgment be arrested.

Cited: *Finley v. Hayes,* 81 N. C., 370; *Harrell v. Warren,* 100 N. C., 264; *Stealman v. Greenwood,* 113 N. C., 358; *Campbell v. Smith,* 115 N. C., 499.

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(475)

GEORGE LEDBETTER v. ISAAC ARLEDGE.

The provisions of Rev. Code, ch. 31, sec. 50, requiring the return of all writs, process, etc., to be made on the first day of the term to which they are returnable, does not apply to executions of writs of *fieri facias.*

MOTION for a judgment *ni. si.* against the defendant, as sheriff of HENDERSON, heard before *Dick, J.,* at Spring Term, 1861. This case was submitted to his Honor on a

CASE AGREED.

An execution issuing from the county court of Henderson, in favor of George Ledbetter against one William Reese, more than twenty days before the term of the court, was placed in the hands of the defendant, who failed to return the same on the Monday of the term. On Thursday of the term, to which the execution was returnable, the plaintiff asked for and obtained a judgment *ni. si.* against the defendant, who immediately thereafter paid the amount called for in the execution to the plaintiff's attorney, and asked for and obtained leave of the court to make his return. On the next day (Friday) the defendant asked leave of the court to strike out the order granting a judgment against him, which was granted and the judgment *ni. si.* was ordered to be stricken out, from which the plaintiff prayed and obtained an appeal to the Superior Court.

In the Superior Court a *pro forma* judgment was given for plaintiff, and defendant appealed to this Court.

No counsel for plaintiff.
Phillips for defendant.

MANLY, J. The provisions of The Code, ch. 31, sec. 50, requiring the return of all writs, process, etc., on the first day of the term to which they are returnable does not apply to executions or writs of *fieri facias.*

This is apparent from a consideration of the section in all its parts, for it is further provided therein that process not made returnable or executed as directed shall be adjudged void upon the plea of the (476) defendant. From which it seems that it means such process as a plea could be made to, viz., original, or *mesne;* see *Duncan v. Hill,* 19 N. C., 291. It is also apparent from the provisions made by law for postponing sales under execution from the first to the later days of the term; Rev. Code, ch. 45, sec. 14, and from the general practice of the courts.

The sheriff is allowed all the days of the term to return a *fieri facias* unless he be ruled, upon motion and cause shown, to return it on some intermediate day. When the return is made, like other acts of the court, it stands, by relation, as if done on the first day.

It follows that when a sheriff made due return on Thursday of his execution, it was not only in the power, but it was the duty of the court to strike out the conditional judgment as soon as the fact of the return was brought to its notice.

The proceedings of a court are all in paper until its close, and are subject in the meanwhile to be reviewed, amended, or revoked, as may seem to the court's maturer judgment right and proper.

The action of the county court was strictly in accordance with law, and consequently the *pro forma* judgment of the Superior Court erroneous, wherefore the latter should be reversed and judgment for the defendant.

PER CURIAM. Reversed.

Cited: Faircloth v. Ferrell, 63 N. C., 642; *Peebles v. Newsom,* 74 N. C., 475; *Person v. Newsom,* 87 N. C., 143; *Boyd v. Teague,* 111 N. C., 247.

WILLIAM J. HOUSTON, SOLICITOR, v. THE NEUSE RIVER NAVIGATION COMPANY.

1. **An information in the nature of a writ *quo warranto* against a corporation to have its privileges declared forfeited because of the neglect and abuse in the existence of them, must be filed in the name of the Attorney-General of the State, and cannot be instituted in the name of a solicitor of a judicial circuit.**
2. **In a matter of a public nature the officer who acts for the State does not pay costs to the other party.**

THIS was an information in the nature of a *quo warranto,* (477) heard at Fall Term, 1861, of CRAVEN.

The information sets forth divers causes why the corporation should be considered as having forfeited its privileges, but from the view taken of the case in this Court neither of these allegations nor the grounds of defense relied on in the answer are material to be stated. The cause was disposed of in the court below by a *pro forma* judgment that the information be dismissed at the plaintiff's costs, from which plaintiff appealed.

J. W. Bryan for plaintiff.
Attmore for defendant.

BATTLE, J. This is an information filed on behalf of the State by the plaintiff, as solicitor of the Second Judicial Circuit, in the Superior Court of law for the county of Craven against the defendant, to inquire by what warrant the company is now exercising its corporate franchises, it being alleged that it has forfeited them. The information was filed by leave of the Court first had and obtained. The defendant appeared by attorney and put in an answer, and upon the hearing in the court below the information *pro forma* was ordered to be dismissed at the plaintiff's costs, and the plaintiff appealed to the Supreme Court.

Upon the argument here, it was objected that the information was improperly filed by the solicitor, and it is contended that it must be dismissed because it was not instituted under the order of the General Assembly, or the Governor, or the Attorney-General of the State, as directed by section 25, chapter 26, Revised Code. The objection is, we think, well taken and is fatal to the proceeding in the present form. The information is in the nature of a writ of *quo warranto,* instituted on behalf of the sovereign, and it can be used only in the cases and in the manner prescribed by the sovereign. It follows that, as the Legislature has prescribed in the chapter and section of the Revised Code to which reference has been made, an information filed (478) against a corporation for the purpose of having its franchises declared to have been forfeited by abuse or neglect must be by sanction of the General Assembly, or the Governor, or the Attorney-General; it cannot be filed by any other authority or by any other officer. There are, indeed, cases in which an information in the nature of a writ of *quo warranto* may be filed by a solicitor as well as by the Attorney-General, but it is in consequence of an express provision of law to that effect. Thus, when a person usurps an office, or intrudes into it, or is found unlawfully holding or executing it, chapter 95, section 101, Revised Code, authorizes the Attorney-General or a solicitor for the State to institute a proceeding of this kind against him for the purpose of trying his right to it. The authority thus given expressly to a solicitor, in a particular case, is an irresistible argument to prove that he has it not in other cases, where it is not only not given to him, but expressly conferred upon another.

The order dismissing the information is affirmed, but it is reversed as to the costs. In a matter of a public nature the officer who acts for the State does not pay costs to the other party. *S. v. King,* 23 N. C., 22; *S. v. Banner,* 44 N. C., 257.

PER CURIAM. Information dismissed.

WILLIAM S. MASON v. ALFRED WILLIAMS.

Where a person purchases a chattel from one who is not the owner of it, and it is admitted by the parties, or found by the jury as a fact, that the purchaser was induced to make the purchase by the declarations or acts of the true owner, the latter will be estopped from impeaching the transaction.

TROVER for the conversion of a steam engine, tried before *Heath, J.*, at Fall Term, 1860, of WAKE.

The case was submitted to his Honor and the jury upon the following (479)

CASE AGREED.

"The title to the engine in question was in James F. Jordan & Co. on 24 July, 1851, when William D. Cooke, one of the partners, conveyed his interest therein to P. F. Pescud, as trustee, for sale, etc. On 7 November, 1851, James F. Jordan, another partner, conveyed his interest to one W. H. Jones, as trustee, for sale, etc. As was understood between the parties to these conveyances, the partnership of James F. Jordan & Co., which consisted of other partners besides the two mentioned, was still carried on, and so continued to be, retaining the possession of the property until it became insolvent, at which time, by assignments, its property became vested in the plaintiff, the corporation having conveyed the same in 1855 to one Benedict, in payment of a firm debt, who, upon 6 June, 1856, conveyed it to the plaintiff, as trustee, for sale, etc. After this, P. F. Pescud, being in his own right, and as agent for Jones, about to make sale of the property, conveyed as above, and not knowing that the engine in question was included therein, was informed by Mason that it was so included, and that he ought to sell it, he (Mason) having no claim upon it. There was no evidence that the defendant had any knowledge of this conversation before the sale.

Pescud, accordingly, a few weeks afterwards, to wit, in November, 1857, offered it at public sale, with the other things, and stated to the bidders that his title was good, asking if any one present had any claim, but stating he only sold his right to it and that of Jones. Mason was present within hearing and made no objection. He also bid for the engine, but it was purchased by the defendant.

It is admitted that Mason then believed Pescud's title was good; subsequently, however, in consequence of the decision in *Bank v. Fowle*, 57 N. C., 8, he had reason to change his views, whereupon he made a demand for the engine upon the defendant and the latter refused to deliver it.

"It is agreed that unless defendant was tenant in common with the plaintiff, or as against the plaintiff sole owner at the time of the demand

and refusal, there was a conversion before the bringing of this suit, (480) and that if he were tenant in common there was a conversion, supposing that a claim to the exclusive ownership amounted to such."

These facts being agreed upon, his Honor charged the jury in favor of the defendant, who rendered a verdict for the defendant. Judgment, and appeal by plaintiff.

Fowle for plaintiff.
Phillips for defendant.

BATTLE, J. It appears from the agreement of the parties that at the time when the defendant purchased the steam engine in question at the public sale made by Pescud, the plaintiff was the owner of it, but it is contended for the defendant that the plaintiff, in consequence of his declarations and acts, is stopped from asserting his title to the article. The argument is that it must be taken either that the plaintiff had waived his title and thereby authorized Pescud to sell the article, or that he cannot now be allowed to assert it, because it would be a fraud upon the defendant to permit him to do so. In support of his argument the counsel for the defendant has cited and relied upon *Bird v. Benton,* 13 N. C., 179, and *Cornish v. Abingdon,* 4 Hurl. & Nor., 549. In the first of these cases it is held that a sale or pledge of a chattel by a person who has no title, in the presence of the owner and without objection on his part, estops him from setting up his title to impeach the transaction. In the latter case the Court says that if from the actual expressions or course of conduct of one person, the other may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he shall do so or not, the party using the language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.

To evade the force of these propositions, it is insisted for the plaintiff that at the time when he spoke to Pescud he was ignorant of his (481) own title, as he was also at the sale, and that there was no evidence to show that the defendant was misled by what he had said or done, or that the defendant had purchased the article in question in consequence of his declarations or acts.

The counsel for the plaintiff has, in support of his views, referred to *West v. Tilghman,* 31 N. C., 163, wherein it was decided that though the owner of a slave who is ignorant of his title stands by and sees the slave sold by a person having no title, and makes no objection, yet he is not thereby estopped from asserting his claim.

We have examined these and the other cases referred to by the counsel on both sides, and in our opinion the true principle to be derived from

them is this: Where a person purchases a chattel from another who is not the owner, and it is admitted by the parties or found by the jury as a fact that the purchaser was induced to make the purchase by the declarations or acts of the true owner, the latter will be estopped from impeaching the transaction; see *Pickard v. Sears,* 33 Eng. Com. L., 117. If, then, in the present case it had been stated as an agreed fact that the defendant purchased the steam engine in question from Pescud in consequence of what the plaintiff told Pescud or in consequence of the conduct of the plaintiff at the time of the sale, we should say that the latter could not recover. That fact cannot, however, be inferred by the court from anything stated in the case agreed, and it must be left as a question for the jury, upon whatever competent and relevant testimony the parties may be able to produce on the trial. The case agreed was made up in the court below, to be "submitted to his Honor and to the jury," and his Honor took it upon himself to decide a question of fact which he ought to have left to the jury, in consequence of which there is error, and the judgment must be reversed, and a

PER CURIAM. *Venire de novo.*

Cited: S. c., 66 N. C., 567; *Lumber Co. v. Price,* 144 N. C., 55; *Supply Co. v. Machin,* 150 N. C., 743.

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(482)

C. E. NEAL & CO. v. WILMINGTON AND WELDON RAILROAD COMPANY.*

1. Where freight is carried on a railroad from station to station, if the owner is not ready to receive it at its destination, the duty of the carrier is discharged by placing it in the warehouse of the company, without giving notice to the owner or consignee.
2. It is certainly not required of the warehousemen at a railroad station to notify consignees, living at a distance, of the arrival of their goods, either through the mails or otherwise.
3. Where a railroad agent received goods into the company's warehouse at a country station, which was an ordinary wooden house, which he kept fastened in the night-time with iron locks, bolts, and bars, also in the daytime in the same manner, it appearing that the agent resided 200 yards from the warehouse, it was *Held,* to be ordinary care, and that the company was not liable for the loss of the goods by theft.

CASE for negligence, tried before *Bailey, J.,* at Spring Term, 1861, of EDGECOMBE.

*JUDGE BATTLE, being a stockholder in the railroad, took no part in the decision of this case.

The following is the case agreed between the counsel of the parties:

The declaration contained two counts: First, against defendant, as "common carriers, and second, as warehousemen." The facts are, that about 1 May, 1859, the plaintiffs delivered to defendant a box of merchandise of the value of $390, at Weldon, to be transported from that place to Rocky Mount. The goods were transported and delivered in the warehouse of defendant at the latter place, and on the day after the arrival, or the second day thereafter, the plaintiffs applied for the box, and on examination it could not be found in the warehouse, but was found, the same day, a few hundred yards from the station, broken open and rifled of its contents. The warehouse was an ordinary wooden building, such as the company had at the other stations, except at Weldon, Goldsboro, and Wilmington, where they are made of brick. The company receives large amounts of freight at this station for persons residing in Tarboro and Nashville and their vicinity. The warehouse usually had in (483) it goods of considerable value, and the company had no watch or guard at night for its protection. The agent resided about two hundred yards from the station. The doors of the warehouse were secured by locks, bolts, and bars in the usual manner at night, and in like manner in the daytime when the agent was absent. The plaintiffs resided and did business in Tarboro, about eighteen miles distant, and there was a daily mail from Rocky Mount to Tarboro. The company did not give notice of the arrival of the goods. The defendant is an incorporated company, and has been duly organized.

It is agreed that if the court shall be of opinion that the plaintiffs are entitled to recover, judgment shall be rendered for $390, with interest from 1 May, 1859, and cost of suit; but if a contrary opinion, judgment of nonsuit shall be entered.

The court being of opinion with the defendant on the case agreed ordered a nonsuit, from which the plaintiffs appealed.

No counsel for plaintiffs.
B. F. Moore for defendant.

MANLY, J. The facts of this case are similar to those presented in the case of *Hilliard v. R. R.*, 51 N. C., 434, and our reflections lead us to the same general conclusions.

Where freight is carried on a railroad from station to station, if the consignee or agent be not ready to receive it at its destination, the duty of the carrier is discharged by placing it in the warehouse of the company, for there is no usage or rule of law which requires the company's servants to deliver elsewhere than at the station, and from the nature of this mode of transportation, it is impracticable to give notice prior to the necessary discharge of the freight. We think, therefore, the duty of

the company as a common carrier is fulfilled when the packages are placed in the warehouse of the company (no person being present to receive them), without giving notice to the consignee or agent. The exigencies of transportation by steam require this. (484)

Other duties then devolve upon the company, viz., those which appertain to a bailment for transportation. The point first occurring in this view of the case is whether the duty to notify owners or consignees belongs to this particular kind of trust. We do not think it necessary to discuss how this may be in all cases. In the particular one before us it was not, as we conceive, the duty of the company. The party by whom the package was owned and to whom it was directed resided at the distance of eighteen miles from the station, and had no agent at the place. It cannot be that the warehousemen of the company were required to notify through the mail. The great number and variety of articles transmitted by this mode of conveyance through our country would make such a duty extremely burdensome, if not impracticable. What may be the rights of the consignees residing at the station we leave undecided. Those who reside at distances, making communication inconvenient except through the mails, are not entitled to notice.

The remaining question presented by the case, in the point of view we are now considering, is whether the company as warehousemen took the proper care of the packages in question. Ordinary care is what is required, and this is defined by a recent elementary treatise (Story on Bailments, sec. 41) to be "that which men of common prudence, generally exercise about their own affairs in the age and country in which they live." We have attentively considered the facts bearing upon this inquiry, and conclude there is nothing to show a want of requisite care. The house is of the kind used by prudent men to store things of value. It is secured by fastenings appropriate to such buildings—is kept by an agent, who resides a short distance from it and who closed it by its fastenings at all times, both night and day, when he was absent from it. This satisfies the definition of ordinary care. There may be conditions of a city or other community making a night-watch a proper safeguard, but there is nothing in the previous general history of our country places or in the proofs respecting this particular (485) locality which induces us to think that it was demanded there by the requirements of ordinary care.

Upon the whole case, we concur in the opinion of the court below, and the judgment of nonsuit should, therefore, be

PER CURIAM. Affirmed.

Cited: Turrentine v. R. R., 100 N. C., 386; *Daniel v. R. R.,* 117 N. C., 603; *Lyman v. R. R.,* 132 N. C., 725.

CEPHAS HUDSON v. ANSON CRITCHER.

The existence of a claim in equity is a sufficient consideration for a promise to pay money or any other thing, and such promise may be recovered in an action at law.

ASSUMPSIT tried before *Bailey, J.*, at Fall Term, 1861, of GRANVILLE.

The declaration contained two counts, one for the price of two slaves Jack and Friday, which plaintiff had sold to the defendant, and for which he promised to pay the sum of $287.25; the other, the common count in *assumpsit.*

One Paschall testified that on 10 June, 1856, the plaintiff and defendant came to him and asked him to make a settlement between them, stating that prior to that time, to wit, about 16 January, 1856, the plaintiff had sold to the defendant two negro slaves, named Jack and Friday; that he then made a statement of accounts between the parties upon their statements of debt and credit, and that there was a balance in favor of the plaintiff of $287.25, the price of the slaves, which balance the defendant promised the plaintiff that he would pay, and at the same time he (defendant) made a writing in these words:

"To Hudson—Balance, $287.25"; and handed it to the witness (486) to keep as a memorandum of the amount of said balance.

The defendant then produced and proved two bills of sale, under seal, dated 16 January, 1856, for Jack and Friday, in which the payment of the full price was acknowledged.

The defendant insisted that the plaintiff was estopped by these bills of sale, and that the debt was entirely taken away, and there was no consideration for the promise to pay the money sued for. His Honor being of this opinion, so instructed the jury, who found a verdict in favor of the defendant. The plaintiff excepted to the charge of the court, and appealed from the judgment rendered on the verdict.

No counsel for plaintiff.
B. F. Moore for defendant.

MANLY, J. An acknowledgment in a bill of sale under seal, or in a deed, of the reception of the consideration money is, in general a bar to any action at law for the same. This was very properly recognized by his Honor below as an established principle. But there remains, notwithstanding *in foro conscientiæ,* a claim which a court of equity will enforce. It is something more than a mere moral obligation. This was decided in *Crawley v. Timberlake,* 36 N. C., 346.

It is also settled that an equitable demand is a sufficient consideration

to support at law a promise to pay; *Lowe v. Weatherley,* 20 N. C., 212; *Noblet v. Green,* 13 N. C., 517. When, therefore, parties between whom there is an unsettled demand of this nature come to an account and strike a balance which the indebted party promises to pay, the equitable is converted into a legal demand and may be recovered by an action at law upon the promise. The accepting of such a promise and the consequent abandonment at that time of further strife or litigation in respect to the claim, is the consideration. Without intimating any opinion upon the merits of the plaintiff's case in this view of it, we think it ought to have been presented to the jury. (487)

Promises upon equitable considerations seem to have been maturely considered by the English judges in banc, in *Hawkes v. Saunders,* 1 Cowper, 289, and we refer to it for a corroboration of the judgment of this Court in *Lowe v. Weatherley* and *Noblet v. Green.* In the English court the question arose in an action upon the promise of an executor having assets to pay a legacy; this was held to be a promise obligatory at law. The general doctrine of moral and equitable considerations is discussed, and there is a concurrence of opinion to the extent that a present demand in equity is a consideration sufficient to support a promise in an action at law brought upon it. There should be a

PER CURIAM.　　*Venire de novo.*

Cited: Lawson v. Pringle, 98 N. C., 452.

ESTHER COX v. JOHN COX.

A court cannot strike out an entry of a compromise in a suit and order it for trial because it has been imperfectly entered, or because it has not been performed. The proper way is to amend, *nunc pro tunc,* so as to make the record speak the truth, and then to enforce the performance of the compromise by attachment or other means usual is such cases.

APPEAL from an interlocutory order at DAVIDSON, made by *Saunders, J.,* in a suit pending in that court for a divorce.

The parties in the case having compromised on certain terms, an entry was made on the docket in these words, to wit: "Compromised and dismissed at cost of the defendant, provided the cost is paid." At the next term thereafter it appeared that the cost was not paid, and the plaintiff's counsel moved that the entry be stricken out and that the cause stand for trial on the docket. To sustain this motion, (488) he produced several affidavits showing that a part of the compro-

mise was that the plaintiff was to be restored to her home, and was to be well treated and provided for by her husband; he also urged the non-payment of the costs as one of the grounds for setting aside the entry.

The defendant filed his own affidavit, not denying the terms of compromise as alleged by the plaintiff, and insisting that he has been ready and willing to perform it as stated by her, and giving reasons why the plaintiff had not returned home, and also why the cost had not been paid.

The Superior Court, on consideration of the motion and the facts disclosed, made the following order: "It appearing to the satisfaction of the court that the entry made by the clerk upon the trial docket did not contain the full and true terms of the compromise and agreement in said case, that said defendant has not complied with the said compromise and agreement, it is ordered that the case stand for trial at the next term of this court."

From which order the defendant prayed an appeal to the Supreme Court, which was allowed.

Kittrell and Miller for plaintiff.
Gorrell for defendant.

MANLY, J. This is an appeal by leave from an interlocutory order of the Superior Court for Davidson. Pending a suit between the parties for a divorce, a compromise was agreed upon and partly entered of record, some of the conditions of the compromise being omitted. At the term next after the compromise evidence was laid before the court, by affidavit, of the omission above stated and of the non-performance generally of the conditions; whereupon the court ordered what was upon the record to be stricken out, and the case to stand upon the docket for trial.

We think this order cannot be supported, because of defect of power in the court. Compromises put a speedy end to contentions and, (489) therefore, commend themselves to the favorable regard of the courts. They are entered of record, and may be enforced by rules upon the respective parties to perform, and by attachments, if need be. The courts cannot unmake any more than they can make them at pleasure; but will see that they are properly entered upon the records, when made, and faithfully carried into execution, if practicable. Without discussing the powers which the court might have over such compromises in certain states and conditions of them, it is sufficient to say that neither the imperfect state of the record nor the neglect of one party to perform and the consequent dissatisfaction of the other, would furnish the court with an occasion for the exercise of a power to abrogate.

This disposes of the question before us and shows that there is error in the order appealed from. The proper course would have been to amend the record as to the terms of the compromise *nunc pro tunc,* so as to make it speak the truth, and then to compel its performance by the exercise of such powers as are usual and proper with the court to enforce its rules. The powers of amendment are unquestionable, and the powers to enforce are also clear; *Freeman v. Morris,* 44 N. C., 287; *Kirkland v. Mangum,* 50 N. C., 313.

We take this occasion to reaffirm that we interfere with no discretionary power of the Superior Court. The order complained of does not lie within the Court's discretion, but is a mistaken exercise of power.

PER CURIAM. Reversed.

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(490)

DOE ON THE DEMISE OF DANIEL FOUST v. G. W. TRICE ET AL.

1. One who comes in as landlord to defend an action of ejectment cannot object that no notice to quit has been given to the original defendant.
2. The act of 1861 (second extra session), chapter 10, section 4, did not affect questions as to the continuance of causes coming before a court whose sittings commenced upon Monday of the week during which the act was ratified.
3. An occupant is incompetent to give evidence for the defendant in an action brought to recover the land of which he is in possession.
4. The declarations of an occupant as to the manner in which he came into possession of the land in question are competent as evidence against the defendant in an action of ejectment.

EJECTMENT tried before *Bailey, J.,* at Fall Term, 1861, of ORANGE.

The case was called on Thursday of the term, when the defendant alleged he was not ready for trial and prayed a continuance—first, for the absence of James Pender, the occupant of the land in dispute, who was detained from court by sickness; that he expected to prove by Pender that he never was the tenant of Foust, the lessor of plaintiff, but was in fact and in truth the tenant of the defendants; that he was carried on the land by the force and fraud of one Hugh Kirkpatrick, and that being there, he became the tenant of the defendants before this suit. The court ruled that Pender was not a competent witness if present, for which the defendant excepted. Second, for the want of the evidence of one Wm. G. George, which was set forth in the affidavit and admitted by the plaintiff. The lessor of the plaintiff exhibited no title, but alleged that James Pender, the occupant of the land, was his tenant,

and insisted that the defendants, who were admitted to defend as landlords of Pender, were estopped to deny his (plaintiff's) title. He called as a witness the aforesaid Hugh Kirkpatrick, who testified that he rented the land in question from the plaintiff's lessor in the last of the year 1853 or the first of 1854; that he was to give as rent one-third of the produce of the then cleared ground, and if he cleared new ground, was to have the product of that rent free for two years; that he did not clear any new ground, but cultivated the cleared land or part (491) of it during 1854-55 and '56; that at the end of 1856, he gave up the privilege of clearing, and agreed for the year 1857 to rent only the cleared land; that at some time during his lease, he could not say when, but which other testimony fixes to have been 17 January, 1854, he carried James Pender from a house where he (Kirkpatrick) had a lease, upon the land in dispute, put out from his wagon the family and goods of the said Pender, in the woods, about twenty yards from a road, one-fourth of a mile from the cleared land, and then told said Pender that he might stay there, rent free, as long as he had anything to do with the land; that Pender gave his assent to this, and witness's negroes assisted him in setting up forks and constructing a shelter, under which his family staid until they cut logs and built a cabin near by, in which they had ever since resided; that Pender soon after cleared a patch of land for a garden, which he had ever since cultivated, but had never paid any rent.

The plaintiff then offered to prove the declarations of Pender, while in possession of the land, to the effect that Kirkpatrick carried him upon the land by his own consent. This was objected to by the defendants, but admitted by the court. The defendants offered to show title in themselves, which was objected to by plaintiff and ruled out, and defendants' counsel excepted.

The defendants produced evidence tending to show that Pender was carried on the land by force and fraud, and did not agree to hold the land from Kirkpatrick or Foust.

The defendants' counsel moved the court to instruct the jury that, even if Kirkpatrick was believed, this action could not be maintained because it was brought prior to the year 1857.

Secondly, that the defendant Pender was entitled to notice to quit, or a demand of possession, before the action could be maintained, of which there was no evidence.

His Honor instructed the jury that if Kirkpatrick was believed by them the plaintiff was not entitled to recover, but if they believed, (492) from his evidence, that Pender went to occupy the land under him, or that after he went upon the land he consented to remain

there under Kirkpatrick, the plaintiff was entitled to recover, provided they believed that at the end of the year 1856 Kirkpatrick had given up the woodland and taken a lease for the cleared land only, for the year 1857, and if this were so this action could be maintained and there was no necessity for a demand of possession or notice on Pender to quit. The defendant's counsel again excepted.

Verdict and judgment for plaintiff. Appeal by defendants.

Phillips for plaintiff.
Graham for defendants.

MANLY, J. Kirkpatrick, at the beginning of 1854, entered on the land as the tenant of Foust, under an agreement that he was to hold for an indefinite time the whole tract, paying as rent a part of the crop each year made on the cleared land, and was to have any land that he should clear, rent free, for two years. This certainly made Kirkpatrick a tenant from year to year. He afterwards put Pender in possession of a part of the woodland under an agreement that he might stay there as long as Kirkpatrick had any interest in the land. Pender built a cabin and cleared a small patch and became the assignee of Kirkpatrick, in respect to the land of which he took possession, and was thus a tenant under Kirkpatrick, holding from year to year so long as Kirkpatrick's tenancy under Foust might continue. The question is, How was Pender affected by the fact that in 1856 Kirkpatrick agreed with Foust to give up his tenancy in respect to the woodland, and hold only the cleared land? In respect to Kirkpatrick, he had become a tenant from year to year, entitled to six months' notice to quit, and Kirkpatrick held in the same way under Foust, and had a right to assign or make any sublease of the same estate. It follows, as we think, that the agreement made by Foust and Kirkpatrick, could not have the effect of determin- (493) ing the estate of Pender and converting him into a wrong-doer or a tenant at sufferance, liable to be subjected to the cost of an action without notice of any kind. On the contrary, our opinion is that the effect of the sublease was to communicate to Pender a right to have the same notice from Foust that Kirkpatrick was entitled to, or, at any rate, to reasonable notice, so as to give him time to remove from the land before he was liable to an action. It would seem, therefore, if Pender had defended the action and put his defense upon the want of notice, it would have been an answer to the action; but as he does not defend, and Trice makes the defense for him, and is allowed to do so upon the ground of being his landlord, the case is said to be altered. The application on the part of Trice to be allowed to defend in the place of Pender presupposes that Pender is the tenant of Trice; so that Pender

having entered as the tenant of Foust must, on this presumption, have attorned or turned over to Trice, whereby he disclaimed or disavowed his tenancy under Foust, and thus put himself in the wrongg, and dispensed with the necessity of notice.

Upon the first presentation of this question to us, we are inclined to the opinion that as a landlord who defends in place of his tenant is only allowed to make such defense as the tenant could have made, and is concluded by any matter which would have concluded the tenant, *Balfour v. Davis,* 20 N. C., 443, so he should be allowed to make every defense which the tenant could have made had the landlord not interposed. But, upon further consideration, our opinion is that the point is with the plaintiff.

If we suppose Trice had not applied to defend in the place of Pender, but Pender had made defense himself at the trial, in reply to his defense for want of notice the plaintiff had proved that before the action was commenced Pender had accepted a lease from Trice and agreed to become his tenant, such proof would certainly have dispensed with (494) the necessity of notice.

If we allow Trice, in defending the action as landlord, to be neither more nor less restrained than Pender would have been, it will follow that the application to be allowed to defend as landlord, and his being on that ground, allowed to defend in place of Pender, concluded the fact, as against him, that Pender had accepted a lease from, or had otherwise attorned and agreed to hold under him, and Foust was thereby dispensed from the necessity of notice. That is to say, dispensed by reason of such supposed disclaimer of tenancy under Foust; Archbold Landlord and Tenant, 53, Law Lib., 225.

On this ground, therefore, the holding of the court below on the principal point in the bill of exceptions is supported.

Upon the other points, we think the ruling of the court was also correct. There is nothing in the motion for a continuance to withdraw its decision from the ordinary discretion of that court, unless it be the statute of 1861-62, extra session, chap. 10, sec. 4; and that turns out, upon examination, not to apply to it. The chapter of the statute in question was in force from and after its ratification, *i. e.,* after 11 September, 1861. The court began its session on 9th of the same month, and all acts of court by the doctrine of relation stand as if done on that day. There is no reason for excepting the acts of the court now in question from the operation of this doctrine. Therefore, although the order of court was not made until the 12th, it related back to the 9th, and was not affected by the statute. *Farley v. Lea,* 20 N. C., 307.

We are also of opinion that the court properly held that Pender, in case he had been present, would not have been a competent witness for

the defendant. As tenant in possession, he was directly interested in defeating plaintiff's recovery; for the legal sequence of such recovery would be the eviction of the tenant from the land.

Pender's continuing in possession of the land warranted also the ruling of the court upon the admissibility of his declarations in regard to the nature of his possession. The principle of a person in (495) possession being heard, through his declarations, to explain the act of possession, is now extensively applied, as will be seen by reference to the cases cited in second edition of 18 N. C., 367, in a note to *Askew v. Reynolds* and in *Marsh v. Hampton,* 50 N. C., 382.

The circumstances under which the declarations were made may not entitle them to much weight, but their admissibility and credibility are quite different questions, and triable, generally, by different tribunals.

PER CURIAM. Affirmed.

Cited: Whissenhunt v. Jones, 78 N. C., 363; *Clifton v. Wynne,* 81 N. C., 162; *Vaughan v. Parker,* 112 N. C., 101.

DOE ON THE DEMISE OF JOHN DOBSON v. JAMES FINLEY.

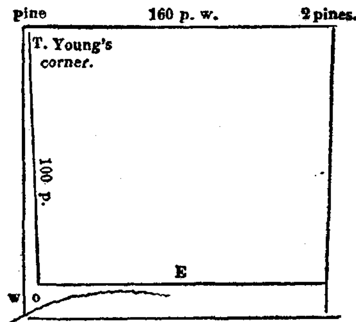
1. Where the second call of a boundary is clearly established, the first may be ascertained by running the course reversed and measuring on it the distance called for.
2. A commission to take a deposition that recites that it issued from the "supreme" court of McDowell County, for a suit pending in McDowell Superior Court, authenticated by the signature of the clerk and seal of the Superior Court of McDowell County, is so palpable a misprision as to authorize it to be regarded as a commission issuing from the Superior Court.
3. Where a white —— was called for as a corner, and a white oak was pointed out nearly in the course, by a marked line leading to it, and by other circumstances, it was *Held,* a proper question to be left to the jury, whether the white oak was the corner intended.

EJECTMENT tried before *Osborne, J.,* at Fall Term, 1860, of McDOWELL.

The lessor claimed title as the heir-at-law of one Dobson, and exhibited a grant to his ancestor, bearing date 18 December, 1799. The controversy was as to the location of the grant. It called for two pines on Beard's line on the south side of a hill, and running west (496) one hundred and sixty (160) poles to a pine, Thomas Young's corner; thence south, crossing the maple swamp branch, 100 poles to a

white ———; thence 160 poles to a pine, Templeton's corner; thence north, to the beginning.

It was in proof that the beginning corner could not be found, and that Beard had no land at the place where it is alleged to have stood; but there existed a hill, and on the south side of it there were several pine stumps and decayed pine timber; running thence 160 poles, the line reached a pine, which was the corner of a tract formerly owned by Thomas Young and one Tate as tenants in common, and running thence south one hundred poles, no white oak or other object answering as a corner was found; but varying the course a few degrees to the west, and extending the line 40 poles, a marked line was found crossing the maple branch, some of the trees on which being blocked, the marks corresponded in age with the grant, and a white oak was reached marked as a corner, but which was not blocked; it stood very near, but on the opposite side of



a drain which in winter afforded running water but in summer was dry. In order to show that the pine was known as Thomas Young's corner, the plaintiff introduced a grant bearing date in 1798, to one (497) Beard, for an adjoining tract of land, one of the calls of which was for a pine, Thomas Young's corner, which it was proved was the same pine contended for by the plaintiff, as being in his survey. This deed was objected to by defendant, but admitted by the court. Defendant excepted.

The lessor of plaintiff also offered in evidence the deposition of one Evans. The commission under which it was taken recited that the same was taken under an order from the "Supreme" Court of McDowell County, and it lacked the ordinary attesting clause of the clerk, but it named the suit, and it was signed by the clerk of the Superior Court of McDowell, and was under the seal of that court. The defendant's counsel objected to the admission of this deposition, but the court overruled the objection, and the defendant again excepted.

Evans testified that for many years he had owned and lived on the adjoining tract to that in controversy; that he knew the pine corner and for many years it had been known as Thomas Young's corner, and that there was an old marked line from the pine to the white oak, and that the white oak was the corner of the Dobson grant.

The defendant contended that as the call in the grant did not designate the white oak or any other natural object as the corner, but called for a course south and a distance of 100 poles, the plaintiff was restricted on that line to course and distance, and called on the court so to instruct the jury.

But his Honor charged the jury that it was necessary that the lessor of the plaintiff should prove to their satisfaction that his grant was located as he contended; that though the beginning corner had not been proved, yet, if they believed that it had existed at the south side of the hill, they would so find, and for this purpose they might consider the testimony which had been introduced to establish the second corner of the grant; that if they believed from the proof that the pine was Thomas Young's corner as called for in the grant, and then measuring the line as the surveyor testified, it would extend to the south side of the hill, and, notwithstanding the imperfect description, that the line of the grant was the marked line proved to exist, and that the (498) white oak was the corner of the grant, they might find it to be so. Defendant's counsel again excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Phillips for plaintiff.
No counsel for defendant.

PEARSON, C. J. We concur in the opinion with his Honor in the court below upon all the points which are presented in the statement of the case.

1. Supposing the pine to be established as the second corner, could the first, a beginning corner, be located by reversing the course and measuring the distance called for, from the pine back—that is, on the reversed course? His Honor ruled that the beginning corner could be fixed in this way; we agree with him. If the second corner is fixed, it is clear, to mathematical certainty, that by reversing the course and measuring the distance, you reach the first corner; so there is no question about overruling either course or distance by measuring the line, and the object is to find the corner by observing both course and distance.

2. The deposition of Evans was properly allowed to be read; the word "supreme" being evidently a misprision of the clerk, instead of "superior." This is palpable; because there is no supreme court in McDowell

County. The signature of the clerk and his seal of office gave full proof of the authenticity of the commission.

3. We concur in the opinion that in order to establish "the pine" as a corner by reputation, the call in Beard's grant, issued in 1798, was competent evidence, and, indeed, was the strongest sort of evidence to show that "the pine" was known as Thomas Young's corner; and we were at a loss to see on what ground the evidence could be objected to, but we are told, on the argument, that the objection was, that it did not appear that the grantee, Beard, or the surveyor were dead, and so that this (499) recital in the grant, which must be considered as "hearsay evidence," coming either from the one or the other, was not competent. The misapprehension proceeds from not distinguishing between evidence by reputation and hearsay evidence, as it is called. It is settled that both kinds of evidence are competent in questions of private boundary in this State; although in England it is confined to questions of public boundary—that is, the lines of parishes and counties and the like matters of public evidence. In the latter, to wit, hearsay evidence, it is necessary as a preliminary to its admissibility to prove that the person whose statement it is proposed to offer in evidence is dead; not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive he should be produced as a witness; whereas, it is manifest that in respect to evidence by reputation, this preliminary question cannot arise; therefore, proof of reputation, that is recitals in old deeds and grants, inscriptions on monuments, and the like, has always been deemed competent, without inquiring as to whether the parties to such deeds and grants, or the man who ingraved the inscription are living or dead, for the fact itself tends to establish the reputation, or received opinion, in regard to the particular matter; for instance, in our case the fact that is recited in a grant to Beard issued in 1798 that this pine is Young's corner, is evidence that the pine was known and admitted to be Young's corner, which is what is treated of in the books as establishing a boundary by reputation, and differs greatly from "hearsay evidence."

4. The call for a white ———, with a blank as a corner, does not present a question of ambiguity of description, but of an imperfect description; in which case, if the description can be made perfect by an implication furnished by the context of the instrument, the omission may be supplied without further proof; as a legacy of 300 is given to a daughter, to be paid out of the proceeds of the sale of a tract of land, the court, from the context, supplied the omission of the word (500) "dollars," and so made the description perfect. In our case, there is nothing in the deed to enable the court to infer what sort of a corner was intended; a white oak, or white ash, or white pine; so,

without further aid, the omission could not be supplied, and the course and distance would govern. But we agree with his Honor that the existence of marked line trees, crossing the maple branch, beyond the point where the distance gave out, which, when blocked, corresponded in age with the grant, and that at the point of intersection of the course of the second line and the reversed course of the third line, a white oak was found marked as a corner for the coming and leaving line, in respect to which no practical surveyor can be mistaken, were facts proper to be submitted to the jury, on which to warrant them in coming to the conclusion that the white oak was the corner, and in that way supply the omission in the description.

PER CURIAM. No error.

Cited: Mizell v. Simmons, 79 N. C., 193; *Whitehurst v. Pettipher,* 87 N. C., 180; *Dugger v. McKesson,* 100 N. C., 10; *Shaffer v. Gaynor,* 117 N. C., 19; *Tucker v. Satterthwaite,* 123 N. C., 532; *Westfelt v. Adams,* 131 N. C., 382; *Cowles v. Lovin,* 135 N. C., 491; *Yow v. Hamilton,* 136 N. C., 358; *Marshall v. Corbett,* 137 N. C., 558; *Hemphill v. Hemphill,* 138 N. C., 506; *Lindsay v. Austin,* 139 N. C., 467; *Bland v. Beasley,* 140 N. C., 631; *Land Co. v. Lang,* 146 N. C., 314; *Hanstein v. Ferrall,* 149 N. C., 243; *Lamb v. Copeland,* 158 N. C., 138; *Bank v. Whilden,* 159 N. C., 281; *Ricks v. Woodard, ib.,* 649; *Sullivan v. Blount,* 165 N. C., 11; *Byrd v. Spruce Co.,* 170 N. C., 434; *Lumber Co. v. Hinton,* 171 N. C., 31.

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* * * Hon. JOHN M. DICK, one of the judges of the Superior Courts, died since the last term of this Court, and Hon. THOMAS RUFFIN, JR., was appointed by the Governor and Council of State to fill his place, *ad interim.*

INDEX

ABATEMENT, PLEA IN. *Vide* Endorsement, 2.

ACTION. *Vide* Contract, 7.

ACTION AGAINST SHERIFF FOR MONEY COLLECTED.

The right to bring an action on the case against a sheriff for money collected by virtue of his office is expressly reserved in the act of Assembly (Rev. Code, ch. 78, secs. 1 and 2), giving an action of debt on his official bond for the same cause of action. *Fagan v. Williamson*, 433.

ADMINISTRATION.

1. Debts on a deceased person, assigned to one after the death of such person, do not constitute the assignee such a creditor as to entitle him to administration under the second section of chapter 46 of the Revised Code. *Pearce v. Castrix*, 71.

2. Where an administrator with a will annexed died, having in his hands money arising from the sale of land, decreed to be sold for the payment of debts, being a surplus over and above the sums required to pay such debts, which money belonged, by law, to persons to whom the land was devised, it was *Held*, that the administrator *de bonis non cum. tes. an.* of the original intestate was the proper person to bring suit for such money, and not the devisees. *Latta v. Russ*, 111.

3. Moneys paid by an administrator for the support of his intestate's minor children are not proper vouchers for him in the settlement of such estate. *Ibid.*

4. Wherever a deceased person has left a will and omitted to appoint an executor, or the person appointed has refused to qualify, the court of ordinary has a discretionary power to appoint any proper person administrator with the will annexed. *Suttle v. Turner*, 403.

ADVANCEMENT.

Where a parent put a slave into the possession of his child, with an intention to make an advancement, but afterwards changed his mind and took it back, it was *Held*, that the law implied no obligation on the part of the parent to pay for keeping, feeding, and clothing the slave. *Hedrick v. Wagoner*, 300.

AMENDMENT.

1. All courts have the inherent power to revise and amend their records, and make them conform to the truth. *Ashe v. Streator*, 256.

2. The power of the county courts to amend their records is a discretionary power, subject to the revisal of the Superior Court on an appeal; but the Supreme Court has no power to examine into the correctness of the exercise of such discretion in the courts below. *Ibid.*

AMENDMENT—*Continued.*

3. Where, however, the Superior Court erroneously decided that a county court had no power to make an amendment, it was *Held*, that this Court, on appeal, would correct such error. *Ibid.*

4. Where a verdict was rendered for more than the amount claimed in the writ, in a case where the measure of damages was certain and there was no certain criterion by which to show a mistake or misapprehension, it was *Held*, not proper to allow an amendment of the writ. *Ashe v. DeRosset*, 240.

Vide Compromise.

ADVERSE POSSESSION. *Vide* Statute of Limitations, 1, 5.

AFFIDAVIT IN ORDER TO BE ALLOWED TO PLEAD. *Vide* Ejectment, 3.

ALLEGATIONS IN A PETITION. *Vide* Pleading, 6.

ALIAS WRIT. *Vide* Statute of Limitations, 2.

APPEAL.

1. No appeal will lie from the county to the Superior Court which must necessarily be ineffectual for the purpose for which it was prayed. *Clark v. Latham*, 1.

2. Where a court refuses to quash a defective indictment, upon the ground that they deem it sufficient, an appeal will lie, and the judgment will be reversed and the cause sent back, that the court may proceed with the motion according to its discretion. *S. v. Brannen*, 208.

3. One who is not a party to a bill in equity cannot appeal or petition to rehear or file a bill for a review. *Thompson v. Cox*, 311.

Vide Amendment, 3; Practice, 6.

APPEAL BOND.

1. Where, upon an appeal from the county to the Superior Court, the suit pended for three terms in the latter court, when a motion was made to dismiss the appeal for defects in the appeal bond, it was *Held*, that the appellant might, as a matter of right, file a sufficient bond, and prosecute his appeal, and that the order of the court below dismissing the appeal was a proper subject for the revision of this Court. *March v. Griffith*, 264.

2. Appeal bonds sent from the county to the Superior Courts are made by sections 1 and 10, chapter 4, Revised Code, a part of the record sent up, and cannot be questioned by plea and proof, at the instance of the sureties. *Whitehead v. Smith*, 351.

APPRENTICE. *Vide* Assault and Battery.

ARBITRATION.

1. Where an arbitrator disposes of matter which was referred to him, and also of matter not referred, and the two are in their nature separable, it is the duty of the court to give judgment for that which is within the terms of the submission, and reject that which is without. *Griffith v. Hadley*, 82.

ARBITRATION—*Continued.*

2. An arbitrator has no right to award himself a fee for his services, unless the power to do so is expressly contained in the submission. *Ibid.*

Vide, Costs, 2.

ARSON.

1. The willful and malicious setting fire to the house of another, the burning of which is only a misdemeanor, will become a capital felony if a dwelling-house or barn, with grain in it, is thereby burnt, where such burning is the probable consequence of the first illegal act. *S. v. Laughlin,* 354.

2. Upon an indictment for the felonious burning of a barn with grain or corn in it, a prisoner cannot be convicted upon proof that he burnt a crib with corn in it. *Ibid.*

3. A house 17 feet long and 12' wide sitting on blocks in a stable yard, having two rooms in it—one quite small, used for storing nubbins and refuse corn to be first fed to stock, and the other used for storing peas, oats, and other products of the farm—is not a barn within the meaning of the statute, Rev. Code, ch. 34, sec. 2, the burning of which is made a felony. *S. v. Laughlin,* 455.

4. A house 18 feet long and 15 feet wide, built of logs notched up, the cracks covered inside with rough boards, roofed with rough boards, with a good plank floor, and a door about 4 feet high, containing, at the time of the burning a quantity of corn, peas, and oats, though the only building on the farm used for storing the crop, is not a barn within the meaning of the statute, Rev. Code, ch. 34, sec. 2. *S. v. Jim.* 459.

ASSAULT AND BATTERY.

One to whom a free negro is hired by a court for the payment of a fine (Rev. Code, ch. 107, sec. 75) has no right to beat him for an unlawful object, or of malice. *S. v. Norman,* 220.

ASSETS. *Vide* Judgment Against an Administrator; Sale of Land.

ATTACHMENT.

1. The meaning of the statute, Revised Code, ch. 7, secs. 27 and 28, concerning liens on vessels for repairs, etc., is that the attachment given for the enforcement of the lien must be issued so as to have the vessel seized before she is allowed to depart from the port or place of repairs. *Harrington v. Schooner Hugh Chisholm,* 4.

2. Where an attachment was sued out against the owner of a vessel, under chapter 7, sections 27 and 28, Revised Code, it was held that a prosecution bond made payable to the "owner" of the vessel by that description was sufficient. *Bryan v. Enterprise,* 260.

3. Chapter 7, section 6, Revised Code, authorizing the sale of perishable articles levied on under an attachment, applies only to cases of original attachment, and not to those against vessels authorized by sections 27 and 28, chapter 7, Revised Code; and it was *Held,* therefore, that a sale by the sheriff of a vessel so levied on under this act was void and did not discontinue the suit. *Ibid.*

INDEX.

ATTACHMENT FOR CONTEMPT.

Where a person was appointed by court a commissioner to sell a slave for partition, and the surety by him, although reputed good at the time of the sale, turned out to be insolvent before the note could be collected, it was *Held*, that an attachment for a contempt for not paying the money into the court under a rule for that purpose was not a proper remedy, if, indeed, there were any. *Pritchard v. Oldham*, 439.

AUCTION SALE. *Vide* Statute of Frauds.

AWARD.

1. Where an action of trespass *q. c. f.* was referred to arbitrators, and they found the title to the *locus in quo* in the plaintiff, and assessed damages, it was *Held*, a sufficient finding, and that it was not necessary for them to fix the boundaries between the parties. *Ballard v. Mitchell*, 153.
2. Where a suit was referred to arbitrators, and they awarded damages and costs to the plaintiff, this was held to include a finding of all issues in his favor. *Ibid.*
3. All the arbitrators must concur in making an award, unless it is provided otherwise by the terms of submission. *MacKey v. Neill*, 214.

Vide Arbitration.

BAIL.

Whether the provision in chapter 10, section 6, of the Revised Statutes requiring a trial of the pleas entered by bail to be had at the first term, is not altered by the Revised Code, ch. 11, sec. 4, *quere*. *Clark v. Latham*, 1.

BAILMENT. *Vide* Statute of Limitations, 1; Trover, 2.

BANK NOTE. *Vide* Indictment.

BARN, WHAT IS A. *Vide* Arson, 2, 3, 4.

BOND OF DEPUTY SHERIFF. *Vide* Practice, 2.

BOND. *Vide* Chairman of Common Schools.

BOUNDARY.

1. Where a witness testified that a certain unmarked pine had been pointed out to him as the corner of a grant, by an old man, at the time of the trial deceased, and there were five particulars in which the description in the grant was supported by the facts proved, it was *Held*, erroneous to charge the jury that there was no evidence of the location of the grant. *McDonald v. McCaskill*, 158.
2. Whether the rule applicable in questions of boundary where an unnavigable stream or a public highway is called for, that is, to run to the middle of the stream or road, is applicable to a private way, *quere*. *Hayes v. Askew*, 226.
3. Where the beginning corner of a deed is on a private avenue, and the other calls of the deed come back to the mouth of the avenue, and "thence down the said avenue to the beginning," "reserving for-

BOUNDARY—*Continued.*

ever 20 feet for my avenue," it was *Held*, that this reservation explained the meaning of the grantor to be to run to the middle of the avenue, and thence down it in the middle to a point opposite the beginning, thence to the beginning. *Ibid.*

4. Where the second call of a boundary is clearly established, the first may be ascertained by running the course reversed, and measuring on it the distance called for. *Dobson v. Finley*, 495.

5. Where a white —— was called for as a corner, and a white oak was pointed out nearly in the course, by a marked line leading to it, and by other circumstances, it was *Held*, a proper question to leave to the jury, whether the white oak was the corner intended. *Ibid.*

Vide Award, 1.

CARNAL KNOWLEDGE OF A FEMALE INFANT.

In an indictment under our statute, Rev. Code, ch. 34, sec. 5, for carnally knowing and abusing an infant female under the age of 10 years, it was *Held*, error in the judge to charge the jury that proof of emission of seed was not necessary in order to convict the prisoner. *S. v. Gray*, 170.

CA. SA. BOND. *Vide* Certiorari, 3.

CERTIORARI.

1. Where a petition for a *certiorari* sets out that the petitioner was detained at home by violent sickness when his cause came up in the county court for trial, and afterwards, during the whole of the term, and that after judgment his counsel prayed and obtained an appeal to the Superior Court upon condition of his giving security for the appeal, which he failed to do by reason of his detention at home, it was *Held*, that these facts were sufficient to rebut the idea of his having abandoned his right to appeal, and entitled him to a *certiorari*. *Sharpe v. McElwee*, 115.

2. Where a judgment had been rendered against a surety on a bail bond in the county court and he filed a petition for a *certiorari* in the Superior Court, stating that he expected to be able to discharge himself from liability by the next term of the court by a surrender of his principal, it was *Held*, that this statement did not render him obnoxious to the charge of appealing merely for delay. *Ibid.*

3. Where the principal obligor in a *ca. sa.* bond was called, and, failing to appear, judgment was rendered against his surety, it was *Held*, that the fact that the principal was sick and unable to attend at the term for which he was bound did not entitle the surety to a *certiorari* to have the case removed into the Superior Court. *Buis v. Arnold*, 233.

4. Where a writ of lunacy was issued by a county court, and a trial had before a jury, and a verdict rendered finding the subject party *non compos*, which was confirmed by the court issuing the writ, and a guardian appointed, all in the absence of the said party, and without notice to such party, and it appeared that the party immediately applied to a judge for a *certiorari*, which was refused on an erroneous ground, and the party under advice of the counsel instituted a suit

CERTIORARI—*Continued.*

in equity, which failed for the want of jurisdiction, and the party swears to merits, it was *Held*, on a petition setting forth these matters, that the petitioner was entitled to a *certiorari* to have the case taken into the Superior Court. *Dowell v. Jacks*, 387.

CHAIRMAN OF COMMON SCHOOLS.

Where a chairman of the board of superintendents of common schools, on going out of office, gave his own note instead of money to his successor, and after a lapse of two years, being reappointed, received the same note back as part of the school fund, and gave a release in full to his predecessor, it was *Held*, that on his subsequent failure and inability to pay such note, he and his sureties were liable on the bond last given. *Cooper v. Cherry*, 323.

CLERK AND MASTER IN EQUITY. *Vide* Statute of Limitations, 5.

COLLECTION OF AN ORDER NOT INDORSED.

The presentment and collection of an order by one to whom it was not indorsed, *prima facie*, makes the collector a debtor to the payee. *Bond v. Hall*, 14.

COLOR OF TITLE.

A grant from the State purporting to be made in obedience to acts of the General Assembly providing for the relief of persons whose title deeds had been destroyed by the burning of the courthouses, etc., of Hertford and Montgomery counties, was *Held*, to be color of title. *Kron v. Hinson*, 347.

COMMISSIONERS TO LAY OFF COUNTY SEAT. *Vide* Mandamus, 1, 2, 3.

COMMISSIONER TO SELL SLAVES. *Vide* Attachment for Contempt.

COMMON COUNTS. *Vide* Contract, 4, 5.

COMPETENCY OF AN EXECUTOR IN FAVOR OF A WILL. *Vide* Evidence, 22.

COMPROMISE.

A court cannot strike out an entry of a compromise in a suit and order it for trial because it has been imperfectly entered, or because it has not been performed. The proper way is to amend *nunc pro tunc*, so as to make the record speak the truth, and then to enforce the performance of the compromise by attachment or other means usual in such cases. *Cox v. Cox*, 487.

CONDITION. *Vide* Treaties with Indians, 2.

CONSTRUCTION OF AN INSTRUMENT.

Where an instrument is susceptible of two constructions, by one of which it will take effect and by the other it will be inoperative for the want of a subject-matter to act on, it shall receive that construction by which it will take effect; for it cannot be supposed that the parties intended to do a nugatory act. *Hunter v. Anthony*, 385.

CONSIDERATION MONEY, RELEASE OF. *Vide* Estoppel, 1.

CONSIDERATION. *Vide* Contract, 12.

CONSTABLE. *Vide* Pleading, 2.

CONTESTED ELECTION. *Vide* Costs, 3.

CONTRACT.

1. Where A sent to B a letter, stating that if B and C wished to hire any negroes for the next year, he would assign as their security, it was *Held*, that the plaintiff having hired certain slaves to B and C on the faith of this letter, A was liable on his refusal to sign a note for the hire, and that B and C having failed to pay at the end of the credit (having become insolvent), the measure of damages was the price agreed to be paid for the hire. *Sleight v. Watson*, 10.

2. *Held further*, that no demand on B and C was necessary previously to bringing suit. Nor was one necessary to be made on A. *Ibid.*

3. *Held further*, that the plaintiff having received a note for the hire from B and C after A's refusal to sign was no discharge of the latter. *Ibid.*

4. Where plaintiff had contracted to serve defendant for ten months for a certain sum, and before the expiration of that time defendant wrongfully dismissed him, and plaintiff sued upon the common count in *assumpsit*, it was held that he could recover, upon this count, for the time he had actually worked. *Madden v. Porterfield*, 166.

5. And it was *Further held*, that had plaintiff inserted a count upon the special contract he might have recovered for the whole time. *Ibid.*

6. It is the province of a jury to affix a value to services according to their nature and extent as proved; and it is not necessary for witnesses to estimate their value in money. *Ibid.*

7. Where a slave was hired, by parol, for a sum certain, and before the expiration of the term the owner took the slave out of the hirer's possession against his will. and the hirer brought an action of *trover* against the owner, and recovered and received the value of the slave's services for the unexpired part of the term, it was *Held*, in an action brought by the owner against the hirer to recover the price stipulated, that the hirer, having got the full benefit of the contract, could not treat it as rescinded, and thereby avoid his obligation under it. *Odom v. Bryan*, 211.

8. A parol agreement between an executor and a purchaser of the property of the estate, that the latter shall pay all of a particular class of debts due by the testator does not entitle one of that class of creditors to sustain a suit against such purchaser. *Styron v. Bell*, 222.

9. Where a plaintiff declared upon a special contract to provide slaves, hired to work upon a railroad, with good accommodations, also on the implied contract of bailment to provide them with ordinary accommodations, it was *Held*, that the lodging of slaves, in the dead of winter, in huts built of poles and railroad sills, without door shutters and without chinking in the cracks, which were large, and which huts were proved to be inferior to others ordinarily used for such purposes on railroads, was a breach of the contract as alleged in both counts, and entitled plaintiff to recover. *Lane v. Washington*, 248.

CONTRACT—*Continued.*

10. A contract for erecting a public building, made with a committee appointed by the justices of a county, when performed by the contractor, must be fulfilled by the justices, although early in the progress of the work they had dismissed the committee and endeavored to rescind the order appointing it, and had given notice to the contractor not to proceed. *McCoy v. Justices of Harnett*, 272.

11. Where a contractor to erect a public building, after the dismission of the committee through whom the contract was made and a rescission of the order appointing it, and a notice by the justices not to go on with the building, still continued to act under such committee, and by its direction made material departures from the specifications in the contract, it was *Held*, that though he completed the building within the time specified, yet he was not entitled to recover the price agreed to be paid. *Ibid.*

12. The existence of a claim in equity is a sufficient consideration for a promise to pay money or any other thing, and such promise may be recovered on at law. *Hudson v. Critcher*, 485.

Vide Amendment.

CONVERSION. *Vide* Trover, 1.

COSTS.

1. The costs allowed against bail, notwithstanding a surrender, etc. (Rev. Code, ch. 11, sec. 10), do not include such as are incurred on account of an improper and ineffectual appeal. *Clark v. Latham*, 1.

2. Where a cause pending in court is by rule of said court referred to arbitrators, who proceed to act, and make an award as to all the matters in controversy in favor of one of the parties, without saying anything as to the costs, the successful party has no right to have a judgment of the court for the recovery of his costs. *Debrule v. Scott*, 73.

3. A contested sheriff's election before the justices of a county court is not an action within the meaning of Revised Code, ch. 31, sec. 75, which entitles the successful party to recover costs. *Patterson v. Murray*, 278.

4. In a matter of a public nature, the officer who acts for the State does not pay costs to the other party. *Houston v. Navigation Co.*, 476.

COURSE AND DISTANCE, REVERSAL OF. *Vide* Boundary, 4.

COURTHOUSES WHICH HAVE BEEN BURNT. *Vide*, Color of Title.

COURT OF EQUITY, SALE BY. *Vide* Land Considered as Money; Sale of Land, 2.

COVENANT. *Vide* Pleading, 1; Quiet Enjoyment, 1, 2, 3.

COVENANT OF QUIET ENJOYMENT.

1. Where a vendee brought an action against an intruder, and failed to recover, but not on account of a defect of the vendor's title (which

COVENANT OF QUIET ENJOYMENT—*Continued.*

was sufficient to sustain the action), it was *Held*, in an action on his covenant for quiet enjoyment, that this did not amount to a breach of the covenant. *Wilder v. Ireland*, 85.

2. A covenant of quiet enjoyment in a deed conveying a fee is not broken if the covenantor had title to a life estate, though his title failed as to the remainder. *Ibid.*

3. *Held further*, that withholding of his title deed on the occasion of the trial, by the covenantor (it not having been registered), was no breach of the covenant. *Ibid.*

4. Note the alteration of the phraseology of the statute of uses in Revised Statutes, ch. 43, sec. 4, and in Revised Code, ch. 43, sec. 6, and *quere* as to its effect. *Ibid.*

5. In an action on a covenant for quiet enjoyment, it is no defense that the covenantor had a life estate in the land at the time of making the deed, if such life estate be fallen in and the covenantee has been evicted by title paramount. *Parker v. Richardson*, 452.

Vide Quiet Enjoyment, 1, 2, 3.

CREDITOR, GREATEST. *Vide* Administrator, 1.

CREDIBILITY. *Vide* Evidence, 8, 10, 11, 16, 17; Witness.

CROSS-EXAMINATION. *Vide* Evidence, 8, 19.

CURTESY. *Vide* Statute of Limitations, 7.

DAMAGES.

Where a part of certain machinery was consigned to defendant as plaintiff's agent, to be forwarded to him, and defendant negligently detained it, whereby the whole machinery was kept idle, it was *Held*, that the measure of damages was not what might have been made by the machinery during the time it was idle, but it was the legal interest on the capital invested, the price of the hire of hands necessarily unemployed during the time, the cost of sending for the missing machinery, and all other damages that resulted, necessarily, from defendant's negligence. *Foard v. R. R.*, 235.

Vide Amendment, 4; Contract, 1, 4, 5, 6; Escape; Quiet Enjoyment, 2; Trespass, *q. c. f.*, 1.

DEAF-MUTE. *Vide* Trial of a Non Compos.

DECLARATIONS OF A TENANT AS TO HIS POSSESSION. *Vide* Evidence, 25.

DECLARATIONS BY A PARTY. *Vide* Evidence, 6; Fraud, 1.

DECLARATIONS OF A WIFE. *Vide* Evidence, 21.

DECLARATIONS OF A PRISONER. *Vide* Evidence, 23.

DECREE FOR DIVISION OF SLAVES.

1. A report by a commissioner in equity, dividing slaves among tenants in common, followed by a decree confirming the same, passes the right of property from the date of the report, and will enable a party,

DECREE FOR A DIVISION OF SLAVES—*Continued.*

acquiring such right, to maintain *trover* for a conversion between the date of such report and the final decree. *Dixon v. Warters,* 449.

2. *Held further,* that all the parties to a suit for the partition of property are estopped to deny the right of their fellow-takers under such decree. *Ibid.*

DEED.

1. Where the intention of the parties to a deed is manifest on its face, the Court in giving a construction to doubtful provisions will, if possible, effectuate such intention. *Barnes v. Haybarger,* 76.

2. Where a wife, after marriage, supposing the whole interest in her land was in her, made a conveyance to a trustee for her sole and separate use, to which the husband signed as a party, and by various clauses manifested a concurrence in her act, but did not profess directly to convey any estate, in which deed it is recited that $10 was paid by the trustee to the wife, it was *Held,* that this raised a use from the husband to the trustee which was executed by the statute, and in that way the husband's interest passed to the trustee. *Ibid.*

Vide Estoppel, 1.

DEED OF GIFT.

A deed of gift of slaves, made in 1823, to a married woman for her natural life, and after her death to the heirs lawfully begotten of her body, passes the absolute property in such slaves to her husband. *Harrell v. Davis,* 359.

DEED OF AN INFANT, CONFIRMATION OF. *Vide* Pleading, 7.

DEMAND.

1. Where it appeared that the plaintiff, who lived in Virginia, had put a note into the hands of the defendant, who collected it, and at the time of employing another to make demand, plaintiff stated that he once before sent the defendant's receipt over and had got nothing, it was *Held,* that this did not amount to proof that a demand had been made more than three years before the bringing of the suit, so as to put the statute of limitatons in motion. *Brooks v. Walters,* 428.

2. An action of debt on a sheriff's official bond for money collected, and a nonsuit therein, is a sufficient demand to enable the plaintiff to sustain an action on the case for the same cause of action. *Fagan v. Williamson,* 433.

Vide Contract, 2.

DEPARTURE FROM TERMS OF A CONTRACT. *Vide* Contract.

DESCENT CAST. *Vide* Statute of Limitations, 7.

DETINUE.

Where an action of *detinue* was brought for a female slave, and the case coming to the Supreme Court by appeal, a judgment was rendered here for the recovery of such slave, it was *Held,* that the plaintiff was entitled to a *scire facias* from this Court for the

DETINUE—*Continued.*

defendant to show cause why execution should not issue for a child of such female slave born after the commencement of the suit and before the final judgment. *Cates v. Whitfield,* 266.

DILIGENCE IN AN AGENT.

Where the plaintiff, the defendant, and another, shipped produce on the same boat, consigned it to a factor, who sent the defendant a draft on New York for the whole amount, which he sold, and, receiving the money for it, indorsed it in his own name, but the paper coming back to him dishonored, the defendant refunded the money and was unable to get it from the factor, after using due and proper diligence, it was *Held,* that the defendant was in no wise liable for the loss of the debt. *Bland v. Scott,* 100.

DILIGENCE, REASONABLE.

Vide Certiorari, 4; Attachment for Contempt; Negligence, 5; Sheriff's Bond.

DRAINING LANDS. *Vide* Pleading, 6.

DRAYMEN. *Vide* Evidence, 15.

EJECTMENT.

1. In trespass *q. c. f.* the principle that where neither party has possession of a lappage the superior title draws to it the constructive possession and excludes the constructive possession of the inferior title may be asserted by one who is a stranger to such superior title against the suit of one claiming under the inferior title. *McLean v. Murchison,* 38.

2. Where both parties in an action of ejectment claim title under the same person, the defendant cannot defeat the action by showing title in a third person, unless he has acquired such outstanding title or connects himself with it. *Brown v. Smith,* 331.

3. The act of 1856, chapter 14, does not authorize a defendant in ejectment, where the plaintiff has filed an affidavit that such defendant entered as his tenant, to plead without giving security for costs, by filing an affidavit that he is unable on account of his poverty, to do so. *Cowles v. Carter,* 381.

4. One who comes in as landlord to defend an action of ejectment cannot object that no notice to quit has been given to the original defendant. *Foust v. Trice,* 490.

Vide Notice to Quit, 1, 2; Trespass *q. c. f.*

ENDORSEMENT.

1. It is no objection to the endorsement of a bond that the presumption of payment from the lapse of time was applicable to it when the endorsement was made. *McLean v. McDugald,* 383.

2. An assignment without consideration passes the title, and where such assignment was made to evade the law regulating the venues of actions, the objection to be good must be taken by plea in abatement. *Ibid.*

ENLISTMENT OF A MINOR. *Vide* Habeas Corpus.

ENTRY ANEW. *Vide* Trespass, *q. c. f.*, 2.

ESCAPE.

In an action of debt on a sheriff's bond for the escape of a debtor imprisoned under a *ca. sa.*, the jury are not bound to give the whole sum due from such debtor, but should give the damages really sustained by the escape. *Willey v. Eure*, 320.

ESTOPPEL.

1. An acknowledgment by the bargainor in a deed that he has received the consideration money is a bar in a court of law to any action for the recovery thereof. *Mendenhall v. Parish*, 105.

2. Where a person purchases a chattel from one who is not the owner of it, and it is admitted by the parties, or found by the jury as a fact, that the purchaser was induced to make the purchase by the declarations or acts of the true owner, the latter will be estopped from impeaching the transaction. *Mason v. Williams*, 478.

Vide Decree for Division of Slaves; Trespass, 1.

EVIDENCE.

1. A receipt signed by a sheriff for a sum of money, "to be applied to the payment of a judgment" obtained against the defendant at a previous term of a court of the county in which the defendant lived and of which the maker of such receipt was sheriff at the time, is no evidence that an execution was in his hands when the money was paid to him. *Covington v. Buie*, 31.

2. A registered copy of a clerk's bond may be read without other proof, and, of course, the original, when pfoved and registered as the acts provide, may also be read thus without being proved at the trial. *Short v. Currie*, 42.

3. It seems at common law official bonds were not subjected to the same tests of strict proof and cross-examination as instruments between private persons. *Ibid.*

4. Where a fact proposed to be proved by a party is admitted by the opposite side, it is not error in the court to refuse to let it be proved by witnesses. *Pridgen v. Bannerman*, 53.

5. Where in an action brought to recover the value of certain slaves the plaintiff sought to set aside a conveyance of them to a daughter, and offered evidence to show that the donor had grandchildren who were poor and in need of her bounty, it was *Held*, competent for the defendant to introduce in evidence, in order to rebut this testimony, a conveyance by the donor of other property to these grandchildren. *Hughes v. Debnam*, 127.

6. Where the question between the parties was whether the plaintiff had agreed with a third party to take him for the performance of the contract sued on, instead of the defendant, and the tender of a sum of money by such third party, and its refusal and the concomitant expressions of the plaintiff were relied on against him, it was *Held*, that a receipt prepared by him and offered as the condition on which he would receive the money was competent evidence. *Myers v. Cherry*, 144.

EVIDENCE—*Continued.*

7. In order to show that a witness in a cause was excited at the horrible crime alleged against a slave, and was, therefore, not fully to be relied on, it was *Held*, competent to ask him on cross-examination whether he had not taken up and whipped other negroes. *S. v. Sam*, 150.

8. In order to weaken the force of a witness's evidence on cross-examination, it was *Held*, competent to show his temper and feeling towards the cause, independently of any prejudice or ill-will towards the accused personally. *Ibid.*

9. Where it was sought to prove the value of plaintiff's services during a term of seven months, it was *Held*, an immaterial question for the defendant's counsel to ask witness the value of such services for half an hour during which witness saw plaintiff at work. *Madden v. Porterfield*, 166.

10. Where in a suit upon an apprentice bond the question was whether the relator was of age at the bringing of the suit, and his mother was introduced to testify as to his age, it was *Held*, that a record of births made in the family Bible under the dictation of the mother, by one since deceased, several years after the birth of the relator, but before he was bound out, was admissible as evidence to corroborate the mother's statement. *Wiseman v. Cornish*, 218.

11. There is no rule of law that the fact of a witness's standing in the relation of mother to one of the parties naturally gives a bias to her statement, by affecting her recollection, but such relation is a matter for the consideration of the jury. *Ibid.*

12. Where a receipt was given on the delivery of a quantity of rice at a mill, setting forth the quantity and terms of deposit, it was *Held*, in an action for the loss of the rice by fire, that the plaintiff could not resort to proof of the quantity *aliunde*, without proof of his inability to produce the receipt. *Ashe v. DeRosset*, 240.

13. Where the owner of rice which had been burned at a mill went to a partner, who was not cognizant of the state of the business, and demanded a given quantity of rice, to which he replied that "it was nothing more than he expected," it was *Held*, that this was no admission as to the quantity. *Ibid.*

14. Where in an action against the owner of a dray in the town of Wilmington brought to recover the value of a trunk lost from the defendant's dray, it was sought to charge the defendant as a common carrier, it was *Held*, competent for the plaintiff to prove that it was the duty of draymen in Wilmington to carry baggage. *Herring v. Utley*, 270.

15. Whether the owner of a lost trunk can be admitted to prove, by his own oath, the contents of a trunk lost, *quere*. *Ibid.*

16. Where the question was whether B., who occupied the land in controversy, did so as the tenant of A., the plaintiff, and B. testified that he was carried upon the premises and left there fraudulently and treacherously, in order to get him off of another tract of land, and that he never held as the tenant of A., it was *Held*, competent

EVIDENCE—*Continued.*

for him to state, also, in order to strengthen his testimony, that his occupation was as the tenant of the defendants. *Foust v. Trice*, 290.

17. Where A. swears that B., C., and D. had an important conversation together, and D. swears that no such conversation took place, it was *Held*, that the rule giving preference to affirmative over negative testimony does not apply, for there being a direct contradiction, the jury must be guided by other tests in ascertaining the truth. *Reeves v. Poindexter*, 308.

18. Where land has been sold as the property of A. under execution and he has received a portion of the sum raised, which was over and above the call of the execution, he cannot be a witness for the purchaser in an action for the recovery of the land. *Brown v. Smith*, 331.

19. Matters elicited on a cross-examination, which are only admissible to weaken the force of the testimony in chief, ought not to go to the jury for a different purpose. *Luther v. Skeen*, 356.

20. A jury in estimating character are to take the testimony of witnesses who are supposed to be able or capable of reflecting in general terms the judgment of the public. *Ibid.*

21. The declarations of a woman made shortly after the birth of a child that it had been born alive are not competent to prove her husband's title to an estate by the curtesy. *Gardner v. Klutts*, 375.

22. Under the act of Assembly, Revised Code, ch. 119, sec. 9, one named as executor in a script, propounded as a will, though named as plaintiff in an issue *devisavit vel non*, may be examined as a witness for the caveator as well as for the propounder. *Pannell v. Scoggin*, 408.

23. No declarations of a prisoner made after the commission of a homicide as to the manner of the transaction that are not part of the *res gestæ* are admissible for him. *S. v. Brandon*, 463.

24. An occupant is incompetent to give evidence for the defendant in an action brought to recover the land of which he is in possession. *Foust v. Trice*, 490.

25. The declarations of an occupant as to the manner in which he came into possession of the land in question are competent, as evidence against the defendant in an action of ejectment. *Ibid.*

Vide Holograph Will; Presumption of Fact, 1; Rape, 1; Secret Trust.

EXECUTION, SATISFACTION OF. *Vide* Evidence, 1.

EXECUTOR, WARRANTY BY. *Vide* Judge's Charge, 5; Pleading, 5.

FALSUM IN UNO, ETC. *Vide* Witness.

FALSE RETURN.

1. The sheriff's return on process in his hands, "Not to be found in my county," implies that the person to be reached by the process was not to be found after due search, and if the fact thus implied be untruly stated, the return is a false one. *Tomlinson v. Long*, 469.

FALSE RETURN—*Continued.*

2. Where a person to be summoned by a subpœna was at his home in the sheriff's county for fifteen days preceding the day of the return of the process, though the sheriff lived 25 miles from him, and though he was informed that such person would continue out of the county during all that time, it was *Held*, he was liable for the penalty for making a false return in saying that he was not to be found. *Ibid.*

3. A return made by a sheriff that is false in fact, although the officer was mistaken in the matter as to which he made his return, will, nevertheless, subject him to the penalty for a false return. *Albright v. Tapscott*, 473.

FAMILY RECORD. *Vide* Evidence, 10.

FIERI FACIAS, WHEN RETURNABLE.

The provisions of Revised Code, ch. 31, sec. 50, requiring the return of all writs, process, etc., to be made on the first day of the term to which they are returnable does not apply to executions or writs of *fieri facias*. *Ledbetter v. Arledge*, 475.

FRAUD.

1. A naked declaration of a debtor in embarrassed circumstances that an assignment of a note theretofore made by him was *bona fide* and for valuable consideration is no evidence, as against creditors, that such was the fact and such assignment was held to be void. *Griffin v. Tripp*, 64.

2. Where an alleged testator, in a paper-writing propounded as his will, devised and bequeathed certain property to the child of his housekeeper, a white woman, which child was proven to be a mulatto, but which the mother had induced him to believe was his, it was *Held*, that this furnished no evidence to support the allegation that the will was obtained by fraud and undue influence. *Howell v. Troutman*, 304.

Vide Secret Trust.

FRAUDULENT CONVEYANCE.

1. Where a father who was largely indebted and insolvent made a deed for his land to his son, who was under age, and received from him money which he had earned as day wages in part payment, and his note for the remainder of the price, such deed was held to be voluntary and void as against creditors. *Winchester v. Reid*, 377.

2. A bond given as a pretext to enable one person to set up a claim to the property of another so as to defraud the creditors of that other is void, even as between the parties to the same. *Powell v. Inman*, 436.

FREE-NEGRO. *Vide* Assault and Battery; Rape, 2.

GAMING.

Only those who bet and those who play at a game or cards where there is betting at some of the prohibited places are liable to be indicted under the statute, ch. 34, sec. 75, Rev. Code. *S. v. Brannen*, 208.

GIFT, RECLAMATION OF.

Where A. handed over a sum of money to B. for the use of C. and took from B. a certificate in writing, expressing that it was the sum given to C. in A.'s will, and obliging B. to pay the interest annually to C., it was *Held*, that A. had no right to demand and recover the money from B. *Parker v. Ricks*, 447.

GUARANTOR, NOTICE TO.

It is a rule of law that one liable in case another does not pay is entitled to notice of the default of the primary debtor before suit can be brought against him, and it forms no exception to the rule that such primary debtor was insolvent at the date of the original transaction, or became so afterwards. *Reynolds v. Edney*, 406.

HABEAS CORPUS.

1. A soldier who is under arrest and in confinement for a violation of orders cannot procure his discharge by means of a writ of *habeas corpus* on the allegation that he was an infant at the time of enlistment. Nor can he or his guardian raise that question before the civil authorities while he is in custody and amenable for trial before a military tribunal. *In re Graham*, 416.

2. Whether a minor of the age of 20 years, who enlisted under the provisions of the act entitled "An act to raise 10,000 State troops," and has taken and subscribed the oath prescribed for enlistment, is entitled to his discharge on the ground of his nonage, and that he enlisted without the consent of his guardian, *quere. Ibid.*

HERTFORD AND MONTGOMERY COUNTIES. *Vide* Color of Title.

HIGHWAY.

A road only one mile long and from 10 to 15 feet wide, leading from a public highway to a church, and used by the people of the neighborhood for sixty years in going to and from the church, and which connected with a country road leading from a mill in the neighborhood and to a railroad station, but which had never been under the charge of an overseer nor worked as a public highway, is not a public highway so as to subject one to indictment for obstructing it. *S. v. McDaniel*, 284.

HIRE OF A SLAVE. *Vide* Contract, 7.

HOLOGRAPH WILL.

That a holograph script was seen among the valuable papers and effects of the decedent eight months before his death is no evidence that it was found there at or after his death. *Adams v. Clark*, 56.

HOMICIDE.

1. If a party deliberately kill another to prevent a mere trespass to property he is guilty of murder. *S. v. Brandon*, 463.

2. The law does not recognize any moral power as compelling a man to do what he knows to be wrong. *Ibid.*

HUSBAND AND WIFE. *Vide* Deeds, 2; Parties.

INDIAN RESERVATIONS. *Vide* Treaties with Indians, 1, 2.

INDICTMENT.

An indictment charging the stealing of a bank note of a certain denomination and value, without setting forth by what authority such note was issued, is not sufficient to authorize judgment on a conviction. *S. v. Brown*, 443.

INFANT, DEED OF.

1. An infant who has executed a deed for land cannot make the deed void or valid by any act of his done while under age. *McCormic v. Leggett*, 425.
2. To make the deed of an infant valid he must, after coming of age, do some deliberate act by which he takes benefit under the deed or expressly recognizes its validity. *Ibid.*

INFANT, NOTE OF. *Vide* Fraudulent Conveyance, 1.

INQUISITION OF LUNACY NOT CONCLUSIVE.

An inquisition of lunacy is not conclusive against a person dealing with a supposed lunatic; but he may show that at the time of the contract such supposed lunatic had sufficient capacity to make it. *Parker v. Davis*, 460.

INSANITY.

The insanity which takes away the criminal quality of an act must be such as amounts to a mental disease, and prevents the accused from knowing the nature and quality of the act he is doing. *S. v. Brandon*, 463.

ISSUE OF FACT. *Vide* Practice, 5.

JAIL FEES.

The master of a slave committed to jail on the warrant of a justice of the peace for an offense cognizable in the Superior Court, is liable for jail fees, although the grand jury, upon an inquiry, may have refused to make presentment against such slave. *S. v Peter*, 346.

JUDGMENT. *Vide* Verdict, 1, 2.

JUDGMENT AGAINST ADMINISTRATOR, EFFECT OF.

In an action against an administrator, on his administration bond, for the nonpayment of a judgment previously rendered against him, such judgment is conclusive evidence against him, both as to the debt and the existence of assets. *Bond v. Billups*, 423.

JUDGMENT, SUMMARY.

The statute, Revised Code, ch. 29, sec. 5, intends that motions for summary judgment against delinquent sheriffs, etc., shall originate in the county courts. *Buchanan v. McKenzie*, 95.

Vide Penalty Against Sheriffs.

JUDGE'S CHARGE.

1. To leave a question to the jury without some evidence bearing upon the matter, and upon which they might base their verdict, is error. *Bond v. Hall*, 14.

JUDGE'S CHARGE—*Continued.*

2. A judge cannot be required to give instructions to the jury upon an assumption of facts not supported by evidence. *S. v. Clara*, 25.

3. Where there are several possibilities of fact, different from the inference intended to be drawn from the evidence offered, a judge is not required to note one such possibility and specifically bring it to the attention of the jury. *Ibid.*

4. On an issue before the court there is no error in refusing to give particular weight to a rebuttal fact, and where the judge thought the testimony preponderating against said fact, it was not error to say of such fact that it was immaterial. *Pridgen v. Bannerman*, 53.

5. Upon a question of warranty or no warranty, it was *Held*, to be error in a judge to charge that the fact that the alleged warrantor was acting in the capacity of an executor was not a matter for the consideration of the jury. *Drake v. Baines*, 122.

6. Where the charge of a judge is in favor of a party, such party cannot make it a ground of objection. *Hughes v. Debnam*, 127.

7. Juries are at liberty to infer the motives of parties from their conduct; therefore, where in an action for an assault and battery it was proved that the defendant came to the house of the plaintiff with whom he had been before on friendly terms, and said to him, "How dare you send a letter to my house," and immediately assaulted him, it was held error in the judge to charge the jury that there was no evidence that the letter was offensive or insulting, and that they could not infer that it was so. *Bond v. Warren*, 191.

Vide Boundary, 1; Pleading, 4.

JURISDICTION.

1. The county courts have no jurisdiction, by bill, at the suit of creditors, to convert a purchaser of land into a trustee, on the allegation of fraud and collusion. *Thompson v. Cox*, 311.

2. The powers of a court of limited jurisdiction cannot be enlarged by implication. *Ibid.*

3. The jurisdiction of the county court to order a partition among tenants in common does not extend to money. *Billups v. Riddick*, 163.

4. A petition against an executor for a filial portion, etc., will not lie for money or other property delivered by him to a legatee for life. *Ibid.*

Vide, Practice, 5; Road.

JURY, QUESTION FOR. *Vide Boundary*, 5.

JUSTICES, CONTRACT BY. *Vide* Contract, 10, 11.

JUSTICE'S TRIAL. *Vide* Waiver, 2.

JUS POSTLIMINII. *Vide* Trespass, *q. c. f.*, 2.

LAND CONSIDERED AS MONEY.

Where real estate, belonging to an infant, has been converted into personalty by a sale, under the decree of court for a division, the fund will continue to have the character of realty, and be transmissible according to the law of descents, until a different character is impressed upon it by some act of the owner. *Jones v. Edwards*, 336.

LAPPAGE. *Vide* Ejectment, 1.

LARCENY.

Where the prosecutor lost a carpetbag on the public highway, and directed one to get it for him, and he did so as his bailee, but concealed the articles, and denied having found it, it was *Held*, that this was but a breach of bailment, and not larceny. *S. v. England*, 399.

LIABILITY OF PUBLIC OFFICERS CIVILLY.

The justices of a county are not responsible to the owner of property for injuries to it occasioned by defects in public bridges under their control. *Kinsey v. Jones*, 186.

LIMITATION IN REMAINDER.

1. A legacy given immediately to a class vests absolutely in the persons composing that class at the death of the testator; and a legacy given to a class subject to a life estate vests in the persons composing that class at the death of the testator, but not absolutely, for it is subject to open so as to make room for all persons composing the class, not only at the death of the testator, but also at the falling in of the intervening estate. *Mason v. White*, 421.
2. Where one thus included in a class with an intervening estate died before the falling in of such estate, there is no ground for holding that his estate was divested by this event. *Ibid.*
3. Where one devised, in 1828, to a trustee, to the use and benefit of a woman for her life, remainder to the use of all her children, it was *Held*, that by force of the statute of uses the legal estate for life was executed in the woman, and that it made no difference that chattel property was conveyed to the trustee by the same will. *Wilder v. Ireland*, 85.
4. *Held further*, that the legal estate in the remainder, by force of the same statute, passed to the children she had at the time of the devise, subject to the participation of such as she might thereafter have. *Ibid.*

Vide Deed of Gift.

LUNACY AS A DEFENSE.

The modern decisions have qualified the old doctrine that a man shall not be heard to allege his own lunacy or intoxication, and these are now held to be a defense to acts done under their prevalence. *Morris v. Clay*, 216.

MANDAMUS.

1. Where an act of Assembly, establishing a new county, appointed commissioners, by name, to ascertain a site and purchase a tract of

MANDAMUS—*Continued.*

land or a county town, and required the justices of the county to appoint commissioners to lay off lots and sell them, it was *Held,* not to be a sufficient return to an alternative *mandamus* to compel the justices to the performance of their duties, to allege that the locating commissioners in discharging their duties were prompted by improper motives. *Lander v. McMillan,* 174.

2. Where an act of Assembly establishing a new county made it the duty of certain commissioners to purchase a tract of land, and having taken a deed for it, to file such deed in the office of the county court, and then for the justices of the county to do certain acts prescribed, it was *Held,* that the justices were not entitled to any other notice that the commissioners had acted than the filing of such deed; especially as no notice is required by the act to be given them. *Ibid.*

3. The proper way for the justices of a county to make return to a *mandamus* is for them to convene, and, a majority being present, to fix upon the facts they mean to rely on by way of defense, and appoint some one of their body to make affidavit, and to do all other things required by the proceeding. *Ibid.*

MONEY ARISING FROM SALE OF LAND. *Vide* Administrator, 2.

MISPRISION.

A commission to take a deposition that recites that it issued from the "Supreme" Court of McDowell County, for a suit pending in McDowell Superior Court, authenticated by the signature of the clerk and seal of the Superior Court of McDowell County, is so palpably a misprision as to authorize it to be regarded as a commission issuing from the Superior Court. *Dobson v. Finley,* 495.

NEGLIGENCE.

1. Where machinery was consigned to the agent of a railroad, to be forwarded to the plaintiff over such road, and it was negligently detained for a time, it was *Held,* that the defendants were not liable as common carriers for this neglect, but only as bailees. *Foard v. R. R.,* 235.

2. Where several pieces of machinery were shipped to the defendants' agent to be forwarded to plaintiff, and they were described in the bill of lading as "three pipes in one bundle, and two single pipes," and they were delivered by the ship's agent to the defendants' agent, who had a copy of the bill, and by some means the direction on one of the single pipes became illegible and it was not forwarded, it was *Held,* that these facts were sufficient to subject the defendant for negligence as a bailee. *Ibid.*

3. Where a hired slave was taken ill with typhoid fever, and the hirer, not knowing the nature of the disease sent him on the railroad cars, in pleasant weather, forty miles, to a place deemed more favorable to the patient, where he remained one day, in proper hands, without a physician being called in, and was then sent off three miles further to the care of his master, it appearing that the ascertainment of the existence of that disease was a matter of skill, and not within the scope of ordinary intelligence, it was

NEGLIGENCE—*Continued.*

Held, that although the disease was aggravated by the treatment of the patient, yet that these facts did not show such a want of proper care and prudent management as to subject the hirer to damages for the death of the slave. *Haden v. R. R.*, 362.

4. Where a deaf-mute slave, who was walking on a railroad track from the direction of an approaching train, was killed by the train, it not appearing that the engineer knew of the slave's infirmity, and it appearing that the usual warning was given by the steam whistle for one endowed with hearing to have made his escape, it was held that the company was not liable for the loss. *Poole v. R. R.*, 408.

5. Where a railroad agent received goods into the company's warehouse, at a country station, which was an ordinary wooden house, which he kept fastened in the night-time with iron locks, bolts and bars, also in the daytime in the same manner, it appearing that the agent resided 200 yards from the warehouse, it was held to be ordinary care, and that the company was not liable for the loss of the goods by the theft. *Neal v. R. R.*, 482.

NONSUIT.

Where one agreed to become surety for another on condition that the creditor should bring suit within a reasonable time, and he did so shortly after the expiration of the credit, but was nonsuited on the ground of not appearing by counsel or otherwise, it was *Held*, that another suit brought immediately after such nonsuit was sustainable. *Gibbs v. Williams*, 391.

NOTICE TO QUIT.

1. Where one rented a plantation for a year, and having joined the fences of another plantation owned by him to the fences of the rented place, and then at the end of the year quit without removing the fence placed there, and after five years entered again, it was *Held*, that he was not entitled to notice to quit before bringing suit against him. *Borden v. Bell*, 294.

2. Where a tenant entered into occupation of premises under an express lease from month to month, and he continued the occupation for more than two years, there is no reason why he should be considered as a tenant from year to year, and thus be entitled to six months notice to quit. *Jones v. Willis*, 430.

3. What notice a tenant from month to month is entitled to, *quere*. *Ibid.*

NOTICE TO CONSIGNEES. *Vide* Negligence.

NUDUM PACTUM.

Where the owner of a rice mill, who had a turn at his own mill, agreed to let a customer have it, and there is no particular inducement shown or other explanation given, it was held that the agreement was a *nudum pactum*. *Ashe v. DeRosset*, 240.

OFFICIAL BOND OF SHERIFF. *Vide* Action Against Sheriff.

OFFICIAL BOND. *Vide* Evidence, 2, 3; Pleading, 2.

OFFICER, PUBLIC. *Vide* Costs, 4.

OFFSPRING OF A FEMALE SLAVE. *Vide* Detinue.

ONUS PROBANDI. *Vide* Presumption of Fact.

ORDER OF SALE. *Vide* Power of Court to Set Aside Proceedings.

OVERSEER OF ROAD.

The statute, Revised Code, ch. 101, sec. 14, gives the overseer of a road (acting in good faith) power to cut poles, etc., on any land adjoining his section, and he is not confined to the land immediately adjoining the spot where the work is to be done. *Collins v. Creecy*, 333.

PARTNERS.

Where an obligation was signed and sealed by one of two partners, and signed only by the other, it was *Held* to be the deed of the former and the simple contract only of the other, and that the latter might be sued in *assumpsit* alone on this contract. *Davis v. Golston*, 28.

Vide Pleading, 3.

PARTIES.

1. In an action against a ferryman for negligently carrying plaintiff's wife across his ferry, whereby she was injured, it is not necessary that the wife should be made a party plaintiff. *Crump v. McKay*, 32.

2. An action against a guardian for the penalty of $200, for hiring the property of his ward privately, is not required to be brought in the name of the State, but is properly brought in the name of an individual undertaking to sue for the same. *Norman v. Dunbar*, 317.

Vide Appeal, 3; Decree for Division of Slaves; Pleading, 1, 3, 5.

PAYMENT TO A SHERIFF. *Vide* Evidence, 1.

PENALTY AGAINST A GUARDIAN. *Vide* Parties, 2.

PENALTY AGAINST A SHERIFF.

A judgment for the penalty authorized by the latter clause of section 5. of chapter 29, Revised Code, against a delinquent sheriff, etc., is only an incident to the main judgment, against him and his sureties, authorized by the former part of the same section; upon a reversal, therefore, of the latter, the former walls with it. *Buchanan v. McKenzie*, 93.

Vide Judgment, Summary.

PENALTY AGAINST AN EXECUTOR.

1. Where an executor gave a part of a standing crop for hauling the remainder to the crib, it was held not to subject him to the penalty imposed for selling a deceased person's estate otherwise than at public auction. *McDaniel v. Johns*, 414.

PETITION AGAINST AN INQUISITION OF LUNACY. *Vide* Certiorari, 4.

PLEADING.

1. Though a covenant be with two or more, jointly, yet if the interest and cause of action of the covenantees be several, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. *Little v. Hobbs*, 179.
2. Where a debtor delivered to his creditor, without indorsement, a bond on a third person as collateral security, with an agreement that it should be returned if not collected, and the creditor took from a constable a receipt for the paper for collection, as being received from him (the creditor), it was *Held*, in a suit against the constable on his official bond for failing to collect, that the creditor was the proper person to declare as relator. *Chipley v. Albea*, 204.
3. A judgment in favor of "L. & M.," trading as a firm, is valid, and is competent evidence in a suit brought by the constitutents of such firm, in their individual names set out in full. *Lash v. Arnold*, 206.
4. Where a declaration contains two counts, and testimony is given as to both, and the judge charges as to both, and a general verdict is given for the plaintiff, if one of the counts be defective, or an error has been committed as to one of them, the defendant is entitled to a new trial. *Wilson v. Tatum*, 300.
5. An action against a person as "executor" for an act done or a contract made by him after the death of his testator cannot be sustained and the words "as executor" rejected as surplusage, as may be done where the action is for the party on his own possession, and these words are improperly inserted. *Beaty v. Gingles*, 302.
6. Two or more separate proprietors of land cannot sustain a joint petition for a ditch to drain their lands without alleging that a common ditch would drain the lands of all the petitioners. *Shaw v. Burfoot*, 344.
7. Matter which does not affect the title, but only affords an objection to the further prosecution of the suit as it is then constituted, as marriage or death, or the plaintiff's taking possession, must be pleaded or otherwise specially brought to the notice of the court; but matter that goes to affect the title as the confirmation of an infant's deed may be given in evidence under the general issue. *McCormic v. Leggett*, 425.

Vide Contract, 4, 5; Quiet Enjoyment, 3.

PLEDGE.

In order to constitute a pledge there must be evidence that the property was delivered for that purpose to the pawnee. *Thompson v. Andrews*, 453.

PONDING BACK WATER.

1. The continuance of an overflow of land by the ponding back of water for twelve years does not justify the presumption of the grant of an easement. *Griffin v. Foster*, 337.
2. It is not competent, either as a bar to the action or in mitigation of damages, for the defendant to show that for twelve years neither the plaintiff nor the party from whom he purchased had complained of the overflow of his land. *Ibid.*

POSSESSION OF STOLEN PROPERTY.

Possession of a stolen article raises a presumption of theft by the possessor only in case such possession is so recent after the theft as to show that the possessor could not well have come by it otherwise than by stealing it. *Gregory v. Richards*, 410.

POSSESSION BY BAILEE. *Vide* Larceny.

POWER OF COURT TO SET ASIDE PROCEEDINGS.

1. Where two *fi. fas.* have been issued to different counties on the same judgment, and one had been satisfied before the return term, it was *Held*, in order to vacate a sale made of the defendant's land on the return day, under the second execution, to be competent for the court to quash and set aside such second execution. *Adams v. Smallwood*, 258.

2. Where a *fi. fa.* on a justice's judgment was levied on land, and the regular proceedings had in the county court for subjecting the land, and a sale made by virtue thereof, it was *Held*, that the county court, at a subsequent term, has no authority, on motion, to set aside the *fi. fa.* on the justice's judgment. *Bennett v. Taylor*, 281.

Vide Practice, 6, 8.

PRACTICE.

1. According to the general understanding of the profession, where parties have gone into trial without a formal declaration, the plaintiff is to be taken to have relied on one suited to the case made by the proof. *Davis v. Golston*, 28.

2. The statute, Revised Code, ch. 31, sec. 114, authorizing a reference in suits upon the bonds of sheriffs and other public officers, does not embrace the case of a bond given by a deputy sheriff for the indemnity of his principal. *Willis v. Melvin*, 62.

3. The fact that a county court by a special statute cannot hold jury trials does not deprive a party of his common-law right to have issues of fact tried by a jury. *Buchanan v. McKenzie*, 91.

4. Where on a writ of error a judgment of the county court refusing to let a party plead was reversed in the Superior Court for error, the proper course was to send the case back to the county court, that the plaintiff in error might be restored to all things which he had lost, and it was *Held* to be error for the judge to give leave to the party to enter his pleas in the Superior Court. *Ibid.*

5. Where a statute requires that a proceeding shall originate in the county courts, and matters of fact are involved therein which cannot be tried in the county court because jurisdiction to try issues of fact has been taken away by special act of Assembly, the proper course is for the issues to be made up in the county court and transmitted, by an order or by a *certiorari*, to the Superior Court for trial. *Buchanan v. McKenzie*, 95.

6. A judgment on a *ca. sa.* bond, during the term at which it is rendered, is *in fieri*, and may be set aside on motion; and an appeal from the county to the Superior Court from an order setting aside such judgment is erroneous, and will be dismissed on motion. *Williams v. Schimmerhorn*, 104.

PRACTICE—*Continued.*

7. A suit at law cannot be removed into this Court by consent. *Rodman v. Davis,* 134.
8. Court of pleas and quarter sessions have power to set aside a verdict and judgment and order a new trial during the term. *Scaff v. Bufkin,* 161.
9. The power of the courts of pleas and quarter sessions to set aside a verdict and order a new trial is entirely discretionary, and the propriety of its exercise cannot be inquired into upon appeal. *Ibid.*
10. Where a petition was filed for partition of slaves and money, and there was no answer, no judgment *pro confesso,* no issue made up, and no order made for setting the case for hearing, it was *Held,* erroneous for the court to pass a decree. *Billups v. Riddick,* 163.
11. The act of 1861 (second extra session), chapter 10, section 4, did not affect questions as to the continuance of causes coming before a court whose sittings commenced upon Monday of the week during which the act was ratified. *Foust v. Trice,* 490.

Vide Compromise; Ejectment, 3; Mandamus, 1, 2, 3; Trial of a Non Compos; Waiver, 2.

PRELIMINARY ISSUE. *Vide* Trial of a Non Compos.

PRESUMPTION OF FACT.

Where in a suit for the loss by fire of a quantity of rice deposited at a mill to be beaten, it was proved that the general custom of the mill was to give a receipt to the owner of the rice delivered, expressing the quantity and the terms of deposit, it was *Held,* in the absence of proof that the custom was departed from in this particular instance, that there was a presumption that such a receipt was delivered to the plaintiff. *Ashe v. DeRosset,* 240.

PRESUMPTION OF HONESTY.

1. At law the rule is that fraud is never presumed, and he who alleges it must prove it. *Tomlinson v. Payne,* 108.
2. It may be taken as a general proposition that every man is presumed to be honest in his dealings until the contrary is proved. *Ibid.*

PRESUMPTION OF PAYMENT. *Vide* Endorsement, 1.

PRINCIPAL AND SURETY.

Where a person bid off a parcel of wheat at an auction sale, and another person came forward and gave his note for it, in compliance with the terms of the sale, it was properly left to the jury to determine whether the latter intended to become the purchaser or to become the surety of the bidder. *Thompson v. Andrews,* 453.

PRIVITY. *Vide* Contract, 8.

PROBATE OF A WILL.

Before a will can be received by our courts as having been established by a tribunal in another State it must appear by the record that such will was duly passed on by it, and that such tribunal was the court of probate of the domicil. *Townsend v. Moore,* 147.

QUASHING AN INDICTMENT. *Vide* Appeal, 2.

QUASHING PROCEEDINGS. *Vide* Power of Court to Set Aside Proceedings.

QUIET ENJOYMENT.

1. Where a grantor of land in another State entered into a covenant of quiet enjoyment, and after his death his widow recovered of the grantor a sum certain in lieu of her dower (the law of the State subjecting all lands to dower of which the husband was seized during coverture), it was *Held*, that such recovery was an eviction, and the covenantee was entitled to recover the amount paid. *Jackson v. Hanna*, 188.

2. Where a covenantee sued on his covenant for quiet enjoyment on account of a recovery of a sum certain off of him by the widow of the covenantor for her dower, and it appeared that only a part of the recovery was paid when the suit was brought, and the remainder afterwards and before the trial, it was *Held*, that the covenantee was entitled to recover the whole sum. *Ibid.*

3. The action on a covenant of quiet enjoyment is transitory, and though entered into in another State, may be sued on in this State. *Ibid.*

QUO WARRANTO.

An information in the nature of a writ *quo warranto* against a corporation to have its privileges declared forfeited because of neglect and abuse in the exercise of them must be filed in the name of the Attorney-General of the State, and cannot be instituted in the name of a solicitor of a judicial circuit. *Houston v. Navigation Co.*, 476.

RAPE.

The inference arising against the truth of a charge of rape, from a long silence on the part of the female, is not a presumption amounting to a rule of law, but is a matter of fact, to be passed on by the jury. *S. v. Peter*, 19.

Vide Carnal Knowledge of a Female Infant.

RAILROADS AS COMMON CARRIERS.

1. Where freight is carried on a railroad from station to station, if the owner is not ready to receive it at its destination the duty of the carrier is discharged by placing it in the warehouse of the company without giving notice to the owner or consignee. *Neal v. R. R.*, 482.

2. It is certainly not required of the warehousemen at a railroad station to notify consignees living at a distance of the arrival of their goods, either through the mails or otherwise. *Ibid.*

RECORD OF AN APPEAL, ITS CONCLUSIVE CHARACTER. *Vide* Appeal Bond, 2.

RECORD OF PROBATE IN ANOTHER STATE. *Vide* Probate of a Will.

RECORDARI.

Where the president of a railroad company was informed that a suit was about to be brought against his company, before a justice of

RECORDARI—*Continued.*

the peace, and believing that a recovery in such suit would be unjust, gave instruction to the most convenient station agent to attend the trial and, in case of a recovery against the company, to appeal to court, and such agent was a diligent and faithful officer, but from ignorance of the law failed to procure security for the appeal, it was *Held*, that there was no such laches on the part of the president as deprived the company of a right to a *recordari*. *R. R. v. Vinson*, 119.

REFERENCE TO CLERK. *Vide* Practice, 2.

REFUNDING BOND. *Vide* Statute of Limitations, 8.

REGISTERED COPY.

1. Section 16, chapter 37, Revised Code, makes a certified copy of a registered deed competent evidence. *Hughes v. Debnam*, 127.
2. Slight and immaterial mistakes in the registration of a deed of gift will not avoid it. *Ibid.*

Vide Evidence, 2.

RELEASE. *Vide* Estoppel, 1.

REMEDIAL LEGISLATION WHERE COURTHOUSES HAVE BEEN BURNT. *Vide* Color of Title.

REMOVING A FENCE.

Where a party has neither possession nor right of possession to land he cannot upon an indictment for unlawfully removing a fence therefrom raise a question as to a right of entry, nor is it any defense to him that he did the act to bring on a civil suit in order to try the title. *S. v. Graham*, 397.

REMOVAL OF A SUIT TO SUPREME COURT BY CONSENT. *Vide* Practice, 7.

REMOVING A DEBTOR.

1. Where a party, with his horse and buggy, carried a debtor to a railroad station and there procured the money to enable him to leave the State, with the intent to assist him in the purpose of avoiding his creditors, it was *Held*, to be a fraudulent removal within the statute. *Moffitt v. Burgess*, 342.
2. The declaration of a debtor fraudulently removed that "he intended to get the defendant into a scrape," was *Held* to be immaterial. *Ibid.*

REPAIRS TO A VESSEL. *Vide* Attachment, 1.

RETURN OF PROCESS. *Vide* False Return, 1, 2, 3.

ROAD.

Whether there was a necessity for a public road between given *termini* is matter which cannot be reëxamined in this Court. *Pridgen v. Bannerman*, 53.

Vide Overseer of Road.

RULE IN SHELLEY'S CASE. *Vide* Deed of Gift.

SALE OF LAND.

1. Where an administrator petitioned for the sale of his intestate's land, setting forth the number and amount of the debts existing against the estate, and a decree passed for such sale, in a suit by an administrator *de bonis non* to recover a surplus over and above the debts, such decree was *Held,* not to be conclusive as to such debts, although the persons to whom the land was devised were made parties. *Latta v. Russ,* 111.

2. A sale of land by a decree of a court of equity is in effect a sale by the owner of the land through the agency of the court. *Williams v. Council,* 229.

3. Notice is not required to be given to the creditors of a deceased person on application by the administrator or executor to sell the real estate for the payment of debts. Revised Code, ch. 46, sec. 45, etc. *Thompson v. Cox,* 311.

4. Nor is the fund raised by such sale under the control and direction of the court making the order of the sale. *Ibid.*

5. After passing the order for the confirmation of a sale made by virtue of the statute, Rev. Code, ch. 46, sec. 45, etc., the jurisdiction of the court is at an end, and a petition to open the biddings under such sale will not be sustained. *Ibid.*

SCHOOL FUNDS. *Vide* Chairman of Common Schools.

SCIRE FACIAS. *Vide* Detinue.

SEAL.

A square piece of paper affixed with a wafer to an instrument opposite to the name of the donor, in the place where the seal is usually placed, will in the absence of proof that the donor intended otherwise, be valid as a seal. *Hughes v. Debnam,* 127.

SECRET TRUST.

Where one owned and possessed slaves for fifteen years, and they were run out of the State secretly by the owner into another State, and then taken in hand by the defendant, who carried them into a distant State and sold them and received the money about the time the plaintiff's judgment was obtained against the owner, it was *Held,* that this was some evidence of a secret trust for the use and benefit of the debtor to enable him to defraud his creditors. *Morrison v. McNeill,* 45.

SEISIN OF ANCESTOR. *Vide* Statute of Limitations, 7.

STAY LAW.

The provision of the act of Assembly passed on 11 May, 1861, commonly called the "Stay Law," forbidding jury trials, and trials before justices of the peace, and the issuing of executions, and sales under executions and deeds of trust, *Held,* to be unconstitutional and void. *Barnes v. Barnes,* 366.

SET-OFF.

Money paid by B., the surety of A., is a good set-off against a note payable to A., which was endorsed after it fell due. *Harrington v. Wilcox*, 349.

SHERIFF. *Vide* Summary Judgment.

SHERIFF. *Vide* False Return, 1, 2, 3.

SHERIFF'S BOND.

1. The ceremony of acknowledgment in open court, and registration, are not essential to the validity of a sheriff's bond. *McLean v. Buchanan*, 444.
2. Where a debtor lived in one county and had places of business in two other counties adjoining, and it appeared that a sheriff who acted as a collecting officer went three times during three months to such residence, at the end of which time the debtor became insolvent, although it appeared that the debtor was most usually absent from home during this time, it was *Held*, that the officer was guilty of such laches as to render him and his sureties liable on his official bond. *Ibid.*

SLANDER.

1. The words, "You as good as stole the canoe of J. H.," are not actionable *per se*. *Stokes v. Arey*, 66.
2. It is not actionable *per se* to charge a white man with being a free negro; and it does not alter the case that such white man was a minister of the Gospel. *McDowell v. Bowles*, 184.
3. In a declaration for slander, in charging the plaintiff with perjury in another State, it must be averred that by the laws of such other State perjury is an offense to which is annexed an infamous punishment. *Sparrow v. Maynard*, 195.
4. Words charging one with an attempt to commit a felony, however odious, are not actionable *per se*. *Wilson v. Tatum*, 300.
5. Reports that the plaintiff swore to a lie or lies in a distant county cannot properly be submitted to a jury in an action of slander as elements from which a jury are to make up an estimate of their own of the character of the plaintiff. *Luther v. Skeen*, 356.

SLAVES. *Vide* Contract, 9; Deed of Gift; Jail Fees.

SOLDIER UNDER ARREST. *Vide* Habeas Corpus.

STATUTE OF FRAUDS.

1. Where the land of one of two sureties of a third person was sold under execution for the debt, and the other surety bid it off, it was *Held*, that an agreement for the owner of the land to pay the debt and take an assignment of the bid to him was not affected by the statute of frauds. *Hockaday v. Parker*, 16.
2. Where a remainder in slaves during the particular interest was offered for sale at auction, when certain written terms were proclaimed by the crier, and the defendant was the last and highest bidder, but the property was not delivered to him, in a suit for not

STATUTE OF FRAUDS—*Continued.*

complying with the terms of sale, it was *Held*, that the contract was within the statute of frauds, so far as the bidder was concerned, and no action would lie against him. *Edwards v. Kelly*, 69.

Vide Contract, 8.

STATUTE OF LIMITATIONS.

1. Where a bailment is once established, a mere possession under a claim of title with the use of property as his own, unaccompanied by an act upon the part of the bailee, changing the nature of his holding, will not set the statute of limitations in motion. *Koonce v. Perry*, 58.

2. Where a writ in slander was issued, returnable to a term of the court, and no *alias* issued from such return term, but a writ issued from the next term thereafter, it was *Held*, that the latter writ was the commencement of the suit, and the limitation to the action must be determined accordingly. *Hanna v. Ingram*, 55.

3. Where the land of an infant was sold by a decree of a court of equity and the purchaser went into possession, but no deed was made by the master during his continuance in office, it was *Held*, that during this time the purchaser was in as the tenant of the former owner, and that his taking a deed from the master, after his going out of office, did not change that relation. *Williams v. Council*, 229.

4. *Held further*, that the purchaser's making a deed of trust to secure debts, but still remaining in possession, did not change the relation and make the holding adverse. *Ibid.*

5. *Held further*, that an agreement on the part of such purchaser to sell the land thus bid off by him, absolutely, and an entry and possession of the party contracting to buy, he acknowledging himself the tenant of the person who bid off the land, did not make the holding adverse to the original owner. *Ibid.*

6. Where the ancestor of a married woman died seized and possessed of a tract of land, it was *Held*, that the descent cast and the title derived from her ancestor, according to the law of this State, gave her an actual seizin, and having had children during her coverture, her husband became tenant by the curtesy initiate, and was subject to the bar of the statute of limitations. A *fortiori* is such the case where one of the wife's coheirs made an actual entry; for his possession was that of all the heirs. *Childers v. Bumgarner*, 297.

7. The children of one entitled to an estate as tenant by the curtesy are allowed seven years from the death of their father before they are barred by the statute of limitations. *Ibid.*

8. The statute of 1789 barring claims not sued for in two years does not protect an administrator unless he has paid over the assets to the distributees and taken refunding bonds as well as advertised in conformity with the act. *Cooper v. Cherry*, 323.

Vide Demand, 1.

STATUTE OF USES. *Vide* Limitations in Remainder, 3.

SUBSCRIBING WITNESS.

1. It is sufficient if a subscribing witness, at the execution of the instrument, had mind enough to understand the obligation of an oath and to prove the capacity of the donor and his execution of the deed. *Hughes v. Debnam*, 127.

2. Where there is doubt whether or not a subscribing witness to an instrument signed it before the donor, it was *Held*, that in the absence of proof to the contrary, the presumption is that the donor signed it first. *Ibid.*

TAXING POWER. *Vide* Town Commissioners.

TENANCY. *Vide* Evidence, 16.

TITLE. *Vide* Trespass, *q. c. f.*, 2.

TITLE COMMON TO BOTH PLAINTIFF AND DEFENDANT. *Vide* Ejectment, 2.

TITLE IN A THIRD PERSON. *Vide* Ejectment, 2; Trover, 2.

TIMBER FOR REPAIRING ROAD. *Vide* Overseer of Road.

TIME WHEN AN ACT TAKES EFFECT. *Vide* Practice, 11.

TOWN COMMISSIONERS.

The Legislature may delegate a portion of the general taxing power to incorporate towns for corporation purposes, and it was held that the statute, Rev. Code, ch. 111, sec. 13, empowering the commissioners of incorporated towns to levy a tax of $25 upon retailers of spirituous liquors by the quart measure or under, was a proper exercise of their power. *Comrs. v. Patterson*, 182.

TREATIES WITH INDIANS.

1. Where an Indian, under the treaties of 1817 and 1819, after having his reservation allotted to him, voluntarily abandoned it and reunited himself with his tribe west of the Mississippi, it was *Held*, that his children, after his death, were not entitled to any estate in such reservation. *Welch v. Trotter*, 197.

2. A treaty in its effect is an executory agreement, and where an estate was limited by treaty to one for life, with a remainder to others, on a condition extending to both estates, it was *Held*, that on breach of such condition both estates were defeated without entry. *Ibid.*

TREATMENT OF HIRED SLAVES. *Vide* Contract, 9; Negligence, 3.

TRESPASS, Q. C. F.

1. Where a defendant in an action of ejectment has been evicted under a judgment and writ of possession he is not estopped, on making an actual entry on the premises, from maintaining an action of trespass *q. c. f.*, and on showing title he may recover for trespasses committed after the termination of the former suit. *White v. Cooper*, 48.

2. Where one having title enters upon one who has evicted him by a judgment in ejectment and writ of possession, the former, by the *jus post liminii*, notwithstanding the presence of the other, will be considered to have been in possession all the time from and after the date of the eviction. *Ibid.*

TRIAL OF A NON COMPOS.

Where upon the arraignment of one for murder it was suggested that the accused was a deaf-mute and was incapable of understanding the nature of a trial and its incidents and his rights under it, it was *Held*, proper for a jury to be empaneled to try the truth of these suggestions, and such jury's responding in the affirmative of these suggestions, for the court to decline putting the prisoner on his trial. *S. v. Harris*, 136.

TRIAL, CONDUCTING OF. *Vide* Evidence, 20.

TROVER.

1. Where a constable, by levy and actual seizure of a slave, had acquired a right to the property for the satisfaction of executions in his hands, and delivered such slave to the jailer of the county for safe keeping, a refusal of the jailer to redeliver the said slave, by command of his superior, the sheriff, was *Held*, in an action of *trover* by the constable against the sheriff, to be evidence of conversion. *McDaniel v. Nethercut*, 97.

2. Where the plaintiff delivered a quantity of wheat to the defendant with an injunction to keep it until called for, to which he assented, it was *Held*, in an action of *trover*, brought to recover its value, that it was a valid defense for the defendant to show that the title to the wheat was in a third person, to whom he had delivered it before the plaintiff's demand and suit. *Thompson v. Andrews*, 125.

VERDICT.

1. Where there were two counts in an action of ejectment on the demises of several heirs at law, and a general verdict was rendered giving nominal damages, but on a point of law reserved it was determined that the lessor in one of the counts was barred by the statute of limitations, it was *Held*, that the other lessor was, nevertheless, entitled to his judgment. *Childers v. Bumgarner*, 297.

2. In an action of debt for a penalty, in which *nil debit* is pleaded, a verdict finding all issues in favor of the plaintiff and assessing his damages to $500 will not sustain a judgment of recovery. *Albright v. Tapscott*, 473.

VERDICT, SPECIAL. *Vide* Larceny.

VICIOUS ANIMALS.

Where a sow, having a bad reputation for devouring young poultry (which was known to her owner), was seen with a duck in her mouth, and on being chased dropped it, but immediately again ran after it, and was shot by the owner of the duck while in such pursuit, it was *Held*, that he was justified in so doing. *Morse v. Nixon*, 35.

VOLUNTARY ASSIGNMENT. *Vide* Fraud.

WAIVER. Appeal Bond, 1; Certiorari, 1.

WAIVER OF OBJECTION ON A TRIAL BEFORE A MAGISTRATE.

1. A defendant, by going to trial before a justice of the peace on the merits of his case, without making objection to the want of

WAIVER OF OBJECTION—*Continued.*

service by a proper officer, is not at liberty to take the objection in an appellate court. *Taylor v. Marcus*, 402.

2. Where there was a trial before a justice of the peace and an appeal, and no objection appears on the face of the proceeding to the service of the warrant, it will be assumed in the appellate court that the objection was waived below. *Ibid.*

WAREHOUSEMEN. *Vide* Railroads as Common Carriers, 1.

WIDOW—HER DISSENT FROM WILL.

Where a widow qualified as executor of her husband's will it was *Held*, that she could not afterwards dissent from the will and claim dower. *Mendenhall v. Mendenhall*, 287.

WILL. *Vide* Probate of a Will.

WRIT OF ERROR. *Vide* Practice, 4.

WRIT OF ERROR CORAM NOBIS.

1. A writ of error *coram nobis* lies from any court of record returnable to itself, and not from a superior to an inferior court. *Roughton v. Brown*, 393.

2. Only the parties to a judgment as to whom there is error of fact need join in a writ of error *coram nobis. Ibid.*

3. The husband of a *feme covert* against whom a judgment has been taken must join with her in an application for a writ of *coram nobis. Ibid.*

WITNESS.

The maxim of law, "*Falsum in uno, falsum in omnibus,*" does not prevail in courts of law, the fact of the witness having sworn falsely as to one matter going to the credibility and not to the competency of his testimony as to the other matters. *S. v. Smith*, 132.

Vide Evidence, 8.

WRIT. *Vide* Amendment, 4.

WRITTEN CONTRACT. *Vide* Evidence, 12.