NORTH CAROLINA REPORTS.

VOL. 6.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

1811 TO 1813, INCLUSIVE

AND AT

JULY TERM, 1818.

REPORTED BY

A. D. MURPHEY.

ANNOTATED BY

WALTER CLARK.

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1910.

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7 " "	"	42	"
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" Eq.	"	45	"
1 Jones Law	"	46	"
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3 " "	"	48	"
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5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
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JUDGES OF THE SUPREME COURT

1811 TO 1818.

CHIEF JUSTICE:

JOHN LOUIS TAYLOR.

ASSOCIATE JUSTICES:

JOHN HALL,
FRANCIS LOCKE,
SAMUEL LOWRIE,
LEONARD HENDERSON,
[1]HENRY SEAWELL,[3]
[2]EDWARD HARRIS,
[4]DUNCAN CAMERON,
[5]THOMAS RUFFIN,
[6]JOSEPH J. DANIEL,
[7]ROBERT H. BURTON,
[8]BLAKE BAKER.

ATTORNEY-GENERAL:

H. G. BURTON.

SOLICITOR-GENERAL:

EDWARD JONES.

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[1]Appointed 1811, *vice* JOSHUA G. WRIGHT, died.
[2]Elected 1811, *vice* SEAWELL, not confirmed.
[3]Appointed 1813, *vice* HARRIS, died.
[4]Appointed 1814, *vice* LOCKE, resigned.
[5]Appointed 1816, *vice* CAMERON, resigned.
[6]Elected 1816, *vice* HENDERSON, resigned.
[7]Appointed 1818, *vice* LOWRIE, died.
[8]Appointed 1818, *vice* BURTON, resigned.

CASES REPORTED.

CITED CASES.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1811.

CLARKE v. WELLS' ADMINISTRATOR.

From Burke.

After an injunction is dissolved, and the bill continued as an original bill, the court will order the money recovered at law to be retained by the master until the plaintiff at law give security to perform the decree which may be made at the hearing, where it appears to the court that the plaintiff is insolvent or is likely to become so, or resides out of the State.

A SUIT at law was commenced in RUTHERFORD County Court, in the name of Wells' administrator to the use of James L. Terril against Clarke, upon a promissory note, and judgment was obtained for the sum of £.... Clarke appealed, and in the Superior Court judgment was again rendered for the plaintiff. Clarke filed a bill in equity, and procured an injunction to stay further proceedings upon the judgment at law. To this bill the defendant put in a special demurrer, which was overruled by the court, and the defendant then filed his answer. Upon the hearing of the bill and answer the injunction was dissolved, and complainant prayed that his bill might (4) stand over as an original bill. At the succeeding term, the money to satisfy the judgment at law having been levied, complainant moved the court for an order that the clerk of Rutherford Superior Court, into whose hands the money so levied had been paid, should retain the money until the final determination of this suit, unless the defendant should give bond with good and sufficient securities to perform the decree which the court should make upon the final hearing of the cause. This motion was founded upon an affidavit made by

complainant, stating the insolvency of James L. Terril, who had the beneficial interest in the judgment at law, and who was the sole administrator of Wells; and this affidavit was supported by the return of "No goods," indorsed by the sheriff on three executions that had issued from the court of said county against the said Terril. It is submitted to the Supreme Court to decide whether this motion ought to be allowed.

R. Williamson and *J. Pickens* for complainant.
T. Coxe and *M. Troy* for defendant.

LOCKE, J. The Court of Equity has the power to make the order moved for by the complainant in this case; but this power ought to be exercised only in cases where, without such interference, justice could not be effected: as where the plaintiff at law is or probably will be insolvent at or before the final decision of the cause in equity, or where he resides out of the State and at such a distance as to expose the party prevailing to great trouble, expense and inconvenience in getting back his money. Indeed, without such a power in a court of equity it could not afford that remedy which induces men to seek redress in that court. A plaintiff (who may be insolvent) obtains a judgment at law against a man who has no legal, but a good equi-
(5) table defense; to avail himself of this defense he procures a bill of injunction; but the plaintiff at law has a conscience hardy enough to deny all the equitable matter contained in the complainant's bill, and on the hearing the injunction is dissolved. The complainant, conscious, however, that he can prove the facts upon which his claim to relief is founded, continues over his bill as an original, procures his testimony, and on the final hearing of the cause obtains a decree in his favor. But in the meantime the plaintiff at law has received a satisfaction of his judgment, is utterly insolvent, and beyond the reach of the court. Of what avail to the complainant is the mere decree of the court? The remedy, which he has been seeking for years, turns out to be merely nominal; it yields him nothing. To prevent this evil, the Court of Equity will exercise the power of making such an order as that now moved for; and it appears to the Court that the facts contained in complainant's affidavit are sufficient to authorize the exercise of this power in the present case. Let the motion be allowed, and the money retained by the clerk until bond with good security be given to refund the money in the event of a decree being made to that effect.

Cited: McDowell v. Sims, 42 N. C., 52.

(6)

ADMINISTRATOR OF CROSS v. TERLINGTON.

From Sampson.

1. A, being the next kin of B, conveys the personal property of which B died possessed to C, who takes out letters of administration on the estate of B and afterwards procures the conveyance to be proved and registered. A brings an action of trover against C for the property, alleging that the conveyance had been fraudulently procured. Upon the trial the jury find that the conveyance had been fraudulently procured, and is void; but C insists that A, having brought an action at law, must show a legal title, and this can be done only by showing the assent of C that he should have the property; for until this assent be given, the legal title is in C as administrator: *Held*, that C having recognized the title of A before administration granted, by accepting the conveyance, and having recognized it after administration granted, by procuring the conveyance to be proved and registered, he has thereby acknowledged A's right, and given such assent as vests the legal title in A.
2. An administrator cannot bring trover for a chattel after his consent that defendant shall have it, before administration granted.

THIS was an action of trover for a number of negroes, mentioned in the plaintiff's declaration. On the trial the following facts appeared in evidence:

Laban Taylo died in 1800, possessed of the aforesaid negroes, intestate, and without issue, and without brothers or sisters, or the children of such; leaving no father, but a mother, who became entitled to the negroes in question. In January, 1804, and before any administration was taken out upon the estate of Laban Taylo, Abigail Taylo, his mother, conveyed to Phelicia Terlington, wife of the defendant, the aforesaid negroes, by an instrument of writing, in the following words, to wit:

STATE OF NORTH CAROLINA—Sampson County.

Know all men by these presents, that, whereas my son Laban Taylo, Esq., late of the county of Sampson, deceased, hath lately died intestate, being possessed, at the time of his death, of very considerable personal estate, consisting of sundry negro slaves, to wit, Moses, Washington, John, Daniel, Nan, (7) and her two children; Anne, and her child; also a considerable stock of different kinds, household furniture, and other chattels; and whereas, although no administration has yet been granted of the goods and chattels of which the said Laban Taylo was possessed at the time of his decease, nevertheless, for and in consideration of the natural love and affection I have towards my beloved sister, Phelicia Terlington, wife of Southey Terlington, and in consideration also of the sum of five shil-

lings, by the said Phelicia to me in hand paid before the ensealing of these presents, I have granted, bargained and set over, and by these presents do grant, bargain and set over unto the said Phelicia Terlington, all and singular, the personal property aforesaid, and all and singular all and every personal property of every kind and nature whatsoever, of which the said Laban Taylo died possessed, and to which I am or may be entitled under the several acts of Assembly of the State aforesaid for the distribution of intestate estates, and this deed I am actuated to execute from a belief that it will tend to the true benefit of myself and of those whom the laws of God and my country have decreed should benefit by my property. Witness my hand and seal, this 31 January, 1804.

her
ABIGAIL × TAYLO. (SEAL.)
mark.

Signed, sealed, and delivered in presence of
JONATHAN FRYER,
JOSHUA BASS.

SAMPSON COUNTY—August Term, 1804. Then was the within proven in open court, by the oath of Joshua Bass. Ordered, etc.

HARDY HOLMES, *Clerk.*

It was in evidence that the said Southey Terlington procured the above-recited conveyance from said Abigail Taylo, and was present when she executed it. In February, 1804, letters of administration upon the estate of Laban Taylo were granted to the said Phelicia Terlington; and shortly after this the above-named Abigail Taylo intermarried with Jonathan Cross, who afterwards died, and the present plaintiff administered upon his estate. The jury found that the negroes had so been in the possession of Jonathan Cross and his wife, during the coverture, as to enable him, in his own name, or his administrator after his death, to prosecute and maintain a suit; and the jury
(8) further found that the above recited deed of conveyance was void, having been obtained by fraud and misrepresentation, and gave a verdict for the plaintiff.

There was no evidence of any assent on the part of the administratrix of Laban Taylo, that Jonathan Cross, or his wife, should take the negroes so as to vest a *legal right* in them, or either of them, except what appeared upon the above recited deed of gift; and the question reserved for the opinion of the Supreme Court was, whether the before recited deed be not such evidence of assent on the part of the defendant and his wife

that the legal interest in the negroes vested in Abigail Taylo; that after administration the defendant cannot retract and claim the property as administratrix, upon the ground that no assent had been given.

Jocelyn for plaintiff.
Sampson for defendant.

LOCKE, J. It is true that a legatee or person entitled (10) to a distributive share cannot legally get possession thereof without the assent of the executor or administrator, either express or implied; but slight declarations of the executor or administrator, as well as many acts, will in law amount to such assent. In 1 Com. Dig., 342 (C. C.), it is said, if an executor take a grant, lease, etc., from the legatee of the thing or term bequeathed, it will amount to an assent. To this effect also is 10 Co., 52-6, Office of Executors, 322-3. Or if he offer money to the legatee for the purchase, or send another to the legatee to purchase it of him. 1 Com. Dig., 342. These and many other acts of the executor will amount to an assent.

This case states that Abigail Taylo, the person by law entitled to the estate of Laban Taylo, deceased, did execute a deed to Phelicia Terlington for the negroes in question; but that at the time said deed was executed no letters of administration had been granted, and that afterwards the said Phelicia obtained letters of administration on said estate. The authorities above recited would be sufficient to show the assent of the administratrix, and to vest the property in the person entitled to the distributive share of said estate, if Phelicia, at the time of taking the deed, had been the administratrix. But it is said she was not, and, of course, that her attempt to purchase and acquire title by this deed ought not to bind the administratrix. *Whitehall v. Squire,* 1 Salk., 296, is a case where a person, before administration granted, agreed that the defendant being in possession of a horse belonging to the estate of the deceased might keep him, in satisfaction of funeral charges; and afterwards, having taken out administration, he brought an action of trover to recover the horse. The Court held that he (11) was bound by his agreement, and judgment was rendered against the administrator by two of the judges. It is true, a very learned judge thought otherwise, and on this case differed from his brethren. If, then, this case should be considered as law, it is decisive of this question; not that there was any express agreement on the part of Phelicia Terlington that Abigail Taylo should retain this property as her own, but because her

receiving a deed of bargain and sale for a valuable consideration was at once an admission and acknowledgment on her part that Abigail Taylo was the true owner, and competent to convey the negroes in question. It is unnecessary to decide this case merely on this ground, inasmuch as Phelicia Terlington, after letters of administration were granted to her, to wit, in August, 1804, had this deed proved in the County Court of Sampson. If as administratrix, and against this deed, she intended to claim this property, why have the deed proved and recorded? It would strengthen the evidence against her claim. If she intended to claim under the deed, then probate thereof in the County Court was necessary to give to it validity. It may therefore be fairly inferred from this act that she admitted and believed the right of this property to have been once in Abigail Taylo; and by recording the deed intended to confirm that right, and make her title under the deed good and valid. Is not this equivalent to obtaining the deed after administration granted? or, at least, equal to sending a person to purchase the legacy from the legatee, which, as before mentioned, amounts to an assent? It is the opinion of the Court that in this case there has been such an implied assent as to vest the property in Abigail Taylo, and that judgment ought to be rendered for the plaintiff.

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(12)

GREEN v. EALMAN.

From Nash.

A appeals from the order of the County Court granting leave to B to build a mill, etc. The order of the County Court is affirmed. A is liable for the costs in the Superior Court under the general law regulating appeals; B is liable for the costs of the County Court under Laws 1779, ch. 23.

THIS was a petition for leave to build a mill, filed under Laws 1779, ch. 23, sec. 2.* Green, the petitioner, owning the land on one side of the run, and Ealman owning the land on the other side. Ealman having been summoned to answer the allegations of the petition, appeared, and prayed that leave to build the mill might be granted to him, and not to the petitioner Green. The County Court decreed that leave should be granted to Ealman to build the mill. From this decree of the County Court the petitioner Green appealed to the Superior Court, and

gave bond and security according to the act of Assembly regulating appeals. The Superior Court affirmed the decree of the County Court; and it was submitted to the Su- (13) preme Court to determine which of the said parties should pay the costs, and in what manner, and to what extent, if the costs be divisible.

LOCKE, J. The Legislature evidently intended that as the party applying for an order to erect a mill was to have a portion of his adversary's property condemned, to answer a public purpose as well as a private benefit to the party intending to erect such mill, this condemnation and appropriation should be at the costs of the party making the application. Yet it would appear that this provision only extended to the costs of the County Court. If, therefore, a party against whom the County Court make the order should appeal from that order to the Superior Court, he takes the appeal subject to the general law of the country regulating costs upon appeals. He will therefore be liable to or exempt from the payment of those costs, according to the event of the suit; if it terminate in his favor, he will be exempted from costs; if otherwise, he must pay the costs. In the present case the same party prevailed in both courts; and therefore the party appealing is bound to pay the costs of the Superior Court, under the general law; and the party in whose favor the order was granted is equally bound to pay the costs in the County Court, under the special act of Assembly provided for that particular case.

*Section 2. Be it further enacted, that any person willing to build such mill, who hath land only on one side of a run, shall exhibit his petition to the County Court, and therein show who is the proprietor on the opposite side of the run; whereupon a summons shall issue to such proprietor to appear at the next court and answer the allegations of such petition; and the court also, at the same time, shall order four honest freeholders to lay off, view and value, on oath, an acre of the land of such proprietor, and also an acre of land of the petitioner opposite thereto, and to report their opinion and proceedings thereon to the next court, and thereupon the court shall order the said report to be recorded; and if it take not away houses, orchards, gardens, or other immediate conveniences, said court shall and may, and are hereby empowered and authorized to grant leave to the petitioner, or such proprietor, to erect such mill at the place proposed, as in their discretion shall seem reasonable, and to order the costs of such petition to be paid by the person to whom such leave shall be granted.

(14)

THE HEIRS OF HILL v. THE HEIRS OF WILTON.

From Craven.

1. Color of title. A constituted B his attorney, "to levy, recover and receive all debts due to him, to take and use all due means for the recovering of the same; and for recoveries and receipts thereof, to make and execute acquittances and discharges." B sold to C a tract of land belonging to A and conveyed the same *as attorney of A.* C entered and had seven years' possession of the land: *Held*, that the deed of B, as attorney of A, although he as attorney had no authority to sell the land, was color of title, and that seven years' possession under it barred the right of entry of A.

2. Where a deed is executed, which is afterwards considered as forming only a color of title, the party executing it must be considered as not having a complete title to the land which he by his deed purports to convey.

THIS case was sent up to the Supreme Court from the Superior Court of Law for CRAVEN, upon a rule obtained by defendants to show cause why a new trial should not be granted. It was an action of ejectment, and the only question was whether the following letter of attorney from Peter Dubois to Vincent Aymette, and the deed from Aymette to Samuel Hill, do not make such a color of title that seven years' possession under it will give a complete right:

Know all men by these presents, that I, Peter Dubois, of the county of Bladen, and Province of North Carolina, planter, have constituted, ordained and made, and in my place and stead put, and by these presents do constitute, ordain and make, and in my place and stead put my beloved friend, Mr. Vincent Aymette, planter, of the same province and county of Craven, to be my true, sufficient and lawful attorney, for me and in my name and stead and to my use, to ask, demand, levy, recover and receive of and from all and every person and persons whomsoever the same shall or may concern, all and singular sum and sums of money, debts, goods, wares, merchandise, effects and things whatsoever, and wheresoever they shall and may be found due, owing, payable, belonging and coming unto me the constituent, by any ways or means whatsoever, nothing excepted; giving and granting unto my said attorney my whole strength, power and authority in and about the premises; and to
(15) take and use all due means, cause and process in the law for the recovering of the same; and of recoveries and receipts thereof, in my name to make, seal and execute, due acquit-

tances and discharges; and for the premises to appear and the person of me the constituent to represent before any governor, judges, justices, officers, and ministers of the law whatsoever, relating to the premises, with full power to make and substitute one or more attorneys under him my said attorney, and the same again at pleasure to revoke, and generally to say, do, act, transact, determine, accomplish and finish all matters and things whatsoever, relating to the premises, as fully, amply, and effectually, to all intents and purposes, as I, the said constituent, myself should, ought or might do personally, although the matter should require more special authority than is herein comprised; I the said constituent ratifying, allowing and holding firm and valid all and whatsoever my said attorney or his substitute shall lawfully do or cause to be done in and about the premises, by virtue of these presents. In witness whereof, I have hereunto set my hand and seal, the fifth day of April, Anno Domini one thousand seven hundred and sixty-four, in the fifth year of his Majesty's reign. PETER DUBOIS. (SEAL.)

Signed, sealed and delivered in the presence of
PETER AYMETTE,
his
VINCENT × AYMETTE.
mark.

October Inferior Court, 1765. Present, his Majesty's Justices. Then was the within power of attorney proved in open court by the oath of Vincent Aymette, evidence thereto, and ordered to be registered.

Teste, PETER CONWAY, C. I. C.

The deed from Aymette to Samuel Hill was in the following words:

This indenture, made this 22 February, 1769, between Vincent Aymette, Sr., being attorney of Peter Dubois, authorized thereto by an instrument bearing date 5 April, 1764, both principal and attorney of Craven County and Province of North Carolina, planter, of the one part, and Samuel Hill, millwright, of the county and Province aforesaid, of the other part: Witnesseth, that the said Vincent Aymette, for and in consideration of the sum of six pounds, five shillings, proclamation money, to him in hand paid by the said Samuel Hill, before the sealing and delivery hereof, well and truly paid, the receipt whereof the said Vincent Aymette doth acknowledge, and hereof doth acquit and discharge the said Samuel Hill, his heirs, executors, administrators, and every of them, by these presents,

hath granted, bargained and sold, and by these presents doth fully and absolutely grant, bargain and sell and confirm
(16) unto the said Samuel Hill, and his heirs and assigns, a certain tract or parcel of land, situate and being in Craven County and Province aforesaid, on the west side of Crooked Run, beginning at Michael Shufus' causeway, running thence south 70 degrees west 160 poles to a pine; thence south 20 east 640 poles to a black gum; thence north 20 east 160 poles; thence north 20 west 640 poles to the first station, as by patent granted to Peter Dubois in 1738, reference being had thereto, may more fully appear: To have and to hold, the aforesaid 640 acres of land, and every part or parcel thereof, unto the said Samuel Hill, his heirs and assigns forever, to their only proper use and behoof. Further, the said Vincent Aymette, so far as he is authorized by the power of attorney before mentioned, shall at any time, at the request and the proper charge of the aforesaid Samuel Hill, do any other act or assurance that may be requisite in law for the more fully transferring the fee-simple right of the premises aforementioned unto the aforesaid Samuel Hill, his heirs, executors or assigns; and the said Vincent Aymette doth warrant and defend the aforesaid premises from his heirs and every other person, so far as the letter of attorney before mentioned shall authorize him thereto, forever. In witness whereof, the said Vincent Aymette hath hereunto set his hand and seal. VINCENT AYMETTE. (SEAL.)

Signed, sealed and delivered in presence of
PETER AYMETTE and VINCENT AYMETTE, JR.

STATE OF NORTH CAROLINA, JONES COUNTY COURT. } November Term, 1806.

Then was the within deed proved in open court by the oath of Samuel McDaniel, Sr., who swore that he was well acquainted with the handwriting of Peter Aymette, one of the subscribing witnesses to the said deed, and that the name of said Peter Aymette thereunto subscribed as a witness is in his own proper handwriting, and that the said Peter Aymette, and also Vincent Aymette, the other subscribing witness, and Vincent Aymette the grantor, are all dead, and that possession of the lands thereby conveyed had gone with such conveyance; whereupon it was ordered that the said deed should be recorded.

WILL. ORME, C. C.

Registered in the register's office of Jones County, in Book G, No. 7, and page 92. JAMES BRYAN, *Register.*

Gaston in support of the rule.
Harris, contra.

(18)

HALL, J. The case admits that the lessors of the plaintiff have had seven years' possession of the lands in dispute, under Vincent Aymette's deed; that this deed was executed, as it states upon its face, in consequence of a power of attorney given to Aymette by Peter Dubois. It is insisted that, although it is so stated in the deed, yet upon inspecting the power of attorney, it appears that no authority is thereby given to sell and convey lands; that as Aymette admits in the deed that he had no right to the lands himself, and claimed only an authority to sell and convey as aforesaid, his deed to Hill did not amount even to color of title. It is true that Aymette was not authorized to sell the lands by Dubois' power of attorney; and if the question depended upon "who had the title at the time of the conveyance," there could be no doubt. But the lessors of the plaintiff have been in possession for the space of seven years, since that time, under Aymette's deed, and no good reason appears to the Court why that deed should not be considered a color of title. Whenever a deed is executed which afterwards is considered as forming only a color of title, the party executing it must be considered as not having a complete title to the land which he by his deed purports to convey; it is a common thing for a person who sells land to allege that he has a title to it by descent, or in some other way, or, as in the present case, (19) that he is empowered to sell it under an authority given to him by the true owner. It is not probable that the purchaser would doubt the truth of this allegation more in the one case than in the other; and in either case, when such purchaser remains in possession for the space of seven years, he ought to be protected. Aymette's deed is of itself sufficient color of title, and its validity, in that respect, should not be affected by any contradiction that exists between it and the power of attorney executed by Dubois. The lessors of the plaintiff stand upon as meritorious ground as if Aymette had sold the lands in question to Hill as his own. Let the rule for a new trial be discharged.

Cited: McConnell v. McConnell, 64 N. C., 344; *Ellington v. Ellington,* 103 N. C., 58; *Smith v. Allen,* 112 N. C., 225.

REBECCA AND MARY LONG v. LUNSFORD LONG'S EXECUTOR.

A, by his marriage with B, acquired sundry negro slaves in 1794. B had issue, two daughters, and died. In 1809 A died, having made his will, and bequeathed to his two daughters "all his negroes, together with their *future* increase, which came by his wife B." The two daughters claimed of the executor, not only the increase *after* the death of the testator, but also the increase from the time the negroes came into A's possession: *Held*, that the daughters were entitled under the will to *all* the increase of the negroes from the time they came into A's possession.

THIS was a petition filed in the Superior Court of Law for HALIFAX, and the facts therein set forth, so far as the same are necessary to illustrate the point sent up to the Court, were as follows:

In 1794 Lunsford Long married Rebecca Jones, by whom he had issue, the petitioners Rebecca Long and Mary Long. At the marriage the father of Rebecca Jones gave to his son-
(20) in-law a number of negro slaves. In 1798 Rebecca, the wife, died; and some time afterwards Long married a second wife, by whom he had several children living at his death. In 1809 Long died, having previously published in writing his last will and testament, which after his death was duly proved; and in the said will he bequeathed as follows, to wit: "I give and devise to my daughters, Rebecca Jones Long and Mary Rebecca Allen Long, all my negroes, together with their future increase, which came by my dear departed Rebecca, their mother (except Frank Bibb, whom I wish to liberate on account of his meritorious services, and request my executors to attend to his manumission), to them, their heirs and assigns, forever." He appointed Allen Jones Green testamentary guardian to the petitioners, and Lemuel Long executor of his will, who delivered over to the said guardian the negroes which his testator had received from his father-in-law at the time of his first marriage, but refused to deliver over those negroes *"which had been born of that stock since his testator received them,"* alleging that they were to be divided, with the testator's other negroes, between the widow and younger children, under the next clause of the will, which is in the following words: "I give and devise all the rest and residue of my negroes, together with their future increase, to my beloved wife, Mary Long, my daughter, Mary McKinnie Long, my sons, Benjamin Sherwood Long and William Lunsford Long, share and share alike." This petition was filed against the executor for the increase of the negroes from the time of the testator's first marriage till his death. To this

petition the executor demurred, and the petitioners having joined in demurrer, the case was sent up to the Supreme Court upon the question, Whether the petitioners were entitled to the increase of the negroes as aforesaid.

HALL, J. The clause of the will under which the peti- (21) tioners claim the increase of the negroes in question is a little doubtful as to its meaning. The testator speaks of "all his negroes, together with their future increase, which came by his dear departed Rebecca, their mother." It appears to the Court that it was the intention of the testator, by this clause in his will, to give to the petitioners the increase of the negroes which came by his wife Rebecca. The expression used by the testator will be understood in common parlance as comprehending the increase: he speaks of the negroes *generally,* as stock, without particularizing them by name, which circumstance is favorable to the idea that as stock is to be diminished by deaths, so it must be kept up and supported by its natural increase. In this view of the case the words *future increase,* it is true, are to be considered as useless. If, however, they are referable in point of time to such increase as happened after the testator became possessed of the original stock (and in this sense the testator seems to have used them), the words of the clause may well stand. This construction is aided by the consideration that it appears from the will to have been the testator's intention to give the petitioners everything that he became possessed of in consequence of his intermarriage with their mother. Let the demurrer be overruled.

Cited: Cromartie v. Robinson, 55 N. C., 223.

(22)

THE CHAIRMAN OF THE COURT v. MOORE'S ADMINISTRATOR AND OTHERS.

From Hertford.

1. An action can be maintained on an administration bond against the securities, before judgment has been obtained against the administrator. An action lies against the securities as soon as the administrator forfeits his bond, and a person be thereby "*injured*"; for
2. Laws 1791, ch. 10, direct that administration bonds shall be made payable to the chairman of the County Court and his successors in office, etc., and shall be put in suit in the name of the chairman at the instance of the person injured.

CHAIRMAN OF COURT *v.* MOORE.

THIS CASE was sent up to this Court from the Superior Court of Law for HERTFORD, upon a rule obtained by the plaintiff to show cause why a new trial should not be granted. The action was brought upon an administration bond, against Eli Moore, administrator of the estate of Willis Moore, deceased, and against his securities; and the question submitted to this Court was, Whether an action can be maintained on an administration bond, against the securities of the administrator, before a judgment has been obtained against the administrator himself.

HALL, J. Laws 1715, ch. 48, direct that all administration bonds shall be made payable to the Governor, etc., who is directed to transfer or assign them *"to any person injured,"* who may maintain an action thereon. No part of the act seems to require that the person injured should prove his injury by the record of a judgment obtained by him against the administrator. Although the administrator might have forfeited his bond, yet the plaintiff was not entitled to recover anything of his securities, unless proof was made, according to the act, that he, the plaintiff, was *a person injured.* Laws 1791, ch. 10, direct
(23) that, in future, administration bonds shall be made payable to the chairman of the County Court and his successors in office, etc., and shall be put in suit in the name of the chairman, at the instance of the *person injured.* Under this act (and the bond in question was given since this act passed) no recovery can be had in the name of the chairman, unless, in addition to the proof that the administrator has forfeited his bond, proof is also made that the party for whose benefit the suit is brought has been injured by such forfeiture. It is contended, however, that this should be shown by obtaining judgment against the administrator; if so, it will follow that this judgment would be good evidence against and obligatory upon the securities, although it be a proceeding *"inter alios acta";* and the defendants, if permitted, might have it in their power to show that the real plaintiff had sustained no injury. Upon this point the Court gives no opinion; but they are of opinion that the whole matter may be inquired into in this action; that the acts of Assembly are plain, and require no previous judgment to be recovered against the administrator to render his securities liable to the suit of the person injured. Let the rule for a new trial be made absolute.

Cited: Strickland v. Murphy, 52 N. C., 244.

WHITLOCKE v. WALTON AND FREEMAN.

From Gates.

The saving in the statute of limitations, as to persons "*beyond seas*," does not extend to persons resident in other States of the Union.

THE defendants gave a letter to Copeland and Freeman, directed and to be delivered to the plaintiff, and therein requested the plaintiff to furnish Copeland and Freeman with goods to the amount of $2,000, and promised to be securities for the payment of that sum. The goods were accordingly furnished by the plaintiff, and after more than three (24) years had elapsed from the delivery of the goods this action was brought, to which the defendants pleaded, "that they had not assumed within three years," and rested their defense upon the statute of limitations. The plaintiff, at the time he delivered the goods, and continually afterwards up to the time of bringing this suit, resided at Suffolk, in the State of Virginia. There was a verdict for the defendants, and the plaintiff having obtained a rule for a new trial, it is submitted to the Supreme Court to decide, Whether the saving in the statute of limitations, 1715, ch. 27, sec. 9, as to persons beyond seas, extends to a person resident in the State of Virginia.

HALL, J. Although more than three years have elapsed since the plaintiff's cause of action accrued, it is contended that as he was a resident of the State of Virginia, his case is embraced by Laws 1715, ch. 27, sec. 9, which gives a further time to plaintiffs "beyond seas," etc., to bring their actions, provided they do so within a certain time after their return from beyond seas. The plaintiff is certainly not within the words of the proviso, and it does not appear to the Court that he falls within the true meaning and spirit of it. Great is the intercourse between the citizens of this State and the citizens of other States, particularly adjoining States; and if suits were permitted to be brought on that account against our own citizens, at any distance of time, by citizens of other States, the mischief would be great. Let the rule for a new trial be discharged.

Cited: S. v. Harris, 71 N. C., 176.

(25)

SCOTT v. DREW AND OTHERS.

From Chowan.

Under Laws 1801, ch. 10, sec. 4, 10 per cent is to be calculated upon the *principal of the debt only*, from the rendering of the judgment in the County Court to the rendering of the judgment in the Superior Court; and 6 per cent thereafter until the debt be paid.

AT November Term, 1804, of Bertie County Court, Scott obtained judgment against Drew in an action of debt upon a bond conditioned in the penalty of £5,685 17s. 2d. for the payment of £2,842 18s. 6d., with interest from 1 August, 1800. Drew appealed, and at March Term, 1807, of Chowan Superior Court the plaintiff obtained judgment; and on motion, judgment was rendered against his securities for the appeal. As the defendant did not, in the Superior Court, diminish the amount of the judgment recovered against him in the County Court, a question arose, how the 10 per cent interest given by Laws 1801, ch. 10, was to be calculated. And it was submitted to the Supreme Court to decide, Whether the 10 per cent given by this act shall be calculated upon the principal only of the said debt, or upon the aggregate amount of principal and interest due at the time of the judgment in the County Court.

HALL, J. The act of 1801, ch. 10, sec. 4, states, "that where a defendant, in any action of debt, etc., shall appeal, etc., and shall not, on the trial of such appeal, diminish the sum recovered by the plaintiff, etc., the party so appealing shall pay to the plaintiff the sum of 10 per cent, to be computed from the time of rendering judgment in the County Court to the time of rendering up judgment in the Superior Court, and the lawful rate per cent from that time till the whole debt shall be
(26) paid," etc. The true construction of this act is that 10 per cent shall be paid upon the principal of the debt, and not upon the principal and interest added together. The Legislature intended to substitute 10 per cent in the place of 6 per cent, the legal interest, from the time of rendering judgment in the County Court to the rendition of the judgment in the Superior Court, and to charge the defendant with the lawful rate per cent from that time till he paid the debt.

SHEPHERD v. SAWYER.

From Camden.

1. A agrees with B, for 2½ per cent premium paid down, to insure a negro slave reported to be lost in Pasquotank River. B had no interest in the negro; yet his loss being proved, B is entitled to recover his value.

2. Innocent wagers are recoverable. They are illegal, where (1) they be prohibited by statute; (2) they tend to create an improper influence on the mind in the exercise of a public duty; (3) they are "*contra bonos mores*," or (4) they in any other manner tend to the prejudice of the public or the injury of third persons.

THE jury found for the plaintiff, and assessed his damages to £200, subject to the opinion of the court upon the following case: The plaintiff, Shepherd, started a boat loaded with brick, from Richmond, on Pasquotank River, down to Davis' bay, a distance of about seven or eight miles; the boat was rowed by a white man and several negroes, among whom was the fellow Jacob, hereafter mentioned. A few days after the boat was started a report was circulated that the boat and all persons on board were lost. The plaintiff and defendant were together at Camden Courthouse when this report reached that place, and the defendant offered to insure the negro fel- (27) low Jacob for the premium of 2½ per cent, which offer was accepted by the plaintiff, and the premium was paid down. It afterwards appeared that Jacob and all the other hands on board the boat were lost. The jury found that the conduct of the plaintiff was fair, open and candid, but that he had no interest whatever in the property insured.

HALL, J. It is submitted to this Court to decide whether, upon the facts found by the jury in this case, the plaintiff be entitled to recover. It is not contended that this case falls within the purview and meaning of any act of Assembly passed in this State for the purpose of suppressing unlawful gaming; and there can be no doubt but that the common law (which is the law of this State) interposes no obstacle to a recovery. Marshall on Insurance, 96, says: "Innocent wagers have long had the sanction of the common law. 11 Rep., 876; 1 Lev., 33; 5 Bur., 2802. They are only deemed illegal when they are prohibited by statute; when they tend to create an improper influence on the mind in the exercise of a public duty; when they are *contra bonos mores*, or in any other manner tend to the prejudice of the public or the injury of third persons." 6

Term, 499; 1 Term, 56; 2 Term, 610; Cowper, 729. And to the cases referred to by Marshall may be added the case of *Good v. Elliott,* 3 Term, 693. These authorities are conclusive. Let judgment be entered for the plaintiff.

Overruled: Burbage v. Windley, 108 N. C., 362.

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(28)

DEN ON DEMISE OF HEIRS OF WILLIAMS v. ASKEW.

From Hertford.

A judgment against the executor or administrator creates no lien on lands descended or devised; and lands *bona fide* aliened by the devisee, before *scire facias* sued out against him, are not liable for his testator's debts.

LEWIS BROWN being indebted to John Armstead by bond, binding himself and *"his heirs,"* died about 1805, having previously published in writing his last will and testament, and therein devised the lands mentioned in the declaration of ejectment to Anthony Brown. Administration on the estate of Lewis Brown was granted with the will annexed, and suit being brought against the administrator upon the aforesaid bond, the administrator pleaded that "he had fully administered," etc., which plea was found by the jury to be true, and judgment having been obtained on the said bond in August, 1806, a writ of *scire facias* was issued against Anthony Brown, the devisee, to show cause why the plaintiff should not have judgment of execution against the lands devised to him by Lewis Brown. Judgment was rendered against Anthony Brown upon this *scire facias,* in August, 1807, upon which a writ of execution was issued, and the lands aforesaid devised to Anthony Brown were seized by the sheriff and sold to satisfy the said execution; at which sale the defendant Askew became the purchaser, and the sheriff executed to him a deed for the land on 25 November, 1808. Defendant set up title under this deed.

On 23 December, 1806, subsequent to the rendering of the judgment against the administrator, but previous to the suing out of the *scire facias* aforesaid, Anthony Brown, the devisee, conveyed the lands, for a valuable consideration, to Richard Williams, under whom the lessors of the plaintiff claim title.

There was a verdict for the plaintiff, and a rule for a (29) new trial being granted, and on argument discharged by the court, the defendant appealed to this Court.

HALL, J. The only question in this case is, Whether the devisee, having sold the lands in question to a *bona fide* purchaser for a valuable consideration, after process had been taken out against the administrator, with the will annexed, but before a *scire facias* had issued against him, the devisee, the lands so sold should be subject to the testator's debts. If any doubts existed on this subject before the act of 1789, ch. 39, that act has removed them. The third section of that act declares that "wherever an heir or devisee shall be liable to pay the debt of his or her ancestor or testator, etc., and shall sell, etc., before action brought, or process sued out against him or her, that such heir or devisee shall be answerable for such debt to the value of the land so sold, etc." It concludes by declaring, "that the lands, etc., *bona fide* aliened before the action brought shall not be liable to such execution." This act embraces not only heirs that were bound at common law to pay off the debt of their ancestors in consequence of lands descending upon them, and in consequence of being named in the obligations of their ancestors, but also heirs and devisees who are made liable by the statute law to the simple contract debts of their ancestors. As to the first, there can be no difficulty, because an action brought or process sued out to recover such debts must be directly, and in the first place, brought against them; as to the latter, it is contended by some that the action and process spoken of by the act mean the commencement of the suit against the executor or administrator. As has been already observed, whatever doubts may have existed upon this subject, in consequence of the act of 1784, they have been removed by the act of 1789, which speaks of "actions brought, or process sued out, (30) against him or her," that is, the heir or devisee, as the case may be. The concluding part of the section exempts "lands sold *bona fide* before action brought" from execution. When the act is speaking of the heir and devisee, and of actions, etc., brought against them, it is surely a very forced construction to say that it means actions brought against the executors or administrators, when they are not mentioned in the act as connected with this subject. Such a construction has no reason to support it, and were it to prevail, *bona fide* sales made by heirs or devisees, who were ignorant even of any process being sued out against the executor or administrator would be rendered invalid. The process sued out against the executor or adminis-

trator, and the judgment rendered thereon, create no lien upon the real estate descended or devised. In the present case Williams, the purchaser from the devisee, acquired the lands honestly; his title is therefore good. Judgment must be entered for the plaintiff, and the rule for a new trial be discharged.

JORDAN v. BLACK AND HORNIBLEAU.

From Perquimans.

A having recovered a judgment against B, assigned it to C; B obtained an injunction, and C in his answer insisted that the judgment had been assigned to him for a valuable consideration, and that he had no notice of the equity of B: *Held*, that the judgment was a *chose in action*, and that a purchaser of a *chose in action* for a valuable consideration, without notice of another's equity, stands in the same situation with the assignor of the chose; and is not protected by being a purchaser for a valuable consideration without notice against the claims of him who has equity.

WILLIAM BLACK, one of the defendants, recovered a judgment at law against the complainant, against which judgment
(31) the complainant obtained an injunction, upon the ground that the debt was due to the defendant and one David Black, trading in partnership as merchants under the name and firm of William Black & Co.; which company had failed, and both parties were insolvent, having assigned all their debts and effects to their creditors, who had thereupon appointed David Black their agent; that after this appointment complainant had accounted with David Black, as agent aforesaid, and taken a full discharge. To these allegations the defendant William Black answered that the copartnership had been dissolved some months before the complainant contracted the debt on which the said defendant had recovered judgment; that the debt was contracted with the defendant alone, the complainant having full notice of the dissolution of the said copartnership. The other defendant, Elizabeth Hornibleau, charges that her codefendant, William Black, by deed duly executed, bearing date 1 June, 1804, assigned the same debt to her in satisfaction *pro tanto* of a debt justly due to her by the said William Black, and denied notice of complainant's equity, and also denied all the allegations of the complainant's bill. Upon this an issue was made up to try whether the debt was a copartnership debt or

the individual debt of William Black; and to prove the debt to be a copartnership debt, the only testimony offered was the deposition of the other partner, David Black, upon whose testimony the issue was found for the complainant, and a decree was made perpetuating the injunction, from which the defendants appealed to this Court, upon the following points: (1) Was David Black a competent witness? (2) If he be a competent witness, Elizabeth Hornibleau being a fair purchaser for a valuable consideration without notice of complainant's equity, will a court of equity interpose to defeat her of the recovery at law.

HALL, J. The law relating to the competency of wit- (32) nesses is too well settled at this day to leave any doubt upon the first point submitted in this case. The general rule is laid down in *Bent v. Baker,* 3 Term, 27, "that the witness is competent, if the verdict cannot be given in evidence either for or against him in any other suit," etc. The finding of the jury upon the issue submitted to them in the present case cannot be used by the witness as evidence in any other suit. There may be exceptions to the general rule, but this is not one. The deposition of David Black was therefore properly received.

As to the second point, it is to be observed that Mrs. Hornibleau has taken an assignment of a *chose in action, a judgment,* a thing in its nature not assignable at law. She, therefore, cannot stand in a better situation than her assignor. Upon an examination of the authorities upon this subject it will be found that the ground taken by Mrs. Hornibleau is tenable by those persons only who, having the *"legal title"* in them, plead that they are purchasers for a valuable consideration and without notice. By this plea they show that they have as much equity on their side as their opponents, and that being the case, a court of equity will not interfere and divest them of their legal title. All that Mrs. Hornibleau shows is that she purchased Black's right to a chose in action. She, then, has *no legal,* but only an *equitable* right. But Jordan shows that Black obtained the judgment against him unconscientiously, and this Court will say, in such case, that he shall not have the benefit of it, nor shall Mrs. Hornibleau, as she can stand in a situation no better than her assignor. Let the injunction therefore be perpetuated.

Cited: Rice v. Hearn, 109 N. C., 151.

(33)

SHOBER v. ROBINSON, BEVILL AND WIFE.

From Stokes.

A covenant "*to warrant and defend the negro Peter to be a slave*" is a covenant only against a superior title. It does not bind the warrantor, on receiving notice from the warrantee that a suit is brought to ascertain whether Peter be free, to come forward and make defense and put a stop to the eviction. He is bound to make defense only when he is sued upon his covenant; and then, if he can show that Peter was a slave at the time of the sale, he shall be discharged. And the record of the proceedings in a suit brought by Peter against the purchaser, in which the jury found that Peter was a freeman, and not a slave, is not conclusive against the covenantor, although he had notice of the said suit.

THIS was an action of covenant, founded upon a bill of sale for a negro fellow named Peter, sold to the plaintiff by Andrew Robinson and Mary Hamilton, since intermarried with Thomas Bevill, at the price of £240. The bill of sale contained the following covenant, to wit: "And we do hereby covenant for ourselves, our heirs, executors and administrators, to and with the said Gotleib Shober, his executors, administrators or assigns, to warrant and defend the said *negro to be a slave.*" And a breach of this covenant was assigned in the declaration. The defendants pleaded, "that they had not broken their covenant," etc., and the plaintiff having replied, and issue being joined, the following facts appeared in evidence: The plaintiff took Peter into his possession immediately after the execution of the aforesaid bill of sale, and in April, 1809, Peter, claiming to be a freeman, instituted an action of assault and battery and false imprisonment against the plaintiff, in the Superior Court of Law for Stokes County; who thereupon appeared by counsel, and pleaded to the said suit a plea in abatement thereof, to wit, "that the negro fellow Peter, suing by the name of Peter Archer, was a slave, and not a freeman," to which plea there was a
(34) replication, and issue being joined between the parties, it was tried at October Term, 1809, when the jury found that the negro fellow Peter was a freeman, and not a slave. Shober gave notice to Hamilton and Robinson of the claim which Peter set up to freedom, and of the suit which he had brought to enforce his right. They appeared and employed counsel to defend the suit, and Shober assisted their counsel in making defense; one of them, to wit, Robinson, was present at the trial, and challenged jurors.

After the verdict and judgment in this case Shober brought

the present suit against his vendors, Robinson and Hamilton, and set forth in his declaration a breach of the covenant before mentioned. The cause came on to be tried, when Shober gave in evidence to the jury the verdict, judgment and proceedings in the suit of Peter against him, as before set forth, and relied upon them as *conclusive* against the defendants. The defendants, in support of their plea, "that they had not broken their covenant," etc., offered evidence to prove that notwithstanding the finding of the jury in the other case, Peter was a slave, and not a freeman. The plaintiff objected to the admission of this evidence, upon the ground that the defendants were concluded by the former verdict. The court overruled the objection, and the evidence was received; upon which the jury found that the negro fellow Peter, on the day on which defendants sold him to the plaintiff, was a slave, and not a freeman; but whether, notwithstanding this fact, the plaintiff was entitled to recover, they prayed the advice of the court. It appeared in evidence that it was known to Shober, as well as to Robinson and Hamilton, before the trial of the suit of *Peter v. Shober,* that John Hamilton, then living within the jurisdiction of the court, could depose to facts which would show that Peter was a slave and not a freeman, and that neither of them had the said John subpœnaed as a witness nor requested his attendance as such. Hamilton was the only witness examined by de- (35) fendants to prove that Peter was a slave.

Upon this case the court gave judgment for the defendants, from which judgment the plaintiff appealed to this Court.

Williams and *Browne* for plaintiff.
Norwood for defendants.

LOCKE, J. This case presents two questions for the consideration of the Court: (1) What is the true construction or operation of the warranty contained in the covenant set forth in the plaintiff's declaration? Does it bind the defendants, on receiving notice from the plaintiff of a suit being brought to ascertain the freedom of the negro Peter, to come forward and make defense in the place and stead of the present plaintiff, and put a stop to the eviction; or are they bound to make defense only when suit is brought against them on this covenant? And if the latter, then (2) Whether the verdict rendered between the negro Peter and the present plaintiff is or is not conclusive against these defendants.

To show that the warranty binds the warrantor to make defense and put a stop to the eviction, Coke Lit., 365, sec. 1, a,

has been cited; and it is true, it is there said, "That in the civil law warranty is defined to be the obligation of the seller to put a stop to the eviction or other troubles which the buyer suffers in the property purchased." It is not necessary to inquire what were the nature and extent of the obligation which by the civil law a warranty imposed upon the seller of personal property, nor what were the forms of proceeding where the buyer was sued and gave notice to the seller to stop the eviction; for the definition of *warranty* here copied by the author from the civil law corresponds with that kind of warranty of which the author was treating, to wit, warranty of freeholds and inheritances, and with the form of proceedings against the war-
(36) rantor upon the writ of *warrantia chartæ,* in which the warrantor is vouched and compelled to come forward and make himself a party and defend his title. The action of *warrantia chartæ* has become obsolete in England, and was never in use in this State. The action of covenant has been substituted in its place, in which it is impossible for any other parties to be made than those against whom the plaintiff may think proper to bring his action. To give, then, to warranties respecting chattels the construction and operation contended for by the plaintiff, would be to compel a vendor to make defense to an action in which he is no party, and in which, by the rules of law, he could not use nor sue out any process whatever. It appears, therefore, to the Court that the fair and just construction of the warranty in question is this, that "the defendants covenanted that when legally called upon by an action grounded on the warranty, at the instance of the plaintiff, they would show that the negro Peter was a slave, or, if they could not, that they would repair the plaintiff's loss by an equivalent in damages; in short, that they only meant to warrant against a superior title, and not against every suit or molestation to which the purchaser might be exposed, and to which they were no parties. Perhaps, if it could be shown that a purchaser was really ignorant of the witnesses necessary to support his title, and they were within the knowledge of the seller, who, upon a proper application, refused to discover them until after an eviction, a court of law might view such conduct as a deceit and fraud, for which the purchaser would be entitled to recover. But this case furnishes no ground for such an action, because the evidence to prove that Peter was a slave was known to the plaintiff. However, the Court do not mean to give any opinion upon the right to recover in such a case as has been stated, because that point does not arise in the case submitted.

If, then, such is the true construction to be given to the war-

ranty contained in the covenant declared upon, what is the effect of the verdict and judgment recovered by (37) Peter against the present plaintiff, as against the defendants? On this point the Court is clearly of opinion that the verdict, being between different parties, ought to have no other effect than merely to show that the plaintiff was evicted, and put the defendants to the necessity of showing that the negro Peter was a slave; but that it is by no means conclusive. *Pearse v. Templeton,* 3 N. C., 379; Peake's Evidence, 26. Judgment for the defendants.

Cited: Martin v. Cowles, 19 N. C., 102.

LESTER v. GOODE.

From Stokes.

1. New trial. Several of the jurors swore that they, in forming their verdict, had misconceived a material fact sworn to by one of the witnesses; and the witness also swore that the fact was otherwise than as understood by the jurors. This is no good ground for a new trial, particularly where the affidavits be in the handwriting of the party asking for a new trial.

2. During the trial a man declares to a bystander that he knows more of the subject-matter in controversy than all the witnesses examined, and then leaves the court before a subpœna can be served on him. This is no good ground for a new trial.

THIS was an action of trover brought to recover the value of a horse claimed by the plaintiff. Upon the trial there was evidence adduced on both sides, each party setting up a claim to the horse. The evidence was commented upon at length by the counsel on each side, and stated at large by the court in the charge to the jury. There was a verdict for the defendant. A rule for a new trial was granted; and, in support of the rule, the plaintiff's counsel read to the court sundry affidavits: 1. Of several of the jurors who tried the cause, stating that they had not correctly understood the evidence of one of the witnesses introduced in behalf of the plaintiff; that from a misconception of a material fact deposed to by the witness, they (38) were induced to find a verdict for the defendant. 2. Of the witness referred to by the jurors in their affidavits, explaining at large the material fact aforesaid in a way different from

that in which the jurors swore they had understood it upon the trial. 3. Of a Mr. Dobson (a bystander), who swore that during the trial a man in his hearing observed that the evidence appeared to be strong against the defendant, and that he knew more on the subject in dispute than all the witnesses present. 4. Of the plaintiff, who swore that as soon as he was informed of this declaration made by the man, he used all possible diligence to get him subpœnaed, but that the man left court before a subpœna could be served on him. These affidavits were all in the handwriting of the plaintiff. The court discharged the rule for a new trial, and the plaintiff appealed to this Court.

LOCKE, J. It appears strange that the facts stated by the plaintiff's witness should have been misconceived by the jury, as the evidence was commented upon at length by the counsel on each side and stated at large by the court in the charge to the jury, with the necessary remarks, showing its bearing on the points in dispute. Yet some of the jurors signed an affidavit, in the handwriting of the plaintiff, setting forth that they were deceived. Admitting this to be the case, surely little reliance ought to be placed on the affidavits of jurors procured at the instance of a party. Every plaintiff or defendant against whom a verdict is rendered is apt to be displeased; and in the street, or some public house, where jurors too commonly assemble, they are attacked by the party cast, and by address, entreaty, and sometimes rewards, are prevailed upon to sign something in favor of the party, although they have, under the solemn obligations of an oath, rendered their verdict against
(39) him. Such tampering with jurors ought to be discountenanced, and when their affidavits are offered upon the subject of their verdict they ought to be received with many grains of allowance, and their weight balanced by the degree of influence which the party obtaining them is calculated to produce.

The circumstances disclosed by Dobson and the plaintiff, in their affidavits, do not furnish any ground for a new trial. Were new trials to be granted for reasons like those contained in these affidavits there would be no end to suits; days might be spent in investigating their merits, and verdicts might be rendered, but all to no purpose. They must all be revised, if the party cast has been artful enough to procure some person to be present at the trial who shall declare to a bystander, during its progress, that he knows a great deal upon the subject of dispute, and then leave the court, so that a subpœna, which the party in due time takes out, cannot be served on him. If, in-

deed, the affidavit of this witness had been taken, and it had disclosed important evidence for the plaintiff, the case would have been very different. But it does not appear whether his evidence would have been material or not. To these reasons for discharging the rule for a new trial may be added another. It appears that each party claimed title to the horse, and evidence was introduced on both sides. In cases where there is a contrariety of evidence the court will not grant a new trial, unless the evidence on one side greatly preponderates. Let the rule for a new trial be discharged.

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(40)

THE JUSTICES OF CASWELL COUNTY COURT v. BUCHANAN.

From Caswell.

1. Guardian bond. A guardian bond made payable to "the justices of Caswell County Court," etc., was held to be void at common law, as *the justices of the County Court* are not a corporation.

2. The act of 1762, ch. 5, directs guardian bonds to be made payable "to the justice or justices present in court and granting such guardianship, the survivors or survivor of them, their executors or administrators, in trust," etc.

THIS was an action of covenant brought on a guardian bond in Hillsboro Superior Court. The bond was made payable "to the justices of the County Court of Caswell and their successors." Two objections were made to the plaintiff's recovery: (1) That the bond was not taken pursuant to the directions of the act of 1762, ch. 5, that act having directed guardian bonds to be made payable to the "justice or justices present in court and granting such guardianship, the survivors or survivor of them, their executors or administrators, in trust," etc.; that the bond was therefore void as a statute bond. (2) That the bond was void at common law, for the want of proper contracting parties, "the justices of Caswell County Court" not being a corporate body, or entitled to sue or contract in a corporate name.

HALL, J. Laws 1762, ch. 5, gives to the County Court very great powers over the interests of orphans and the conduct of guardians, and does not, like the statute of 23 Henry VI., ch. 10, declare all other bonds to be void that are not taken agreeably to its provisions. This action might, therefore, probably be sustained, were it not for the other objection which the case

presents. Every plaintiff must sue either in his natural or corporate capacity. It cannot be pretended here that the
(41) plaintiffs sue in either. As to the first, it is sufficient to observe that their individual names are not inserted in the writ or declaration; as to the latter, although they sue as justices, etc., yet they have never been created a corporation, by that name to sue or be sued, grant or receive, by its corporate name, and do all other acts as natural persons may. 1 Bl. Com., 476. Judgment for the defendant.

KEDDIE v. MOORE.

From New Hanover.

The acts of Assembly increasing the jurisdiction of a justice of the peace to £30 are not inconsistent or incompatible with the Constitution of the State.

THIS was an action of debt, commenced by a warrant issued by a justice of the peace, which warrant commanded the ministerial officer to whom it was directed to arrest the body of the defendant and to have him before some justice of the peace for the county of New Hanover, to answer the plaintiff of a plea that he render to him £18, which he owed and detained, etc. The justice before whom the warrant was returned for trial gave judgment for the plaintiff, from which judgment the defendant appealed to the County Court; and upon the return of the appeal, pleaded in abatement of the warrant, "that the warrant was issued for a sum above $20; whereas, by the Constitution of the United States and the law of the land, a justice of the peace has no jurisdiction in a sum over $20, and cannot issue a warrant or render any judgment for a sum greater than $20." The plaintiff demurred to this plea, and the defendant having joined in demurrer, the case was, by consent, removed to the Superior Court, and the presiding judge ordered
(42) the case to be sent to this Court upon the question, Whether a justice of the peace, by the law of the land, has jurisdiction over a sum greater than $20.

Jocelyn for defendant.
No counsel for plaintiff.

LOCKE, J. It is intended, by the question arising upon (43) this demurrer, to ascertain whether the act of Assembly increasing the jurisdiction of a justice of the peace to the sum of £30 be inconsistent with the provisions of the Constitution or not; and to show that it is, section 14 of the Bill (44) of Rights is relied upon. This section declares, "that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." It is alleged that at the time this Declaration of Rights was made a justice of the peace had jurisdiction of sums only to the amount of forty shillings sterling, and that all the acts passed by the Legislature since that period, increasing the jurisdiction of a justice, are inconsistent and incompatible with this clause in the Declaration of Rights.

It must be admitted that if, upon a fair examination of these several acts, they should be found incompatible with this or any other provision of the Constitution, it would be the duty of this Court at once to declare such acts void, and pronounce judgment for the defendant. Otherwise, to decide for the plaintiff.

When the convention declared that the ancient mode of trial by jury should be preserved, no restriction was thereby laid on the Legislature as to erecting or organizing judicial tribunals in such manner as might be most conducive to the public convenience and interest on a change of circumstances affected by a variety of causes. It is true that the Legislature cannot impose any provisions substantially restrictive of the trial by jury; they may give existence to new forums; they may modify the powers and jurisdictions of former courts, in such instances as are not interdicted by the Constitution, from which their legitimate power is derived; but still the sacred right of every citizen, of having a trial by jury, must be preserved. These remarks lead us to inquire whether the several acts passed by the Legislature, increasing a justice's jurisdiction, have taken from the citizen this right or not.

At the time the Constitution was formed it must have been well known to the framers of that instrument that a justice of the peace had jurisdiction over sums of forty shil- (45) lings sterling and under; and that, too, without the intervention of a jury. Did they mean, by section 14 of the Declaration of Rights, entirely to destroy this jurisdiction, and have the benefit of the trial by jury in the first instance, in every possible case? Or did they intend that when property came in question (which was always tried in a court of justice

by a jury) this ancient and beneficial mode of trial should still be preserved? It appears to the Court that the latter was the object for which they intended to make provision. The Legislature has also given to either party the right of appealing to a court where he will have the benefit of a trial by jury. It cannot, therefore, be said that the right of such trial is taken away. So long as the trial by jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the Legislature. The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not in this nor in any other case where security is required, amount to a denial of right. In conformity with the opinion here given is the case of *Emrick v. Harris,* 1 Binney, 416, decided in the Supreme Court of Pennsylvania, where the provision in the Constitution is the same, and where the jurisdiction of a justice of the peace has been gradually increased. The Court, therefore, cannot view this as a case which will warrant the judiciary to exercise an act of such paramount and delicate authority as to interfere with the act of the Legislature.

Let the demurrer be sustained, and plea in abatement be overruled.

Cited: Richmond v. Boman, post, 46; *Wilson v. Simonton,* 8 N. C., 482.

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(46)

RICHMOND v. BOMAN.

From Caswell.

Jurisdiction of a justice of the peace. The act of 1802, ch. 6, giving jurisdiction of penalties not exceeding £30 to a justice of the peace, is not inconsistent with the spirit of the Constitution: therefore, a justice of the peace has jurisdiction of the penalty given by the act of 1741, ch. 8, for mismarking an unmarked hog.

THE act of 1741, ch. 8, inflicts a penalty of £10 proclamation money for mismarking an unmarked hog, etc., to be recovered in any court of record by any person who will sue for the same. By the act of 1802, ch. 6, jurisdiction is given to a justice of the peace over all penalties that do not exceed in amount £30. Under this act Richmond brought a warrant before a justice of the peace for Caswell County, to recover of defendant the penalty of £10, given by the act of 1741 for mismarking an

unmarked hog not properly his own, but the property of the plaintiff. He obtained judgment before the justice, and the defendant appealed to the County Court, where he demurred specially to the warrant, and for cause set forth that a justice of the peace had not jurisdiction of the penalty claimed by the plaintiff. There was a joinder in demurrer, and the case was removed by consent to the Superior Court, and thence to this Court.

LOCKE, J. The case of *Keddie v. Moore, ante,* 41, has settled the question upon this demurrer. The Court are of opinion that Laws 1802, ch. 6, is not incompatible with the spirit of the Constitution; that act has given to a justice of the peace jurisdiction of all penalties, etc., in amount not exceeding £30. Let the demurrer be overruled.

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(47)

WILLIAM WILLIAMS v. JOSIAH COLLINS.

From Bertie.

Case of guaranty. A applied to B to purchase a vessel and cargo, and B, entertaining doubts of his solvency, refused to credit him. A then got from C a letter directed to B, in which C says: "A informs me that he is about bargaining with you for the purchase of a new vessel and cargo. In case you and he should agree, I will guarantee any contract he may enter into with you for the same, or any part thereof." On the credit of this letter, B sold to A a vessel and cargo, and took his bonds for the purchase money; one payable 1 January, 1805, another on 15 June, 1805, and the third on 15 June, 1806. On 17 August, 1807, suit was brought against A on the bonds, judgment recovered in March, 1808, and execution against A's property was returned to June term following, indorsed by the sheriff, "Nothing found." Whereupon B brought suit against C on his letter of guaranty. It appeared on the trial that at the time the several bonds respectively fell due, A had property sufficient to pay their amount; which property he mortgaged in October after the last bond fell due and in January following, to secure divers debts which he owed. There was no evidence that B had applied to A for payment until suit was brought on the bonds, except an inference to be drawn from the indorsement of certain payments on the bonds after they became due; nor was there any evidence that C had notice of A's failure to pay, and that B looked to him for payment, until suit was brought against him: *Held*, that C was discharged from liability on his letter of guaranty, by the want of due diligence in B to get payment from A, and by his failure to give notice, within a reasonable time, to C, of A's delinquency.

HENRY FLEURY applied to the plaintiff to purchase, on a credit, a vessel and cargo; but the plaintiff, entertaining some doubts of his solvency, refused to credit him. Fleury then procured from the defendant a letter directed to the plaintiff, in the following words:

GEN. WM. WILLIAMS.

SIR:—The bearer hereof, Mr. Henry Fleury, informs me that he is about bargaining with you for the purchase of a new vessel and a cargo for her, also for a quantity of Indian corn.
(48) In case you and he should agree, I will guarantee any contract he may enter into with you for the same or any part thereof, and am

Your ob't serv't,

JOSIAH COLLINS.

On the credit of this letter, the plaintiff sold to Fleury a vessel and cargo for $2,072.25, for which he gave three bonds, each bearing date 11 April, 1804; one for $902.25, payable 1 January, 1805, with interest from 15 June, 1804; another for $585, payable 15 June, 1805; and the third for $585, payable 15 June, 1806. There was a credit of $675.71 indorsed on the first bond, 15 June, 1806, and a credit of $450 indorsed on the last bond, 12 January, 1808. On 17 November, 1806, Williams assigned the bonds to Thomas E. Sumner, who, on 17 August, 1807, brought suit on them in Chowan County Court, and obtained judgment at March Term, 1808, for £604 7s. 10d. He sued out execution, which was returned to the next term, "Nothing found," and Williams having, in his assignment of the bonds, "obliged himself to guarantee the ultimate payment thereof to Sumner," did, upon the application of Sumner, pay the amount due upon the bonds, and on 16 September, 1808, brought suit against Collins on his aforesaid letter of guaranty. The defendant pleaded the "general issue, set-off, statute limitation."

On the part of the defendant it was proved that on 29 October, 1806, Fleury mortgaged to him seven lots and one-half lot of ground, with their improvements, lying in the town of Edenton, to secure the sum of £1,256 18s. 8d. due by note; and on the same day Josiah Collins, Jr., took from Fleury a mortgage for the same property on the back of the foregoing, to secure the payment of $954.22, due by note; and on 15 January, 1807, Fleury mortgaged the same property, with a storehouse and shop, eleven negroes and a considerable quantity of furniture, to certain merchants in New York, to secure the pay-

ment of $6,000 due by him to them. The defendant also proved that Fleury possessed the property mentioned in (49) the foregoing mortgages for many years before, and that the lots were among the most valuable in the town of Edenton; that on 6 August, 1806, one Francis Vallette, of Edenton, having died, bequeathed to Fleury property of the value of $4,000, which came to his hands.

It appeared in evidence that Collins, the defendant, was a subscribing witness to the mortgage executed by Fleury, on 15 January, 1807, to certain merchants in New York, and that the property included in this mortgage, but not in the preceding mortgages, was sold for £1,200 or £1,300. It did not appear that Fleury had any property out of which the debt to the plaintiff could have been satisfied, except the property before enumerated.

The jury rendered the following verdict, to wit: "The jury find, from the evidence adduced, that the defendant must have been better acquainted with the circumstances of Henry Fleury than the plaintiff, and that the plaintiff could not at any period have obtained his money from Henry Fleury, even though he had commenced suit as soon as his cause of action accrued, and that the defendant did assume liability within three years; that there is no set-off, and assess the plaintiff's damages to £716 1s. 8d." A rule was obtained to show cause why a new trial should not be granted, on the grounds, (1) that the verdict was contrary to law; (2) that it was contrary to evidence, at least so far as it found that the plaintiff could not, at any time after the debt became due, have obtained payment from Fleury. The rule for a new trial was sent to this Court.

Browne for defendant.
Jones and *Cherry* for plaintiff.

Browne, in support of the rule, said this contract must be considered either as a primary or a secondary contract; if as a primary contract, then the plaintiff's cause of (50) action accrued at the respective times when Fleury's bonds fell due, and his right of recovery is barred by the statute of limitations. But he did not suppose this contract ought to be so considered; it is a contract of a secondary kind. Defendant agreed to guarantee the debt to the plaintiff, and is placed by the law in the same situation with indorsers of bills of exchange or promissory notes. He agreed to guarantee a primary contract, and the law, whilst it deems this guaranty binding upon him, does so *sub modo* only; it at the same time imposes

certain obligations upon him who claims the benefit of this guaranty; it declares to him that he shall use due diligence to reap the benefit of the primary contract, and to collect the debt from him who really owes it. For the person making this secondary contract only agrees to pay the debt if the principal does not; and in all cases is discharged from liability if due diligence be not used to enforce the contract against the principal and get the money from him. In this case Williams had discharged Collins from his guaranty by the indulgence which he extended to Fleury. Had he sued Fleury when his bonds became due, the money could have been collected; but he neither sued nor demanded payment, nor gave notice to Collins of Fleury's neglect to make payment. This is a commercial transaction, and is to be governed by the general law respecting commercial contracts, where one man guarantees the payment of another's debt. Williams having failed to use the diligence which that law required in demanding payment, and giving notice of Fleury's neglect or refusal to make such payment, has discharged Collins, who, not having received any such notice, remained ignorant of Fleury's failure to pay at the time when he took the mortgage to secure his own debt. This is the legal presumption, for every man shall be presumed to have done his duty until the contrary appears; Fleury shall be pre-
(51) sumed to have paid his bonds at the times they respectively fell due, or that he would have paid them if Williams or his assignee had applied for payment. It was not the duty of Collins to inquire whether he had made such payment; it was the duty of Williams to give him notice if Fleury failed to pay; and to compel him to make good the debt to Williams would be, not to conform to the true spirit of the contract on his part, but to subject him to a hardship against which he has no relief. If he had been regularly called upon for payment as Fleury made default, he could have advanced the money to Williams and indemnified himself out of Fleury's property. Williams gave indulgence until Fleury became insolvent, and Collins has not been called upon for payment until he has lost all opportunity of indemnifying himself.

Collins was liable on his letter of guaranty only in case of Fleury's failing to pay; and it may be laid down as a general principle that where one man agrees to indemnify another against any loss which he may sustain from any transaction, the person thus indemnified must use ordinary diligence to prevent any loss. Doug., 514; 3 Term, 524; 8 East, 242. Here the first demand on Fleury was by suit, one year and two months after the last bond became due; and the first notice of Fleury's

delinquency that was given to Collins was two years and three months after the last bond became due. This was not using due diligence to get the money from Fleury and prevent a loss to Collins.

BY THE COURT. For the reasons urged by the defendant's counsel, let the rule for a new trial be made absolute.

Cited: Eason v. Dixon, 19 N. C., 79; *Shewell v. Knox,* 12 N. C., 412; *Straus v. Beardsley,* 79 N. C., 67.

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(52)

DEN ON DEMISE OF HARDY v. JONES.

From Washington.

In ejectment the lessor of the plaintiff claimed title under a grant describing the lands *as confiscated lands*, the property of A. B. It is incumbent on him to show that the lands had been confiscated, to authorize the issuing of the grant. For the grant shows the title was once *out* of the State, and accounts for its being again *in* the State by averring the fact of confiscation. This fact must be proved, otherwise it does not appear that the State had any authority to make the grant.

THE lessor of the plaintiff claimed title under a grant from the State, by which the lands in question were granted to him as confiscated lands, the property of Governor White; and it was objected by the defendant that it was incumbent on him to prove that the land had been confiscated, to authorize the issuing of the grant. The presiding judge overruled the objection, and there was a verdict for the plaintiff. A rule for a new trial being obtained, the same was sent to this Court.

BY THE COURT. It appears from the plaintiff's own showing that the title to the lands was once *out* of the State and *in* Governor White. The State cannot resume this title at her pleasure, and pass it by grant to the lessor of the plaintiff; nor has she pretended to do such an act; but in the grant she declares that the lands of Governor White had been confiscated, and the title to them vested in her by the confiscation. If this be true, the State had a right to grant the lands to the lessor of the plaintiff; but if not true, the State had no such right. The fact of confiscation is therefore necessary to be proved before any validity can attach to this grant. The rule for a new trial must be made absolute.

(53)

JAMES REID v. JOSIAH POWELL.

From Halifax.

In detinue for a slave A was offered by the defendant as a witness, and, being sworn on his *voir dire*, said he as constable had sold the negro under an execution at the instance of B, and at the sale also acted as B's agent, and bid off the negro, and by the direction of B, executed a bill of sale, as constable, to C, the defendant. A is a competent witness to prove these facts to the jury.

THIS was an action of detinue for a negro slave. On the trial one Gregory being called as a witness for the defendant, was sworn on his *voire dire,* and said that he as constable had sold the negro in question, under an execution at the instance of one Bell; that at the sale he also acted as agent for Bell, and bid off the negro for Bell's use, and afterwards, by the direction of Bell, he, as constable, made a bill of sale for the negro to the defendant, who was not a bidder. The presiding judge thought Gregory was not a competent witness; he was set aside, and a verdict was rendered for the plaintiff. A rule for a new trial was obtained and sent to this Court.

BY THE COURT. Let the rule be made absolute.

WILLIAM BRIDGES, JR., v. LAWRENCE SMITH.

From Northampton.

The statute 31 Elizabeth, ch. 5, limiting the time for bringing *qui tam* actions, is in force in this State.

THIS was an action of debt to recover the penalty given by the act of 1741, ch. 11, to restrain the taking of usurious interest upon money loaned. The usury was received on 15 May, 1806, and the writ in this case was sued out on 9 Decem-
(54) ber, 1807. The defendant pleaded, among other pleas in bar, the stat. 31 Eliz., ch. 5, limiting the time within which actions *qui tam* shall be brought; and the jury found for

the plaintiff, subject to the opinion of the court, whether that statute of Elizabeth be in force in this State. The question was sent to this Court.

BY THE COURT. The statute 31 Elizabeth, ch. 5, is in force in this State, and bars the plaintiff's right of action.*

JOHN WILLIAMS v. AMBROSE JONES.

From Pitt.

A gave his bond for the hire of a slave for one year. By the terms of the hiring he was not to employ the slave on water. He, however, did employ the slave on water, and the slave was drowned. He was sued for this breach of the terms of hiring, and the value of the slave recovered against him. In an action on his bond for the hire, judgment given for the whole amount. The hiring shall not be apportioned, because of his breach of promise.

THIS was an action of debt on a bond given for the hire of a negro slave. By the terms of the hiring the defendant was not permitted to employ the slave on water during the time for which he was hired; but he, in violation of these terms, employed the slave on water, and the slave was (55) drowned. For this he was sued, and a verdict given for the value of the slave; and now, being sued upon his bond for the hire, a question arose, whether the hire should be apportioned and the defendant be charged only for the time the slave lived.

BY THE COURT. The defendant having violated the contract of hiring, must abide by the consequences. He ought not to be relieved from the payment of his bond because he has thought proper to do an improper act.

*This case occurred in 1806, and the Court resorted to the statute of Elizabeth, because at that time the General Assembly had passed no general act limiting the time for bringing penal actions. In 1808 they passed "An act to limit penal actions," in which it is declared, "That all actions and suits to be brought on any penal act of the General Assembly for the recovery of the penalty therein set forth shall be brought within three years after the cause of such action or suit shall or may have accrued, and not after: *Provided*, that this act shall not affect the time of bringing suit on any penal act of the General Assembly which hath a time limited therein for bringing the same."—REPORTER.

BENJAMIN ATKINSON v. ROBERT FOREMAN.

From Pitt.

1. A petitioned the County Court for leave to keep a public ferry; B opposed the petition, but the court allowed it. B has not the right to appeal to the Superior Court, under section 32 of the act of 1777, ch. 2, which gives the right of appeal in all cases where the party is "dissatisfied with the judgment, sentence or decree of the County Court."

2. In all cases where a party has a right to appeal, and the Legislature has not prescribed the form of the appeal bond, nor declared to whom it shall be made payable, it is the duty of the County Court to prescribe the form and direct to whom the bond shall be made payable.

BENJAMIN ATKINSON petitioned the County Court of PITT for leave to erect and keep a ferry across Tar River, at a place where he owned the lands on each side of the river. The granting of this petition was objected to by Robert Foreman; and the County Court having heard the allegations and proofs of the parties, allowed the prayer of the petition. From this decree of the County Court, Foreman prayed an appeal to the Superior Court, which was allowed, and he gave bond with security to prosecute the appeal. In the Superior Court a
(56) question was made and sent to this Court, Whether, if the County Court grant to an applicant leave to keep a public ferry at a particular place, another person who claims the right of keeping a ferry near that place can appeal from the decree of the County Court. On this question the judges of this Court differed in opinion.

HALL, J. Section 32, ch. 2, Laws 1777, declares, "That when any person or persons, either plaintiff or defendant, shall be dissatisfied with the sentence, judgment or decree of any county court, he may pray an appeal from such sentence, judgment or decree to the Superior Court of Law of the district wherein such County Court shall be." This is a very general expression, and would seem to authorize an appeal in every case whatever that can come before a county court, unless the appeal be taken away. It is true that in some instances, where by subsequent acts the jurisdiction of the county courts has been increased, the right of appeal has been expressly given by such acts; and the act which gives the court jurisdiction of the case now before us, as well as some others, is silent with respect to appeals; and this circumstance is much relied on. We apprehend that the Legislature, by giving the right of appeal in those

acts, did so from abundant caution. Certainly no argument can be drawn from the reason of the thing against an appeal in the present case. It is a dispute about property, and it is of as much consequence that justice should be legally administered in this case as in any other. The expression in the act of 1777 is so general as to embrace all cases that can come before a county court, whether it had jurisdiction of them at the time of the passage of that act or acquired it since. Suppose the Legislature had not given an appeal in express terms by the act of 1785, ch. 2, which gives to the county courts jurisdiction in actions of ejectment: would there not be as great or greater reason why there should be appeals in such cases than in actions of which jurisdiction was given to them by the act of 1777, ch. 2? The Legislature did not think proper (57) at first to trust them with the trial of actions of ejectment, on account of their difficulty; but since they have given to them jurisdiction of such actions, the reason is stronger why there should be an appeal. Were not this reasoning correct, it would be difficult to say on what principle this Court have at this term decided the case of *S. v. Washington* (a slave), *post,* 100. In that case the County Court refused to grant an appeal; the owner of the slave stated that fact on affidavit, and prayed from one of the judges of the Superior Courts a writ of *certiorari,* which was granted. A question was made upon the return of this writ, and sent to this Court for decision, Whether an appeal in that case was a matter of right, and this Court decided in the affirmative. It is worthy of remark that neither of the acts of Assembly which relate to the trial of slaves gives an appeal from the County to the Superior Court in such cases. The decision had for its basis the wide and general expression used in the act of 1777, authorizing appeals from every sentence, judgment or decree of the county courts. It is true that in that case one of the Court dissented from the opinion delivered, not because the clause in the act of 1777 was not broad enough to comprehend the case, but for reasons drawn from the different acts of Assembly relating to the trial of slaves. In an anonymous case, 2 N. C., 457, that came before the Court by way of appeal from an order of the County Court authorizing one of the parties to keep a ferry, no question seems to have been made, nor doubt entertained by the bar or bench, as to the legality of such appeal. Other cases might be shown from which we might infer what the opinions of other judges were, who have gone before us, although the question was not made and solemnly decided by them. In *Hawkins v. Randolph,* 5 N. C., 118, brought to this Court some terms ago from the Superior (58)

Court of Hillsboro, where the question was, Whether a party dissatisfied with the order of a county court relative to a road had the right of appealing, it was urged that there was no person to whom bond with security could be given for prosecuting the appeal with effect; but it was answered that if a party has the right to appeal, it is the duty of the County Court, although there be but one party to an order made by them relative to a road or ferry, to point out the mode in which security for the appeal shall be taken; for if the act be substantially complied with, it is sufficient. By the act of 1762, ch. 5, any person dissatisfied with any order made by the County Court relative to a guardianship, with which he may have been interested, or to which he may think himself entitled, has the right of appealing, and yet he is directed to give bond with security for prosecuting his appeal with effect. The same inconvenience would apply in that case; there is no person, or there may be no person but one interested in or a party to such order. But it is the duty of the court to comply with the act, by directing the manner and form in which such bond shall be taken. And so it is in the case before us. If, however, that objection be good, it cannot apply here; for there are two parties before the Court, one of whom has appealed, and from whom bond has been taken.

It may be said that the county courts are better judges of roads, ferries, etc., in their several counties, than the Superior Courts; that questions arising upon the acts of Assembly which regulate them are generally questions of fact, of expediency, of convenience or inconvenience to the people of the county. Be it so: when such be the questions, the Superior Courts will interfere very reluctantly. But it must be admitted that questions of law will sometimes arise also. Besides, has not experience taught us that an unpopular, obscure individual, though he may have the better side of the question, has too much cause
(59) to dread a conflict with a wealthy, popular antagonist?

BY ALL THE OTHER JUDGES. It was decided in this Court, at June Term, 1806, in *Hawkins v. Randolph,* 5 N. C., 118, that an appeal would not lie from an order of the County Court disallowing a petition for laying out a road. This case is not distinguishable in principle from that. The appeal must be dismissed.*

Cited: S. v. Bell, 35 N. C., 378.

Overruled: Smith v. Harkins, 39 N. C., 491.

*In 1813 the General Assembly passed an act amending the acts relative to the laying out of roads and the establishment of ferries.

This act prohibits the County Court from laying out any public road or establishing any ferry, unless upon petition in writing of one or more persons in court filed, and notice thereof given to all persons over whose lands the road proposed to be laid out is to pass, or to the person whose ferry theretofore established shall be within two miles of the place at which the petition prays another ferry to be established. This act gives the right of appeal to any person dissatisfied with the judgment, sentence or decree which the County Court shall pronounce upon such petition.

DEN ON DEMISE OF DUNSTAN v. S. SMITHWICK.

From Bertie.

A *fieri facias* issued against A and was levied on his lands, which were sold by the sheriff and conveyed to B, who conveyed them to C; but before his sale and conveyance to C, he contracted to sell the lands to A, who actually paid him the purchase money; and this sale and payment were known to C before he purchased. In ejectment brought by C, A shall not be permitted to give in evidence his purchase of the land, and payment of the purchase money, and knowledge thereof by C. This is a defense in equity, but at law the only question is who has the legal title.

THE defendant being seized of the lands in question in right of his wife, a writ of *fieri facias* was levied thereon, and his interest in the lands sold by the sheriff, who conveyed to Robert Reddick, the purchaser, and Reddick conveyed to Dunstan, the lessor of the plaintiff. On the trial the defend- (60) ant offered to prove that Reddick, before he sold the lands to Dunstan, had contracted to sell them to him, the defendant, and that he, the defendant, had actually paid him the purchase money, and that Dunstan had full knowledge thereof before he purchased from Reddick. The presiding judge thought this evidence inadmissible upon the trial of an ejectment, in which the only question was who had the legal title. A verdict was given for the plaintiff, and a rule for a new trial being obtained, upon the ground that the evidence offered by the defendant ought to have been received, the same was sent to this Court.

BY THE COURT. We concur in opinion with the presiding judge. It would be a departure from long established principle to go into an examination of equitable claims upon the trial of an ejectment. A court of law is not the proper forum for such an examination. If the defendant be entitled to relief, he will obtain it upon application to the proper forum, and obtain it at the costs of the lessor of the plaintiff. Let the rule be discharged.

STATE v. CLAYTON SMITH.

From Rutherford.

Where the grand jury return a bill of indictment, "Not a true bill," the prosecutor is bound to pay the witnesses for the State, and one-half of the other costs.

A BILL of indictment for perjury was preferred against the defendant by one William Graham, who was indorsed thereon as prosecutor. The grand jury returned the bill "Not a true bill," and a question arose, Whether the prosecutor was
(61) bound to pay the witnesses for the State, and that question was sent to this Court.

BY THE COURT. The prosecutor is bound to pay the witnesses for the State, and one-half of the other costs.

JOSEPH MCGOWEN v. WILLIAM CHAPEN.

From Duplin.

A, having hired a slave for a year, placed him, without the consent of the owner, in the employment of B, who cruelly beat him, and greatly impaired his value thereby. *Case* is the proper action for the owner to recover damages of A.

THIS was a special action on the case. On the trial it appeared in evidence that the plaintiff hired to the defendant a negro slave for the term of one year, which slave was, at the expiration of the term, returned ruptured and greatly impaired in value. The defendant had, during the term, without the consent of the plaintiff, hired the slave to a man of the name of Thally, who, with his father, had, whilst the slave was in his employment, beaten him with such severity as to occasion the rupture and consequent diminution of value. The jury found a verdict for the plaintiff; and a question was made, Whether an *action on the case* could be maintained by the plaintiff, and whether *trespass* be not the proper action.

BY THE COURT. Case is the proper action against the defendant. Judgment for the plaintiff.

(62)

DEN ON DEMISE OF ROGER JONES AND EUNICE, HIS WIFE, *v.* JOHN CLAYTON AND JOHN THOMAS.

From Craven.

A, a married woman, being seized of lands, joins her husband in a deed of them to B, who enters and occupies the lands seven years, during the coverture of A, who then dies, leaving C her heir at law. A never acknowledged her deed to B; it was proved as to her husband, and registered. B occupied the lands more than three years after the death of A, without any claim or suit by C. C was a *feme*, and with her husband brought suit for the lands after the expiration of three years from A's death. But it did not appear whether she labored under any disability at the time of A's death. The Court, to avoid deciding the question as to the effect of cumulative disabilities until it be fairly presented for decision, will presume that C did not labor under any disability at the time of A's death; and seven years' adverse possession having run in the lifetime of A, and continued for three years after her death, the right of entry of C and her husband is barred.

THE lands claimed in this ejectment were granted to John Tannyhill on 6 December, 1720. On 13 February, 1753, Nathan Smith made a deed of bargain and sale in fee of the lands to Francis Dawson, who devised them to Anne Dawson, 17 February, 1781. Anne Dawson, having married Seldon Jasper, they executed to William Clayton and Nelson Delamar the following instrument, to wit:

This indenture, made this 13 September, 1798, between Seldon Jasper and Anne Jasper, of the State of North Carolina and county of Hyde, on the one part, and William Clayton and Nelson Delamar, of the State aforesaid and county of Craven, of the other part, witnesseth: that for and in consideration of the sum of 400 Spanish milled dollars, to the said Seldon Jasper and Anne Jasper in hand paid by the said William Clayton and Nelson Delamar at the sealing and delivery of these presents, the receipt whereof is fully acknowledged, we, the said Seldon Jasper and Anne Jasper, have granted, bargained and sold, and by these presents do grant, bargain and sell unto William Clayton and Nelson Delamar, all our right, title and interest in a certain piece or tract of land, situate, lying and being on the north side of Neuse River, and partly at (63) the mouth of said river, it being the whole of that parcel or piece of land which was left by will by Francis Dawson, Sr., to the said Anne, generally known by the name of the Gum Thicket, containing by estimation 300 acres, be the same more

or less. And we, the said Seldon and Anne Jasper, do warrant and defend the aforesaid granted lands and premises from him, the said Seldon Jasper and Anne Jasper, their heirs, executors, administrators and assigns forever, from the lawful claim of any other person. In testimony whereof, we have hereunto set our hands and affixed our seals, the year and date above written.

SELDON JASPER. (SEAL.)
ANNE JASPER. (SEAL.)

In presence of

FRANCIS DELAMAR,
CHRISTOPHER DELAMAR.

STATE OF NORTH CAROLINA—Craven County Court, March Term, 1804. Then was the within deed proved in open court by the oath of Francis Delamar, one of the subscribing witnesses thereto, and ordered to be registered.

Teste: SAML. CHAPMAN, C. C.

I certify that the within deed is correct agreeably to the register's office of Craven County—Book Z, page 317.

Teste: THOS. L. CHEEKE, *Register*.

The wife of said Jasper never acknowledged the said deed, had no children, and died in February, 1806, leaving the plaintiff her heir at law, and her husband, Seldon Jasper, yet living. The question submitted to this Court was, Whether a possession of seven years by Delamar and Clayton, under the aforesaid deed, before the death of Anne Jasper, and three years thereafter without claim or suit, bars the right of entry of her heir at law, Eunice, the wife of Roger Jones.

Gaston for plaintiff.

(64) BY THE COURT. It doth not appear in the statement of the case whether Eunice, the heir at law of Mrs. Jasper, was of full age or covert at the time of Mrs. Jasper's death. Although the fact be not stated in the case, yet it is admitted by the parties that Clayton and Delamar had seven years' possession of the lands before the death of Mrs. Jasper. The character of their possession is evidenced by the deed under which they claimed. It is also admitted that this possession was continued for more than three years after Mrs. Jasper's death. If, instead of the death of Mrs. Jasper, she had become discovert, the act of 1715, ch. 27, gave her three years after her discoverture to bring her suit or make her entry. What time shall be

allowed to her heir at law? It is said, if at the time the descent is cast the heir labor under disability, the statute of limitations shall remain suspended during the disability; so that if Eunice was married to Roger Jones at the time of Mrs. Jasper's death, she shall have during all the coverture and three years thereafter to bring her suit or make her entry or claim, notwithstanding seven years' adverse possession had run in the lifetime of her ancestor, Mrs. Jasper. This would at once present the question of cumulative disabilities to the Court—a question which will not be decided until it be fairly presented. It would be wrong to decide it in this case by assuming facts which are not in proof. As the verdict and judgment in this (65) case is not conclusive upon the rights of the parties, the Court will rather presume that Eunice labored under no disability when Mrs. Jasper died, and that this suit being instituted more than three years after that event, her right of entry was barred by the adverse possession of the defendants. Judgment for defendants.

Cited: Fagan v. Walker, 27 N. C., 638; *Williams v. Lanier,* 44 N. C., 38.

DUNCAN CAMPBELL v. DANIEL CAMPBELL.

From Robeson.

A, B and C are tenants in common of certain negro slaves. B takes possession of the slaves, and A demands of him to deliver over to him one-third of them. B refuses, and A brings an action of trover against him to recover the value of one-third of the slaves. This action cannot be maintained.

THIS was an action of trover to recover one-third of the value of a slave. On the trial it appeared in evidence that the plaintiff and defendant were brothers, and they, with another brother, purchased a negro woman for the purpose of waiting upon their mother during her life. After her death the negro woman went into the possession of the defendant, she then having several children. The plaintiff called on the defendant and demanded his share of the negroes; the defendant refused to deliver them over, and thereupon he brought this suit. The defendant insisted that he being a tenant in common with the plaintiff of the negroes, trover would not lie against him for the plaintiff's third part; and this objection to the plaintiff's recovery was sent to this Court.

BY THE COURT. This action cannot be maintained in the present case. Let a nonsuit be entered.

Cited: Bonner v. Latham, 23 N. C., 275; *Powell v. Hill,* 64 N. C., 171; *Grim v. Wicker,* 80 N. C., 344; *Strauss v. Crawford,* 89 N. C., 151.

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(66)

JOHN TAYLOR v. ROBERT GRACE AND OTHERS.

From Wayne.

An action of debt will not lie against heirs upon a bond of the ancestor in which they are not expressly bound.

JAMES GRACE gave a bond to John Taylor in the following words, to wit:

On demand, I promise to pay or cause to be paid unto John Taylor, his heirs or order, the sum of £56 12s., specie, with lawful interest till paid, it being for value received, as witness my hand and seal, this 27 July, 1796.

JAMES GRACE. (SEAL.)

James Grace having died, Taylor brought an action of debt on this bond against the defendants, who were his heirs at law; and upon the trial the presiding judge nonsuited the plaintiff, on the ground that the obligor had not bound his heirs to pay the debt.

BY THE COURT. There can be no doubt upon this point. The nonsuit was regular and must stand.

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(67)

DEN ON DEMISE OF MOSES LANGSTON v. RICHARD MCKINNIE.

From Wayne.

A having entered a tract of land, conveyed it to B in 1780, and to C in 1784. In 1782 the land was surveyed, and the grant from the State issued in 1792. C had possession of the land under the deed to him for seven years before the grant issued, and B brought an ejectment against him for the land. He cannot recover; for (1) if the grant had relation back, so as to vest the

legal title in B as from 1780, the seven years' adverse possession of C would bar his right of entry; but (2) the grant shall inure by way of estoppel to the benefit of B, so as against A to give him a legal title as from 1780, because of the privity of estate between them; yet there being no privity between B and C, the estoppel cannot operate, and B sets up against C a title derived from one who had only an entry; for the title remained in the State until 1792. A court of law cannot take any notice of B's title in an ejectment against any other person than A; and as to A, he would be estopped to deny it.

THIS was a special verdict, in which the jury found that Risdon Nicholson conveyed the lands in question to Jacob Langston, on 8 August, 1780; that Jacob Langston devised the same to the lessor of the plaintiff on 25 December, 1784, and shortly afterwards died. That a grant from the State, for the lands, issued to Risdon Nicholson on 10 April, 1792, the survey of which bears date 10 June, 1782. That Risdon Nicholson conveyed the same to Thomas Daughtry on 24 December, 1783, who conveyed the same to Frederick Hering on 7 January, 1784. That Frederick Hering, by his will, empowered his executors to sell, and on 20 November, 1805, he being dead, they sold and conveyed the lands to the defendant. The jury further found that Frederick Hering and those claiming under him had possession of the lands for seven years from 4 June, 1784.

BY THE COURT. The grant issued in 1792 to Risdon Nicholson, inured by way of estoppel to the benefit of (68) those claiming under him by conveyances made anterior to that time, and the conveyance to Jacob Langston being prior in time to the conveyance to Daughtry, would prevail, were it not for the seven years' adverse possession which those claiming under Daughtry have had of the lands. This possession would bar the right of entry of the lessor of the plaintiff, if the grant had relation back, so as to vest the legal title in any one having a conveyance from Nicholson anterior to the issuing of the grant. But could the grant relate back so as to produce such effect? As between Nicholson and either the lessor of the plaintiff or the defendant, the grant shall be considered as producing this effect; for as to the first, Nicholson would be estopped by his deed of 1780 from denying that he had not the legal title to the lands at that time; and as to the second, he would be in like manner estopped from denying that he had not the legal title to the lands in 1784. But the estoppel operates only between parties and privies. There is no privity between the lessor of the plaintiff and the defendant; and what is the title which the lessor of the plaintiff sets up? A deed

from a man who at the time he made it had no title that a court of law can take notice of; he had a mere entry, and the legal title remained in the State for twelve years afterwards. This title would by way of estoppel prevail against Nicholson, were he the defendant; but it shall prevail in this Court against no one else. The condition of the defendant would be the same as that of the lessor of the plaintiff, were he out of possession and should bring suit to recover it. He could recover against no one in an ejectment, except Nicholson. So that, *quacunque via data,* the plaintiff cannot recover.

Cited: Reynolds v. Cathens, 50 N. C., 439.

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(69)

STATE v. JOSEPH GREGORY.

From Wilkes.

On the trial of an indictment for perjury, charged to have been committed in an oath taken before a company court-martial, it is not necessary to produce the commission of the captain; parol proof of his acting as such is sufficient.

THE defendant was indicted for perjury, charged to have been committed in an oath taken before a company court-martial, for the purpose of getting a fine remitted. On the trial a question arose, Whether the commission of the senior officer of the court ought not to be produced, to prove his grade as an officer and that the court was legally constituted. The presiding judge thought that it was not necessary to produce the commission, and received parol proof of the grade of the officers and of the constitution of the court. The question was sent to this Court.

BY THE COURT. It was not necessary to produce the commission of the captain; parol proof of his acting as such was sufficient.*

*The solicitor for the State relied upon 4 Hawk. P. C., 432, title *Evidence,* and 2 McNally, 485 to 488, and the authorities there cited.

(70)

JAMES TAYLOR v. TAYLOR & JUSTICE.

From Craven.

Case of partnership. If an agreement for a common or special partnership appear to have existed between parties for the purchase of property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the law extends the concern to all the goods purchased by either of the parties; and the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there be no contract as to the amount of the advances to be made by them respectively.

THE bill charged that complainant, in January preceding the filing thereof, had introduced to defendants, merchants and copartners in trade, in the town of New Bern, under the firm and style of Taylor & Justice, a Capt. John Thomas and a Capt. Emanuel Roderique, whose vessels had lately before been cast away and wrecked at Ocracock Inlet, requesting them to aid those gentlemen in the transaction of their business at the custom-house, and observing that as there was a probability that some advantageous purchases might be made of the vessels or cargoes, the complainant with Taylor & Justice should be mutually and equally concerned in the purchases, that is, that Taylor & Justice should be interested one-half and complainant the other half in all the purchases to be made, and in all the profits and emoluments, of whatever kind, that should thence be derived. That Taylor & Justice acceded to this proposition, and in order to enable complainant more readily and beneficially to go on with the proposed speculation, it was agreed that he, instead of paying off the sum of £94 8s. 7d. which he owed Taylor & Justice on a running account, should pass his note for the same, and invest the amount thereof, and also the amount of the duties on the said Thomas' cargo, in such advantageous purchases as might offer at Thomas' sale (the complainant being the surveyor of the port of Beacon Island). (71) That in consequence of this agreement, complainant went to Ocracock, attended the sale, made very advantageous purchases to the amount of $515, in rum, sugar and molasses, and about the first of February returned to New Bern with the articles so purchased, which he delivered to Taylor & Justice, to be sold for his and their benefit, and also the sum of $294 in cash, making in the whole the sum of $809, the exact amount of duties secured on the said Thomas' cargo. That for these

duties Taylor & Justice had given their bond at the custom-house, payable in three and six months, and in consequence of the aforesaid agreement complainant was responsible for a moiety thereof. That at the same time he put into the possession of Taylor & Justice about forty boxes of Spanish segars, and three or four hundred bundles of Spanish tobacco, which he had detained in consequence of the duties thereon not being paid or secured; but that shortly afterwards the duties on these articles and on the whole of Captain Roderique's cargo were secured, and the owners of these articles being introduced by complainant to Taylor & Justice, complainant consulted with Taylor & Justice about the purchase of them, and assisted them to make the purchase; that the amount of the duties on these articles, viz., $92, was deducted, and the residue paid, partly in money and partly in goods furnished by Taylor & Justice. That the purchase of the segars and tobacco was made, as well as the former purchases and those intended to be made thereafter, equally on account of complainant and of Taylor & Justice, and in pursuance of the agreement before set forth. That about this time, Captain Roderique having concluded to sell his cargo, and being desirous of employing complainant to manage the business, as his agent and as agent for all concerned, and allow him a regular commission for the agency, proposed to complainant to undertake it; he declined, and recommended to this agency Taylor & Justice, promising Captain Rod-
(72) erique to give them his assistance. Complainant, on behalf of Captain Roderique, applied to Taylor, one of the partners, offered his aid and expressly stipulated for an equal division of the commissions and of all the profits and emoluments that might arise from the transaction. This offer and stipulation being acceded to, the agency was undertaken, and complainant charged that he accordingly did aid in the agency. That Taylor, one of the partners, proceeded with complainant and Captain Roderique to Beacon Island, to attend the sales of Captain Roderique's brig and cargo, and, in pursuance of the agreement entered into by himself and partner with complainant, made purchases to the amount of $2,000, or thereabouts, and took the property purchased into possession. That, having returned to New Bern with a considerable part of the property purchased, they found an agent of the owners, to whom complainant explained all that had been done, and paid to him $500. That Taylor & Justice paid the residue, retaining $191 for commissions. That, knowing large profits had accrued from the speculation, which profits were entirely in the hands of Taylor & Justice, complainant applied to them for an

account thereof and payment of his share; and that Taylor & Justice denied his right to *an equal participation* of the profits, saying that complainant had not made *equal advances* with them, and was entitled to profits only in proportion to the advances which he had made, and insisting that his running account for which he had given his note as aforesaid should be deducted from his advances, and that they should be credited exclusively by the expenses of the speculation out of the profits realized, although the expenses were not then paid. That they then agreed to submit the matter in controversy between them to the arbitrament and award of John Devereux and John Harvey, merchants of New Bern; and in pursuance of this agreement they submitted to the said arbitrators, "Whether complainant's advances had been such as to entitle him to a full moiety of all the profits arising from the pur- (73) chases and speculations before set forth"; and the arbitrators, after hearing the allegations of the parties, and examining their documents, were of opinion that complainant was so entitled. The bill then charged that complainant had often applied to Taylor & Justice for a settlement of the account and payment of his share of the profits, and they had refused to make such settlement and payment. The bill prayed for an account and relief, etc.

The answer of the defendants admitted that complainant proposed to them that they should become bound at the custom-house for the duties upon the cargoes of the vessels, and that he and they should jointly purchase at the sale of the wrecked property, and equally divide the profits arising therefrom; but they denied that they acceded to the proposition of an equal concern and division of profits in whatever purchases might be made beyond the sum of duties secured. They admitted that to the amount of the duties complainant was to be entitled to an equal share of the profits, but alleged that in case the purchases exceeded the amount of duties, the benefit was to belong exclusively to that party by whom the advances for such purchases were made; and that in cases of purchases on their joint account the property should be placed in their hands, and the disposal thereof be wholly under their direction; and that whenever they should supply the funds to make purchases at said sales beyond the amount of duties secured, and should not themselves attend the sales, but leave the management of the business to complainant, he was to be entitled to an equal part of the profits arising from the purchase, as a compensation for his services in making the purchases; that if, when they or either of them attended a sale, and intended to purchase beyond the amount of

the duties secured, complainant thought proper to meet them with equal funds, he was to share equally in the profits
(74) of such purchase; otherwise, in proportion to the sum which he should advance.

As to the running account of defendant for £94 8s. 7d., defendants answered that the same had been long due, and they were pressing complainant for payment; but he, alleging that he wished to apply some money in purchases for his own benefit at the said sales, they proposed, and complainant agreed to it, that complainant should retain the sum of £94 8s. 7d. and give them, not his note, but an accountable receipt for that sum; that he should invest the money in purchases at the said sales, and in consideration of his doing the business and making the payment at the sale, he should be entitled to half the profits on the purchase made with that sum; and this was done, not in consequence of a general agreement of equal concern in all purchases at the contemplated sales, but merely to close complainant's account.

They stated that they gave complainant instructions in writing, at the first sale, to invest the amount of Thomas' duties in purchases, pointing out the articles which he should buy and the prices he might venture to give. At this time it was not known that Roderique's vessel and cargo would be sold; but expecting that a sale might take place, complainant was instructed to invest the amount of Roderique's duties in such purchases; and they informed him that the profits arising from his purchases to the amount of the duties should be equally divided between them and him.

They admitted that upon complainant's return to New Bern he delivered to them the rum, sugar and molasses charged in the bill, but they denied that he paid them $294 in cash, or any other sum. Captain Thomas paid this money, which, with the articles purchased by complainant, made up the amount of duties which Captain Thomas owed, and for which they had given their bond at the custom-house; and upon his making this payment, they gave him a discharge. They denied that
(75) there was any agreement that complainant should be responsible for one-half of the duties.

They admitted that in February there were deposited with them, under the inspection of complainant, Captain Roderique and his seamen, thirty-nine boxes of segars, belonging to the captain, and thirty-one boxes and one bocket of segars and four bags of tobacco belonging to the seamen. On the 11th of that month the seamen called at their store and offered to sell their segars and tobacco. They were foreigners, and there was a

difficulty in understanding them. Complainant came in and acted as interpreter, and a bargain was concluded. They denied that complainant was entitled to any participation in that purchase; that he either introduced the seamen to them or had any agency in making the bargain, except in acting as interpreter. That neither he nor they were precluded, by any agreement between them, from employing any sum which either might think proper to advance, in purchases of wrecked property, while there remained sufficient to invest the amount of duties on their joint account; and complainant purchased for his own use, of Captain Roderique, articles to the amount of $103.

They admitted their agency for Captain Roderique, but expressly denied any agreement that complainant was to share the commissions. They agreed that in consideration of his having recommended them to the agency, he should have the profits which would arise from purchases to the amount of the commissions. They admitted the purchases at Captain Roderique's sale, the delivery of the goods in New Bern, the arrival there of the agent of the owners, the settlement with him, the amount of commissions received, and the payment to them of $500 by complainant.

As to the award charged in the bill, the defendants gave a history of it, and insisted that it was not in any way binding on them.

Upon the hearing of this case the following issues (76) were submitted to a jury, to wit:

1. Was there an agreement between the complainant and defendants as to the division of the profits to arise from the purchase and sale of the articles in complainant's bill set forth; and what was that agreement?

2. Was there any agreement as to the division of the commissions on the agency for Roderique's vessel; and what was that agreement?

3. Was there any award which settles the principles on which a division of profits should be made; and what was that award?

The jury found that there was an agreement between the complainant and defendants as to the division of the profits mentioned in the first issue; and that agreement was that the said profits should be equally divided between the complainant on the one part and the defendants on the other. They further found there was no agreement as to the commissions mentioned in the second issue; and that there was no such award as is mentioned in the third issue.

The presiding judge, in his charge to the jury, said that if an agreement for a common or special partnership appeared to

have existed between the parties for the purchase of any property at the sales set forth in the bill and answer, with intent to sell the same for the profits of the parties, and no express agreement was proved, adjusting the division or share of the profits, the law was that the contract extended to all the goods purchased by one of the parties at the time of the sales, and that the parties were entitled equally to share the profits, without regard to the payments or advances made by either of them for the purpose of effecting the purchase, there being no contract as to the amount of the advances to be made respectively. A rule for a new trial was obtained, on the ground that the charge was incorrect in law. The rule was sent to this Court.

BY THE COURT. The presiding judge laid down the
(77) law correctly in his charge to the jury. The rule must be discharged.

Cited: Worthy v. Brower, 93 N. C., 349.

DEN ON THE SEVERAL DEMISES OF JOHN C. OSBORN AND JOHN STANLY v. JOHN COWARD.

From Craven.

Question of evidence. In ejectment the plaintiff claimed title under a grant issued in 1707 for 640 acres. The beginning corner called for in the grant was "a poplar on Trent River, thence 320 poles to a pine," etc. On the trial he contended his beginning corner was 400 poles from the poplar, and the second corner 400 poles from the pine; and to prove it he offered to lay before the jury the record of a petition filed by one of the old proprietors of the land, before the Governor in Council, praying for a resurvey, the order in council for a resurvey, directed to the Surveyor General, and the resurvey made in pursuance thereof in 1768: *Held,* that the record of this petition and resurvey is not admissible in evidence.

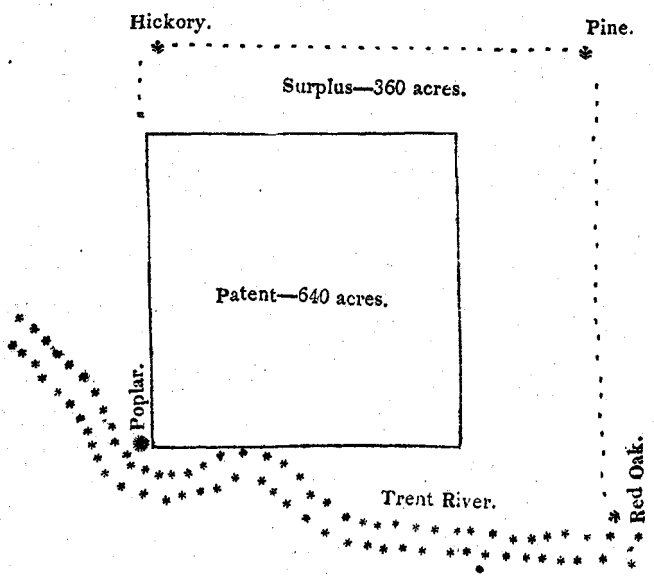
THE lessors of the plaintiff claimed the lands in question under a grant issued to Frederick Jones, in 1707, in which the boundaries are described as follows, to wit: "Beginning at a poplar on Trent River, running thence west 320 poles to a pine, thence north 320 poles to a pine, thence east 320 poles to the river at a Spanish oak, and with the river to the beginning, containing 640 acres." They contended that the beginning corner stood at the distance of 400 poles from the poplar, and the second corner 400 poles from the pine. To support this contention they prayed for leave to give in evidence the record

of a petition of Edward Franks, a former proprietor of the land, to the Governor and Council, in 1769, praying for an order of resurvey, and also the resurvey authorized and made pursuant thereto, in the words and figures following, viz.:

"At a council held at Wilmington, on 28 April, 1769— (78) present, his Excellency the Governor in Council. Read the petition of Edward Franks, setting forth that his father, Martin Franks, in his lifetime, purchased from Frederick Jones a certain tract of land granted by patent to the said Jones, in 1707, for 640 acres, in Craven County, on the north side of Trent River, called the White Rock; the courses and distances of which patent will not extend as far as the natural bounds and marked lines of the original survey. Whereupon the petitioner prayed an order to resurvey the same agreeably to the known bounds and marked lines; that if there should be found a surplusage the said petitioner might have the preference to secure the same in such a manner as his Excellency in Council shall hereafter direct. Ordered a warrant of resurvey to issue, according to the prayer of the petition.

A true copy,

To the Surveyor General. JNO. LONDON, *D. Sec'y.*



The above plan represents a tract of land patented by Frederick Jones, in 1707, for 640 acres, in Craven County, called

the White Rock, surveyed by virtue of a warrant of resurvey, issued at Wilmington 28 April, 1768.

L. LANE, *D. Surveyor.*

Resurveyed this 24 November, 1768.

(79) The presiding judge refused to receive the evidence offered, whereupon the plaintiff suffered a nonsuit; and it was referred to this Court to decide, Whether the said petition and resurvey were admissible in evidence.

BY THE COURT. The evidence offered was inadmissible. Rule for a new trial discharged.

JOHN SUTTON AND WIFE v. JAMES BURROWS.

From Martin.

Dower. The rents which accrue before the assignment of dower belong to the heir; but he is answerable over to the widow for them, as damages for not assigning her dower. The remedy for the widow to recover these damages is by petition for a writ of dower, and praying therein to have the damages assessed. The court will order an issue to be made up between her and the heir, and submitted to a jury. The widow cannot maintain an action on the case against the heir, nor any other person, for the rents received before the assignment of dower.

DAVID PERRY died seized of certain lots in the town of Williamston, which his administrator, the present defendant, leased for three years, and received the rents, amounting to £70 5s. Subsequent to the making of this lease the widow of Perry married John Sutton, and they filed a petition praying that her dower might be laid out in the lands of which Perry died seized. The jury included the lots aforesaid in her dower, and returned their report to court, and the court confirmed it. The jury also included the dwelling-house and outhouses of Perry in the dower, and the widow occupied the dwelling-house until her marriage, and her husband and herself afterwards occupied it until the dower was laid out. Sutton and wife then brought an action on the case against Burrows, to recover the (80) rents aforesaid, which he had received; and the question was, Whether the action could be maintained.

Browne for plaintiffs.
Daniel for defendant.

BY THE COURT. It is the duty of the heir to assign (81) dower to the widow within a reasonable time after the death of her husband. If he fail to do it, she shall, upon petition filed for that purpose, have her dower assigned by a jury; and if she claim damages for the detention of her dower, she must inform the court of that fact in her petition (to which the heir must necessarily be a party), and the court will order an issue to be made up and tried between her and the heir, and the damages to be assessed. The rents are necessarily incident to the freehold, and go to the heir until dower be assigned. The rents now claimed belong to the heir, as they accrued before the assignment of dower. But the heir is not liable to the widow for the rents in an action on the case. He is liable upon her petition given by the act of Assembly, in analogy to the proceedings under the writ given by the statute of Merton; and there the widow recovers, not rents (which suppose a privity of estate), but damages for the detention of her dower, in assessing which the value of the rents is the proper guide to the jury. Judgment for the defendant.

(82)

DEN ON DEMISE OF THADEUS PENDLETON v. GEORGE PENDLETON.

From Pasquotank.

Executory devise. A devised to her son B one part of a tract of land, and to her son C the other part, and directed *that if either of them died, leaving no heir lawfully begotten of his body, the living son should be the lawful heir of all the land.* B died without issue: *Held,* that C was entitled to the lands under the limitation.

SARAH PENDLETON, being seized of the lands in question, devised them as follows, to wit: "I give unto Benjamin Pendleton, my eldest son, this end of a plantation whereon I now live, divided by a ditch from the creek swamp to the road; and one-half of the land I bought of James Jackson. I give to my son Thadeus Pendleton the remaining part of this land whereon I now live, and the remainder of the land I bought of James Jackson; *and if either of my sons dies, leaving no heir lawfully begotten of his body, the living son shall be the lawful heir of all the land.*" Benjamin, one of the brothers, died without issue, having made his will and devised his interest in the lands

to his wife, Sarah Pendleton, under whom the defendant entered and took possession; and the question in the case was, Whether the limitation over to Thadeus Pendleton, the lessor of the plaintiff, be good.

HALL, J. From the particular words used in the clause of the will now under consideration, it may be fairly inferred that the meaning and intention of the testatrix was that if either of her sons should die, leaving no heirs lawfully begotten of his body at the time of his death, the living son should be the lawful heir. The words, "the living son shall be the lawful heir," mean the same as if she had devised the lands to Benjamin in fee, but in case he died without leaving heirs lawfully begotten of his body, *living, or during the life of Thadeus,* then
(83) Thadeus to be the lawful heir. In this case the dying without heirs would be tied up to the time of the death of Benjamin, and of course not too remote. The case before the Court is very much like the case of *Pells v. Brown,* Cro. Jac., 590, where it was decided that a devise in fee to A, and if he die without issue in the lifetime of B, then to B and his heirs, was a good executory devise, to take effect on the contingency of A's dying in the lifetime of B without issue. The principle of that decision has been approved in *Patton v. Bradly,* 3 Term, 145, and *Roe v. Jeffrey,* 7 Term, 589. In *Hughes v. Sayer,* 1 P. Wms., 534, a devise of personal estate to A and B, and if either die without children, then to the survivor, was held good. Let judgment be entered for the plaintiff.

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(84)

DEN ON DEMISE OF GEORGE W. L. MARR AND OTHERS v. THOMAS PEAY AND OTHERS.

From Rowan.

1. Power of executors to sell lands. Presumed renunciation of an executorship. A being seized in fee of lands, and possessed of personal estate, made his will, and directed "his executors therein named to pay and discharge all his just debts, and to sell and dispose of whatever they might think proper and best of his estate to satisfy his debts." He appointed B, C and D executors, and died in 1778. B and C qualified, and undertook the execution of the will. D never qualified, nor intermeddled with the estate, nor formally renounced the executorship. In 1798 B and C sold the lands to pay the debts, D being alive and not refusing

to join in a deed to the purchaser: *Held*, that the deed of B and C was good to pass the title, they being answerable to creditors for the debts, and the testator having left it to the discretion of his executors to pay the debts out of any part of his estate they might think proper. The power to sell is attached to the executorship, and not to the persons named executors.

2. The Court will presume a renunciation after such a lapse of time. A formal renunciation in open court is not necessary; it only affords easier proof of the fact.

JOHN HUNTER, being seized of the lands in question, devised as follows, to wit: "I order my executors hereafter named to pay and discharge all my just debts, and that they sell and dispose of whatever they think proper and best of my estate, to satisfy my said debts." He appointed Alexander Martin, James Martin, James Hunter, John Tate and Edward Hunter, executors of his last will, which was proved in Guilford County Court, at February Term, 1778, and James Martin, James Hunter, John Tate and Edward Hunter qualified as executors. Alexander Martin never qualified, nor in any way intermeddled with the estate of the testator, nor did he ever formally renounce the executorship. John Tate and Edward Hunter having died, James Martin and James Hunter, the surviving acting executors, in 1798, for the purpose of raising money to discharge the testator's debts, sold the lands in question, (85) and by a deed of bargain and sale conveyed them to the lessors of the plaintiff, Alexander Martin being then alive and having not refused to join in the conveyance. The question submitted to this Court was, Whether, as Alexander Martin had neither formally renounced the executorship nor joined nor refused to join in the sale and conveyance of the lands, the lessors of the plaintiff were entitled to recover.

BY THE COURT. The lands in question were sold to pay the debts of the testator. He did not set apart a particular portion of his estate for the payment of his debts; he has left it to the discretion of his executors to pay his debts from the sales of any part of his estate. The executors are to pay the debts; creditors look only to such of them as undertake the execution of the will, and it seems necessarily to follow that those who qualify and undertake the execution of the will shall be competent to do what the will directs to be done. The power to sell is attached to the executorship, not to the persons named as executors. But were it otherwise, the Court will necessarily presume, after such a great lapse of time, that Alexander Martin has virtually renounced the executorship. A formal renun-

ciation in open court is not indispensable; it only provides an easy method of proving the fact. Other evidence may be equally satisfactory; and none could be more so than lying by for the space of twenty years, and during that time never intermeddling with the estate. Let judgment be entered for the plaintiff.

Cited: Wood v. Spark, 18 N. C., 395.

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(86)

WILLIAM EXUM v. THE HEIRS OF BENJAMIN SHEPPARD.

From Craven.

Judgment being given for an administrator, upon the plea of "fully administered," a *scire facias* issued to the heir to show cause why judgment of execution should not be had against the real estate descended. The heir pleaded "nothing by descent," and afterwards, pending the suit, he pleaded "that since the last continuance the lands had been sold to satisfy other executions." The plaintiff demurred; and the demurrer was sustained.

THE plaintiff recovered against James Glasgow and Martha Jones Sheppard, administrators of the estate of Benjamin Sheppard, deceased, in the County Court of Greene, in an action of covenant, £.. for damages and £.. costs of suit; but the plea of "fully administered" was found for the defendants. The plaintiff then sued out a writ of *scire facias* against the defendants, suggesting that the said Benjamin Sheppard died seized of a large real estate, which descended upon the defendants, as heirs at law, and praying for execution of the said damages and costs against the real estate to them descended. Upon the return of this writ the defendants appeared and pleaded several pleas, amongst which were, "No such record, and nothing by descent"; and issues being joined upon said pleas, they were all found for the plaintiff. The defendants being dissatisfied with the verdict, appealed to the Superior Court for New Bern District. The transcript of the record was filed by the defendants in due time, and the case stood upon the docket of the Superior Court for trial upon the issues joined in the County Court, until January Term, 1804, when the defendant's counsel, as of course, and without motion to the court, pleaded "that since the last continuance the lands have been sold to satisfy other executions issued from this court," to which plea the

plaintiff demurred, and the defendants joined in demurrer. At July term the issues joined between the (87) parties in the County Court were tried and found for the plaintiff; and the issue in law joined between the parties was sent to this Court.

BY THE COURT. Let the demurrer be sustained.

LAWRENCE WOOD v. JOHN ATKINSON.

From Wayne.

A employed B as an overseer, and agreed to give him a certain part of the corn and hogs which should be raised on the plantation during the year. Before the corn was gathered, or hogs divided, B conveyed his interest in them to C, who, in the month of November of that year, the corn being then gathered, demanded of A the share to which he claimed title under his conveyance from B. A refused to deliver it, and C brought an action of trover: *Held*, that the action would not lie, for the contract between A and B continued *executory* until B's share of the corn and hogs was set apart by A.

THIS was an action of trover, in which the plaintiff claimed to recover the value of certain corn and pork, which he alleged belonged to him, and which defendant had converted to his own use. The facts of the case were as follows: Atkinson, the defendant, employed one John Lindsay as an overseer for 1806, and agreed to give him a certain portion of the corn and hogs which should be raised on the plantation in that year. In September of that year Lindsay sold and conveyed to Wood, the plaintiff, all his undivided share of the corn and hogs. When Lindsay gathered the corn, in October, he deposited a part for himself in one place and a part for Atkinson in another; but no consent of Atkinson to such division appeared, except an inference which might be drawn from his calling the corn which Lindsay had deposited in a place for himself, "Lindsay's corn." No division of the hogs was made, but Atkinson (88) stated, in December, that Lindsay's share was a certain number. In November, 1806, Wood demanded of Atkinson the corn and hogs to which Lindsay was entitled; Atkinson refused to deliver them, and thereupon Wood brought this suit. Upon the trial the presiding judge was of opinion that the

plaintiff could not maintain the action, and a nonsuit was suffered. A rule for a new trial being obtained, was sent to this Court.

BY THE COURT. In this case there was no evidence that Lindsay's share of the corn and pork had been set apart for him by Atkinson, and, while so set apart, that the conveyance to the plaintiff was made. Before the plaintiff can recover he must show that the share of Lindsay had been set apart, otherwise the case would rest upon the mere contract of the parties. He must show, in the next place, that after Lindsay's share had been so set apart it was conveyed to him, and before any conversion thereof was made by Atkinson. The evidence does not support either part of the case, and the nonsuit was proper. Let the rule for a new trial be discharged.

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(89)

RICHARD B. JONES AND FRANCES, HIS WIFE, v. RICHARD D. SPAIGHT AND OTHERS.

From Craven.

Bringing lands into hotchpot. A, being seized of divers tracts of land, died intestate, leaving two daughters, B and C, his heirs at law. B intermarried with D, and A conveyed to *B and her heirs* four tracts of land; to *D and to his wife B and their heirs*, three tracts of land; to *D and his heirs*, two tracts of land. Some of the deeds purported to be made for a small pecuniary consideration; others of them purported to be made for natural love and affection, and others for natural love and five shillings: *Held*, that in making partition of the lands of which A died seized, (1) the lands conveyed to the husband alone are not to be brought into hotchpot, but that (2) the lands conveyed to the wife alone, and *a moiety* of those conveyed to the *husband and wife*, are to be brought in.

THIS was a petition for the partition of the lands of which Joseph Leech died seized, and it presented divers questions relative to advancements in lands, made by the parent to his or her children. The petition stated that Joseph Leech, formerly of Craven County, had died intestate, seized and possessed of divers tracts of land therein described; that he left him surviving a son named George M. Leech, and two daughters, the petitioner Frances and Mary Jones Spaight, widow of Richard Dobbs Spaight, on whom descended, as his heirs at law, the

lands aforesaid. That the said George M. Leech died intestate, leaving him surviving his two sisters, the aforesaid Frances and Mary; that Mary had since died intestate, and all her right, title and interest in the lands descended upon Richard D. Spaight, Charles G. Spaight and Margaret E. Spaight, between whom and the petitioners the lands aforesaid were to be divided in equal moieties, viz., one moiety to them and one moiety to the petitioners.

That Joseph Leech, in his lifetime, by deeds reciting the respective considerations hereinafter mentioned, did convey sundry other tracts of land, either to his daughter Mary Jones Spaight and her heirs, or to Richard Dobbs (90) Spaight, her husband, and to his heirs, or to the said Richard and to the said Mary, his wife, and their heirs: that is to say, that he, by a deed bearing date 3 August, 1800, purporting to be made in consideration of the sum of five shillings, conveyed a tract of land containing 640 acres, on the west side of Pee Dee River, to Richard Dobbs Spaight and his heirs; by deed bearing date 20 May, 1801, purporting to be made in consideration of the sum of five shillings, he conveyed a tract containing 200 acres, lying in Craven County, on the south side of Neuse River, to Mary Jones Spaight and her heirs; and by deed bearing date 11 May, 1801, purporting to be made in consideration of the sum of £40, he also conveyed to the said Mary Jones Spaight and her heirs a tract containing 300 acres, lying near to the before described tract. That by deed bearing date 13 December, 1797, and purporting to be made in consideration of the sum of £20, he conveyed to the said Richard Dobbs Spaight and his heirs a tract containing 100 acres, lying in Craven County, on the west side of Slocumb's Creek; that by deed bearing date 21 May, 1794, and purporting to be made in consideration of natural love and affection and of the sum of £5, he conveyed the front of lot No. 24 and the eastern half of lot No. 25, in the town of New Bern, to the said Richard and Mary, his wife, and their heirs; that by deed dated 18 June, 1795, purporting to be in consideration of £100, he conveyed a tract of thirty acres on Trent River to the said Richard Dobbs Spaight and his heirs; that by deed dated 3 June, 1796, purporting to be in consideration of natural love and affection and the sum of five shillings, he conveyed a tract lying near New Bern to the said Mary Jones Spaight and her heirs; that by deed dated 4 January, 1797, purporting to be in consideration of natural affection and the sum of £5, he conveyed two tracts, one of 70 acres, the other of 60 acres, to the said Mary and her heirs; that by deed dated 12 May, 1792, pur- (91)

porting to be in consideration of love and affection and the sum of £5, he conveyed a tract of 76 acres in Craven County, a lot in the town of New Bern, No. 23, and the half of lot No. 25, to the said Richard Dobbs Spaight and to Mary, his wife, and to their heirs.

The petition then charged that all the said lands were actually and in fact given to the said Mary Jones Spaight and her husband, by way of advancement unto the said Mary, by her father, and that the pecuniary considerations therein stated were never paid nor received, and were only mentioned as a formal circumstance in the execution of the deeds, and that the said lands ought to be brought into hotchpot. The petition prayed that the said lands might be decreed as advancements made unto the said Mary Jones Spaight, and be brought into hotchpot. The questions arising upon this petition were sent to this Court.

Gaston for petitioners.
Edward Harris for heirs of Mary Jones Spaight.

BY THE COURT. The lands conveyed to the husband alone are not to be brought into hotchpot; those conveyed to the wife alone, and a moiety of those conveyed to her and her husband, are to be brought into hotchpot in making partition of the lands of which Joseph Leech died seized.

Cited: Dixon v. Coward, 57 N. C., 357; *Harper v. Harper,* 92 N. C., 302, 303; *Barbee v. Barbee,* 108 N. C., 583.

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(92)

McKENZIE AND WIFE v. BENJAMIN SMITH, EXECUTOR OF WILLIAM DRY.

From New Hanover.

1. Liability of a legatee, for interest upon the value of his legacy, to the executor and creditors. The general liability of a legatee to refund is measured by the value of his legacy; but whether he be liable for interest upon that value depends upon the particular circumstances of the case.

2. If he have good reasons to believe that the debt is just, and no dispute exist as to its amount, he ought to contribute his ratable part of the debt immediately upon demand made. If he be guilty of improper delay, he shall be charged with interest.

ON hearing the bill and answer in this case, on a motion to dissolve the injunction, it was ordered and decreed that the injunction be dissolved as to part of the recovery at law, and that as to the other part the injunction be retained until further order. It was further ordered that this case be transmitted to the Supreme Court for decision on the following point: Whether a legatee, to whom a legacy is delivered over by the executor, who does not know that debts exist, shall be liable afterwards to refund the mere value of the property delivered to him, at the value when delivered to him, and no more; or whether the executor, having subsequent notice of existing debts, and giving notice to the legatee thereof, and demanding of him to refund his proportion of the legacy delivered for the payment of the debts, shall not, on the refusal of the legatee to do so, be entitled to charge the legatee with interest on the value of the property delivered over, from the time of such notice and refusal.

Gaston for legatee.
A. Henderson for executor.

BY THE COURT. The general liability of a legatee to (95) refund is measured by the value of his legacy; but whether he shall be chargeable with interest upon that value or upon any part thereof, for not refunding when he has notice from the executor of existing debts, and he is called upon to refund his ratable part, and he refuses, must necessarily depend upon the particular circumstances of the case. If he has good reason to believe that the debt is just, and there be no dispute as to its amount, he ought to contribute his ratable part immediately upon demand made; and if the executor take from him no refunding bond, still he ought to contribute with the same promptitude as if he had given a bond; for here he is to contribute for the relief of the executor, from whom the creditor exacts his debt *de bonis propriis*. The refunding bond is given for the benefit and ease of the executor, that after two years creditors may be turned over to the legatees for their money; and as in cases where no bond is given, the executor shall recover interest if the legatee be guilty of improper delay in refunding his ratable part of the debt, so in cases where a bond is given, there seems to be no good reason why the creditor shall not have interest, if the legatee has been guilty of such delay. But the circumstances of each case must be looked to in deciding whether the legatee shall be chargeable with (96) interest. It does not appear in the case before the Court what were the circumstances attending the debt, nor whether

those circumstances were made known to the legatee when the executor gave him notice of the debt and called upon him to refund. It is surely not a general rule, that a legatee shall pay interest; and there not appearing in this case any peculiar circumstances to charge him, judgment must be entered in his favor upon the point sent to this Court.

JUDGES

OF THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEAR 1812.

CHIEF JUSTICE:

*JOHN LOUIS TAYLOR.

ASSOCIATE JUSTICES:

JOHN HALL, FRANCIS LOCKE,

SAMUEL LOWRIE, EDWARD HARRIS,

LEONARD HENDERSON.

H. G. BURTON, ATTORNEY-GENERAL.

EDWARD JONES, SOLICITOR-GENERAL.

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*The General Assembly, at their last session, having directed the judges to appoint one of their body to preside in the Supreme Court, who should be styled "Chief Justice of the Supreme Court," the judges at this term proceeded to make such appointment, when the Honorable JOHN LOUIS TAYLOR, Esquire, was unanimously appointed.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY TERM, 1812.

BATEMAN v. BATEMAN.

From Washington.

Construction of the acts of 1784, ch. 10, and 1792, ch. 6, relative to the sale of slaves. The object of these acts was to protect creditors and purchasers. The first required all sales of slaves to be in writing; the second declared valid all sales of slaves where possession accompanied the sale. Neither of these acts apply to a case where the interests of a creditor or purchaser are not concerned. A bill of sale or a delivery is necessary in every case where their rights are affected; but between the parties themselves a *bona fide* sale according to the rule of the common law transfers the property, and is good without a bill of sale or delivery.

THIS was an action of detinue for a negro slave, and upon the trial the plaintiff proved that some time in 1804 the defendant, in conversation, said that he had settled (98) his dispute with the plaintiff, and that he had let the plaintiff have the negro in question in satisfaction of a debt of $100 which he owed to him; that as the negro was small, he had agreed to keep her until she was able to do service, or was called for by the plaintiff. The defendant had remained in possession of the negro ever since. There was no evidence of a delivery of the negro to the plaintiff. Upon the trial of this cause in Washington Superior Court of Law the judge informed the jury that to pass a title in a slave there must be either a bill of sale or a delivery of the slave. The jury returned a verdict for the defendant, and a rule was obtained by the plaintiff upon the defendant to show cause why a new trial should not be granted, upon the ground of misdirection by the court. The case was sent to this Court upon the rule for a new trial.

TAYLOR, C. J. The question in this case depends upon the true construction of the act of 1792, ch. 6, to ascertain which it is necessary to consider the act in connection with that of 1784, ch. 10, section 7 of which it is its professed object to amend and explain. The preamble to that section declares that many persons have been *injured* by secret deeds of gift to children and others and for want of formal bills of sale. The enacting clause provides that all sales of slaves shall be in writing, and that they, as well as deeds of gift, shall be recorded. The exposition of this law, made soon after its passage, and generally acquiesced in since that period, was that the design of the Legislature being to protect the rights of creditors and purchasers, the want of a written transfer could be set up against the validity of a sale only in cases where the rights of those persons were to be affected; that as between the parties
(99) to the transaction it was valid and effectual, although made by parol. The act of 1792, having the same object in view, dispenses with the necessity of a bill of sale in every case, manifestly under the impression, in the framers of the law, that the rights of creditors and purchasers might be as effectually guarded by superadding delivery to the common-law mode of selling a chattel as by a written evidence of the sale. The expressions of the act are, "that *bona fide* sales of slaves, accompanied with delivery," and which would have been good before the passing of the act of 1784, shall be held valid. But a *bona fide* sale without delivery would have been held good at common law; and if the Legislature designed to alter the common-law mode of transfer, they might have effected that object by a simple repeal of the clause in question. It was believed either that a delivery was necessary to the validity of a common-law sale or the delivery was substituted in lieu of the bill of sale for the sake of creditors and others. The first supposition is inadmissible; and in adopting the latter we must apply to the act the same principles of construction which have governed the decisions of cases arising under the act of 1784. Hence it follows that a delivery is necessary in all cases where the rights of creditors or third persons are affected; but between the parties themselves a *bona fide* sale according to the rule of the common law effectually transfers the property; and the sale in this case being of the latter description, the rule for a new trial must be made absolute.

Cited: Cotton v. Powell, 4 N. C., 314; *Palmer v. Faucette,* 13 N. C., 242; *S. v. Fuller,* 27 N. C., 29; *Benton v. Saunders,* 44 N. C., 362.

(100)

STATE v. WASHINGTON, A SLAVE.

From Warren.

Under the act of 1807, ch. 10, a slave convicted in the County Court of any offense the punishment of which extends to life, limb or member, is entitled to an appeal to the Superior Court; and if such appeal be prayed for and denied, a writ of *certiorari* is the proper remedy to bring up the case to the Superior Court, where there shall be a trial *de novo*.

AT a Court of Pleas and Quarter Sessions held for the County of Warren on the fourth Monday of February, 1811, Washington, a negro slave, was charged with the crime of rape, before that time committed upon the body of Elizabeth Beasley, of said county, and was found guilty by the jury; and at May term of said court, he being brought to the bar, and it being demanded of him why sentence of death should not be pronounced on him, Robert H. Jones, his counsel, showed for cause, (1) that he being tried for the offense before the justices of the Court of Pleas and Quarter Sessions on the fourth Monday in February preceding, it was incompetent for any other or subsequent court to pronounce judgment; (2) that the verdict of the jury did not correspond with the charge, nor did it sufficiently appear by the verdict that the person therein mentioned was the person described in the charge.

The charge was in the following words, to wit:

WARREN COUNTY COURT—February Term, 1811.

Negro man, Washington, the property of Oliver Fitts, Esq., stands charged that he, the said Washington, on 15 February, 1811, with force and arms, at the county of Warren, in and upon the body of one Martha Beasley (spinster) in the peace of God and the State then and there being, violently and feloniously did make an assault, and then and there the said Martha Beasley, against the will of her, the said Martha Beasley, feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the State. WM. MILLER, *Attorney for the State.*

The finding of the jury was in the following words: (101) "Find the defendant guilty."

The court were of opinion that the causes shown were not good and sufficient, and sentence of death was pronounced upon the slave. His counsel prayed an appeal to the Superior Court,

which was denied. He then moved for a writ of error to reverse the judgment, and this motion was disallowed. Oliver Fitts, the owner of the slave, made an affidavit setting forth the foregoing facts, and applied to his Honor, *Judge Henderson,* for a writ of *certiorari* to have the proceedings removed into the Superior Court, and the judge granted the writ, and also a *supersedeas;* and the case was sent to this Court upon the following points: 1. Whether it was competent for the County Court, at May Term, 1811, to pronounce sentence of death, the conviction having taken place at February term preceding. 2. Whether the writ of *certiorari* will lie in this case (and this necessarily involved the question, Whether the County Court acted rightly in refusing the appeal prayed for). 3. Whether a trial *de novo* is to be had in the Superior Court.

Upon the second point the Court were divided in opinion. They were unanimous in the opinion that the County Court had the right of pronouncing sentence of death at May term, and that if a trial was to be had in the Superior Court, it must be a trial *de novo.*

As to the second point all the judges, except his Honor, *Judge Hall,* were of opinion that the slave had the right of appealing to the Superior Court from the verdict and judgment in the County Court; and that as the appeal had been denied when prayed for, the writ of *certiorari* was the proper remedy in the case for the purpose of having the proceedings in the County Court certified to the Superior Court, that a trial *de novo* might there be had.

(102) HALL, J., *contra.* I readily agree with my brethren that the County Court next subsequent to that at which a verdict had been rendered against the prisoner had a right to pronounce judgment upon such verdict. I also agree with the counsel for the prisoner that where a slave was tried upon a criminal charge, by a special court created under the act of 1791 or 1793, it was not competent for any other than such special court to pass judgment against him, because such courts only sat from time to time, as occasion required; each court was distinct from the other. Besides, not being courts whose records and proceedings were directed to be preserved, it was impossible for a subsequent court to know with certainty what a former court had or had not done. This is not the case with the county courts. A record is made of all their proceedings, and it may be seen with the greatest certainty what has or has not been done. If so, no mischief can result from one court doing that

which it sees another court has omitted to do, but which it ought to have done. In addition to this consideration, it is to be observed that the county courts have their regular terms throughout the year, and although the individuals who hold them are not the same at different times, yet in contemplation of law each is the same court, and must be so considered as long as the law creating them is in force.

But a strong argument has been attempted to be drawn from the act of 1794, ch. 11, which declares, "that it shall be the duty of the *County Court, when sitting* on the trial of any slave or slaves, or of three justices when *they* shall be sitting on such trial, to pass judgment," etc. But let us inquire what was the cause of passing that act. By Laws 1793, ch. 5 (by which the benefit of trial by jury was extended to slaves), the duty of the jury, and of the court under whom they acted, was not distinctly defined; and the act of 1794 was passed for the purpose of pointing out the province of each, and, as I view it, for no other purpose. And although the Legislature (103) have used the words *"when sitting on the trial of any slave,"* etc., yet I cannot give to these words, when connected with the other words of the act and with other acts passed upon the same subject, the construction contended for: that is, that no subsequent County Court had the legal power to pass sentence against the prisoner Washington, but that that exclusively belonged to the court who presided when the verdict was rendered.

If, then, the court possessed such power, had the prisoner a right to the benefit of an appeal or writ of error? It is with reluctance that I dissent from the opinion entertained by my brethren on this point. I shall endeavor, however, as it is my duty to do, to assign my reasons for this dissent. The first act of Assembly that relates to the trial of slaves for crimes or misdemeanors was passed in 1741, ch. 24. Section 48 of that act empowered three justices of the peace and four freeholders, owners of slaves, upon oath to try all manner of crimes and offenses that should be committed by any slave, etc., at the courthouse of the county, and to pass such judgment upon such offender, according to their discretion, as the nature of the crime or offense should require. The same section also directs the manner in which such special court should be convened, when occasion might require it. The next act passed on this subject was passed in 1793, ch. 5. By this act the benefit of the trial by jury was extended to slaves charged with offenses, "the punishment whereof extends to life, limb or member." It will be of importance to bear in mind that by this act the sheriff is directed to convene a special court, to wit, three justices of

the peace and a jury of good and lawful men, owners of slaves, to try slaves charged with such offenses, provided that the County Court shall not meet within fifteen days from the time of commitment of such slaves. The third act on this subject was passed in 1794, ch. 11, which declares that it shall (104) be the duty of the jury to give a verdict of guilty or not guilty on the evidence, etc.; and on the verdict so given it shall be the duty of the County Court, when sitting on the trial of any slave or slaves, or of three justices when they shall be so sitting, to pass judgment on such slave, etc. The fourth and last act on this subject was passed in 1807, ch. 10. This act repealed all others, which authorized courts to be specially convened for the trial of slaves charged with offenses, and declared that in future all such offenses should be tried at the regular terms of the county courts, under the same regulations and restrictions as by law were then directed.

I have thought it important in this case that all the acts of Assembly on this subject should be brought into view. It has not been contended, nor would the ground be tenable, that an appeal or writ of error would lie from any special court created by act of Assembly, because, in the first place, in none of the acts is an appeal or writ of error spoken of; secondly, because the act of Assembly, commonly called the court law, which declares, "that if either plaintiff or defendant shall be dissatisfied with any sentence, judgment or decree of the County Court, he may pray an appeal," was passed in 1777, long after the act of 1741, which first established the special courts; and, thirdly, because the act of 1777 speaks of appeals and writs of error from the county courts only to the Superior Courts. However, if such special courts should transcend the limits prescribed to them, no doubt there ought to be a correcting power in the Superior Courts, and such power they certainly possess.

But it is said that since the act of 1807, which directs that slaves charged with offenses shall be tried at the regular terms of the county courts, the prisoner is entitled to an appeal or writ of error, because the act of 1777 gives the benefit of an appeal or writ of error to any person, plaintiff or defendant, who may be dissatisfied with any sentence, judgment or (105) decree of the County Court. This seems to be the ground on which the argument for the prisoner rests. With a view to ascertain the meaning of the Legislature, let us examine the acts of 1793 and 1794, before mentioned. By the former, in case a slave were committed within fifteen days before the sitting of the County Court, such slave must be tried by the County Court at its regular term, and not by a special

court. But if such slave was committed to jail more than fifteen days before the sitting of the County Court, the sheriff is directed to convene a special court, to wit, three justices and *a jury,* etc., as is evident from the act of 1794, which says, "that on the verdict of the jury it shall be the duty of the *County Court,* when sitting on the trial of any slave or slaves, or of three justices, when they shall be sitting on any such trial, to pass judgment, etc., agreeably to law. The Legislature, in defining the duties of the courts and juries in this act, speak of the county courts as well as the *three justices;* by which I understand them to mean special courts convened by the sheriff, because it depended on circumstances whether the trial might be in the one court or the other; and I suppose that each court, as to the trial of slaves, possessed precisely the same powers. But if an appeal from the County Court be a matter of right, or if such court is bound to grant a writ of error when asked for, what would be the consequence? A slave is committed to jail for a capital offense more than fifteen days before the sitting of the County Court; another is committed to jail upon a similar charge within fifteen days of that time: with respect to the first, there must be a special court convened; the latter must be tried in the County Court. Is it likely that the Legislature intended the one tried in the County Court should be entitled to an appeal or writ of error and the other should be deprived of this right? By the act of 1741 the trial of slaves was entrusted to a special court, consisting of three justices and four freeholders. By the act of 1793 a jury was (106) substituted in the place of the four freeholders; but in case the slave was committed to jail within fifteen days before the sitting of the County Court, then such County Court was substituted in the place of the special court. It never could be intended that such County Court should, as to the trial of slaves, possess more or less power than three justices, in case they had been convened as a special court by the sheriff, so that the slave tried in the County Court should have more privileges than if he had been tried in a special court. If he could not move his case by way of appeal from the one court, he certainly could not from the other.

But the act of 1807, it is said, gives the right of appeal by implication. Let us examine this act. It declares that all slaves charged with criminal offenses the punishment of which extends to life, limb or member, shall be tried at the regular terms of the County Court, etc., under the same regulations and restrictions as by law there directed. The only effect of this act, and its sole purpose, were to do away with the necessity of con-

vening special courts. But the same powers which those special courts possessed and exercised, and the same powers which, before the passing of that act, the county courts possessed and exercised, in case a slave was committed to jail within fifteen days of the sitting of such court, were by the act of 1807 transferred to the county courts at their regular terms. The act is express that the trials shall take place under the same rules, regulations and restrictions as by law there directed. The Legislature had some reason for passing this act, and probably it was that greater notoriety might attend the trial, and that impartial justice might thereby be more certain to be administered. But I think the object could not have been to give to the slave so tried a right to appeal. If that had been an object, the Legislature would have so expressed their meaning. It is
(107) therefore my opinion that no appeal lay from the special courts created by the act of 1741, continued with some alteration by the act of 1793, or from the county courts, which had jurisdiction to try slaves committed to jail within fifteen days of the time of their sitting, and that the County Court of Warren did right in refusing an appeal in the present case, because they possessed only the same powers and stood precisely in the same situation, as to the trial of slaves, with those courts which preceded them.

Cited: Atkinson v. Foreman, ante, 57.

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THOMAS HOLLOWELL v. JOHN POPE AND WILLIAM POPE, DEVISEES OF JOHN POPE, DECEASED.

From Lenoir.

1. Statute of Limitations. Whether the act of 1789, ch. 23, bars the demands of creditors against the heirs and devisees, as well as against executors and administrators. A, having given his bond to B for a certain sum, and therein bound his heirs, etc., devised his lands to C. B brought an action of debt against C, the devisee, who pleaded in bar the act of 1789, ch. 23, and that the executor had advertised agreeably to that act. The action was not brought within two years after the qualification of the executor: *Held*, that the plea shall not avail C; for (1) the words of the act do not provide any limitation to suits brought against heirs or devisees; nor (2) are heirs and devisees within its equity and spirit.

2. The act of 1715 was designed to protect *the heir, and every part of the estate,* from demands of creditors; and therefore fixes the *death* of the debtor as the period from which the time is to be computed, and does not require *the demand* to be made of the executor or administrator, but leaves the inquiry "from whom shall the demand be made?" to be determined by the nature of the debt itself. If by the nature of the contract the heir is liable, the demand may be made of him, *or* of the executor. If the heir be not liable, the demand must be made of the executor only.

3. The act of 1789 was designed to protect the executor or administrator from such demands as *he alone* is liable to in the first instance, or such as the creditor *may elect* to enforce against him; and therefore fixes *the qualification* of the executor or administrator as the period from which the time is to be computed.

THIS was an action of debt against the devisees of John Pope, deceased, on a bond given by the said John Pope to the plaintiff, Thomas Hollowell. The jury found the following special verdict, to wit: "That the bond declared on is the act and deed of John Pope, the devisor of the defendants, and that they have lands by devise sufficient to discharge the same. That the executors of John Pope, deceased, duly advertised the death of their testator, according to the directions of the act of 1789, ch. 23, and the plaintiff, at the time the said bond was executed, and ever since, has been an inhabitant of this State; and that this suit was not instituted within (109) two years from the qualification of the executors. But whether the plaintiff be barred from a recovery by the said act of 1789, the jury pray the advice of the court. If the said act is to be considered as extending to claims against heirs and devisees, they then find for the defendant; but if the act is to be confined only to suits against executors and administrators, they then find for the plaintiff, and that the bond was not paid at or after the day."

TAYLOR, C. J. It is very clear that the words of the act of 1789, ch. 23, do not provide any time of limitation to suits brought against devisees, nor can the Court, after an attentive consideration of its equity and spirit, discern any satisfactory ground on which such a construction can be rested. The creditors are required to make demand, within the time limited, against the executor or administrator from whose qualification the period is computed—a provision necessarily implying that the claims must be of that description which the representatives of the personal estate are, in the first instance, liable to pay. But where a creditor having a direct remedy, which he chooses to enforce against the heir or devisee, from a belief that the

real fund is either more solvent or more accessible than the personal one, it is difficult to imagine a reason why he should be compelled to make a demand of the executor or administrator, or why it is necessary for him to take notice of the time of their qualification.

The whole act relates either to the proving of wills and granting letters of administration or to the recovery of such debts as are to be paid out of the personal estate. It points to the convenience of that class of creditors and to the safety and protection of executors and administrators after a certain pe-
(110) riod, provided they perform specified duties intended to apprise creditors of the death of the testator or intestate and to secure the personal assets, so that they may be forthcoming to their demands.

It is worthy of remark that at the very same session a law was passed which for the first time rendered devisees liable to the payment of debts. So that had the Legislature designed to extend the limitation to them and to heirs, they would probably have done so in express terms; and as the whole subject was brought under view, as well the alteration of the law on such a material point as the time of limitation prescribed by the act of 1715, the omission can scarcely be ascribed to inadvertence. The act of 1789 professes to supply the deficiency of the act of 1715, in which the limitation is expressed in terms essentially different. It fixes the death of the debtor as the period from which the time is to be computed; nor does it, like the act of 1789, require the demand to be made of the executor or administrator; thereby confining the operation of the law to such debts as they are liable to be sued for. From whom the demand is to be made must, under the act of 1715, be determined by the nature of the debt itself; it may be made of the heir, if he is liable by the nature of the contract; it may be made of the executor or administrator, if the creditor will not or cannot pursue the heir in the first instance. So that in this view of the subject there is no conflict between the two laws, which, being intended to promote different objects, may well stand together. The act of 1715 was designed to protect the heir and every part of the estate from demands of whatsoever kind or nature; the act of 1789 was intended to protect the executor and administrator from such demands as they alone are liable to in the first instance, or such as the creditor may elect to enforce against them.

That there should be a diversity of opinion as to the repeal of the act of 1715, between this Court and the Supreme
(111) Court of the United States, we cannot but regret; and if

authority were a proper arbiter on such a question, there is none to which we could submit with more pleasure, because we highly estimate the talents and integrity which adorn that bench. But the exposition and construction of the legislative acts of this State will be sought for and expected in this tribunal, by the citizens of the State; and we are bound to give that judgment which the best exercise of our own understandings will enable us to pronounce. Let there be judgment for the plaintiff.

CALEB HOUTON v. WILLIAM HOLLIDAY.

From Lenoir.

1. A borrowed of B $200, and to secure the payment thereof pledged to him a negro slave, whose services were worth $60 per year. A paid B the money borrowed, and B delivered to him the slave. A then demanded of B satisfaction for the services of the slave during the time B had him in possession, and upon B's refusal to pay brought suit and declared, (1) upon a *quantum meruit*, and (2) for money had and received. He is entitled to recover; and the measure of damages is the excess of the value of the slave's services above the interest of the sum borrowed.

2. Equity will always make the mortgagee account for the rents and profits of an estate which he has in possession; and to establish an opposite doctrine in the case of pledges, where the profits exceed the interest of the money lent, would furnish facilities to evade the statute against usury.

3. Wherever a man receives money belonging to another, without any valuable consideration given, the law implies that the person receiving promised to account for it to the true owner; and for a breach of this promise an action for money had and received lies.

HENRY TAYLOR, by his will, dated 21 November, 1799, bequeathed to his daughter Lucy a negro slave named Harry. In March, 1800, Taylor borrowed of William Holliday, the defendant, £100, and to secure the payment thereof executed the following deed, viz.:

STATE OF NORTH CAROLINA—GREENE COUNTY.

Know all men by these presents, that I, Henry Tay- (112) lor, of the State and county aforesaid, have, for and in consideration of the sum of $200 to me in hand paid by William Holliday, of the said State and county, the receipt whereof is hereby fully acknowledged, bargained, sold and de-

livered, and by these presents do bargain, sell and deliver, unto the said William Holliday, one negro man named Harry, to him, the said Holliday, his heirs and assigns forever; and I, the said Henry Taylor, do and will warrant the title of said negro, free and clear from myself, my heirs, executors, administrators, or assigns. In witness whereof, I, the said Taylor, have hereunto set my hand and seal, this 18 March, 1800.

The condition of the above bill of sale is such that if the said Henry Taylor, his heirs, executors or administrators, do and shall well and truly pay to the said William Holliday or his heirs, on or before 25 December next, the sum of $200, then the above bill of sale shall be null and void; otherwise remain in full force until the said Taylor do pay the sum of $200. Signed, sealed and delivered, the day and year above written.

Teste: TITUS CARR. HENRY TAYLOR. (SEAL.)

Taylor died in April, 1800; his will was duly proved, and Micajah Edwards, the executor therein named, qualified in the same month. The plaintiff intermarried with the legatee, Lucy, in April, 1801; and upon the marriage the executor of Taylor assented to the legacy of the negro Harry to the plaintiff. The negro Harry remained in the possession of defendant from March, 1800, until April, 1803; and it was proved that his services were worth $60 per year.

In April, 1803, the plaintiff paid Holliday the sum for which the negro was pledged ($200) and the negro was delivered to him. He then demanded satisfaction for the services of the negro, which defendant refused to make; and therefore the plaintiff brought his suit and declared, (1) upon a *quantum meruit* for the services of the negro from the death of Henry Taylor to the surrender by defendant, in April, 1803; and (2) for money had and received by defendant to plaintiff's use, for the excess of what was paid to defendant over the sum due
(113) of the money lent, allowing the wages of the negro annually to diminish the debt and interest.

The jury found a verdict for the plaintiff, under the charge of the court, for the sum of $88, estimated as the wages of the negro from the time of plaintiff's marriage with Lucy, the legatee, until the delivery, in April, 1803, deducting the interest of the sum loaned for the same term. It was submitted to the Supreme Court whether the verdict should stand or a nonsuit be entered.

TAYLOR, C. J. It has been the uniform practice of the courts of equity in this State to make a mortgagee in possession account

for the rents and profits upon a bill filed for redemption. This is a necessary consequence of the principles which prevail in those courts relative to a mortgage, which is considered only as a security for money lent, and the mortgagee a trustee for the mortgagor. To sanction an opposite doctrine, even in the case of pledges, where the profits exceed the interest of the money lent, would be to furnish facilities for the evasion of the statute against usury, almost amounting to a repeal of that salutary law. Nothing can come more completely within the legal notion of a pledge than the slave held by Holliday in the present case; for by the very terms of the contract it was so to continue until the money should be paid, no legal property vesting in Holliday, who had only a lien upon it to secure his debt. All the profits, therefore, exceeding the interest of his debt, he received to the plaintiff's use, and cannot conscientiously withhold. Wherever a man receives money belonging to another, without any valuable consideration given, the law implies that the person receiving promised to account for it to the true owner; and the breach of such implied undertaking is to be compensated for in the present form of action, which is, (114) according to Mr. Justice Blackstone, "a very extensive and beneficial remedy, applicable to almost every case where a person has received money, which *ex æquo et bono* he ought to refund." Nor is its application to cases like the present without authority from direct adjudication; the case of *Ashley v. Reynolds,* Strange, 915, furnishes an instance of a man being allowed to receive the surplus which he had paid beyond legal interest, in order to get possession of goods which he had pledged. In principle, the cases are the same; the only thing in which they differ is that in the case before us the money was received by the defendant from the labor of the pledge; in the other, it was paid by the sheriff. Let judgment be entered for the plaintiff.

(115)

ISAAC WHITE v. SAMUEL CREECY.

From Perquimans.

1. A sued B in the County Court, and B pleaded several pleas. The jury, in rendering their verdict, neglected to pass upon some of the issues submitted to them, which being moved in arrest of judgment, the motion was allowed, and the judgment arrested. During the same term A moved that a *venire de novo* issue, which motion was allowed by the court; and at the next term the jury found for A upon all the issues. B moved for a writ of error, and assigned for error, "that a verdict had been before rendered in the same case, and judgment thereon had been arrested. Writ of error dismissed; for,

2. Although upon a judgment being arrested, the defendant is out of court, yet during the same term the whole matter of the cause is under the control and within the power of the court; the design was to set aside the preceding judgment and grant a new trial. The mode of proceeding was informal, but the substantial thing done was correct; and the administration of justice requires that the records of the county courts should be expounded with a view of ascertaining what was the object and design of those courts.

THIS was a writ of error brought to reverse a judgment recovered in Perquimans County Court. Samuel Creecy instituted an action of trespass *quare clausum fregit*, against Isaac White, who pleaded, *"Not guilty, liberum tenementum, justification, license, trespass involuntary, and tender of sufficient amends."* In rendering their verdict, the jury responded only to the plea *of "Not guilty,"* and assessed the plaintiff's damages to ten shillings. It was moved in arrest of judgment that the jury had not passed upon all the issues submitted to them, and the court allowed the motion. A motion was then made on behalf of the plaintiff, that a *venire facias de novo* issue, which motion was allowed, and the writ being returned to the succeeding term of the court, the case was again submitted to a jury, who found for the plaintiff upon all the issues, and assessed his damages to £5. White then brought this writ of error, and as-
(116) signed for error, "that a verdict had been before rendered in the same case, and judgment thereon had been arrested."

TAYLOR, C. J. The proceedings in this case are not so substantially defective as to warrant a judgment of reversal. For although upon a judgment being arrested the defendant is out of court, and is entitled under the act to his costs, yet during the same term the whole matter of the cause was under the

control and within the power of the court. The motion for the *venire* and the entry of it was informal, because the preceding judgment made an end of the cause; but the design was to rescind that judgment and to grant a new trial, which the court might properly do. So if a nonsuit be awarded, the court, by afterwards granting a new trial, virtually and in fact set aside the nonsuit, although a precise entry to that effect might not have been made on the record. It is essential to the administration of justice in this State that the County Court records should be expounded, with a view to ascertain the real conduct of the court, and the exact history of the cause; and if they be such as the law permits, their judgment ought to be sustained, although the entries may not have been made with the technical exactness which the precedents of records prescribe. Let the writ be dismissed.

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(117)

STEPHEN BROWN v. ADMINISTRATOR OF BLAKE BRADY, DECEASED.

From Granville.

The act of 1800, respecting horse-racing contracts, declares "that all such contracts shall be reduced to writing and signed by the parties thereto at the time they are made." Under this act a race may be made on one day, and the articles of the race and the bonds for the money bet may be reduced to writing and signed by the parties on a subsequent day; but the contract shall not be reduced to writing on one day and signed by the parties on a subsequent day.

THIS was an action of debt to recover money won on a horse race; and the only question in the case was, whether as the race was made on one day and the articles of the race and the bonds for the money bet were not reduced to writing and signed by the parties until the subsequent day, this was such "a reducing to writing and such a signing as are required by the act of Assembly."

TAYLOR, C. J. This case turns upon the interpretation of certain words introduced into the act of 1800, concerning horse racing. The words of the act are, "that all horse-racing contracts shall be reduced to writing and signed by the parties thereto at the time they are made." Do these words signify that a race shall not be made by parol on one day and the writings executed on another? Or do they import that the

contract shall not be written on one day and signed by the parties on a subsequent day? That the latter is their true and rational construction is evident from the context and the subsequent part of the clause; for a contract cannot be signed until it is written, and therefore it is not made until it is reduced to writing. What passes between the parties in conver-
(118) sation before the contract is written is carefully kept out of view by the act itself, which excludes parol evidence to alter or explain; but if the written contract is set aside because the parties talked about the race before, or even made the race before, it must be done by parol evidence of that fact, which would be in the face of the act. No possible mischief can arise from the parties making a race at one time, if they afterwards deliberately put the terms on paper and sign them at the same time. But if there be any length of interval between the writing and signing of the contract, a man might be entrapped by hastily putting his name to a contract, the terms of which might have escaped his recollection. It was this inconvenience which the Legislature meant to guard against, and not to destroy a written contract because it had been preceded by discussion and argument as to the terms; for such a method is calculated to prevent surprise and misapprehension. If, however, it could be shown by any induction that the written articles do not form the contract contemplated by the Legislature, but that the race is the contract, what is the consequence? It is declared to be void; but it was already a nullity, being extinguished by the subsequent specialty. So that whichever way it be taken, the party has a right to recover.

(119)

SAMPSON LANE v. WILLIAM DUDLEY.

From Craven.

1. A sells B's horse to C, and warrants his soundness. The sale is made without the privity or knowledge of B, but B accepts the purchase money, at which time he is ignorant of the warranty which A has made. B is answerable to C upon this warranty; for

2. He has accepted the purchase money and ratified the sale; and although he was ignorant of the warranty, he shall not be excused, for the authority to warrant is included in the general authority to sell; and he ought to have inquired into the terms of the sale and ascertained the extent of the liability imposed on him by his agent before he consented to receive the money.

3. If a servant borrow money in his master's name, although it be done without the master's consent, and the money come to the master's use, and by his master's assent, the master shall be charged with it.

THIS was an action on the case for a breach of warranty. William Pritchard exchanged with the plaintiff a mare of the defendant's for a horse of the plaintiff's. He was advised or directed to make this exchange by Charles Saunders, in the manner set forth in the deposition of Saunders hereafter mentioned. On the exchange Pritchard warranted the mare to be sound. Saunders had neither instructed nor forbidden Pritchard to make such a warranty, nor did he know of its being made. Dudley had given no authority whatever, either to Saunders or Pritchard, to dispose of his mare, or to make any warranty of her soundness; but he had offered a few days before to exchange the same mare with Saunders for a horse belonging to Saunders. After the exchange was made with the plaintiff the horse was taken by Pritchard to Dudley, who was then made acquainted with the exchange, but was not informed of the warranty. He was also told by Saunders that he might either have this horse thus procured from the plaintiff or the horse of Saunders, for which he had before proposed to exchange the mare. He took the horse which had been procured from the plaintiff.

Saunders, in his deposition, stated that in January, (120) 1804, the plaintiff, being at his house, asked him if he had a mare to exchange for a horse. Saunders answered in the negative, but informed him that Dudley had one which he would probably exchange, as he had offered to exchange a mare for a horse belonging to Saunders. A day or two after this conversation Saunders went to New Bern, and Pritchard borrowed Dudley's mare. He saw Pritchard, who informed him that propositions had passed between him and Lane for exchanging the mare for Lane's horse, and asked Saunders whether he should trade, and upon what terms. Saunders advised him to make an exchange, saying, if Dudley should be dissatisfied he would keep Lane's horse and let Dudley have his. At this time Saunders had not informed Dudley of Lane's proposition, nor of his remark to Lane, that he, Dudley, would probably be willing to make an exchange. He was influenced entirely by the consideration that if Dudley should disapprove of the bargain he, Saunders, could keep Lane's horse and let Dudley have his. He did not advise nor consent that Pritchard should warrant the mare's soundness; he was not present at the bargain, and Pritchard never informed him that he had warranted the

mare's soundness, nor had he any reason to suspect that such warranty would be made or required. Afterwards on the same day he saw Dudley, and informed him that he had given such authority to Pritchard, and told him that if he were displeased he, Saunders, would keep Lane's horse and let him, Dudley, have his.

The question in the case was, Whether the warranty of Pritchard bound Dudley.

TAYLOR, C. J. The distinction between a general and special agent is founded in such obvious justice, and has been so (121) often recognized as law, that the spirit of it ought to be observed, even where the parties themselves have not stated it in terms. A general agent binds the principal by his acts; but an agent appointed for a particular purpose, and acting under a circumscribed power, cannot bind the principal by an act in which he exceeds his authority. Thus, if a person keeping livery stables and having a horse to sell empower his servant to sell, but not to warrant, still the master would be bound by the servant's warranty, because he acted within the scope of his authority, and the particular restraint upon the servant ought not to affect the public. But if the owner of a horse were to send a stranger out with him, with a power to sell, but with express direction not to warrant the horse, and the stranger disobeyed this direction, the purchaser would have a remedy against him on the warranty, but not against the owner; because he invested the servant with a circumscribed authority, beyond the scope of which he had acted. According to this rule, it is clear that Dudley would not have been liable on Pritchard's warranty, if he had directed him to sell or exchange the horse, but not to warrant him. If, on the contrary, he had been silent with respect to the warranty, and had trusted that to Pritchard's discretion, it is reasonable that he should be bound by it, since it was within the scope of an authority to sell. Does not Dudley's receiving the horse procured in exchange, and thereby assenting to the contract, place the case on the same ground as if he had given Pritchard a general power to sell in express terms, and had said nothing of a warranty? "If a servant borrow money in his master's name, the master shall not be charged with it unless it come to his use, and that by his assent. And the same law is, if a servant make a contract in his master's name, the contract shall not bind his master, unless it were by his master's commandment, or that it come to the master's use by his assent. But if a man send his (122) servant to a fair or market, to buy for him certain things,

though he command him not to buy them of no man in certain, and the servant doth accordingly, the master shall be charged; but if the servant in that case buy them in his own name, not speaking of his master, the master shall not be charged, unless the things bought come to his use." Doctor and Student, 236. Dudley has, then, ratified the contract as well as the warranty made by Pritchard, by receiving the horse; and although he did not know of the warranty—his own agent concealed it from him, very improperly, it is true, as between themselves—yet such concealment ought not to affect the plaintiff, who might have been induced by the warranty to part with his property. Dudley should have inquired into the terms of the exchange and ascertained fully the extent of the liability imposed on him by his agent before he consented to receive the horse. Let judgment be entered for the plaintiff.

Cited: Mfg. Co. v. Davis, 147 N. C., 270, 1.

LEMUEL LONG v. JESSE RHYMES.

From Halifax.

By the law of this State no one has a right to the guardianship of an infant, except as testamentary guardian or as appointed by the father by deed or by the County or Superior Court. The appointment of a guardian by court is a subject of sound discretion to the court making the appointment, and another court will not rescind the appointment without perceiving that injury is likely to result from it to the person or estate of the orphan.

THE plaintiff and defendant applied to the County Court of Halifax for the guardianship of the orphan children of the late Lunsford Long, deceased. The plaintiff was the brother of the deceased, and uncle, on the father's side, to the children. No testimony was exhibited in the County or Superior Court, but the former committed the guardianship to the defendant, from which the plaintiff appealed; and the question was, (123) Who was entitled to the guardianship?

TAYLOR, C. J. By the law of this State no one has a right to the guardianship of an infant, except as testamentary guardian or as appointed by the father by deed or by a County or Superior Court. The act of 1762 regulates this subject in such a manner as to render unnecessary a reference to any prior rule.

It is a subject of sound discretion with the court making the appointment, which another will not annul without perceiving that injury is likely to result from it to the person or estate of the orphan. Neither of these parties can be said to have a right to the guardianship; but as Rhymes has been appointed, and there is no imputation against his character or conduct, nothing shown to the court inducing a belief that he may or will mismanage the estate, we must presume that the County Court has decided rightly. The appointment of Rhymes must therefore be confirmed.

JOSHUA GRAY v. JOSHUA YOUNG.

From Washington.

A gave his bond to B, promising to pay him $100 *or* a good work horse. On the day A tendered to B a good work horse, but he was worth only $30. This is not a compliance with his bond. He owed $100, and the horse which was to discharge the debt ought to have been at least equal in value to its amount.

THIS was an action of covenant, brought upon the following writing obligatory, to wit:

Fifteen months after date, we, or either of us, do promise to pay or cause to be paid unto Joshua Gray, or order,
(124) $100 currency, or a good work horse, for value received. Witness our hands and seals this 3 September, 1808.

JOSHUA YOUNG. (SEAL.)
C. LEARY. (SEAL.)

The defendant pleaded, among other pleas, *"tender and refusal,"* and the jury found that on the day mentioned in the said writing obligatory the defendant did tender to the plaintiff a good work horse, and that plaintiff refused to accept the horse; that the horse so tendered was of the value of $30 only; and whether such a tender was a performance of the covenant, they submitted to the court.

TAYLOR, C. J. The evident intention of the parties, as well as the justice of the case, cannot be mistaken. The bond could have been satisfied only by the payment of $100 or the delivery or tender of a horse of that value, and requires the same con-

struction as if the debtor had promised to pay $100 in a horse or any other specific property. The value in property which he is bound to pay is to be measured by the amount of the debt, and must be at least equal to it. The contract might have been susceptible of a different construction if the money had been inserted in the nature of a penalty; but there is nothing in the instrument where such an inference can be derived. Judgment for the plaintiff.

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(125)

PETER BROWN v. SAMUEL BEARD.

From Rowan.

A, being seized of a house and lot in town, and also of two tracts of land, devised that his executors should sell one of the tracts of land and his house and lot in town for the purpose of paying his debts; that his widow should have the other tract during her life, and at her death that should be sold and the money arising therefrom be equally divided among his children then living. The executors sold one of the tracts, but not the house and lot; and one of them dying, the survivor sold part of the other tract: *Held*, that this last sale was void, because the executors had by the first sale executed the power devolved on them by the will. One tract being sold to pay debts, the other was to be reserved for the children.

THIS was an action of trespass *quare clausum fregit,* to which the defendant pleaded "the general issue" and *"liberum tenementum."* Michael Moor being seized of the lands in question, made his will duly executed to pass his real estates, wherein he devised as follows, to wit: "I devise that my executors may (so soon as they can conveniently and to advantage) sell my dwelling-house in town, together with the 170 acres of deeded land adjoining Barbarie's land, out of which they must pay off the remainder of my debts, should any remain; and any balance that should remain, after paying my debts, I desire the same may be disposed of in the best manner, at the discretion of my executors, for the advantage of my children. Item: Should it not be in the power of my executors to sell the house and land before mentioned, then my desire is that they sell the tract of land I bought from Frederick Getzcha, to be employed in manner before mentioned; but I should rather wish the first to be sold. Item: Whichever of the premises remains unsold, my will is that my wife shall have the same during her widowhood. At her marriage or death I devise the

same to be sold to the best advantage, and the money arising from the sale thereof to be equally divided among all my (126) children that shall then be alive." The testator appointed Susannah Moor and Gasper Kinder executrix and executor of his will, who qualified and undertook its execution. Some time after the death of the testator the executors sold the tract of land which the testator purchased from Frederick Getzcha; and many years afterwards Susannah Moor, then the surviving executrix, sold to Peter Brown, the plaintiff, the land in controversy in this case, to wit, twenty-two acres of the Barbarie tract, and executed to him a deed. Brown entered and took possession of the land. Some time afterwards Susannah Moor, the widow, died, and the children of Michael Moor, claiming the land after her death, sold and conveyed the same to Maxwell Chambers, under whom the defendant entered and cut down the trees complained of by the plaintiff in his declaration. It was submitted to the Court to decide whether the deed made by Susannah Moor to the plaintiff passed an estate in fee or for life only: if in fee, judgment to be entered for the plaintiff; if for life only, judgment to be entered for the defendant.

TAYLOR, C. J. The widow could convey only a life estate in the land she sold to Brown, because she and the other executor had previously executed. The power devolved on them by the will of selling one tract. It is true, they did not sell the house and land which the testator desired to be sold in the first instance; but the direction to that effect is not peremptory, and if they found that inconvenient to be done, they were at liberty to sell the land bought of Getzcha. But one tract being sold, and it is immaterial which, the other ought to have been reserved for the uses of the will. The widow had but a life estate in it, and on her death it should have been sold to the best advantage for the use of the children. Judgment for the defendant.

(127)

ADMINISTRATORS OF GRIFFITH J. McCRAE v. THOMAS ROBESON.

From New Hanover.

Upon the settlement of a copartnership account between A and B, it appeared that a loss had been sustained whilst the business was under the exclusive management of B, who could not satisfactorily explain how the loss had accrued. They referred the case to arbitrators, who awarded that the loss should be equally divided between A and B, as there was no proof of fraud on the part of B, whom they examined on oath. Award excepted to, (1) because it was wrong in principle; and (2) because the arbitrators had permitted B to purge himself of the charge of fraud by examining him on oath. Exceptions overruled.

THIS was a bill filed for the settlement of a copartnership account; and the principal question made in the case was, Whether, as a loss had been sustained whilst the business was under the exclusive management of the defendant, and he could not satisfactorily explain how the loss had accrued, and it appearing that he had acted fairly and honestly, the loss should be divided or borne entirely by the defendant. The complainants' intestate and the defendant entered into a copartnership agreement in writing, on 27 October, 1800, for the purpose of carrying on the business of retailing merchandise in the town of Wilmington. In this agreement, among other things, it was stipulated that after deducting store expenses and clerks' hire, the profits arising from the business should be equally shared between them; but there was no stipulation relative to losses by deficiencies or in any other way. The defendant managed and directed the partnership, solely, and had the property employed therein in his sole care and trust. One Timothy Bloodworth was employed in the business as storekeeper and clerk, was intrusted with the care of retailing goods, and generally made the first entries in the books. He deposed that the goods sold by retail were charged with the customary profit. He further swore that the store was broken open and money (128) stolen to the amount of about $73. It appeared from the cash account that more money had been paid away than had been received; and how this had happened could not be explained. It further appeared that in the course of the business merchandise had been purchased and furnished at wholesale prices to the amount of $8,536; that merchandise was sold at retail prices to the amount of $5,170, and that goods remained on hand at the time of the dissolution of the partnership by the

death of McCrae to the amount of $1,463, at wholesale prices, leaving a deficiency of $1,902. The defendant could not show how this deficiency happened.

The master, in his report, not only charged the defendant with this deficiency, but with one-half of the usual profit on the capital stock, after deducting the amount remaining on hand at the dissolution of the partnership, on the ground that the business had been under his exclusive management.

Upon the coming in of the master's report the parties agreed to refer the entire case to Richard Bradley and William Giles, and that their award should be a rule of court. The arbitrators examined the defendant upon oath as to the loss which the partnership had sustained, and he declared that he was entirely unable to account for it. They made the following award, to wit:

"It appears that commercial business was conducted on account of the complainants' intestate and the defendant, from February, 1800, without any particular articles, until October of the same year, when the terms on which their said concern should be conducted were specified in a deed signed and sealed by the parties, having, in its operation, relation back to the commencement of the copartnership. It appears that on closing the said copartnership concern, at the death of complainants' intestate, a loss appeared; and the point in dispute between the parties is whether this loss arising from the business of said concern should be wholly sustained by the defendant, or be divided between him and the complainants.

"To decide this point correctly, it seems to us that a recurrence should be had to the general principles of the laws relative to copartnerships, as they may appear modified, extended (129) or limited in their operation by the deed of the parties regulating their particular copartnership. This deed excludes the general principles operating on copartnership concerns only (1) as to the articles wherein they were to deal, and (2) that either party crediting out any part of the property of the copartnership should become individually responsible for the amount thereof. It does not seem to us that on either of these points any complaints or claims can be made against the defendant, he having taken upon himself to account for all the debts on the books of the concern.

"Whenever profits are to be equally divided, it is always implied that losses are to be sustained in the same proportion. It is not to be presumed, and it does not appear from any evidence before us, that the defendant guaranteed the success of

the concern, nor that he in any way became responsible for the integrity of their clerks and servants. It was well known to the complainants' intestate, at the forming of the copartnership, that the defendant, being employed in his office as deputy collector of the port, would appropriate but a very small portion of his time to their mercantile concerns, and ought to have been aware of the risk of loss that would naturally attach to business so conducted. If he overrated the abilities, industry or carefulness of the defendant, as we are not possessed of any evidence of fraud on his part, and he having purged himself thereof on oath before us, it is not for us to remedy the effect of his imprudence, by overturning every principle of law, justice and common sense. We are therefore of opinion that the loss arising from the business should be equally sustained by the parties."

The following exceptions were filed to this award: 1. That the award was improper, in making the complainants sustain a loss on the business, which was under the special management and direction of the defendant, and which could have arisen only from the gross negligence or irregular conduct of the defendant. 2. That the arbitrators received and acted upon the affidavit of the defendant himself, and from the facts sworn to by him undertook to discharge him from his legal accountability.

The case was sent to this Court upon these exceptions; and the judges were divided in opinion upon the first exception.

HALL, J., delivered the opinion of a majority of the (130) Court. If the fact really was as is set forth in the first exception, that the award made the complainants' intestate sustain a loss on the business whilst under the special management of the defendant and occasioned by his mismanagement, it would seem to be inequitable; but the referees do not admit that to have been the fact. They direct the loss to be divided, because from the books, documents and testimony adduced it did not appear to have been occasioned by the misconduct of any one of them. They were not bound by the master's report nor opinion; they had a right to exercise their own judgments and draw their own conclusions from all the facts of the case before them. They profess to be governed by the principles of law arising out of the case; and in this respect they seem not to have been mistaken. If they had been, it would be a good reason for setting aside their award. All the facts of the case were laid before them; if they acted honestly (and the contrary

is not presumed), although the opinions which they formed might be different from the opinions of others formed upon the same evidence, that is no reason for setting aside their award. The first exception must therefore be overruled. As to the second exception, it is only necessary to remark that arbitrators have great latitude of discretion; they are not bound down by the strict rules of law. Besides, courts of equity, in settling disputes like the present, frequently direct a party to the suit to be examined on oath. Nothing more is stated to have been done by the arbitrators by this exception; and the exception must be overruled.

TAYLOR, C. J., *contra*, as to the first exception.

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(131)

EDWARD JONES v. MARTHA HILL.

From Franklin.

The security to a bond for an injunction is liable, whether the injunction be dissolved on the merits, or in consequence of the death of complainant, or of his negligence in suing out process in due time. For the act of 1800, ch. 9, requires complainants in equity, who obtain injunctions, to enter into bond with security conditioned for the payment of the sum complained of upon the *dissolution* of the injunction. The word *dissolution* is used in a general sense, and includes every case where, on account of anything whatever, the injunction is dissolved.

THE plaintiff having recovered a judgment against Henry Hill, as special bail of one Perry, Hill obtained an injunction to stay proceedings at law, and gave bond with Martha Hill his security. The bond was in the form in which injunction bonds are usually taken. Jones, the plaintiff at law, filed his answer, but before the hearing of the case upon bill and answer, Henry Hill, the complainant, died, and the suit abated. Jones then brought this suit on the injunction bond, against Martha Hill, the security; and it was submitted to the Court, Whether the suit could be maintained. If it could, judgment to be entered for the plaintiff; if it could not, judgment of nonsuit to be entered.

TAYLOR, C. J. Laws 1800, ch. 9, requires complainants in equity, who obtain injunctions, to enter into bond with security conditioned for the payment of the sum complained of,

upon the dissolution of the injunction. The bond given in this case is within the very terms of the act, and the question is, whether the security is liable, the injunction not having been dissolved on the merits, but in consequence of the death of the complainant. As the act uses the term *dissolution* in a general sense, it would not be consistent with the ordi- (132) nary rules of construction to restrain the meaning to a dissolution on the merits, unless it could be shown that such only were within the meaning of the Legislature, or that no others were within the mischiefs intended to be guarded against. An abatement arising from the negligence of the complainant in not suing copies and process in due time would seem to be clearly within the meaning of the law, when the injunction is dissolved in consequence of such negligence; and this shows, at least, that the security undertakes something more than that the complainant shall substantiate his equity. To proceed a step further: the interposition of the security prevents the plaintiff from enforcing his judgment at law, which he might have done, notwithstanding the death of the defendant; by the security's means he has lost the power of recovering the debt from the defendant or his estate. Ought not the security, then, to indemnify him? Where an appeal is taken from the County to the Superior Court, the condition of the bond is not more obligatory than in the present case, yet the abatement of the suit by the death of the appellant and defect of revival could scarcely be thought a reason for discharging the security from the bond. If the equity of the bill could have been supported, it might have been done by obtaining administration on the complainant's effects, and prosecuting the suit; and no one was so much concerned to do this as the security. She has not thought proper to take this step. At all events, the creditor ought not to lose his debt because it has not been done. Judgment for the plaintiff.

Cited: Collier v. Bank, 21 N. C., 329.

(133)

JOHN ROBERTSON v. ROBERT DUNN.

From Wake.

If it appear doubtful from the face of an instrument whether the person executing it intended it to operate as a deed or a will, it is proper to ascertain the intention of such person, not only from the contents of such instrument, but also from evidence showing how such person really considered it.

THE only question in this case was, Whether the following was to be considered as a testamentary paper, or a deed of gift. The paper was written by Joseph Fowler, at the request of Lucretia Robertson, who told him at the time she wished him to write a deed of gift. After she had signed it and it had been attested, she requested one of the witnesses to attend at the next court and prove it, that it might be recorded; and she said at the time that none of the persons to whom she had given any of her property were to have it until after her death.

To all to whom these presents shall come—Greeting:

Know ye, that I, Lucretia Robertson, for and in consideration of the natural love and affection which I have and bear for my beloved children hereafter named, (1) I give and devise to my son Needham Robertson one negro man Essex, one negro girl named Martha, two feather beds, steads and furniture, and one horse, to be possessed after my death. (2) I give to my daughter Nancy Dunn one negro man named Mason, one feather bed and furniture, to be possessed after my death. (3) I give to my son Thomas Robertson one negro girl named Charity, to be possessed after my death. (4) All the rest of my estate that I may die possessed of, I give to my three sons, Christopher, Herbert and John Robertson. In witness whereof, I have hereunto set my hand and seal, this 16 January, 1805.

LUCRETIA ROBERTSON. (SEAL.)

Teste: JO. FOWLER,
LEO'D COOKE.

HALL, J. If it appear doubtful from the face of an instrument whether the person executing it intended it to oper-
(134) ate as a *deed* or a *will*, it is proper to ascertain the intention of such person, not only from the contents of such instrument, but also from evidence showing how such person really considered it. Powell on Devises, 12, and the cases there cited. In the first part of the instrument before us, Lu-

cretia Robertson gives to her son Needham several articles, which, however, she directs he shall not be possessed of until after her death. In the second clause she gives other articles to her daughter Nancy, with a similar direction; and in the third clause the same precaution is used. All this precaution would be useless in a will, which cannot take effect until after the death of the testator. In the fourth clause she gives all the rest of her estate that she may die possessed of to three of her other children. There is nothing in this clause indicative of the way in which she intended the instrument to operate; for whether the property given by it be a gift or a legacy, its quantum is referable to her death, and cannot be ascertained before. It is to be observed, however, that in the first part of the instrument she expresses that the gifts are made in consideration of love and affection for her children, which expression would be unnecessary in a will. She appoints no executors, nor does she use any words commonly used in last wills, except in the first clause, where she uses the word *devise*. Nothing more than this slight circumstance can be collected from the writing itself evidencing a disposition in her to make a will. But when we reflect upon the testimony adduced to show what she herself considered she was doing, there can be little doubt. She called upon one of the witnesses to write her a *deed of gift*, and directed him to have it recorded at the next court, which she would not have done had she believed she was making her will. The person who wrote it considered it to be a deed of gift. From the evidence furnished by the deed itself, as well as from that produced to show the light in which she herself viewed the transaction, the instrument must be considered as a deed, and not as a testamentary paper. (135)

Cited: Davis v. King, 89 N. C., 446; *Egerton v. Carr*, 94 N. C., 653.

STATE v. JAMES NICHOLSON.

From Franklin.

The overseer of a road is subject to indictment if he neglect to keep signboards, as directed by the act of 1784, ch. 14.

THE defendant was indicted for not keeping up a signboard as overseer of a road; and it was submitted to the Court whether the offense was indictable.

HALL, J. Laws 1786, ch. 18, declares, "that all offenses committed or done against the purview of the act of 1784, ch. 14, shall thereafter be prosecuted by indictment in any court having cognizance thereof. Particular penalties were, by the act of 1784, inflicted upon persons who committed the offenses mentioned in that act. It is not necessary to inquire whether any of these offenses were indictable before the act of 1786; if doubts existed, they were removed by that act. The acts of 1784 and 1786, so far as they relate to the present subject, must be considered as one act. The construction proper to be given to them will resemble that which is given to a statute by which particular offenses are created and particular remedies are pointed out, but in which, as to such offenses, there is a substantive prohibitory clause. There is no doubt that an indictment would lie on such prohibitory cause. The present case is much stronger, for assimilating the act of 1786 to such prohibitory clause, it gives the indictment in express terms. The Legislature probably considered that the penalties given by the act of 1784 were not sufficiently severe to deter persons (136) from committing the offenses therein mentioned, and intended to give to the court a power to punish such offenses at discretion, when convictions should take place upon indictments. The latter part of the section of the act of 1786 declares that "all forfeitures shall be recovered by action of debt, etc., one-half to the use of the prosecutor, the other half to the use of the State, unless the same have been otherwise provided for by the said act." These latter words, on which so much reliance has been placed by the defendant's counsel, refer to forfeitures altogether, and not to offenses committed against the purview of the act of 1784, as spoken of in the first part of the section. Let us, however, consider them as having such reference; then the meaning will be that where an offense created by the act of 1784 is provided for, or, in other words, where a penalty is inflicted upon any person who may be guilty of it, an indictment will not lie; but had it not been provided for by such penalty, an indictment would lie. But it ought to be remembered that if particular penalties had not been given by the act of 1784, an indictment would have lain on such act without the aid of the act of 1786; and this latter act can only operate in this particular to give the indictment where, probably, it would not lie before; that is, to subject to indictment offenses to which particular penalties were annexed by the act of 1784. But if the concluding words of such section be considered as referable to forfeitures only, a plain meaning can be given to them; for it is obvious that some of the forfeitures

mentioned in the act of 1784 had been particularly appropriated, and some had not. On the latter those concluding words of the section were intended to operate. Judgment for the State.

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(137)

SUSANNAH NICHOLS v. THOMAS CARTWRIGHT.

From Pasquotank.

A by deed "lent to his sister B a negro slave and her increase, during her natural life, and at her death gave the said slave and her increase unto the heirs of his said sister, lawfully begotten of her body, forever": *Held*, that the slave vested absolutely in B.

HOLLOWAY SAWYER, by deed executed on 20 January, 1798, conveyed, in consideration of love and affection, to his sister Absala Sawyer, as follows, to wit: "I lend to my sister, Absala Sawyer, the use and labor of my negro girl Lidda and her increase, during her natural life, and at her death I give the said girl and her increase unto the heirs of my said sister, lawfully begotten of her body, forever." The question submitted to the court was, whether Absala Sawyer took the absolute estate in the negro girl Lidda, or an estate for life.

TAYLOR, C. J. A rule applied to chattels is, that where a remainder is limited by such words as if applied to realty would constitute an estate tail, the person to whom it is given takes the property absolutely. The deed before us does not permit a doubt as to the intention of the maker, for the words are precisely such as would amount to an estate tail in real property. Absala Sawyer is to take the use and labor of the slave and her increase during her natural life, and at her death they are to go to the heirs of her body lawfully begotten. This is exactly the way in which an estate tail in lands would subsist, the tenant having it in his power to defeat his issue only by a fine and recovery, or lineal warranty with assets. From the whole tenor of the deed the legal construction is that Absala Sawyer took the negro girl absolutely.

Cited: Morrow v. Williams, 14 N. C., 264.

(138)

WILLIAM DREW, ASSIGNEE, ETC., v. ADMINISTRATOR OF JONATHAN JACOCKS, DECEASED.

From Halifax.

A bill of exchange drawn by B on C, in favor of D, was protested for nonacceptance. D wrote on the bill, "Sent to F to collect for D." This is such an indorsement as will enable F to maintain an action against B in his own name as indorsee. But the indorsement being for a special purpose, F cannot transfer the bill to another person, so as to give to that person a right of action against D, or any of the preceding parties. The indorsement confines the bill in the hands of the indorsee to the very purpose for which the indorsement was made.

A BILL of exchange was drawn by defendant's intestate on Samuel Jackson, of New York, in favor of Conway and Fortune Whittle, and protested for nonacceptance. On the bill there was an indorsement in the words following, to wit: "Sent to William Drew, Esq., to collect for Conway and F. Whittle." This action was brought by William Drew as indorsee; and it was submitted to the court, whether the indorsement transferred the interest to William Drew so as to enable him to maintain an action in his own name against the drawer.

TAYLOR, C. J. No particular form of words is necessary to make an indorsement; but the name of the indorser must appear upon the bill, and it must be signed by him or by some person authorized by him for that purpose. Indorsements, however, are of two kinds, general and restrictive, the latter precluding the person to whom it is made from transferring the instrument over to another, so as to give him a right of action, either against the person imposing the restriction or against any of the preceding parties. Such an indorsement may give a bare authority to the indorsee to receive the money for
(139) the indorser; as if it say, "pay the money to such a one for my use," or use any expressions which necessarily imply that he does not mean to transfer his interest in the bill or note, but merely to give a power to receive the money. This is the case before us. It is evident, from the indorsement, that William Drew paid no valuable consideration for the note, and therefore could not sue the indorsers, nor indorse it to any other person who could sue either them or the preceding parties. The indorsement is restrained to him merely, and is to the same amount as if it had been, "pay the within to my use," or "I indorse the within to William Drew to collect for me."

These indorsements confine the bill in the hands of the indorsee to the very purpose for which they were made, the indorser not meaning either to make himself liable or to enable the indorsee to raise money on the bill. The action in this case can well be maintained in the name of William Drew.

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(140)

JACOB PERRY, ADMINISTRATOR, ETC., v. JACOB RHODES AND OTHERS.

From Hertford.

1. A bequeathed "all his movable estate, excepting his negroes, to his wife, till his youngest daughter arrived to the age of twenty-one years, and then to be equally divided among his wife and daughters. And as to his negroes, he directed them to be hired out annually till his youngest daughter attained the age of twenty-one, and that his wife should have the money arising from their hire till that time, when they and their increase were to be equally divided among his wife and daughters." One of the daughters died before the youngest of them attained the age of twenty-one years: *Held*, that her representative was entitled to a distributive share of the negroes, for the right vested immediately, and the enjoyment thereof only was postponed.

2. The general rule in cases of legacies charged upon personalty is, that if the legatee die before the day of payment, his representative becomes entitled to the legacy, unless the will shows a manifest intention to the contrary; and there is an established distinction between a gift of a legacy to a man at, or if, or when, he attains the age of twenty-one, and a legacy payable to a man at, or when, he attains the age of twenty-one. In the first case the attaining twenty-one is as much applicable to the substance as to the payment of the legacy, and therefore the legacy lapses by the death of the legatee before the time. In the last case the attaining twenty-one refers not to the substance, but to the payment of the legacy, which therefore does not lapse by the death of the legatee before the time.

THE question in this case arose upon the following clauses of the last will of Hardy Witherington, deceased, to wit:

"I give and bequeath all my movable estate, excepting negroes, of every kind, first to my loving wife, Arcadia Witherington, till such time as my youngest daughter comes to be of the age of twenty-one years, and then to be divided equally among my loving wife and daughters, Arcadia Witherington, Anne Witherington, Jane Witherington, Mary Witherington,

and Lucy Witherington, to them, their heirs and assigns, forever." "And my will is that my executors hire out all my said negroes yearly, till such time as my youngest daughter comes of the age of twenty-one years, and the money arising from said hire I give to my wife, Arcadia Witherington, to her and her heirs and assigns, forever. And my will is that at such time as my youngest daughter comes of the age of twenty-one
(141) years all my said negroes, and their increase, be equally divided among my wife, Arcadia Witherington, Anne Witherington, Mary Witherington, Jane Witherington and Lucy Witherington, to them, their heirs and assigns, forever."

Jacob Perry, the complainant, married Jane Witherington, one of the daughters, and she died before Lucy, the youngest daughter, arrived to the age of twenty-one years. Perry took out letters of administration on the estate of his deceased wife, and brought this suit, claiming a distributive share of the negroes; and it was submitted to the court, whether he was entitled to such share.

TAYLOR, C. J. The substance of the bequests contained in this will is that all the testator's personal property should be divided amongst his wife and daughters, when the youngest of the latter attained the age of twenty-one years. But in the meantime he gives all his movable property to his wife, except his negroes, which he directs his executors to hire out yearly, and to pay the money arising from their hire to his wife. To give the hire of the negroes to his wife till that period is to give her all the beneficial interest in them, and will warrant the same construction upon the whole will as if the exception had not been introduced. In principle, then, the case cannot be distinguished from *Conlet v. Palmer,* 2 Eq. Ca. Ab., pla. 27, where J. S. bequeathed his personal estate to his wife for life, and gave several particular legacies after her death, and then declared that the residue, at her decease and after the legacies paid, should be divided among his relations, A, B, C, and E. A and B died in the lifetime of the wife, and after her decease the administrators of A and B had a decree for their shares; for, by the Chancellor, "The time of payment is future, but the right to the legacies vested upon the death of the testator." The general rule resorted to in cases of legacies charged upon personalty is, that if the legatee die before the day of
(142) payment, his representatives become entitled to the legacy, unless the will shows a manifest intention to the contrary; and the court proceed upon an established distinction between a gift of a legacy to a man at, or if, or when, he attains

the age of twenty-one, and a legacy payable to a man at, or when, he attains the age of twenty-one. In the first case the attaining twenty-one is held to be as much applicable to the substance as to the payment of the legacy, and therefore the legacy lapses by the death of the legatee before the time. In the last case the attaining twenty-one refers not to the substance, but to the payment only, of the legacy, which therefore does not lapse by the death of the legatee before the time. In this case, the division of the property amongst the wife and children is not annexed to the substance of the legacy, but to the period of the youngest daughter attaining the age of twenty-one years. This prescribes the time of enjoyment, but the right vested immediately upon the testator's death. The intermediate interest is given to the wife, doubtless with a view to the benefit of the children as well as herself; and it has been held that where the intermediate interest is given, either to a stranger or to the legatee himself, such a case forms an exception to the distinction which has been stated, because it explains the reason why the time of payment or division, as in this case, was postponed, and is perfectly consistent with an intention in the testator that the legacy should immediately vest. The consequence of a different construction would be that if any of the daughters died leaving children, before the youngest daughter came of age, those children would be wholly unprovided for; which certainly was not the intention of the testator.

Cited: Giles v. Franks, 17 N. C., 522; *Hathaway v. Leary,* 55 N. C., 266; *Fuller v. Fuller,* 58 N. C., 225; *Sutton v. West,* 77 N. C., 432; *Hooker v. Bryan,* 140 N. C., 405.

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(143)

JOHN SCOTT'S EXECUTOR v. JORDAN HILL, LATE SHERIFF OF FRANKLIN.

From Halifax.

A having recovered a judgment against B, sued out a writ of *fieri facias*, which the sheriff levied upon two negroes, and returned his levy on the execution. A then sued out another *fi. fa.* instead of a *venditioni exponas: Held*, that A, by suing out a *fi. fa.* after the return of the levy, discharged the levy, and was not entitled to a distringas against the sheriff to compel him to sell the negroes.

SCOTT *v.* HILL.

THIS was a motion for a distringas to issue to compel the defendant to expose to sale two negroes, Anaca and Clary, and one bay horse, theretofore levied on by him, in virtue of an execution of Joseph Scott, assignee, etc., against Durham Hall and William Brickell. The motion was founded on the following facts, viz.: Joseph Scott obtained judgment against Durham Hall and William Brickell, in Franklin County Court at June term, 1792; a *fi. fa.* issued to September term, which was returned by the sheriff, "stayed by plaintiff's attorney." Another *fi. fa.* issued to December term, on which the sheriff returned that he had "levied execution upon two negroes, Anaca and Clary, and one bay horse, and that he had not sold for want of bidders." Instead of suing out a *venditioni exponas,* commanding the sheriff to sell the property levied on, the plaintiff sued out to March term a writ of *fi. fa.,* which the sheriff returned "stayed by plaintiff's attorney." Another *fi. fa.* was sued out to June term, which the sheriff returned "levied on two negroes, Anaca and Clary, two head of horses, etc., not sold, for want of bidders." A writ of *venditioni exponas* was issued to September term, on which the sheriff returned "no sale for want of bidders." Another *venditioni exponas* was issued to the next term, which was stayed by plaintiff's attorney, and then a writ of *fi. fa.* was issued, which was levied on some property of the defendants, and a sale being made, the property sold for ten cents only. The plaintiff then sued out a *venditioni ex-*
(144) *ponas,* commanding the sheriff to sell the negroes Anaca and Clary, and the bay horse, first levied on; and in the meantime, J. Foster having been appointed sheriff, he returned on this writ, that "no such property was to be found." Whereupon a motion was made, that a *distringas* issue to compel Jordan Hill, the late sheriff, who had levied on the two negroes and the horse, to sell the same; and whether such a motion should be allowed was referred to this Court.

TAYLOR, C. J. It may be laid down as a principle that a levy may be discharged by the act of the plaintiff. There are authorities to that effect, and the law may be considered as settled. When one *fi. fa.* is issued against the property of the defendant, it ought either to be satisfied or discharged before another is sued out; otherwise, a plaintiff might wantonly harass a defendant by multiplying executions, and sending them to different places, and levying to an amount greatly beyond the debt. The two executions in this case are incompatible with each other, and both cannot subsist at the same time. The first ought to have been proceeded on and its final event known be-

fore a second was ordered. The suing out of the second must be considered as a dereliction of the first; for it is to be presumed that a second would not have been ordered by the plaintiff's attorney if he meant to proceed on the first. It would be an extreme hardship upon the sheriff to distrain him to proceed on an execution which the plaintiff himself has abandoned by every act short of a positive discharge.

Cited: Smith v. Spencer, 25 N. C., 264.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1812.*

GALES v. BUCHANAN & POLLOK.

From Wake.

A gives his bond to B for $1,000, payable six months after date, with interest from the date on so much of said bond as should remain unpaid at the end of sixty days, after the said bond became payable. This interest is secured by way of penalty, and equity will relieve against it; and where such interest has been paid, equity will decree it to be refunded.

THIS was a bill filed in the Court of Equity for Wake County against Buchanan & Pollok, merchants, of the town of Petersburg, in Virginia. The complainant charged that on or about 12 July, 1804, Robert Johnson and Robert Fleming, merchants, trading under the name and firm of Johnson & Fleming, with Andrew Fleming, Henry Hunter and complainant, their securities, gave three several writings obligatory to one Jacob Mordecai, who, before either of the said writings obliga- (146) tory became due, assigned them to the defendants. That Johnson & Fleming made large payments towards the discharge of these bonds, and that defendants had failed to apply those payments as in good conscience they were bound to do, and had instituted suits in Hillsboro Superior Court against complainant, on two of the said bonds, and had recovered judgments for larger sums than in equity were due to them, complainant being ignorant, at the time of the trial, of the amount of payments made to defendants by Johnson & Fleming. The first bond was to secure the payment of $2,000 on or before 20 April, 1805; the second bond was to secure the payment of $1,662.38 on or before 20 October, 1805; and the third bond was to secure the

*The Honorable LEONARD HENDERSON, Esquire, was prevented by indisposition from attending at this term.

payment of the said sum on or before 1 March, 1806. In each bond the obligors bound themselves "to pay interest, from the date of the bond, on such part thereof as should remain unpaid at the end of sixty days after the said bond became payable." Johnson & Fleming having failed to discharge the first bond within sixty days after it became due, were required by defendants to pay interest from the date of the bond upon the sum remaining due at the end of the said sixty days; and such interest had been satisfied to defendants out of the moneys paid to them by Johnson & Fleming, and the balance of such moneys, only, carried to the credit of the second and third bonds, upon which complainant had been sued; and these being penal bonds, judgments had been rendered for the penalty in each, and complainant charged that defendants threatened to sue out their executions and cause to be raised the interest attempted to be secured by the said bonds. The complainant prayed for an injunction as to this interest, and that defendants might be decreed to come to an account for the moneys paid to
(147) them by Johnson & Fleming, and give credit to complainant for the amount of interest which they had improperly received upon the first bond.

An injunction was granted, and the defendants having filed their answer, the cause came on to be heard upon the bill and answer, when the following question was made and ordered to be sent to this Court, to wit, Whether interest on the three bonds mentioned in complainant's bill, or on either of them, shall be computed from the time they bear date, or from the time they were made payable.

LOWRIE, J. The question submitted to us in this case is simply this, whether the interest secured by the bonds and to be paid from the dates thereof, on such sums as should remain unpaid sixty days after each bond became due, was so secured by way of penalty or not. And the Court think that such interest was so secured by way of penalty, and that a court of equity ought to relieve against it. This is like the case of *Orr v. Church*, 1 Hen. Bl., 227. It is true that the word *penalty* is there inserted in the bond; but we think that makes no difference. The principle in both cases is the same. In this case, as well as in that, the interest was only demandable on the failure of the obligors to pay at the day. Had the principal of the bonds been paid on the day on which they became due, or within sixty days thereafter, such interest would not have been demandable by the terms of the contract; hence it could only be demanded as a penalty for nonperformance. The obligors

wanted no interest until the days of payment mentioned in the bonds and the clauses securing the interest were inserted to insure punctuality. It is the peculiar province of a court of equity to relieve against penalties. We, therefore, think that the injunction should be made perpetual as to the interest which by the terms of the contract accrued on the two bonds on which complainant hath been sued, from the date of the (148) said bonds up to the time when they respectively became payable; and that defendants come to an account for the moneys paid to them by Johnson & Fleming, and that complainant be credited with the amount of interest which they have improperly received upon the first bond.

WEST AND WIFE v. DEVISEES OF HATCH.

From Craven.

A being seized of lands in fee, devised a certain interest therein to his widow, and the rest of his real estate he devised to B. At the death of A crops were growing on the lands devised to B, and by him were gathered. The widow dissented from the will, and filed her bill against B for her dower and for an account of the profits of the lands, to be allotted to her for dower, from the death of the devisor. It being ascertained that the provision made for the widow under the will was not equal to the dower to which she would be entitled in case of the intestacy of her husband, her dower was allotted to her. But the court refused to call B, the devisee, to an account for the profits, on the ground that as in case of her husband dying intestate the crop growing would belong to the administrator, and be assets to be distributed under the statute of distributions, so she, having dissented from the will and claimed dower, the crops growing belonged to the executor, and constituted part of the personal estate, of which the widow was entitled to a distributive share.

THIS was a case agreed, sent to this Court from the Court of Equity for CRAVEN. The case stated that Lemuel Hatch, being seized in fee of lands, devised an interest therein to his widow, one of complainants, and the residue of his real estate to defendants. At the death of the devisor there were crops growing upon the lands devised to defendants, which not being included in any other devise or bequest, were gathered by them. The widow dissented from the will, and filed this bill (149) against the devisees for her dower, and for an account of the profits from the death of the devisor. It had been ascer-

tained, by proceedings under the authority of the Court of Equity, that the provision made for the widow under this will was not equal to the dower to which she was entitled by law, and her legal dower had been allotted to her and she had been put in possession thereof. The case was referred to this Court to decide, whether the crops growing on the lands devised to defendants at the death of the devisor, and gathered by them, were to be brought into the account of profits of the land for the benefit of complainant; and, if so, whether the said profits shall be subjected to such claim in the hands of defendants, or are to be considered personal property and to be included in the estimate of assets, of which the widow is entitled to a share, and to be paid by the executors from the assets in their hands. Complainants admitted that there were assets of the devisor in the hands of the executors, more than the value of the said growing crops.

HALL, J. We think the property in question is not to be considered profits of the dower lands for the exclusive benefit of the complainants, but personal property, and to be included in the assets of which the widow is entitled to share under the statute of distributions. As the widow thought proper to dissent from the will of her husband (which the law permitted her to do), and as she has had lands allotted to her for her dower, she can derive no greater benefit from those lands than she could have done in case her husband had died intestate, in which case the crops growing on the land would have gone to the administrator, and not to the heirs, and would have been considered part of the personal estate of the deceased, of which the widow would have been entitled to a distributive share.

(150) So in the present case the crops are to be considered part of the personal estate of Lemuel Hatch, and consequently are to be brought into view by the executor in the settlement which shall take place under the statute of distributions between him and the complainants.

JONES AND OTHERS v. JONES AND OTHERS.

From Granville.

1. Lands advanced to a child in the lifetime of the parent are not to be brought into account in the settlement and distribution of the personal property of the parent after his death.

2. The act of 1766, ch. 3, on this subject is repealed by the act of 1784, ch. 22. The act of 1766 compelled all the children, *except the heir at law*, to bring into account in the settlement and distribution of the personal estate of the parent the lands advanced to them by the parent. The act of 1784 abolished the right of primogeniture, and gave the lands to all the sons equally; and the act of 1795 raised the daughters to a level with the sons in the inheritance. So that since 1795 *all the children* compose the heir at law, which the eldest son did under the act of 1766, and all are of consequence within the exception of that act; and whether this act be considered as repealed or not, by the act of 1784, the consequence is the same. For, as under the act of 1766 the eldest son was not bound to bring into account in the settlement of the personal estate of the parent lands advanced to him by the parent, so under the acts of 1784 and 1795, all the children being placed in the same condition as to the inheritance with the eldest son, none of them are bound to bring into account lands advanced to them.

THIS was a petition for distribution. The father of the parties, petitioners and defendants, in his lifetime, gave land to part of his children, and died intestate in 1803, seized of real estate and possessed of personal property. It was referred to this Court to decide whether the lands so given should be brought into account in the settlement and distribution of the personal property. And upon this question *Taylor, C. J.*, dissented from the opinion of the other judges.

LOCKE, J. The decision of the question in this case (151) depends entirely upon the construction of the several acts of Assembly relative to the estates of deceased persons, and it will be necessary to review those acts. By the act of 1766, ch. 3, the personal estate of an intestate is directed to be distributed as follows: "one-third part to the wife of the intestate, and all the rest in equal portions to and among the children of such person dying intestate, and such persons as legally represent such children, in case any of the children be then dead, other than such child or children (not being heir at law) who shall have any estate by settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be

allotted to the other children to whom such distribution is to be made. And in case any child (other than the heir at law) who shall have any estate by settlement from the intestate, or shall be advanced by the said intestate in his lifetime, by portion not equal to the share which shall be due to the other children by such distribution aforesaid, then so much of the surplus of the estate of such intestate to be distributed to such child or children as shall have any lands by settlement from the intestate or were advanced in the lifetime of the intestate as shall make the estate of all the said children to be equal as near as can be estimated; but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate." This being the first act passed on the subject, and the only one which seems to blend the real and personal estates together (with the exception of the heir at law), it is necessary to inquire, (1) whether the subsequent acts directing the distribution of personal and the descent of real estates (152) have not repealed all the provisions of this act, and (2) whether, if they have not, all the children being by subsequent acts entitled to an equal share of the land, do not fall within the exception of the act of 1766, being all heirs, and entitled in equal portions to the land to which the eldest son succeeded previous to Laws 1784, ch. 22.

By this last mentioned act the land is made to descend to all the sons equally, and if there be no sons, to all the daughters, to be divided among them equally, share and share alike, with a proviso, that if any child shall have lands settled on him or her in the lifetime of the parent, then he or she shall have only as much land as will make his or her share equal. The eighth clause of the act provides that in case a widow shall dissent from her husband's will, she shall be entitled to one-third part of the land by way of dower during life; and that if her husband die leaving no child, or not more than two, she shall be entitled to one-third part of the personal estate; but if more than two children, she shall be entitled to a child's part only. It is to be remarked that this act makes special provision for the division of the real estate, and directs how a child advanced in the lifetime of the parent in lands shall be bound to bring the land into hotchpot before he shall be entitled to any share of the land descended. Now, suppose in 1785 a husband died intestate, leaving two sons and two daughters, and one of his sons had been advanced in the lifetime of the father with a

portion of land not equal to a full share. *Immediately* on the death of the father the sons would be entitled to have the lands divided and a share in severalty allotted to each; but the daughters and sons could have no claim for distribution of the personal estate for two years after the death of the father. The son advanced prays to have a division of the land, his brothers admit that he is entitled to some additional quantity, but say he has been advanced, and is entitled only to so much as, when added to his advancement, will give him a full (153) share. He must necessarily admit the fact, and content himself with this additional quantity. The lands are divided accordingly, the report of the commissioners returned to court, recorded and registered. Each son has then an estate in severalty, and such as cannot be changed, the division and return operating in the nature of a conveyance. Two years afterwards the same son petitions for his share of the personal estate, and the daughters say he has been advanced in land, during the life of the father, and under the act of 1766 he must bring the value of this land into hotchpot. The son answers that he has already brought them in with his brothers in the division of the real estate under the act of 1784, as he was bound to do by the express provisions of that act. This answer would not avail him, if the act of 1766 be in force, for the daughters' portions are not increased or diminished by the division among the sons; and the consequence is that the son would have to account twice for his advancement. What rule of justice or equity would compel the son advanced to bring his land into account in the division of the personalty, after the passage of the act of 1784? He has not a cent in value of the real estate more than his brother who has not been advanced. They are on an equal footing, and yet, according to the doctrine contended for, the brother advanced must bring his advancement into account with the sisters, while the brother who has not been advanced, but who has an estate equally valuable by descent, shall be exempt from the claim of the sisters. The act of 1784 must be considered as repealing the act of 1766, so far as respects lands by advancement; the Legislature in 1766 viewing the real and personal estates as one joint fund, and in 1784 viewing them as separate and distinct funds, and pointing out the mode of division in each.

Let us now examine the subsequent acts, and see how (154) far they support or contradict this construction. In 1792 the Legislature declared that "where any person shall die intestate, who had in his or her lifetime given to or put in possession of any of his or her children any *personal* property, of

what nature or kind soever, such child or children possessed as aforesaid shall cause to be given to the administrator or manager of such estate an inventory on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime." The third clause of the act provides that "if he or she refuse to give an inventory as aforesaid, he or she shall be presumed to have received a full share." This act confirms the construction given to the act of 1784. The inventory required to be given respects the personal property only; not a word being used having reference to any advancement of land. When we consider that the evident design of this act was to enable the executor or administrator to make an equal distribution of the estate, by being furnished with a list of the articles received by each child, it would seem strange, if the Legislature did not consider the act of 1766 to be repealed as to advancement of land, that they should not have required an inventory of the real estate also to be returned. The one is as necessary as the other, to enable the administrator to make distribution. But if the act of 1784 be considered as repealing the act of 1766, on this point, such a provision was wholly unnecessary in the act of 1792, and very properly omitted. But it is said that advancements of land being by deed, the administrator could easily ascertain by the register's books what lands the father had given to a child, that no such evidence could be procured with regard to the personal property, and therefore the Legislature only required the inventory as to the personal. This reason is not satisfactory. The object of the act was to relieve the administrator from the trouble of searching after (155) evidence, by compelling the person who best knew the fact to disclose it, or be precluded from a share. And if this was the object, why not extend it to the land? Why put the administrator to the trouble and expense of searching the records, if the same plain, easy mode could be adopted with regard to the lands which was provided as to the personal property? As the Legislature have not prescribed such a mode, it is conclusive that they never intended advancements of land to be taken into account in the distribution of the personal property. But it is not correct to say that in any instance the administrator could discover from the records what lands had been given by way of advancement. It is common for a father who is about to advance his son, to purchase lands for him and to have the deeds made by the vendor directly *to him*. In all such cases the administrator could not be informed by the deeds that the lands were given by the father. He would be subjected to the same trouble in proving this fact that he was exposed to as

to advancements of personal property before the act of 1792. It cannot be presumed that the Legislature, intending to relieve him from this trouble, would take into view only the personal estate, and leave the real unprovided for.

The act of 1791, providing for a widow who dissents from her husband's will, views the real and personal estates as separate and distinct funds. By the act of 1784 the widow, in case of intestacy, is entitled to a child's part, and if one of the children could compel a brother or sister to bring lands, advanced to him or her in the lifetime of the father, into account in the division of the personal property, so can the mother; for the act of 1791 places her, after her dissent from her husband's will, in the same situation as if the husband had died intestate. The fourth clause of this act directs the jury to inquire whether, by the will, the widow is as conveniently and comfortably provided for as if her dower were allotted to her according to the act of 1784; and if so, she is precluded from any (156) further claim upon her husband's land. The fifth clause directs how her share in the personal property is to be laid off: that the same jury shall inquire whether the legacy or legacies given to her by the will is or are equal in value to the distributive share she would take under the act of 1784; and if equal, she shall be content, but if not, the deficiency to be assessed, and judgment granted for the same against the administrator, etc. What was her share under the act of 1784? One-third of the real and a child's part of the personal estate. So that this act evidently precludes the widow from any share of the land advanced, and yet gives her precisely such share as a child would get. Hence it must follow that the child shall not take any share of the advanced lands in the division of the personal property. The Legislature, in the act of 1791, seems desirous to express themselves in language which cannot be misconstrued; they do not say that the widow shall have such deficiency made up, so as to give her a full share of the husband's estate, but expressly refer to the act of 1784 to ascertain what shall be her share, the very act which compelled the advancement in land to be brought into account in the division of the real estate, and the very act which we think repealed that provision in the act of 1776. It is also worthy of remark that in 1766 there was no division of land to be made; the eldest son took the whole. But when, by the act of 1784, all the brothers took, there were persons between whom the land was to be divided; and there the Legislature direct the child advanced to bring such advancement into account in the division of the real estate; whereas, before that time, the advancement could be taken into account

only in the division of the personal estate. If the act of 1791 refers expressly to the act of 1784, to ascertain what shall be the share of the widow, and that act expressly gives her (157) one-third of the real and a child's part only of the personal estate, it must necessarily follow that a child can have no more than a share of the personal property, excluding altogether advancements in land from the personal property.

In the next place, we are of opinion that if the act of 1784 should not be construed as repealing the act of 1776, so far as respects advancements in land, yet that the land now in question is not liable to be brought into account. By the act of 1766 the heir at law is expressly excepted. The act of 1784 makes all the brothers heirs; not, indeed, by reducing the situation of the eldest son to a level with the younger ones, but by raising the latter to the level of the former. And as the eldest son, by the act of 1766, is exempted from the operation of the clause respecting advancements, so are *all* the sons by the act of 1784. By the act of 1795 the daughters are raised to the level of the sons, and entitled to inherit equally with them. So that, since that act, *all the children* compose the same heir which the eldest son did under the act of 1776, and, consequently, are all within the exception. It has been said that the heir at law means the heir at common law, and that since the acts of 1784 and 1795 there is no such person known to our law. The term, *"heir at law,"* means the person or persons on whom lands descend according to the law of the State, or Kingdom, in which they are situate, and in our law means *all the children* of a deceased person. On this ground, also, we are of opinion that the land advanced ought not to be taken into account in a division of the personal property.

TAYLOR, C. J., *contra.* It was the policy of the common law, resulting from the feudal system, to favor the eldest son as heir at law, both by giving him all the lands where the ancestor died intestate, and by requiring an express devise of the estate (158) over to another in order to disinherit him. Hence, the innumerable cases to be found in the books on the construction of wills, and the frequent confirmation of the rule that the claim of the heir at law shall not be defeated but by necessary implication.

With respect to personal property a different policy operated, and the natural and just principle, that it should be divided amongst the intestate's nearest of kindred, in equal degree, prevailed over the artificial one which had been applied to real estates. In this spirit the British statute of distributions was

passed (from which our act of 1766 is nearly a transcript), guarding with systematic anxiety the right of primogeniture, as to land, and dispensing, with the bounty of nature, the chattels amongst the relations of the deceased. Under these acts the heir at law, claiming distribution of the personal property, shall have an equal share, without any regard to the land that may have been settled upon him in his father's lifetime, because, as he would have had all the land upon his father's death intestate, by the previous appointment of the law, such advancement was only anticipating the time of enjoyment, and ought not to lessen his equal right to the personal estate, which he claimed upon different principles. In this way the law preserved the harmony of its system and protected its favorite from consequent inconvenience.

Very different is the rule with respect to the other children, and indeed with respect to the heir at law himself, where he has been advanced with anything but land. The other children must account for land and chattels, when they claim distribution; the heir at law must account for personal property alone. With respect to this, therefore, the object of the law is to establish an equality, because it is just, and because it does not interfere with any prior system of artificial policy. The degree in which this principle of equality is cherished by the law, as new cases have called for its decision, may be seen from the whole current of authorities. 2 P. Wms., 443.

Thus stood the law in this State until 1784, a period (159) when the minds of men had become considerably enlightened in the principles of society and the theory of government; when many of the pretensions of the latter had been accurately investigated and traced back to their original sources—pride, vanity, the love of power, and all the lamentable imbecilities of our nature. The Legislature of that day felt the necessity of extirpating those anomalies in the law, which were utterly hostile to the growth of our infant republic; and they seem to have acted under the conviction that the right of primogeniture was of the essence of a monarchical or aristocratical form of government—a contrivance instituted to perpetuate the grandeur of families, and to prevent that continual division of inheritances by which something like a level is preserved among the citizens of a free State. Their steps were, at first, cautious and timid, perhaps from a fear of passing to the other extreme of too minute a subdivision of lands, and they accordingly gave the preference to the male issue. But, so far as they did advance, it was their design to render the division among the males perfectly equal; and it is remarkable that in order to accomplish

this object they have followed the language, as nearly as the subject would permit, of the act of distributions, for they except from the right of division such son or daughter as shall have a settlement of lands, of equal value, from the parent, and require them to bring it into hotchpot, if they claim under the act. Afterwards, in 1795, they complete the system by admitting females to an equal right of inheritance with males, subject to the same rules relative to advancements.

With these several acts before me I cannot bring myself to doubt the design of the Legislature, either as to the disposition of the real or personal estate: that the first should be divided in equal portions amongst the children, and the latter amongst the next of kin. The true interpretation of these acts
(160) appears to me to be this: By the act of 1766 a distinction is made in favor of the eldest son, because he is heir at law, and is, therefore, privileged from bringing into hotchpot any advancement of lands that may have been made to him by his father; but, by the other two acts, this distinction is abolished, and a benefit from it can no longer be claimed by the eldest son or any other child, because they are all placed on an equal footing. Therefore, if any one claim distribution of the personal estate, he must bring into the account whatever real estate his father has settled upon him, in order that the manifest aim of the Legislature may be accomplished.

I will not undertake to prove that the very words of the two latter acts authorize this construction, and I should perhaps hesitate to adopt it as the true one, if the least doubt remained in my mind as to the policy of the law or the meaning of the Legislature. In considering what answer can be made to these reflections, or what arguments can be adduced to prove that the children are not bound to bring in their advancements, nothing conclusive or satisfactory has occurred to my mind. If it be said that the act of 1776 privileges the heir at law, and that by the subsequent acts all the children are made heirs at law, and therefore all are privileged, the answer is, that the latter acts were passed for the very purpose of annulling that policy on which the claim of exemption is grounded by the first act; and that to yield to the construction contended for would have a direct tendency to revive and perpetuate all the evils of the ancient system. That when the reason ceases the law itself ought to cease with it, and that when the Legislature seeks to effect by a statute an object of public utility, when the end of the act is evidently larger than the words, it is right and allowable so to construe it as to reach their design. Vaugh., 172.

To the argument that no law since 1766 requires the eldest

son to bring his advancement into distribution, I would (161) answer that the subsequent laws put all the children upon a footing of equality with regard to the real estate, but this equality cannot exist if any one or more refuse to bring in their advancements.

In whatever light this case has presented itself to my understanding, I am forced to the conclusion that the lands given to them by the father of these parties ought to be brought into the account upon the distribution of the personal estate.

Cited: Wilson v. Hightower, 10 N. C., 77.

DEN ON DEMISE OF JOHN HAMILTON v. JOHN ADAMS.

From Guilford.

1. In ejectment, the purchaser at a sheriff's sale is bound to show the judgment on which the execution issued. And where he purchases under an order of sale made by the County Court, upon a return of a constable that "he had levied the execution upon the lands of the defendant, there being no personal property found," he must show the judgment recovered before the justice of the peace.

2. No person shall be deprived of his property or rights without notice and an opportunity of defending them.

THE lessor of the plaintiff claimed the land in this case under a sale made by the Sheriff of Guilford County, at which he became the purchaser. On the trial he gave in evidence the docket of Guilford County Court for February Term, 1807, on which were entered three cases against the defendant, John Adams, each purporting to be an execution issued by a justice of the peace, and levied by a constable on the land in question, and that the court had directed orders of sale to be issued. He also gave in evidence the orders of sale, with the return of the sheriff on each, that he had, in obedience to the order, sold the land, and that the lessor of the plaintiff had become the purchaser. But he did not produce in evidence any judg- (162) ment rendered by a justice of the peace, nor any execution issued by a justice of the peace against the defendant; and it was insisted, on behalf of the defendant, that the plaintiff was not entitled to recover without giving in evidence such judgment and execution.

HALL, J. The first question in this case is whether the lessor of the plaintiff, claiming to be a purchaser at a sheriff's sale, be bound to show the judgment on which the execution issued. Not to require a party, claiming under an execution, to produce the judgment is to say that the execution would convey the property, although no judgment exists, or, in other words, that the execution is sufficient evidence of the judgment, and that the purchaser under it shall retain the property against the true owner, although no judgment was ever obtained against him. We should pause before we adopt a rule that would give rise to such consequences. It is a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the Constitution. Hence it is that no court will give judgment against any person unless such person have an opportunity of showing cause against it. A judgment entered up otherwise would be a mere nullity. Courts of justice adhere so strictly to this rule that when a judgment is produced the strong presumption arises that the parties to it had notice.

It may be said that an execution is evidence of a judgment, and that a judgment presupposes notice; this presumption in the latter case is much weaker. A judgment is matter of record, and entered up under the inspection of judicial officers; an execution issues out of term-time by the clerk, who is altogether a ministerial officer, and such execution does not become (163) a record until it be returned. It is true that where an execution issues to a distant county it would be inconvenient to require the purchaser to ascertain the fact whether a judgment had been rendered; but he is not required to search for the judgment when he purchases; he advances his money at his own risk, and is required to show the judgment when the right to the property is contested. Is it not better that this should be the case than that a man should lose his property when no judgment has been rendered against him? Would it not be iniquitous to say that if a clerk be corrupt enough to issue an execution where there is no judgment to support it, the property of the defendant in the execution shall be transferred to the purchaser, when the true owner had no notice of such execution? If there be a judgment, it ought to be produced; if there be none, the right of property ought not to be changed; the execution should have no other effect than to justify the officer who acts under it.

It has been argued for the plaintiff that, as Adams was the defendant in the execution under which the defendant pur-

chased, the plaintiff is not bound to produce the judgment on which the execution issued; and the case of *Lake v. Billers,* 1 Ld. Ray., 753, has been relied upon, as well as some other cases, in which the one in Lord Raymond is mentioned with approbation. To this we may repeat what has been said, that where a person claiming under an execution produces it, but is excused from producing the judgment upon which it issued, such person can successfully contest the right of property under such execution, although no judgment was ever obtained. It matters not whether a thing exist or not, if it be not required to be shown. The defendant would be awkwardly situated if he were required to show the negative fact that no judgment existed against him. If there be no judgment, an execution cannot change the right of property.

What constitutes such a judgment and execution in (164) cases like the present is pointed out in the act of 1794, ch. 13. Section 25 of that act directs that when an execution issues to a constable, in case of deficiency of personal estate, he shall levy upon lands, etc., and make return thereof to the justice who issued the same, which justice shall return such execution, with all other papers on which judgment was given, to the next County Court to be held for his county. It is then declared to be the duty of the clerk to record the whole proceedings had before the justice and all the papers. The court are then required to make an order directing the sheriff to sell such lands, or so much of them as will be sufficient to satisfy such judgment, a copy of which record is directed to be made by the clerk; and such order of sale by the court constitutes the judgment required in this case. The judgment before the justice necessarily forms part of the proceedings. Judgment for the defendant.

Cited: Hoke v. Henderson, 15 N. C., 16; *Ingram v. Kirby,* 19 N. C., 23; *Rutherford v. Raburn,* 32 N. C., 145; *Lyerly v. Wheeler,* 33 N. C., 289; *Green v. Cole,* 35 N. C., 429; *Wilson v. Jordan,* 124 N. C., 715; *Wainwright v. Bobbitt,* 127 N. C., 276; *Daniels v. Homer,* 139 N. C., 240, 270.

(165)

JOSEPH REDDICK v. NOAH TROTMAN.

From Gates.

Judgment being recovered against B, he, for the purpose of raising money to discharge it, offered for sale at auction a negro slave, and C became the highest bidder, and the slave was delivered to him; but he not paying the money on the delivery of the slave, B by consent of C took the slave home to his own house, to keep until the money should be paid. Afterwards B offered to deliver the slave to C if he would pay the money. C refused to pay, and disclaimed all right to the slave. Execution was then sued out on the judgment, and levied on the slave, and at the sale by the sheriff he brought less than the price which C agreed to pay for him. B then sued C for the difference between the sum which the slave brought when sold by the sheriff and that for which he was bid off by C. B cannot recover because the circumstances show it was the intention of the parties to rescind the contract.

JOHN COFIELD recovered a judgment against Joseph Reddick, as executor of the last will of Simon Stallings; and Reddick, for the purpose of raising the money to discharge the judgment, offered for sale at auction a negro slave, belonging to the estate of his testator, for ready money. Noah Trotman became the highest bidder, and the negro was delivered to him, but he not paying the money on the delivery, Reddick, by his consent, took the negro home to his own house, to keep until the money should be paid. A few days afterwards he called on Trotman for the money, and offered to deliver the negro if the money were paid to him. Trotman refused to pay, and disclaimed all right to the negro. Cofield having sued out his execution, the sheriff, by the direction of Reddick, levied the same on the negro aforesaid, advertised and sold him; and at this sale the negro did not bring as much by $70 as at the sale when Trotman bid him off. Reddick thereupon brought this suit to recover from Trotman the difference between the sums at which the negro was bid off at the first and second sales; and
(166) it was submitted to this Court to decide whether he was entitled to recover.

LOWRIE, J. What might have been the right of the plaintiff to recover damages for the nonperformance of such contract as is stated in the case, had the defendant kept possession of the negro, it is not necessary now to inquire. The refusal of the defendant to pay the money, and the act of the plaintiff in taking home the negro, show the intention of the parties. By

the terms of the sale the defendant was bound to pay down the money; his becoming the highest bidder amounted to an undertaking to pay the money on that day. The plaintiff took the negro home because the money was not paid, and the defendant's refusal to pay on a subsequent day was no breach of his undertaking. But if there could be any doubt as to the legal effect of the plaintiff's conduct, in taking the negro home on the day of sale, his conduct afterwards in directing the sheriff to levy on the negro as the property of his testator is sufficient to remove it. This sale was made after the defendant had disclaimed all title, and shows that the contract had been rescinded between the parties. Judgment for the defendant.

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(167)

BENJAMIN TORES v. JUSTICES OF THE COUNTY COURT OF ROWAN.

From Rowan.

1. A justice of the peace appointed to receive the lists of taxable property has no right to add to the list any article of taxable property not returned by the owner.
2. If the owner fail to attend at the time and place appointed to receive the lists of taxable property, the justice may, under the act of April, 1784, make out a list for him, to the best of his knowledge.
3. If the owner omit in his list a part of his taxable property, the sheriff may collect the tax upon the property omitted; but he will make such collection at his own risk, and, if wrongfully made, the owner has his remedy against the sheriff.

AT August Term, 1811, of Rowan County Court, Benjamin Tores came into court and prayed that a certain billiard table returned as his property in the list of taxable property in Captain Wood's district be stricken out, he not having made a return thereof to the justice to whom he delivered his list of taxable property. His prayer was disallowed, and from this judgment he prayed an appeal to the Superior Court, which was refused. He then applied to one of the judges of the Superior Court for a writ of *certiorari*, that the proceedings might be certified to the Superior Court and his motion there considered. His application for the writ of *certiorari* was founded upon the following affidavit:

"Benjamin Tores maketh oath that, having erected, he kept

a billiard table in the town of Salisbury, during 1809, and duly accounted for and paid the tax on the same. That, intending not to keep the said billiard table for use after the expiration of the time for which he had paid the tax, he shut up his house and did not permit any games to be played nor any use to be made of the said table for some time previous to 1 April, 1810. That Gen. John Steele, Esq., one of the justices of Rowan County, having been appointed by the County Court to receive the lists of taxable property in the town of Salisbury and its vicinity, for 1810, this deponent waited on him at the proper time and rendered a list of his taxable property for that (168) year, which list was drawn up by this deponent, subscribed and sworn to in the presence of the said John Steele, Esq., and delivered to him. That in this list the billiard table aforesaid was not included. He was asked by the said John Steele if he did not intend to return his billiard table as part of his taxable property; he answered that he did not, for the reason aforesaid, that he had not used the said table nor permitted it to be used since the first day of April then last past, nor did he intend to use it afterwards for the purposes of play. This deponent further states that, notwithstanding this declaration and the list before mentioned, of this deponent's taxable property for 1810, subscribed and sworn to and delivered to the said John Steele, the said billiard table was, by the said John Steele, listed and returned to the County Court of Rowan as part of this deponent's taxable property for 1810, without any other proceedings being had against this deponent than those before mentioned, and without his direction or consent."

He then set forth in his affidavit an account of his motion in the County Court to have the billiard table stricken out of the list, and of the refusal of the court to allow this motion; of his praying an appeal to the Superior Court, and the refusal of the County Court to grant an appeal.

The writ of *certiorari* being granted, and the record certified to the Superior Court, the case was sent to this Court for the opinion of the judges upon the question, Whether a justice of the peace appointed to receive the lists of taxable property has a right to add to the list any article of taxable property not returned by the owner.

LOCKE, J. In deciding this question it becomes necessary to examine the acts of Assembly which prescribe the duty of the justice in receiving lists of taxable property, and the duty of the owner in returning his list. The first act on the subject is

that of April, 1784, which, after directing that a justice of the peace shall be appointed to take in the lists of taxable property in each captain's company, and requiring him to give notice of the time and place of receiving such lists, prescribes in the fourth clause the duty of the owner as follows: "The inhabitants of the respective districts in each county (169) shall attend at the time and place to be appointed, and shall return on oath, in writing, to the justice appointed to receive the same, a list of all the taxable property which to him belonged, or of which he was possessed on 1 April then last past." The act then prescribes the oath which the justice is to administer to him: "You do swear or affirm that this list by you delivered contains a just and true account of all the property for which, by law, you are subject to pay taxes, to the best of your knowledge and belief." The seventh clause directs the justice to return such list to the County Court. The eighth clause imposes a penalty on those who fail or refuse to return such list: "If any master or mistress of a family, his or her agent, manager or attorney, after due notice given as aforesaid, shall fail or neglect to attend and return inventories of his or her taxable property in manner before mentioned, each and every person so failing shall forfeit and pay the sum of £50, and shall also pay a double tax. The number of polls, etc., belonging to the person neglecting as aforesaid, to be reported by the justice, to the best of his knowledge."

By this act the duty of the owner and the duty of the justice are clearly defined; and it is only in cases where the owner fails or neglects to attend and return a list that any latitude or discretion is given to the justice of making a return, *to the best of his knowledge,* for the delinquent. The law evidently intended to vest in each individual the right of making out his own list, and bind him by the solemnity of an oath to do it truly. Where, therefore, an individual tenders to the justice his list, and swears to it, the justice is bound to receive it and return it as the true list. He has no right to add to this list a single article. Indeed, to delegate such a power to a justice of the peace would be to expose property to his will and pleasure, for by the return the addition made by the justice appears as the act of the party, and the sheriff is bound to collect (170) the tax or pay it himself. There is no doubt, if a sheriff discovers that an individual has omitted to return a part of his property which is taxable, that he may collect the tax from the owner; but such collection is made at his own risk, and, if wrongfully made, the party has his remedy against the sheriff. But where the justice makes an addition to the list, it appearing

to be the list returned by the owner, he must pay the tax, let it be just or unjust, and has no remedy for the injury sustained. Without, therefore, giving any opinion whether, in this case, the billiard table was taxable, we say that the justice, by adding it to the list returned by Tores, has exceeded his authority, and that Tores is not bound to pay the tax in consequence of his return; that, therefore, the writ of *certiorari* ought to be sustained, and the *supersedeas* issued as to the collection of the tax, by virtue of such return, be made perpetual. We do not intend to restrain the discretion of the sheriff in collecting this tax, if he choose to encounter the risk, and proceed upon the ground that the billiard table was liable to tax, and Tores has omitted to return it. The law has given him a discretion on the subject, and he may proceed, if he be willing to risk his own liability for such collection.

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(171)

JOSEPH BELL AND OTHERS v. BENJAMIN BLANEY.

From Brunswick.

1. A, not being indebted, conveyed all his property to his children, who were infants and lived with him. The conveyance was attested by three persons, not related to the parties, and proved and recorded within ninety days after its execution. A remained in possession of the property from 1796, to his death, free from debt, and his children continued to live with him. The conveyance was generally known in the neighborhood. In 1809 he sold one of the slaves included in the conveyance, for a fair price to B, who was ignorant of the conveyance. This conveyance, although purely voluntary, is not on that account fraudulent as against subsequent purchasers; and the circumstance of the donor's remaining in possession, being explained by the infancy of the donees and their living with him, furnishes no sufficient ground to presume a fraudulent intent.

2. The act of 27 Eliz. in favor of subsequent purchasers relates only to lands and the profits thereof, and not to personal property.

ON 1 January, 1796, James Bell, Jr., not being indebted, conveyed all his property to his children, who were infants and lived with him. The conveyance was attested by three witnesses, not related to the parties, and proved and recorded at January term of Brunswick County Court, 1796, and registered within ninety days after the probate. There was no evidence of his having become indebted after the conveyance, which was generally known in the neighborhood. Bell was a

drunkard, and in 1809 he sold one of the negroes, included in the conveyance to his children, to the defendant, Benjamin Blaney, at a full and fair price; Blaney having no actual notice of the conveyance which Bell had made in 1796 to his children. Bell remained in possession of all the property mentioned in this conveyance, until the time of his death.

LOCKE, J. Two questions arise in this case: (1) whether the deed, being purely voluntary, is to be considered on that account merely fraudulent as against subsequent pur- (172) chasers; and (2) if the deed be not void on that account, whether there be any circumstances disclosed in this case from which a jury ought to infer fraud.

It cannot be denied that by the common law a father might make a good and valid gift of a chattel, either by deed or without deed, by declaring his intention to give, and placing the property given in the possession of the donee. But on account of many secret deeds of gift of slaves, the Legislature in 1784 declared "that from and after 1 January next all sales of slaves shall be in writing, attested by at least one credible witness, or otherwise shall not be valid; and all bills of sale of negroes, and deeds of gift of *any estate* of whatever nature, shall, within nine months after the making thereof, be proved in due form and recorded; and all bills of sale and deeds of gift not authenticated and perpetuated in manner by that act directed shall be void and of no force whatsoever." The deed in question being regularly executed, proved and recorded according to the provisions of this act, must necessarily be good and valid according to the common law and according to the statute, unless it should be found fraudulent as against creditors. In England the leading statutes for the suppression of fraud are 13 and 27 Eliz. The first, for the protection of creditors, and the second, of subsequent purchasers. Our act of 1715 is nearly a literal copy of the first. That act declares "that for abolishing and avoiding feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which of late have been and still are devised and contrived of malice, fraud, covin or collusion, to the end, purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions, debts and accounts, it is enacted that all and every feoffment, gift, grant, alienation, bargain (173) and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had

or made since 1 January, 1714, or at any time hereafter to be had or made to or for any intent or purpose, last before declared and expressed, shall be from henceforward deemed and taken (only as against that person or persons, his or their heirs, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties and forfeitures shall release by such covinous or fraudulent devices and practices as is aforesaid, or shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any matter or thing to the contrary notwithstanding." The case expressly states that at the time of the gift the donor was not indebted; and as he had no creditor then nor since, who could be affected or defrauded by the deed in question, it must follow that the act of 1715 can have no operation in this case, especially as the defendant does not pretend to invalidate the deed as a creditor, but as a subsequent purchaser.

Let us then examine statute 27 Eliz. and see whether it can affect this case. This act, made "for avoiding fraudulent, feigned and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchase of lands, tenements and hereditaments," enacts "that all and every conveyance, grant, charge, use, estate, encumbrance and limitation of use or uses, of, in or out of any lands, tenements or other hereditaments whatsoever, had or made, or at any time hereafter to be made, for the intent and purpose to defraud and deceive such person or persons, bodies politic and corporate, as have purchased, or shall afterwards pur-
(174) chase in fee simple, fee tail, for life, lives or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, encumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, commodity, in or out of the same or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them or any of them, which have purchased or shall hereafter so purchase for money or other good consideration the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same, to be utterly void, frustrate and of none effect, any pretense, color, feigned consideration, or expressing of any use or uses, to the contrary not-

withstanding, etc." This statute refers only to lands, or to rents and profits issuing out of lands, and does not apply to personal property. It is indeed decided in *Otley v. Manning*, 9 East, 59, that a voluntary conveyance is *eo nomine* and, unaccompanied with any other circumstance of fraud, void as against subsequent purchasers. That, however, was a conveyance of land.

But if this act had received such a construction that every deed which was void under statute 13 Eliz. against creditors should be held void under this act as against purchasers, yet the reasons before given show that this deed could at no period be held void as against creditors. From the statement of the case it would seem that much reliance was intended to be placed on the circumstance of the donor's remaining in possession; and it is admitted that in most cases this is a very strong badge of fraud, and sufficient in many to induce a jury to infer fraud. Yet there may be circumstances attending the transaction that will destroy or rebut such inference, as where, (175) by the terms of the deed, the donor is to remain in possession, etc. In this case the donees were infants, and lived with the donor, and were not capable of having any other possession than that of their father, their natural guardian. And this is as strong a circumstance to rebut fraud as where the possession is consistent with the deed, especially when connected with the notoriety of the gift and the registration of the deed at the first court after its execution. The donor's remaining in possession is a badge of fraud only where there are creditors deceived or likely to be defrauded by the gift; in this case there were none. Judgment for the plaintiff.

ROSANNAH E. SPRUILL AND AGNES H. SPRUILL, BY THEIR NEXT FRIEND, V. LAIS SPRUILL, EXECUTRIX OF THE LAST WILL OF BENJAMIN SPRUILL, DECEASED.

From Edgecombe.

A loaned certain slaves to his son-in-law B, and afterwards by his last will gave these slaves to B's children, then infants. B then made his will, and bequeathed these slaves to his wife until his children should arrive to full age, and appointed her executrix. She took possession of the slaves, and the executors of A there assented to the legacy to B's children. The possession of the slaves by the executrix of B is not such an adverse possession

as to prevent the assent of the executors of A from vesting the legal title to the slaves in B's children. It is not necessary that executors should have the actual possession of legacies when they assent to them.

THIS was an action of detinue for slaves, and it appeared in evidence that Peter Hines, the father of plaintiffs' mother, loaned to the plaintiffs' father, soon after his marriage, the negro slaves in question. The mother died and the father married a second wife. Peter Hines then made his will, and (176) gave to the plaintiffs the said slaves. During the life of the father, as well in the lifetime of his first wife as after his intermarriage with his second, he acknowledged the plaintiffs' title under the will of Peter Hines, of which will he had a copy. The father made his will and bequeathed the slaves to the plaintiffs, together with some other property. In a latter clause of his will he bequeathed as follows: "I lend the whole of my property above mentioned, of every kind, to my beloved wife, Lais Spruill, for the purpose of raising, clothing and educating my children, and also raising the young negroes that are or may hereafter be born in my family, free from any charge hereafter to be made against my children heretofore named, until my children arrive to lawful age or marry." And he appointed the defendant executrix of his will, who proved the same at August Term, 1808, qualified and took upon herself the burthen of executing the same. She took possession of the property as executrix and continued in possession thereof until the time the executors of Peter Hines, the grandfather of the plaintiffs, assented to the legacy, which was three months before the bringing of this suit.

It appeared further in evidence that when the plaintiffs demanded the slaves, immediately before the commencement of this suit, the defendant declared her willingness to surrender them up if the plaintiffs would pay a ratable part of the debts of their father. The defendant pleaded *"non detinet,* and the statute of limitations." The jury found a verdict for the plaintiffs, and a rule for a new trial was obtained, upon the ground that the assent of the executors of Peter Hines did not vest in the plaintiffs such a right as enabled them to sue, and that the action should have been brought in the name of the executors of Peter Hines. The rule was discharged and the defendant appealed to this Court.

(177) HALL, J. It is not necessary to inquire how far the assent of an executor to a specific legacy adversely claimed by a third person having possession thereof would en-

able the legatee to sue for and recover such legacy in his own name; for it does not appear that there was an adverse possession of the legacy in question before the assent of the executors of Peter Hines was given. The slaves were loaned, in the first instance, to the father of the plaintiffs, and then bequeathed to the plaintiffs. Their right was acknowledged by the father during his life; his possession, therefore, was the possession of Peter Hines during his life, and after his death that of his executors. The father, then, by his will, gave the same property to the plaintiffs. It does not follow that he thereby set up a claim to it; for the property had been loaned to him, he had been possessed of it for several years, and he might have thought that his children, being of tender years at the time of the loan, and some of them not born, might not know, when they grew up, in whom the title was. He, therefore, confirmed by his will the will of his father-in-law.

The case recites a clause in the will of the father, by which he lends the whole of his property to his wife, for the purpose of educating his children, and raising the young negroes, until the coming of age or marriage of his children. By this clause nothing beneficial is given to the wife; it was obviously inserted for the benefit of his children. Although he does not by this clause make his wife testamentary guardian, he seems to have had such an intent. If he had carried this intent into effect she would have been entitled to the slaves, during the minority of the children, unless they had sooner married. It seems, however, to have been his wish that she should discharge in part the duties of guardian, and she must be considered as taking possession of the property for the benefit of the children. Her possession of it was not adverse to their right, and therefore there was no adverse claim at or before the (178) time the executors of Peter Hines assented to the legacy. By that assent the right of the legatees to sue in their own names was complete—a right which no after adverse claim could destroy. It is not necessary that executors should have the actual possession of legacies when they assent to them. It is sufficient if the legacies be in the possession of third persons, holding such possession under them. If, however, the Court were mistaken on this part of the case, a new trial ought not to be granted; for complete justice has been done by the verdict, and if a suit was to be brought in the name of the executors of Peter Hines, it would be for the use of the present plaintiffs, and the same verdict would be rendered. Let the rule be discharged.

DEN ON DEMISE OF HENRY HUNTER v. FREDERICK BRYAN.

From Martin.

A deed made by husband and wife had a certificate indorsed on it by the clerk of the County Court, "that the wife appeared in open court and acknowledged the deed, before the court was privately examined, and said it was done freely and without compulsion"; and on the minute docket of the court there was an entry that "a deed from A. B. and C. B. to D. E. was acknowledged." The deed was registered: *Held*, that upon the trial of an ejectment the deed shall be given in evidence to the jury. For although the record does not expressly state A. B., the husband, acknowledged the deed, yet it states that a deed from him to D. E. *was acknowledged;* and the necessary inference is that the acknowledgment was made by him and not by another.

ON the trial of this case the plaintiff deduced title to the lands in question to Auterson Kelly and Nancy, his wife, and then offered in evidence a deed purporting to have been executed by Auterson Kelly and Nancy, his wife, to the
(179) lessor of the plaintiff, which had been duly registered. On this deed there was the following certificate of acknowledgment indorsed by the clerk of Martin County Court, to wit:

Nancy Kelly appeared in open court and acknowledged the within deed, before the court was privately examined, and said it was done freely and without compulsion.

THOMAS HUNTER, *Clerk.*

The plaintiff also offered in evidence the minute docket of Martin County Court, in which there was the following entry, to wit:

"17 March, 1794. The court met according to adjournment. A deed from Auterson Kelly and Nancy Kelly to Henry Hunter was acknowledged."

The reading of this deed in evidence was objected to by the defendant's counsel: 1. Because it did not sufficiently appear that the *feme covert* was privately examined. 2. Because the execution of the deed by both or either of the grantors was not sufficiently proven either by the minutes of the County Court or by the certificate of the clerk indorsed on the deed. 3. Because it did not sufficiently appear from the indorsement on the deed in what County Court, or at what term, the acknowledgment and private examination of the *feme covert* were taken.

And on argument the court refused the plaintiff the liberty of reading the deed in evidence, on the ground that the execution of it by Auterson Kelly was not legally proven.

The plaintiff's counsel then offered parol evidence to show that the deed had been acknowledged by both the grantors, and that the *feme covert* had been privately examined in a proper and legal manner, and that there was no unfairness or fraud in the record. This evidence was rejected by the court.

The plaintiff's counsel then contended that as the court were of opinion the execution of the deed by Nancy Kelly, one of the grantors, was sufficiently proven, the deed (180) should be submitted to the jury as color of title; and they then offered to prove actual possession under it for more than seven years. This evidence was rejected by the court, and the plaintiff was nonsuited. A rule for a new trial was obtained, and being discharged by the court, the plaintiff appealed.

HALL, J. The deed ought to have been received in evidence, on the ground of the acknowledgment in the County Court. The certificate of the clerk appointed and trusted for that purpose states *that the deed was acknowledged.* A deed cannot be acknowledged except by him or them who have executed it. It is not indispensably necessary that the names of the persons by whom the acknowledgment was made should be set forth. When an officer sets forth that anything has been done in his office officially, by him, we must presume that it was done legally, unless the contrary legally appears. Here we must presume that the acknowledgment was made either by the husband and wife or by the husband alone, in either of which cases it ought to be read. It is a far-fetched presumption that it was made by the wife alone, without the consent or participation of the husband. If, then, it was made by the husband it ought to be read as to him. It is a matter of little moment whether it was acknowledged by the wife or not, unless her privy examination was also produced. However, it is not the province of this Court to look into the deed and say what interest passed by it; that belongs to the court and jury, who shall try the cause below. Let the rule for a new trial be made absolute.

(181)

MATHEWS & McKINNISH v. WILLIAM MOORE AND CLAIBORN HARRIS.

From Cumberland.

Judgment set aside upon motion for irregularity. Judgments confessed before the clerk, where there is no court, are irregular, and will be set aside upon motion. The rendering of a judgment is a judicial act to be done by the court only.

THIS was a motion to set aside a judgment for irregularity. A writ was sued out at the instance of the plaintiffs against the defendants, returnable to the Superior Court of Law for CUMBERLAND, at Spring Term, 1811, the service of which was acknowledged by the defendants on 4 March, 1811, and the following indorsement was made:

Service acknowledged 4 March, 1811.

WM. MOORE,
C. HARRIS.

Teste: D. McINTIRE.

Judgment confessed by the defendants in person, agreeably to the specialties filed. Any credits that shall appear on statement between the plaintiffs and William Moore to be admitted. Stay of execution six months.

WM. MOORE,
C. HARRIS.

Afterwards, during the week appointed by law for holding the court in April, 1811, the clerk entered up judgment agreeably to this indorsement; and when six months had expired he issued execution for the debt and costs. William Moore, one of the defendants, applied to one of the judges for a writ of *supersedeas*, and made an affidavit setting forth "that some time in the week assigned by law for holding the Superior Court in the county of Cumberland, in the spring of 1811, he and Claiborn Harris confessed a judgment before the clerk of said court to Mathews & McKinnish, for the sum of £450 or thereabouts, with costs. That there was no Superior Court
(182) holden for the county of Cumberland in the spring of that year, by reason of the indisposition of the late Judge Wright; and that he was advised the said judgment was irregular and ought to be set aside." A *supersedeas* was awarded, and at the next term of the court the judgment was set aside, and the plaintiffs therein appealed.

HALL, J. It cannot be seriously contended that the judgment in this case is regular and legal. What authority has the clerk to enter up judgment where there is no court? It is his business to record the proceedings of the court; but the rendering of a judgment is a judicial act, to be done by the court only. The judgment is irregular and must be set aside.

WILLIAM FILGO v. WILLIAM PENNY.

From Johnston.

A having by mistake paid to B a $50 bank note for a $5 bank note, cannot maintain *assumpsit* to recover back $45. A bank note is not money, and a delivery by mistake of anything except money does not pass the property in the thing delivered, and cannot raise an implied promise to pay money.

THIS CASE commenced by a warrant before a justice of the peace, in which the plaintiff claimed the sum of $45, "a balance due to him on exchange of some bank notes." The plaintiff declared upon a special agreement, and for money had and received, for money paid to the defendant by mistake, etc. There was no evidence of any special agreement, and the only evidence to maintain the other counts was that the plaintiff had, by mistake, paid to the defendant a $50 bank note for a $5 bank note. No promise, either express or implied, (183) was proved, unless the payment of the bank note as aforesaid implied a promise to pay money. The defendant relied upon the plea of *"non assumpsit."* The jury found a verdict for the plaintiff, under the charge of the court, and a rule for a new trial being obtained, the same was sent to this Court.

HARRIS, J. The case states that there was no evidence of a special agreement, and the only evidence to support the money counts was that the plaintiff had, by mistake, paid to the defendant a $50 bank note for a $5 bank note. A bank note is not money, and does not differ in its nature from any other promissory note payable to bearer. A delivery by mistake of anything, except money, does not pass the property in the thing delivered, and cannot raise an implied promise to pay money. Let the rule for a new trial be made absolute.

(184)

COMMISSIONERS OF THE BRIDGE AT TARBORO v. JOHN WHITAKER.

From Edgecombe.

An appeal lies from the judgment of a justice of the peace to the County Court, and then from the judgment of that court to the Superior Court. The act of 1777, ch. 2, made the judgment of the County Court, in cases of appeal from the judgment of justices of the peace, *final*. The act of 1786, ch. 14, declared the judgment of the County Court, in such cases, *decisive;* but the act of 1794, ch. 13, gave the right of appeal from the judgment of a justice, in general terms, and repealed all other acts which came within its purview; and by the act of 1802, ch. 1, the right of appeal from the judgment of a justice is given to either party.

THIS SUIT was commenced by warrant before a justice of the peace, from whose decision an appeal was taken to the County Court, where it was again decided, and an appeal prayed for and granted to the Superior Court; and the counsel for the plaintiffs moved that court to dismiss the appeal, upon the ground that the judgment of the County Court was decisive, and that no appeal lay from it. This motion was disallowed, and the plaintiffs appealed to this Court.

HALL, J. The act of 1777, ch. 2, sec. 69, declares that "all debts and demands of £5 and under shall be cognizable and determinable by any one justice of the peace." The next section gives to either party a right to appeal to the next County Court, and directs that the same shall be reheard and *finally determined* by that court. The next act on the subject which it is necessary to notice is the act of 1786, ch. 14. By this act the jurisdiction of justices, out of court, is increased to £20, and the right of appeal to the County Court is given to either party,

(185) "which appeal shall be tried and determined by a jury of good and lawful men, and the determination thereon shall be *decisive.*" The act of 1794, ch. 13, brings into view and consolidates all that is to be found in the previous acts relative to the recovery of debts of £20 and under. This act gives to either party, in *general terms,* the right of appeal to the County, Court, and repeals all other acts coming within its purview. The act of 1802, ch. 6, professes to have been passed for the purpose of amending the act of 1794, ch. 13, by increasing the jurisdiction of a justice to £25. The last act necessary to be noticed is that of 1803, ch. 1, by which this jurisdiction is extended to £30, and the right of appeal reserved to either party.

It is understood that the Superior Courts have sustained appeals from judgments given by the County Court upon appeals from judgments given by justices out of court, ever since the act of 1777, ch. 2, was passed. Whatever doubts may be entertained of the legality of these decisions, on account of the restrictive words used in the acts of 1777 and 1786, it is not necessary to attempt to remove. The former of those acts declares that such appeals to the County Court from the judgments of justices of the peace shall be *finally determined* by those courts; the latter act declares that *"their determination shall be decisive."* But in the act of 1794 there are no such expressions. In that act and in those of 1802 and 1803, which were passed for the purpose of increasing the jurisdiction of justices, an appeal is given to the county courts, without declaring that their judgment shall be final or decisive. And this omission might have been the result of a conviction in the Legislature that an appeal to the Superior Court would be proper, because the jurisdiction of justices had been greatly increased beyond the limit fixed by the act of 1777, ch. 2. Section 82 of this act declares that when either plaintiff or defendant shall be dissatisfied with any sentence, judgment or de- (186) cree of the County Court, he may pray an appeal to the Superior Court. This is a very general expression. Now, if the restrictive words used in the acts of 1777 and 1786 are considered to be repealed by subsequent acts passed on the same subject, it seems there can be no obstacle in the way of an appeal to the Superior Court in the present instance. It is certainly such a judgment as would be embraced by that part of the act of 1777 just recited. Judgment for the plaintiff for his debt and for the defendant upon the motion to dismiss the appeal.

STATE v. WYATT BALLARD.

From Edgecombe.

1. Indictment for forgery. The act of 1801, respecting forgery, took effect on 1 April, 1801. The indictment charged that the act was done "against the form of the act of the General Assembly in such case made and provided." Motion in arrest of judgment, "that the indictment did not charge that the crime was committed after 1 April, 1801," overruled.

2. The instrument forged was a bond, purporting to be attested by one A. B. The indictment charged that the defendant "wittingly and

willingly did forge and cause to be forged a certain paper-writing, purporting to be a bond, and to be signed by one C. D. with the name of him, the said C. D., and to be sealed with the seal of the said C. D.," but did not charge that the bond purported to be attested by one A. B. Motion to arrest the judgment on this account overruled, for nothing need be averred in the indictment, which is not necessary to constitute the offense charged. It is not necessary that there should be a subscribing witness to a bond; and if there be one, it is not his signature, but the signing, sealing and delivery by the obligor that constitute the instrument a bond.

THIS was an indictment for forgery under the act of 1802. It charged that "Wyatt Ballard, late of the county of Orange, planter, on 12 November, 1803, with force and arms, at
(187) the county of Edgecombe, of his own wicked head and imagination, wittingly and falsely did forge and cause to be forged a certain paper-writing, purporting to be a bond, and to be signed by one Thomas Wiggins, with the name of him, the said Thomas Wiggins, and to be sealed with the seal of the said Thomas Wiggins, the tenor of which said false, forged and counterfeited paper-writing purporting to be a bond is as follows:

"On demand, 1 January, 1805, I promise to pay Wyatt Ballard, or his assigns, the full sum of $1,030, the same being for value received, as witness my hand and seal this 12 November, 1803.

THOMAS WIGGINS. (SEAL.)

"Teste: B. LEWIS.

"with intention to defraud the said Thomas Wiggins, against the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the State." The defendant was found guilty, and it was moved that the judgment be arrested, (1) because it is not averred in the indictment that the offense was committed *after* the act was in force on which the indictment is founded; and (2) that it is not stated that the forged bond purported to be attested by the subscribing witness. The case was sent to this Court.

HARRIS, J. As to the first reason in arrest, the act was in force from and after 1 April, 1802, and the indictment charges that the offense was committed on 12 November, 1803, *against the form of the act.* If the offense was committed against the act, it must necessarily have been committed after the
(188) act was in force; for if it were not, the defendant could not be guilty of the offense charged against him, and must have been acquitted. As to the second reason in arrest, noth-

ing need be averred which is not necessary to constitute the offense charged in the indictment. It is not necessary there should be a subscribing witness to a bond, and although there be one, it is not his signature, but the signing and sealing by the obligor, that constitute the writing a bond. The indictment avers that the writing set forth purports to be signed and sealed by the obligor, which is all that is necessary to constitute the offense and bring it within the act. And although another averment *might* have been made with propriety, it does not follow that it *ought* to have been made. Let the reasons in arrest of judgment be overruled.

Cited: S. v. Newcomb, 126 N. C., 1107.

DEN ON DEMISE OF WOOTTEN AND WIFE v. WILLIS SHELTON.

From Halifax.

A, being seized in fee of certain lands, devised them "to his daughter Anne during the full term of her natural life, and at her decease to descend to the *first male child* lawfully begotten on her body; but if Anne should die without *such male heir of her body*, then the said land to belong to her present daughter Martha, to her and her heirs forever." Anne had several male children after the death of the testator, and her eldest male child died in her lifetime, living her daughter Martha, who afterwards married and had issue. The other male children survived their mother, Anne: *Held*, that on the birth of the first male child the estate vested in him, by which means the limitation to Martha was defeated. The law leans in favor of the vesting of estates, and in limitations like the present the vesting shall take place on the birth of a child, without waiting for the death of the parent.

IN this case the jury found the following special verdict, viz., that David Lane being seized in fee of the land in question, on 12 April, 1789, made his last will, and therein and thereby devised the same as follows, to wit: "I lend to my daughter, Anne Shelton, the 729 acres of land whereon she (189) now lives, during the full term of her natural life, and at her decease to descend to the *first male child* lawfully begotten on her body; but if my said daughter die without *such male heir* of her body, then the said land to belong to the *present* daughter, Martha Shelton, to her and her heirs forever." That the said will was afterwards duly proven; that the said Anne Shelton had several *male children* after the death of the tes-

tator; that the *eldest* one lived two or three years, and then died in the *lifetime* of the said Anne, *living* the said Martha, who afterwards intermarried with William Wootten; and they two are the lessors of the plaintiff. That the other male children, five in number, survived the said Anne, the eldest of which *afterwards* died an infant, and unmarried before the bringing of this suit, and before the act of 1795, letting in females equally with males. That the remaining four children are still alive, and that the defendant Willis Shelton claims as guardian to the said four sons and to Mary, who is another daughter of the said Anne.

Upon this special verdict the court gave judgment for the plaintiff for the whole of the said land, and the defendant appealed to this Court.

Browne for plaintiff.

(194) THE COURT gives judgment for the defendant, on the ground that on the birth of the first male child the estate vested in him, by which means the limitation to Martha was defeated; that this was the clear intention of the testator; otherwise, if the first male child had left children, they would have been unprovided for; that the law always leans in favor of the vesting of estates, and in limitations like the present they have said the vesting shall take place on the birth of a child, without waiting for the death of a parent.

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(195)

WELLS COOPER v. THE PRESIDENT AND DIRECTORS OF THE DISMAL SWAMP CANAL COMPANY AND OTHERS.

From Chowan.

1. Under the acts of Virginia and North Carolina, incorporating the Dismal Swamp Canal Company, the courts of each State have equal jurisdiction in all matters relating to the concerns of the company; and the court, in either State, in which a suit shall be first properly instituted ousts all other courts of jurisdiction during the pending of such suit, and whilst the judgment which may be given therein remains in force.
2. The shares of the company are not liable to seizure and sale under a *fieri facias*. They are declared *real estate* by the acts, only to make them inheritable.
3. A bill in equity will not lie against the officers of the company to compel them to register a conveyance of shares. The proper remedy is a *mandamus*.

COOPER *v.* CANAL CO.

IN 1790 the States of North Carolina and Virginia (by acts of their respective Legislatures) incorporated a company by the name of the Dismal Swamp Canal Company, and declared the shares of the company to be real estate, and the proprietors thereof tenants in common. The canal lies partly in Virginia and partly in North Carolina. The office of the president and directors, for the purpose of registration and of performing their other corporate acts, is held in the town of Norfolk, in the State of Virginia. Wells Cooper purchased certain shares in this canal, at a sheriff's sale, under an execution issuing from the Superior Court of Law at Edenton, and directed to Camden County, where the proprietor then resided and the canal partly lies. He then brought a bill, among other purposes, to compel the president and directors to register the deed executed to him by the sheriff for the shares which he had purchased; and the case was sent to this Court upon the following questions: 1. Whether an execution issuing from a court in North Carolina can be levied on or affect the shares of the com- (196) pany. 2. Whether the shares can be transferred under the acts of incorporation, by execution. 3. Whether the courts of North Carolina have jurisdiction in the present case.

HALL, J. The last question submitted to this Court should be first considered: have the courts of North Carolina jurisdiction of the present suit? It is to be observed that the canal lies partly in Virginia, and partly in this State, and that the acts of Assembly incorporating the companies give no preference to the courts of either State. And it is to be further observed that the office of president and directors of the company has not by these acts been located. It therefore follows that the courts of each State have equal jurisdiction; but the court in either State in which a suit shall be first properly instituted does, by such priority, oust all other courts of jurisdiction during the pendency of such suit, and whilst any judgment, which may be regularly given in such suit, remains in force.

But the complainant has not applied to the proper jurisdiction. He ought to have applied to a court of common law for a *mandamus* to compel the officers of the company to register his deed, in case he be entitled to have it registered. 4 Burr., 1991; 1 Ld. Raym., 125; 1 Strange, 159; 2 *id.*, 1180; Com. Dig. Mandamus, A; 2 Burr., 943; 2 Term, 2. It is not necessary to discuss this point, as the first and second points made in this case must be decided against the complainant. It is true that the acts of incorporation declare that the shares shall be considered *real property,* and it is also true that real property

may be sold under writs of *fieri facias* in this State. But it was not contemplated to make such shares liable to debts as real property. The object of the acts was to give to shares (197) the quality of being inheritable. This idea is strengthened by a clause in the acts which declares that there shall be no severance of a share. If the shares are to be considered real property as to the payment of debts, they must be viewed as savoring of and issuing from the land, in which case they have locality; and part of the land lying in Virginia is not within the jurisdiction of this Court, so that an execution could be levied on it; and we have just seen that that part which lies in this State cannot be sold, because there can be no severance of a share. If the shares be considered as unconnected with the land, although, as to some purposes, they be considered as real estate, yet, as to executions, they are *choses in action,* and not the subject of seizure or sale. It may be aptly said of them, what *Lord Ellenborough,* in *Scott v. Scholey,* 8 Term, 467, said of equitable interests in terms for years, "that they had no locality attached to them, so as to render them more fitly the subject of execution and sale in one country than in another." Let the bill be

Dismissed.

(198)

THOMAS C. RESTON v. THE EXECUTORS OF THOMAS CLAYTON, DECEASED.

From New Hanover.

A bequeathed certain personal estates to trustees, "until some one of his grandchildren, the lawful children of his daughter B, should arrive to the age of twenty-one years, at which time the property was to be divided among his said grandchildren, equally, share and share alike": *Held,* that *all* the grandchildren living at the time the first of them attained to the age of twenty-one years are entitled, share and share alike.

THOMAS CLAYTON, by his last will, gave his estates, both real and personal, to certain persons in trust, to sell his lands and his perishable property and hire out his slaves "until some one of his grandchildren, the lawful children of Isabella Reston, of Scotland, should arrive to the age of twenty-one years, at which time his slaves were to be divided among his said grandchildren, equally, share and share alike; and all the rest and residue of his estate to be equally divided among his said grand-

children, and given to them when they should arrive to full age respectively; and that his executors should allow for the annual profits of his estates whatever sum or sums of money they might think proper for the education and maintenance of his said grandchildren, until they respectively should arrive to full age." At the time of the making of the will in July, 1793, and of the death of the testator, in October following, Isabella Reston, named in the will, had three children: Thomas C., who arrived to full age in October, 1810, Mary and William. After the death of the testator, and before Thomas C. Reston arrived to full age, Isabella Reston had seven other children, who were alive at the commencement of this suit; and the question submitted to this Court was, whether the estates of the testator were to be divided among the three children living at the death of the testator or among the ten children living at the time Thomas C. Reston arrived to full age. (199)

HALL, J. It is not necessary to inquire whether the legacies vested before the time pointed out for their payment. If they did not vest before that time, it is clear that all the grandchildren are entitled; if they did vest before that time, we are authorized by *Attorney-General v. Crispin*, 1 Brown Ch., 386, to say that the consequence is the same. All the children of Isabella Reston living when her son Thomas C. arrived to full age are equally entitled. Ves., Jr., 136; 2 *id.*, 687; 3 *id.*, 119, 150; Ambler, 334.

SIMON PRICE v. REDING SCALES AND THOMAS LOCKHART.

From Johnston.

Practice. A capias is sued out against A and B and is served on A. An *alias* and then a *pluries* capias are issued against B, which are returned "Not found." A shall be allowed to plead to the action, and the plaintiff to come to issue as to him.

THIS was an action of trespass *vi et armis*, and the capias had been served on Lockhart of the defendants; after which an *alias* and *pluries* capias issued against Scales, the other defendant, on both of which the sheriff returned "that Scales was not to be found"; and thereupon Lockhart moved to plead to the action, and that the plaintiff be compelled to come to issue as to him, which motion was sent to this Court.

BY THE COURT. At this stage of the proceedings the defendant Lockhart is entitled to plead and to demand that issue be joined as to him. Let the motion be allowed.

Cited: Dick v. McLaurin, 63 N. C., 187.

(200)

JOHN SEAWELL v. WILLIAM SHOMBERGER.

From Moore.

Action *qui tam.* In an action to recover the penalty given by the statute against usury, it is not necessary to show that the principal money has been paid. The offense is complete when anything is received for the forbearance, over and above the rate of 6 per cent per year.

THIS was an action *qui tam,* to recover the penalty given by the statute against usury; and the facts were that one Jabez York was indebted to the defendant upon a judgment rendered by a justice of the peace, and for forbearing the payment of the said judgment the defendant accepted and received from York a sum greater than at the rate of 6 per cent per year. The principal sum was unpaid when the action was brought, and the question submitted to this Court was, whether, as the principal sum was not paid, the defendant was liable for double the amount thereof (the penalty given by the statute).

LOWRIE, J. Our act of Assembly on this subject is copied from 12 Anne, ch. 16, and the construction given to this latter statute ought to be given to ours. It is laid down by *Lord Chief Justice De Grey,* in *Loyd qui tam v. Williams,* 3 Wills., 261, that "wherever parties make a contract for moneys or other things, and above the rate of 5 per centum per annum is received by the lender, the offense against the statute is complete; and even if the principal money shall never be paid, yet the offense is committed." Judgment for the plaintiff.

(201)

STATE v. BENJAMIN JOHNSON.

From Robeson.

The prosecution being removed for trial to another county, the clerk transmitted the original indictment, on which the defendant was tried and convicted. It was moved in arrest that under the act of 1806 the clerk should have transmitted a copy of the indictment as part of the transcript of the record, and that the defendant ought to have been tried on this copy. Motion disallowed.

THE defendant was indicted for petit larceny in Cumberland County Court, and being convicted, he appealed to the Superior Court. At the term at which the appeal was returned he filed an affidavit, on which the court ordered the prosecution to be removed for trial to Robeson County, and at Fall Term, 1811, of Robeson Superior Court, he was tried and convicted; and it was moved in arrest of judgment: (1) that he was tried in the Superior Court of ROBESON upon a copy of the record from the County Court of Cumberland, which was not certified under the seal of the court; (2) that the clerk of Cumberland Superior Court transmitted to Robeson Superior Court the transcript of the record received by him from the clerk of the County Court of Cumberland, instead of sending a copy of that record as required by the act of 1806; and (3) that the act of 1806 requires a transcript of the record to be transmitted from one Superior Court to another, and not the original.

LOWRIE, J. In this case the original indictment and not a transcript was sent to Robeson Superior Court, and the defendant has been tried on it and convicted. Had it not been for the peculiar words of the act of 1806, the objections now urged would never have been thought of. It is a novel objection that the defendant has been tried on the original indictment, and not on a copy. The objection is not substantial; for (202) the defendant by pleading to the original indictment did not lose any advantage that he could have had by being tried on the transcript. The original is better evidence of the facts charged, and of the finding of the grand jury, than any transcript or copy can be. The object of the clause of the act relied on is to multiply the chances of a fair and impartial trial by jury; and as that was in no respect abridged by the defendant's taking his trial on the original bill, the reasons offered in arrest must be overruled. Judgment for the State.

THOMAS DAVIS AND ARCHIBALD McNEIL v. THEOPHILUS EVANS AND OTHERS.

From Cumberland.

A special demurrer being filed to a declaration, and sustained, the court will give leave to amend the declaration on payment of costs.

IN this case a declaration had been filed, to which the defendant demurred specially, and after argument at the Spring Term, 1812, *Locke, J.*, sustained the demurrer, but gave the plaintiffs leave to amend on payment of costs. At Spring Term, 1813, Williams for the defendants obtained a rule to show cause why so much of the order as gave the plaintiffs leave to amend should not be vacated, on the ground of error, irregularity and want of authority in the judge to make such an order; and the case was sent to this Court upon this rule.

Bela Strong for plaintiffs.

(221) BY THE COURT. This question is, in effect, whether the court below had power to allow the amendment, for if the court had no authority, the granting of the order was a perfect nullity.

If a strict and literal construction be placed upon the act of 1790, it will be found that in no case whatever can *matter of form* be amended, whereby any end is obtained; for by the words of the act this power seems to be only exercisable as to imperfections, which are not set down as causes of demurrer; and by the preceding part of the same act such defects are cured by not being demurred to. The last part of the section, however, has these general words, "that the said courts may *at any time* permit either of the parties to amend *anything* in the pleadings and process, upon such conditions as the said courts respectively shall, in their discretion and by their rule, prescribe." Unless, therefore, the courts under these last words have power to permit the parties to amend in cases of special demurrer, the consequence would be that the plaintiff may be permitted to amend, in substance, though there be a general demurrer; and yet, as to a mere slip in matter of form, not essential to the justice of the case, which had been seized upon by a vigilant counsel, the hands of the court would be com-

pletely tied. As, therefore, this construction can be completely obviated by allowing to the latter words an import which they certainly bear, that of amending *anything* at *any time*, we are of opinion that it was competent for the court below to make such order, and that the rule for setting aside the order be discharged.

JUDGES

OF THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEAR 1813.

CHIEF JUSTICE:

JOHN LOUIS TAYLOR.

ASSOCIATE JUSTICES:

JOHN HALL, SAMUEL LOWRIE,

FRANCIS LOCKE, *HENRY SEAWELL,

LEONARD HENDERSON.

H. G. BURTON, ATTORNEY-GENERAL.

EDWARD JONES, SOLICITOR-GENERAL.

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*The Honorable EDWARD HARRIS, Esq., having died since the sitting of the last General Assembly, HENRY SEAWELL, Esq., was appointed by the Governor and Council, to his place on the Bench, April, 1813, and took his seat in the Supreme Court at July term following.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY TERM, 1813.

(225)

STATE v. FLOWERS & HAMPTON.

From Chatham.

A negro slave in the possession of and claimed by B goes on the land of C, and is there taken possession of by C in the absence of B, who shortly thereafter pursues C and attempts to take the slave from him. C is at liberty to repel this attempt, and is not indictable if he uses only such force as is necessary to retain the possession of the slave, nor is he indictable for the trespass in taking the slave, as the taking was on his own land, without any force or violence to B.

THE defendant was indicted for a trespass. The jury found them guilty subject to the opinion of the court on the following case:

"On 16 November, 1810, a negro woman, the property of Wright Kirby, had taken some clothes to wash at a creek running through the land of the defendant, Green Flowers. The place where she went to wash was distant from the house of Kirby about a quarter of a mile, and within the lines and on the land of the defendant Flowers. In the evening a negro girl named Nan, then in possession of Wright Kirby, was sent by Mrs. Kirby to assist in bringing up the clothes (226) from the place where they were washed; and whilst she was there the defendants Flowers and Hampton came up, and Flowers, assisted by Hampton, took the negro girl Nan into his possession (Mrs. Kirby being then at her house) and carried her some distance towards his house contrary to the will of the said Nan. While Nan was so in the possession of Flowers, and while he was on his own land and within his own inclosures, and after he had carried her nearly three hundred yards, Mrs.

Kirby overtook them and attempted to take the said Nan from the defendant, who prevented her from so doing. In making these attempts, Mrs. Kirby was once or twice pushed down by defendants, and bruised, but she was not struck, nor was any offer made to strike her; no force was used towards her except in preventing her from taking the negro girl Nan from the defendants.

Upon these facts the jury prayed the advice of the court, whether the defendants were guilty of an indictable trespass, and the case was sent to this Court.

LOCKE, J. The principle has long been settled, that an indictment for a trespass in taking property can be supported only in those instances where the act of taking has been accompanied with force, or where it is done *manu forti*. The evidence disclosed to support this indictment states that the negro charged to have been taken was found on the land of the defendant Flowers; that he took her from the place where she was employed in the service of her master or mistress, distant about a quarter of a mile from her master's house; that the mistress having understood it, pursued the defendants in order to regain the property, but that at the time of taking she was absent, and when she came up no more force was exercised than what was necessary to enable the defendants to retain possession of the negro, which they had already taken. The defend-
(227) ants, then, having without any force or violence to the owners, gained possession of the negro when on their own land, were at liberty to protect themselves as well as the negro from the attack or interference of any person who might claim title to said property; and great as the anxiety of this Court may be to discourage and discountenance every act of this nature, we cannot conceive that the circumstances of this case (though affording good ground for a civil action) evidence such a forcible taking by the defendants as constitutes an indictable trespass. Judgment must therefore be entered for the defendants.

Cited: S. v. Phipps, 32 N. C., 19; *S. v. Ray, ib.,* 40; *S. v. Davis,* 109 N. C., 811; *S. v. Lawson,* 123 N. C., 743.

AARON MARSHALL v. JESSE LESTER.

From Surry.

A judgment given by a justice of the peace, or other inferior tribunal, from which an appeal hath been prayed and granted, remains no longer a judgment, and cannot be sued on as such.

THIS was an action of debt founded on two judgments recovered before a justice of the peace, from which the defendant had appealed to the County Court, and given security as the act of Assembly directs for prosecuting the appeals; but the appeals had not been returned to the County Court. On the trial the court nonsuited the plaintiff, and he appealed.

HALL, J. The question is whether two judgments rendered by a justice of the peace really had that character at the time this action was commenced. The law gives to every person the right of appealing from the judgment of a justice, upon praying it and giving security. This was done in the (228) case of these two judgments, and from that moment they ceased to be judgments. After an appeal the case goes to the County Court, where there is a new trial and a new judgment given; and it is the duty of the justice to transmit it to the County Court for that purpose. The laws cited of suits brought on judgments, after writs of error obtained, do not apply. The case is too plain for a doubt. The rule for setting aside the nonsuit must be discharged.

DEN ON THE SEVERAL DEMISES OF GABRIEL HOMES AND MILDRED, HIS WIFE, AND JAMES B. SAWYER AND LOUISA, HIS WIFE, v. ROBERT MITCHELL.

From New Hanover.

The word *legacy*, used in a will, often relates to *real* as well as *personal* estate. The explanation of this word must be governed by the intention of the testator. Common people apply the word *legacy* to land as well as money; and courts should construe words according to their meaning in common parlance.

ARTHUR MABSON being seized in fee of the lands in question, departed this life in 1777, having published in writing his last will, duly executed to pass his real estates; and therein and

thereby devised: 1. "To his wife, Mary, all his household furniture at his plantation on Neps Creek, his riding horses and carriage, and all such part of his plate as was marked M. C. And he gave to her, during her natural life, the use and property of one-fifth part of all his slaves; and after her decease he gave the said slaves to his children, Mary, Susannah, Arthur, Samuel and William, or the survivor of them, to be equally divided among them. And he also gave to his wife, dur-
(229) ing her widowhood, the use of any one of his plantations she might choose. 2. To his son, Arthur Mabson, his plantation on Neps Creek and all his other lands thereto adjoining, and a sixth part of all his slaves, cattle and hogs, and the remaining part of his plate. 3. To his daughter, Mary Mabson, one house and lot in Wilmington and one-sixth part of all his slaves, cattle and hogs, to be put into her possession when she should attain the age of twenty-one years or she should marry. 4. To his daughter, Susannah Mabson, another house and lot in Wilmington and one-sixth part of his slaves, etc. 5. To his son, Samuel Mabson, his plantation on the sound and a tract of land adjoining, and one-sixth part of his slaves, etc. 6. To his son, William Mabson, all his other lands and one-sixth part of his slaves, etc. 7. He gave all the rest and residue of his personal estate to his aforesaid five children, to be equally divided between them. 8. He directed that in case of the death of any of his said children without lawful issue, *before the time they could get possession of their respective legacies, the legacy bequeathed to such child so dying shall be equally divided between the survivors or survivor of them.*"

Arthur Mabson was the testator's eldest son and heir at law. He died intestate in 1793, leaving the lessors of the plaintiff, Mildred and Louisa, his heirs at law. Mary Mabson, named in the third clause of the testator's will, entered into possession of the premises upon the death of her father, and remained in possession of them until 1808, when she died without issue, having by her last will, duly executed to pass real estate, devised the premises to the defendant. The premises described in the declaration were the same with those devised to Mary Mabson in the third clause of the testator's will. The question submitted to the Court was, "What estate in the premises did Mary Mabson take under her father's will?"

(230) HALL, J. The first clause of the will connected with this question, and by which the premises are given to Mary Mabson, certainly has only the effect of conveying to her an estate for life. The testator has not even expressed an in-

tention of giving away *the whole* of his estate—a circumstance which in many cases has been much relied upon. But what appears to be decisive of the question is the clause in which the testator directs, "that in case of the death of any of my aforesaid children without issue before the time they can get possession of their respective legacies, the legacies before bequeathed to such child so dying shall be equally divided between the survivors or survivor of them." It has been argued that the word legacy relates only to personal property; and no doubt it would be more correct to use it in that way; but most testators are unacquainted with that circumstance, and apply this word indiscriminately to both real and personal property, and so the testator applied it in this case. *Hope v. Taylor,* 1 Burr., 268, is an authority that settles this question. It certainly never could be the intention of the testator that in case Mary died before she got possession of the property given to her by the will, the personal property should be divided among the survivors, and the real estate either go to a residuary legatee or to the heir at law, as property undisposed of. Let judgment be entered for the defendant.

Cited: Tucker v. Tucker, 40 N. C., 84; *Cole v. Covington,* 86 N. C., 298.

(231)

DEN ON THE SEVERAL DEMISES OF JOSEPH PIPKIN AND OTHERS V. HENRY COOR.

From Wayne.

Case of descent. Construction of the 3d clause of the act of 1784, regulating descents. It was the object of the Legislature in this clause to allow the half blood to inherit, (1) where there was no nearer collateral relations; and (2) where the brother or sister of the whole blood acquired the estate by purchase; and therefore, where A died after 1784 and before 1795, intestate, seized of lands and leaving five sons, one of whom died after 1794 and before 1808, intestate and without issue, leaving four brothers of the whole blood and a half brother on the mother's side, this half brother shall not inherit.

IN this case the jury found a special verdict, stating that Elisha Pipkin died some time subsequent to 21 December, 1784, and previous to 1 January, 1795, intestate, (232) seized of a tract of land containing the premises in dispute, and leaving sons, Joseph, Elisha, Charles and James Pip-

kin; that the said James died after 1794, but previously to 1808, intestate and without issue, leaving the aforesaid Joseph, Elisha and Charles, his brothers of the whole blood, and Mille and Ruth Pipkin, his sisters of the whole blood; and leaving John Coor, a half brother on the mother's side. On this special verdict the court gave judgment for the plaintiff, and the defendant appealed.

(233) TAYLOR, C. J. The only question presented in this case is, whether the defendant, who is a maternal brother of the half blood to the lessors of the plaintiff, shall share with them in the descent of lands of which James became seized in consequence of the death of his father; and this depends upon the true construction of the third clause of the act of 1784, regulating descents.

It seems to have been the aim of the Legislature to abolish that rule of the common law which totally excludes the half blood from the inheritance; and to allow them to inherit, (1) where there are no nearer collateral relations, and (2) where the brother or sister of the whole blood acquires the estate by purchase.

It is true that the provision of the clause under consideration is couched in very broad and general terms, which, considered by themselves, would clearly admit the half blood in every possible case. But this construction is narrowed by the proviso, which, while it declares the intent of the Legislature, evinces the spirit in which the alteration is made in the law. The words are: "*Provided, always,* that when the estate shall have descended on the part of the father, and the issue to which such inheritance shall have descended shall die without issue, male or female, but leaving brothers or sisters of the paternal line, of the half blood, and brothers or sisters of the maternal line, also of the half blood, such brothers and sisters respectively of the paternal line shall inherit in the same manner as brothers and sisters of the whole blood, until such paternal line is exhausted of the half blood; and the same rule of descent and inheritance shall prevail among the half blood of the maternal line, under similar circumstances, to the exclusion of the paternal line." It is said that this proviso describes a case where there are brothers or sisters both of the paternal and maternal half blood, and does not provide for a case where there is but one set of

(234) half blood. But certainly the spirit and equity of a law which excludes the maternal half blood in favor of the paternal, because the estate descended from the father, must under similar circumstances exclude the *frater uterinus* in

favor of the whole blood. To give the law a different construction, we must assume the principle that the Legislature meant to place the whole blood in a more unfavorable situation than the half blood. So that if the lessors of the plaintiff in this case were of the half blood, they would exclude the defendant by the very words of the proviso; but being of the whole blood, the land, though descending on the part of the father, must be shared equally with the defendant. This could not have been designed by the lawmakers, and, therefore, is a construction wholly inadmissible. Judgment for the plaintiff.

CLARK'S EXECUTORS v. EBORN AND OTHERS.

From Hyde.

In 1800 A made a will duly executed to pass his lands; in 1809 he made another will, also effectual to pass lands, in which he made a different disposition of part of his estate. Afterwards a paper in the form of a will was drawn by his direction, but neither signed nor attested, which, as to some of his lands, differed from both of the former wills: *Held*, that this paper, if made *animo revocandi*, although not good as a will to pass lands, was a revocation of the former wills. For our acts of Assembly are silent as to the manner of revoking a will of lands; the statute of frauds was never in force in this State, and therefore the rule of the common law must govern; and by that rule a will of land can be revoked by either words or acts evincing an immediate purpose to revoke.

WILLIAM CLARK made a will in June, 1800, duly executed to pass lands, by which he devised lands to his sons. In January, 1809, he made another will, also effectual to pass lands, by which he made a different disposition of part of his estate; and subsequently a paper in the form of a will (235) was drawn by his direction, but neither signed nor attested, which in respect to some of his lands differed from both of the former wills. Upon the issue of *devisavit vel non* the jury found that the latter paper operated as a revocation of the first will, as to the personal property, but not as to the real. Upon a motion for a new trial, the question submitted to this Court was, Whether the paper last drawn amounted to a revocation of the former wills.

TAYLOR, C. J. It is contended that the third will, made by the direction of the testator, not conforming in any respect to

the provisions of the act of 1784 relative to devises of land, cannot operate as a revocation of the former wills, which are effectual under that law. But after an attentive consideration of the arguments and authorities adduced in the case, we are of opinion that in point of law the latter paper may operate as a revocation *pro tanto,* and that it must have that effect, if upon another trial of the issue the jury shall find the *animum revocandi.*

It is not to be doubted that this case would receive a different determination under the statute of frauds and perjuries, the sixth clause of which requires a revoking will to be made with nearly all the solemnities which appertain to a devising one. But it must be remembered that the law of this State is silent as to the manner in which a will of land shall be revoked, and the statute of frauds never had operation here.

On this point, therefore, the common law, as it existed previously to the enactment of that statute, and as it exists at present, must furnish the rule. Now, according to that, any act or words of the testator which evince an immediate purpose to revoke his will must have that effect. As if one having made his will in writing, and devised his lands to A, after-
(236) wards being sick, and on his deathbed, declares that he did revoke his will, and A should not have the lands given him by the will, or other like words showing the devisor's intent to make an express revocation thereof; or if, speaking of his will, he had said, "I do revoke it, and be a witness thereof." For these expressions would have shown an immediate intention to revoke it. Dyer, 310.

The case cited by the defendant's counsel, from 2 Danvers, 529, conveys the law directly applicable to this case: "If a man devises land to another by his will, and after, he devise it by parol, though this be void as a will, yet it is a revocation of the first will." So in the present case, the paper which was written by the testator's direction, being unsigned, unaltered, and not in his own handwriting, cannot operate as a devise of the lands described in it; but as it indicates a clear purpose of making a different disposition of some of them from that contained in his former wills, it so far operates as a revocation of them.

All the authorities concur in ascertaining beyond a doubt the right of a testator to revoke by parol a will of real estate before the statute of 29 Charles II. And it seems to be equally clear, from analogous constructions of that statute, that such right would have subsisted after it, if a special prohibition had not been introduced. Thus the fourth section of the statute

requires a certain agreement to be made in writing, but is silent as to the mode of revocation. Yet it has been held that all those agreements may be revoked by parol.

All the cases relied upon to show that a revocation is not effected here have arisen since the statute and are constructions of it, which, however just they may be in relation to that law, cannot apply to a case to be tested by a different rule. Whether it be not necessary to appoint solemnities for the revocation of a will, and thus guard against the perjury, imposition and disappointment of testator's wishes, which the pres- (237) ent system may produce, is a question for the Legislature to decide. The province of this Court is limited by the duty of ascertaining what that system is. Let there be a new trial.

WILLIAM JOHNSON, ASSIGNEE, ETC., v. MOSES KNIGHT AND RICHARD KNIGHT.

From Anson.

A gave his bond to B, and C became the subscribing witness. B assigned the bond to C, who sued A. The general issue being pleaded, C was nonsuited, because he had become interested in the case by his own voluntary act, and could not give evidence to prove the execution of the bond. And the court would not receive inferior evidence of its execution, such as the acknowledgment of A that he had given the bond, and that he would pay it. The evidence of the subscribing witness is dispensed with in case of marriage, or in favor of executors or administrators, from necessity, and in furtherance of justice.

THE special case was this: Johnson, the plaintiff, was the subscribing witness to the bond on which this action of debt was brought; and on the trial he proved that the defendants had acknowledged the execution of the bond; that one of them had promised to pay it, and the other had said he expected to have it to pay, and it would ruin him. The question submitted to this Court was, whether this was a sufficient proof of the execution of the bond.

LOCKE, J. It has already been decided by this Court, and between this plaintiff and the defendants, that it is improper to receive evidence of the handwriting of the subscribing witness, who was the plaintiff and had taken a voluntary assignment of the bond in question. The case is again submitted upon

another question, to wit, whether the acknowledgment of
(238) the defendants, that they had given the bond and would pay it, be legal and proper evidence to be left to a jury to prove its execution. This point is expressly decided in *Abbott v. Plumb,* Doug., 216, 217, and in *Cunliffe v. Houghton,* 2 East, 187. *Lawrence, J.,* in delivering his opinion in this last case, decided in 1802, repeats this as a general principle of law: And although the evidence of the subscribing witness may be dispensed with, in cases of marriage, or in favor of executors or administrators, from necessity and in furtherance of justice, yet no case has been found where it has been dispensed with by reason of the subscribing witness becoming assignee. Let a nonsuit be entered.

JEREMIAH MURPHY v. THE EXECUTORS OF ISAAC GUION, DECEASED.

From Craven.

1. In an action of trespass for mesne profits, the defendant pleaded the statute of limitations. The action was brought two years after the decision of the action of ejectment, in which the demise had expired before the decision: *Held*, that the plaintiff was entitled to recover for the whole term, from the commencement of the demise to the taking of possession, it being eleven years.

2. The action for mesne profits does not accrue until possession is given after judgment in the action of ejectment, and from that time only the statute of limitations begins to run.

THIS was an action of trespass for mesne profits. The defendants pleaded "the general issue, and statute of limitations." The plaintiff replied, and issue being joined, the case came on to be tried, when the jury found the issue for the plaintiff, subject to the opinion of the court upon the following points, to wit: Whether the plaintiff in this action, brought two years after the decision of an ejectment in his favor, in which
(239) the demise laid had expired before the decision, ought to recover for the whole sum, from the commencement of the demise to the taking of possession, being eleven years. No formal judgment was entered in the ejectment.

Gaston for plaintiff.
Harris for defendant.

HALL, J. It has been alleged for the defendants that the plaintiff ought to be barred because he had it in his power at any time he pleased to make an entry on the land in question, by virtue of which entry, and his having a better title than the defendant, the law would have adjudged him in possession; and being so in possession, he might have had the same redress by action that he now seeks. Admitting that he might have taken this step, yet the law allowed him to choose the course he has taken of bringing an ejectment, and by that means possessing himself of the premises. And this mode of redress ought not to be discouraged, because thereby he is put in possession of the land under the sanction of the judgment of the court. Until such possession the action for mesne profits does not accrue, and from that time only the statute of limitations begins to run. It seems to be a very wrong construction of the act to say that a recovery can be had for the profits of the land for the last three years only next before the commencement of the action, when the action of ejectment may have been pending ten or more years, and the defendant has been in the receipt of the profits during all that time, and when an action could not be commenced for them until after possession gained by the action of ejectment. It is true, there is a *dictum* in Buller's Nisi Prius, 88, which seems to be sanctioned by some other books; but no adjudged case is found on which it rests.

It is said, however, that no judgment has been for- (240) mally entered up in the action of ejectment. We all know that too little form is observed in our judicial proceedings; but if the judgment has been entered in that action, as is usual in other similar cases, it must be deemed sufficient. As to the expiration of the demise, it ought not now to be an objection, after the plaintiff has obtained judgment in the action of ejectment and been put in possession of the lands. Let judgment be entered for the plaintiff for the mesne profits for eleven years, as assessed by the jury.

JOSEPH M. BLACK v. JAMES G. BEATTIE.

From Rutherford.

A conveyed a negro slave to B, upon condition that B was not to take the slave out of her possession or deprive her of the use and benefit of the slave, until her death, or until she might see proper or fit to give up to him the slave. A then married C, who placed the slave in the hands of D, where he remained until C's death. A survived her husband, took possession of the slave and delivered him to B, from whom he was taken by C. B brought *trover* for the slave: *Held*, that he could not recover, because the beneficial interest for life in the slave, which A retained, vested upon the marriage in her husband, and the right of assenting to the delivery of the slave to B was in him during his life, and in his representatives after his death. A had no right of assenting to the delivery.

MOTION to set aside a nonsuit, and for a new trial, upon the following case: The plaintiff brought an action of *trover* for a negro, the title of which he founded on the following instrument of writing, executed by Elizabeth Black, then a widow and the mother of the plaintiff. The paper was executed about an hour before her marriage with her second husband, Cox, by whom it was known and approved. The negro came into Cox's possession, who died some years thereafter; but before
(241) his death the negro was placed in the defendant's possession, where he was at the time of Cox's death. Elizabeth, the widow of Cox, took possession of the negro, when sent on an errand by the defendant, and delivered him to the plaintiff, from whom he was taken away by the defendant.

The following is a copy of the instrument of writing executed by Elizabeth Black to the plaintiff:

Know all men by these presents, that I, Elizabeth Black, of the county of Lincoln and State of North Carolina, for and in consideration of the sum of five shillings to me in hand paid by Joseph Black, and also the further consideration of the love and affection to my son, the said Joseph Black, I do give, set over and deliver to the said Joseph Black my negro slave named Meny, about thirty years of age, five and one-half feet high, well made and set, and very black, which said man slave I do give and bestow unto the said Joseph Black, and warrant and defend the property thereof on the following terms and conditions, to wit: (1) that although I do now, for the consideration above mentioned, give and bestow, bargain and deliver unto my son Joseph Black, my said negro man slave named

Meny, yet he is not to take him out of my possession or deprive me in any manner or sort of the use and benefit of said negro, until my death, or until I see proper or fit to give him up or surrender him to the said Joseph; (2) that if the said Joseph should at any time get possession of the said negro, either by my consent or otherwise, that then and in that case the use, benefit and labor of the said negro shall be due and owing to me, and to be disposed of at my will and pleasure.

her
ELIZABETH × BLACK.
mark.

HENDERSON, J. A beneficial interest in the negro in question, for the life of Elizabeth Black, is clearly reserved to her in the deed making part of this case. This interest became vested in Cox, her husband, as well as her right of assenting to the delivery to the defendant. As it does not appear that Elizabeth is dead, the title which she had still subsists in her husband's representatives; and of course the plaintiff has no title. The nonsuit must therefore remain.

Cited: Sutton v. Hollowell, 13 N. C., 186; *Newell v. Taylor*, 56 N. C., 376.

(242)

LEMUEL THIGPEN v. WILLIAM BALFOUR.

From Edgecombe.

A, being security for B to C in a bond, C died, and E got possession of the bond after his death, and sold it to F, who threatened to sue A, and A, to avoid suit, gave a new bond for the debt and took up the old one. It was afterwards discovered by A that the old bond had been discharged by B; F was ignorant of this fact when he purchased the bond from C, but knew it before he got the new bond from A, and did not disclose it to A. E was solvent when F discovered that the old bond had been discharged, but was insolvent when this fact came to the knowledge of A. Equity will relieve A from the payment of the money on the new bond, on the ground of the concealment by him of the fact that the old bond was paid at the time he got the new bond from A.

THE BILL charged that the complainant became bound as surety for one Causey, in an obligation to one Stringer, for $48.50, payable in December, 1796. That Stringer removed to Georgia, and Causey to the county of Pitt, in this State, about

forty miles from the complainant, who, in consequence thereof, heard nothing of the debt until 1804, when Balfour presented the obligation and demanded payment.

That Stringer died in Georgia, and complainant understood that one Ruffin, a man of little worth either in character or property, went to that State, and in searching among Stringer's papers found the bond, which he brought to this State, and sold or pretended to sell it to Balfour. That complainant, to avoid a suit with which Balfour threatened him, gave a new bond for the debt and took up the old one, which he then believed to be due. And on applying to Causey for payment, Causey informed him that he had paid the debt to Stringer soon after it was contracted, and that Stringer had informed him that he had destroyed the bond. That complainant thereupon commenced a suit against Causey; but having learned since that the debt really had been paid by him, he had abandoned the hope of recovery; and he charged that he be-
(243) lieved Balfour knew that the debt had been paid.

The defendant, in his answer, insisted that Ruffin had paid a valuable consideration for the bond, and that he, the defendant, bought it fairly from Ruffin for £20, which Ruffin owed him; but he had not made this purchase until complainant had voluntarily agreed to give a new bond, upon a further day of payment being allowed. He denied all collusion with Ruffin, and also notice of the payment of the first bond when the second was given. He alleged that he could have secured the debt which Ruffin owed him, if complainant had not consented to renew the bond, for that Ruffin was then in possession of property, but had since become insolvent, so that he must lose his money if deprived of the benefit of the judgment. He further insisted that complainant could not rightfully claim the interposition of a court of equity for facts which, if true, would have formed a defense at law.

Upon the issues made up and submitted to the jury, they found that the defendant, when he purchased the old bond, had not notice that the debt was paid, but he had notice of that fact before he took the new bond payable to himself. They further found that Ruffin was solvent from January, 1804, till the April following, shortly after which time he became insolvent. The case was submitted without argument.

HALL, J. The jury have found that at the time the defendant purchased the old bond he had no knowledge that it had been paid. If by that purchase he had obtained any legal advantage of the complainant, and one or the other must have

suffered in consequence of Ruffin's insolvency, equity would not interfere, but leave the loss where the law placed it. But by that purchase he gained no legal advantage. He could not have recovered at law upon that bond, for Thigpen had a good defense. Afterwards during the solvency of Ruffin, (244) the jury find that the defendant had full notice that the bond was discharged; yet with this notice, and before Ruffin's insolvency, he procured complainant to give him the bond on which he had obtained judgment, founded on no other consideration than the circumstance that Thigpen had been security in the first bond. Here was such a concealment of the true situation in which the parties stood, and such an attempt to wrest money out of the complainant, without any consideration, when the defendant ought to have sought his remedy elsewhere, if Ruffin really owed him, that this Court ought to interfere. It is therefore ordered and decreed that the defendant pay to the complainant the full amount of all the money which he received upon his judgment at law, with interest thereon from the time he received it as well as all costs at law which complainant was bound to pay, together with the costs of this suit.

JOHN FINDLEY, COUNTY TRUSTEE, ETC., v. WILLIAM W. ERWIN, CLERK, ETC.

From Burke.

The removal of a prosecution from one county to another for trial does not affect the right of the county in which the prosecution originated to the fine imposed upon the defendant in case of conviction. For fines were given to the county to defray the expenses of prosecution in cases of acquittal; and it necessarily follows that the county which on an acquittal would have to pay the costs shall on a conviction have the fine.

A PROSECUTION for a conspiracy was commenced in the Superior Court of Wilkes, and removed for trial to the county of Burke, where the defendants were convicted and fined £100, which sum was paid into the office of the Superior (245) Court of Law for BURKE. This action was brought by the county trustee of Wilkes to recover the money for the use of that county.

HENDERSON, J. As the law is silent in the case of a prosecution removed from one county to another, in respect to the

county entitled to the fine which may be imposed, we must have recourse to reason and construction, in order to decide the question. No doubt the fines were given to the county to defray the expenses of those prosecutions to which it was made liable in certain cases of acquittal. If that be correct, it follows that the county which would have been chargeable, in case of an acquittal, is entitled to the fine on conviction; and that is the county in which the offense was committed and in which the prosecution was commenced. Policy as well as justice seems to dictate this: policy, because it will make it the interest of a county to suppress offenses; justice, because those who originate a groundless prosecution ought to bear the costs. The removal of the case to another county for trial cannot destroy that liability. We are, therefore, of opinion that as the county of Wilkes, where the prosecution was commenced, would have been subject to the payment of the costs of prosecution if the defendants had been acquitted, it should have the fine imposed on their conviction.

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(246)

ARRINGTON v. BATTLE.

From Nash.

Question of costs. In an action of detinue, the parties refer the case to arbitration. The arbitrators award that the defendant shall deliver to the plaintiff the slave sued for, and that the plaintiff shall pay to the defendant the purchase money for the slaves; but were silent as to the costs of the suit: *Held*, that each party shall pay his own costs.

THIS was an application for a writ of *supersedeas,* to set aside an execution for costs. Battle had instituted two suits against Arrington, one in detinue and the other in trespass for false imprisonment. After issue joined, both causes were referred by the parties to arbitrators, who awarded that in the action of detinue Arrington should return to Battle the negro woman sued for and her increase, and that Battle should pay to Arrington the purchase money. In the action of trespass they awarded that Arrington should pay Battle £250 and costs. Arrington delivered the negro according to the award in the action of detinue, but refused to pay the costs, to obtain which Battle issued an execution. It was the object of the present application to set aside this execution. The affidavit and cer-

tificate of two of the arbitrators were filed, in which they stated their intention to have been that Arrington should pay the costs in both actions.

HALL, J. The only question that can arise here is with respect to the action of detinue. In that action the arbitrators directed the negro to be delivered up by Arrington, and a certain sum of money to be paid by Battle. Thus the rights of the parties with respect to the subject-matter of the suit were settled. This Court is not applied to to set that award aside; there is no law which in a case situated as this is directs that either party shall pay the whole costs. Upon legal principles, then, it will follow that each party shall pay his own costs to the clerk, as for work and labor done. Those (247) costs being ascertained, the clerk is at liberty to issue an execution against each party separately. In the other action Arrington must pay the costs, because the arbitrators have said so.

Cited: Debrule v. Scott, 53 N. C., 74.

REUBEN McCLENAHAN v. JOHN THOMAS.

From Iredell.

Suing *in forma pauperis.* The true meaning of the act of 1787 is that all such persons shall give security for costs as would be liable for costs if they fail in their suit. It does not render any person liable for costs who was not so before. Statute 23 Henry VII., ch. 15, excuses paupers from the payment of costs. This statute and the act of 1787 are compatible and *in pari materia,* and should be construed together. Persons may therefore sue in this State *in forma pauperis,* upon satisfying the court that they have a reasonable ground of action, and from extreme poverty are unable to procure security.

THIS was an application to the court for leave to sue *in forma pauperis,* founded upon an affidavit of the plaintiff that he was not worth £5 sterling, and had no property except such as the law allows insolvent debtors to retain; and that he verily believes he had good title to the lands for which he wished to institute suit.

The only question in the case was whether in this State a person can sue *in forma pauperis.* The question was submitted without argument.

TAYLOR, C. J. The act of 1787 does not demand a construction which would necessarily deprive a portion of the community of all means of having their claims investigated in a court of justice. And unless necessity required it, we are not disposed to put such a construction upon it. The true meaning of the law seems to be to require all such persons to give
(248) security previously to taking out a writ as would have been liable for the payment of costs in the event of failing in the suit. But it does not render any person liable to the payment of costs who was not so before. Now, the statute of 23 Henry VII., ch. 15, excuses paupers from payment of costs. And a law founded upon principles of such obvious justice ought to be repealed by express words or necessary implication before the court hastens to that conclusion. For, indeed, the two statutes are perfectly compatible, and being *in pari materia,* should both have operation, and may be construed together. On this ground we think that persons may sue in this State *in forma pauperis* upon satisfying the court that they have a reasonable ground of action, and from their extreme poverty are unable to procure security.

WILLIAM THOMPSON v. EDWARD MORRIS.

From Burke.

The terms of a sale were that persons purchasing to the amount of 20s. or upwards should have a credit of twelve months; that they should give bond with approved security; and those not complying with these terms should pay four shillings in the pound for disappointing the sale, and return the goods before sunset. A mare was put up for sale, and struck off to A at the price of £50 6s. The mare was delivered to him, but he failed to give bond and security, and he did not offer to return the mare for several days, when B refused to receive her, and immediately brought an action of *indebitatus assumpsit* for the price: *Held,* that the action affirmed the sale, and therefore could not be sustained before the term of credit expired. An action for breach of contract in not giving bond with security, or for not returning the mare, would have been the proper remedy.

IN this case the plaintiff declared in *indebitatus assumpsit* for the price of a mare sold and delivered to the defend-
(249) ant, and on the trial he proved that at a public vendue made by him on 25 August, 1808, conducted according to certain terms then publicly proclaimed and made known to the

defendant, the mare was put up and struck off to the defendant at the price of £50 6s., he being the highest bidder; that the property was delivered to him, but he omitted to give bond and security for the sum bid, on that day or at any other time, nor did he return or tender the mare on the day of sale; that a few days afterwards the plaintiff called on the defendant for his bond and security, which he did not give, and then for the first time offered to return the mare, which the plaintiff refused to accept. The suit was commenced in October, 1808.

Part of the terms of sale were that those who purchased to the amount of twenty shillings or upwards should have a credit of twelve months; that persons purchasing should give bond with sufficient security, and that those who did not comply with the terms of sale should pay four shillings in the pound for disappointing the sale, and return the goods before sunset. The case was submitted.

HENDERSON, J. It is clear from the authorities that the present action affirms the sale; therefore, it cannot be sustained before the term of credit expires. An action for the breach of contract in not giving the bond, or for not returning the mare, would have been the proper remedy. The principles which govern this case are well established and clearly laid down in 4 East, 147, and 3 Bos. and Pull., 582. As, therefore, this action was commenced before the cause of action occurred, a nonsuit must be entered.

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(250)

MARY GREGORY v. STEPHEN R. HOOKER, ADMINISTRATOR, ETC.

From Halifax.

The truth of the plea "fully administered" must be tested when process is served or when the plea is pleaded. After that time an executor or administrator is not at liberty to dispose of the property of the testator or intestate, although it was proper to do so before. He can sell only before the lien of the creditor attaches upon the goods of the deceased debtor.

THE plaintiff brought suit against the defendant in HALIFAX County Court, returnable to August Term, 1810, when the defendant pleaded, "Fully administered, no assets, judgment, bonds, etc., no assets ultra, property sold under act of Assembly, and the money not yet due." The case was taken to the Superior Court, and at April Term, 1812, the defendant moved

for leave to add, as of November Term, 1810, of the County Court, a plea, "Since the last continuance, that the residue of the property had been sold under the act of Assembly," and founded his motion on an affidavit which stated in substance that he administered at February term of Edgecombe County Court, 1810, and at the following term, having notice of debts due from the estate, sold some of the estate according to the act of Assembly; and that afterwards having notice of more debts, he did, before November Term, 1810, sell the residue of the property. Of all which his counsel was informed, and was required to plead everything necessary for his defense as an administrator. That at the pending May term the writ in this case was served on him, and at August following his counsel entered the pleas then necessary for his defense, but omitted to plead at the following November the sale of the residue of the estate.

HALL, J. It may be a hard case on the defendant, if he shall have the plaintiff's debt to pay out of his own pocket; (251) but the truth of the plea of "fully administered," in point of time, must be tested when process is served, or when pleaded; after that time the defendant is not at liberty to dispose of the property, under the acts of Assembly alluded to in the affidavit, although it was proper to do so before. Those acts of Assembly did not intend to deprive a creditor of the lien which the commencement of an action might give him on the goods of the deceased. He can sell only before that lien attaches. The application to enter the plea must be refused.

DEN ON DEMISE OF ARCHIBALD D. MURPHY v. JOSEPH BARNETT.

From Guilford.

Where both parties claim under the same person they are privies in estate, and cannot, as such, deny his title. Therefore, where in an ejectment it appeared that the defendant had accepted a deed from the same person under whom the plaintiff claimed, he was estopped to deny title in this person.

IN this case a verdict was found for the plaintiff, and a rule for a new trial being obtained, the case was that T. Dixon, being seized of the lands in question, agreed to sell them to W.

Dixon, to which end he made a power of attorney to C. Dixon. W. Dixon took possession of the lands under the agreement, and contracted to sell them to Thomas Barnett, who entered accordingly. Upon which C. Dixon, intending to execute the power of attorney, did, at the request of W. Dixon, seal and deliver a deed of bargain and sale to Thomas Barnett, as assignee of W. Dixon. The deed was signed by C. Dixon, attorney in fact for T. Dixon. A judgment was recovered against Thomas Barnett in the County Court of Caswell, on which a *fi. fa.* issued, which was levied on the land, and at the sale of the land made by the sheriff the lessor of the plaintiff became the purchaser, and received a deed from the sheriff. A short time before the *fi. fa.* was issued, Thomas Barnett executed to his son, the defendant in this case, a deed for the land. The defendant entered and was in possession, claiming title, when the (252) sheriff sold.

The demise laid in the declaration was in the name of A. D. Murphy; and it was objected on the trial that it appeared from the plaintiff's own showing that the legal title to the land was in T. Dixon; for although he had empowered C. Dixon to execute a deed to W. Dixon, he had not empowered him to execute it to Thomas Barnett; and, therefore, the power not having been executed, the title still remained in T. Dixon. To this it was answered, that although this objection might be urged with success under other circumstances, yet, situated as the defendant was, he could not be permitted to insist that Thomas Barnett had not title, for it appeared in evidence that he himself had accepted a deed for the land from Thomas Barnett, and had entered and claimed title under the deed; that, therefore, he was estopped from denying title in Thomas Barnett. And of this opinion was the court.

The jury found that the deed made by Thomas Barnett to the defendant was fraudulent against creditors, and rendered a verdict for the plaintiff. Upon a rule for a new trial the case was sent to this Court, on the question of estoppel.

TAYLOR, C. J. We think the decision of this case rests on a plain principle of law; and that as both parties claim directly from Thomas Barnett, they are privies in estate, and it is not competent to either, as such, to deny his title. The defendant has accepted a deed from him, which admits the title and estops him from denying it afterwards, for a person may be estopped by matter *in pais* as well as by indenture or writing. The doctrine as applied to this case appears highly reasonable, since nothing but the truth ought to be alleged by any man

(253) in his defense, and what he has alleged must be presumed to be true, and he ought not to contradict it. Let the rule for a new trial be discharged.

Cited: Ives v. Sawyer, 20 N. C., 181; *Love v. Gates, ib.,* 499; *Duncan v. Duncan,* 25 N. C., 318; *Gilliam v. Bird,* 30 N. C., 283; *Copeland v. Sauls,* 46 N. C., 73; *Johnson v. Watts, ib.,* 230; *Feimster v. McRorie, ib.,* 549; *Spivey v. Jones,* 82 N. C., 181; *Ryan v. Martin,* 91 N. C., 469.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1813.

JAMES STUART v. JAMES FITZGERALD.

From Surry.

1. To a *scire facias* against A as sheriff, to subject him as special bail of B, he pleaded, among other pleas, *that he was not sheriff when the writ was executed.* He had returned the writ "*executed*" to August Term, 1807, of the County Court, and he was elected at May Term, 1806, but did not qualify and give bond until August term thereafter, and in the election of sheriff in that county that had been the uniform practice: *Held*, that having qualified and given bond within a year preceding the return of the writ, and having acted as sheriff in executing the writ, he shall be deemed sheriff, and shall not be permitted to contradict his own acts.

2. Parol evidence admitted to prove that a *ca. sa.* issued, and that the sheriff returned on it, "Not found," and that it was lost or mislaid.

THIS was a *scire facias* against the defendant, as Sheriff of Surry County, and special bail of Martin Armstrong. The pleas were "*Nul tiel record,* surrender of the principal," and a special plea, "that the defendant was not sheriff at the time the writ was executed."

The plaintiff sued out a writ against Martin Armstrong, from the County Court of Surry, returnable to August Term, 1807, but it was not returned until November term following, when it was returned into the office with the following indorsement, viz., "Executed, James Fitzgerald." (256)
No bail bond was taken by the sheriff; a judgment was recovered by Stuart against Armstrong, and thereupon Stuart sued out this *scire facias* to subject the defendant to the payment of the judgment.

The defendant was elected sheriff of Surry at May Term, 1806, and qualified and gave bond with security at August term following. At May Term, 1807 (at which time the writ against Armstrong was issued and placed in the defendant's hands), Thomas C. Burch was elected sheriff and qualified, and gave bond at August term following. It appeared from the evidence of Joseph Williams, Sr., clerk of Surry County Court, that the practice of electing the sheriff in May, and of his qualifying in August, prevailed as far back as the time when the law required the sheriff to be commissioned by the Governor, and that the practice has continued in Surry ever since. It appeared further, by his evidence, that the sheriff elected in May did not enter upon the duties of his office until he qualified and gave bond at August following. It appeared by an entry on the docket of November Term, 1807, that the writ was then returned by consent of Armstrong and of the defendant. And the deputy clerk, Joseph Williams, Jr., swore that when the defendant returned the writ he observed that he had executed it in due time, but had failed to return it at August term, because it was mislaid.

No *ca. sa.* against Armstrong could be found in the office; but it appeared from an entry on the execution docket that a *capias* did issue from August, returnable to November Term, 1809, and that the sheriff's return thereon was "Not found." It appeared, also, from the evidence of the clerk and sheriff, that such a *ca. sa.* had been issued and returned.

(257) The court adjudged that there was such a record as that mentioned in the *sci. fa.* The jury found the issues of fact for the plaintiff, and the court gave judgment. A rule for a new trial was obtained upon the grounds, (1) that the court was in error in adjudging that there was such a record; (2) that parol evidence was received to supply the record; (3) that the jury ought to have found that he was not sheriff when the writ was executed. The case was sent to this Court.

HALL, J. It has been objected for the defendant, that at the time the writ was executed by him he was not Sheriff of Surry County. It is not necessary to examine critically whether he was regularly in all respects chosen sheriff for that year; because it appears that he qualified by taking the oath of office, and acted as sheriff of the county during that time, and in that character returned the writ in question. He shall not now be permitted to contradict his own acts.

He objects that the *ca. sa.* which issued against his principal is not produced. It appears from the clerk's execution docket

that such writ issued and was returned, "Not found"; and, from the oaths of the clerk and sheriff, that such a writ was in the office, but had been taken out or mislaid. Let the rule for a new trial be discharged.

Cited: Mobley v. Watts, 98 N. C., 289.

(258)

ALLEN PARISH v. JACOB FITE.

From Mecklenburg.

Practice. The court may, in its discretion, permit new witnesses to be introduced and examined before the jury, after the arguments of counsel are closed and even after the jury have retired and come into court to ask for further information. But the rule which forbids witnesses to be introduced after the argument of the case has commenced ought not to be departed from, except for good reasons shown to the court.

RULE to show cause why a new trial should not be granted because, after the jury had retired under the charge of the court, they came into court and requested that further evidence might be heard by them, when the court permitted two witnesses to be examined who had not been previously introduced.

The facts of the case were that the plaintiff had brought two actions of the same nature against the defendant, and during the examination of the witnesses in the second, and whilst the jury were out deliberating on the first, two new witnesses appeared in the second, who deposed to facts which, in the opinion of the court, were important, and whose evidence would have been equally important in the first. After the jury in the second case had retired, the jury in the first came into court and stated that they were not likely to agree, and wanted some further information, upon which the counsel for the plaintiff moved for leave to introduce the two witnesses examined in the second case. The court granted the leave, and there was a verdict for the plaintiff.

LOCKE, J. It is certainly the regular and proper practice never to suffer witnesses to be introduced after the first examination, particularly after the arguments of counsel are closed. Yet we are of opinion that the discretion of the judge must govern this rule of practice; the rule is founded on the

(259) temptation which a departure from it would hold out for committing the crime of perjury. Where a case has been argued and the party discovers the points on which it rests, the court will not permit him to support the weak parts of his case by a re-examination of it; and this rule ought never to be departed from, unless the court discover the necessity of a re-examination, and that it will not produce the evil which it is the object of the rule to prevent. In this case the jury were in great doubt, and the evidence was sought for and asked by them. To satisfy them and relieve them from difficulty, the evidence was permitted to go to them. The evidence was properly admitted, and the rule must be discharged.

Cited: Gilbert v. James, 86 N. C., 249; *Featherston v. Wilson,* 123 N. C., 627.

MICAJAH T. COTTON v. THOMAS BEASLEY.

From Warren.

Proof of lost bond. In an action at law upon a bond, the plaintiff shall not be admitted to prove the loss. He may prove the loss by disinterested witnesses, but he shall not be heard in his own behalf, unless the defendant can also be heard. This can only be done in the Court of Equity; and there, if a decree be made for the complainant, the court can compel him to indemnify the defendant against the lost bond.

THIS was an action of debt on a bond for $50, claimed in consequence of the plaintiff's having won a race made and run pursuant to certain articles. The plaintiff deposed that the bond was not in his custody or possession, that it was deposited in the office of the clerk of the County Court, and he had made repeated applications for it, and could not procure it. This mode of proving the loss of the bond was objected to by the defendant, but admitted by the court. The clerk of the County Court swore that he had searched for the bond in vain, (260) and he believed it was not left in his office. A witness then swore that a bond for $50, payable either on demand or when the race was to be run, was staked in his hands, by the plaintiff and defendant, to be delivered to the winner of the race; that a parol agreement to run a race was made between the plaintiff and defendant, and some time afterwards the articles of the race were executed in consequence and in pur-

suance of this parol agreement, and were signed by the parties on the day they bore date, and were attested by him. The giving of these articles in evidence was objected to by the defendant, but admitted by the court. They set forth that the distance to be run was a quarter of a mile.

There was no evidence that the distance run was ascertained to be a quarter of a mile; but it was proved that immediately after the race was run the defendant acknowledged that he had lost it, and that the bond was delivered by his direction to the sheriff.

Upon this latter evidence it was left to the jury to decide whether the distance run was a quarter of a mile; but the court did not instruct the jury that any measurement of the distance was necessary to be proved.

The court instructed the jury that no parol evidence was admissible to connect the bond with the agreement; that they must look into the agreement, and consider the description of the bond given by the stakeholder, in order to decide whether the bond declared on be the one which was staked in pursuance of the articles to secure the money bet on the race; that, having decided this point, they would consider whether the race was run according to the articles, with respect to distance, time and circumstances; and whether it was run fairly and according to the usages of racing.

The jury found a verdict for the plaintiff, and a rule for a new trial was obtained and sent to this Court.

HALL, J. It has been objected that parol evidence (261) should not be introduced to prove the contents of the bond, because the act of Assembly on this subject declares, "that on every trial an obligation for the amount of the money, etc., bet, shall be produced." That is true, and the Legislature no doubt had it in view to compel parties to produce evidence of higher dignity, as to racing contracts, than before by the rules of law was required. But before that act passed, if the sum bet had been secured by a written obligation, it was incumbent on the plaintiff to produce it. In all cases it is necessary to produce the instrument of writing on which a suit is brought; and this can be dispensed with only where it appears that the instrument has been lost by accident. In such case the production of it is impossible, and the plaintiff may give evidence of its contents. So with respect to the bond in question, the act requires it to be produced; but if satisfactory evidence of its loss by accident be given, parol evidence of its contents may be received.

It has been objected that the articles should not be received in evidence, because the contract which they set forth was made some time prior to the date of the articles. Whilst the contract was in parol, it was a nullity; when reduced to writing, it became such a contract as the act of Assembly required, and it was properly received in evidence.

So far the Superior Court acted correctly; but it appears from the case that the plaintiff himself was introduced to prove the loss of the obligation. It is a very general rule that a party shall not be a witness in his own case; and any exception to the rule must be founded in necessity. It is true that the party himself is very frequently the only witness of the loss of a paper, and if there could not be a remedy for him without the aid of his own testimony, it ought to be received from the necessity of the case. In answer to this it may be observed that in such a case a party has a remedy in the Court of Equity, (262) where he will be at liberty to swear to the loss of the obligation; and where the defendant will also be at liberty to make any answer he pleases, upon oath; and where, if a decree be made for the complainant, it will be upon condition that he enter into bond to indemnify the defendant against any demand which may be made against him in consequence of such lost bond. It seems not to be right that the plaintiff shall be permitted to become a witness at law, and not the defendant. Suppose the plaintiff swears at law that he has lost the bond: the defendant will not be permitted to swear that he has paid it, taken it up and destroyed it. The parties ought to stand upon equal grounds. In a court of equity they will both be heard upon oath. The plaintiff can require no more than that he may proceed at law, if he can make out the loss of the bond by disinterested witnesses. If he wishes to become a witness in his own cause, let him bring his suit in equity. Let a new trial be granted.

Cited: McRae v. Morrison, 35 N. C., 48; *Chancy v. Baldwin,* 46 N. C., 79; *Fisher v. Webb,* 84 N. C., 45, 6.

DANIEL S. MANN v. SOLOMON S. PARKER.

From Nash.

New trial. In an action on the case for selling an unsound negro, the jury found for the defendant. There was no direct and positive evidence of the defendant's knowledge of the unsoundness; yet there was no clear proof of facts from which such knowledge must be inferred. The verdict set aside and new trial granted.

THIS was an action on the case for a fraud in the sale of a negro child. It appeared in evidence that the plaintiff, who was a speculator in negroes, applied to the defendant for the purpose of purchasing a negro woman and child; the defendant said he wished to sell them, stated his price, and told the plaintiff to "go into the kitchen, look at the negroes and judge for himself." The plaintiff continued in the (263) kitchen while the defendant and his family breakfasted, and upon his coming out, the defendant asked him how he liked them, and he answered, "Very well." The bargain was concluded, and a day agreed on when the negroes were to be delivered and a bond for the purchase money executed. On that day the plaintiff was asked by one Tindale, who was a partner with him in the purchase, what sort of bargain he had made, to which plaintiff answered, "I have got a likely wench, and the child is middling." After a bill of sale for the negroes and a bond for the purchase money were executed, the defendant said to the plaintiff, "If you wish to be off the bargain, you may; I can get the same price from another man, and you are at liberty either to take the bond or the bill of sale." The plaintiff replied, "he had bought the negroes and would hold him to his bargain." It further appeared in evidence that the defendant had bought the negroes in question at a public sale, about nine months before the sale to the plaintiff, and at the time of the latter sale the child was between fifteen and nineteen months old, and at that age could not walk, talk or move itself, except upon its back, *backwards*. That the plaintiff shortly after his purchase took the negroes to South Carolina with others; that a snow fell whilst they were on the road, that the child was neglected by its mother, and attacked with a dysentery, in common with other negroes in company, and when they reached South Carolina the plaintiff could not sell the child, and he gave it away. One witness, who lived in the family of the defendant at the time the plaintiff went to examine the mother and child, said the child appeared to be well and ate heartily, but he thought it might appear to the most common

observer that the child was not altogether right. The witness further swore that the defendant observed on a certain occasion, when he was looking at the child, "I wish you were on
(264) the sandhills and I had my money for you."

There was no evidence that the defendant knew of any defect, unless such knowledge could be inferred from the preceding facts, and from the circumstance that the child was kept in the house where the defendant and his family ate. The person who sold the negroes to the defendant was an executor, and he swore that he did not know of any defect in the child.

Upon this evidence the court instructed the jury that if they believed the child was unsound and that unsoundness known to the defendant, and he failed to disclose it, or was guilty of any fraud or misrepresentation, they ought to find a verdict for the plaintiff. But if they believed the unsoundness, if any existed, was unknown to the defendant, and he had been guilty of no fraud, or if the defect complained of was such as to be discovered by a common observer, and no artifice was used to conceal it, they ought to find a verdict for the defendant.

The jury found for the defendant, and a rule for a new trial being obtained, on the ground that the verdict was contrary to the evidence, and the same being discharged, the plaintiff appealed.

LOCKE, J. In this case the plaintiff was entitled to a verdict, if the evidence was sufficient to satisfy the jury that the defendant knew of the defect or unsoundness of the negro child and failed to disclose it, or the defect was apparent to a common observer and no artifice used to conceal it. The jury have found for the defendant, and the plaintiff asks that a new trial may be granted because the verdict is either contrary to the evidence or to the weight of evidence, and if this be the case, a new trial should be granted.

It appears that the defendant purchased the negro child nine months before the sale to the plaintiff, and during that
(265) time the child remained in the same house where the defendant breakfasted and dined. The child was between fifteen and nineteen months old, incapable of talking, walking or moving, except on its back, *backwards*. Is it likely that a defect so apparent would, during all this time, and with so many opportunities for observation, escape the notice of the defendant or some of his family, who would communicate it to the defendant? If we judge of this defendant as from our knowledge of the world we judge of others, the inference is irresistible that he knew of the defect. But this is not all: a

day is fixed for the delivery of the negro, and when the plaintiff arrives there, the defendant, without the least intimation of dissatisfaction on the part of the plaintiff, proposes to him to recant. What could induce him to do this? The reason given by defendant was certainly a very weak one, to wit, that he could get the same price from another person. He is not to gain anything by the recantation, except the trouble of making a new bargain, which few men would covet. It is fair to presume that the true motive which influenced him in making this proposition was an expectation that it might, in the event of a suit against him, be given in evidence as a proof of fairness in his dealing. Such artifice cannot impose upon men accustomed to investigate fraud; to them it is proof direct of a fraudulent intention.

But if the foregoing circumstances be insufficient, or leave the case doubtful (in which case the rule for a new trial should be discharged), the declaration of defendant when coupled with them places the case beyond any doubt. What did the defendant mean when he said (looking at the child), "I wish you were on the sandhills, and I had my money for you"? It must mean that he had discovered some defect which impaired the value of the child, and made him willing to have his money again. To this evidence on behalf of the plaintiff there is very little opposed on behalf of the defendant, and although (266) there be no direct and positive evidence of a knowledge of the defect, there is clear proof of facts from which such knowledge must be inferred. The verdict is contrary to the weight of evidence, and the rule for a new trial must be made absolute.

THE PRESIDENT AND DIRECTORS OF THE BANK OF NEW BERN v. JAMES TAYLOR.

From Craven.

In *doubtful cases* the Court will not declare an act of the Legislature *unconstitutional*. The power to declare such act unconstitutional will be exercised only in cases where it is plainly and obviously the duty of the Court to do so. Therefore, where the Legislature gives to a corporate body, created for the public benefit, a summary mode of collecting debts, the Court will not declare the act unconstitutional. The Legislature alone is to judge of the public services which form the consideration of any exclusive or separate emolument or privilege.

BANK *v.* TAYLOR.

THE defendant gave his note negotiable at the Bank of New Bern, and having failed to make payment, a notice was served on him and motion made for judgment and execution in a summary way, according to the directions of the act incorporating said bank. The defendant pleaded that the right claimed by the plaintiffs to have judgment of their demand, on notice and motion, was unconstitutional and ought not to be allowed.

HALL, J. It is not questioned that the Legislature had the power to grant the charter to the Bank of New Bern. The object of this grant was the public good, which the Legislature had in view on the one hand, and the grantees had their (267) private interest in view on the other. To carry into effect the scheme of the bank, it became necessary for the parties to enter into arrangements for that purpose; and one part of the arrangement was that debts due to the bank might be recovered in a summary way. It is said this is a violation of the second section of the Bill of Rights, which declares, "That no man, or set of men, are entitled to any exclusive or separate emoluments or privileges from the community, but in consideration of public services." This objection will vanish when we reflect that this privilege is not a gift, but the consideration for it is the public good, to be derived to the citizens at large from the establishment of the bank. It is not for this Court to say whether the Legislature made a good or a bad bargain; it is sufficient to see that they contracted under legitimate powers; for over such contracts courts of justice have no control. Although it is the duty of this Court, when they believe a law to be unconstitutional, to declare it so, yet they will not undertake to do it in doubtful cases. Mutual tolerance and respect for the opinions of others require the exercise of such power only in cases where it is plainly and obviously the duty of the Court to act. It is not for this Court to judge of the expediency of the measure, nor to estimate its anticipated or actual benefit or injury to the community. These are considerations strictly of a legislative nature, and the competent authority has pronounced upon them.

Cited: S. v. Moss, 47 N. C., 68; *S. v. Womble,* 112 N. C., 871.

(268)

DANIEL CARTHEY v. JAMES WEBB.

From Orange.

1. If administration cannot be granted to the nearest of kin, on account of some existing incapacity, it shall be granted to the next after him, qualified to act, and the creditor be postponed if any of them claim the administration within the time prescribed by law. Therefore, where A died during the war between the United States and Great Britain, leaving B his next of kin in the United States, and leaving two sisters, who were aliens, in Great Britain, B was held to be entitled to the administration in preference to the highest creditor of A.

2. An alien enemy may rightfully act as executor or administrator, if resident within the State, by the permission of the proper authority; but not otherwise.

THIS was an application to the County Court of ORANGE for letters of administration on the estate of John Casey, deceased. This application was opposed by James Webb, on the ground of his being the largest creditor in the State. The court refused Carthey's application, and he appealed. The case came on to be heard in the Superior Court, when it appeared in evidence that John Casey died intestate, in Hillsboro, about 4 July, 1812, leaving Daniel Carthey, of New Bern, his next of kin in the United States; and that he had two sisters in the Kingdom of Great Britain, who were aliens, about six years before his death. It further appeared in evidence that James Webb was the largest creditor of Casey, and had proved his debt as the act of Assembly directs.

Brown and *Nash* for plaintiff.
Norwood for defendant.

TAYLOR, C. J. As the sisters of the intestate, who are his nearest of kin, are resident beyond seas, and subjects of a hostile country, they are certainly disqualified from administering on his effects. This principle may be fairly ex- (269) tracted from the numerous cases on this point, which, however, are so much in conflict as not to yield any satisfactory information on the question whether an alien enemy may bring an action as administrator. The two cases in Cro. Eliz., 142 and 683, are in direct opposition to each other. The true rule probably is that even an alien enemy may rightfully act as executor or administrator if resident within the State, by the permission of the proper authority; but without such authorized residence he must be subject to all the incapacities which

appertain to his civil condition. For this reason it is wholly unnecessary to go into the inquiry whether the sisters of the intestate be aliens or not; for, taking them to be so, it does not weaken the claim of the plaintiff.

Considering the act of 1715 in reference to the provision made on the same subject by the two statutes of 31 Ed. III., and 22 Hen. VIII., it would seem to be exercising too great a latitude of construction to pronounce that because the nearest of kin labor under an impediment, all the rest of kin shall be excluded, and the claim of a creditor be preferred to those for whose primary benefit the statutes were enacted. On the contrary, the true meaning of those laws seems to be that if administration cannot be granted to the nearest of kin, on account of some existing incapacity, it shall be granted to the next after him, qualified to act, and the creditor be postponed, if any of them claim the administration within the time prescribed by law. Let administration be granted to the plaintiff.

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(270)

DEN ON DEMISE OF NICHOLSON v. ISAAC HILLIARD.

1. Giving copies of deeds in evidence. A person who ought to have the custody of a deed shall exhibit it to the court in the deduction of his title; but he may give a copy in evidence upon making oath that the original is lost or destroyed. If it be in the adversary's possession, notice to produce it must be given to authorize the introduction of secondary evidence.

2. And as to the cases where a party ought to have the custody of the original deeds, where land is sold without warranty, or with warranty only against the feoffor and his heirs, the purchaser shall have all the deeds as incident to the land, in order that he may the better defend himself. But if the feoffor be bound in warranty, and to render in value, he must defend the title at his peril, the feoffor is not to have custody of any deeds that comprehend warranty of which the feoffor may take advantage.

3. A purchaser at sheriff's sale is only privy in estate, and is not supposed to have custody of the original deeds.

IN this case the following questions were submitted to the Supreme Court:

1. Shall one who has purchased lands without a warranty be permitted to give copies of title deeds, except of that immediately to himself, in evidence, without an affidavit by himself to account for the nonproduction of the originals?

2. Shall a purchaser with general warranty be permitted to give such copies in evidence without such affidavit?

3. Shall a purchaser at a sheriff's sale be permitted to give such copies in evidence without such affidavit?

TAYLOR, C. J. The law, proceeding upon the rule that the best evidence the nature of the thing is capable of shall be produced, requires the person who ought to have the custody of the deed to exhibit it to the court in the necessary deduction of his title; and in such case a copy from the register's office, or even inferior evidence, has by the constant practice of courts in this State been admitted, upon the oath of the party that the original is lost or destroyed. If it be in the adversary's possession, notice to produce it must be given to authorize the introduction of secondary evidence. But where the law does not suppose the party to have custody of the deed, either as party to it or as privy in representation, it admits at once inferior proof, without requiring the oath as to the original. (271)

The cases in which a party ought to have custody of the original deeds, and where, consequently, he will be compelled to produce them or account for their absence, are stated in *Burkhurst's case,* 1 Rep., 1. Where land is sold without warranty, or with warranty only against the feoffor and his heirs, the purchaser shall have all the deeds, as incident to the land, in order that he may the better defend it himself. But if the feoffor be bound in warranty and to render in value, he must defend the title at his peril, and the feoffor is not to have custody of any deeds that comprehend warranty of which the feoffor may take advantage. A purchaser at a sheriff's sale may give copies in evidence where it is necessary to deduce the title of him whose land was sold, because he is only privy in estate, and is not supposed to have custody of the original.

Cited: Irwin v. Cox, 27 N. C., 523; *Harper v. Hancock,* 28 N. C., 127; *Cowles v. Hardin,* 91 N. C., 233.

(272)

JAMES MEALOR v. BENJAMIN KIMBLE.

From Warren.

1. A received from B a tobacco note, which he agreed to sell for the best price that could be got for it, and retain out of the money a debt which C owed to him. A went to market and sold tobacco belonging to himself for the highest market price; but not being able to get the same price for B's tobacco, he declined selling it at that time, and determined to appropriate it to his own use and pay to B the same price for which he (A) sold his own tobacco. B settled with A under the belief that A had sold the tobacco in the market. A afterwards sold the tobacco for 5s. in the cwt. more than he had accounted for to B, and B, having discovered it, brought suit for the money: *Held*, that B was entitled to recover, although A was guilty of no fraud; for A acted as the agent of B, and in all cases where an agent becomes a purchaser himself the principal has power to put an end to the sale. He may elect to be bound or not to be bound by the purchase of the agent.

2. The rule as to purchasers by a trustee is this, that if he purchase *bona fide*, he purchases subject to the equity that if the *cestui que trust* come in a reasonable time after notice of such purchase, he may have the estate resold.

THIS was an action for money had and received to the use of the plaintiff. On the trial the plaintiff produced the following instrument of writing, to wit:

March 22, 1808, then received of James Mealor a tobacco note, inspected at Petersburg, weight 1,415 pounds net, which I am to sell at Petersburg or elsewhere, for the best price I can get for it; and the money to be placed to the credit of John Cheeks, executor of James Mealor, obtained 9 January, 1808, and I, the said Benjamin Kimble, am to retain to myself what Thomas Mordy owes me out of this money.

BENJAMIN KIMBLE.

This was proved to be in the handwriting of the defendant. In August, 1808, the defendant sold the tobacco note to Dudley Clanton, of the county of Warren, at the price of $4 per hundredweight and on 25 December afterwards received the money of Clanton, the tobacco being sold upon a short credit. The plaintiff produced upon the trial an account in the hand-
(273) writing of the defendant and in the following words:

1808. BENJAMIN KIMBLE, Dr. to JAMES MEALOR.

To balance of Hogshead of Tobacco, weighing 1,415 lbs. net, from 19s. to 24s.

MEALOR *v.* KIMBLE.

Some time in the month of May, 1808, after defendant returned from Petersburg, upon being asked whether he had sold Mealor's tobacco, if he had, at what price, he answered that he had sold it at 19s. per cwt. It was admitted that the defendant had paid to Mealor's use the amount of the tobacco specified in the receipt at 19s. per cwt.

On the part of the defendant the deposition of Gideon Johnston, of Petersburg, was read in evidence, which set forth that on 1 April, 1808, Benjamin Kimble, the defendant, came to his store in Petersburg, and was asked by him if he had sold the hogshead of tobacco which his negro had brought down some time before, and which was inspected at Cedar Point Warehouse. Kimble answered, no, but he wished to sell it. Deponent offered him 20s. per cwt. After some minutes he agreed the deponent should have the tobacco at 20s. per cwt., which he paid him. Kimble then offered to sell to him a hogshead of tobacco, which he said belonged to his neighbor. The deponent refused to purchase, because he did not know the quality. Kimble observed that he should be glad to get the same price for his neighbor's tobacco that he had gotten for his own. The deponent answered that he did not wish to purchase the tobacco, as he had not seen it; but advised him to apply to a man in town, who was buying upon the face of the note. Kimble went off, and returned without success. The deponent then proposed to purchase from him another hogshead of tobacco, which he had in town, and which he had seen on that day, and offered Kimble 19s. per cwt. for it. Kimble at first refused, saying that he would hold up that hogshead for a better price; but after some conversation Kimble agreed to sell it and take (274) 19s. per cwt., saying he would keep his neighbor's tobacco for himself, and his would sell for the best price. The price of tobacco was 18s. per cwt., and the deponent did not purchase any other tobacco from Kimble that year. It was further proved that Clanton sold the tobacco note which he purchased from Kimble for 24s. per cwt.

Upon the foregoing facts the plaintiff insisted that he was entitled to a verdict for the difference between 19s. and 24s. for 1,415 pounds of tobacco; but the jury under the charge of the court gave their verdict for the defendant. A rule for a new trial was obtained, and sent to this Court.

SEAWELL, J. From this case it is evident that the defendant acted as agent or trustee for the plaintiff; and that it was the understanding of the parties he was to have nothing for his trouble. It is equally clear that the agent accounted for the

tobacco at 19s. (under pretense of having sold for that price) and afterwards sold for 24s., by which he gained 5s. in each hundredweight.

But it is attempted to be inferred from the statement that the defendant was unable to sell the plaintiff's tobacco for so much as 19s. and, with a view of obliging him, substituted one of his own hogsheads that would command that price. Without inquiring whether there be sufficient evidence of fraud in the conduct of the defendant to overrule the verdict, we are of opinion that it is not in the power of an agent to become a purchaser himself, without leaving it also in the power of his principal to put an end to the sale. 2 Brown Ch., 400, 430; 5 Vesey, Jr., 680. In the present case the plaintiff has elected not to be bound by the exchange of the tobacco which the defendant in his representative character thought fit to
(275) make with himself, and calls upon him to account for the full amount, and no more, of the tobacco he was entrusted to sell, and which he has sold; and this he is entitled to by law. The rule for a new trial must therefore be made absolute.

HALL, J., *contra*. It seems that the plaintiff, being indebted, did on 22 March, 1808, deliver to the defendant the tobacco in question, to be by him sold, and the money arising from the sale to be applied towards the discharge of his debts. In the course of a week after that time the defendant attempted to sell the tobacco in the town of Petersburg. The price of tobacco at that time, on the face of the note, as it is called (that is, although it had passed inspection, but the quality unknown to the purchaser), was 18s. Now, had Kimble sold the tobacco for that price no blame could have been attached to him. But his own tobacco having been opened and looked at, commanded a better price. He therefore substituted this in the room of it, and sold it for 19s., and applied the money towards the discharge of the plaintiff's debts, as he had agreed to do. At what time, indeed, does not appear; but there is no complaint on that score. In the month following he stated, when asked, that he had sold Mealor's tobacco at 19s. Now, as he had not sold Mealor's, but his own tobacco, avowedly a substitute for it, and that for a greater price than Mealor's would have brought, and applied the money to Mealor's use, he thereby, I think, made Mealor's tobacco his own, and had it fallen in price afterwards he must have borne the loss. Let it be remembered that there is no allegation or proof of fraud in the defendant. Months after this time, when Mealor's debts were paid off, the tobacco

was sold for 24s. on a credit of four or five months, and it is alleged that the plaintiff is entitled to the difference between 19s. and 24s. Had it sold for 4s. only, the defendant must have borne the loss. Besides, it is well known that tobacco generally rises in price from the time it is inspected at (276) least for one year. From this view of the case, rather than the defendant should be compelled to settle with the plaintiff at 24s. per cwt., the plaintiff should return to the defendant 1s. per cwt., rating the tobacco at 18s., the price it bore when he substituted his own in the room of it, and sold it for 19s.

But it is said a trustee shall not become a purchaser, and the cases of *Fox v. Mockroth,* 2 Brown Ch., 400; *Forbes v. Ross, ibid.,* 430; *Whichcote v. Lawrence,* 3 Vesey, Jr., 740, and *Campbell v. Walker,* 5 Vesey, Jr., 678, are relied upon. This position cannot be admitted except under certain limitations. I will examine it, but without believing that its solution is indispensable to a decision in the present case, for I can view no other person as the real purchaser, but G. Johnston.

In *Fox v. Mockroth, supra,* the trustee who purchased was decreed still to be a trustee, because he was guilty of a fraud in taking an undue advantage of the confidence reposed in him. That case is founded in reason and justice, and ought to be considered good authority where a similar case shall occur. In *Forbes v. Ross, supra,* no fraud was alleged against the trustee; but through a misapprehension of his duty he took money to himself at 4 per cent which the testator had directed to be laid out at the most that could be got for it, giving as a reason for so doing that the testator had loaned him money upon those terms during his life. It appeared, also, that the trustee was a man of large property. This is a short and certainly a very plain case, for although there was no fraud alleged in the trustee, yet he became a gainer, and his *cestui que trust* a loser by his conduct, and it matters not whether such conduct was induced by fraud or happened through ignorance. In *Whichcote v. Lawrence, supra,* the Chancellor observes, "that it is not true, as a naked position, that a trustee cannot buy of the *cestui que trust,*" and goes on to qualify it by observing, (277) "that it is plain, in point of equity and a principle of clear reasoning, that he who undertakes to act for another in any matter shall not, in the same matter, act for himself. Therefore, a trustee to sell shall not gain any advantage by being himself the person to buy, because he is not acting with that want of interest, that total absence of temptation, that duty imposed upon him that he should gain no profit to himself."

In the same case his lordship observes that he does not recollect any case in which the mere abstract rule came to be tried distinctly, abstracted from the consideration of advantage made by the purchasing trustee; for unless advantage be made, the act of purchasing will never be questioned. From these authorities it appears that courts of equity interfere to declare trustees still to be trustees, where a benefit accrues to themselves and a loss to their *cestui que trust* in consequence of their having become purchasers.

If, then, Kimble was the purchaser of the tobacco in question, that purchase is not shaken by the principles on which these cases profess to have been decided; because he gained no profit to himself thereby, and instead of a loss, a benefit accrued to the plaintiff. It remains to be seen what bearing the case of *Campbell v. Walker* will have on this case. In that case the master of the rolls says: "There never was a rule that no trustee should buy," but adds that "if they do purchase *bona fide*, they purchase subject to the equity that if the *cestui que trust* come in a reasonable time they may call to have the estate resold." To examine this case by that rule it must be kept in view that Mealor, the plaintiff, was indebted to Cheek's executors, which debt, as well as the one due to Kimble, was to be discharged by the proceeds of the sale of the tobacco. This sale took place on 1 April, 1808, in consequence of which those debts were promptly discharged. A month afterwards this (278) fact was disclosed by the defendant to the plaintiff, except that he said he had sold Mealor's tobacco, when in fact he had sold his own. This literal deviation from truth seems to give some umbrage; but it should be recollected, by way of extenuation, that two hogsheads of tobacco, made in the same neighborhood, of the same weight (or so nearly so that the circumstance makes no difference), when offered for sale on the face of the note (that is, without the quality of either being known), are as much without earmarks as two bushels of wheat out of the same field; and as far as there was any difference in the present case, the advantage was on the side of the defendant. Be that as it may, Mealor's debts being paid, he remained satisfied two years and seven months; for this suit was not brought until 15 November, 1810. This, to be sure, is not made part of the case now before the Court; but if it be of any importance, and does not appear (and it seems to be so from the case last cited), why may not this Court as well suppose that the plaintiff has been guilty of neglect in not bringing his suit in proper time, as it is more than five years since this transaction took place. Under all the circumstances of the case con-

nected with this lapse of time, and under a knowledge that his debts were discharged by a sale of his tobacco at 19s. per cwt. (a price more than it was really worth), I cannot believe that the master of the rolls, who laid down the rule, would have sustained a bill on behalf of the plaintiff in case it had been brought before him.

It appears, then, that a trustee may be a purchaser, and that his purchase will be protected, unless the *cestui que trust* apply within a reasonable time after the notice to have a resale. And according to this rule, if Kimble became the purchaser of Mealor's tobacco, by selling his own in lieu of it, he ought to be protected in the purchase. It is not pretended that the sale was not honestly made, and for a full price; and it would have been equally so if the plaintiff's tobacco had been sold for 18s. But let it be assumed that Kimble had no right (279) to substitute and sell his own tobacco for Mealor's; it follows that Mealor's tobacco was not sold at all. Then Mealor's debts were paid with Kimble's own money, and had he brought an action against Mealor for the money so advanced, Mealor would have defended himself by proving the terms on which Kimble took the tobacco, and that the price of tobacco was 18s. at the time Kimble ought to have paid it; and so it would have been settled. There would have been the same result if the present action had been brought before Kimble sold to Clanton, and why that circumstance should make any difference I am at a loss to see. Had not Mealor's debts been paid off, the case would be very different; in that case, if tobacco had risen in price after the time when Kimble ought to have sold, he ought to be answerable for such rise; or in case it had fallen, he ought to be answerable for what it would have brought when he ought to have sold it; or if his own tobacco had been of less value than the plaintiff's, and he had sold it as the plaintiff's, the same consequence ought to follow. The only offense that I can see the defendant has been guilty of is that he allowed the plaintiff a greater price for his tobacco or sold it for a greater price than it was worth. For this he ought to be forgiven; and I think the rule for a new trial should be discharged.

DICKENSON v. DICKENSON.

Where an absolute deed is made, parol evidence is not admissible to prove that the deed was made under any special trust, and that a valuable consideration was not paid.

THE BILL charged that David Dickenson, the elder, in 1782 conveyed by deed a slave to Shadrack Dickenson, which (280) deed, on its face, purported to be absolute and made for a valuable consideration, whereas, in truth, the deed was made in trust for the benefit of David, and under an agreement on the part of Shadrack that the slave should be conveyed and delivered to David, or to such person as he should at any time direct. The bill further charged that no consideration was paid, and that the complainant being a judgment creditor of David's, the latter did, in 1810, assign all his right in the said slave to him; of which assignment Shadrack had notice, but refused to give up the property, insisting that he was an absolute purchaser for valuable consideration.

The answer denied the trust, averred a valuable consideration to have been paid, and alleged that the transaction was an absolute sale and purchase.

The only question submitted to the decision of this Court was, whether parol evidence was admissible to show that the deed was made under the trust specified in the bill, and that a valuable consideration was not paid.

TAYLOR, C. J. The Court have looked into the cases of *Smith v. Williams,* 5 N. C., 426, and *Streator v. Jones, id.,* 449, heretofore decided, and are of opinion that this case is governed by them, and that, consequently, it is not competent for the plaintiff to give parol evidence for either of the purposes stated in the case.

Cited: Bonham v. Craig, 80 N. C., 229.

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MILLER v. SPENCER'S ADMINISTRATORS.

In an action against an administrator, he pleads "no assets," which plea the jury find to be true, and the plaintiff signs judgment; he then sues out a *scire facias* against the heirs at law, to subject the real estate of the debtor to the payment of his debt, and pending this *sci. fa.* assets come to the hands of the administrator. The plaintiff cannot have a *scire facias* against the administrator, to subject those assets to the payment of his judgment. This process lies only on judgments which are taken *quando*, etc.

JUDGMENTS were taken in 1807, against defendants, to the full amount of assets then on hand; and afterwards James Greenlee obtained a judgment for £280, and about the same time a suit instituted by defendant's testator against one Davidson, was dismissed agreeably to a compromise made in the lifetime of defendant's testator. At the time of Greenlee's judgment no assets were in the hands of the defendants, and that fact so found by the jury. Greenlee sued out a *scire facias* against the heirs at law, to subject the real estate, and that *sci. fa.* being pending, the plaintiff in this case, Miller, brought his suit, to which the defendant pleaded, "fully administered, former judgment, etc." And assets to the amount of £94 3s. 3d. having come to the defendant's hands, a question arose and was sent to this Court, how these assets were to be disposed of: whether Greenlee's judgment created any lien upon them, or they were to be applied to the payment of the costs in the case of defendant's testator against Davidson, or were liable to the recovery of the plaintiff in this case.

HALL, J. It is clear that Greenlee's judgment is no lien upon the assets which have come to the hands of defendants since that judgment was obtained. It would be difficult to devise a process by which they could be reached, for Greenlee, after the plea of "fully administered" was found against him, made his election to proceed against the real estate, (282) by signing judgment and suing out a *sci. fa.* against the heirs at law, agreeably to the directions of the act of 1784, ch. 11. Had Greenlee intended to rely upon assets to be received by the defendants subsequent to the time of obtaining his judgment, he ought to have taken a judgment *quando acciderunt*, in which case a *sci. fa.* might have issued conformably thereto, that would have reached the assets in question. 6 Term, 1, 2; Saunders, 217. But no such process can issue from the judgment as it stands. This judgment, then, cannot stand in the way of the plaintiff.

As to the costs due upon the dismission of the suit against Davidson, they must be considered as a debt due by the defendant's testator, because that dismission took place in consequence of an agreement by him made; and the defendants only acted in conformity with the agreement. They are, therefore, entitled to retain to the amount of their costs, although an execution may have issued against them for the costs before the assets came to hand, and the sheriff may have returned on that execution, *nulla bona*. Yet the party interested in that execution is not precluded from suing another execution at a subsequent time. The assets in question must therefore be applied, in the first place, to the payment of these costs; and in the second place, to the satisfaction, as far as they will go, of the plaintiff's judgment.

Cited: Green v. Williams, 33 N. C., 141; *Carrier v. Hampton,* 311.

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ALBERTSON v. THE HEIRS OF REDING.

1. In all cases of ejectment, whether the consent rule be general or special, the lessor of the plaintiff is bound to prove the defendant in possession of the premises which he seeks to recover.
2. If the defendant neither claims the land nor has the possession of it, he may enter a disclaimer when called upon to plead. And if he be unable to decide, upon a view of the declaration, whether he be in possession of the lands claimed by the plaintiff, he may enter into the common rule, and also have leave to disclaim, if he should afterwards discover, upon a survey, that he ought so to do.

THE only question submitted to the Court in this case was whether the lessor of the plaintiff in ejectment is bound to prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the common consent rule to confess lease, entry and ouster.

HENDERSON, J. The operation of the consent rule raises the doubt in this case; for, very clearly, without it the plaintiff would be bound to prove the ouster, as a material allegation in his declaration. It becomes, therefore, necessary to examine the extent of the admissions made by the tenant by entering into the rule. The confession has never been deemed to acknowledge that which is the substance of the action, as when

the plaintiff's entry is necessary to complete his title, as an entry to avoid a fine or the like; there an actual entry must be shown. The ouster confesses an expulsion from some lands, but whether they are the lands mentioned in the declaration or those which are in the defendant's possession, creates the difficulty.

Taking the whole record together, it would seem that they are the latter. The plaintiff, either by name or boundary, gives a description in his declaration of the lands sued for. This declaration he causes to be served on the tenant in possession; for none but the tenant or his landlord can be (284) made defendant. This is, in substance, saying to the tenant that you are in possession of the lands described in the declaration; that whatever description I may have given of them, either by name or boundary, they are the same lands that you possess. On which the tenant confesses that he ousted the plaintiff from the lands, and relies on his title as a justification. Should it appear at the trial that the defendant's possession did not interfere with the plaintiff's claim, it is but just that the mischief should be borne by the plaintiff, who has misled the defendant, rather than by the defendant, who has trusted to the plaintiff's assertion. Should it be otherwise, yet the defendant would be compelled to decide at his peril whether the lands described in the declaration are those possessed by him, although he is told so by the plaintiff; and this, too, where the plaintiff describes by artificial boundaries, the beginning and extent of which may be entirely unknown to the defendant. The practice of disclaimer shows the difficulties to which the defendant was driven; but this carried the remedy too far. By this means an action commenced on proper grounds would be defeated by disclaiming the very lands which were the cause principally of the suit, and defending as to others to which his title was good. Or if the plaintiff, after the disclaimer, should dismiss his suit, he must pay the defendant his costs. Whereas, if the tenant had declined to defend, there would be no costs due to the casual ejector, but only the plaintiff's own costs to be paid. Nor can the Court so regulate the disclaimer as not to produce this inquiry, as some have alleged, by preventing the defendant from disclaiming lands which he had possessed; for the Court has no proper mode of ascertaining this fact; and to settle this preliminary point, if it had, would increase litigation and delay and incur unnecessary expense. A contrary practice would also enable two designing men more easily (285) to convert the action of ejectment to the means of getting possession of lands, without making the actual tenant a de-

fendant or apprising him of the suit. For these reasons we think, in all cases, whether the consent rule be general or special, the plaintiff is bound to prove the possession of the defendant. In the case in 7 Term, 327, the question was fully considered, and the unanimous opinion of the Court given of the law as here laid down. The case in Willson, 220, is also an authority, although in that case the landlord defended, for he certainly was placed in his tenant's situation.

TAYLOR, C. J., *contra*. With the utmost respect for the opinion of my brethren, I cannot consent to innovate upon a long-established rule of practice, without being convinced that it is inconvenient or mischievous in the observance; but I have never had occasion to remark that the present mode of practice in this State was productive of any ill effect. That the practice should be different in England, I readily admit; because the custom there of drawing declarations in very general terms is not calculated to apprise the defendant of the particular lands demanded. As the judges in that country observe, the declaration communicates but little intelligence to the defendant. If he happen to be in possession of any land falling within the declaration he must defend in order to preserve his own rights. In the very case cited from 7 Term, 327, the declaration was for 30 acres of land, 20 acres of meadow, and 20 acres of pasture, within a certain parish, so that if the defendant had any land of that description within the parish he must defend, in order to preserve it. But the custom here, of describing with liberal exactness the boundaries of the land claimed, leaves nothing for the defendant to doubt about; or, if he should doubt, a survey may be had to inform him whether he claims the land sued for. If he is satisfied at the first view of the declaration that he neither possesses the land nor claims (286) a right to it, he may enter a disclaimer, when called upon to plead. If he is unable to decide, upon reading the declaration, he may enter into the common rule, and also have leave to disclaim, if he should afterwards discover, upon a survey, that he ought to do so. It has appeared to me that defendants were perfectly protected by the practice of disclaimers, and that no injury could arise to either party, under the disposition constantly manifested by the courts to consider the fictions of ejectment as within their control, and unfettered by any technical strictness that would frustrate the equitable purpose of bringing forward the real right and title of the parties. If by any fraudulent connivance between two persons a third were turned out of possession, I apprehend he would be

reinstated instantly upon the Court's being apprised of such an abuse of the process of the law. My brother *Locke* directs me to signify his unwillingness to alter the practice; but as a majority of the Court think differently, the rule for a new trial is discharged.

Cited: Mordecai v. Oliver, 10 N. C., 482; *Gorham v. Brenon,* 13 N. C., 176; *McDowell v. Love,* 30 N. C., 503; *Atwell v. McLure,* 49 N. C., 373; *Graybeal v. Powers,* 83 N. C., 563.

MARTHA BOYT v. JOHN COOPER.

From Martin.

1. To an action of debt on a bond, the defendant pleaded that it was given for an *illegal consideration;* and on the trial offered to prove that the bond was given in consideration of compounding a prosecution for a felony. The evidence rejected, because the plea was too indefinite to apprise the plaintiff of the *particular illegal consideration* intended to be relied upon.

2. But upon an affidavit filed that the defendant had instructed his counsel to defend the suit upon the ground that the bond was given for compounding a felony, leave was given to the defendant to amend his pleas and set forth this special matter.

THIS was an action of debt on a sealed instrument. The defendant pleaded "that it was given for an *illegal consideration.*" On the trial the defendant wished to give evi- (287) dence that the bond was given in consideration of compounding a prosecution for a rape. This was opposed on the ground that the defendant's plea was not sufficiently special for such evidence to be received. This point was reserved by the court. The defendant obtained a rule on the plaintiff to show cause why he should not be permitted to add a *special* plea, upon an affidavit made by him, that he had instructed his counsel in the County Court to defend the suit on the ground that the bond was given to compound a felony.

Two questions were sent to this Court: (1) Whether the defendant could give evidence of compounding a prosecution for a rape, under the plea of *"illegal consideration,"* and (2) whether upon the affidavit filed the defendant should be permitted to add a special plea, and if so, upon what terms.

TAYLOR, C. J. The memorandum of "illegal consideration," made on the docket, is entirely too indefinite to apprise the plaintiff of the point on which defendant actually relied. Of the numberless illegal considerations for which a bond may be given, it would be highly unreasonable to expect that in every instance the plaintiff should understand that one precisely which the defendant intended to urge when he entered his plea. But having guessed rightly, and summoned witnesses to explain the intended defense, what should prevent the defendant from afterwards shifting his ground, and setting up some other objection to the bond, which the plaintiff may be altogether unprepared to repel? But upon looking into the affidavit filed in the case, the Court are of opinion that the defendant ought to have leave to amend the plea; and as he instructed his counsel in (288) due season, what was the nature of his defense, the justice of the cause seems to require that the amendment should be made without costs.

Cited: Rountree v. Brinson, 98 N. C., 109.

PAGE v. FARMER.

In an action of debt on a penal statute, the writ called upon the defendant "to render to the plaintiff the sum of £50 due under an act of the General Assembly to him, and which from him he unjustly detains, to his damage, etc.": *Held,* that this writ is substantially in the *debet and detinet.*

THIS was an action of debt on a penal statute, and after verdict it was moved in arrest of judgment that the writ was not in the *debet* and *detinet,* but in the *detinet* only. The writ called upon Farmer to answer Page of a plea "that he render to him the sum of £50, due under an act of the General Assembly to him, and which from him he unjustly detains to his damage, etc." The plaintiff contended that the court must necessarily adjudge, from the phraseology of the writ, that the action was in the *debet* and *detinet,* and was therefore such an action as the defendant contended should be brought; and it was submitted to this Court, whether this writ was in the *debet* and *detinet,* or *detinet* only.

TAYLOR, C. J. It is not deemed necessary to decide the question whether a vicious writ can be taken advantage of after

verdict, or whether the statutes of *jeofails* extend to actions upon penal statutes. The construction of this writ which presents itself to the Court as the just and necessary one, and derived from the unavoidable import of the words, renders it a writ in the *debet* and *detinet*. Though not pre- (289) cisely in the form that the usage of the law has annexed to such process, yet the words in which it is expressed will not, without a strained interpretation, convey a meaning substantially different. The defendant is called upon to answer to the plaintiff, "that he render to him £50, due under an act of Assembly to him, and which the defendant detains from him." It is due to the plaintiff, under or by virtue of the act of Assembly, and the defendant cannot detain it unjustly, unless it is due from him. If A call on B to demand payment of a sum of money, which the former states to be due to him by bond, the amount of which he charges the latter with detaining from him, B cannot doubt that the meaning of A is to charge him with owing as well as detaining the money. Whether the writ uses the verb in the present tense, or substitutes for it the past participle, the charge of owing and detaining is in substance equally made out. The general issue then is *nil debet*, to which the verdict of the jury is responsive by its finding that the defendant does owe. Let the reasons in arrest be overruled.

STRONG AND OTHERS V. GLASGOW AND OTHERS.

A agrees with B at a sheriff's sale to bid off the property sold, for B. He bids it off, and takes a conveyance to himself, and then refuses to convey to B. As B is not privy to the conveyance, he is not bound by it; and he may produce parol evidence to prove the agreement between A and himself.

THE bill charged that William Sheppard, the father of the complainant, being considerably indebted, with a view to make payment, came to an agreement with B. Sheppard, to convey to him a tract of land, for which B. Sheppard was to convey to W. Sheppard two other tracts, of inferior (290) value by £800; to satisfy which difference, B. Sheppard was to pay off all the debts, and indemnify W. Sheppard from them. That soon after the agreement, W. Sheppard died, and one of his creditors obtained judgment and took out execution, which was levied on his slaves; and at the sale B. Sheppard,

intending to perform his agreement, bid off twelve slaves at £133, for the benefit of the complainants; that he took an absolute bill of sale from the sheriff to himself, but that the purchase was really made in trust and for the benefit of the complainants. And the case was sent to this Court upon the question, whether parol evidence could be received to prove the agreement and set up the trust for the complainants.

BY THE COURT. This case is not influenced by the principles that decided the case of *Streator v. Jones,* 5 N. C., 449. The complainants allege that the defendant, B. Sheppard, contrary to the agreement he had entered into, which was to purchase the property for the complainants, took an absolute deed to himself. They were not privy to that deed, and of course not bound by it. They are therefore at liberty to produce parol evidence to establish the original contract.

Cited: Gaylord v. Gaylord, 150 N. C., 227.

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(291)

JOHN ATKINSON v. JOHN FARMER AND OTHERS.

From Johnston.

1. A party has no remedy to recover a debt once sued for, the execution on which has been returned "Satisfied."

2. At a sheriff's sale there is no warranty of title, independent of the act of 1807, ch. 4. Whoever, therefore, purchases, runs the risk of a bad title.

3. No man can be compelled to become debtor to another, except in the case of a protested bill of exchange paid for the honor of the drawer; if, therefore, at a sheriff's sale, the plaintiff in the execution purchase the property, and the title prove bad, the law raises no *assumpsit* in the debtor or defendant in execution to make good to the purchaser the sum lost by such purchase.

4. If an administrator has delivered over the property to the next of kin, or has delivered part and wasted part, so as not to be able to pay the debt, the property may be followed into the hands of the next of kin, although the administrator has wasted more of the assets than the debt amounts to.

5. But where, in the settlement of an administrator's accounts, a certain sum is left in his hands to pay a debt, as to the next of kin that debt is paid; the creditor must look to the administrator and his securities. But the securities are not liable if suit has been brought by the creditor against the administrator

for this debt, and at the sheriff's sale such creditor has purchased the property sold, by reason of which the execution is returned "Satisfied," although the creditor may afterwards lose the property by reason of a superior title.

THIS bill was filed against the administrator and distributees of the estate of William Farmer, deceased, charging that William Farmer being indebted to John Atkinson upon bond, died intestate, and administration of his estate was granted to Benjamin Farmer, who was sued by Atkinson, and judgment recovered. Execution issued against the goods of the intestate in the hands of his administrator. Pending the suit the administrator delivered to the next of kin, who were the defendants in this case, their several shares of the intestate's estate; nevertheless, the sheriff seized and sold some of the negroes delivered over to the defendants, and complainant became the purchaser at the price of $170, and took the administrator's bond for the balance of the debt; in consequence of which the (292) sheriff returned the execution "Satisfied." Not long afterwards the distributees, to whom the said negroes had been delivered, got possession of them, and complainant being advised that he could not recover them, as the title did not pass to him by the sale, and his remedy at law being gone for his debt, he charged that other property had been sold by the administrator, the proceeds of which had not been exhausted by the payment of the intestate's debts, and prayed for an account of this sale, and for payment to himself of any residue that might be in the administrator's hands; and as to the next of kin, he prayed that they might be decreed to pay the balance of his debt, in consideration of their being in possession of the estate of their intestate.

The distributees pleaded that in the settlement of the administration accounts of the estate of William Farmer, deceased, the administrator had been credited with the amount of the complainant's judgment at law against him, and that the residue only of their intestate's estate had been distributed among them (costs and charges deducted). And some of the distributees in their answer insisted that by the finding of the jury it appeared that when complainant recovered his judgment against the administrator there were assets sufficient in the administrator's hands to discharge said judgment, and that he gave security for his administration; that complainant's remedy, if he were entitled to any, was against the administrator and his securities.

The Court of Equity for Johnston County, upon hearing the bill, answers, pleas, etc., decreed that the defendants should pay

to complainant £281 19s. 4d., and that each party should pay his own costs. From this decree the defendants appealed to this Court.

D. Cameron and *Gaston* for complainant.
Seawell and *Browne* for defendants.

HALL, J. It may be well doubted whether the complainant has any remedy to recover this debt, since the execution (293) has been returned "Satisfied." When property is sold under execution, whether real or personal, there is no warranty of title, either express or implied, attached to such sale, independent of Laws 1807, ch. 4. There is no compulsion on any one to purchase; but he who pleases to purchase incurs the risk of purchasing a bad title. If a stranger had purchased in the present instance, could he have recovered his money back upon finding he had purchased a bad title? And can it make any difference that the purchaser was the plaintiff in the execution? He had the liberty of bidding, but when he purchased he stood in the same situation with a stranger. He was creditor and purchaser both; in which of these capacities does he come into the court? As creditor, it is said. Suppose, then, that a stranger had purchased and paid the money through the sheriff to the plaintiff: the plaintiff would have no claim either at law or in equity; his claim would be satisfied, and he would rest satisfied, but the purchaser would not; and it is in that character that the complainant now stands in this Court.

It seems to be an established principle that no man shall be compelled to become the debtor of another, except in cases of bills of exchange, paid when protested, for the honor of the drawer (1 Term, 20; 1 H. Bl., 83, 91; 3 Esp., 112), and cases of implied *assumpsits* do not contradict the rule. If one person pay the debt of another, merely because he chooses to do it, he cannot recover the amount so paid from the debtor. Nor is the case different if he voluntarily purchase a bad title at a sheriff's sale, and thereby discharges it. The law in such (294) case will not imply an *assumpsit*. There is no privity of contract between the parties. For these reasons the complainant is not entitled to the relief he asks.

But if complainant be entitled to recover, who ought to pay the debt? In common cases the administrator ought to pay; but if he has delivered the property over to the next of kin, or if, as in the present case, he has delivered over part and wasted part, so as not to be able to pay the debt, the property may be followed into the hands of the next of kin, although the admin-

istrator has wasted more of the assets than the debts amount to. But in the present case the administrator stands upon very different grounds. He had a demand at law, and at law that demand has been satisfied, and he comes into the court to ask a favor. The equity of his request must be examined, as well as the equity of the defendant's objections. What are they? They state that this amount was paid to or left in the hands of the administrator, for the purpose of paying this debt. As to them, then, it is paid; the administrator was the proper person to receive it from them, and they have fully paid it, although the complainant never received it. We are then led to inquire who was in fault? and the answer is, the administrator, and he is insolvent. The next question is, Ought not his securities to pay it? They undertook for his faithful administration of the estate, in which he has failed, and of course it would seem that they are answerable. But it is said that they are exonerated at law, and that equity will exonerate them. Admitting that to be the case, it has been brought about by the conduct of the complainant himself, by bidding at the sheriff's sale, and having his execution returned "Satisfied." And if he by that means has put it out of his power to receive his debt from them, others ought not to be liable on that account. The defendants have equal equity with the complainant, and this Court can give no relief. The bill must be dismissed.

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(295)

MARY SPAIGHT, EXECUTRIX OF THE LAST WILL OF RICHARD D. SPAIGHT, DECEASED, v. THE HEIRS OF THOMAS WADE.

From Craven.

1. Laws 1784, ch. 11, sec. 2, directs what judgment shall be entered against heirs who have lands by descent, although they omit or refuse to point out the land descended; it also authorizes a *sci. fa.* to the heirs, and upon judgment gives execution "against the real estate of the deceased debtor in the hands of such heirs," etc.

2. Laws 1789, ch. 39, sec. 3, enacts that when heirs or devisees are liable by reason of land descended or devised, and sell the land before action brought or process sued out against them, they shall answer the debt to the value of the land sold.

3. Under these acts, if the lands have been *bona fide* sold before the *sci fa.* issues, to satisfy a debt of the ancestor under a prior lien,

they of course are not liable. If sold to satisfy the heir's own debt, under the spirit of the act of 1789, the heir is personally liable as if he himself had sold them, but the land is not.

4. If the lands have been fraudulently sold before *sci. fa.* and are not in point of fact in the hands of the heir or devisee, such lands are still liable to the demands of creditors.

5. When execution issues, plaintiff proceeds at his peril; he can sell all lands descended or devised, unless they have legally passed into other hands.

AT March Term, 1792, of New Bern Superior Court, the plaintiff's testator recovered against Thomas Wade and Holden Wade, executors of Thomas Wade, the elder, £2,000 for debt, and £8 10s. 6d. for costs; but the plea of "fully administered" was found for the defendants. The plaintiff's testator then sued out a *scire facias* against William Wade, Judith Wade, Polly Wade, Sally Wade, Thomas Vining and Polly, his wife, Joshua Prout and Sarah, his wife, heirs, devisees and *terre tenants*, suggesting that Thomas Wade, the elder, died seized of a large real estate, sufficient to satisfy the said debt and costs, which was devised by him to Thomas Wade, the younger, Holden Wade, Polly, the wife of Thomas Vining, and Sarah, the wife of Joshua Prout; and that Thomas Wade, the younger, was dead, and the estate devised to him had descended
(296) upon his heirs at law, the said William and Judith; and that Holden Wade was also dead, and that the estate devised to him had descended upon his heirs at law, the said Polly and Sally; and praying judgment of execution for the said debt and costs against the real estate to them devised and descended as aforesaid.

Upon the due return of this process William Wade, Judith Wade, Sally Wade and Polly Wade appeared by their guardian, and pleaded several pleas, but afterwards withdrew them, and judgment was entered against them, as well as Thomas Vining and wife, by default; but upon condition that said William, Judith, Polly and Sally should not be liable for any estate which had come or should come to them, other than such as should be derived by devise or descent from Thomas Wade the elder, or Thomas the younger, or Holden.

Joshua Prout appeared for himself and wife, as devisees of Thomas Wade, the elder, and pleaded, *"nothing by devise on the day of the sci. fa. purchased."* The plaintiff's testator replied, "that lands were devised to Sarah by Thomas Wade, the elder"; upon which issue was joined by demurrer.

The said Joshua Prout also pleaded as *terre tenant*, that the lands of which he was in possession, not mentioned in the de-

vise to Sarah, his wife, were never bound by any judgment against Thomas Wade, the devisor; upon which issue was joined by demurrer.

The death of the plaintiff's testator had been suggested, and the plaintiff duly admitted to revive and prosecute. And upon this state of the pleadings and facts the case was submitted to this Court.

HALL, J. The proper judgment to be entered against heirs, under Laws 1784, ch. 11, sec. 2, is against the lands descended in the hands of the heirs, although they refuse or omit to point out the lands that have descended. (207) The act directs a *sci. fa.* to issue against the heirs to show cause why execution should not issue against the real estate of the deceased debtor, and then declares that "if judgment shall pass against the heirs or devisees, or any of them, execution shall and may issue against the real estate of the deceased debtor in the hands of such heirs, etc." Laws 1789, ch. 39, sec. 3, declares that "where an heir or devisee shall be liable to pay the debt of an ancestor or testator, and shall sell, alien or make over the land which makes them liable to such debt, before action brought or process sued out against them, such heir or devisee shall be answerable on such debt to the value of such land so sold, etc." Under this act, where it appears that the lands have been *bona fide* sold by the heir or devisee, before *sci. fa.* sued out, the debt for which the land would have been otherwise liable becomes their own debt, and judgment must be entered against them, as if sued at common law and they had omitted to point out the lands descended. Under these two acts the lands descended or devised are liable to the demands of creditors, except when *bona fide* sold, in which case the heir or devisee is liable in *propria persona,* for the amount of such sales. No mischief can arise from such a construction; all lands will be liable under such judgment that ought of right to go in discharge of an honest debt due by the ancestor or testator. If they have been *bona fide* sold before the *sci. fa.* issued, they are not liable; if fraudulently sold, and, in point of fact, not in the hands of the heir or devisee, they are still liable to the demands of creditors. If they have been sold to satisfy another debt of the ancestor under a prior lien, they of course are not liable; nor would they be if *bona fide* sold to satisfy the debt of the heir or devisee; in which case the heir or devisee, under the spirit of the act of 1789, is as if he himself had aliened them. Such judgments will not affect the rights of third persons not parties to them. When executions issue

(298) on them, plaintiffs must, at their peril, sell such lands as are liable to their demands; and all lands which have descended or have been devised are so liable, unless they have legally passed into other hands. The plea states that the defendant had nothing by descent at the time the *sci. fa.* issued. If he ever had any lands by descent or devise it has not been shown either by him or the plaintiff what has become of them, so as to make it necessary to render judgment accordingly; to give judgment against the heirs, for instance, in case of alienation by him. The plaintiff replies that lands had been devised, which is admitted by the plea; if so, he is entitled to judgment and execution against them.

NELSON v. STEWART.

From Guilford.

Under Laws 1777, ch. 22, regulating the mode of proceeding by warrant for the recovery of damages occasioned by the inroads of horses, cattle, hogs, etc., the report of the justice and freeholders directed by the act to examine the state of plaintiff's fences is final and conclusive on the parties.

THIS CASE commenced by a warrant issued by a justice of the peace, under Laws 1777, ch. 22, which declares, "that upon complaint made by any person to any justice of the peace of the county, of any trespass or damages done by horses, cattle or hogs, it shall and may be lawful for such justice, and he is hereby required and authorized to cause to be summoned two freeholders, indifferently chosen, who, together with himself, shall view and examine on oath whether the complainant's fence be sufficient or not, and what damage he has sustained by reason of the trespass, and certify the same under their hands (299) and seals. And if it shall appear that the said fence be sufficient (five feet high), then the owner of such horses, cattle or hogs shall make full satisfaction for the trespass or damages to the party injured, to be recovered before any jurisdiction having cognizance thereof. But if it shall appear that the said fence is insufficient, then the owner of such horses, cattle or hogs shall not be liable to make satisfaction for such injury or damages as aforesaid." The defendant had notice of the proceedings of the freeholders in sufficient time to make his defense; and the question submitted to this

Court was, whether in the taxation of costs the plaintiff should be allowed for the attendance of sundry witnesses whom he summoned to prove the truth of the report made by the justice and freeholders.

TAYLOR, C. J. The question submitted involves another, to wit, whether the report of the justice and freeholders be conclusive upon the parties. A majority of the Court think that it is. The Legislature have thought proper to confide a portion of judicial power to the justice and two freeholders, and their judgment, like that of any other tribunal, must be conclusive whilst it remains in force. Though notice is not directed by the act to be given to the defendant, yet it was done in the present case, and he had a full opportunity of cross-examining the witnesses, and adducing testimony in his own behalf. And if, after all, manifest injustice had been done to him, he could have put the case in a course of revision in a superior tribunal. This Court is not at liberty to enter into an examination of the justice or injustice of the decision, unless it come before them in a regular way. They will take care that the persons who act do not exceed the jurisdiction entrusted to them, but while they keep within that, their determination is binding upon the parties to it. On the legislative policy of (300) erecting particular tribunals there may exist a variety of opinions, and if called upon to declare our own we should not hesitate to express a wish that the present law, particularly, might undergo a revision, since it derogates so much from the common-law mode of proceeding that the powers exercised under it may have the most injurious operation. But as it is a law, we are bound by it, and a majority of the Court are of opinion that the plaintiff ought to pay for the witnesses summoned by him for the purpose of supporting the certificate of the justice and freeholders.

HALL, J., *contra.* If the report of the justice and freeholders be conclusive, it was unnecessary for the plaintiff to summon witnesses, and he ought to pay them. But I think the report is not entitled to so much credit, nor do I think there ought to be a trial *de novo.* The report should be considered so conclusive as to establish a demand, and put the defendant to impeach it, and show that it was improperly made. It should be considered as only *prima facie* evidence of a demand. If it were considered as conclusive, the defendant would be deprived of his property without the semblance of a trial by jury. It is true, if the party fail to pay the damages, the remedy must be

by suit or warrant. But what will that avail him, if he be not permitted to examine the report, and show it to be irregular and unjust? If the Legislature had intended it to be conclusive, they might as well have directed the justice to issue execution for the damages. One thing alone satisfies my mind on this subject, the law points out no way by which the defendant can appeal; and to say that the report shall not be impeached is to say that the parties shall be bound by the decision of the justice and freeholders, without an opportunity of having a rehearing before a court and jury. I, therefore, think (301) the plaintiff ought to recover the costs in question, and that the defendant's motion should be overruled.

Cited: Kearney v. Jeffreys, 30 N. C., 98.

ARTHUR CHATHAM v. LUCY BOYKIN.

From Northampton.

1. To a *sci. fa.* upon a refunding bond, defendant pleaded that the debt recovered against the administrator was not justly due, and that the administrator fraudulently and collusively with the plaintiff confessed the judgment.
2. The burthen of proof lies on the defendant to verify his plea by proof of the fraud, otherwise judgment must be rendered against him on the *sci. fa.*
3. After a decree on a petition, a *sci. fa.* may issue on the refunding bonds given by distributees; it is within the spirit of the act giving the *sci. fa.*

THIS was a *sci. fa.* upon a refunding bond given by the defendant, to which he pleaded that the judgment stated in the *sci. fa.* to have been recovered against the administrator was not justly due, and that the administrator fraudulently and in collusion with the plaintiff suffered the judgment to be entered against him by confession. To this plea there was a demurrer, and issue joined thereon.

HALL, J. If that part of the plea which states that no debt was due by the administrator stood as a distinct plea to itself and was to be allowed, it would be incumbent on the plaintiff to prove his demand upon the *sci. fa.* after having obtained judgment against the administrator, and that, too, merely at

the suggestion of the defendant, which ought not to be allowed. But when the defendant, in addition to that suggestion, states that the judgment was fraudulently obtained, he places the burthen of proof on himself, and the judgment re- (302) mains good until he verifies his plea; upon doing which judgment ought not to be entered against him on the *sci. fa.* The plea appears to be indivisible, and in substance this, that the judgment against the administrator was obtained through fraud, and this fact he may substantiate if he can. The demurrer should be overruled.

An objection has been raised, in the argument of the case, to the form of the process in this case, and it is contended that a *sci. fa.* cannot issue from a decree on a petition. Although this objection is not presented by the pleadings, the Court have no hesitation in saying that the objection is unfounded. It is convenient and within the spirit of the act of Assembly which gives the *sci. fa.* on the bonds of distributees where their shares have been delivered to them.

NICHOLS v. NEWSOM.

From Hertford.

Where one purchases at sheriff's sale a quantity of lightwood, set as a tar-kiln, he has a right, unless forbidden by the defendant who owns the land, to go peaceably after the sale and remove it; because the article is too bulky to be removed immediately after the sale, and the law is the same of all cumbrous articles, such as corn, fodder, stacks of hay, etc.; but if defendant forbid the purchaser to go upon the land, he cannot then go, for his entry then could not be a quiet or peaceable one, and the law will not permit a man forcibly to enter upon another's possession to assert a private right which he may have to an article there. The purchaser may bring *trover* for the lightwood, and the refusal of the owner to let him go on the land to take it is evidence of a *conversion*, though he may never have touched the lightwood, and it should be left to the jury.

THIS was an action of trover for a quantity of lightwood set as a tar-kiln on the defendant's land, but not banked or turfed. Upon the trial it appeared that a judgment had been obtained against the defendant, on which an execution (303) was issued and levied on the said lightwood, which was duly advertised and sold and struck off to the plaintiff as the highest bidder. The plaintiff afterwards applied to the defendant for liberty to bank, turf and burn the kiln as it then stood,

which liberty the defendant refused to grant. The plaintiff then demanded the lightwood, and proposed to bring his team and cart it off the defendant's land; whereupon the defendant replied, if the plaintiff came on his premises for that purpose he would sue him. There was no evidence of an actual conversion, and at the time the suit was commenced the kiln remained in the same situation in which it was when purchased by the plaintiff. The plaintiff was permitted to take a judgment for £20, the value of the kiln, with leave to the defendant to have the verdict set aside and a nonsuit entered, provided the court should be of opinion the plaintiff was not entitled to recover in this action on the foregoing facts, and on motion of the defendant the case was transmitted to this Court for the opinion of the judges. On this case the Court were divided in opinion.

SEAWELL, J. To support an action of trover, it is necessary for the plaintiff to prove property and right of possession in himself and a conversion by the defendant. It is admitted in this case that the plaintiff has shown property and a right of possession in himself, but it is insisted by the defendant that he has *committed* no conversion. This leads to the inquiry, "What is a conversion?" Conversion, in legal acceptation, means the wrongfully turning to one's use the personal goods of another, or doing some wrongful act inconsistent with or in opposition to the right of the owner. It is a malfeasance, and the plea to the action is "Not guilty." This malfeasance, like all others, is capable of proof in divers ways, as by the confession of defendant, or when called upon to surrender the prop-
(304) erty, his refusal affords a presumption that he has converted it to his own use; for otherwise he would not refuse. But this presumption, like all others, vanishes when the contrary appears.

In the present case the plaintiff calls upon the defendant for permission to dig earth and cover the kiln; the defendant refuses, and he not being bound to grant the permission, it is admitted that this refusal does not amount to a conversion. The plaintiff then formally asks a permission which the law had already afforded to him, and which defendant could not abridge or withhold. The defendant refuses and threatens the plaintiff with a suit, in case he should enter upon his premises and take away the lightwood; and the parties, no doubt, believed that it was in law necessary to obtain such permission to prevent the plaintiff from becoming a trespasser. This menace, it is said, amounts to a conversion, and it is the policy of the law to do away the necessity the plaintiff was reduced to of taking

his property at the risk of a suit, though without foundation. However stupid the conduct of the defendant hath been, yet when we recollect that in legal understanding conversion is *an act,* and that in all instances where the words of a party are given in evidence it is with a view of inferring such act, it would seem irresistibly to follow that where there is clear evidence that no act has been done, it is equally as clear there has been no conversion. What has the plaintiff to complain of? Has the defendant injured his property? Has he used it in any way, or exercised any act of ownership inconsistent with the plaintiff's right? He has not. He has merely threatened to sue the plaintiff if he took the lightwood away, or entered upon his premises for that purpose, and it is admitted that no such action would lie. How, then, does this differ from a case where one man says to another, "If you plough your own horse, I will sue you for it"? The owner of the horse would incur the same risk by ploughing him after this menace (305) that the plaintiff would have incurred by entering upon the defendant's land and taking away the lightwood; and yet it would hardly be said that this menace was a conversion of the horse.

But a case has been cited from 3 Mod., 170, where in trover for a tree, upon demand and refusal, the plaintiff recovered. When that case is examined, it will turn out to be this: Trover was brought for fourteen *lemon trees in boxes* which were placed by the plaintiff in the *garden* of Lord Brudenell, by his lordship's consent. The premises were afterwards sold, and after passing through many hands, they came to the defendant, who refused to deliver the lemon trees to the plaintiff upon request. These trees were placed in a garden which was walled, and which plaintiff could not enter unless defendant would open the gate, and out of which he could take the trees only through the gate. The defendant by his refusal *withheld* from the plaintiff the enjoyment of his fruit trees. But it is worthy of notice that the conversion was not made a point in the case. In the present case the lightwood was as accessible to the plaintiff as to the defendant, and has not in any manner been withheld from him.

In 5 Bac. Abr., 279, title "Trover," it is stated that a demand and refusal of a piece of timber or other cumbrous article, when it has remained untouched, will not support an action of trover. Independently of this authority, I am of opinion, from the reason of the case, that this action cannot be supported, and that the rule for a new trial should be made absolute.

HALL, J. The lightwood which is the subject-matter of this action was legally levied upon and sold to the plaintiff. That sale gave the plaintiff a title to it. The kiln of lightwood could not be delivered and carried away like most other kinds of personal property; it was cumbrous and could only be (306) removed in the manner proposed by the plaintiff. If so, he had a right to remove it in that manner, and the defendant had no right to forbid him. Of course, the plaintiff's right was not impaired by the defendant's threat to sue him if he entered upon his land and removed the lightwood; his physical power to do himself justice still remained. Had that been opposed, then there would have been a conversion. Had the defendant sued the plaintiff for carrying away the lightwood, he could not have recovered, because the plaintiff only did that which the law gave him a right to do, that was, to enter on the defendant's land and carry away property to which he had acquired a title by a purchase under an execution, property which could be removed in no other way. The threat which defendant made was of no legal significance, and ought to have been disregarded by the plaintiff. If the lightwood had been within the defendant's inclosures and admittance had been denied, the case might have been different; but being in the woods and no barrier interposed, the idle threat of defendant could not amount to a conversion, and the rule for a new trial, I think, ought to be made absolute.

LOWRIE, J., delivered the opinion of the majority of the Court.* The action of trover is the legal remedy to recover damages for the unlawful conversion of a personal chattel. The lightwood was a chattel of this description, and the purchase under the execution vested in the plaintiff a right to it. The lightwood, however, being bulky, and too cumbrous to be immediately moved from the defendant's land on which it was sold, the law will presume, unless by some express and unequivocal act of the debtor such presumption should be destroyed, that it was left there by his consent and in his possession until the necessary arrangement could be made for (307) taking it away. In all cases where the consent of one man becomes necessary, and without which another cannot conveniently enjoy his property, the law presumes such consent to be given, unless the contrary expressly appears. Whenever, therefore, a man purchases heavy articles at a sheriff's sale, such as corn, fodder, haystacks, etc., which it is not pre-

*TAYLOR, C. J., LOCKE, LOWRIE, and HENDERSON.

sumable he is prepared immediately to take away, he may, if not prohibited by the debtor, return in a peaceable manner and lawfully enter upon the freehold, or into the inclosures of such debtor, or other person on whose land such articles were sold, for the purpose of taking them away. But in the present case such presumption ceased to exist the moment the defendant expressly prohibited the plaintiff from entering upon his freehold, and threatened him with a suit if he did enter. After such express prohibition, the entry of the plaintiff could not be a peaceable and lawful one. The law will not permit one man to enter upon the possession of another for the assertion of a mere private right which he may have to an article of personal property, against the express prohibition of him in possession; such permission would be attended with consequences very injurious to the peace of society. We therefore think that the refusal of the defendant, as stated in this case, was such evidence of a conversion as was proper to be left to a jury. The conduct of the defendant reduced the plaintiff to the necessity of asserting his right by an action at law. "If a man give leave to have trees put into his garden, and afterwards refuse to let the owner take them, it will be a conversion." Com. Dig. Action on the Case, title, Trover E. This case differs from that to be found in Gilbert's Evidence, 262, and in 5 Bac. Abr., Trover B, where there was a refusal to deliver a beam of timber; for here was not only a refusal to *deliver*, but a refusal to suffer the plaintiff to *take* the lightwood into his possession and cart it away, coupled with a declaration that if the plaintiff entered upon his freehold for that purpose he would sue (308) him. The plaintiff was under no necessity to enter upon the defendant's land and thereby incur the trouble and expense of a lawsuit. We therefore think the rule for a new trial should be discharged.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1818.

CATHERINE H. HASLIN v. THE ADMINISTRATOR AND HEIRS OF EDWARD KEAN, DECEASED.

From Craven.

A. conveyed land to B. upon trust that he would at any time, at the request of J. H., or at the request of C. H., wife of J. H., in case she should survive her husband, or in case J. H. and C. H. should die without making such request, then at the request of the executor or administrator of the survivor of them, convey the land in fee simple to such person qualified to hold lands in North Carolina, as J. H. in his lifetime, or C. H. in case she should survive him, or the executor or administrator of the survivor, by writing signed in the presence of one or more credible witnesses, or by last will and testament duly executed, should direct, limit or appoint. J. H. afterwards, reciting the conveyance made by A. to B., and stating an intention to go to South America, in execution of the power of appointment reserved to him, directed by deed, attested by a witness, B. to sell at his discretion to any person qualified to hold real estate in North Carolina. J. H. and B. both died within a short time of each other, without having done anything further in relation to the power of appointment; and C. H., who survived her husband, directed the lands to be conveyed to herself by writing, executed in the presence of two credible witnesses: *Held*, that the deed of J. H. to B. is not to be considered an execution of the power, so that on his death no power remained in his wife, surviving him. It is but a mere substitution by J. H. of B. for himself, and until B. had sold the lands, as in his discretion he was authorized to do, the power of the wife remained undefeated.

THIS CASE coming on to be heard upon the bill, an- (310) swers and exhibits, it appeared that Wilson Blount, by deed dated 25 February, 1799, duly conveyed certain lands in the manner following, viz.:

STATE OF NORTH CAROLINA—Craven County.

This indenture made 25 February, 1799, between Wilson Blount and Anne, his wife, of the one part, and Edward Kean of the other part, witnesseth: that for and in consideration of the sum of £6,000, current money of the State aforesaid, to the said Wilson Blount and Anne, his wife, in hand paid, at or before the sealing and delivery of these presents, by the said Edward Kean, the receipt whereof they do hereby acknowledge, and thereof acquit the said Edward Kean, his heirs, executors and administrators, have granted, bargained, sold, aliened, conveyed, enfeoffed and confirmed, and by these presents do grant, bargain, sell, alien, convey, enfeoff and confirm, unto him, the said Edward Kean, his heirs and assigns forever, all that certain tract or parcel of land lying and being in Craven County, on the south side of Neuse River, being all that tract or parcel of land which was granted to John Lovick by patent bearing date 1 November, 1719, which lies to the eastward of a branch which runs into Bachelor's Creek, above the road which leads from New Bern to Kemp's Ferry, and on which Colonel Wilson had a mill, beginning, etc. Also, one other certain tract, etc., etc.: To have and to hold the said several tracts or parcels of land and premises hereby bargained and sold, or intended so to be, unto the said Edward Kean, his heirs and assigns forever, upon trust that the said Edward Kean, his executors, administrators or assigns, shall and will, at any time at the request
(311) of John Haslin, Esq., of the colony of Demarara, in South America, or at the request of Catherine H. Haslin, in case she should survive the said John Haslin, Esq., or in case John and Catherine H. Haslin, his wife, should die without making such request, then at the request of the executors or administrators of the survivor of them, by good and sufficient deeds, such as the counsel of the said John and Catherine, his wife, or the executors or administrators as aforesaid, shall advise, convey in fee simple to such person or persons qualified to acquire, hold and transfer lands and other real estate in the State of North Carolina, as the said John Haslin during his life, or Catherine H. Haslin after his death, in case she should survive, or the executors or administrators of the survivor of them, by writing signed in the presence of one or more credible witnesses, or by last will and testament duly executed, shall direct, limit or appoint. And the said Wilson Blount and Anne, his wife, do hereby covenant with the said Edward Kean, etc., to warrant

the said land unto the said Edward, his heirs, etc., from the claim of all manner of persons, etc. In witness whereof, etc.

WILSON BLOUNT. (SEAL.)
ANNE BLOUNT. (SEAL.)

Sealed and delivered in the presence of
DANIEL CARTHEY.

On 5 April following, John Haslin executed the following instrument in the presence of one credible witness, viz.:

Whereas by a deed of bargain and sale bearing date 25 February, 1799, between Wilson Blount and Anne, his wife, of the one part, and Edward Kean of the other part, two several tracts of land containing about 800 acres, with the buildings and improvements thereon, lying in Craven County, on the south side of Neuse River and on Bachelor's Creek (all which will more fully appear by a reference to said deed), were (312) conveyed to the said Edward Kean and his heirs, upon trust to convey the same to such person or persons qualified to hold lands in the State of North Carolina as I, John Haslin, during my life, by any writing, signed in the presence of one or more credible witnesses, should appoint; and whereas I, the said John Haslin, intend shortly to undertake a voyage to the colony of Demarara, in South America, and am apprehensive of the dangers to which my life will be exposed in the said voyage: Now, therefore, know all men by these presents, that in consideration and in execution of the above power of appointment to be reserved to me, I, the said John Haslin, do hereby direct, limit and appoint that the land and premises above recited and referred to may and shall be conveyed, sold and aliened by the said Edward Kean, at his discretion, to any person or persons qualified to acquire, hold and transfer lands and other real estate in the State of North Carolina. In witness whereof I have hereunto set my hand and seal this 5 April, 1799. JOHN HASLIN. (SEAL.)

Signed, sealed and delivered in presence of
WILL. WATSON.

John Haslin departed this life in March, 1804, and Edward Kean in August following, without either the said John Haslin or Edward Kean doing any other or further act in relation to the execution of the power of appointment created by the said deed of Wilson Blount and Anne, his wife. Catherine H. Haslin survived her husband, and by deed duly executed, sub-

sequent to the death of her husband, in the presence of two credible witnesses, directed and appointed the lands in the said deed mentioned to Wilson Blount, to be conveyed to herself; and she produced a record, duly authenticated, of her naturalization in due form of law, in a court of record of the United States.

(313) Upon these facts it was submitted to this court to decide, 1. Whether the deed of 5 April, 1799, is of itself such an execution of the power of appointment created by the deed of Wilson Blount and wife that on the death of the said John Haslin no power to appoint remained in his wife, who survived him. 2. Whether it be competent for the defendant to deny the ability of the complainant to hold land, notwithstanding the record of naturalization, by adducing proof that she had not such residence in the United States as entitled her to be naturalized; and that the facts set forth in the affidavit, upon which she was permitted to be naturalized, were not true. 3. Whether it be competent for either of the parties to give in evidence any other deed executed by John Haslin in his lifetime, or his last will and testament, having relation to the deed of 5 April, 1799, to prove the intention of the said John in said deed.

SEAWELL, J. The main question in this case is whether John Haslin, by the deed which he executed to Kean, completely and in due form executed his power. If he did, there is an end to the wife's power; if he did not, she was entitled to appoint. The present controversy is between volunteers, and the wife is entitled, unless there has been not only an *intention* to appoint, but an *actual* appointment, and that made in the *precise* form required by the power. This position is proved by many authorities. *Dormer v. Thurland,* 2 P. Wms., 506; *Darlington v. Pulteney,* Cowp., 260; Powell on Powers, 150, 163, and the cases there referred to. It is, then, necessary to inquire in what manner Blount, the donor of this power, declared it should be exercised, so as to defeat the right of the wife. He required that it should be *by deed,* executed in the presence of a witness or witnesses, and that by this deed Haslin, the husband, should *limit and appoint to whom Kean should convey,* provided

(314) such person should be qualified to take, hold and transfer lands in North Carolina. Has the husband *appointed,* and *in the manner* prescribed? Does his deed to Kean appoint *to whom* Kean shall convey? No; it authorizes Kean to convey to whom *he* pleases in *his discretion.* This is a confidence

which Blount did not confer on Kean, nor did he vest Haslin with a power to confer it. However, it is said that Haslin took a beneficial interest under the power; for as he might appoint whom he pleased, he could consequently have appointed himself. That will depend upon a fact which does not appear in this case, namely, whether he was qualified to take, hold and transfer lands in North Carolina. If he were qualified, then he has a beneficial interest; but it is indispensable for those who claim the execution of a power to show every circumstance necessary therefor.

But assuming it as a fact that the husband was qualified, and could appoint himself, and that, having a beneficial interest, he could delegate this power, has Kean exercised it? He has not. But then it is said that, having the legal estate, with Haslin's power, he might appoint himself. Does Haslin's deed say so? It only authorizes him to bargain, sell, alien and convey to any person in his discretion, who should be qualified to take, hold and transfer lands in North Carolina. In substance, the deed is that Haslin authorizes him to sell to any person, being, as the deed declares, about to take a voyage to South America, when, as the purchaser was to be looked for, it was not in the nature of things that Haslin could be present. And though Haslin declares in the deed that he transfers that authority *in execution of the power,* it is only by *reference* to his power, and is tantamount to saying, "in virtue of his power." It seems impossible to collect from this deed an intention in Haslin to effect any other object than a bare substitution; there is nothing in it which even implies that he had surrendered or released to Kean the right of appointing, nor anything which prevented Haslin from revoking it the next moment.
The substitute must, then, necessarily stand in the shoes (315) of his principal; and until he had bargained and sold the lands, as he was entrusted in his discretion to do, the power of the wife remained undefeated. To consider the deed as an execution of the power, and consequently as a destruction of the power limited to the wife, could only be by a far-fetched presumption, which we are not authorized to make in favor of a stranger and a pure volunteer; especially when by so doing we are defeating the wife, who was an object of the donor's bounty; we say *donor's* bounty, for if it was the husband's bounty, she has still a stronger claim. And according to the view of the case which we have taken, it seems clear that the release or other act of the husband, since the appointment either by himself or the substitute (if he had a right to delegate his power), could not defeat the power of the wife, though he might expressly

have declared it in extinction of the wife's power. In favor of purchasers courts of equity, on account of the consideration, will effectuate appointments wherever defective, and will consider as done what the parties have agreed to do. But it comes to the same thing at last, and is an appointment in equity.

The result of the whole seems to be that by this deed, if it operated at all, the power of the wife was placed at the mercy of Kean, instead of the husband; and that thereby he acquired the power, and nothing more, of defeating by his own act the claim of the wife, which he could not before; but that in both cases it required the exercise of this power. The consequence is that the wife, having become qualified to take, hold and transfer lands in North Carolina, and having appointed herself, the heirs of Kean, who hold the legal estate, must convey to her.

Many points were made in this case upon the difference in powers, and the effect of a release; but from the view we have taken of it this has become unnecessary to be examined, (316) considering the manifest intention of the deed to be only a substitution of power. But if it were necessary, we should say that those who claim an execution of the power must show it; they must, of course, show themselves qualified to be appointed. Aliens can take; so they can transfer, but they cannot hold lands; that, therefore, it does not appear the husband had any beneficial interest; if he had not, that it was then a mere personal confidence, which could not be delegated. And as to a release, it would have no effect, if the husband had no interest to give up. But if he had an interest, as the power of the wife was limited to her by the original donor, to be exercised in default of the appointment of the husband, both being strangers and upon an equal footing, the husband by release could only relinquish to the *legal* owner what he had; and that the only effect would be to lop off one power, in like manner as if it was spent by death. For Blount, who created both powers, and who, as the case appears, is to be considered the benefactor of both, has appointed Kean to hold the estate subject to the appointment of the wife, in default of any appointment by the husband. And as the release could only destroy what the husband had, as between volunteers, it gave Kean no ground in equity to oppose the wife's claim; for that must be founded either in regular title, according to the prescribed form, or upon moral obligation, which in equity dispenses with form. So long, therefore, as Kean continued to hold the lands, without any appointment being made by the husband, the power of the wife remained alive.

It is admitted that the execution of a power limited to a stranger is to be *fairly* construed; and this is what the books mean when they use the phrase, "liberally construed"; and that it is to be supported, if there appear an *intention,* and the manner employed is within the fair and liberal exposition of that prescribed by the donor. And had the husband clearly evinced such intention, by limiting in this deed that Kean should have, hold and *enjoy* the estate, or words to that effect, (317) such appointment would have been sufficiently formal, and enabled him to resist the wife's power. But according to the clear intent of the parties, he stood in no other condition than one with a general power of attorney to sell the lands to any person in his discretion, except such as could not hold them under the laws of North Carolina.

THE EXECUTORS AND DEVISEES OF ARCHIBALD McCRAINE v. NEIL CLARKE AND CATHARINE, HIS WIFE.

From Cumberland.

1. On the trial of an issue *devisavit vel non* the declarations of executors or devisees named in the will are evidence against them, if they be parties of record to the suit or issue.
2. A contract for the sale of land, contained in a devise previously made, which contract is not executed by reason of the death of the owner or devisor, before the day appointed, does not operate as a revocation of the devise.

ARCHIBALD McCRAINE made his will and devised a tract to some of the plaintiffs, and appointed the others his executors, who offered the will for probate. Neil Clarke and wife (the latter of whom is one of the heirs at law and next of kin of McCraine) opposed the probate, and an issue of *devisavit vel non* was made up. Upon the trial of this issue, the defendants offered in evidence the declarations of one of the executors and some of the devisees, who were parties to the issue; and the court refused to receive the evidence. They then proved that after the making of the will McCraine contracted to sell a tract of land, part of the real estates devised in and by the will, for a price agreed upon, and was to convey on a particular day; but he died before the day arrived and did not (318) convey, and they insisted that this contract was, in law, a revocation of the will. The court instructed the jury other-

wise, and they found that McCraine did devise, etc. A motion was made for a new trial upon the ground that the court had erred in both of the above points.

RUFFIN, J. Upon the last point, it is clear that the court informed the jury correctly. What may be the effect of such a contract in equity, upon the particular devisee of the land sold, is another question. The devisee may or may not be a trustee for the purchaser, according to circumstances; and the price of the land may or may not be a part of the testator's personal estate for the benefit of his residuary legatee or next of kin, also according to circumstances; but we have nothing to do with either of those questions now. The point in dispute is, whether there be a revocation of the will at law; and that there is not, is proved by many authorities. *Ryder v. Wager,* 2 P. Wms., 332; *Cotton v. Sayer, ibid.,* 623. Even if the lands had been actually conveyed, the will would not have been thereby *revoked,* properly speaking, so as to prevent its probate; the only effect would be an ademption of the devise of the particular lands conveyed.

Upon the point of evidence, however, the Court are of opinion the judge erred in refusing to admit the declarations of the executors and devisees. The issue of *devisavit vel non* is in the nature of a suit, and the executors and devisees are regularly parties to it. Their declarations ought to be received in evidence against themselves. We cannot see a legal ground to reject them. We cannot in a court of law look to the interests of third persons not before us; we cannot here know the executor as a trustee. All we can know is that he is before us as a party to the suit. The rule is universal, that whatsoever a party says or does shall be evidence against him, to be left to the jury. It is competent evidence; the jury can and will (319) give it its weight, according to the manner of obtaining the confession, or the relative interest of him whose admissions are proved. A solitary exception to this rule cannot well be imagined. The rule for a new trial must therefore be made absolute.

STATE v. JOHN HOGG.

From New Hanover.

A commissioner of navigation is not exempt from serving as a tales juror.

THE defendant was returned as a talesman, to serve on the jury during the day on which he was returned. He came into court and stated that he was a commissioner of navigation for the Port of Wilmington, and was exempt from serving on juries by the act of 1807, ch. 51, sec. 3, and prayed a discharge. The court held that he was not exempt from serving as a tales juror; and it was submitted to this court to decide whether he was exempt.

RUFFIN, J. We look into the act of 1807, ch. 51, and sundry others of a similar nature; and the result is that we think the exemptions therein meant are from services as jurors of the original panel. Such exemptions are not intended as privileges or a compensation to the party, unless where it is expressly so stated, as in the act of 1794, ch. 4, in favor of patrols. The purpose of the Legislature is to forward and promote the public advantage, by leaving officers, physicians and others to exercise their employments without interruption. So far, therefore, as serving on a jury does not interfere with their public avocations, they are still liable to be called on for that service. But inasmuch as no one can be summoned as a (320) talesman except a bystander at the court, no inconvenience can result to the community from compelling a person to serve in that capacity; for the very fact of his being a bystander proves that he has not then any official or professional engagements which require his attention. If, however, such duties should occur, after he is summoned, it is in the power and has been the practice of the courts to excuse a juror upon a proper case.

Cited: S. v. Williams, 18 N. C., 374; *S. v. Whitford,* 34 N. C., 101; *S. v. Willard,* 79 N. C., 661; *S. v. Cantwell,* 142 N. C., 614.

STATE v. JONATHAN CAFFEY.

From Iredell.

An indictment for perjury in swearing to an affidavit charged that the affidavit was "in *substance* and to the effect following." The assignment was that defendant swore he did not know a writ was returned against him in the above *suit;* the affidavit when produced had the word *case* instead of suit. The variance is immaterial; the indictment does not profess to give the *tenor.*

THE defendant was indicted for perjury, alleged to have been committed in swearing to an affidavit. The assignment of the perjury was that the defendant swore that he did not know that a writ was returned against him in the above *suit.* The evidence offered in support of the assignment was an affidavit in which the defendant had sworn that he did not know that a writ was returned against him in the above *case.* The indictment charged that the affidavit was "in substance and to the effect following," etc. Upon the trial the defendant's counsel objected to the giving of the affidavit in evidence, on the ground that it was variant in its language from the one recited in the indictment. The objection was overruled, and the defendant convicted. A rule for a new trial was obtained, and sent to this Court.

(321) SEAWELL, J. A new trial is moved for, on the ground that the affidavit was improperly admitted; and it has been insisted that, inasmuch as the assignment and affidavit differ in a *word,* the assignment was not supported by the evidence; and the case from Cowper (*Rex v. Beach,* 229) has been relied on, where *Lord Mansfield* says: "The true distinction is, that when the word misrecited is *sensible,* then it is fatal." This case only implies where the *tenor* is undertaken to be recited; in which, if the recital be variant in a word or letter so as thereby to *create a different word,* it is fatal. In the present case the indictment only pretends to set forth the *substance* and *effect* of the affidavit; and all the authorities show that whenever a statement of the substance and effect is sufficient in the proceedings, evidence of the substance and effect will also suffice. *Lord Holt,* in *Queen v. Drake,* 2 Salk., 661, by way of illustration says that when only the sense and meaning are professed to be set out, it may be done by translating it into Latin. The evidence was properly admitted, and the rule for a new trial must be discharged.

DEN ON DEMISE OF ARRINGTON AND OTHERS v. JOHN ALSTON.

From Nash.

A testator by the first clause of his will devised to his three daughters, each, a tract of land, and provided in the same clause that if either of them should die before marriage, the lands of such one should go to the survivors; and in case all should die before marriage, their lands were to go to B and C. After several other bequests and devises, the testator, in the last clause of his will, bequeaths to the same daughters a number of slaves, with other specified personal estate; and then adds a general clause of *all the residue* of his estate, *real*, personal and mixed, to be equally divided among them when the two eldest arrive at the age of eighteen years or marry; and that if either of them should die before their arrival at eighteen years or marriage, then the share of the one so dying should go to the survivors; but if they should all die before they arrive at eighteen years, *or* marry *and have issue*, then the said personal estate (particularly specifying it) and all other property which they were entitled to by his will should go to B, P, R and A. The lands mentioned in the first clause are not affected by anything contained in the last clause; and therefore upon the death of one of the daughters who reached eighteen years and married, but died without issue, the lands passed to her surviving sisters.

THIS was a case agreed, in which the material facts (322) are as follows: Micajah Thomas having three illegitimate children by Ann Jackson, to wit, Mourning, Margaret and Temperance, made his will in 1788, and therein devised "to his daughter Mourning all that part of his manor plantation, etc., containing 2,500 acres; also another tract, etc." And to his daughter Margaret other lands in fee simple; and to his daughter Temperance other lands in fee simple. He then declared that if "either of his said daughters should die before they marry, *the lands* of the deceased shall go to and be equally divided between the surviving two and their heirs forever; and in case two of them should die before they marry, then the whole of their lands shall go to the surviving one and her heirs forever; and in case that all three of them should die before they marry, that all *the lands* willed to them should go and be equally divided between Bennet Boddie, George Boddie, John Crudup and George Crudup, to them and their heirs forever."

The testator then gave several legacies to other persons, and, returning to his daughters, he declares, "that he gave to them his negro slaves, with their increase, his cash on hand, certificates, stock in trade, debts due by bond or otherwise, all and every thing else of his estate, real and personal or mixed, that is not before given in and by his will, to be equally divided

(323) between them when they should arrive at the age of eighteen years, or marry, to them and the heirs of their bodies forever. But if either of the said children should die before they arrive at the age of eighteen years, or marry, then and in that case the estate of the one deceased should be equally divided between the surviving two, to them and the heirs of their bodies forever; and if two of them should die before they arrive at the age of eighteen years, or marry, then that the portions of the two deceased should descend to the surviving one, and the heirs of her body forever. But if all of them should die before they arrive at the age of eighteen years, or marry, and *has issue* thereby, then the said negroes, cash, etc., shall go to and be equally divided between Bennet Boddie, George Boddie, Temperance and Mary Perry, daughters of Nathan Boddie, Elizabeth Boddie, Mourning Boddie, and testator's two nieces, Rhoda Ricks, and Mourning Arrington, to them and their heirs forever."

Mourning, one of the testator's daughters, arrived at the age of eighteen, married, and died, without issue, in 1805. Her mother was named Ann Jackson, who after the death of the testator, Micajah Thomas, had four illegitimate children, named Munroe, who survived Mourning. She had also a daughter named Mary, wife of Joseph Arrington, one of the lessors of the plaintiff, born out of wedlock; and John Arrington, Martha, wife of Laurence Battle, and William Arrington (all lessors of the plaintiff), born in wedlock, who survived Mourning.

Margaret, one of the testator's daughters, married John Alston, and Temperance married James Alston. The case stated that John Alston was in possession of the lands in question, claiming them adversely to and denying the title of the lessors of the plaintiff.

It was submitted to this Court to decide who were entitled to the real estate acquired by Mourning, under the will of Micajah Thomas. If Margaret and Temperance were enti-
(324) tled, then judgment to be entered for defendant; if all the brothers and sisters of Mourning, legitimate and illegitimate, were entitled, then judgment to be entered for the plaintiff on the demises of each of his lessors. If only the legitimate were entitled, then judgment for the plaintiff, on the demises of John Arrington, William Arrington and Laurence Battle and wife.

SEAWELL, J. By the first clause of this will the testator devises to his daughters several tracts of land, and provides in the same clause that if either of them should die before mar-

riage, the lands devised to such one so dying should go to the survivor; and in case they should all die before marriage, the lands so devised should go to the Boddies and Crudups. By the latter clause the testator devises to his same daughters a number of slaves, together with other specified personal estate, and then adds a general sweeping clause of all the rest and residue of his estate, both real, personal and mixed, to be equally divided amongst them when the two eldest arrive at the age of eighteen years or marry; and that if either of them should die before their arrival at eighteen years or marriage, then the share of the one so dying should go to the survivors; but if they should die before they arrive at eighteen years, or marry and have issue, then the said personal estate, particularly specifying it, and all other property which they were entitled to by his will, should go to the Boddies, the Perrys, the Rickses, and the Arringtons.

Mourning, one of the daughters, arrived at eighteen years and married, but died without issue; and the question is, Do the lands devised to her pass to the surviving sisters, or do they descend to her heirs at law? If the lands be not affected by the latter clause, it is clear they become vested; and upon looking into both clauses it appears plain that it was not intended by the testator that they should be subject to it in any manner. The first is a plain limitation to the Boddies (325) and Crudups, upon a default of the daughters arriving at eighteen years or marriage. The other clause respecting the personal estate is limited to a different set of persons, and not upon the same contingency that the lands were limited upon, but upon a default of their dying unmarried, under eighteen years of age, and *without issue*. So that it seems impossible to suppose he could have intended, consistently with all he had declared, to have made the lands subject to that clause; nor can we be brought to understand him so by anything short of downright and positive declarations; these he has not made; but he has used terms which comprehend them within their scope. He has said, "all the other property"; but as they do not otherwise than by construction embrace the lands, such construction must stand controlled by the other clause, whose peculiar office it was to dispose of them.

The case is, therefore, not like those where the same identical thing is devised to two different persons, by different clauses; there it is impossible to understand the testator, on account of the *same thing* being twice devised. Here a *general term* is used, and the testator's general intent is easily perceived. But if the lands were considered as subject to the second clause, a

remainder to the surviving sisters was not to take place but upon a dying unmarried, under eighteen years of age and *without issue;* for the words of the will are, "if she should die under eighteen, *or* unmarried and without issue"; yet the copulation *or* must be understood *and,* otherwise a dying *without issue,* if under eighteen, would not prevent the estate from passing to the survivors; and surely it was the intention of the testator to provide for the issue, if we respect his declarations.

But it has already been decided in this Court, upon this will, and this very clause, that such construction should be
(326) put upon the word *or: Alston v. Branch,* 5 N. C., 326; and the cases cited by the plaintiff's counsel are decisive in favor of this construction. 1 Wills., 140; 3 Term, 47; 4 Term, 441. It has, however, been insisted that though this should be the proper construction in relation to the personal estate, yet in respect of the real the same words may be construed differently; and *Forth v. Chapman,* 1 P. Wms., 668, is cited as an authority. This case has been fully answered on the other side by *Richards v. Burgaveny,* 2 Vernon, 324, which determines that whenever the real and personal estates are to go over *together,* there the same construction shall be applied to the words in relation to each. This case is noticed in 2 Fearne, 195, by way of note to *Forth v. Chapman.* Whichever way, therefore, the case is considered, there must be judgment for the heirs at law; and the act of Assembly of 1799 having made bastard brothers and sisters capable of inheriting from each other in like manner as if they were legitimate, there must be judgment for their lessees also.

Cited: Turner v. Whitted, 9 N. C., 619; *Flintham v. Holder,* 16 N. C., 349; *McBryde v. Patterson,* 78 N. C., 415; *Powers v. Kile,* 83 N. C., 157.

THOMAS POWELL AND OTHERS V. THE EXECUTORS OF STERLING POWELL, DECEASED.

From Robeson.

1. One by his will, after giving several small legacies, directed his executors to sell the remainder of his estate, both real and personal, *not before disposed of*, and, after paying his debts, to dispose of the proceeds as they might think proper: *Held*, that this clause absolved the executors from responsibility to any one as to every part of the personal estate which had not by operation of the will come into their hands subject to a trust.

2. Where a testator gives to his executors (as in this case he does) all the rest of his estate *not before disposed* of, he leaves nothing which the next of kin can claim, for their claim is founded on a partial *intestacy*.

THIS was a bill filed for distribution of the slaves of (327) Sterling Powell, deceased. He by his will gave several small legacies, and then directed his executors to sell the remainder of his estate, both real and personal, *not before disposed of*, and after paying the debts, to dispose of the proceeds as they might think proper. The negroes were included in the residuary clause, and it was submitted to this Court to decide, whether, as the testator had not given the negroes to his executors *directly*, but simply authorized them to sell and dispose of the proceeds, the next of kin were not entitled.

SEAWELL, J. The residuary clause of the will, by authorizing the executors to dispose of the surplus of the estate as they might think proper, absolved the executors, who are the legal owners of the personal estate, from accountability to *any* one; and this want of accountability goes to every part of the personal estate which had not, by the operation of the will, come into the hands of the executors, subject to a trust.

When the legatee dies in the lifetime of the testator, and the legacy becomes lapsed, or when the devise is void, and on that account cannot take effect, they shall pass into the residuum of the estate; and the testator having given to the executors all the rest of his estate *not before disposed of*, leaves nothing which the next of kin can claim; for their claim is founded upon a partial intestacy. Let the bill be dismissed.

Cited: Ralston v. Telfair, 17 N. C., 358; *Rawles v. Ponton*, 36 N. C., 356.

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LEVIN BOZMAN v. JOHN ARMSTEAD AND BENJAMIN FESSENDEN.

From Washington.

Equity. The act of 1810, ch. 12, relates only to the *remedy* on injunction bonds; the act of 1800, ch. 9, requires the bond to be taken. The *mode of proceeding* presented by the act of 1810, to wit, by *sci. fa.*, may be pursued on all injunction bonds, whether taken before or since the act of 1810.

THE question in this case arose upon a demurrer to a *scire facias*. Levin Bozman recovered a judgment at law against John Morrison, who obtained an injunction and gave John Armstead and Benjamin Fessenden securities. The bond for the injunction bore date 23 December, 1807. The injunction was dissolved and the bill retained as an original bill, and finally dismissed. In October, 1816, a *sci. fa.* issued on the injunction bond against the securities, Armstead and Fessenden, to show cause why execution should not issue against them for the amount of the judgment and costs recovered at law by Bozman against Morrison. To this *sci. fa.* the defendants demurred, and the plaintiff having joined in demurrer, the case was sent to this Court.

RUFFIN, J. This case comes here upon the objection that the act of 1810, ch. 12, does not extend to this bond, which was executed before the passage of that act. Upon looking into the act, it is found to relate only to *the remedy* upon injunction bonds, which the Legislature can alter from time to time, as shall seem expedient. The true construction of the act seems to be that the obligee might sue by *sci. fa.* on *all* such bonds, whether executed after or before the passage of the act; for it professes only to regulate the *mode of proceeding* on the bond which the act of 1800, ch. 9, had required to be taken; and we see no reason why the remedy should be different on one bond from what it is on another. Judgment for the plaintiff on the demurrer.

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JOHN EASON AND WIFE v. HENRY WESTBROOK AND MATTHEW GARLAND.

From Greene.

Conspiracy. An action on the case in the nature of a conspiracy will lie against one; or if brought against many, all may be acquitted but one.

THIS was an action on the case, in which the plaintiffs charged that they were the owners of a tract of land lying in Greene County, of great value; that a writ of *venditioni exponas* issued from Greene County Court, from November Term, 1812, commanding the sheriff of said county to expose to sale the said tract of land to satisfy certain sums of money in the said writ mentioned; that the said writ came to the hands of Henry Westbrook, sheriff of said county, to be executed; and that he, disregarding his duty as sheriff and contriving to cheat and defraud the plaintiffs, and to cause the said land to be sold for less than its value, by conspiracy then and there had between the said Henry Westbrook and Matthew Garland, did on 10 December, 1812, before the hour of 11 o'clock A. M., proceed to sell the said land under the writ aforesaid, he not having advertised the said sale for the space of forty days; and in furtherance of the conspiracy aforesaid did then and there sell the said land for a small sum, to the said Matthew Garland; and in pursuance and affirmance of said sale so fraudulently made, executed a deed in his character of Sheriff of Greene County to the said Matthew Garland for the said land, etc., etc.

The defendants pleaded the *general issue;* and the jury acquitted Matthew Garland, but convicted Henry Westbrook, and assessed damages to the plaintiffs. A rule for a new trial was obtained on the ground that the judge had instructed the jury that if they were satisfied from the evidence that the sheriff had not advertised the sale for forty days, he would be liable to the plaintiffs upon the issue, although this irregularity or impropriety of conduct was not occasioned by any com- (330) bination or conspiracy with Garland, the other defendant, nor produced by any design to injure the plaintiffs. The rule was discharged, and the defendant appealed.

HALL, J. It is said in Fitzherbert's Natura Brevium that a writ of conspiracy for indicting for felony doth not lie, but against two persons at the least; and that both or neither must be found guilty. But a writ of conspiracy for indicting one for

trespass or other falsity made lieth against one person only. F. N. B., 116. It appears from many adjudged cases that an action on the case in the nature of a conspiracy will lie against one; or if brought against many, all may be acquitted but one. 1 Saund., 230, Note 4. So that it is no good objection to this action that one has been acquitted and the other found guilty.

If several persons be made defendants jointly, where the tort in point of law could not be joint, they may demur; and if a verdict be taken against all, the judgment may be arrested, or reversed on writ of error. 1 Chitty's Pleadings, 74. In this case the declaration charges both defendants with that of which only one can be guilty, viz., that the sale of the land was not advertised for forty days. This is a charge that can only be made against the sheriff, whose official duty it was to advertise the sale; and if a verdict had been taken against both, advantage might have been taken of it in either of the ways before mentioned. But a verdict has been taken against the sheriff only, and the other defendant has been acquitted. This removes the objection. As in an action against husband and wife, for that they spoke of the plaintiff certain slanderous words, the jury found the husband guilty and the wife not guilty; the plaintiff had judgment. For, though the action ought not to be (331) brought against both, and therefore, if the defendant had demurred to the declaration it would have been held bad, yet the verdict cured this error. 1 Roll. Abr., 781; 1 Str., 349; 2 Saund., 117, note 2. Indeed, if the jury in the present case had found both defendants guilty, the plaintiff might have entered a *nolle prosequi* against Garland, and taken judgment against Westbrook. 1 Wills., 306; 1 Saund., 207, note 2. Whether the charge of the court was right or not, Westbrook has no cause of complaint. If wrong, it was only so as to Garland, who cannot complain, as the jury have acquitted him. Let the rule for a new trial be discharged.

LEWIS BOND AND WIFE AND OTHERS v. THOMAS TURNER'S EXECUTORS.

From Bertie.

Executors and administrators. The court is authorized to allow executors or administrators 5 per cent on their receipts and 5 per cent on their expenditures. It may in its discretion allow less, but cannot allow more.

THIS was a bill filed for an account and distribution of the estate of Thomas Turner, deceased. The accounts were referred to the master, who made his report, and allowed the executors 5 per cent commission upon their receipts and also 5 per cent upon their expenditures. Exceptions were filed to the report on this point, and the case sent to this Court.

BY THE COURT. The court has the power of allowing 5 per cent commissions on their receipts and the same on their expenditures. The court may, in its discretion, allow less, but not more.

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HENRY SLEIGHETER v. ROSANNA HARRINGTON, EXECUTRIX OF HENRY W. HARRINGTON, DECEASED.

From Cumberland.

Executors and administrators. The promise of an executor, having assets at the time of the promise, that he will pay a debt of his testator, is valid; such promise makes the debt personal, and *assumpsit* will lie on it.

THIS was an action of *assumpsit,* in which the plaintiff declared that the defendant's testator, being executor of the last will of Robert Troy, deceased, and having assets in his hands, and the said Robert Troy being at his death indebted to the plaintiff, in consideration thereof, promised in writing to pay to the plaintiff the said debt, and it was submitted to this Court, whether upon this declaration the plaintiff was entitled to judgment against the defendant, to be satisfied out of the estate of her testator in her hands.

RUFFIN, J. The case is, that Troy was indebted to the plaintiff and died, having appointed Henry W. Harrington his ex-

ecutor, to whose hands sufficient assets came to pay the plaintiff's debt; and that Harrington, having assets, promised the plaintiff, in consideration thereof, to pay the said debt. That he afterwards died, leaving the defendant his executrix. This action is brought against the defendant as executrix, to subject her testator's estate upon the said promise. The defendant pleaded *non assumpsit,* and issue being joined, a verdict was found for the plaintiff. A motion is now made in arrest of judgment, because there was no consideration for this promise. I always considered it as a point well settled that the promise of an executor, having assets at the time of the promise, to pay his testator's debt, was valid. Upon looking into the authorities we find many cases wherein it has been expressly decided, besides numerous sayings to the same effect in elementary books. Cro. Eliz., 91; 1 Ves., 126; 9 Co., 94. Such a promise is enforced and supported by the consideration of the execu-
(333) tor's liability as executor, to pay the plaintiff's demand. He is liable by reason of the assets; and therefore the having of assets is indispensable in such a case. When I speak of assets, as relates to the subject, I mean such estate of the testator as would at that time be liable to the debt of the creditor in a suit at law. If, for example, the creditor be so by simple contract, the assets in the hands of the executor necessary to support the *assumpsit* of the executor must be such as the creditor would be entitled to recover if he were then suing the executor in his representative capacity for his debt. The executor is the mere holder, as it were, of money, which is in justice and conscience the money of another person. The consideration may therefore be said to consist of the strongest moral obligation as well as legal liability. The only case relied on to contradict this reasoning and the strong current of authorities for the plaintiff is that of *Rann v. Hughes,* 7 Term, 350. But in that case there was no averment of assets. It is said, indeed, that Hughes died possessed of sufficient effects; but it is not alleged that they ever came to the defendant's hands, much less that he had them at the time of his promise. The note of the case in Term Reports seems to me to be a confused one; but its accuracy in this respect is evinced by what fell from *Lord Mansfield* in *Hawks v. Saunders,* Cowp., 291, where he mentions and comments on this circumstance.

It has been contended that the defendant would have been at liberty upon the trial to show that her testator, after his promise, applied the assets to other debts of the testator Troy, and thereby became excused from the payment of this debt. If his promise were good at all, it made the debt personal. There is

no halfway ground; Harrington must be considered as liable only in his representative capacity, if he be allowed to show the state of the assets subsequent to the time of his promise. But when we say that by his promise he became *personally* bound, we lose sight of the assets altogether, except (334) so far as regards their situation at the time the promise was made. In that respect we are obliged to examine into them for the purpose of ascertaining whether the promise was *then good,* or a *nudum pactum.* If he *then* had assets, the promise is good, and he becomes personally liable. It appears to me that settles the other point, for whenever one becomes *personally* bound for the debt of another (no matter how) it becomes *his own debt,* and must be paid out of *his own estate.* Nothing but actual satisfaction, or other matter which would discharge him from *any other of his own personal debts,* will discharge him from this. In *Bam's case,* 9 Co., 94, *Lord Coke* is express that an executor can only show upon the day of trial that he had no assets *at the time* of the promise. The short note of *Cleverly v. Brett,* cited in *Pearson v. Henry,* 5 Term, 6, relates as well as the principal case to the question of assets, on the plea of *plene administravit* in a suit against the executor as such; which is totally different from this. There the question is what assets the defendant had at the time of the plea pleaded; and does not regard the personal liability of the defendant at all.

HALL, J. That an action will lie against an administrator or executor upon a promise to pay in consideration of assets, seems clear from divers cases. Cro. Eliz., 91; Cowp., 284, 289; 1 Ves., 125. It is true that the cases cited from Cowper were cases of legacies sued for; and although they have been much shaken, if not overruled, in the case of *Dicks v. Street,* 5 Term, 690. The principle of the decision in this last case rested upon a different ground from that now before the Court. Two of three of the judges held that an action would not lie at common law for a legacy, because courts of law had no power to compel a husband, who sued for his wife's legacy, to make a settlement upon her; whereas a court of equity had such (335) power. The reasoning in that case does not apply to debts which an executor or administrator promises to pay in consideration of assets. If they have money in hand, there is no reason why they should not pay. If they have property which they are diligently converting into money, and some accident happen to it not within their control, or, if in the meantime they have notice of debts of higher dignity, they ought to be at liberty to show these things in their defense. 9 Co., 94.

The promise, as was said by *Lord Mansfield,* 5 Term, 8, only eases the creditor from proving assets, and throws the *onus* on the other side. Judgment for the plaintiff.

Cited: Williams v. Chaffin, 13 N. C., 335; *Oates v. Lilly,* 84 N. C., 645; *McLean v. McLean,* 88 N. C., 396; *Banking Co. v. Morehead,* 116 N. C., 416; *LeRoy v. Jacobosky,* 136 N. C., 450.

RICHARD GOODE AND OTHERS v. JOSEPH GOODE AND OTHERS.

From Rutherford.

1. Executors and Administrators. An account cannot be decreed of the personal estate of a deceased person without making the executor or administrator a party to the petition.

2. Executors *de son tort* are not answerable to the distributees on a petition filed by them as against a rightful executor; for if a decree should be made for petitioners and they receive the property under it, they thereby become themselves executors *de son tort,* and a court of equity will never become accessory to such an act, or so far disregard the rights of creditors.

THIS was a petition filed in the County Court for an account and distribution of the personal estate of Judith Goode, who died intestate. The petition charged that the petitioners and defendants were the next of kin of the said Judith, and entitled to distribution of her estate. That the said Judith died intestate, and the defendants took the estate into their hands as executors, and were bound to distribute it. The defend-
(336) ants filed their answer, and the cause was heard in the County Court, and dismissed; from which decree there was an appeal to the Superior Court, when the decree of the County Court was affirmed, upon the ground that no administration of the estate of the intestate had been taken. From that decree the petitioners appealed to this Court.

RUFFIN, J. The question in this case is, whether an account can be decreed of the personal estate of a deceased person without making the executor or administrator a party to the bill, and we think it cannot. *Humphreys v. Humphreys,* 3 P. Wms., 348, is a direct authority to this point. It is true that here the defendants are called *executors* in the petition; but the petition also charges that Judith Goode died *intestate.* This, therefore,

is an attempt to make executors *de son tort* answerable to distributees, which we are satisfied, from the reasons given in the case just cited, ought not to be done. There is another consideration that has great weight with us, which is, that if a decree should be made for the petitioners, and they receive the property under it, they would themselves thereby become executors *de son tort,* which implies a wrongful interference with the property of the intestate. A court of equity can never be accessory to such an act, or so far disregard the rights of creditors. The decree of the Superior Court must be affirmed.

Cited: Spruill v. Johnston, 30 N. C., 399; *Ward v. Huggins,* 37 N. C., 136.

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LONG v. BEARD AND MERRIL.

From Rowan.

IN EQUITY.

When a party has relief at law and files his bill charging that he cannot procure proof to proceed at law, and praying a discovery, a demurrer to such bill admits the fact of inability to make proof, and the bill must be sustained on the ground that there is no *adequate* relief elsewhere.

THIS cause came before the Court on an appeal of the defendants from the judgment and decree from the court below, overruling a demurrer to the bill and granting an injunction.

The bill as first filed stated that the complainant had for many years been proprietor of two ferries on the river Yadkin, established by the County Court of Rowan, and by means thereof made gains and profits, but that the defendants had opened a road to another point on the river, near the ferries of complainant; had set up direction boards at the forks of the roads, and informed the public that they, the defendants, kept a ferry over which travelers might pass toll free, and that they did transport and carry over the river many travelers, etc., to the injury of complainant; that defendants had petitioned Rowan County Court for a ferry, and the petition was refused, and this refusal was confirmed by the Superior Court of Rowan and the Supreme Court of the State, and that complainant was now prosecuting a suit at law against defendants to recover damages. The bill prayed an injunction.

Afterwards the complainant filed an amended bill, setting forth the orders of the County Court of Rowan, establishing his ferries, and charging that defendants had transported travelers, etc., for pay, and prayed a discovery as to the amount of their profits, which he had no means of proving, and an account.

Defendants demurred to the bill, and on the argument
(338) below of the demurrer it was overruled and the defendants ordered to answer, and the injunction was continued until the answer.

RUFFIN, J. Since this cause was decided in this Court (January, 1817) the complainant has amended his bill by charging that the defendants transport many persons and much property at their ferry *for pay;* as to the particulars or amount of which he is unable to procure proof. He has also appended to his bill the orders of the County Court of Rowan, by which his ferries were appointed and settled many years ago. The bill then prays a discovery, an account since the commencement of the suit at law mentioned in his original bill and an injunction. To this amended bill the defendants appeared and put in a demurrer, whereupon the court upon motion awarded the injunction till further order of the court, and upon argument of the demurrer, overruled it, and ordered the defendants to answer. From those orders and decrees there is an appeal to this Court. The case certainly stands upon different grounds, in many respects, from what it formerly did. The complainant has now appended *his title* and thereby shown that he has the exclusive right to a ferry, which the defendants have violated in direct opposition to the provisions of the acts of Assembly, 1764, ch. 3, sec. 4, and 1787, ch. 16, sec. 1. The defendants have appealed and *demurred,* by which they admit all the allegations of fact made in the bill to be true. It is nevertheless contended that this Court ought not to interfere, because complainant has relief at law, and may make himself whole for the injury sustained in damages. A plain answer to that objection is that it is expressly charged in the bill, and admitted by the demurrer, that the complainant is unable to procure proof, so as to proceed at law, and therefore this Court must entertain

this bill upon the common ground that there is no ade-
(339) quate relief to be obtained elsewhere. This consideration alone is sufficient to warrant the injunction, without adverting to the propriety of protecting the owner of a clear, legal, exclusive right in the enjoyment of it, against such violations of it as may be repeated every hour in the day, and continued for years to come, and without calling to the complain-

ant's aid the ordinary rule which governs a court of equity, of assuming jurisdiction to avoid a multiplicity of suits. We are therefore *unanimously* of opinion that the injunction issue as ordered below, and that the decree be affirmed *in toto*.

Cited: Hoke v. Henderson, 14 N. C., 18; *Baird v. Baird,* 21 N. C., 538; *Murray v. Shanklin,* 20 N. C., 434; *Halford v. Tetherow,* 47 N. C., 398; *Caldwell v. Neely,* 81 N. C., 117; *Pope v. Matthis,* 83 N. C., 172.

DEN ON THE DEMISE OF BURTON v. MURPHEY.

From Burke.

A recognizance creates an express, original and specific *lien*, which attaches to the lands then owned by the conusor; and if the lands be afterwards conveyed, they pass *cum onere*.

CASE AGREED. This was an action of *ejectment* in which the plaintiff deduced title as follows: The land in dispute was granted to Abednego Inman by patent, dated 20 September, 1779, and conveyed by the patentee to John Welch the elder, by deed dated 5 June, 1784. Welch died intestate between 1784 and 1795, leaving five sons, the youngest of which came of age in 1803. John Welch the younger became administrator to the estate of John the elder, and conveyed the whole of this land in dispute to Joseph Dobson by deed dated 21 January, 1800, without any authority from the heirs; Joseph Dobson conveyed part of the land to one Hyatt by deed dated 9 April, 1805. Hyatt at October sessions, 1809, of Burke County Court, entered into a recognizance which he forfeited at January sessions, 1810; a *sci. fa.* issued thereon to April, 1810, and an *alias* to July, 1810; these were both returned indorsed that defendant was not to be found in Burke, (340) whereupon there was judgment according to *sci. fa.*; a *fi. fa.* then issued regularly from term to term, up to July Term, 1811, at which time the writ was returned satisfied in part, and indorsed, "Land sold to Robert H. Burton." The sheriff's deed to Burton bore date 4 March, 1812.

It was in evidence that Dobson took possession shortly after the conveyance to him, and that the land did not remain vacant any year until suit brought.

The defendant took possession in 1810, and deduced title as

follows: On 2 December, 1809, James Murphey obtained a judgment before a justice of the peace against Hyatt, and on 4 December, 1809, a constable levied on the land in dispute; the execution was returned to Burke County Court at January Term, 1810, when a *ven. ex.* issued, under which on 28 April, 1810, the land was sold to Murphey, and on the same day the sheriff executed a deed.

RUFFIN, J. The question made in this case does not seem to arise upon the facts stated, for it seems clear that the possession of Dobson and Hyatt from 1800 to July, 1809, under the deed from Welch to Dobson and that from Dobson to Hyatt (both of them during the whole period claiming the whole), forms a perfect title in Hyatt under the statute of limitations. It therefore is unnecessary to say whether upon a demise of the whole tract laid in the declaration the plaintiff could recover an undivided part; because in this case the title of Hyatt, under whom the lessor of the plaintiff claims, appears to extend to the whole tract. For the same reason we decline saying anything about the operation of the deeds to Joseph Welch, Jr., from his brothers, executed after that from him to Dobson, which have been spoken of.

(341) Then as to another point made at the bar, though not stated in the case: whether the recognizance entered into by Hyatt so far binds the land owned by him at the time of acknowledging the recognizance as to give that debt a preference to subsequent judgments under which the lands may be first sold. Without adverting to the reasons of policy which should form the law on this subject, it is sufficient for us to know that it has always been thought certain that recognizances do bind, as contended for by the plaintiff. *S. v. Magniss,* 2 N. C., 100. The recognizance creates an express, original and specific *lien,* which attaches to the lands then owned by the conusor; and if the lands be afterwards conveyed, they pass *cum onere.* It follows from these considerations that the rule for a new trial must be discharged.

HELME AND OTHERS v. GUY.

From Johnston.

Where a testator owned a large body of land, composed of several tracts, acquired at different times and known by different names, and living on one of the tracts known by a distinct name, devised in these words, "I give and bequeath to my son, W. H. G., the tract of land *whereon I now live*, including the plantation, together with all the *appurtenances* thereunto belonging," *it was held* that he had devised to W. H. G. only the tract on which he lived; the word *appurtenances* comprehended only things in the nature of *incidents* to that tract. Had testator said the *lands* on which he lived, the construction might have been different.

PETITION for partition. The petitioners set forth that William Guy had died seized of divers tracts of land, leaving the defendant and the wife of the petitioner his only children and heirs at law; and that by his last will William Guy had directed the said tracts to be equally divided between the defendant and the wife of the petitioner, and prayed a division.

The answer denied that the will had directed such a (342) division of the lands, and the clause in question was in the following words:

"Item: I give and bequeath to my son, William Henry Guy, the tract of land *whereon I now live,* including the plantation, together with all the *appurtenances* thereunto belonging." After giving to his son several negroes, he thus proceeds: "The residue of my property to be equally divided between my son, William Henry Guy, and my daughter, Ann Eliza Helme."

It appeared that the testator was possessed of many tracts of land, acquired at different times and composing a large body, and lived on a tract which was called "the Ben. Radcliffe tract"; many of the other tracts had also names by which they were distinguished.

SEAWELL, J. From all the circumstances of this case it seems impossible to doubt about the meaning of the testator. He had a large body of land composed of different tracts, and known by different names. The one he levied on was called the "Ben. Radcliffe tract," and he devises the *tract* on which *he lived* to his son, William Henry, together with all the *appurtenances.*

Had he said "the lands" on which he lived, there might have been doubt; but we are clear that, according to the manner in which he *has* expressed himself, the devise extends no further than to that distinct tract; and the word "appurtenances" can have no other or greater meaning than to comprehend things in the nature of *incidents* to this tract. There must be a decree for partition.

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DOE ON DEMISE OF BRYAN v. BROWN.

From Craven.

An execution will not protect property in the hands of the purchaser, if it issued without any authority; and in ejectment the purchaser who claims under the sheriff's deed must show a *judgment* as well as an execution.

EJECTMENT. Harvey Bryan died seized in fee of the land described in the plaintiff's declaration; he devised it to his son, John Council Bryan, the lessor of the plaintiff, who is still an infant.

The defendant claimed title to the land under a deed made to him by the Sheriff of Craven County, who sold the land by virtue of an execution issuing from Jones Superior Court.

It appeared from the record of Jones Court, which made part of the case, that a writ had issued against Nathaniel Tisdale and Dorcas Bryan, executors of Hardy Bryan, at the instance of William Coombs, to which the defendants, among other things, pleaded fully administered, and a jury found that the defendants had fully administered, and on the other issues found for the plaintiff, assessing his damages to £125 and costs.

The clerk of the court thereupon issued a paper-writing to the sheriff of Craven, commanding him to summon John Council Bryan, the heir of Hardy Bryan, deceased, by Dorcas Bryan, his guardian, to be and appear at the next term of the court, to show cause why he should not be made defendant in the action brought by Coombs, and why there should not be judgment and execution against him. On the return of this paper endorsed "Made known," the clerk docketed it as a *sci. fa.*, and the entry made was "judgment by default according to *sci. fa.*"

It also appeared from the records that a jury had been impaneled in the suit against Tisdale and Dorcas Bryan, but no judgment appeared to have been rendered. The clerk then issued a *fi. fa.* against the goods and chattels, lands and
(344) tenements of the heirs of Hardy Bryan, reciting therein that William Coombs had recovered against John Council Bryan. On this the sheriff levied on and sold the land in controversy to the defendant.

Dorcas Bryan was the widow of Hardy Bryan and mother of John Council Bryan, but was never appointed his guardian by any court.

HALL, J. If it be necessary for defendant to produce a judgment (and I think it is), it will be difficult to find one on the

record from Jones. A new kind of process has issued, calling upon John Council Bryan, by his guardian, to show cause why he should not be made party to an action of debt commenced by William Coombs; on this a judgment is taken "by default, according to *sci. fa.*," thereby meaning the process just spoken of, a process which the clerk had no right to issue and on which no person could have a right to enter any judgment.

Further, it is admitted that Dorcas Bryan was not the guardian of John Council Bryan; he was, therefore, not a party to the proceeding in court, had they been perfectly regular; her being a defendant in the original suit as an executrix does not alter the case; she was not on that account bound to protect the interest of the heir.

I think the proceedings which have been had are altogether void, and that they cannot be made to serve the purposes of a regular judgment or, indeed, of an irregular one. *Anonymous,* 2 N. C., 73.

But suppose that a judgment need not be shown by the defendant: it is taken for granted, and the strong presumption is that there is one; that presumption, while it lasts, is sufficient perhaps for the person claiming under the execution, but, like other presumptions, surely it may be done away by proof.

In the present case it is admitted that there is no judg- (345) ment, unless the record produced show one. I think it will not do to say that an execution protects property in the hands of a purchaser, if a clerk thinks proper to issue it without any authority; this, it is possible, he may do fraudulently, and the person purchasing may purchase honestly; yet, if you say that in such case the purchase is good, you at the same time say that a person may be deprived of property without trial, hearing or notice. To such a doctrine I cannot assent. My opinion, therefore, is that the plaintiff is entitled to judgment.

DANIEL, J. In the suit which W. Coombs brought against Hardy Bryan's executors, the jury found that the defendants had fully administered the assets. Judgment was signed by virtue of the act of Assembly for £125. Laws 1784, ch. 11, sec. 2, directs that a *scire facias* shall issue summoning the heir and devisee to show cause why execution should not issue against the real estate for the amount of such judgment, and if judgment shall pass against the heir or devisee, execution may issue against the real estate of the deceased debtor in the hands of such heir or devisee, to satisfy the judgment.

The instrument which is set forth as a *scire facias* in this

record does not mention the suit against the executors, the fact of their having fully administered, nor does it state that *any judgment for any amount* had been signed by the plaintiff—it does not call on the heir to show cause why execution should not issue against the real estate to satisfy *any judgment.*

The return of this instrument and the entry, "Judgment by default according to *sci. fa.,*" was all a nullity; there never has been any recovery against the heir by William Coombs. It is said that the defendant being a purchaser at a sheriff's sale, was bound to look no farther back than the execution, as he was no party to the suit; that the execution having issued,
(346) a sale by the sheriff under it and a deed given vested the title in the purchaser.

Lord Chief Justice De Gray, in delivering his opinion in *Barker v. Braham,* 3 Wills., 376, says: "A sheriff, or his officers, or any acting under his or their authority, may justify themselves by pleading the writ only; because *that* is sufficient for their excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes and sets the sheriff to do an act, he must take care to find a record that warrants the writ, and must plead it; so must the party himself at whose suit such an execution is made."

In trespass against a sheriff, it is enough for him to show a writ returned, if returnable; but in trespass against the plaintiff himself or a mere stranger, they cannot justify themselves unless they show there was a judgment as well as an execution, for the judgment may be reversed. 1 Salk., 409; 12 Johns., 213.

There being no judgment in the present case to warrant the execution, the defendant derived no title by his purchase.

PER CURIAM. There must be judgment for the plaintiff.

Cited: Whitehurst v. Banks, post, 347; *Ingram v. Kirby,* 19 N. C., 23.

DOE ON DEMISE OF WHITEHURST AND WIFE v. BANKS.

From Beaufort.

EJECTMENT. The declaration contained but one demise of the whole tract of land therein described; plaintiffs proved title to an undivided third part only, as tenants in common with one Joseph White.

Defendant claimed the whole tract under a purchase made at a sheriff's sale by virtue of an execution, to which defendant was not a party, and on the trial produced in (347) evidence the sheriff's deed and the execution, but did not produce the judgment. It also appeared that to one-ninth part of the tract plaintiffs had a title not derived through the person against whom the execution had issued.

The judge charged that though plaintiffs had declared for the whole, yet they might recover an undivided third part; and that the defendant, claiming under a sheriff's deed, was bound to produce the judgment as well as the execution. Verdict for plaintiffs; new trial refused, and appeal.

PER CURIAM. The case of *Bryan v. Brown, ante,* 343, settles this case. Rule for a new trial discharged.

ROWLAND v. DOWE.

From Robeson.

In assessing damages for a breach of a contract made for the sale of a tract of land, the *standing* of the parties in life has nothing to do with the measure of damages; for that standing could not have been given in evidence, as it was not conducive to show either the fact of an injury having been done or the extent of the injury which was done; and the jury should not be permitted to take into consideration anything which would not be admissible in evidence.

THIS was an action on the *case* for nonperformance of an agreement to sell lands, tried below before *Seawell, J.*

It appeared on the trial that the defendant had agreed with the plaintiff to inform him by letter, as soon as he could determine, whether he (defendant) would take the price which plaintiff had offered for the land. The price offered was $2,000, payable by installments, and the cause of plaintiff's desiring early information of defendant's determination (348) was that by the sale of other lands he might be provided with the purchase money. Soon after this understanding between the parties, defendant wrote a letter to the plaintiff informing him that he had reflected on the subject, and containing these words: "I do not hesitate to say that you may proceed to make sale of your lands when a favorable opportunity may offer. As the land I am going to let you have, on the back of

the plantation, is of greater value than that which I retain on the Elizabeth road, I know you will not hesitate to make me some equivalent of a spot of land on some other corner, joining other land of mine, where it will be no inconvenience to you."

When the plaintiff received this letter he declared his acceptance of and closing with the terms of the original contract; he also tendered his bonds according to the original terms, and demanded a title to the lands. The defendant declared he would *sign no deed* which did not reserve to him a few acres out of the tract at a particular place, adjoining the town of Lumberton, which from the evidence appeared to be the most valuable part of the land. Plaintiff did not tender any deed for defendant's signature.

The court directed the jury that the fair exposition of the letter was according to the original offer of purchase; and as to that part which related to the reservation of a few acres, the court directed the jury that the same was *precatory* and rested merely in the will of the plaintiff, and as to the want of having tendered a deed, the plaintiff was discharged from a formal tender by defendant's declarations. The jury were further told that in assessing the damages they ought to respect the situation of the parties, when mere loss of bargain was the gist of the action; and that a jury in its discretion was well authorized to assess damages to a greater amount between parties whose situation and circumstances in point of fortune placed (349) them beyond ordinary standing, than in a case where they were of the opposite character and had no opportunity from education or manners to know the impropriety of violating a contract.

The jury found a verdict for plaintiff, damages £50, and on a motion for a new trial because of misdirection, the court entertaining doubts on the former part of the charge to the jury, directed the case to be transmitted to this Court.

SEAWELL, J. Upon full consideration of this case, I am well satisfied that I was mistaken in the direction I gave to the jury in respect to taking into consideration the standing of the parties in assessing the damages. I think the true rule is that the jury are not *permitted* to take into consideration *anything* which would not be admissible to be given in evidence; the evidence is either to inform the jury in respect to the *existence* of a fact put in issue or as to its *quality* or *extent*. Where the character of a party is put in issue, or when the matter in controversy is vindictive or matter of feeling, the *extent* of the injury done in the latter case, as well as the existence of the

fact in the former case, can in some degree be estimated by the standing of the parties, and where the evidence is *conducive* to the matters put in issue, or their *extent,* it is admissible.

In this case the *standing* of the parties was not conducive to inform the jury upon either of these points. There must be a new trial.

But upon the *other* point I see no reason to alter the opinion I entertained on the trial.

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(350)

BROWN v. BROWN.

From Wilkes.

The persons who are introduced to establish a nuncupative will must have been specially called on by the testator to bear witness to what he was saying. Where the words uttered were drawn from the testator by the person interested to establish them as a will, they will not constitute a good nuncupative will.

THIS was a petition filed for a distributive share of the estate of James Brown, deceased, to which defendant answered, claiming the property by virtue of a nuncupative will.

It appeared from the record of Wilkes County Court, which made part of the case, that the court had directed to be recorded as a nuncupative will certain affidavits, which were as follows:

STATE OF NORTH CAROLINA, WILKES COUNTY. } 25 August, 1814.

This day came John N. Green before me and made oath in due form of law and saith that on Saturday, the day before James Brown died, the said Brown was in a low state of health, but in his senses, and was asked in his presence by Leannah Chapman what he wanted to be done with his property if he should die. His reply was, for her to do with it as she pleased.

George Chapman came before me, the subscribing justice for said county, and made oath in due form of law, and saith that he heard James Brown say the same words in answer to what he was asked by Leannah Chapman: for her to do with his property as she pleased, as is stated in the above by Mr. Green. Sworn to, etc., 25 August, 1814.

James Brown died on 14 August, 1814.

HALL, J. If we were informed by the records of the County Court of Wilkes that the nuncupative will of James Brown had

been proved in court, and we should be furnished with a (351) copy of it properly authenticated, I think we would be bound by it; but in the present instance it seems that the County Court has admitted to record two affidavits which fall far short of establishing a nuncupative will. It is true, the record speaks of them as a nuncupative will, but that does not make them one. I think we cannot view them as such, although they have been directed to be recorded, and that the petitioner has a right to recover. It does not appear that James Brown specially required either of the witnesses to bear witness to what he was saying; the words he uttered were drawn from him by the person whose interest it is to establish them as a will. My opinion is that the petitioner should have a decree.

PER CURIAM. Judgment for the petitioner.

Cited: Haden v. Bradshaw, 60 N. C., 261; *Bundrick v. Haygood,* 106 N. C., 472.

MARGARET ARMSTRONG v. SIMONTON'S ADMINISTRATOR.

From Iredell.

1. In detinue the husband and wife must join for the slave which belonged to the wife before coverture, when the person in possession holds *adversely.*

2. But when the person has possession under a bailment from the wife made while sole, he is a trustee for the husband, and his possession is that of the husband, who may bring suit in his own name.

DETINUE for a negro woman and her three children. Simonton intermarried with the daughter of the plaintiff and removed to Georgia. Afterwards, when Simonton was on a visit in North Carolina, the plaintiff, who was then a widow, gave or loaned the negro woman, then a girl, to Simonton, and he carried her to Georgia on his return. The testimony left it uncertain whether it was a loan or gift. Declarations of Simonton were given in evidence, in which he said it was a loan, (352) and other declarations in which he stated that if he survived plaintiff the negro was his, and if she survived, it was hers. After the gift or loan the plaintiff intermarried with Armstrong, who afterwards died before Simonton, having taken no steps for the recovery of the negroes.

It was left to the jury to say whether it was a gift or loan

to Simonton for his life with a contingent remainder to the plaintiff, or whether it was a loan determinable at the will of the plaintiff. If the first, then the jury was instructed that it was too remote; and if the second, then by the intermarriage of plaintiff the property became Armstrong's, and the right was now in his executors. There was a verdict for defendant, and the case stood on a rule to show cause why there should not be a new trial.

HALL, J. If the plaintiff's husband had thought proper to have brought an action of detinue for the negroes in question, and it would have been necessary to have joined his wife with him in the action, it follows that, as no action was brought, the property has survived to her. And it has been decided in *Johnston v. Pasteur,* 1 N. C., 582, as well as in several other cases, that it was necessary to make the wife a party, because she was the meritorious cause of action.

But we think those cases are unlike the present, because there the defendant held *adversely;* here the defendant claims under the bailment of the wife when sole, and it seems to be admitted in the case of *Johnston v. Pasteur* that when the defendant is a trustee for the husband, then the husband may bring suit in his own name; in other words, that the possession of the bailee was the possession of the husband, and that therefore the right of the husband was complete.

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(353)

DOE ON DEMISE OF McLEAN AND OTHERS v. UPCHURCH.

From Chatham.

1. When a defendant in an execution sells his lands after the execution is in the sheriff's hands, such sale is void, and the purchaser under the execution has the better title; and *it seems* the execution bound from its *teste;* it certainly did from its *delivery.*
2. An alias *fi. fa.,* though a different piece of paper, is considered the same as the first *fi. fa.* as to the lien created.

THIS was an action of *ejectment,* and from the case agreed the following appeared to be the facts:

On 2 February, 1804, Robert Harris was seized of a tract of land including within its boundaries the land in dispute, and conveyed the same to Joseph Brantley, Jr., and John Crump. On 5 April, 1805, Crump conveyed his moiety to Brantley.

At November Term, 1801, of Chatham County Court, Brantley had confessed a judgment to Ambrose Ramsay for £160 2-6, with interest from 2 October, 1801, till paid; "execution to issue when called for." No process issued on this judgment until November Term, 1805, when a *fi. fa.* was sued out, after which executions regularly issued within a year and a day up to February Term, 1807, when another execution issued, which was levied on the land in dispute, and under which a sale of the land was made by the sheriff to McLean, one of the lessors of the plaintiff.

On 4 February, 1807, Brantley conveyed the land to the defendant, who took possession under his deed.

SEAWELL, J. At the time when the sale was made by Brantley to Upchurch, viz., on 4 February, 1807, there was in the sheriff's hands Ramsay's execution, and the execution taken out from the term thereafter, though it is a different piece of paper, is still the same execution. We do not, therefore, see upon what principle it can be contended that the lands were
(354) not bound, as the sale was made not only after the *teste* of the execution, but after the *delivery* thereof to the sheriff.

If it be that these lands were acquired by Brantley after the judgment was obtained, we think there is nothing in that; for we do not decide how far a *judgment* binds lands, but think this case the common one of a party having lands and selling them after an *execution* is in the hands of the sheriff against them. There must be judgment for the plaintiff.

WRIGHT AND SCALES v. LOWE'S EXECUTORS.

From Rockingham.

1. A devise of slaves to executors in trust to liberate is void, and the next of kin are entitled.

2. The purchasers of distributive shares for a valuable consideration may proceed against the executors, under the act of 1762, by a petition in their own names for an account.

3. The deeds to the purchasers containing an acknowledgment of having received a valuable consideration, the distributees are concluded thereby; nor shall the executors, on the hearing of the petition, be allowed to question it.

WRIGHT *v.* LOWE.

PETITION for a settlement and account. The petitioners set forth that Isaac Lowe died leaving a wife and children, and having first duly made and published a last will and testament; that Isaac Lowe was the owner of several slaves, which by his will he directed his executors to emancipate after the death of his wife; that the wife was dead, some of the slaves having been emancipated by the County Court during her lifetime, with her consent; that the court refused to emancipate the rest, and as to them petitioners averred that Lowe died intestate; petitioners then stated that they had purchased for valuable consideration the shares of the children of Isaac Lowe in these (355) negroes, tendered their conveyances for the inspection of the court, and prayed that the executors might be decreed to settle and account with them.

The defendants filed their answer, and submitted whether they were not trustees for the benefit of the slaves, and whether the County Court had jurisdiction. Certain issues were submitted to a jury on the trial below, when the petitioners offered to prove the *actual* payment of the consideration expressed in the deeds from Lowe's children to them; the court deemed it unnecessary. The defendants also offered to prove a *want* of consideration in the deeds, which was rejected by the court as inadmissible.

It was submitted to the Supreme Court to say whether the County Court had jurisdiction of the case; this was the principal question.

TAYLOR, C. J. The court wherein a petition is filed for distributive shares under the act of 1762 is invested with such a portion of equitable jurisdiction as is necessary to effect complete and final justice in relation to those subjects. If this petition had been filed in a court of chancery, the assignment of the distributive shares for a valuable consideration would have placed the assignees in the situation of the distributees; and the deed is conclusive evidence that such consideration was paid. That fact being ascertained, it would have been in all respects a question between those entitled to distribution and those bound to distribute. When courts have a concurrent jurisdiction, it would be a mischievous anomaly to measure out their justice by different rules, and I cannot doubt that it was the design of the Legislature to give to the Superior and County Courts full jurisdiction to decide upon these cases. Every part of the act, and especially the mode of proceeding so precisely laid down in it, serves to confirm this idea.

(356) SEAWELL, J., for the rest of the Court. The only difficulty we have felt in this case is upon the point of jurisdiction; but upon an attentive examination of the act of 1762 we are inclined to support that of the County Court.

The act declares that all legacies, distributive shares, etc., due or owing to any *orphan,* may be *recoverable* by petition to the County Court; and if we are not to understand the word "recoverable" as referable to the person entitled to receive, it would follow that on the death of the distributee his administrator would not be within the provision of the act. Such a construction we think would be confined; and as this act was designed to *remedy* the delay and inconvenience incident to the courts of chancery, it ought to be construed liberally.

This is a petition to recover a distributive share of the slaves of the testator which are stated to be undisposed of by the will; and as to the devise to the executors in trust to liberate, the trust is void and the next of kin are entitled, if left not otherwise disposed of by the will. In this will there is no residuary clause, and *Haywood v. Craven,* 4 N. C., 360, is in point.

Then as to the evidence offered to prove a want of consideration in the purchase by the petitioners: that point was a controversy exclusively between the two parties to the contract, in which the executors had no interest or concern. For though the petitioners were bound to make out an effectual contract before the court would give them a decree, yet whatever was valid and conclusive between them and the distributees, who were parting with their interest, must necessarily be so with the executors, who are only naked trustees. The substance of this part of the case is, To whom shall the shares be delivered? The distributees are, *of course,* entitled unless they have parted with their interest, and whether they have depends (357) upon their contract; the contract set forth is by deed, and for valuable consideration expressed, they are concluded by it, and the executors have no interest in disputing it. And as the distributees, in case payment was made to them by the executors, would be compelled by their deeds to account with the petitioners, all being before the court, the executors are compelled to do it in the first instance. The evidence, therefore, was properly rejected, and there must be a decree for the petitioners.

Cited: Newsom v. Newsom, 26 N. C., 389; *Burch v. Clark,* 32 N. C., 173; *Pass v. Lea, ib.,* 417; *Bennehan v. Norwood,* 40 N. C., 108.

CUMMINGS v. MACGILL.

From Bladen.

1. Replevin will only lie in the case of an *actual* taking out of the possession of the party suing out the writ.
2. A delivery by a sheriff to the purchaser of a slave at an execution sale, of a bill of sale for the slave, there being no adverse possession in another, is a delivery of the slave.
3. If one at a sheriff's sale bid for the property, and fails to pay his bid, it thereby becomes void, and the sheriff may either expose the property again to public sale or validate and confirm the next highest bid by receiving the money and making a title to the bidder.

REPLEVIN for a slave. In December, 1814, the negro was the property of one Tryon Smith, when the sheriff, having an execution against Smith, levied it on the negro, and on 24 December exposed her to sale at Bladen Courthouse to the highest bidder, she being then present. Defendant was the last bidder at the sum of $908.15.

The defendant not having the money, the sheriff at his request allowed him until the next day to make payment; defendant failed to make payment on the next day, and a few days afterwards gave to plaintiff, who was the next highest bidder on the 24th, a bill of sale for the negro, without (358) having exposed her to public sale again. Soon after, defendant obtained possession of the negro, by going at night to a place where this negro and others had assembled to dance, and kept possession until she was replevied.

There was no formal delivery of the slave made by the sheriff to either party.

The points relied on in the defense below were: (1) that the facts did not show such a taking as would support replevin; (2) that the property vested in the defendant when the slave was struck off to him at public sale and a day of payment was allowed him by the sheriff; (3) that the sale by the sheriff to plaintiff being *private,* was therefore void; (4) that one of defendant's pleas being, property in a stranger, plaintiff could not recover under all the circumstances of the case.

The court charged for the plaintiff on all the points, and there was a verdict accordingly.

The case stood here on a rule for a new trial.

TAYLOR, C. J. The delivery of the bill of sale to the plaintiff was equivalent to a delivery of the slave, and it must be

considered that he had thereby full and complete possession of the property, inasmuch as she was in the possession of the sheriff at the time of the sale, and no adverse possession is shown in any other person till the period when she was seen in defendant's possession.

I am clearly of opinion that the writ of *replevin* will only lie where there has been an actual taking out of the possession of the party suing it; but as the jury were the proper judges whether the taking was proved, and they have found affirmatively upon proper evidence, the verdict is not exceptionable on that score.

As to the title of the slave, I apprehend that the bid made by the defendant became absolutely void by his failing (359) to pay the money according to the terms given to him by the sheriff, who then had it in his power either to expose the property again to public sale or to validate and confirm the next highest bid, by receiving the money and making a title to the bidder. It is true that such bidder could not be bound without his own consent; but when the sheriff who had the title in him thought proper to convey it to Cummings, no complaint can justly be made by the defendant, who had doubly forfeited all claim, both by his bidding without money and neglecting to avail himself of the terms of credit offered by the sheriff. I cannot, therefore, but approve of the direction of the judge on all the points.

DANIEL, J. I will examine the points submitted to this Court in the order in which they stand in the case sent up.

First. Do the facts disclosed in the case constitute a sufficient *taking* to support this action?

The negro was in the possession of the plaintiff, and the defendant without any authority went in the night and either by force or seduction obtained possession of the negro; if it was by force, then all the authorities will support the action; if it was by seduction he deprived the plaintiff of his possession, the rule of law should be the same. No precedent can be produced, because there is no slavery in England, nor do I know of any case of the kind coming before any of the courts in this country; but the reason is the same.

The second objection is that the property was in the defendant by his bid, and time given him to pay, etc.

A bid at a sheriff's sale is an *offer* to pay so much money for the property exposed to sale, not the mere verbal declaration of the party that he is willing to give so much; therefore the defendant could not be considered a bidder, as he did not pay

the money. The property could not pass to the defendant, as there was no money paid by him, nor any delivery of possession to him. *S. v. Johnston,* 2 N. C., 294; 8 (360) Johns., 620.

The third objection is that the sale of the negro to the plaintiff was illegal, and did not divest Smith of his property.

The negro was levied on by the sheriff and taken into the custody of the law to satisfy the amount of the execution which was against Smith; the negro was exposed to public sale and was then present; the plaintiff was the highest *legal bidder,* and although the money was paid and a bill of sale given in a few days after, it did not destroy the bid, but the title passed to the plaintiff on the payment of the money. It does not appear to us but that the plaintiff was ready at any moment to pay the money, so soon as a bill of sale should have been executed by the sheriff to him.

My opinion is that the plaintiff is entitled to jugdment.

Cited: Duffy v. Murrill, 31 N. C., 48.

SPURLIN v. RUTHERFORD.

From Burke.

Where a defendant sued on a contract pleads the statute of limitations, which is true, and the jury, disregarding the plea, find for the plaintiff, the court will set aside the verdict and grant a new trial if justice has not been done on the merits; had it been done, *it seems* the court would let the verdict stand.

THIS was an action on the *case,* in which plaintiff declared that by an agreement dated 1 September, 1806, between himself and defendant, defendant was to let him have a still and 300 bushels of corn, in consideration that plaintiff would distil for him 600 gallons of whiskey, and averred performance of his part of the contract and a refusal by defendant to perform his part. Defendant pleaded the general issue and the statute of limitations.

It appeared in evidence that the still, at the making of (361) the contract or shortly thereafter, was in the possession of plaintiff; that it was taken privately out of his possession in the fall of 1808, and very soon after it was so taken, defendant had it and claimed it as his property.

SPURLIN *v.* RUTHERFORD.

The defendant on 13 July, 1809, sued out a writ against the present plaintiff for a breach of his part of the agreement before mentioned in not making the 600 gallons of whiskey, and at September Term, 1814, obtained a judgment, which plaintiff satisfied before bringing this suit.

The writ in this cause was sued out 30 August, 1815.

Two questions were presented on the appeal to this Court, viz.:

1. Should the action be *trover?*
2. Was it barred by the statute of limitations?

SEAWELL, J. The substance of this case is, that the defendant agreed with the plaintiff to let him have a still and 300 bushels of corn, for which the plaintiff by the ensuing April was to make for the defendant 600 gallons of whiskey, *when* the still was to become the property of the plaintiff. The contract is not under seal, and is dated September, 1806, and the present action is brought *upon the contract* in 1815, and one of the questions submitted to this Court is, whether the action is barred by the statute of limitations. The breach assigned in the declaration is, that the defendant failed to deliver the still. By the contract, though no precise time is stated, it would seem from the whole of it that the still was to be delivered in time to make the whiskey by the April following. By *that* time the defendant was bound to make delivery, and the act, of course, must commence upon his failure; for, though it might be that the plaintiff had it in his power to "quicken" the defendant by a demand before that time, yet, without de-
(362) mand, an action accrued to the plaintiff by this failure on the part of the defendant. What, then, appears to take the present action out of the act? The cross suit was commenced in 1809, in time, and depended upon *its* merits, and the recovery, whether rightfully or wrongfully, or at what time, has no influence upon this case; for that action or recovery in no respect constitutes the *foundation* of this action. If, however, as seems to have been the fact, the still was delivered in proper time, and afterwards taken away by the defendant in 1808, the action *then* commenced. In whatever light, therefore, the case is considered, it seems clear that the present action is barred. The case, then, presents this aspect: The jury have disregarded the plea of the defendant and found for the plaintiff, and the question arises, Will the Court set aside the verdict on that ground?

Many cases are to be found establishing the doctrine that as a new trial is in the discretion of the court, the court will never award one where it sees justice has been done, and most of these

cases are in relation to the act of limitations. Without finding fault with the reason as well as policy of the rule, it is sufficient in this case to say that nothing appears in this case to warrant a belief that justice *has* been done; for to lay it down as a rule that the Court is to permit a beneficial statute, made for the repose of the country and the safety of the citizens, to be repealed, as it were, by a jury who happened to differ from the Legislature, is a doctrine which *Justice* revolts at, and is repugnant to every idea which I entertain of discretion. As we are all against the plaintiff upon this point, it is not necessary to consider the other. The rule must be made absolute and a new trial awarded.

HALL, J. The case states that Spurlin was put in possession of the still at or shortly after the making of the contract; in addition to this, it was Rutherford's duty to furnish the amount of corn specified in the contract, and we must take it for granted that he did so, otherwise he could not have (363) effected a recovery against Spurlin for a breach of contract, which the case states he did. If the still and corn were furnished, it was the duty of Spurlin to have had the whiskey ready by the first day of April ensuing, which we must take it for granted he had not ready in that time, otherwise a recovery for breach of contract could not have been had against him. But what cause of action can Spurlin have against Rutherford? The only one stated is, that two years after the making of the contract the still was missing, and shortly after was seen in the possession of the defendant. There was only one way under the contract that the plaintiff could acquire a right to the still, and that was by making the whiskey agreeably to the contract, which from the case stated, I assume as a fact, he did not do. Of course, he had no right to the still, and although a trespass might have been committed in taking the still from him by violence, which does not appear to have been the case, he cannot in any form of action recover either the still or its value from the defendant, who is the real owner of it. For these reasons, I think there should be a new trial. If the facts in the first action were not as above assumed, let them be explained and set forth as they were proved. As to the other question, namely, Is the action barred by the statute of limitations? I clearly think it is, for the reasons given by *Judge Seawell.*

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DOE ON DEMISE OF JONES v. FULGHAM.

From Halifax.

1. A purchaser at execution sale is not affected by the *irregularity* of the sheriff's advertisement.
2. Fraud and combination between the sheriff and a purchaser will render the sale void, whether regularly or irregularly made.
3. It is the province of the jury to weigh the evidence; to the court it belongs to say whether what is offered be evidence *conducive* to prove the fact.

EJECTMENT for two tracts of land, to one of which plaintiff claimed title under a deed from the defendant and one Powell as executors; to the other he claimed title under a deed from the heir at law of the original grantee, and both titles were regularly proved.

Defendant admitted that the first tract had been sold by him and Powell, but alleged that the purchase money not having been paid according to the contract, a suit was instituted, judgment recovered, and the two tracts levied on under an execution, sold to him, and a deed made by the sheriff to him, and of the record and deed due proof was made. Plaintiff then said that in avoidance of defendant's title he meant to contend that the sale was irregular in having been made without forty days' notice, and that this irregularity was known to the defendant when he purchased, to which facts he offered witnesses. A question being made by defendant as to the relevancy of such testimony, the court held that if it were proved that defendant knew of the irregularity, it would not vitiate the sale; such irregularity was a question between the owner of the land and the sheriff; but that if from such knowledge of the defendant the jury could infer a fraudulent combination between him and the sheriff, it would make the sale void.

Witnesses were then examined on the part of plaintiff, from whose testimony it appeared that a day was appointed for the sale, of which more than forty days' notice had been
(365) given; that on the day appointed, one Smith attended, either as the friend or agent of Jones, the plaintiff in this case, and declared his intention of bidding for the land to the amount of the execution; and who, when no sale did take place, expressed a desire that he might be informed when the sale thereafter would take place, that he might be present. The sheriff at this time was not present, in consequence of which the sale was postponed, but it was not adjourned to any future time. Fulgham, the defendant, was present.

About eight or ten days afterwards a person who was a surety for Jones in the purchase of the land, and a defendant in the execution, met the deputy sheriff, who told him that he meant to advertise the land again and sell it in about fifteen days from that time; the surety said it would be illegal, and begged the officer not to do so, being, as he said, very anxious that a sale should be legally effected in order that he might be secured, and being fearful that if it were not so effected he might be compelled to pay the money; the officer, however, disregarded his request, saying that he knew the law on the subject as well as any person; and accordingly he then wrote advertisements appointing the sale as he said he would do. Fulgham was not present at this conversation.

When the day of sale arrived this witness again attended; there were present eight or ten persons, among whom was Fulgham; the witness repeated to the officer his disapprobation of the proceeding, but he did not know whether Fulgham heard him. Smith was not present at the sale.

Two or three persons bid for the land, and the last and highest bidder was one Harwell, to whom it was knocked off at much less than the amount of the debt, and who when applied to by the officer for the purchase money, said he had bid for Fulgham, which assertion the latter, coming up at the time, affirmed, saying, "It is all fixed." The deed was accordingly made to Fulgham.

Harwell, the bidder, was called as a witness, and swore (366) that he was requested by Fulgham to bid for him, but Fulgham did not assign any reason for the request. The defendant called other witnesses who swore that he was afflicted with a malady at the time, which compelled him frequently to retire. Harwell did not make known that he was bidding for Fulgham, until the sheriff applied to him for payment.

The court charged the jury that the opinion expressed by the court on a question made at the opening of the evidence, on that question, continued unaltered, viz., that defendant's knowledge of the irregularity of the sale would not avoid it; and stated that it seemed to the court, however, that the question of law did not arise in the case, because defendant's knowledge was not proved; that according to the testimony of plaintiff's principal witness, the sheriff himself did not know that he was acting improperly. He did not put it upon the footing, "I know it is *wrong,* but I will *nevertheless* do it; but I think it is *right,* and *therefore* I will do it," and to suppose that the defendant was apprised of the irregularity, when the sheriff was not, would be to impute to the former, without any apparent

cause, more legal skill as to the sheriff's duty than he possessed himself. That on the whole cause the court held the law to be:

1. That supposing it proved that Fulgham knew the irregularity of the sale, it would not vitiate his title.

2. That if the jury could collect from the testimony satisfactory evidence of a fraudulent combination between the sheriff and Fulgham, *that* would vitiate the title of the latter.

3. That if Fulgham constituted Harwell his agent in good faith, to bid for him, and recognized his acts, it was equivalent to bidding himself; bidding being an act which a man may do as well by an agent as in person. In such case, the deed to Fulgham was valid and transferred the title.

There was a verdict for the defendant, and plaintiff (367) moved for a new trial on the ground of misdirection by the court:

1. In stating that defendant's knowledge of the irregularity of the sale did not *per se* vitiate the sale, though it would be a circumstance among others (if proved to exist) to show a fraudulent combination between the sheriff and purchaser.

2. In stating to the jury that even if the circumstance of knowledge could affect the purchaser, the plaintiff had not proved facts on which that question could arise.

3. In stating to the jury that the deed to Fulgham transferred the title.

A new trial was refused, and the plaintiff appealed.

SEAWELL, J. The motion for a new trial is made upon a supposed misdirection of the judge below; and the two last reasons may be comprised in one.

As to the first, it has been repeatedly held in this Court that a purchaser at execution sale is not affected by the *irregularity* of the advertisement, and that point may now be considered as put at rest; and as to the other, the law very clearly is that fraud and combination between the sheriff and the purchaser will render void a sale, whether *regularly* or irregularly made; for it is not the external form and ceremony that is alone to give validity to the transaction, but it must be accompanied with a proper *motive*, and not with a view to contravene the design which the law intended from the act to be done.

And though it be true that it belongs to the jury alone to *weigh* the evidence, yet it is equally true that it is the province of the court to determine whether the evidence offered is *conducive* to prove the fact. The jury are to hold the scales, but the court must determine upon the admissibility of everything that is to be cast into them. The eyes of the jury are exclu-

sively confined to the *beam,* the eyes of the court to the scales; the court is to determine *what* the jury is to weigh, the jury are to pronounce what it *does* weigh. Whether *any* evidence has been given is, therefore, the peculiar province (368) of the court to determine.

I concur *in omnibus* with the opinion of the judge below, and the rule for a new trial should be discharged.

The other judges concurring. Rule discharged.

MURRAY v. LACKEY.

From Iredell.

To support an action for a malicious prosecution in taking out a warrant against plaintiff on a charge of perjury, it is necessary for plaintiff to show a discharge—a party bound over to court has only to attend, and, according to our practice, when the term expires stands discharged, unless rebound or his default recorded.

THIS was an action for a malicious prosecution in taking out a State's warrant against the defendant on the charge of perjury.

The plaintiff on the trial produced the warrant, and proved that the defendant had obtained the same as prosecutor; that plaintiff was arrested under it, carried before a magistrate and bound in recognizance to appear at October Term, 1816, of Iredell Superior Court.

The recognizances were found on file among the records of the court, but no entry was made upon the docket or records that the defendant in the warrant, now the plaintiff, had been discharged. No bill of indictment could be found among the records, nor did anything appear from the records to have been done in the case, after the return of the recognizances, except that the clerk had made out a bill of costs. Plaintiff proved that the solicitor told the bail for his appearance at the return term that he was discharged and might go home; that the prosecuting officer would do nothing in the matter, (369) and that the State's witnesses need not attend another court. The magistrate who took the recognizances swore that the solicitor told him the parties were discharged at the return term. Upon the affidavit of the magistrate it was moved that the entry of discharge be made *nunc pro tunc;* this motion was refused. The evidence of discharge as above stated was received, subject to the opinion of the court.

It was referred to this Court to say whether the entry *nunc pro tunc* should have been allowed; if it should, was it sufficient to prove the discharge of the defendant in the warrant? And further, were the facts proved as above, without any entry of discharge on the records, sufficient in law to establish the discharge of the now plaintiff from the prosecution of the warrant?

SEAWELL, J. We think this a plain case. A discharge means, where proceedings are at end and cannot be revived. A party bound over to court has only to attend, and, according to our mode of practice, when the term expires stands discharged, unless rebound, or his default recorded. As to the parol testimony offered to prove a discharge by the solicitor and the motion to enter a discharge *nunc pro tunc,* it is of no importance to consider either of them. The rule for a new trial must be discharged.

Cited: Rice v. Ponder, 29 N. C., 394; *Hatch v. Cohen,* 84 N. C., 603.

IN THE MATTER OF MINOR HUNTINGTON.

From Craven.

When a defendant in execution within the prison rules is afterwards thrown into prison by another creditor, he has a right to be discharged from the walls of the prison under the insolvent laws.

MINOR HUNTINGTON, a prisoner for debt, was brought before his Honor, *Judge Daniel,* to be discharged under the insolvent laws.

(370) It appeared that he had been arrested by one of his creditors and entered into bond with security to keep within the prison bounds, which bond was returned to the County Court. A second creditor arrested him while in the bounds and he was put into close prison, remained there upwards of twenty days, gave notice to each of his creditors pursuant to the statute, and prayed to be discharged generally (upon taking the insolvent oath) from the prison, and the prison bounds. This was objected to by the attorney of the first creditor.

The opinion of the Supreme Court is required, whether the judge could permit the said Huntington to go at large on his taking the oath, so as not to subject his security for the bounds to the debt of the first creditor.

SEAWELL, J. When a defendant in execution within the prison rules is afterwards thrown into prison by another creditor, the defendant then has a right to be discharged from the walls of the prison under the insolvent laws. And when discharged, it is for *him* to determine whether his bond has become vacated by such discharge; he then is at liberty to act in the same way as he was before his imprisonment. The Court cannot in such case restrain him from breaking the bounds, nor will it advise him of the effect which breaking the bounds will have in subjecting his securities. It is not competent for the Court to pass any judicial determination upon the rights of creditors, who are not before it, in a shape where the validity of the bond can come in question.

In this opinion *Hall, Daniel and Ruffin, Judges,* concurred.

(371)

STATE v. COMMISSIONERS OF FAYETTEVILLE.

From Cumberland.

Where defendants are bound to keep the streets of an incorporated town in order, and three or four streets are presented on the same day, the defendants should be indicted but once for all. If separate bills be found, on a conviction on one, it may be pleaded in bar to the others.

THE defendants, seven in number, being commissioners of the town of Fayetteville, as such were bound to keep all the streets, etc., within the limits of the town in repair; there were three or four different streets presented as being out of repair, all on the same day, for which separate bills of indictment were preferred against the defendants in each case.

The defendants being convicted on *one* indictment, pleaded it in bar to the others; and the question before this Court was, whether it was a good plea in bar.

TAYLOR, C. J. The defendants are bound to keep all the streets of the town in repair, and are liable to an indictment upon every neglect of this duty. But if more than one street is out of repair at the same time, this does not multiply the offenses, though the one committed must take its nature and degree from the greater or less negligence with which it is attended. It would be monstrous to charge them with separate indictments for every street in the town, when the whole were

out of repair at the same time; especially when upon one indictment a fine can be imposed adequate to the real estimate of the offense. Were such a doctrine tolerated, it is impossible to say where its consequences would end; for, then, an overseer whose road is out of repair might be charged in separate indictments for every hundred yards (why not every yard?) and be ruined by the costs, when perhaps a moderate fine would atone for the offense. This notion of rendering crimes, (372) like matter, infinitely divisible, is repugnant to the spirit and policy of the law and ought not to be countenanced. It is the opinion of the Court that the plea of *auterfait convict*, relied on by the defendant, is a bar to all the other indictments.

Cited: S. v. Lindsay, 61 N. C., 470; *S. v. Nash,* 86 N. C., 653; *S. v. Crumpler,* 88 N. C., 650; *S. v. Cross,* 101 N. C., 780.

SALMON AND JORDAN v. MALLETT.

From Cumberland.

When a bridge company entered into certain articles, one of which was that the stockholders should have permission to pass toll free, so long as they owned stock, *it was held*, that the wagon of a stockholder had a right, under this article, to pass toll free.

A TOLLBRIDGE was erected in the town of Fayetteville, by a company who associated themselves for that purpose under articles of agreement, containing, among others, the following: "ART. 4. The owners of stock to have permission to pass without any charge of toll, so long as they continue possessed of stock in the said company."

The plaintiffs (who were stockholders) leased the bridge from the company, and in the lease there was a reservation to stockholders of the privileges secured by the original articles of agreement. The defendant was also a stockholder, and during the continuance of the lease his wagon crossed the bridge frequently, claiming to do so toll free, under the fourth article above set forth.

This was a suit brought to recover for the toll of the wagon.

TAYLOR, C. J. The permission to pass without any charge of toll extends as well to the defendant's wagon as to his person. The expression being general and in its common accep-

tation signifying a charge upon horses, carriages and (373) cattle, as well as persons, will comprehend all, unless limited and qualified by an especial exception. This construction, which seems to be the one naturally arising from the terms of the agreement, is justified and supported by an ancient rule of law by which it is held that the law respecteth matters of profit and interest largely, matters of pleasure, skill, ease, trust, authority and limitation strictly. Wingate's Maxims, 99. Thus a license to hunt in my park or walk in my orchard extends but to himself, not to his servants or others in his company, for it is but a thing of pleasure; otherwise, it is of a license to hunt, kill and carry away the deer, for that is matter of profit. *Ibid.* We therefore think the decision in the court below was correct.

BLAND ET AL. v. WOMACK.

From Orange.

A bailee who undertakes to do an act gratuitously, *e. g.*, to carry money, is bound to use ordinary care and caution; if he loses the money entrusted to him, but does not lose his own, it is clear that he did not use becoming caution, for had he done so the money entrusted to him would have been treated as his own was, and consequently would not have been lost.

CASE, for so negligently carrying plaintiffs' money from the town of Hillsboro to the city of New York, that it was lost.

The facts were that the defendant was a merchant of Hillsboro, and with several other merchants of the same place was going to New York to purchase goods. The plaintiffs, with several others, placed in his hands money to purchase goods for them, but he was to receive no commission or profit of any kind for carrying the money and purchasing the goods for plaintiffs.

The defendant had with him of his own money $6,000 (374) in bank notes, and the sum placed in his hands by his friends amounted to between $1,500 and $1,700, also in bank notes.

The defendant placed the money of his friends in the same package with his own, and put the whole in the breast pocket of his coat. The party going on, took the stage together at Raleigh, and when they arrived at Richmond, Va., the defendant took the money of his friends and put it up in separate

packages, writing the name of the owner of each on the outside of the package. Defendant complained that all the money together made a package so large as to be inconvenient in the breast pocket of his coat (and it was proved to be so), and he placed the several bundles into which he had put the money of his friends, together with some letters and small change, in a large pocketbook, which he deposited in the outside pocket in the skirt of his surtout or body coat.

After leaving Richmond the defendant several times opened this pocketbook to get small change, and the packages were then there.

At Elkton, in Maryland, the defendant had the book and money; the party took the stage at that place for Wilmington, Del.; on reaching Wilmington the passengers went directly from the stage on board the steamboat, which immediately got under way, and the passengers were called to breakfast. On rising from breakfast, defendant first discovered that the pocketbook was missing. On getting out of the stage at Wilmington defendant observed a young man pick up a pocketbook, which very much resembled his, and in the act he cast a smiling look on the defendant, and when defendant discovered his loss, he went to this young man, who was also a passenger in the boat, and demanded the book. The young man denied having it. A partial search then took place among the baggage on board; the young man had no baggage. The book never was found. *The $6,000 which defendant kept in the breast pocket of his coat was not lost.*

(375) Upon this evidence the jury found for the plaintiffs, and the question before this Court was, whether there was such gross neglect in law as to make defendant liable.

HALL, J. I have no hesitation in saying, from the facts set forth in this case, that the jury were well warranted in finding a verdict for the plaintiffs. They were the proper judges of the conduct of the defendant, and how far he used that becoming caution and care which his agreeing to carry the money in justice and law bound him to do. I think the rule should be discharged.

PER CURIAM. Rule discharged.

TERRELL v. MANNEY.

From Rutherford.

1. In proceedings by *sci. fa.* under the act of 1798, to vacate a grant, an *innocent purchaser* from the original grantee (the grant being void) is not protected; the act subjects to the operation of its provisions any "person claiming under the grant," and the Court can make no saving for the benefit of innocent purchasers.

2. Entries made by entry-takers, otherwise than the act directs, are *void.*

3. There is no limitation prescribed by the act. Section 9 gives the court jurisdiction and cognizance of *all* grants made since 4 July, 1776, by which it would seem that the Legislature intended to exclude the operation of time.

PETITION to vacate a grant. Petitioner set forth that he made an entry in the entry-taker's office of Rutherford, and obtained a grant from the State on said entry, for a tract of land in Rutherford County; that his entry was made 26 March, 1801, and his grant bore date 12 August, 1805, and was duly registered; that David Miller, who was now dead, being entry-taker, had before made an entry in his own office, in his own name, for the same tract of land or a part thereof, (376) without having done so before a justice of the peace for the county, and without any return having been made by any justice of the peace, of such entry, to the next County Court, as the law required; that in fact no entry ever was made on the records of Rutherford County Court, or on the books of said Miller as entry-taker, showing that the entry of Miller was there inserted by order of the court; that by false suggestions Miller had obtained a grant from the State for the land; that one Peter Manney was now in possession of the land or part thereof, under Miller's entry and grant, with full knowledge of all the facts connected with Miller's entry and grant; and petitioner prayed for a *sci. fa.* to Manney to show cause why Miller's grant should not be vacated.

Manney pleaded that he had no knowledge of any irregularity in Miller's obtaining the grant; that he was a *bona fide* purchaser for valuable consideration, without notice; that he and those under whom he claimed had been in possession more than twenty-one years under colorable title; that he had been in possession seven years, and that during that time petitioner had made no entry; that he was in possession of 50 acres only of the land now claimed by virtue of the grant to Miller; and,

lastly, that petitioner hath not title to the *whole tract* covered by Miller's grant. Issue was taken on all the pleas but the last; to that there was a demurrer and joinder.

Upon the issues submitted to them, a jury found that David Miller made his entry contrary to law, as charged in the petition, and under such entry obtained his grant; that Manney at the time of receiving a deed of conveyance for the land had no notice, and was ignorant of anything unlawful or irregular in Miller's entry or grant; that he purchased of Miller for a full and valuable consideration, which he paid; that Manney and those under whom he claimed had not been in possession
(377) twenty-one years, but that Manney had been in the uninterrupted adverse possession of the land for seven years and more, before the filing of the petition; that the title of the petitioner did not extend to *all* the land covered by Miller's grant, but to part thereof, including all of Miller's grant which Manney claimed.

Upon this finding the court ordered the case to be transmitted to this Court for its decision.

SEAWELL, J. We have carefully examined the act of 1798, establishing a Court of Patents, in the hope we might be able to satisfy ourselves that we are at liberty to determine this case upon principles of equity; but the result is that we find it impossible to do so without a departure from the *obvious* meaning of the Legislature. The present proceedings are under that act, and besides the generality of the expressions used, the *scire facias* is directed to be awarded against the grantee, or patentee, the *owner,* or *person claiming under such grant;* and the act in substance declares that if any grant shall appear upon verdict, or demurrer, to have been *made against law,* the court shall vacate it. For us, then, to hold that the act did not extend to the case of an innocent purchaser would be like adding a saving to the act of limitations. The Legislature, in its enumeration of cases, has mentioned precisely that in which the defendant is placed, viz., a person claiming under the grant; and there is nothing from which it can be collected that he was to be more favored than a purchaser with notice. This act, in its operation, must be construed like the act declaring gaming bonds void, by which, as the Legislature has made no savings, all gaming bonds, into whatever hands they may come, are absolutely void.

Then as to the other part of the case, whether this grant was made against law, we think there can be no doubt. The act of 1777 pointed out in what manner grants should be obtained;

and in the case of entry-takers directs that they shall (378) enter lands before a justice of the peace, to be returned to the County Court, and then declares that entries by entry-takers made otherwise shall be *void,* and liable to the entry of any other person. Miller, the grantee, *was* an entry-taker, and obtained this grant in defiance of the law. His grant, therefore, was against law. Any other construction would be to render inefficient the principal object of the Legislature, which was to vacate the many grants that had been made upon illegal entries and illegal warrants. This act was passed immediately after the discovery of the improper practices that had prevailed in the several land offices, and from its scope seems to comprehend every possible case.

As to the act of limitations, there is no limitation prescribed by the act, and section 9 gives the court jurisdiction and cognizance of *all* grants made since 4 July, 1776, by which it would seem that it was the intention of the Legislature to exclude the operation of length of time. But if the acts of limitation did apply, there was not twenty years before the petitioner's grant to bar the State, nor seven years afterwards, before the filing of this petition, to bar the petitioner. So that in no event can the defendant be aided. There must therefore be judgment for the petitioner that the grant be vacated.

Cited: Harris v. Norman (misciting this case as *Sewell v. Manney*), 96 N. C., 62.

(379)

STATE v. DALTON.

From Rutherford.

An indictment charging the defendant with forging a receipt against a "book account" is too indefinite; the term is not known to the law, and in common parlance may mean money, goods, labor and whatever may be brought into account. Had the charge been forging an acquittance for goods, the evidence of forging the paper described in the indictment would have been proper for the jury.

INDICTMENT in the following words, viz.:

The jurors for the State, upon their oath present, that James Dalton of the county of Rutherford, on 1 October, 1817, with force and arms in the county of Rutherford, by his own head and imagination, feloniously and wittingly did falsely forge

and make, and cause to be falsely forged and made, and did feloniously, willingly and wittingly assent in falsely making, forging and counterfeiting a certain acquittance and receipt against a book account, in the words, letters and figures following, that is to say, "3 September, 1816. Received of James Dalton, his book accompt in full. JOHN LOGAN," with intent to defraud one John Logan, of the county of Rutherford aforesaid, against the form of the statute in that case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James Dalton, afterwards, to wit, on the said 1 October, 1817, aforesaid, with force and arms in the county aforesaid, a certain false, forged and counterfeited acquittance and receipt, against a book account, feloniously, wittingly, knowingly and corruptly did show forth in evidence as true, which said last mentioned acquittance and receipt is in the words, letters and figures following, that is to say: "3 September, 1816. Received of James Dalton his book accompt in full. JOHN LOGAN"; with an intent to defraud the said John Logan,

(380) of the county of Rutherford aforesaid, he, the said James Dalton, at the time when he so showed forth in evidence the said last mentioned false, forged and counterfeited acquittance and receipt, well knowing the same acquittance and receipt, so by him showed forth in evidence as aforesaid, to be false, forged and counterfeited, against the form of the statute in such case made and provided and against the peace and dignity of the State.

The prisoner was found guilty, and the only question here was as to the sufficiency of the indictment.

SEAWELL, J. The term, book account, is unknown in the law, and in common parlance it may mean money, goods, labor and whatever may be brought into account. The charge is therefore too indefinite, either to support the indictment upon the act of Assembly or at common law. Had the indictment charged the forging of an acquittance for goods, this would certainly have been proper evidence to be left to a jury. But as the indictment is substantially defective, there can be no judgment for the State, and it must therefore stand arrested.

HORTON AND WIFE v. REAVIS.

From Granville.

In case for slander the proof of speaking the words must correspond in substance, at least, with the charge in the declaration.

CASE for words spoken. The declaration charged that defendant had said the wife of plaintiff, while single, had sexual intercourse with a negro, *per quod* she lost a marriage with one Waddy, who was addressing her and had offered her marriage.

The evidence offered was that defendant had said there was a report in the neighborhood that the plaintiff's wife (then sole) had had connection with a man of the wrong (381) color; and upon being asked, by the person to whom such declaration was made, whether he believed the report to be true, the defendant answered, he did not know well how to do so, as she was a clever, smart, ingenious girl.

It also appeared that defendant, after speaking the words proven, said he did not believe the report to be true, at the time of communicating it to the witness; and further, it was proved that there was in circulation such a report as defendant had mentioned.

Seawell, J., who presided, instructed the jury that there was a difference between stating the existence of the fact, as charged in the declaration, and stating a *report* of the existence of such fact; that the first, as applied to the charge in the declaration, *imported guilt;* that the latter, as it related to the evidence, did not; and informed the jury that to entitle the plaintiff to a recovery the proof offered must correspond in substance with the allegation contained in the declaration. The jury found for the defendant, and a rule for a new trial having been discharged, plaintiff appealed to this Court.

TAYLOR, C. J. It is necessary that the proof of speaking the words should correspond with the charge in the declaration, at least in substance. The declaration contains a direct charge against the defendant for having uttered the slanderous words; but the proof is that he said there was such a report in the neighborhood, and that he expressed, at the time of speaking the words, his difficulty in believing them. This is a material variance from the charge, and altogether insufficient to support it. The verdict was proper, and the direction of the court clearly right.

(382)

HASLEN v. KEAN.

From Craven.

IN EQUITY.

The only modes pointed out by law for transmitting cases to this Court are by appeal, or by order of the presiding judge because he doubts on certain points. When, therefore, the parties *by consent* make points in a case, without the authority of the court, and transmit them for decision, the case comes through no legitimate channel, and the Court will send it back.

THIS case was before the Court, 4 N. C., 700, and it appears from the statement sent up that on motion below that a decree be pronounced pursuant to the certificate sent down before in this cause, defendant prayed that the cause should be remanded to the Supreme Court for their opinion on the following points:

1. Whether the trust expressed in the deed of Wilson Blount be not void in its creation.

2. Whether the heirs of Edward Kean can be required to make the conveyance demanded by complainant, inasmuch as the said deed, in terms, binds only the said Kean, his executors, administrators and assigns to make the conveyance.

The presiding judge, having declined giving any opinion in the case when in the Supreme Court before, from reasons founded on his peculiar situation, and yet retaining all their force, directed a decree to be entered pursuant to the certificate sent from this Court, subject to the opinion of the Supreme Court whether the foregoing points shall be made for their consideration.

HALL, J. This case, some time ago, was sent to this Court for its opinion on certain questions therein made, by the judge who then presided in the court below. The questions have been decided by this Court, and sent back, in order that that court should make a decree in the case. At the ensuing term
(383) the presiding judge was so situated that he could give no opinion in the case. The parties, by their own consent, rather than by any authority from him, have made other points in the case, and transmitted them here for our opinion. It results that the case has now come here, through no legitimate channel—not by way of appeal, nor by order of the presiding judge because he doubts upon those points, which are the only ways pointed out by law in which cases can be transferred to the Supreme Court from the Superior Courts. I am, there-

fore, of opinion that the case must be sent back to await such order or decree as the next presiding judge shall think proper to make therein.

SEAWELL, J. I am of opinion that the defendant is not precluded from insisting on anything which he has a right to do, according to the rules of a court of equity, except such as have been decided by this Court. And as this Court can take no jurisdiction but on the points submitted to it, it follows that none others can be judicially decided. It is impossible to give a direct answer to the questions now submitted, as it does not appear by the case what was submitted in the former case.

DANIEL and RUFFIN, JJ., concurred.

ASHE v. MOORE ET AL.

From New Hanover.

IN EQUITY.

Every order made in the progress of a cause may be rescinded or modified, upon a proper case being made out.

THE bill in this case was filed in 1804, and was demurred to. The demurrer was overruled, and the defendants ordered to answer by the Supreme Court; and at November Term, 1806, the records of New Hanover Court of Equity stated (384) that the cause was set for hearing, with leave to take testimony. The cause was continued thereafter until April Term, 1817, when the record stated that it was set for hearing; and at April Term, 1818, it was ordered, "Upon reading the affidavit of William Watts Jones, Esq., complainant's solicitor, ordered that this cause be continued, and that the order setting the same for hearing be set aside, and leave given to take testimony." From that part of the order giving leave to take testimony defendant appealed to this Court.

TAYLOR, C. J. Every order made in the progress of a cause may be rescinded or modified, upon a proper case being made out. The affidavit laid before the presiding judge appears to have been sufficient to warrant the order appealed from.

Cited: Shinn v. Smith, 79 N. C., 313; *Mebane v. Mebane,* 80 N. C., 39; *Miller v. Justice,* 86 N. C., 31; *Welch v. Kingsland,* 89 N. C., 181; *Murrill v. Murrill,* 90 N. C., 124.

PEEBLES AND VAUGHAN, ADMINISTRATORS, v. OVERTON.

From Guilford.

1. Where on a sale by executors the terms made known were, twelve months' credit, by giving bond with approved security, and the defendant purchased, but refused to pay the money or give a bond, *it was held*, that the executors might immediately sue for the money, notwithstanding the terms were twelve months' credit.
2. A new trial will not be granted on an affidavit of the absence of a material witness under such circumstances as would not have induced the court to *continue* the cause for the absence of the witness.

THIS was an action originally commenced by warrant, which by successive appeals had reached the Superior Court when it came on for trial before *Seawell, J.*

The warrant was "to answer" plaintiffs "in a plea of debt on sale of articles to the amount of $1.27."

The plaintiffs were the administrators of one Kenlian Vaughan, and at the sale of his effects made known the following as the articles of sale:

(385) The highest bidder to be the purchaser; all sums over ten shillings, twelve months' credit, by giving bond with approved security. All sums of ten shillings and under, cash. No property to be removed off the premises until bond be given or money paid. Whoever purchases at the sale and fails to comply with the articles shall pay four shillings in the pound for disappointing the sale.

On the trial the court admitted evidence to prove that the defendant at the sale became the purchaser of an article at the price mentioned in the warrant; that he refused to pay the money or comply with the terms of sale by giving bond and security; and instructed the jury that by such refusal a right of action accrued immediately to the plaintiffs, though according to the terms of sale the purchaser, by giving bond, was entitled to a credit.

The plaintiff offered to prove a special agreement to resell the property purchased by defendant, and a promise made by defendant to pay the difference; that such resale did take place, and to claim such difference if entitled to recover in this form of the warrant. This was overruled by the court, on the ground that the form of the warrant would not admit of the introduction of such evidence. It appeared that the plaintiffs, after the sale to defendant, had made no use of the property sold.

The jury returns a verdict for the plaintiffs to the amount of the property sold, and a new trial was moved for on two grounds:

1. The admission of improper evidence and misdirection in law to the jury.

2. Upon an affidavit of one Sanders as agent for defendant, who swore that he had taken out a subpœna for a witness and delivered it to a constable of the county, supposing that any constable might execute it; that the constable had summoned the witness, and she did not attend; that he was advised by his counsel that under the circumstances her absence was not a ground for the continuance of the cause, and therefore he had gone into the trial in her absence. By the wit- (386) ness defendant expected to prove that plaintiffs had, after the sale to defendant, sold the same article (a spinning-wheel) to the witness.

SEAWELL, J. The warrant is for the price of a spinning-wheel, sold at vendue and purchased by defendant. The terms of the sale were twelve months' credit, by giving bond with approved security. The defendant bought the wheel, but refused to give bond or pay the money. He had his election to do either, but must be differently situated from other men, if exempted from both. So far the verdict was well warranted, and as to the motion for a new trial, grounded upon the defendant's affidavit, that must also fail, as it is an attempt to obtain a new trial for a reason admitted to be insufficient for a continuance.

Rule discharged.

EXECUTORS OF RAINEY v. DUNNING.

From Chatham.

In all cases of escape after a debtor is committed to jail, the sheriff is liable, however innocent he may be, unless the escape has been occasioned by the act of God or the public enemies.

THE defendant was a sheriff, and this was an action on the *case* to recover damages for the escape of one James Wilson, who was in the custody of the defendant, at the suit of plaintiff's testator. Wilson was placed in the prison, and the evidence as to the escape was that the door of the prison was cut quite across the latch or bolt, and that the prisoner escaped thereby.

The court instructed the jury, as to the fact of the escape, that Wilson being out of the custody of the defendant,
(387) without having been legally discharged, was *prima facie* evidence against the sheriff; but that he was not liable unless the escape happened by his *actual neglect;* and without such neglect they should find for the defendant. There was a verdict for the defendant, and an appeal to this Court for misdirection in matter of law.

HALL, J. On the trial of this suit it appeared to me a great hardship upon sheriffs to be made liable for escapes of persons from jails, when they had no authority in ordering the building of them or in keeping them in order when built, and when it does not appear that they have acted in any respect otherwise than correctly. Considering how rigid the law of England is against sheriffs, I had supposed that in all probability it gave them a greater power than our sheriffs possess of keeping the jails in good order. But in this I was mistaken. They are built there and kept in order as ours are here; the sheriff there accepts of the office at his peril, and in case of an escape after the debtor is committed to jail, the sheriff is liable, however innocent he may be, except the escape has been occasioned by the act of God or the King's enemies (4 Co., 84), because the law supposes in all other cases that the sheriff and his posse are sufficient (1 Str., 435), and although both the plaintiff and defendant may be innocent, yet the law and policy require that the loss should rather fall on the sheriff than on the other party. Cro. Jac., 419. So it is with a common carrier: he is liable in all events, unless he come within the exceptions before given. Therefore, upon further reflection, considering the policy of the law, and conferring with my brethren, I think I misdirected the jury on the trial below, and, for that reason, that a new trial should be granted.

Cited: Adams v. Turrentine, 30 N. C., 162; *S. v. Johnson,* 94 N. C., 926.

(388)

STATE v. DICK, A SLAVE.

From Edgecombe.

At common law, rape was a felony, but the *offense* was afterwards changed to a misdemeanor before the statute of Westminster 1. By that statute the *punishment* was mitigated; but by statute Westminster 2 the *offense* was again changed to a felony, and thence its present existence *as a felony* is by statute. An indictment for rape must therefore conclude *contra formam statuti.*

INDICTMENT for a rape in the following words:

The jurors for the State, upon their oath present, that negro Dick (the property of Mrs. Blount), late of Edgecombe County, on 21 July, 1817, at and in the county of Edgecombe, in and upon Judah Wilkins, spinster, in the peace of God and the State then and there being, violently and feloniously did make an assault, and her, the said Judah Wilkins, then and there, violently and against her will, feloniously did ravish and carnally know, against the peace and dignity of the State."

The prisoner was found guilty, and the case was transmitted to this Court upon the indictment and finding, to determine whether any and, if any, what judgment shall be pronounced.

SEAWELL, J. At common law rape was a felony, but the *offense* was afterwards changed to a misdemeanor, before the statute of Westminster 1. By that statute the *punishment,* which then was castration and loss of eyes, was mitigated; but by the statute of Westminster 2, the offense was again changed to a felony, and hence its present existence *as a felony* is in virtue of that statute; the indictment must therefore conclude *contra formam statuti.* Lord Coke, Lord Hale and Hawkins all concur in the necessity of such a conclusion; and in 2 Institute, 180, a clear history of the offense is to be (389) found. It is true, Mr. East in his Crown Law is of a contrary opinion, but we cannot feel ourselves justified, in so important a case, to depart from what has been by the great men above mentioned considered as settled law, in complaisance to the opinion of any writer, however respectable; more especially, as all the precedents have such a conclusion. The judgment must therefore stand arrested.

CAMPBELL v. STAIERT.

From Cumberland.

When a slave cuts timber on land not belonging to his master, the master is liable in trespass, if the act were done by his command or assent; but if it be the voluntary and willful act of the slave, the master is not liable.

TRESPASS against defendant for cutting timber on plaintiff's lands. The evidence was that a slave, the property of defendant, had cut the timber; and the court directed the jury that if the cutting was done by the command or assent of the defendant, that he was liable; but that if the act was the voluntary and willful act of the slave, then the defendant was not guilty. Verdict for defendant. Rule for a new trial refused, and an appeal to this Court.

McMillan for defendant.

TAYLOR, C. J. It would be repugnant to principle, and in direct contradiction to every adjudged case, to support this action of trespass against the master for this act of his slave, which was not done at his command or by his assent. From all the cases it is to be collected that where the act of
(390) the servant is willful, and such that an action of trespass and not an action on the case must be brought, the master is not responsible, unless the act is done by his command or assent. But where mischief ensues from the negligence or unskillfulness of the servant, so that an action on the case must be brought and not an action of trespass, then the master will be answerable for the consequences in an action on the case, if it is shown that the servant is acting in the execution of his master's business and authority. It is true that a man is liable for trespasses committed by his cattle in treading down the herbage on another's soil; but that is because he is bound to keep them within a fence, otherwise they will wander and probably do much mischief; but he is not bound to keep his slaves confined, and if he were, it would be a monstrous thing to charge him with their depredations.

DANIEL, J. This is an action of trespass *vi et armis* against the defendant, for the act of his servant. The jury have found, under the charge of the court, that the defendant did not command or assent to the trespass committed by the servant.

The plaintiff contends that the defendant is liable for the

acts of his servant in this action, notwithstanding he knew nothing of them. The law on this subject is clearly laid down by *Lord Kenyon* in *McManus v. Crickett,* 1 East, 106. He says a master is not liable in trespass for the willful act of his servant done without the direction or assent of his master. He further remarked that it was a question of very general concern, and had been often canvassed; but he hoped it would at last be at rest.

An action on the case would be against a master for any damages arising to another from the *negligence* or *unskillfulness* of his servant acting in his *employ,* although the master knew nothing of the act at the time; as when the captain of a vessel runs down another vessel by his negligence or un- (391) skillfulness, or where a servant does another an injury by negligently driving his master's carriage or riding his horses. 1 East, 106; 1 Chitty, 68, 131; 3 Wills, 317.

But where a servant *willfully* commits an injury to another, although in his master's employ, as if he willfully drives his master's carriage against another, the master not knowing or assenting to it, an action of trespass cannot be sustained against the master.

Motion for a new trial overruled.

Cited: Parham v. Blackwelder, 30 N. C., 449; *Stewart v. Lumber Co.,* 146 N. C., 88.

DEN ON THE SEVERAL DEMISES OF ROBINSON AND OTHERS V. BARFIELD.

From Bladen.

1. The deed of a *feme* covert, without a private examination, according to the act of 1751, is a mere nullity and void; and to give validity to her deed it must *appear* that her private examination has been had pursuant to the act; if it appear by the clerk's certificate that the "deed was acknowledged in open court and ordered to be registered," the court will not presume a private examination from such certificate.

2. An act of Assembly declaring that certain deeds which are not executed according to law shall be held, deemed and taken to be firm and effectual in law for the conveyance of the lands mentioned in them is *unconstitutional,* being in violation of section 4 of the Bill of Rights, which declares the legislative, executive, and judicial powers of Government to be distinct.

ROBINSON *v.* BARFIELD.

CASE AGREED. William Bartram, in or about the year 1769, died intestate, seized in fee simple of divers lands in Bladen County, and leaving one son, William, and two daughters, Mary and Sarah. William died intestate and without issue, in 1771, on which Mary and Sarah became seized of the lands in coparcenary. Afterwards Mary intermarried with Thomas
(392) Robinson and Sarah with Thomas Brown. Mr. and Mrs. Robinson and Mr. and Mrs. Brown made partition of part of the lands, and on 8 February, 1776, mutually executed deeds to each other, sufficient in form to convey a joint estate in fee simple; but there is no evidence that either Mrs. Robinson or Mrs. Brown was privately examined as required by the act of Assembly. The land described in the declaration is comprehended in the deed from Mr. and Mrs. Robinson to Mr. and Mrs. Brown, on which deed is the following indorsement, to wit: "August Term, 1778; this deed acknowledged in open court and ordered to be registered." On 25 March, 1779, Mrs. Brown joined with her husband in a deed, and conveyed the premises to George Lucas, and on the day following Lucas conveyed the land to the said Thomas Brown. Mrs. Brown was never privately examined as to her free consent in making the deed to Lucas, in the manner prescribed by the act of Assembly; but a short time previous to her death she was asked, on examination by the subscribing witnesses to the deed, as to the fact, when she acknowledged to them that the deed had been executed at her voluntary instance and of her own accord, which the witnesses testified in writing on the deed the same 25 March, 1779. After her death her husband, Gen. Thomas Brown, applied to the General Assembly, and in 1788 an act was passed confirming his right to the land, and declaring that he and his heirs should hold the same in fee simple, which act, so far as it is consistent with the above facts, is made a part of this case. Mrs. Brown had three children, two of whom died in her lifetime without issue. The other, named Elizabeth, died afterwards in the lifetime of her father, intestate and without issue. On 4 June, 1796, after the death of Sarah Brown and Elizabeth Brown, General Brown executed a deed to Stephen Barfield for the same land. Stephen Barfield afterwards con-
(393) veyed to Allen Barfield, the defendant. The Barfields, or one of them, possessed the land constantly since 4 June, 1796. General Brown died on 22 November, 1814, and this suit was brought in August, 1815. The lessors of the plaintiff are the heirs at law of Mary Robinson, and also the heirs at law of Elizabeth Brown, who survived her mother, but died in the lifetime of her father.

Murphey for defendant. (417)

SEAWELL, J. Two questions arise in this case: first, the operation of the acts of 1776, and, secondly, the effects of the private acts of Assembly passed in 1778, entitled "An act to quiet Thomas Brown, of Bladen County, esquire, in his title to and possession of divers lands, tenements and hereditaments therein referred to." As to the first, Mrs. Brown being at the time of making the deed a *feme* covert, her deed *without* a private examination, according to the act of 1751, is a mere nullity and void. By the rules of the common law *femes* covert are *morally* incapable of doing any act which is to bind themselves; this act forms an exception to the common-law rule, and to give validity to this deed of the *feme* covert it must *appear* that the deed in question comes within the exception. It has been insisted that the certificate of the clerk that "the deed was acknowledged in open court and ordered to be registered," imports a private examination, or, if it did not, that it is to be *presumed* the court did its duty by examining Mrs. Robinson; but we think differently, and on this branch of the case I believe we are unanimous.

The certificate implies only that the parties came into court in the usual form, and, as the acknowledgment is stated to be in *open court,* excludes the idea of any *other* acknowledgment; and though it is correct to presume the doing in a proper manner everything confided to a court, when it shall appear the court has done the thing entrusted to it, yet that only holds good as to the *manner,* and is not *universally* true as a proposition to that extent.

The reason of the rule is that courts will be inclined (418) to support the thing done, and leave it the parties to reverse the judgment by writ of error; but in *summary* proceedings which are not according to the rules of the common law, no writ of error will lie; and in such cases it is required that everything should *appear* which authorized the doing of the thing done. The books contain many cases of this sort upon convictions on statutes. The principle to be extracted from all the cases respecting what things are to be presumed seems to be this, that whatever is entrusted to the *determination* of the courts, to authorize the acts done, shall, when the act is done, be presumed to have been sufficient for that purpose, as when a court is authorized upon *satisfactory* evidence to do a particular thing: in such a case they are made the judges of the

sufficiency of evidence; but when they are only authorized upon particular prerequisite circumstances they are not *entrusted* with the authority to determine, and for the thing done to be valid the essentials required by law must *appear* to warrant the proceedings of the court. We are therefore *all* of opinion that the certificate of *probate does not* warrant a presumption that Mrs. Robinson was privately examined as required by the act of 1751, and consequently that the deed is void. Then as to the other point, a majority of us entertain the opinion that the private act of 1778 is a manifest violation of section 4 of our Bill of Rights, which declares "that the legislative, executive and supreme judicial powers of Government ought to be forever separate and distinct from each other." And we think that the whole of the argument in respect to the plenitude of legislative power is inapplicable to the present question. The act itself does not profess to *direct* the heirs of Mrs. Brown and *transfer* to General Brown; it only declares "that the several *deeds* shall be *held, deemed* and *taken* to be firm and effectual *in law* for the conveyance of the lands, etc., therein mentioned, against the heirs of the said Sarah Brown, and so as to bar them and
(419) every of them forever." This we consider as *importing* nothing further than the *determination* of the Legislature upon the *effects* in *law* of the several deeds. By the Constitution they are restricted from this exercise of power; they are to *make* the law, and the *judicial* power is to expound and determine what cases are within its operation. The Legislature is the only authority which can give to a *feme* covert the capacity of conveying her lands; they *have* done so, and prescribed the particular mode in which it should be done; but whether the deed of Mrs. Brown was executed according to the provision of that law, belongs not to them to decide, nor can they do so without violating the authority under which alone they can pass any acts—the Constitution. Upon this point a majority of us are of opinion that the plaintiff is entitled to judgment, and that we are not under the necessity of re-examining the question whether the Legislature does possess the power of stripping one individual of his property without his consent and without compensation, and transferring it to another. That principle has already been twice examined in this Court, and in both cases determined against the power. *University v. Foy,* 3 N. C., 310, 374; *Allen v. Peden,* 4 N. C., 442. Divers cases have been decided the same way in the Supreme Court of the United States, which, we think, ought to put the question at rest.

DANIEL, J. The deed from Thomas and Sarah Brown to George Lucas, dated 25 March, 1779, did not pass the fee-simple estate of Sarah Brown; she never was privately examined by any of those modes and ways pointed out by the Legislature, and without such an examination we are ignorant whether coercion or undue influence was exercised by her husband or not. She being a *feme covert* at the time the deed was executed, the law declares it void without such an examination.

Had the Legislature any right or power to take the lands without the consent of the lessors of the plaintiff, in whom the fee simple vested, and, without compensation rendered, give them to Gen. Thomas Brown and his heirs? or, in other words, is the act of the Assembly, passed in 1788, con- (420) firming the title of General Brown, of any force or effect? I am of opinion the act is a nullity, and does not affect the rights of the lessors of the plaintiff. The Constitution declares that the legislative, executive and supreme judicial powers of Government ought to be forever separate and distinct from each other. The transfer of property from one individual, who is the owner, to another individual, is a *judicial* and not a *legislative* act. When the Legislature presumes to touch *private property* for any other than public purposes, and then only in case of necessity, and rendering full compensation, it will behoove the Judiciary to check its eccentric course by refusing to give any effect to such acts. Yes, let them remain as dead letters on the statute-book. Our oath forbids us to execute them, as they infringe upon the principles of the Constitution. Miserable would be the condition of the people if the judiciary was bound to carry into execution every act of the Legislature, without regarding the paramount rule of the Constitution. This Government is founded on checks and balances. The Judiciary check the Legislature when it strays beyond its constitutional orbit, by refusing to enforce its acts. "The opinion of Sir Mathew Hale, that a statute is in the nature of a judgment, may be law in England, but in this State, where the Constitution has separated the legislative and judicial powers, courts can neither nibble at the legislative power, nor can the legislative stride over the judicial." In England "acts of this kind are carried on in both Houses with great deliberation and caution, particularly in the House of Lords. They are generally referred to two judges to examine and report the facts alleged, and to settle all technical forms. Nothing, also, is done without the consent expressly given of all parties in being and capable of consent, that have the remotest interest in the matter, unless such consent shall appear to be perversely and

without any reason withheld; and as before hinted, an equivalent in money or other estate is usually settled upon infants (421) or persons not in *esse,* or not of capacity to act for themselves, who are to be concluded by this act, and a general saving is constantly added at the close of the bill of the rights and interests of all persons *whatsoever,* except such whose consent is so given or purchased, and who are therein particularly named. Though it has been holden that if even such saving be omitted, the act shall bind none but the parties." 2 Blackstone Com., 345. Judge Blackstone then adds: "A law thus made, though it binds all parties to the bill, is yet looked upon more as a private conveyance than as the solemn act of the Legislature." In this country, a variety of determinations by different judges, in different courts, has established the principle that the Legislature has not the power to take the lands of A and give them to B. Such a power is not within the definition of that prerogative affixed to sovereignty, and denominated, by writers on national law, the *eminent domain.* This prerogative of majesty is to be exercised only in case of *necessity,* and for the public safety. When the sovereign disposes of the property of an individual in case of *necessity* and for the public safety, the *alienation* will be valid; but justice demands that this individual be recompensed out of the public money, or if the treasury is not able to pay it, all the citizens are obliged to contribute to it. Vattel, Book 1, ch. 20, sec. 244.

It is by virtue of the *eminent domain* that highways are made through private grounds. Fortifications, lighthouses and other public edifices are constructed on the soil owned by individuals. Necessity demands these works; they are for the *public safety,* and the individual is *compensated* for his loss; but necessity can never demand that the lands of A shall be taken and given to B, nor can the *public safety* ever require it. It is immaterial to the State in which of its citizens the land is vested; but it is of primary importance that when vested it should be secured and the proprietor protected in the (422) enjoyment of it. *Judge Patterson,* in *Vanhorner v. Dowanee,* 2 Dallas, 310, says: "The Legislature has no authority to make an act divesting one citizen of his *freehold* and vesting it in another, without a just compensation; it is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance in every free government, and lastly, it is both contrary to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own

case." *Judge Chase,* in *Calder v. Bull,* 3 Dallas, 394, observes: "It is not to be presumed that the Federal or State Legislature will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the *whole* community, and on making full compensation." *Chief Justice Parsons,* in delivering the opinion of the Court in *Walls v. Stetson,* 2 Mass., 146, says, "that we are also satisfied that the rights legally vested in this or any other corporation cannot be controlled or destroyed by any subsequent statute." *Chief Justice Marshall,* in *Fletcher v. Peck,* 6 Cranche, 132, 143, said: "The Legislature of Georgia, in their session of 1796, had no power to divest the titles of the Yazoo lands out of those grantees to which the Legislature in its session of 1795 had conveyed." We all know that Georgia repealed or attempted to repeal the law of 1795. The records were *erased or burnt.* Congress fretted and stormed, but the grantees held the land.

In *Osborn v. Huger,* 1 Bay, 197, *Judge Burke* said, "he should not be for construing a law so as to divest a right; and that a retrospective law in that case would be against the Constitution of the State."

Chief Justice Kent is of the same opinion, *Dash v. Van Kluck,* 7 Johns., 507. *Chancellor Lansing,* in delivering his opinion in the case of *Catlin v. Jackson,* 8 Johns., 557, remarking on the passage in Blackstone's Commentaries relative to the manner of passing private acts in England, (423) observes: "If in Great Britain, where so many precautionary measures are taken to preserve the interest of strangers, private acts are restrained to the parties only who are evidenced to be such, by consent to them, either in person or by those who legally manage their concerns for them; and if when the suggestions on which the act is passed are proved fraudulent, a court of chancery will relieve against them, which is there well settled, the general practice which obtains here with respect to the passing such acts generally on the bare suggestion of the applicants, affords additional and very cogent reasons against *relaxing* such restraints; and it can be scarcely necessary to add, to divest an interest to a stranger to it is contrary to the clearest dictates of justice and repugnant to the Constitution." The same doctrine has been held by this Court: *University v. Foy,* 3 N. C., 310, 374; *Allen v. Peden,* 4 N. C., 442. No principle in the law appears to be better supported by authority than this. The Legislature had no right or power to divest the lessors of the plaintiff of their title to the lands in controversy, and vest them in *General Brown and his heirs.* The act of 1788 shall not prevent the recovery of the plaintiff.

The act of limitations does not bar the entry of the plaintiff. *Thomas Brown* was tenant by the curtesy of these lands. On 4 June, 1796, by deed of bargain and sale, he conveyed in fee to Stephen Barfield. But as he was seized and possessed only of a life estate, the statute of uses executed and transferred that only to the bargainee. The conveying a greater estate in land than a person has by any of those modes of conveyancing which have sprung out of the statute of uses, does not amount to a forfeiture; but it shall pass such estate or interest which the bargainor had or was seized and possessed of, and no more. 4 Com. Dig. "Forfeiture" A, 3.

"A right of entry in the remainderman cannot *exist* during the existence of the particular estate, and the *laches* of a (424) tenant for life will not affect the party. An entry to avoid the statute must be an entry for the purpose of taking *possession,* and such an entry cannot be made during the existence of a life estate. 4 Johns., 402; 1 Burr., 120, 126; 2 Salk., 422; 7 East, 311, 312, 319, 321.

The plaintiff had no right to enter before the death of Thomas Brown, and he died 22 November, 1814.

BY THE COURT. Judgment for the plaintiff.

Cited: Hoke v. Henderson, 15 N. C., 16; *Lowe v. Harris,* 112 N. C., 481; *Miller v. Alexander,* 122 N. C., 720; *Wilson v. Jordan,* 124 N. C., 715; *Daniels v. Homer,* 139 N. C., 240, 242, 270.

HUNT v. CROWELL.

From Nash.

It seems that an appeal may be taken from an interlocutory order of the County Court granting leave to *amend,* and that on confirming the judgment of the County Court a *procedendo* will issue from the Superior Court.

THIS was a suit commenced before a justice of the peace and came to the County Court by appeal. In the County Court the defendant pleaded in abatement that the warrant was not made returnable within thirty days, Sundays excepted; whereupon plaintiff moved for leave to amend by inserting in the warrant the words, "within thirty days, Sundays excepted," which was granted by the court.

The defendant thereupon appealed to the Superior Court, where the plaintiff objected that the appeal was improperly taken in a matter from the decision of which no appeal would lie.

The case was referred to this Court to say whether the appeal was properly taken and could be sustained, or whether the Superior Court had no jurisdiction of the cause; and if the cause be remanded to the County Court, whether any, and what judgment shall be rendered in the Superior Court.

TAYLOR, C. J. I am of opinion that the County Court did right in allowing the amendment of the warrant, and that the judgment thus pronounced by them was so (425) closely connected with a final determination of the suit that it is quite within the equity and meaning of the act of 1777, the subject of appeal by the party dissatisfied. It would be perhaps impossible to draw the line, in the abstract, between those orders made by the court which may be appealed from and those which cannot; and it would probably be safer to decide upon each case as it arises. If I were to lay down a general rule, it would be, that wherever the question presented to the County Court is such that a judgment upon it one way would put an end to the cause, it may be appealed from; but where the court cannot give such a judgment upon it as would decide the cause, or directly affect its decision, it cannot be appealed from. If the County Court had disallowed the amendment, the warrant must have been abated, and the plaintiff, beyond all question, might then have appealed. By allowing the amendment, the defendant was deprived of a defense upon which he chose to rest his case, and one which involving also a question of law, with the determination of which he was dissatisfied, he had a right to ask for the opinion of an appellate court.

I hope I shall not be understood as sanctioning an opinion that every order made by court in the progress of a cause may be appealed from. There are many that must be confided solely to their discretion, the proper or ill exercise of which cannot be tested by any rule of law; but the question as to this amendment I consider in a very different light, and depending upon fixed principles repeatedly adjudged by this Court. Being, therefore, of opinion that the County Court did right, and that the judgment appealed from must be affirmed, it follows that a *procedendo* must issue, and that the appellee recover the costs of the appeal.

SEAWELL, J. When an application is made, either by a plaintiff or defendant, to amend any part of the proceed-
(426) ings, though it is within the *discretion* of the court to allow it, yet that is a *legal* discretion, and to be exercised according to the rules of law. *All* the instances of judicial discretion are for the attainment of justice, and leave the court at liberty to do justice *"all around."* When the application is made in respect to a matter not relating to the *final* determination of a suit, as for a continuance, or the like, as the determination of the court in such case can have no possible influence upon the ultimate decision, and is in truth nothing but a refusal *then to consider,* it would be absurd to allow an appeal in such case. For the party appealing would defeat his own object, and the opinion of the Court above could in no way be of service to him. But where the application is to amend the proceedings, *that,* if allowed, *may* deprive the defendant of a good defense upon the trial; and consequently is affording, in like manner, to the plaintiff a correlative benefit. The *law,* from the state of the pleadings, afforded this advantage to the defendant; the *law* also *required* and authorized the court to relieve the plaintiff from this difficulty, according to these rules of legal discretion; if the court refuse to exercise this authority when these rules require it, or do exercise it, but in a manner in which it should not, there is in each way an injury done to the party, and which *can* be redressed by an appeal.

To apply these principles to the present case: The writ is defective; the party applies to the court to amend; the acts of Assembly vesting it with the power, entitle the party to claim it; if it refuses its aid when it should be extended, the party is injured, and must lose his suit, unless he can appeal. It is no answer to say, let him wait till the final determination of the case and then appeal upon the whole case; for if it be the case of a defendant who wishes to avail himself of some thing in *mitigation,* the accumulated costs will probably place him in a worse situation *with* this sort of *remedy* than he
(427) would be by submitting in the first instance. As to making a motion in the court below and spreading it on the record, as has been said to be the usage in the Superior Courts, I can see no possible benefit to be derived from that; for if it be a *partial* defense, there will still be a saddling of the party defendant with the costs of both courts, without the least necessity.

And as to a party's staving off a cause by perpetually appealing, that is for the *Legislature* to provide against, who already

have supposed (as we must presume) that the party cast is sufficiently punished by the payment of costs to prevent an appeal purely for delay.

The words of the act of 1777 are that when any person or persons, either plaintiff or defendant, shall be dissatisfied with the sentence, judgment or decree of any County Court, he may pray an appeal to the Superior Court. These words should not by *construction* be confined to a *final* judgment, if in so doing we are to leave remediless any *possible* case where by appeal the court above *would* have power to afford relief.

I therefore think there should be judgment that the amendment was properly allowed by the court, thereby confirming their *judgment,* and that a *procedendo* issue to the same court. The judgment of this Court, therefore, being in favor of the appellee, he must have judgment also for his costs.

HALL, J., concurred in the opinion of SEAWELL, J.

DANIEL, J., *dissentiente.* It appears from this case that the defendant appealed from the collateral or interlocutory order made by the County Court, permitting the plaintiff to amend; there was no final judgment in the cause. By section 82 of the act of Assembly of 1777 the Legislature authorizes any person or persons who shall be dissatisfied with the sentence, judgment or decree of any County Court, to pray an appeal from such sentence, judgment or decree, to the Superior Court; but before obtaining which he must enter into bond for prosecuting the same with effect, and for performing the judgment, sentence and decree which the Superior Court (428) shall make, if the cause be decided against him. If this was the only section on the subject, I admit that it would be extremely doubtful whether a party to a cause might not appeal from every order made in the cause, although such order or judgment did not finally determine the cause. But when we come to examine section 84 of the same act, the Legislature clearly gives us to understand that the *"sentence, judgment or decree"* spoken of in section 82 means such a sentence, judgment or decree as finally determines the cause. It directs a transcript of the record of the suit on which the appeal shall be made to be delivered to the clerk of the Superior Court fifteen days before the sitting of the term; it then directs the method of trial in the Superior Court. If it is an appeal from the law side of the court below, and the issue was to the country, then the trial is to be *de novo;* if the appeal is on a hearing of a petition for a filial portion, or a legacy, or a distribu-

tive share of an intestate's estate, or other matter relating thereto, then the trial is to be by rehearing in the Superior Court.

This section speaks of such appeals as takes the cause completely out of the County Court. If the party appealing refuses to carry up the appeal, viz., the transcript of the record and appeal bond, the appellee has his judgment, sentence or decree confirmed with double costs, not in the County Court, but in the Superior Court. If the transcript is carried up, and the appellant does prosecute, the Superior Court gives the final judgment or sentence on the trial *de novo,* if the appeal is from the law side of the County Court, and the final decree, if the appeal is from the equity side of the County Court. It does not contemplate appeals to be brought up or tried in any other way. If the defendant could sustain his appeal on an order, which did not determine the cause, it would involve the absurdity of placing part of the cause in the Superior Court, and leaving the balance in the County Court. The appeal should be dismissed.

Cited: Masten v. Porter, 32 N. C., 3; *Cook v. McDugald,* 50 N. C., 307; *Minor v. Harris,* 61 N. C., 324, 325.

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(429)

GARDINER v. JONES.

From Montgomery.

An indorser is entitled to reasonable notice of the nonpayment of a note by the maker; but if, after such a lapse of time as would have exonerated him, he makes a promise to pay, with a full knowledge that by law he is not liable, it amounts to a waiver of the want of notice.

THIS was an action made by the indorsee against the indorser of a promissory note made by William Moss and Drury Parker to the defendant.

The note was indorsed before it became due; the makers of the note resided in Montgomery County, and the County Courts of that county were held on the first Mondays in January, April, July and October in each year. The note became payable on 25 December, and suit was brought by the indorsee against the makers, to the first *April* Court after it became due, and judgment was obtained in the ordinary course. An execution was taken out against the makers, from the term at

which judgment was obtained, viz., July, and continued until January following, directed to the sheriff of Montgomery, and in every instance was returned *nulla bona*. An execution then issued to Rowan, and was returned in like manner.

In March following the plaintiff gave notice to the defendant (the indorser) that he looked to him for payment, at which time the indorser promised to settle the matter and make payment, as he said he had before promised to do.

The declaration contained two counts, one upon the indorsement and the other upon the defendant's promise. The court directed the plaintiff to be nonsuited; but upon a motion for a new trial, doubting the propriety of the nonsuit, directed the case to be transmitted to the Supreme Court. It appeared in evidence that at the time of the promise defendant said he had made a foolish bargain, but he was bound and would pay it, but in future he would use more caution.

At the time of the trial the court did not understand (430) the witness to say that the defendant at the time of the promise admitted that he had before that time promised the plaintiff to settle and make payment, or after that time; but the court certified that on the argument of the rule that such was the evidence.

HALL, J. I cannot think that there is much difficulty in this case, either as to the law or justice of it. It is very frequently the case, at least in the interior of the State, when a bond or note is indorsed, that the understanding of the parties is that if payment is not made by the maker the indorsee shall coerce payment by suit; that if there be a failure of the suit without fraud, the indorser will pay it. In this case the plaintiff seems to have used all diligence to collect the money, until he altogether quit the pursuit, though it does not appear that he was directed by the defendant to do so. How long it was from the time the last execution was returned until notice was given does not appear, because the defendant admits that he had promised payment before March, when application was made to him a second time. It cannot be said that the plaintiff has been guilty either of fraud or neglect, unless bringing the suit be neglect in law. We must take it for granted, also, that there is a *bona fide* debt due to him, which the defendant has promised to pay. If obstacles did lie in the way before, I think that promise has removed them. The plaintiff could not be ignorant of the time that elapsed from the date of the indorsement until application was made for payment, and most likely was not ignorant that a suit had been brought. I

think he can recover on the count setting forth the promise. I also think he can recover on the other, because the promise amounts to a waiver of the right, which the defendant might otherwise have, of compelling the plaintiff to prove legal diligence. In giving my opinion in favor of the plaintiff, I think I am supported by the following authorities: 1 Taunt.,
(431) 12; 6 East, 16 N. A.; Strange, 1246; 7 East, 231; 2 East, 469.

DANIEL, J. This is an action by an indorsee against an indorser. There are two counts in the declaration. I will notice each in its turn.

The first count is on the indorsement of the note by the defendant. Before an indorsee shall be permitted to recover on a count like this, it becomes necessary for him to prove to the court and jury that he has in a reasonable time from the period of the note's becoming due demanded payment of the drawer, and given notice to the indorser of the nonpayment, and that he, the indorser, was looked to for payment. What is reasonable notice to an indorser is a question compounded of law and fact. 5 East, 14; 6 East, 4; 1 Schoale and Lef., 461; 1 Johns., 428; Note, 12 East, 36. In this State no fixed rule has been established within what time notice of a demand and nonpayment should be given. In some of the States (where trade and commerce are carried on more extensively than in our State) they have been very particular, and rather rigid. In New York they have in a great measure adopted the British rule, viz., that notice should be sent by the first post after the bill or note became due, if the indorser lives at a distance; personal notice, or leaving it at the dwelling-house of the indorser, if he lives in town. 10 Johns., 490; 11 Johns., 232. Where the parties in that State lived in the same town, three days was held too long. 11 Johns., 187. In the case before the Court notice was not given until fifteen months had elapsed after the note was due. I think there cannot be a doubt that this was not reasonable notice. A man might be fully able to pay the greater portion of the time, but insolvent at the time notice was given. If a loss happens, it should fall on him who has omitted to do that which the parties impliedly contracted should be done at the time of the indorse-
(432) ment—make application to the drawer for the money in a reasonable time; if he does not pay you, give me notice, and I will pay you and resort myself to the drawer, and either draw my effects out of his hands or take such steps, either by suit or some other means, as to get the money. Do

not delay so long that the drawer may by possibility become a bankrupt, or lose all kind of credit with his friends; if you do, I am not responsible. This is language which is presumed by the law to be used by the indorser, and agreed to by the indorsee at the time of indorsement. The indorsee's bringing suit against the drawer makes no difference. The law does not require him to sue, and if he does, his case is not bettered by it.

The second count is on an express promise by the indorser to pay the amount of the note. Whether or not the plaintiff can derive any benefit from this promise depends upon the time the promise was made and the circumstance under which it was made. Did the defendant make this promise before the law had entirely exonerated him from the plaintiff's claim? Did he make it under a mistake, or ignorance of the law's having exonerated him? If he made the promise after such a lapse of time as would have exonerated him, had it not been made, and he had a perfect knowledge that he was not by law subject to plaintiff's recovery, then he would be liable to pay the note. The promise is a waiver of any notice of a demand on the drawer in such a case, and would be proper evidence to support the first count in the declaration. Chitty on Bills, 101, 102; 5 Johns., 248; 6 East, 16; 7 East, 231, 236; Peake's N. P., 202.

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