ANNOTATIONS INCLUDE 172 N. C.

NORTH CAROLINA REPORTS

VOL. 60

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM

JUNE TERM, 1863, TO DECEMBER TERM, 1864,

INCLUSIVE

(EMBRACING 1 AND 2 WINST. AND WINST. EQ.)

BY

H. C. JONES AND P. H. WINSTON.

ANNOTATED BY

WALTER CLARK

(3D. ANNO. ED.)

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CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1863

IN THE MATTER OF J. C. BRYAN.

HABEAS CORPUS.

1. The courts and judges of the States have concurrent jurisdiction with the courts and judges of the Confederate States in the issuing of writs of *habeas corpus* and in the inquiring into the causes of detention, even where such detention is by an officer or agent of the Confederate States.

2. The courts of this State, as well as the individual judges, have jurisdiction to issue writs of *habeas corpus* and to have the return made to them in term-time, and, as a court, to consider and determine of the causes of detention.

3. A person liable to military service, as a conscript, under the act of Congress of April, 1862, and who, by virtue of section 9 of the act, regularly procured a discharge by furnishing a proper substitute, cannot again be enrolled as a conscript under the act of September, 1862.

BRYAN, the applicant, petitioned to the Supreme Court, at the (2) present term, for a writ of *habeas corpus,* alleging that, being between the ages of 18 and 35 years, he procured a substitute, who was duly received by Peter Mallett, then major in command of the conscript camp near Raleigh, and the chief enrolling officer of the State, and that the said Major Peter Mallett, on 29 July, 1862, gave him a discharge for the war; that the age of the said substitute was 39 years; that on 16 June, 1863, he was arrested as a conscript, and was at the date of his

*Judge MANLY was absent during the greater part of the term on account of sickness, and did not participate in the consideration of any of the cases of *habeas corpus* decided at this term.

petition in the custody of Lieut. J. D. H. Young, of Franklin County, as a conscript, under the second law for raising conscripts (September, 1862), and that the said Lieutenant Young is about to carry him to Camp Holmes, a rendezvous for conscripts near the city of Raleigh. The prayer of the petition is for a writ of *habeas corpus* to inquire into the cause of detention of the said J. C. Bryan, and for a discharge. The court ordered the writ, which was accordingly issued by the clerk, and was returned with this endorsement:

I accept the service of this writ, and return for answer, that the facts set forth in the petition are substantially true, and that I arrested him by an order of the enrolling officer for Fifth Congressional District.

J. D. H. YOUNG,
Lieut. 40th Regt. N. C. Militia.

On the return of the writ a day was given in court for the hearing of the case, and as a preliminary to the consideration of the facts stated in the petition, the Court requested arguments from gentlemen present on the question whether this Court and the other courts of superior jurisdiction, and the judges individually of this State, have jurisdiction to issue writs of *habeas corpus* and to consider the causes of detention where the imprisonment or detention was under the authority of the Confederate Government.

B. F. Moore and P. H. Winston, Sr., in support of the juris-
(18) *diction.*

George V. Strong, District Attorney of the Confederate States, with whom was Thomas Bragg, contra.

PEARSON, C. J. Governor Vance having informed the judges that the Secretary of War puts his objection to the release of citizens who have been arrested as conscripts by the officers of the Confederate States after they had been discharged by the State tribunals on writs of *habeas corpus,* upon the ground that the courts of the State had no jurisdiction over the subject, the Court directed the question to be argued as preliminary to the disposition of the many applications before it by writs of *habeas corpus,* and assigned a day. As the organ of the Court, I addressed a communication to his Excellency the President of the Confederate States, informing him of the fact, and that the Court would be pleased to hear an argument by the Attorney-General of the Confederate States or any other gentleman of the bar he might appoint for the purpose. The question has been fully argued by Mr. Moore and Mr. Winston in support of the jurisdiction, and by Mr. Strong, District Attorney of the Confederate States, with whom was associated Mr.
(19) Bragg, against the jurisdiction.

We have devoted to the subject that temperate and mature deliberation which its great importance called for, and the Court is of opinion that it has jurisdiction and is bound to exercise it, and to discharge the citizen whenever it appears that he is unlawfully restrained of his liberty by an officer of the Confederate States. If the restraint is lawful, the Court dismisses the application and remands the party. If, on the other hand, the restraint is unlawful, the Court discharges him. The lawfulness or unlawfulness of the restraint necessarily involves the construction of the act of Congress under which the officer justifies the arrest, and the naked question is, By whom is the act of Congress to be construed? By the Secretary of War and the subordinate officers he appoints in order to carry the conscription acts into effect, or by the judiciary? Or, if the latter, have the State courts jurisdiction over the subject? This, as was well remarked by Mr. Strong, is a dry question of constitutional law, and its decision should not be influenced by collateral disturbing causes.

The jurisdiction of the State courts over the subject is settled in this State, and has been so considered as far back as the traditions of the bar carry us. In 1815 *Judge Taylor,* 2 Law Rep., 57, published *Lewis's case,* decided by the Supreme Court of Massachusetts, in which the Court, upon a *habeas corpus* to an officer of the United States, took jurisdiction and discharged a soldier on the ground that the enlistment was not valid by the proper construction of the act of Congress. That decision was concurred in by the bench and bar in this State, and the jurisdiction has ever since been exercised by our courts and judges, and treated as "settled" until the present term of the Court. In *Ex parte Mason,* 5 N. C., 336 (1809), the jurisdiction was exercised, and a soldier of the United States was discharged by the Court. We have traditions of other cases tried by single judges, but no reports were made of them. About 1847, while on the Superior Court bench, I exercised the jurisdiction, and a soldier was brought before me at Smithville, on a writ (20) directed to the officer in command at Fort Caswell (Captain Childs, who afterwards so highly distinguished himself in Mexico), *In re Mills,* who claimed exemption as a shoemaker during the past winter. In my letter to *Judge Battle* and *Judge Manly,* asking their opinion as to the construction of the conscription and exemption acts, all three of us took it for granted that the question of jurisdiction was settled, and in the opinion filed by me in that and all of the other cases which have been before me, I set forth that the power of the State judges to put a construction upon the acts of Congress, so far as they involve the rights of the citizen (as distinguished from mere military regulations), is set-

tled, and all of the other judges in this State who have issued writs of *habeas corpus* have so treated it (Judges Battle, French, Heath, and Shipp).

The question has been considered as settled in the other States, and their courts have in many cases assumed and exercised the jurisdiction, and it has been conceded by the courts of the United States. Chancellor Kent, 1 Com., 440, referring to *Stacey's case,* says: "The question was therefore settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other States." In the note many cases are referred to. Hurd, in his treatise on *Habeas Corpus,* under title "Concurrent Jurisdiction," refers to and collates a great many cases which fully support his conclusion: "It may be considered settled that State courts may grant the writ in all cases of illegal confinement under the authority of the United States." So if any question can be settled by authority, the concurrent jurisdiction of the State courts must be treated as settled. It must be presumed that this long series of cases which establish the concurrent jurisdiction of the State courts, and their power to put a construction on acts of Congress when necessary to the decision of a case before them, is supported by the most clear and satisfactory reasoning, and it would be idle to attempt to add anything to what has been said by the many able judges who (21) have discussed the question. I will content myself by making a few extracts from some of the opinions. *Tilghman, C. J.,* in *Lockington's case,* Brightly, 269, (in 1818) says: "It is to be observed that the authority of the State judges in cases of *habeas corpus* emanates from the several States, and not from the United States. In order to destroy their jurisiction, therefore, it is necessary to show, not that the United States have given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the States have vested in their own judges." *Southard, J.,* in *S. v. Brearly,* 2 South., 555, (1819) says: "It will require in me a great struggle, both of feeling and judgment, before I shall be prepared to deny the jurisdiction of the State, and say that she has surrendered her independence on questions like this, and that her highest judicial tribunal, for such purposes, is incapable of inquiring into the imprisonment of her citizens, no matter how gross or illegal it may be, provided it be by the agents of the United States and under color of their laws." "Have we lost the jurisdiction because we cannot construe and determine the extent and operation of acts of Congress? We are often compelled to construe them; they are our supreme law, when made in conformity with the Constitution. Is it because the United States is a party? How does she become a party on such a question? Is she a party for the purpose of despotism? Whenever a man holds a commission from her shall he,

without legal authority, or in violation of her own statutes, injure, imprison, or oppress the citizen? Surely not." In *Slocumb v. Mayberry,* 2 Wheat., 1, (1817), Slocumb was surveyor for the port of Newport in Rhode Island, and under the directions of the collector had seized the "Venus," lying in that port with a cargo, ostensibly bound to some other port in the United States. Mayberry, who was the owner of the cargo, brought an action of replevin in the State court for restoration of the cargo. Slocumb put his defense on the ground that he was an officer of the United States, and the seizure of the vessel and cargo was authorized by an act of Congress, and denied the jurisdiction of (22) the State court. The court took jurisdiction, and decided in favor of Mayberry, on the ground that the act of Congress, by its proper construction, only authorized the seizure and detention of the *vessel,* and did not embrace the cargo; consequently the officer had detained the cargo against law. Slocumb carried the case to the Supreme Court of the United States, where it was held that the State court had jurisdiction, and had put a proper construction on the act of Congress. *Marshall, C. J.,* says: "Had this action been brought for the vessel, instead of the cargo, the case would have been essentially different; the detention would have been by virtue of an act of Congress, and the jurisdiction of a State court could not have been sustained; but the action being brought for the cargo, *to detain which the law gave no authority,* it was triable in the State court." I cite this case, particularly, because in the action of replevin the thing is taken out of the possession of the officer, as the person is taken out of the possession of the officer under a writ of *habeas corpus;* so it is directly in point to show that a State court has jurisdiction wherever the law gives no authority to detain the person or the thing; and, in order to decide that question, the State court has power to put a construction on the act of Congress under which the officer justifies the imprisonment or detention.

To oppose this array of authorities and reason, Mr. Strong relies on two cases: *Ableman v. Booth,* 21 How., 506, and *Hill's case,* recently decided by the Supreme Court of Alabama. With the decision in *Ableman v. Booth,* 21 How., 506, we entirely concur, and agree with *Taney, C. J.,* that it is "a new and *unprecedented attempt, made for the first time,* by a State court" to assume, not merely an exclusive jurisdiction, but a jurisdiction controlling the District Court of the United States. This decision of the Supreme Court of the United States in no wise impugns the concurrent jurisdiction of the State courts, which has been settled by the authorities and reasoning to which we have referred. Two cases were presented. Booth was arrested under (23) a warrant of the commissioner appointed in pursuance to an act of Congress in respect to fugitive slaves, under a charge of having aided

in the rescue of a fugitive slave; and upon examination before the commissioner, probable cause being shown, he was committed to answer a charge of the United States for a misdemeanor, before the District Court in the State of Wisconsin; he gave bail for his appearance, but was afterwards surrendered by his bail and imprisoned by the marshal; whereupon he obtained a writ of *habeas corpus* from a judge of the State and was discharged. After being discharged, the grand jury found a bill of indictment against him in the District Court, upon which he was tried and convicted and sentenced to pay a fine and be imprisoned. While in prison, under sentence, he obtained a writ of *habeas corpus* from the Supreme Court of the State, and was discharged; whereupon the Supreme Court of the United States had the matter brought before it on a writ of error, and decided that as Booth, in the first case, was legally in custody of the marshal on a warrant of commitment to answer a charge for an indictable offense before the District Court, and, in the second case, was in jail under the sentence of the District Court, the State court had no jurisdiction by *habeas corpus* to take him out of the custody of the marshal, or out of jail and discharge him. This was the *decision* in the case, and if the language used by the Chief Justice in delivering the opinion is construed in reference to the facts of the case before the Court, there is nothing either in the decision or the opinion which denies the concurrent jurisdiction of the State courts. It is true the language is susceptible of a wider meaning, and may afford room for an inference that the learned Chief Justice "goes outside of the record," and expresses an opinion against the jurisdiction of the State courts in all cases where one is restrained of his liberty by an officer or *agent* of the Government of the United States, although the imprisonment be unlawful, and is not authorized by the act of Congress under which the officer pro-
(24) fesses to act; but, in our opinion, such an inference will do great injustice to that able jurist; he surely could not have intended to put "his *obiter dictum*" in opposition to the series of authorities above referred to, without making any allusion or reference to them, or any attempt to controvert the reasoning upon which they rest. However this may be, the decision does not conflict with the concurrent jurisdiction of the State courts, and the *obiter dictum,* if it be one, is not entitled to the weight of an authority, and must be treated simply as the opinion of an able lawyer on a question not presented by the facts before the Court, and entitled only to that degree of consideration which its intrinsic merit will command.

The same remarks are applicable to the case of *Hill and others,* recently decided by the Supreme Court of Alabama. The petitioners claimed to be entitled to exemption by reason of bodily incapacity, but had not been held unfit for military service in the field by a surgeon,

under the rule prescribed by the Secretary of War. We fully concur in the decision of the case before the Court; indeed, during the last spring, I refused the application of two persons who claimed exemption on the ground of being "unfit for military service in the field by reason of bodily incapacity," because by the proper construction of the exemption act, only those persons are exempted who shall be held "unfit for military service in the field by reason of bodily incapacity, under rules to be prescribed by the Secretary of War;" and, according to these rules, it was necessary that the party should be examined by a surgeon, or board of surgeons, appointed for that purpose, and the certificate of the surgeon or board of surgeons was the only evidence of bodily incapacity that could be acted on as evidence of the fact; so, in that case, the parties were not unlawfully restrained of their liberty, but were lawfully in custody of the officer of the Confederate States, under the authority of the acts of Congress, according to their proper construction. Consequently, that decision is not opposed to the jurisdiction of the State courts when by the proper construction of the acts of Congress one who is not liable to conscription, or who is exempt, is re- (25) strained of his liberty against law. That portion of the opinion, and reasoning of the learned Chief Justice, which is not applicable to the case, made by the facts before the Court, has received from us due consideration.

On the argument, this position was taken: Congress may authorize the President to suspend the writ of *habeas corpus:* this would not apply to the State tribunals, and if the State courts and judges have power to issue the writ when a person is imprisoned by an officer of the Confederate States, the suspension of the writ, so far as the tribunals of the Confederate States are concerned, would be vain and nugatory. This reply answers the position: The act of Congress would specify the cases in which the writ might be suspended, or would, in general terms, authorize the President to suspend it in all cases where a person shall be imprisoned by order of the President. And as the acts of Congress made in pursuance of the Constitution are the supreme law of the land, it follows that such an act would be as imperative on the State courts and judges as on the tribunals of the Confederate States.

This position was also taken: It is admitted that should a judicial tribunal of the Confederate States, by its construction of an act of Congress, subject a citizen to imprisonment wrongfully, the State courts, having only concurrent jurisdiction, could not interfere to prevent the oppression; and on what ground can they have any more power to prevent oppression on the part of the executive (if we may suppose such a case) than to prevent oppression on the part of the Confederate judiciary? This reply, we think, is a conclusive answer: The judicial tribu-

nals of the Confederate States have jurisdiction, consequently any adjudication of those tribunals would fix the construction of the act of Congress, and the State courts could not review or reverse its decision; whereas the executive branch of the Government has no judicial power, and any construction it might give to an act of Congress would
(26) be the subject of review, either by the State courts or the Confederate courts; and when a citizen is unlawfully deprived of his liberty or property by an executive officer, acting under an erroneous construction of an act of Congress, the State courts may give redress, as in *Slocumb v. Mayberry, supra.*

This further position was taken, and seemed to be mainly relied on: By the conscription and exemption acts, Congress invests the Secretary of War, and the officers he is authorized to appoint in order to carry them into effect, with a *quasi-judicial power,* by which the enrolling officers have jurisdiction to "hear and determine" all questions which are necessary to be decided in order to ascertain whether a person is liable to conscription, or is entitled to exemption, which of course includes the power to put a construction on the acts of Congress. From the decision of the enrolling officer there is an appeal to the commandant of conscripts, and from his decision there is an appeal to the Secretary of War; and possibly there is an appeal to the President. This grant of judicial power is deduced from the several clauses in the acts of Congress by which the Secretary of War is authorized "to make rules and regulations to carry the acts into effect," and from the nature of the subject, because without exercising judicial power it would be impracticable to execute the conscription acts. This position is not tenable. There are three conclusive objections to it:

1. Congress has no power to make the Secretary of War a judge, or to authorize him to invest his subordinate officers with judicial power, for, as I say in the opinion delivered by me *In re Meroney:* "It is true, for the purpose of carrying acts of Congress into effect, the Secretary of War, in the first place, puts a construction on them, but his construction must be subject to the decision of the judiciary; otherwise our form of government is subverted, the constitutional provision by which the legislative, executive, and judicial departments of the Government are separate and distinct is violated, and there is no check or control over the executive." The circumstances growing out of the sub-
(27) ject now under consideration demonstrate the wisdom of the framers of the Constitution in adopting the principle by which Congress has no authority to exercise judicial power or to confer judicial power upon a department of the executive branch of the Government. The military officers appointed to execute the conscription acts

are naturally prompted to increase the numerical force of the army, and for this purpose so to construe the acts as to embrace as many persons as possible. For this reason, and as a protection to those citizens who are not embraced by the conscription acts, the Constitution provides a third branch of the Government in which is confided the trust of expounding the law and putting a construction upon the acts of Congress, and it follows that Congress has no power to ignore the existence of this third branch of the Government and confer on the executive powers which belong to the judiciary.

2. There is no apparent intention of Congress to confer judicial power on the Secretary of War, and authorize him to establish inferior and superior courts, with the right of appeal to himself. If such had really been the intention, it would have been expressed in plain and direct terms, and the simple fact that the Secretary of War is authorized "to prescribe rules and regulations to carry the acts of Congress into effect," which power he would have had almost by necessary implication, surely cannot, when considered calmly and uninfluenced by collateral disturbing causes, be considered sufficient to confer a power on the Secretary of War totally at variance with every principle of our government.

3. If the Secretary of War and his subordinate officers are invested with this judicial power so as to exclude the jurisdiction of the State courts, for the very same reason it would exclude the jurisditcion of the courts and judges of the Confederate States. No provision is made by which a case can be taken for review before the District Court of the Confederate States from these *military judicial tribunals.* Consequently the judicial department of the Government, both State and Confederate, is set aside, and the liberty of the citizen depends solely on the action of the War Department and its subordinate officers. Can (28) this be so? Surely not.

Our conclusion is that the Court has jurisdiction to discharge a citizen by the writ of *habeas corpus* whenever it is made to appear that he is *unlawfully* restrained of his liberty by an officer of the Confederate States; and that when a case is made out, the Court is bound to exercise the jurisdiction, which has been confided to it *"as a sacred trust,"* and has no discretion and no right to be influenced by considerations growing out of the condition of our country, but must act with a single eye to the due administration of the law, according to the proper construction of the acts of Congress.

BATTLE, J. The question presented for the consideration of the Court is whether the courts and judges of this State have the right to issue writs of *habeas corpus* for the purpose of inquiring into the legality of the detention of persons held in custody by officers of the Confederate

States as conscripts, under certain acts of the Confederate Congress. The constitutionality of those acts has never been judicially questioned in this State, so that the only inquiry is that which I have just stated. My opinion is decidedly in favor of the jurisdiction of the State courts, and I will endeavor to state, briefly, the process of reasoning by which I have been conducted to this conclusion. In the exposition of my argument, it will be more convenient for me to show what were the power and authority of the courts of this State in relation to this matter while it was a member of the United States Government; for no one contends that they have less power and authority under the Confederate Government.

After the American Revolution, North Carolina was a sovereign and independent State. In virtue of that sovereignty and independence, she was vested with many and great powers and prerogatives, and had imposed upon her many and important duties. Among these duties none was higher than that of protecting all her citizens in the full and free enjoyment of life, liberty, and private property. Fully alive to this duty, she, in the fundamental organization of her government,
(29) declared "that no freeman ought to be taken, imprisoned, or deprived of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, sec. 12. And again: "That every freeman, restrained of his liberty, is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed." *Ibid.*, sec. 13. To give a practical effect to these rights, courts were established and judges appointed. Had the State been powerful enough to continue to exist as an independent nation, nothing more would have been wanted to secure the protection of her citizens. But North Carolina, for causes not now necessary to be set forth, found it expedient to unite with other States similarly situated, for the purpose of forming a new and distinct government, and in doing so all these States were compelled to give up a portion of their former respective sovereignties, and to invest the newly created government with them. Hence the adoption of the Constitution of the United States, in which, after the enumeration of all the powers conferred on the General Government, it is declared that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See amendments to Constitution, Art. X. This article was indeed unnecessary, as the General Government had no powers except what the States had granted to it, either expressly or by a necessary implication; but it was, out of abundant caution, very propeerly adopted.

We are now to inquire whether the State gave up any portion of that sovereignty which was necessary to be retained for the purpose of enabling her to discharge the duty of protecting the personal liberty of her citizens.

As the courts and judges furnish the means through which that liberty is to be vindicated, let us see what authority or power has been taken from them. Alexander Hamilton, a member of the convention which framed the Constitution of the General Government, and (30) one of its ablest expounders, declared in No. 82 of the Federalist, p. 377: "That the States will retain all *preëxistent* authorities which may not be exclusively delegated to the Federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is in express terms granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as with the latter. And, under this impression, I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes."

Chancellor Kent, 1 Com., 396, in remarking upon the rule as thus stated in the Federalist, says: "A concurrent jurisdiction in the State courts was admitted in all except those enumerated cases; but this doctrine was only applicable to those descriptions of causes of which the State courts had previous cognizance, and it was equally evident in relation to causes which grew out of the Constitution. Congress, in the course of legislation, might commit the decision of causes arising upon their laws to the Federal courts exclusively; but unless the State courts were expressly excluded by the acts of Congress, they would of course take concurrent cognizance of the causes to which these acts might give birth, subject to the exceptions which have been stated."

Among the causes of which the State courts had previous cognizance, none were more important than those in which they claimed the right to inquire, through the means of writs of *habeas corpus,* into the reasons for the imprisonment of persons alleged to be illegally restrained of their liberty. A jurisdiction so essential to the great privilege of going where one may please—a privilege which every citizen of (31) the State would wish to enjoy as freely as he did the air he breathed—the State courts would hardly have parted with except upon the most urgent necessity. As soon, then, as a citizen of the State was supposed to be illegally restrained of his liberty by an officer of the Gen-

eral Government under color of a law of Congress, we might have expected that the State courts would promptly and anxiously inquire whether they had been deprived of their jurisdiction over the matter. They would ask, had it been taken away by an exclusive authority granted in express terms to the courts of the Union?

If, for instance, it were the case of a soldier unlawfully enlisted into the army, the answer would be in the negative. They would then ask, Was it a case where a particular authority was granted to the courts of the Union, and the exercise of a like authority prohibited to the courts of the States? The answer would be still in the negative. They would then ask, Was it a case where an authority was granted to the courts of the Union, with which a similar authority in the courts of the States would be utterly incompatible? That was considered to be a debatable question, and it was debated with great zeal and ability in almost every State of the Union for many years. The result was in favor of the jurisdiction of the State courts, and was thus announced by Chancellor Kent in the first edition of his Commentaries, and was so published in each successive edition of his work until his death. (See 1 Kent's Com., 400-401.)

"In the case of *Ferguson* (9 Johns., 239) an application was made to the Supreme Court of New York for an allowance of a *habeas corpus* to bring up the party alleged to be detained in custody by an officer of the army of the United States, on the ground of being an enlisted soldier; and the allegation was that he was an infant and not duly enlisted. It was much discussed whether the State courts had concurrent jurisdiction by *habeas corpus* over the question of unlawful imprisonment, when that imprisonment was by an officer of the United States, by color or under pretext of authority of the United States. The Supreme
(32) Court did not decide the question, and the motion was denied on other grounds, but subsequently, *In re Stacy* (10 Johns., 328), the same Court exercised jurisdiction in a similar case by allowing and enforcing obedience to the writ of *habeas corpus*. The question was, therefore, settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other States." See, also, Hurd on Habeas Corpus, Book 2, ch. 1, sec. 5, where many cases are stated which show the correctness of Chancellor Kent's assertion.

To the cases mentioned by Hurd may be added that of *Mason*, decided in this State, and reported 5 N. C., 336. The question of the compatibility of the jurisdiction of the State courts with that of the courts of the United States seems thus to have been proved exclusively by long experience of their harmonious action, and the general acquiescence of the country in it.

But it has been recently said that this is all a mistake, and that the decision of the Supreme Court of the United States in *Ableman v. Booth,* 21 How., 506, is directly opposed to the supposition of a concurrent jurisdiction in the courts of the State with those of the Federal Government. With the decision of that case I entirely concur; and I think that it is clearly shown in the opinion of the Chief Justice of this Court, filed in this case, that the remarks of *Taney, C. J.,* in giving the opinion of the Supreme Court of the United States, cannot fairly be construed to sustain the doctrine contended for by the supporters of the exclusive jurisdiction of the Federal courts.

Another case recently decided by the Supreme Court of Alabama has also been invoked to the aid of those who opposed the concurrent jurisdiction of the State courts. The case is that of *Ex parte Hill,* decided at the last January term of the Court, and reported and published in pamphlet form by Mr. Shepherd, the reporter of the Court. An attentive examination of the case will show that though the decision of the Court is right, it cannot be used as an authority for the (33) purpose for which it has been cited. I will premise that the Court is composed of three judges, of whom only the Chief Justice, A. J. Walker, and Stone, judge, were present, the other judge, R. W. Walker, being detained at home by providential causes. The Court agreed in the conclusion that the judge whose action they were reviewing should not issue the writ of *habeas corpus* upon the petition before him. The Chief Justice put his opinion upon the ground of a want of jurisdiction in the courts of the State, but *Judge Stone* expressly said: "I withhold the expression of any opinion on all those cases in which the party, either by name or as one of a class or sect, stands absolutely and unconditionally exempt from conscription, without any other qualification than that he is of the given class: such, for example, as persons under the age of 18 years or over 45, officers judicial and executive of the Confederate and State Governments, etc." The judge then went on with his argument to show that the petitioner in the case before the Court was not exempt from conscription under the law of Congress. In doing so, it seems to me he, himself, as a member of the Court, was assuming a jurisdiction of the case. If he had the right to construe the act of Congress for the purpose of ascertaining that the party was not entitled to exemption, he had the same right to construe the act, if his construction led to the conclusion that the party was exempt. A power to construe the act at all involves, necessarily, a jurisdiction in the Court. If this be so, then the Court was equally divided upon the question of jurisdiction, and, therefore, there was no decision either way upon that question.

Another case reported in the same pamphlet, and, I suppose, decided at the same term, shows manifestly that the Court assumed and exer-

cised jurisdiction over the cause. The case is that of *Ex parte Stringer.* The party being in custody as a conscript, applied for a writ of *habeas corpus* upon the ground that he was a regular member of the "Christian Church," and had conscientious scruples against bearing arms. *Stone, J.,* delivered the opinion of the Court, in which it was decided
(34) that the acts of Congress known as the "Conscription Laws" were constitutional, and that the petitioner did not come within any of the exemption clauses of those laws. The opinion closes thus: "As the opinion of the entire Court is not yet announced, nor indeed formed, on the broad question of the jurisdiction of the State courts in cases like the present, and as we feel no hesitation in refusing the present application on the merits, we place our refusal on the ground stated above. The prayer of the petitioner is denied."

If the Court had no jurisdiction of the cause, I should like to know how it acquired the power to decide the case upon its merits? From this examination, it is manifest, I think, that neither the *Alabama case* nor that of *Ableman v. Booth* has lessened in any sensible degree the weight of authority in favor of the concurrent jurisdiction of the State courts in cases like that now under consideration.

In closing this opinion, I will take occasion to return my thanks to the counsel on both sides for the aid which they have given to the Court by their able and well considered arguments.

Afterwards, the Court invited an argument from the bar upon this question: Whether this Court, as such, had the power to issue a writ of *habeas corpus,* and to determine the case in open court.

B. F. Moore and P. H. Winston, Sr., argued in favor of the jurisdiction.

George V. Strong, District Attorney of the Confederate States, with whom was Thomas Bragg, contra.

PEARSON, C. J. At the beginning of the term the judges requested the members of the bar to investigate the subject and give their opinions and their reasons for them *pro* or *con,* on this question: Has the Court jurisdiction to issue a writ of *habeas corpus,* returnable to the Court, and thereupon to inquire of the lawfulness of any restraint put on the liberty of a citizen? We have been favored with the opinions of Messrs. Moore and Winston in favor of the jurisdiction, and of Mr. Strong against it, and the subject has been fully discussed. After giving it due consideration, we are of opinion that the Court has jurisdiction. This conclusion is put on two grounds:

1. The Court has jurisdiction by common law. The laws of our State rest for a foundation upon the common law of England. It is an admitted principle of the common law that every court of record of superior jurisdiction has power to issue the writ of *habeas corpus,* which is the great right for the protection of the liberties of the citizen. This "power is an incident to every superior court of record." 3 Wilson, 172; 3 Bac. Abr., title *Habeas Corpus;* notes. It arises from the obligation of the king to protect all of his subjects in the enjoyment of their right of personal liberty, and for this purpose to inquire by his courts into the condition of any of his subjects. As this duty of the king in regard to any of his subjects confers on every court of record of superior jurisdiction the power to issue the writ, as incident to its existence, it follows that the duty of the State of North Carolina in regard to its (43) citizens must confer a like power on all of its courts of record of superior jurisdiction, as incident to their existence; for surely, under our Constitution and Bill of Rights, in which is reiterated the great principle of *Magna Carta,* "every free man restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and such remedy ought not to be denied or delayed," the personal liberty of our citizens must be equally as well protected and secured as the personal liberty of the subjects of the King of England.

Our Constitution vests the legislative power in a General Assembly; the executive power in a Governor, and the supreme judicial power in a Supreme Court; so that the establishment of a Supreme Court, without any words to that effect, necessarily and as an incident to its existence, by force of the Bill of Rights, of the Constitution, and the principles of the common law, invests it with power to inquire by means of this great Writ of Right into the lawfulness of any restraint upon the liberty of a free man, and if in establishing a Supreme Court the Legislature had in express terms denied the Court the power to issue this writ and prohibited it from so doing, such prohibition would have been void and of no effect.

Our conclusion that the Supreme Court has power to issue the writ is confirmed by a consideration of the provisions of the *Habeas Corpus* Act, Rev. Code, ch. 55. It is taken from two English statutes, 31 Charles II. and 56 George III. We have seen that all of the Superior Courts of England had power by the common law to issue the writ, but the *courts* could only act in *term-time,* and a free man might be unlawfully imprisoned in vacation time, so the remedy would be delayed; and to provide the means of speedy inquiry into the cause of imprisonment, it is enacted by 31 Charles II. that every judge of all the courts of

superior jurisdiction, on the application of any person imprisoned upon a criminal charge (unless after conviction), shall in the vacation time, under a penalty of £500, grant a writ of *habeas corpus,* returnable
(44) without delay; and by 56 George III. it is enacted that all of the judges shall, in vacation time, under a like penalty, in the same manner grant the writ on the application of any person in prison or restrained of his liberty for any cause other than a criminal charge. So in England any person, whether imprisoned on a criminal charge or restrained of his liberty for any other cause, had a right during the sitting of the courts, by application to the court, and during the vacation by application to any one of the judges, to have the cause of his being imprisoned or restrained of his liberty inquired into without delay.

Our *Habeas Corpus* Act, as before observed, is taken from these two English statutes, and not only gives power to, but requires, under a penalty of $2,500, any judge of the Supreme or Superior Court in the *vacation time* to issue the writ of *habeas corpus* on the application of any person imprisoned on a criminal charge or otherwise restrained of his liberty.

It is manifest that this act presupposes that both the Supreme and the Superior Courts had power in term-time to issue the writ, and the intention was to extend the remedy to the vacation. This must be a declaration by the Legislature of the fact that both the Supreme and the Superior Courts had power to issue the writ, or we must adopt the absurdity that the Legislature intended to give to a single judge in vacation a power which the Court did not possess in term-time, and we can only account for the fact that while giving this power to the judges in vacation, the Legislature did not in express words confer a like power on the courts, upon the ground that it was taken for granted that our courts, like those in England, already had the power; for under the unrestricted legislative power of the General Assembly it not only had the power, but it was its duty by the Constitution and Bill of Rights to confer this power on both the Supreme and Superior Courts, if the courts did not already possess it.

2. Suppose, for the sake of argument, it was necessary that the power should be conferred on the Supreme Court by statute: we are of
(45) opinion that it is conferred by the act establishing the Court. Rev. Code, ch. 33, sec. 6. It is in these words: "The courts shall have power to hear and determine all questions of law brought before it by appeal or otherwise from a superior court of law, and to hear and determine all cases in equity brought before it by appeal or removal from a court of equity, and shall have original and exclusive jurisdiction in repealing letters patent, and shall also have power to issue writs

of *certiorari, scire facias, habeas corpus, mandamus,* and all other writs which may be proper and necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law."

There are several kinds of writs of *habeas corpus:* inferior ones, to enable the Court to exercise its jurisdiction, for instance, *ad testificandum*—to bring a man out of jail to be a witness; and the great Writ of Right, *habeas corpus,* to bring any citizen alleged to be wrongfully imprisoned or restrained of his liberty before the Court, with the cause of his arrest and detention, that the matter may be inquired of and the party set at liberty, if imprisoned against law. This proceeding is original, and in no wise connected with or dependent on any other matter over whch the Court has jurisdiction.

The queston is: Does the act restrict the power of the Court to writs of the inferior sort, or does it confer power to issue the great Writ of Right?

In support of the first construction, it is urged that the words, *"all other writs* which may be proper and necessary for the exercise of its jurisdiction," show that the writs before specified were intended to be of the same kind, and must have the effect of restricting the power of writs of the inferior sort. Several considerations are urged in reply: In strict grammatical construction, the restrictive words, "which may be proper and necessary for the exercise of its jurisdiction," refer to the last antecedent, *"all other writs,"* so as to make the true reading (supplying the ellipsis), "and shall also have power to issue all other writs which may be proper and necessary for the exercise of its jurisdiction." (46) This further reply is made: If the intention was merely to give power to issue the inferior writs necessary to the exercise of its jurisdiction (which power every court in fact has, by implication), it was sufficient to say, "and the Court may issue all such writs as may be necessary for the exercise of its jurisdiction." Instead of this simple clause immediately following the grant of original jurisdiction to repeal letters patent, comes this formal announcement: "and shall *also have power* to issue writs of *certiorari, scire facias, habeas corpus, mandamus.*" Why this formal announcement of substantive grant of power? And why are there four writs particularly named, if the object was merely to authorize the Court to issue the inferior sort of writs?

In questions of this kind, the Court is not confined to the narrow field of the import of words, construction of sentences and rules of grammar, but may draw to its aid considerations of a more comprehensive nature, and if due weight is given to the power of the Legislature—its duty, the object in view and the nature of the subject—the conclusion is irresistible that it was the intention to give the Court power to issue the great *"Writ of Right."*

The power of the Legislature in respect to the jurisdiction it was about to confer on the Supreme Court then to be established was unlimited—it had the same power to confer original as appellate jurisdiction.

It was the duty of the Legislature, under the Bill of Rights and the Constitution, to provide in the most ample manner for the protection of the liberty of "all free men." The object in establishing a Supreme Court was to provide the tribunal best calculated to secure uniformity and correctness of decision in respect to all questions involving "rights of persons" and "rights of things." This it was supposed could be accomplished by a court composed of three judges. From the nature of the subject, in actions at law and indictments where the facts must be tried by a jury, it was seen to be impracticable for the Supreme Court
(47) to exercise original jurisdiction. Hence, it was deemed expedient that all actions and indictments should originate in the lower courts, where the facts can be found, so as to present to the Supreme Court only questions of law by way of appeal. In suits in equity where, although the facts are sometimes complicated, the mode of trial is by the court, it was deemed expedient that the proceedings should originate below and then be brought up by appeal or removal after being set for hearing. So, in respect to these remedies, only appellate jurisdiction is conferred.

There remained a fourth distinct and important subject of jurisdiction, to wit, the writ of *habeas corpus*. From its nature no complicated state of facts can be presented, so that consideration presented no objection to the grant of original jurisdiction to the Supreme Court. While, on the other hand, as all of the judges of the Supreme and Superior Courts had power to issue such writs and decide upon the lawfulness of the imprisonment, in order to prevent conflict of decision and utter confusion and chaos, and to give uniformity and correctness to decisions involving the liberty of the citizen, the necessity of conferring original jurisdiction on the Supreme Court to issue the writ and decide on the right was patent; and, if the statute in question does not confer the power, no reason can be assigned for the omission, unless it was the opinion of the Legislature that the power would attach to the Court as soon as it was established, as an incident of its existence, upon the principles of the common law and Bill of Rights.

The Legislature had full power. It was its duty; there was a patent necessity; the object in establishing the Supreme Court could not otherwise be fulfilled, and no objection to it could be suggested. It follows that the Court has the power, either on the ground that the statute confers it or the omission to do so is a legislative declaration that the Court possesses the power as incident to its existence.

On the able argument with which we have been favored by Mr. Strong, he called attention to the fact that the act of Congress, 1789, establishing the Supreme Court of the United States, used nearly the (48) same language as the act of the Legislature establishing the Supreme Court of this State, and that in the construction of the act of Congress the Supreme Court of the United States have decided that the Court cannot issue the writ of *habeas corpus* except where the writ is incident to an appellate jurisdiction.

That is true, and it seems to account for the general impression which has prevailed in this State against the power of the Court. The fact that so many applications have been made to the judges for writs of *habeas corpus* during the last few months has directed attention to this subject; and a closer and more serious investigation than the subject had before received results in the conclusion that the Court had the power, and that the erroneous impression which had prevailed is to be ascribed to the circumstance that due weight had not been given to the difference between the two courts in regard to the *sources* from which jurisdiction may be derived. The Supreme Court of the United States can derive no jurisdiction from the principles of the common law. Its jurisdiction must rest solely on acts of Congress, and the power of Congress to confer jurisdiction rests on the Constitution of the United States. It can have no power except that which is conferred by the Constitution, and by it the power to establish a Supreme Court is restricted to a court of *appellate jurisdiction,* except in cases affecting ambassadors, etc. Art. III, sec. 2.

The very reverse of all this is the case in respect to the Supreme Court of the State. It may derive its jurisdiction from the principles of the common law. The power of the Legislature to confer jurisdiction is unlimited, and there is no reason why it should not, if deemed expedient, have established a Supreme Court with full original jurisdiction, or one with jurisdiction partly original and partly appellate.

In the opinion of *Judge Marshall, Ex parte Bollman,* 4 Cranch., 98, 2 Curtis, 24, a full and critical examination is made of the act of Congress, and he comes to the conclusion that by its true construction it would confer on the Supreme Court jurisdiction to issue the (49) writ of *habeas corpus,* but for the fact that it was to be construed in reference to the limited power of Congress. Our act, on the contrary, is to be construed in reference to the unlimited power of the Legislature, and in this view the opinion of *Judge Marshall* strongly supports the conclusion to which we have arrived.

Mr. Strong also cited *Jones v. McLaurin,* 52 N. C., 392. That was a *scire facias* against bail, and the Court decide that it has not jurisdiction, because the *scire facias* as there used is, in effect, an action of debt, in

respect to which the Court has only appellate jurisdiction. The question we have before us is plainly distinguishable. The *habeas corpus* is totally distinct in its nature from any action at law, or proceeding in the nature of an action or suit in equity, or indictment, and is put by us on grounds peculiar to itself.

Our conclusion is that the Court has power to issue writs of *habeas corpus,* returnable to the Court, and thereupon to inquire of and decide upon the lawfulness of any restraint put on the liberty of a citizen. This opinion does not affect the question of the jurisdiction of a State court where the arrest is justified on the authority or by color of an act of the Congress of the Confederate States. That question may be the subject of future consideration.

Afterwards, the cause was taken up on its merits.

B. F. Moore, with whom was Henry C. Jones, for petitioner.

G. V. Strong, Confederate States District Attorney, with whom was Thomas Bragg, contra.

PEARSON, C. J. For the reasons given by me *In re Irvin* and *In re Meroney,* I am of opinion that the petitioner is entitled to exemption.

In those cases (see note*) I considered the subject fully, although
(60) I was not aided by the argument of counsel. The subject has been fully argued before the Court, and I have reviewed my opinion previously given, with an anxious wish to decide the question

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*Note—IN RE IRVIN.

The facts are: John N. Irvin, being liable as a conscript under the act of April, 1862, offered in July, 1862, one Gephart as his substitute. Gephart was 36 years of age, and in all respects a fit and sufficient substitute for the war, and was accepted by Major Mallett, commander of conscripts, who thereupon gave Irvin an absolute discharge.

The petitioner avers he is advised that the conscription acts are unconstitutional; but it is not necessary for the purpose of this case to decide the question.

It is admitted that, under the regulations of the War Department, Major Mallett had full authority to accept substitutes and give discharges; but it is insisted that Irvin's discharge was afterwards, by the action of Congress, rendered of no effect; for the act of September, 1862, makes all persons between the ages of 35 and 45 liable as conscripts; so Gephart became liable as a conscript, by reason whereof he was no longer a sufficient substitute; and thus Irvin's discharge had no further effect. If one who is at the time liable as a conscript should be offered and accepted as a substitute, it may be conceded the discharge obtained in that way would be void, because no consideration is received by the Government, and the officer exceeds his au-

according to the proper construction of the act of Congress. The (61) argument and my consultation with *Judge Battle* confirm my judgment as to the correctness of the views taken by me in those cases, and I refer to the opinions filed by me as the ground of my (62) present conclusion.

BATTLE, J. My opinion concurs with that of the Chief Jus- (63) tice, that a person liable to military service as a conscript under the act of April, 1862, and who, by virtue of section 9 of that act, regu-

thority. So, if after the conscription act of April one who is under 18 years of age is offered and accepted as a substitute, it may be conceded that the discharge would only be of effect until the substitute arrives at the age of 18; for as it was known to the parties that the substitute himself would become liable at that date under a law then in force, it will be presumed that the contract and discharge were made in reference to that state of things, and after the substitute arrives at the age of 18 the consideration fails, and the officer had no authority to grant a discharge for a longer time.

But in our case there was at the time no law in force under which it was known to the parties that the substitute would afterwards be himself liable as a conscript; on the contrary, he was in all respects fit and sufficient substitute for the war, and was accepted as such, and an absolute discharge given, so there was full consideration received by the Government and full authority on the part of the officer. The question is, Does the subsequent action of Congress, to wit, the act of September, 1862, by its proper construction and legal effect, repudiate and make void the contract and discharge?

The construction of acts of Congress, so far as the rights of citizens, as distinguished from the military regulations, are concerned, is matter for the courts.

Whether Congress has power to pass an act expressly making liable to conscription persons who have heretofore furnished substitutes and received an absolute discharge, is a question not now presented, and one which, I trust, public necessity never will cause to be presented, as it would violate natural justice and shock the moral sense.

In my opinion, the act of September, 1862, by its proper construction, does not embrace men who were before bound, as substitutes, to serve during the war. It is true, the act in general words gives the President power to call into military service all white men, residents, etc., between the ages of 35 and 45; but this manifestly does not include men who are already in military service for the war, for this plain reason: there was no occasion to include them—they were bound before; and the true meaning and intent of the act is to increase the army by calling into service men who were not before liable. Suppose the act contained a provision giving a bounty of $500 to all men called into service under its operation, or providing that such conscripts should not be ordered out of their own respective States, would it be imagined that men who had previously volunteered for the war, or were substitutes for the war, would be entitled to the extra bounty, or to the special privilege of remaining in their own States? Certainly not, because there was no need of legislation in order to make soldiers of them.

A decent respect for our lawmakers forbids the courts from adopting a construction which leads to the conclusion that it was the intention, by the

larly procured a discharge by furnishing a proper substitute, cannot be again enrolled as a conscript under the amendatory act of September, 1862, though such substitute may have been, when received, between the ages of 35 and 45 years.

Cases like the present have been so often and so recently decided in the same way by different judges, and the reasons upon which the decisions were founded have become so generally known through the medium of the newspapers, that it is unnecessary for me to do more than to state briefly my conclusions on the subject.

(64) Persons between the ages of 18 and 35 years, who have furnished substitutes, are certainly not within the meaning of the

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use of general words, to include within the operation of the act substitutes who were already bound for the war not for the purpose of affecting them, but for the indirect purpose of reaching parties who had furnished substitutes, and in that way asserting a power which is at least doubtful, and certainly involves repudiation and a want of good faith.

As the conscription act does not include substitutes, the conclusion that Gephart is no longer sufficient as a substitute, and that Irvin's discharge is of no further effect, fails.

It is considered by me that John N. Irvin be forthwith discharged, with liberty to go wheresoever he will.

It is further considered that the costs of this proceeding, allowed by law, be paid by James Irvin (the officer arresting the petitioner), to be taxed by the clerk of the Superior Court of Rockingham County, according to the statute in such cases made and provided.

The clerk will file the papers in this proceeding among the papers of his office. R. M. PEARSON, Ch. J. S. C.

At Richmond Hill, 9 July, 1863.

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*IN RE MERONEY.

The facts of this case bring it within the decision *In re Irvin, ante,* 60. That decision is put on the ground that the conscription act of September, 1862, does not embrace substitutes; and so the questions growing out of the regulations prescribed by the War Department, "where a substitute becomes subject to military service, the exemption of the principal shall expire," was not presented.

It seems to me that any one accustomed to judicial investigation cannot read the act and fail to come to the conclusion that it does not embrace volunteers and substitutes who were already bound to serve for the war. A different construction is excluded by the words used, and is inconsistent and repugnant to its provisions.

The President is authorized "to *call out and place in military service* all white men, etc." The words "*call out*" and "*place in military service*" are not applicable to men who are already in the military service for the war; no legislation was necessary to make soldiers of them. If only a part is called for, provision is made for taking "those who are between the age of 35 and

act of September, 1862, because that act is a call, in express terms, for persons between 35 and 45 years of age. Volunteers and substitutes between the latter ages are not embraced, because, being already in the military service, they cannot, with any sort of propriety of language, be said to be called out and placed in that service, nor can it for a moment be believed that such volunteers and substitutes were intended to be taken from the companies and regiments of which they were already members and sent off to fill up other "companies, battalions, squadrons, and regiments." Not being liable to be called into service under this act, the substitutes cannot be taken away from their principals by force of

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any other age less than 45." Can this be applicable to volunteers and substitutes? It is further provided that "those called out under this act, and the act to which it is an amendment, shall be first and immediately ordered to fill to their maximum number the companies, battalions, etc., from the respective States, etc., the surplus, etc." This supposes that the volunteers and substitutes composing the companies are to remain in the field, and the companies and battalions are to be filled up by those who are ordered into service under the conscript act.

Again, how can the regulation that all conscripts are to be sent to camps of instruction be applicable to volunteers and substitutes? Are they to be taken from the army and sent to camps of instruction? Certainly not, because they are not called out and placed in the military service under the conscription acts, but are bound for the war by the force of the original contracts of enlistment.

I am informed that, soon after the conscription act of April, a regulation was made for the discharge of all volunteers for the war who were over the age of 35; and under it many were discharged; but the regulation was revoked, the War Department becoming satisfied that the act by its true construction did not apply to men who were bound by the terms of enlistment to serve for the war. This is the same construction given by me to the act. Under it all volunteers and substitutes, whether over or under 35 or 45, are to continue in service, because they are not embraced by the conscription acts. I can see no reason why this construction should not be followed to the further consequence, that as substitutes are not embraced by the conscription acts, and do not become subject to military service as conscripts, the fact necessary to the application of the regulations of the War Department does not exist; consequently, the question that may grow out of that regulation is not presented.

It is said the arrest of Meroney was ordered in disregard of the decison *In re Irvin*, because the Secretary of War does not consider the construction given to the conscription act of September "a sound exposition of the act." The inquiry naturally suggests itself, Who made the Secretary of War a judge? He is not made so by the Constitution; Congress has no power to make him a judge, and has, by no act, signified an intention to do so. It is true, for the purpose of carrying acts of Congress into effect, the Secretary of War, in the first place, puts a construction on them, but his construction must be subject to the judiciary; otherwise, our form of government is subverted—the constitutional provision by which the legislative, executive, and

the act, so as to leave the latter liable again under the act of April, 1862, as having no person substituted and serving in their stead. If such principals can be made liable, then it must be on account of some condition, either expressed or implied, contained in the discharges. The only pretense for an express condition is a recital in their discharges that
(65) they are given under the orders and regulations of the War Department. The regulations of that department, made at the time when the discharges were granted, were that the substitute should not be liable to military duty, and should be found, upon an examination by a surgeon or assistant surgeon of the army, to be sound and in all respects fit for military service. See General Order, No. 29. The Secretary of

judicial departments of the Government are separate and distinct is violated, and there is no check or control over the executive.

According to the view taken by me, it is not necessary, for the purpose of this case, to decide upon the legal effect of the regulations prescribed by the Secretary of War in regard to receiving substitutes; but as those regulations are relied on as authorizing the arrest of the petitioner, it is proper for me to say that many objections entitled to consideration may be urged to the power of the Secretary of War to make the regulations in question. The enactment under which it is assumed that the power to make a regulation that "in all cases where a substitute becomes subject to military service the discharge of the principal shall expire," comes within the scope of the power confided by Congress, in section 8 of the conscription act of April, 1862, in these words: Persons not liable for duty may be received as substitutes for those who are, *under such regulations as may be prescribed by the Secretary of War.*

The obvious construction of this section seems to be: substitutes may be received on two conditions, one implied, to wit, the substitute must be an able-bodied white man, fit for military service in the field; the other expressed, to wit, the substitute must be a person who is not liable to military duty under the existing law; the time, place, and manner of *receiving substitutes*, in which is included the mode of deciding whether he is an able-bodied white man not liable to duty, to be regulated by rules prescribed by the Secretary of War.

If the regulation in question be confined to cases where the substitute, being under the age of 18, afterwards arrives at that age and *becomes* liable to military duty, it accords with the provision of the act. But if it be extended to cases where the substitute is not at the date of the contract of substitution liable to duty, but is afterwards *made liable* by a subsequent act of Congress, it departs from and goes beyond the provisions of the act by adding a third condition, and the power to do so may well be questioned; especially where the regulation as well as the act of Congress which is supposed to give it application are both subsequent to the contract of substitution and the discharge is absolute on its face. For illustration, suppose a regulation to be prescribed that in all cases where the substitute is killed or disabled, or where he deserts, the discharge shall expire, which stand on the same footing with the regulation that the discharge shall expire if the substitute is made liable

War had no power afterwards to make an order to have a retrospective operation to affect rights already attached. The Legislature may pass retrospective laws, but it is very certain that no other department of the Government can. I conclude, then, that the discharges were not subject to any express condition of the kind contended for.

Neither can any such condition be implied. If any can be implied, it can only be upon the ground that the conditional event was in the contemplation of the parties at the time the discharge was given. When the act of April, 1862, gave to conscripts the right to employ, as substitutes, persons not liable under that act to perform military duty, could it have been contemplated by the parties that the substitutes were to be taken away by another act of Congress, to be passed in a few months afterwards? Such a contingency was not so probable as that the substitute might desert, or die of disease, or be killed in battle; and yet no person contends that these contingencies should be regarded as conditions implied in the discharges. The truth is, it was a *casus omissus,* for which Congress neglected to provide, and it is too late for the War Department to attempt to remedy the mischief by assuming to legislate under the name of regulations.

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to duty by a subsequent act of Congress, for all add a third condition to the two imposed by the act, and it may be urged against them that the power to add other conditions than those contained in the enactment is an *act of legislation* which Congress has no right to delegate to a department of the executive branch of the Government, and of course an intention to do so can only be inferred from plain and direct words, and the words, in this instance, are satisfied by the construction stated above.

The same question of construction is presented *In re Huie*, from Cabarrus County, under a clause in the exemption act which exempts all persons who shall be held unfit for military service in the field *under rules to be prescribed by the Secretary of War*, where the power is confined to making rules to ascertain whether the person is or is not fit for military service in the field, and it is decided that the act does not confer power to prescribe a rule under which a citizen may be taken as a conscript, although held unfit for military service in the field, on the ground that he may answer some purpose in the hospitals, etc. These instances tend to show the wisdom of the Constitution in not confiding legislative, judicial, and executive powers to any one department.

I am of opinion that the petitioner is entitled to exemption.

Therefore, it is considered by me that P. P. Meroney be forthwith discharged, with leave to go wherever he will. It is further considered that the costs of this proceeding, allowed by law, to be taxed by the clerk of the Superior Court of Rowan County, according to the act of the General Assembly, be paid by Jesse McLean (the enrolling officer).

The clerk will file the papers in this proceeding among the papers in his office and give copies. R. M. PEARSON, Ch. J. S. C.

At Richmond Hill, 4 July, 1863.

Whether Congress has the power to apply a remedy, and whether it is expedient for it to exercise that power, if it has it, is a question which it is not my province to decide. I have discharged the only duty which devolved on me in this case, when I say I think that the petitioner is entitled to his discharge.

PER CURIAM. Petitioner discharged, with costs against the officer seizing him.

Cited: In re Bradshaw, post, 383; *In re Sowers, post,* 386; *Walton v. Gatlin, post,* 318, 323; *Harkins v. Cathey,* 119 N. C., 663; *McDonald v. Morrow, ib.,* 672.

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(66)

IN THE MATTER OF SOLOMON N. GUYER, A BLACKSMITH.

1. Soldiers who had been "placed in the military service of the Confederate States in the field," under the conscription act of April, 1862, and were so at the time of the passage of the exemption of 11 October, 1862, were *held* not to be entitled to exemption under that act.

2. But where a blacksmith, after being so enrolled, was at the time of the passage of the exemption act not so placed in service in the field, but was detailed to work on a Government contract, and did so work at his trade, at accustomed wages, not having received any bounty, pay, rations, or clothing up to that time, it was *held* that he was entitled to exemption.

THE petitioner was a blacksmith, and had worked at the trade for ten years. In May, 1862, he quitted his shop and went to work in the armory of one B. Weathersbie, who was engaged in working for the State of North Carolina. On 8 July he was enrolled as a conscript, and shortly thereafter was detailed at Weathersbie's request to work in his armory, where he remained until the contract was abandoned in the latter part of March, 1863. From the last of March to 19 May the petitioner was in the service of Captain Coffin, in command of the armory, and was working there at his trade of a blacksmith; whence he was directed by Coffin to report to Lieutenant Anderson, enrolling officer for the Sixth Congressional District of North Carolina, which he did as soon as he could find him, to wit, on 22 May, 1863. He then filed his affidavits for exemption, and the proofs necessary to sustain his application, and insisted on his discharge, but this was refused, and he was sent to the camp of instruction near Raleigh, where he was detained, and is still detained, by the order of Col. Peter Mallett, commander of the said camp of instruction. Up to the time of the arrival of petitioner at the camp, he had never received any bounty, pay, rations, or clothing; but since then, he received a few articles of clothing (which are speci-

fied in the proofs) and his daily subsistence. For these causes he applied for a writ of *habeas corpus* to this Court, and on its return, with the cause of his detention, the cause was argued by (67)

Gilmer and Scott for petitioner.
Strong, District Attorney of Confederate States, and Bragg, contra.

PEARSON, C. J. For the reasons given by me in my opinion, *In re Nicholson,* the Court is of opinion that the exemption act of 11 October, 1862, applies as well to the conscription act of April, 1862, as to the conscription act of September, 1862, and the reasoning in *Nicholson's case* is now referred to as the ground of the decision of the Court on that point.*

In regard to the proper construction of the exemption act, in (68) its application to the conscription act of September, 1862, the Court is not called on to express an opinion, as there is no case before it which involves the question.

*Note—IN RE NICHOLSON.

The facts are: Nicholson is 33 years of age, is a miller and millwright, skilled in both trades. He was enrolled as a conscript 8 July, and was ordered into service 15 July, 1862. Between 8 and 15 July he applied to the commandant of conscripts for a special exemption as a miller; this was refused. He, nevertheless, failed to report, and continued at his trade as a miller, as he had habitually done for many years before. In August, 1862, he went into the armory of Lamb & Co. expecting to be detailed, but left before the detail was made and set in to work for one Shipman, as a millwright, where he worked until 1 January, 1863, when he went to Virginia, and set to work as a millwright for one Lamb, where he remained actually employed at his trade until March, when, coming into this State on a visit to his family, he was arrested as a recusant conscript. He has made the affidavit as required by the exemption act.

In the matters of *Mills*, a shoemaker, and *Angel*, a wagonmaker, I decided that the exemption act, 11 October, 1862, applied as well to the conscription act of April as to the conscription act of September. I see no reason to change my opinion. The act adds to the list of exemptions contained in the exemption act of April; uses general words applicable to both conscription acts, "all shoemakers, tanners," etc.; makes no distinction between persons under or over 35, and repeals the former exemption act, showing obviously that the intention was in reference to the conscription act of April, to put the last exemption act in place of the act repealed, and make one exemption act answer for both conscription acts. If this be not so, there are no exemptions between the ages of 18 and 35, and governors of the States, judges, members of the Legislature, etc., under the age of 35, are liable as conscripts; nay, all persons, although "unfit for military service by reason of bodily or mental infirmity," are liable as conscripts, if under the age of 35. Such a construction is inadmissible. It was said by Mr. Scott, on the argument, "This difficulty is met by the power given to the President to make special exemptions." But it could not have been the intention to make governors, judges, and

In regard to the proper construction of the exemption act in its application to the conscription act of April, 1862, the Court is of opinion that no person is embraced by its provisions so as to be entitled to exemption as a shoemaker, tanner, etc., who was at the date of its passage in the army as a soldier; that is, who had, prior to the passage
(69) of the act, been *placed* in the military service of the Confederate States in the field. But that all "shoemakers, tanners," etc., under the age of 35 years who had not been, prior to the passage of the act, "placed in the military service of the Confederate States in the field," are embraced by its provisions, and are entitled to exemption, whether the fact of the party's not having been placed in military service in the field be owing to his not having arrived at the age of 18 years, or to his not being in the State, or to his not having been enrolled, by an
(70) oversight or neglect of duty on the part of the enrolling officer, without default on the part of the party himself (which is one of

members of the Legislature dependent upon the pleasure of the President. The object was to entitle them to exemption *by law*, and *not by favor*.

It was also said, if the act applies to the conscription act of April, it must have a retroactive effect, and its construction will present many difficulties. That is true; but when the clear intention of the lawmakers that the one act should apply to the other appears, it becomes the duty of the judges to adopt such a construction as will make them fit in the best way they can be put together.

In the matters of *Mills* and *Angel* it was not necessary to fix on the time when the act requires the party to be actually employed at his trade, for they were not ordered into service until after its passage, and were, without default, actually employed at their trades, both at the passage of the act and when ordered into service, and, taking either date as "the time," were entitled to exemption.

In this case the point is directly presented. If "the time" be when the party is ordered into service, then Nicholson was entitled to exemption, and his subsequent conduct in keeping out of the way and going to Virginia to avoid an arrest does not prejudice his right, it being induced by the unauthorized act of Government officers in attempting to arrest him, although the more commendable course would have been to insist openly on his right. If, however, "the time" be when the exemption act passed, then he was liable as a conscript, and although actually employed at his trade, cannot claim, for that reason, to stand on higher ground in this respect than if he had been in the army, because of the maxim, "No man shall take advantage of his own wrong."

The clause under consideration does not (except indefinitely, in the proviso) refer to the time when the person claiming to be exempted must be actually employed at his trade. It makes no exception of persons then in service or who had been ordered into service, and puts the stress on the fact of actual employment. It is in these words: "All shoemakers, tanners, etc., skilled and actually employed in the said trades, habitually engaged in working for the public, and whilst so actually employed, provided said persons shall make oath in writing that they are so skilled and actually employed

the cases before us), or, if enrolled, that he was not ordered into service by similar laches of the officer (which is another case before us), or to the fact that when enrolled the party was detailed to work as a shoemaker, or blacksmith, or wagonmaker, in the employment of a Government contractor, the person so detailed receiving no bounty, or pay, or rations, or clothing, as a soldier, but receiving only his (71) accustomed wages as a journeyman tradesman, of which kind is the case now under consideration, and several other cases before us, or whether they had been allowed to remain at home "as a reserve," receiving no pay as soldiers, under the provisions of the sixth section of the conscription act of April. In other words, we draw the dividing line between those who had become *soldiers* and those who had not *left the walks of private life,* and were *actually employed* in their respective trades at the date of the passage of the exemption act.

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at the time, at their regular vocation, in one of the above trades, which affidavit shall be only *prima facie* evidence of the facts therein stated."

In reference to the conscription act of September, it is clear "the time" is when the party is ordered into service; that being the time when the affidavit is called for to enable him to claim exemption. But in reference to the conscription act of April, it is not so easy to fix the time. The difficulty arises from the fact that the exemption act is applicable to both conscription acts, one of which was passed six months before the other, and after it had, in a great measure, been carried into effect. In my opinion, "the time" is the same in reference to the act of April as in reference to the act of September, to wit, when the party is ordered into service. Had the time of the passage of the act been intended, it is reasonable to presume that the words would have been "*now* actually employed," as in the clause just preceding, in respect to physicians, "at *this* time." The policy of exempting shoemakers, etc., being not to favor the individual, but to subserve the public interest, which was greatly prejudiced by taking tradesmen from their occupations, it was immaterial whether the tradesman was under or over the age of 35 years.

The material inqury is, Was he working for the public at the time? which naturally refers to the time when he was called off from his trade—taking the distinction between *volunteers*, who of their own accord had quit their trades, and *conscripts*, who had been taken from their trades by act of law, and should be considered in reference to the intended exemption as still at their trades. This construction is called for by the rule, "the same words in the same statute ought to have the same meaning," and as in reference to the act of September, the meaning certainly is when the party is ordered into service, the same words cannot have a different meaning in reference to the act of April. Had it not been the intention to include all shoemakers, etc., without regard to age, this result would have been avoided by adding the words: *"Provided,* no shoemaker, etc., shall be exempted who is now in service, or has been ordered into service." So the question is narrowed to this, Can the courts add these words to the act? I see no ground on which the omission, if it be one, can be supplied by construction. It was urged by Mr. Scott that the public interest required as many soldiers as could be raised; therefore an intention to exempt any who were already in service, or

The task of making an application of the exemption act to a conscription act, which was passed six months before, and had, in a great measure, been carried into effect (as I say in *Nicholson's case*) is a very difficult one. It is hard to make the one fit the other. The Court has been aided by very full and able arguments at the bar, and after weighing the suggestions offered pro and con, and taking into consideration the act of 9 October, 1862 (two days before the exemption act), which authorizes the President to detail *from the army* persons skilled as shoemakers (not exceeding two thousand), to make shoes for the soldiers, to which our attention was for the first time called by Mr. Bragg, and of which
(72) neither member of the Court was before apprised, we have come to the conclusion stated above.

On the one hand, a construction confining the operation of the exemption act to the few persons who may have arrived at the age of 18 years

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who ought to have been in service, can only be inferred from plain and direct words. This was met by Mr. Gilmer with the suggestion that the public interest required that tradesmen should not be taken from their vocations, and that those who have been taken off by act of law should be allowed to return; as it was seen the public interest had been prejudiced, and it was a matter of difficulty for the people to get a pair of shoes or have a plow sharpened, etc., and that the benefit of a matter of doubt, if there be one, arising from a want of precision in an act of Congress, should be given to the citizens rather than to the Government.

Giving to these suggestions proper consideration, the inquiry, whether the intention was to consult the public interest in the army or at home, can only be answered by the words used. The clause under consideration does "in plain and direct words" exempt all shoemakers, etc., and does not except those who are in the army, or ought to have been in the army, at the passage of the act, and the indefinite words in the proviso, "actually employed at the time," cannot, by any recognized rule of construction, make the exception.

And it does "in plain, direct words" repeal the exemption act of April. This fact has an important bearing on the question of construction, for if it was not the intention that the additional exemptions should apply to persons under 35, why repeal that act? And if such was the intention, the only way in which it can be carried out, and the exemption act be made to fit the conscription act of April (with a few exceptionable cases like *Mills* and *Angel*), is to give it relation to the time when the party was ordered into service and taken from his trade.

Whether shoemakers, etc., who were in service as conscripts when the act passed can *now* claim exemption, or would be taken to have waived the right, by acquiescence, in afterwards receiving pay, etc., is not the question now presented.

Nicholson certainly has done no act that can amount to a waiver of his right; he has not received the State bounty, has received no pay, and has done nothing from which acquiescence can be implied.

It is considered by me that Nicholson is entitled to exemption, and that he be forthwith discharged, with leave to go wherever he will. It is also considered that Lieutenant Anderson (the enrolling officer) pay the costs of

after the passage of the conscription act, and the few exceptionable cases where persons under 35 years of age had by the omissions of the Confederate officers not been enrolled, would certainly be restricting it too much; on the other, to extend its operation to all shoemakers, tanners, etc., who were in the army would seem to carry it too far, and the act referred to (9 October), taking men *out of the army,* by detail, to make shoes for soldiers (restricting the number to two thousand), is inconsistent with the fact that two days thereafter it was the intention to take "all shoemakers, tanners," etc., from the army and send them home to work at their trades. So that broad construction is excluded. The same act furnishes proof that the members of Congress were aware of the fact that the number of artisans working at their respective occupations was not enough to supply the necessities of the public. From this we arrive at the conclusion, without going into a particular examination of the words used, that all soldiers were to continue in service, and all who were at home, *actually employed* at their trades, should remain there, and be exempted as long as they should continue to work at their trades at prices not exceeding 75 per cent. on the cost of production.

This construction varies in some measure from that given by me to the act in the opinion delivered *In re Nicholson;* but the difference does not affect any case now before us; the distinction being that in my opinion, *then,* soldiers were embraced by the exemption act, but those who failed to make their election, and afterwards received pay, rations, clothing, etc., were to be considered as having waived their right to exemption; whereas, in the opinion of the Court, in which I fully concur, soldiers or persons who had been *placed in the military service in the field* were not embraced by the exemption act. Its practical (73) application to the only case of the kind before us (*In re Dixon*) results in the same way. He was under 35; was in the army as a conscript when the exemption act passed; had received the bounty, pay, etc., of a soldier afterwards, up to November, 1862, and was not entitled to exemption: whether on the ground that the exemption act did not embrace his case, or, if it did, that he had waived the right, makes no difference, as in either view he was to be remanded.

PER CURIAM. Let the petitioner be discharged, and recover his costs.

Cited: In re Wyrick, post, 376, 378; *In re Bradshaw, post,* 382; *In re Sowers, post,* 387; *McDonald v. Morrow,* 119 N. C., 672.

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this proceeding, allowed by law, to be taxed by the clerk of the Superior Court of Guilford County, according to the statute in such a case made and provided.

The clerk will file the papers in this proceeding among the papers in his office, and give copies to Nicholson and Lieutenant Anderson.

At Richmond Hill, 4 May, 1863. R. M. PEARSON, Ch. J. S. C.

IN THE MATTER OF BARFIELD GRANTHAM, A SHOEMAKER.

The conscription act requires that the trade on which the claim of a mechanic to exemption is based shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times.

THE facts are stated in the opinion of his Honor.

Everett for petitioner.
Strong and Bragg contra.

BATTLE, J. The petitioner claims to be exempt from military service as a conscript, upon the ground that he was a shoemaker. The testimony offered in support of his claim shows that for some years past he had a small farm on which he worked during the spring and summer, but during fall and winter he made shoes for his own family and for some of his neighbors. In August, 1862, he commenced, and continued to do more work in the business of making shoes than he had been previously accustomed to do, though it does not appear that he devoted himself exclusively to that occupation. This proof is not, in our (74) opinion, sufficient to establish the right to the exemption for which the party contends. The conscription act requires that the trade upon which the claim of a mechanic to exemption is based shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times. A mechanic is excused from military service, not for his own ease and as a favor to himself, but for the benefit of the public, whom, it is supposed, he can serve better by working at his trade than in any other way. He must stand towards the community upon the same footing that a common carrier does, so that all persons who may have occasion to claim the aid of his services may, at all seasonable times, be able to obtain it.

The petitioner has not shown himself to be within the limits of this rule, and his application for a discharge is therefore rejected.

PER CURIAM. Application rejected.

Cited: In re Cunningham, post, 396; *McDonald v. Morrow,* 119 N. C., 672.

IN THE MATTER OF MOORE W. DOLLAHITE, A SCHOOL TEACHER.

A schoolmaster whose occupation had been suspended for twelve or eighteen months, within the term required for his previous pursuit of the business, is not entitled to an exemption under the act of Congress passed on 11 October, 1862.

THIS was a petition for a *habeas corpus* by the plaintiff, who is a citizen of Person County. The facts of the case appear from the opinion of the Court.

Winstead for petitioner.
Strong, District Attorney of Confederate States, and Bragg, contra.

BATTLE, J. The petitioner claims to be exempted from military service in the army of the Confederate States upon the ground of being the teacher of a school. The clause of the exemption act (75) which relates to his case is as follows: "all presidents and teachers of colleges, academies, schools, and theological seminaries who have been regularly engaged as such for two years previous to the passage of this act," which was 11 October, 1862. He states that he had been engaged as a teacher for ten or twelve years before the passage of the conscript act, but that his school had been suspended for twelve or eighteen months in consequence of the troubled condition of the country. He states, further, that at the time of his enrollment he was again engaged in teaching a school.

It seems from the papers which accompany the petition that the case of the petitioner had been referred by the commandant of the camp of instruction to the Bureau of Conscription at Richmond, when the following decision was pronounced: "Exemption declined. The object of the law of 11 October, 1862, in defining certain classes to be exempt from the operation of the conscript acts, was not to attach privileges to those classes, but to abstain from breaking up the existing civil and industrial organizations of the country. Exemptions, therefore, have reference to the *status* at the date of the passage of the act. No antecedent or subsequent coming within the classes enumerated can entitle to an exemption. In the case of school teachers and physicians, the profession must not only have been in existence on 11 October, 1862, but also the pursuit of it, both then and for a specified time previous." We concur in the above decision, and think that the reasoning upon which it is founded fully sustains it. As to the time when the *status* of some of the enumerated classes is to be fixed, we may differ in opinion from the distinguished head of the Bureau of Conscription, but as to school teachers and physicians, the act is express, and leaves no room for doubt.

PER CURIAM. The petitioner must be remanded back to the custody from which he was taken, and must pay the costs of this proceeding.

Cited: McDonald v. Morrow, 119 N. C., 672.

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(76)

IN THE MATTER OF ELIAS RITTER.

1. A person who had been *drafted,* and who had put in a substitute that was accepted by the officer appointed to act on that business, *was held* not liable to be conscripted under the act of September, 1862.

2. The circular of the War Department, dated 20 October, 1861, allowing substitutes to be received after the companies were formed and actually in the service, applies, by a liberal construction, to companies while in the condition of being formed and organized or recruited, and when a substitute is received under the latter circumstances, several of the formalities for obtaining a discharge become immaterial.

PETITION for a *habeas corpus,* before the Supreme Court. Elias Ritter, the petitioner, on the call on the State of North Carolina for troops, was drafted on 25 February, 1862, to go into actual service. He then hired a substitute over 18 years of age, by the name of Medlin, for three years or the war, who was received by Colonel Richardson, an officer authorized by the Government to receive substitutes. Medlin entered into the service for the war, and the petitioner received his discharge from Colonel Richardson. Under the conscription act of April, 1862, Ritter was not called on (being over 35 years), but under that of September, 1862 (being under 45), he was enrolled and ordered into the camp, near Raleigh, and was held there against his will by the officer in command.

It was insisted on the argument that as no company was organized when the substitute was offered and received, that he did not, and could not, comply with the requisitions of the department in furnishing of substitutes.

The regulations of the War Department, alluded to above, are as follows:

"WAR DEPARTMENT,

"RICHMOND, 20 October, 1861.

"1. When any noncommissioned officer or soldier of the volunteer service desires to procure a substitute, he shall first obtain the written consent of the captain of his company and of the commander of his regiment or corps, a duplicate of which he shall forward to the substitute.

"2. The substitute shall then obtain from some surgeon and some commissioned officer in the service of the Confederate States a certificate of his fitness for service and of his having been mustered into the service of the Confederate States for the war, no matter what the (77) term of the service of his principal may be, and these several certificates shall serve as a passport to the holder to join the regiment or corps to which his principal belongs—he paying the expenses of his own transportation.

"3. When a noncommissioned officer or soldier is entitled to discharge, by reason of a substitute, the captain of his company and the commander of his regiment or corps shall give him a certificate to that effect, stating that the substitute furnished according to the regulations is actually on duty with the regiment or corps; that the holder of the certificate is in no wise indebted to the Confederate States, and that he is not entitled to transportation at the expense of the Government; and this certificate shall serve the holder as a passport to leave the camp and travel to his home.

"4. If it shall be found that a noncommissioned officer or soldier, discharged by reason of a substitute, is indebted to the Government, the commander of the regiment or corps giving the discharge will be held accountable for the same, and any back pay due said noncommissioned officer or soldier shall be drawn and receipted for by the substitute at the next pay day.

"5. Commanders of regiments or corps shall, under no circumstances, permit substitutions in their commands to exceed one per month in each company, and all such cases shall be noted in the following morning report of the regiment or corps in which they occur, and in the next muster roll and monthly return."

McDonald for petitioner.
Strong and Bragg contra.

PEARSON, C. J. We are of opinion that the circular from the War Department, dated 20 October, 1861, by which substitutes were allowed to be received after the companies were formed and actually in service, applies, by a liberal construction, to the companies while in the act of being formed or organized, or recruited, without the neces- (78) sity of the details which were made material by the fact that when the party was in service and wished to put in a substitute, many circumstances had to be attended to in order to prevent confusion—as the back pay or indebtedness of the principal and mode of getting home, and then to allow too many at a time might disorganize the company; but when the companies were in the act of being organized, no considerations of

that nature were presented, and the purpose was fully answered by putting in an able-bodied man for the war; and if proof can be made that these essentials were complied with, the object is fully answered when the substitute went into the service, and is still there, or has been killed or disabled.

PER CURIAM. Petitioner discharged.

Cited: In re Prince, post, 195; *In re Wyrick, post,* 377; *McDonald v. Morrow,* 119 N. C., 672.

SYLVIA CAROLINE WALLIS v. LOUISA A. WALLIS.

1. A widow under 21 years of age cannot be appointed an administratrix. But the court may appoint an administrator during her minority, and, on her arriving at full age, grant her the administration. Or, it may give the office to her appointee.

2. On an appeal to the Superior Court from a grant of administration, it is not proper in that court, on the reversal of the order below, itself to make the appointment, but to order a *procedendo* to the county court.

APPEAL from an order of the County Court, appointing an administrator, before *Bailey, J.,* at Fall Term, 1860, of ONSLOW.

The plaintiff, as the widow of James G. Wallis, was appointed by the county court of Onslow administratrix. It appeared that at the time of this appointment she was only about 17 years old. The defendant, who is the mother of the intestate, opposed the motion in the court below, on the ground that the plaintiff was under age, and on the further
(79) ground that she (defendant) was the greatest creditor of the intestate, and appealed from the judgment.

The Superior Court reversed the judgment below. A motion was then made to grant letters to the appointee of the plaintiff, which was allowed by his Honor, and the defendant appealed.

McRae for plaintiff.
Donnell and Humphrey for defendant.

PEARSON, C. J. We concur with his Honor in the opinion that the county court erred in granting letters of administration to Caroline Wallis, the widow of the intestate. As widow, she was entitled to the administration, but the court could not grant it to her until she arrived at the age of 21 years, for the law presumes that before that age she is not capable of discharging the duties of administratrix.

She did not, however, on that account lose her right, and, in order to preserve it, the court might have granted letters of administration to some other person *durante minoritate,* so that when she arrived at full age the general administration could be granted to her. Or the court might have granted the administration to such person as she should appoint. *Ritchie v. McAuslin,* 2 N. C., 220; *Pearce v. Castrix,* 53 N. C., 73.

In the Superior Court his Honor decided correctly that the appointee was entitled to the administration; but he erred in granting the administration, instead of directing a *procedendo* to the county court. This was done in *Pearce v. Castrix, supra,* as we find by a reference to the record, although it is not set out by the reporter, and such has been the practice since the adoption of the Revised Statutes. The county court has a peculiar jurisdiction in the probate of wills and granting letters of administration. It is substituted for the court of ordinary in England. The original will is to be filed there; the returns are to be made there by executors and administrators, and the settlement of estates is (80) to be made there.

We presume his Honor was misled by the case of *Blount v. Moore,* 18 N. C., 10. That case was decided under the act of 1777, Laws of North Carolina, ch. 115, sec. 58, which directs the Superior Court, in cases of appeal, to grant letters of administration. That provision is omitted in the Revised Statutes, and also in the Revised Code. See ch. 46, secs. 1, 2, 3; ch. 4, sec. 2; ch. 31, sec. 17, from which it is evident that the letters of administration are *now* to be granted by the county courts, and, in cases of appeal, after deciding who is entitled to administration, the Superior Court should order a *procedendo.* For the error in this respect, the judgment is

PER CURIAM. Reversed.

Cited: Millsaps v. McLean, post, 83; *Hughes v. Pipkin,* 61 N. C., 6; *Little v. Berry,* 94 N. C., 437; *Garrison v. Cox,* 95 N. C., 355; *Williams v. Neville,* 108 N. C., 561, 566; *Boynton v. Heartt,* 158 N. C., 495.

RICHARD J. MILLSAPS v. ARCHIBALD MCLEAN ET AL.

1. Where one, by will, gave all his slaves, equally to be divided among his four children, and afterwards, by deed of gift, gave two of them by name to one of his children, there is no rule of law preventing the donee of the two from coming in for an equal share of the residue.

2. Where on a petition for the partition of slaves the county court ordered that partition should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed and the division ordered in different proportions, it was *held* that the Superior Court was not in possession of the whole case by the appeal, and that a *procedendo* to the county court was proper.

PETITION for partition of slaves, heard before *Bailey, J.*, at Fall Term, 1862, of ROBESON.

Neill McLean, by his last will, executed in 1846, gave to his wife, Nancy, her dower in his land, and among other bequests of personal property, he bequeathed to her as follows: "Also, all my negro slaves, all my crop of corn, cotton, peas, and potatoes, during her widow-
(81) hood; then, after that, to be equally divided between all my heirs. I also will and bequeath to my two sons, Archibald and Daniel W. McLean, all my lands, to be equally divided between them."

Afterwards, to wit, in 1853, after the marriage of his daughter, Mary Ann, with Richard J. Millsaps, Neill McLean, by a deed of gift duly executed, gave to her two slaves, Calvin and Rose, which were of his estate when the above mentioned will was written; and to her son, Neill Millsaps, a negro child named Harriet. R. J. Millsaps and his wife filed this petition in the county court of Robeson against the above named Archibald and Daniel McLean, and another son, Nathaniel, alleging that she, with her three brothers, are the only children of the testator, and that these petitioners are entitled to certain slaves (naming them) as tenants in common under the will of Neill McLean.

The defendants in their answer to this petition assert that in making the deed of gift Neill McLean intended to give her the enjoyment of the share he designed for her under his will, and they insist that "if the plaintiffs claim these slaves independently of the will, they will not be allowed their share of the other slaves named in the petition." They, therefore, insist that Calvin and Rose shall be brought into the common stock, and the division be made of equal shares in the whole stock.

The county court gave judgment "that the slaves conveyed in the will of Neill McLean should be divided equally between the legatees, notwithstanding the conveyance by deed of gift to his daughter," and commissioners were appointed to make the partition according to this decision. The petitioners prayed an appeal to the Superior Court, and on the hearing of the cause in that court his Honor reversed the decision of the county court and ordered that the partition be made as prayed by the plaintiffs and a *procedendo,* from which the defendants appealed to this Court.

Shepherd and W. McL. Mackay for petitioners.
Leitch for defendants.

PEARSON, C. J. We concur with his Honor. The slaves (82) which the testator had conveyed to his daughter, Mary Ann Millsaps, did not constitute a part of his estate at the time of his death, and do not come within the general description given in the will, and of course are not subject to partition among the legatees in remainder after the death or marriage of the widow .

As the slaves are not embraced in the will, the rule relied on by the defendants, "one cannot claim under and against a will," has no application. If these slaves had been *named* in the will, the point would have been presented. But they are not named, and do not come under the general description; so the defendants have nothing to rest their claim on except what they suppose to be a hardship—that Mrs. Millsaps shall hold two negroes, under the deed of gift, and come in for an equal share of the negroes belonging to the testator at the time of his death. It may be that Mrs. Millsaps thinks it equally hard that the sons of the testator should take all of his land and come in for an equal part of the slaves. Considerations of this nature are not matter for the Court. Its province is to determine the rights of the parties according to the legal effect of the deed of gift and the will, and that question is almost too plain for discussion .

The matter was presented in another point of view, *i. e.,* the gift to Mrs. Millsaps was an ademption of her legacy in respect to the testator's slaves. We can see no ground on which this suggestion can rest. The fact that the testator does not name the slaves in his will, but gives, in general terms, "all my negro slaves to my loving wife during her widowhood, then, after that, to be equally divided between all my heirs," is fatal to the suggestion of an ademption. See *Gillis v. Harris,* 59 N. C., 267.

Shafner v. Fogleman, 44 N. C., 280; *Harvey v. Smith,* 18 N. C., 186; *Morehead v. R. R.,* 52 N. C., 500, which were cited and relied on to show error in that part of the judgment directing a *procedendo* to the county court, do not sustain the position. The general rule is, "when the judgment of the county court is final, so as to put an end to the case so far as that court is concerned, the Superior Court (83) having the case in its possession will dispose of it finally; otherwise, a *procedendo* will be ordered to the county court. There is this exception, *i. e.,* the Superior Court will *always* order a *procedendo* where the county court has a peculiar jurisdiction—as in regard to the probate of wills and granting letters of administration." *Wallis v. Wallis, ante,* 78.

In this case the judgment of the county court is not final, so as to put an end to the case so far as that court is concerned, but it is interlocutory; it decides the question of law raised by the petition and answer,

against the petitioner, and directs a partition in pursuance of that instruction, retaining the case for the coming in of the report of the commissioners for the final action of the court. So, according to the general rule, a *procedendo* ought to have been ordered.

PER CURIAM. No error.

Cited: Mordecai v. Boylan, 59 N. C., 371.

JOHNSON & BOWLES v. ALEXANDER MURCHISON.

1. Where a rule was obtained against a plaintiff in the county court to give oyer of his cause of action by a given day at the next term, it was *held* to be regular for the plaintiff to submit to a nonsuit before the day assigned at the next term, and take an appeal to the Superior Court.

2. A nonsuit may be entered before the defendant's appearance or before pleading, or at any day of continuance in the cause.

3. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for irregularity, it was *held* that all such objections were considered as waived by the delay and acquiescence.

4. It is not ground to dismiss an appeal in the Superior Court, that the county court failed to enforce a rule made by itself, incidentally, in the progress of a cause.

(84) This was a motion before *Bailey, J.,* to dismiss an appeal at Fall Term, 1862, of MOORE.

The facts of the case are fully stated in the opinion of the Court.

Neill McKay and McDonald for plaintiffs.
Buxton, Haughton, and Strange for defendant.

BATTLE, J. This was an action of debt upon a bond, brought to the court of pleas and quarter sessions for the county of Moore. Upon the appearance of the defendant at January Term, 1859, he craved *oyer* of the bond, and the suit was continued in this condition until July Term, 1860, when the defendant obtained a rule upon the plaintiff to give the oyer demanded of him "on or before Thursday of the next term of the court, or this cause will stand dismissed." At the next term the following entry appears upon the record: "Judgment of nonsuit in this case on Wednesday of this term, from which an appeal is prayed and granted to the Superior Court." In that court the cause was put upon the trial docket at Spring Term, 1861, with the entry, "Oyer craved before pleading." In this condition the cause was continued from term to term,

until Fall Term, 1862, when the record shows that oyer was had. At the same term it appears that the following judgment was rendered: "Motion by the defendant's counsel to dismiss the appeal, on the ground that the plaintiff had no right to take a nonsuit after the rule was granted at July Term, 1860, of the county court. Motion sustained, and appeal dismissed by the court." From this judgment an appeal was taken to the Supreme Court.

The Superior Court erred in dismissing the appeal to it from the county court. This error proceeded from a misapprehension of the nature of nonsuit. We suppose this may have been so, because the counsel of the defendant contends here that the plaintiffs had no right to take a nonsuit in the county court before they gave oyer of the bond upon which the suit was brought. Plaintiffs cannot, properly, be said to *take* a nonsuit at all. It is a judgment rendered against them, when they are demandable, for not appearing upon the demand (85) for them. Thus in 5 Com. Dig., 548, it is said that "If the plaintiff does not appear at the day when he is demandable, he shall be said to be nonsuited *quia non est prosequt,* etc. Co. Lit., 138 b. And this may be before the defendant's appearance, or at the return of the writ." *Ibid.* "So at the return of an assize, if the plaintiff is not ready to make plaint on the demand of the tenant, he shall be nonsuited. Salk., 82. Or a plaintiff may be nonsuited after an appearance as at any day of continuance, for the plaintiff is then demandable and is the first agent. Co. Lit., 138 b." These extracts, taken from the highest authority known to the law on the subject of pleading, show that the judgment of nonsuit in the county court was perfectly regular. When the cause was reached on Wednesday of the October term of the county court, the plaintiffs were demandable, and judgment of nonsuit which was then rendered against them necessarily imports that they were demanded by the defendant, and, upon their not appearing, the judgment against them was given. From this judgment they, of course, had a right to appeal, under the provisions of the Revised Code, ch. 4, sec. 1.

But, supposing there had been some irregularity in the judgment of the county court, we should hold that the defendant had, by his delay, waived his right to move to dismiss the appeal from the Superior Court. The latter court certainly had no right to dismiss the appeal because the rule in the county court had not been complied with. Every court must enforce its own rules, made, incidentally, in the progress of a cause; upon an appeal, the higher court cannot notice such rules, which have been made in the inferior tribunal.

PER CURIAM. Reversed.

Cited: Bank v. Stewart, 93 N. C., 403.

(86)

THOMAS BAILEY, TRUSTEE, *v.* JOHN C. MOORE ET AL.

1. Where a parol agreement was made between A. and B. for the exchange of slaves, and A.'s slave immediately went into possession of B., but the latter's slave, being runaway, it was agreed that A. should take him into possession whenever he could do so (at his risk), it was *held* that on A.'s afterwards taking possession of the runaway slave the title to him passed.
2. And it was *further held*, that such a contract made with the attorney of B. under a *parol* authority (followed by delivery) was valid to pass the title.

ACTION of detinue for a slave, tried before *Bailey, J.*, at Spring Term, 1863, of JOHNSTON.

On 8 November, 1854, Henry R. Nelson made to the plaintiff, as trustee, a deed for six slaves, valued at about $4,000, to secure debts amounting to about $400, among which slaves was the man Hinton, now in controversy. In November following the plaintiff, as trustee, put up the slaves to auction, and they were bid off by divers persons. The slave, Hinton, was then runaway, and he was cried off to a bidder, on the condition that if the purchaser did not get him, he was to pay no money. The slave not coming in, this sale was, after a month elapsed, rescinded by the parties. Afterwards, 19 February, 1854, Nelson executed to the defendant Moore the following instrument: "Received of John C. Moore his negro man, Cager, in place of my boy, Hinton, to which I warrant the right and title to be good against the claims of all persons whatsoever, but do not warrant the delivery of the said Hinton, as he is now in the woods or runaway; therefore, the said Moore takes the said Hinton as he runs." Signed and sealed by the said Nelson. Cager went into the possession of Nelson and continued to work for him until his death, in July, 1855. After this trade, Hinton was captured and went into Moore's possession. After the sale of the slaves under the deed of trust, several of them continued in possession of Nelson.

The defendant, among other defenses, contended that the exchange was made by the consent of the plaintiff; that he authorized it
(87) before it was made and assented to it afterwards; that the slave Cager, after the exchange, was under the control of the plaintiff, or of Nelson, as his agent, and the defendant offered evidence of this defense, both by the conduct and declarations of the plaintiff, but produced no writing showing such assent or authority.

The court was of opinion, and charged the jury, that although they should believe the exchange was made by Moore and Nelson in the manner alleged, and by the parol consent and authority of the plaintiff, or of Nelson, as his agent, still the plaintiff was entitled to recover.

Defendant's counsel excepted. Verdict and judgment for plaintiff. Appeal by defendant.

Phillips for plaintiff.
Winston, Sr., and Moore for defendant.

PEARSON, C. J. Assuming the facts to be that Nelson, having a verbal authority from Bailey to exchange Hinton for Cager, made the exchange, received Cager from Moore, and told Moore to take possession of Hinton as his property whenever he could do so; that Hinton was a runaway, but was afterwards apprehended and taken into possession by Moore as his property in pursuance of the agreement, his Honor was of opinion that the plaintiff was entitled to recover. We do not concur.

The statute provides that "All sales of slaves, accompanied with actual delivery of the slave to the purchaser, shall be valid." Rev. Code, ch. 50, sec. 13.

It was insisted by Mr. Phillips that the sale or exchange (which is the same thing) must be accompanied with delivery; that is, that the sale and delivery must be at the same time, and that the delivery must be actual, that is, although it need not be a delivery from hand to hand, still the slave must be present and the possession be changed at the time. For illustration, he referred to the old doctrine of "livery of seizin in deed," where the parties went upon the land and made livery, and livery in law, when the parties did not go on the land. (88)

We think neither branch of this proposition can be maintained, and the counsel has fallen into error by not distinguishing between a "contract of sale" and a sale or contract executed, by which the title passes.

At common law the title to personal property passes by a sale without delivery: For instance, A. sells B. a horse and receives the price or a note for it; the horse, although 10 miles distant, instantly becomes the property of B. This principle of the common law was confined to sales, for delivery was necessary to pass title by a gift, and in the civil law delivery was necessary to pass title either by sale or gift. In respect to slaves (the most valuable species of personal property) it was seen that this rule of the common law opened the door to fraud and perjury. To remedy this evil, the statute provides that all sales of slaves shall be in writing, attested by a credible witness, unless the sale be accompanied with the actual delivery of the slave to the purchaser, so as to give notoriety to the transaction by a change of possession, a fact about which there can be no mistake, and consequently no room for perjury. The object of the statute is to change the common law in respect to the sale of slaves, and to provide that the title shall not pass as soon as "the

bargain is struck," but shall remain in the vendor until there is an actual delivery, which is fully accomplished by treating the bargain or agreement to sell as merely inchoate and of no effect until the sale is consummated by a change of possession; when that is done, there *is a sale,* and not before; so that, literally, the sale is accompanied with an actual delivery. For instance, A. sells B. a slave and receives the price; at common law the title would pass *instanter;* but under the statute it does not pass. If, however, A., on the next day, carries the slave to B. and delivers him, the sale is consummated, and the title passes. So, if after the agreement to sell, A. says to B., "The slave is at my plantation; go and take possession of him as your property," and, accordingly, B., on the next day or the next week, goes and takes the negro into possession and carries him home with him, there is a sale, and the
(89) title passes by the change of possession.

The allusion of the counsel to the doctrine of "livery of seizin" furnishes an apt illustration, and, when followed out, supports the correctness of our conclusion. If the parties *go on the land* and the feoffor makes livery to the feoffee, the title passes *instanter;* but if the parties do not go on the land, the livery of seizin is simply livery in law, and the title does not pass, unless the transfer is afterward consummated by the entry of the feoffee in the lifetime of the parties. So the livery in law is inchoate merely, but still is a foundation for the feoffment to rest on, so that it may be consummated and pass the title by the fact of the feoffee's afterwards taking possession, and thereby giving notoriety to the transaction, so that every one may see that the feoffor has ceased to be the fee-holder, and the feoffee has taken his place.

To the suggestion that livery in law cannot be made by attorney, the reply is, livery in law was only allowed when the feoffor could not go on the land for fear of bodily harm. This is personal to him, so he cannot in such a case act by attorney. This reason has no application to a sale or contract to sell a slave, which, under a general rule of law, may as well be done by attorney as in person. *Facit per alium, facit per se.* There is

PER CURIAM. Error.

DOE ON DEMISE OF WILLIAM A. BLOUNT ET AL. v. SARAH WRIGHT.

A judgment that the defendant recover his costs from the lessor of the plaintiff, in an action of ejectment where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper.

BLOUNT *v.* WRIGHT.

THIS was a motion to set aside a judgment and execution, (90) heard before *Heath, J.,* at Spring Term, 1859, of ROBESON.

An ejectment had been brought against the defendant, in which there was a count on the demise of the plaintiffs. In the suit the defendant prevailed, and a judgment was rendered against the lessors of the plaintiff for costs, on which the execution issued. The plaintiffs' counsel moved to set aside the judgment and execution, but the court refused the motion, and the plaintiff appealed to this Court.

Jenkins Rodman for plaintiffs.
Strange for defendant.

BATTLE, J. The validity of the judgment rendered in the court below against the lessors of the plaintiff for the costs of the suit is impeached upon the ground that they were no parties to the suit. In support of this position, the well-known rule, that upon the death of the plaintiff in an action of ejectment the suit does not abate, is relied upon. See *Thomas v. Kelly,* 35 N. C., 43; *Wilson v. Hall, ibid.,* 489.

The reason why an abatement does not take place in such a case is founded upon the peculiar nature of the action; but from that it does not follow that the lessor is not a party to the suit. He is certainly such, for the purpose of being compelled to give security for the prosecution of the suit, and if there be a nonsuit, he may be compelled to pay the costs. See Revised Code, ch. 31, sec. 45; *Thomas v. Kelly, supra.* It is certain that the lessor is regarded by the courts as so much a party that upon a recovery he is the person to be put into possession of the land recovered, and that the action for the mesne profits may be maintained in his name, as well as in that of his nominal lessee. *Holdfast v. Shepard,* 31 N. C., 222. If, then, the courts permit the lessor of the plaintiff, in ejectment, to take all the benefits of a recovery in the action, we cannot perceive any just reason why, upon a failure, he may not have a judgment rendered against him for the costs. That in such a case he may be ordered to pay costs is directly decided in *Scott v. Sears,* 31 N. C., 87. (91)

But it is insisted for the plaintiffs that the only mode by which the payment of costs can be enforced against the lessor is by attachment, and for this position 2 Arch. Prac., 56, is cited as a conclusive authority. Supposing that such is the English practice, we are not bound to adopt it when the milder one of an execution against the property of the party will answer the same purpose. That the latter mode may always be adopted when an attachment would lie against a party to enforce the payment of costs, we intimated in *Clerk's Office v. Allen,* 52 N. C., 156.

Our conclusion is that the court below did not err in refusing to set aside the judgment and execution which had been rendered at a previous term against the lessors of the plaintiff.

In his argument here the counsel for the lessors have alleged that their names were used without their knowledge or consent. We find no evidence tending to support the allegation, either on the record proper or in the bill of exceptions. But if it were true, it could not affect the rights of the defendants to recover their costs. The only remedy of the lessors would be against the person or persons who had, without authority, used their names in such a manner as to subject them to damage.

PER CURIAM. Judgment affirmed.

THE STATE ON THE RELATION OF DUNCAN McLAURIN v. WILLIAM BUCHANAN ET AL.

The provision of section 3, chapter 78, Revised Code, giving the whole amount of debt as damages for the failure of an officer to collect a claim put into his hands for collection, when the debtor is solvent, only applies to claims within the jurisdiction of a justice of the peace, and does not apply in cases of noncollection of process issuing from court.

(92) DEBT on sheriff's official bond, tried before *Bailey, J.*, at Fall Term, 1862, of RICHMOND.

The relator gave in evidence a writ of *fieri facias* issued from the Superior Court of Richmond County against F. McLeod and James McLeod, executors of William McLeod, which came into the hands of Buchanan, as sheriff, in due time, to be collected before the return day; after the return day an *alias fi. fa.* was issued, but the debt was not collected on either of the executions. It was proved that the defendants were amply responsible for the debt while the sheriff held the execution, and continued to be so, and at the time of the trial were well able to pay the same. Upon these facts, the defendants insisted that they were liable only for nominal damages, and asked his Honor so to charge the jury, but he declined to do so, and instructed them to find the whole amount due. Defendants' counsel excepted. Verdict and judgment for the plaintiff. Appeal by the defendants.

No counsel for plaintiff in this Court.
Shepherd, Leitch, and McDonald for defendants.

MANLY, J. The measure of damages laid down by the court below is, upon the case stated, erroneous. *State v. Skinner*, 25 N. C., 564, is an authority in point. Upon the reasoning in that case, with which we are

entirely satisfied, the relator, in the suit before us, is entitled to nominal damages only. Where the debt is not lost by the officer's negligence, the relator is not entitled, by reason of that negligence, to recover the amount of the debt, and when he does not show any actual injury thereby sustained, he is entitled only to the damages which the law infers without proof, viz., nominal damages. The act of 1844, embodied in the Revised Code, ch. 78, sec. 3, alters the rule of damages declared in *Wood v. Skinner* in respect to a certain class of official negligences, and is restricted to that class. The statute provides that "When a claim shall be placed in the hands of any sheriff or constable for collection, and he shall not use due diligence in collecting the same, he shall (93) be liable for the full amount of the claim, notwithstanding the debtor may have been at all times, and is then, able to pay the amount thereof." This, manifestly, applies to those claims for debt within the jurisdiction of a justice of the peace, with the collection of which officers were then intrusted, and the penalty here provided was added in that class of cases, probably, upon the suggestion made in the opinion in the case above referred to, where it is intimated that some additional penalty might be required to secure official diligence in the collection of debts within the then greatly extended jurisdiction of a justice of the peace. The statute was not intended to apply to claims collected by process upon judgments in a court of record, the speedy collection of these being already insured by sufficient guards and penalties. These latter are not claims put into the sheriff's hands for collection within the purview of the statute, but are writs or processes upon which execution is to be done and official returns thereof made.

We think, therefore, that the authority of *Wood v. Skinner* stands—is applicable to the case before us, and disposes of it.

PER CURIAM. *Venire de novo.*

Cited: Brunhild v. Potter, 107 N. C., 419.

STATE TO THE USE OF GEORGE A. GRAHAM v. WILLIAM BUCHANAN ET AL.

1. An officer that has received the note of a *feme covert* within a magistrate's jurisdiction for collection is not guilty of negligence so as to subject him on his official bond in failing to take out a warrant on the claim.

2. Where the deputy of a sheriff received the bond of a married woman within a magistrate's jurisdiction for collection, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, it was *held* that there was no breach of the former sheriff's official bond.

(94) DEBT on official bond of sheriff, tried before *Saunders, J.*, at Spring Term, 1861, of RICHMOND.

The breaches of the bond assigned were the failure to collect a note on one Isabella McKay, placed in the hands of one Moorman, a deputy of the sheriff, for collection. (2) Collection of the money and failure to pay it over. There was an objection to the proper execution of the bond, declared on, which was filed at October Term, 1856, but as the facts relating to this point were all set forth and considered in the case of *McLean v. Buchanan,* 53 N. C., 445, it is deemed unnecessary to state them again.

As to the second breach, Moorman, the deputy, testified that in 1857 he was acting as the deputy of Buchanan when the paper in question was placed in his hands, and that Buchanan went out of office at October Term, 1857, when J. T. Bostick was appointed sheriff, and he, Moorman, continued as his deputy. While acting in this latter capacity he collected the money from Mrs. McKay. He stated further that Mrs. McKay was a married woman at the date of the execution of the note, and that her husband is still living, and, further, that he never sued out any warrant on the claim.

The court charged the jury that if they believed this evidence, the plaintiff was entitled to recover. Defendants' counsel excepted.

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

Ashe for plaintiff.
Shepherd, McDonald, and Leitch for defendants.

MANLY, J. We think there was no default of the officer, Buchanan, in respect to the claim in question, whereby he became liable on the bond of 1856. The facts are that the promissory note of a woman, under coverture at the time of its execution, for $27.50, was placed in the hands of the sheriff's deputy for collection, 23 September, 1857, and that the sheriff went out of office the third week of the following month.

No warrant was sued out for the collection of the demand, but (95) it continued in the hands of the deputy after the expiration of Buchanan's term, and in 1858 was collected by the deputy then acting under Buchanan's successor.

The collection of the money could not have been legally enforced by a warrant at any time, and it was not, therefore, incumbent on the officer, in acquitting himself of his duties, to sue out a warrant for the purpose.

While we hold in conformity with *Dunbar v. Doxey,* 52 N. C., 222, that if the money had been paid within the official term of Buchanan, his sureties would have been liable, we think it very clear, as it was not

paid, and the officer had no power to coerce its payment, that there has been no official negligence or breach of official duty whereby his sureties may be subjected to the payment of the debt or any part of it.

The instruction of the court, therefore, on this point, was erroneous, and should have been that, as there had been no breach of the conditions of the bond in suit, the relator could not recover upon it. This was settled in *Keck v. Coble,* 13 N. C., 49, and has been often reaffirmed since. *Miller v. Davis,* 29 N. C., 198; *Ringold v. McGowan,* 34 N. C., 44.

In the view above taken, we have assumed the validity of the bond. The objections to its proper execution have been already met in *McLean v. Buchanan,* 53 N. C., 445. Its sufficiency was there questioned upon the ground now alleged, duly considered by the Court, and affirmed. That case disposes of this point.

It may be proper to state that this last case was not known to the counsel taking the exception, because not published at the time. There should be a

PER CURIAM. *Venire de novo.*

ROBERT J. McDOWELL, TREASURER, v. ANDREW HEMPHILL ET AL.

The treasurer of the trustees of Davidson College is not a corporation sole; on a bond, therefore, payable to one as such, and his successors, a suit cannot be sustained in the name of a successor.

THIS was an action of debt, tried before *Osborne, J.,* at Fall Term, 1860, of McDOWELL.

The plaintiff declared as successor on a bond, payable "to Thomas H. Robinson, treasurer of the trustees of Davidson College, and his successors," and on the trial below the judge ordered a nonsuit, from which plaintiff appealed.

Dickson for plaintiff.
Merrimon for defendant.

PEARSON, C. J. We concur with his Honor in the opinion that the action cannot be maintained in the name of McDowell. In *Ferebee v. Saunders,* 25 N. C., 360, it was decided that "a bond taken by a clerk and master in pursuance of an order of the court, and made payable to him and his successors in office, must, on his death, be sued upon in the name of his personal representatives, there being no act of the Legislature requiring bonds to be made payable to him and his successors in office."

That case is decisive of the present action, and we suppose the attention of the counsel who issued the writ was not called to it. "The treasurer of the trustees of Davidson College" is not a *corporation sole,* and cannot be made so, except by an act of the Legislature. If there be any clause in the charter of the college having that effect, it should have been offered in evidence to the court. As the bond is payable to Thomas H. Robinson, the suit on it must be in his name, if he is living, or in that of his personal representatives, if he is dead.

PER CURIAM. Affirmed.

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(97)

ALICE SAUNDERS, WIDOW, v. DANIEL RUSSELL, ADMINISTRATOR.

An administrator has a right to appeal from an order of the county court affirming the year's allowance made to a widow.

THIS was a petition in behalf of the widow of the defendant's intestate for a year's provision out of her husband's estate. A decree theretofore had been duly had in the county court of Onslow. Commissioners were appointed to make the allotment; the allotment was made and returned to court, and on motion the same was confirmed and a decree made accordingly. Whereupon defendant appealed, on the ground that the allotment was excessive. On opening the case before *Heath, J.,* at Fall Term, 1861, of Onslow, the counsel of the petitioner moved to dismiss the appeal as having been improperly granted. On such motion the appeal was dismissed and a *procedendo* awarded to the county court; from which order the defendant appealed to this Court.

Green, Humphrey, and Person for plaintiff.
Moore for defendant.

PEARSON, C. J. It is provided, Revised Code, ch. 118, sec. 20: "Upon the return of the report, if the same be not excepted to by the administrator or next of kin, or any legatee, or, if excepted to and the exception be disposed of, the court shall make such *decree* therein as may seem to be right and proper."

Upon exception being taken by the administrator, or next of kin, or legatee, there are adversary parties—a suit is constituted in court, and from the decree either party may appeal according to the general law in respect to appeals.

The judgment in the Superior Court dismissing the appeal is

PER CURIAM. Reversed.

(98)

A. J. SUMMEY, COUNTY TRUSTEE, v. H. JOHNSTON ET AL.

A clerk can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years, where he has *admitted money to be due* in the manner prescribed by section 1, chapter 73, Revised Code.

MOTION for summary judgment, tried before *Osborne, J.*, at Fall Term, 1860, of BUNCOMBE.

This was an action beginning by motion, brought by plaintiff, as county trustee of Buncombe, to recover of the defendants as sureties to the official bond of W. T. Coleman, late clerk of the Superior Court of Buncombe, for moneys paid to their principal at April and October terms, 1851, in his official capacity. Mr. Coleman was sworn in as clerk at October Term, 1849, for four years. He went out of office in October, 1851, and died soon after. The amount alleged to be due was ascertained by an investigation and report of a committee of finance, which was admitted as proof, but no report of money in the office had been made by the clerk, and it was contended that the form of proceeding did not apply in this case, and the court being of this opinion, the plaintiff submitted to a nonsuit and appealed.

Gaither for plaintiff.
Merrimon for defendants.

PEARSON, C. J. We concur in the opinion of his Honor, that the summary mode of proceeding can only be resorted to where the clerk has *"admitted money to be due"* in the manner prescribed by Rev. Code, ch. 73, sec. 1. On a perusal of the statute, this is so clear as not to admit of discussion.

PER CURIAM. Affirmed.

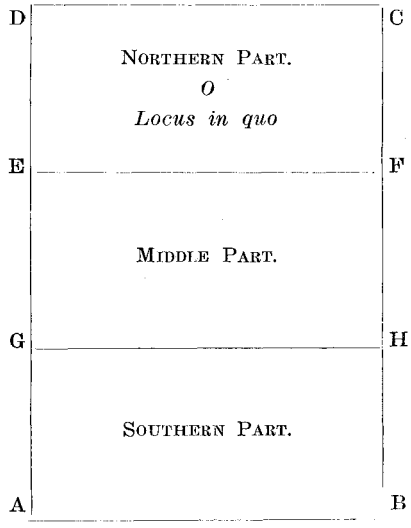
(99)

THOMAS T. NEWSOM v. SAMUEL KINNAMON.

Where A. owned a tract of land in the form of a parallelogram, of which he had an actual possession on one end and severed the two ends by selling a piece from the middle, and at the end of twenty-two years he conveyed the southern end to B., who continued the possession until the possession of the whole extended beyond thirty years, and then conveyed the northern end by a separate deed, but had no actual occupation of that end, it was *held* that holding it thus for more than thirty years was not sufficient to authorize the presumption of a grant to this northern end.

TRESPASS *q. c. f.*, tried before *Howard, J.*, at Fall Term, 1861, of FORSYTH.

The plaintiff offered in evidence a State grant for the tract E, F, C, D, covering the *locus in quo*, dated in December, 1859. The defendant admitted the trespass by clearing one acre of the land included within the boundary of the said grant since the issuing thereof.



The defendant read in evidence a deed from one Ashman to one Matthews, dated in 1823, for the whole tract, A, B, C, D; also a deed from Matthews to J. Newson for the same. The said Ashman and

(100) Matthews had actual possession of the southern end of this tract.

In 1834 J. Newson conveyed to one Johnson the land contained in the diagram G, H, F, E, and Johnson, in 1840, conveyed the same to the plaintiff. The said J. Newsom, in 1845, conveyed the southern end of the land, A, B, H, G, to the defendant, and in 1846 he conveyed the northern end, E, F, C, D, to him, the defendant, also. The several deeds evidencing these transfers were produced and read in evidence. Ashman, Matthews, and the defendant continued the actual possession of the southern end of the land described, for more than thirty years continuously, but there was no actual occupation of the northern part, E, F, C, D, until the entry of the defendant, and clearing the one acre, as above described, for which this suit is brought, it being in forest.

Upon this state of the facts, his Honor instructed the jury that the plaintiff was entitled to recover. Defendant's counsel excepted. Verdict and judgment for the plaintiff, and appeal by the defendant.

Gorrell for plaintiff.
Gilmer and Starbuck for defendant.

PEARSON, C. J. We concur with his Honor that upon the facts stated the plaintiff was entitled to recover. In 1834 J. Newsom, under the deed of Matthews, having actual possession of the southern part of the tract, had possession of the whole. He then conveyed the middle part to Johnson, cutting the tract in two, so as completely to separate the southern part, where his possession was, from the northern part. From the view we take of the case, it is not necessary to decide whether the fact of his thus separating the two parts had the effect of confining his possession to the southern part, or whether he would still be considered as being also in possession of the northern part by force of the deed of Newsom; for, suppose he was still in possession of both parts, in 1845, he conveyed the southern part to the defendant, and no longer had any actual possession, so that he then had no ground on (101) which to claim to be in possession of the northern part, unless he had title from which a possession would be inferred, and the case is narrowed to this: Did he, in 1845, have title to the northern part?

The deed from Ashman to Matthews was in 1823, and a continued possession under that deed up to 1845 would only make twenty-two years, which is not long enough to *presume a grant.* So the title was still in the State. In *Reid v. Earnhart,* 32 N. C., 516, it is said: "In England a possession of sixty years is required, but the necessity of the rule and its manifest good policy in a new settled country induced our courts to shorten the time, and by successive decisions it has been reduced to fifty, forty, thirty years, and an intimation is made that it might be supported by twenty-five years." Thus it is seen that twenty-two years is not long enough. As in 1845 J. Newsom had no title to the northern part, and had conveyed away the middle and southern parts, he had no possession whatever, and the effect of his making a deed to the defendant for the northern part in 1846 could, on no principle, extend the possession of the defendant in the southern part, which he held under the deed of 1845, so as to put him in possession of the northern part, which he claimed under the deed of 1846, because he claimed under two distinct deeds, and had no actual possession of the northern part, the title to which was in the State, and there was, consequently, nothing to divest the title out of the State until 1859, when the plaintiff obtained a grant.

PER CURIAM. No error.

(102)

DOE ON THE DEMISE OF WILLIAM A. WILLIAMS ET AL. V. JOHN M. BEASLY ET AL.

1. Where a father, by deed, gave to his daughter and the heirs of her body a tract of land, and provided that "if the said daughter should die and leave an heir or heirs of her body, in that case, said heirs being her children or child, are to have, occupy, and possess all the property herein given, to them and their heirs forever," it was *held* that the children of the said daughter take as *purchasers*, and that the rule in *Shelley's case* does not apply.

2. Whether the rule in *Shelley's case* would apply where the limitation is to A. for life, remainder to the heirs of her body and their heirs, *quere*.

EJECTMENT, tried before *Bailey, J.*, at Fall Term, 1862, of CUMBERLAND.

The counsel for the parties, respectively, agreed on the following case:

In 1803, Jesse Potts made to his daughter, Nancy C. Potts, a deed, of which the following is the material parts relating to the case: "The said Jesse Potts as well for and in consideration of the natural love and affection which he hath and beareth unto the said Nancy C. Potts, his daughter, as also for the better maintenance and preferment of the said Nancy C. Potts, his daughter, agreeable to the conditions following, hath given, granted, and confirmed unto the said Nancy C. Potts that tract, etc. (describing it): *Provided,* my daughter Nancy C. Potts should have an heir or heirs of her body to live and survive; then and in that case all the property above given is to belong to the said heirs, to them and their heirs forever. But if it should so happen that my daughter should die and not leave any surviving heir or heirs of her body, in that case all the property is to descend back to the said Jesse and his heirs, the same as if the said land and other property had never been given to the said Nancy C. Potts. . . . But if the said Nancy C. Potts should die and leave an heir or heirs of her body, in that case, said heirs being her children or child, is to hold, occupy, and possess all the property herein given to them and their heirs forever." Nancy Potts
(103) was married to William H. Williams, and by him had two children, the lessors of the plaintiff. William H. Williams died in 1815, and under him the defendants claim. Nancy C. Williams died on 11 June, 1859. It is agreed that the defendants were in possession at the time of the beginning of the suit, and that the land sued for is that known as Springfield in the deed. The defendants and those under whom they claim have had possession of the land for forty years, claiming it as their own.

If the court shall be of opinion for the plaintiff, judgment is to be rendered for him; otherwise, for the defendant.

His Honor gave judgment for the plaintiff, and the defendants appealed to this Court.

W. McL. McKay for plaintiffs.
Shepherd for defendants.

PEARSON, C. J. The case turns upon the legal effect of the deed of Jesse Potts. We are of opinion that the clause, "but if the said Nancy C. Potts should die and leave an heir or heirs of her body, in that case said heirs, being *her children or child,* is to hold, occupy, and possess all the property herein given, to them and their heirs forever," together with the whole instrument, shows clearly that the words "heir or heirs of her body" are used in the sense of *child or children,* and the case is simply this: a life estate to Nancy C. Potts, with a remainder to her child or children and their heirs, but if she die leaving no child or children at her death, then over. So the children take as *purchasers,* and the rule in *Shelley's case* does not apply.

It is not necessary to consider whether the rule in *Shelley's case* would apply where the limitation is to A. for life, with remainder to the heirs of her body and their heirs; although we incline to the opinion that the rule would not apply, for, if it did, A. would take an estate tail, leaving the reversion in fee in the grantor. Whereas, the limitation to the heirs of her body, and *their heirs* forever, shows that the whole estate was granted, and no reversion was left in the grantor; so the heirs of her body would take a *different estate* by *purchase* from that which would come to them by descent as heirs of her body, and the rule, (104) it would seem, does not apply.

PER CURIAM. Affirmed.

Cited: Clark v. Cox, 115 N. C., 100; *Marsh v. Griffin,* 136 N. C., 335.

DOE ON THE DEMISE OF SAMUEL T. STANCEL v. SAMUEL CALVERT.

Where A. agreed to let B. put a sawmill and houses and fixtures on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished,* it was *held* that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege, were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Held, also,* that ejectment would lie to recover such an interest.

STANCEL *v.* CALVERT

EJECTMENT, tried before *Heath, J.*, at Fall Term, 1862, of NORTHAMPTON.

The action was brought to recover a "sawmill and fixtures situate on the land of John W. Stephenson," and of which the defendant had possession. Both parties claimed under one George R. Jordan, who held the property in dispute under the following sealed instrument, entered into by said Jordan and Stephenson:

"Know all men by these presents, that we, George R. Jordan and John W. Stephenson, have this day entered into the following agreement, viz.: That the said George R. Jordan wishes to put up on the lands of the said John W. Stephenson a sawmill with all the necessary fixtures, and agrees to let the said John W. Stephenson have all the manure that is raised by the stock on and around the said mill, in compensation for the use of the privilege of putting the mill and necessary fixtures thereon.

(105) "The said John W. Stephenson agrees on his part to let the said George R. Jordan have the privilege to use and enjoy the said land around the said mill as long as the said Jordan wishes to use the same for the purpose of carrying on the business of sawing timber at said mill; and when the said Jordan wishes to discontinue the business or wishes to remove the said mill, he shall have the right to remove the mill and all the fixtures, houses, and everything else he, the said Jordan, may have put thereon."

The plaintiff claimed under a judgment and execution issued from the county court, and a sale and deed therefor from the sheriff, who sold under the execution; the defendant claiming under a magistrate's judgment, execution, levy and sale by a constable, the levy not having been returned to court. The plaintiff's execution was first levied, but the sheriff did not remain in possession of the premises. The defendant's execution was then levied on the premises, and the officer remained in possession and advertised and sold, and the defendant purchased and took a deed therefor from the officer. The plaintiff then procured the sheriff to sell under his levy, when he purchased and took a deed from the sheriff. Jordan was living at the time of the trial. The foregoing facts were submitted to his Honor, with the understanding that he was to enter a judgment for the plaintiff or for the defendant, as the law might be for the one or the other.

His Honor, on consideration, gave judgment for the plaintiff, from which the defendant appealed.

Barnes for plaintiff.
No counsel for defendant.

BATTLE, J. We concur in the opinion expressed by his Honor in the court below, upon the facts agreed. The contract executed under the hands and seals of Jordan and Stephenson had the effect to make the former the owner of the houses, machinery, and other fixtures of the mill erected by him on the land of the latter, and also to give him an easement in the said land immediately around the mill, (106) so far as the same was necessary, for the business of sawing lumber. The quantity of estate or interest which Jordan thus acquired in the mill and land was certainly not a mere estate at will, because Stephenson had no right to put an end to it at pleasure, nor was it a lease for years for the want of certainty or of anything that could be reduced to a certainty in the time. It was, therefore, an estate for at least the life of Jordan, with a condition annexed, to be void as to the land upon his abandoning the milling business and taking off the houses and fixtures, as by the contract he was authorized to do. Such an interest could not be sold under an execution from a justice, without a return of the levy by the constable to court, an order of sale therein made, and a sale by the sheriff under such order. See Rev. Code, ch. 62, secs. 16 and 17. It follows that the levy and sale by the constable were void.

There can be no doubt of the propriety of the remedy by ejectment. It is settled that even the upper chambers of a house may be held separately from the soil on which it stands, and that an action of ejectment will lie to recover it. 4 Kent Com., 401, Note e; *Gilliam v. Bird,* 30 N. C., 280.

PER CURIAM. Affirmed.

Cited: S. c., 63 N. C., 617.

SCHEIFFELIN, HAINS & CO. v. J. M. STEVENS.

1. Where a partnership has had continuous dealings with a distant correspondent for some time, actual notice of its dissolution must be given to such correspondent to prevent a liability of all the members of the firm for subsequent dealings carried on by one of the partners in the name of the firm, though without the knowledge or consent of the late partners.
2. Publication of such notice in a local newspaper in this State was *held* not actual notice, nor was it evidence from which actual notice could be inferred.

ASSUMPSIT for goods sold and delivered, tried before *Osborne,* (107) *J.,* at Fall Term, 1861, of BUNCOMBE.

The plaintiffs were partners, dealing in drugs in the city of New York. The defendant and Boyd entered into a copartnership in the drug business in the town of Asheville, early in the year 1855, which was dissolved on 7 December in the same year, and notice thereof published in the *Spectator,* a newspaper printed in Asheville, for three weeks consecutively. The goods for which this action was brought were delivered to Boyd, in the name of Boyd & Stevens, in 1857 and 1858, the orders for the same having been made by Boyd in the partnership name without the knowledge or privity of Stevens. The plaintiff exhibited orders by the firm of Boyd & Stevens, on them, of date 14 June, 1855, 1 July, 1855, October, 1855, 16 November, 1855, and 5 December, 1855, before the dissolution, and of 12 March, 1856, 22 August, 1856, 15 September, 1856, 17 September, 1856, 6 February, 1857, 9 February, 1857, March, 1857, 29 August, 1857, 3 September, 1857, 9 October, 1857, 10 February, 1858, 12 March, 1858, 2 July, 1858. This evidence was offered to show a continuous dealing with the firm of Boyd & Stevens, both before and after the dissolution. A verdict was taken, by consent, subject to the opinion of the court on the law governing the case.

His Honor, on consideration, being of opinion with the defendant on the point of law, ordered a nonsuit, from which the plaintiffs appealed.

Merrimon for plaintiffs.
Gaither for defendant.

BATTLE, J. The point presented in this case is said by the counsel for the plaintiff not to be found adjudicated in any of the reports of this State. It is, however, well settled in the mercantile law of England and in New York and in Tennessee, and probably other States. See
(108) Collier Partnership, sec. 532 *et seq.,* and the cases referred to in the notes. In *Wardwell v. Haight,* 2 Barb. (N. Y.), 549, the rule is laid down precisely as is contended for by the counsel of the plaintiffs in this case. That rule is that when a partnership has had continuous dealings with a distant correspondent for some time, actual notice of its dissolution must be given to such correspondent to prevent a liability of all the members of the firm for subsequent dealings carried on by one of the partners in the name of the firm, though without the knowledge or consent of the late partners. The rule is reasonable and convenient, and we have no hesitation in recognizing it as a part of our law. It is founded upon a very general principle that where one of two persons must suffer a loss, he upon whom is imposed the duty of being active to prevent it shall bear it, where he has failed to put the other on his guard against it. Thus where a customer has been in the habit of sending his servant to purchase goods of his merchant on credit, and

afterwards sends him with money to buy other goods, the customer, and not the merchant, shall bear the loss in case his servant had, on the way, embezzled the money. So if a husband suffer his wife to take up goods on his credit, he shall still be liable, though he has forbidden her to deal in that way, unless he has notified the tradesman not to trust her.

Applying this principle to the case now before us, we think it was the duty of the partners in Asheville to give notice of the dissolution of their copartnership to their correspondents in New York, and that a publication of it in the *Asheville Spectator* was not actual notice, nor did it furnish any evidence from which such notice could be inferred. His Honor erred in deciding otherwise. The judgment must be

PER CURIAM. Reversed.

Cited: Ellison v. Sexton, 105 N. C., 360; *Straus v. Sparrow,* 148 N. C., 311.

(109)

WILLIAM CLARK v. WESTERN NORTH CAROLINA RAILROAD.

Where it had been made to appear by the plaintiff's testimony that his horse had been injured on a railroad by the running of a train against it, and it was left doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on track, it was *held* that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled.

ACTION for negligence, tried before *Kerr, J.,* at Fall Term, 1862, of IREDELL.

The plaintiff claimed damages for injury done to his horses by defendant's agent negligently running the train of the railroad against them.

Christopher Clark testified that in November, 1860, when the train was passing near the residence of the witness, he saw a mule of the plaintiff passing over the track of the road, and at the time he heard the *station* whistle, and in a short time he heard the alarm whistle used to scare off stock; that the plaintiff's horses, which were injured, were on the side of the road opposite to that from which the mule came, and came upon the track; the alarm whistle continued to blow, and the horses started off on the track and ran away from the approaching train until they reached a cattle-guard, where they were overtaken and struck by the engine; that the train was stopped about 30 or 40 yards beyond the cattle-guard. He stated that the train was running at a moderate rate of speed when the mule crossed, and that the signal whistle for putting on the brakes was not sounded. He further stated that the grade of

the road was such at this point as admitted of the train being stopped quite readily, if proper effort had been made to do so; that he has known it stopped suddenly on the same ground, some time before that, to prevent a collision; that the train was 212 yards from where the horses were overtaken when the station whistle was blown. Another witness for the plaintiff testified substantially to the same facts.

(110) The defendant introduced one Roberts, the engineer in charge of the engine when the alleged injury was inflicted. He stated that while moving around a heavy curve in the road, at the rate of 20 miles an hour, which was the schedule rate, he saw before him, at a distance of about 50 yards, the plaintiff's horses on the track; that he was then in his proper position on the right of the engine; that the road curved to the left at this point, and his position on the right of the engine was unfavorable for seeing far ahead on account of the smoke-stack and the lamp which obstructed his view; that as soon as he saw the horses he *immediately blew the whistle for the brake and reversed the engine,* and he also blew the alarm whistle for driving off stock; that before he could get the engine stopped it struck the horses; that the train continued running for 30 or 40 yards before he could stop it. He further stated that he was running upon a heavy down-grade with five cars attached; that he did all in his power to stop the train, and that under the circumstances it was impossible for him to have done so sooner than he did.

Another witness by the name of Cox, who was also an engineer, stated that he was on the train at the time, near the engineer, and he gave substantially the same statement with Roberts.

The plaintiff then recalled his witness Clark and offered to prove by him that he, plaintiff, in company with witness, had an interview with Dr. Powell, president of the railroad company, soon after the injury was done, and upon plaintiff's representation of the extent of the injury and the manner of its occurrence, Dr. Powell advised him to kill one of the horses and then to have both of them valued by two freeholders, and, if one of the horses should get well, to have them valued again in like manner, which was done accordingly. This evidence was objected to by the defendant, but admitted by the court. Defendant excepted. The action was commenced within six months after the injury sustained.

The court charged the jury that by the act of 1856, after the injury was satisfactorily shown by the plaintiff, it devolved upon the

(111) defendant to prove that it did not result from the negligence of the defendants' agents; that in law the defendants were required to show that everything had been done which, under the circumstances, it was possible to do to prevent the injury; that in the opinion of the court the brake ought to have been applied to aid in stopping the train

when it was discovered that the horses were on the track; that there was no evidence that the brakes were so applied, the testimony being only that the whistle was blown as a signal for the brakes to be put on, and that the want of such proof left the presumption of negligence still standing against the defendant.

The defendant's counsel asked the court to instruct the jury that they had a right to *infer* that the brakes were applied from the testimony of Roberts and Cox.

This the court refused to do, but stated to the jury that, notwithstanding what Roberts and Cox had testified, the plaintiff was entitled to recover. Defendant excepted to the charge. Verdict for the plaintiff. Judgment, and appeal by the defendant.

Mitchell and Boyden for plaintiff.
Moore for defendant.

BATTLE, J. We are unable to discover any error in the charge of his Honor of which the defendant can complain. The act of 1856, chapter 7, makes the mere fact of killing cattle or other live stock by the engine or cars of a railroad company *prima facie* evidence of negligence on the part of such company. Proof of having killed the plaintiff's horse, then, having been made, the force of that law is to declare that the company's agents were guilty of negligence, of which they could not acquit themselves except by showing that there was no neglect whatever. It is not sufficient for them to prove that there was probably no negligence. They are put by the law under the heavy burden of proving affirmatively a negative. The difficulty of such a position is strongly exemplified in *S. v. Patton,* 27 N. C., 180, and *S. v. Goode,* 32 (112) N. C., 49, decided under the law which made the examination of the mother of a bastard child *prima facie* evidence of its paternity. In the case before us, we think, for the reasons given by his Honor in the court below, that the *prima facie* case made by the plaintiff was not overthrown by the testimony given for the defendant. His Honor might, perhaps, have gone further and stated that the engineer, himself, had shown some neglect by not having placed himself in such a position that he could see along the curve of the road around which the cars were running. Of that, however, the facts stated do not enable us to give a definite opinion.

PER CURIAM. No error.

Cited: Battle v. R. R., 66 N. C., 344; *Pippen v. R. R.,* 75 N. C., 58; *Doggett v. R. R.,* 81 N. C., 466; *Winslow v. R. R.,* 90 N. C., 74; *Baker v. R. R.,* 133 N. C., 34.

ANDREW COPE v. ANDREW BRYSON.

1. Where a defendant in a justice's warrant, after a trial and judgment against him, but before the appeal was tried, paid a part of the claim to the justice, who held it till the trial above took place, and then paid it to the officer of the appellate court, it was *held* that under the pleas "tender and refusal" and "always ready," the measure was unavailing.

2. The proper way for a defendant to avail himself of a payment into court is to have a rule of court to permit him to do so.

3. Whether a justice of the peace can make a rule to pay money into his hands which will avail in an appellate court, *quere.*

ASSUMPSIT, tried before *Dick, J.,* at Spring Term, 1861, of JACKSON.

The suit was commenced before a justice of the peace on a book account for $2.50 and an order purporting to be given by the defendant to the plaintiff. The account was admitted by the defendant, but the order was disputed. The justice gave judgment for both claims, and the defendant prayed and obtained an appeal to the Superior Court,
(113) and he then, in the same presence, but after the judgment and appeal, tendered to the plaintiff $6 in gold and silver, which was sufficient to cover the $2.50 and the costs then due, which was refused by the plaintiff. The defendant then handed the money to the magistrate and gave surety for the appeal. The appeal was returned to the court, and the defendant appeared and pleaded "General issue, payment, tender and refusal, always ready." The cause was continued on the docket for several terms, and a large amount of costs accumulated. At the trial term, on the day before the trial, the magistrate gave the money to the clerk of the court, having retained it till then, and the clerk produced the money on the trial.

The plaintiff, on the trial, offered no evidence as to the sum claimed under the order, but asked for a verdict and judgment for the $2.50 admitted to be due. His Honor charged the jury that if they believed from the testimony that the amount tendered was sufficient to pay the $2.50 and the costs due at the time of the trial before the magistrate, the defendant was entitled to a verdict. Plaintiff excepted.

Verdict and judgment for defendant. Appeal by plaintiff.

Merrimon for plaintiff.
No counsel in this Court for defendant.

PEARSON, C. J. We presume the attention of his Honor was not called to *Murray v. Windley,* 29 N. C., 201; *Winningham v. Redding,* 51 N. C., 126, where the point is directly decided against the defendant. The defendant ought, as soon as the appeal was returned to the county

court, to have paid the money, which he admitted to be due, for principal, interest, and costs, into court, and taken a rule on the plaintiff "to take the money or proceed further in the case at his peril."

Possibly it was in the power of the justice of the peace who tried the case to grant such a rule on the payment of the money to him before the appeal was taken, and at first it occurred to us that the ruling of his Honor might be supported on that ground, but the justice made no entry of the kind on the judgment, and the defendant (114) went to trial on the pleas "general issue," "payment," "tender and refusal," "always ready," and the money was not paid in by the justice until the trial term. Upon these facts and the *pleading,* his Honor erred in his charge to the jury. To have availed himself of the fact that the justice had received the money before the appeal was granted, the defendant ought to have brought it to the notice of the court when the appeal was returned, and taken the rule on the plaintiff; or else to have obtained leave for the justice of the peace to make the entry on the judgment and pay the money into court, so as to allow the plaintiff then "to take the money or proceed further at his peril." Instead of that, the justice of the peace is allowed to keep the money, and the defendant relies on the plea of "tender and refusal, always ready," which plea can only be supported by proof that the money was tendered before the action was commenced. See the cases above cited. There is error.

PER CURIAM. *Venire de novo.*

Cited: Parker v. Beasley, 116 N. C., 7; *DeBruhl v. Hood,* 156 N. C., 53.

DOE ON DEMISE OF D. M. SINCLAIR v. K. H. WORTHY.

1. In ejectment a landlord who is permitted to defend the suit in the place of his tenant is confined to the same defense as his tenant would have been confined to.

2. In an action of ejectment against the debtor by a purchaser at sheriff's sale, the defendant needs only a judgment, execution, and sheriff's deed.

3. There is no principle of law or practice of the courts by which, after a plaintiff in ejectment has obtained a judgment against the tenant in possession, upon whom a declaration has been served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession on the suggestion that the title was in some other person.

(115) EJECTMENT, tried before *French, J.*, at Fall Term, 1860, of MOORE.

The declaration was served on Duncan Murchison, Leonard Farr, and Henry Oldham, and at the appearance term K. H. Worthy was permitted to come in as landlord and defend the suit. The lessor of the plaintiff offered in evidence a judgment and execution against Duncan Murchison, a levy and sale in 1857 of the land described in the declaration, a purchase by him for $15, and a sheriff's deed for the same. The defendant then showed a sale by the sheriff for the same land as the property of Duncan Murchison, and a purchase of it by him for $2,000, in July, 1856, and a sheriff's deed to him of that date, reciting a judgment and execution against Duncan Murchison and a sale to him, and showed that a short time after the sale Duncan Murchison agreed with the defendant that if he, the defendant, would not turn him out of possession, he would hold the land as his (defendant's) tenant, and Murchison then became his tenant and held the land of him until his death, in 1857, and was so holding the land when the plaintiff purchased and at the time of the service of the declaration, and that defendant had been in possession, by himself or his tenants, from the time of his purchase, in 1856, up to the time of the trial. The court charged the jury that as the lessor of the plaintiff had showed a judgment and execution against Duncan Murchison, upon whom the declaration was served, a levy and sale, a purchase by the lessor of the plaintiff and a sheriff's deed, the plaintiff was entitled to their verdict, and that in this action it could avail the defendant nothing to show title to the land sued for. Defendant's counsel excepted. Verdict for plaintiff, and judgment and appeal by the defendant.

The record proper sets out that the plaintiff moved for a writ of possession to issue, which was opposed by the defendant, upon affidavits filed, which were considered by the court sufficient, and he moved that the writ of possession should be stayed until the lessor of the plaintiff should bring his action of ejectment against the present defendant, and until the termination of such action. This motion was sustained
(116) on condition that the defendant, in the future action, should admit possession of the premises, from which order the plaintiff appealed.

Haughton for plaintiff.
Strange, McDonald, and W. McL. McKay for defendant.

PEARSON, C. J. From the manner in which the record is made out, we are at a loss to determine whether this is an appeal by the defendant from the ruling of his Honor on the trial of the action of ejectment, or

an appeal by the plaintiff from the order staying the writ of possession until the lessor of the plaintiff should bring his action of ejectment against the defendant. But for the fact that the case made out by his Honor is sent as part of the record, we should conclude that the only point presented was on the appeal of the plaintiff in regard to the motion to stay the writ of possession, and that the confusion is to be ascribed to an attempt on the part of the clerk to insert the proceeding in respect to the order staying the writ of possession as of Fall Term, 1860. We will take it, however, that both matters are brought up for review.

There is no error in the ruling of his Honor on the trial of the action of ejectment. The facts bring this case within the doctrine that when a landlord defends in place of his tenant, he can make only such defense as his tenant could make, and that in an action of ejectment by a purchaser at sheriff's sale against the debtor in the execution, he need only show a judgment, execution, and sheriff's deed. This is the general rule, and the case does not come within the exception made under the peculiar circumstances presented in *Jordan v. Marsh,* 31 N. C., 234; so we conclude with his Honor, that the plaintiff was entitled to recover.

But we do not concur with him in his holding on the motion to stay the writ of possession. We are not aware of any principle of law or practice of the courts by which, after a plaintiff in ejectment has obtained judgment against the *tenant in possession,* upon (117) whom the declaration in ejectment has been duly served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession, on a suggestion that the title is in some other person. We were informed on the argument that his Honor supposed the order to stay the execution was warranted by the opinion in *Judge v. Houston,* 34 N. C., 108. Such a conclusion was not warranted by that opinion, and shows that it was totally misapprehended. In that case the declaration in ejectment was not duly served on the *tenant in possession,* but was served on one who was only a *guest* or *servant* of the persons really in possession, and it was held that the latter, who had received no notice of the action and had no right or opportunity of making defense, should be turned out of possession under a judgment obtained against the guest or servant. But in this case the declaration was served on the *person really in possession;* so the opinion in that case had not the slightest application.

We are glad of an opportunity to correct this misapprehension, for, if the practice should prevail of staying the writ of possession in all cases where the landlord defends in place of his tenants, the rule that he is confined to such defense as his tenant could make, and that a pur-

chaser at sheriff's sale, as against the debtor in the execution, need only show a judgment, execution, and sheriff's deed, would be completely eluded.

PER CURIAM. Judgment in the action of ejectment confirmed. The order staying the writ of possession reversed.

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(118)

DOE ON THE DEMISE OF A. AND E. KRON v. BENJAMIN CAGLE.

Where a tract of land had marked trees all around it, demarking 300 acres, and one held a small isolated parcel within these bounds for five years, and there was no evidence to connect him with the marked trees or the grant under which the marks were made, it was *held* that he had not *prima facie* evidence of title to the land according to these bounds under the act of 1850.

EJECTMENT, tried before *Howard, J.,* at Fall Term, 1861, of MONTGOMERY.

The plaintiffs offered in evidence a grant to one James Noll, 1799, for the land in dispute, and proved that in 1831 one Burrage built a small house on it and occupied the same, cultivating a field around the house, and while there hunted and dug for gold on the land by the permission of Delamotte (as he stated); that there were marked trees all around the tract; that in 1832 one Ferrill occupied the house; that it was then vacant until December, 1834, when Ferrill returned and took possession, telling the witness that he had a house at last where he felt settled; that he had been put there by Delamotte. Ferrill continued to live on the land from December, 1834, to August, 1845, when he was ejected at the instance of the lessors of the plaintiff. The plaintiffs are the devisees of the land under the will of Delamotte, which was duly proved. He died in 1838. These facts, and others not material to the point considered by the Court, were submitted to his Honor. The question raised by the counsel was whether the possession of Ferrill, as tenant for Delamotte for five years, was *prima facie* evidence of title under the act of 1850.

Judgment for the defendant, and the plaintiffs appealed.

Ashe for plaintiffs.
Strange for defendant.

(119) PEARSON, C. J. An objection presents itself *in limine,* which is fatal to the plaintiff's case. There is no evidence that Delamotte ever had a deed, or in any manner claimed to derive title under

Noll. So there is nothing to show that he held or claimed according to the boundaries of the grant to Noll, or to connect his title with the marked trees around that grant. He may have claimed up to some line, including a fourth or a half, or any indefinite part of the land covered by the Noll grant, or his claim may have extended outside of that grant to any other lines or boundaries. In other words, there is no evidence to fix the boundaries according to which Delamotte claimed.

The fact that, in 1799, a grant issued to one James Noll for 300 acres of land, and that there were marked trees all around it, and that in 1834 Delamotte put one Ferrill in possession of a piece of land inside of these marked trees, and Ferrill lived there as Delamotte's tenant for more than five years and cleared a few acres of land, is no evidence of the allegation that Delamotte held and claimed according to the lines which had been marked for the grant to Noll, in the absence of any proof whatever to connect his title with the grant or to show that he had ever seen or heard of it, or knew anything about the marked trees around it.

The evidence does not bring the plaintiff's case within the provisions of the statute relied on, chapter 68, section 12, Laws 1850, which is in these words: "Peaceable possession of land, although no color of title be shown, for five years, shall be *prima facie* evidence of title, where persons may *hold or claim* under known and visible metes and bounds." There is no evidence that Delamotte did hold or claim under known and visible metes or bounds, and there is nothing to show the extent of his claim. There is no error.

PER CURIAM. Affirmed.

Cited: Smith v. Kron, 96 N. C., 396.

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(120)

DOE ON THE DEMISE OF JOHN McDOUGALD v. ALLEN McLEAN.

1. A person whose land has been sold at sheriff's sale is a competent witness, in an action of ejectment against the purchaser at such sale, to show that his own title was defective.

2. Any one who had an opportunity of knowing and observing a person whose sanity is impeached, though he may not be an attesting witness, may give his opinion of such a person's capacity to make a deed or will.

3. Where it is established that the deed offered by one of the parties in ejectment, claiming under the same person with the other, is void, he is not estopped from denying the title of the other party.

EJECTMENT, tried before *Howard, J.*, at Fall Term, 1861, of HARNETT.

The plaintiff's declaration included three tracts or pieces of land. The lessors of the plaintiff showed by grant and deeds a good title to two of the tracts in one Hugh McDougald, the death of McDougald, and that they were his heirs at law. They also showed the possession of the defendant, at the time the declaration was served, of all three tracts, but offered no evidence of title as to the third tract.

The defendant then offered in evidence a deed from Hugh McDougald to one McPhail, a judgment, execution, levy, sale, etc., as the property of McPhail, and a sheriff's deed to himself. The deed of Hugh McDougald and the sale and deed of the sheriff covered all three tracts.

The plaintiff then offered evidence of Hugh McDougald's incapacity to make the deed. Among his witnesses, he tendered McPhail, to whom the deed was made. The defendant objected, but the objection was overruled, and defendant excepted.

One Atkins was introduced as a witness. He stated that he had been deputy sheriff during the year in which the deed was made; that he knew McDougald, and did some business with him. The plaintiff proposed asking the witness "whether, in his opinion, McDougald was, during that year, competent to transact business or make a deed."

The defendant's counsel objected to the question, and insisted that Atkins, not being a witness to the deed, could only describe the
(121) acts and sayings of McDougald, and was not, in law, allowed to express his opinion. The witness was permitted to give his opinion, which was that he did not think he had mind enough to protect himself. Defendant excepted.

The court charged the jury that as the defendant produced the deed from McDougald and claimed title from him through McPhail, he was estopped from denying his title, and, therefore, if they were satisfied that McDougald was not competent to make a deed at the time the deed purported to have been made, the plaintiff was entitled to recover not only the two tracts, but the third also. Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

N. McKay for plaintiff.
W. B. Wright and Buxton for defendant.

BATTLE, J. The objections to the competency of testimony were untenable, and his Honor was right in so deciding.

1. McPhail was competent to testify for the plaintiff. His testimony was against his interest. In proving that the deed from McDougald to him was void on account of the incapacity of the grantor to make it, he

showed that he was liable to the defendant, who was the purchaser of the land as his, under a sheriff's sale. See Rev. Code, ch. 45, sec. 27.

2. *Clary v. Clary,* 24 N. C., 78, has settled the rule that in the case of a deed as well as of a will any witness, though he may not be an attesting one, who has had opportunities of knowing and observing a person whose sanity is impeached may not only depose to the facts within his knowledge, but he may also give his opinion as to the sanity or insanity of such person.

Upon the question of estoppel, his Honor's opinion was wrong. If the deed from McDougald to McPhail was a nullity because of the grantor's insanity, we cannot see how it could estop the grantee or any person claiming under him. It certainly did not estop the grantor, and a primary rule in the doctrine of estoppels is that, to be of any (122) force, they must be mutual. Hence the defendant was not estopped to take advantage of the fact that the plaintiff's lessors could not show title to the third tract of land described in the plaintiff's declaration. It was error, then, in the court to instruct the jury that the lessors were entitled to recover that tract, and for the error thus committed the judgment must be reversed and a

PER CURIAM. *Venire de novo.*

Cited: Drake v. Howell, 133 N. C., 167; *In re Peterson,* 136 N. C., 29.

STATE ON THE RELATION OF A. R. SHIPMAN v. JESSE MCMINN.

Where the record of the county court showed that A. was appointed a constable for one year, and it was proved that he acted as such during the year ensuing, although the condition of the bond did not express the term for which he was appointed, and although the appointment was not made at the term prescribed by law for appointing constables, yet it was *held* that he and his sureties were liable for a breach of the bond occurring within the year ensuing.

DEBT on a constable's bond, tried before *Osborne, J.,* at Fall Term, 1860, of HENDERSON.

It appeared that at October Term, 1856, of Henderson County Court the defendant was appointed constable for one year, and filed the bond on which this suit was brought. The bond was in the ordinary form, with a condition to perform the duties of constable, without specifying the term of his office. It further appeared that the regular term for the appointment of constables, by the statute, was at the county court held

on the first Monday after the fourth Monday in December. The claim was put in the hands of the defendant in March, 1857, and the breach occurred within the year after the appointment of the defendant.
(123) Upon this state of facts his Honor held that the defendant was liable on his official bond, and so instructed the jury, who found a verdict for the plaintiff. Judgment was given for the plaintiff, and the defendant appealed to the Supreme Court.

Merrimon for plaintiff.
No counsel for defendant.

BATTLE, J. The principle of this case is identical with that of *Hoell v. Cobb,* 49 N. C., 258, and the decision must be the same. The only difference in the facts of the two cases is that in the former it was stated in the official bond of the constable, as well as in the record of his appointment, that he was chosen for one year. In the present case it appears upon the record that he was appointed for one year, though the bond does not recite the duration of office. But it was proved that he continued to act under color of his office during the year, and that is sufficient to render him and his sureties liable by force of section 9, chapter 78, Rev. Code. The policy of that law is to render the sureties of a constable liable for his official delinquencies, rather than to subject those who may have put claims into his hands for collection to suffer loss, though he may be acting under an irregular or invalid appointment.

PER CURIAM. Affirmed.

DOE ON THE DEMISE OF NANCY LEATHERWOOD v. JOHN BOYD.

Where the certificate of probate to a will set forth that it was proved in common form by the oath of A., one of the subscribing witnesses, and then proceeded to state what the witness swore to, and there was no assertion among these particulars that A. subscribed the will as a witness in the presence of the testator, it was *held* that the probate was defective.

(124) EJECTMENT, tried before *Dick, J.,* at Spring Term, 1861, of HAYWOOD.

The lessor of the plaintiff adduced his title regularly to John Leatherwood, whose will conveying the same to her, was offered in evidence, but objected to for the want of a due probate. The certificate of the probate of the will was as follows:

"The last will and testament of John Leatherwood, deceased, was duly proven in common form by the oath of Rufus A. Edmonston, one of the

subscribing witnesses thereto, who swears that he saw the said John Leatherwood sign and seal said paper-writing, and declared it to be his last will and testament, and at the time thereof was of sound, disposing mind and memory, and that he done it freely and without compulsion. Sworn in open court, which was ordered to be spread at length on the paper-book kept for that purpose."

The evidence was admitted, and defendant excepted. The will had two subscribing witnesses to it, and it was objected that the probate was made by one only. This objection was overruled, and defendant excepted.

Verdict and judgment for plaintiff, and appeal by defendant.

No counsel for plaintiff.
Merrimon for defendant.

PEARSON, C. J. We are of opinion that the probate of the will of John Leatherwood was not sufficient according to the certificate, and it was, consequently, error to permit the will to be read in evidence. Had the certificate stopped after these words, "The last will and testament of John Leatherwood was duly proved in common form by the oath of Rufus A. Edmonston, one of the subscribing witnesses thereto," it would have been sufficient in this view of the question (*Marshall v. Fisher,* 46 N. C., 111; *Beckwith v. Lamb,* 35 N. C., 400; *University v. Blount,* 4 N. C., 13), on the ground that every court, where the subject-matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there is something on the face of the proceeding to show to the contrary; for the presumption is that the court knew how to take the probate of a will, (125) and saw that it was properly done. But if there be anything on the face of the proceeding to show the contrary, that will rebut the presumption. In *Carrier v. Hampton,* 33 N. C., 307, the probate of a deed was before a judge of the Superior Court, and he certified "that Jefferson S. Hampton, being duly sworn, testified that Edmund Tomberlin, the subscribing witness to the within bill of sale, is dead, and that the signature of Jonathan Hampton, the grantor therein, is in the proper handwriting of the said grantor." It is held that the probate was not sufficient, because the judge professes to set out what was sworn by the witness, and on the face of the proceeding it appeared that the probate was defective in this, that the witness did not state upon what ground he founded his opinion, nor by what means he had acquired a knowledge of the handwriting of the party. In our case the certificate professes to set out what was sworn to by the witness Edmonston, *i. e.,* "who swears that he saw the said John Leatherwood sign and seal said paper-writing,

and declared it to be his last will and testament, and at the time thereof was of sound and disposing mind and memory, and that he done it freely and without compulsion. Sworn in open court." So it appears on the face of this proceeding that the probate was defective in this: the witness did not state that he subscribed the will, as a witness, in the presence of the testator, which is an essential requisite in the due execution of a will to pass land. The omission of this fact, where particulars are entered into, rebuts the presumption that would otherwise have been made under the maxim *omnia presumuntur rite esse acta;* consequently the probate as it now appears must be held to be defective. Should the fact be that the witness did swear that he subscribed the will as a witness, in the presence of the testator, and the omission to set it out was a misprision of the clerk, the county court may permit an amendment so as to make its records speak the
(126) truth, and in that way put the matter right. For this error there must be a *venire de novo.*

We do not see proper to notice the objection that the will was proven by only one witness, whereas by the Revised Code it is necessary that it should be proved by at least two witnesses, because it is not necessary for the purpose of this decision, and from the statement of the case made by his Honor it does not appear *at what time* the will was admitted to probate; for if it was done before the Revised Code went into operation, the probate by one of the subscribing witnesses was sufficient. How that fact is will, of course, be set out if the case should come up again.

PER CURIAM. Error.

Cited: Howell v. Ray, 92 N. C., 514; *S. v. Jones,* 93 N. C., 618; *Cowles v. Reavis,* 109 N. C., 421.

STATE v. HENRY YOUNG AND COSBY YOUNG.

Where a person suspected of a murder was arrested and brought before a jury of inquest as a witness and subjected to a rigid examination, it was *held* that this examination was not competent evidence against him on a trial for the offense.

INDICTMENT for murder, tried before *Saunders, J.,* at Fall Term, 1861, of MACON.

The prisoners were indicted for the murder of John Wesley Jenks. On an inquest over the body of the deceased, the wife of one of the prisoners had left the place and gone in the direction of the residences of the prisoners, in order, it was suspected, that she might give them notice

to escape; and in order to prevent this, and to avoid alarming them, they were arrested as witnesses by the deputy sheriff (several of the jury acting as his assistants) and brought to the place of holding the inquest. They were then sworn as witnesses and subjected to a rigid examination, which, in many of its particulars, were supposed to implicate them in the homicide. They were then charged with the crime, and on the trial in the Superior Court the solicitor for the State offered (127) to read in evidence the examination of the prisoners before the jury of inquest. This was objected to by the counsel for the defendant, but admitted by the court. Defendants' counsel excepted.

There was a verdict of guilty, a judgment, and an appeal by the defendants.

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

BATTLE, J. There are very few questions in which there is a greater conflict of judicial decisions than in that whether the statement made on oath by a person while under examination as a witness before a coroner's inquest or an examining magistrate can afterwards be used as evidence against him upon an indictment for the same offense as that as to which he has been examined. In Roscoe's Crim. Ev., pp. 49 and 50, references to many of these conflicting cases may be found. Mr. Phillips, in the last edition of his valuable treatise on evidence, after referring to most of the cases on the subject, endeavored to draw a distinction between the case where the prisoner was in custody, or was under suspicion, and where he was examined against another party under a distinct charge (see 1 Phil. Ev., 404). Mr. Roscoe, in remarking upon the distinction, says that in none of the recent cases had it been adverted to as the ground of decision. He then closes his observations on the subject by the remark that "the ground on which a deposition, upon oath, by a prisoner, has been generally considered to be inadmissible, without reference to the circumstances under which it is made, is that, being upon oath, it cannot be looked upon as a voluntary statement, although it undoubtedly strengthens the objection to such a deposition that the party is in custody or under suspicion at the time."

In *S. v. Broughton,* 29 N. C., 96, the prisoner had been exam- (128) ined as a witness before the grand jury, who were investigating the case of alleged murder, and had given evidence tending to fix the charge on another person. He was afterwards suspected and indicted for the crime, and his testimony, as given before the grand jury, was offered as evidence against him. The Court said that if the evidence offered had purported to be a confession, it could not have been admitted,

because, being under oath, it could not have been deemed voluntary; but as a statement tending to criminate another person, it was admissible against him, and the falsity of it, taken in connection with other circumstances, was relied on as evidence of his guilt. There the prisoner at the time when he was examined was not under arrest, in which respect the case differs from the one now before us. *Rex v. Lewis,* 6 C. and P., 161 (25 Eng. C. L., 333), approaches in its circumstances to our case. There the prisoner, Coelia Lewis, was indicted for an attempt to poison. It appeared that on the day on which she was committed she had been summoned as a witness, along with others, to give evidence before a magistrate. At first, she was not suspected, but on the conclusion of her examination she was committed for trial on the same charge. In her examination she had referred to a letter produced by her, and on her trial it was proposed to be proved, on the part of the prosecution, what she had said about the letter. *Gurney, Baron,* refused to receive the testimony, saying that it was in her written examination. It was then proposed to give evidence of what the prisoner said, which was not taken down, and this was also refused by the judge. Here it will be noticed that the evidence which was ruled out is not stated to have been a confession of the prisoner's guilt, and the ground upon which it was rejected must have been that the prisoner's statement was made while she was on examination on oath. The circumstances of the case now before us are still stronger to show that the prisoners were under restraint in giving their testimony. They were suspected of having committed the homi-
cide, were under arrest, and were subjected, as the bill of excep-
(129) tions states, to a rigid examination. Although treated as witnesses, they were, in truth, prisoners under examination, and as such nothing which they stated under oath ought to have been admitted in evidence against them (see Roscoe Crim. Ev., 61). The judgment must be reversed and a

PER CURIAM. *Venire de novo.*

*Cited*s *S. v. Wright,* 61 N. C., 488; *S. v. Matthews,* 66 N. C., 110; *S. v. Grady,* 83 N. C., 645; *S. v. Parker,* 132 N. C., 1018.

STATE v. JACOB W. MURPH.

1. It is no ground for a challenge to the array, in a capital case, that it does not appear from an order for a special *venire facias* that it was made in the case of the prisoner. It is sufficient if it appear that it was made at the term at which the trial was had.

2. A challenge to the array of jurors is generally founded on a charge of partiality, or some default in the sheriff or other officer summoning them.

3. Whether, where the manner of a homicide charged in a bill of indictment is by cutting the throat of the deceased with a knife, and the proof is that it was done by blows inflicted on the head with a gun, the variance is material, *quere.*

4. The court is not bound to give special instructions to the jury, at the request of counsel, on a hypothetical case.

INDICTMENT for murder, tried before *Kerr, J.,* at Fall Term, 1862, of ROWAN.

The defendant was indicted for the killing of one John Cope, by cutting his throat with a knife, and in the same bill one Wilson McGrady was indicted for aiding and assisting in the same homicide. The case was removed to Rowan from the county of Cabarrus.

Upon the trial, one Mary Cope, wife of the deceased, testified that on Sunday, 8 December, 1861, Jacob Murph came to the house of the other defendant, McGrady, about 8 o'clock in the morning; that shortly thereafter Cope, the deceased, came to the same place in a buggy, (130) and she went out to meet him, and found that he had put his horse in the stable; he and McGrady were brothers-in-law; that in a short time Cope concluded that he would leave the place, and went to the stable to get his horse for that purpose, and witness went with him, but found the horse sick and unfit to be used; that they then returned to the house and found McGrady standing near the corner of the house; they (witness and her husband) entered the building and were standing near the door when Murph came up with a gun under his arm, pointing towards witness and deceased; that Murph said, "Good evening," to which Cope said, "Good evening, G—d damn you; I will kill you"; that Cope then turned towards the prisoner and seized the gun, and succeeded in wresting it from the prisoner's hands; that the prisoner stepped back a little, and Cope fired the gun at him; that the witness then stepped back a little and took a seat in the house where she could not see the parties; that she heard the noise of a scuffle between them, and heard the sound of heavy blows, and heard the deceased say, "Oh, don't!" She also heard the prisoner say, "I have cut his damned throat"; that a few minutes afterwards she heard him say, "We will take him and put him in the smokehouse, and then we will carry him to Beaty's old field"; that she heard chopping at the smokehouse, and saw McGrady coming from towards the stable, and on his going to the smokehouse, Murph again said, "We will put him into the smokehouse until night, and then take him to Beaty's old field"; this was about 2 o'clock in the evening; she got supper about sundown, of which the prisoner and McGrady partook, and then the former left the house and went off; but before he went, he

told witness that if any one came there and inquired for him, to say that he had not been there since Thursday, and said further, "If you tell anybody what has happened, we will kill you"; that the prisoner did not return to McGrady's until 12 or 1 o'clock that night; that as soon as he came back he said to McGrady, "It is time to go"; that she, in a short time, heard the tramping of a horse in the yard and the noise of
(131) a buggy, and then Murph and McGrady went away and did not return till about 3 o'clock, and that they then made up a fire and sat until about day, when Murph went off again; the gun to which witness referred was the property of the prisoner, which he carried away with him when he left on Monday morning; it was a rifle. This witness also testified that on Sunday before the killing took place, Cope told her that he intended to kill Murph wherever he met him, and that she had told Murph of this threat. The witness further stated that Murph, the prisoner, was in the habit of having his washing done at McGrady's, and frequently left his gun there.

(133) The State offered in evidence a letter, purporting to be from the prisoner, addressed to Mary Cope, wife of the deceased, which was objected to by the prisoner's counsel, but the State examined the witness, G. L. Gibson, touching the origin of the letter, who stated that while Murph was in jail, in Concord, he requested witness to go to the postoffice and inquire for a letter which he had written to Mary Cope, and if he found such a letter, to take it out. The witness did as directed, and found the letter in question. The prisoner's counsel objected to the reading of this letter, but the court overruled the objection, and defendant's counsel excepted. (The letter was not sent up in the bill of exceptions.)

On the trial of the cause the witness G. L. Gibson was asked by the prisoner's counsel if he had not gone to the witness Mary Cope and offered her money, which had been furnished by the prisoner, to go away and not testify in the cause. This evidence was objected to by the State's counsel, and the court rejected it. Defendant's counsel excepted.

On the trial of the cause, when the jurors were directed to be called, the prisoner's counsel objected to the whole venire, which had been summoned by an order of the court made on the day before. The objection was on the ground that it did not appear that the said jurors had been ordered by the court to be summoned in this particular case, but that it appeared from the minutes of the court that the order was made in the case of the State against McGrady. The court overruled the challenge, and defendant's counsel excepted.

After carefully recapitulating the evidence, the court charged the jury:

"1. If the jury believe that the prisoner went to the house of McGrady, at the time spoken of, for the purpose of carrying on an illicit intercourse with the wife of the deceased, and carried his rifle with him for the purpose of using it against the deceased if a difficulty or encounter should arise between them, and he then took the life of the deceased by the infliction of the violent blows on the head and cutting of his throat, as the evidence indicated, then it was a case of murder.

"2. If the jury believe that the prisoner went to the house of (134) McGrady with no unlawful purpose, and, getting there, he was involved in a fight with the deceased, without provocation on his part, and the deceased wrested the gun from him and fired it at him, and then at the spot where the fight commenced, the prisoner inflicted the blows with the rifle, and cut the throat of the deceased in the heat of blood, then it was only a case of manslaughter.

"3. If the jury believed that the deceased was struck down by the prisoner, by blows with a rifle, as testified to by Dr. Beatty, and as indicated by the prisoner's confession, and yet, life being not extinguished by the blows, the prisoner took the deceased and moved him to the smokehouse, and there, finding him still alive, took a knife from the crack of the smokehouse and cut the throat of the deceased, and that extinguished his life, it was a case of murder, and was such a killing as was charged in the bill of indictment.

"4. That the jury must be satisfied that the killing was in the manner and form as charged in the bill, and if they believe that the deceased died from wounds inflicted with the rifle, the jury ought to acquit."

The prisoner's counsel asked the court to charge the jury that, supposing the prisoner went to the house of McGrady, and took the gun with him only for the purpose of defending himself, and that the fight occurred and the throat was cut at the place where the fight commenced, then it was a case of manslaughter only. The court declined giving the instruction, and defendant excepted.

Prisoner's counsel further moved the court to charge the jury that if they believed the fight was as the female witness (Mrs. Cope) described it, and that the deceased got the gun and the prisoner drew his knife to defend himself from the attack of the deceased, and then cut his throat to prevent deceased from killing him, then it was a case of justifiable homicide. The court declined to give this instruction, and defendant again excepted. (135)

The defendant was found guilty of murder. Upon which, judgment of death was pronounced, from which the defendant appealed to the Supreme Court.

Attorney-General for the State.
No counsel appeared for prisoner in this Court.

BATTLE, J. We have examined with care the various objections set out by the prisoner in his bill of exceptions, and are prepared to state the conclusions to which we have been led.

1. The challenge to the array of jurors made by the prisoner has nothing to sustain it. Such a challenge is an exception to the whole panel, and is generally founded on a charge of partiality, or some default of the sheriff or other officer who summoned them. 3 Bl. Com., 359; 4 *ibid.*, 452. In the present case the jurors excepted to were summoned on a special *venire facias* issued by an order of the Court and executed by the sheriff. No exception is taken to the officer nor to the manner in which he discharged his duty; the objection is founded on the allegation that the order was not made in the case of the prisoner. But we can see no necessity that the record should show in what particular case the court made the order. It is sufficient if it appear that it was made at the term at which the trial was had. When summoned, the jurors may be called in any case in which a person may be tried at the term for a capital offense. Rev. Code, ch. 35, sec. 30.

2. The objection to the introduction as evidence of the letter written by the prisoner to Mary Cope is, we suppose, abandoned, as no copy of the letter has been sent up, though stated to be annexed to the bill of exceptions as a part of it.

3. The purpose for which the prisoner's counsel proposed to ask the witness G. L. Gibson if he had not gone to the witness Mary Cope and offered her money, furnished by the prisoner, to go away, is not
(136) stated. We are unable to perceive how the exclusion of it by the court could have prejudiced the cause of the prisoner.

4. The charge of the court to the jury as to the law applicable to the different views which they might take of the testimony was certainly as favorable to the prisoner as he had a right to claim. Whether upon the point in relation to the manner of the killing it was not more so may, perhaps, admit of doubt. It is true that if a man be indicted for one species of killing, as if by poison, he cannot be convicted by proving a totally different species of death, as by shooting, starving, or strangling; but if the means of the death proved agree in substance with those charged, it is sufficient. Thus, where the death is caused by any weapon, the nature and description of the weapon ought to be stated; yet if it appear that the party was killed by a different weapon, it maintains the indictment; as if a wound or bruise be alleged to be given with a sword, and it proves to be with a staff or axe, the difference is immaterial. See

Ros. Crim. Ev., 706; 1 East Pl. Cr., 341; 2 Hale Pl. Cr., 185. It is unnecessary to pursue the inquiry, because the error, if there were one, was in favor of the prisoner, and he cannot object to it.

5. The special instructions asked for by the prisoner's counsel were upon a hypothetical state of facts not presented by the evidence, and his Honor was, therefore, not bound to give them.

We have examined the whole record, and have found therein

PER CURIAM. No error.

Cited: S. v. Hensley, 94 N. C., 1028; *Boyer v. Teague,* 106 N. C., 620; *S. v. Moore,* 120 N. C., 571.

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(137)

STATE v. STEPHEN BAILEY.

Where there is a conflict of testimony, which leaves a case in doubt before a jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead, this Court will order a *venire de novo.*

INDICTMENT for trading with a slave, tried before *Osborne, J.,* at Fall Term, 1862, of DAVIDSON.

The indictment was for trading with Miles, a slave, belonging to one Robert B. Jones, for a piece of bacon. The prosecutor, Jones, swore that on a certain night of one of the first days of March (he could not tell which) he found his negro boy, Miles, near his smokehouse with some pieces of bacon in a bag, which the negro had taken from the smokehouse; that he demanded of the negro whither he intended to take it, and threatened to whip him severely unless he disclosed, whereupon the slave stated that he intended carrying it to the defendant, who was to start to Cheraw the next day, and had persuaded him to bring the bacon that night. (The conversation of the slave with the master was received by the consent of the defendant's counsel); that he then told the slave to carry it to the defendant, as he had intended, and he went with him to near the house of the defendant; that the negro placed the meat on a stump and went to the door of the house and quietly knocked and whistled, when the defendant came out and agreed to give the negro $1.50 for the meat; that defendant stated that he had no smaller sum than $5 and could not make the change, but would pay him soon; that he took the meat up and carried it into the house, and then the witness and the

negro left. On cross-examination, he stated that he allowed the negro to carry four pieces, when one would have answered, because he feared the suspicions of the defendant would be excited if he had carried but a small piece of meat. He further stated, without objection on the part of defendant's counsel, that he detected the defendant once before trading with a slave which belonged to his mother, and did not prosecute, because his mother did not wish a fuss in the neighborhood.

(138) The defendant introduced one Bailey, his brother, who stated that on the last day of February he started with his brother to Cheraw; that on the first day they went out of the county of Davidson; that they were absent six days, when they returned to the house of the defendant on the night of 7 March; he was not certain, but thought that they returned about 12 o'clock at night; that defendant and his wife slept in one room of the house and he in another; that the door was open and he could see or hear whatever occurred in his brother's room, and did not believe that the circumstances narrated by the witness Jones could have occurred without his knowledge. He further stated that on the next day defendant and witness went to a sale in the neighborhood and did not return until very late; that he slept that night in the same room; that on the 8th he and his brother went to the house of one Hopkins and remained until after 12 o'clock, when they returned and slept in the manner previously described; that on the 9th he and his brother went to Wadesboro as witnesses, and did not return until the 12th of the month.

Two witnesses by the name of Hunt stated they were present when a general quarrel grew up between the witness Jones and one Reeves; that there was a great deal said on both sides which they did not hear or remember, but they were under the impression that, in the course of the quarrel, Jones said he knew nothing about the trading except what the negro told him. On cross-examination one of the witnesses stated that he could not assert, positively, that this was the language of the prosecutor, but it was his best impression.

One Hopkins testified that some time in August the prosecutor came to his field where he was at work and asked him what Reeves and Bailey, the defendant, said about his going to the house of the defendant in June, and said he had not stated at that time that Bailey got any meat from his negro, but all he knew about it his negro told him; but that on the last days of March he had detected his negro stealing meat

(139) from his smokehouse; that he didn't make known to the negro that he had found it out, but followed him secretly until he saw him place the meat on a stump near the door of defendant's house; that the negro went to the door and knocked and whistled, when the defendant came out and agreed to give the negro $1.50 for the meat, but he said

he had no bill smaller than $5; that he would pay him as soon as he could get the change. This witness also stated that in the same conversation the prosecutor said he would not have prosecuted the defendant if he had paid the negro for the meat and had not brought suit against him.

Several witnesses testified that the character of the prosecutor was bad, and several others testified that it was good.

The court charged the jury that if they believed the witness Jones, they ought to find the defendant guilty; but it was argued that the prosecutor should not be believed, because of contradictions to his testimony which had been proved, and because of his bad character; that as to the contradictions alleged to be derived from the witness Bailey, they would inquire whether there was any fact proved inconsistent with the testimony of the prosecutor; if they believed the trading took place before the journey to Cheraw, there was no contradiction; if it took place afterwards, whether there was a contradiction or not depended on whether there was an opportunity for the occurrence spoken of by the prosecutor to have taken place without the knowledge of the witness Bailey; that it was the duty of the jury to reconcile testimony, if possible; that on questions of time, depending upon the memory of witnesses, they would consider whether there might not be errors of recollection as to days, weeks, or hours of the night when certain occurrences took place.

As to the contradictions alleged to be proven by the witness Hunt, the court charged the jury that contradictions are more or less strengthened by the recollection of the witness, by his opportunity of hearing all the antecedents and succeeding parts of the conversation; the context might explain the language of the witness and relieve what other- (140) wise might be an apparent contradiction.

As to the contradiction deposed by the witness Hopkins, it was to be taken, as a whole, inconsistent with the statements of the prosecutor as to the manner of the negro's getting the meat and his taking it to the house of the defendant; that these matters were not material to the question of the defendant's guilt, which depended on what they might think as to whether he purchased the meat from the slave after he arrived at the house; that the contradictions of the prosecutor were immaterial matters, and, if they believed them, might go to his credit; they would also consider the testimony so far as it confirmed the State's witness in matters on which the guilt of the defendant depended, and give to each such force as they believed it entitled to; that as to the character of the prosecutor, they would consider the testimony both for and against it, always weighing it with care and scrutiny. The defendant's counsel excepted to the charge.

Verdict for the State and judgment of the court. Appeal by the defendant.

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

PEARSON, C. J. The evidence in this case leaves the matter so nearly on a balance as to require very great consideration on the part of the jury in order to determine on which side the truth preponderates. When that is the case, it is of the utmost importance that the words used by the judge in giving his charge should be precise and accurate and not susceptible of a meaning which would be calculated to mislead the jury. His Honor puts the case on the credit of the prosecutor, Jones, and instructs the jury that it was *their duty* to reconcile the testimony, if *possible,* and then suggests that a "collision" between the witnesses Jones and Bailey, the witness for the defendant, might be avoided on the supposition that Jones was mistaken as to the date of the supposed
(141) trading with the slave. It is a rule of law, based on the principle that no witness, either on the side of the prosecutor or the defense, shall be presumed to have committed perjury; that the witnesses should not be put in collision, and a perjury on the one side or the other made inevitable, if the collision can be avoided by any other fair and reasonable view of the case as presented by the whole of the evidence. We presume his Honor intended so to be understood; but his words are much stronger, and were calculated to mislead.

His Honor also instructs the jury that in regard to the alleged contradiction of the witness Jones, in that he had said in conversation before the trial that all he knew of the negro's having taken the meat and trading it to the defendant was from what the negro had told him, whereas, on his oath, he stated that he had detected the negro in *the very act of taking the meat,* and had gone with him, and was present when the defendant committed *the very act of trading* with the slave, so that he had caught the defendant in the act, that this contradiction of the witness Jones was an *immaterial matter,* and *went to his credit,* if the jury believed it. There had been no objection to the competency of the witness Jones, so that we do not clearly understand what his Honor means by the words "went to his credit," in the connection in which they were used. Of course, this contradiction went to his credit, for it bore on *the very fact,* and ought to have had a very decided weight with the jury, if they believed it, in estimating the credit to which the testimony of the witness Jones was entitled. There is

PER CURIAM. Error.

Cited: S. v. Rogers, 93 N. C., 532; *Withers v. Lane,* 144 N. C., 190; *Speed v. Perry,* 167 N. C., 127.

(142)

STATE v. JOHN TWIGGS.

1. It was held to be error in a court, in the trial of a criminal case, to order that an affidavit, made by the defendant, for the continuance of the cause should be read as evidence for the affiant, with leave for the State to offer testimony in contradiction (the defendant objecting and insisting on a continuance).

2. Upon the conviction of a prisoner in a capital case, the sentence of the court must be carried into execution by the sheriff of the county where he was tried, and it was *held* error to order it to be done in the county whence the cause was removed, or by the sheriff of that county.

INDICTMENT for murder, tried before *Saunders, J.*, at Fall Term, 1862, of RUTHERFORD.

The cause had been removed, on the affidavit, from Burke. The defendant offered an affidavit stating certain facts as the ground for a continuance of the cause, on which the court decided "that the cause should be continued unless the solicitor for the State would consent to have the affidavit read as evidence, and he should be at liberty to offer testimony in contradiction. The defendant excepted to this ruling. The solicitor accepted the terms, the trial was had, the affidavit was read in behalf of the prisoner, and the State produced evidence controverting the facts stated in the affidavit. There was a verdict against the prisoner for murder. The court adjudged that the defendant be taken to the county of Burke, from whence he came, and kept in close confinement until Friday, 2 January, 1863, when he be taken to the place of public execution, and then be hanged by the neck until he be dead, and the sheriff of Burke is to carry this sentence into effect."

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

PEARSON, C. J. In all criminal prosecutions every man has a right to be informed of the accusation against him, and to *confront the accusers and witnesses with their testimony,* and shall not be compelled to give evidence against himself. Declaration of Rights, (143) sec. 7.

By the common law the witnesses must be examined in the presence of a jury, so as to enable the jury the better to pass on their credit by observing their looks, manner, etc.

In the trial of civil cases this rule of the common law is departed from, under certain circumstances, and depositions are allowed to be read where the attendance of the witnesses cannot be procured. But in criminal cases depositions are never read, either for or against the

prisoner, and the common-law mode of trial is strictly adhered to. Where an affidavit is offered for the continuance of a cause and is considered sufficient, the cause will be continued, unless the opposite party *will admit the facts set out in the affidavit to be true,* for, if the statement of the witness is to be controverted, the party offering the testimony has a right to have the witness examined in the presence of the jury. This practice has never been departed from, so far as we are informed, until the present case, and we can see no principle upon which, in the trial of a capital case, this departure from the well-settled mode of trial can be allowed; indeed, it violates the clause in the Bill of Rights which secures to every man the right to confront the accuser and witnesses with other testimony.

Another departure from a well-settled practice appears in the record in this case, which the Court feels it to be a duty to correct. The judgment is, "that the prisoner be taken to the county of Burke, from whence he came, and kept in close confinement until Friday, 2 January, 1863, when he will be taken to the place of execution," etc., and "the sheriff of Burke County is to carry this sentence into effect," etc.; "ordered that the sheriff of this county (Rutherford) safely deliver the prisoner to the sheriff of Burke County, to be kept in the jail of Burke County," etc.

When the cause was removed to Rutherford County for trial, the prisoner was in possession of the *court there,* and the sheriff of
(144) Rutherford then had charge of him; neither the court nor the sheriff of Burke had any further concern with the cause of the prisoner, and we can see no ground on which, after conviction, the judge could order the sheriff of Burke to carry the sentence into effect. The fact that the prosecution had originated in the county of Burke, after the removal to Rutherford, gave the judge no more power to give the power to the sheriff of Burke than to the sheriff of any other county. The sheriff of Rutherford then had the prisoner in his charge, and was to execute the sentence of the law.

PER CURIAM. Error.

Cited: S. v. Cunningham, 72 N. C., 478.

STATE v. WILLIAM B. GARRETT ET AL.

1. Where a defendant in a State's warrant charging a misdemeanor put himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take defendant, slew him, without resorting to unnecessary violence, it was *held* that he was justified.

2. The principle of *self-defense* does not apply to the cause of one who puts himself in the posture of armed defiance to the process of the State.

3. One to whom a State's warrant is specially directed is bound to show it, and read it, if required; but where the defendant in such warrant had notice of the process, and was fully aware of its contents, and had made up his mind, beforehand, to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant on demand.

INDICTMENT for murder, tried before *Saunders, J.*, at Fall Term, 1862, of BUNCOMBE.

The defendant William B. Garrett and the other defendants, ten in number, were put upon their trial for the murder of Uriah C. Burns.

Verdict of guilty of murder as to W. B. Garrett, John Morris, Sr., and R. L. Birchfield, and judgment of death pronounced against them; and verdicts of guilty of manslaughter were rendered against six others, who were sentenced to imprisonment for six months, but were permitted to escape imprisonment by entering into the army. Two of the defendants, J. H. C. Morris and J. M. Morris, were acquitted. W. B. Garrett, John Morris, Sr., and Robert L. Birchfield appealed to this Court.

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

PEARSON, C. J. His Honor charged: "The warrants in this case, being for a misdemeanor, and not for felony, gave the prisoner Garrett no authority, or any of his numerous guard of eighteen men, all armed, to take away life by the use of a deadly weapon, in order to execute his warrants." We do not concur in the proposition of law (149) which his Honor here lays down; on the contrary, after mature reflection, we are satisfied, not only that it is erroneous, but would make the due administration of the law impracticable.

These facts are not controverted: State's warrants and peace warrants had been duly issued against the deceased and his wife and son and daughter, for an assault and battery on Adeline Burns; for the want of a regular officer, the sheriff duly deputed the prisoner, Garrett, to execute the warrants and arrest the defendants; Garrett goes to the deceased and notifies him that he has the warrants, whereupon the deceased, having his gun, refuses to submit, but says he would let the

sheriff or coroner serve the warrants. Garrett thereupon retires, and on the next day, having summoned eighteen men, they all go, armed with guns, to the premises of the deceased and arrest the son, whereupon the deceased, his wife and daughter, he armed with his gun, and they with an axe and knife, sally out from the house and meet the party in the lane; guns are several times pointed on both sides; the deceased starts to cross the fence and is shot by one of the guard.

His Honor ought to have instructed the jury that, as the deceased had put himself in resistance to the officer and his guard, they were not only authorized, but were bound to use such a degree of force as was necessary in order to execute the warrants, and were entitled to a verdict of acquittal on the ground that the homicide was justifiable, if no unnecessary violence had been used, unless from the fact that the prisoner had started to cross the fence the jury should be satisfied that he had abandoned his deadly purpose of resisting to the death the execution of the law, and was attempting to make his escape by moving off; in which event there was no longer any necessity for shooting, and the officer, or some portion of his men, should have run after him and captured him in that way, and in passing on this question it was for the jury to de-

termine whether the intention of the deceased in attempting to
(150) cross the fence was to make an attack on Birchfield or to rescue his son, or run away; and in the latter case, if he still retained his purpose of resisting to the death, and to make a *running fight,* the officer and his men were not bound to risk their lives by rushing on a desperate man who still kept his gun in his hands.

This conclusion is so fully sustained by the necessity of "preserving good order and asserting the supremacy of the law" as to make it unnecessary to cite cases. In the execution of a State's warrant for treason, felony, or a *breach of the peace,* the sacredness of the Lord's day is to be disregarded; the dwelling-house (or castle, as it is termed in the books) must be broken into, and everything done which is necessary in order to execute the warrant. In other words, resistance to the execution of the command of the State is not allowed. The warrant must be executed *peaceably, if you can; forcibly, if you must.*

There are other points to which we will not refer, because, from the manner in which the case is made up, we are not satisfied that we clearly apprehend them. It is proper, however, to say that we can see no evidence, by a perusal of the record, to justify this charge: "The deceased, whilst he had a right to defend himself, had no right to use a deadly weapon, *unless in self-defense of his life.*" When a man puts himself in a state of resistance, and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and to set up the excuse of self-defense. Again, one who

is not a known officer ought to show his warrant, and read it, if required; but it would seem that this duty is not so imperative as that a neglect of it will make him a trespasser *ab initio,* where there is proof that the party subject to be arrested had notice of the warrant and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. There is

PER CURIAM. Error.

Cited: S. v. Belk, 76 N. C., 12; *S. v. Dula,* 100 N. C., 427; *S. v. Armistead,* 106 N. C., 644; *S. v. Lingerfelt,* 109 N. C., 780; *S. v. Stancill,* 128 N. C., 610; *S. v. Horner,* 139 N. C., 611; *S. v. Durham,* 141 N. C., 744, 757; *S. v. McClure,* 166 N. C., 330; *S. v. Beal,* 170 N. C., 767.

(151)

STATE v. ROBERT W. JOHNSON.

Where a defendant in a criminal prosecution offered, in defense, proof of the character he sustained at the time of the alleged offense, it was *held* to be error to permit evidence to be given of his character at a subsequent period.

LARCENY, tried before *Howard, J.,* at Fall Term, 1861, of BLADEN.

The defendant introduced witnesses to prove his general character. The defendant's counsel asked them as to his general character at the time the offense was supposed to have been committed. The solicitor then asked them what his character was then (at the time of the trial). The defendant's counsel objected to the question, but it was allowed by the court. Defendant excepted.

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

Attorney-General for the State.
Shepherd for defendant.

BATTLE, J. It is a rule of evidence that the defendant in an indictment for a criminal offense may offer testimony of his general character as evidence from which, if good, a presumption in favor of his innocence may be inferred. Formerly, it was thought that this evidence could not be of any avail unless the case were a doubtful one; but it is now settled that the testimony establishing a good character must be considered by the jury in every case, they giving to it whatever weight they may consider it entitled to under the circumstances. *S. v. Henry,* 50 N. C., 65. Whenever such testimony is given, the prosecuting officer may rebut it, if he can, by introducing testimony to show that the defendant's charac-

ter is bad. The question is now presented, for the first time, in this State, To what time shall the prosecutor's evidence refer—to the time of the alleged commission of the offense, or to that of the trial? The (152) authorities referred to by the counsel seem to leave this question somewhat unsettled in the courts of England and of the States where it has occurred. We think that, upon principle, it ought to be confined to the time when the charge was first made. A different rule will expose the defendant to the great danger of having his character ruined or badly damaged by the arts of a popular or artful prosecutor, stimulated to activity by the hope of thus making his prosecution successful. Evidence of character is of the nature of hearsay, and the general rule in relation to that kind of testimony is that it shall not be received if the hearsay be *post litem motam.* See *Dancy v. Sugg,* 19 N. C., 515; 1 Phil. Ev., ch. 7, sec. 7, p. 192. The reason for this is "that no man is presumed to be indifferent in regard to matters in actual controversy; for when the contest has begun, people, generally, take part on the one side or the other—their minds are in a ferment, and if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected." 1 Green. Ev., sec. 131. These remarks apply with equal force to evidence of the character of a person after a controversy, involving it, has commenced. Such evidence ought, therefore, to be rejected.

PER CURIAM. New trial.

Cited: S. v. Laxton, 76 N. C., 218; *S. v. Patterson,* 78 N. C., 473; *S. v. Brittain,* 117 N. C., 783; *S. v. Spurling,* 118 N. C., 1251; *S. v. Connor,* 142 N. C., 705; *S. v. Holly,* 155 N. C., 494; *S. v. Morse,* 171 N. C., 778.

APPENDIX

IN THE MATTER OF J. G. MARTIN.

The acceptance of the office of brigadier general under the Confederate States vacated the office of adjutant general of North Carolina.

EXECUTIVE DEPARTMENT, N. C.
RALEIGH, N. C., 2 March, 1863.

HON. R. M. PEARSON, *Chief Justice of North Carolina:*

DEAR SIR:—You are aware that the Legislature, by a joint resolution, declared the office of adjutant general vacant by reason of the incumbent's having accepted an incompatible office under the Confederate States Government, and that by a subsequent act the appointment was conferred upon the Governor.

General Martin, the present incumbent, having declared his intention of testing the legality of this action of the Legislature by an appeal to the courts, I am placed in a position rather embarrassing. To avoid the somewhat unpleasant spectacle of a lawsuit for the possession of an office, confidential in its relation to myself, and very important to the public at this time, I have concluded, with the consent of General Martin, to make a case and ask the opinion of the Supreme Court immediately thereon.

With this view I should be greatly obliged, and I have no doubt the public interest would also be subserved, if you would have the kindness to call the Court together and give its opinion upon the question. As early a day as possible is respectfully requested.

Very respectfully, your obedient servant,

Z. B. VANCE.

CASE AGREED.

At the recent session of the General Assembly the Legislature having resolved "that by reason of the acceptance by Gen. James G. Martin, adjutant general of North Carolina, of the office of brigadier general of the army of the Confederate States, the said office of adjutant general was surrendered and is declared to be vacant," and having (154) enacted, also, that the power of appointing to said office should be vested in the Governor; and his Excellency, Governor Vance, having indicated to General Martin his purpose to proceed to make an appointment thereto, it was insisted by General Martin that the office was filled, and he was the proper and lawful incumbent thereof, notwithstanding

the resolution aforesaid, by virtue of his election to said office by the preceding Legislature, under the act of the General Assembly, entitled "Militia," chapter 17, ratified on 20 September, 1861. Whereupon it was agreed by the Governor and General Martin to request the judges of the Supreme Court to give their opinions upon the question whether the office was vacant and the Governor might lawfully proceed to appoint thereto.

The question upon which the opinions of the judges are sought arises out of the following agreed facts:

In September, 1861, Gen. James G. Martin was duly elected by the Legislature adjutant general of the State of North Carolina, in pursuance of a statute on the subject of the State militia, ratified 20 September, 1861, accepted the office, was qualified, and entered upon the duties thereof, and has continued since to exercise the powers and perform the duties of the same.

General Martin held the rank of captain and brevet major in the army of the United States, tendered his resignation at Fort Riley, Kansas, 1 June, 1861, and by the provisions of the law of the Confederate States he became entitled to similar rank in the regular army of the Confederate States, and received and accepted the appointment therein of a captain of artillery, and at the request of the Governor of North Carolina was ordered to report to him for duty.

In May, 1862, General Martin accepted the office of brigadier general in the provisional army of the Confederate States, under the following circumstances: The appointment had been some days tendered, but not accepted, when Governor Clark received a telegram from the President, urging him to send General Martin with four regiments, then in camp near the city of Raleigh, and which had not then been mustered into the Confederate service, to Weldon.

(155) General Martin then had an interview with the Governor, and it was concluded between them that he should accept the appointment of brigadier general, in order to comply with the request of the President, but with the understanding that it was not to vacate his office of adjutant general.

In a day or two afterwards, and before the regiments moved, General Martin was ordered by General Holmes, commanding in this department, to repair with these regiments to Kinston, which he did.

He remained there some six weeks, and while there had also authority from the Governor, in his capacity of adjutant, to call out, for active service, the militia in the adjacent counties.

While the battles near Richmond were being fought, Governor Clark telegraphed the President that he thought General Martin and his brigade could be spared from the State, if he deemed it important to have

them; and in consequence, General Martin receiving an order from General Holmes, then below Richmond, repaired with his brigade to Drury's Bluff, on James River. The battle was over before he reached that point.

A few days after reaching Drury's Bluff, General Martin tendered his resignation as brigadier general for the purpose of returning to North Carolina to resume the discharge of the duties of adjutant general, in person. About ten days afterwards he was notified of the acceptance of his resignation. While at Drury's Bluff, by the request of Governor Clark, he also transacted business as adjutant general of the State, with the Confederate authorities in Richmond.

Upon the interposition of General Lee, and with the approbation of Governor Clark, and consent of General Martin, the resignation of General Martin and the acceptance thereof were annulled, and he was reinstated in the office of brigadier general, but has never received any pay either as brigadier general in the provisional army or captain in the regular army, and has since remained in the city of Raleigh in the discharge of the duties of Adjutant General, except when absent by the orders or assent of the Governor of the State.

B. F. Moore, Esq., for the Attorney-General. (156)
Thomas Bragg for General Martin.

OPINION OF THE JUDGES IN THE MATTER OF THE ADJUTANT GENERALSHIP.

At the request of his Excellency, Governor Vance, and of General Martin, the judges of the Supreme Court have heard a full argument on the questions of law presented by the facts set out in "the case agreed," and certify their opinion to be that the office of brigadier general under the Confederate States is incompatible with the office of adjutant general under the State of North Carolina; and that, on the facts stated, "the office of adjutant general is vacant, and the Governor may lawfully proceed to appoint thereto."

It is proper to state that in giving this opinion we do not act as a Court, but merely as judges of the Court, and have treated the matter in the same light and with the same full consideration as if the case had been regularly before the Court upon a proceeding appropriate to present the question.

We were induced to take this action, and felt not only at liberty to do so, but conceived it was in some measure our duty thus to aid a coördinate department of the Government, because we were informed by his Excellency, the Governor, that the subject would in that way be relieved from all further embarrassment, and that the public interest required that it should be adjusted sooner than it could be done by the regular

mode of proceeding in court, particularly as the Court now holds but one term during the year. *Berry v. Waddell,* 31 N. C., 516, Appendix.

R. M. PEARSON, C. J., S. C.
WILL H. BATTLE, J., S. C.
RALEIGH, 11 March, 1863. M. E. MANLY, J., S. C.

Cited: McNeill v. Somers, 96 N. C., 473; *Barnhill v. Thompson,* 122 N. C., 497.

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IN RE HUIE—HABEAS CORPUS.

The facts are: Huie is 29 years of age; is now, and has been since the death of his father, in 1857, the overseer of his mother, who is a widow, and lives on and owns a plantation in Cabarrus County, and has during that time owned and kept on her plantation more than twenty negroes. She is upwards of 60 years of age, and no white person lives on the place except herself and a daughter about 19 years of age. Huie owns and lives on a place adjoining; has a wife and two small children; no other white person on the place. The witness did not know whether Huie receives wages as an overseer, but if he does not, he knows that he earns wages, for ever since the death of his father he has managed his own negroes (some thirteen or fourteen) and has acted as the overseer of his mother, and attended to her business generally; has been diligent; managed the negroes well; kept them in good order, and made good crops. The affidavits required by the act are filed. Huie has for several years been afflicted with bronchitis and was not enrolled and ordered into service when the other conscripts left the county, but on 11 October, 1862, reported at the camp of instruction near Raleigh, when Dr. Baker certified as follows:

HEADQUARTERS, CAMP OF INSTRUCTION,
CAMP HOLMES, 11 October, 1862.

I certify, on honor, that I have carefully examined Henry C. Huie (Colonel Barnhardt, 84 N. C. Militia) and find him incompetent to perform the duties of a soldier, because of bronchitis. He is excused until 1 May, 1863. R. B. BAKER, *Surgeon, P. C. S. A.*

Approved:
J. C. MCRAE, *Captain & A. A. G., P. C. S. A.*

Huie's name was put on the roll at that date, and returned home and remained there until his arrest.

The construction of the conscription and exemption act, like other acts of Congress, so far as they concern the rights of a citizen, as distinguished from military regulations and rules which the Secretary of War is authorized to prescribe in order to carry the acts into effect (for instance, the manner of having persons examined in order to determine whether they are fit for military service in the field) is matter for the courts, and any construction put on the acts by the officers (166) of the executive department, as to who is liable as a conscript or who is entitled to exemption, is subject to the decision of the judiciary. This principle of constitutional law is so clear that I suppose it will be conceded by every one.

In re Mills, a shoemaker, *Angel,* a wagonmaker, and *Nicholson,* a miller, I decide that the exemption act applies to the conscription act of April as well as to the conscription act of September, and no discrimination is made between mechanics under or over the age of 35. For the same reason I am of opinion that the exemption act of May, which is an amendment of the act of October, applies to both conscription acts.

I do not consider it necessary, for the purposes of this case, to decide the point made by Mr. Boyden, that it is the intention by the act of May to take out of the army and restore to their occupations the overseers of *feme soles,* infants, and lunatics, provided the persons were employed and acting as overseers previous to 16 April, 1862, and provided there is no white male adult on the farm who is not liable to military duty, and provided affidavit is made that after diligent effort no overseer can be procured for the farm who is not liable to military duty, and provided $500 shall be annually paid into the public treasury by the owner of the farm or plantation. For I am of opinion that supposing the act not to embrace persons who are in service, the petitioner's case fulfills all of the conditions and requirements of the act. He is now, was previous to 15 April, 1862, and has been all the time since 1857 the overseer of a *feme sole,* etc.

It is insisted on the part of Colonel Mallett that the petitioner was enrolled 11 October, 1862, and has been from that date constructively in the service of the Confederate States, and consequently cannot during that time be considered as having been an overseer.

This position depends on what amounts to an enrollment, and its legal effect. If an enrollment amounts to no more than writing a man's name on a list with others, that was certainly done on 11 October, 1862; but, if it is to have the legal effect of putting a man in the actual or constructive service of the Confederate States, then I am of opinion that what was done on that day was not valid as an en- (167)

rollment; for the reason that Huie, by force of Dr. Baker's certificate, was excluded from the operation of the conscription act, and was exempted, being ascertained under the rules prescribed by the Secretary of War *"to be unfit for military service in the field"*; so the commandant of conscripts had no right to have his name put on the roll *as a conscript,* and instead of doing so, and excusing him until 1 May, 1863, according to the rights of Huie, he should have been sent home, and the proper time for enrolling him would be after he recovered and became fit for military service in the field (if he happened to recover), to be determined under the rules prescribed by the Secretary of War; for the law exempts all persons who shall be held unfit for *military* service in the field by reason of bodily infirmily, etc., under rules to be prescribed by the Secretary of War, and Dr. Baker, acting under these rules, certified that he is incompetent to perform the duties of a soldier. In other words, he is "unfit for *military* service in the field." So that he was *ipso facto* exempted for the time being. In reply to this, it is said the Secretary of War, by the Adjutant General, had prescribed a rule that persons unfit for military service in the field shall be enrolled and may be put to service in the hospital, quartermaster, or on medical staff. So the question is, Had the Secretary of War authority to have men unfit for *military* service in the field enrolled as conscripts, on the ground that they might be of some service in hospitals, or on the quartermaster's or medical staff? The act exempts all persons held to be unfit for "military service in the field," and clearly no rule prescribed by the Secretary of War could defeat this express provision; for instance, no rule of his could make a man with one arm, who is certified by the surgeon to be unfit for military service in the field, liable as a conscript, although he might answer some purpose about a hospital or be of some service to the quartermaster; because, whether a man is entitled to exemption or not depends on the construction of the act, which it is the privilege of the courts to make, and the authority of the Secretary of War is simply to prescribe rules and make regulations in order to have the fact
(168) determined whether a man is or is not fit for military service in the field; for which purpose *alone* the representatives of the people in Congress assembled, to whose wisdom is confided the trust of making laws, had declared it necessary to take citizens from their homes against their consent. Thus far conscription is carried by our lawmakers, and no further. I was informed by Adjutant Pierce, who returned the body for Colonel Mallet, that this rule had been revoked; but he insists that acts done under it before it was revoked are valid. I do not concur in this position, for the reason stated above, and consider what is called an enrollment on 11 October, 1862, as void and of no legal effect. So the petitioner, according to my view of the case, was

employed and acting as the overseer of a *feme sole* owning, etc., etc., at the time of his arrest, at the passage of the act, on 11 October, 1862, on 16 April, 1862, and for several years previous thereto, and is entitled to exemption. R. M. PEARSON, C. J., S. C.

20 May, 1863.

IN RE AUSTIN—HABEAS CORPUS.

THE writ in this case was returned before me at Richmond Hill. As it presented a new question, I desired to have the aid of *Judge Battle* and *Judge Manly* at the hearing, and also the benefit of argument by counsel, for which purpose it was adjourned to this place. I regret that I have been disappointed. It becomes my duty to decide the case without the presence of the other judges, and without argument, except by Mr. Furches and Mr. Winston in behalf of the petitioner; so that I am really not apprised of the ground on which the Governor rests his claim of authority.

The petitioner is exempted as a conscript by reason of a substitute, and is exempted from duty as a militiaman by force of the first section of the act of the last session of the Legislature entitled "An act in relation to the militia and a guard for home defense." Major Harbin sets out in his return to the writ that he had the petitioner (169) arrested under an order of the adjutant general for the purpose of arresting conscripts and deserters, "as said Austin was a member of the Home Guard and liable to perform said duty." The order is in these words:

RALEIGH, 15 September, 1863.

Major A. A. Harbin will immediately call out the Home Guard of Davie County, and arrest every deserter or recusant conscript within said county, and deliver them to Colonel Mallett at Camp Holmes. If it be necessary, you can pursue said deserters beyond the limits of your county. Those citizens who aid, harbor, or maintain deserters will be arrested and bound over to the courts to answer said charges. You will report to this office the manner in which this order has been executed.

By order of Governor Vance. J. H. FOOTE, *A. A. Gen.*

The question presented by the petition and return is of great importance. On the one hand, if the Governor is authorized to require the Home Guard to perform the service of arresting deserters and conscripts, it will promote the efficiency of the Confederate Army; on the other

hand, it will impose on citizens who, by the acts of Congress and the Legislature, are exempted from conscription and militia duty, a dangerous and irksome labor.

The subject must be considered by a judge "as a dry question of law," unaffected by collateral considerations growing out of the condition of our country; and for this reason his conclusion may differ from that of those who are at liberty to look at it under the bias of feeling.

It is a part of the duty of a soldier of the Confederate Army to arrest deserters and recusant conscripts. The Governor of a State has certainly no authority to require a citizen, unconnected with any military organization, to perform this part of the duty of a Confederate soldier. Whether the Governor had authority to require a citizen belonging to the militia to perform this duty is a question which has not been decided. It may be conceded that the Legislature has power to give this authority to the Governor in respect to the militia, on the ground that they (170) were liable to be called into the service of the Confederate States, and might be required to do a part of the duty as a compensation for not being called into service and required to do the whole duty of a Confederate soldier. But it is a question worthy of great consideration whether the Legislature has power to authorize the Governor to require this duty of citizens who do not belong to the militia, which is the only military organization, except enlisted soldiers, recognized by the Constitution. It is not necessary for the purpose of this case to decide the queston and it is referred to only for the sake of applying the rule, "where a power has never been before exercised and is doubtful, the courts will not presume that it was the intention of the Legislature to assume it, but will require a clear expression of an intention to do so."

The matter then stands thus: The Governor has no authority to require a citizen, who does not belong to the militia, to perform this part of the duty of a Confederate soldier. Has the Legislature conferred the authority upon him? It is insisted that this is done by the act of the last session, entitled "An act in relation to the militia and for home defense," which act, and the act "to punish aiders and abettors of deserters," were ratified at the same time, 7 July, 1863, and are to be construed together. So the question depends upon the meaning and proper construction of these two statutes.

At the meeting of the Legislature two questions were pending: (1) Congress in its wisdom having allowed substitution and many other exemptions from the conscription acts, was it in the power of the President, by calling upon the State for its quota of militia, to subject the persons so exempted as conscripts to military duty as militia? (2) Had the Governor authority to require the militia to arrest conscripts and deserters from the Confederate Army? By the first section of the act "in relation

to militia and a guard for home defense," the problem was solved, and it is enacted that all persons exempted as conscripts shall be likewise exempted from service as militia. By the third section of the act "to punish aiders and abettors of deserters," it is enacted that the Governor may require the militia to arrest deserters and conscripts, thus solving the second problem by authorizing the Governor to call (171) out the remnant of the militia, that is, those not exempted from militia duty, to perform a part of the duty of Confederate soldiers, to wit, the officers of the militia and the men between 40 and 45 who had not then been called for as conscripts.

In order, however, to provide for home defense, the Legislature assumed the power of making *State conscription.* Whether the Legislature had the power to do so is a question into which it is not necessary to enter. The power is expressly assumed, and it does not become a coördinate branch of the State Government to decide upon it unless it be necessary to do so in order to dispose of a case before it. So it may be granted that the Legislature had power to organize for home defense a military body composed of the remnant of the militia, the exempts and persons over the age, liable to militia duty. It is very certain that in doing so the intention was to make this new body wholly distinct and different from the militia. Persons exempt from militia duty are included, new companies are formed, new officers appointed—in fact, everything is different; it is a new organization—a State conscription made for two special purposes, "to be called out against invasions and to suppress insurrections" (section 6). And special care is taken to distinguish this new body from *militia,* for otherwise they might, under the Constitution, be called for by the Confederate States. Upon what ground, then, can it be insisted that the Governor is authorized to require this newly organized body and peculiar State institution to perform a part of the duty of Confederate soldiers? It is said the authority follows as a consequence of the military organization. I cannot see the force of the argument. In the act declaring the special purposes for which this new organization is made, no such authority is expressly given to the Governor; the power of the Legislature to confer it, even if such had been the intention, is by no means clear; and so we are not at liberty by implication to infer that such was the intention, and the act "to punish aiders and abettors of deserters" puts the matter, as it seems to me, out of the range of discussion, by *expressly authorizing* the Governor to use *the militia* to arrest deserters and conscripts, thereby excluding, as plainly as words could do it, any authority to re- (172) quire such service of this new organization—the State conscripts, Home Guard. *Expressio unius exclusio alterius* is a well established rule of construction which the courts are not at liberty to disregard;

and its soundness, when the object is to ascertain the intention of the Legislature and neither to fall short of it nor go beyond it, is fully illustrated by this case. So the two statutes relied on as confirming the authority of the Governor actually exclude it by a double implication. In the first place, the act authorizes the Governor "to call out the Home Guard against invasions and to suppress insurrections." Why was it not added, "and to arrest deserters and recusant conscripts," if such was the intention? That subject was present to the minds of the Legislature. In the second place, the act authorizes the Governor in so many words "to call out *the militia* to arrest deserters and conscripts." Why did it not add, "and also the Home Guards," if such was their intention? The conclusion that it was not the intention of the Legislature that the *Home Guards* should be subject to this service is as clear as if the acts had contained the words: *"Provided, however,* that the Governor shall not have authority to require the *Home Guards* to arrest deserters and conscripts," unless it be contended that the Governor has all power except such as is expressly prohibited—a position which, I suppose, no man will venture to assume.

The argument may be stated thus: The statute expressly authorizes the Governor to require "the militia," that is, the officers and men between 40 and 45, to arrest deserters—that is, they form a part of the Home Guard. It follows, the Governor had no authority to require the *whole body* of the Home Guard to perform this duty; for if he had such authority, it was vain, idle, and superfluous to authorize him expressly to require a part to do that which he had authority to require of the whole. In this connection the provision, section 9, "The commissions of the officers of the militia shall be suspended only during the period of their service in the Home Guard," has an important bearing, the object being to preserve the organization of the militia and to use
(173) them to arrest deserters, for which purpose the force was then adequate. The fact that, afterwards, the call for the men between 40 and 45 as conscripts made the force inadequate cannot change the meaning and proper construction of the statutes. If an amendment was thereby made necessary, the Legislature must make it; for neither the Governor nor the judges have authority to strain the law to meet the emergency.

I am aware of the responsibility under which I act. Jurisdiction is given to a single judge in vacation; my decision fixes the law until it is reversed by the Supreme Court, or amended by the Legislature and I would not feel it to be my duty to stay the action of the Executive, except upon the clearest conviction.

Whether in the event the Governor should call out the Home Guard to repel a raid or suppress an insurrection, he would not, while the men

were on this tour of service, which is limited to three months (section 6), have authority, collaterally, to require them to take up deserters and conscripts who might aid the enemy, is a question to be presented. We are confined to the naked question, Has the Governor authority to require the Home Guard to be called out for the mere purpose of arresting deserters and conscripts? The special order under which Major Harbin acted is for this purpose alone. It is true that the State was, before the passage of the acts, invaded, and the enemy was at that time and is now within the limits of our State; but the order does not profess to be made for the purpose of repelling that invasion; there is no "tour of duty prescribed by the Governor not exceeding three months at any one time," according to the provisions of the 6th section. The time is unlimited and the purpose is declared to be "to arrest every deserter and recusant conscript within the county of Davie, and deliver them to Colonel Mallett at Camp Holmes."

The suggestion that, as the arrest of deserters and conscripts would promote the efficiency of the Confederate Army, and thereby tend to defend the State against the invasion, the authority of the Governor can be sustained on that ground, involves a latitude of construction unsupported by any principle of law, and, as it seems to me, can- (174) not impress with much force the mind of any one who will read the two statutes attentively and in connection. He will see from the mode of defense contemplated by the Legislature in calling out the Home Guard for defense against invasion and insurrection, by regiments, battalions, and companies, on tours of duty within the State not to exceed three months, etc., that the indirect and far-off mode of repelling the existing invasion by arresting deserters and conscripts was not in the mind of the Legislature, except when the Governor was authorized to use the *militia* for that purpose, which, according to the view I have taken above, excludes the conclusion that the Home Guards for home defense—the State conscripts—were to be used for that purpose also. For, if so, it was surely vain, idle, and superfluous to impose that service on the militia, who constituted but a small part of the guard for home defense.

The position was taken on the argument, that the order under consideration clearly exceeds the Governor's authority, in this: It requires the Home Guards for home defense "to arrest and bind over to the court to answer said charges those citizens who aid, harbor, and maintain deserters," and is therefore void *in toto*. It is true, citizens who aid, etc., deserters, etc., although made liable to indictment by one of the statutes referred to, cannot, according to the Constitution and laws of the land, be arrested and bound over to the court to answer the charge, by military authority; that can only be done by the civil authority, to wit, a

warrant by a judge or justice of the peace on probable cause shown on oath, and executed by the sheriff or constable. So it is clear that part of the order is void and against law. But it does not vitiate the other part of the order, provided the Governor had authority to make it.

It is thereupon considered by me that Richard M. Austin be forthwith discharged. R. M. PEARSON, Ch. J., S. C.

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IN RE BOYDEN—HABEAS CORPUS.

In February, 1863, Captain Johnson was raising a cavalry company for the Confederate service, and Captain Hall an infantry company, in the county of Anson. Boyden volunteered in Johnson's company, and on 1 March procured one McLendon to enter Hall's company as his substitute. On 4 March, Polk, colonel of militia, certifies as follows: "This is to certify that John A. Boyden, a member of Cedar Hill militia company, has employed a substitute to serve for him and in his place during the present war with the United States, and he is hereby exempt from militia duty for the space of three years." And Johnson certifies as follows:

WADESBORO, 25 May, 1863.

This certifies that John A. Boyden, who volunteered in the Anson troops, has, by furnishing a substitute in a foot company, and a horse to supply a member of my company, discharged his duty as a volunteer of North Carolina and the Confederate States.

L. A. JOHNSON,
Capt., Anson Troops.

These certificates, together with the receipt of McLendon for $50, for taking Boyden's place as a substitute for the war, proved by Grimsly, the attesting witness, are attached to each other, with this indorsement: "Case of exemption." John A. Boyden "furnished substitute," "approved, exempted." "J. M. Little, E. O., etc." "I certify that these are the original papers filed in the office by Lieutenant Little. Peter Mallett, Colonel Commanding Conscripts, North Carolina. 6 October, 1863." On 26 February, 1863, Lieutenant Little gave Boyden a certificate as follows: "John Boyden is hereby exempt from military duty, by reason of having furnished a substitute, 51 years of age. When he ceases to be employed as such, this exemption is declared void." Indorsed "C. E. O., 21 May, 1863." "C. E. O., 6 July, 1863," meaning

that it was approved at those several dates. In August, 1863, Colonel Mallett read a letter from Lieutenant Colonel Polk, calling attention to a fraud practiced upon an old man in his regiment and the Government by one John Boyden of Anson County. This letter is referred to Lieutenant Little, 31 August, 1863, "who will have this party sent to camp. W. L. Cole, Capt. Commanding." It was returned with (176) the following indorsement: "Enrolling Office, Pittsboro, 3 September, 1863. Respectfully returned to commandant of conscripts." "This case has already undergone an examination, and the papers found correct. By reference to the papers of the 81 Regiment North Carolina militia, you will find his substituting papers correct. J. M. Little, Lieutenant and Enrolling Officer, 7 N. C. Conscript District." Upon the receipt of a letter from Major Boggan (reiterating the charges of fraud by Boyden on McLendon and the Government), and the affidavit of Captain Hall, stating that McLendon had enlisted in his company on or about 26 February, 1862, as a volunteer, and was considered a volunteer, and not a substitute, in his company; that he did not believe Boyden had engaged McLendon, until after he had been sworn in, as a substitute, Boyden was arrested as a conscript, and sued out a writ of *habeas corpus,* which was returned before me, 3 October, 1863, and after much of the evidence was heard, adjourned until 18 October, and was decided after argument by General Fowle for petitioner and written argument by Governor Bragg for the Government. Three grounds were taken to exclude Boyden from exemption: first, invalidity of the substitution by reason of fraud on McLendon; second, fraud on the Government; third, want of power in Polk and Johnson to discharge Boyden.

1. The fraud alleged to have been practiced by Boyden on McLendon is in this: that Boyden, under pretense of making him a present of $50 as a reward for his patriotism in going as a volunteer, had induced him to sign the receipt set out above, he being an ignorant man and not apprised of its contents. How far this allegation, if proven, would affect the validity of the substitution as between Boyden and the Government it is not necessary to consider, because, after a full examination, the allegation, so far from being proved, was clearly disproved. The witness Clark swore that, hearing Boyden wished to procure a substitute, and being told by McLendon that he would go as a substitute in a foot company for $50 (he objected to a cavalry company, not being a good rider), he communicated the fact to Boyden at Wadesboro, on 1 March, 1862, when Hall was raising his company; that a few days after- (177) wards McLendon told witness he had gone into Hall's company as Boyden's substitute, and asked him if it was true that the county would not provide for his wife and children, as he was a substitute. Clark told him that it was so. McLendon replied, before entering as a

substitute some people had told him so, but others said the county would provide for the wives and children of all soldiers, no matter how they went to the war, and he believed so when he became Boyden's substitute, but did not intimate that Boyden had ever said anything to him on the subject. A few days afterwards McLendon applied to Boyden to let him off, which Boyden declined. The other evidence confirms this state of facts, and shows that McLendon did become Boyden's substitute, and made no clamor about it until he found out he was mistaken as to the nature of the provision made by the county, in respect to which he had been put on his guard before becoming a substitute, and even then he made no complaint that Boyden had led him into error, his allegation being that he never had agreed to become a substitute, but had entered as a volunteer and received the $50 of Boyden as a present.

2. The fraud alleged to have been practiced by Boyden on the Government is this: that he procured McLendon to become his substitute *after* he had volunteered and was sworn in Captain Hall's company. Captain Hall swore that after the men who were going to join his company had been drawn up before the hotel door to be sworn, Boyden approached McLendon and wanted to speak to him, which he prohibited, saying he must wait until the men were all sworn in. They were then sworn in, and soon afterwards McLendon stepped off with Boyden. He had no recollection that McLendon was sworn in as Boyden's substitute. It was done about 3 o'clock in the evening; he took down the names on a piece of paper with a pencil as they were sworn in; does not recollect that the entry as to McLendon differed from the others. Being notified to produce the original paper, he stated that he had searched for it; it was lost; being a rough draft, it was not usual to keep such papers.

(178) Boyden makes affidavit that the entry was "John A. Boyden by Lewis McLendon"; when Hall made it, he asked if that would do, to which Boyden replied, "I suppose so." Witness Smith swore that he saw Boyden, on 1 March, at Wadesboro, about 12 o'clock, take McLendon off and have a talk to themselves, and it was generally understood that McLendon had agreed to become Boyden's substitute and joined Hall's company as such. Grimsley, the witness to the receipt, swore that while the men were drawn up before the hotel door, he is not certain whether it was just before or just after they were sworn in, Boyden and McLendon stepped into his room; Boyden said he was going to give McLendon $50 for his patriotism. Boyden drew the receipt, McLendon signed it, and Boyden paid him the money and he witnessed it. He supposed the parties understood each other, as the receipt was read over, and that McLendon either had or was just about to swear in as Boyden's substitute. There was much evidence tending to show that McLendon had agreed to become Boyden's substitute before he was sworn in, and

that he was sworn in as his substitute, and that the money was paid and the receipt signed a few moments afterwards; which circumstances, I am satisfied, gave color to and was suggestive of the rumor that he did not become Boyden's substitute until after he was sworn is as a volunteer, when, of course, it would have been too late. Captain Hall was mistaken as to the date of the transaction; it was on 1 March, and not on 25 February.

3. As Boyden had not been drafted by Colonel Polk, the case does not come within the decision *In re Ritter,* so the discharge by Polk is of no effect. The case turns on the validity of the discharge by Captain Johnson. Had Boyden put in McLendon as his substitute in Johnson's company, the case would have come under the decision of the Supreme Court *In re Kennedy,* a recruiting officer. Now, suppose Boyden had, on 1 March, himself joined Captain Hall's company with the assent of Captain Johnson, previously given, as presumed from his subsequent discharge on the receipt of the horse, under the maxim, *Omnis ratihabitio retrotrahitur et mandato equiparatur,* would the transfer have been valid? I am convinced that it would, by giving to the regulations in respect to transfers the same liberal construction that the regu- (179) lation in respect to substitutes (October, 1863) received in the matter of *Ritter* and *Kennedy.* The regulation is in these words: Article 15, 142, "The colonels may, upon the application of the captain, transfer a soldier from one company to another of his regiment." Article 143: "When soldiers are authorized to be transferred, the transfer will take place on the 1st of a month, with the view to the more correct settlement of their accounts." 144: "In all cases of transfer, a complete descriptive list will accompany a soldier transferred, which roll will contain an account of his pay, clothing, and other allowances, also all stoppage to be made on account of the Government and debts due the laundress, as well as such other facts as may be necessary to show his character and military history." It is clear that while companies are in the act of being formed, a compliance with these details, which are made material when the party is in service, in order to prevent confusion, as back pay, indebtedness, description, first day of month, character and military history, etc., is not necessary, and should be dispensed with by a liberal construction, for when the companies are in the act of being formed, no considerations of that nature are presented, and the purpose is fully answered if the two captains consent that the man may withdraw from one company and join the other; certainly there can be no necessity for an application to the colonel of the regiment, and the matter must rest in the discretion of the captains who are endeavoring to raise the companies, because the companies are in an inchoate state and there is no regiment or colonel. It seems to me the analogy is perfect,

and that the transfer in the case supposed must be held to be valid, or the principle established by the decisions in the cases of *Ritter* and *Kennedy* must be overruled or disregarded. The fact that the one was to be cavalry and the other an infantry company cannot prevent the application of the principle, because neither company was organized or attached to a regiment. In our case Boyden did not himself join Hall's company, but put in a substitute, which fact raises the case only to the extent of requiring a direct application of the same principal fact in regard to the transfer and then to the substitution, and although (180) it makes the case more complicated, the conclusion must be precisely the same, as the result in compound is as true as in simple multiplication. I am fortunate in having my conclusions as to the construction of the army regulations confirmed by the fact that Mr. Boyden's substitute papers have been time and again passed on by Lieutenant Little, E. O., and adjudged by him to be valid, and also have received the sanction of Colonel Mallett, commandant of conscripts, who filed them in his office without exception, and I think it clear the matter never would have been stirred but for the suggestions of fraud which, upon full examination, turn out to be untrue, although in respect to both charges, upon the clamor of McLendon, there may have been sufficient color to make an investigation proper.

It is, therefore, considered by me that John A. Boyden be forthwith discharged, with leave to go wheresoever he will; the costs to be taxed by the clerk of the Superior Court of Anson County will be paid by F. Darley. The clerk will file the papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

17 October, 1863, at Richmond Hill.

IN RE CURTIS—HABEAS CORPUS.

CURTIS is under 35 years of age, a minister of religion, of the denomination called "Primitive Baptist," authorized to preach according to the rules of his sect; and has been heretofore in the discharge of ministerial duties in Caldwell, the county of his residence, and exempted from conscription on that ground. In October last, Curtis agreed to become the substitute of one Foster, in 10 Regiment of Cavalry, Army of Virginia, and in execution of that agreement left home and went as far as Salisbury, 70 miles, where he was arrested as a conscript, and sued out a writ of *habeas corpus.*

The question is of great practical importance; on the one hand, if exempts may legitimately become substitutes, a new source of supply will be opened to those who wish to leave the army or keep out of it; on the other, the people at home will be deprived of serv- (181) ices necessary for their subsistence and well-being. My duty is simply to expound the law. In its discharge I have been much aided by Mr. Graham, who filed a written argument for the petitioner, and Mr. Sharpe, who appeared for the Confederate States. After full consideration, I am convinced that the agreement to become a substitute, and *the entering upon the execution of the agreement,* put an end to the exemption, and made Curtis liable to conscription, because he had ceased to be *"in* the regular discharge of ministerial duties."

A perusal of the exemption act will satisfy any one that the exemption of editors of newspapers, ministers of religion, physicians, shoemakers, blacksmiths, etc., was made, not for the purpose of conferring a special privilege on individuals, but for the benefit of the people at home, who required the services of physicians, shoemakers, blacksmiths, millers, etc., to enable them to live, and the services of editors and ministers of religion for their intellectual and religious support. The exemption is restricted to the editor of a newspaper *now being published,* a minister of religion *in the regular* discharge of ministerial duties, a physician *now in actual* practice, shoemakers, blacksmiths, millers, etc., *actually employed* at the time *at their trades.* From the words, and the object in view, the law implies that the exemption shall cease when the services cease to be rendered to the public; for the services are the reason and consideration on which the exemption is based, and when the one ends the other ends, by operation of law and by force of an implied condition which my Lord Coke says "the law tacitly annexes by reason of the object, and the nature of the subject-matter, to prevent the policy of the statute from being defeated." No more striking illustration of the wisdom of this tacit act of the law can be presented than is furnished by the case under consideration. The object of the statute was to keep an army in the field, and at the same time enable the people at home to support themselves; for this purpose a man is left out of the army to discharge ministerial duties for the people, another to attend them in sickness, another to make shoes, and another to sharpen their plows. Suppose the men left out of the army for these purposes are (182) tempted by large sums of money to quit their vocations and go into the army as substitutes: the army gets a man and loses one; the people lose the services of one, without any equivalent. The army gains nothing, the people worse, and the individual pockets $5,000 or $10,000! The law would not be true to itself if it did not *proprio vigore* prevent such a perversion of its policy.

To meet this view of the subject, Mr. Graham takes three positions: (1) "It may be said that it is for the benefit of the public and not of the individual that the exemption is granted. Be it so; there is no means provided by the statute of securing the supposed benefit to the public; that is left to the voluntary rendition of it by the exempt." He may, if he chooses, quit his vocation and join the army; certainly he may do so as a volunteer, and there is no reason of policy why he may not do so as a substitute. Or he may migrate to another State, or run the blockade, and in all such cases the public loses the services on account of which he was exempted.

The learned counsel in assuming that "no means is provided by the statute of securing the supposed benefit to the public," begs the question, for the liability to conscription of one who quits his vocation is predicated on the condition which the law tacitly annexes for the purpose and *as the means* of securing the benefit to the public. True, a minister of religion, or shoemaker, may quit his vocation and join the army as a volunteer recruit, and the public will lose his services in his vcoation; but the army gains a soldier—has two instead of one; and in this lies the distinction between that case and one of substitution; there the army gains nothing and the public lose. It is also true, a minister of religion or shoemaker may migrate to another State, and the public lose his services; but he thereby becomes liable to conscription in the State to which he goes by force of that same tacit act of the law, and the army gains a soldier; so it is true an exempt may take his chance to run the blockade; a soldier may likewise desert and run the blockade, and if he escapes, there is no help for it, not from a defect in the law, but because it cannot reach him. I will add to the list: a man may quit his (183) vocation and stay at home, and thus deprive the public of his services, but by force of this implied condition he becomes liable to conscription, and the army gains a man. These considerations demonstrate, as it seems to be, that such a condition must be implied, otherwise all who are exempted by reason of being actually employed in serving the public, as soon as the exemption is consummated, may quit their vocations and go as substitutes for large rewards, or remain at home in idleness or enter into speculation. The condition which the law tacitly annexes effectually guards against all of these evils.

2. "If forfeitures were contemplated, undertaking service as a substitute soldier is not one of them; it is not a forfeiture for nonuser." See 2 Blackstone, 153.

The duties of a soldier or officer and a minister of religion are not incompatible. Mr. Graham refers to the instance of the Rev. Dr. Hall, who, in the Revolution, was a captain of a company and chaplain to a regiment, "fighting or preaching as occasion offered." Foote's Notes

N. C. Bishop and Lieutenant General Polk, Captain Pendleton, and others. In such cases the church to which the individual belongs, if they disapprove such conduct in a minister, may visit him with its penalties of deprivation, etc.; but it is not perceived how the *lay* authorities, either military or civil, shall ascertain and declare that a minister of religion has ceased to be a minister and subject him to forfeitures and penalties therefor; it is an ecclesiastical question affecting one's right "to worship God according to the dictates of his own conscience," with which government is forbidden to interfere.

The learned counsel has fallen into error in supposing that the exemption is annexed to *the office* of a minister of religion, and that the implied condition involves a forfeiture of the office, so as to call for a sentence of deprivation; whereas, it has no more concern with the question whether the individual continues to be a minister of religion than whether one continues to be a physician or a shoemaker. The exemption is annexed to the services of the individual, so that when a minister of religion ceases to be *in the regular* discharge of ministerial duties, or a physician ceases to practice, or a shoemaker to make shoes for the public, the exemption ceases, notwithstanding he may still be (184) a minister of religion, a physician, or a shoemaker by trade. How it would be in the case of a judge or a member of the Legislature, and others holding *public offices* (where, it may be, the exemption is annexed to the office), should any of such officers become substitutes, and whether a judgment of forfeiture would be necessary before they become liable to conscription, is a question into which I will not enter, for it is certain that in case of a *public office,* as a minister of religion, or a profession of a physician, or the trade of a shoemaker and the like, no deprivation of the profession, office, or trade is involved, and they may take it up again, as soon as the war is over or they are allowed to leave the army. The point is, that supposing them to continue to be ministers of religion, physicians, or shoemakers, they have ceased to serve the public in their vocations. So, likewise, the question of "incompatibility" is not involved; for admit a minister of religion, who is a soldier, may preach when his officers permit him, still he is not *in the regular* discharge of ministerial duties; so a physician, while in camp, may administer a dose of medicine, still he is not in the actual practice of his profession; or a shoemaker may mend or make a pair of shoes, or a blacksmith may shoe a horse; still they are not actually employed in serving the public in their trades. In other words, although such soldiers may be at times useful in that way, it is not their regular business.

3. "A forfeiture of exemption cannot be incurred until some act is done which binds the exempt to duty—that is, until he signs the articles of enlistment and is sworn into service. Until that is done, he has his

locus penitentiæ, and may refuse to fulfill the contract and return to his flock in the county of his residence. A forfeiture would surely not be enforced merely upon a declaration of intention to enlist in conversation, or upon an executory agreement to that effect."

It may be conceded that an *agreement* to become a substitute, the man still continuing in the regular discharge of ministerial duties, would not cause his exemption to cease; but our question is, after making the agreement, he enters upon its *execution,* to wit, leaves home, starts to (185) the army, and goes 70 miles on his way: is that an act by which he ceases to be in the regular discharge of his ministerial duties? That is the question. It certainly will not do to allow the door to be left open for the *locus penitentiæ* until the man is actually received as a substitute and the principal is discharged; for, if so, the time to enforce the implied condition will be past; he cannot be made a conscript after he has been received as a substitute. There must, consequently, be some intermediate stage at which the exemption ceases and he becomes liable as a conscript. My conclusion is that stage is when, after making an agreement, he does some act in part execution of it showing unequivocally a purpose to abandon his former vocation and cease to render to the public the services in consideration of which he had been exempted. The act of leaving home, starting to the army, and going 70 miles on his way is one of that character.

Whether, if Curtis had been allowed to execute his agreement fully and been received as a substitute, the substitution would not have been void, on the ground that he had himself become liable to military duty, is a question which suggests itself, but need not be determined. I suppose, however, if he did not become liable, as a conscript, until the thing was done, that is, until he signs the articles of enlistment and is sworn into service, the substitution would be valid. If so, it furnishes an additional reason for having some intermediate stage in order to give effect to the law and prevent the condition from being nugatory.

It is considered that Samuel Curtis be remanded, and that he pay the cost of this proceeding, to be taxed by the clerk of the Superior Court of Burke County, who will issue an execution if necessary.

The clerk will file the papers in his office and give copy.

R. M. PEARSON, C. J., S. C.

Richmond Hill, 10 November, 1863.

(186)

IN RE F. W. KIRK—HABEAS CORPUS.

KIRK is 31 years of age, and on the 18th ult. was arrested as a conscript, by order of Brig. Gen. Robert F. Hoke, and sued out a writ of *habeas corpus,* claiming exemption as a captain of the militia of Yadkin County.

The return sets out that "Kirk was arrested by order of General Hoke, by virtue of verbal orders from Governor Vance to arrest the militia officers of the counties of Yadkin and Wilkes as persons subject to the Conscription Act."

The act of Congress, 11 October, 1862, excepts "the officers judicial and executive of the Confederate and State Governments," etc., except such State officers "as the State may have declared or may hereafter declare by law to be liable to military duty." The legislation of the several States in respect to the liability of State officers to militia duty was not uniform. In some certain officers were liable, in others not, which caused the exemption act to be unequal in its operation. The Governor of Georgia claims that "militia officers" could not by the act of Congress be made subject to conscription, being officers required for the due administration of the State Government.

To meet this state of things, the exemption act was amended 30 April, 1863, and it is provided: "All State officers shall be exempted whom the Governor of any State may claim to have exempted for the due administration of the government and laws thereof; but this exemption shall not continue after the adjournment of the next regular session of the Legislature, unless such Legislature shall, by law, exempt them from military duty in the provisional army of the Confederate States." In pursuance of this act Governor Vance claimed to have exempted the militia officers of this State, and they have been considered and treated as exempted, until Kirk was arrested under the order of Governor Vance, referred to in the return. The case depends on the validity and legal effect of that action on the part of the Governor.

Mr. Dodge, for Captain Kirk, insisted on the argument that by the proper construction of the amended exemption act the Governor having claimed certain officers, the act contemplated by the law was done, and the Governor in respect thereto *functus officio,* and the militia and other State officers embraced in the claim were *ipso facto* (187) exempted, and this exemption continued until the adjournment of the next regular session of the Legislature. That it was not in the power of the Governor to open and shut, from time to time, at his pleasure, and make liable to conscription persons who were exempted under the act of Congress and his claim in pursuance thereof. He further

insisted, should he be mistaken in this, that the Governor certainly had not the power to take away the exemption in respect to particular individuals of a class, at his pleasure, leaving the other individuals of this class still exempted; that he must act upon classes of State officers, and could not reach individuals unless charges were preferred, and they were on trial by a court-martial deprived of their offices. And more especially that he could not discriminate between the officers of different counties by conscripting the officers of one or two and letting the officers of the other counties remain exempted. That such power could not be conferred on one man, because it was against the genius of a free government and was the essence of despotism—"the one-man power."

Mr. Winston, for the Confederate States, insisted that by the proper construction of the act power was conferred on the Governor to claim to have exempted from time to time such State officers as he should think necessary for the due administration of the Government and laws thereof, and it was proper to give him an opportunity to try how many officers were necessary. He could see nothing in the act or in our form of government requiring the Governor to exempt by classes, or restraining him from saying "he no longer needed the services of this or that individual, or the officers of this or that county." And that by General Order No. 6, 17 May, 1863, the Governor had reserved to himself this power, which was like a power of revocation in a deed which one creating an estate under a power of appointment thought proper to insert in order to enable him to avoid the estate. And he insisted this "power of revocation" made by the Governor was fit and proper to enable him to exact prompt obedience on the part of his officers, as the matter could not be dealt with by a court-martial. The clause
(188) in the order referred to is as follows: "Militia officers are hereby exempted from the operation of the Conscription Act so long as they yield prompt obedience to the orders issued from this office. The services of refractory and negligent officers will not be considered as necessary for the due administration of the Government and laws of the State."

In reply, Mr. Dodge relied on General Order No. 13, 10 July, 1863, in which certain State officers, among others, county solicitors, militia officers, the mayor and police of Raleigh, Wilmington, etc., are set out as exempted, under the act of 30 April, 1863, without qualification or "power of revocation" as revoking General Order No. 6, even if the Governor had the right to add a qualification, or power of revocation, which he denied.

I have given this sketch of the positions assumed by the counsel, as tending to elucidate the subject, and to aid me, in some measure, in setting out the ground of the conclusion to which I have come, that the

order of the Governor does not, in law, have the effect of avoiding the exemption of Captain Kirk and the other militia officers of the counties of Yadkin and Wilkes, which had been effected by the previous act of the Governor under the act of Congress, 30 April, 1863.

The function of designating what officers are necessary for the due administration of the Government and laws of the State is a matter of legislation, which belongs to the General Assembly, but at the time, when it seemed fit in the wisdom of Congress to amend the exemption act, the Legislatures of the States were not in session, and the plan adopted by Congress was not *confer* power on the Governor to exempt State officers; for the Governors derive their power from the Constitution and laws of the States and not from Congress, but to make the operation of the act of Congress depend on the action of the Governors in claiming certain State officers for the due administration and laws of the State. The legitimacy of this mode of legislation, by which the *operation* of a law is made to depend upon the act or election of *one* man or of a number of men was at one time seriously questioned, and many grave considerations may be urged against it. The subject is discussed in *Manly v. Raleigh,* 57 N. C., 370. The authorities are cited and it is held the Legislature (and, for like reasons, Con- (189) gress) has power to legislate in that way. Still, it is only resorted to when made necessary by peculiar circumstances, and the act should be construed strictly, so as not to carry it beyond the exigence of the circumstances which gave rise to it.

I can see nothing in the act of Congress which intimates an intention to put it in the power of the Governors, from time to time, to enlarge or contract the list of State officers claimed for the due administration of the Government and laws of the State. On the contrary, the words used plainly contemplated a single act on the part of the Governor, to wit, making a claim for the necessary State officers, which was to have the effect of exempting them. Indeed, the words, "But this exemption shall not continue after the adjournment of the next regular session," etc., are inconsistent with the notion that the act was to be repeated from time to time.

Mr. Winston conceded that it was not in the power of a Governor, after a State officer has been conscripted, to enlarge the clause so as to include such officer in the list of exempts. This being so, it is difficult to see how the same words can have the effect to enable a Governor to curtail the claim, and exclude an officer from exemption. There is nothing in the act to show that, in the opinion of Congress, it was either necessary or proper that the Governors should have an opportunity of "experimenting" in regard to what State officers are required for the due administration of the Government and laws thereof. It was reason-

able to presume the Governors possessed this knowledge, or could acquire it by the perusal of the acts of the Legislature then in force, which would enable them to take the action necessary to effect the exemption, which was to continue until it could be known whether, in the opinion of the Legislature, any change in the law was called for.

In the other view of this case, there is much force in the objection urged by Mr. Dodge to the verbal orders of Governor Vance to General Hoke in reference to the militia officers of the counties of Yadkin and Wilkes. It is, in my opinion, contrary to the genius of our free
(190) institutions to put it in the power of any one man to say to a county solicitor, for instance, "Do my pleasure, or I will send you to the camp of instruction as a conscript," or to the mayor and police at Raleigh, "Each and every one of you must act to please me, or I will send you to Camp Holmes as conscripts," or to the officers of the militia in Yadkin County, "Obey my orders promptly, and see to it that no one is refractory; for if so, I will send not only him, but the whole of you, to Camp Holmes as conscripts." Such a power might lead to oppression, and become dangerous to liberty. There is no precedent to support it in the history of any free people. So, according to a well settled rule of construction, it shall not be taken that it was the intention of Congress so to legislate as to enable the Governor to exercise such unlimited sway over the State officers. (See my opinion *In re Finley,* next case.)

The position of Mr. Winston, that, supposing the act of Congress not to confer the power, Governor Vance had in respect to the militia officers reserved it by General Order No. 6, is not tenable, and the analogy on which he replied, drawn from the doctrine of powers of appointment and revocation, in fact overthrows his position. The party which exercises a power of appointment cannot create a power of revocation. One who makes an estate can annex a condition by which to defeat it; so, the *maker* of a power of appointment may, by the same instrument, make a power of revocation, and he is the only one who can make it. According to this doctrine, it was necessary for Congress to make the power of revocation, which the argument assumes not to have been done.

But I do not attach much weight either to Order No. 6 or Order No. 13. The exemption was not effected by them, in fact. They presuppose and are predicated upon a prior action on the part of the Governor, by means of which the exemption had been effected, and the part of Order No. 6 relied on by Mr. Winston as a power of revocation must be considered as a matter *in terrorem* only—a rod held up to make the officers of the militia prompt in their obedience, and it was superseded by Order No. 13.

It is considered that F. W. Kirk be forthwith discharged, with (191) leave to go wheresoever he will. The costs, to be taxed by the clerk of the Superior Court of Yadkin County, will be paid by Robert F. Hoke. The clerk will file papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

7 November, 1863.

IN RE FINLEY.—HABEAS CORPUS.

THE facts are: Finley is a native of Baltimore, in Maryland, and had for many years been a merchant in Baltimore. In May, 1861, his political sentiments being on the side of the Confederate States, he left Baltimore and came to Asheville, North Carolina, with no intention of changing his domicile, but with the intention of staying in Asheville until the war was over, and, in the meantime, of collecting or securing debts due him in this State and in Tennessee, Georgia, and South Carolina; he has been, the most of the time, in Asheville, where he boarded at a hotel by the month, and visited other places in the above named States as business required; he is 36 years of age and a single man.

In October, 1863, he was ordered out to do military service as one of the "home guard," by Major J. W. Woodfin, and upon his refusing to serve he was arrested and sued out the writ of *habeas corpus*.

Mr. Winston, for petitioner, assumed the grounds:

1. The act of the Legislature is unconstitutional for the reason that a regular army and the militia are the only military organizations recognized by the Constitution of the Confederate States, or of this State, and the act in question makes a new military organization, which supersedes the militia and defeats and makes of no effect the power of the Confederate States over the militia.

2. The petitioner being a foreigner, who has not acquired a domicile in this State, to subject him to military service would be a violation of the law of nations and international comity, which it will not be taken that the Legislature intended to commit. (192)

3. The petitioner is a subject of a country with which we are at war; an "alien enemy," and is not embraced by the act of the Legislature.

I. The constitutionality of "the act in relation to the military and guard for home defense," although presented by the facts, is a question which it is not necessary to decide in order to dispose of the case, according to the view I take of it, and I do not, therefore, enter upon its consideration.

II. Assuming that according to the law of nations and international comity the subject of another government, who is a resident but has not acquired a domicile here, cannot be required to do military service in order to repel invasion and aid in establishing our independence, and assenting, as I do fully, to the position that when the words of a statute will admit of any other construction, it will not be taken that the Legislature intended to violate the law of nations and of international comity, still there is no provision either in the Constitution of the Confederate States or of the State which prohibits the Legislature from doing so, and if the words are used, showing clearly and unequivocally that such is the intention, the law is valid, and there is no ground on which the courts can decline to give effect to it from respect to the law of nations. In putting a construction on the conscription acts, the general words, "all white men *who are residents* of the Confederate States," etc., are held not to embrace subjects of another government who are residents, but who had not acquired a domicile here. The statute under consideration, besides the general words, "all white male persons residents in this State," adds the words, "*including foreigners not naturalized who have been residents* in the State for thirty days." These words are clear and unequivocal, and, as it seems to me, admit of no other construction than that it was the intention of the Legislature to include foreigners who had been residents here for thirty days, without reference to the fact of domicile, on the ground that to repel invasion and prevent our subjugation the principle of comity on which the law of nations is based should be to a certain extent disregarded; and it is the intention to re-
(193) quire foreigners who are residents, as distinguished from itinerants or travelers, to take up arms and aid in our defense. So my construction is that an Englishman or a Frenchman who had resided here for thirty days would be embraced by the act.

III. The petitioner is not simply a foriegner who is a resident here, like an Englishman or Frenchman, but he is "alien enemy," here by the permission of our Government. Should he bring an action, and to the plea, "alien enemy," take issue, it would be found against him, and he could only avoid the plea by confessing and putting in a special replication that he is a resident here by the permission of the Government. "Foreigner," the word used in the statute, in its general sense, includes all persons who are not citizens of this State or the Confederate States; but in the law books, state papers, histories, and in conversation, it is commonly used to signify citizens of other countries, neutral in their relations to us. In order to designate the citizens of a nation with which there is a state of war, the word "enemy" or "alien enemy" is appropriate. So, upon the principle of construction above referred to, which applies with increased force in the case of an alien enemy, for reasons

which I will state, I am convinced that the statute, under the general word "foreigner," does not embrace an alien enemy, for, in that case, it is not a mere question of comity, but other considerations are involved which may deeply concern the safety of the State, and which force upon us a different construction, to avoid a violation of the immutable principles of justice. A soldier has to be trusted; a faithless sentinel may sacrifice a whole army; or an alien enemy, acting as a soldier, may desert and give information of vital importance. So nothing short of direct words will justify the conclusion that it was the intention to make soldiers of them, and it should only be done by voluntary enlistment, with the express sanction of the Government and full notice of the fact. Would we trust a citizen of Massachusetts, who had resided here thirty days, as a soldier in our army? In the eye of the law, a citizen of Massachusetts and a citizen of Maryland are on the same footing. Again, if a citizen of Massachusetts or of Maryland takes up arms and fights in our defense, he will not, even in the view of the subject (194) taken by our Government, be entitled to be treated as a prisoner of war. The United States would have a right to deal with him as a *traitor,* and not a citizen of a belligerent nation. Under the general word "foreigner" can it be taken that the Legislature intended to force a man to incur the guilt of treason, where the words are plainly susceptible of a construction which excludes "alien enemies"? Here the rule of construction is pressed on us, not to avoid a violation of comity, but to avoid the commission of a positive wrong—a crime. Instances of the application of this rule of construction are to be met with in all of the works. A familiar one: A., having an estate in fee simple, enfeoffs B. *for life;* it is taken to be for the life of B., as most beneficial to him; but if one having an estate for his own life enfeoffs B. for life, it shall be taken for the life of the feoffor, because it would be wrong to make an estate for the life of B.; a forfeiture would be incurred. In our case the word "foreigner" is satisfied by confining it to the subjects of neutral nations, and cannot be taken to embrace a citizen of Maryland—an alien enemy—without forcing men to commit treason, and thereby incurring the highest forfeiture known to the law.

The petitioner stands on a different footing from a citizen of Kentucky or Missouri. Those two States are claimed by our Government as belonging to the Confederate States. Their citizens fighting in our armies may consequently expect to be treated as prisoners of war; but we have, as yet, no higher pretension to the State of Maryland as being a member of the Confederate States than to the State of Massachusetts; and for the purpose of this discussion, the citizens of Maryland and Massachusetts are to be viewed in the same light.

If there be citizens of those States, or any of the other States which still belong to the United States, residing among us, with the permission of our Government, they cannot by any but direct and unequivocal words be forced into our armies to repel invasion; and it is to be presumed that whenever their presence is supposed to endanger the public safety the permission to reside here will be withdrawn, and the Government will require them as "alien enemies" to depart.

(195) It is considered by me that R. S. Finley be discharged, with leave to go wheresoever he will. The clerk of the Superior Court of Buncombe County will file the papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

Richmond Hill, 7 November, 1863.

IN RE PRINCE—HABEAS CORPUS.

WHERE the substitute is under the age of 18, and the substitution is made under the conscription acts, it may be a presumption of law, there being an act of Congress by which the Government will be entitled to the services of the substitute at the age of 18, that the substitution was made in reference to this state of things, to wit, the prospective liablity of the substitute, by reason whereof the legal effect of the substitution is restrained, so that should the war continue so long, the Government will then be entitled to the services of both substitute and principal. But where the substitution is made before the passage of the conscription acts, under the regulation of the War Department, October, 1861, there being no act of Congress in force making citizens, either presently or prospectively, liable to service in the Confederate Army, the age of the substitute is immaterial; it can make no difference whether he be under or over the age of 18, or of what age he is, the only essential requirement being that he is "an able-bodied man, fit for military service in the field"; consequently the substitution cannot be presumed to have been made in reference to the age of the substitute, and there is nothing to restrain the legal effect of the substitution. So that should the war continue until the substitute arrives at a certain age, say 18 or 25, or any other age (for we might well suppose one age as another to have been in contemplation), the Confederate Government would then be entitled to the services of both substitute and principal.

Under the regulations of October, 1861, above referred to, the fact of substitution for the war, certified by the militia colonel, holding a draft, as in *Ritter's case, ante,* or by the captain, who was raising a company of volunteers, as in *Kennedy's case,* had the legal effect of exempt-

ing the principal for the war, the addition by the colonel or captain of the words, "and the principal is discharged from military service in the Confederate armies for the war," is mere surplusage, be- (196) cause it simply sets out a conclusion of law from the fact that the substitute had been received in place of the principal for the war; in other words, it is the law which discharges the principal, and not the colonel or captain.

In this case the substitute was under 18, but he was put in and received by the colonel for the war (5 March, 1862), but the certificate of the colonel, instead of expressing the conclusions of the law, that the principal was thereby exempted for the war, sets out that he is exempted until the substitute arrives at the age of 18; and the question is, Does this surplusage vary or annul in part the conclusion of law by which, from the fact of substitution for the war, the principal *ipso facto* was exempted for the war?

It seems to me that a mere statement of the proposition is a full answer, and the matter, when fairly presented, is too plain for argument. The colonel might just as well have said that the principal was exempted until the substitute arrived at the age of 21 or 25, for we have seen that, at that time, there was no act of Congress in force having reference to any particular age or making the age of the substitute at all material, and, of course, the colonel could not vary or annul the legal effect of the fact of substitution, and there was no act of Congress which could, by reference, vary the legal effect. For the sake of illustration, suppose an enrolling officer, under the exemption act, should certify that a man is a shoemaker, skilled at his trade, and actually employed working for the public, etc., and thereupon give him a discharge for six months; it is evident that the man is exempted "so long as he continues to work at his trade," because that is a conclusion of law, from the facts, and does not in any degree depend on the discharge which the officer may see proper to set out.

It is considered by me that Miles H. Prince be forthwith discharged, with leave to go wheresoever he will. The costs to be taxed by the clerk of the Superior Court of Wake County, and will be paid by John A. Spears. The clerk will file the papers in his office and give copies.

R. M. PEARSON, C. J., S. C.

At Richmond Hill, 17 October, 1863.

MEMORANDUM

R. B. GILLIAM, Esq., was elected judge of the Superior Courts in the place of Hon. THOMAS RUFFIN, JR., resigned.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1864

STATE v. WILLIAM CODY.

(1 Winst., 197.)

A charge in a bill of indictment that the prisoner committed a burglary by feloniously breaking and entering into the dwelling-house of the prosecutor with intent to steal his goods, is supported by proof that his intent was to rob the prosecutor.

INDICTMENT for burglary, tried before *Shipp, J.*, at Court of Oyer and Terminer for LINCOLN, on 1 February, 1864.

So much of the case as is material is stated in the opinion of the Court.

**Winston, Sr., for the State.*

No counsel for the prisoner in this Court.

BATTLE, J. We are of opinion that there is but one question presented by this case upon which the least doubt can be entertained. The bill of indictment charges that the prisoner committed a burglary by feloniously breaking and entering into the dwelling-house of the prosecutor in the night-time, with the intent to steal, take and carry away his personal chattels; and the counsel for the prisoner contended on the trial that the testimony tended to prove that the breaking and entering was with the intent to commit a robbery and not a lar- (198)

*In the necessary absence of the Attorney-General, at his request Mr. Winston argued his cases for him.

ceny, and that, therefore, there was a fatal variance between the allegation and the proof. The question thus raised is found upon examination to be against the prisoner. Robbery and larceny are both felonies and of the same general kind, the former being an aggravated species of the latter. Hence, upon an indictment for a robbery, the prisoner may, if the facts proved in evidence justify it, be acquitted of the robbery and found guilty of the larceny. *Rex v. Gnosil,* 11 Eng. C. L., 400; *Regina v. Walls,* 61 Eng. C. L., 214; 2 Russ. on Crimes, 91. This shows that the charge of commission of larceny is included in that of the commission of a robbery; and it follows that if the charge be of an act done with intent to commit the former offense, it is included in a similar charge with the intent to commit the latter. His Honor in the court below was therefore fully supported by authority when he said that it made no difference whether the testimony proved that the burglary was committed with the intent to commit a robbery or larceny. If it were proved that the felonious intent were to rob, it included proof of the intent to steal, and therefore it sustained the charge contained in the indictment. No error.

Cited: S. v. Halford, 104 N. C., 877; *S v. Brown,* 113 N. C., 647.

THOMAS ADAMS v. RICHARD M. JONES.

(1 Winst., 199.)

1. If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail.

2. And the sheriff is said to fail to take bail when the paper returned by him as a bail bond is so defective and imperfect as to be adjudged not to be such.

(199) SCIRE FACIAS to charge the defendant as special bail of one Campbell, tried before *Osborne, J.,* at Fall Term, 1862, of ORANGE, upon the following statement of facts agreed on by the parties:

The plaintiff brought an action against one Campbell and one Jackson, in Orange County Court, and the defendant being the sheriff of that county, arrested Campbell and Jackson by virtue of the writ, who, together with one Hedgepeth, under their hands and seals executed an instrument of writing, which is set out in *Adams v. Hedgepeth,* 50 N. C., 327, and which was returned to the county court by the defendant as a bail bond. After the judgment obtained in the original suit, Camp-

bell left the State, and Jackson, the other defendant, being insolvent, the plaintiff sued out a *sci. fa.* against Hedgepeth as bail, and it was decided that the aforesaid paper-writing is not a bail bond. This suit was then commenced. No exception was taken to the said paper-writing as a bail bond at the return term of the writ in the original suit, or at any other time, and no notice was given to the defendant respecting the matter of bail or the insufficiency of the paper as a bail bond. Judgment was given for the plaintiff.

Graham for plaintiff.
No counsel for defendant in this Court.

BATTLE, J. The sheriff or other officer who arrests a defendant by virtue of a writ in a civil case will, according to the provisions of the Revised Code, ch. 11, sec. 1, become special bail for the party arrested, whenever he shall fail either to take a bail bond or the bail returned be held insufficient on exception taken and entered the same term to which said process shall be returnable, and due notice thereof given to the officer. The exception and notice are clearly not required where no bail is taken at all; and a paper, though intended as a bail bond, which is so defective and imperfect as to be adjudged not to be (200) such, cannot be regarded as the taking of bail.

It follows that the sheriff or other officer who returns such a paper instead of a proper bail bond must be held as special bail, though no exception were taken nor notice given. See *Adams v. Hedgepeth,* 50 N. C., 327.

The judgment must be Affirmed.

PETER PLIMMONS v. WILLIAM FRISBY.

(1 Winst., 201.)

Where the applicant for a cartway over the land of another has already one or more convenient rights of way over the land of another to the public road or other public place to which he seeks access, his application shall be rejected, and if an order for a cartway has been previously obtained, the cartway will be discontinued on the petition of the owner of the land under Rev. Code, ch. 101, sec. 38.

PETITION to discontinue a cartway, tried before *Shipp, J.,* at Spring Term of BUNCOMBE, 1864.

The defendant had obtained an order for laying off a cartway leading to his mill through the plaintiff's land, and the way had been laid off accordingly. This petition was filed in the county court to discontinue the way, and came to the Superior Court by appeal. On the trial in the Superior Court it appeared that the defendant is, and has been for many years, the owner of a gristmill, to which five different roads lead; that these roads have been traveled for many years, three of them for more than twenty years, and how much longer did not appear, and that these three had been used by the public for that time and more, but it did not appear that any of the roads had been laid off by order
(201) of the county court, or that any overseer lawfully appointed had ever worked on them. In order to pass over said cartway it would be necessary for passengers to pass by the end of two of said roads that had been used by the public constantly for more than twenty years.

The judge ordered the cartway to be discontinued and gave judgment against the defendant for the costs.

Merrimon for plaintiff.
No counsel for defendant in this Court.

BATTLE, J. This was a petition to discontinue a cartway which had been laid off according to the provisions of Rev. Code, ch. 101, sec. 37. The proceeding was instituted under section 38 of the same act which declares that "cartways laid off according to the preceding section may be changed or discontinued upon application of any person concerned, under the same rules of proceeding as they may first be laid off, and upon such terms as to the court may seem equitable and just."

We have decided at the present term in *Burgwyn v. Lockhart, post,* 264, that where the applicant for a cartway over the land of another has already one or more convenient rights of way to the public road or other public place to which he seeks access, so that it will not be "necessary, reasonable, and just" that he shall have the cartway laid off, his application shall be rejected, though such rights of way over the lands of others be not cartways. That decision disposes of the present case. There are several other ways leading to the defendant's mill which were constantly used by him and the public, and it was not "necessary, reasonable, and just," therefore, that the plaintiff's land should be bur-
(202) dened with the cartway. The order of the court to discontinue it was proper, and must be

Affirmed.

C. D. SMITH *v.* NORTH CAROLINA RAILROAD COMPANY.

(1 Winst., 203.)

In an action by a passenger on a railroad against the company to recover damages for the loss of his trunk, the plaintiff is not a competent witness to prove the loss of his trunk or its contents, though he offer to swear that he has no means of proving those facts or either of them except by his own oath.

APPEAL from *Shipp, J.*, at Fall Term of MACON, 1863.

The plaintiff declared against the defendant as a common carrier for the loss of his trunk and its contents. It was admitted on the trial that the trunk was put into the charge of the defendant at Graham station, on the road where the plaintiff took the cars, and that the trunk was put on the train as the plaintiff's baggage, to be carried to Charlotte, a station on said road, that being the plaintiff's destination. The plaintiff tendered himself as a witness to prove by his own oath that the trunk was lost between Graham and Charlotte, and that he could not prove the loss otherwise, and also to prove the contents of his trunk, or for either of these purposes. The judge was of opinion that the plaintiff was not a competent witness in his own case, though he could not prove the loss of his trunk by other evidence than his own oath, and refused to permit him to be sworn and to testify in his own case. To which refusal the plaintiff excepted and submitted to a nonsuit.

Fowle and Phillips for plaintiff.
Moore and Merrimon for defendant.

BATTLE, J. The question on the record by the bill of excep- (203) tions is one of much practical importance in these days of increased and increasing traveling in stages, railroad cars, and other modes of conveyance. Though not a new question in some of the American States, it is now for the first time brought before us, and we must decide it upon the principles of evidence settled and established in this State.

It is an ancient and fundamental rule of evidence in the common law that *"nemo in propria causa, testis esse debet."* 1 Bl. Com., 443. Exceptions to this rule have, perhaps, always been admitted as to matters which are auxiliary to the trial, and which are in their nature preliminary to the principal subject of controversy, and are addressed to the court. Thus a party may make affidavit to the materiality of a witness; of diligent search made for a witness, or for a paper alleged to be lost; of his inability to attend; of the death of a subscribing witness; and cases of the like kind. 1 Greenleaf Ev., sec. 349. But upon the trial of

the merits of the cause, on an issue before the jury, the maxim that "no one is allowed to be a witness in his own cause" has come down to us from the earliest period of the common law, almost intact. The first innovation made upon it arose out of the Statute of Winchester, 13 Ed. I., ch. 1, commonly called the statute of "Hue and Cry," which gave to a party robbed an action on the case for damages against the hundred. In such action the plaintiff was allowed to be a witness on his own behalf to prove the loss. This testimony was said to have been admitted on the ground of necessity, and *Lord Kenyon,* in *Evans v. Williams,* 7 Term, 481, in a note, said that originally it was only in an action on that statute that it was admitted on such ground. It was, no doubt, thought, as the statute gave the action to the party robbed, and as he could very rarely prove his loss except by his own oath, a just and liberal construction of it gave him also the privilege of being a witness for

(204) himself. The change of the rule of evidence in cases of this kind may, therefore, very properly be considered as having been effected by statutory enactment, rather than by a deviation from it at common law. The breach in the integrity of the maxim being, however, once made, it was followed in course of time by at least one other innovation for which no statute can be held responsible. Thus, in 12 Vin. Abr., 24, Pl., 32, it is laid down that in a trial at Bodmyn, *coram Montague, Baron,* against a common carrier, a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness *ex necessitate rei.* These are the only cases which have been called to our attention as having been decided by the English common-law courts; and of these it may be remarked that one was a decision at *nisi prius* and the others were evidently the offspring of a statute. In some of the American States the decision made by *Baron Montague* has been adopted, and applied to the baggage of a traveler lost by the negligence of the carrier. (See *Pettigrew v. Barnum,* 11 Md., 434; *Johnstone v. Stone,* 11 Hump. (Tenn.), 419; *Herman v. Drinkwater,* 1 Green. (Me.), 27, while in one State at least it has been rejected. See *Snow v. R. R.,* 12 Met. (Mass.), 44.)

In North Carolina the common-law rules of evidence have been generally very strictly observed; and we are not aware that the maxim upon which we are commenting has been departed from as testimony intended for the jury, except in cases where the innovation has been introduced by statute. Thus, in what is generally known as the book-debt law, a party may prove by his own oath the items of his account to the amount of $60 only. Rev. Code, ch. 15. In cases of this kind there was a very strong necessity for the admission of such testimony, but the courts did not feel themselves at liberty to change the settled rule of evi-

(205) dence, and it remained unaltered until 1756, when the act en-

titled "An act to ascertain the method for proving book debts" was passed. (See Potter's Revisal, ch. 57.) In admitting the witness to testify for himself, it is worthy of remark that the act has carefully guarded the other party against the danger of a corrupt or perjured testimony. The account must be a book account; there must be no other means of proving the delivery of the articles than by the book and his oath; it must be for articles delivered within the last two years, and he must swear that the book contains "a true account of all the dealings, or the last settlement of accounts between them."

The necessity for admitting a plaintiff as a witness to prove the contents of his trunk, in an action against a railroad company or other common carrier for its loss, is not greater than it was in the case of a book debt; and as in the latter named case the courts felt themselves bound to leave it to the Legislature to supply a remedy for the mischief, so we must do in the case now before us. Our duty as a court is to ascertain, in each case that comes before us, what the law is, and then to decide accordingly; and if in the progress of society new circumstances or combinations of circumstances arise to which there is no principle of the common law applicable, we cannot assume the functions of legislators to devise one. That is the province of the Legislature, and we have neither the inclination nor the right to interfere with it.

The judgment of the court below must be

Affirmed.

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(206)

DAVID CLINE, EXECUTOR OF FRANK LATIMORE, v DANIEL LATIMORE AND JAMES C. LATIMORE.

(1 Winst., 207.)

1. Testator gave to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, says: "All of my property that is *not named*, both real and personal, is to be sold and, after paying all my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal." The reversion in the land devised to the wife for life falls into the residue and must be sold for an equal division.

2. No action can be sustained on a covenant made by one of the heirs who had received more than his share, to secure the excess so received by him until the reversion had been sold.

THIS was an action of covenant brought on the following deed:

Know all men by these presents, that we, Daniel Latimore as principal and James C. Latimore and John Latimore as securities, promise to pay

David Cline, executor of Frank Latimore, deceased, such sum as may be due from the said Daniel Latimore to make the other heirs equal with the said Daniel in the amount due each one from the estate of Frank Latimore, deceased. Witness, etc.

D. LATIMORE, [L. S.]
JAMES C. LATIMORE, [L. S.]
JOHN LATIMORE. [L. S.]

Frank Latimore by his will gave to his widow, who was alive at the time of the trial, a tract of land during her life, worth at the testator's death $2,000 or $3,000. The will contains this clause: "My eldest son Daniel I have given 223 acres of land on Knobb Creek, which was worth $600, and other property worth $85, and also a negro boy named Anthony (provided he will refund back sufficient to make the rest of the heirs equal to himself), which boy was worth $850." The testator had many children, to some of whom he declares in his will he had made advancements of a certain value; and the dispositive part of his
(207) will concludes as follows: "My daughter Susan I have given her her full share of all that I intend for her to have out of my estate. All my property that is not named, both real and personal, is to be sold, and, after paying my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal, Susan excepted." The testator's estate, exclusive of the land devised to his widow for life, and including the property given to his children other than Susan, was worth $8,000, and Daniel had received more than his share by $900. The reversion of the land given to the widow for life had not been sold.

The defendant moved to nonsuit the plaintiff, because he had brought suit before he had sold the reversion in the land devised to the widow. The judge reserved the question of law, by consent of parties, with leave to enter a nonsuit if he should be of opinion with the defendant. The jury returned a verdict in favor of the plaintiff. The judge being of opinion with the defendant on the question of law reserved, ordered the verdict to be set aside and a nonsuit to be entered, from which judgment the plaintiff appealed.

No counsel for plaintiff in this Court.
Phillips for defendant.

MANLY, J. We concur with the court below in awarding a judgment of nonsuit.

The reversion in the parcel of land devised to the wife for life was a part of the testator's estate undisposed of specifically, and which fell therefore into the residue.

This executor is required to sell and divide among the heirs, so as to equalize shares. It must be converted into cash, and applied as the will directs; in other words, the will must be fully executed before the sum secured by the covenant can be ascertained or considered due. The action was therefore premature.

The judgment of nonsuit is (208)

Affirmed.

DOE ON THE SEVERAL DEMISES OF HUGH N. REEVES AND WILLIAM CURRIE v. JAMES H. CRAIG.

(1 Winst., 209.)

A devise of a tract of land to the son of the testator, "if he be living and returns to the county of Orange," is a gift of the land on condition that the son returns to Orange as his domicile, especially when other provisions of the will seem to show the testator's expectation and desire that the son should reside there after testator's decease.

EJECTMENT, tried before *Gilliam, J.*, at Spring Term of ORANGE, 1864.

Hugh Currie of Orange County made his will in 1849, whereby he devised as follows: "I give and devise to my son William Curtis, if he be living and returns to the county of Orange, the plantation whereon I now live, containing, etc.; but if my son is dead or does not return to the county of Orange, I give and devise to my grandchildren, Mary Currie, Betsy Currie," etc. The said grandchildren were the children of William. By another clause of his will the testator directed his slaves to be sold, and gave one-third part of the price to the children of his son William. The testator died in 1851, and his will was proved in that year. William Currie had been absent from this State for several years before 1849, and did not return to this State until in the year 1860, when he came to Orange County for the purpose, as he said, of disposing of his land. He made a deed of bargain and sale for the land to Hugh C. Reeves, one of the lessors of the plaintiff, and, after remaining in Orange County about three weeks, left the State and has not returned to it since. The testator's grandchildren above named had always resided in Orange County. The defendant in the (209) action claimed under them. The jury found a special verdict to the effect above stated, and the judge being of opinion with the plaintiff, a verdict was entered accordingly and judgment rendered thereon, from which the defendant appealed.

Graham for plaintiff.
Phillips for defendant.

MANLY, J. The case depends upon the construction of the devise to William Currie; and the question is, What is the true meaning and intent of the condition upon which his taking the estate is made to depend?

We are satisfied the *return to the county* of his son which the testator had in his mind was a return *as a resident;* otherwise, it is difficult to conceive why he should have stipulated for a return at all. If he had meant it as a personal advancement, it would have been more germane to his object to have given it absolutely upon the condition of his surviving him.

The main object of the testator seems to have been to make provision for his son's family. This he desired to do through his son, for reasons of mutual benefit; and therefore he stipulated for his return to the county—for his return to it as his domicile, whereby his children would become subject to his care, and he be in a condition to attend to their education and maintenance. It could not have entered into his contemplation that his son might come into the county, make sale of his estate, and then return with the proceeds to his former retreat. Such a return would not at all advance what we have supposed to be the principal object of the testator.

In further support of the view we have taken, it may be remarked
(210) that the testator in making provision for this branch of his family gives the land to the son and the personalty to his children, suggesting by this arrangement an expectation and desire that there should be a common possession and enjoyment.

The question as to the time within which the condition should be performed we have thought it unnecessary to consider. Our opinions upon the first point dispose of the case, and we decline going into the other.

The judgment of the Superior Court should be reversed and a judgment entered for the defendant.

Reversed.

Cited and distinguished: Harris v. Hearne, post, 484.

W. W. HIGDON AND OTHERS v. E. C. CHASTAINE.

(1 Winst., 212.)

1. If the general issue be pleaded together with special pleas, and the jury find all the issues in favor of the defendant, the Supreme Court cannot reverse the judgment of error in the charge of the judge respecting the matter of the special pleas.

2. It cannot be assigned for error that the judge did not charge the jury on a point which the party did not make at the trial.

ACTION of debt, tried before *Shipp, J.*, at Fall Term of MACON, 1863.

The declaration was for $500 claimed by the plaintiff to be due to him by virtue of a deed executed by the defendants, the contents of which it is unnecessary to state, as its construction is not brought into question. The defendants pleaded the general issue, conditions performed, and no breach. The plaintiffs assigned two breaches: (1) That the defendant had discovered a valuable copper mine, and sold it before 25 December, 1859. (2) That he was satisfied that it was proved to be a valuable copper mine: in either of which cases they insisted that the (211) defendant was bound to pay the sum of $500.

The subscribing witness was introduced and proved the execution of the instrument declared on. Mr. Cannon was introduced as a witness by the plaintiffs, who testified that he went with plaintiff Higdon to the defendant Chastaine, before the bringing of this suit, and demanded the $500 or a surrender of plaintiff's lease, offering to settle and pay the defendant's expenses. The defendant refused to pay the $500, but said he would pay if he could sell the mine for $10,000, and that he could not surrender the lease, because there was some sort of contract upon the mine. This evidence was objected to by the defendant, but admitted by the court. The defendant's counsel moved to nonsuit the plaintiffs, which motion was overruled. The cause was submitted to the jury upon this testimony, and the counsel for the plaintiffs insisted that the testimony proved a breach of one or the other of the conditions mentioned in the agreement, and pressed his right to recover upon this ground alone. The court charged the jury that if the testimony of the witness Cannon satisfied them that the defendant had committed either of the breaches of the agreement assigned by the plaintiffs, viz., if the proof satisfied their minds that the defendant had discovered a valuable copper mine and sold it as such, or that he was satisfied that it was proved to be a valuable mine as contemplated in the agreement, the plaintiffs were entitled to their verdict of $500 and interest; and if they were not satisfied of these facts, the defendant was entitled to their verdict.

There was no exception to the charge. There was a verdict in general terms for the defendant. Rule for a new trial. Rule discharged, and the plaintiffs appealed to the Supreme Court.

(212) *Merrimon for plaintiffs.*
No counsel for defendant.

BATTLE, J. This was an action of debt in which the plaintiffs declared upon a sealed instrument, and assigned breaches of the conditions annexed to it. The defendant pleaded the general issue and conditions performed and not broken. Upon the trial, the jury found a verdict for the defendant; and it is stated in the case that there was no exception taken to the charge of the court to the jury. Yet there was a motion for a new trial, which being refused, and a judgment rendered for the defendant, the plaintiff appealed.

We cannot discover any error which we are at liberty to redress. The plea of the general issue made it necessary for the plaintiffs to prove the execution of the instrument declared on, and they introduced and examined the subscribing witness, who testified that it was duly executed: and they also offered evidence for the purpose of proving the breaches assigned. It does not appear that any testimony was introduced on the part of the defendant. The court charged the jury upon the bearings of the evidence, and no objection was made to the charge. The jury returned a verdict generally "for the defendant," which of course negatives the execution of the instrument upon which the suit was brought. Upon this state of the record it is out of our power to notice any improper instructions upon the evidence given in relation to the breaches, even if there were any such; for if the execution of the instrument were not established, what was said about its breaches must have been irrelevant.

It has been repeatedly decided in this Court that in an action of assumpsit, if the defendant plead the general issue and the statute of limitations, and the jury find "all the issues for the defendant," the court cannot inquire into the correctness of the charge in rela-
(213) tion to the issue on the latter plea. *Morisey v. Bunting,* 12 N. C., 3; *Mastin v. Waugh,* 19 N. C., 517; *Cole v. Cole,* 23 N. C., 460. The present appears a parallel case, and must receive the same determination.

But it is said in the argument here that the plaintiffs were not bound to assign breaches of the bond, and to offer proof in support of them, and that upon the testimony offered by them to establish the execution of the instrument sued on, the court ought to have told the jury that if they believed the testimony the plaintiffs were entitled to recover. The

reply is, that the court was not bound to instruct the counsel for the plaintiffs in the management of their case; and it was not error of which they have a right to complain that he did not charge the jury upon a point which they did not think proper to take. They made no objections to his instructions upon the questions which they presented, and after a verdict generally in favor of the defendant, they are estopped from making exceptions founded on their own mismanagement.

No error.

Cited: Thornburgh v. Mastin, 93 N. C., 263.

JARMAN G. JOHNSON v. ELI OLIVE.

(1 Winst., 215.)

1. An indorsement of a bond by the obligee in this form, "A B, for sixty days, 19 November, 1858," imposes no liability on the indorser after the expiration of the limited time.

2. A justice of the peace has no jurisdiction of a guaranty.

APPEAL from a justice of the peace, tried before *Heath, J.,* at Fall Term of JOHNSTON, 1860.

The defendant was the obligee of a bond executed by one (214) Moore. He indorsed it to the plaintiff by writing these words on the back: "Eli Olive, for sixty days, 19 November, 1858." The warrant was brought on 25 December, 1859, a demand having been made on defendant a few days before. No evidence was offered of any communication between the parties concerning the import of the indorsement, or of any consideration other than what is implied by the indorsement. A verdict was taken for the plaintiff, subject to the opinion of the court, and the judge being of opinion with the defendant on the question of law reserved, the verdict was set aside and the plaintiff nonsuited. From this judgment the plaintiff appealed.

Winston, Sr., for plaintiff.
No counsel for defendant.

MANLY, J. The judgment of the Superior Court appears to us to be correct.

We take the indorsement, upon which the action is brought, to be susceptible of but two interpretations. It is either an indorsement importing an unconditional promise, but to continue in force for a limited term only, or it is a conditional promise, *i. e.*, a guaranty of the debt for the time limited. If it be the first, the time having been permitted to elapse, the responsibility ceases, and the right of action is gone. If the second, the right of action is not only gone by the lapse of time, but the justice before whom the action was commenced had no jurisdiction of it; and the want of jurisdiction being patent on the face of the pleading, the suit may be dismissed on motion.

Affirmed.

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(215)

WILLIAM J. BINGHAM AND OTHERS v. PHARAOH RICHARDSON.

(1 Winst., 217.)

1. Where the proprietors and managers of a school, on being applied to by a parent to receive his sons as scholars, inform him of their willingness to receive them, and send him a statement of their terms, one of which is, "when a place is engaged, the session's charge is considered due, unless the boy be prevented from coming by act of God," and the parent by letter expresses his acceptance of the terms, though he does not send his sons to the school, he is liable to pay for a session's board and tuition, the proprietors proving their ability and willingness to comply with the contract on their part.

2. If there be only one event on which money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is competent for the parties to fix a given amount of compensation in order to avoid the difficulty.

ACTION of *assumpsit,* tried before *Heath, J.,* at September Term, 1863, of ORANGE.

The case is stated in the opinion of the Court.

Phillips for plaintiff.
No counsel for defendant.

MANLY, J. Upon the trial of this case, in Orange Superior Court, there seems to have been no dispute as to this state of facts:

The plaintiffs are proprietors and managers of a select school in the county of Orange, for the government of which they have adopted various regulations, and among them the following:

(14) "Charge per session, $125 in advance, which covers board and tuition, bed and bedding, fuel and washing.

(15) "When the place is engaged, the session's charge is considered due, unless the boy be prevented from coming by the act of God. Notice of continuance or withdrawal to be given a month, at least, before the end of the session."

The defendant applied for the admission of three of his sons (216) into this school, and after receiving a favorable answer and a copy of the regulations, from which the foregoing was extracted, he wrote to the principal of the school as follows: "Your communication to Mr. Saunders was handed me this morning. I gladly avail myself of the opportunity of handing my boys over to you, hoping that you may not be disappointed in them."

The boys were not sent to the school of the plaintiffs, but to another school in the same county, without notice to plaintiffs.

The plaintiffs averred and proved a readiness on their part at all times to fulfill their undertaking.

The counsel for the defendant, upon this state of facts, contended that inasmuch as the boys were not actually entered at the school, by being sent there, the contract on the part of the defendant was not complete. The counsel, however, consented that the jury might find a certain amount of damages, subject to the opinion of the court upon the point of law raised by him.

The court gave judgment for the plaintiffs and the defendant appealed. We are of opinion the court properly interpreted the negotiations between the parties.

The school is a select school; application is made for the admission of three boys; the managers engage to receive them, and announce at the same time that when a place is engaged, the session's charge is considered due; and the defendant then writes: "I gladly avail myself of the opportunity of handing my boys over to you, hoping that you will not be disappointed in them."

This certainly imports an engagement on the one hand to take charge of the boys, and a promise on the other to send them. There were mutual obligations, for the violation of which one or the other, as the case might be, would have legal cause of complaint.

The record does not seem to raise another question which was (217) discussed in this Court, viz., whether the sum of $125 was a penalty or liquidated damages. According to the view we take of it, no such question can well be made. By the terms of the contract, the semi-annual charge of $125 for each pupil is to be paid in advance, and was due at the time the places were engaged. It was a demand presently due, and could be recovered forthwith, whether the boys were ultimately sent or not.

Regarding it in the light of a mere security for the performance of the contract, it seems to us very clearly to be of the nature of liquidated damages. We entertain no doubt of the principle that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty. The case supposed is before us, and the *difficulty* has been guarded against as clearly as words can serve to do so. So *quacumque via data,* the recovery made below is correct.

Affirmed.

Cited: Horner School v. Wescott, 124 N. C., 520; *Teeter v. Military School,* 165 N. C., 571.

DUNCAN MURCHISON AND OTHERS v. HECTOR McNEILL.

(1 Winst., 220.)

1. Clause 19, section 86, schedule B, of the act of the General Assembly of 1862-3, imposing a tax of all the net profits above 75 per cent on the cost of production on every person or corporation manufacturing cotton or woolen cloth, etc., is constitutional, but does not apply to profits already made when the law went into effect.

2. Such tax is not a capitation or poll tax.

(218) ASSUMPSIT for money had and received, tried before *Osborne, J.,* at Fall Term, 1863, of CUMBERLAND, on the general issue.

It appeared that the plaintiffs were manufacturers of cotton goods, in Cumberland County, and had made a profit of $1,500 over 75 per cent on the cost of production upon yarns and cloth which they had manufactured before the ratification of the act of 1862-3, entitled "Revenue," and between 1 January, 1863, and the date of its ratification. The plaintiffs paid the money under protest to the defendant, the sheriff of Cumberland County, who demanded payment under the penalty of the act. The plaintiffs gave notice to the defendant at the time of paying the money that they would sue to recover it back, as money paid by compulsion, without authority of law.

The jury, under the direction of the judge, found a verdict for the defendant. The plaintiff excepted to the direction of the court, and from the judgment on the verdict appealed to this Court.

Moore for the plaintiffs.
Buxton for the defendant.

BATTLE, J. The General Assembly, by an act which went into effect 11 February, 1863, imposed a tax of all the net profits above 75 per cent upon the cost of production on every person or corporation manufacturing cotton or woolen cloth, or a mixture of both, from and after the first day of January of the same year. The plaintiffs were manufacturers of cotton cloth on 1 January, 1863, and continued to be so during that year, and having, as they admitted, made a profit of $1,500 in their business, between 1 January and 11 February, they paid the same to the sheriff under protest, and brought this action to recover it back.

In the argument here the counsel for the plaintiff contends that the Legislature had no power to impose a tax upon the past profits of the plaintiff's business. He insists that the tax is in effect a capitation tax, and as such is imposed contrary to the Ordinance of the Convention of 1861, entitled "An ordinance in relation to taxation." That ordinance provides, "that all free males, over the age of 21 years and under the age of 45 years, shall be subject to a capitation tax not less than the tax laid on land of the value of $300, and no other free person shall be liable to such taxation; and also land and slaves shall be taxed (223) according to their value, and the tax on slaves shall be as much but not more than that on land, according to their respective values; but the tax on slaves may be laid on their general average value in the State, or on their value in classes in respect to age, sex, and other distinctive properties, in the discretion of the General Assembly, and the value be assessed in such modes as may be prescribed by law." It is manifest that if the tax to which the plaintiffs object be a capitation tax, it is not assessed in accordance with the provisions of this ordinance, and the act imposing it is in violation of the fundamental laws of the State, and is therefore void. The question then is, Can the tax be deemed a capitation or poll tax? The counsel insists that it is, for the following reasons: A tax, he says, on the land, franchises, slaves, or other personal chattels and choses in action which a man now owns is a tax on his property, and is a legitimate impost upon him. So he may be rightfully taxed on the profits of his business, profession, or trade, or for a license to follow any particular business, profession, or trade. But a tax on any article of property, which he formerly owned, but which he has heretofore consumed, lost, or destroyed; or upon the profits of a business, profession, or trade which he followed, or in which he was engaged, in bygone times, which profits he has consumed, lost, destroyed, or converted into some other kind of property; or upon a license heretofore granted to pursue a business, profession, or trade which he has ceased to follow or be engaged in, cannot be called a tax on property, profits, or licenses, because when it is imposed the subjects of it have no existence. Being past and gone, they are to be considered as if they

never had been. Such a tax, then, can be only upon the person. It is to all intents and purposes nothing more nor less than a capita-
(224) tion or poll tax. This is a succinct statement of the argument of the plaintiff's counsel, presented by him, however, in a variety of views, and with many ingenious illustrations. Of its force and conclusiveness we do not feel ourselves called upon to judge, because we do not think it applies to the law in question, as we shall now endeavor to show.

The act required that the manufacturers of cotton cloth, who carried on their business from and after 1 January, 1863, should pay annually a certain tax upon their profits. It was well known to those who passed the act that such manufacturers did not, and from the nature of their business could not, ascertain and declare a dividend of profits, either daily, weekly, or monthly. Hands had to be employed, raw materials purchased, and a great many things done before sales could be made and accounts stated so as to show what the profits were. It was well known, too, to the Legislature that partnerships and corporations were in the habit of declaring dividends at certain stated periods, usually annually or semiannually, but never as frequently as monthly or even quarterly. It was further known that winter was mainly the time for preparing the ensuing year's work, by hiring workmen, purchasing supplies, etc., and hence was the time for expenses rather than profits, for the latter were to be realized afterwards. Hence, there could be no profits, properly speaking, for the first month or two of the year, and when they did accrue, the law would be in force and would apply to them as present and accruing, and not past profits. It certainly can be no objection to the validity of the act that the work and materials which were to produce the profits after its ratification were in existence prior to that time.

But it may be said that the bill of exceptions states as a fact that a certain sum was realized as profits between 1 January, 1863, and
(225) 11 February of the same year, when the act was ratified, and that we must take the fact to be so, without inquiring as to how it was ascertained. A sufficient reply, we think, is this: that the law directed the tax upon the profits to be paid annually, and clearly means such profits as are ascertained in the usual way and at the usual stated periods. If the plaintiffs kept their books so as to have a balance sheet of profits and loss struck *de die in diem,* or from week to week, or month to month, it ought to have been so stated in the case; for we know that such a course, in business of the kind in which they were engaged, is not common, even if it be possible. They certainly had no right to do what we suspect they did—that is, make out the account of profits at the end of a half year, and then calculate the average per month or week. Profits have never in fact been realized in such way; and the Legisla-

ture never intended that they should be ascertained by such a mode of calculation.

Our conclusion, then, is that the act of the Legislature in question did not apply to profits past and gone, but to profits then in the process of being made, and which were in fact ascertained and declared after the law went into effect, and that consequently the act is constitutional and valid.

Affirmed.

Approved: S. v. Bell, 61 N. C., 86; *Huggins v. Hinson, id.,* 128.

(226)

THE STATE v. JOHN HARWOOD.

(1 Winst., 228.)

It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses upon whose testimony the indictment was found were sworn before they were sent to the grand jury.

THE prisoner was indicted in WAKE, and the case was removed to JOHNSTON, where it was tried at Spring Term, 1864, before *Heath, J.*

The transcript of the record from the Superior Court of Wake sets out the holding of the Superior Court on the first Monday after the fourth Monday of September, A. D. 1862, the return of the venire by the sheriff, and the names of the jurors, and proceeds in these words: "And thereupon, by the oath of Thomas Whitaker, foreman, John Adams, etc., good and lawful men of the county aforesaid, then and there drawn from the said venire and then and there impaneled, sworn, and charged to inquire for the State of and concerning all crimes and offenses committed within the body of the said county, it is presented in manner and form following, that is to say, the jurors for the State, upon their oath, present that John Harwood, late of Wake County," etc., charging him in the usual form with the murder of John C. Kennedy, and the transcript sets out his arraignment and plea of not guilty.

On his trial one Patrick, a witness for the State, swore that on the day of the homicide, 12 December, 1861, Kennedy, the deceased, and Harwood, the prisoner, were at his house in the county of Wake. The deceased and the prisoner drank together several times and seemed perfectly friendly; both started out of the house, prisoner going (227) first and the deceased following him in about a minute and a half. The prisoner went down the steps and passed to the corner of the piazza and stopped. The deceased went down the steps, and about the time he

might have got to the lower portion of the steps, the prisoner, who had his gun in his hand, raised his gun, put his eye to it and fired quickly, and the deceased fell from the steps. The prisoner said nothing before he fired. The witness could distinctly see the prisoner all the time, but could not see deceased after he fell. The witness went out of the house and found deceased on the ground shot in the breast; he lived but a few moments. The witness asked the prisoner why he killed Kennedy (the deceased). The prisoner made no answer, and left in four or five minutes after the killing.

Miss Patrick, a witness for the State, swore she was present at her father's house on the day of the homicide. She saw the prisoner standing at the corner of the piazza with his gun, and heard him say to the deceased, "If you put your foot in this yard, I will put this load in you." He then fired. The deceased made no answer to the prisoner's threat, and she saw no more of the prisoner that day. She saw no arms in possession of the deceased. On cross-examination, this witness swore that prisoner came out of the house in a hurry with his gun on his arm. Deceased came out slowly. Prisoner (who is a Texas man) had been at her father's for some time previous to the homicide, but witness neither saw nor heard any disturbance, nor anything unfriendly between them. In passing out of the house and towards the eastern end of the piazza the prisoner was going towards home.

Mrs. Patrick, also a witness for the State, swore that she was the wife of the first witness, and was at the house on the day of the homicide, and saw the transaction through a glass window in the kitchen; de-
(228) ceased went out of the house first, and prisoner passed him with his gun on his arm; as prisoner passed out he said to deceased, "If you come out I will shoot you"; he then shot deceased, who fell and drew only one breath and died. In a minute prisoner was gone. On cross-examination, she swore that prisoner passed out of the house and down the steps rapidly; that as he passed deceased he looked at deceased, but deceased did not look at him, and that, as prisoner spoke to deceased, deceased turned towards prisoner and prisoner discharged his gun at him.

One Stancell, a witness also for the State, swore that within an hour after the homicide, prisoner came to him and asked him to lend him his repeater; he said he wanted it, for he had killed a man and was compelled to go away. Witness asked, "Whom have you killed?" Prisoner answered, "I have killed Kennedy." Witness asked, "Why did you kill him?" Prisoner answered, "Kennedy said if I went out he would kill me, G—d damn me, and he came out and I slammed eight buck shot into him."

One Hinton stated that he examined the deceased immediately after his death, and that the load passed nearly through his body.

The before named are the witnesses examined for the State. No point was made either in the examination of the witnesses or in the prisoner's counsel's address to the jury as to the mode or immediate cause of the death of the deceased, or as to time or place.

The defendant's counsel in his statement of the grounds of defense said he should contend, first, that the prisoner was guilty of no offense, because the act of killing was committed under a temporary or permanent insanity; or, if otherwise, was excusable in necessary self-defense.

Secondly, that the prisoner was guilty of manslaughter only, as there was no malice. (229)

He introduced many witnesses who swore to the prisoner's previous good character; some of whom swore to the insanity of the prisoner's ancestry, and others swore that they knew him when a boy, and that his mind was not good; he could not learn anything and therefore they thought his mind was unsound.

The judge instructed the jury that if a killing takes place, nothing more appearing, the law implies malice, and the killing would be murder, and that in this case there was evidence of malice to go to the jury, to be weighed and passed upon by them, and if they believed there was malice, it was a case of murder; that evidence of the prisoner's character was permitted to be introduced, not to screen a guilty man because of his previous good character, but to satisfy the jury that notwithstanding the evidence in the cause, the prisoner is not guilty; and that in this case, if the evidence of good character overcame the other evidence against the prisoner, and satisfied them it was not true, then they ought to find him not guilty. That it was not every degree of insanity that would excuse homicide; that if a man knows what he is doing, and at the same time knows that he is doing wrong, he is responsible for his acts. But if he does not know what he is doing, or, knowing what he is doing, he does not know that he is doing wrong, then he would not be responsible. And further, that the law does not recognize irresistible impulses as excuses for criminal acts, which the mind of the actor recognizes as wrong; that in this case, if the prisoner was insane to the extent above stated, then he would not be guilty; and this was equally true whether the insanity was temporary—existing at the time of the act done—or permanent.

The judge further charged the jury that there was no evidence (230) tending to show that the killing was in necessary self-defense; that if the prisoner had cause to believe, and did believe, that the deceased intended to kill him, and the prisoner killed deceased *simply* because of such belief, the killing would be murder. In order to excuse or

mitigate the killing, the deceased must have been in a condition, actual or apparent, to kill the prisoner; that if the prisoner had good cause to believe, and did believe, that the deceased intended to kill him, and the deceased was in apparent condition to execute such intention, and the prisoner killed the deceased when the prisoner might have retreated, without danger of death or other great bodily harm, then the prisoner would be guilty of manslaughter at least.

The jury found the prisoner guilty of murder.

There was a motion in arrest of judgment: (1) Because the record does not show that the indictment was found a true bill by the grand jury. (2) The record does not show that the witnesses on whose testimony the indictment was found were sworn before they were sent to the grand jury.

The motion was overruled, and judgment was rendered according to the verdict.

No counsel for the State.
Winston, Sr., for the prisoner.

MANLY, J. The case in the court below seems to be set forth in the record with particularity. The evidence, as well as the charge of the presiding judge, seems to be full and complete.

We have examined these in connection with each other, and are of opinion that the charge is applicable and responsive to every view
(231) which can properly be taken of the evidence, and that the prisoner has no cause of complaint.

We have had no particular part of the charge called to our attention by way of exception, and suppose there is none in the view of prisoner's counsel that affords ground for such criticism.

The principles propounded to the jury in the court below, whether they relate to the grades of homicide or the question of insanity, have been so frequently discussed in this Court down to a recent period that we deem it unnecessary to repeat them now. They consist with what we regard as the settled and established law of the land.

The grounds taken in arrest of judgment are not tenable. These are also settled against the prisoner by recent adjudications in this Court. *S. v. Guilford,* 49 N. C., 83; *S. v. Roberts,* 19 N. C., 540; *S. v. Barnes,* 52 N. C., 20.

The record upon which the judgment below was pronounced, as stated by the court, follows the precedent in the Appendix to 4 Black. Com. This has been adopted by Mr. Eaton in his book of Forms, and approved in this Court in *S. v. Guilford, supra.*

The prisoner was tried for a homicide which, for aught that appears, was unprovoked and wanton. He has had the benefit of every proper safeguard afforded by the courts under the rules of law, and the record sent to this Court seems to be free from defects.

No error.

Cited: S. v. Lanier, 90 N. C., 716; *S. v. McBroom,* 127 N. C., 530, 535; *S. v. Sultan,* 142 N. C., 573.

(232)

THE STATE v. JAMES C. McNEELEY.

(1 Winst., 334.)

1. One who has been licensed to retail spirits may lawfully employ an agent to conduct that business for him, although he leaves the country for an indefinite time, as, in this case, in the military service of the Confederate States for three years, or the war.

2. It *seems* he cannot assign his license.

INDICTMENT tried at Fall Term of BURKE, 1863, before *Howard, J.*

The defendant was indicted for selling spirituous liquors by the small measure without license. (See Rev. Code, ch. 34, s. 94, and ch. 79, s. 6.) He admitted retailing in November, 1862, and produced, in justification of his doing so, a license to retail from the sheriff of Burke to one W. C. Good, from February, 1862, to February, 1863, and a paper-writing from Good to himself in words and figures as follows, viz.:

Know all men by these presents, that I, W. C. Good, have employed J. C. McNeeley to act for me in my absence, and to manage my grocery store, and to retail spirituous liquors for me in the town of Morganton, and, if he prefers doing so, he may have the one-half of the profits, instead of the salary, I have promised him. Given under my hand and seal this 1 October, 1862. W. C. GOOD. [L. S.]

It was proved that at the date of this instrument Good was taken into the army as a conscript, where he has remained all the time since, and that the instrument was executed for the purpose of continuing his business in Morganton.

The court charged the jury that the business of retailing must be under the control and supervision of the person licensed, and that he had no right to delegate another to retail in his stead during such an absence as that of a soldier enlisted for three years or the war. (233)

The defendant excepted to the instruction. Verdict of guilty, and judgment.

Winston, Sr., for the State.
No counsel for defendant.

BATTLE, J. The decision of this case depends upon the question whether the defendant, when he committed the act of retailing, was the assignee of W. C. Good, or was merely his agent or manager. If he were the assignee, we expressed the opinion *arguendo* in *S. v. Gerhardt,* 48 N. C., 178, that he could not sell spirituous liquors by the small measure under the license of his assignor, because his moral qualifications had not been examined into and approved by the county court, as required by law. We can see no reason why a licensed retailer may not have a clerk or agent to assist him in his business, he himself remaining liable for the acts and contracts of such clerk or agent, done or made within the scope of his employment. It is a matter of public notoriety that much of the trading with slaves is done in grocery and other stores, and the Rev. Code, ch. 34, sec. 90, evidently contemplates that the owners of such stores may have agents or managers, because it makes certain provisions in relation to them as such. The keepers of groceries are frequently licensed retailers also, and we have never understood that they cannot have clerks, agents, or managers in the latter, as well as in their other business. W. C. Good had applied for and obtained a license to retail spirits in the town of Morganton for one year. He had paid the State for a valuable privilege, which he was clearly entitled to enjoy for the specified time, unless he should forfeit it by a *misuser.* Before the expiration of his time he was conscripted and carried off into the military service of his country. He could no longer enjoy his privi-
(234) lege in person, and he could not assign it. Why could he not employ another person to manage the business for him? He would still remain responsible for the good conduct of his agent; and that, it seems to us, makes a difference between such a case and that of an assignee.

The instrument offered in evidence by the defendant showed clearly that he was acting only as agent, and not as assignee. If, indeed, the transaction between the parties was really intended as a sale of the privilege, instead of the appointment of an agent, then it was an attempted fraud, and afforded no protection to the defendant. But the case was not presented to the jury in that view, and the conviction cannot, therefore, be sustained on that ground.

Error.

Cited: S. v. Kittelle, 110 N. C., 565, 568, 588.

SARAH WOODFORD v. LUTHER HIGLY AND WIFE.

(1 Winst., 237.)

A conveyance of land to a man and his wife and their heirs vests the entirety in each of them, and upon the death of one of them the survivor takes the whole in severalty.

PETITION for dower, tried before *Heath, J.*, at Fall Term of LINCOLN, 1863.

In 1822 John Boyd conveyed the land in which dower is demanded to Lyman Woodford and his wife, Jane (she being the daughter of Boyd), and their heirs, and to them after the death of the grantor and his wife. John Boyd and his wife died in the lifetime of Woodford and his wife. Then Mrs. Woodford died, and Woodford married the (235) petitioner and died.

The judge below decided that the petitioner was entitled to dower in the whole of the land.

Fowle for petitioner.
No counsel for defendant.

MANLY, J. The judgment of the court below is in conformity with the decision of this Court in *Motley v. Whitmore,* 19 N. C., 537, and is certainly correct. The contrary view arises, we suppose, from a misapplication to the case of the statute in relation to estates held in joint tenancy, Rev. Code, ch. 43, s. 2, where it is declared that in cases of estate held in joint tenancy the part or share of a tenant dying shall not go to the surviving tenant, but to the heir of the deceased.

Lyman Woodford and his wife, Jane, were not joint tenants, and neither had a *part or share* to go to the heir or assignee of the one dying first. When land is conveyed to a husband and wife, they hold by entireties. "Being in law but one person, they have each the whole estate as one person, and on the death of either of them the whole estate continues in the survivor."

This has been long established as the rule governing cases of this kind, as will be seen by reference to the authorities cited in *Motley v. Whitmore.*

Affirmed.

Cited: Hancock v. Wooten, 107 N. C., 15; *Harrison v. Ray,* 108 N. C., 216; *Stamper v. Stamper,* 121 N. C., 254; *Ray v. Long,* 132 N. C., 896.

THE STATE v. JOHN JOHNSON.

(1 Winst., 238.)

Property proved to have been stolen, found six weeks after the theft in a house occupied exclusively by the defendant and his wife, is found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt.

(236) THE defendant was indicted for stealing cotton cloth from the storehouse of the prosecutor. The goods had been stolen about six weeks when they were found in a house rented by the defendant, in which he and his wife and no other person lived. The defendant stayed at a store adjacent to that of the prosecutor, and there was an opening in the partition wall between the two stores, through which a man might pass from one to the other. The prosecutor lost many other articles besides the cloth, some of which were men's wearing apparel. One of these garments had been stolen a short time before the finding of the cotton cloth, and was found in the defendant's house at the same time. The cotton cloth was identified by the prosecutor by a mark upon it in the course of business.

The court charged the jury that the goods, being found in the house of the defendant, were presumed to be in his possession; but, owing to the length of time which had elapsed from the stealing of the goods until the discovery of them in the possession of the defendant, no presumption could arise that he had stolen them; but the fact of his having them in possession was evidence which they would consider with the other evidence in the cause in determining his guilt or innocence. Verdict guilty, and judgment accordingly.

Winston, Sr., for the State.
No counsel for defendant.

MANLY, J. We are informed that the proofs in this cause establish as a fact the finding of the stolen property in the house of the defendant, where he and his wife alone resided, and the exception to the (237) charge of the judge is that he regarded this as a possession by the defendant, and authorized the jury so to assume.

We do not think this is erroneous. The sense of the term possession in this connection is not necessarily limited to custody about the person. It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn, when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or with his undoubted concurrence. See *S. v. Williams,* 47 N. C., 194, and cases referred to in Waterman's notes to 2 Archbold's Criminal Pr. and Pl., 369.

We think the case before us falls within the scope of the decided cases, and that it is proper to hold one responsible as the possessor of property, when it is found in his dwelling house under the circumstances stated in this case. It consists with reason, policy, and the just rights of persons to hold as a legal presumption that the property must have been put there by his act or his concurrence.

This disposes of the only exception which appears upon the record, and there is nothing in other portions of the judge's charge of which the defendant can properly complain. It is clearly in accordance with well settled principles of evidence. Possession of stolen property, although not so recent as to raise a legal presumption of the taking, is nevertheless evidence to be considered in connection with other evidence upon that point. It is of very frequent occurrence on the circuits that a part of the evidence in cases of larceny consists of proof that the stolen property was found in the house of the accused, either before or after his apprehension, and question has rarely been made in our courts, so far as I am aware, of its competency. At any rate, it is now settled to be admissible, be the time longer or shorter, and however insufficient it may be *"per se"* after a considerable lapse of time. Such a pos- (238) session, of course, is more or less cogent, according to the lapse of time, the nature of the house, and the condition of the household, the manner of keeping the lost property, proximity to the place of taking, the probability or improbability of representations to account for the possession, the character of the accused, and the like. Such matters of proof might give significance to a possession, which would be of itself of slight import; and all such evidence is, therefore, competent, and may be sufficient to satisfy a jury of the felonious taking by the person who is fixed with the possession. There was evidence of this character in the cause. It appears to have been fairly laid before the jury, according to the view here taken, and the jury have come to a conclusion with which we have no right to interfere, if we had the inclination.

PER CURIAM. No error.

Cited: S. v. Brown, 76 N. C., 226; *S. v. Rights,* 82 N. C., 678.

THE STATE v. GREEN DRAKE AND OTHERS.

(1 Winst., 241.)

If three men break open the prosecutor's crib and take and carry his corn therefrom, his son being present and forbidding them, they are guilty of an indictable trespass, and the taking may be averred to be from the possession of the prosecutor.

INDICTMENT against three persons for a forcible trespass in taking and carrying away the plaintiff's corn, tried before *Osborne, J.,* at Spring Term, 1864, of DAVIE.

(239) The indictment charged "that William F. Miller, of, etc., was lawfully possessed of a certain quantity of corn, etc., and Green Drake, N. H. C. Williams, and Samuel Howard, with force and arms and strong hand, etc., did seize and take from the actual possession of the said William F. Miller, he being present and forbidding the same, by his son and agent, William H. Miller, the aforesaid 20 bushels of corn, and did then and there unlawfully, forcibly, violently, and with strong hand retain possession of the said 20 bushels of corn, etc." The jury found a special verdict as follows: "The prosecutor had gathered his corn, and put it into a crib on his plantation, and locked the crib and left home. In his absence the defendants broke open the crib and carried away a part of the corn. W. H. Miller, a son of the prosecutor, was present and forbade the entry and the removal of the corn. Whether the defendants be guilty as charged, the jury are not advised. If the court should be of opinion that the defendants are guilty, the jury find them guilty. If the court should be of opinion that the defendants are not guilty, the jury find them not guilty." The court being of opinion with the defendants, a verdict of not guilty was entered, and judgment accordingly, and the State appealed.

Winston, Sr., for the State.
No counsel for defendant.

MANLY, J. The judgment of the Superior Court upon the special verdict is erroneous. In the absence of the father, the son had authority to forbid the entry into the crib, and the entry with *strong hand,* under such circumstances, is more than a civil trespass. The force is sufficiently manifest from the number of persons engaged, and from the violence committed on the building.

(240) It is not necessary the owner should be present always in his house to forbid the entry of a trespasser, in order to continue it under the protection of the law against this offense. A member of the family left in charge, forbidding, will have the same effect.

The possession of the son is the possession of the father, and it is, therefore, properly laid as a trespass to the latter's possession. Upon the whole, we conclude the offense is well laid, and the facts found in a special verdict constitute a case of guilt.

This should be certified to the Superior Court of Davie County, that the judgment may be reversed and judgment for the State awarded.

THE STATE v. ALEXANDER DUCKWORTH.

(1 Winst., 243.)

1. An indictment upon section 29, ch. 107, Rev. Code, is sufficient if it avers that the defendant did "permit the said slave, Peggy, to keep house to herself as a free person"; and, in the second count, did "connive at said negro slave keeping house to herself as a free person."

2. A., being the owner of a female slave, left the county several years before the finding of the indictment. At the time of going away he conveyed the house and lot, in which the slave lived, to the defendant, and gave him also a note for $50 in consideration that the defendant would support the slave and her husband, both being old, for the rest of their lives. This is a sale of the slave from A. to the defendant.

INDICTMENT tried before *Howard, J.*, at BURKE Fall Term, 1863. The indictment was as follows:

"The jurors for the State, on their oath, present that Alexander Duckworth, etc., being the owner of a certain female negro slave, named Peggy, on the, etc., unlawfully did permit said negro slave, Peggy, (241) to keep house to herself as a free person, contrary to the form, etc.

"And the jurors, etc., further present, that the said A. D., being the owner, etc., did unlawfully connive at said negro slave, Peggy, keeping house to herself as a free person, etc."

The witnesses testified that the slave was the property of one Smyth, who moved from Burke County several years ago; that she was reputed since that time to be the property of the defendant; that when Smyth left the county, he conveyed the house and lot in which the slave lived to the defendant, and gave him a note for $50, in consideration that he would take the slave and her husband, both old negroes, and take care of them the rest of their lives; that for a year or two after Smyth left, the defendant did furnish them with wood, provisions, etc., but for several years last past he had done nothing for the woman, the man being dead, and she had to support herself as she could, by begging and what little work she could do; and that the defendant has not of late exercised any control or supervision over her, but has permitted her to act entirely as a free woman.

The court charged the jury that the possession of the slave having been passed from Smyth to the defendant, the question was whether the contract between Smyth and the defendant was, at common law, a contract of bailment, or sale, and that this was a question of construction for the court; that, as the interest conveyed was the whole interest in the slave, and the obligation of the defendant the full duty of master or owner, it amounted to a sale, and the title passed to the defendant. The defendant excepted to the instructions given by the court to the jury. Verdict for the State, and judgment accordingly.

(242) *Winston, Sr., for the plaintiff.*
No counsel for defendant.

MANLY, J. The court below put, as we think, the proper construction upon the transaction between Smyth and the defendant. It passed the ownership of the slave to the defendant for reasons very clearly given by the court, and we deem it unnecessary to add more.

Looking into the record, we find the indictment has not employed all the phrases used in the statute for the description of the offense. The statute provides that "no slave shall go at large, as a freeman, exercising his own discretion in the employment of his time; nor shall any slave keep house to him or herself as a free person, exercising like discretion in the emlpoyment of his or her time; and in case the owner of the slave consent to the same, or connive thereat, he shall be deemed guilty of a misdemeanor."

The indictment charges that defendant, being the owner of the slave, "did permit her to keep house to herself as a free person," omitting the words, "exercising her discretion in the employment of her time."

We do not perceive that the words omitted would give any other signification to the words used than they express standing alone. To *keep house to oneself as a free person* involves with sufficient precision and certainty the exercise of one's discretion in the employment of his time, and no additional words would seem to be necessary to convey that idea; although it is best, and we therefore recommend the use of the terms and *all* the terms deemed proper by the Legislature for defining the offense; yet it is not necessary, provided the sense be perfectly preserved without.

(243) For like reasons we are of opinion that the substitution of the word "permit" for the word "consent" does not vitiate the indictment.

No error.

Cited: S. v. Brown, post, 449.

THE STATE v. SAMUEL MORGAN.

(1 Winst., 246.)

An indictment at common law for a "forcible entry into the house of John Bell, Mary Bell being then and there present and forbidding the same," is fatally defective for want of an averment that it is the dwelling-house of J. B., or that M. B. is the wife, daughter, or other member of the family of J. B.

INDICTMENT for forcible entry, tried before *French, J.,* at Spring Term, 1864, of BRUNSWICK.

The indictment is in these words: "The jurors for the State, upon their oath, present that Samuel Morgan, late, etc., with force and arms, and with a strong hand, unlawfully did enter upon the premises and into the house of one John Bell, Mary Bell being then and there present, and forbidding, against the peace and dignity of the State."

The jury found the defendant guilty. His counsel moved in arrest of judgment, and the judgment was arrested, and the State appealed.

Winston, Sr., for the State.
No counsel for defendant.

BATTLE, J. This was an indictment for a forcible entry at (244) common law, and after a verdict, finding the defendant guilty, the judgment was arrested in the court below, because there was no allegation in the indictment that the owner of the house was present at the time of the entry; and, although it was alleged that one Mary Bell was present, there was no allegation that she was in possession of the house, nor that she was a member of the prosecutor's family, or had any right to forbid the entry of the defendant. The counsel who has appeared for the State in this Court has endeavored to avoid the force of this objection to the indictmnet by contending that "house" *ex vi termini* means dwelling-house, and that at common law a forcible entry into a dwelling-house is a misdemeanor, whether the owner be present or not. In support of the latter part of his proposition, he referred to and relied upon 1 Hawk. P. C., Book 1, ch. 28, sec. 26. It is unnecessary for us to decide this question, because we do not assent to the position that a "house" means *ex vi termini* a "dwelling-house."

The law takes notice of different kinds of houses, and distinguishes dwelling-houses by giving them the preëminence above all others. Thus at common law noctural breaking of a dwelling-house is an offense of a higher grade than injury of a similar kind to other houses is held to be. Indictments for burglary must charge the house broken to be a dwelling-house, and it would be a fatal defect in the bill to describe it merely as "a house." So we think that if it be, as is contended, that a forcible

entry into a dwelling-house in the absence of the owner and his family is an indictable offense, the indictment must allege the house to be a dwelling-house. Were it otherwise, the indictment would not have that certainty as to facts and circumstances which is necessary to apprise the defendant of what is charged against him, so that he may know how to prepare his defense. Arch. Cr. Pl., 41.

(245) The indictment in the present case cannot, then, be supported as one for a forcible entry into the dwelling-house of the prosecutor. Being an indictment for a forcible entry into a house other than a dwelling-house, it ought to have charged that the offense was committed in the presence of the prosecutor, or, at least, of some member of his family. *S. v. McCanless,* 31 N. C., 375; *S. v. Walker,* 32 N. C., 234; *S. v. Caldwell,* 47 N. C., 469. Here the indictment does not charge the presence of the prosecutor, nor of any person who is stated to be a member of his family. It is, therefore, defective and insufficient. But it is contended by the counsel for the State that it is aided by the Rev. Code, ch. 35, sec. 114. That act was passed for the purpose of putting an end to objections founded upon mere informalities and refinements. The answer to this is that the defects in this indictment are matters of substance, for the Court cannot discover from the indictment that the house into which the illegal entry was made was the dwelling-house of the prosecutor, nor that Mary Bell was his wife, daughter, or other member of his family, having a right to forbid the entry of the defendant.

PER CURIAM. No error.

THE STATE v. WESLEY McDANIEL.

(1 Winst., 249.)

1. If a man breaks and enters into a dwelling-house by night, with intent to commit a felony, the crime of burglary is consummated, though after entering the house he desists from an attempt to commit the felony through fear, or because he is resisted.

2. The intent to commit a felony may appear from antecedent circumstances, and if there be a forcible entry into the house at night, the intent so appearing, it is burglary.

(246) INDICTMENT for burglariously breaking and entering a dwelling-house with intent to commit a rape, tried before *French, J.,* at Spring Term, 1864, of MONTGOMERY.

Mary Boyd, the prosecutrix, testified that in the month of August last, about one or two hours before day, she was asleep in the house of her sister-in-law, in Montgomery County, and was waked by the noise

of some one throwing something against the door and window; she got up and found the prisoner at the window; she asked him what he wanted; he answered, "Something good," and got down from the window and went to the back door and broke it open, entered the house, struck her violently with a water bucket, placed his hands across her breast and threw her down. She resisted as far as she was able. A child of her sister, about 9 years of age, struck at the prisoner with a stick, and the witness called to him to go to a neighbor's for help. As the child went off, the prisoner got off the person of the witness and left the house. The prisoner did not, when he first laid hands on her, or after he had thrown her down, attempt to raise her dress.

One witness testified that the prisoner was between 16 and 17 years of age. Another, that he was between 18 and 19. There was other evidence on the part of the State in confirmation of the testimony of the prosecutrix.

The prisoner is a free negro.

The court presented to the jury the testimony on the part of the State and prisoner, and instructed them on the law, to which instruction no exception was made.

The counsel for the prisoner requested the court to instruct the jury that although they were satisfied from the evidence that the prisoner broke and entered into the dwlling-house in the night-time, with the intent to commit a rape on the prosecutrix, yet if he afterwards desisted on account of the resistance he met with, or through fear (247) or any other cause, that the prisoner was not guilty.

The court declined to give the instruction, and instructed the jury that if they were satisfied from the evidence that the prisoner broke and entered into the dwelling-house in the night-time, with the intent to commit a rape on the prosecutrix, and afterwards, through resistance or fear, abandoned the intent, he was guilty. The counsel for the prisoner excepted. His counsel moved, in arrest of judgment, that the indictment charged an offense at common law, and under the statute in one and the same count, which motion was overruled, and judgment entered according to the verdict.

The indictment is as follows: "The jurors for the State, upon their oath, present that Wesley McDaniel, being a free negro, late of the county of Montgomery, not having the fear of God before his eyes, etc., on, etc., about the hour of 12 in the night of the same day, with force, etc., at, etc., the dwelling-house of one Adeline Boyd, there situate, feloniously and burglariously did break and enter with intent in and upon one Mary Boyd, being a white female in the said dwelling-house, then and there being, with force and arms then and there violenly, forcibly, feloniously, and burglariously, against her will, to ravish and carnally

know, contrary to the form of the statute in such case made and provided; and then and there, with force and arms, in and upon the said Mary Boyd, being a white female as aforesaid, in the peace of God and the State, in the said dwelling-house, then and there being, violently, forcibly, feloniously, and burglariously did make an assault, and her, the said Mary Boyd, in the said dwelling-house, then and there did beat, wound, and ill-treat, with an intent her, the said Mary Boyd, be-
(248) ing a white female as aforesaid, violently, forcibly, and against her will, then and there, in the said dwelling-house being, feloniously and burglariously to ravish and carnally know, and other wrongs, etc., contrary to the form of the statute, etc."

Winston, Sr., for the State.
No counsel for prisoner.

MANLY, J. There appears upon the record but one exception to the rulings of the judge below. After instructions upon the law of the case not complained of, the court was asked to inform the jury that, "although they were satisfied from the evidence the prisoner broke and entered into the dwelling-house in the night-time, with the intent to commit a rape on the person of the prosecutrix, yet if he afterwards desisted, on account of the resistance he met with, or through fear, or any other cause, the prisoner was not guilty."

The court declined to give the instructions thus asked, but told the jury, if they were satisfied from the evidence the prisoner broke and entered into the dwelling-house in the night-time with the intent to commit a rape on the prosecutrix, and afterwards, through resistance and fear, abandoned the intent, he was guilty. To this exception is taken.

We see no ground for a question either upon the propriety of refusing the specific instructions asked or upon the propriety of giving the instructions substituted therefor.

The definition of a burglar given by Sir Edward Coke is: "He that by night breaketh or entereth into a mansion house with intent to commit a felony."

A moment's consideration of the elements of this definition will show the groundless nature of this exception. It is apparently based upon the assumption that the felonious *intent* can only be made evident by its actual execution, which is a great mistake.

(249) This element of the offense may appear from circumstances happening antecedently to the act intended, and so appearing (other elements being conceded), the offense is consummated.

This view of the offense is supported by many adjudged cases and by the uniform practice; and accordingly we find a definition conforming

thereto, adopted by East, Russell, and other text-writers, viz.: "a breaking and entering a mansion house of another in the night with intent to commit some felony within the same, whether such felonious intent be executed or not."

This meets in all respects the case now before us, and by express words disposes of the prisoner's exception.

The case informs us there was evidence as to the intent laid before the jury, and proper instructions in relation thereto given by the court. There is no error, therefore, in the instructions given, and those asked for were rightfully refused.

We have examined the whole record with the care which its importance demands, and find no defect or impediment to hinder the due course of the law.

PER CURIAM. No error.

Cited: *S. v. McBryde*, 97 N. C., 399.

JOHN W. B. WATSON v. MOSES A. BLEDSOE.

(1 Winst., 253.)

A bond for a certain sum of money, payable to A. or order, with interest from a day preceding its date, is payable immediately, although it purports to be given for the price of bricks to be delivered at a subsequent day.

ACTION of covenant, tried before *Gilliam, J.*, at WAKE Fall (250) Term, 1863, in which the plaintiff declared on an instrument under seal of the tenor following:

With interest from 14 November, 1854, I promise to pay to J. W. B. Watson, or order, $500 for 100,000 bricks, to be delivered during March or April next, as the said Bledsoe may determine, and he pay for the hauling. Witness my hand and seal this 19 December, 1854.

M. A. BLEDSOE. [L. S.]

On the trial the plaintiff proved the execution of the instrument declared on, and stopped his case. The defendant moved to nonsuit the plaintiff, which motion was denied by the judge. The defendant then offered evidence to prove that the plaintiff had delivered only a part of the bricks. The evidence was rejected by the judge. Verdict and judgment for the $500, with interest from 15 November, 1854.

Mason and Fowle for plaintiff.
K. P. and R. H. Battle for defendant.

PEARSON, C. J. The general rule is, when by a contract of sale an article is to be delivered at a future day, the payment of the price and the delivery of the thing are to be concurrent acts, and the promises are held to be "dependent" on the ground that each party is supposed to intend to hold on to his own as a mode of compelling payment on the other side. But if the purchaser agrees to pay the price *before* the day on which the thing is to be delivered, the promises are held to be "independent," because that circumstance shows that he relies on his remedy by action to compel performance on the part of the vendor. 1 Saund., 320, note, *Pordage v. Cole.*

(251) The question is, Does the bond oblige the defendant to pay before the bricks are delivered? If it had been drawn "one day after date," which is a form usual in this country, or "on demand," "I promise," etc., there could have been no question about it. We are of opinion that the bond is a present promise to pay on the day of its date; it purports to be such, and although the fact that the bricks, which are to be delivered in March or April, are set out as the consideration, instead of the usual words, "for value received," would, were there no other facts, qualify the promise to pay, and give it the meaning of "I *am* to pay $500 for 100,000 bricks, to be delivered, etc.," we are satisfied, from the other facts on the face of the instrument, that it is, as it purports to be, a present purpose to pay, and was not intended to be dependent upon the delivery of the bricks.

1. It is in the usual form of a negotiable bond, payable to J. W. B. Watson, or "order"; so the parties intended it to be negotiable, which is inconsistent with the intention that it should be dependent on the delivery of the bricks; for, if so, it is not negotiable (*Goodloe v. Taylor,* 10 N. C., 458); so the fact that it is expressly payable to order must be rejected, or the fact that it refers to the bricks as the consideration must be taken as a mere memorandum or surplusage, and the words of the instrument are to be taken most strongly against the obligor, for they are his words.

2. The defendant obliges himself to pay interest from 15 November, 1854. This shows that it is not the ordinary transaction of the purchase of an article to be delivered at a future day, and to be paid for when delivered; or the price will not bear interest until it was due; so the face of the instrument proves that the price was not only payable on the day of its date, but, according to the contract, was payable before, viz., on 15 November, 1854, and back interest is to be paid for

(252) the forbearance to collect.

PER CURIAM. Affirmed.

DEMPSEY BLAKE AND OTHERS v. WILLIAMSON PAGE.

(1 Winst., 255.)

A testator, in 1819, bequeathed to his daughter a negro woman, "to her and her heirs of her own body forever; and if none, to return after her death to the rest of my children equally." The limitation over to the testator's other children is not too remote.

APPEAL from *Gilliam, J.*, at Fall Term, 1863, of WAKE.

Petition for the division of slaves. The only material fact in the case is stated in the opinion of the Court.

Moore for petitioner.

Fowle, G. W. Haywood, and Phillips for defendants.

BATTLE, J. The controversy in this case arises upon the construction of the following clause in the will of Dempsey Blake, deceased: "I give and bequeath to my daughter Anne my negro woman Sarah, to her and her heirs of her own body forever; and if none, to return after her death to the rest of my children equally." The question is, whether the limitation over to the rest of the testator's children is too remote, and therefore void. The will was made in 1819, so that the construction is not controlled by the act of 1827; and that act cannot be allowed to influence our decision, except, perhaps, as indicating to us that the Legislature of that year thought the courts had gone too far in holding that the expressions "dying without heirs," or "heirs of the body," or "without issue," or "issue of the body," etc., meant an indefinite failure of such heirs or issue, and not heirs or issue living at the death (253) of the testator. Many decisions, both of the English courts and of those of this State, affecting the question now before us, have been brought to our attention by the counsel, and the task of showing an entire consistency among them would be a difficult one, if it were necessary for us to undertake it. From this difficulty, however, we are relieved by one or two recent adjudications of this Court, the authority of which we do not feel ourselves at liberty to dispute.

In *Baker v. Pender,* 50 N. C., 351, the bequest was in the following words: "The balance of the property to be for the sole use and benefit of my wife, to her and her heirs lawfully begotten of her body, forever; but should my wife die without heirs of her body, then, at her decease, the whole of the property to go to the use and benefit of my daughter Nancy and her heirs forever." The contest was about a slave, and the question was whether the limitation over to the testator's daughter Nancy, who was a child by a former wife, was too remote. In delivering the opinion of the Court, it was said: "Without entering into the

question whether the word 'then' is an adverb of time or a merely relative adverb, about which much is to be met with in the books, we are satisfied that the words 'at her decease' fix the happening of that event as the time at which the limitation over must take effect, if it takes effect at all, and that consequently it is not too remote. 'At' is a more precise word of time than 'after,' and it is settled that 'after her death' is sufficient to restrict the limitation. *Pinbury v. Elkin,* 1 Peere Williams, 563; *Wilkinson v. South,* 7 Fearne, 555; 1 Fearne, 473; Smith, 557; 2 Roper Leg., 370." In the subsequent case of *Newkirk v. Howes,* 58 N. C., 265, the bequest was: "I also lend to my daughter Penny Newkirk, during her natural life, the following negroes, viz., etc., and at her decease to the lawful heirs of her body, if any such there
(254) be; and if none, to the lawful heirs of my body, and to be equally divided amongst them." The decision was in favor of the validity of the limitation over, as being not too remote, the Court holding that it made no difference whether Penny Newkirk took an estate for life, with a limitation to the heirs of her body as purchasers at her decease, or whether she took the absolute estate under the effect of the rule in *Shelley's case,* as applied to bequests of personality, and that the time was fixed, and the limitation over depended upon her having heirs of her body at her decease. "The force of the words 'at her decease' pervades the whole clause, and manifestly qualifies both of the limitations. 'To the lawful heirs of her body, if any such there be.' When? Clearly at her decease. 'And if none such there be.' Equally clearly at her decease; that is, to the lawful heirs of her body, if any such there be at her decease, and if none, to return to the lawful heirs of my body."

The words of the bequest in the case now before us vary somewhat from those in the cases to which we have referred, but we are decidedly of opinion that the meaning is the same. The slave is given to the testator's daughter, Anne, and to the heirs of her own body; but if none, to return after her death to the rest of his children. "If none" means if she had no heirs of her own body, that is, children or the issue of children, the slave was, after her death, that is, as soon as she was dead, to return to the rest of his children. The expressions in *Pinbury v. Elkin* and *Wilkinson v. South, ubi supra,* were similar to those of the present case, with the exception that they contained the word "then," as "then after his decease" the property, which was personal, was given over to other persons. We think the construction must be the same whether the word "then" be inserted or not. The word, when used in such a connection, is not an adverb of time, as some have supposed, but is to be understood as a relative adverb in the sense of "in that case" or "in
(255) that event"—that is, in the case or in the event of a "default of

such issue" the property shall, "after the decease" of the first taker, go over to another. Thus explained, these cases are direct authorities in favor of the construction which we adopt in the present case.

Decree accordingly.

Cited: *Springs v. Hopkins,* 171 N. C., 494.

JAMES R. WALKER v. SALLY WALKER.

(1 Winst., 259.)

1. Parol evidence is admissible to show what matters are submitted to arbitration and what matters are brought to the notice of the arbitrators.

2. An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision. But when arbitrators act within the bounds of their authority, their decisions on questions of law and of fact are binding on the parties, unless the arbitrators acted corruptly or committed gross errors.

ACTION of debt on award, tried before *Heath, J.,* at Fall Term of ORANGE, 1863.

It appeared on the trial that the plaintiff and defendant, on 23 March, 1859, chose John U. Kirkland and John Berry to settle a dispute between them by arbitration, and executed an instrument under seal, of which the following is a copy:

"Know all men by these presents, that James R. S. Walker and Sally Walker, both of the county of Orange and State of North Carolina, acknowledge themselves indebted in the sum of $5,000 to any person suing for the same, good and lawful currency of North Carolina, for which we bind ourselves and our heirs and assigns. In testimony whereof we set our hands and affix our seals, this 23 March, 1859.

"The condition of the above obligation is such whereas James (256) R. S. Walker and Sally Walker have agreed to leave a matter of dispute to referees, as they cannot settle it themselves, viz., John U. Kirkland and John Berry; they are their referees to settle the matter in controversy. James R. S. Walker having his letters examined on trial with other testimony. Sally Walker having the privilege to produce testimony on the trial to rebut the evidence in said letters, with the understanding that the said James R. S. Walker is to leave the mills which are in dispute, surrender to Sally Walker the mill key and leave within ten days after this paper is signed. Then, after the referees hearing the testimony on both sides shall decide that James R. S. Walker is entitled to damages, whatever the damages shall be laid at, the said Sally Walker is to pay to the said James R. S. Walker; but should the

referees find, upon examination, that Sally Walker is damaged, instead of James R. S. Walker, then the said James R. S. Walker is to make it good to Sally Walker, whatever it be."

The arbitrators found that the plaintiff had removed from Tennessee to this State, at the solicitation of the defendant, and in expectation of pecuniary advantages promised by her, and that he had suffered a loss thereby of $500, and that he was not indebted to her on the mill books or otherwise,, and they award that she pay him $500, and that he deliver to her the mill books. The plaintiff proved the performance of what he was required to do, both by the deed and the award. The defendant contended that the arbitration had been corruptly conducted, and as evidence of this allegation showed that she had offered evidence before the arbitrators of a battery committed on her by the plaintiff, whereby she insisted she was greatly injured, which the arbitrators refused to hear. The plaintiff contended that this matter was not submitted to arbitration, and offered to show that the only matter submitted was a question of damages alleged to have arisen from the plaintiff's having
(257) removed from Tennessee to North Carolina because of promises made by the defendant to him, which were alleged to have been broken. To the reception of this evidence the defendant objected, on the ground that as the submission was by deed, parol evidence could not be given to show what was submitted. The judge permitted the evidence to go to the jury, reserving the question of its competency, and giving leave to the defendant to move to enter a nonsuit in case he should be of the opinion that the evidence offered by the defendant was competent. Under the instructions of the court, the jury found a verdict for the plaintiff for the amount awarded and interest. The defendant moved to enter a nonsuit according to leave given. The court refused the motion and gave judgment for the plaintiff upon the verdict.

Fowle for plaintiff.
Phillips for defendant.

BATTLE, J. It is a general rule that where an arbitrator does not make his award upon all the matters submitted to him, the award is entirely void; and the defect may be shown as a defense to an action on the award. Watson on Arb. and Award, 59 Law Lib., 121. But where the submission is of all matters in difference, or of all disputes, without specifying them, the arbitrator may make his award only of such things as he has notice. Yet the award is good. *Ibid.* How can these rules be made of any practical benefit to parties unless parol evidence is admissible to show what matters were within the terms of the submission, or were brought to the notice of the arbitrator? That such evidence is ad-

missible for such purposes was directly decided by this Court, in *Brown v. Brown,* 49 N. C., 123. Indeed, on the trial of the very case now before us, the presiding judge, notwithstanding the submission was in writing, admitted parol evidence on the part of the plaintiff to (258) show that a certain matter was the only one submitted to the arbitrators; and it seems to us that upon the same principle the defendant ought to have been permitted to offer testimony to rebut that of the plaintiff, by showing that another matter was embraced within the terms of the submission, and was not acted on by the arbitrators.

But it is contended by the counsel for the plaintiff that the testimony offered by the defendant and rejected by the court was irrelevant, because it could tend to prove only that the arbitrators had committed a mistake in a matter of law, which, if so, would not hurt their award. That is true, if the mistake be committed when the arbitrators are acting within the scope of the authority conferred upon them, and upon matters within that scope. But it cannot be so as to an error in law, by means of which they are induced to embrace within their award a matter not submitted, or reject one which was submitted to them. See 1 Green. Ev., sec. 78. What are the terms of the submission, what is the true construction of such terms, and what things are embraced within them, may present questions of law or of fact; and when presented the questions can only be decided conclusively, not by the arbitrators, but by the proper judicial tribunals of the country. But when the arbitrators are acting within the bounds of their authority, and only within those bounds, then they are the judges of the parties' own selection, and their decisions on questions of law and of fact are binding on the parties, unless it can be shown that the arbitrators acted corruptly or committed gross errors or mistakes in making their award. See the same section of Greenleaf on Evidence.

His Honor having erred in rejecting the testimony offered by the defendant, the judgment must be reversed, and a

Venire de novo. (259)

Cited: Walker v. Walker, 61 N. C., 546; *Osborne v. Calvert,* 83 N. C., 371; *Cheatham v. Rowland,* 105 N. C., 222; *Patton v. Garrett,* 116 N. C., 858; *Millinery Co. v. Ins. Co.,* 160 N. C., 141.

JAMES W. HADEN AND OTHERS v. JOHN A. BRADSHAW AND OTHERS.

(1 Winst., 263.)

Where a person, in his last sickness, desired the physician to write his will, and the physician declined to do it, but told him that A. and B. were in the piazza, and that he might make his will by oral declarations in their presence; and A. and B. were called into the sick man's presence by his direction, and, addressing A. by name, he stated to him in presence of B. and the physician how he wished his property to be divided, and named A. and another as his executors; that is sufficient *rogatio testium* to make a valid nuncupative will.

ISSUE of *devisavit vel non,* tried before *Bailey, J.,* at Fall Term, 1863, of ROWAN.

Henry R. Bradshaw, a citizen of the county of Cabarrus, was on a visit to his brother-in-law, James W. Haden, who lives in the county of Davidson, and while there was taken sick and continued so until he died on 1 May, 1863. Dr. Shamwell attended him as his physician. He testified that he was requested by the deceased to write his will and also to send for a minister of the gospel. The doctor told him that he could not write his will then, but that he (the deceased) could make a will by expressing his wishes before two or three witnesses, and that March and Smith were in the piazza. The deceased then requested him to call them into the room. The doctor called them into the bedroom where the deceased lay. The deceased addressed March by the name of Hense, saying:

(260) "Hense, I am worth about $13,000 in money and notes. I wish this equally divided between the children of my deceased sister, Elizabeth Haden, and my sister Julia Cuthsell. I want my sister Julia's share so arranged that it will not come into the possession of her husband, nor for him to have anything to do with it, but to be for the use of her and her children. I want Obadiah M. Smith to have $500 for waiting on me. I want my burial expenses and my debts paid, and the balance of my property divided between my half sisters, so that Laura may have a fraction the most. I don't care so Laura gets a fraction the most; there will not be a great deal. I wish A. H. March and James H. Haden to be my executors and settle up my business."

This witness also stated that the deceased was of sound mind and memory at the time.

A. H. March testified that when he went into the room he was addressed by deceased as "Hense," and he made a disposition of his property in the words stated by Dr. Shamwell. He further said that the deceased was of sound mind at the time.

The words above stated to have been spoken by deceased in his last illness were reduced to writing within four days after they were spoken. The words as reduced to writing were propounded as the last will and testament of Henry R. Bradshaw. The jury, under instructions as to the sanity of the deceased, rendered a verdict that it was the last will and testament of the deceased; the question of law being reserved whether the requisitions of the statute had been complied with. The court being of opinion with the caveators, set the verdict aside.

Boyden and Winston, Sr., for the propounders.
Wilson for the caveators.

BATTLE, J. In the probate of a muncupative will the court (261) ought to see that everything which the statute requires has been fully and faithfully observed. *Rankin v. Rankin*, 31 N. C., 156; *Brown v. Brown*, 6 N. C., 350. In the present case it is admitted by the counsel for the caveators that every requisition of the act (Rev. Code, ch. 119, sec 11) has been complied with except what is called the *rogatio testium*, the calling upon the witnesses to the will, or some of them, "to bear witness thereto," by the testator himself. This the counsel contends was not done; but we think he is clearly mistaken. The witnesses to the will were Dr. G. N. Shamwell, A. H. March, and O. M. Smith, the last of whom was not examined because he was a legatee. Exclusive of Smith, there were two witnesses, the number required by the statute. Of these, A. H. March was unquestionably called upon to bear witness to the will. He was invited into the room for that very purpose, was addressed by the testator, who proceeded to state what he wished to be done with his property. It is true that he did not say to March that it was his will which he was making, but he stated what disposition he wished to be made of his property, and to show that it was in contemplation of death, he named the persons who were to act as executors. March, then, must have known that the testator was making his will, and that he himself was called upon to bear witness to it. Dr. Shamwell was then in the room, and heard the will, as it was dictated by the testator. But it is objected that he was not intended to be a witness, and was not addressed as such by the testator. In reply it may be said that it does not appear from the circumstances of the transaction that he was to be excluded as a witness; and from the fact that the testator had just before requested him to write his will, it may well be inferred that he was to be a witness, though the two other persons named were more especially to be called in for that purpose. The statute requires only that some of the witnesses present at the making of a nuncupative will shall be "specially required to bear witness" to it. The object of this requirement of the statute is that it may be known with certainty that the testa- (262)

tor was making his will, and that the witnesses, by having their attention drawn to it, may understand and be able to recollect what the will was. This object is, in the estimation of the law, accomplished when the attention of any one of the witnesses is called to the transaction, and that was certainly done in the present case. In our opinion, then, his Honor in the court below erred in holding and instructing the jury that the will was not well proved.

PER CURIAM. Error.

Cited: Smith v. Smith, 63 N. C., 640; *Bundrick v. Haygood,* 106 N. C., 472; *In re Garland Will,* 160 N. C., 558.

THE STATE v. JESSE BLACK.

(1 Winst., 266.)

A husband cannot be convicted of a battery on his wife unless he inflicts a permanent injury or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement.

INDICTMENT for assault and battery, tried before *Bailey, J.,* at Spring Term, 1864, of ASHE.

The defendant was indicted for an assault on Tamsey Black, his wife. The evidence showed that the defendant and his wife lived separate from one another. The defendant was passing by the house of one Koonce, where his wife then resided, when she called to him in an angry manner and asked him if he patched Sal Daly's bonnet (Sal Daly being a woman of ill-fame). She then went into the house, and (263) defendant followed her and asked her what she wanted, when she repeated her question about the bonnet. Angry words then passed between them. He accused her of connection with a negro man, and she called him a hog thief, whereupon the defendant seized her by her hair, and pulled her down upon the floor, and held her there for some time. He gave her no blows, but she stated on the trial that her head was considerably hurt, and that her throat was injured, and continued sore for several months, but that he did not choke her nor attempt to do so. At the trial she was entirely recovered. After she got up from the floor, she continued her abuse of him. A verdict of guilty was entered, subject to the opinion of the court. The judge being of opinion with the State, gave judgment accordingly.

Winston, Sr., for the State.
No counsel for defendant in this Court.

PEARSON, C. J. A husband is responsible for the acts of his wife and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.

Certainly, the exposure of a scene like that set out in this case can do no good. In respect to the parties, a public exhibition in the courthouse of such quarrels and fights between man and wife widens the breach, makes a reconciliation almost impossible, and encourages insubordination; and in respect to the public, it has a pernicious tend- (264) ency; so, *pro bono publico,* such matters are excluded from the courts, unless there is a permanent injury or excessive violence or cruelty indicating malignity and vindictiveness.

In this case the wife commenced the quarrel. The husband, in a passion provoked by excessive abuse, pulled her upon the floor by the hair, but restrained himself, did not strike a blow, and she admits he did not choke her, and she continued to abuse him after she got up. Upon this state of facts the jury ought to have been charged in favor of the defendant. *S. v. Pendergrass,* 19 N. C., 365; *Joyner v. Joyner,* 59 N. C., 322.

It was insisted by Mr. Winston that, admitting such to be the law when the husband and wife lived together, it did not apply when, as in this case, they were living apart. That may be so when there is a divorce "from bed and board," because the law then recognizes and allows the separation, but it can take no notice of a private agreement to live separate. The husband is still responsible for her acts, and the marriage relation and its incidents remain unaffected.

New trial.

Cited: S. v. Rhodes, 61 N. C., 455; *Vann v. Edwards,* 128 N. C., 428; *S. v. Jones,* 132 N. C., 1048; *S. v. Thornton,* 136 N. C., 616; *S. v. Fulton,* 149 N. C., 498, 500; *Price v. Electric Co.,* 160 N. C., 455; *S. v. Nipper,* 166 N. C., 278; *S. v. Knight,* 169 N. C., 362.

THOMAS P. BURGWYN v. B. F. LOCKHART.

(1 Winst., 269.)

1. If there be two private ways, though not cartways, leading from the land of a petitioner for a cartway, under ch. 101, sec. 37, Revised Code, to the public road to which he seeks access, and if the petitioner have also by a parol license an unobstructed passage through the lands of a third person to the public road, the petitioner is not entitled to have a cartway laid off for him, unless it appear to the court trying the case that, notwithstanding such private ways and license, it is "necessary, reasonable, and just" that the petitioner should have it.

2. The inference from evidence tending to show that a way over and through a man's land is a public road may be rebutted by evidence of nonuser for more than twenty years.

(265) PETITION for a cartway over the defendant's land, heard by *Heath, J.*, at Spring Term of NORTHAMPTON, 1863.

The facts are stated in the opinion of the Court.

Barnes for petitioner.
Conigland for defendant.

BATTLE, J. This petition was filed under the provisions of the Revised Code, ch. 101, sec. 37, which gives to any person, settled upon or cultivating any land, to which there is no public road leading, a right to a cartway over the land of others, whenever it shall appear "necessary, reasonable, and just" that he shall have such way to any public road, ferry, bridge, or public landing. The defendant put in an answer denying the right of the petitioner to have a cartway laid out across his land; and, among other objections, he insisted upon the hearing in the Superior Court that the desired road was not "necessary, reasonable, and just," and offered to show that there were two private ways—though not cartways—from the lands of the petitioner to the public road to which he wished to go, over the lands of other persons; and also that the plaintiff had, by a parol license, an unobstructed passage through the lands of one Burgwyn to the aforesaid public road. The presiding judge held that these facts would not bar the right of the petitioner to have a cartway, and declined to hear the evidence. In this we think his (266) Honor erred, in consequence of which the order in favor of the petitioner must be reversed, and the case sent back to be heard again.

The enactment in the Revised Code, to which we have referred, is substantially the same with that contained in the Revised Statutes, ch. 104, sec. 33. The case of *Lea v. Johnson,* 31 N. C., 15, decided under the

last mentioned act, shows that it is to be construed strictly; for the establishment of a cartway over the land of any person without his consent is to deprive him of his full and free enjoyment of his land for the benefit of another. The latter, then, must show that he comes completely within the requirements of the act before he can claim its benefits. He must be a person settled upon or cultivating land to which there is no public road leading, and that it is "necessary, reasonable, and just" that he shall have a cartway over his neighbor's lands in order to give him access to some public place. Now, if he already have such access by means of a private way, equally convenient, over the lands of other neighbors, why should be be allowed to burden the land of still another person by having a cartway laid out over it? We think it clear that he should not, for in such a case an additional way to the prejudice of that other person will *not* be "necessary, reasonable, and just." There is nothing in the argument that one cannot be barred of his right to a cartway by reason of his having a *private right of way.* He may be barred by that as well as anything else that shows that it is not "necessary, reasonable, and just" that he should have a cartway. The evidence proposed to be given to the presiding judge may not have established the fact for which it was offered; but as, on the other hand, it may have had that effect, the judge ought to have received and considered it, and it was error in law for him to refuse to do so.

There were other objections urged at the hearing in the court (267) below, against the petitioner's claim, which it is unnecessary for us to notice very particularly. One was that the petitioner had formerly instituted suit for the same purpose against the immediate ancestor of the defendant, had obtained an order for a cartway through his land, and then abandoned the proceedings. The record of that case shows that the proceedings were against other persons besides the defendant's ancestors, and that the cartway, as laid out, was to run through their lands as well as his; so that, even supposing that if the suit had been against the ancestor alone, it would have been a bar in the present case (which we are not prepared to admit), it cannot have the effect claimed for it by the defendants, because it is not for the same cause of action.

We are inclined to think that the evidence offered failed to show that there was, at the time when the petition was filed, any public road running through the lands of the petitioner, and that the presiding judge was right in so deciding. The evidence in favor of such a road was rather slight, and was rebutted, we think, by the testimony offered to show that it had not been used as such for more than twenty years.

The remaining objection was that the land of the petitioner once formed a part of a large tract, part of which abutted on the public road to which he now seeks access, and that though it is now cut off from such

public road by a partition among the tenants in common of the large tract, yet the owner has by operation of law a right of way to the public road through the lands of the other former tenants. It is unnecessary to decide the question raised by this objection, because it involves the same principle as that as to which we shall be compelled to send the case back to be heard again in the Superior Court. If the defendant shall succeed in proving that the petitioner had already such rights of way to the public road as would show that it is not "necessary, reasonable, and just" that he shall have a cartway over the land of the de-
(268) fendant, the object of his petition must fail, whether he obtained his right or rights of way by grant, prescription, or the mere operation of law.

PER CURIAM. Error.

Cited: Plimmons v. Frisby, ante, 201; *Warlick v. Lowman,* 103 N. C., 124; *Burwell v. Sneed,* 104 N. C., 121; *Cook v. Vickers,* 144 N. C., 314.

DOE ON DEMISE OF OBADIAH PAGE AND WIFE v. JOSIAH ATKINS.

(1 Winst., 273.)

1. Whenever a testator shows an intention to dispose of all his property, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass.

2. Testator gave a tract of land to his wife for life, and after several bequests of money and specific legacies says: "My desire is that all the property that I have not willed away shall be sold after my death and equally divided between my six children," etc.: *Held,* that the reversion in the land after the end of the widow's estate for life passes by the residuary clause. Until the sale, the reversion descends to the heirs at law, and this whether the sale is to be made by the heirs or by the executor.

EJECTMENT, tried before *Gilliam, J.,* at Spring Term, 1864, of ORANGE.

The facts of the case are stated in the opinion of the Court, except that the *feme* lessor of the plaintiff is one of the heirs at law of the testator. Judgment in the court below was given for the defendant.

Graham for plaintiff.
Phillips for defendant.

BATTLE, J. Josiah Atkins, the elder, after devising to his wife
(269) an estate for life in his land, and giving some specific legacies to

her and to two of his daughters, bequeathed to his two granddaughters, Elizabeth Atkins and Sarah Atkins, $5 each, and then added the following residuary clause: "My desire is that all the property that I have not willed away shall be sold after my death and equally divided between my six children, Josiah Atkins, William S. Atkins, James H. Atkins, Lucinda Burroughs, Martha Atkins, and Ann Eliza Atkins, so as to make each share equal." The *feme* lessor of the plaintiff is one of the granddaughters mentioned in the will as a legatee of $5, and claims that the reversion in the land given to her grandmother for life did not pass by the residuary clause of her grandfather's will, and that she is entitled, since the death of the tenant for life, to a share thereof, as one of the heirs at law of the devisor. The question is, whether her claim is well founded, and we are decidedly of opinion that it is not. In 6 Cruise's Dig., Tit. 38, ch. 10, sec. 117 (see 3 Green. Cruise, p. 251), it is said that "with respect to the words necessary to pass estates in reversion, wherever a testator shows an intention to dispose of all his property by his will, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass." Thus the words, "the rest of my lands in Somersetshire, or elsewhere, I give to my brother," "all my lands not settled or devised" I give to T. K. and his heirs, "all my lands not before devised" to be sold and the money divided among my younger children, were in different cases held to pass the reversions which the devisors had in the lands. See, also, 1 Jarman on Wills, 591. That the words "all my property" are as effective to pass reversions as the words "all my lands" cannot be doubted. See *Hurdle v. Outlaw,* 55 N. C., 75. It is true that where the devisor manifests an intention that his reversion in land shall not pass by general words, then a different construction shall prevail. 6 Cruise's Dig., Tit. 38, ch. 10, sec. 129 (see 3 Green. Cruise, p. 255). Thus is *Harris v. Mills,* 4 (270) N. C., 149, where a testator, after giving a tract of land to his son B. for life, by another clause of his will devised thus, "I give and bequeath to my son B. and my four daughters all the rest of my estate, consisting of various articles too tedious to mention," it was held that the reversion in the land did not pass to B. and the daughters under the residuary clause, but descended to the heir at law, though there was a bequest in the will giving him twelve shillings. It seemed to be taken for granted by the Court that the words, "all the rest of my estate," would have been sufficient to have embraced the reversion in the land had there been no explanatory words annexed to them. But, say the Court, the testator undertook to specify the estate to be given away, to wit, that it consisted of various articles too tedious to mention. "Thus the terms, as well as the description of them, are strictly referable to personal property. No person would understand the word 'article' as

relating to land; nor would it be tedious to mention a reversion, although it would have been so to enumerate the great variety of articles of which chattel property usually consists." This case, thus explained, is not in opposition to the general rule, but virtually admits and sustains it.

In the language of the will now before us, we are unable to discover any intention of the testator not to dispose of the reversion in the land which he had given to his wife for life. The words "all the property that I have not willed away" are, beyond all doubt, sufficient to embrace the reversion in the land, and it does not appear from the will, nor has it been shown from any extraneous proof, that the testator owned any property, either real or personal, of much value besides such reversion. The only circumstance relied upon to show that the testator did not intend to include the reversion in the residuary clause, which is,
(271) that he directed a sale of the property after his death, does not, in our opinion, support the conclusion attempted to be drawn from it. It is contended that "after his death" means "at" or "immediately after" that event, and that the testator could not have wished the reversion to be sold as such in the lifetime of his widow. The reply is that though the words "after his death" may have in law the meaning attached to them in the argument, it may be that the testator did not know it, or at least advert to it, at the time he penned the clause; and further, that if he did, the inconvenience of a sale of the reversion is too slight a circumstance to control the meaning of the strong language, that all the property which he had not willed away should be sold and equally divided among his six sons and daughters.

There can be no doubt that the reversion of the land descended to the heirs at law until the sale. This was so, whether the sale was to be made by the heirs or by the executor, for he could at best have but a naked power. If this point, taken for the first time in this Court, had been insisted upon, it would have prevented the Court from deciding the very question for which the suit was instituted. But, as we understand that, upon the engagement of the defendant's counsel to pay all the costs of the suit, the objection is withdrawn, we must affirm the judgment given in the court below, upon the only question which was presented to the judge presiding therein.

PER CURIAM. Affirmed.

Cited: Foil v. Newsome, 138 N. C., 123.

JOHN BAKER, EXECUTOR, v. RICHARD HARRIS.

(1 Winst., 277.)

1. An action on the case, brought by A. against B., for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C. against B. for the same act of removing, and are challenged by the plaintiff. This is a challenge to the polls *propter affectum*, and not to the array.

2. It is a principal cause of challenge, involving matter of law, and therefore the judgment of the court below upon it may be reviewed in this Court.

3. The jurors challenged are under a legal bias by reason of having decided the case of A. against B., and the challenge ought to be allowed, and this although additional evidence is to be adduced on the second trial.

4. Jurors ought not to be asked, either on oath or otherwise, whether their minds are in such a state that they can try a case fairly and impartially. Their answers can have no influence on the question of their competency, and it is an improper practice to ask them.

ACTION on the case against the defendant for fraudulently re- (272) moving a debtor to the plaintiff, from the county, tried before *Bailey, J.*, at Fall Term, 1863, of ROWAN.

The counsel for the plaintiff challenged the jury (being the original panel) and assigned for cause of challenge that the jury had tried the case of *Goodman v. Harris*, the same defendant as in this case, for the same act of removing the debtor, and had given a verdict for the defendant. The court inquired of the plaintiff's counsel whether they expected to offer any evidence in addition to that offered in the case of *Goodman v. Harris;* they answered that they should offer the same witnesses they had examined in the case of *Goodman v. Harris* with additional evidence by other witnesses.

The judge then proceeded to try the cause of challenge, no objection being made thereto by the plaintiff. Each juror was sworn, and each severally asked whether, if additional testimony was offered, he believed he could give the plaintiff a fair and impartial trial. Each juror answered that in case no additional testimony was offered in the cause, that he would find in the same way he found in the case of Goodman, but if additional testimony was offered, he believed to could give the plaintiff a fair and impartial trial. (273)

The court thereupon ordered the jury to be impaneled.

In the course of the trial several exceptions were taken by the plaintiff to the decision of the judge on questions of evidence, but it is unnecessary to state them, as this Court gives no opinion on them.

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

Wilson for plaintiff.
Boyden and Winston, Sr., for defendant.

MANLY, J. There is no cause assigned upon the record for a challenge to the array, and we consider the case, therefore, as a challenge to the polls. It was so treated in the court below.

Challenges of this sort lie under three principal divisions: (1) *propter honorem;* (2) *propter defectum;* (3) *propter affectum.* Of the last, under which lies our case, there are two sorts; the one working a principal challenge, the other to the favor. And the first question that presents itself for our consideration is whether the cause assigned be principal cause or cause for challenge to the favor only. For if it be of the latter class, whether it be tried through consent of parties by the judge or decided by triers appointed for the purpose, it is a subject of *discretion,* and cannot be reviewed in this Court.

Many cases of the one class approach those of the other so nearly as to be hardly distinguishable.

(274) The one before us, however, does not seem to be incumbered with much of this difficulty, and we are of opinion that it falls under the class of principal challenge. According to the explanation in Joy's treatise on the subject, a principal challenge under the head *propter affectum* is where there is express malice or express favor, and is a judgment of law, either without act on the part of the proffered juror or a judgment of law upon his act. Upon the cause assigned in the record before us, viz., the act of trying as a juror the former case (the facts being conceded), the law draws a conclusion as to his fitness or unfitness. Hence, the cause is one for principal challenge, which, in the court below, involves questions of law, and is subject to be reviewed in this Court. *Sehorn v. Williams,* 51 N. C., 575, presents questions of challenge to a juror. It was a plain case of principal challenge, and is an authority on the point here stated, if any were needed.

The action is against the defendant for fraudulently removing a debtor from the county. (Rev. Code, ch. 50, sec. 14.) It seems that divers creditors had commenced actions against the defendant upon the same allegation, one of which had been tried before, and the jurors tendered on the trial of this case had set on that trial and rendered a verdict for the defendant. This was assigned as cause for principal challege, and we think well assigned.

It is a well established and ancient usage not to allow a juror to sit a second time on the same cause, and it matters not whether the same only or other additional or different witnesses are to be examined. The juror is alike unfit. This does not differ substantially from the case now before us. Then the *corpus* to be proved is precisely the same that it was

on the trial at the suit of the other creditor. It is in the nature of a criminal information, in which the allegation is that defendant removed or assisted to remove the debtor from the county with intent to defraud creditors. If he did so in respect to one creditor, he did so in respect to all. The juror has decided the case under oath as to one, and if the conclusion to which he came in that case be true, it is equally (275) true of all the others, however they may happen to appear on divers trials. It is not in the nature of man, even in the most conscientious of the race, to divest himself altogether of prepossession or bias in favor of a judgment so solemnly formed; and it is difficult to perceive how the bias can be less in the special case before us than in the case of a juror called to try the same cause a second time. It is indeed substantially a requirement of the latter class, and is a strain which the law does not allow to be put upon the conscience of a juror. It is important, in order to preserve the trial by jury as a safeguard for rights that the juror should not only be intelligent and of sound moral sense, but free from all prejudice.

We take no account of the information, elicited by the judge from the plaintiff's counsel, that some additional testimony was to be examined; for, as in the case of a juror offered a second time in the same cause, it would make no difference, so in this case we think it would not affect the juror's competency.

We have passed over also, as matters of no weight in the cause, the answers given by the jurors to the inquiry whether, if additional testimony was offered, they could give the plaintiff a fair and impartial trial. The law upon the supposed state of facts pronounces a judgment of incompetency, and no answer of the jurors could obviate the rule of law. In Coke upon Littleton, 158, b., it is said: "If the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined on his oath, but in other cases he shall be examined on his oath to inform the triers." And since the trial of Cooke for treason in the reign of William III., 13 State Trials, Howell's Ed., pp. 312, 234, *et seq.*, it has been, I think, uniformly held, when the question has been made, that if the question disparage the juror, he ought not be asked it, either upon oath or otherwise. While, therefore, we hold that (276) the answers could not have affected the result, we take occasion to disapprove of such a course of inquiry. Answers to such questions, in the great majority of cases, will not be likely to afford reliable information as to the true state of the juror's feelings.

The Court is of opinion, therefore, (1) That the cause of challenge assigned is cause of principal challenge, and that the Court can take cognizance of and review the same. (2) That the jurors challenged were under a legal bias, by reason of having decided the case of *Good-*

man v. Harris, and that the challenges ought, therefore, to have been sustained and the jurors withdrawn.

This will entitle the plaintiff to a *venire de novo,* and we abstain from going into an examination of the questions of evidence raised upon the record.

PER CURIAM. *Venire de novo.*

A. S. MERRIMON, SOLICITOR, ETC., ON RELATION OF ELIJAH HERBERT, v. WILLIAM M. SANDERSON AND OTHERS.

(1 Winst., 282.)

Where commissioners are appointed by an act of Assembly to "select and determine a site for the permanent seat of justice" in a county, and are directed, when they have selected a site, to give notice thereof to other commissioners appointed by the same act, for the purpose of acquiring title to the site selected, the commissioners for location may make a conditional selection; and if the condition be broken by the owner of the land selected as the site, the commissioners may make a new selection.

This was a writ of *Mandamus* at the suit of the solicitor of the Seventh Judicial Circuit, on the relation of Elijah Herbert, against the defendants, commanding them to procure a conveyance to the chairman of the county court of Clay County of a tract of land which had been selected, as the writ supposed, by the commissioners appointed for that purpose, for the county site of that county, or to show cause at the next term.

The affidavit of the relator stated that the county of Clay was established by an act of the General Assembly at the session of 1860-61, and that certain persons, naming them, citizens of Cherokee County, were appointed commissioners to "select and determine a site for the permanent seat of justice for said county," and a majority of them were empowered to perform any duty imposed on them by the act. The act directed that when these commissioners had, in pursuance of its provisions, located the seat of justice, it should be the duty of the defendants, or a majority of them, to buy or receive, by donation, a tract of land for the county of Clay, consisting of not less than 25 acres, to be conveyed to the chairman of the county court and his successors
(278) in office, to be held by him and them for the use and benefit of the county. The relator further stated that in April, 1861, a majority of the commissioners first named in the act assembled in the

locate a site for the permanent seat of justice on the lands of James Coleman; that they "staked off" and "marked out" the site on James Coleman's land, and made a written report of their proceedings, signed it and read it to the people assembled at the place so selected, and then delivered their report to the commissioners, named in the scond place in the act, to wit, the defendants; that James Coleman proposed to the commissioners, for locating the site, to give 25 acres of land for the use of the county, at the place and on the site established by them; that the relator proposed to give, in addition to the 25 acres, 15 acres of his own land, adjoining the 25, and that Robert B. Chambers proposed to give 15 acres of his land, adjoining the 25 acres; and that Coleman, Chambers, and the relator *are willing and ready now,* and at all times, to convey said lands according to the provisions of the act.

Four of the defendants, William M. Sanderson, Ezekiel Brown, John H. Johnson, and George Bristol, being the majority of the commissioners appointed to acquire title to the county site, make a return stating that the majority of the commissioners appointed to select a site selected therefor "a tract of land belonging to James Coleman, upon the following conditions, to wit: that said Coleman should give 25 acres of land selected for said site to the county for the town site, with the liberty to reserve one choice lot, and that R. B. Chambers was to give 15 acres of land, 'convenient and adjoining' the land so conditionally selected for a site as aforesaid, and the relator, E. Herbert, was to give 15 acres of land also 'convenient and adjoining the 25 acres to be given by Coleman' "; that upon receiving the report of the first named commissioners as to the selection of a site, they, together with Coleman (279) and Chambers, had a form of a deed prepared proper for conveying the said 25 acres to the chairman of the county court, and offered said writing to Coleman to be executed by him as his deed; Coleman refused to execute that deed, and refused to convey any land for a county site, except upon condition to be expressed in the deed, that the estate conveyed by it should cease and determine in case any spirituous liquors should be sold upon any of the lots in the proposed town. The return sets out with particularity the refusal of Chambers and the relator to convey the 15 acres which each had promised to give, and goes on to state that these defendants gave notice to the commissioners for selection of a site of the refusal of Coleman, Herbert, and the relator to convey, as they had promised, and thereupon the commissioners for selection did "select and determine" a site on the lands of William Hancock, and gave notice thereof to these defendants, who procured from Hancock a deed of conveyance according to the act of Assembly, and reported what they had done to the county court; and the county court directed a tem-

porary courthouse to be built, in which the court has been held since its completion, and the lots for the public offices have been designated, and other lots have been sold to individuals.

The plaintiff demurred to the return, and the defendant joined in demurrer.

Merrimon, Solicitor, in proper person.
No counsel for defendant.

MANLY, J. Upon the coming in of the answer to this writ, there was a demurrer and joinder in demurrer, so that the question brought here is upon the sufficiency of the answer. Its sufficiency depends upon (280) whether the commissioners had authority to make a conditional location; for if so, it seems to us their power would not be exhausted by such action, but, upon the nonperformance of the condition, might be resumed as an unfinished work; and so, *toties quoties,* until a seat of justice was finally provided.

The power of commissioners in such cases should receive a practical construction, such as will meet emergencies likely to arise in the transaction of such business. It is of the nature of such a duty that it may meet with obstacles in the course of its performance, and the commissioners be obliged to retrace their steps, and try again in some other place and with some other parties.

This was more probable, as a different class of commissioners are appointed to fix the site and to acquire it. While the Legislature might not have been able to foresee the absurd stipulations which did prevent the first attempt to locate, they must have been able to anticipate other similar obstacles, and when they provided two sets of commissioners, it could not have been intended that the designation of a place by the first, which is all they had to do, would fix it there irrevocably, and the commissioners of the second class would be obliged to make the purchase, whatever bad faith, imposition, or other obstacle the proprietor of the land might interpose, unless the Legislature should convene in time to afford relief.

It must have been intended that the two classes of commissioners should act in concert, and, in our opinion, it was not necessary that one set should exhaust its power before the other could be called upon to move.

It was entirely competent and proper for the one set to say, "Here is a proper site for the town, provided the other set can procure a surrender of the title in fee, and provided suitable town commons can also be procured." And upon a report back, that such titles could not be (281) had, the first commissioners could resume a duty not entirely or

absolutely completed, and perfect it. This reasoning, it seems to us, is analogous to that in *Caldwell v. Justices,* 57 N. C., 323, on which this Court was conducted to a similar conclusion.

All provisions of law for the accomplishment of an object should be so construed and executed as to accomplish it, notwithstanding such obstacles and opposition as may be naturally expected to arise out of such affairs.

The report of the first class of commissioners as to the location is referred to in the answer, and speaks of the donation of lands by Coleman, Chambers, and Herbert as *understandings* had with them, while the answer calls them *conditions.* We do not think this variance materially affects the case. The words in connection with such a negotiation were probably considered synonymous. They seem to have been so treated by the defendants, and no complaint is made of such construction.

From the nature of the transaction, it must have been that the grants of land were to be concurrent, at least, with the final act of the commissioners declaring the site fixed and their duty accomplished. A different construction would lead to the altogether inadmissible conclusion that the Legislature intended to fix the site irrevocably, and leave the public, in the acquisition of it, to such exactions as the cupidity, whim, or folly of owners might suggest.

Supposing the commissioners to select the site had a right to designate a place conditionally, there can be no redress under the present information. The conditions not being complied with, the commissioners have proceeded to select another place. The title has been acquired, temporary public buildings erected, the lands divided out into lots and sold, and the municipal machinery of the county put into action. According to what is said in *Hill v. Bonner,* 44 N. C., 257, the Court cannot revise the *discretion* of the commissioners. It may be conceded that they ought to have selected the lot on Coleman's land, (282) but not having done so, and having passed on and made a different selection, the writ will not lie, because it would be but a command to make a different selection from the one which they had thought proper to adopt.

Upon the whole, we are of opinion that the commissioners to select a site for the public buildings for the county of Clay could make a conditional selection without exhausting their power; and, upon the nonfulfillment of the condition, might resume the power and make another selection; and that a writ of mandamus, therefore, will not lie against the commissioners appointed to acquire title, commanding them to take a title to the place provisionally selected, although the owner may be now willing to waive former impediments.

The answer is held to be sufficient. The demurrer is overruled and the information quashed.

Each party is to pay his own costs.

Cited: Barnes v. Comrs., 135 N. C., 38.

A. J. LLOYD v. ALVIS DURHAM.

(1 Winst., 288.)

1. If an article of property laid off to a housekeeper by freeholders be exchanged for another article, the article received in exchange is not exempt from execution.

2. It *seems* that the debtor might have procured the article received in exchange to be laid off to him by a second allotment, and then it would have been exempt.

ACTION of trover, tried before *Heath, J.,* at Fall Term, 1863, of ORANGE.

The plaintiff proved that in 1859 he was the owner of a gray mare, which was laid off to him as a housekeeper, by freeholders acting (283) under the provisions of the Revised Code, ch. 45, secs. 8 and 9, and that a list of the property so laid off, including the mare, valued therein at $35.75, was made out and returned to the clerk of the county court, and that within a few weeks thereafter he exchanged the gray mare for a sorrel mare, being the one concerning which this suit was brought.

The defendant proved that he had purchased the mare at a sale made under a judgment and execution against the plaintiff.

The judge reserved the question of law as to the exemption of the mare from execution, and under his instructions the jury found a verdict for the plaintiff. The judge being of opinion with the plaintiff on the question of law reserved, gave judgment according to the verdict, and the defendant appealed.

Graham for plaintiff.
Phillips for defendant.

PEARSON, C. J. The plaintiff had a right to exchange the gray mare, and the effect of the exchange was to vest in him the title to the sorrel mare; so she was his property; but the question is, Was she protected from execution?

The plaintiff insists that as the gray mare was exempted, the privilege passed to the sorrel mare by the legal effect of the exchange; but the defendant insists that the privilege was personal to the gray, and did not attach to the sorrel.

The statute makes void any alienation of exempted property by the debtor, for the payment of his debts. He can sell or exchange it, but there is no provision that the article received in exchange shall be exempted from execution, and we see no ground upon which it is exempted by implication, as an effect of the exchange. On the contrary, we are of opinion that, by a proper construction of the statute, the sorrel mare was liable to execution as property acquired after the allotment.

We are led to this conclusion, in opposition to the opinion of his (284) Honor, by two considerations:

If the effect of the exchange was to communicate to the newly acquired article the quality of being exempted from execution, it would be liable to abuse, and tend to defeat the policy of the statute in respect to the provision that the "other property" not enumerated shall not exceed in value the sum of $50 at each valuation; for example, if the debtor should exchange the property allotted for other property of the value of *$100,* by undertaking to pay the difference in cash or some other way, and the newly acquired property should be exempt from execution, the policy of the statute is defeated at once; but it would not stop there. If the property received on the first exchange acquired the quality of being exempt from execution, the same quality would be communicated to property received upon a second exchange, and thus the debtor would become an independent trader with privileged property *ad infinitum.* So, if a mare can be exchanged for a mare, she may be exchanged for a house, or for cattle, or a negro, or for land, and the same principle would apply. Thus any species of property acquired by exchange would be exempted from execution. In short, the courts can fix no limit to the number of exchanges or the kind of property. In this instance it was the *first* exchange—a mare for a mare—and we take it there was but little difference in value, and it may be, as suggested by Mr. Graham, that the motive was simply to exchange a young gray mare, which the man's children could not work, for a sorrel mare, which was steady and well broke; and if the Court had power to grant this indulgence to debtors, it would be disposed to do so in this case, but "hard cases are the quicksands of the law." The Court has no power to add to a statute; that is the province of the makers of the law; they can, if it be deemed expedient, allow this indulgence and fix a limit to it, so as to (285) guard against abuse.

There is another view of the subject. The statute requires a descriptive list of the several articles exempted to be made out and filed among

the records of the office of the clerk of the county court. The object of this provision is to enable officers having executions in their hands to know with certainty what property was exempted. *Dean v. King,* 35 N. C., 20. This object would be entirely defeated if property received in exchange is also exempted. For it would put on an officer, who finds the debtor in possession of property not specified in the list, the responsibility of deciding whether it had been acquired by exchanges, which may have run through four or five stages. If he errs on one side, he is liable to the debtor; if on the other, he is liable to the creditor! It is not in the power of the Court to obviate this difficulty. The Legislature may do so, if it be deemed expedient to allow the debtor to exchange, by requiring the debtor to have the property, received in exchange, to be entered upon the list in place of the other, so as to give it the same "ear-mark" for the information of all concerned. And it was in the power of the debtor to accomplish the same end by having a second allotment, and a new list made out and filed, after the other property was acquired; and in that way both purposes of the statute would have been carried out. The value could not exceed $50, and the "ear-mark" would have been put on the property. It was the debtor's misfortune that he neglected to have a second allotment.

PER CURIAM. Error.

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(286)

DANIEL JOHNSON AND W. A. BUIE, EXECUTORS OF DUNCAN JOHNSON, v. ALEXANDER MURCHISON.

(1 Winst., 292.)

1. Where a witness who had an interest in a cause gives or accepts a release in order to extinguish his interest, which expresses to be given in consideration of a sum of money named therein, it is competent for the other party to ask him whether there was in fact any consideration.

2. A deed absolute on its face, which is intended to operate as a mortgage, is void in law as against creditors.

3. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them.

4. A. and B. were partners in trade in 1851 and 1852; an account is taken in 1857, by which a balance is ascertained to be due to B. In 1855 A. conveys his property to C. without a valuable consideration; the conveyance is void as to B., for he was a creditor of A. from 1852.

5. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation.

6. A conveyance of property, absolute on its face, and declared to be made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened and may never happen.

ACTION for trover, for the conversion of two slaves by the defendant, tried before *French, J.*, at Fall Term, 1863, of MOORE.

On the trial it was in evidence on the part of the plaintiff that (287) on 7 May, 1855, one Samuel E. Johnson, being in the possession of two slaves named Nat and Charles, conveyed them and other slaves, by his deed, bearing said date and registered January, 1856, to his brother, Duncan Johnson, the plaintiff's testator, in consideration of $2,789.43. About 1 January, 1858, the said slaves, being in possession of plaintiffs as executors of Duncan Johnson, were seized by the sheriff of Moore, and at January Term, 1858, sold under execution, when the defendant became the purchaser, who, on demand made by plaintiffs, refused to give them up.

On the part of defendant, Robert Belden testified that in September, 1857, he was called upon to make a settlement between Samuel E. Johnson, the bargainor, and the defendant; that they had been partners in trade in 1851, and the latter year the partnership was dissolved. Upon the settlement it was ascertained that Samuel E. Johnson was indebted to the defendant about $2,200. The defendant then gave in evidence a judgment for the debt, execution levied on the slaves, a sale and purchase by him in January, 1858.

Upon the part of the plaintiff, Samuel E. Johnson was offered as a witness. He was objected to by the defendant, on the ground that he was a legatee of his brother, Duncan Johnson. Plaintiffs then gave in evidence a deed from Samuel E. Johnson to his brother, Malcolm, dated 3 October, 1857, and registered in 1861, conveying all his interest under his brother Duncan's will, in consideration of $1,100. Defendant then proved that the mother of Samuel E. Johnson was a legatee under the will, and that she was dead intestate. Plaintiffs then gave in evidence a release of his interest as one of the next of kin of his mother for the consideration of $50. Defendant insisted that the witness was still incompetent, on account of his interest in the costs of this suit, whereupon the plaintiff gave in evidence a release from them to (288) the witness of his liability for the costs in consideration of $50.

The witness then testified that on 9 May, 1855, he was justly indebted to his brother, Duncan, in the sum of $1,500 by note, dated 28 August, 1849, in three other notes dated 12 June, 1852, 1853, 1854, for $150 each, payable to Duncan Johnson, and in the further sum of about $260, due by notes executed by him in 1849 and 1852, in favor of one Duncan Morrison, which were held by his brother, Duncan. He conveyed

Charles and Nat, and the other slaves, in order to pay these debts. Of these debts, the note for $1,500 was to secure the payment of that amount of money, which he owed Duncan for work done for him; the three notes for $150 each were given to secure the payment of the hire of a negro from his brother, Duncan, for three years, and the debt for $260, or thereabouts, accrued in this way: Duncan Morrison was the creditor of the witness for that sum, he was uneasy about the debt, and desired that it should be either paid or secured, and a note was made to secure it, payable to Duncan Morrison, and executed by Buie, one of the plaintiffs, as principal, and the witness and Duncan Johnson as sureties, and the witness's old notes to Morrison were delivered to W. A. Buie. This witness was asked by defendant's counsel whether, when he executed the release for his mother's interest, expressed to be in consideration of $50, he had received that or any other sum, and whether he had paid anything as a consideration for the plaintiff's release of his liability for costs. These questions were objected to by the plaintiff's counsel, and the objection overruled by the court. The witness answered that he received nothing in the one case, for he thought his mother had no interest, having sold it, and he paid nothing in the other. It was proved that Samuel E. Johnson was embarrassed and in failing circumstances in 1854 and 1855.

(289) The counsel for the defendant contended that so much of the consideration for the conveyance of Nat and Charles from Samuel E. Johnson to Duncan Johnson as related to the notes from Samuel E. Johnson to Duncan Morrison, viz., $260, or thereabouts, was feigned and covinous between Samuel E. Johnson and Duncan Johnson. The plaintiff's counsel contended that W. A. Buie, when he gave his note with Samuel E. and Duncan Johnson as sureties, received and held the Morrison notes as an indemnity.

The court charged the jury that if they believed the witness Samuel E. Johnson, the plaintiffs were entitled to recover; that if Buie held the Morrison notes as an indemnity, as contended by the plaintiff's counsel, and Duncan Johnson held them in the same way, then the deed, being absolute on its face, was void, and the plaintiffs could not recover; that the debts which were due from Samuel E. Johnson to Duncan Johnson formed the consideration of the bill of sale, and the intention of the conveyance is to accomplish the object which moved the maker to execute it, and if any part of the consideration be feigned or fraudulent, the intent is so, and the whole deed is void. The counsel for the plaintiffs requested the court to charge the jury, there being no account stated between Murchison and Samuel E. Johnson as partners in May, 1855, no debt ascertained to be due to Murchison, and no evidence that the deed was made to defraud Murchison, that the deed was not fraudulent

in law as to him. The court declined to give the instruction, and the plaintiffs excepted. The counsel for the plaintiffs asked for further instruction, "that although Duncan Johnson might not indeed be able to collect the Morrison notes from Samuel E. Johnson, yet if Samuel E. Johnson thought so, and took them in good faith in part consideration of the negroes in the bill of sale, the bill of sale would not be void as to creditors on that account." The court declined to give such instruction, and the plaintiffs excepted.

No counsel for defendant. (290)
Buxton for plaintiffs.

MANLY, J. The exceptions to the trial below which appear upon the record may be disposed of in the order in which they stand.

During the examination of Samuel E. Johnson as a witness on behalf of plaintiffs he was asked whether certain releases, which he had given to qualify himself, were not, in truth, without any consideration. This was objected to by plaintiffs, but allowed by the court, and answered in the affirmative.

The case does not disclose for what purpose this was used in the argument, or whether it was used for any purpose. We should take it for granted, therefore, that it was applied only to such uses as were proper, if there be any such.

There is one point of view in which, however little it may of itself weigh, it would nevertheless be proper to consider it, and that is in respect to the feelings and relations of the witness to the parties respectively, and the consequent bias under which he might be disposed to testify. The subsequent explanation which the witness gives of his estimate of these considerations makes the testimony of little or no significance, and we suppose it could not have influenced the verdict. We see no wrong that it can have done the plaintiffs, and it is not therefore a just ground of exception.

The second exception arises upon the charge of the judge, and is to that part of it in which he instructs the jury, "that if Buie held the Morrison notes as suggested by plaintiff's counsel, and Duncan Johnson held them in the same way, then the deed, being absolute on its face, was void." This instruction appears to be justified by the facts and the law of the land as settled in this Court in *Halcombe v. Ray,* 23 N. C., 340. It seems that Samuel E. Johnson was indebted to (291) Morrison by several notes, and being unable to pay them on demand, it was arranged, in order to quiet Morrison's apprehensions, that Buie should become the principal in a note to him for the amount, with the uncles, Samuel E. and Duncan Johnson, as sureties. Upon this arrangement the notes of Samuel E. Johnson to Morrison were left in

the hands of Buie, with what precise understanding does not appear; and the obvious inference might well be made that they were left there to abide the result of Buie's liability for the debtor, and an indemnity in case of loss; and, therefore, in respect to that part of the consideration, the deed from Samuel E. to Duncan Johnson was a mere security for debt. In other words, the deed in question was a mortgage. The court was justified in presenting the case to the jury on this hypothesis, and the law, we think, was properly declared. The principle that makes void a deed, which is absolute on its face, but intended to operate as a mortgage only, springs from the requirements of our registration laws. To hold otherwise would defeat entirely the objects of the Legislature in requiring mortgages to be registered before taking effect. These laws for registration were passed to provide for creditors such means of knowledge as would enable them to avail themselves promptly of the remedies the law provides.

If an absolute deed could be substituted and upheld, it would enable the debtor to baffle the creditor in pursuit of his just demands, and the latter would be in the same condition as if no law for the registration of mortgages had ever been passed. We are obliged, therefore, to hold such a deed void, in order to give effect to the repeatedly declared will of the Legislature. There is no error in the instruction of the judge on this point.

The third exception is to that part of the charge in which the jury are told "that the debts which were due from Samuel E. Johnson to
(292) Duncan Johnson formed the consideration of the bill of sale, and the intention of the conveyance is to accomplish the object that moved the maker to execute it; and if any part of the consideration be feigned or fraudulent, the intent is so, and the whole deed is void." This is in strict conformity to the law as laid down by this Court in *Stone v. Marshall,* 52 N. C., 300, when this Court announced the same principle in about the same words. The Court is now satisfied with the soundness of this view.

The fourth exception is to the refusal on the part of the court to charge the jury "that, as there was no account stated between Samuel E. Johnson and Murchison in May, 1855, and no debt ascertained to be due Murchison at that time, and no evidence that the deed was made to defraud Murchison, the deed was not fraudulent in law as to him." In asking for the instruction, it seems to be assumed that Murchison was not a creditor to be defrauded until after the balance was struck in his favor in 1857. This is manifestly wrong. The testimony discloses the fact that the settlement spoken of was solely in relation to partnership transactions in the years 1851 and 1852. So that the balance, ascertained to be due in 1857, and for which judgment was recovered in that

year, had been due since 1852. It would, therefore, have been manifestly improper for the judge to predicate any part of his charge on such an assumption, and he was right in refusing the specific instructions asked.

The last and only remaining exceptions of the appellant is to the refusal of the court to give this instruction, "That although Duncan Johnson might not, in strict law, be able to collect the Morrison notes out of Samuel E. Johnson, yet, if Samuel E. Johnson thought so, and took them in good faith, in part consideration of the bill of sale, the bill of sale would not be void as to creditors on that account." This instruction was properly refused. The note not being due and col- (293) lectible by Duncan Johnson, which is the supposition made, it follows it could only be held by him as a collateral security against his liability for the maker; and we have already seen that such a consideration cannot support an absolute deed so as to defeat a creditor. The claim or demand is a contingent and not an absolute one. The event may never happen upon which a legal demand would arise, and to estimate the value of such a risk, and insert it as a consideration in a deed absolute upon its face, is a fraud in law upon creditors. The necessary intendment of such an instrument is to defraud, and it is the duty of the court so to hold, irrespective of any special evidence of the mind or intent of the maker.

Upon the whole, we see no error upon the trial of this case in the court below, and, therefore, it is considered by us that the judgment be affirmed.

PER CURIAM. No error.

Overruled: Woodruff v. Bowles, 104 N. C., 207.

THE STATE v. SAM.

(1 Winst., 300.)

An infant under the age of 14 years cannot commit the crime of rape, nor be guilty of an assault with intent to commit rape.

INDICTMENT against a slave, tried before *Osborne, J.,* at Spring (294) Term, 1864, of DAVIE.

The indictment contained three counts. The first, for carnally knowing and abusing a female child under the age of 10 years. The second, for assault on a white woman with intent to commit a rape. The third, for an assault on a white female under the age of 10 years with intent to carnally know and abuse her.

The jury found the prisoner not guilty on the first count; and they found specially "that the prisoner made an assault on the body of Camilla Ann Brock, with an intent, forcibly and against her will, carnally to know her, the said Camilla. That the said Camilla Ann was of the age of 4 years at the time of said assault, and that the prisoner was under 14 years of age; the jury further find that there was an emission of seed from the person of the prisoner, which was found on the undergarment of the said Camilla. Whether the defendant be guilty," etc.

The court gave judgment for the prisoner, and the State appealed.

Winston, Sr., for the State.
Boyden for prisoner.

MANLY, J. The question brought up in this case for review is whether a person of color, under 14 years of age, can be convicted of an assault with intent to commit a rape.

By the provisions of the Rev. Code, ch. 107, sec. 44, and ch. 34, sec. 5, the offense charged in the bill of indictment is declared to be a capital felony, and is therefore entitled to be considered under the safeguards which the law has thought proper to throw around human life.

By the common law persons between the ages of 7 and 14 may be convicted of most offenses if, added to the proof of the *corpus delicti,* there be proof also of the mischievous mind. There is a legal presump-
(295) tion that such persons are *doli incapaces;* but it is a rebuttable presumption.

It is not so in respect to the crime of rape. The presumption against its commission by persons below the age of puberty (14) is irrebuttable. This is not so much on the ground of incapacity of mind or will, but of physical impotency. It will follow as a plain legal deduction from this, that the person under 14 cannot commit an assault with intent to commit a rape. It is a logical solecism to say that a person can intend to do what he is physically impotent to do.

These principles are supported by the following authorities: Arch. Cr. Pr., 3; 3 Chitty Cr. Law, 811; *Rex v. Eldershaw,* 14 Eng. Com. Law, 336, and *Regina v. Phillips,* 34 Eng. Com. Law, 763.

The courts of two of the States north of us have held convictions for "assaults with intent" right, when the persons were under 14. But it is noticeable that the offense in these States is a misdemeanor. In the one case there was a divided Court, and in the other the common-law principles, as here laid down, were recognized; but the Court undertook to alter them to suit the altered temperament of the population. These do not at all affect the stability of the law as now expounded. With the ex-

ceptions noticed, it has been uniform, we think, in all the settlements of the continent which have adopted the common law of England.

By a proper consideration of principles, it will be seen why the fact found by the jury, that there was an emission of seed from the person of the prisoner, does not materially affect the case. The presumption which arises from want of age applies equally to the offense of rape and the offense of assault with intent to commit it. Both presumptions are alike irrebuttable. *S. v. Pugh,* 52 N. C., 61, recognizes the distinction here made. So far from impugning, it is decided strictly in accordance with them.

A large portion of our population is of races from more (296) southern latitudes than that from which our common law comes. We have indeed an element of great importance from the torrid zone of Africa. It is unquestionable that climate, food, clothing and the like have a great influence in hastening physical development. Whether it may not be advisable to move down to an earlier age than 14 the period of puberty, for a portion if not for all the elements in our population, may be a proper inquiry for the statesman. The courts declare the law as it stands. The legislative body will inquire whether the exigencies of the age require change.

The judgment of the Superior Court is

PER CURIAM. Affirmed.

STATE v. NORTON.

(1 Winst., 303.)

1. When a question arises on a jury trial concerning the competency of a witness, and the parties disagree about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which, in his opinion, the evidence proves, this Court cannot revise his decision.

2. In such case the prisoner is entitled to a *venire de novo.*

INDICTMENT for murder, tried before *Osborne, J.,* at Fall Term, (297) 1863, of RICHMOND.

The defendant was indicted for the murder of one Angus Campbell.

The solicitor for the State proposed to examine one Woodel as a witness, but it was objected to by the prisoner that he was of negro blood within the prohibited degree, which being proved, the solicitor replied that the prisoner was also of negro blood, and to establish this fact introduced a witness by the name of McNeill, who said he knew the father and grandmother of the prisoner, and they were reputed to

be of negro blood; that the grandmother of the prisoner was very dark, and that he should suppose that she was at least one-fourth of negro blood; that he had no particular skill in telling the degree of negro blood from the complexion, was not an expert, and knew nothing of the subject except from general observation, and could not form an opinion from the complexion to be satisfactory. One Gibson also proved that the grandmother of the prisoner was reputed to be a mulatto; she was quite dark, but he did not know whether she was one-fourth negro blood or not. One Mrs. Huckaby testified that she knew the grandmother of the prisoner, whose maiden name was Brigman; that she was reputed to be a mulatto, was very dark, and must, from her complexion, have had a good deal of negro blood in her veins, but how much she was unable to say. Two witnesses examined by the prisoner testified that they knew the father of the prisoner; that he was reputed to be a white man, and was allowed to vote; the mother of the prisoner was a white woman from Scotland.

Upon this evidence the court held that the witness was competent, and he was examined.

The jury found the prisoner guilty.

Winston, Sr., for the State.
No counsel for defendant.

(298) PEARSON, C. J. On the argument, Mr. Winston assumed that the grandmother of the prisoner had one-*fourth* negro blood; from this he inferred that one of his great-grandparents had one-*half* negro blood, and one of his great-great-grandparents was full negro; and insisted, from this fact, that the prisoner was of mixed blood within the meaning of the statute, and, consequently, that negro testimony was competent on his trial.

The record does not present the question; it is not found as a fact that "the grandmother of the prisoner had one-fourth negro blood."

His Honor, in making a statement of the case, sets out all the evidence, and his conclusion, as a matter of law, that "upon this testimony the witness was competent." But he does not find or set out the fact or facts upon which this conclusion is based. In other words, he did not have his attention called to the difference between "the evidence" and the fact or facts established by the evidence. So the case comes up in such a condition that this Court cannot revise his decision as to the law, because we do not know upon what state of facts he formed his opinion. It is the province of the jury to pass on the issues joined by the pleadings; but when a collateral question arises, as in this instance, it is the province of the judge to decide the questions of fact as well as of law, and the record should state the facts found by the judge, as well as his

conclusion as to the law arising on that state of facts, so as to put it in the power of this Court to review his opinion as to the law. *S. v. Goodwin,* 27 N. C., 401. It may be, when the evidence is clear, and there is no conflict, so that, if the case was for the jury, the judge would be at liberty to charge, "if you believe the witnesses, you will find for the plaintiff," it would be sufficient for the judge merely to set out the evidence. But when, as in this instance, the testimony is not clear, and the witnesses on behalf of the State can only give matter of opinion and conjecture, which is unsatisfactory even to the witnesses (299) themselves, and there is conflicting testimony offered on the part of the prisoner, it is necessary for the judge to state his conclusions as to the facts.

For the sake of illustration: a special verdict, instead of finding the *facts,* merely sets out the *evidence,* which is unsatisfactory and conflicting. The judge cannot decide the law, for there is no question of law presented; and if he does undertake to do it, this Court cannot review his decision, for it cannot be known upon what state of facts he based his opinion. Such is our case. The question is, Must the prisoner be prejudiced, and lose his right to have the opinion of the judge reviewed by this Court, or should there be a *venire de novo?*

The general rule is, judgment must be affirmed unless error appears; and it is the misfortune of the appellant if by reason of an omission in making up the statement of the case the point on which he relies is not presented. We are satisfied, however, that this case does not fall under the general rule. There is a defect, not in the statement of the case, but in the record proper, in this, that it does not show the facts on which the court decided the law. The illustration drawn from a special verdict makes the matter and the distinction very clear. Suppose a special verdict sets out the evidence, and does not find any fact, and the court gives judgment: clearly there is error in the face of the record, and the judgment would be arrested, for there is "no verdict" or finding of the facts by the jury.

In our case there is the same error; the judge does not find the facts.

As the matter relates to a collateral issue, touching the competency of a witness, its effect is to entitle the prisoner to a

PER CURIAM. *Venire de novo.* (300)

NOTE.—In the transcript of the record in this cause, as well in the record proper and in the case stated by the judge, the word "defendant" was used instead of "prisoner." The court ordered the clerk to strike out the first mentioned word wherever it occurred, and insert "prisoner." The same order was made as to the transcript of the record in other capital cases, where the like mistake had been made, and the clerk corrected the record accordingly. *Vide S. v. Ellick, post,* 457; *S. v. Summey, post,* 499; *Gaither v. Ferebee, post,* 310.

Cited: *Gaither v. Ferebee, post,* 310; *S. v. Ellick, post,* 457; *S. v. Summey, post,* 499; *S. v. Secrest,* 80 N. C., 456; *S. v. Jones,* 87 N. C., 556; *S. v. Crumpler,* 88 N. C., 649; *Branton v. O'Brient,* 93 N. C., 104; *Smith v. Kron,* 96 N. C., 397; *Leak v. Covington,* 99 N. C., 564.

STATE v. JAMES LEWIS.

(1 Winst., 307.)

1. An admission by a defendant, indicted under the act of 1863, for "aiding, assisting, harboring, and maintaining" a deserter, that the person so aided, etc., belonged to Captain Galloway's company in the army, that he had been at defendant's house two or three weeks, and defendant believed that he was absent from the army without leave, in the absence of all other proof, is not competent evidence that the person aided, etc., is a soldier in the army of the Confederate States, or that he is a deserter.

2. Whether an indictment under that act must not aver that the person aided, etc., is a soldier in the army of the Confederate States, as well as that he is a deserter, *Quere.*

INDICTMENT, tried at Spring Term, 1864, of ROCKINGHAM, before *Howard, J.*

The indictment charged that "James Lewis, laborer, late of the county of Rockingham, on the first day of August, one thousand eight hundred and sixty-three, and at divers other times, etc., with force and arms, at the county aforesaid, did knowingly aid, assist, harbor, and maintain one L. G. Lewis, a deserter from the military service of the Confederate States of America, he, the said James Lewis, then and there, well knowing the said L. G. Lewis to be a deserter as aforesaid, against the form of the statute in such case made and provided, etc."

(301) The witness for the State testified that he arrested L. G. Lewis, a son of the defendant, whom the defendant is charged in the bill of indictment to have harbored; that the defendant, in a conversation with witness, told him that L. G. Lewis belonged to Captain Galloway's company, in the army; that L. G. Lewis had been at defendant's house two or three weeks, and that defendant believed that L. G. Lewis was absent from the army without leave. This evidence was objected to by the defendant's counsel, but left to the jury by the court, and the jury found the defendant guilty.

Winston, Sr., for the State.
Fowle for defendant.

PEARSON, C. J. The statement of the case made by his Honor is very short. It sets out the testimony of one witness only, and we take it from the words, "the witness for the State testified," etc., that he was the only witness, and that his testimony was all the evidence in the case. So the evidence is this: The witness arrested L. G. Lewis, who is a son of the defendant. In a conversation with the witness, the defendant told him his son, L. G. Lewis, belonged to Captain Galloway's company, in the army; had been at his house two or three weeks, and the defendant believed his son was absent from the army without leave.

We have no doubt that if the fact that L. G. Lewis was a soldier of the army of the Confederate States of America and the fact of his being a deserter had been established by competent proof, then the above admissions of the defendant would have been admissible in evidence, as tending to fix the defendant with the *scienter,* that is, with a knowledge of the fact that L. G. Lewis was a deserter. But we are clearly of opinion that the admissions do not amount to evidence to be (302) left to the jury, from which they were at liberty to infer that L. G. Lewis was a soldier of the army of the Confederate States, or that he was a deserter. "L. G. Lewis belonged to Captain Galloway's company!" Who is Captain Galloway? What army? The army of the Confederate States, or the State of North Carolina? In the language of *Judge Gaston,* "the jury must not be left to guess the facts." "He believed his son was absent from the army without leave!" "Desertion" is one thing, "absence without leave" is another. Every deserter is absent without leave; but every soldier who is absent without leave is not a deserter. These terms have a distinct meaning; a deserter is a soldier who *quits* the army without leave, and in violation of his duty, and wrongfully stays away. So he is in the wrong from the beginning. One who is permitted to leave the army, as by a furlough, and who afterwards stays away, either by reason of sickness or some accident or by design, is said to be "absent without leave." The two offenses are considered and treated as entirely different.

What we mean to decide is this: when the fact of desertion is proved, then an admission that the defendant believed the party was absent without leave is evidence from which the jury may infer that the defendant knew that the man was a deserter; but when the main fact, to wit, that the party is a soldier and that he is a deserter, is not proved by other evidence, then such an admission is no evidence that the man is a deserter, or that the defendant knew him to be a deserter, because the words do not in their ordinary and appropriate sense bear, and there is nothing to give them, a different signification.

What kind of evidence is necessary in order to prove the fact that a

man is a soldier or a deserter is a question which it is not necessary for the purposes of this decision to determine.

(303) Whether by a proper construction of the statute the "aiding, assisting, harboring, and maintaining" must be done *secretly* and *fraudulently,* with intent to enable the deserter to conceal himself and keep out of the way (which is the construction given to the words "harbor and maintain" in the statute concerning runaway slaves, *Dark v. Marsh,* 4 N. C., 249), was mooted at the bar, but the question is not presented by the case, and we intimate no opinion in regard to it.

This being the first indictment that has come up on a new statute, it may be proper to call the attention of the solicitors to the question whether the indictment should not contain an averment that the man "is a soldier," as well as the averment that he is a deserter.

PER CURIAM. Error.

JAMES W. GAITHER v. THOMAS FEREBEE AND OTHERS.

(1 Winst., 310.)

1. When evidence is direct, leaving nothing to inference, and, if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that if they believe the witness they may find for the plaintiff, or for the defendant.

2. But this is not allowed where the evidence is circumstantial, or where the evidence offered on the other side tends to explain it, or to rebut the inferences sought to be drawn from it, or to contradict the witness.

ACTION on the case, tried before *Bailey, J.,* at Fall Term, 1863, of DAVIE.

The suit was brought to recover damages from the defendants for so negligently using their machine for thrashing wheat that the plaintiff's wheat, which they were thrashing for hire, was burned and consumed.

(304) The plaintiff proved that the defendants were employed to thrash his wheat and Basil Gaither's wheat with a thrashing machine. The wheat was in separate parcels, the plaintiff being the owner of one parcel and his father, Basil, owner of the other; but the stacks were close together.

Thompson, a witness for the plaintiff, said he had been engaged in manufacturing thrashing machines and other machinery for many years, and had also been running a thrashing machine for the past twenty years, and that he had skill in machinery; that thrashing machines were liable to heat, and, if not attended to, to catch fire, and that such ma-

chinery ought to be frequently oiled to prevent it from burning; that it ought to be oiled from every hour to every half hour, and the purer the oil the better it is for that purpose; that lard was not suitable for oiling it, unless prepared by being dripped; that to prevent heating, much would depend upon the machinery being put down right, properly leveled and geared. If a thrashing machine was in proper condition, every way, and kept well oiled, it might safely be run all day without stopping, and that dirty grease was not proper for greasing thrashing machines.

Sheek said he had been making thrashing machines for several years, and had been a millwright for fifteen years, and was skilled in machinery; that thrashing machines were liable to heat from friction, and frequent oiling was necessary to prevent it. Oil was better than lard, and pure lard than dirty grease, for greasing machinery. That thrashing machines might heat in several parts, as about the cylinders and where the foot rested on planks.

Spry said he was a mechanic, and had experience in running a thrashing machine. A year before the plaintiff's wheat was burned he had opened defendant's thrashing machine and examined it to see (305) if it was worn; at that time the zinc or metal on which the cylinder rested was considerably worn, but not worn through; when worn through, even if new, it would heat.

Basil Gaither said that in the morning of the day when the wheat was burned the machine was put down before breakfast; he saw one of the defendants at the machine with the can in which the grease was, as if in the act of greasing the machine before it started; the machine started about an hour by sun, and very soon after starting the band broke, which was soon mended, and it started again and never stopped until about 11 o'clock, a. m. He never saw it greased after it started in the morning; he was superintending some of his hands, who were clearing up wheat near-by; that the defendant Etchison had three hands, besides himself, who attended to the horses and the machine, and the witness had twelve or thirteen hands, engaged in throwing wheat off the stacks and taking off and putting up the thrashed straw in a rick and clearing off the wheat and hauling it off. After stopping a short time, about 11 o'clock, the machine started again and ran until they all stopped work for dinner, about 12 o'clock. The thrashed straw was raked up and put in the rick before the hands went to dinner. George Gaither, who was hauling, brought word to him that dinner was ready; he did not at once tell defendants, but waited till George Gaither loaded his wagon with wheat, and then he told defendants dinner was ready, and he heard defendant Etchison tell the hand on the wheat stack to stop throwing down wheat; there was a considerable bulk of unthrashed wheat piled up against the

machine when they stopped for dinner. When the hands got word about dinner, George Gaither started his wagon to the house at a gallop, and some of defendant's hands went to water the horses, and witness and the hands clearing up wheat stayed while a person might have walked
(306) 50 or 60 yards, and then went to the house, and witness went into the whiskey house, when the alarm of fire was heard, and he made all speed he could to the thrashing yard; when he got there he found the machine burning, the bulk of wheat was burned up, and the fire was catching to the thrashed straw; he noticed the place where Latham had fire to heat the grease before he went to dinner, and thought the fire was out.

Taylor said he was in the house yard at Colonel Austin's plantation, and had just eaten his dinner, when he smelt something burning like dirty grease; he went into the loft; when he got up there, he had a good view of the thrashing yard at Basil Gaither's; he saw a small puff of smoke immediately, then a larger; the smoke arose near the wheat stack, and where he found the thrashing machine when he got to the thrashing yard. When he got there, he found the machine burning and sinking over to one side, the wheat stacks burning and catching to the rick. The machine was all burned but the horse-power and part of the shaker.

Griffith said Ed. Valentine was working at his house, and he saw him at dinner-time the day the wheat was burned, until 1 o'clock, 1½ miles from Basil Gaither's.

The case made by the judge sets out other evidence of the same character, introduced by the plaintiff.

James Latham, witness for defendant, said he was one of the hands employed to work the machine at Basil Gaither's; his principal business was feeding and oiling it. The burning occurred between 11 and 12 o'clock, as well as he recollects; was at the stables, when the alarm of fire was given, about a quarter of a mile from the thrashing yard; rode to the fire as quick as he could; when he got there the straw was all on fire—the shaker was on fire at the further end from the machine, but no other part of the machine, that he saw. The shaker was about 12 feet long; the machine caught very soon, and was burnt up very soon
(307) after. When he last oiled the machine, he greased it as usual, and examined it to see if the caps were right, and to remove the trash, if any; the machine was as cool as it ought to have been after running. When the machine first started that morning, fire was brought by him to the yard, for the purpose of warming the grease, that it might be poured into the can; he asked the plaintiff where the fire should be put, and by his direction the fire was put in a place about 20 steps from the machine, and about 20 or 25 from the nearest wheat; the wheat farthest from the fire was first burned. The fire was used for warming

the grease until 9 o'clock, or a little later; we used dirty grease; some of it was furnished by George Gaither and some was brought by defendants. The thrashing commenced about 8 o'clock, and continued three heats. It was in July; the machine was in good repair, one of the caps was lost, but a piece of leather was put in its place, which answered the same purpose; during the last heat the witness did not feed the machine, he greased it; the heats lasted about an hour each.

Naylor, another witness for defendants, said he had skill in machinery; he thought lard better than sperm oil for greasing machinery, and lard oil better than lard; lard, without being dripped, answered a good purpose.

Riley, another witness for defendants, heard the plaintiff say he believed an enemy had burned his wheat.

Griffith, defendant's witness, heard plaintiff say he believed Ed. Valentine had burned it.

Another witness for defendant said that the cylinder rested on some composition metal at its ends, and did not touch the wooden part of the machine by 2 or 3 inches; that he had run a thrashing machine, and, in his opinion, the machine commenced cooling from the time it stopped, and if it did not fire during the time the wagon was loaded with wheat, it would not fire after that.

Other evidence of the same general character was given by the (308) defendants.

The judge instructed the jury that if they were satisfied that the evidence offered on the part of the plaintiff was true, the defendants were guilty of negligence, and they should render a verdict for the plaintiff.

There was a verdict and judgment for the plaintiff, and the defendants appealed.

Clement for plaintiff.
Boyden and Winston, Sr., for defendants.

PEARSON, C. J. For the purpose of showing negligence on the part of the defendants, the plaintiff examined many witnesses, who stated facts and circumstances from which he insisted an inference might be drawn as to how the fire was caused, and fixing the defendants with negligence. To contradict this evidence, or to explain it and rebut the inferences which might be drawn from it, the defendants examined many witnesses, and the court instructed the jury, "that if they were satisfied that the evidence offered on the part of the plaintiff was true, the defendants were guilty of negligence, and they should find a verdict for the plaintiff. If they were not satisfied as to this, but believed the evidence offered by the defendants, they should find a verdict for the defendants." There was a verdict for the plaintiff.

There is error. The verdict must be set aside and a *venire de novo* awarded, on the ground that the judge in the court below has not pursued the statute in that case made and provided, and has left the case to the jury in such a manner as to make it impossible for this Court to know what his opinion was on the question of law arising on the facts of the case, and of course making it impossible to review his decision.

The statute requires the judge to "state, in a full and correct
(309) manner, the evidence given in the case, and *declare* and *explain the law arising thereon.*" Rev. Code, ch. 31, sec. 130.

It is not essential, by the true construction of this statute, that the judge shall recapitulate all of the evidence in detail. It is sufficient for him to call the attention of the jury to the material parts of it, and he is then to *declare* his opinion of the law arising thereon; that is, he is to charge what the law is on a given state of facts. For instance, he is to instruct the jury that in order to make out his case the plaintiff must establish by the evidence certain facts, or, in order to support his plea, the defendant must establish certain facts, and leave it to the jury to decide whether the evidence does or does not establish the facts necessary to sustain the action or the plea. In this way it is made to appear by the record what facts the jury find and what is the opinion of the judge as to the law arising thereon.

When the evidence is direct, so as to leave nothing to inference, and the evidence, if believed, is the same thing as *the fact* sought to be proved, the judge is at liberty to instruct the jury that, if they believe the witness, they should find for the plaintiff, or for the defendant; and this may be done even when many other witnesses are examined in support of the principal witness, or to contradict him. This mode of leaving a case to the jury is allowed in such cases because it is easy, and the main purpose is accomplished, viz., it shows what facts are found by the verdict and what is the opinion of the judge as to the law arising thereon; but this indulgence cannot be extended to cases like the one before us, where the evidence is altogether circumstantial, and that offered on the other side tends to explain it, or to rebut the inferences, or to contradict some of the witnesses, because the main purpose is not accomplished; the

judge does not "declare or explain the law to the jury," and there
(310) is no telling what facts the jury find, or what was the opinion of the judge on the questions of law arising thereon. So the decision cannot be reviewed, and the testimony is thrown broadcast to the jury, and they are to take the responsibility of making a final decision!

Suppose the jury should render a special verdict, not finding the fact, but setting out all the testimony, such as that offered in this case! Could the judge decide the case upon such a verdict? or if he did undertake to do it, would it be in the power of this Court to review his decision? Cer-

tainly not; for he cannot know what the facts are, nor can this Court know what he supposed them to be. This subject is discussed in an opinion delivered at this term (*S. v. Norton, ante,* 296), a reference to which will aid in its elucidation and show the distinction between the evidence in a case and the facts established by such evidence. Sometimes the difference is not so obvious, but in a case like the present it is glaring.

Venire de novo.

Cited: S. v. Ellick, post, 457; *S. v. Medlin, post,* 493; *S. v. Summey, post,* 499; *S. v. Horan,* 61 N. C., 575; *Hardin v. Murray,* 68 N. C., 536; *S. v. Jones,* 87 N. C., 556; *McQuay v. R. R.,* 109 N. C., 588; *Nelson v. Ins. Co.,* 120 N. C., 305; *Williams v. R. R.,* 130 N. C., 120; *Wetherington v. Williams,* 134 N. C., 280.

EDWARD S. WALTON v. T. H. GATLIN.

(1 Winst., 318.)

1. Where the object of a writ of *habeas corpus* is to inquire whether there be probable cause for commitment, the decision on it is not the subject of review by writ of error or *certiorari.*

2. Where the question on a writ of *habeas corpus* is concerning the power of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review.

3. The decision on a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment,* and the subject of review by writ of error or *certiorari.*

4. The Supreme Court has the power to review the action of the Superior Courts, and the judges in vacation, upon questions of law in all cases under section 10 of the *Habeas Corpus Act.*

ON the first day of the term Messrs. Bragg and Strong, on be- (311) half of T. H. Gatlin, a captain in the army of the Confederate States, moved for a writ of *certiorari,* to be directed to the Honorable Richmond M. Pearson, Chief Justice of this Court, commanding him to certify, under his hand and seal, into this Court, the record of a writ of *habeas corpus* issued by him at the suit of Walton against Gatlin, and the proceedings thereon before the said Chief Justice, and his judgment thereon, suggesting that in the proceedings and judgment there was error in law to the injury of the said Gatlin.

It appeared that Walton had applied to Chief Justice Pearson, on 27 January, 1864, for a writ of *habeas corpus,* alleging that he had been

arrested and was detained in custody by T. H. Gatlin, a captain in the army of the Confederate States, as a person subject to serve as a conscript, he being legally exempt from such service. The writ was granted by the Chief Justice, returnable before himself, and was served on Captain Gatlin, who made a return thereon to the effect that Walton was liable to serve as a conscript under the act of Congress of 5 January, 1864. The Chief Justice decided, on 19 February, 1864, that Walton was not liable to service on the conscription acts, and discharged him; but on an intimation of the counsel who appeared on behalf of the Confederate States that he would move at the next term of the Supreme Court for a writ of *certiorari,* the Chief Justice bound Walton in a recognizance to appear in the Supreme Court on second Monday of next term.

The Court ordered the motion to stand over for argument on (312) the second Monday of the term, when it was argued by

Bragg, Strong, and Winston, Sr., in support.
Moore and Boyden against.

PEARSON, C. J. The motion on the part of the defendant for a *certiorari,* or other appropriate writ to bring up this case for review on the question of law, was opposed by the counsel of Walton on two grounds:

1. It was insisted that the action of a single judge in vacation, upon a writ of *habeas corpus,* is not the subject of review. The counsel relied on the authorities cited, and the reasoning of *Judge Kent,* in *Yates v. New York,* 6 Johnson, 397, and of *Judge Baldwin* in *Holmes v. Jennison,* 14 Peters. 614 (13 Curtis, 649).

These cases show that there is a conflict of decisions and a great contrariety of opinion on the question. Any one who reads them will become satisfied that the amount of talent and learning bestowed on the subject has tended to mystify rather than to elucidate it. When the stream becomes too muddy to see the bottom, the surest way to find truth is to go up to the fountain head, that is, "to the reason and sense of the thing." We believe the conflict and confusion found in the books in regard to this question are mainly to be attributed to the fact of not keeping in view the distinction between a *habeas corpus* "when one stands committed for a crime" and a *habeas corpus* when one is imprisoned or otherwise restrained of his liberty for some cause other than the commission of a criminal offense. This distinction is pointed out in *Caine's case. Judges Kent* and *Baldwin,* in the cases referred to, had their minds fixed upon the former class of cases, and do not advert to the distinction.

The object of a commitment is to secure the attendance of the party at the trial; and it is the duty of the committing magistrate to make

an examination, inquire into the circumstances, and to discharge (313) the person arrested, or remand him, or take security for his appearance, according to the nature of the offense and the degree of proof. This proceeding is not the subject of review by writ of error or *certiorari,* for the reason that there is no trial, and no judgment, but a mere inquiry, to see whether the person accused ought to be tried; indeed, when the law is duly administered, the trial will take place before a writ of error or *certiorari* could be disposed of in the course of the court. The courts, however, exercise a supervising jurisdiction over the action of the committing magistrate, by means of the writ of *habeas corpus,* and to inquire into the legality of the commitment and the question of probable cause. This proceeding is in lieu of a writ of error or *certiorari,* and is not the subject of review by either of those writs, when it turns on the question of probable cause, for, like the proceeding before a committing magistrate, it is not a trial; there is no judgment; it is a mere inquiry. When it turns on the power of commitment, or its legality, the question is not so clear. There is much force in the authorities cited, and in the reasoning of *Judges Kent* and *Baldwin,* although the weight of authority in this country is on the other side; for in *Yates v. New York* the decision is against the opinion of *Judge Kent.* In *Holmes v. Jennison* a majority of the judges differ from *Judge Baldwin,* and in the late case of *Ableman v. Booth,* 21 Howard, 506, the jurisdiction by writ of error is assumed by the Supreme Court of the United States, and the point seems to be conceded.

The superintending jurisdiction over committing magistrates was intrusted to the judges in vacation, 32 Charles II., ch. 2, Rev. Code, ch. 55, sec. 1.

The purpose of a writ of *habeas corpus,* where one "is restrained of his liberty for some cause other than the commission of a criminal offense," is altogether different. In ancient times, in such cases, the writ *de homine replegiando* was used. It was an original writ by which an action was instituted when a person was restrained of (314) his liberty, unless committed for a crime, and the right to the services and custody of the person was determined. Fitz. N. B., 68; Com. Dig. Pleader, 3 K. I., Imprisonment, L. 4; 2 Inst., 55; 3 Mod., 120. There can be no doubt that the judgment in this action was the subject of review by writ of error. This original writ is now superseded by the judicial writ of *habeas corpus,* as a more speedy and summary remedy, called for by the nature of the case, which the courts issued under their common-law jurisdiction. In the proceeding instituted by this writ the right in controversy is *determined by a judgment,* and no reason can be assigned why such judgment is not the subject of review in the same way as the judgment in the old action *de homine replegiando,*

or any other action or proceeding in which the court renders a judgment; because, thereby, the right of the parties is adjudicated and determined. It is true, if the plaintiff seeks for damages he must follow it up by an action of trespass for assault and battery, and false imprisonment, as the action of ejectment, which is substituted for the old real actions, is followed up by an action of trespass for mesne profits; but that is no reason why the judgment should not be the subject of review.

This jurisdiction is extended to the judges in vacation by 56 Geo. III. (1816), so the jurisdiction of a single judge in such cases is of very recent origin, which may, in some measure, account for the confusion in which the subject has been involved, by not distinguishing this class of cases from that of the case coming within the operation of the act of Charles II. The fact that so many writs of *habeas corpus* have been issued in the last two years has elicited a closer and more serious investigation of the nature and purposes of the proceeding in cases of this kind, and the result is a clearer apprehension of the distinction between the two classes of cases.

(315) The question is narrowed to this, Is not the judgment of a single judge, in the exercise of this jurisdiction, conferred by statute of George III., and our statute of 1836, subject to review for the same reasons and on the same grounds which are applicable to the judgment of the courts in the exercise of their common-law jurisdiction by *habeas corpus?* There are a suit, a trial, and a judgment, deciding the rights of the parties; and the fact of its being the decision of a tribunal composed of a single judge can furnish no reason why it should not be the subject of review by a higher tribunal. Certainly, the decision of a judge in vacation cannot be put on a higher footing than the decision of the same judge in term-time.

For illustration: *Zeigenfuss v. Hastings,* 24 N. C., 463, presented this question of law: Has a creditor the right to take the body of his debtor by writ of *capias ad satisfaciendum,* after the debtor has filed his petition in bankruptcy, and given notice, but before a decree of bankruptcy? The case was constituted before a single judge by a writ of *habeas corpus,* under section 10 of the act of 1836. The judge decided against the debtor. It was an adjudication of the rights of the parties.

So *Prue v. Hight,* 51 N. C., 265, instituted by writ of *habeas corpus,* before a single judge, presented a question of law as to the validity of indentures of apprenticeship on which the rights of the parties depended. The judge decided in favor of the defendant, and his right to the services of the plaintiff, as an apprentice, was thereby determined.

These cases show strikingly the difference between a *habeas corpus* under the first section of our statute, when one "stands committed for a

crime," which is a mere inquiry preliminary to his trial, and a *habeas corpus* under section 10, which is a suit involving the rights of the parties, and in which their rights are adjudicated and determined. In cases of this kind we think it clear the decision on matter of (316) law is the subject of review; and it is equally clear that the case before us falls under this class of cases. Walton did not "stand committed for a crime," but was restrained of his liberty as a conscript. His case presents a question of law, arising under an alleged contract, and the right is adjudicated and determined by the decision of a single judge.

2. Admitting that the Court of King's Bench and the Supreme Court in several of the States where their statutes provide for it have power to review the action of a single judge in *habeas corpus* cases, when one is restrained of his liberty for some cause other than the commission of a criminal offense, it was insisted that this Court has no such power, because its jurisdiction is limited, and it has no jurisdiction except what is conferred by statute. *Binford v. Alston,* 15 N. C., 399; *American Bible Society v. Hollister,* 54 N. C., 10, and *Smith v. Cheek,* 50 N. C., 213, were relied on.

When these cases were decided there was, as is said in *Bryan's case, ante,* 1, a general impression against the power of the Court, and candor requires the admission that the judges were then of opinion that the Court did not have jurisdiction in *habeas corpus* cases; and although those cases are correctly decided, yet the language used must be restricted, and the general import controlled, by construing it as having reference only to the questions then before the Court. Within the last few years the subject of *habeas corpus* has called into action the utmost effort of the legal mind, both of the bar and the bench, and eliminated the fact that the *protection of personal liberty is a distinct head of jurisdiction.* In the *Matter of Bryan,* after full argument and due consideration, this Court held that, in regard to the proceeding under writs of *habeas corpus,* the Court has a common-law jurisdiction: "So that the establishment of a Supreme Court, without any words to (317) that effect, necessarily, and as an incident to its existence, by force of the bill of rights, of the Constitution, and the principles of the common law, invests it with power to inquire, by means of this great writ of right, into the lawfulness of any restraint upon the liberty of a freeman," and the inference is made that although in actions at law, indictments, and suits in equity it was deemed expedient to limit the jurisdiction, as to the manner of constituting such cases in that Court, so as to make the jurisdiction *appellate* only, yet in regard to the important subject of jurisdiction, to wit, the writ of *habeas corpus,* there is no limitation of power or restriction, save the principles and usages of law, "it

being the opinion of the Legislature that the power would attach to the Court as soon as it was established, as an incident of its existence, upon the principles of the common law and bill of rights."

We are fully satisfied of the soundness of this conclusion, and it has since received the sanction of a *legislative enactment.* So the question must be considered as settled. We allude to the act of June, 1863, by which it is enacted that a single judge may, in term-time, grant a writ of *habeas corpus,* and make it returnable either before himself or some other judge, or before the *Supreme Court;* thus expressly recognizing the jurisdiction of the Court.

Taking this to be so, it follows as a necessary consequence that the Court has the power to review the action of the Superior Courts and of the judges in vacation, upon questions of law, in all cases of *habeas corpus,* when a decision is made and the rights of the parties are determined; that is, in all cases under section 10 of the *Habeas Corpus Act.* For it is the function of every court which is "supreme," not simply a "court of appeals" or a "court of conference," to control the action of all other judicial tribunals, so as to prevent them, by prohibition, from exceeding their jurisdiction, and to correct errors while acting within
(318) their jurisdiction. When the mode of exercising this jurisdiction is provided by statute, as in respect to actions at law, indictments, and suits in equity, that, of course, must be pursued; when no mode is provided, the Court must pursue a mode which is "agreeable to the principles and usages of law." It may be that in a *habeas corpus* case of the kind now under consideration, constituted in the Superior Court, an appeal will lie under the general provisions of the Rev. Code, ch. 4, secs. 21, 22. When the decision affects the rights of infants, the Legislature has deemed it expedient to allow the matter to be brought up both from a court and a single judge, by the speedy mode of appeal, Acts of 1858, ch. 53. In all other cases it is left to be done in such way as is "agreeable to the principles and usages of law."

It is gratifying to know that the Court possesses this jurisdiction, for it would have been a deplorable state of things if Williams is to serve as a conscript because his case was decided by Judge A., and Walton is not to serve because his case was decided by Judge B., and that there should be no mode of correcting the error, so as to settle the law—make it uniform, and give to *decisions* in such cases the weight to which an adjudication of the highest judicial tribunal of the State is entitled.

BATTLE, J., concurred.

MANLY, J., dissenting: The question presented for our consideration is, whether the Supreme Court has the power to bring into the Court

for revision a case of *habeas corpus* tried and disposed of by a judicial officer at chambers. I am of opinion the Court has no such power, either by statute or at common law.

At the last term of the Court, in the *Matter of Bryan, ante,* 34, the Court held that it had original jurisdiction to issue the writ and to hear and decide causes. I was too unwell at the time to take part in the decision of that case, and gave no opinion in it. Subsequently, I gave it all proper consideration, and have been unable to concur (319) with my associates. The jurisdiction, then assumed for the first time since the establishment of the Court, is of the gravest importance, and I deem it proper to put upon record, briefly, the reasons which influence me to dissent. These reasons will be found also to have an important bearing upon the case now before us. The question then made was, whether the Court had the power to grant the writ of *habeas corpus* as an original writ to acquire jurisdiction.

Supposing the Court to have no common-law jurisdiction, and to be confined within the limits prescribed by statute, the question must be decided by the construction which shall be put upon the act of 1818, Rev. Code, ch. 33, sec. 6. That part of the act bearing upon our inquiry is as follows:

"The Court shall have power to hear and determine all questions of law brought before it by appeal, or otherwise, from a Superior Court of law, and to hear and determine all cases in equity brought before it by appeal or removal from a court of equity; and in every case the Court may render such judgment, sentence, and decree as on inspection of the whole record it shall appear to them ought, in law, to be rendered thereon; and shall have original and exclusive jurisdiction in repealing letters patent, and shall also have power to issue writs of *certiorari, scire facias, habeas corpus, mandamus,* and all other writs *which may be proper and necessary* for the exercise of its jurisdiction, and agreeable to the principles and usages of law; and it may, at its discretion, make the writs of execution which it may issue returnable either to the said Court or to the Superior Court from which the cause may have been removed."

The whole of the passage quoted describes, as I think, a purpose on the part of the Legislature to make this Court a court of appeals, authorizing it to hear only cases brought into it by appeal or removal from the courts below. The first part of the passage quoted is (320) appropriate to this purpose. The act then gives the Court an *original* and *exclusive* jurisdiction (using the words) in repealing letters patent; and it then proceeds to give the use of certain writs which it was easy to foresee might be needed for the full and effectual exercise of the jurisdiction granted, to wit, writs of *certiorari, scire facias, habeas*

corpus, mandamus, and all other necessary writs. That the writs here specially enumerated are all in the category of ancillary writs is inferable from the fact that some of them are plainly and necessarily so, because rarely, if ever, used in any other way, and from the use of the word "other." In the connection in which it stands, it must imply that *some,* at least, of the antecedently enumerated writs were auxiliary in their nature, and provided as such. If it had been intended to make the grant of auxiliary writs only, in the latter part of the clause in question, and to give power to the Court in respect to the previously enumerated writs, to use them for acquiring jurisdiction, either the order of the words would have been inverted, and the grant of auxiliaries would have followed immediately the grant of principal powers, or the word "other" would have been dropped, and it would have read, after the enumerated writs, *and all writs which may be proper and necessary.*

The words "all other" seem naturally to mean an indefinite extension of a class of writs then partly enumerated. If the relative "which" be extended at all beyond the words, *all other writs,* for an antecedent, it must be clearly referred to all the *enumerated writs.*

I have dwelt more at length upon the phraseology of the Court act because I suppose its construction controls substantially the question which was then before the Court. If the power then exercised be not there granted in terms, or by plain and necessary implication, it (321) is not granted at all; for the Court has no common-law jurisdiction. It is the creature of the statute law, and has its power limited and defined by that law. It possesses no greater capacity to take jurisdiction or to exercise power than the law gives. Other courts of the State have what is called a common-law jurisdiction, that is to say, such powers as they have been accustomed to exercise under the approval of our ancestors from time immemorial, and unless these powers are restrained by legislation, they may continue to exercise them indefinitely. It is not so in respect to this Court. It is created by statute and clothed with powers there specially defined. With a range of jurisdiction in the very highest regions of power exercised by human tribunals, it is nevertheless a limited range, defined by the written law.

A question of jurisdiction, therefore, in this and other courts of the State would be decided by a different course of inquiry; for, supposing the power in question to be one which had been exercised by the courts of inferior jurisdiction from time immemorial, the inquiry in this Court would still be, Has it been granted to us? while in the courts below it would be, Have they been restrained from its exercise?

The identity of the language used in the two statutes, the one constituting the Supreme Court of the United States, the other the Supreme Court of this State, makes any discussion and exposition of the one per-

tinent in respect to questions arising on the other. The United States Supreme Court act has this provision: "that all the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

The power of the court to issue the writ of *habeas corpus cum causa* came under discussion in *Bollman v. Swartwout,* 4 Cranche, 75. These men were in prison by order of the Circuit Court for the District of Columbia, upon a charge of treason, and the Supreme Court (322) of the United States "in banc" ordered the writ, sustaining the motion for it upon the ground that it was auxiliary and incidental to the Court's jurisdiction. I have considered attentively this case, and it seems to me that the point decided, as well as the course of reasoning of the eminent judge who delivered the opinion, corroborates the view I have taken. In that case the Court was restrained from claiming the power as an independent power by the article in the Constitution defining its jurisdiction. We are precisely under a similar restraint through the law defining our jurisdiction. All law is obligatory alike. We are as much bound by the act of the Legislature establishing the Court and prescribing its jurisdiction as the Supreme Court of the United States is bound by the limitations of its jurisdiction found in the Constitution.

If, therefore, the writ is not sought for in aid of a full exercise of the Court's jurisdiction, it cannot be granted.

The *dicta* in *Bollman v. Swartwout* can be brought to bear favorably on the exercise of the power in question only upon the assumption that this Court has a jurisdiction as of common right. If it have not, but be restrained by the terms of the act, it is an authority the other way. This will be more intelligible by reference to the Constitution of the United States, where it will be found that the constitutional restraint spoken of is the article defining the jurisdiction of the Court.

That this Court possesses no common-law jurisdiction is further made manifest by a practical construction of the organic law from the beginning, ignoring any such jurisdiction, and by a current of authorities, coming down from the period of the establishment of the Court. Whenever the subject has been discussed, the language of the Court appears to have been uniform that its jurisdiction is defined and limited by statutory enactments, and it is, in no respect, derived from the common law. *Binford v. Alston,* 15 N. C., 351; *American Bible* (323) *Society v. Hollister,* 54 N. C., 10, and *Smith v. Cheek,* 50 N. C., 213, show this conclusively. It may be remembered that the judge

(*Gaston*) who delivered the opinion in *Binford v. Alston,* and who speaks most explicitly of the source of jurisdiction, was the framer of our Court Act of 1818; and his opinion, therefore, apart from his acknowledged legal learning, should be considered of special authority.

The question made at the last term in the case of *Bryan* may now be considered at rest, not only by the authority of that case, but also by the action of the Legislature. It is now provided that the judges of this Court may issue writs of *habeas corpus,* and make them returnable to the Court. This, by implication, confers the power to hear and determine them; but it goes no further, and has no effect upon the question now before us, viz., whether the Court has *quasi appellate* or *revisory* power in respect to the decisions of other tribunals. It seems to me to hold this would be a further disturbance of settled law. The Court has now been established for upwards of forty years, and no necessity for the exercise of such a jurisdiction has been developed, unless the present condition of the country discloses one. Whether it does may be a proper subject for legislative inquiry, and, if need be, for legislative remedy.

To this time the whole course of legislation in the State has carefully avoided lodging an appellate or revisory power anywhere, in matters of *habeas corpus.* It seems to have been designed by the Assembly to give a summary and determinate remedy to the citizen for an imprisonment considered unlawful by any one of the judges, or by any of the courts in which they sit, and to leave parties to assert rights disputed between them to the ordinary channels of litigation. It was never con-
(324) templated that constitutional questions, and others affecting the public weal and private interests, should be thus determined. The ordinary actions at law, provided to meet every possible requirement, have been considered the safer means of adjusting controversies, and have been studiously preferred, as I infer from a review of our legislation. Sound reasons may be given why the Legislature should prefer that the writ might be thus facile and speedy in its action, rather than of the highest authority in its results. At any rate, such has been the policy, as I conceive, and the judicature of the country has no power to reverse it.

The act of the last Legislature, I have said, does not affect the question. There is no necessary connection perceived between the *original* jurisdiction conferred by the act and the *revisory* jurisdiction which it claims to draw after it. The one is supplying what appears to be a *casus omissus* in the *habeas corpus* act, and is in accordance with the policy of the State legislation; the other reverses that policy. The sole effect of the act is to add another to the one subject of original jurisdiction possessed by this Court.

Upon the whole, my opinion is that this Court has no right, at common law or by statute, to take jurisdiction of and revise a case of *habeas corpus* tried before a judge at chambers, either by writ of error, *recordari*, or other process.

It is conceded that a right to revise a case of *habeas corpus* may be as easily deduced from common-law principles as a right to entertain *original* jurisdiction. As the one, however, does not necessarily follow the other, I have thought it due to the importance of the decision to file a separate opinion, expressive of my views, and showing why it is that I cannot concur.

By the Court: Motion allowed. (325)

NOTE.—Appeal in certain *habeas corpus* cases will lie. *Matter of Ambrose*, 61 N. C., 91; *In re Holley*, 154 N. C., 166; *In re Wiggins*, 165 N. C., 458; *Page v. Page*, 166 N. C., 90. See *S. v. Adair*, 68 N. C., 68; *Thompson v. Thompson*, 72 N. C., 32; *Harris, ex parte*, 73 N. C., 66.

Cited: S. c., post, 326; *Wood v. Bradshaw, post*, 424; *Bridgman v. Mallett, post*, 507; *S. v. Herndon*, 107 N. C., 935; *In re Briggs*, 135 N. C., 130; *Johnson v. Cameron*, 136 N. C., 247.

T. H. GATLIN v. EDWARD S. WALTON.

(1 Winst., 333.)

1. The acts of Congress of 5 January and 17 February, 1864, concerning conscription, are constitutional and valid.
2. If a contract were made between the Government and the conscript, by which the latter furnishes a substitute, under section 9 of the act of 16 April, 1862, the Government has a right to annul the contract by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power.
3. But it *seems* no contract was made by the Government with the conscript furnishing a substitute.

PEARSON, C. J., dissenting.

A WRIT of *certiorari* was sued out by Captain T. H. Gatlin (see the case of *Walton v. Gatlin, ante*, 310, on the motion for a *certiorari*), returnable immediately. The writ is set out at length, because the form was settled by the Court.

The State of North Carolina, to the Hon. Richmond M. Pearson, Chief Justice of our Supreme Court, Greeting:

Whereas, in the proceedings on a writ of *habeas corpus* sued out by E. Stanly Walton against T. H. Gatlin and returned before you, and

in the judgment thereon, rendered by you, there is manifest error, to the injury of the said T. H. Gatlin, captain in the Army of the Confederate States of America, as he has complained to us: These
(326) are, therefore, to command you that you send immediately into our Supreme Court, now sitting at Raleigh, the record of the said writ, proceedings, and judgment, certified under your hand and seal.

Witness, Edmund B. Freeman, clerk of our said Court, at office, the second Monday in June, 1864.

Indorsed upon the writ is:

The answer of Richmond M. Pearson, Chief Justice of the Supreme Court of North Carolina, within named:

I certify to the Supreme Court of North Carolina the writ of *habeas corpus* within specified, together with the return thereto, and the proceedings had therein before me, and the opinion given by me, and judgment rendered in pursuance thereto, as I am within commanded.

Witness my hand and seal, this 25 June, 1864.

R. M. PEARSON, C. J., S. C. [SEAL]

The writ of *habeas corpus,* the return thereto, and the proceedings and judgment thereon, are described in the report of the motion for a *certiorari. Walton v. Gatlin, ante,* 310.

Bragg and Winston, Sr., for Gatlin.
Moore and Fowle for Walton.
Strong, C. S. District Attorney, for the C. S. Government.

BATTLE, J. The writ of *certiorari* in this case brings before the Court for review the judgment of his Honor, the Chief Justice, pronounced in vacation, in a proceeding on a writ of *habeas corpus.* The facts upon which the judgment was rendered are set forth in the petition of the applicant for the writ and the return of the officer, and they present the question whether the act of the Confederate Congress, approved 5 January, 1864, and entitled "An act to put an end to the exemption from military service of those who have heretofore furnished substitutes," is constitutional. The act is in these words:
(327) "Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms:

The Congress of the Confederate States of America do enact, That no person shall be exempted from military service by reason of his having furnished a substitute; but this act shall not be so construed as to affect persons who, though not liable to render military service, nevertheless furnished substitutes."

The Chief Justice, in the opinion which he has filed as explanatory of the reason upon which his judgment was founded, has declared that the petitioner, having under the provisions of the act of 16 April, 1862, furnished a substitute and obtained his discharge from military service, made a binding contract with the Government, which Congress had no constitutional power to violate. The question thus presented upon the constitutionality of the act of January, 1864, is invested with momentous importance, and has been argued before us with very great zeal and ability by the counsel on both sides. I have given to the arguments all the consideration in my power, and will proceed to state the conclusion at which I have arrived and the reasons which have conducted me to it.

The governments which the emigrants from Great Britain established on this continent in the sixteenth and seventeenth centuries were largely imbued with the principles of the country from which they sprang. And even when, in the eighteenth century, they severed the bonds which had connected them with the mother country, and became free and independent States, the new governments which they formed, though differing widely from the old, still retained, particularly in their legislative bodies, many of the attributes and much of the spirit of the nation from which they emanated. The source from which legislative power was supposed to be derived in the nationalities of the Western conti- (328) nent was very different from what it was in the Eastern; but the extent of power, except in the cases of a restriction by a written constitution, varied very little in the legislatures of the free States of America from that of the Parliament of Great Britain. It may aid us, then, in our investigations, to inquire what were the powers of the British Parliament, and what those of the several American States prior to the formation of the Government of the United States, and subsequently of that of the Confederate States.

The power and jurisdiction of Parliament (says Mr. Justice Blackstone, quoting from Sir Edward Coke) are so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. . . . It can, in short, do everything that is not naturally impossible, and, therefore, some have not scrupled to call its power, by a figure rather too bold, the "omnipotence of Parliament." In the exercise of these vast powers, we know that the Parliament claimed and acted upon the privilege of violating contracts, and of taking away vested rights, when it was deemed that the good of the country required it. An interesting instance of the latter kind is seen in the statute of 9 and 10 Vic., ch. 54,

which opened the Court of Common Pleas to the practice of the bar generally. Prior to the year 1834 the sergeants at law had had from time immemorial the exclusive privilege of practicing, pleading, and audience in that court, but in that year his Majesty, King William IV., issued a warrant under his sign manual to the judges of the court, commanding them to open it to all the other members of the Bar. The judges did so, and the sergeants, after acquiescing in the change
(329) for a few years, brought the matter to the attention of the court, and questioned the authority of the Crown to take from them a valuable exclusive privilege which, from the very origin of the court, had been vested in them. After a solemn argument, the court decided against the power of the Crown to do what the warrant had commanded, but admitted that it might be done by Parliament (see 37 Eng. C. L., 338 and 362); and it being a reform which the best interests of the country demanded, it was accomplished by the statute to which we have referred. It is but justice to the legislators of Great Britain to say that, though they possess this transcendent power, and have sometimes abused it, they have, in the main, been very solicitous to secure intact private rights and to preserve inviolate the public faith.

We come now to the legislatures of the American States, after they had gained their independence. When established by the people of their respective States, these bodies were invested at once with supreme legislative power, except in the particulars in which the people themselves, assembled in convention, had restricted them by written constitutions. See *Hoke v. Henderson,* 15 N. C., 1. Among the powers which they claimed and exercised was that of resuming granted lands, and of otherwise interfering with the obligations of executed and executory contracts. This is proved both by the political and judicial records of the country. *Owings v. Speed,* 5 Wheat., 420 (4 Curtis, 688), is a striking case directly in point. The facts are not stated by the reporter, but from the opinion of the Supreme Court, as delivered by *Chief Justice Marshall,* the case will be seen as follows: The suit was brought in the Circuit Court of the United States for the district of Kentucky, to recover a lot of land lying in Bardstown. The plaintiff claimed under a patent issued by the Commonwealth of Virginia in 1780. A
(330) part of the same land was afterwards, in 1788, granted by the Legislature of Virginia to other persons, and the defendant claimed under them. A verdict and judgment were rendered for the latter, upon the ground that, when the act in question was passed, the Constitution of the United States had not been adopted; therefore, the prohibition upon the State to pass laws violative of contracts, contained in that Constitution, did not apply. Here there was a case where a parcel of land, vested in one person by a patent, which was an executed

contract, was taken from him and granted to another by the Legislature of the same State that had issued the patent; and yet it was sustained by the highest Court in the United States, affirming a judgment, not of one of the State courts, but of a Circuit Court of the United States. That was one mode in which the obligation of a contract was violated. Another very common one was seen in the passage of laws by which "worthless lands and other property of no value to the creditor were made a tender in payment of debts; and the time of payment stipulated in the contract was extended." See *Sturges v. Crowninshield,* 4 Wheat., 122 (4 Curtis, 362). These instances show conclusively that the legislatures of the different States, prior to the adoption of the Federal Constitution, claimed the power to violate contracts whenever, in their estimation, the good of the State required, and the courts felt constrained to sanction their acts by adjudications in favor of them.

Let us now see what powers were vested in the Congress of the United States. The Federal Government was established by the people of the several States, "in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." To accomplish these all-important objects, each State surrendered a portion of its sovereignty, and vested it in the new Government. The attributes of sovereignty thus given up were (331) those which concerned the foreign relations of the Government.

Thus we find among the enumerated powers of the Federal Constitution, the great ones, to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. These powers were essentially and absolutely necessary to enable the United States to take and maintain its stand among the nations of the world. By looking at the Constitution, it will be seen that the powers are given with very few express restrictions, and with none implied, except what are necessary to the continued existence of the State governments. Where it is said that the Federal Government is one of limited powers, it is not to be understood as true in the sense that all its powers, as, for instance, the great powers of war and peace, of taxation, and the regulation of commerce, are limited, but that the number of powers granted is limited. The proper expression, then, is that it is a government of *enumerated* powers, rather than one of *limited* powers. The truth of this, as to the power of regulating commerce, is admirably demonstrated in the able and interesting exposition of the nature and extent thereof contained in the opinions of the judges in the great case of *Gibbons v. Ogden,* 9 Wheat., 1 (6 Curtis, 1), and as to the power of taxation, in the opinion of *Chief Justice Marshall* in the leading case of *McCulloch v. Maryland,* 4 Wheat., 316 (4 Curtis,

415). But it is the war power of the Federal Government which my argument requires me more particularly to consider. It is contained in the Constitution of the United States, Art. I, sec. 10, pars. 10, 11, 12, 13, 14, 15, and 17. This power is given in the most unlimited terms, the only restriction upon it being that, in raising and supporting armies, "no appropriation of money to that use shall be for a longer term than two years." (See paragraph 11 of the article and section referred to (332) above.) The first duty of a nation is that of self-preservation, and to that end "it has a right to everything necessary for its preservation." Vattel's Law of Nations, book 1, ch. 2, secs. 16 and 18. The framers of the Federal Constitution, being men no less distinguished for a profound knowledge of the principles of government than for patriotism, knew this, and acted accordingly. They were master workmen, and in the edifice of government which they erected they took special care that those for whose use it was intended should have ample means to protect it. Hence, we find in No. 23 of *The Federalist* Mr. Hamilton declaring that "the authorities essential to the care of the common defense are these: to raise armies, to build and equip fleets, to prescribe rules for the government of both, to direct their operations, to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. . . . This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it, and may be obscured, but cannot be made plainer, by argument or reasoning. It rests upon axioms as simple as they are universal—the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of any *end* is expected ought to possess the *means* by which it is to be attained." To the same effect speaks Mr. Madison in the 41st number of the same work: "Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, (333) to enter into a proof of the affirmative. . . . Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense. But was it necessary to give an *indefinite power* of raising *troops,* as well as providing fleets, and of maintaining both in *peace* as well as in *war?* The answer to these questions has been too far anticipated in another place to admit an extensive discussion of them in this place. The answer, indeed, seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety

could the force necessary for the defense be limited by those who cannot limit the force of offense? If a Federal Constitution could restrain the ambition or set bounds to the exertions of all other nations, then, indeed, might it prudently restrain the discretion of its own government, and set bounds to the exertions for its own safety."

The views of these eminent statesmen and patriots as to the unlimited extent of the war power conferred by the Federal Constitution upon the Government of the United States have never been called in question. An inspection of the Constitution of the Confederate States will show that the same unlimited war power has been conferred, and in almost the same terms, upon the Confederate Government. Thus, in Art. I, sec. 8, it is declared that "the Congress shall have power (par. 11) to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; (par. 12) to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; (par. 13) to provide and maintain a navy; (par. 14) to make rules for the government and regulation of the land and naval forces; (par. 15) to provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections and repel invasions; (par. 15) to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States, reserving to the (334) States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress; (par. 18) and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Confederate States, or in any department or officer thereof."

A government thus invested with the unlimited sovereign power of declaring war and raising and supporting armies, and possessing also the scarcely less restricted sovereign powers of taxation, of borrowing money, and of regulating commerce (see Constitution of the Confederate States, Art. I, sec. 8, pars. 1, 2, and 3), must have attached to it the right of *eminent domain;* for this right is an essential and inalienable attribute of sovereignty. It is so essential and so inalienable that the several States retained it as connected with their respective remaining sovereignties, notwithstanding the great powers which they surrendered to the general government, and notwithstanding they had also surrendered the power of passing any "law impairing the obligation of contracts." See *R. R. v. Davis,* 19 N. C., 451; *S. v. Glen,* 52 N. C., 321. "This right of eminent domain is the right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State. It is evident that this

right is, in certain cases, necessary to him who governs, and consequently is a part of the empire or sovereign power, and ought to be placed in the number of the prerogatives of majesty. When, therefore, the people confer the empire on any one, they at the same time invest him with the eminent domain, unless it be expressly reserved." See Vattell's Law of Nations, book 1, ch. 20, sec. 244. The Confederate Government
(335) must also possess, as an inseparable incident of its sovereign power to declare war and to raise armies, the right to command the services of all its citizens capable of bearing arms. "Every citizen (says Vattell, book 3, ch. 2, sec. 8) is bound to *serve* and *defend* the State as far as *he is capable.* Society cannot otherwise be maintained; and this concurrence for the common defense is one of the principal objects of every political association. Every man, capable of carrying arms, should take them up at the first order of him who has the power of making war." Other writers on government, of great eminence, have laid down the same doctrine. See the authorities referred to in the case of *Ex parte Tate,* decided by the Supreme Court of Alabama at its last January term.

As the Confederate Government possessed the undoubted right of *eminent domain,* those who framed its Constitution deemed it proper not to restrict the exercise of it, for that would have been highly impolitic, but to regulate it by declaring that private property shall not be taken for public use without just compensation. (See Constitution, Art. I, sec. 9, par. 16.) But there is no restriction nor regulation whatever in the Constitution on the power of the Government to command the services of all its arms-bearing population, unless it be deemed such that, for the raising and supporting of armies, there shall be no appropriation of money for a longer term than two years. (See Mr. Madison's article on this subject in No. 41 of *The Federalist.*)

If I have succeeded in showing, as I think I have, that the Confederate Government possesses the right of *eminent domain,* and has also the power of commanding the services in its army of all its citizens capable of bearing arms, I am prepared to prove that Congress had the constitutional power, by the act of 5 January, 1864, to call into the military service of the country the petitioner, Walton, notwithstanding he had previously furnished a substitute.

(336) The only obstacle in the way of my argument is the assumption, made by those who oppose it, that Walton, by procuring and putting into the army a substitute, as he was authorized to do by the act of 16 April, 1862, made a contract with the Government which the legislative department of that Government has no power to violate. Admitting, under a protestation, that a contract was made between Walton

and the Government, and further, that the effect of the act of 16 April, 1862, was not merely to grant an exemption as a matter of grace and favor, yet I insist that the Government had the power, whenever the necessities of the country should require, to annul and disregard it.

Let us see what is the nature of the right or interest which Walton acquired by virtue of his supposed contract. Was it property, or something in the nature of property, or a mere personal privilege? If it were none of these, I am at a loss to imagine what it was. The counsel for the petitioner say that it was property, a thing of value. Suppose it was: then the Government had an undoubted right to take it, upon making just compensation to the owner, as has already been clearly demonstrated. But it cannot be regarded as property in the sense in which that term is used in the Constitution. It cannot be "taken" from the owner. It cannot be liable to the payment of his debts; and yet it is a well established principle of law that a man cannot own property, in the proper sense of that term, of any kind, real or personal, in possession, in expectancy, or in action, legal or equitable, which cannot, in some way, or in some court, be made available by his creditors for the satisfaction of their demands. *Graves v. Dolphin,* 1 Sim., 66; *Piercy v. Roberts,* 1 Mylne and Keene, 4; *Snowden v. Doles,* 7 Sim., 524; *Mebane v. Mebane,* 39 N. C., 131; *Hough v. Cress,* 57 N. C., 295. It seems to me to be certain, then, that Walton's exemption from military service was not "property," which could be taken from him for (337) public use, and, not being such, there was no obligation on the Government to make compensation. As Walton's exemption from military service was not property in the sense of the Constitution, it must be regarded as a mere personal privilege, and as such it may be a thing of value. Still it was liable to the control of the Government by virtue of its right of *eminent domain,* or its power to command the services of all the arms-bearing population of the country. It cannot possibly escape the operation of one or the other of these two great prerogatives of government. Had it fallen under the first, then a just compensation would have been due to the owner; but being under the second, the Constitution makes no such provision in his favor. It resembles, in the respect of being personal and inalienable, the right which a person may have in an office, and it is clearly established that when the necessities or the good of the country require it, the office may be abolished, though the effect of it will be that the officer will be deprived of the emoluments without any claim to compensation on that account. *Hoke v. Henderson,* 15 N. C., 1; *Butler v. Pennsylvania,* 10 How., 416 (18 Curtis, 435). The necessities of a nation, as of an individual, have laws of their own, and that is the true meaning of the celebrated maxim, that "necessity has no law." It has a law, but it is the law of exception. "Thou shalt not

kill" is an injunction of the law, divine and human. "Thou mayest kill in necessary defense of thine own life" is a precept of the same law, of no less force than the other.

I have considered this case without adverting to the fact that Walton does not allege in his petition that he paid any money or other valuable consideration to his substitute to induce him to become such. If he were entitled to any compensation, then it would be difficult to ascertain the *quantum*. But the view which I have taken of the case renders
(338) it unnecessary for me to say any more on the subject. I have alluded to it only for the purpose of showing that I had not overlooked the allegations of the petition.

Having, as I hope, vindicated successfully the *power* of Congress to revoke whatever right or privilege Walton had acquired by his supposed contract with the Government, made under the sanction of 16 April, 1862, I will endeavor to show what was the true nature of the contract, if contract it were. Parties who enter into a contract necessarily do so with reference to the existing law. If they use terms apparently absolute, but to which the law annexes a condition, such condition will, of course, be implied. The distinction mentioned in the books between express and implicit conditions and express and implied contracts is founded upon this principle. So if one of the parties to the contract possesses the power (which under certain circumstances it will be its duty to exercise) to annul, the other party must necessarily be supposed to enter into the contract with the understanding that it may, under such circumstances, be annulled. The party having the power to annul must be taken to have reserved it, whether it be expressed in the terms of the contract or not, and the other party must be taken to have tacitly acquiesced in such reservation. Government is the only party which can have the right to annul a contract to which it is a party; and when the exigency arises which requires the avoidance—when it may be that the very salvation of the Nation depends upon such avoidance—the Government would be faithless to the great trust confided to it if it did not proceed fearlessly to the fulfillment of its duty. He who contracts with the Government, then, cannot complain that the Government avails itself of its power to put an end to the contract, in virtue of the condition impliedly annexed to it.

(339) These considerations have led me to the conclusion that Congress had the constitutional power to pass the act of 5 January, 1864, and that in doing so it did not violate its faith with the principals or substitutes by calling them again into the military service of the country. In coming to this conclusion, I have not availed myself of the authority of adjudication made by the highest tribunals in several

of our sister States; yet I think I might rightfully have done so. The law of Congress was intended to operate in each and all the Confederate States. It would be unequal and therefore unjust that it should take effect in some of the States and not in others. The State courts have, upon writs of *habeas corpus,* taken concurrent jurisdiction with those of the Confederate States, to decide upon the constitutionality of the acts of Congress, called the conscription acts, and with respect to them there ought to be as much uniformity of decision as is practicable. Impressed with this consideration, and knowing that the constitutionality of the act of 5 January, 1864, had been heretofore sustained by the Supreme Court of Appeals of Virginia, in *Burroughs v. Peyton,* 16 Grattan, 470; by the Supreme Court of Georgia, in *Doby v. Harris, Fitzgerald v. Harris, Howell v. Cohen,* Supplement to 33 Ga., 38; and by the Supreme Court of Alabama, in *Ex parte Tate,* I should have been reluctant to have concurred in making a different decision. The judgment of his Honor, the *Chief Justice,* rendered in vacation, was given before either of the adjudications to which I have referred was made known, and of course he could not have been influenced by that weight of authority which would now, were my convictions different from what they are, press upon me.

As my brother *Manly* concurs in the conclusion at which I have arrived in this case, the judgment given by the *Chief Justice* in vacation must be reversed with costs, and the petitioner, Edward S. Walton, be surrendered to the custody of the defendant, T. H. Gatlin. (340)

MANLY, J. The great importance of the subject, and the disquietude which it has caused in the public mind, induce me to add to the reasons of my brother *Battle* such as occur to me for the judgment we give. I shall do so briefly.

All contracts or engagements on the part of Government with individual citizens must, from the paramount nature of its duties to the public, be subject to conditions. Public necessities may arise which will require a modification or reversal of the policy out of which such contracts spring, and it will become the duty of the sovereign power to provide for such necessities by all means and at every hazard. Wherefore, if it be conceded that substitution, under act of 16 April, 1862, was a contract in the sense contended for, dispensing the conscript from further military service during the war, it was, nevertheless, a contract subject to the condition of which I speak. From the nature of the case, the Government, under its high responsibilities, must judge when this necessity comes; and Congress has accordingly declared in the preamble to act of 5 January, 1864, in obedience to which the petitioner was con-

scribed a second time, that it had come. "Whereas," it says, "under the present circumstances of the country, it requires the aid of all who are able to bear arms."

If any evidence were proper or needful to confirm the truth of the view taken by Congress, a survey of the situation at that time would convince any unprejudiced mind. A large portion of our States was occupied by a foreign foe. The invasion was established by a power stronger in all military appointments than ours, having an overwhelming population more numerous in the proportion of five to one, and large armies were mustered and marched into the country by every open avenue to pillage and waste the land and to subjugate its inhabitants.

Surely the time had come, if such a time can come, when the
(341) Government had a right to call upon every man to aid in its defense.

Authorities are abundant as to the rights and duties of the war power in such an emergency. Vattel, Burlamaqui, Wheaton, and Calhoun have been referred to, and are believed to be full and explicit upon the point that exigencies may and will most probably arise in the history of every community in which its entire resources in men and money may be needed to defend its existence, and that, in such case, it is the right and duty of the war power to call them into action. Every other consideration yields to self-preservation—the supreme law. Vattel, book 3, ch. 2; 2 Burlamaqui Nat. and Pol. Law, 151; Wheat. International Law, p. 85; Calhoun's Discourse on Government, p. 10.

Whatever restraints may be imposed in the Constitution upon the Government of the Confederate States in other respects, it is clear, in respect to the making of war, maintaining armies, and providing for the public defense, that they are unfettered. Of these matters that Government has sole charge, and it constitutes one of those high attributes of power upon the proper exercise of which its very existence depends. It cannot be abdicated, contracted away, or encumbered, but should be kept as a trust to be used for the public safety when there is need for it, unembarrassed by claims of private right. The power of the Government over persons, like that which it possesses over property in the right of eminent domain, is to employ every man, as well as every dollar, if need be, in defense. The Government is but the representative of the people, and it has, therefore, in substance, the right which the people have to call upon one another for aid.

These principles are reasonable, consist with natural law and with the law of the land, and should be present in the minds of all citizens making contracts among themselves or with the Government. They are

binding upon all, and need never, therefore, be carried into ex-
(342) press stipulation, for this could add nothing to their force. Every

contract is made in subordination to them, and must yield to their control as conditions inherent and paramount, whenever a necessity for their execution shall occur.

When Congress, therefore, calls upon a citizen, who under ordinary circumstances would be exempt, for military service in this emergency, to speak of it as a violation of contract seems to me to be a misuse of words. It is a condition of the contract, not arising out of its literal terms, but superinduced by the preëxisting and higher authority of the laws of nature, of nations, and of the community to which the parties belong.

The principle here asserted has been rarely discussed, or supposed to have any bearing upon the practical affairs of mankind, because the occasions have been rare in the history of the world which called for its practical application.

Subject to this intrinsic condition which attaches itself to every contract, I think they are binding alike between individuals and between Government and individuals. Government cannot be constrained by legal process to execute its contracts with individuals, but their fulfillment is nevertheless enjoined by the immutable laws of right and natural justice, which even governments are not at liberty to disobey.

There is no article in the Constitution of the Confederate States which forbids the Congress to pass an act impairing the obligation of contracts, and the courts could not, I take it, declare such an act inoperative. There is nothing in the organic law to prevent them from violating their own contracts but faith and honor, a sense of justice and of their own interests, which they cannot be supposed to want, and which constitute for them their rule of action.

I have considered the case thus far upon the hypothesis that a (343) contract was intended between the Government and the conscript.
I will now proceed to inquire whether that hypothesis be true.

It should be remembered that the petitioner was conscribed under the act of April, 1862, put in a substitute, as allowed to do by section 9 of that act, and was discharged. He was again conscribed under the act of January, 1864, sued out the writ of *habeas corpus* now under review, and was discharged by the judicial officer before whom he was taken.

The act under which the second enrollment was made is the well known act of 5 January, 1864, the preamble of which has been already quoted. No point has been made upon the constitutionality of conscription generally, but resistance is made to the act of '64 upon the ground that the furnishing of a substitute under the act of 1862, and his consequent discharge, was a contract of discharge for the war. The clause of the act allowing substitutes is in the following words: "Persons not liable to duty may be received as substitutes for those who are, under

such regulations as the Secretary of War may prescribe" (sec. 9, act of April, 1862). This is the charter of powers under which the enrolling officer acted in receiving substitutes; and the question is, Did it authorize, in any sense, a contract on behalf of the Government?

No regulation of the Secretary of War, or special language in the certificate of discharge, is believed to affect the question. None has been called to our attention. Indeed, with respect to both, I suppose the true inquiry would be, What was authorized by the law? Did it authorize an irrevocable exemption? The entire power of the officer, I take it, would be to declare the conscript exempt under the clause of the act in question, according to its true intent and meaning. To this test the acts of all ministerial officers should be brought. Within the pale of the law they are valid and binding; without, they have no efficacy.

(344) There have been many definitions of a contract. The one which seems to be fullest and most approved, and which has been elsewhere adopted in discussing this subject, is "an agreement upon sufficient consideration to do, or not to do, a particular thing, between parties able to contract, willing to contract, and actually contracting." The distinction noticed by *Judge Campbell* in his opinion in *Bank v. Knoop,* 16 How., 369, should be kept in mind, between statutes which create hopes, expectations, faculties, and conditions, and those which form contracts. Section 9 of the act of 1862 authorized the condition of exemption upon certain terms (the putting in of a substitute), and may have raised expectations that this condition would be allowed to continue through the term of service for which the enrollment was made. But it by no means follows that there was an engagement of the Government to this effect. It may be conceded that it was the wish and purpose of the conscript to make a contract, that it was indeed his understanding and intention; but this is not conclusive; mutuality of intention or assent is of the essence of a contract. Light may be thrown upon the question, whether there was a contracting on the part of the Government, by turning to the condition of affairs at the time this act of 1862 was passed, and by a consideration of the object it was intended to accomplish. The States were at that time pressed by a foe with superior forces and munitions of war, threatening by overwhelming numbers to surround and crush them as it were in the folds of a serpent. To meet this state of things the law was enacted. The Confederate Government must have been greatly in need of soldiers, and had in prospect an absolute want of the whole available physical force at their demand for defense. Is it probable the States would at such time have intended by contract to strip themselves of any part of their powers, and thus diminish their ability to make successful their defense?

Let it be remembered that the Government had the absolute (345) power to control the citizens for military duty, limited only by the exclusion of State officers; that it had actually resorted to the compulsory enrollment of a class of which the petitioner was one. A service was thus demanded of him, which he owed, and from which he had no escape as a matter of right. Why should the Government make any contract with him dispensing him irrevocably from duty, and weakening and fettering its military power? For it is easy to demonstrate that the principles of substitution, viewed as an irrevocable contract, must diminish the force of the Nation—cannot augment it.

When the legislative department seeks to enlist individual citizens in an enterprise promising public good, and enacts a law granting franchises and privileges to those who will associate and contribute the necessary capital, and citizens actually embark in the enterprise, it is properly regarded as a contract executed. In such cases it is manifestly the interest of the legislative body to bind the State to the extent indicated in the act, in order to secure favor from those who owe them nothing of the sort, time, labor, money, and skill. It is not so in the case of the conscript. The Legislature has unlimited authority to use his personal service. It has but to command, and he must obey.

If in a law exacting such service there be embodied a privilege of exemption, which cannot by any possibility promote, and must probably retard the end proposed, the reason for construing statutes into contracts utterly fails. In the one instance the Government descends from its high position and says to the citizen, Here is an object to be accomplished which will benefit the whole people, but which it is proper should be effected by private enterprise; if you will undertake it, I will grant you privileges which render the doing of it more profit- (346) able and easy. In the other, from its eminence of power, it says to them, The country is invaded, the national existence is menaced; you all owe military service; I bid you to the field. The one is the language of contract *"do ut facias,"* the other, that of command, *sic volo, sic jubeo.* No degree of clemency with which the Legislature may choose to temper the exercise of prerogative can transmute either command into contract, or its accompanying privilege into vested right. There might have been a contract between the principal and his substitute, but with that the Government had nothing to do, except to acquiesce in the same and accept the one man instead of the other. The transaction between them may possess the elements of a contract, but not so as between the Government and the principal. Where is the consideration, for instance, upon which it is based? The Government gets nothing; one man is but substituted for another. There is no damage or inconvenience wrought to the principal. Upon his motion he puts in a substitute,

which he prefers to doing personal service. No outlay of money is made at Government request. The conscript is accommodated. The Government gets no advantage, subjects no one to inconvenience. There is, therefore, not a semblance of a consideration moving between the Confederate States and the conscript. Indeed, it requires more ingenuity than I possess to perceive any one of the elements which constitute a contract in these substitute transactions. Other exemptions from military duty are allowed by the same acts of Congress, and conceded to be revocable, which appear to me on principle no less binding than that of substitution; for instance, the exemptions of persons engaged in manufactures and in the mechanic arts. These cases are quite as strong as those of exempts by substitution. In the former case the parties submit to sacrifices, from which the Government as well as citizens derive advantage; but in the latter there is no advantage accruing to the
(347) Government. I confess myself incapable of appreciating the logic which makes one of these exemptions revocable at will, yet throws around the other all the sanctity of inviolable compact.

Indeed, I discern in neither an intention on the part of Congress to bind the public irrevocably; but in both, the announcement of a policy which might last for a longer or shorter period, but determinable at the will of the Legislature.

Looking at section 9 of the act of 1862, it will be found there is no specified term of substitution or exemption, no declaration of legal consequences to ensue, nothing which savors of abdication or suspension of the power confessedly possessed by Congress over the conscript, and which it was the express object of the act to exert. The language of the clause is permissive and not mandatory, as in the other clauses, and the inference is that exemption by grace only was intended, to continue at the will of the Legislature. This will might reasonably be expected to prolong the exemption whilst, and only whilst, in the opinion of the Legislature, it should be compatible with the safety of the country. Parties might fairly hope that, without a change in the necessities of the States, they would not be again called upon to do military duty; but the Congress represents, in this exercise of power, a sovereign, and as such conscripted a portion of its citizens for military duty, upon the then existing considerations of policy, without annexing restraints on its will or abdicating its prerogative; and, consequently, was free to modify, alter, or repeal the requisition at will.

No engagement of an explicit or direct nature, on the part of the Government, is pretended. The engagement contended for is at best deduced from substitution by way of inference. This is against established laws of interpretation. Government is held to part with its powers only by express grant, never by implication. *Charles River Bridge v.*

Warren Bridge, 11 Peters, 548 (12 Curtis, 496); 2 Parsons on (348) Contracts, 506; 3 Parsons on Contracts, 552; *McRee v. R. R.,* 47 N. C., 186.

The direct authority referred to in the argument, *Commonwealth v. Bird,* 12 Mass., 422, was a case of military exemption. In a statute requiring certain extra military duties it was stipulated that those who performed them for the space of five years should be exempt from further military service for life. Bird had confessedly put himself in a condition to claim this exemption, and was in fact exempt for some years; but the exemption was afterwards revoked by statute, and the revocation was held to be legal.

We have been assisted in our consideration of the subject before us by cases of a like nature in the States of Virginia, Georgia, and Alabama, which seem to have been well considered. These cases decide the acts of April and September, 1862, and also the act of January, 1864, to be constitutional and valid.

They are entitled, I think, to much weight, and serve to confirm and strengthen the conclusion to which this Court has come. *Burroughs v. Peyton* and *Abrahams. v. Peyton,* 16 Gratt., 470, and matter of *Abrams, Fitzgerald, Daley,* and *Cohen,* in Georgia, Supplement to 33 Ga., 38, and matter of *Tate,* in Alabama, at Summer Sessions, 1864.

Reviewing, then, and condensing what has been said, I am of opinion:

1. That Congress, in the exercise of the war power, cannot grant permanent and irrevocable exemptions upon any terms whatever, and viewing such exemptions in the light of contracts, they must be subject to the condition, that if the public necessity require, they may be revoked, and that each successive Congress must judge of the necessity.

2. That the act of Congress of January, 1864, declared such a necessity then to exist, and therefore the revocation by that act of exemptions by substitution was valid and legal.

3. That section 9 of the act of April, 1862, did not authorize (349) exemptions as matters of contract on the part of the Government, but as matters of grace and favor; and that the policy of that act in this particular was subject to modification or repeal at all times at the will of the legislative body.

4. In conformity with these principles, I am of opinion that the act of Congress of 5 January, 1864, declaring that "no person shall be exempt from military service by reason of his having furnished a substitute," and the act of 17 February, 1864, which repeals all previous exemptions, both have the effect of repealing so much of the act of 16 April, 1862, as allows an exemption to any one furnishing a substitute, and are constitutional and valid. And the petitioner in this case, not-

withstanding he had furnished a substitute, is now liable to military service, agreeably to the provisions of said acts of 5 January and 17 February, 1864.

The decision below, discharging the prisoner, *is reversed,* and he is recommitted to the custody of Captain Gatlin.

PEARSON, C. J., dissenting: After a full argument at the bar, after reading attentively the opinions filed in the courts of Virginia, Georgia, and Alabama, and after a free discussion with my brothers *Battle* and *Manly,* the conviction that there is no error in the judgment rendered by me at Salisbury is unchanged. On the contrary, it is firmer, because I have now heard all that can be said, and am satisfied that the reasoning set out in the opinion filed in support of that judgment has not been, and cannot be, answered. I adopt it as my opinion in this case. (See that opinion in *Ex parte Walton,* hereto annexed.)

In regard to the decisions in the States referred to, being made *post litem motam,* they are not entitled to the weight of authority, and
(350) should only receive the consideration due to the reasoning offered in their support; and I must be allowed to protest against the position that the action of the courts of other States can have any legitimate bearing on the action of this Court. When North Carolina was called on to decide the great question of withdrawing from the Union, the action of the other States was a matter relevant to the question, because it was a *political* one; but ours is a question of law, the principles of which are fixed, and should not be influenced by collateral circumstances.

My brothers *Battle* and *Manly* have put the decision on the only ground which is unanswerable, "necessity knows no law"; for if the courts assume that the Government may act on that principle, there is no longer room for argument. We may put aside the "books" and indulge the hope that when peace again smiles on our country law will resume its sway. *"Inter arma silent leges."*

PER CURIAM. Reversed, and prisoner recommitted to custody of Captain Gatlin.

EX PARTE WALTON.

The opinion of *Pearson, C. J.,* in the case *Ex parte Walton,* referred to in the preceding case, is made a part of the same:

The writ issued 27 January, but the hearing was postponed under an arrangement with Col. Peter Mallett, commandant, etc., in order to have

a full argument. In August, 1862, the petitioner, being conscripted, put in a substitute; the substitution has been adjudged valid. The case, then, depends on the question, Had Congress power to pass the act conscripting men who have put in substitutes? The power of a judicial tribunal to declare an act of Congress unconstitutional, when it is necessary to decide the question in order to dispose of a case properly constituted before it, is settled. Acts of Congress not unfrequently involve questions purely legal, and the wisdom of giving this jurisdiction to the judiciary is manifest; for, besides the advantage of having (351) such questions passed on by those who have not become heated in the arena of politics, there is this further consideration: members of Congress are not elected because of their supposed knowledge of law, and those who have not devoted themselves to the science, however able they may be as statesmen, or eloquent as orators, are not presumed to be as good judges of law as men who have made it "a lifetime study." The courts, however, always presume an act to be constitutional, and do not declare it void except on the clearest conviction. Where, as in this instance, a dry question of the common law is involved, the judge is "more at home," and feels less embarrassment in dealing with the subject than when the question depends solely on the construction of the Constitution, as in questions of constitutional law the province of the judge and that of the statesman frequently run so nearly together as to make it difficult to distinguish the dividing line.

The power of Congress depends on the questions (1) Is substitution a contract? (2) Has Congress power to violate its own contract?

1. Is substitution a contract? This is a dry question of the common law, and should be considered without reference to politics. There are parties capable of contracting; there is a thing to be the subject of contract; so I suppose the only question that can be made is as to the *consideration.* "Gain to one and loss to the other party is a legal consideration." See *Coggs v. Bernard* and the cases cited in 1 Smith's Lead. Cases, 283. If I lend one my horse to ride to Salem, and he takes him and starts, I am not at liberty to follow on and take my horse from him; it is a contract of bailment, although done merely for his accommodation. If you agree to carry a package for me to Salem, and start with it, I can maintain an action for breach of contract should you be guilty of gross negligence, although I was to pay nothing, and it (352) was purely for my accommodation; your undertaking to carry it and my confiding it to you, is a consideration. So, if you fancy my horse, and I tell you I will not sell, but to gratify you I agree to let you have him, if you will let me have as good a horse, and the exchange be made, title passes by "contract executed," just as if you had paid me the price in money. So, if you are bound to work for me three years at

wages, and for your accommodation I agree to discharge you in consideration of $500, and the money is paid, or if I agree to discharge you in consideration of your putting another man to work in your place, and it is done, there is, in either case, a contract executed, and it can make no difference whether you pay me the money with which I may get another man to supply your place, or whether you pay the money to the other man and he takes your place. This is substitution. Really, the fact that it is a contract seems too plain for discussion; it is neither more nor less than an exchange or "swap," as it is commonly called. The Government agrees to discharge a man in consideration of his putting a sound, able-bodied man in his place, and it is done; this is a valid contract.

It is true, substitution is "a privilege," but it is a privilege offered at a stipulated price, which is paid. So it is a prvilege *paid for,* and that makes it a contract, and distinguishes it from an *exemption,* and because of this distinction, it is made a distinct clause in the *conscription act,* and is not put in the exemption act. Suppose Congress was induced to enter into the contract of substitution in reference to conscripts, in order to make conscription more palatable to the people, and as a means of relief in cases of unequal hardship, and, in reference to volunteers, the Secretary of War was induced to allow it in order to relieve some who, in a moment of enthusiasm, had entered the ranks and afterwards (353) found the service too hard for them; or suppose the inducement was that our citizens might procure able-bodied men from Ireland or Germany, and put them in the ranks as substitutes, while the citizen stayed at home and raised food and clothing; there is no principle of law by which the inducement can change the nature of the transaction or take from it the character of a contract. You are, by the terms of the contract, to furnish a sound, able-bodied man, and you do so; that is the *consideration;* one man is taken for the other, just as in an exchange for horses, one horse is the consideration for the other; and the fact that it is made for the gratification or accommodation of one of the parties does not in any way affect the legal question.

The ground that substitution is a "mere privilege" is that taken in the President's message and in the debates in Congress, and that was the point mainly relied on by Mr. Kittrell and Governor Bragg in their able and learned argument on the part of the Government. For this reason I have given to it the most anxious consideration, and feel fully convinced that, although substitution is a privilege, yet, as by the agreement it was to be paid for, and the stipulated price has been paid and accepted, it is, to all intents and purposes, an executed contract according to the common law.

It is said Congress will not be presumed to have made a contract by which to deprive the Government of the services of those men during the war. Allow such to be the presumption, it is rebutted by direct evidence. Congress has agreed to the contract of substitution in plain and unequivocal words, so as to leave no room for construction or doubt.

Again, it is suggested, "the manufacturer is exempt upon the condition that he will dispose of his fabrics at rates not higher than 75 per cent added to the cost of production; he promises to manufacture and sell at the reduced price. Here is a privilege paid for." *A condition* is *annexed* to a gratuity, gift, or sale, by which it may be defeated; (354) a *consideration forms a part of the contract itself;* this is the distinction. But, it is true, they sometimes run into each other, and the conditions may constitute a consideration when, from the words used, that appears to be the intention. Whether this be the case in regard to that class of exemptions in which a condition to work at certain rates is imposed on mechanics, is a question not presented; for, take it to be so, it will only add to the list of contracts which Congress has entered into; unless an exemption be made on the ground that this is granted merely as *an exemption,* and no plain and unequivocal words of contract are used, as in the case in regard to substitution. It certainly has not the weight of an argument *in absurdum,* and that is the only point of view in which it can have any bearing.

It is also suggested, "a blacksmith, who has enlarged his business in consequence of his exemption, may say he cannot rightfully be disappointed. A similar argument was urged by Mr. Webster, to justify his change of opinion on the subject of the tariff. He said the New England States had engaged in manufacturing on the faith of the action of the Government in passing the tariff, and they, therefore, had a right to have their manufactures protected." The case of the blacksmith, like that of the tariff, presents simply a *political question*—shall the Government disappoint a reasonable expectation based on its prior action?—not a dry question of law. Mr. Webster, in his speech, puts it on the political ground, and nowhere intimates that the prior action of the Government amounted to a valid, legal contract. One may have reason to expect a legacy and complain should he be disappointed, but he has no *legal* claim, because there is no contract.

2. Has Congress power to violate its own contract? The power (355) of Congress is limited by a *written* Constitution. It has no power except what is conferred by that instrument, and it contains no such power, either expressed or implied. Indeed, it is excluded, for the power to make contracts, for instance, "to borrow money on the credit of the Confederate States," if there be also power to violate it, would be nugatory. No government can have power to violate its own contract, except

under the rule, "might makes right." The power to violate its own contract, or, in other words, the right of "repudiation," has never been claimed by the Confederate States, and I had supposed it was conceded by all that it did not have the power. But I am asked, "Cannot the Confederate States, in a case of extreme necessity, violate its own contract—not with reference to morals, but to the supreme power of the Government—and has the Government of the Confederate States less, and if less, how much less, power than other governments, in a case of extreme necessity?"

The other governments referred to have no written Constitution, and may act on the broad and arbitrary rule, "the safety of the State is the supreme law"; but the Confederate States has a *written Constitution,* which all officers *are sworn to support.* This Constitution, and laws made in pursuance thereof, is "the supreme law." The Constitution, being *written,* can neither bend nor stretch, even in a case of extreme necessity. It is not only written and supported by oaths, but so extreme was the caution of its framers as to provide, "All powers not herein delegated to the Confederate States, or prohibited to the States, are reserved to the States respectively." In some few instances large powers are conferred to meet extreme cases—for instance, the power to suspend the writ of *habeas corpus,* "where in cases of rebellion or invasion the *public safety* may require it," thus excluding, even in the case of "extreme necessity," any power other than those "nominated in the bond."

(356) Again, I am asked, "Admit substitution to be a contract, the power of Congress is limited by a written Constitution: where is the power to make a contract of substitution by which the Government gives up its right to the services of able-bodied citizens for the public defense in a case of extreme necessity, conferred by the Constitution, either in express words or by implication? The word *substitution* is not to be found in that instrument."

In reply, I might ask, Is the word *conscription* to be found in the Constitution? This is a Yankee mode of meeting one question by asking another, which the gravity of the subject forbids. I prefer to meet the question squarely, because I appreciate the motive which prompted it, and recognize it as fair reasoning. The power to conscript is supposed to be conferred by "the power to raise armies," in connection with the general authority "to pass all laws which shall be necessary and proper to carry that power into effect"; and in adopting the means to raise an army by conscription, it follows that Congress has power to modify the means in such manner as to make it injure the public as little as possible, and to produce as great collateral benefit as possible; in other words, to modify conscription by allowing substitution, so as to make it answer the purpose of raising an army and at the same time relieve in cases of

unequal hardship, and collaterally benefit the public by providing the means whereby the citizen might be left at home, to raise food and clothing for the soldiers, and "thus *support* the army" at the same time, that the full complement of soldiers may be kept up by substitutes brought from abroad, or found among those who are not liable to military service. Suppose Congress, in its wisdom, had required, as the consideration for substitution, that *two* able-bodied Irishmen or Germans should be put in the place of the citizen, would it have occurred to any one that the power to conscript did not necessarily include the power to allow substitution on such terms? The greater includes the less.
And it will be remembered that substitution is not a new thing; (357) it is prominent, and taken to be a matter of course in all prior legislation, both in this country and in England. Where "the militia" is looked on as a mode of defense in cases of invasion or rebellion, and where conscription was made to take the place of the militia organization, as a matter of course it was accompanied by this prominent feature.

Mr. Kittrell, on the argument, treated the subject in a different light. He assumed substitution to be a contract, but insisted Congress had no power to make that particular sort of contract, on the ground that it would be "political suicide," for, said he, "if Congress has power to deprive the country by its contract of the services of 1,000 of its citizens, it may extend it to 100,000, and 500,000, and so we would have no citizen soldiers!" Whether it would amount to "political suicide" to have a condition of things in which 500,000 Irishmen and Germans would be in the army, to fight our enemy, while a corresponding number of citizens were at home raising food and clothing, and paying taxes to support this army, is a question into which a court is not at liberty to enter. I will observe that this mode of reasoning, by supposing extreme cases, is not apt to lead to truth, and is very apt to cover fallacy (as it manifestly does in this instance), for, allow that, in the extreme case put, it would be political suicide, does it prove a *want* of power, or an *abuse* of power? That's the question. If Congress has the power, whether it will so exercise it as to commit suicide, or to stultify itself, is a matter with which the courts have no concern, and a proper respect for a coördinate branch of the Government forbids the judiciary from making an extreme supposition in order to express a conjecture how far a power may be so abused as to avoid it and require the courts to say it shall not be exercised under that head of jurisdiction by which the courts prevent madmen or idiots from injuring themselves or "wasting their substance." (358)

Congress has power to borrow money on the credit of the Confederate States. It has (I believe) borrowed $15,000,000, and

pledged the export duty on cotton. It had power to do so, as a means necessary and proper to enable it to borrow the money. Run out this reasoning by supposing extreme cases. Congress borrows 150 millions more, and pledges the export duty on tobacco; it then borrows 150 billions, and pledges all export and import duties, and all money that may be raised by direct taxation; this might be political suicide or stultification, and after the money is spent, the Government would have "no assets," and no means of raising any; but will any one venture to aver, on this reasoning, that Congress had no power to borrow the 15 millions and pledge the export duty on cotton? The announcement of such a proposition would startle the commercial world.

Take a case near home: Governor Morehead proposed a plan by which to enable the Government to borrow 400 millions, in consideration, among other things, that the bonds should not at any time be liable to taxation, thereby withdrawing that amount of the wealth of our citizens from liability to support the Government in all time to come. Many said it would be unwise in Congress to withdraw that amount from liability to taxation, but no one ever suggested that Congress did not have power to make the contract; and yet brother Kittrell might run out his mode of reasoning so as to show that Congress might in this manner abuse its power and reduce itself to absolute beggary; *ergo,* Congress did not have the power!

It is gratifying, however, to know that I am not under the necessity of relying on my own judgment in deciding this question. The "inviolability" of a contract, whether made by the Confederate States, or
(359) the State, or an individual, is uniformly upheld by the decisions of our Supreme Court, in a tone of firmness that is gratifying to every one. Search from Haywood's reports to Jones', and you will nowhere meet a decision, or a *dictum,* or an intimation, that the State has power to violate its own contract, or to avoid or repudiate it, on the ground that the power has been or might be abused. To mention a few: *S. v. Matthews,* 48 N. C., 351, where the Court say, if the State has made a *contract* allowing the bank to issue "one-dollar notes" in so many words, the State is bound; *McRee v. R. R.,* 47 N. C., 186, where the Court say, "If the charter grants the monopoly, and the railroad bridge or structure comes within the meaning, it is a contract, and the State is bound, unless the effect of the revolution and our bill of rights was to introduce a new order of things, and avoid all such monopolies"; *Attorney-General v. Bank,* 57 N. C., 287, where it is *decided,* "Where a price is stipulated in the grant of the charter, it is the *consideration* for which the sovereign makes the grant and cannot be increased; to levy a tax on the bank is to add to the stipulated price, and therefore an act of the

Legislature imposing such a tax is in violation of the Constitution, and void." Here is a thing withdrawn from the power of taxation by force of contract.

I have heard some express the opinion that it would have been better not to have made a Constitution for the Confederate States until after the war was over! It is sufficient that it was deemed wise to frame a written Constitution, with a grant of such powers to the Confederate States as are supposed to be ample enough to meet the emergency of the invasion and carry us through the war. The Constitution has been adopted and we are sworn to support it.

The only authority relied on to support the position that Congress has power to violate its own contract is the decision of his Honor, *Judge French,* in the *Matter of Williams.*

The question is, Does that decision settle the law, or should it (360) be overruled? I am aware that, in the opinion of the Secretary of War and of his Excellency Governor Vance, the decision of a single judge on *habeas corpus* questions is only binding in the *particular case,* and I infer from the fact that none have filed opinions except *Judge Heath* and *Judge French* in this instance, that other judges take the same view; but in my opinion it is also entitled to the weight of "the authority" of "an adjudicated case," as settling the law until the judgment be reversed or the principle is overruled; for it is the decision of a tribunal of superior general jurisdiction over the subject, without appeal.

The power of a tribunal having equal and concurrent jurisdiction to overrule a decision is conceded. It is a *judicial* function made necessary by the imperfection of human judgment, and must be exercised in order to secure correctness of decision. True, uniformity as well as correctness are to be desired; but the former is secondary, must yield when it appears that a court has fallen into error; and the sooner error is corrected, the better, for it will spread and become the source of other errors. *Williams v. Alexander,* 51 N. C., 137. On consulting his books, a lawyer is sure to find "cases overruled," as instances: *Stowe v. Ward,* 12 N. C., 57, is overruled by *Ward v. Stowe,* 17 N. C., 509; *Wagstaff v. Smith,* 39 N. C., 1, by *Northcot v. Casper,* 41 N. C., 303; *Spruill v. Leary,* 35 N. C., 225, by *Myers v. Craige,* 44 N. C., 169. But the jurisdiction should be exercised sparingly and only when *palpable error* is shown. Several circumstances were relied on by Messrs. Gilmer and Boyden as tending to weaken the authority of the decision in *Williams' case.* It conflicts with two decisions before made by his Honor, *Judge Heath,* in the *Matter of Farmer,* decided June, 1863, and in the *Matter of Ricks,* published August, 1863. The opinion in *Williams' case* does not show error in either of these decisions, and, in fact, (361)

takes no notice of either adjudication. So there is a conflict, and the decision now to be made is to settle the difference between *Judge Heath* and *Judge French,* by overruling one or the other. Greater respect is due to a decision made after full argument than to one made hastily and without argument. At the time the decision was made by his Honor, *Judge French,* this case was pending, and the hearing postponed in order to have a full argument, and if the first decision be *conclusive* of the law, it might tend to produce the indecent spectacle of "a race" as to who should get the first judgment; and it was stated on the argument that in *Williams' case* the writ was issued, returned, and the decision made on Friday, 29 January, and the opinion filed in time to be sent 40 miles and published on Monday, 1 February, showing haste, or else that the question was prejudged.

Putting these considerations out of view, I take on myself the *onus* of showing palpable error. The first thing that strikes any one who reads the opinion attentively is the fact that his Honor does not deny that, according to the principles of common law, *"substitution* is a *contract."* He says not one word about its being a *mere privilege*—which is the ground on which the matter is put in the President's message and the debates in Congress; but yielding that point, and assuming substitution to be a contract, he boldly takes the position—one which no politician, lawyer, or judge had ever before taken—that the Government of the Confederate States has power under the Constitution "to violate its own contract"; in other words, he avows the right of repudiation, and covers his position by setting forth an array of general principles which he supports by a long list of references. I shall only notice two of the cases cited, being decisions of our Supreme Court: *S. v. Matthews,* 48 N. C.

451. The charter of the Bank of Fayetteville does not authorize
(362) it, in so many words, to issue one-dollar notes. Had such been the fact, there would have been no room for construction, and the Court would have decided that the act of the Legislature was void as violating a contract; but such was not the fact. The charter authorizes the bank in general terms "to receive deposits," "discount notes," and "issue notes for circulation," *without saying of what denomination;* and the Court came to the conclusion that by a fair construction the power to issue one-dollar notes did not form a part "of the essence of the contract," but was "a mere incident" intended by the parties to be subject to future legislation, on the ground that the Legislature will not be presumed, from the use of general words, to give up, by *a contract,* its power to regulate the currency; but this presumption may be rebutted by positive, that is, by the use of plain and unequivocal terms of contract, as if the charter had specified "one-dollar notes," thereby making the evidence of a contract as positive as is done by the words used in the

act of Congress in regard to substitution. His Honor, in what purports to be a quotation from the opinion of *Pearson, J.*, does me great injustice. I set out two alternative positions: "Is authority to issue small notes, conferred by the charter, *as a part of the essence of the contract, with the intention to put it beyond the control of all future legislation?* or is it conferred *as a mere incident,* with the *intention that it should be subject to such limitations as the Legislature might at any time thereafter deem inexpedient, etc.?"* He does not set out both of these positions, or either of them, but confounds them together; takes the words "as a part of the essence of contract" from the first, and substitutes them into the second, in place of the words "as a mere incident," which he omits, and this mars the sense and makes nonsense of it, and represents me as saying: the authority to issue small notes is conferred by the charter "as part of the *essence of the contract,* with the intention that it should be *subject to future legislation,"* and that this is so plain (363) that a mere statement is sufficient to dispose of it. I must be allowed to object to this mode of treating the opinion of judges. *McRee v. R. R.,* 47 N. C., 186. The statement made by his Honor keeps in the background the prominent fact on which the case turns, that the structure—a bridge erected by the company—was a mere *continuation of the road* across the river; no toll was ever received on it as a bridge, and it was used in every respect as any other part of the road, and the decision is put on the ground that a structure or bridge of this sort was not in contemplation of the parties, and was not embraced by the contract. As his Honor admits substitution to be a contract, I am unable to see how these cases have any application to his position, that the Government may violate its own contract. I have not examined the many other references; indeed, it is unnecessary, for I concur in the correctness of "the general principles" in support of which they are cited; and the labor and research bestowed on these general principles only tend to prove that no case can be found to support the particular position on which his decision rests.

In support of his position, his Honor takes two grounds:

1. "There is nothing in the Constitution of the Confederate States which prohibits Congress to pass laws violating the obligation of contracts, though such a power is denied to the several States;" therefore, Congress may violate its own contract—a *non sequitur.* The important distinction, that the States have all legislative powers except such as are prohibited, whereas Congress has no power except it be conferred by the Constitution, is entirely overlooked. As the States have all powers except such as are prohibited, a prohibition in regard to the States was necessary. As the Confederate States has no power except it be conferred by the Constitution, a prohibition in regard to the (364)

Confederate States was unnecessary; all occasion for a prohibition is superseded by the article which provides, "The powers not delegated to the Confederate States by the Constitution nor prohibited by it to the States are reserved to the States respectively." So the conclusion drawn from the absence of a prohibition in respect to the Confederate States is illogical and palpably erroneous.

2. "The Congress shall have power to raise and support armies, to make rules for the government of the land and naval forces," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Confederate States, in any department or officer thereof."

The reasoning is this: the act of Congress conscripting men who have put in substitutes is necessary and proper to carry into effect the power to raise armies; therefore, Congress has power to violate its own contract; a *non sequitur*. His Honor fails to take into consideration the fact that the supposed necessity is caused by the act of Congress which allows substitution as to conscripts, and the act of the Secretary of War, 20 October, 1861, which allows substitution as to volunteers. He fails to consider that the clause to make all laws which shall be necessary and proper for carrying into execution the powers conferred by the Constitution has never before been supposed to be a grant of a *general substantive power*, but is confined to *the means* of giving effect to the powers already conferred, and is merely the expression, out of abundant caution, of what would have been implied; and he fails to consider that the word "proper" is added to the word "necessary"; so the measures adopted must be both necessary and proper, and certainly, however great the necessity may be, it never can be *proper* for the Government to violate its
(365) own contract; and he fails to consider the consequence to which his doctrine leads—nothing more or less than this: Congress has power to do whatever it pleases in order to raise and support an army!!! It may repudiate its bonds and notes now outstanding, a renovated currency being necessary to support the army, or it may conscript all *white women* between the ages of 16 and 60 to cook and bake for the soldiers, nurse at the hospitals, or serve in the ranks as soldiers, thus uprooting the foundations of society; or it may conscript the Governor, judges, and legislatures of the several States, put an end to "State Rights," and erect on the ruins a "consolidated military despotism."

So the fact of subjecting principals of substitutes to military service sinks into insignificance when contrasted with the consequences to which the grounds on which the decision is put must lead, and for which the decision, if not overruled, may be cited as authority. I am convinced, then, there is not only palpable error in this second ground, but it is de-

structive of society and subversive of our Constitution. For these reasons, I do not consider the case of *Williams* as an authority, and for the reasons above stated, I have the clearest conviction that Congress has not, under the Constitution, power to pass the act in question, and feel it to be my duty to declare that, in my opinion, it is void and of no effect.

No one can regret the necessity for this conflict of decision more than I do. What is to be its effect is for the consideration of others. It may be to leave the law unsettled, and that a "judgment of discharge" on *habeas corpus* will, as heretofore, be treated as binding only in the particular case. I suggested to Governor Vance, to meet a condition of things like the present, the propriety of calling the attention of the Legislature, at its last session, to the expediency of amending the law so as to allow appeals in *habeas corpus* cases, and make it the duty of the *Chief Justice,* under certain circumstances, to call an extra (366) term of the Supreme Court. No action was taken by the Legislature. So I have no power to call a term of the Court, and the other two judges concur with me in the opinion that as the Supreme Court has jurisdiction, the law does not authorize a convocation of all the judges in vacation. My duty is plain, to decide the cases before me, according to the best of my judgment.

I must be permitted to express my obligation to the learned counsel, Messrs. Bragg and Kittrell, who argued on the side of the Government, and Messrs. Gilmer, Boyden, Scott, and Caldwell, who argued on the side of the petitioner, and Messrs. Moore and Fowle, who filed written arguments, for the assistance they have rendered me. I feel that I have heard all that can be said on both sides of the question; and if I have failed to arrive at a correct conclusion, it is because the power of judgment with which nature has gifted me, aided by a lifetime study of the principles of the law, does not enable me to make legal deductions.

I will add that the pains taken by the officers of the Government to have the question fully argued before a judicial tribunal affords a grateful assurance of a desire to have the rights of a citizen ascertained and protected by an adjudication according to the Constitution and laws.

It is, therefore, considered that E. S. Walton be forthwith discharged.

Cited: Smith v. Prior, post, 418; *McDaniel v. Trull, post,* 400; *In re Long, post,* 536; *S. v. Miller,* 97 N. C., 454.

APPENDIX

OF

CASES DECIDED BY JUDGES IN VACATION

IN THE MATTER OF ROSEMAN.

A writ of *habeas corpus* will be granted for the relief of persons unlawfully detained as conscripts, notwithstanding the act of Congress suspending the writ in certain cases.

PEARSON, C. J. The petitioner states he had put in a substitute, and being advised he is not liable to conscription, applies for a writ of *habeas corpus*. I had considered the provisions of the act suspending the writ of *habeas corpus*, and issued many writs before the decision of brother *Battle* in *Long's case*. After reading his opinion, I still think it the duty of a judge to issue writs, and it is proper to give my reasons.

The first section of the act specifies *the cases* in which the writ is to be suspended; the third section provides *the mode* in which the suspension is to be effected. The question depends on its construction. "No military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to appear in person, or to return the body of any person detained by him by the authority of the President and Secretary of War; but, upon the certificate under oath of the officer having charge of any one so detained, that such person is detained by him as a prisoner for any of the causes hereinbefore specified, under the authority aforesaid, further proceedings under the writ of *habeas corpus* shall immediately cease and remain suspended so long as this act shall continue in force."

(369) This section was evidently intended to apply to all cases arising under the act, and provides the mode for carrying it into effect. It was known to Congress that by the law of the State, judges are required under a penalty of $2,500 to issue the writs, and the object of this section is, while not interfering with that imperative duty, at the same time to give effect to the act, by suspending *further proceedings* on a certain state of facts. The writs are to issue as before, and *further proceedings* to cease on the certificate of the officer. No officer shall be *compelled* in answer to any writ of *habeas corpus* to appear in person, or to return the body. This assumes that writs will issue, but the officer shall not be compelled, by a *rule*, to make return according to the exigencies of the writ, but, in lieu thereof, is to file a certificate, under oath, and thereupon further proceedings shall cease. This takes it for granted that the proceeding is to go on until it arrives at that stage.

NOTE.—The cases in the appendix were reprinted from the newspaper reports of them.

The certificate is to be made *under oath,* as a protection to the citizen. There is no provision that in any of the cases specified it shall not be lawful to issue a writ. I am not aware of any principle of law by which a judge is at liberty to adopt a construction enlarging one section or restricting another, so as to deprive the citizen of a safeguard provided by an act which is to override all individual rights coming in conflict with it; although the judge may suppose this safeguard will, in the end, be of no avail, that question does not arise at the outset. Is this a *remedial* act to be construed liberally? My impression is it is an act in derogation of common right, and is to be construed strictly; at all events, the man, in my opinion, is entitled to the writ, and to proceed as he may be advised.

According to my views of the subject, the question of construction is not now presented, and I will not now enter into it. My brother *Battle* construes the words in the clause of the first section, "marked with a number 5," and "all attempts to avoid military service," so as to include the case of a person who, not being liable to conscription, (370) applies for a writ "for the sole purpose of establishing his claim to exemption," and arrives at the conclusion that as the *application* in such a case is one of the causes mentioned in the act, upon the man's own showing he is not entitled to the writ. Our statute required the writ to issue on *"probable cause."* The act of Congress does not expressly prohibit it, so if the facts alleged raise a question of law, unless it has been settled, and admits of no question, and is frivolous, the writ must issue. The party asks that "the matter may be inquired of," and, as it seems to me, the judge should grant the writ, unless he can say, "It is too plain to talk about." The proposition, that the mere application for a writ is one of the causes mentioned in the act, is startling! It might be said this extreme construction is not a necessary one, and the proper construction is to include only those persons who, whether liable or not liable, attempt to *avoid* military service by keeping out of the way, taking to the woods, instead of coming up and appealing to the courts to decide upon their rights, giving to the word "avoid" the sense it has in the English statutes of bankruptcy, where a debtor attempts to avoid his creditors by keeping out of the way, secreting himself, etc.; that if the mere application for a writ is an attempt to avoid military service in the meaning of the act, the certificate of the officer under oath is superfluous, for that fact is patent; whereas, if keeping out of the way is meant, the oath would have significance, and show the true cause of detention, and there is an incongruity in making the application a cause of detention, as it is a *consequence* and not the *cause;* that several well settled rules of law favor this construction—"where some particulars are enumerated, general words must be confined to acts

ejusdem generis." Here is a deserter harboring deserters—encouraging desertion. Keeping out of the way is an act somewhat of the
(371) same sort, but it is a strange association to class with crimes and misdemeanors the mere act of applying for a writ. Congress will not be presumed to intend an extreme exercise of power, or to exercise a doubtful power, unless the intention is expressed in plain and direct words. There is no precedent in this country or in England where the privilege of the writ has ever been suspended in *civil cases.* All the precedents are in cases of *political offenses,* treason, sedition, and the like.

I will not pursue the subject further, my purpose being merely to show that matter worthy of consideration may be urged against the construction of his Honor; so in my opinion I am not warranted in adopting the summary mode of refusing the writ, and am bound to pursue the mode provided by section 3.

There is another view. The certificate, besides the cause, must set out that the man is detained *as a prisoner* under the authority of the President or Secretary of War. How can a judge know this fact judicially unless it is certified? The petitions presented to me state that a substitute had been put in, and the party, being advised he is not liable to conscription, prays for the writ, that the matter may be inquired of. I cannot know, as a judge, that an order, either special or general, had been issued to detain the man as a prisoner for applying for the writ until the certificate of that fact is filed.

It may be the writ will be of no benefit to the petitioner. Whether the officer has it in his power, by the generality of the certificate, to exclude from the judiciary the question of construction, and whether it was the intention of Congress to enable him to do so, are questions not presented at this stage of the proceedings, and which can only arise on the filing of the certificate. I cannot refuse the writ.

Cited: In re Spivey, post, 541.

IN THE MATTER OF HUNTER.

A dentist is a physician, within the meaning of the act of Congress, and is exempt from conscription by reason thereof.

PEARSON, C. J. The petitioner is 37 years of age. In 1856 he graduated at "Philadelphia College" as a *surgeon dentist,* and has ever devoted himself exclusively to the practice of his profession, in which he is skillful, and in fact eminent.

The act of Congress exempts "all physicians who now are and for the last five years have been in the actual practice of their profession."

The question is, Does the word "physician" embrace a surgeon dentist?

In a restricted sense, "physician" means one who administers medicine to cure disease, but in its proper sense it has a broader signification, and means one who by a knowledge of the nature and structure of the human system, and of the nature and properties of substances, cures the injuries and diseases to which it is subject.

It is derived from a Greek word, *"phusis,"* nature—which is the root of many other words: "physic," medicine; "physic," to treat with medicine, to evacuate the bowels, to purge; "physic," the science of nature and of natural objects; "physical," pertaining to the material part or structure of an organized being, as "physical strength," "physical force," as distinguished from "moral force"; "physiology," the science of the functions of all the different parts and organs of animals and plants, the offices they perform in the economy of the individual, their properties, etc.

To say of a substance having the property to evacuate the bowels, it is a "physical herb," is not as appropriate as a "medical herb," because it uses the word "physical" in its narrow sense.

From its derivation, I am satisfied I have given the word phy- (373) sician its proper definition, and it includes not only "doctors" who administer medicine and physic, but "surgeons" who, by a knowledge of the nature and structure of the human system, are able to amputate an injured and diseased limb, or to extract a ball with skill and as much safety to life and as little pain as the case admits of. So the question is narrowed to this: Does a surgeon dentist come under this definition of the word "physician," or is he a mere mechanic, who cleans, plugs, and extracts teeth without the aid of science?

As the question was new and had not, so far as I could learn, been decided, I adjourned the case and required evidence to be taken as to the course of instruction at dental colleges, the knowledge it was neces-

sary to acquire in order to obtain a diploma and to practice with skill, and any other facts calculated to aid in the solution of the question, Is a dentist a machine merely, or a *surgeon,* devoting himself exclusively to one branch of the profession?

The depositions of many eminent gentlemen of the profession are filed; they all state that the course of instruction at the college includes anatomy, physiology, and *materia medica,* and a knowledge of all of these sciences is necessary to obtain a diploma and enable the party to practice with skill; and I concur in the opinion that a dentist is a "surgeon, devoting his practice to a specialty." With the aid of these depositions, and the argument filed by Mr. Fowle for the petitioner, I am satisfied that a regular graduated dentist is a "physician." I will add, that all who remember the time when "the doctor" carried in his saddle-bags that horrid instrument, a "pullican," and extracted teeth by main force, frequently bringing with it a part of the jaw-bone, will (374) readily admit that the division of labor has contributed greatly to the improvement of this branch of the science and the safety and ease of the patient; for now, instead of the "pullican" and brute force, there are various instruments fitted for each particular case. Teeth are often saved by removing the decayed part and filling and plugging; and new teeth are inserted, adding as well to the comfort as to the looks of the individual; and if a tooth has to be extracted, the "surgeon dentist" by his knowledge of "physiology" ascertains the condition of the system, and by his knowledge of "materia medica" administers the necessary alteratives to put it in proper condition; and by his knowledge of anatomy finds how the tooth is inserted in the jaw-bone, and knows what instrument will extract it with as little pain as possible, and without injury to the bone; and the depositions state that frequently surgeon dentists are called in to perform delicate operations on the "facial parts" (the upper and lower jaw-bone) which requires an intimate knowledge of the structure of the bones and the location of the arteries, veins, and nerves. In short, the teeth being more subject to decay and disease than any other part of the human body, I am satisfied, not only that regular educated surgeon dentists are physicians, but that the human family are much indebted to them for confining themselves to a "specialty," that is, one branch of the profession, whereby that which was some years ago a mere mechanical art has become a useful and important science.

It is therefore considered by me that John W. Hunter be forthwith discharged, with leave to go wheresoever he will.

The cost, to be taxed by the clerk of the Superior Court of Forsyth County, will be paid by J. H. Anderson. The clerk will file the papers in his office and give copies.

At Richmond Hill, 4 December, 1863.

(375)

IN THE MATTER OF WILLIAM WYRICK.

(1 Winst., 450.)

1. A conscript who has furnished a substitute under the act of Congress is exempt from military service.

2. He is entitled to be discharged under *habeas corpus*, although after furnishing a substitute he has been forced to serve sixteen months in army, and is absent from his command without leave when he sues out the writ.

PEARSON, C. J. The petitioner, before the passage of the conscription act, volunteered for the war in a company which Captain Shober was raising in Guilford, put in a substitute for the war, and was discharged; afterwards, notwithstanding his discharge, he was enrolled as a conscript and taken to the Army of Virginia, where he served sixteen months; last fall he came home on sick furlough, refused to return at the expiration of his time, was arrested, and sued out this writ. While in service, he had received pay, clothing, and rations, but had not received bounty.

The enrolling officer insisted that the petitioner being absent from the army without leave, could not be heard to claim a discharge until his offense was disposed of by a court-martial, and relied on *Graham's case*, 53 N. C., 416. In my opinion, that case does not apply. Graham entered the army by enlistment before he was 21 years of age, and being under arrest for some collateral offense, sued out a writ, seeking to avoid his contract of enlistment on the ground of infancy. It was held that he could not be heard until the offense for which he was under arrest was disposed of by court-martial. Graham went into service voluntarily, and was rightfully a soldier until the contract was avoided; his offense was a collateral act, having no connection with the validity of his enlistment. The petitioner was taken to the army against his consent; the matter, as he alleges, was void *"ab initio"*; the supposed (376) offense grows out of and depends on the question whether he was rightfully a soldier or not; and that is the point put at issue by this proceeding. It would be strange if the Court, before it can try the question, is required to assume, in favor of the Government, that the petitioner is rightfully a soldier, and on that ground to remand him to be tried before a court-martial for an act the character of which depends on that very question! "No one shall take advantage of his own wrong" is a maxim of law. Suppose the petitioner was not liable to conscription, the act of the Government was wrongful, and his act in leaving the army in order to assert his right before a judicial tribunal of his

country is justifiable, because made necessary by the first wrongful act of the Government. To refuse to hear him would be to enable the Government to take advantage of its own wrong, and amount to a denial of justice.. See how it would work: a man leaves the army, comes home and appeals to a court to try the question whether he is rightfully a soldier or not; the court refuses to hear him; he is sent back to the army in Virginia, tried by a court-martial as a deserter, and executed to deter others from like acts; that is the end of it. Or suppose he is punished, and allowed to live: he is without remedy in the courts of his country, because beyond the reach of their process. Will it be said this denial of justice is necessary for the good of the public service to prevent desertion? God forbid! *"Fiat justitia, ruat cœlum,"* let justice be done without regard to consequences! The case of *Dixon* is direct authority for the petitioner on this preliminary question. (See reference *In re Guyer, ante,* 66.) *Dixon* was under 35 years of age, a blacksmith, taken as a conscript and serving in the army when the exemption act passed; served several months, received bounty, pay, clothes, and (377) rations; came home on furlough, refused to return, and was arrested as a deserter, and sued out the writ on the ground that he was not rightfully a soldier. On the preliminary question the two learned gentlemen who appeared for the Government did not rely on the case of *Graham* as applicable; and the Court considered that he was not precluded from being heard on the merits by the fact that he was absent without leave, but went into the merits, and decided against him. I have a distinct recollection, although I do not remember the names of the cases, that in looking over "Hurd on Habeas Corpus," in reference to this preliminary question, he cites several cases in which *an alleged deserter* was heard on the merits, taking the distinction between the cases where the enlistment is alleged to be void, as in this case, and where it is alleged to be voidable, as in the case of *Graham.* So, both upon "the reason of the thing" and upon authority, I decide the preliminary question in favor of the petitioner.

On the merits, according to the decision of the Supreme Court in *Ritter's case, ante,* 76, the petitioner was not liable to conscription, and I learn the enrolling officer refused to exempt him, because he had special instructions not to regard the decisions of the Supreme Court unless the party had been discharged on writ of *habeas corpus. On the question of waiver:* do the facts, that he receives pay, clothing, rations, and serves sixteen months, make him liable to serve for the war? He insists that the Government would thereby take advantage of its own wrong. The enrolling officer insists that these facts amount in law to a waiver of his original right growing out of the substitution, and relies on *Dixon's case.* In that case the point is not positively decided, there

being another ground, to wit, that as he was in service, the exemption act does not embrace his case. But I know the judges were of opinion that when all of these facts exist, to wit, receipt of bounty, pay, clothing, rations, and service, there is a waiver of a right to exemption, and I have accordingly, on that ground, remanded the parties in three other cases.

But *In re Fleming,* who was arrested as a conscript and, with- (378) out an opportunity to sue out a writ, taken to Camp Holmes, sent to Richmond, and then to Staunton, where he left the army without leave, came home and was arrested as a deserter, I had General Hoke notified, and it being objected that, as he was a deserter, he could not be heard until a court-martial had disposed of him, I overruled the objection for the reason above stated, and on the authority of *In re Dixon.* On the merits, it appeared that he was over 35, and the keeper of a public mill, and had been refused exemption on the ground that he attended to a sawmill as well as a gristmill! I held that position untenable. On the question of waiver, it appeared that he had been under military restraint for three weeks, had rceeived rations, and drilled a time or two. I held there was no evidence of a waiver—he was obliged to eat and forced to drill, and it was bad enough that he had been put in jail, taken off, tied like a felon, and restrained of his liberty for three weeks against law. In the matter of..... (I forget the name) the petitioner was a blacksmith, had been detailed, was afterwards taken as a conscript to Virginia, kept there three months, most of the time in the hospital, sent home on a sick furlough, and refused to return. I overruled the preliminary objection. On the merits, I held he was exempted according to *Guyer's case,* and as to waiver, that the additional circumstance of receiving clothes did not vary the case from that of *Fleming;* clothes were necessary and he was required to be in uniform.

In this case, there are the additional facts of receiving pay and serving sixteen months. *As to pay,* two considerations bear on the matter: a soldier is, in many cases, obliged to draw for his own com- fort and the support of his wife and children in his absence. The (379) pay is only an equivalent for services rendered, and, consequently, cannot be the foundation for an implication of a waiver or consent to serve for the war; as to the *sixteen months service,* it would seem the Government should be content with having exacted that much out of him, and can on no principle make it the ground for forcing him to serve during the war. The case differs from that of *In re Dixon* in this: no *bounty was received,* which is the most material and unequivocal evidence of a waiver; it is a voluntary act, inconsistent and against conscience, except on the supposition that the party is to serve out the whole time as a conscript; and for that reason the Court in *Dixon's case*

considered this fact, connected with and propped by the other facts, evidence of a waiver or consent to serve for the war. The acceptance of bounty is so important a fact that a case cannot be made out without it; it would be like an arch without a keystone, or acting the play of Hamlet with the character of Hamlet omitted.

It is, therefore, considered that the petitioner be discharged.

December, 1863.

NOTE.—*Vide Gatlin v. Walton, ante,* 333.

IN THE MATTER OF BRADSHAW.

(1 Winst., 454.)

A. was elected and qualified as constable in March, 1863. In April, 1863, he was conscripted, and on 5 May, 1863, was sent to the ramy, where he served six weeks, receiving bounty. *Held,* that he was exempted, as a State officer, under act of Congress of 1 May, 1863, enacted while he was in the service.

(380) PEARSON, C. J. In March, 1863, the petitioner, being elected a constable, was duly qualified and entered upon the discharge of the duties of his office. In April, 1863, he was sent to the camp of instruction as a conscript; on 5 May, 1863, he was sent to the army, where he served about six weeks. On joining the army, he received bounty, but has never received any pay; he came home on furlough until his case could be decided. A correspondence was had between Governor Vance and the Confederate authorities, which need not be set forth. On 15 January, 1864, he sued out a writ of *habeas corpus.*

Congress, 1 May, 1863, enacted: "In addition to the State officers exempted by the act of 1 October, 1862, there shall be exempted *all State officers* whom the Governor of any State may claim to have exempted for the due administration of the Government and the laws thereof," etc.

Governor Vance, on 9 May, 1863, claimed to have exempted "all justices of the peace," etc., "constables who entered into bond previous to 11 May, 1863, and their successors in office," etc.

The Legislature, on 14 December, 1863, adopted and made permanent the claim which had been made by Governor Vance.

1. The receipt of bounty by the petitioner was a waiver to any claim to exemption under the act of 11 October, 1862; but, of course, it could not have the legal effect of being a waiver of any exemption to which

he might afterwards become entitled. Its effect is to put him in the condition of a soldier having at that time no right to exemption.

2. The next question is, Did his being placed in the military service as a conscript vacate his office of constable? or did he continue to hold that office while he was in the condition of a soldier? Absence from the country or *nonuser* does not *per se* deprive one of a public office; it may be cause of forfeiture, but the office continues until there be proper legal proceedings to put him out of it. This is well settled; 2 Bl. Com., 153.

3. The question, then, is narrowed to this: Does the act of (381) Congress, and the claim that Governor Vance made in pursuance thereof, and the act of the Legislature, embrace the case of a constable who was, at the date of the claim of the Governor, in the military service of the Confederate States; or is the exemption confined to constables who were not in the military service? The words of the act of Congress are general: "There shall be exempted *all State officers* whom the Governor of any State may claim," etc. The words of the Governor's claim and of the act of the Legislature are also general: "All justices of the peace, etc., constables who have given bonds previous to 11 May, 1863," etc.

I can see no ground to except from the operation of these general words State officers who were in the military service. If such was the intention, a proviso to that effect would have been made; and there is no rule of law under which it can be made by construction. I am therefore of the opinion that the petitioner is exempted.

It was suggested in the argument that the exception should be made by implication from the use of the words "shall be exempted," and it is said that the word "exempted" is restricted in its meaning to persons who are not in the military service, and "discharged" is the proper word when referring to persons who are in the military service. This distinction may obtain in military circles, but the word "to exempt" is not a technical term; it is a plain English word, and means literally "to take out of or from," and its ordinary signification is "to free from, not be subject to," any service or burthen to which others are made liable; as, to exempt from military service, to exempt from taxation; and it is a settled rule of construction, words in a statute are to be construed according to their ordinary meaning, unless there is something to show they are used in a different sense. The courts can- (382) not expect Congress to take notice of the military parlance, and require, in order to express the intention, that all the State officers whom the Governor may claim as necessary, etc., shall be free from military service, that this particular mode of expression shall be adopted, to wit: "All State officers not in the military service shall be *exempted,* and all who are in the military service shall be *discharged,* whom the Governor

may claim as necessary," etc. The meaning as expressed by the act of Congress to exempt all State officers is clear; and the words used to express the intention are appropriate according to their well-known signification.

It was further suggested that from the nature of the subject the act should be so construed as not to embrace State officers who are in the military service; and it is assumed that Congress did not intend to take any one out of the army. There is the same reason to assume that Congress did not intend to keep any one out of the army! It may be said, on the other side, the power of Congress to conscript was seriously questioned, and especially its power to conscript State officers, who were necessary for the due administration of the Government and the laws thereof, and this extended exemption was a concession designed to avoid all conflict with the States, and the use of the peculiar words, "whom the Governor of any State *may claim* to have exempted," countenances this idea. But these are conjectures on political questions into which the courts are not at liberty to enter.

The cases of *Irvin, Meroney,* and of *Bryan, ante,* 1, in which it is held that the conscription acts do not embrace persons already in service, and of *Guyer, ante,* 66, and others, in which it is said that the exemption act of 11 October, 1862, did not embrace mechanics between 18 and 35, who were already in service, may seem at first blush to oppose the
(383) conclusion to which I have arrived; but upon examination, these cases will be found negatively to support it. The general words of the conscription acts embrace all white males between 18 and 35 and between 35 and 45, and it is only by reference to the nature of the subject and the context, that persons already in service were excluded. *The nature of the subject,* for there was no occasion to conscript persons in service for three years or the war; they were soldiers already. The *context,* for the provision as to camps of instruction, calling the men into service at different times, etc., were not applicable to persons already in service.

So the general words of the exemption act of 11 October, 1862, embraced all shoemakers, blacksmiths, etc., and it is only from the context that shoemakers, blacksmiths, etc., already in service were excluded. These were required to be *"actually employed* in their respective trades *at the time,"* which, in reference to those between 18 and 35, was held to be at the passage of the act, in order to fit it to the conscription act of April, 1862; and in reference to those between 35 and 45, or who afterwards come to the age of 18, "at the time" is taken to mean when called into service; and this actual employment in their respective trades could have no application to men who were in the military service, and so could not be actually employed at their trades.

But in our case we have seen there is nothing in the subject-matter which the courts can judicially take notice of, and there is nothing in the context to control the general words, so as to exclude State officers who may be in the military service, supposing the position to be correct, of which there can be no doubt, that being in the military service does not *per se* deprive one of his office.

My conclusion is also supported by the decision of *Judge Haliburton,* of the District Court of the Confederate States, *In re Lane,* where it is held that a soldier who becomes a mail contractor is embraced (384) by the act of Congress of 17 April, 1863, and is exempted from military service; and by the decision of *Judge Meredith, In re Brooking* (which I noticed briefly referred to in a newspaper), where it is held that a soldier who, while in the service, was elected a justice of the peace and regularly qualified as such, was exempted.

It is thereupon considered by me that Joseph Bradshaw be forthwith discharged, with leave to go wherever he will; the costs, to be taxed by the clerk of the Superior Court of Alamance County, will be paid by W. A. Albright. The clerk will file the papers and give copies.

At Richmond Hill, 3 February, 1864.

Cited: In re Sowers, post, 386.

IN THE MATTER OF JESSE SOWERS.

(1 Winst., 459.)

A soldier in the army, who becomes a mail contractor, is as such exempted from further military service, and should be discharged under *habeas corpus.*

PEARSON, C. J. The petitioner, Jesse Sowers, filed his bid for carrying the Confederate States mail on Route No. 2222, between Thomasville and Shady Grove in the State of North Carolina—14 miles long, stating, in his application that he was then a soldier in the Confederate Army; which bid, with this assurance, was accepted by the Postoffice Department, and he was discharged by the officers of his regiment and brigade. His bonds were accepted and he put in charge of the mail, which he has been carrying from July up to the time of his arrest.

The act of 14 April, 1863, enacts: "That the contractors for (385) carrying the mails of the Confederate States shall be exempt from performance of military duty in the armies of the Confederate States from and after the passage of this act, during the time they are such

contractors: *Provided,* that no more than one contractor shall be exempt on any route, and that no more than one member of any firm of contractors shall be exempt, and no contractor on any route of less than 10 miles in length, and on which the mail is carried on horse, shall be exempt under this act; and if one or more members of any firm be exempt, from age or other cause, from the performance of military duty, the other member or members of such firm shall not be exempt by this act on account of being mail contractors: and *Provided further,* that no person to whom a contract for carrying the mails may be transferred, with the consent of the Postoffice Department, after the passage of this act, shall be exempt from military service on that account."

The question is, Does this act embrace persons who are in the military service of the Confederate States, so that a soldier is at liberty to become a bidder for a mail contract, and, if he obtains it, gives bond, and enters upon the performance of the contract, he is exempted from military service; or is the operation of the act confined to persons who are not in the military service? Upon this question there seems to be a conflict between the Department of War and the Postoffice. The one insists that the act extends to all persons who may choose to bid—the policy being to have as much competition as possible, and in that way get the mail service performed for the lowest amounts. The other, that the act does not include persons who are enrolled as conscripts, and certainly not those in actual military service. The courts are not at liberty to enter into a discussion of this political question. Our duty is to ascertain, by fixed rules of law, the intention of the lawmakers from the words they have selected to express it.

(386) In this case the words are general. What is then to control them and except from their meaning persons who have been enrolled or are actually in military service? There is no proviso to that effect. It is said this should be supplied from the use of the word "exempted," which we are told in military circles is confined to persons not in service, the word "discharge" being used in reference to those who are in the service. "Exempted" is not a technical term, and, as is said by *Judge Haliburton,* of the District Court of the Confederate States, *In re Lane,* and by myself *In re Bradshaw, ante,* 379, in its ordinary signification, its meaning is "to take out of or from," "to free from" any service or burden to which others are subject—as to exempt from military service; to exempt from taxation. It is a settled rule of construction that words in a statute are to be taken in their ordinary signification, unless there be something in the subject-matter or in the context to show they were used in a different sense. The courts cannot require members of Congress to take notice of a distinction which may obtain in the War Department or among gentlemen of the army, and to

conform to it, by saying all persons not in the army or enrolled as conscripts, becoming mail contractors, shall be "exempted," and those who are in the army or have been enrolled as conscripts shall be "discharged," in order to express the intention to free from military service all mail contractors. It is sufficient if words be used which, in their ordinary signification, express that intention; if so, the courts must give effect to it. There is nothing in the nature of the subject of which the courts can take notice, and nothing in the context to control the (387) general words.

The cases of *Irvin, Meroney,* and of *Bryan, ante,* 1, as to the construction of the conscription act; *In re Guyer, ante,* 66, and others, as to the construction of the exemption act, 11 October, 1862, support this conclusion—for in those cases special considerations, growing out of the nature of the subject and the contexts are relied on and held sufficient to control the general words. Here there are no special circumstances, and the general words stand by themselves and must be allowed their full effect. The decision of *Judge Haliburton In re Lane,* referred to above, is an authority directly in point—the very question is decided—save that this case goes a little further, because the petitioner proves the additional fact, that after being accepted as a mail contractor, he was discharged from the army by the proper military authority; but I lay no stress on this circumstance, and base my decision on the general principles. The decision of *Judge Meredith, In re Brooking,* that a soldier in the army who is made a justice of the peace and duly qualified as such is exempted, also supports my conclusion, and likewise my decision *In re Bradshaw,* in which it is held that a constable, although in the army, is exempted by the act of May, 1862, and the claim of the Governor in pursuance thereof, to have exempted "all constables," as necessary for the due administration of the laws of the State, and the reasoning on which it is put, support the conclusion that the petitioner is exempted by law.

It is, therefore, considered by me that the petitioner, Jesse Sowers, is entitled to exemption from service in the Confederat Army, and it is adjudgd by me that he be discharged, with leave to go whereso-ever he will. It is ordered that Lieut. J. A. Little pay the cost, (388) to be taxed by the clerk of Davidson Superior Court; that the papers be filed in the office of the said clerk, and that the clerk give copies to the parties.

Done at Salisbury, N. C., 20 February, 1864.

NOTE.—*Vide In re Russell, ante,* 388; *Smith v. Prior, post,* 317; *Johnson v. Mallett, post,* 410; *Bridgman v. Mallett, post,* 500; *Johnson v. Mallett, post,* 511; *Bringle v. Bradshaw, post,* 514.

IN THE MATTER OF D. L. RUSSELL.

(1 Winst. 463.)

1. An officer in the army who has been reduced to ranks, and thereupon appointed county commissioner, is exempt from military service, and must be discharged from custody as a conscript.
2. The validity of his appointment, on the ground of infancy, can only be impeached by a *quo warranto* or other proceeding in which the matter can be put directly at issue and the office adjudged forfeited or vacated. It cannot be impeached collaterally. (*In re Cain, post,* 525, cited and approved.)

PEARSON, C. J. In 1864, Daniel L. Russell, Jr.,* was commissioned a captain in Company G, Thirty-sixth Regiment, North Carolina Troops. In February, 1864, he was sentenced by a general court-martial "to be dismissed from the service," which sentence was approved by General Whiting, "so as to deprive him of his commission," and the general granted him the privilege of selecting another company, if he desired to do so, and gave him leave of absence for thirty days. In March, 1864, Russell was appointed county commissioner by the justices of Brunswick County, gave bond and entered upon the duties of the office on 11 March; the Governor certified that he was a county officer, necessary for the proper administration of the government of the State. Notwithstanding his appointment, and the Governor's certificate, General Whiting claimed him as a private, liable to military service; whereupon he sued out a writ of *habeas corpus,* asserting his right to exemption.

(389) The act of Congress, 17 February, 1864, is a general conscription law. By the first section, all white men, residents of the Confederate States, between the ages of 17 and 50, are conscripted for the war. Section 2 has reference to men between the ages of 18 and 45 "now in service," and the sole purpose is obviously to make a distinction between them and other conscripts, *by retaining them in the same regiments, battalions, and companies to which they belonged at the passage of the act,* instead of having them enrolled and sent to camp of instruction. There is nothing in the act to show an intention to put them on a different footing from other conscripts in any other respect, or to exclude them from the operations of the provisions in relation to exemptions. It follows that the first ground taken in the return, to wit, that Russell, being already in service, cannot be a conscript, and, consequently, is not embraced by the provisions in relation to exemptions, is untenable. So the question is, Does clause 2 of section 10 exempt one who is in service at the time he is elected or appointed a State officer—

*Governor of North Carolina, 1897-1901.

a member of the Legislature, for instance, or a State officer, whom the Government may certify is necessary for the proper administration of the State Government, *i. e.*, a judge of the Supreme or Superior Court (for as the act is worded, these officers, although constituting a coördinate branch of the State Government, are required to entitle themselves to exemption by the certificate of the Governor), or a justice of the peace, constable, or county commissioner?

The question is stated broadly, in order not to raise the issue made by the petitioner and return, as to whether Russell, at the time of his appointment, was in actual military service, or only constructively so; for, assuming that the effect of the sentence of the court-martial was not to dismiss him from the service, and subject him to conscription, *de novo,* but simply to deprive him of his commission and make him a private in the company of which he had been captain, I (390) am of opinion that his appointment to the office had the effect of exempting him from military service, both by force of the Constitution and of the act of Congress and the certificate of the Governor in pursuance thereto.

The authority of the Government to conscript is derived from the power conferred on Congress to "raise and support armies." This power, from the very nature of things, is subject to the restriction that it shall not extend to the Governor, members of the Legislature, judges or other officers necessary for the proper administration of the State Government; for as the Confederate Government is a creature of the States, it is absurd to suppose that the intention was to make a grant of power which would enable the creature to destroy its creator, and cause the existence of the States to be dependent on the pleasure of Congress.

Apart from this, the act of Congress in general terms exempts "members of Congress, and of the several State Legislatures, and such other Confederate officers as the President or the Governors of the respective States may certify to be necessary for the proper administration of the Confederate and State governments, as the case may be."

The province of deciding what officers are necessary for the proper administration of the State governments belongs to the Legislature. That body has deemed it necessary to provide for the appointment and exemption of county commissioners (act of 1864), and in compliance therewith the Governor has certified, in pursuance of the act of Congress, that this officer was necessary.

Will it be said the States must procure their Governors, members of the Legislature, judges, and other necessary officers from among the citizens who are over the age of conscription, or at all events those who are not already in service, and cannot take a man out of the army to

(391) fill any of these offices? On what ground is this assumption based? There is no such provision in the Constitution, or in the act of Congress, or in the act of the Legislature, and there is nothing from which it can be implied; on the contrary, the implication is directly against it, and the courts cannot presume that it was the intention thus *to narrow the field of selection in regard to State officers.* Nothing short of plain and direct words could be allowed to have that effect. The practice in such cases, and the legislation of Congress whereby it is provided that a military officer may resign when elected or appointed to a civil office in a State, confirm this conclusion, and leave no room to question the position that a private, although in the ranks, whenever he is elected or appointed and is qualified and inducted into an office under the State, and the Governor certifies, in pursuance to the act of Congress, becomes by the force and effect thereof exempted.

The second ground taken in the return is also untenable. The court or judge, in a proceeding of this nature, is not at liberty to go behind the record of the qualification and appointment of a party. The validity of his appointment, on the ground that Russell is under the age of 21 years, cannot be impeached in this collateral way. It can only be done by a *quo warranto,* or other proceeding, in which the matter can be put directly at issue and the office be adjudged forfeited or vacated.

The writ of *habeas corpus* is used in cases like the present as a civil remedy for the purpose of having the liability of the petitioner to conscription adjudicated, for the reasons given by me in *Cain's case* (*post,* 525). I am of opinion that the act of Congress suspending the writ of *habeas corpus* does not apply to this case. Since the decision in *Cain's case* I was gratified to find that my conclusion is supported by the opinion of *Chief Justice Marshall* in *Bollman v. Swartwout,* 4 Cranch, 75. He says that the clause of the Constitution which authorizes the suspension of the writ applies only to the writ of *habeas corpus ad sub-*
(392) *jiciendum,* "the great writ of right," sued out by a person who stands committed for some criminal or supposed criminal offense, and does not embrace the inferior kinds of the writ, such as *habeas corpus ad testificandum* and the like. I will also refer to the very full and able argument filed by Mr. Moore in this case.

I am of opinion that the return of W. H. C. Whiting is insufficient, and does not show that the petitioner is liable to military service. My conclusion is that he is entitled to exemption, and should be discharged, the facts set out in the return to the contrary notwithstanding.

Richmond Hill, 25 July, 1864.

NOTE.—*Overruled* by *Smith v. Prior, post,* 417; *Vide In re Sowers, ante,* 384; *Johnson V. Mallett, post,* 410. See note to *In re Sowers, ante,* 388.

IN THE MATTER OF WILLIAM H. CUNNINGGIM.

(1 Winst., 467.)

One who is a local preacher of the Methodist Episcopal Church, South, regularly officiating as such, without salary, but who supports himself by keeping a hotel, is exempt from conscription under act of Congress of 17 February, 1867, as a "minister of religion."

P. H. Winston and R. G. Lewis, counsel for petitioner.

BATTLE, J. This is a proceeding under a writ of *habeas corpus,* in which the petition, return, and proof present the following case:

The petitioner is, and has been for five or six years, a local preacher of the Methodist Episcopal Church, South, duly licensed as such according to the rules of his church. It is a part of the discipline of this church that the license of a local preacher must be given by (393) the Quarterly Conference and signed by the president of the Conference, and must be renewed every ecclesiastical year. A local preacher is a minister of his church, and his duty is to preach and perform such other duties as may be assigned by his presiding elder or preacher in charge; but, until he is ordained as a deacon, he cannot administer the sacraments of his church. He is not entitled to any salary or pay for preaching or for the performance of his other ministerial duties. The petitioner was, prior to 17 February last, and has been ever since that time, located at the city of Raleigh, and has been constantly and regularly engaged in preaching every Sunday, alternately, to two congregations in the country, near the city, and at the hospitals, and also performing other ministerial duties, by attending class meetings, etc., all under the superintendence of Dr. Craven, his preacher in charge. He has received no salary or pay from his church or his congregations, but has supported himself from the income of a hotel in the city of Raleigh, of which he is the owner and manager.

Having been enrolled as a conscript and carried to Camp Holmes, the petitioner claims to be discharged under an act of the Confederate Congress, ratified on 17 February, 1864, which grants an exemption from military service in the army of the Confederate States to "every minister of religion authorized to preach according to the rules of his church, and who, at the passage of this act, shall be regularly employed in the discharge of his ministerial duties." The commandant of conscripts for this State denies his right, and insists upon retaining him in custody as a conscript under a regulation adopted by the Bureau of Conscription, to the following effect: "If the party is a regularly licensed minister, authorized to preach according to the rules of his sect, and that is his only business, he is entitled to exemption. If, however, he

depends for support on any other business, even if he should preach regularly, he is not entitled to exemption."

(394) That the case of the petitioner is obviously within the letter of the act of Congress cannot be denied. He is, according to the policy of his church, a minister of religion, duly authorized to preach, and he was, at the time of the passage of the act of Congress, regularly employed in the discharge of his ministerial duties. He is, therefore, entitled to be exempted from the performance of military service, unless the Bureau of Conscription is authorized, by law, to make a regulation other than that prescribed in the act of Congress, by which he shall be held as a conscript, or in construing the words of the act the Bureau has adopted a construction which is in accordance with its spirit, though not within its strict letter. I cannot find in the act any authority conferred upon the Bureau of Conscription to frame regulations upon this subject; and I cannot suppose that it sets up a claim to an independent power of legislation. In making provision for carrying the act into effect, the Bureau must ascertain its meaning, and, in doing so, must necessarily put a construction upon its language. That construction, though, is not conclusively binding upon the persons upon whom the act is to operate, for they have an undoubted right to appeal to the courts of law for redress, and it is the decisions of such courts alone which can finally settle the disputed point. The true and only inquiry before me, then, is whether the Bureau of Conscription has adopted the proper construction of the act in question, according to the intention of those who framed it—that is, according to the reason and spirit of it.

I have already remarked that the case of the petitioner is obviously within the letter of the act of Congress. This being so, it is incumbent upon the Government to show that it is not also within its reason and spirit, for it is the first among the fundamental rules for the inter-

(395) pretation of laws to construe words in their usual and most known signification. If the words be dubious, then we may resort to other means for ascertaining the will of the Legislature, among which is that of considering the reason and spirit of the law, or the cause which moved the Legislature to enact it. See 1 Bl. Com., 59 and 61. Supposing, then, that there is some dubiousness in the meaning of the act under consideration, let us inquire what was the motive which induced members of Congress to pass it. About that there cannot be the slightest doubt. Most manifestly it was to afford to all who should not be called into the field—to the men, women, and children who should remain at home—the services of all the ministers of religion, of every grade in every denomination, who were duly authorized to preach, and who, when the act was passed, were regularly employed in the discharge of their ministerial duties. Can any good reason be given why these minis-

trations may not be useful and productive of much good, though rendered by unpaid ministers? In the ecclesiastical polity of the M. E. Church, South, the local preachers form, as I learn, the most numerous class of their ministers. They occupy an important though it may be an humble field of labor, and are deemed essential in the scheme of that church, as furnishing the means whereby "the poor have the gospel preached to them." The fact that they take nothing from the coffers of their church for their support renders that body much more able to sustain those who are laboring in the higher grades of the ministry. These unpaid ministers are thus enabled to effect much good, both by what they do and by what they abstain from doing. In working for nothing of an earthly nature and supporting themselves, they have, as was well said by Messrs. Winston and Lewis, the counsel for the petitioner, an illustrious example in St. Paul, the greatest preacher whom the world has ever known, who worked with his own hands at his occupation of a tent-maker, that his support might not be a burden to the (396) churches of Corinth and Ephesus. See Paley's *Horæ Paulinæ*, ch. 3, No. 6. Has this great apostle ever been considered as having forfeited any of the rights as a preacher by reason of such forbearance and self-denial? On the contrary, has he not furnished to all succeeding ages an additional proof of the divinity of his mission and of the sincerity of his devotion to it, by showing that amidst the severest of trials, persecutions, and afflictions he labored not for the riches and honors of this world, but for the temporal and eternal good of his fellow-men, and for that crown of glory which his faith assured him was laid up for him in heaven? From these considerations I am led to believe the ground upon which the Bureau of Conscription would exclude from the exemption contained in the act of 17 February, 1864, that class of preachers to which the petitioner belongs, was not within the contemplation of Congress, and ought not, therefore, to control the decision of the question now before me.

But there is, no doubt, another class of ministers of religion, having authority from their respective sects to preach, to whom it might, perhaps, be properly applied. I allude to those ministers of different denominations who, being in affluent circumstances, preach occasionally and from time to time as their ministerial services may be required, without receiving any compensation therefor. In analogy to *In re Grantham, ante,* 73, in which it was decided that under the act of 11 October, 1862, a mechanic was not entitled to exemption from military service unless he followed a trade as his regular occupation and employment, it may be that such ministers of religion should not be exempted under the act of February, 1864. Cases of this latter kind were probably in the minds of the Bureau of Conscription when they adopted the

regulation to which I have referred. But it is manifest that this class of cases differs essentially from that in which the petitioner is embraced.

We have in this State an act which requires that the rites of
(397) matrimony shall be performed by justices of the peace or by "ordained ministers of the gospel of every denomination." See Rev. Code (1856), ch. 68, secs. 1, 2. I feel quite sure that there is not a judge in the land who would for a moment feel himself at liberty to decide that a marriage was void because the ceremony had been celebrated by an ordained minister, who depended for support upon some other business than that of his ministry.

The conclusion to which I have come in favor of the petitioner derives additional support from the fact that under the act of October, 1862, which is almost in the precise terms of the last act, no person holding the same position in his church as that occupied by the petitioner has, so far as I have heard, ever been enrolled and called into the military service as a conscript.

My order is that the petitioner be discharged, and that his costs be paid by the defendant.

Chapel Hill, 8 August, 1864.

CASES AT LAW

DECIDED AT THE

EXTRA TERM

*COMMENCING ON 26 OCTOBER, 1864

JOSEPH McDANIEL v. TRULL.

(2 Winst., 1.)

A substitute never liable to conscription, being over 50 years of age, is not discharged from the service by the conscription of his principal under the act of Congress of 4 January, 1864.

The nature and facts of the case are stated in the opinion of the Court.

Winston, Sr., for Trull.
No counsel in this Court for petitioner.

MANLY, J. The case before us is brought into this Court by writ of *certiorari* from the judgment of the Chief Justice at chambers, his judgment having been pronounced *pro forma,* that it might be reviewed in this Court at this term. The case involves the question whether a substitute, taken into the military service of the Confederate States under the act of April, 1862, was entitled to a discharge upon the conscription of his principal, after the passage of the act of 5 Jan- (400) uary, 1864.

It seems the substitute was not bound under any act of Congress to do service on his own account (being past 50 years of age), so that the question is freed from complication; and is simply whether the act of the Government, calling back into the service the principal, puts an end to the substitute's term of service. We think it does not.

As we had occasion to say at the last regular term of this Court, in *Gatlin v. Walton, ante,* 325, with the special agreement of the parties in a case of substitution, with the considerations and motives actuating them, the Confederate States have had nothing to do. They acquiesced in the arrangement of the parties so far as to accept one man instead of another, in compliance with what was supposed to be their mutual wish and convenience; and in respect to the Confederate States, the substitute stands, therefore, in the light of a volunteer for the term of service to which the principal was subject; and such being the case, there is

*This term was appointed by the Chief Justice under the act of the General Assembly passed at the adjourned session of 1864, chapter 5.

no principle we are aware of to exempt him from the performance of the full term of that service, by reason of any action of the Government which may affect the rights of his principal under their private agreement.

There is a manifest intention on the part of the Congress to retain the substitute in the service; and I take it there can be no question that Congress had the power to do so specifically, without any general legislation to cover their case. No provision is made for their discharge in the act of January, 1864, but they are left in the condition in which they were found—volunteers for the war.

(401) What seems to us conclusive evidence of this purpose of the Congress to continue them in the service is found in the act itself. It declares: "Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms, the Congress of the Confederate States do enact, that no person shall be exempt from military service by reason of his having furnished a substitute; but this act shall not be so construed as to affect persons who, though not liable to render military service, nevertheless furnished substitutes." From this we learn two things clearly: (1) that the Confederate States were in need of soldiers in the field; and (2) that they expected to get them by calling back into the service the men who had theretofore put in substitutes. The object of the act was to secure an addition to the military force. Now, this object would be entirely frustrated if one man was to be let out for every one taken in, which would be the case (proximately at least) if substitutes are entitled to a discharge.

It is perfectly clear, therefore, that Congress intended no such thing. The implication to the contrary is as forcible as if they had declared it in words.

A military force in some form constitutes, amongst all people, a part of the organism which we call government, being a portion of the executive branch; and such a force, when once constituted, is manifestly intended for an indefinite term of service, unless there be something in the organic law to define and limit it. Such limitation in the case before us can be found only in the general provision of law relating to the army, to which the petitioner belongs, defining its term of service to be for the war. A sense of interest, as well as justice, will induce the Government, through its proper agents, to listen to all applications for relief on account of disability, or arising from time to time, and to these the soldier must resort.

(402) The judgment at chambers is therefore reversed, and a judgment rendered in this Court that the petitioner, Joseph McDaniel, is rightfully in the custody of the military authorities, and must so continue.

TOBIAS KESLER v. JOHN M. BRAWLEY.

(2 Winst., 4.)

A conscript who was between 45 and 50 years old when he was enrolled under the act of Congress of 17 February, 1864, is entitled to his discharge when he becomes 50 years of age.

MANLY, J., dissenting.

THIS was a writ of *certiorari* from this Court, sued out by Captain Brawley, in order to review the decision of *Chief Justice Pearson* on a writ of *habeas corpus,* at the suit of Tobias Kesler against John M. Brawley, a captain in the army of the Confederate States, complaining of being illegally restrained of his liberty by Captain Brawley. It appeared on the trial before the Chief Justice that the petitioner had been enrolled under the act of Congress of 17 February, 1864, as one of the senior reserves, he being then between the ages of 45 and 50, and that he became 50 years old on.....October, 1864, and he was discharged.

Blackner for petitioner.
Winston, Sr., for Brawley.

PEARSON, C. J. "From and after the passage of this act all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States for the war." Act of Congress, 17 February, 1864, sec. 1.

One of two constructions must be adopted: (1) It applies to *individuals* who are, at the date of the passage of the act, between the ages of 17 and 50, as *descriptio personarum,* the same, in legal effect, as if the persons answering the description were named, and puts them in the military service "for (that is, during) the war." This meaning can be given by adding the words "who are now," so as to make it read: "All white men, residents of the Confederate States, *who are now* between the ages of 17 and 50, shall be in the service of the Confederate States for (that is, during) the war. This act shall take effect from and after its passage." According to this construction, all white men who are, at the date of the passage of the act, under the age of 50 would be liable to military service during the war, notwithstanding they afterwards arrive at that age, because they are embraced by the description; and all white men who are, at the date of the passage of the act, under the age of 17 would not be liable to military service, because they do not answer the description. So that, if this construction be adopted, and judgment is therefore rendered against the petitioner, the courts and judges will be bound, as a matter of course, upon the au-

(403)

thority of this decision, to discharge every one who has been, or may be, put in the military service who was not, at the passage of the act, 17 years of age.

There are two fatal objections to this construction: (1) In order to express the meaning, it is necessary to add words which are not found in the act, and the addition of which varies the sense *materially*. This is not authorized by any rule of construction. (2) According to the whole scope and tenor of the act, one of its main objects is to bring into the military service the young men who are continuously arriving at the age of 17; and the purpose is not only to embrace those who are 17 at the passage of the act, but all who shall thereafter arrive at that age; which purpose would be defeated by this construction, and it can only be contended for on the ground of an oversight, or *casus omissus* in framing the act, which, in so important a matter, the Court is not at liberty to assume.

(404) The second construction is that the section applies to a class composed of all white men between the ages of 17 and 50, without regard to the time when they may be between those ages, and puts them into military service as *a class* for (that is, during) the war. This meaning can be given simply by changing the position of the words "for the war," so as to make the section read, "for (that is, during) the war, all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States." "This act shall take effect from and after its passage." The Court is authorized, by a well-settled rule of construction, to change the position of words. See Dwarris on Statutes.

Indeed, this change in the position of words in this instance is only for the purpose of making the sense clearer. For if persons are conscripted *as a class,* it follows, of course, that they cease to be liable when they pass out of the class, and become liable when they enter the class. When no time is fixed at which they are to be between the ages designated, the conscription is necessarily as a class; the distinction being, when a time is fixed the conscription is as *individuals, descriptio personarum.* When no time is fixed, the conscription is as a class. Here the time is fixed; so the conscription is not as a class, and that consequence follows without reference to the position of the words "for (that is, during) the war," although it makes the sense clearer to put the words at the beginning of the section, instead of at the end. "For the war" is evidently used in the sense of "during the war," and conceding that the conscription is by a class, if the words "for (that is, during) the war" had been placed at the beginning of the section, the fact that a "senior reserve" would not be liable after arriving at the age of 50 is too plain for discussion; and it would be strange if the result can be different

from the circumstance that the words, "for (that is, during) the (405) war," happen to be at the end of the section. These words have no reference to the *time of service;* that is fixed by conscription *as a class,* and the words are manifestly used to enact that the intended conscription of *all* between the ages of 17 and 50 should continue, or be in force, during the war.

According to this construction, all persons under the age of 17, for the time to come, on arriving at that age, enter into the class, and are liable to military service; and all persons under the age of 50, from time to time, on arriving at that age, pass out of the class, and are no longer liable to military service; the rule working both ways unless some provision be made to the contrary.

It may be objected to this construction that it lets out of the military service all who arrive at the age of 50. The reply is, there is nothing in the act tending to show that it was not the intention to let men, who were over 45 when conscripted, go out of the service on arriving at the age of 50; and there is reason to suppose such was the intention, on the idea that heads of families, after arriving at the age of 50, would be of more use to the country at home than if they are kept in the military service as *senior reserves.* But assume this not to be so, and that this construction also supposes a *casus omissus,* how does it compare with the *casus omissus* implied by the first construction? *This* lets out of the *senior reserves* a few old men, comparatively speaking, while *that* fails to take in a large body of young men, who are looked to as the main resources of the country for future military operations in the *regular army!* By reference to the census statistics, the number of young men arriving at the age of 17 in the course of a year, in proportion to old men arriving at the age of 50, is about fifteen to one. From this it may be seen how much the public service will lose by adopting the first construction and rejecting the second; and of course if a *casus omissus* is to be applied in both constructions, that should be supposed (406) which is of least consequence, and is the most likely to have occurred. The Court is of opinion that the second is the proper construction.

The perusal of the whole act will tend to support this construction. Mr. Winston, who argued for the Government, referred to section 5 as tending to support the first construction. It seems to us that this section sustains the conclusion to which we have arrived. The provision that persons failing to enroll themselves at the time required "shall be placed in the service in the field, *for the war,* in the same manner as though they were between the ages of 18 and 45," is imposed as a penalty on such as were recusant; in respect to whom the term of service is fixed, and excludes the idea of a general liability of all to *serve for the war.*

The suggestion of the learned counsel, that the proviso in this section that the persons mentioned shall constitute a reserve for State defenses, etc., should be modified by adding the words, "except those who fail to enroll themselves," has nothing to support it.

Our conclusion is also strengthened by reference to the other conscription acts. The act of April, 1862, conscripts, *as a class,* for three years or the war. The act of September, 1862, conscripts, *as a class,* for three years or the war, and the effect of *passing out of this class,* to relieve from further liability to service, is prevented by a proviso, *"when once enrolled, all persons between the ages of 18 and 45 shall serve the full time."* This proviso was necessary to show an intention that, although the conscription was as a class, still, in respect to persons who should, after being enrolled, arrive at the age of 45, it was deemed important to retain them in service for the full time. The act under consideration in like manner conscripts for (that is, during) the war as a class,
(407) those between the ages of 17 and 50. There is no proviso to continue in the service those who arrive at the age of 50 and pass out of the class. Whether a proviso to prevent this effect was left out on purpose, because it was not deemed expedient to keep senior reserves in service after they became 50 years of age, or was an oversight, we have no means of deciding. Our duty is to expound the law according to the sense of the words used by the lawmakers; and, in the absence of a proviso to the contrary, it follows, of course, that when a "senior reserve" arrives at the age of 50, he passes out of the class, and is no longer liable to military service.

There is no error in the judgment below.

BATTLE, J., concurring, there was judgment for the petitioner.

MANLY, J., dissenting: Not concurring in the opinion of a majority of the Court, I will state briefly the reasons of my nonconcurrence.

The military bill of February, 1864, under which the service of the petitioner is claimed, prescribes the term of service *"for the war"* too plainly and positively to admit of abridgment by implications in favor of any persons embraced within its provisions.

The part of the bill directly bearing upon the question is the first section, and is in the following words: "That from and after the passage of this act all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States for the war."

Here, manifestly, all persons between the ages of 17 and 50 are declared to belong to the military forces of the country, for the war. That the Congress in this conscription of persons was regarding them as a

class seems to be probable. A proper *exegesis* of the statute, according to the view which I take of it, requires this concession. But it does not follow that a continuous application of the law to the (408) class would enlarge or let out any one embraced within its folds. The obligation to service under it is not during their continuance in the class, but *during the war.*

A prescribed age is an anomalous and novel limitation to military service; for a term of years, for the year, or for an expedition, is more usual and convenient. In our country, where there is no provision for keeping a register of births, and where, consequently, these records are very irregularly kept, and in most cases soon lost or destroyed, there is no fact more liable to controversy, and which may be affected by a greater variety of proof, than the age of a person. How are questions of age to be determined? It will not do to make them depend upon the allegations of soldiers or the will of the commanders; and it follows that some tribunal must be established and set daily to adjudicate cases as they arise. In the beginning, when enrolling men for service, where time and opportunity are afforded for investigation, questions of age are found sufficiently vexatious and troublesome. In the midst of campaigns such investigations would be utterly impracticable.

My inference is that Congress could not have intended to prescribe such a limit to the service of the senior reserves, and I think it did not.

The true and reasonable interpretation of the law, then, is that it places in the military service of the Confederate States all persons within the prescribed ages, *for the war.* There is no other interpretation which will give the ordinary signification to the words used. And as the intention of this as well as other laws on the subject is to raise an army for full and complete service in the field, it is believed to be within the purview of the law that from time to time, as the junior reserves arrive at the age of 18, they may be conscribed for general service. When once so conscripted and classed, there is no provision of the law, and no rule of the military service, I take it, whereby they become entitled at any time to be discharged except for disability. (409)

The fifth section of the bill (17 February) has been referred to as throwing some light on the question before us. I perceive but little in it to aid us. It seems to be an instance, not unfrequently occurring in legislation, where a proviso is made to emasculate completely the section or part of the law to which it is appended. This is all.

In the law of 10 April, 1862, authorizing the President to call into service persons between the ages of 18 and 35, it is provided that the President may call those thereafter arriving at 18, and when called, all should serve their full term. The two acts, that of April, 1862, and the one now before us, have accomplished, in my judgment, the same objects

by different words. The same necessities were upon the country, and it is proper to presume that similar provisions of law were intended to be made to meet them. The two laws were probably constructed by different minds, and hence the difference of language. The intent seems to have been the same, and the comprehensive and forcible words used in the act of February last sufficiently declare such intent.

The words, *"for the war,"* or any similar words in any other connection in the section, might be of ambiguous import. But in *the connection in which they stand* they prescribe a *term of service,* as already stated, too plainly to be mistaken, and which I do not feel at liberty to abridge, from anything which I find of apparent inconsistency in the law or from any considerations of public policy.

My opinion is that the petitioner is rightfully under the control of the military authorities, and is not entitled to be discharged.

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(410)

WILLIAM D. JOHNSON v. PETER MALLETT.

(2 Winst., 13.)

1. The Congress of the Confederate States have no power to exact military service from a State officer.
2. A policeman of an incorporated town is, as a State officer, exempt from conscription.
3. The Constitution and laws of this State determine, conclusively and exclusively, what offices are necessary for the administration of its government.
4. The certificate of the Governor is not required to entitle a State officer to exemption from conscription.

THE nature and facts of this case are stated in *Judge Battle's* opinion.

Fowle for Johnson, petitioner.
Bragg for Mallett.

BATTLE, J. The petitioner claims to be exempt from military service in the army of the Confederate States upon the ground that he is a policeman of the city of Raleigh. His claim is resisted in the return of the defendant upon the allegation that the petitioner is not a policeman, but only a contractor to keep the city pumps in order.

The testimony of the mayor of the city, together with the other proofs taken and filed in the cause, satisfy us that the petitioner is one of the city police, though, in addition to his duties as such, he has had assigned

to him the charge of keeping the pumps in repair. Upon the facts thus appearing from the pleadings and proofs, the question arises whether the petitioner is entitled to exemption from conscription. This is a question of law, and it is our duty now to proceed to its consideration.

It is now generally if not universally conceded that the Con- (411) federate Congress have no power to order the conscription of State officers. The principle is well expressed by the Supreme Court of Appeals of Virginia, in the opinion given in the case of *Burroughs v. Peyton,* 16 Gratt., 470, and we express our full concurrence in it. "The State governments are an essential part of our political system, for upon the separate and independent sovereignty of the States the foundation of our confederation rests. All powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the State, are reserved to States respectively, or to the people thereof"; and the Confederate States guarantee to each State a republican form of government.

It is absurd to suppose that the Government of the Confederate States can rightfully destroy the States which created it; and all the powers conferred on it must be understood to have been given with the limitation that in exercising them nothing shall be done to interfere with the independent exercise of its sovereign powers by each State. Congress can have no right, therefore, to deprive a State of the services of any officer necessary to the action of its government; and the State itself is the sole judge as to the officers that are necessary for that purpose.

We are not aware that the Confederate Congress have ever set up claim to the exercise of a power inconsistent with this fundamental principle of State sovereignty. On the contrary, in all the acts it has passed granting exemptions from conscription it has expressly mentioned, in some form or other, State officers as being entitled to exemption. Thus, in the act of 21 April, 1862, "all judicial and executive officers of State governments" are exempted. In the act of 11 October, 1862, which repeals that of April, the officers, judicial and executive, of the State governments are again declared to be exempted. The act of 1 May, 1863, provides that in addition to the State officers exempted by (412) the act of 11 October, 1862, there "shall be exempted all State officers whom the Governor of any State may claim to have exempted for the due administration of the government and laws thereof; but this exemption shall not continue in any State after the adjournment of the next regular session of its Legislature, unless such Legislature shall by law exempt them from service in the provisional army of the Confederate States."

It is unnecessary to consider the effect of these exemption acts, because they are all repealed by the act of 17 February, 1864, and State officers were exempted in the following terms: "The members of the

several State Legislatures and such other State officers as the Governors of the respective States may certify to be necessary for the proper administration of the State Government." If the petitioner be a State officer, and had he produced any such certificate in his behalf from the Governor of this State, we must presume that the Confederate officers would have admitted it, and have exempted him accordingly; but he has failed to produce any such certificate, and yet he insists, nevertheless, that his right to exemption is established by the action of our General Assembly. That body, by an act ratified 14 Decmeber, 1863, mentions several officers as "necessary to carry on the operations of the State Government," for whom claims had been made and obtained under the act of Congress of May, 1863, and then itself claims and exempts them from conscription. Among the officers thus claimed to be exempt are the "mayor and police of Raleigh." See laws of extra session in December, 1863, ch. 14. That same body, at its extra session in May, 1864, by a resolution ratified 28 May, "demands" the exemption of the same, together with some other officers, prefacing it with a preamble declaring

"that the fearless and free discharge of the officers of the State is
(413) essential to the preservation of its sovereignty," and that "Congress has no power to conscript State officers."

Has the Legislature of the State the right to "demand" these exemptions? It is very decidedly our opinion that it has, and that it has to the exclusion of every other department of the State Government. It is clear beyond all question that, within the limits of the written Constitution which the people of the State have imposed on the Government, the legislative power is the supreme power in the State. Among its vast powers of legislation, which are unlimited and unrestricted except by the Constitution, is that of ascertaining what officers, in addition to those specified in the Constitution, are necessary for the efficient management of the affairs of the State, and then of appointing the officers and prescribing their duties. The powers of the other two great departments of Government are very different. To the judiciary is assigned the power of expounding the Constitution and laws, while the Executive has, solely, the power to enforce their faithful execution. From this, as it seems to us, it follows as a logical sequence that when it is shown that each State is the sole judge as to the officers who are necessary to the action of its government, its Legislature, and its Legislature alone, is the organ by which its judgment is to be ascertained and made known. It may well be that the *Legislature* can select and appoint the Governor as its agent to certify its decision, but we are unable to find, among the powers given to the *Confederate Government,* any authority to confer upon the Governor of the State the power to decide, and then to certify his decision, as to who are the necessary State officers.

The conclusion to which this course of reasoning leads us is (414) that the petitioner is entitled to his discharge, provided he is such an officer as the Legislature has the power to exempt as being necessary in the administration of the laws of the State. *Police* are defined by Webster to be "a body of civil officers, especially in cities, for enforcing laws within their chartered limits must be a matter of great importance parts, of the organization of the State; hence the enforcement of the laws within their chartered limits must be a matter of great importance to the weal of the State itself. It follows, as a necessary consequence, that the police of all the larger towns, and especially of the capital of a State, must be deemed essential to the full, complete, and beneficial action of the State Government.

The conclusion is that there is no error in the judgment rendered by the court below.

Judgment for the petitioner.

PEARSON, C. J. I concur fully in the decision of this case, for these reasons:

1. What officers are necessary and proper for the administration of the Government and laws of the State is a matter confided to the wisdom of the Legislature by the Constitution of the State, except in respect to the offices created or recognized by that instrument itself. Whenever the Legislature creates and fills an office, or authorizes a county or municipal corporation to do so, it is to be taken *conclusively* as a "presumption of law" that such office is necessary and proper; for otherwise the *folly* of creating and continuing an useless office is imputed to the Legislature.

2. The Governor, members of the Legislature, judges, and other officers of the State, are not *liable to conscription,* by the force and effect of the Constitution and of our form of government, and stand in no need of being exempted, either by an act of Congress, or the certificate and claim of the Governor, or an act of the Legislature; for the power to conscript is restricted by the condition that it does not include officers of the State; otherwise, the *existence* of the *creator* would (415) be made to depend on the will of the creature.

So that part of the act of Congress which enumerates among the persons exempted "the members of the several State Legislatures and such other State officers as the Governors of the respective States may certify to be necessary for the proper administration of the State governments" (act of 17 February, 1864, sec. 10, clause 2) is a matter of supererogation. The certificate of the Governor, there required, has no legal effect. And the resolution of the State Legislature which demands the exemption of State officers is, in effect, a protest by that body against the right

asserted on the part of Congress to conscript officers of the State by enumerating them among the persons whom, in its wisdom, it deemed expedient to exempt.

Cited: *Wood v. Bradshaw, post,* 434; *Bridgman v. Mallett, post,* 507, 508.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1864.

ROBERT H. SMITH v. JOHN N. PRIOR.

(2 Winst., 19.)

1. A man who has been enrolled becomes thereby a soldier in the army of the Confederate States, and his appointment afterwards to an office under the State Government does not entitle him to exemption.

2. The Governor's certificate has no effect in such a case, for the person is not an officer, his appointment being void.

CERTIORARI at the suit of Lieut. John N. Prior, enrolling officer of the Eighth Congressional District, directed to *Chief Justice Pearson,* for the purpose of reviewing a judgment given by him in a writ of *habeas corpus* sued by Robert H. Smith against John N. Prior.

Besides the facts stated in the opinion of the Court, it appeared by the return of the Chief Justice that in February, 1864, a writ of *habeas corpus* was issued at the suit of Robert H. Smith against Lieutenant Prior, returnable before the Chief Justice, and that on the trial of it by him he adjudged that Smith was unlawfully held in custody, and he ordered that Smith should be discharged; and at the same time this discharge was made subject to the decision of the Supreme Court in the case of *Walton,* and the appointment of Smith to be watchman of the town of Salisbury was made after the decision of the Supreme Court in *Walton's case, ante,* 325.

Boyden for petitioner. (418)
Bragg for Lieutenant Prior.

MANLY, J. The facts of this case are that after the acts of 5 January, declaring persons who had furnished substitutes no longer exempt, the petitioner was enrolled and ordered into camp.

But as there was then pending a case in this Court in which the constitutionality of the act of 5 January was to be tested, it was agreed that further proceedings in the petitioner's case might be suspended until the decision of the Court was known. In the meantime the petitioner was released on furlough. Afterwards, and while on furlough, petitioner received the appointment of watchman for the town of Salisbury. Having been again brought into camp, after the decision in *Gatlin v. Walton, ante,* 325, he sued out this writ, which was heard and decided at chambers, and is brought here by *certiorari,* at the instance of the General Government.

Upon this state of facts, we are of opinion the petitioner is not entitled to exemption by reason of his appointment as watchman of the town of Salisbury. His enrollment, prior to such appointment, put him in military service, and he could not be elected out of it into a city watch. It is not necessary that one should be in the field, as we conceive, to constitute him a soldier. If he has been enrolled by legal authority, and put on furlough, his status is as firmly fixed as if he were in the trenches, confronting the enemy.

We have had occasion to explain more fully the rights of the respective governments of the State and the Confederate States, in matters of this sort, in the case of *Upchurch v. Scott, post,* 520, to which reference may be had.

(419) We can conceive of no greater reason why the State should have the power to take away from the Confederate States persons appointed to places of duty than the reverse of the proposition. Neither, in our opinion, is necessary, and neither is constitutional. Still less can it be supposed that a soldier can be taken out of the army by the State and appointed to office, especially when we consider the paramount powers and duties of the General Government in respect to war. The exemption certified does not seem to be material, according to the view we take of the case. Exemptions are granted by the act of Congress to specified officers of the State Government, and to such other *officers* as the Governor shall certify to be necessary. But Smith is not an officer, and therefore not in the class which the Governor's certificate could avail. Being a soldier of the Confederate States, as we think he was, by the acts of enrollment and furlough, he could not divest himself of the character, except by the will of these States.

There is error, therefore, in the judgment at chambers, discharging the petitioner, and he is hereby declared subject to perform military

service to the Confederate States, and is therefore recommitted to the officer, John N. Prior, or to such other officer as may be in charge of the matter.

NOTE.—See *Sowers' case, ante,* 384; *Bridgman v. Mallett, post,* 500, overruling *Russell case, ante,* 388.

(420)

T. S. WOOD v. JOHN A. BRADSHAW.

(2 Winst., 22.)

1. A bonded exempt is in the service of the Confederate States by force of a constitutional act of Congress, 17 February, 1864, section 10, 4th clause, 1st, 2d, and 3d paragraphs.

2. And, therefore, he is not liable to service in the Home Guards, under State laws.

MANLY, J., dissenting.

CERTIORARI, at the suit of Thomas S. Wood, to review the judgment of *Heath, J.,* in a writ of *hebeas corpus* sued out by him for the purpose of being released from the custody of the defendant, an officer of the Home Guard. *Judge Heath* ordered the petitioner to be remanded into the custody of the officer.

All the facts are stated in the opinions of the judges.

Boyden for petitioner.
No counsel for Bradshaw.

BATTLE, J. The question in this case is, whether the petitioner, who is what is commonly called a bonded exempt under paragraphs 1, 2, and 3 of clause 4 of section 10 of the act of Congress, passed in February, 1864, can be made to perform military service in the Home Guards, by force of the acts of our Legislature creating that organization. The solution of this question depends upon the preliminary inquiries, first, whether the petitioner was, by virtue of the act of Congress, in the service of and performing duty for the Confederate Government at the time when he was arrested by the defendant for service in the Home Guard; and, secondly, whether Congress had power under the Constitution, to conscribe the petitioner for any other than services of a military kind.

Upon the first inquiry, I think there cannot be a reasonable doubt. A critical examination of the 2d and 3d paragraphs of the clause and section of the acts of Congress to which I have referred will show that the personal attention of the bonded exempt is required in the management of the farm, to enable him to furnish the Gov- (421)

ernment with the amount of provisions required of him. It is inadmissible to suppose that the Government was indifferent as to the source from which his quota of supplies was to be obtained. The Government expected him to produce the grain and meat on his own farm, and not to purchase them from another person. The exigencies of the country imperatively demanded that every man should produce what he could, and the spirit of the act of Congress in granting exemptions to the owners of fifteen able-bodied hands, and authorizing details in favor of the owners of a less number, evinces a clear design to stimulate production to the greatest extent. It is manifest that this policy would be thwarted if a large slave owner, after securing his exemption, should be allowed to become indifferent whether he raised provisions on his own farm or purchased them elsewhere. The requirement of a personal supervision of his farm is further shown by the proviso contained in the 6th paragraph of the clause and section of the act referred to, which declares, "That all the exemptions granted under this act shall only continue whilst the persons exempted are actually engaged in their respective pursuits or occupations." This proviso is evidently not confined to the particular exemption spoken of in the same paragraph, for it uses the term "act" instead of paragraph or clause, and the words, "their respective pursuits or occupations," are clearly inapplicable, if contractors to carry the mail were the only persons meant. These words necessarily embrace all the classes of exempts mentioned in the whole "act."

A reference to the exemption act of October, 1862, in favor of slave owners, and the general dissatisfaction which it caused throughout the country, will prove still more fully that Congress intended, by the act of 1864, to place the bonded exempts from military duty into the service of the Confederate Government, as producers.

(422) The act of October, 1862, exempted from military service in the army the owner of twenty slaves, without regard to the age, sex, or condition, "to secure the proper police of the country." But, notwithstanding the cause assigned for it, the fact of this exemption of slave owners produced, as is well known, a popular clamor against the measure, which was so great that Congress was compelled to yield to it; which it did by repealing the act and passing the act of February, 1864. The latter act omits the odious feature in the former, and while providing for the indispensable necessity of keeping up a surveillance over slaves when owned in large numbers, made it acceptable to the country by demanding a vigorous service from the owners as producers for the Government.

The second inquiry is, whether Congress had power under the Constitution to conscribe the petitioner for any other than services of a military kind. That it had, I think, there cannot be a doubt. Congress

has conferred upon it by the Constitution of the Confederate States the power to declare war, and to raise and support armies. Art. 1, sec. 8, pars. 11 and 12. These powers are conferred in unlimited terms, except that no appropriation of money to that use shall be for a longer time than two years. Armies, when raised, must be supported, and the power to support must be unlimited as the power to raise them. If the Government have the money, or the ability to procure it, Congress may, and usually does, approprate that to the purpose of purchasing the necessary supplies; but if there be no money in the treasury, and the Government have no means of procuring a sufficient amount of it, I cannot perceive any reason why these persons, who would otherwise be in the field as soldiers, may not be compelled to furnish, according to their respective abilities, such provisions and munitions of war as the (423) army may need. This commutation of service is similar to the escuage which, in process of time, was allowed in the feudal law in exchange for the military services which the tenants in chivalry originally owed the lord of whom they held their lands. 2 Bl. Com., 74. But even supposing that this commutation of service cannot be *compelled* by Congress, there can be no objection to its being *allowed* to those who may prefer the service of raising provisions to that of performing military duty in the field or garrison.

From the foregoing considerations, I am clearly of opinion that the petitioner was rightfully in the service of the Confederate Government. This, as it seems to me, must settle the question as to his liability to be seized and carried off as a member of the Home Guard.

The supremacy of the war power of the Confederate over that of the State Government cannot be disputed.

The personal service which the Confederate Government has a right to demand, and has demanded, of the petitioner is inconsistent with that which the State demands of him; and, such being the case, the latter must give way to the former. In this respect the bonded exempts differ from all those classes of exempts from whom the Confederate Government makes no demand of other kinds of service as a condition of exemption from military service. All of the latter kind of exempts the State may, at its discretion, pass into the service in the militia or Home Guard organization. The Confederate Government cannot exempt from the service of the State any person who is not called into its own service; but every one who is doing service for it must, of necessity, be protected from being forced into an inconsistent service for the State.

I concur, therefore, in opinion with *Judge Heath,* that the petitioner ought to be discharged; but as he, in deference to some prior adjudications of two of his brethren on the bench of the Superior (424)

Court, made an order *pro forma* to remand the petitioner, I think that order should be reversed, with costs, and an order of discharge entered.

PEARSON, C. J. Has Congress power to conscript citizens to *serve as agriculturists*, and thereby take from the State the right to require them to perform "Home Guard" duty?

The only doubt I have had is as to the first branch of the question, *i. e.*, can the Confederate States, while one part of our citizens are put in the field to fight with muskets, put another part in the field to work with plows?

My brothers *Battle* and *Manly* are clear in the opinion that this may be done under the war power, to raise and *support* armies; and, indeed, it seems to fall within the principles of the decision in *Gatlin v. Walton, ante*, 325, that, in case of necessity, the power of the Confedeate States is unlimited so far as the citizens are concerned. It is my duty to conform to that decision.

Upon the other branch of the question I have no difficulty. It is decided in *Johnson v. Mallett, ante*, 410, that the war power of the Confederate States, so far as the States are concerned, is *limited* by their rights in regard to civil officers; and the question is narrowed to this, Is there also a limitation on the war power of the Confederate States in regard to the rights of the States under their war power? I think not, for the reason that the States have, by the provisions of the Constitution, subordinated the State war power to that of the Confederate States. "No State shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." "Congress shall have power to call forth the militia, etc."—the whole if necessary. So the war power of a State is secondary, and imposes no limitation on that of the Confederate States. It follows that, although the State may have, as in this instance, put citizens in the Home Guard, such action of the
(425) State is subject to the future action of the Confederate States, and the latter may *rightfully* take men out of the "Home Guard" of a State in order to put them in the service of the Confederate States, under their paramount war power.

These "agricultuists" are as fully in the service of the Confederate States, under the war power, as if they were fighting in the army. They are, in the first place, conscripted for the army, then exempted *for the purpose* of putting them in the service as agriculturists. This was done in order to give them an election to serve with a musket or with a plow. But that does not affect the question; nor is it, in my judgment, at all varied by the circumstance that those having fifteen slaves are exempted *directly* by the act, and others are exempted or detailed by the President

in his discretion, under the authority of the act; for the point is, they are all put in the service of the Confederate States as agriculturists, under the war power, and a State has no right to interfere with, or impair, the exercise of *its* war power.

Whether men are to work themselves in order to raise provisions for the army, or are to "manage and oversee" fifteen slaves, so as to make them work for that purpose, it is clear that in either case their efficiency as agriculturists for the Government will be impaired if they are required to do duty in the Home Guard.

I concur with *Judge Battle* in the opinion that the petitioner is entitled to a judgment of discharge.

MANLY, J., dissenting: Having a decided conviction to the contrary, I cannot concur in the opinion of a majority of the Court.

The question is, whether an exempt, who owns fifteen hands, and has given bond as required by the act of Congress of 17 February, 1864, 4th sess., ch. 5, sec. 10, par. 4, is bound to perform military service in the Home Guard, organized under the act of our Legislature of (426) July, 1863.

That part of the act of Congress relating to the matter is found in the fourth division of section 10, and consists of two paragraphs, as follows:

"IV. There shall be exempt one person, as overseer, or agriculturist, on each farm or plantation upon which there are now, and were upon 1 January last, fifteen able-bodied field hands between the ages of 16 and 50, upon the following conditions:

"1. This exemption shall only be granted in cases in which there is no white male adult on the farm or plantation not liable to military service, nor unless the person claiming the exemption was, on 1 January, 1864, either the owner and manager or overseer of said plantation; but in no case shall more than one person be exempted for one farm or plantation.

"2. Such person shall first execute a bond, payable to the Confederate States of America, in such form, and with such security, and in such penalty, as the Secretary of War may prescribe, conditioned that he will deliver to the.....at some railroad depot, or such other place or places as may be designated by the Secretary of War, within twelve months then next ensuing, 100 pounds of bacon or, at the election of the Government, its equivalent in pork, and 100 pounds of net beef (said beef to be delivered on foot) for each able-bodied slave on the farm or plantation within the above said ages, whether said slaves be worked in the field or not; which said bacon or pork and beef shall be paid for by the Government at the prices fixed by the commissioners of the State

under the impressment act: *Provided,* that when the person thus exempted shall produce satisfactory evidence that it has been impossible for him, by the exercise of proper diligence, to furnish the amount of meat thus contracted for, and leave an adequate supply for the
(427) subsistence of those living on the said farm or plantation, the Secretary of War shall direct a commutation of the same to the extent of two-thirds thereof, in grain or other provisions, to be delivered by such person as aforesaid, at equivalent rates.

"3. Such person shall bind himself to sell the marketable surplus of provisions and grain now on hand, and which he may raise from year to year while his exemption continues, to the Government, or to the families of soldiers, at prices fixed by the commissioners of the State under the impressment act: *Provided,* that any person exempted as aforesaid shall be entitled to a credit of 25 per cent on any amount of meat which he may deliver within three months from the passage of this act: *Provided further,* that persons coming within the provisions of this act shall not be deprived thereof by reason of having been enrolled since 1 February, 1864.

"In addition to the foregoing exemptions, the Secretary of War, under the direction of the President, may exempt or detail such other persons as he may be satisfied ought to be exempted on account of public necessity, and to insure the production of grain and provisions for the army and the families of soldiers. He may also grant exemptions or details, on such terms as he may prescribe, to such overseers, farmers, or planters as he may be satisfied will be more useful to the country in the pursuits of agriculture than in the military service: *Provided,* that such exemptions shall cease whenever the farmer, planter, or overseer shall fail diligently to employ, in good faith, his own skill, capital, and labor exclusively in the production of grain and provisions, to be sold to the Government and the families of soldiers at prices not exceeding those fixed at the time, for like articles, by the commissioners of the State under the impressment act."

It is plain to see that the proviso in the second paragraph has no reference to the exempts in the first, and therefore has no bearing on the question before us. Each seems to be independent of the other.
(428) The first authorizes a class of exemptions upon conditions, and with provisos. The second adds to this class others upon other conditions, and with one other proviso—the one in question.

The conditions and proviso in each pertain only to the exemptions or details therein authorized, and have nothing to do with the exemptions and details in any other.

The language of the last proviso, in its grammatical structure, is further confirmatory of this idea: "*Provided,* that such exemptions shall

cease," etc. The qualifying adjective *such* limits the meaning of the word exemptions to some particular class. What class? Of course, the last mentioned, those in the paragraph to which the proviso is appended.

Another part of the act which has been referred to as bearing upon our inquiry is that found in paragraph VI of the same section. It is in these words:

"VI. That nothing herein contained shall be construed as repealing the act approved 14 April, 1863, entitled An act to exempt contractors for carrying the mails of the Confederate States, and the drivers of post coaches and hacks, from military service: *Provided,* that the exemptions granted under this act shall only continue while the persons exempted are actually engaged in their respective pursuits or occupations."

Here, again, is an independent provision for exemptions, with its appropriate proviso. They belong to each other, and have no reference to anything going before or after. It will be perceived that this part of the section declares the act, theretofore exempting mail contractors and the drivers of mail post coaches and hacks, shall be continued in force: "*Provided,* that the exemptions granted under this act shall only continue," etc. Under what act? The answer is obvious—under the act of 14 April, 1863.

This construction is strengthened, and rendered certain in my (429) mind, by an examination of the whole structure of the act under consideration, by the apparent independence and completeness of most of its parts, by the consideration that this same provision is introduced in another part of the act, with respect to another class of exempts, and by the further consideration that the language of the proviso is inapplicable to some of the exemptions therein granted.

Having cleared away these extraneous and irrelevant matters, the construction of the act in the particular matter now before us will follow without difficulty. The sole connection of the exempt who works fifteen able-bodied hands, and who gives bond as required, with the Government, is through a contract, executory in its nature, which gives the Government no right of control over his person, but simply a right to demand the meat stipulated for, and to call for a sale to itself or to the families of soldiers, of all surplus marketable produce, at the valuation assessed by commissioners. A failure to perform these obligations will subject the obligor to an action on the bond, and damages. But I look in vain, whether in the bond or in the act, for any obligations of personal service to the Confederate States inconsistent with his duty of service to North Carolina.

I recognize, in the fullest sense, the war power of the Confederate States. There is no limit to the demand which that Government may make for men, save necessary officers of the State Government; but until

such demand is made, and the citizen put into service, he is subject to be employed in any way which the State may think proper.

If it were conceded that the proviso in paragraph VI of section 10 had reference to all the exemptions in the act of which it is a part, it would by no means follow, in my judgment, that it would amount to a conscription for agricultural labor. Personal service with the
(430) hands is not necessarily implied. The pursuit or occupation may be carried on vicariously, and, provided it be prosecuted with the hands continuously, there would be no forfeiture of the exemption. He might well perform a tour of duty in the Home Guard and still remain an exempt from Confederate military service.

He is not, according to this construction of the act, either a civil officer or a soldier on detail. He is bound by no tie of personal service other than that of every citizen, and by consequence may be employed by the State in either her civil or military department.

There is a manifest distinction between the exempts in the first paragraph of the act which I have quoted and the detailed men authorized in the second. The first are loosed from their obligations as conscripts, and cannot be recalled, except by a new law; the second are retained, merely detailed for other duties than military, being *liable,* all the while, to a revocation of their details.

My conclusion is that the petitioner owes no personal service to the Confederate States which is inconsistent with service of the State in any post, civil or military, and that he may consequently be compelled to serve in the Home Guard.

In my opinion the judgment below is correct.

PER CURIAM. Reversed.

MURDOCH WHITE v. PETER MALLETT.

(2 Winst., 34.)

1. Application for exemption, on account of being the owner and manager or overseer of fifteen able-bodied slaves, must be made in reasonable time after 1 January, 1864.

2. Application on 22 November, 1864, is not in reasonable time.

(431) THIS was a writ of *certiorari* at the suit of Major Mallett, for the purpose of reviewing the judgment of *Gilliam, J.,* in a writ of *habeas corpus* sued out by Murdoch White.

The writ of *habeas corpus* was applied for and issued on 22 November, 1864.

It appeared on the trial that the petitioner was the owner and manager of more than fifteen able-bodied slaves, and that he had all the other qualifications required by the act of Congress of 17 February, 1864.

It also appeared that on 20 April, 1864, the petitioner had applied for a detail as a farmer working ten hands, and that his application had not been acted on by the Department of War when he was ordered to camp in November.

Judge Gilliam discharged the petitioner on the authority of *Savage's case,* decided by *Chief Justice Pearson.*

Fowle for petitioner.
Bragg for Mallett.

PEARSON, C. J. Assuming that the plaintiff was, in the *first instance,* entitled to exemption as the owner or manager of fifteen hands, we are of opinion that he is too late in now making an application on that ground.

One of the conditions of the exemption is that the party "shall sell the surplus of provisions and grain *now on hand,* and which he may raise from year to year, to the Government," etc.

We think the application must be made in reasonable time, so that the Government may have the benefit of this condition in respect to the provisions and grain on hand. This application was not made until November, 1864, nine months after the passage of the act, which is not in reasonable time; for during that period the surplus of provisions and grain on hand in February, 1864, may have been sold, exchanged, or otherwise disposed of, and thus the Government would lose the benefit of a condition which has been made impossible by the act (432) of the plaintiff.

Whether an allegation that the plaintiff had on hand at the time he made the application now relied on the same surplus of provisions and grain which he had in February, 1864, would have met this objection, is a question not presented. It would seem, owing to the nature of the subject, that the Government should not be subjected to the inconvenience of going into such collateral matters by the folly or misfortune of the plaintiff in not putting his claim to exemption, in the first instance, on the ground he now takes. In a few words, the exemption is made to depend on a condition precedent, that the Government shall have his surplus provisions and grain at certain rates. Its performance is made impossible by the delay of the plaintiff, which is his misfortune.

The case of *Savage,* on which his Honor puts his opinion, was de-

cided without reference to the point on which this decision is put. It is a new suggestion on the construction of the act of Congress, but, we think, well founded.

There is error. Judgment reversed, and judgment that the petitioner be remanded.

EDWIN HASWELL v. PETER MALLETT.

(2 Winst., 36.)

1. One enrolled in March, 1864, under the act of 17 February of that year, who was under 45 years of age at the time of enrollment, is bound to serve in the regular army during the war.

2. A written paper, signed by the enrolling officer, in its terms an exemption, is but a furlough or detail if the officer had no right to grant an exemption.

(433) HABEAS CORPUS, sued out by Haswell, for the purpose of being released from service in the regular army as a conscript.

The facts appear from the opinion of the Court.

Moore and Rogers for petitioner.
Bragg for Mallett.

MANLY, J. This case turns upon the principles considered in *Goodson v. Caldwell, post,* 519. But the facts of the case being different, we are conducted to a different conclusion.

The petitioner was 45 years of age in May last. He had been exempted anterior to the passage of the law of 17 February, as a miller. After the passage of that act, viz., in the month of March, he was enrolled, and another exemption paper given, which, after the act of February repealing exemptions in such cases, could only operate as a furlough or detail. He was afterwards, viz., on 10 June, ordered into camp. He applied for a detail. This was refused. He was ordered into camp, and sued out this writ.

The enrollment and detail, which took place in March, about two months before he reached the age of 45, fixed his status as a soldier. He was properly enrolled in the body of regular troops, where the term of service for the war is prescribed by the acts of 1862.

The petitioner must be remanded to custody, and the costs be taxed against him.

See *Kesler v. Brawley, ante,* 402.

(434)

JAMES CASEY v. L. S. ROBARDS.

(2 Winst., 38.)

1. Free negroes are compellable to render the services required of them by the act of Congress of 17 February, 1864.

2. Congress has the power to assign conscripts to any branch of the service.

3. If a free negro sells his services for a valuable consideration, by deed, for ninety-nine years, he does not thereby cease to be a free man.

APPEAL from *Reade, J.*, at Fall Term, 1864, of HAYWOOD.

James Casey, a free negro, presented his petition to *Reade, J.*, on 17 September, 1864, setting forth that he was a free negro, and that in 1859, for a valuable consideration, he conveyed by deed his services for ninety-nine years to James R. Love, and that the contract has never been rescinded, and then continued in full force; that on 10 September, 1864, he was taken by Lieut. L. S. Robards, the enrolling officer of that district, into his custody as a conscript free negro, and was then detained as such. The prayer was for a writ of *habeas corpus*. The writ issued, returnable before *Judge Reade* "at the courthouse in Waynesville, Haywood County, on 3 October next," which day was during the term of Haywood Superior Court. Lieutenant Robards' return admitted the facts stated in the petition, and claimed the petitioner as a free negro conscript. The petition, writ, and return were filed in the court, and at the term of the Superior Court of law for Haywood County, held on the first Monday after the fourth Monday of September, 1864, the case was tried by *Judge Reade,* and judgment rendered against the petitioner, from which he appealed to the Supreme Court.

The following is the case made by the judge: "The petitioner applied for and obtained a writ of *habeas corpus,* returnable before me in open court at Waynesville on the first Monday after the fourth (435) Monday of September, 1864. The petitioner, who is a free negro, was arrested by the respondent, Lieutenant Robards, on the ground that he was liable, under the act of Congress, to be enrolled for employment as a free negro in the military service of the Confederate States, as contemplated by that act. It is conceded by the petitioner that he is between the ages named in the act; and it is admitted by the respondent that some four or five years ago the petitioner conveyed his services for a valuable consideration, by deed, to James R. Love, for ninety-nine years, and that said contract still remains in full force. J. R. Love is dead, and his executors claim the services of the petitioner."

Bragg for Lieutenant Robards.
W. H. Bailey for petitioner.

MANLY, J. Upon the argument with which we have been favored in this case the matter was made to turn upon two points:

1. Whether the status of petitioner, as a free negro, continued, notwithstanding the deed entered into with James R. Love.

2. Whether, as a free man, he could be conscribed for such services as are indicated in the act of Congress of 17 February, 1864 (1 Cong. 4th sess., ch. 79, sec. 1).

The part of the act pertinent to our inquiry is in the following words: "That all male free negroes, and other persons of color, resident in the Confederate States, between the ages of 18 and 50 years, shall be held liable to perform such duties with the army, or in connection with the military defenses of the country, in the way of work upon fortifications, or in Government works for the production or preparation of material of war, or in military hospitals, as the Secretary of War may (436) from time to time prescribe; and while engaged in the performance of such duties shall receive rations and clothing, and compensation at the rate of $11 a month, under such rules and regulations as the said Secretary may establish."

It is admitted that the Government does not proceed against the petitioner as one bound to serve as a slave, and who may, therefore, under the act of Congress, be *impressed;* but it claims him as a free negro, subject to be conscribed, and to do duty under the section of the act which has just been quoted.

The petitioner contends that the effect of the deed to Love is to degrade him from the condition of a free man and, by consequence, to withdraw him from liability to conscription for military service.

In *Phillips v. Murphy,* 49 N. C., 45, it was decided that a deed made by a free negro, of his services for a term of years, did not operate to make a slave of him, or to pass a property in him, but simply to give the grantee a right to his services upon an executory agreement, for a breach whereof an action of covenant would lie. So, in the case before us, the deed for service for a term of years does not alter the social or political condition of the negro. No other or different legal consequences result from his agreement than if it had been entered into by a white man. Both, upon a breach of it, are subject to be sued for damages. Neither is subject to have enforced against him a specific execution.

Besides the direct authority I have quoted, it may be observed that the petitioner can only maintain his suit upon the assumption that he is a free man. There is no middle ground upon which he can stand. He is either a slave or a free man. If the latter, he is of the class intended to be embraced by the first section of the act of 17 February, 1864; if the former, he cannot sue, but his suit must be dismissed and he remitted to

custody. If he says, I am a free man, he abandons this point; if he says he is a slave, his declaration puts him out of court.

2. The question in the second place seems to be based upon the (437) idea that all men must be put into the army upon a footing of equal rights, and be permitted to choose the arm of service to which they will respectively attach themselves. This, we think, is a palpable mistake. The organization of an army consists in dividing it into parts, and assigning these parts to different modes of service. This is essential to give it efficiency, and to distinguish it from a fighting mob.

Without descending to minute divisions, there is found in every army a body of infantry, who are on foot and armed with the musket and rifle; a body of cavalry, who are on horseback and armed with saber and pistol; a body of artillery, who are in charge of the cannon, and a body of engineers, who are not armed at all, but with spade and shovel and pickaxes are in charge of fortifications, sapping and mining, and the like. Here are varieties of service, of unequal eligibility; and yet the public authorities, without question of right, assign men to these departments as they deem them best fitted for one or another, whether they will or no. If this can be done by executive and ministerial officers of the law, surely it can be done by the law tself. If regulations made by the War Department, as incidental to its power to organize an army, can justify an arbitrary assignment, the organic law itself can prescribe such regulations.

So it is entirely competent, according to regulations and the unquestioned usages in the army for officers to detail or assign men for the performance of work on the fortifications, in the workshops, producing the material of war, and in the hospitals for taking care of the sick and wounded; and it seems plain, if this thing can be done as an incidental power, of which there has never been any question, the detail may be preordained by the law authorizing the force to be raised.

We can perceive no reason why the law, in authorizing the levy (438) of troops from time to time, may not provide that any portion of these (the latest conscripts, for instance) shall be employed in the least responsible positions; that is, on the fortifications, in the shops and hospitals, and as wagon and ambulance drivers.

By an examination of the act (19 February, 1864, ch. 79) it will be seen that what is here indicated is all that has been attempted by Congress. For the purpose of giving greater efficiency to the army, by preventing the withdrawal of men from the field, the act authorizes the conscription of free negroes for the purpose of performing duty "with the army, and in connection with the military defenses of the country," in working on fortifications, in workshops, hospitals, etc. If these

duties could be assigned the free negroes after they got into the army (of which there seems to be no question), *a fortiori,* could they be assigned to these duties by the law conscribing them.

We have been willing to put the case of the petitioner upon the most favorable ground, and to consider it as the case of a white man, entitled to all the rights and privileges of the race; and with respect to him in that point of view, the law is constitutional and proper to be enforced.

When we consider the difference, before the law, between the social and political conditions of the races, how it has been its uniform policy to keep them separate socially, the law appears to be now eminently proper. Its special features seem to be in conformity only to the unbroken system of our legislation, and to be necessary to preserve homogeneity in our social fabric.

When it became necessary, therefore, as it is declared to be in the preamble to this and other acts of the Congress, passed at the
(439) same session, to conscribe or impress negroes for military duty, it was a requirement of social order that they should be brought in in such way as not to violate the distinction of race. It would not have been proper, and according to usage, to mix them with the whites in such way as to compel social equality.

The idea of equal rights, upon which the petitioner's case seems to be based, is not practicable in the government of an army.

Troops, to give them efficiency, must be moved by one head. The unexperienced and excitable may be kept in the rear, while veterans may be selected, at the will of the commander, to occupy the posts of danger. Regiments, proved to be untrustworthy in the hour of trial, may be removed from the post of honor, and their places supplied with others who have been found more reliable. Individuals whose dispositions or whose loyalty may be suspected may be removed from opportunity and temptation, by being detailed for service in the rear, as cooks, teamsters, nurses, and the like. It has never been imagined that the different divisions of the army could be permitted to contend or by any means determine for themselves their respective positions and duties in the same.

There can be but little room in an army for the enjoyment of civil rights. Its government is necessarily absolute, and, in most respects, according to the will of a single mind, the great and paramount duty being to give it force and rapidity of action, and to guard it against dangers, internal and external.

Our conclusion, then, is:

1. That the first section of the act of Congress, 17 February, 1864, ch. 79, is simply a conscription of free negroes for certain duties pertaining to military service.

2. That it is within the scope of authority belonging to the War (440) Department, incidental to the war power, to place men, and of course free negroes, in the army, in any position where they may be deemed most safe from improper influences, and for which they may be deemed best fitted.

3. If the War Office can do this as an incident to the power to organize the army, *a fortiori,* may it be done by Congress, which, of right, declares the war, and authorizes the raising of the army. In the latter, the power must be the more complete and perfect.

4. That it was not only the right of the Congress to dispose of the negro conscripts as the act prescribes, but there was also a fitness and propriety in such disposition, arising out of the condition of society amongst us, and all previous legislation in respect to the negro race.

Judgment of this Court, in accordance with the judgment of the court below, that the petitioner be remanded to the custody of the officer, and that he pay the costs of this proceeding, to be taxed by the clerk.

THE STATE v. DICK.

(2 Winst., 45.)

1. Any remark made by a judge, on the trial of an issue by a jury, from which the jury may infer what his opinion is as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is *error;* and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of evidence, and that they are not bound by his opinion in regard thereto.

2. It is *error* to leave to the jury the decision of a fact on which the admissibility of evidence depends. But, if the party excepting could not possibly be injured by it, it is not ground for a *venire de novo.*

APPEAL from *Heath, J.,* at Fall Term, 1864, of IREDELL. (441)

The prisoner, a slave, was indicted for arson, in burning a barn with grain in it. The State offered evidence tending to prove the guilt of the prisoner as charged in the indictment: among other things, his confessions, which one Kerr testified were freely and voluntarily made. In the course of the trial one Edson testified that the confessions were made after Kerr had represented to the prisoner that it would be for his advantage to confess his guilt, and the prisoner's counsel moved the court to withdraw the confessions from the consideration of the jury, which the court refused to do, and adjudged that they were freely made,

as testified to by Kerr; and then remarked to the solicitor, that after the other evidence already given in the cause, he, the solicitor, might withdraw this, if he chose so to do. The solicitor declined doing so.

The judge charged the jury that there was evidence tending to show the prisoner's guilt, besides his confessions; and as to them, he instructed the jury that if they believed Kerr, they were to be received, and such credit given to them, in whole or in part, as they might think proper; but if they believed Edson, they should discard *all* the evidence about the confessions, and try the prisoner on the other evidence. He further told them, "that they were the judges of the facts, as he was of the law, and nothing was to be inferred as to the prisoner's guilt because of any remark made by him; they were as independent of him, as to the facts, as he was of them as to the law; that it was his right and duty to say whether there was evidence tending to show that the prisoner was guilty, and theirs to pass upon it, and weigh it, and say whether it was strong enough to convict him."

The jury found the prisoner guilty, and from the judgment according to the verdict the prisoner appealed.

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

(442) MANLY, J. In looking into the record in this case, two errors appear to have been committed on the trial, for one of which, at any rate, the prisoner is entitled to a *venire de novo.*

On the trial a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the State, that, after the other evidence already given in the cause, he, the solicitor, might withdraw them, if he chose to do so, which the solicitor declined. This seems to us to be an expression of opinion on the part of the judge that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference plainly from the manner in which the expedient of withdrawing the testimony is suggested: "After the other evidence, already given in the cause, the solicitor might withdraw," etc. The sense which we attribute to this language is that which his Honor himself seems to have ascribed to it; for he takes pains to explain to the jury that they were not bound by any opinion or judgment of his as to the facts. He endeavored to obviate the effect of his opinion by announcing, in distinct terms, the jury's independency of him in all matters of fact pertaining to the issue; but this it was not practicable for him to do. The opinion had been expressed, and was incapable of being recalled.

The statute declares that "no judge, in delivering a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proved, such matters being the true office and province of a jury."

The object is not to inform the jury of their province, but to guard them against any invasion of it.

The division of our courts of record into two departments—the one for the judging of the law, the other for judging of the facts—is a matter lying on the surface of our judicature, and is known to everybody.

It was not information on this subject the Legislature intended (443) to furnish; but their purpose was to lay down an inflexible rule of practice—that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. Knowledge on the part of the jury of their proper province is not the criterion for determining the propriety or impropriety of an opinion from the judge as to the sufficiency of the proofs. It is the same whether the jury know their rights or not.

The provision of the law in question has been in existence since 1796. On the various occasions when the law has been digested and reënacted, it has been continued in the same words; and the interpretation which we now give it is that which has been given it from the beginning. The judge cannot properly express an opinion whether a fact pertinent to the issue is sufficiently or insufficiently proved. Many questions of fact, especially inquiries into mental capacity, and frauds, require as much experience, science, and acumen as the abstruser questions of law; and yet their decision is left by law in the hands of the comparatively inexperienced and unlearned. This, we suppose, has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger, also, from the ever-active principle that power is always stealing from the many to the few. We impute no intentional wrong to the judge who tried this case below. The error is one of those casualties which may happen to the most circumspect in the progress of a trial on the circuit.

When once committed, however, it was irrevocable, and the pris- (444) oner was entitled to have his case tried by another jury.

The second error appearing upon the record is the instruction given to the jury in relation to the confessions of the prisoner.

The question made before the court was whether the confessions had not been made under such influences as to render them inadmissible.

The two witnesses who had been examined before the judge upon that point were Kerr and Edson. The court instructed the jury that, as they had heard the evidence of these persons, if they believed Kerr had stated the truth of the transaction in regard to the confession, then they were all to be received, and such credit given to them as they might think proper; but if they thought that Edson's statement was the true one, and the inducement was held out before the prisoner made any confession of his own guilt (if any such was made), then they should disregard all the evidence of confessions, etc. The error here consists in laying the confessions before the jury in this alternative way. In the first exception just considered, the judge went over into the field of labor belonging to the jury. In this he invites the jury to come over into his. Neither is lawful. Such a trespass, without leave, on the part of juries, though a grave error, is irremediable in the class of cases now before us. If invited, it becomes an error in the judge. He cannot put upon others the decision of a matter, whether of law or fact, which he himself is bound to make. The parties are entitled to his judgment, as a finality, on all questions of fact arising on the trial of a cause upon which depends the admissibility of testimony. It is the duty of the judge to determine them definitely, and to admit or reject the testimony accordingly. It is error to leave it to the jury to decide the preliminary question of admissibility, and to instruct them to consider it, or not
(445) to consider it, as they find the question the one way or the other.

This matter was considered in *Ratliff v. Huntley,* 27 N. C., 545, and *Monroe v. Stutts,* 31 N. C., 49, and the law declared to be as herein stated. For this error, the prisoner would be entitled to have his case put before another jury, if it would, by any possibility, have brought him harm; but it does not appear to us that it could, the judge having previously decided against the prisoner; and it is not therefore considered of any avail to the prisoner in his bill of exceptions. It is noticed in order to renew our disapprobation of the course.

For the first error, the prisoner is entitled to a

Venire de novo.

Cited: S. v. Andrews, 61 N. C., 206; *S. v. Caveness,* 78 N. C., 490; *S. v. Alston,* 113 N. C., 668; *Williams v. Lumber Co.,* 118 N. C., 935, 939; *S. v. Howard,* 129 N. C., 673; *Avery v. Stewart,* 134 N. C., 292; *Withers v. Lane,* 144 N. C., 190; *S. v. Swink,* 151 N. C., 728; *S. v. Cook,* 162 N. C., 588; *S. v. Harris,* 166 N. C., 247; *Speed v. Perry,* 167 N. C., 128; *Medlin v. Board of Education,* Ib. 244; *Bank v. McArthur,* 168 N. C., 52; *S. v. Beal,* 170 N. C., 768.

THE STATE v. RICHARD HONEYCUTT.

(2 Winst., 51.)

Buying of and receiving from a slave corn or other forbidden article on the slave's own account, the owner of the slave being present and knowing what is done, and giving no *written* permission, the buyer and the slave being unaware of his presence, is indictable under section 85, ch. 34, Rev. Code.

INDICTMENT against the defendant for buying of and receiving from a slave belonging to F. B. Moore, a certain quantity of corn, against the act of the General Assembly (Rev. Code, ch. 34, sec. 85), tried before *Heath, J.*, at IREDELL Fall Term, 1864.

On the part of the State there was evidence tending to show that the slave, in the night-time, carried a bag of corn near to the defendant's house and threw two stones on the roof of the house, and the defendant came out of the house on the second stone being thrown, and received the corn. The master of the slave and the witness for the State, suspecting that the slave was carrying the corn to the defendant for the purpose of selling it to him, followed the slave, and was near him when the corn was sold and delivered, and saw the sale and delivery. When the corn was delivered to the defendant, he handed something to the slave, but the witness did not know what. The defendant did not know of the master's presence.

The defense was that as the master was present at the sale and delivery, they were his acts, and not those of the slave.

The judge charged the jury that if the sale and delivery, one or both, were made by the slave as described by the witness, and the defendant did not know at the time that the master was present, the presence of the master made no difference, and the defendant was guilty; and from the judgment accordingly, he appealed.

Attorney-General for the State.
No counsel for defendant. (447)

MANLY, J. The principle assumed by the counsel in the court below, that the master may sell and deliver corn by the hands of his slave, he (the master) being present and directing it, is too plain to admit of contradiction; but this is not the case presented upon the record.

The master was, indeed, within view of the transaction between his slave and the defendant; but there is no evidence that either defendant or the slave knew of his being there; much less is there any evidence that the master authorized the act. All the case states, bearing upon this

point, is that the master followed the slave because he *suspected* that he was going to trade with the defendant, and was in view of the trading when it occurred.

The delivery of the corn was made in the night-time, by the slave, upon a private interview procured by unusual signals, and may be presumed, under the circumstances, to have been on the slave's own account, unless the contrary appear. Such a delivery, without a written permission, is against the criminal law, although the owner or manager was cognizant of it and consenting to it. This is decided in *S. v. Hart,* 26 N. C., 246, and is now approved.

Without impugning, therefore, the position that a slave may lawfully, without a written license, deliver corn in his master's name and on his master's account, provided his master constitutes him his agent for such purpose, and it so appears on the proofs; yet it is clear that all other trading with or acceptance from a slave of corn or other forbidden article, without permission in writing, is unlawful.

The point, then, presented is whether a delivery of corn by a slave, on his own (the slave's) account, the owner being present and observing the transaction, but giving no permission in writing, is a viola-
(448) tion of the criminal law. The judge below instructed the jury it was, and in this we concur.

PER CURIAM. No error.

THE STATE v. PETER BROWN.

(2 Winst., 45.)

1. It is not a ground for arresting judgment that the two offenses of permitting a slave to go at large as a free person, and of permitting him to keep house as a free person, are joined in the same count of an indictment. Such objection ought to be taken upon a motion to quash the indictment, and not upon a motion in arrest of judgment.

2. If a slave, living in a house to himself, keeps a boarding-house for his own livelihood, and the master, knowing it, exercises no control over him or his business, this is an offense within chapter 107, sec. 29, of the Revised Code.

INDICTMENT against the defendant for permitting his slave to go at large, as a free person, and for permitting him to keep house as a free person, exercising his own discretion in the employment of his time. Both offenses were charged in one count. The trial was before *Heath, J.,* at MECKLENBURG Fall Term, 1864.

It was in evidence that the defendant was the owner of the slave, who is 65 or 70 years old; that she lived on a lot in the town of Charlotte, 200 yards from where the defendant lived, who was frequently on the lot where she lived, he having a tanyard on the lot, and being engaged in working at that business; that she kept a boarding-house for soldiers and other white persons, and was frequently seen in the market and in the stores, buying supplies for her household; that when the defendant was remonstrated with, by a policeman of the town, for permitting her to go at large and live in this manner, he said that she was old and unable to work, and was of little value to him while he had (449) her, and that he permitted her to work her own way.

The judge charged the jury that if they believed, from the evidence, that the defendant knowingly permitted the slave to go at large as a free person, exercising her own discretion in the employment of her time, or if he knowingly permitted her to keep house to herself as a free person, exercising her own discretion in the employment of her time, he was guilty; but if the slave lived or kept house in the house mentioned, for the purpose of attending to the business of her master, he was not guilty.

The jury found the defendant guilty, and from the judgment on the verdict the defendant appealed.

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

BATTLE, J. We are unable to discover any error committed by the judge in the trial of the case in the court below. The facts stated by the witnesses, if believed, certainly brought the case within the prohibition of the act under which he is indicted.

The testimony was fairly submitted to the jury in the charge of the court, and with the result the defendant must be content. *S. v. Duckworth, ante,* 240.

There is no ground upon which the motion to arrest the judgment can be sustained. The offenses of the owner of a slave, permitting him or her to go at large as a free person, and to keep house as a free person, are of a cognate character, and there can be no more objection to their being included in the same count of an indictment than there is for joining in the same count the charge of an affray and that of (450) a mutual assault and battery.

At all events, the objection ought to have been taken upon a motion to quash the indictment, and cannot be made available upon a motion in arrest of judgment. See Arch. Cr. Pl., 53; *S. v. Allen,* 11 N. C., 356.

PER CURIAM. No error.

Cited: S. v. Tytus, 98 N. C., 707; *S. v. Christmas,* 101 N. C., 755.

THE STATE v. ELLICK.

(2 Winst., 56.)

1. It is error for the judge to make a general charge, without declaring and explaining the law arising on the evidence.
2. If A. is about to strike B., who is unwilling to enter into a fight, and shows it by words or actions, and A. presses on and strikes, or attempts to strike, and thereupon B. kills with a deadly weapon, it is *manslaughter.*
3. If, on a sudden quarrel, the parties begin a fight by consent, without deadly weapons, and, after blows pass, one uses a deadly weapon and kills, it is *manslaughter.*
4. If, on a sudden quarrel, the parties fight by consent, at the instant, with deadly weapons, and one is killed, it is but *manslaughter:* provided the parties fight on equal terms and no undue advantage is taken.
5. Where words passed between the prisoner and the deceased, who were sitting on the doorsill, and the prisoner got up, the deceased then got up and reached his hand inside the door and got a stick which was a deadly weapon, and, as he was turning around with the stick, the prisoner stabbed him with a bowie-knife: *Held* to be *murder.*
6. If on a trial of an indictment for murder the judge instructs the jury that if they believe the witnesses on either side the prisoner is guilty, it is equivalent to a charge that the prisoner is guilty, upon his own evidence alone, taken in the most favorable view for him; and there is no error if his evidence did not, in such view, tend to prove his innocence or to mitigate his offense to a lower grade.
7. When it is proved that one has killed intentionally, with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him, and the jury must be satisfied, by the testimony, that the matter offered in mitigation is true. The doctrine of reasonable doubt does not apply.

(451) INDICTMENT against Ellick, a slave, for the murder of another slave, Cornelius, tried before *French, J.,* at Fall Term, 1864, of GRANVILLE.

Micajah, a slave, a witness on the part of the State, swore that one night in the last summer he had a quarrel with the prisoner, about the prisoner having been attacked by a dog a week before. He and the prisoner fought; he threw the prisoner down, and seeing the prisoner feeling for his knife, he left him; shortly afterwards he saw the prisoner seated on the doorsill with the deceased; he heard some words pass between the two, but did not hear what they were. He saw the prisoner get up, and immediately afterwards the deceased arose, and as he rose, prisoner made a thrust at him with both hands, and witness saw the blow stricken on the left side of deceased, who immediately after receiving the blow reached his hand inside the door and took a stick and knocked prisoner down. The deceased died of the wound. The stick

which the deceased used was admitted by the State to be a deadly weapon. Other witnesses for the State swore to the same general effect as Micajah.

Witnesses were examined on the part of the prisoner who testified to the facts stated in the opinion of the Court.

The counsel for the prisoner requested the court to charge the jury that if they had a rational doubt, from the evidence, whether the killing was done with malice, that the prisoner was entitled to the benefit of that doubt, and they should find the prisoner guilty of manslaughter only. The court refused to give the instruction. The counsel for the prisoner further requested the court to charge the jury that if the fatal blow was given by the prisoner after he was stricken with the stick by the deceased, that it was manslaughter only. The court (452) declined to give the instructions, because there was no evidence to sustain it. The court instructed the jury that upon the evidence of the witnesses on the part of the State, or of the prisoner, the killing was murder.

The counsel for the prisoner excepted to the charge of the judge.

The jury found the prisoner guilty, and from judgment accordingly the prisoner appealed.

Attorney-General for the State.
Eaton for the prisoner.

PEARSON, C. J. We concur with Mr. Eaton in the position that from the manner in which the case was put to the jury, the motion for a *venire de novo* is to be considered on the testimony of the witnesses for the prisoner only; and that the testimony of his principal witness, Harriet, is to be taken in the view most favorable to him. This follows from the fact that the judge made a general charge, and did not "declare and explain the law arising on the evidence." *S. v. Summey, post,* 496; *Gaither v. Ferebee, ante,* 303; *S. v. Norton, ante,* 296.

We have these facts: The prisoner and one Micajah, on a starlight night and in the shade of trees, had a fight. Micajah got the prisoner down, and then ran off. The prisoner rose up, and had his hand to his side as if he was holding something in his hand; he then (458) sat down on the doorsill on which the deceased was sitting. Words passed between them; the prisoner got up; the deceased then rose up and reached his hand inside the door and got a stick. As he was turning round (after getting the stick), the prisoner stabbed him in the left side with a bowie-knife, the blade of which was 9 inches long. The deceased then knocked him down with the stick; as he rose, he knocked him down

a second and a third time; prisoner ran off, the deceased followed him a few steps, and fell, and died of the wound. The bowie-knife and stick were admitted to be deadly weapons.

The learned counsel insisted that the offense was manslaughter, on two grounds: (1) The act of seizing the stick, with an intent instantly to strike, was an assault with a deadly weapon, and amounted to legal provocation. (2) The prisoner had reasonable ground to believe that the deceased was about to do him great bodily harm, and struck to prevent it, which mitigates the offense to manslaughter.

Conceding these principles of law, the Court is of opinion that neither applies to this case, and that the offense is murder. There is some *confusion* in respect to the application of these principles of the law of homicide, growing out of *obiter dicta* and certain decisions to be met with in the books. It is important that all confusion should be cleared away, especially in times like these; for one of the ill effects of war is to scatter deadly weapons among the people, familiarize the public mind to scenes of blood, and make a resort to such weapons a thing of frequent occurrence, unless it is prevented by the fear of the law. On this account, without attempting to review the cases (which would be an endless task), I will endeavor to give the reasons on which the law is based, whereby the proper applications of its principles will be made clear.

Manslaughter is of two kinds: (1) When the killing is in the heat of blood. (2) When the killing is by accident or mistake, arising from negligence or a want of due precaution.

(459) 1. If A. is about to strike B., who is unwilling to enter into a fight, and shows it by words or actions, or otherwise, as by going back, or warns A. not to strike, and A. presses on and strikes, or attempts to strike, and thereupon B. kills with a deadly weapon, it is manslaughter; for there is legal provocation, and the law ascribes the killing to "heat of blood," and not to malice.

2. If, on a sudden quarrel, the parties begin a fight by consent, *without deadly weapons,* and, after blows pass, one uses a deadly weapon and kills, it is manslaughter; for by the excitement of the fight the blood is heated, and the killing is done not of malice, but in the *"furor brevis,"* which the law, out of indulgence to human frailty, allows to mitigate the offense, although the party had himself committed a breach of the peace by entering into the fight willingly.

3. If on a sudden quarrel the parties fight by consent, *at the instant, with deadly weapons,* and one is killed, it is but manslaughter, *provided the parties fight on equal terms and no undue advantage is taken;* for the *fairness* of the fight rebuts the implication of malice, and the law mitigates the offense, out of indulgence to the frailty of human nature.

Which of these three principles is applicable to our case? When it is proved that one has killed intentionally, with a deadly weapon, the burthen of showing justification, excuse, or mitigation is on him. It is admitted the prisoner killed intentionally, with a deadly weapon. He does not show, by his words or actions, that he declined to fight, or give back, or warned the deceased not to strike. So the first principle does not apply. The parties did not begin the fight *without* deadly weapons. So the second principle does not aply. The parties fought, by *consent,* with deadly weapons; so the case falls under the third principle, and the question is narrowed to this, Does the principle in regard (460) to a fair fight apply? or does the case fall under the exception in regard to a fight on unequal terms and when undue advantage is taken? This is too plain for discussion. The prisoner, having his weapon ready, took his adversary at a disadvantage, and stabbed him in the side while he was in the act of turning round to face him, and before he was "on his defense." This dastardly act excludes the idea that he entered into the fight in compliance with the common notions of honor, and shows that he "sought the blood" of the deceased.

The principle by which a killing in a *fair* fight, with deadly weapons, is mitigated, was adopted at a time when every gentleman wore a sword; and the custom was, on offense given, to draw and fight. Such fights, owing to the expertness of the combatants in defense, were not often fatal. Manners have since changed. No one in private life now wears a sword; and how far this may affect the principle is a serious question; but it is certain that a fair fight at the instant with deadly weapons is now a rare occurrence. When one has a knife, and the other a stick or a pistol they are not on equal terms; and the purpose of each is to take advantage and give a mortal blow as soon as possible. Such cases fall under the exception; the party killing is a murderer, and there is nothing to mitigate.

If, as contended by Mr. Eaton, in a "mutual combat" with deadly weapons the offer to strike amounts to a legal provocation, neither party would ever be guilty of more than manslaughter; for each could say, "My adversary was about to strike with a deadly weapon" So it would make no difference whether the fight was declined or entered into willingly, or was fair or unfair—and the law would encourage a hasty resort to deadly weapons, and an unfair use of them, by saying, "You need not show that you declined to fight, and attempted to avoid it; you need not show that you took no undue advantage. Use your weapon as soon as you can, and take all advantages! for if your adversary is (461) about to strike, it is a legal provocation, although you are also about to strike, and whichever kills will only be guilty of manslaughter." This would only lead to horrid consequences, and completely upset and

confound all the principles which have been so carefully adopted to deter men from the use of deadly weapons and at the same time extend a reasonable indulgence to the frailty of human nature.

The learned counsel did not insist with much earnestness that the case could be brought under the second kind of manslaughter. One or two instances will show that the doctrine has no application, viz.:

1. If one handles a loaded gun so negligently that it goes off and kills, it will be excusable homicide or manslaughter, according to the degree of negligence.

2. An officer pushed abruptly and violently into a gentleman's chamber early in the morning to arrest him, not telling his business or using words of arrest. The gentleman, *not knowing that he was an officer,* under the first impulse, stabbed him with his sword. It was ruled manslaughter at common law, for the prisoner, not knowing the officer's business, might, from his behavior, *reasonably conclude* that he was about to rob or murder him. *Cook's case,* Cro. Car., 538.

3. Upon an outcry of thieves, in the night-time, a person who was concealed in a closet, but no thief, in the hurry and surprise the family was under, was stabbed in the dark. This was holden to be an innocent mistake, and ruled *chance-medley. Lever's case,* cited in *Cook's case, supra.* Foster, at page 299, observes of this case: "Possibly it might have been better ruled manslaughter, due circumspection not having been used. In all cases when the offense is mitigated because the party acted under a mistake, for which there was reasonable ground, if the danger had been real, the act would have been justifiable." In our case (462) the danger was real—the deceased was about to strike with a deadly weapon; and if this doctrine applies, the killing was justifiable, and the prisoner ought to have been acquitted. *Reductio ad absurdum.*

The second objection to the charge is not tenable. From the view we have felt bound to take of the case, the judge is considered as having, in effect, instructed the jury that, putting the testimony of the witnesses on the part of the State out of the case, as an intentional killing with a deadly weapon was admitted, the testimony of the prisoner's witnesses did not mitigate the offense to manslaughter; and the prisoner has no right to complain because the instruction assumes that what his own witnesses swore to was true.

The third objection is not tenable. The position "that the principle on which the doctrine of reasonable doubt is grounded is as much applicable to the grade of the homicide as it is to the fact of the homicide" is not true. The error consists in not attending to the distinction, that the fact of the homicide must be proved *by the State;* but if found, or admitted, the *onus* of showing justification, excuse, or mitigation is upon

the *prisoner*. At page 290 Foster says: "Whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of the jury"; the presumption of law is against him "till the presumption is repelled by contrary evidence." At page 255 the matter is explained at large.

The principle on which the doctrine of reasonable doubt as to the fact of the homicide is grounded is that, in *favor of life*, the fact which *the State* is required to establish must be proved beyond a reasonable doubt. It certainly would not be in favor of life to apply this doctrine to matter of mitigation, which the *prisoner* is required to establish. Hence, in regard to that, the rule is, the jury must be satisfied by the testimony that the matter offered in mitigation is true.

There is no error. (463)

NOTE.—A judge must declare and explain to the jury the law arising on the evidence. *S. v. Dunlop*, 65 N. C., 288; *Smith v. Smith*, 72 N. C., 159; *S. v. Gaither*, 72 N. C., 458; *Hill v. Sprinkle*, 76 N. C., 353.

If two fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes *manslaughter*. *S. v. Massage*, 65 N. C., 480.

If A. assaults B., giving him a severe blow, and B. strikes him with a deadly weapon and death ensues, it is *manslaughter*. If the provocation from A. is slight, and B. strikes, and it appear from the weapon used, or other circumstance, that B. intended to kill A. or do him bodily harm, and death ensues, it is *murder*. *S. v. Smith*, 77 N. C., 488.

Upon a trial for murder, the fact of killing with a deadly weapon being proved, it is incumbent upon the prisoner to establish matter of mitigation, neither beyond a reasonable doubt nor according to the preponderance of testimony, but *to the satisfaction* of the jury. *S. v. Willis*, 63 N. C., 26; *S. v. Haywood*, 61 N. C., 376. If the jury are left in doubt, it is *murder*. *S. v. Smith*, 77 N. C., 488.

Cited: S. v. Willis, 63 N. C., 27, 29; *S. v. Smith*, 77 N. C., 489; *S. v. Payne*, 86 N. C., 610; *S. v. Brittain*, 89 N. C., 502; *S. v. Carland*, 90 N. C., 675; *S. v. Mazon, ib.*, 683, 684; *S. v. Kennedy*, 91 N. C., 577; *S. v. Vines*, 93 N. C., 498; *S. v. Gooch*, 94 N. C., 1002; *S. v. Byers*, 100 N. C., 518; *Harding v. Long*, 103 N. C., 5; *S. v. Rollins*, 113 N. C., 734; *S. v. Barringer*, 114 N. C., 841; *S. v. Neal*, 120 N. C., 621; *S. v. Byrd*, 121 N. C., 686; *S. v. Barrett*, 132 N. C., 1012; *S. v. Lipscomb*, 134 N. C., 695; *S. v. Clark, ib.*, 702, 714; *S. v. White*, 138 N. C., 718; *S. v. Quick*, 150 N. C., 824; *S. v. Bradley*, 161 N. C., 293; *S. v. Pollard*, 168 N. C., 120; *S. v. Kennedy*, 169 N. C., 295.

THE STATE v. M. B. EDNEY.

(2 Winst., 71.)

1. A judge, being possessed of jurisdiction over the person of a prisoner by any proceeding before him, may adjudge that he be allowed bail, and make an order that his recognizance be taken by a justice or justices of the peace, named by him, in a sum fixed by him; and a recognizance taken according to the order is valid.

2. An instrument of writing, executed with intention to comply with such an order, in form a bond, signed and sealed by the prisoner and his surety, on the prisoner's being let out of prison, and received by the justices named, by them returned to the proper court, and by its order filed as a record, is a *recognizance.*

3. Taking a recognizance consists merely in making and attesting a memorandum of the acknowledgment of a debt due to the State, and of the condition on which it is to be defeated.

4. Presenting a petition to a judge for a writ of *habeas corpus* gives him jurisdiction of the subject, and the parties may waive all errors and dispense with all forms in the proceedings on it.

5. Where a petition for a *habeas corpus* was presented to a judge, in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it; and, by the consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on the petition, and fixed the amount in which bail should be taken, and named the justices of the peace to take it, and the prisoner was afterwards discharged from prison, on his entering into a recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance: this is plenary proof of a waiver of all errors in the proceedings.

6. It *seems* that the defendant would be *estopped* by the recital that, "upon application to the judge, he had ordered that the prisoners be allowed bail in the sum of $2,000 each, and had authorized the two justices to take the recognizance."

(464) THIS was a *scire facias* to show cause why an execution should not issue on a forfeited recognizance, and was tried before *Reade, J.,* at BUNCOMBE Spring Term, 1864, on the plea of *nul tiel record.*

The State gave in evidence a record of the Superior Court of Law of Buncombe County, setting forth that at Spring term of that court, "B. J. Smith and W. W. McDowell, justices of the peace of said county,

brought into court paper-writings of the tenor following, to wit:" (Here was inserted the petition of J. A. Shock and five others, addressed to the Hon. William M. Shipp, one, etc., praying for a writ of *habeas corpus,* in order that they might be bailed.) The record then proceeded: "Upon the facts stated in this petition, I think the parties entitled to bail. Therefore, by the suggestion of the solicitor, without the formality of a writ, and to save trouble and expense, I suggest that they be admitted to bail in the sum of $2,000 each, and that B. J. Smith (465) and W. W. McDowell take bond for their appearance at the first Superior Court to be held after this time. If the suggestion is not adopted, the writ must issue above my name, which is signed near the bottom of this sheet.

W. M. SHIPP.

5 February, 1864.

"W. M. SHIPP, J. S. C. L. E."

Know all men by these presents, that we, J. A. Shock, Carol Walton, James T. Holbert, Daniel Mayberry, G. W. Walker, and B. M. Edney, are held and firmly bound to the State of North Carolina in the sum of $2,000, for the faithful payment whereof we hereby bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is such: Whereas, the above bounden, J. A. Shock, Carol Walton, James T. Holbert, Daniel Mayberry, and G. W. Walker, have been committed to the common jail in and for the county of Buncombe in said State, charged with the crimes of larceny, robbery, and burglary; and whereas, on application to the Hon. W. M. Shipp, one of the judges of the Superior Courts of Law and Equity in and for said State, he has ordered that the said last parties be allowed bail in the sum of $2,000 each, the bond to be received by B. J. Smith and W. W. McDowell, justices of the peace: now if the said J. A. Shock, Carol Walton, James T. Holbert, Daniel Mayberry, and G. W. Walker, and each of them, shall well and truly make their and his personal appearance before the judge of the Supe- (466) rior Court of Law to be held in and for the county of Buncombe aforesaid on the sixth Monday after the fourth Monday in April, A. D. 1864, and if they and each of them shall well and truly make their and his personal appearance before the judge of any court of oyer and terminer that may be ordered to try criminal cases in and for the county of Buncombe aforesaid, at any time before the said Superior Court, and not depart the court aforesaid until lawfully discharged, then the above obligation to be void; otherwise, to remain in full force and effect. And it is expressly understood that the above bond is for the several appear-

ance of the last named parties; and that the forfeiture is to be the forfeiture of the said sum of $2,000 for the default of each and every one of the said last named parties.

Test: (Signed) P. C. WALTON, [SEAL]
(Signed) JAMES T. HOLBERT, [SEAL]
(Signed) DANIEL His × mark. MAYBERRY, [SEAL]
(Signed) J. A. SHOCK, [SEAL]
(Signed) G. W. WALKER, [SEAL]
(Signed) B. M. EDNEY. [SEAL]

Approved:
W. W. McDOWELL, J. P.
Approved:
B. J. SMITH, J. P.

And the said papers and recognizance were ordered by the court to be entered of record and were duly entered accordingly, and at the same term of the court the following proceedings were had, to wit:

(467) "The said defendant is called on his recognizance, and failed to answer and appear. Let *scire facias* issue according to law. Judgment *nisi* against the defendant and his surety, B. M. Edney, for the sum of $2,000."

The court adjudged that there was no such record as is supposed by the *scire facias*.

The State appealed.

Attorney-General for the State.
W. H. Bailey for defendant.

PEARSON, C. J. In support of the plea, *"nul tiel record,"* the defendant takes three grounds. This Court is of opinion that neither is tenable.

1. "The judge had no power to authorize the justice of the peace to take the recognizance."

When a judge, in a proceeding initiated before him, adjudicates that the party is entitled to be discharged on giving bail, and fixes the amount, it has long been the practice in this State, if the party be not prepared with sureties, for the judge to authorize one or more justices of the peace, named by him, to take the recognizance; and recognizances so taken have heretofore, as far back as the memory of the members of this Court extends, always been deemed valid. This practice has prevailed so long, and is so obviously for the ease of the citizen, that we would not be justified in now putting a stop to it, unless satisfied that it is in violation of some important principle of law. It is true, a judicial func-

tion cannot be delegated; but after the judge has decided that the party is entitled to be discharged on giving bail, and has fixed the amount, all of the questions presented by the proceedings are disposed of, and nothing remains to be done but to carry the adjudication into execution; and there is no reason why the judge may not authorize a justice of the peace to do it; for all he has to do is to pass on the sufficiency of the surety, and to attest the fact that the recognizance is entered into. The former involves no question of law, but is a matter of fact, which may be ascertained by one man, who is authorized to administer (468) an oath, as well as another; and although in strictness it may be deemed an act of a judicial nature, it affords rather a technical than a substantial objection to the practice. The latter is a mere ministerial act, which requires no exercise of judgment, either in respect to a matter of law or of fact, and is done by hearing the recognizance and making and attesting a "minute" or memorandum by which a formal recognizance may be afterwards drawn up. For instance: "A. B. recognized in $1,000 to appear at, etc." "C. D. recognized as surety in a like sum." In *S. v. Hill,* 25 N. C., 398, *Judge Ruffin* sanctions the practice and intimates an opinion that it may be supported on the ground that a justice of the peace has power, *virtute officii,* to take recognizances; and the effect of the order of the judge is simply to enable the justice to obtain control of the body, which he could not otherwise do, having no power to issue a writ of *habeas corpus.* So the authority conferred by the judge is not a delegation of a judicial function, but the substitution of one judicial officer in place of another, in respect to a minor part of the proceeding, the main questions having been disposed of.

2. "The judge made no adjudication allowing the prisoner to give bail, and no order authorizing the justice of the peace to take the recognizance."

It is true, an adjudication that the prisoner is entitled to be discharged on giving bail is not formally set out, and there is no formal order authorizing the justices to take the recognizance. But these things are done in substance, and all errors are waived by consent. The facts are: the petition is filed, and the judge decides that the writ should issue, and for this purpose signs his name *officially,* and directs the formal words to be inserted, and the writ to issue, if necessary; but for the sake of saving "expense and trouble," with the consent of the solicitor for the State, he expresses his opinion that on the facts stated the petitioners are entitle to be discharged on giving bail for their ap- (469) pearance, fixes the amount at $2,000 for each, and suggests that the recognizance be taken by two justices of the peace, whom he names, without the formality of a writ. This suggestion is accepted and acted on. The justices named treat the matter as if the judge had allowed

the prisoners to give bail, and authorized them to take it. This is done with the consent of the solicitor, and of the prisoner, and of the defendant, who was offered as surety, and they admit under their hands and seals that, *"upon application to the judge, he had ordered that the prisoners be allowed bail in the sum of $2,000 each, and had authorized the two justices to take the recognizance,"* which is done, and the prisoners thereupon discharged.

There is force in the suggestion that, on the authority of *Iredell v. Barbee,* 31 N. C., 250, and *United States v.* (*sic*), 2 Brockenborough, 115, these admissions, made in a solemn manner and acted on for the benefit of the prisoners, amount to an estoppel, and conclude the parties from gainsaying the matters admitted. However this may be, it is clear that if the admissions do not operate by way of estoppel, they constitute *plenary evidence* of consent to "waive all errors" and dispense with all parts of the proceeding preliminary to taking the recognizance which it was in the power of the parties to dispense with.

It is true, "consent cannot confer jurisdiction"; but we are of opinion that the jurisdiction of the judge attached, and the proceeding was regularly constituted before him, by filing the petition; and all errors of form could be waived, and all formal parts of the proceeding be dispensed with, by consent. For instance, if the parties consent that the body need not be produced, and, on the return, setting out "the cause of detention," the judge disposes of the question, his ruling is binding. This shows that, after the proceeding is regularly constituted, the parties may, by consent, treat the production of the body as a matter of
(470) form, and dispense with it, although it is usually the most important part of the proceeding, and the judge cannot dispose of the matter unless the body is produced, or considered as present, by consent, and error waived.

So, after the petition is filed, if the parties submit the questions on a "case agreed," waiving, by consent, the necessity for issuing a writ, I apprehend the ruling would be binding; for the purpose of the writ is simply to compel the production of the body, together with the cause of detention; and if that purpose be answered, the writ may be treated as matter of form, and waived by consent. Our case is stronger, for the judge signed his name officially, with directions to insert the formal words; and the writ, so far as his action was concerned, had issued, and further proceedings on it were dispensed with by consent.

It is also true that it was irregular for the judge to give his opinion that, on the facts stated, the prisoners were entitled to be discharged on giving bail, and to fix the amount and name the justices of the peace *before and in anticipation* of the consent of the prisoners to waive errors and dispense with formal proceedings; but, as this consent was after-

wards, while the proceeding was pending, given in the fullest manner, the irregularity was cured; and it would have been an idle form for the judge to repeat his opinion, and to state the amount of the bail, and name the justices of the peace a second time.

3. "The recognizance is not in due form, and was not taken as authorized by the judge."

We stated, under the first head, what is necessary in order to take a recognizance.

These requisites are complied with. The signing and sealing by the prisoners and defendant were not necessary to give validity to the recognizance; but, in respect to *that,* it does no harm; and in respect to the consent to waive errors, etc., we have seen, under the second head, that it had a very important bearing. (471)

Whether the defendant can be made to pay more than one sum of $2,000, by a proper construction of the instrument, is a question not presented in this case.

There is error. Judgment reversed and judgment for the State according to *scire facias.*

Cited: S. v. Houston, 74 N. C., 176; *s. c., ib.,* 550; *S. v. Jones,* 100 N. C., 440; *S. v. White,* 164 N. C., 410.

THE STATE v. JAKE.

(2 Winst., 80.)

1. It is not burglary to break and enter a smokehouse thirty-five steps from a dwelling-house, the dwelling-house having no inclosure around it.

2. A log cabin belonging to the owners of a tobacco factory, in which the superintendent of the factory usually slept, is a dwelling-house, in which burglary may be committed.

INDICTMENT for burglary, tried before *French, J.,* at Fall Term, 1864, of PERSON.

The evidence relative to the points on which the case turned in this Court was that Alexander Walker and two others were owners of a tobacco factory in Person County. The factory, and a smokehouse appurtenant to it, were inclosed—one wall of the smokehouse and one wall of the factory forming part of the inclosure. The smokehouse was 15 feet from the factory. There was a log cabin about 35 or 40 steps from the smokehouse, belonging to the owners of the fac- (472)

tory, and occupied by the superintendent of the factory, who usually slept in it. This house was not inclosed. The superintendent sometimes kept the key of the house. There was evidence to show that the smokehouse had been broken and entered in the night by the prisoner, and that some bacon had been stolen from it by him.

The jury found the prisoner guilty, under the instructions of the judge.

Attorney-General for the State.
Graham for prisoner.

BATTLE, J. Burglary, at common law, is defined to be the breaking and entering the dwelling-house of another, in the night-time, with intent to commit a felony therein. Roscoe Cr. Ev., 298; *S. v. Langford,* 12 N. C., 253; *S. v. Jenkins,* 50 N. C., 430. Every permanent building in which the owner or renter and his family, or any member thereof, usually and habitually dwell and sleep is deemed a dwelling in which this crime may be committed. See Roscoe Cr. Ev., 299, and the authorities there referred to, and *S. v. Jenkins, ubi supra.* The term "dwelling-house" includes within it not only the house in which the owner or renter and his family, or any member of it, may live and sleep, but all other houses appurtenant thereto, and used as part and parcel thereof, such as kitchen, smokehouse, and the like: provided they are within the curtilage, or are adjacent or very near to the dwelling-house. *S. v. Langford, ubi supra; S. v. Whit,* 49 N. C., 349. If the kitchen, smokehouse, or other house of that kind be placed at a great distance from the dwelling, and particularly if it stand outside of the curtilage or inclosed yard,
it cannot be considered a part of the dwelling-house for the pur-
(473) pose of being protected against a burglary. The reason is that
the law protects from unauthorized violence the dwelling-house and those which are appurtenant, because it is the place of the owner's *repose;* and if he choose to put his kitchen or smokehouse so far from his dwelling that his *repose* is not likely to be disturbed by the breaking into it at night, it is his own folly. In such cases the law will no more protect him than it will when he leaves his doors or windows open. *S. v. Langford, ubi supra.*

The principles which we have thus stated as establishing the kind of house in which a burglary may be committed, we do not understand the counsel on either side to dispute. In their application to the facts of the case now before us, the counsel for the prisoner contends: (1) That the house in which the superintendent Pulliam slept was not such an one as the law recognizes as a dwelling-house; and (2) if it were, the smoke or meat house which was broken open was so situated in reference to it that it could not be considered as a part or parcel of it.

Upon the first point, our opinion is against the position taken by the prisoner's counsel. The building is described to be a small log house, and is called a log cabin; but it appears to have been a substantial, permanent one, and therein differs from a tent or a booth erected in a market or fair, in which no burglary could be committed, although the owner lodges in it. See 1 Hawk. Pl. Cr., ch. 38, sec. 35; 1 Hale, Pl. Cr., 559; Roscoe Cr. Ev., 300. This house was in truth the dwelling-house of the owners of the tobacco factory, and not of the superintendent, Pulliam, he being only their servant or employee. See *S. v. Curtis,* 20 N. C., 222. But if it were taken to be the dwelling of Pulliam, there is a count in the indictment which so states it.

As to the second position taken for the prisoner, there is per- (474) haps more doubt, but upon mature consideration we think it is in his favor. The dwelling-house in which Pulliam usually slept was uninclosed, and of course had no curtilage or inclosed yard; and the smokehouse stood upwards of a hundred feet from it. The factory and the smokehouse had a common inclosure, from which the log dwelling was excluded. Under these circumstances, it seems too much to say that the smokehouse was appurtenant to the log dwelling-house. Indeed, it did not appear to have been used as such; for Pulliam, who slept in it, did not carry the key to it, except occasionally; that being usually carried by the acting manager of the partnership, who lived and slept in a dwelling-house about a quarter of a mile off. The smokehouse was doubtless used for the purpose of storing meat and other things for the use of all the persons, white and black, who were engaged in the tobacco factory established at that place. It was the "carelessness or indifference" of the proprietors which placed it in such a situation that it would not enjoy that protection which the law affords against a burglarious entry.

PER CURIAM. Error.

NOTE.—As to what is a dwelling-house, etc., in which burglary can or cannot be committed, *vide S. v. Mordecai,* 68 N. C., 207; *S. v. Outlaw,* 72 N. C., 598; *S. v. Potts,* 75 N. C., 129. As to persons in whom to charge the property, *vide S. v. Outlaw,* 72 N. C., 598; *S. v. Wincroft,* 76 N. C., 38; *S. v. Matthews,* 76 N. C., 41; *S. v. Davis,* 77 N. C., 490.

Cited: S. v. Pressley, 90 N. C., 733.

R. V. HIX v. ALLEN FISHER.

(2 Winst., 84.)

The Superior Court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision, in pursuance to sec. 63, ch. 31, Rev. Code, or when it is offered to be read in evidence on a trial; therefore, an appeal under ch. 4, sec. 23, Rev. Code, from the decision of a judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways.

(475) THE case is stated in the opinion of the Court.

Merrimon for plaintiff.
W. H. Bailey for defendant.

BATTLE, J. This is an appeal from an interlocutory order made in the Superior Court of Haywood County by *Reade, J.* In the argument here it was said by the counsel that the order was made in a proceeding to review the decision of the clerk in passing upon the sufficiency of a deposition as prescribed in Rev. Code, ch. 31, sec. 63. But the record does not show that the clerk had passed upon the deposition at all, and of course does not show that there was any appeal from any order made by him. The order of the judge does not appear to have been made on the trial of the cause, for, so far as the record shows, there was no jury impaneled to try it. All that appears from the record is that the deposition was brought to the notice of the court preparatory to the trial, and the question was submitted to the presiding judge, whether it was taken under such circumstances as would allow of its being read on the trial, and he decided against its admissibility. Such being the case, he had no jurisdiction to make the order, and there having been no cause before the court, there could be no appeal under section 23 of chapter 4 of the Revised Code. The consequence is that the appeal must be dismissed as having been improvidently granted. Whether, if the record had shown an appeal from the decision of the clerk to the court, the judge might have decided on the appeal, before the jury was impaneled in the cause, and allowed an appeal from his order to this Court,
(476) or whether it was necessary to offer the deposition on the trial, and let its admission or rejection form an item in a bill of exceptions, is an interesting question of practice which we will not undertake to decide until it is properly brought before us.

The appeal must be dismissed at the cost of the appellant.

PER CURIAM. Appeal dismissed.

THE STATE v. J. R. BRYSON.

(2 Winst., 86.)

1. The declarations and admissions of a party to a suit, civil or criminal, pertinent to the issue, may be given in evidence against him by the other party.
2. It is not the belief, simply, of a man that he is about to be stricken which will justify him in striking first, but his belief founded on reasonable grounds of apprehension.
3. One who seeks a fight, or provokes another to strike him, cannot justify returning the blow on the ground of self-defense.
4. If two men fight by consent, they are guilty of mutual assaults and batteries, no matter who committed the first assault or struck the first blow.

INDICTMENT for an assault and battery by the defendant on L. S. Gash, tried before *Reade, J.*, at Fall Term, 1864, of HENDERSON.

The State offered evidence tending to show that the defendant met Gash in the street and knocked him down with his walking cane, without provocation. The defendant offered evidence tending to show that at the time he struck Gash, Gash had a knife in his hand, held up in a striking position at the distance of 4 or 6 feet from him. (477) The State offered evidence tending to show that a short time before the fight the defendant said that he intended to give Gash a caning. The defendant objected to his declarations being given in evidence, but the court admitted them.

The defendant's counsel asked the court to charge the jury that if defendant, at the time he struck Gash, believed that Gash was about to strike him with the knife, that then the defendant had a right to strike him first. The court declined so to charge, but instructed the jury that if defendant struck Gash, he was guilty, unless he struck him in self-defense; that if the jury believed that the defendant had good reason to believe, and did believe, that Gash was about to strike him, that then the defendant had the right to strike him first, unless the jury believed that the defendant sought the fight or provoked Gash to attack him; in which case the defendant would be guilty.

Verdict, guilty, and judgment accordingly, from which defendant appealed.

Attorney-General for the State.
W. H. Bailey for defendant.

MANLY, J. This case is brought before us upon exceptions to the ruling of the court below, in a matter of evidence, and also for the refusal of the judge to give certain instructions asked for, and for giving other instructions alleged to be erroneous.

1. We are not informed of any ground upon which the evidence is deemed inadmissible. Ordinarily, in both civil and criminal causes, the declarations and admissions of one party may be introduced by the other. There are exceptions to this rule, but the case before us does not fall under any of these exceptions.

(478) The defendant was indicted for a battery on L. S. Gash, and, on the trial, his case was made to turn on the question whether the battery was in self-defense or otherwise. His previous declarations, that he intended to give Gash a caning, were certainly pertinent to the inquiry, and, therefore, for aught we can see, admissible.

2. The instructions asked for were properly refused. The court was requested to charge the jury that "if defendant, at the time he struck Gash, believed Gash was about to strike him with the knife, that then the defendant had the right to strike Gash first."

A right to act in self-defense does not depend upon the special state of mind of the subject of inquiry. He is judged by the rules which are applicable to men whose nerves are in an ordinary sound and healthy state; and whatever may be his personal apprehensions, if he has not reasonable ground to support them, he will not be protected by the principle of self-defense.

The normal condition of the human passions and faculties must be regarded in establishing rules for the government of human conduct. The question, then, in such cases as the present, is not what were the apprehensions of the defendant, but what they ought to have been when measured by a standard derived from observation of men of ordinary firmness and reflection. This is what is called reasonable ground of belief, and is the rule for judging of a case of self-defense, upon an indictment for an assault and battery. Therefore a prayer for instruction which assumed that one's personal feelings and apprehensions, however eccentric and morbid these might be, determined the character of his conduct, was properly refused.

3. It will be found, from a consideration of what has been said above and from other plain principles of law, that the instructions actually given are in conformity with law.

(479) The portion which we suppose is objected to is, "If the defendant had good reason to believe, and did believe, Gash was about to strike him, then the defendant had a right to strike first, unless the defendant sought the fight and provoked an attack." This is correct, and is one of the plainest principles pertaining to the law of assault and battery. If two men fight by consent (which consent may be inferred from language and conduct), the parties are guilty of mutual assaults and batteries, no matter who committed the first assault or struck the first blow.

PER CURIAM. 306 No error.

NOTE.—For discussion of the distinctions between attempts to strike and offers to strike, see *S. v. Myerfield*, 61 N. C., 108, as to when one may strike in self-defense; *vide S. v. Dixon*, 75 N. C., 275; *S. v. Harman*, 78 N. C., 515; *S. v. Medlin, post*, 488; when in defense of his father, *S. v. Johnson*, 75 N. C., 174. If one provokes an affray by any language or conduct of his own, he is guilty; *S. v. Robbins*, 78 N. C., 431.

Cited: *S. v. King*, 84 N. C., 741; *S. v. Williford*, 91 N. C., 532; *S. v. Mills, ib.*, 596.

DOE ON DEMISE OF ALEX. RILEY v. RICHMOND BUCHANAN.

(2 Winst., 89.)

A devise "to Alexander Riley for him and his mother and the rest of the children to live on until the youngest becomes of age" is a gift of the fee simple to A. R.

EJECTMENT tried before *French, J.*, at Spring Term, 1864, of ANSON. The case is fully stated in the opinion of the Court.

R. H. Battle for lessor of plaintiff. (480)
Winston, Sr., for defendant.

MANLY, J. Upon the case agreed, this Court is of opinion with the plaintiff. The controversy arises upon the construction of the following paragraph in the will of Henry Buchanan:

"5th Item. I give and devise to Alexander Riley one tract of land on which I now live, known as the Dickson tract of land, for him and his mother and the rest of the children to live on, until the youngest becomes of age; also, a negro boy named Alfred," etc.

The question is, whether Alexander Riley takes a fee simple in the land, or a term to last only through the minority of the youngest child. There is a general residuary paragraph in the following words:

"7th Item. I give and bequeath to my son, Richmond, all the remaining part of my property, or all my property not otherwise disposed of; and should Richmond die," etc. The legatee, Richmond, herein named, who is the defendant in this suit, claims the remainder in the land after the arrival at age (21) of the youngest child, which event has happened.

The language of the paragraph and the silence of the will in all its parts as to any remainder in land lead to the conclusion that it was testator's intention to give the entire legal estate to Alexander Riley.

"I give and devise to Alexander Riley one tract of land" is not the language which a testator usually employes when carving out a particular estate in land. "I *lend*" or "I give until" would be more obvious and natural.

There is no allusion in any part of the will to a supposed remainder in this important portion of his estate; and there is nothing in the *residuary item* to induce a belief that it was then in any way present to his mind. Our duty, therefore, is plainly indicated by the rule of construction laid down in the statute law, Revised Code, ch. 119, sec. 26,

which is in these words: "When real estate shall be devised to
(481) any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

The gift, by virtue of this declared will of the Legislature, must then be held to be a gift in fee simple, for there is nothing in the will to qualify or limit it. The words annexed to the gift, "for him and his mother and the rest of the children to live on until the youngest becomes of age," seem to be an inartificial way of creating a trust for a limited term, and may well be interpreted in that sense. Indeed, we cannot suppose that it was the intention of the testator, in so obscure a way, to qualify his former words of bequest, and to limit an estate for a term of years only.

There must be a judgment affirming that below, viz., that the plaintiff recover his term, etc.

PER CURIAM. Affirmed.

RICHARD HARRIS, ADMINISTRATOR, ETC., v. EBEN HEARNE.

(2 Winst., 92.)

These words in a will, "I give to my daughter, Susannah, four slaves, named, etc., to her and her heirs: *Provided, nevertheless,* if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of the country," do not import a *condition* that Aaron shall return to this country.

(482) ACTION of trover for slaves, tried before *French, J.,* at STANLY Fall Term, 1863. There was a verdict for the defendant, by the direction of the judge. The plaintiff appealed.

Edward Almond, of Stanly County, by his will gave to his "daughter Susannah, four slaves, named, etc., to her and the heirs of her body: *Provided, nevertheless,* that if the said Susannah shall die childless, then

and in that case it is my desire that my beloved son, Aaron Almond, shall remove back to this country, and have them, but not to take them to any other part of the country." The testator gave legacies to other sons and daughters, and to the children of a deceased daughter. There was no gift over of the four slaves in case Aaron did not return to this country, or of his carrying the slaves out of this country. The will contained this clause: "I will that the remainder of my property be sold and the proceeds . . . divided among my children, as follows," etc.

At the time of the making of the will Aaron Almond lived in Tennessee, and he has never been in Stanly County since. The plaintiff is the administrator with the will annexed of the testator. The defendant is in possession of the slaves given to Susannah as above recited, claiming them as the purchaser from Aaron.

Dargan and R. H. Battle for plaintiff.
Moore for defendant.

PEARSON, C. J. We concur with his Honor in the opinion that the executory bequest to Aaron Almond of the slaves in the event that the first taker, Susannah Almond, should die childless, on the happening of the event, vested absolutely in Aaron, and was not defeated (483) by the fact "that he did not remove back to this country."

The *wish* of the testator that, "should his daughter die childless, his son should remove back to this country and have them (the slaves), but not to take them to any other part of the country," does not have the effect of a condition precedent to the limitation over to him, whereby it was to be defeated, but must be considered simply as the expression of an earnest wish, in respect to what he supposed would benefit the slaves, without impairing the right of property which he intended should vest in his son. In the language of the books, these words are "precatory," not "mandatory."

We are led to this conclusion by several considerations, which it is not needful to elaborate much at large.

1. Such a restriction on the right of property, as a *condition,* is impracticable and incompatible with the nature of personal property. This must have been known to the testator. So it is unreasonable to suppose that he intended to impose a *condition* and meant that his son should not have the slaves unless he complied with it. On the other hand, it is reasonable to suppose that the testator, having a decided wish on the subject should recommend and ask his son to come back to this country and keep the slaves here, should his daughter die childless; on which event the negroes are to belong to the son.

2. The severest test that a *condition* is intended is a provision by which it is to be enforced: as by making a limitation over to some one

else on breach of the condition. The testator had other children and grandchildren, as appears by the will, who lived in this country; and if Aaron was not to have the slaves, should Susannah die childless, *unless he removed back to this country,* and the testator meant to
(484) insist on it as a condition, he would have added a provision: "If Aaron does not remove back to this country, then the slaves are to belong to my son Edmond, or to the children of my daughter Polly, or such of them as will take them on the condition that they are not to be taken out of the country"—so as to leave no doubt that it was his *primary* intention that the slaves should not be taken out of the country.

The absence of a limitation over makes a broad distinction between this case and *Reeves v. Craig, ante,* 208—besides the fact that in that case direct words of condition are used, "but if Mary is dead or does not release, I give the land to my children," and not words simply expressing a wish.

PER CURIAM. Affirmed.

THE STATE v. WILLIAM S. COCKMAN.

(2 Winst., 95.)

1. If an indictment for murder charges that A. killed the deceased, and that others were present, aiding and abetting, and it is proved that the deceased was killed by some one with whom A. was acting in concert, and that A. was present, aiding and assisting, the jury should be instructed to find A. guilty.

2. If a challenge by the prisoner for good cause be disallowed, and the juror be challenged peremptorily by the prisoner, and the panel is completed, the prisoner having challenged peremptorily a smaller number than twenty-three, this is no cause for a *venire de novo.*

3. A juror, challenged by the prisoner because he had formed and expressed an opinion that the prisoner was guilty, says on his examination by the court that he has formed and expressed an opinion to that effect from rumor, but that he thinks he can give an impartial verdict on the trial, is adjudged by the court to be indifferent between the parties, and is tendered to the prisoner: this is no error of which the prisoner can complain.

(485) INDICTMENT for the murder of John C. Howard, tried before *Gilliam, J.,* at Fall Term, 1864, of MOORE.

The indictment charged that the deceased, John C. Howard, was killed by the prisoner, and that others, to the jurors unknown, were present, aiding and abetting him in the act of killing.

"In forming the jury, the prisoner challenged one Donald McDonald, and assigned for cause that he had formed and expressed an opinion that

the prisoner was guilty. The juror, on his oath, stated that he had formed that opinion, but had not before expressed it; that his opinion was formed on rumor alone; that he had great confidence in the truth of the rumors he had heard, and that he was afraid they might have some influence on his judgment." Upon his further examination, he said that "he was satisfied he could render an impartial verdict upon the evidence as it might come out on the trial, uninfluenced by the rumor which he had heard." The prisoner's counsel insisted that the juror was not indifferent; but the court being of opinion, from the examination of the juror and from his whole demeanor, that he was indifferent, disallowed the challenge and directed him to be tendered, when he was challenged peremptorily by the prisoner. Another juror, named Bryant Dowd, was challenged by the prisoner for the same cause. He stated, on oath, that he had formed and expressed the opinion that the prisoner was guilty, and that he had formed it on information derived from a person who, not long after the occurrence, had been to the place where the homicide was committed, and from information derived from other persons; but that he was satisfied he could give the prisoner a fair and impartial trial, uninfluenced by anything he had heard. He was directed to be tendered, and the prisoner challenged him peremptorily.

When the jury was completed, the prisoner had made twenty- (486) one peremptory challenges.

On the trial, witnesses testified that on 6 August before, a company of soldiers under the command of Lieutenant Mills, an officer of the Confederate States Army, having arrested three deserters, were carrying them from Carthage, in Moore County, to a station on the railroad, whence they might be sent on to the army. While the soldiers were marching along a road, they were shot at by persons about fifteen steps from the road, and John C. Howard, one of the soldiers, was killed. Two volleys were fired in quick succession from the woods through which the road ran. In the first volley eight or ten guns were fired. Immediately after the last volley, one of the soldiers rushed into the woods in the direction from which the guns were fired, and he saw several men running away. He saw the prisoner sitting at the foot of a tree about fifteen steps from the road, in the direction from which the deceased was shot. The prisoner had a gun in his hand, which was empty, and had, apparently, just been discharged. There were signs on the ground and grass of several men having been recently standing close to the tree at the foot of which the prisoner was sitting, in a line parallel to the road; and there were marks of powder on the leaves

about 4 feet from the ground, between the tree and the column of soldiers. None of the persons in the woods were identified except the prisoner.

The counsel for the prisoner contended that he could not be convicted unless the jury were satisfied that the prisoner discharged the gun which caused the death of the deceased, and requested the court so to charge the jury. The court declined to give the instructions asked, and instructed the jury that if they were satisfied from the evidence that the party in the woods fired upon the party in the road; that
(487) the decesed was thereby killed; that the prisoner was one of the party in the woods, and was aiding and abetting the others; then they might convict the prisoner, although the discharge of his gun may not have given the wound of which the deceased died; and even though the prisoner may not have discharged his gun at all; for that in combinations of the kind alleged, the mortal wound, though given by one of the parties only, is considered, in the eye of the law, as given by every individual present, aiding and abetting.

The prisoner's counsel then asked the court to instruct the jury that there was no evidence of any combination between the prisoner and the others in the woods; but the court declined to give the instruction.

There was a verdict of guilty, and from the judgment thereon the prisoner appealed.

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

MANLY, J. The exceptions made to the ruling of the judge below on the formation of the jury cannot avail the prisoner.

Both the men, when tendered, were rejected by peremptory challenges. The challenges of this kind had not been exhausted at the completion of the jury (only 21 having been made), so that no one was upon the jury against the prisoner's will. If, therefore, an error was committed in tendering a man, it did the prisoner no wrong. It is due, however, to state that no error, of which the prisoner can complain, is apparent upon the record. The subject of challenges to jurors underwent in this Court so full an examination in *S. v. Benton*, 19 N. C., 196, and the principles there discussed and announced have been so often reaffirmed and illustrated by subsequent cases that we deem it unnecessary to enter upon it anew. Several of the later cases will be found collected in the note to *Benton's case* (second edition).

(488) The instructions given by the court, on the principal ground of defense taken by the prisoner's counsel, are in strict conformity to law. These principles are of common learning. 1 Hale P. C., 462.

The court was requested to charge the jury that there was no evidence of a combination. This the court declined—and, as we think, properly declined. There was evidence, and abundant evidence, as we think.

We have examined the whole record in this case, and do not find any error.

PER CURIAM. No error.

NOTE.—When one person is present aiding and abetting another in the commission of a crime, both are guilty. *S. v. Merritt*, 61 N. C., 134; *S. v. Rawls*, 65 N. C., 334; *S. v. Hill*, 72 N. C., 345; *S. v. Gaston*, 73 N. C., 93.

It is not a good cause of challenge that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, and the juror further stating that he could try the case, according to the law and the evidence, uninfluenced by any opinion he may have so formed from such rumor. To disqualify the witness the opinion should have been fully made up and expressed. *S. v. Collins*, 70 N. C., 241. See *Baker v. Harris*, *ante*, 271.

Cited: *S. v. Holmes*, 63 N. C., 21; *S. v. Hill*, 72 N. C., 349; *Capehart v. Stewart*, 80 N. C., 102; *S. v. Brittain*, 89 N. C., 504; *S. v. Hensley*, 94 N. C., 1029; *S. v. Green*, 95 N. C., 613; *Dunn v. R. R.*, 131 N. C., 447; *S. v. Robertson*, 166 N. C., 362; *Oliphant v. R. R.*, 171 N. C., 304.

THE STATE v. JOHN MEDLIN.

(2 Winst., 99.)

If several armed men go to a dwelling-house in the night-time, for the purpose of seizing the body of the owner, without lawful authority, and one of them be killed by the owner to prevent the execution of their purpose, such killing is not *murder;* it is certainly no more than manslaughter.

INDICTMENT against the prisoner for the murder of one Hosea (489) Little, tried before *Heath, J.*, at Fall Term of MECKLENBURG, 1864.

On the trial one Ringstaff testified that before and at the time of the homicide he was a lieutenant in the army of the Confederate States; and in obedience to a written order directed to him, purporting to be from General G. W. Smith, commander of the department of Henrico, he, in the fall of 1862, came to the counties of Union and Mecklenburg, in this State, for the purpose of arresting deserters and persons absent from their commands without leave, who might be found in those counties; that he has been a prisoner in the hands of the enemy for nine months, and the order was lost or destroyed while he was a prisoner. The counsel for the prisoner objected to the witness speaking of the

order, but the objection was overruled by the court. The witness said that in execution of the order, in September or October, 1862, he summoned the deceased, who was not a soldier, and five other persons, to go with him to the dwelling-house of the prisoner, about 10 or 11 o'clock at night; and he and the men with him disposed themselves so as to surround the house. He and another man went into the porch, where he heard knocking at the door on the opposite side of the house. He then put his eye to a crack in the side of the house, and before he had time to see anything, some one in the house said, "God damn you!" and fired a gun, the ball from which cut his whiskers and knocked splinters in his face. He then said to the deceased, who was standing by, "Open the door, and give me a chance." He does not know what else he said; thinks he might have said, "I will shoot the damned rascal who
(490) shot at me." He had a rifle in his hand with a hair trigger, which went off accidentally at this time. The door was opened afterwards, he did not know by whom, or how; he thinks it was opened from the outside; it was not broken down. He then heard the sound of men's feet running on the other side of the house, and some one say, "Here they go!" He ran around and found his men running off after some one. He heard voices in the house in a low tone, and called to his men to come back, and the deceased and another started back; when they had got within about ten paces of the house, a door opened on the side, on which they were advancing; three men stepped from the house; two guns were fired in quick succession by them, he thinks from a double-barrel gun; the deceased fell, and the man advancing with him was also hit; the three men went off and he fired at them as they ran. One Austin swore that he was one of the men summoned by Lieutenant Ringstaff; when they first went to the house of the prisoner, one of the men named Short went into the porch on the opposite side to where Lieutenant Ringstaff was, and knocked at the door; a female voice within asked, "Who's there?" to which Short answered, "It doesn't matter; I have come here with the proper authority, and intend to come in," to which the female replied, "There is nothing here that belongs to you, and I will not open the door." Short continued to knock, and said: "If you don't open the door, I will break it open." At this time witness looked into the house through a crack, and by a light in the fireplace saw the prisoner advancing toward the fireplace with a gun in his hand, which he fired at Ringstaff.

There was also evidence tending to show that the prisoner was a deserter from the army of the Confederate States, and that he fired the gun which killed the deceased.

The prisoner's counsel contended:

(491) 1. The prisoner did not do the act of shooting.

2. If he did, it was excusable, as it was done in self-defense—defense of the prisoner's dwelling-house; in defense of his person and family, and in prevention of a threatened felony.

The court charged the jury:

1. That if these men banded together as deserters, with a common understanding and determination to stand together and resist all persons who might lawfully come to arrest them, and if the prisoner killed in consequence of this determination, it would be murder.

2. If the prisoner knew he was a deserter, and sought as such by persons having proper authority ot arrest him, and killed to prevent such arrest, it would be murder.

3. If the prisoner believed, and had reason to believe, that a mere trespass only was intended, and killed to prevent such trespass, it would be murder.

4. If the prisoner killed for revenge for anything that had been done to his house, and out of malice, it would be murder.

5. That if the prisoner killed because his house was broken into in the night, he not knowing what was to follow, he would be guilty of nothing; that if the prisoner believed, and had cause to believe, that a known felony was about to be committed on himself, his property, or his family, the parties being in apparent situation to commit said felony, and he killed to prevent it, then he would be guilty of nothing.

The jury found the prisoner guilty, and from judgment according to the verdict, the prisoner appealed.

Attorney-General for the State.
Wilson for prisoner.

PEARSON, C. J. In *S. v. Jarrott,* 23 N. C., 76, this Court, (492) taking the law to be that insolence on the part of a slave to a white man would justify a battery, but not an *excessive* one, awarded a *venire de novo* on the ground that the instruction to the jury must be understood as having reference to the testimony, and was in that sense erroneous; and used these words: "The language of his Honor, indeed, is that 'if the prisoner used the provoking language testified by the witnesses, deceased had a right to *whip* him.' But by the word 'whip' he must necessarily be understood as meaning to 'whip in the manner testified by the witnesses,' that is, with a knife and a fence rail."

In this case we think the prisoner has a right to complain of the third instruction, *i. e.,* "If the prisoner believed, and had reason to believe, that a mere trespass only was intended, and killed to prevent *such trespass,* it would be murder"; for taking the law to be that a mere trespass to personal property does not mitigate where the killing is with a deadly

weapon, but that a violent trespass to the person does mitigate, this instruction must be understood as having reference to the kind of trespass spoken of by the witness, and, in that sense, is erroneous. His Honor having, in the second instruction, presented the case to the jury on the footing of the deceased, and the party to which he belonged, had *proper authority* to arrest the prisoner, in the instruction now under consideration, assumes that the deceased, and the party to which he belonged, were acting *without proper authority,* and that what they did, or intended to do, was *a trespass,* and must necessarily be understood as meaning the kind of trespass testified by the witnesses—that is, going to a man's house in the night-time, with a number of armed men, for the purpose of seizing his body. Killing to prevent a trespass of this nature is certainly no *more* than manslaughter.

It occurred to us that this error might be cured by the fifth instruction. On consideration, we are satisfied that that instruction cannot have this effect, because it is qualified and restricted by the words, "he not knowing what was to follow." On the supposition that he (493) did not know what was to follow—that is, that they intended to arrest and take him off as a deserter—the killing was mitigated, unless they had proper authority to do so, which view is not presented by this instruction, and, consequently, it does not cure the error of the third instruction. The first and second instructions assume that there was proper authority to arrest; the other instructions assume that there was not. The most important question is left undisposed of, and to that omission the want of clearness in the case is to be ascribed.

As is said in *Gaither v. Ferebee, ante,* 303, "His Honor has left the case to the jury in such a manner as to make it impossible for this Court to know what his opinion was on a question of law arising on the facts of the case, and, of course, making it impossible to review his decision" —unless his instructions are considered as mere abstract propositions of law, without reference to what was testified to by the witnesses.

PER CURIAM. Error.

NOTE.—*Vide* note to *S. v. Bryan, ante,* 479; *S. v. Summey, post,* 496.

Cited: S. v. Rogers, 166 N. C., 390.

JOHN R. BRANCH AND BENJAMIN F. GARY, EXECUTORS OF SAMUEL W. BRANCH, v. N. A. H. GODDIN.

(2 Winst., 105.)

1. One who has made a gift of slaves, void by the act of 1806 (Rev. Code, ch. 50, sec. 12), cannot be estopped to assert his title by any act *in pais*.

2. Nor is he estopped by the record of a partition of the slaves by a suit, some of the parties to which, being infants and his wards, sue by him *as their guardian*.

ACTION of detinue for slaves named, etc., and was submitted to (494) the decision of *Saunders, J.*, at HALIFAX Fall Term, 1864, on the following case agreed:

About 1852 Samuel W. Branch, the plaintiff's testator, placed the slaves for which this suit is brought, by parol, in the possession of Edward Tillery, who had married his daughter, Rebecca. They remained in the possession of the said Edward until his death in 1857. The plaintiffs' testator administered on his estate, and returned the said slaves in the inventory thereof, and listed and paid taxes on them as such administrator. At November Term, 1862, of Halifax County Court, Rebecca, widow of the said Edward, and her children, Olivia and Eliza, the latter suing by the plaintiff's testator, who had qualified as their guardian, filed their petition for a division of the slaves belonging to the estate of said Edward, of which they were tenants in common, specifying in said petition the above-mentioned slaves as belonging to said estate. On 28 December, 1862, the said Rebecca intermarried with the defendant, N. A. H. Goddin, and on 29 of said month the said slaves were divided according to a decree made in the said cause at the previous November sessions. In the division the slaves sued for were allotted to the defendant and wife. The proceedings were returned in due form to February sessions, 1863, of said court, and the defendant made a party thereto; the said division was thereupon confirmed and ordered to be recorded. The plaintiff's testator was present at said division, and fully assented thereto. He died in January, 1864, having made and published his last will and testament in writing, of which the plaintiffs are the executors, by which he bequeathed the negroes aforesaid to the sole, separate, and exclusive use of his daughter, Rebecca, during the term of her natural life, and at her death over, etc. But the plaintiff's testator never made any demand for said slaves, nor claimed them in any way, from the time he put them into the possession of his daughter until his death. (495)

The slaves have been in possession of the defendant and claimed by him as his property since the division on 29 December, 1862, and upon demand of the executors therefor, he refused to deliver the same, and thereupon this suit was brought.

In the Superior Court judgment was given for the defendant, from which the plaintiffs appealed.

Moore for plaintiff.

BATTLE, J. In *Alston v. Hamlin,* 19 N. C., 115, it was decided that the act of 1806 (Rev. Code, ch. 50, sec. 12) having been enacted on purpose to exclude all parol evidence of a gift of slaves, necessarily avoids every estoppel by parol which might be set up to defeat its operation. Hence, where the owner of slaves made a parol gift of them to his son-in-law, who bequeathed them to his children, and died, leaving the donor executor of his will and guardian of his children, it was held that the taking possession of the slaves and hiring them out, first as executor and then as guardian, was of no avail to pass the title; and that there was no possession adverse to the donor; and, further, that the statute of limitations did not begin to run against him until he had permitted a division of the slaves among his grandchildren and delivered them over.

The authority of that case has always been acknowledged; and the principle therein established must entitle the present plaintiffs to a judgment on the case agreed, unless the partition of the slaves, made under the decree of the county court of Halifax, shall be deemed sufficient to prevent it. If the plaintiffs' testator had been a party to the suit for partition, then he would have been estopped by the record from (496) setting up any title to the slaves. *Armfield v. Moore,* 44 N. C., 157; *Dixon v. Warters,* 53 N. C., 449. But his being guardian to the infant petitioners in that suit did not make him a party for the purpose of having any adjudication of his rights. It was his duty, as guardian, to protect the rights of his wards (whatever such rights may be) in the suit for partition between them and their mother. Unless the plaintiffs' testator had been made a party, he could not have any opportunity to assert his title in that suit, and hence he cannot be estopped by any order or decree in it. The division of the slaves which was then made, in pursuance of the decree in the cause, and the possession of the parties which followed it, had the effect to put the statute of limitations in operation; and the testator's title would have been barred had not the present suit been commenced within less than three years from that time.

What will be the effect of the record of partition between the parties thereto when the present plaintiffs shall assent to the legacy, is a question not presented to us, and upon which, therefore, we refrain from expressing any opinion.

As the case now stands, we think the judgment given in the court below upon the case agreed is erroneous, and must be reversed, and a judgment be entered for the plaintiffs.

PER CURIAM. Reversed.

NOTE.—No estoppel of record is created against one not a party to the record. *Falls v. Gamble*, 66 N. C., 455. See, also, *Frey v. Ramsour*, 66 N. C., 466; *Mason v. McCormick*, 75 N. C., 263.

Cited: *Falls v. Gamble*, 66 N. C., 465; *George v. High*, 85 N. C., 113; *Weston v. Lumber Co.*, 162 N. C., 193.

THE STATE v. JOHN SUMMEY.

(2 Winst., 108.)

1. A person who leases his still-house and still, knowing that the lessee takes them for the purpose of distilling spirits from corn, which purpose is accomplished by the lease, is not guilty of a violation of the act forbidding the distillation of spirits from corn, if he has not any interest in the liquor made.

2. Liquor obtained by running the beer once through the still is "*spirituous liquor*" within the act.

3. The judge is required to put the case to the jury in such a way as to make it appear by the record what facts the jury find, and what is his opinion as to the law, so that his opinion may be reviewed.

INDICTMENT tried before *Reade, J.*, at Fall Term, 1864, of (497) TRANSYLVANIA.

The indictment charged John Summey, William Summey, and Samuel Johnston with distilling spirituous liquor from corn. Johnston was not taken. The two other defendants appeared and pleaded not guilty.

On the trial, one witness swore that John Summey admitted to him that one Johnston, who lived in South Carolina, had corn which he wished to distill, and the defendant leased to him his still-house and still in Transylvania County for the purpose of distilling his grain, but he, the defendant, had nothing to do with the spirits or profits; and that the defendant further admitted that some of the corn had been distilled, or that was asserted in the defendant's presence, and he did not deny it. Another witness for the State swore that he went to the still and found them distilling; that they had not doubled; they had not run the beer twice through the still, but once; and the liquor so produced is called *singlings*. It is usual to run the singlings through the still a second time to make it stronger.

There was no other evidence.

It was admitted on both sides that the witnesses were entitled to credit. It was contended by the defendant John that he was not guilty, because he did not actually participate in the stilling, and because there was no distillation unless they doubled.

(498) The court charged the jury that if they believed the evidence, the defendant John was guilty.

The jury found the defendant William Summey not guilty, and the defendant John Summey guilty; and from the judgment against him, John Summey appealed.

Attorney-General for the State.
W. H. Bailey for defendant.

PEARSON, C. J. The counsel for the defendant, on the trial below, put the case on two grounds, both of which were presented by the evidence:

1. That he was not guilty, "because he did not actually participate in the stilling."

2. Because "there was no distillation."

His Honor does not respond to either position, directly, but charged, in general terms, that "if the jury believed the evidence, the defendant was guilty."

From this mode of putting the case to the jury there is no telling whether they found the defendant guilty upon the testimony of the first witness or of the second, or of both; for, although both witnesses are admitted to be entitled to credit, it may be that the jury acted on the testimony of the first, not being able to find, from the testimony of the second witness, that the defendant was present, or, if present, that he had anything to do with the stilling, which is a work which may not require more than one hand. If this witness referred to the *three* persons against whom the bill was found, or to the *two* who were on trial, and the jury found on his testimony, it cannot be understood why they acquitted *William Summey*. Or it may be that the jury acted on the testimony of the second witness, supposing the first might be mistaken in regard to the conversation which he had heard. In this state of the case it follows that the defendant is entitled to a *venire de novo,* if the point

(499) made upon the testimony of *either* of the witnesses ought to have been ruled in his favor. For we are obliged to suppose that his Honor overruled both positions, or impute to him a want of candor, by which the jury were left in the dark as to his opinion on the questions of law, and this Court would not be able to review it.

When counsel make a point which arises on the evidence, and expressly, or by implication as in this case, request the opinion of the

judge, and he declines to give it, or fails to do so by a general charge like the one under consideration, it is error, notwithstanding there is another view of the case arising on other parts of the evidence which is against the party. The statute requires a judge to "state to the jury, in a full and correct manner, the evidence given in the case, and to *declare* and *explain* the law arising thereon." He is not required to recapitulate the evidence in detail—but he *is* required to put the case to the jury in such a way as to make it appear by the record what facts the jury find and what is his opinion as to the law, so that his opinion may be reviewed by this Court.

A general charge is only allowable in special cases, when these purposes are otherwise fully answered. *Gaither v. Ferebee, ante,* 303; *S. v. Norton, ante,* 296. These cases dispose of the subject. They were decided at June term last, and we presume his Honor had not read them.

This Court is of opinion that in order to justify a conviction under the statute, it must be proved that the party either distilled grain himself or *procured* it to be done; and that the fact that the defendant "leased or hired" his still-house and still to one who had corn, for the purpose of distilling the corn, and that it was in fact distilled by him at the house and in the still, *the defendant having no interest in the spirits,* does not make him guilty of a violation of the statute.

Upon the second point, the Court is of opinion that to run beer, (500) made of corn, through the process of distillation once is a violation of the statute; for spirituous liquor is thereby distilled out of corn; and although the liquor is improved by running it through twice, that is not necessary in order to make it "spirituous liquor" within the meaning of the statute.

PER CURIAM. *Venire de novo.*

Cited: S. v. Ellick, ante, 457; *S. v. Jones,* 87 N. C., 556; *S. v. Kennedy,* 89 N. C., 590.

SETH BRIDGMAN v. PETER MALLETT.

(2 Winst., 112.)

The appointment to an office, under the State Government, of a citizen of the State who is in the service of the Confederate Government is void unless, *perhaps,* the office be one recognized by the *Constitution* of the State as essential to its government.

CERTIORARI at the suit of Major Mallett, for the purpose of reviewing the decision of *Battle, J.,* in a writ of *habeas corpus* sued by the plaintiff against the defendant as commandant of conscripts in this State.

Judge Battle, on the trial before him, ordered the petitioner to be discharged, on the authority of *In re Russell, ante,* 388.

The facts of the case are stated in the opinion of *Judge Battle.*

Busbee for petitioner.
Bragg for defendant.

BATTLE, J. The petitioner was, prior to 26 April, 1864, a lieutenant in the Army of the Confederate States; but by an order of that date he was dropped from the roll as an officer. At the August Term,
(501) 1864, of the Court of Pleas and Quarter Sessions for the county of Hyde, he was elected register of deeds of the county, and was duly qualified as such by entering into bond and taking the necessary oaths. Subsequently, to wit, on 22 September, 1864, he was ordered as a conscript by the enrolling officer of the county, to report himself without delay to the camp of instruction, near Raleigh. The date of enrollment is not distinctly specified either in the petition or return, though it is strongly to be inferred from the allegations of the petitioner that it was prior to his election as register. That, however, I consider as immaterial, because I think that under the army regulations he was in the military service as a private as soon as he was dropped from the roll as an officer. See Army Regulations.

It is agreed by the counsel that a register of deeds of a county is a civil officer of the State, and that the Governor had claimed the petitioner as an exempt from military service in the Army of the Confederate States.

Upon this statement of facts, it is contended by the counsel for the petitioner, first, that he is entitled to a discharge from custody, upon a just construction of the second paragraph of section 10 of the act of Congress ratified on 17 February, 1864, though he was in the military service when he was elected register of deeds of Hyde County. Secondly, if that be so, that after his election and qualification as a civil officer of the State, he became exempt from any further service in the army of the Confederate States, because Congress has no power to restrict the State in the selection of any of its citizens, whether in or out of the army, to fill any office necessary to the action of the Government. I differ from the counsel as to the correctness of his position, and will proceed to state, as well as I can, the reasons upon which my opinion is founded:
(502) 1. In ascertaining and settling the construction of the military act of February, 1864, it is proper to avail ourselves of any light which may be thrown upon the subject by any statute *in pari materia,* particularly if it were passed about the same time. 1 Bl. Com., 60.

It appears from the act of Congress approved 5 January, 1864, entitled "An act to put an end to the exemption from military service of

those who have heretofore furnished substitutes," that the country was then in very great need of soldiers. The preamble recites that, "Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms, the Congress of the Confederate States do enact," etc. This most pressing want of the Confederate Government is, if possible, still more strongly shown in the act under consideration. It repeals all former laws which granted exemptions, and thus at once sweeps away the long list of exempts which may be found in the act of October, 1862. It enlarges the ages of conscripts from 18 and 45 to 17 and 50, thus calling into the field of active service boys and old men. It takes from their homes almost every person capable of bearing arms, except those officers who are necessary to the proper administration of the Confederate and State governments, and a few others who were deemed necessary to carry on the educational, industrial, and other indispensable pursuits of the country, with the addition of a still fewer number who are restrained from bearing arms by religious scruples. With this most urgent, pressing demand for soldiers for the defense of the country in its life and death struggle for National existence, placed thus prominently before us, have we a right to infer that Congress intended, by the exemptions which it granted in the act of February, 1864, to release from further service in the army any soldier whom it had a right to retain there? It seems to me to be ignoring the whole spirit of the act to suppose so. I cannot come to any such conclusion unless I find it so declared by the express terms of the act.

So far from finding any express declaration in the act to that (503) effect, the terms of exemption may be fully satisfied by confining them to the persons filling offices, occupying positions, or engaged in pursuits at the time of their enrollment. In some cases the persons exempted must have been employed in the duties of their office or profession at the date of the act, and could not entitle themselves to an exemption by subsequently engaging in such office or profession, even prior to the time of their enrollment. This is the case with regard to ministers of religion, physicians, and schoolmasters.

All the farmers of the country are put into the army, except the bonded overseers of fifteen able-bodied field hands, and even they, it seems, might have been deprived of the benefit of this exemption had they been enrolled since 1 February, 1864, but for a special provision in their favor. See paragraph 4 of section 10 of the act of February, 1864. Looking, then, over the whole act, from the first section to the last, I am unable to discover anything, either in its language or spirit, which releases or exempts from service any person already in the army as a soldier. The fact that, by another act of Congress, officers and soldiers in the army may become exempt from further service by being elected to

certain offices or places of trust, either in the State or Confederate Government, does not affect the present case, which depends, in the view in which I am now looking at it, entirely upon the construction of the act of February, 1864.

2. The second position taken for the petitioner by his counsel is a much more important one, affecting as it does the relative powers and rights of the Confederate and State governments; and I, therefore, approach its discussion with much diffidence, particularly as I find that the conclusion at which I have arrived is at variance with the (504) opinion entertained by many for whose learning and ability I entertain the highest respect. The difficulties of the case arise from the fact that the same persons are citizens of two separate and distinct sovereigns, to both of which they owe duty and allegiance. If the constitutions upon which their respective governments are based be rightly construed, and rigidly adhered to, there will be little or no danger of their clashing or interfering with each other in their respective demands of service from the people. In the distribution of the powers of sovereignty it is conceded that the States have conferred upon the Confederate Government the war power; that is, the power to declare war and to raise and support armies. It has been held by all the greatest statesmen and judges of the country that this power is, with a slight exception, unlimited. In aid of this and the other powers vested in the General Government, the Constitution declares that Congress shall have power "to make all laws which shall be necessary and proper" for carrying them into execution. See Art. I, sec. 8, par. 18. And it asserts the supremacy of the Confederate States, as to the powers conferred upon the Government, by declaring that "this Constitution, and the laws of the Confederate States made in pursuance thereof, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding." Although the war power of the Confederate Government is thus absolute and unlimited in terms, and the supremacy of that Government over the States, with regard to that power, is thus clearly and distinctly asserted, it has been decided, and I think rightly decided, that the Confederate Government cannot, in the exercise of the war power, destroy the States, by conscribing those officers who are necessary to the action of the State governments. See *Burroughs v. Peyton,* 16 Gratt., 470, decided by the Supreme Court of Appeals of Vir- (505) ginia, and recognized as authority in *Johnson v. Mallett, ante,* 410, decided by this Court. Whatever persons filled any office in the State which the Legislature declared to be necessary for the State Government when the act of February, 1864, was passed, were thereby placed beyond the power of conscription by the Confederate Govern-

ment. That government is founded upon the State governments as sovereigns, and cannot exist without them. The superstructure must fall when its pillars are taken away or destroyed.

But the case is reversed when the Confederate Government has, in the exercise of its rightful supreme war power, conscribed into its service a man who is not an officer of the State, and the State is attempting to take him out of it by electing him to an office. The man, as a citizen, owed the duty to the General Government which it had called upon him to perform, just as much as he owed the duty to the State to accept and discharge the duties to which he was elected. Here are two obligations undoubtedly binding upon the man, but which, being inconsistent, cannot both be performed at the same time. How can this conflict be settled but by resorting to a principle of potent efficacy both in international and municipal law, that priority of possession gives priority of right? This would seem to be a just rule, even if the two governments were equal in their powers with respect to the subject; and it surely cannot operate against that government whose power in that particular is supreme.

The State must, in such a case, yield to the prior claim of the General Government, and select some other man to fill its office. The argument, that perhaps the State cannot find another person out of the army fit for the place, is answered by the equally probable supposition, that the General Government may not be able to procure another fit person for a soldier. When either supposition shall become certainty, it will be when both governments are on the eve of destruction.

The petitioner, in the present case, is not one of the officers of (506) the State who is recognized in its Constitution as being essential to the Government. If he were so, the argument in his favor would be much stronger, perhaps irresistible. The Constitution declares, in express or necessarily implied terms, that there shall be a Governor, judges of the Supreme Court, justices of the peace, a sheriff, a coroner or coroners, and constables in each county; a Secretary of State and several other officers; also members of both houses of the General Assembly; and it may be that with regard to all these the State never surrendered the right to have the offices and places filled by any of her citizens, whether they should be at the time of their election in the service of the General Government or not. This is a question of the highest importance to both governments, and I will not undertake to decide upon it until it becomes necessary, in the performance of my judicial duty, to do so. It may also deserve more consideration than the subject has yet received, whether the Legislature can deprive the State of any of these

constitutional officers by permitting them to be conscribed, as it purports to do as to some of them, by the act of 14 December, 1863. See laws of the extra session in December, 1863, ch. 14.

My conclusion, upon a full consideration of the whole matter, is that the judgment which I rendered in vacation, in favor of the petitioner, founded, as I expressed at the time, upon the previous case of *In re Russell, ante,* 388, decided by the Chief Justice, was erroneous, and ought to be reversed, with costs, and that the petitioner must be remanded to the custody of Major Peter Mallett, commandant of conscripts.

MANLY, J., concurred.

(507) PEARSON, C. J., dissenting: It is a matter of regret that the judges of this Court have not been able to agree upon all of the questions to which the general conscription act, 17 February, 1864, has given rise. But the ground was untrodden. There was no case to guide us, and perfect concurrence of opinion was hardly to be expected.

So far as the opinion delivered by my brother *Battle* is based on the doctrine of necessity, *"which knows no law,"* and the principle that, in respect to *individuals,* the war power of Congress is unlimited—those questions being settled by *Gatlin v. Walton, ante,* 325, it is my duty to conform to that decision.

That case did not present the question whether the war power of Congress is also unlimited in respect *to the States,* which is "the point" in this case.

Johnson v. Mallett, ante, 410, at the extra term, settles the principle that, in respect *to the States,* the war power of Congress is limited, and is subject to their reserved right in regard to their officers; and on that ground it is decided that a State officer is not liable to conscription.

It is conceded that this right cannot be impaired by the action of Congress, and the difference of opinion is as to the *extent* of the right. Is it confined to *the keeping* in offices persons who may be in office at a given time? or does it extend to *the filling of vacancies* which from time to time may occur? That is the question.

The ground on which this right is based is that the existence of a State depends on having such officers as are necessary to administer its government and laws. Therefore it cannot be intended that in creating the government of the Confederate States it was the design of the States to confer a power by which their existence would be made to depend on the will of their creature.

This is a broad ground, and it embraces as well the right to fill (508) vacancies as the right to keep in office persons who may be in

office at a given time; for the former right is equally as necessary to the continued existence of a State as the latter; and no State can have an independent existence without both. In fact, they are but *parts of one and the same right.* This being so, it follows that neither part can be impaired by the action of Congress; and it must be conceded that the part in relation to filling vacancies is decidedly impaired if it be restricted to the election or appointment of men who are over conscript age, exempt as a "matter of grace" on the part of Congress.

Both being necessary, and covered by the same principle, I can see no ground to draw a dividing line between the two parts, except to "split the difference" between the claim of the Confederate States and the reserved rights of the States because of a "present necessity," on the idea of "letting the future take care of itself."

To meet this difficulty, a distinction is suggested between the offices named in the Constitution and offices created by the Legislature. This suggestion does not meet the difficulty. It was not to be expected that an instrument like the Constitution would enumerate all of the necessary State offices, and, therefore, it confers on the Legislature power to create and fill all offices which, in its wisdom, should be deemed necsesary; and there can be no substantial difference between offices *named* in the Constitution and offices *created under its authority,* both classes of offices being necessary for the proper administration of the government and laws of a State—in other words, to preserve its existence; and the power conferred on Congress is subject to the rights of the State in regard to both classes. Indeed, it is decided by *Johnson v. Mallett, supra,* that the part of the right in relation to keeping persons in office embraces offices of the latter class as well as offices of the former class; so the only question "open" is as to that part of the right in relation to filling vacancies. This suggestion, so far from disproving that part of the right, yields a part of the question and makes it more difficult (509) to maintain the other. To make the subject clear, take an illustration from the operations of war, that being the order of the day: The main work in front is carried by *Johnson v. Mallett, supra;* the work on the right is yielded by this suggestion, whereby the work on the left becomes so exposed in front and flank as to be no longer tenable.

Again, it is suggested: "The two governments should act in harmony, and to do so, the government which first exercises a power ought to be allowed to retain all citizens who have been taken into its service." No one feels a deeper conviction than I do that in order to preserve harmony, each government should be allowed the fullest exercise of its *rightful* powers. But the suggestion under consideration interferes with the exercise of a rightful power of the State, and assumes the powers of the two governments in regard to this subject to be *concurrent.* This is

a departure from the principle settled in *Johnson v. Mallett,* to wit, that the war power of the Confederate States is subservient to the reserved right of the States in regard to their officers. In my opinion, the proper way to preserve harmony and allow "each to move in its appropriate sphere" is to consider Congress as having exercised its powers of conscription, *subject to the preferred right* of the States; so that, when it becomes necessary for a State to exercise the preferred right, the prior action of Congress shall give way and allow the election of a State officer to fill a vacancy, to have the effect *ipso facto* of terminaitng the conscription of the person elected; in the same way, and on the same ground, that one in the militia or home guard service of a State, as soon as he is conscripted, passes into the service of the Confederate States, because the war power of the State is secondary, and the Confederate States have the preferred right under their war power. (See my opinion, *Wood v. Bradshaw, ante,* 419. The principle may be illus-
(510) trated by many analogies of the law. One will suffice: A sister takes as heir of her brother; afterwards another brother is born. At the common law the estate of the sister terminates, and gives place to the right of the brother, under the rule, "males are prefered to females."

The other point, as to the meaning of the act, section 10, clause 2, is of minor importance. But I am so unfortunate as to differ in respect to that also. I can see nothing in this clause to confine its operation to persons who, at the date of the act, filled the offices of Vice President, members of Congress, members of the Legislature, and other Confederate and State offices, and to exclude from its operation all persons who may afterwards be elected to these offices, *if they are at the time of their election in the military service of the Confederate States.* The conscription, by the act, February, 1864, is general, and applies as well to persons then in service, to keep them in during the war, as to persons not then in service. The exemption must have as broad an application as the conscription, unless there be words of restriction. The only words used are, "shall be exempted," which means "shall be relieved" from the service imposed by the conscription. Such being the plain meaning of the words used, it must be taken that Congress so intended, and there is no room for construction.

If words at all ambiguous had been used, the rule of construction, that the Court may derive aid from other statutes *in pari materia,* or from the *preamble* to a former statute made for the special purpose of justifying an act which, to many, seemed to be in violation of a contract, might have been applicable; and, on the other hand, it might have been relevant to have made the suggestions: that the exemption in regard to State officers was meant to extend to persons in the army, elected

to fill vacancies, in deference to the right claimed by the State; (511) that it is unreasonable to suppose it was intended to confine the States, in filling all vacancies that might thereafter occur, to the election or appointment of men over conscript age; and that in regard to members of Congress and other Confederate officers, it would be indecent to suppose that the members *in* at the date of the act intended to exclude from competition with themselves, at future elections for Congress, all of their fellow-citizens except men over the age of 50 years.

In my opinion, there is no error in the judgment at chambers.

PER CURIAM. Judgment reversed with costs. Petitioner remanded to the custody of Mallett.

NOTE.—*Vide Sowers' case, ante,* 384; *Smith v. Prior, ante,* 417, overruling *Russell's case, ante,* 388.

Cited: Johnson v. Mallett, post, 514.

MATTHEW JOHNSON v. PETER MALLETT.

(2 Winst., 135.)

One who has been enrolled as a conscript is not exempted from military service under the act of 17 February, 1864, by becoming the driver of a mail coach.

CERTIORARI for the purpose of reviewing the judgment of the *Chief Justice* in a writ of *habeas corpus* sued out by Matthew Johnson and returned before him. The *Chief Justice* discharged the petitioner.

The facts of the case are stated in the opinion of the Court.

Mason for petitioner.
Bragg for defendant. (512)

BATTLE, J. Upon the facts agreed it appears that the petitioner had been enrolled as a private soldier under the act of Congress, ratified 17 February, 1864, prior to the time when he became a driver of the mail stage from Morrisville to Pittsboro. The question, then, is whether a mail contractor or driver of a post coach can claim exemption from military service, under the act of 14 April, 1863, by having become such after his enrollment as a soldier. The question arises under the last mentioned act, because the act of February, 1864, expressly declares that nothing therein contained shall be construed as a repeal of it. Mail contractors and stage drivers were not mentioned among the classes of

exempts contained in the act of 11 October, 1862, and the act of April, 1863, was passed, no doubt, to supply the omission. The act is in the following words:

"The Congress of the Confederate States of America do enact, That the contractors for carrying the mails of the Confederate States shall be exempt from the performance of military duty in the armies of the Confederate States from and after the passage of this act, during the time they are such contractors: *Provided,*" etc.

Section 2: "That drivers of post coaches and hacks for carrying the mails, on all routes where the weight of the mail requires that they should be carried in coaches or hacks, shall be exempt from military service in the armies of the Confederate States from and after the passage of this act, so long as they continue to be so employed as drivers: *Provided,*" etc.

For the petitioner it is contended that the terms of this act are broad enough to embrace his case, whether he was in the army or out of it at the time of his becoming the driver of a stage coach, and a decision made by *Judge Haliburton,* of the District Court of the Confederate States, in Virginia, is relied upon in support of it. On the other hand, it is insisted by the counsel for the defendant that the act in question was never intended to allow a soldier in service to exempt himself therefrom by taking a mail contract, or being employed as a driver, and he (513) relies upon the decision to that effect made by *Judge Joynes,* of the Circuit Court of Petersburg, in Virginia. Adjudications made in this State were also referred to by the counsel on both sides.

In this conflict of judicial authority, I feel myself at liberty to adopt the strong convictions of my own mind as to what is the true construction of the act. All the acts of Congress called the conscription acts are, it must be confessed, strong war measures. They can only be sustained, in point of authority, upon the unlimited power vested in the Confederate Government to declare war and to raise and support armies; and in point of policy they can only be justified upon the pressing exigencies of the country, struggling for National existence, with an enemy of vastly greater resources in all the means and appliances of war. It was with a full knowledge of this condition of the country that the conscription acts of April and September, 1862, and the exemption act of October, 1862, as well as the one now under consideration, of April, 1863, were passed. The manifest object of the conscription acts was to call into the military service of the Government as many persons as possible, without interfering with the necessary industrial, educational, and other great interests of the country; and in favor of those interests the exemptions were granted. In making those exemptions, I cannot discover in

the acts any spirit to extend them beyond the purpose for which they were allowed. Persons engaged in certain pursuits or occupations when the acts were passed were not to be enrolled for military service; but there is no indication of an intention strong enough to show that if they were in the army, they were to be permitted to take themselves out of it. It is true, as *Judge Haliburton* says, that the words of the act exempting mail contractors and post coach drivers are broad enough to embrace persons in the military service; but that, I do not think, is (514) the question. The true inquiry is, What did the lawmakers mean? Did Congress intend to let any person out of the army to perform a duty which could be performed quite as well by another person, though not quite so cheaply, while it was resorting to the extremest measures to bring men into it? It must be admitted that the terms of the act may be satisfied by applying them solely to persons not enrolled for service when they become mail contractors or mail stage drivers, and that construction must be adopted whenever we are satisfied that such was the intention of Congress. In *Bridgman v. Mallett, ante,* 500, I have stated the reasons which have led me to adopt that construction as the proper one, upon the act of 17 February, 1864, and I think they apply with very nearly as much force to the other conscription and their attendant exemption acts.

My opinion is, therefore, that the order, made in vacation to discharge the petitioner, must be reversed with costs, and that he should be remanded to the custody of the defendant.

PER CURIAM. Order reversed, and the petitioner remanded to the custody of the defendant.

NOTE.—*Vide Sowers' case, ante,* 384.

Cited: S. v. Harrell, 107 N. C., 943.

DAVID L. BRINGLE v. JOHN A. BRADSHAW.

(2 Winst., 129.)

A contractor to carry the mail is a civil officer of the Confederate Government, and, therefore, exempted from service in the Home Guard by the act of the General Assembly at the session of July, 1863, ch. 10.

CERTIORARI at the suit of John A. Bradshaw, to bring into this Court for review the judgment of *Heath, J.,* in a writ of *habeas corpus* sued out by David L. Bringle against John A. Bradshaw, an officer of the Home Guard. (515)

The facts are stated in the opinion of the Court.
Judge Heath discharged the petitioner from custody.

Blackmer for Bringle.

BATTLE, J. The petitioner, who would be otherwise liable to perform military service in the Home Guard of the State, claims an exemption therefrom on the ground that he is a contractor with the Confederate Government to carry the mail over a route more than 10 miles long, in the county of Cabarrus.

It is contended for him, first, that he is an officer of the Confederate Government, and is, as such, expressly exempted in the act of the called session of the Legislature in July, 1863, ch. 10, "An act in relation to the Militia and a Guard for Home Defense"; secondly, that if not an officer, in the sense of that act, yet he has imposed upon him, by his contract with the Confederate Government, important public duties which require his personal attention, and which are incompatible with the duty of military service in the Home Guard.

The act establishing a Guard for Home Defense, in the second section, exempts, among other persons, "the civil and military officers of the Confederate Government," and the point raised upon the first ground taken for the petitioner is that he is a civil officer of that government. What is an office? It is said to be a place "where one man hath to do with another's affairs against his will and without his leave; and he who is in it is an officer. There is a difference between an office and an employment; every office is an employment; but there are employments which do not come under the denomination of offices." 7 Bac. Abr., 279, Offices and Officers, Letter A. "Offices are distinguished into those (516) which are of a public and those which are of a private nature; and herein it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office, and the nature of his duty, which makes him a public officer, and not the extent of his authority. *Id.*, 280.

Taking this definition of offices and officers to be correct, the duty which is devolved upon a contractor to carry the mail must constitute him a civil officer of the Confederate States. He assumes the performance of certain services under the authority of the Confederate Government, and has the exclusive right to perform them, and to receive the compensation provided therefor. These services are of a public nature, and though the authority of the contractor may be confined to narrow limits, yet the services are of great importance to the public. He is, therefore, within the express terms of the exemption contained in the act

concerning the Home Guards. We are, therefore, unable to perceive any error in the judgment of discharge granted to the petitioner, by his Honor, *Judge Heath;* and it must be affirmed with costs.

NOTE.—*Sowers' case, ante,* 384.

JOSEPH J. COX v. JOHN H. GEE.

(2 Winst., 131.)

1. A soldier actually and rightfully in the army can have no relief by the writ of *habeas corpus* against any alleged abuse of military authority.

2. If he be *wrongfully* held as a soldier, he is not entitled to a *habeas corpus* while he is undergoing punishment or awaiting trial for a military offense.

CERTIORARI at the suit of Joseph J. Cox, directed to *Heath, J.,* (517) for the purpose of reviewing his judgment in a writ of *habeas corpus,* at the suit of Cox against Major Gee, commandant of the military post at Salisbury. The petition alleged that Cox was detained in prison wrongfully and without any cause. The return of Major Gee stated in substance that Cox was a soldier in the Army of the Confederate States, and that he was held in close prison by order of the Secretary of War, on charges of murder and larceny, awaiting his trial by a military court.

Judge Heath dismissed the writ and remanded Cox.

W. H. Bailey for petitioner.
Bragg for Major Gee.

MANLY, J. We concur in the judgment pronounced by his Honor, *Judge Heath,* in this case, and for the reasons stated by him.

With respect to the facts, there is no controversy. The petitioner is a soldier in the Army of the Confederate States. About 1 November charges were preferred against him from some source, entitled, as we presume, to credit, as they invoked the action of his superior officers; and he was put under arrest and sent, for safe keeping, to the military prison in Salisbury, where, soon after his arrival, on 26 November, he sued out a writ of *habeas corpus.*

We are at a loss to conceive any ground upon which the application can be based, even with plausibility. A soldier, bound to service in the army, when once enrolled and assigned his post of duty, is in military

custody, and no longer at liberty to go about at will. His greatest freedom from restraint allows him only to move about within certain limits in the camp. For misconduct he may be put under arrest and confined to narrower limits or condemned to close confinement. And, I (518) take it, in any of these positions he is equally out of the reach of enlargement through civil tribunals until, at least, his term of enlistment expires.

It would indeed be a prolific source of jurisdiction for our judges if they could, or are bound to, carry the writ of *habes corpus* into the camp, the guardhouse, and the military prison, and inquire into the legality of the restraints there enforced.

Such an interference with the discipline of the army, if practicable, would utterly disorganize it.

Legitimate inquiry in such cases goes only to the extent of ascertaining whether the prisoner is rightfully in the army. If so, the civil tribunals leave him to the military, to be dealt with according to their rules and regulations. All the cases which have been before our judiciary have had for their object simply to inquire whether the petitioners were rightfully claimed as soldiers. We have no precedent, therefore, for proceeding with any such object as the one before us.

Supposing the petitioner to have ground for questioning the right to detain him as a soldier, he cannot be heard to do so now. Having waived his right until he is under arrest for offense, he cannot escape consequences by showing on a writ of *habeas corpus* that he was not bound to be there. This is laid down in *Graham's case,* in the Appendix to 53 N. C., at page 416.

But our case is of a soldier admitted to be in the service, and, therefore, with no claim to get out of it or be released from it. He has fallen under censure; he has been imprisoned subject to charges; and from this he desires to be relieved. How, and to what end? We cannot set him at large, we cannot hasten the action of the military tribunals, and it would be an unheard-of novelty to order him from the guardhouse to some position in the ranks of the army. Such a power involves again a troublesome and mischievous jurisdiction.

(519) Arrests in the army are made, as we suppose, by orders from headquarters, verbal or written. There is no affidavit and no warrant, other than the order. The person is detained in such way as may be necessary to keep him safely until a court-martial can be organized for trying him. He may be removed from one place to another, at the will of the military authority, and all this, we are bound to suppose, is in accordance with army regulations. We have no power to interfere for any purpose that we are aware of.

We affirm the judgment of the court below, and order the petitioner to be and remain in custody as before. Petitioner is also ordered to pay the costs.

NOTE.—*Vide Wyrick's case, ante,* 375.

Cited: S. v. Harrell, 107 N. C., 943.

MILES GOODSON v. J. D. CALDWELL.

(2 Winst., 135.)

A man who was between the ages of 18 and 45 at the date of the passage of the act of 17 February, 1864, and arrives at the age of 45 before he is enrolled, is exempt from service for the war, but is liable to serve in the Senior Reserves.

HABEAS CORPUS, returnable before *Shipp, J.,* and by him adjourned into the Supreme Court.

The facts are stated in the opinion of the Court.

Bynum for petitioner.
Bragg for Caldwell.

MANLY, J. Previous to the act of 17 February, 1864, entitled "An act to organize forces to serve for the war," the petitioner was exempt by reason of his being a blacksmith. This exemption being repealed by that act, he became liable to military duty, but was not enrolled until 2 October. In the meanwhile—that is, between the passage of the act and the enrollment—he reached the age of 45 years. The enrollment and arrest are for duty in the army generally, and not as a (520) senior reserve.

We have had occasion at this term to declare in several cases (as in that of *Upchurch v. Scott,* next case) that the act of 17 February does not, of itself, operate as an enrollment, something more being required to put a citizen in military service. This being so, it follows that if the citizen, at the time he is called for, be not liable to perform the service required, he cannot be rightfully enrolled and made to serve.

The act of Congress divides the army into three parts: (1) The junior reserves, between the ages of 17 and 18; (2) The great body of the army, between 18 and 45, as organized under the acts of 1862; and (3) The senior reserves, between the ages of 45 and 50. Had the petitioner been incorporated into the army by enrollment, and ordered into camp, when between the ages of 18 and 45, he would have been rightfully put in the

second division mentioned above, and would have been in for the full term prescribed by the act of 1862. But inasmuch as he was not called for until after he had passed the terminus (45) of that division, he ought to have been enrolled in the third.

He is entitled to relief, therefore, from his present custody, and will stand subject to duty in the corps of senior reserves.

He is discharged accordingly, the officer to pay costs.

NOTE.—*Vide Haswell v. Mallett, ante,* 432.

WILLIAM G. UPCHURCH v. S. W. SCOTT.

(2 Winst., 137.)

A man between the ages of 17 and 50 is exempt from military service under the act of Congress of 17 February, 1864, by becoming the employee of the editor of a newspaper at any time before enrollment.

(521) CERTIORARI at the suit of S. W. Scott, a captain in the militia, directed to *Chief Justice Pearson,* commanding him to certify the proceedings had before him, and his judgment, in a writ of *habeas corpus* at the suit of the plaintiff against the defendant, tried by him in vacation. He had adjudged that the petitioner was unlawfully in custody, and had discharged him.

The facts of the case are stated in the opinion of the Court.

Bragg for Scott.
Mason for Upchurch.

MANLY, J. The facts as they appear upon the record returned into this Court are that the petitioner, in the beginning, furnished a substitute under the act of April, 1862. After the passage of the act of 5 January, 1864, declaring persons no longer exempt by reason of having furnished substitutes, he became again liable to military service. He was not, however, enrolled or ordered into camp until 3 May, 1864. In the meanwhile he had made an engagement with the editor of a long established paper in the city of Raleigh, and actually entered into his service on 2 May, 1864. The editor has made a certificate, under oath, that petitioner is a necessary employee in his office, as prescribed by the act of 17 February.

The question is, whether he be exempt.

The difficulty seems to arise from what we consider a misapprehension of the true and proper effect of the act of 17 February, 1864, ch. 65.

Although, in respect to age, it fixes the *"status"* of every citizen at its passage, as liable or not liable to serve for the war, as they might be within or without the ages prescribed, yet it is not *per se* an enrollment or mustering into service so as to withdraw men from their pursuits and deprive them of the liberty of engaging in or changing them at pleasure, although these pursuits might operate as an exemption (522) from military duty.

We can perceive nothing in the policy or language of this law to prevent a citizen after its enactment, though subject under it to military duty, from accepting an office, or from engaging in any occupation which interest or inclination might suggest, provided it were done before he was actually called into service by enrollment. Up to that time the State had a right to the service of its citizens, and they had a personal liberty to engage in whatsoever business they might think proper. We are citizens of the State and also of the Confederate States. We owe duties to each; and if these duties are inconsistent, both cannot be performed. There is no principle by which such a conflict can be settled but that of the maxim, *"prior est in tempore, potoir est in jure."* If one Government has appropriated a person to its service, by inducting him, in the way known to the law, into a place of duty, the other must yield its claim. The language of the act is, "From and after the passage of this act all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States for the war." The terms are admitted to be comprehensive; but they must, we think, be interpreted in the modified sense of declaring simply, all persons within teh ages to be subject to duty when called on. Such seems to be the sense in which the Government itself has undertood them; for it has put into action the official machinery necessary for actually enrolling and bringing into camp, and has not regarded the men as subject to military law until so brought in.

We make no question, because it seems to us plain, that the exemption granted by the act to necessary employees in newspaper establishments was intended to apply not only to such as were employed at the time of the passage of the act, but to such as might be introduced in their stead, or become necessary from time to time in the development (523) of the business.

It will then be seen that, although the petitioner was liable, under the act of Congress, to be called at any time into active service, yet, inasmuch as he was not so called and ordered into camp until after he had become an employee in the publication of the newspaper, certified to be necessary, he is exempt by virtue of the same act of 17 February. There is

but a narrow space of time between the employment and the enrollment. It is nevertheless sufficient to mark his case, and to distinguish it from a case of liability to enrollment and consequent liability to duty.

The judgment at chambers is affirmed, and the prisoner discharged; the costs to be paid by the officer, Scott.

Cited: *Smith v. Prior, ante,* 418; *S. v. Harrell,* 107 N. C., 943.

APPENDIX

DECISIONS OF JUDGES IN VACATION

ON

WRITS OF HABEAS CORPUS

IN THE MATTER OF CAIN.

(2 Winst., 142.)

The act of Congress suspending the writ of *habeas corpus* held applicable constitutionally only to cases where the person seeking the writ stands committed for crime.

PEARSON, C. J. The petitioner alleges he has put in a substitute for the war and is not liable to conscription, but was arrested and detained as a conscript by the enrolling officer, and prays for a special writ to the sheriff to take his body and have it on the return, and to summon the enrolling officer to show the cause of his arrest and detention, under the act of the Legislature, 1862, ch. 46, on the averment that adequate relief may not be afforded by directing the writ to the enrolling officer, for he believes the officer will not return his body.

If the act of Congress suspending the privilege of the writ of *habeas corpus* embraces the case, and if Congress has power to suspend the writ in such cases, the petitioner is not entitled to the special writ, as it would be doing indirectly what cannot be done directly; otherwise he is, for unless the body be returned, adequate relief cannot be given; (526) so that is the question; and as it is new, I directed notice of the application to be given to the enrolling officer and requested an argument.

It was insisted by Mr. Furches, on the part of the petitioner, that the act of Congress only applies to the case of persons *lawfully* arrested and afterwards detained as prisoners by a *special* order of the President or Secretary of War. The effect being simply to deprive persons detained as prisoner, under such circumstances, of the privilege of the writ whereby to be discharged, if a probable cause is not shown, or admitted to bail if the offense be a bailable one, and to enable the President or Secretary of War to have them detained as prisoners without further

inquiry on the part of the Judiciary until the case is tried; and that the suspension does not have the effect of enabling the President or Secretary of War to cause citizens to be arrested *illegally,* as by general order, or by military officers, or to delay the trial. In support of this position he relied on this clause of the Constitution: "The right of the people to be secure in their persons, etc., against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," as qualifying and restricting the power to suspend the privilege of the writ of *habeas cropus;* so that Congress has not the power to authorize the President or Secretary of War to issue a general order to military or other officers to arrest and detain, as prisoners, any persons who may be charged or be suspected, by these *subordinate ministerial officers,* to be guilty of any of the offenses specified, or even a special order for the arrest of any particular individual, but that the arrest must be made under a warrant issued by a judicial officer upon probable cause,
(527) supported by oath and particularly describing the person to be seized; that otherwise this and other principles of liberty, solemnly announced in the Constitution for the purpose of restricting the power of Congress, may be annulled and made of no effect, the Judiciary ignored as a coördinate branch of our Government, and the Executive invested with absolute power to imprison any citizen at discretion. In other words, the President would be a *dictator;* that the act would not have been passed for any such purpose, and if it was, it is unconstitutional and void.

There was no argument on the side of the enrolling officer. I infer (see General Order 31, 10 March) the Secretary of War insists that the effect of the suspension is to empower the President or the Secretary of War, by general or special orders, to authorize the arrest and detention, as a prisoner, of any person for any of the causes specified, and to suspend all inquiry by the *Judiciary* in regard to the legality of the arrest or the cause of it.

There is certainly a wide difference of opinion as to the effect of the suspension, and one not easy of solution. It would be a matter of regret if the bill passed under a misapprehension in regard to the effect of a suspension of the privilege of the writ. But it is not necessary for the purpose of this case that I should form or express an opinion on that question; for it will be conceded that whether a case is embraced by the act, or not, is a *question of law for the courts,* and I have a clear conviction that the clause authorizing the suspension of the privilege of the writ does not apply to the case before me, which is an application for a

civil remedy to assert a private right under a contract, the party not being charged with the commission of, or an intention to commit, any crime.

There are several kinds of writs of *habeas corpus*. Bacon Abr., (528) title *Habeas Corpus*. (1) *Habeas corpus ad subjiciendum*, which is the main writ, called the "writ of right," "the bulwark of liberty," and by way of preëminence, "the writ of *habeas corpus*," which a person who stands committed or detained as a prisoner for *any crime* may obtain from a court of common law, or a single judge in vacation time by 31 Charles II., ch. 2 (Rev. Code, ch. 55, sec. 1), on which the matter will be inquired of and the prisoner discharged, bailed, or remanded. (2) A *writ of habeas corpus for a civil cause*, when the right to the custody or services of a person is contested, and he is imprisoned or otherwise restrained of his liberty for *any other cause* than the commission of the criminal offense. At common law in such cases a writ *homine replegiando* may be sued out. That is an original writ, and under it the body is replevied subject to the decision of the Court. Fitz Herbert N. B., 68, E.; Comyn Dig., Pleader, 3 K., 1; Imprisonment L., 4. "So a man unlawfully detained in custody may have *homine replegiando, si non captus sit preceptum regis* (that is, if not imprisoned for crime). 2 Inst., 55. This is a civil suit to determine the right to the custody. *Homine replegiando* lies for a negro or an Indian brought into England (3 Mod., 120); or if one takes a wife, or a child, or apprentice of another.

This original writ is now out of use, being superseded by a judicial writ issued by a court in all cases where *homine replegiando* lay to have the body returned, the right to the custody determined, and the person discharged or remanded. By statute 56, Geo. III., ch. 100 (1816), Rev. Code, ch. 55, sec. 10, this jurisdiction is extended to a single judge in vacation time, when any person shall be imprisoned or otherwise restrained of his liberty for any *other cause* than the commission of a criminal offense. *Musgrove v. Kornegay*, 52 N. C., 71, is an instance of a suit under this statute; it was a contest in respect to minor children instituted by a writ of *habeas corpus*, and brought to the Supreme Court by appeal. *Prue v. Hight*, 51 N. C., 265, is another instance; it was a contest as to an apprentice, decided on *habeas* (529) *corpus* before a single judge on a writ sued out by the alleged apprentice. 3 Keb., 5, 26, sec. 2; Lev., 128; 1 Strange, 444. A young lady brought before a judge on *habeas corpus* by one who claimed her as his wife. Many other cases might be referred to, in all of which the proceeding is treated as a civil suit to determine the right to the custody or services of a person. (3) A *writ of habeas corpus ad testificandum* to bring up a prisoner to give evidence before a court. (4) A *writ of*

habeas corpus ad respondendum. (5) A *writ of habeas corpus ad faciendum et recipiendum.* (6) A *writ of habeas corpus ad deliberandum et recipiendum.*

It seems to me perfectly clear that the clause of the Constitution giving power to Congress to suspend the writ of *habeas corpus* refers to the writ of *habeas corpus ad subjiciendum,* when a person stands committed or detained as a prisoner for a crime within 31 Charles II., ch. 2; Rev. Code, ch. 55, sec. 1, and does not include the other writs.

Our Constitution, with a few alterations, is taken from that of the United States, which rests on the Constitution of England as its substratum, with some modifications, conferring certain powers on the legislative branch of the Government which in England are vested in the Crown. The clause in the Constitution of the United States and of the Confederate States is in these words: "The privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion or invasion, when the public safety may require it." These words do not confer the power affirmatively, but by what is called a negative pregnant. An explanation of this is to be found in the history of the times. In England it was a vexed question whether Parliament could suspend the privilege of the writ of *habeas corpus* unless in cases of rebellion or invasion. There are some precedents for suspending it when there is no rebellion or invasion, but the authority of these precedents is questioned.

(530) In 1777 Lord North brought in a bill to suspend the writ of *habeas corpus* in cases of treason or sedition committed in any of the colonies. The bill was violently opposed. There was no rebellion or invasion in Great Britain, and it was denounced as unconstitutional and dangerous to liberty. Lord North had to yield and allow it to be amended by inserting a proviso: "Nothing in this act shall be construed to extend to persons resident in Great Britain." This concession gave extreme offense to the leaders of the high prerogative party, who had zealously supported the bill in its original state. Miller, Cont. Hume, and Smollett, 187-'8. In framing the Constitution of the United States the purpose was to settle this vexed question and to limit the power expressly to times of rebellion or invasion. So the *occasions* on which the privilege of the writ may be suspended are fixed by the Constitution in so many words. In respect to the cases and the writs to which the suspension might be made to apply, no question had ever been raised. It was conceded by all persons of all parties, and at all times, that the suspension could only include cases of persons who stand committed or detained as prisoners for some criminal or supposed criminal offense, treason, sedition, and the like, and the writ applicable to such cases. No precedent can be found among the rolls of Parliament where the suspension has ever been made to extend to civil cases or the writs

used in such cases, or to any of the other kinds of the writ save that which is styled *"the writ of habeas corpus,"* applicable to the case of persons committed for crime and within the provision 31 Charles II., ch. 2; Rev. Code, ch. 55, sec. 1. Hence the words "when the public safety may require it" were deemed sufficiently explicit in respect to the cases and the kind of writ to which the suspension would apply. What reason can be conceived for extending the suspension to the writ of *habeas corpus ad testificandum* or the other inferior writs, or (531) to that kind which is used as a civil remedy, and is a civil suit substituted in place of the action *homine replegiando,* as in *Musgrove v. Kornegay* and *Prue v. Hight, supra,* and the case of the lady claimed as a wife, and others of a like nature with which the public are not directly concerned?

One would as soon expect to find in the Constitution power conferred on Congress to suspend the right to a writ in case for money had and received, against tax collectors for an excess exacted under a wrong construction of the tax bill, and paid under protest; or the right to a writ in trespass, for false imprisonment, against military officers for illegally arresting men as conscripts, with which cases the public interest may indirectly be made to connect itself, as bearing on the amount of taxes collected, or the number of men put into the service. Suppose, by reason of the difficulty put in the way of this kind of writ of *habeas corpus,* the old action, *homine replegiando,* should be resorted to. Will any one venture to say the supension would apply to that action? It is worthy of remark that the special writ to the sheriff, and summons to the party detaining, prayed for in this petition and authorized by the statute, 1862, are very similar to the proces used in that action when brought by the party restrained of his liberty.

On so grave a subject every word must be supposed to have some import; and every word used in this clause does import that the power of suspension has reference only to the writ applicable to the case of persons imprisoned for crime. *"The privilege."* When one is committed to await his trial for a crime, it is a privilege to be allowed a writ whereby the legality of his arrest may be inquired of, and he may be discharged or admitted to bail. But when one who has not committed and is not supposed to have committed a criminal offense is wrongfully restrained of his liberty, that he should be allowed to institute a civil suit to be relieved from the confinement is a *right* which every State is bound to secure at all times to its citizens; and these words must import that the power of suspension refers only to the former (532) class of cases, otherwise no meaning can be attached to them. *"The* writ of *habeas corpus,"* using the definite article instead of *"a* writ." Why?—to designate that kind which, by way of preëminence, is

called *"the* writ of *habeas corpus." "Shall not be suspended.* The other kinds of the writ never had been suspended or their suspension thought of, so this negative points to that kind which had been before suspended, and in regard to which the public mind had been so frequently and so violently agitated. "Unless in cases of rebellion or invasion, when the public safety may require it." There is nothing in the purpose for which the other kinds of the writ are used that has the slightest reference to times of rebellion or invasion, or to the public safety; but in times of internal commotion it might affect the public safety if persons who had committed, or were suspected of the intention to commit, treason, sedition, or other like offenses should be allowed to go at large; so these words also point to the suspension of that kind of the writ which might be used to obtain a discharge, and put it in the power of such malefactors to carry out their treasonable and seditious practices.

The remaining question is, Does the case made by this petition present matters for a writ of *habeas corpus* under the first section of the statute, "if any person shall stand committed, etc., for a crime, he may, in the vacation time, complain to a judge, who, on view of a copy of the warrant of commitment, or otherwise on oath that it is denied, shall grant a writ of *habeas corpus";* or does it present matter for a writ of *habeas corpus* as a civil remedy to assert a private right under section 10, when any person shall be arrested or otherwise restrained of his liberty "for any *other cause* than the commission of a criminal offense, he shall be entitled, upon its appearing by affidavit that there is reasonable ground for the complaint, to a writ of *habeas corpus"?*

(533) The case clearly falls under scetion 10. The petitioner does not show that he was committed for a crime, but that he is restrained of his liberty as a conscript. He avers he is not liable to conscription, and asks for the writ as a civil remedy to establish his right under a contract. I am to take it, until otherwise decided by the Supreme Court, that the act of Congress conscripting principals of substitutes is unconstitutional, according to the decision in *Walton's case, ante,* 310;* so there appears to be reasonable ground for the complaint.

Will it be said Congress has power to pass an act, and then make it a crime to apply for a civil remedy to test its constitutionality, and to suspend the privilege of *habeas corpus,* so as to exclude the question from the *courts?* (!!) I shall leave the proposition stated nakedly, to be looked at in silence, as the best mode of exposing its error.

The petitioner avers that he has been arrested and detained as a conscript, and make a case for a writ under section 10, to which the power

*NOTE.—The decision in *Walton's case* was reversed at June Term, 1864, *ante,* 325, subsequently to the filing of this opinion.

of suspension does not apply. Can the tables be turned so as to put him in the condition of one committed or detained as a prisoner for a crime, and make it a case for a writ under section 1, to which alone the power of suspension does apply? This application for a writ is a *consequence,* and not the cause of the arrest and detention complained of; and to detain the man as a prisoner for making the application, and substitute a certificate of that fact for a return to the writ, inverts the order of things. If he is detained as a *prisoner,* he becomes an encumbrance, and the purpose of using him as a conscript is defeated (534) unless there can be another magical change by which he will no longer be considered to be detained as a prisoner, but to be held as a conscript. The proposition requires no comment.

The party is, in my opinion, entitled to a special writ.

22 May, 1864.

NOTE.—*Vide In re Roseman, ante,* 368; *contra, In re Long,* next case; *In re Rafter, post,* 537.

Cited: In re Cain, ante, 312; *In re Russell, ante,* 391.

IN THE MATTER OF M. LONG.

(2 Winst., 150.)

The act of Congress suspending the writ of *habeas corpus* held applicable constitutionally to the case of a person who was claimed as a conscript under the act of 17 February, 1864, and that the judge was prohibited from issuing the writ.

BATTLE, J. This is an application to me for a writ of *habeas corpus,* founded upon the allegation that the petitioner, having been liable to perform military service, had heretofore put a substitute in the Army of the Confederate States to serve in his stead for three years or the war. He contends that the late act of Congress, under the authority of which he has been again enrolled and taken into custody, is unconstitutional and void.

A grave question is at once presented, whether I am not prohibited from issuing the writ. An act was passed at the late session of Congress entitled "An act to suspend the privilege of the writ of *habeas corpus* in certain cases." This act was passed under the authority of a power conferred upon Congress for the purpose, and its constitutionality cannot be doubted. It is binding upon all the judges, both of the Confederate and the State courts, and they are not at liberty to issue the writ, or, if issued, to proceed under it, in any of the cases specified in the act.

(535) These cases are clearly defined and classified in the first section, and among them is a class marked with the number 5. The question before me arises upon the specification in that class, "of attempts to avoid military service." Are not persons who are claimed as conscripts, or as otherwise liable to military service, and who apply for a writ of *habeas corpus* for the purpose of thereby getting exempted from it, making attempts to avoid it? To my mind it seems clear that they are. They are certainly within the letter of the clause, and why are they not within its spirit? To this it is said that the act was intended to apply only to those who, being liable to perform military duty, were unlawfully attempting to evade it, and not to those who seek the benefit of the writ for the sole purpose of establishing their claim to exemption from such duty. That cannot be so. Such a restricted construction of the act would tend strongly to defeat the great purposes it was intended to accomplish. It could not, in the terms of the Constitution, be passed at all unless the country were invaded or in rebellion. The salvation of the country is the object sought, and the framers of the Constitution who authorized the act of suspension, and the legislators who passed it, deemed that object so transcendently great that, for the time, all individual rights which conflicted with it ought to give way to it. The spirit, then, as well as the letter of the clause, must embrace all persons, without any exception, who are making "attempts to avoid military service." But if the words upon which we are commenting admitted of any doubt, it is entirely removed by the proviso which immediately follows them. In that proviso a clear, definite, and precise remedy is given to any party who does not legally "owe military service." If any such person be wronged by a subordinate officer, his superior shall give prompt redress to the injured party and at the same time punish the wrongdoer by dismissing him from office. Why is this prompt redress thus expressly provided for a party not liable to military service, unless it was be-
(536) cause the great remedial writ of *habeas corpus* is taken away from him?

I am aware that in the case of *Walton, ante,* 350, and others lately decided by *Chief Justice Pearson* at Salisbury, he held that the act suspending the writ of *habeas corpus* did not apply to them; but why he so held, I regret that I am not informed. The question is now presented to me, and I cannot avoid deciding it. If, in my opinion, I have no authority to issue the writ, I cannot stand justified before the country should I do it.

In deliberating upon the subject, another question occurred to me, which is, whether I ought to issue the writ and await the return of the officer before deciding upon the effect of the act, or to decide that question now. Section 3 of the act may at first view seem to favor the former

course. That section provides for the stay of the proceeding under the writ, when the officer, who has a party in custody, shall certify on oath that he detains him for any of the causes specified in the act. The true construction is, I think, that when the petition itself shows the cause of the detention, and it is one of those mentioned in the act, the judge cannot issue the writ at all; but if such cause be not stated in the petition, then the writ must be issued, and the proceedings under it can only be suspended upon its being made to appear by the affidavit of the officer that the true cause of the detention is one of those embraced in the act.

I have thus endeavored briefly and plainly to set forth the reasons why I feel bound to decline issuing the writ of *habeas corpus* applied for in this case.

Chapel Hill, 29 February, 1864.

NOTE.—*Vide In re Rafter*, next case; *contra, In re Cain, ante*, 525; *In re Russell, ante*, 388.

Cited: In re Roseman, ante, 368; *In re Spivey, post*, 542.

IN THE MATTER OF P. RAFTER.

(2 Winst., 153.)

1. When the return of the officer to a writ of *habeas corpus* disclosed the fact that the petitioner was held as a conscript under the act of Congress, *Held*, that the judge could proceed no further with the case, but must remand the petitioner.

2. The act of Congress suspending the writ of *habeas corpus* is constitutional.

MANLY, J. The answer of the officer, having custody of the (537) petitioner, to the writ of *habeas corpus*, discloses a case which cannot be prosecuted further under the writ. The following return is made: "W. T. Shipp maketh oath that Patrick Rafter was arrested and is now detained by him as a person liable to do military duty, and who is attempting to avoid the same; that his arrest and detention is in pursuance of the authority of the Secretary of War of the Confederate States."

The act of Congress, after declaring the writ of *habeas corpus* suspended in its application to arrests made by the President or Secretary of War in certain enumerated cases, provides that "during the suspension no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to appear in person, or return the body of any person

detained by him by the authority of the President or Secretary of War; but upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner under the authority aforesaid, further proceedings under the writ of *habeas corpus* shall immediately cease, and remain suspended so long as the act shall continue in force."

It appears to me clear, from the provisions of the law, that Congress intended to take away from the ordinary tribunals of the country
(538) all inquiry by *habeas corpus* into arrests made by the President or Secretary of War, professedly in any of the enumerated cases.

Congress is so guarded upon this point that it prescribes the form of the return which the officer cited by the writ is to make, and which it declares shall be sufficient; and this form tenders no issue, and leaves open no opportunity for making an issue, upon the construction of the law. The officer's return, in the case before me, pursues the form prescribed; and that, by the terms of the act, puts an end to all further inquiry. It results that no question can be properly raised in the matter before me unless it be a question as to the power of Congress to pass such a law. I see no sufficient reason for holding the law invalid for defect of power.

The Confederate Constitution (Art. I, sec. 9, par. 2) declares that the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. This is a "negative pregnant," which implies a power in Congress, within the sphere of the General Government's action, to suspend the writ, as the Parliament of England was wont to do, subject to the limitation that the power shall be exercised only in cases of rebellion and invasion, when the public safety may require it. Invaded from all quarters by the public enemy, as the States were at the late session of Congress, the occasion had arisen when that body might lawfully consider of the exigency for a suspension of the writ. It did so consider; decided in favor of a suspension in the cases enumerated; and this decision is necessarily conclusive.

It is conceded as a high exercise of the legislative power; but it is believed not to be beyond its legitimate range, while the momentous and profound exigencies with which the country is now struggling are its full justification.

An affidavit is found among the papers, from which it appears that petitioner claims now to be 47 years of age, and to be exempt by
(539) reason thereof from enrollment to do military service to the Confederate States. According to the view taken by me of the law, the question thus raised is excluded from consideration. But if it should turn out that I am in error in this construction, and the point be made and considered, it will not avail the petitioner.

The first section of the military bill provides that all white men between the ages of 17 and 50 shall be in the military service of the Confederate States during the war. In the fifth section, those between 17 to 18 are placed in a reserve corps, not to serve out of the State in which they reside. In the eighth section power is given to the President to detail from the class between 45 and 50, persons for office, hospital, and other similar duties. No restriction seems to be imposed upon the employment of this latter class in military field duties; and the enrollment and arrest for duty of petitioner are not, therefore, an illegal interference with his personal liberty. Indeed, had Congress limited the field of duty to the State, as in the case of persons between 17 and 18, the mustering him into service simply, and placing him in a camp of instruction near the capital of the State, which is the alleged trespass upon his rights, would not be illegal. The arrest and detention would not be without warrant of law; and the writ under which he is seeking redress is confined in its office to the enlargement from imprisonment or custody of persons so arrested and detained, and none others.

Upon the questions which have arisen out of the laws of April and September, 1862, as well as that of January last, usually called the conscription acts, some future occasion may be afforded of giving to the public my views. At present I abstain from any discussion of them, as it is not necessary, and they may be the subject of future reviews in the Court of which I am a member.

I deem it proper to state that the petition in the case does not set forth the alleged ground for the petitioner's arrest; but I concluded to overlook this defect and meet at once the questions raised upon (540) the construction of the law. I mention it here that it may not be regarded as a precedent against me. In general, it is believed to be more consistent with a just and prompt execution of the laws to require petitioners to set forth the grounds of controversy so far as they are known; and if the petition disclose a case to which the act of suspension clearly applies, it seems to me it ought to be rejected.

The petitioner is remanded to the custody of the officer.

NOTE.—*Vide In re Long, ante,* 534; *In re Cain, ante,* 525; *In re Roseman, ante,* 368; *In re Russell, ante,* 388; *In re Spivey,* next case.

IN THE MATTER OF SPIVEY.

(2 Winst., 156.)

When the officer made return to the writ of *habeas corpus*, that he held the petitioner as a conscript under the act of Congress, and for that reason did not return his body: *Held*, that the return was sufficient under the act of Congress suspending the writ of *habeas corpus;* and *Held further*, that the body not having been produced, no judgment of discharge could be rendered.

PEARSON, C. J. The petitioner had put in a substitute, the writ issued 16 February, 1864, was executed on 9 March, and the following returns made:

CONSCRIPT OFFICE,
RALEIGH, N. C., 8 March, 1864.

HON. R. M. PEARSON, *Chief Justice, N. C.:*

In answer to your summons, demanding the body of N. G. Spivey before you without delay at Richmond Hill, I hereby certify that (541) the said Spivey is detained by me under orders of the Secretary of War as a prisoner for an attempt to avoid military service.

PETER MALLETT,
Col. Com'd'g Conscripts for N. C.

The certificate was sworn to, but the oath was afterwards made.

On 8 April, 1864, Mr. Boyden, counsel for the petitioner, after notice to Colonel Mallett, moved for judgment of discharge, on the ground that the act of Congress suspending the writ of *habeas corpus,* by its proper construction, does not embrace the case of one who, like the petitioner, not being liable to conscription, simply applies for a writ to test the constitutionality of the act subjecting principals of substitutes, that not being an attempt to avoid military service within the meaning of the act; and that as section 3 contemplates that writs are still to be issued (*In re Roseman, ante,* 368), it involves an absurdity to say that the application for the writ is a cause for detaining the man, not as a *conscript,* but as a *prisoner.*

The fact of applying for the writ cannot be made the foundation of a certificate, which is to be substituted in place of a return of the body, that Colonel Mallett acted under *general* orders of the Secretary of War, which orders are unconstitutional and void; for which he relied on the case of *Wilkes,* where *Chief Justice Pratt* so decided.

The certificate is so general as not to raise these questions. For the purpose of this motion the return is to be taken as true; it negatives the

allegation that the petitioner is detained as a conscript, and avers that he is detained as a *prisoner* for an attempt to avoid military service. I cannot know *judicially* what the act was which is considered to be such an attempt. It may be that Spivey secreted himself, or tried to escape within the limits of the enemy; or it may be he is one of those men who, not being liable to conscription, in the language of *Judge Battle* in *Long's case, ante,* 534, "seek the benefit of the writ for the sole (542) purpose of establishing their claim to exemption from such duty." I am not at liberty to presume that the petitioner, being in the first instance arrested and detained as a conscript, his application for the writ is made the ground for the averment that he is detained as a prisoner for an attempt to avoid military service, which would be a *consequence* and not the cause of the detention for which he makes complaint and prays may be inquired of, and this would seem, as Mr. Boyden says, to involve an absurdity.

Nor can I know judicially whether the orders of the Secretary of War are general or special; that is, whether Colonel Mallett is ordered to arrest and detain as prisoners all persons who attempt to avoid military service, leaving it to him to say what constitutes such an attempt, and to pass on the law as well as the facts, and to certify his conclusion on oath, or whether he was ordered specially to detain N. G. Spivey as a prisoner for an act which the Secretary of War considered as amounting to an attempt to avoid military service within the meaning of the act of Congress. So the certificate gives me nothing to act on.

2. Mr. Boyden then moved for judgment of discharge, in the nature of a motion for judgment *non obstante veredicto,* on the ground that the certificate is insufficient by reason of its generality. He insisted that filing the certificate required by the act is a condition precedent to the suspension of further proceedings, which in this case has not been performed. For there might as well be no certificate at all as one that the man is detained as a prisoner under orders of the Secretary of War for one of the causes specified in the act, without setting out which one; and this, he urged, would surely not be a performance of the condition. He relied on *Croke James,* and *In re Douglass,* 43 E. C. L., 992, where the parties are discharged by reason of the insufficiency of (543) the return.

In both of these cases "the body" was returned and was in *custodia legis,* and I have not been able to find any case in which judgment of discharge is rendered where the Court is not in possession of the thing to be acted on, which is the body in *habeas corpus* cases. Without that, no judgment can be given. This conclusion is supported by all of the common-law analogies; no one could be tried unless he were present. A man convicted of murder cannot be sentenced unless he is before the

court, and the judgment is void if it do not appear by the record that the culprit was at the bar of the court. *S. v. Craton,* 28 N. C., 164. Nay, the rule at common law was so imperative that the court could not try the prisoner, although he was at the bar, unless he put in a plea; and to compel him to plead, the *peine forte et dure* was anciently resorted to. It is superseded by a statute authorizing the court, if a prisoner stands mute, to enter the plea of not guilty for him. So in civil cases there must have been an appearance before judgment could be rendered; hence the process of distress infinite, outlawry, etc., to compel an appearance and a rule on the sheriff to bring in the body when a *capias ad respondendum* had issued, which is also altered by our statute. In *habeas corpus* cases, *alias* and *pluries* writs, rules, attachments, etc., are resorted to to compel a return of the body. There is no statute applicable to *habeas corpus* cases, which stand in this respect as at common law; so judgment cannot be rendered unless the body be returned.

Motion for judgment of discharge not allowed.

11 April, 1864.

NOTE.—*Vide In re Rafter, ante,* 537, and note.

(544)

IN THE MATTER OF AUSTIN.

(2 Winst., 160.)

The Governor is not authorized to require the *Home Guard,* which is composed in part of persons exempt from militia duty, to perform the service of arresting deserters and conscripts. He may require the *militia* to perform this service.

PEARSON, C. J. The writ in this case was returned before me at Richmond Hill. As it presented a new question, I desired to have the aid of *Judge Battle* and *Judge Manly* at the hearing, and also the benefit of argument by counsel. For which purpose it was adjourned to this place (Raleigh). I regret that I have been disappointed. It becomes my duty to decide the case without the presence of the other judges, and without argument, except by Mr. Furches and Mr. Winston in behalf of the petitioner; so that I am not apprised of the ground on which the Governor rests his claim of authority.

The petitioner is exempted as a conscript by reason of a substitute, and is exempted from duty as a militiaman by force of the first section of the act of the last session of the Legislature, entitled "An act in rela-

tion to the militia and a guard for home defense." Major Harbin sets out in his return to the writ, that he had the petitioner arrested under an order of the Adjutant General for the purpose of arresting conscripts and deserters, "as said Austin was a member of the Home Guard and liable to perform said duty." The order is in these words:

RALEIGH, 15 September, 1863.

Maj. A. A. Harbin will immediately call out the Home Guard of Davie County, and arrest every deserter or recusant conscript within said county, and deliver them to Colonel Mallett at Camp Holmes. If it be necessary, you can pursue said deserters beyond the limits of your county. Those citizens who aid, harbor, or maintain de- (545) serters will be arrested and bound over to the courts to answer said charges. You will report to this office the manner in which this order has been executed.

By order of GOVERNOR VANCE:

J. A. FOOTE, *A. A. Gen.*

The question presented by the petitioner and return is of great importance. On the one hand, if the Governor is authorized to require the Home Guard to perform the service of arresting deserters and conscripts, it will promote the efficiency of the Confederate Army; on the other hand, it will impose on citizens who, by the acts of Congress and the Legislature, are exempted from conscription and militia duty, a dangerous and irksome labor.

The subject must be considered by a judge "as a dry question of law," unaffected by collateral considerations growing out of the condition of our country, and for this reason, his conclusion may differ from that of those who are at liberty to look at it under the bias of feeling.

It is a part of the duty of a soldier of the Confederate Army to arrest deserters and recusant conscripts. The Governor of a State has certainly no authority to require a citizen, unconnected with any military organization, to perform this part of the duty of a Confederate soldier. Whether the Governor had authority to require a citizen belonging to the militia to perform this duty is a question which has not been decided. It may be conceded that the Legislature has power to give this authority to the Governor in respect to the militia, on the ground that they were liable to be called into service of the Confederate States, and might be required to do a part of the duty, as a compensation for not being called into service and required to do the whole duty of a Confederate soldier. But it is a question worthy of great consideration whether the Legislature has power to authorize the Governor to require this duty of citizens who do not belong to the militia, (546)

which is the only military organization, except enlisted soldiers, recognized by the Constitution. It is not necessary for the purposes of this case to decide the question, and it is referred to only for the sake of applying the rule, "Where a power has never been before exercised and is doubtful, the courts will not presume that it was the intention of the Legislature to assume it, but will require a clear expression of an intention to do so."

The matter, then, stands thus: The Governor has no authority to require a citizen who does not belong to the militia to perform this part of the duty of a Confederate soldier. Has the Legislature conferred the authority upon him? It is insisted that this is done by the act of the last session, entitled "An act in relation to the militia and a guard for home defense," which act and the act "to punish aiders and abettors of deserters" were ratified at the same time, 7 July, 1863, and are to be construed together. So the question depends upon the meaning and proper construction of these two statutes.

At the meeting of the Legislature two questions were pending: First, Congress in its wisdom having allowed substitution and many other exemptions from the conscription acts, was it in the power of the President, by calling upon the State for its quota of militia, to subject the persons so exempted as conscripts to military duty as militia? Second, had the Governor authority to require the militia to arrest conscripts and deserters from the Confederate Army? By the first section of the act "in relation to militia and a guard for home defense," the first problem was solved, and it is enacted that all persons exempted as conscripts shall be likewise exempted from service as militia. By the third section of the act "to punish aiders and abettors of deserters," it is enacted that the Governor may require the militia to arrest deserters and con-
(547) scripts; thus solving the second problem, by authorizing the Governor to call out the remnant of the militia, that is, those not exempted from militia duty, to perform a part of the duty of Confederate soldiers, to wit, the officers of the militia and the men between 40 and 45 who had not then been called for as conscripts.

In order, however, to provide for home defense, the Legislature assumed the power of making *State conscription*. Whether the Legislature had the power to do so is a question into which it is not necessary to enter. The power is expressly assumed, and it does not become a coördinate branch of the State Government to decide upon it unless it be necessary to do so in order to dispose of a case before it. So it may be granted that the Legislature had power to organize for home defense a military body composed of the remnant of the militia, the exempts and persons over the age liable to militia duty. It is very certain that in doing so the intention was to make this new body wholly distinct and

different from the militia. Persons exempt from militia duty are included, new companies are formed, new officers appointed—in fact, everything is different; it is a new organization—a State conscription made for special purposes, "to be called out against invasions and to suppress insurrections" (section 6). And special care is taken to distinguish this new body from *militia,* for otherwise they might, under the Constitution, be called for by the Confederate States. Upon what ground, then, can it be insisted that the Governor is authorized to require this newly organized body and peculiar State institution to perform a part of the duty of Confederate soldiers? It is said the authority follows as a consequence of the military organization. I cannot see the force of the argument. In the act declaring the special purposes for which this new organization is made, no such authority is expressly given to the Governor. The power of the Legislature to confer it, even if such had been the intention, is by no means clear; and so we are not at liberty by implication to infer that such was the inten- (548) tion, and the act "to punish aiders and abettors of deserters" puts the matter, as it seems to me, out of the range of discussion, by *expressly authorizing* the Governor to use *the militia* to arrest deserters and conscripts; thereby excluding, as plainly as words could do it, any authority to require such service of this new organization—the State conscripts, Home Guard. *Expressio unius, exclusio alterius,* is a well established rule of construction which the courts are not at liberty to disregard, and its soundness, when the object is to ascertain the intention of the Legislature, and neither to fall short of it nor go beyond it, is fully illustrated by this case. So the two statutes relied on as conferring the authority on the Governor actually exclude it by a double implication. In the first place, the act authorizes the Governor "to call out the Home Guard against invasions and suppress insurrections." Why was it not added, "and to arrest deserters and recusant conscripts," if such was the intention? That subject was present to the minds of the Legislature. In the second place, the act authorizes the Governor, in so many words, "to call out *the militia* to arrest deserters and conscripts." Why did it not add, and "also the Home Guard," if such was their intention? The conclusion that it was not the intention of the Legislature that the *Home Guard* should be subject to thi service is as clear as if the acts contained the words, *"Provided, however,* that the Governor shall not have authority to require the *Home Guard* to arrest deserters and conscripts," unless it be contended that the Governor has all power except such as is expressly prohibited—a position which I suppose no man will venture to assume.

The argument may be stated thus: The statute expressly authorizes the Governor to require "the militia," that is, the officers and men be-

(549) tween 40 and 45, to arrest deserters. They form a part of the Home Guard. It follows that the Governor had no authority to require the *whole body* of the Home Guard to perform this duty; for if he had such authority, it was vain, idle, and superfluous to authorize him expressly to require a part to do that which he had authority to require of the whole. In this connection the provision, section 9, "The commissions of the officers of the militia shall be suspended only during the period of their service in the Home Guard," has an important bearing, the object being to preserve the organization of the militia, and to use them to arrest deserters; for which purpose the force was then adequate. The fact that, afterwards, the call for the men between 40 and 45, as conscripts, made the force inadequate, cannot change the meaning and proper construction of the statutes. If an amendment was thereby made necessary, the Legislature must make it; for neither the Governor nor the judges have authority to strain the law to meet the emergency.

I am aware of the responsibility under which I act. Jurisdiction is given to a single judge in vacation; my decision fixes the law until it is reversed by the Supreme Court or the law is amended by the Legislature; and I would not feel it to be my duty to stay the action of the Executive except upon the clearest conviction.

Whether, in the event the Governor should call out the Home Guard to repel a raid or suppress an insurrection, he would not, while the men were on this tour of service, which is limited to three months (sec. 6), have authority collaterally to require them to take up deserters and conscripts who might aid the enemy, is a question not now presented. We are confined to the naked question, Has the Governor authority to require the Home Guard to be called out for the mere purpose of arresting deserters and conscripts? The special order under which Major Harbin acted is for this purpose alone. It is true that the State was, before the passage of the acts, invaded, and the enemy was at that time, and (550) is now, within the limits of our State; but, as the order does not profess to be made for the purpose of repelling that invasion, there is no "tour of duty prescribed by the Governor not exceeding three months at any one time," according to the provisions of section 6. The time is unlimited, and the purpose is declared to be "to arrest every deserter and recusant conscript within the county of Davie, and deliver them to Colonel Mallett at Camp Holmes."

The suggestion that, as the arrest of deserters and conscripts would promote the efficiency of the Confederate Army, and thereby tend to defend the State against invasion, the authority of the Governor can be sustained on that ground, involves a latitude of construction unsupported by any principle of law, and, as it seems to me, cannot impress with much force the mind of any one who will read the two statutes atten-

tively and in connection. He will see, from the mode of defense contemplated by the Legislature in calling out the Home Guard for defense against invasion and insurrection, by regiments, battalions, and companies, on tours of duty within the State, not to exceed three months, etc., that the indirect and far-off mode of repelling the existing invasion, by arresting deserters and conscripts, was not in the mind of the Legislature, except when the Governor was authorized to use the *militia* for that purpose; which, according to the view I have taken above, excludes the conclusion that the Guard for Home Defense—the State conscripts—were to be used for that purpose also; for, if so, it was surely vain, idle, and superfluous to impose that service on the militia, who constituted but a small part of the guard for home defense.

The position was taken on the argument that the order under consideration clearly exceeds the Governor's authority, in this: It requires the guard for home defense "to arrest and bind over to the court, to answer said charges, those citizens who aid, harbor, and main- (551) tain deserters," and is, therefore, void *in toto*. It is true, citizens who aid, etc., deserters, etc., although made liable to indictment by one of the statutes referred to, cannot, according to the Constitution and laws of the land, be arrested and bound over to court to answer the charges, by military authority; that can only be done by the civil authority, to wit, a warrant by a judge or justice of the peace, on probable cause shown on oath, and executed by the sheriff or constable. So it is clear that part of the order is void and against law. But it does not vitiate the other part of the order, provided the Governor had authority to make it.

It is thereupon considered by me that Richard M. Austin be forthwith discharged.

CASES IN EQUITY

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1864

JAMES AND ROBERT SLOAN AND OTHERS v. CYRUS P. MENDENHALL, ADMINISTRATOR, AND OTHERS.

(Winst. Eq., 1.)

A. dies intestate, seized of land in fee simple in this State, which descends to her heir at law resident in another State. His creditors here sue out attachments which are levied on the land, and final judgments are obtained therein and writs of *venditioni exponas* issued. The land is sold by B., the administrator of A., under an order of the county court, for the payment of the debts of the intestate. After payment of them, the administrator is bound in equity to pay the residue to the creditors who attached the land, notwithstanding that the administrator has paid it by order of the nonresident debtor to another *bona fide* creditor.

IT appeared by the pleadings and exhibits in this case that Mrs. Mitchell was seized in fee of a house and lot in the town of Greensboro, and died intestate in the year 1855, and the defendant Mendenhall was her administrator, and applied by petition to the county court of Guilford for an order to sell the house and lot, alleging that the personal property was insufficient to pay the intestate's debts; and such (554) order being made, the premises were sold, and out of the proceeds of the sale the debts were paid, and part of the residue was applied to the payment of a debt which the heir of Mrs. Mitchell, John S. Dare, owed to R. G. Lindsay, one of the defendants, by the express order of Dare, and the other part was paid to J. and R. Sloan, two of the plaintiffs, in part satisfaction of a judgment obtained by them against Dare,

as is hereinafter stated. In 1848 Dare was indebted to R. G. Lindsay, and J. and R. Sloan were his sureties for the payment of the debt. Dare executed and delivered a deed purporting to convey his interest in the house and lot, stated therein to be an estate in fee in remainder after the death of Mrs. Mitchell, which deed was absolute on its face, but it was admitted by the defendants that it was intended by the parties thereto to be a security for money; and it was not registered until after the lapse of seven years or thereabouts. The defendant Dare was indebted to J. and R. Sloan, to Jesse H. Lindsay, and to John A. Mebane, and in 1843 removed to another State, where he has ever since resided. After Mrs. Mitchell's death, before the sale by her administrator, the plaintiffs J. and R. Sloan sued out an attachment against Dare as an absent debtor, which was levied on the house and lot and prosecuted to judgment, and a writ of *venditioni exponas* was issued. The plaintiffs Lindsay and Mebane severally attached the same property for debts due to them respectively, and prosecuted their attachments with like effect. The defendant Mendenhall had notice of the attachments before he paid the money in discharge of the debt to R. G. Lindsay. The plaintiffs severally demanded of Mendenhall the payment of their respective claims before this suit was brought, out of the proceeds of the sale, but he refused so to apply the money, except the sum which he paid to the
(555) Sloans in part payment of their judgment.

J. T. Morehead for plaintiff.
Gilmer for defendants.

PEARSON, C. J. John S. Dare, on the death of his mother, became the owner of a house and lot, in fee simple, as her heir at law, subject to a power of sale by her administrator in the event that a sale was necessary for the payment of her debts.

The plaintiffs, by the suits and judgments under their attachments, acquired a lien on the house and lot, and but for the exercise of the power of sale by the administrator of Mrs. Mitchell, they would have been entitled to have the house and lot sold for the payment of their debts. Having been deprived of this right at law by the sale by the administrator, the question is, whether they are not entitled in a court of equity to follow the funds in the hands of the administrator, and have it applied in discharge of their debts, after deducting the amount applied by the administrator in payment of the debts of his intestate.

We think the equity a clear one. The plaintiffs had acquired a lien, and have an equity to be relieved from the accident that the property was sold under a power which the law gave to the administrator of the ancestor. The lien of the plaintiffs having attached, it follows that the

defendant Dare had no right to dispose of the fund in the hands of the administrator, nor had the administrator as such, or as the agent of Dare, any right to make an application of the fund remaining in his hands after discharging the debts of his intestate.

It is properly conceded that the deed executed by Dare to R. M. Lindsay is of no effect, and it is equally clear that the plaintiffs J. and R. Sloan are not estoppel, by receiving a part of the fund, from setting up their equity to have such an amount as may be necessary (556) applied to the payment of their debt, as they had acquired the first lien. The administrator, if he was in doubt as to the right of the creditors of Dare, ought to have retained the fund and filed a bill of interpleader. As two of the plaintiffs, Sloan and Lindsay, were sureties on the debt of R. M. Lindsay, to which the administrator applied the fund, he is entitled to a credit, as against them, for a ratable part of that debt; that is, such as they were bound to pay upon contribution with the other sureties of Dare.

There will be a reference to ascertain this amount and show the sums to which the plaintiffs are respectively entitled.

SOLOMON S. PEELER v. DAVID BARRINGER.

(Winst. Eq., 5.)

The plaintiff alleged in his bill that he had conveyed his land and his horses, mules, hogs, etc., wheat, hay, corn, etc., to the defendant, by a deed absolute on its face, but which was intended to be only a security for the payment of money, and was put into the form of an absolute sale by the fraud and oppression of the defendant, and that defendant had advertised a public sale of all the property. He is entitled to an injunction; and although the answer positively denied any fraud or imposition, or that there was any agreement or understanding that the plaintiff should have any right of redemption, yet as the answer contained admissions, which, taken in connection with the allegations of the bill, furnish a probable ground of belief that the latter are substantially true, the injunction ought to have been retained until the hearing.

(557)

THIS was an appeal from an interlocutory order made by *Kerr, J.*, at Fall Term, 1862, of ROWAN, dissolving an injunction granted in the vacation before.

The order in the court below was made on motion upon the coming in of the answer. Every part of the bill and answer necessary to the full understanding of the case is stated in the opinion of the Court, except

that the answer contains a positive and direct denial of any fraud or imposition on the plaintiff, and of any agreement or understanding that the conveyance was not to be an absolute sale.

Moore and Boyden for plaintiff.
Bragg for defendant.

PEARSON, C. J. This is not the case of *ordinary* injunction to stay proceedings on an execution, after the right of the defendant has been established by a judgment. The plaintiff alleges that being pressed by executions, in order to prevent a sale of his property, he applied to the defendant to aid him in raising the money, and take a lien on the property. The defendant agreed to pay off the executions, provided he would save him harmless by including the amount for which he was liable as plaintiff's surety. Accordingly the plaintiff executed a deed absolute on its face, and the defendant commenced writing a paper to show that the plaintiff was to have the privilege of redeeming his property, but afterwards, on various pretenses, refused to sign it, saying the plaintiff must take his word, and insisting that the deed should be absolute on its face. So, the plaintiff avers, the deed was obtained by taking undue advantage of him by reason of his necessities; and seeks to set up his equity to redeem on paying principal and interest.

In aid of this primary equity, the plaintiff prays that the defendant may be enjoined from exposing his property to public sale, or otherwise making way with it, until his equity to redeem can be established; (558) and he puts his right to an injunction on the ground that if the property is sold, as contemplated by the defendant, he will be turned out of his house and home; and his property, consisting in a great part of horses, mules, corn, wheat, hay, hogs, sheep, farming utensils, and other articles of the kind, will be scattered all through the country, so as to make it impossible ever to regain it; and so the loss will be irreparable, and the very purpose of his bill, should he succeed in establishing his equity, will be defeated.

The defendant insists that he made an absolute purchase of all of the property, and denies that there was any understanding that the plaintiff should be at liberty to redeem.

It is certain that if the property is exposed to public sale and scattered through the country it will be impossible to reclaim it specifically, and the plaintiff's primary equity would be thereby in a great measure defeated. So the question of injunction is of a *special nature,* and must be treated and considered in the character of a sequestration, which the court will not remove until the hearing of the cause, when it appears by the bill and answer that the claim of the plaintiff is probably well

founded, and is not merely frivolous and vexatious; for as the defendant is secured by the injunction or sequestration bond, the court having the property under its control, will take care of it, so that it may be subject to its final decree.

In cases like this under consideration, equity assumes jurisdiction on the principle of giving effect to the agreement of the parties; and when it appears that the intention was to secure the payment of money, and the transaction has been made to assume the form of an absolute conveyance by fraud, ignorance, accident, or advantage taken of a needy man, the court will not be trammeled by the form, and will give effect to the intention. In illustration: A. borrows money, and to secure its payment executes a deed, to be void provided the money and (559) interest are paid by a given day; otherwise, the estate to be absolute. The money is not paid and the estate becomes absolute at law; but a court of equity will interfere and allow the property to be redeemed, on the ground that it was not the intention of the one to sell, or of the other to buy; but the deed was given as a *security* for the money, and it is against conscience for the creditor to insist on keeping the property. So in a case like the present, if it was not the intention of the one to sell, or of the other to buy, and the actual intention was to let the property stand as a security, equity will, as between the parties, give effect to the intention, by disregarding *the form* which the transaction has been made to assume, and convert the deed, although absolute on its face, into a security; it being against conscience for the creditor to insist upon keeping the property absolutely.

In our case, this Court is of opinion that the bill and answer show "probable cause" in support of the plaintiff's equity. In fact, the admission of the defendant, taken in connection with the circumstances of the transaction, would seem to make out the plaintiff's case, although in respect to that question we are not at liberty in this stage of the proceeding to deliver our opinion.

The deed conveys the plaintiff's land, horses, mules, sheep, hogs, corn, wheat, hay, farming utensils, etc.—just such articles as are usually contained in a deed of trust. The defendant does not allege that the property was valued separately, or that the *price* (as he considers it) was fixed on in reference to the *value of the property;* but the amount inserted in the deed had reference merely to the amount of the executions, and the amount for which he was liable as surety. This is inconsistent with the idea of an absolute purchase. It is not usual for a man to wish to sell, or for one to wish to become the purchaser of, such an infinite or indefinite variety of articles by the wholesale. Indeed, it is evident that the plaintiff did not wish to sell, and the defendant admits he did not wish to buy. All he wanted was to be *saved harmless.* (560)

He admits that he did commence writing an instrument to show that the plaintiff was to have the right to redeem, but on reflection concluded not to do it, and thereupon the plaintiff delivered the deed to him; the plaintiff retained *possession of the property.* The defendant admits that he afterwards repeatedly offered to let the plaintiff have the property back, provided he was indemnified, as all he wanted was to be "saved harmless," which is the very thing the plaintiff now offers to do, and which he has done by the injunction bond; unless the defendant is at liberty to insist on *the time;* but in such matters it is a maxim of equity that "time is not of the essence of the contract." This is the foundation of the doctrine concerning equities of redemption in mortgages and all dealings of that nature.

There is still another view of the case: Can any one be made to believe that the plaintiff would have executed the deed if he had supposed that the defendant could come the next day and turn him out of house and home and scatter all the accumulations of his plantation to the winds, by exposing it to public sale? That was the very thing he desired to prevent, and its prevention the sole purpose for which he asked the aid of the defendant. This was well known to the defendant. So if it was his intention at the time not to allow the plaintiff to redeem, he practiced a fraud by concealing it; and if he intended at the time to allow him to redeem, he cannot now in conscience refuse to do so.

So, taking it either way, the defendant procured the execution of the deed by a positive fraud, or else he procured it by taking underhand advantage of the necessities of the plaintiff, the pressure of which induced him to put himself in the power of the defendant and trust to his (561) good conscience; and the defendant cannot be allowed in equity to disregard the trust reposed in him and set himself up as an absolute purchaser, and thereby give to the transaction the result of doing the very thing which he well knew it was the plaintiff's object to avoid, viz., an absolute sale of the property.

There is error in the decretal order dissolving the injunction. Let this opinion be certified to the court below, to the end that the order be reversed, and the injunction continued over until the hearing.

Cited: High v. Lack, 62 N. C., 179; *Williams v. Moore, id.,* 212.

BENJAMIN F. CROSSLAND AND ANOTHER v. FRANCIS E. SHOBER AND ANOTHER.

(Winst. Eq., 10.)

Courts of equity have no jurisdiction to reform a marriage settlement by which property is conveyed to the separate use of the wife, when the bill alleges no fraud, imposition, error, or mistake, in respect of the contents of the deed or its execution, and there is no allegation that any provision of the deed has been found to be hurtful to the fund, prejudicial to the interest of the parties, or of marked inconvenience in execution.

THE bill sets out that the plaintiff married in July, 1859, having a short time before executed a deed jointly with the defendant Francis E. Shober, by which everything then owned by Mrs. Crossland, and everything which she might thereafter acquire, or which might come to her by act of law, was conveyed to the defendant Shober in trust for the sole and separate use of Mrs. Crossland, with power to her to dispose of the property by will during the coverture. The deed provided that in case Mr. Crossland died in his wife's lifetime, the trustee should reconvey all the property to her, and if Mrs. Crossland died first, the property not disposed of by her will should go to the issue of the marriage, and if there was no issue, to such persons as would take her property (563) in case she died unmarried and intestate. The bill states that there is issue of the marriage, the defendant Lizzie Crossland; it then says that the plaintiffs are desirous that the settlement should be reformed by vesting all of the property in the husband, or such part of it as the court shall think proper, and concludes with a general prayer for relief. A guardian has been appointed to the infant, who answers, submitting her rights to the court. The trustee answered, admitting the facts set forth in the plaintiffs' bill, and submitting to perform what decree the court might make.

Winston, Sr., for plaintiffs.
No counsel for defendants.

MANLY, J. We are at a loss to conceive of any principle of jurisdiction in courts of equity upon which the bill of complaint can rest.

No fraud, imposition, error, or mistake is alleged in respect to the deed, or in respect to its execution. No provision has been pointed out which in its practical working has been found hurtful to the fund, prejudicial to the interests of the parties, or of marked inconvenience in execution. Those who entered into it, therefore, must abide its operation.

To reform a marriage settlement at the instance of the wife upon whose stipulation and for whose benefit it was intended would expose

such instruments to frequent change and much uncertainty and lead to mischief, which we are anxious to avoid. Married women can only be allowed to deal with the separate estate in conformity with the faculties conferred on them by the deed, and if not restricted in terms by the instrument, can charge specifically income or profits, with the con-
(564) currence of the trustee. Beyond this, it seems to us, it would be mischievous to enlarge her faculties.

A power during the coverture to modify at will the provisions of the deed would remove at once the protection secured by these rules, and render of little or no avail such deeds of settlement. Parties cannot be relieved from the incidental chafing of such restraints as they may choose, for prudential reasons, deliberately to impose on themselves in respect to the control of property, any more than they can be relieved fro mthe occasional unpleasant force and effect of the matrimonial ties themselves.

Both may be relieved by gentle and prudent conduct appropriately tempered, but not by the courts.

The bill must be dismissed.

MICHAEL SCHOFFNER AND ANOTHER v. HENRY FOGLEMAN AND OTHERS.

(Winst. Eq., 12.)

1. The interest of a purchaser of land, when the purchase money is not paid and the title is retained as a security for its payment, is considered and treated as an equity of redemption.

2. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid.

3. In sales of land under execution there is a distinction between the cases in which the defendant has an interest subject to execution and cases where he has not such interest. In the first mentioned cases the purchaser becomes the owner of the defendant's interest. If it be an equity, upon discharging the encumbrances on it, he has a right to call for the legal estate. In the last mentioned cases the purchaser only succeeds to the equity of the debtor to the extent of holding it as a *security* for the money paid.

4. An equity of redemption cannot be sold under an execution for the mortgage debt.

5. Where land is sold, and the purchaser gives a bond with a security for the payment of the purchase money, and the title is retained as a further security for its payment, the surety for the original purchase money has

the first equity to be indemnified, and his claim is preferred to that of a purchaser of an equity of redemption at sheriff's sale, or of any encumbrancer who comes in by assignment or otherwise; and the question of notice has no relation to such cases, because neither party has the legal estate.

IN 1852 a tract of land belonging to one Ingold, an infant, con- (565) taining 10 acres on which there was a mill, was sold by order of the court of equity of Alamance County, and bought by John S. Fogleman at the price of $306, for which he gave his bond, payable to the clerk and master of the court, with Henry Fogleman and others as his sureties.

In 1854 a tract of 9 acres adjoining the 10-acre tract (which on Ingold's death had descended to his heirs) was sold by order of the same court, and was purchased by John S. Fogleman for $60, for which he gave his bond with Henry Fogleman and others as sureties.

In 1857 judgment having been recovered against John S. Fogleman, by the clerk and master, on his bond for $306 and execution issued, the execution, and other executions against the same defendant were levied on the 19 acres and on another tract of land belonging or supposed to belong to the defendant; George McRay, one of the plaintiffs, was the purchaser of the 19-acre tract from the sheriff at the price of $405; he assigned his bid to the other plaintiff, Michael Schoffner, who paid the money to the sheriff and took a deed for the land, which did not set forth what interest in the land John S. Fogleman had at the time of the levy and sale, or what interest in the land was conveyed to the purchaser, except that it was bargained and sold to him and his heirs. Schoffner took possession under the deed.

In 1859 a bill was filed by Henry Fogleman and his cosureties (566) against John S. Fogleman, alleging that John having become insolvent, Henry had been forced to pay the purchase money, except $50 paid by John, praying that the mill and 10-acre tract be sold for his indemnity. On reference to the clerk and master, he reported that Henry had paid the sum of $377.91 as surety of John; an order of sale was made, and William Hudson became the purchaser at $300, for which he gave his note with a surety.

Henry Fogleman also filed a bill in respect to the 9-acre tract, alleging that he had been forced to pay the purchase money, $95, and that he had assigned his equity to Patterson and Bason; whereupon it was ordered that the clerk and master make title to them, which he did.

The plaintiffs charge in their bill that Henry Fogleman paid $15 as surety for the purchase money of the 10-acre tract and the whole price of the 9-acre tract; and prayer of the bill is for a decree that Henry Fogleman and William Hudson release to the plaintiff Schoffner all

claims, etc., to the 10-acre tract, upon the payment to Henry Fogleman of $15 and interest, and that the clerk and master execute a deed to the said plaintiff for the said tract in fee simple; and for a like decree as to the 9-acre tract against H. Fogleman, Patterson, and Bason, on the payment of $95 with interest; and there is the general prayer for relief.

Graham for plaintiffs.
No counsel for defendants.

PEARSON, C. J. In 1852 the mill and the 10 acres of land were sold by order of the court of equity and bought by John S. Fogleman, at the price of $306, for which he gave his note with Henry Fogleman and others as sureties.

In 1854 the lot of 9 acres adjoining was sold by order of the court of equity, and bought by John S. Fogleman at the price of $95, for
(567) which he gave his note with Henry Fogleman and others as sureties.

In 1857 judgment was taken in the name of the clerk and master on the note of $306, execution issued, the mill and 19 acres were sold, and bought by McRay at the price of $405. McRay did not pay the money, and the sheriff was forced to pay it, and was allowed by the plaintiff's attorney to have the execution renewed. Schoffner took the bid off McRay's hands, paid the sheriff, and took his deed in the usual form. It does not set forth, as required by statute, that the title was held as security for the purchase money. Schoffner took possession under the deed.

In 1859 a bill was filed by Henry Fogleman and his cosureties, against John S. Fogleman, alleging that said John having become insolvent, Henry had been forced to pay the purchase money, except $50 paid by John, praying that the mill and 10 acres be sold for his indemnity. On reference to the clerk and master, he reported that Henry had paid the sum of $377.94 as the surety of John; an order of sale was made, and William Hudson became the purchaser for $300, for which he gave his note with a surety.

Henry Fogleman also filed a bill in respect to the 9-acre tract, alleging that he had been forced to pay the purchase money, to wit, the $95, and assigned his equity to Patterson and Bason; whereupon it is ordered that the clerk and master execute title to them, which he did.

The plaintiff Schoffner asserts an equity under the sheriff's deed to pay off the encumbrances and have the legal title conveyed to him. In respect to the 9-acre tract, he submits to pay the $95, and asks for a conveyance from Patterson and Bason. In respect to the 10-acre tract,

including the mill, he insists that the amount paid by Henry Fogleman does not exceed the sum of $15 which he submits to pay, and asks for a conveyance by the clerk and master.

The defendants deny the equity of the plaintiff, on the ground (568) that the interest of John S. Fogleman was not subject to execution, and so he acquired nothing; but they aver that before the bill was filed they offered to release all claim to the land, provided Schoffner would pay the amount which Henry Fogleman had been obliged to pay as the surety of John S. Fogleman, which he refused to do.

The interest of a purchaser of land sold by a clerk and master, or other person, when the purchase money is not paid, and the title is retained as a security, is considered and treated as an "equity of redemption," the purchaser being in fact a mortgagor, in the same way as if the vendor had made title and then taken a mortgage to secure the purchase money. *Green v. Crockett,* 22 N. C., 390.

The purchaser of an "equity of redemption" at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid, by the provisions of the act of 1812. Rev. Code, ch. 45, sec. 546.

When the defendant in the execution has a trust or other equitable interest, which is not embraced by the act of 1812, a purchaser at sheriff's sale does not acquire the equity of the debtor, but is substituted to his rights "to the extent of holding it as a security for the money which he has paid." *Taylor v. Gooch,* 49 N. C., 486. I will remark for the purpose of correcting the error that the word "creditor" is put in the "headnote" of that case, and also in the opinion, as reported, in place of "debtor." The mistake is obvious from the context; for it is the *debtor* who has the equity, to which the purchaser succeeds as a security for the money he pays. The creditor has only a judgment and execution, to which the debtor's equity is not liable, and the money paid is considered as so much advanced for the debtor on the security of his equity.

The difference between buying at sheriff's sale an equity which is the subject of execution, and one that is not, is this: in the former case the purchaser becomes *the owner* of the equity, and upon (569) discharging the encumbrances is entitled to the legal estate, although it may greatly exceed in value the amount which he has paid; whereas in the latter case the purchaser only succeeds to the equity of the debtor, to the extent of holding it as a *security* for the money paid: in other words, he becomes an encumbrancer merely, and the debtor still holds the equity, and upon discharging the encumbrance may call for the legal estate; and he is the person entitled to any excess which there may be in the value of the land over the encumbrances on it.

An "equity of redemption" cannot be sold under an execution for the *mortgage debt.* The reason is obvious; for the purchase money would be applied in payment of the mortgage debt, and so the purchaser would get the legal estate, and in effect pay nothing for the equity of redemption, which is the very thing he professed to buy and the sheriff undertook to sell. For illustration: suppose a tract of land worth $2,000 to be under mortgage for $1,000. If the sheriff sells the "equity of redemption" under an execution for some other debt, and it is bid off at $1,000, the purchaser on paying the mortgage debt gets the land at its supposed value of $2,000; but if the sheriff was allowed to sell the "equity of redemption" under an execution for the mortgage debt, the $1,000 bid for it would extinguish the debt, and the purchaser could call for the legal estate without paying one cent more, and in fact get the land for $1,000 (half its value) and pay nothing for the equity of redemption. *Camp v. Cox,* 18 N. C., 52.

The sureties for the original purchase money have the first equity to be indemnified, and their claim is preferred to that of a purchaser of the equity of redemption at sheriff's sale, or any subsequent encumbrancer who comes in by assignment or otherwise; and the question of notice has no bearing in such cases, because neither party has the legal es-
(570) tate, and the right turns on priority. *Polk v. Gallant,* 22 N. C., 395; *Green v. Crockett, supra.*

To apply these principles to our case: 1. In respect to the mill and 10 acres of land. The execution being for the mortgage debt, the "equity of redemption" was not subject to be sold under it; so McRay and his assignee, Schoffner, did not acquire the equity of redemption by the sheriff's deed; and Schoffner's equity was that of a subsequent encumbrancer, and John S. Fogleman still held the equity of redemption, and the right to have the land by discharging the encumbrances.

Schoffner, in order to enforce his equity, ought at once to have paid such part of the original purchase money as remained unpaid, and then filed a bill to have the land sold for his indemnity. Instead of doing so, he enters into possession and rests contented with the sheriff's deed until the sureties for the original purchase money file a bill, and the land is resold for their indemnity. Schoffner then comes forward and asks to be relieved from the effect of that deed, which was to purchase the mortgage, on the ground that he had not been made a party to the proceeding. We think he is entitled to relief to that extent, and there will be a decree for a sale of the land, the price to be brought in and subject to further directions.

2. In respect to the 9 acres of land. The equity of redemption was subject to sale under the execution; and if he had proceeded at once to pay off the $95 mortgage money, he could have called for the legal title,

but for a difficulty which will be mentioned below. He hangs back, however, until the surety, Henry Fogleman, assigns his equity to Patterson and Bason, and a deed is made to them by the order of the court, whereby the mortgage is foreclosed. The difficulty alluded to is that the 19 acres were sold together; so there is no mode of ascertaining what he paid for the equity of redemption; and to meet the justice of the (571) case, there will be a decree for the sale of this parcel also; the two parcels to be sold together or separately, as the commissioner may deem best, the whole fund to be subject to further directions. There will be a reference to ascertain the amount which has been paid by Henry Fogleman or any of the other sureties. This amount, with interest and the costs incurred in seeking indemnity (of which the master will also report), will be first paid out of the fund. Then the amount paid by Schoffner on the execution, allowing him interest and charging the rents and profits received by him. The residue, if any, will belong to John S. Fogleman or his assigns. The clerk will also report what amount was due on the note given by John S. Fogleman for the price of mill and 10 acres at the time of the sheriff's sale, and how much has been received by the clerk and master on account of this debt. The Court has had no little difficulty about it, for the clerk and master reported when the bill was filed for a resale that Henry Fogleman, as surety, had paid $377.94, and it seems from the plaintiff's admissions that John S. Fogleman had paid $50, and the sheriff says he paid to the attorney who had the note for collection $405, which greatly exceeds the price of both tracts of land, and needs explanation.

Let there be a decree for the sale of the land and an account, and the cause will be retained for further directions. Remanded.

NOTE.—A vendor who contracts to convey upon payment of the purchase money is, as between the parties, a mortgagee. *Ellis v. Hussey*, 66 N. C., 501; *Derr v. Dellinger*, 75 N. C., 300. The interest of one who holds land under bond for title, the price not having all been paid, is not subject to sale under execution. *Ledbetter v. Anderson*, 62 N. C., 323. Neither is the vendor's interest liable to execution sale. *Moore v. Byers*, 65 N. C., 240; *Blackmer v. Phillips*, 67 N. C., 340; *Fogler v. Bowles*, 72 N. C., 603; *Tally v. Reid*, 72 N. C., 336; *s. c.*, 74 N. C., 463. But when all the purchase money has been paid, the vendee's interest may be sold under execution. *Phillips v.* (572) *Davis*, 69 N. C., 117.

Where a debtor conveys property in trust to sell and pay certain creditors, the trustees hold in trust for the creditors, and then in trust for the debtor as a resulting trust. The resulting trust cannot be sold under execution as an equitable estate. After the debts are paid, the resulting trust is liable to sale under execution. But a mixed trust cannot be sold in that way. *Sprinkle v. Martin*, 66 N. C., 55.

Where one purchases land and takes a paper-writing intended by all the parties to be a deed, the seal being left off by inadvertence: *Held*, the pur-

chaser acquired no interest that is subject to execution. *Hinsdale v. Thornton*, 74 N. C., 167; *s. c.*, 75 N. C., 381. Only such equitable interests as are authorized by the act of 1812 can be sold under execution. *Mannix v. Ihrie*, 76 N. C., 299. An equity of redemption cannot be sold under execution for the mortgage debt. *Myrover v. French*, 73 N. C., 609. Still a mortgagee may purchase the equity of redemption at an execution sale had at the instance of a stranger. *Barnes v. Brown*, 71 N. C., 507.

Cited: *Rogers v. Holt*, 62 N. C., 111.

Dist.: *Myrover v. French*, 73 N. C., 611.

JULIA M. PATTON v. JAMES A. PATTON AND OTHERS.

(Winst. Eq., 20.)

1. Where real estate of an inheritance is purchased by a partnership for partnership purposes, and is so used, on the death of one of the partners his widow is entitled to dower.

2. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together and not to *hand over* any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed." *Held*, the last clause has relation only to what is given by the residuary clause.

THE plaintiff filed this bill to recover dower in the lands of which her late husband, William A. Patton, died seized and possessed.
(573) There was no controversy except about a piece of land, called the tanyard lot, and some tracts of land devised to her late husband by James W. Patton, deceased.

The material facts respecting the tanyard lot are: In 1861 William A. Patton, Washington Morrison, James A. Patton, and Samuel G. Kerr formed a partnership for the purpose of tanning leather, manufacturing leather into shoes, etc. William A. Patton was the owner in fee of a piece of land conveniently situated for carrying on the business of the firm. He conveyed three-fourths of it to three other partners, retaining the other fourth, and each partner put his fourth into the partnership as part of his stock, and the whole piece of land was used for the purposes of the firm during its continuance. As to the other subject of controversy, James W. Patton devised several town lots and tracts of land

to his son, W. A. Patton, in fee, and bequeathed to him some slaves. He devised and bequeathed many other town lots and tracts of land and slaves to his wife and children, other than William A.

The will then proceeds as follows: "All the rest and residue of my estate, real and personal and mixed, wherever situate, including land, negroes, chattels, and every interest, legal and equitable, I will, devise, and bequeath to my executors hereinafter named, and such of them as act, and the survivors of them, in trust to be sold at public or private sale, as they may judge best, and the lands in tracts or parts of tracts or lots, as they may from time to time judge best, and on such terms as they may determine for the interest of the estate, and out of the proceeds of the sales and collections of the debts due to me pay all debts owed by me, and the surplus of said funds to pay over to and distribute equally between my said wife, Henrietta Kerr Patton, my sons James A. Patton, William Augustus Patton, Thomas W. Patton, and my daughter, Frances L. Patton. I direct my executors to keep my estate together, and not to hand over any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed"; (574) and after giving some practical directions respecting his railroad contracts, the testator says: "And after the said railroad contracts are completed, the various legacies and devises herein contained shall take effect. But, in the meantime, the provisions herein made for my wife shall take effect at once, or such part thereof as she desires," and "if for any cause my executors should think it necessary to sell one or more of the slaves directed to be sold, even before said railroad contracts are completed, for bad conduct or other cause, they are at liberty to do so." The testator, James W. Patton, died in 1861, and W. A. Patton died in 1863.

Merrimon for plaintiff.
No counsel for defendants.

PEARSON, C. J. The right of the plaintiff to dower in the tanyard lot is settled by *Summey v. Patton, post,* 601. The lot having been sold by the surviving partners, there will be a reference to fix the amount to which she is entitled absolutely, according to the ratable value of her life estate.

We are of opinion she is also entitled to dower in all of the land acquired by her husband under the will of J. W. Patton, except the tracts or parcels of land which pass to the executors under the residuary clause, in trust to be sold by them, and the proceeds of sale divided equally among his wife and children. A devise operates as a conveyance. The land passes *directly* from the devisor to the devisee, and the

executor takes no estate or interest in it. For this reason the lands given specifically to the wife and children do not come within the operation of that clause which directs the executor "to keep my estate together, and not to *hand over* any of the devises or legacies until my existing rail-
road contracts in Tennessee and North Carolina are completed."
(575) In reference to land specifically given, the words "not to hand over" can have no application whatever. Indeed, apart from this principle growing out of the essential difference between a devise and a legacy, we should incline to the opinion that by a proper construction this restriction only applies to the property contained in the residuary clause. It is a part of that clause, and is naturally confined to the property therein disposed of, to say nothing of the unreasonableness of the supposition that it was the intention to tie up his whole estate, real and personal, until a future event which might not happen for several years, leaving his wife and children in the meantime to starve. If such had been the intention, there surely would have been some provision for their support. And the fact that the land in the hands of the devisees would still remain ultimately liable for the debts of the devisor, in aid of the other portions of his estate towards the completion of the railroad contracts, seems to confirm the soundness of this construction.

Decree for the plaintiff.

Cited: Ferguson v. Hass, 62 N. C., 115; *Mendenhall v. Benbow,* 84 N. C., 650; *Sherrod v. Mayo,* 156 N. C., 148; *Phifer v. Phifer,* 157 N. C., 229.

JOHN CARSON, EXECUTOR OF W. M. CARSON AND OTHERS, v. GEORGE S. CARSON AND CATH. CARSON AND OTHERS.

(Winst. Eq., 24.)

1. Where a deed recites that it is made in consideration of good will and affection to A., the wife of B., and the children of A. and B., namely, C. D., etc., *and such as they may have hereafter,* and property is conveyed by it to B. in trust "for the children aforesaid, and such as may be born and begotten by the said B. hereafter," the trust is for the children of A. and B., and the children of B. by an after-taken wife have no interest in the trust property.

2. B. having power by the deed to him to advance the children of himself and A. by conveying to them or any of them a portion of the trust property, on 6 January, 1850, conveys to his son John, a child of himself and A., a part of the trust property by way of advancement, as the deed declares, and on the same day John reconveys to B. the same property in consid-

eration of the natural love and affection he bears his half-brother and sister, the children of his father by an after-taken wife, in trust for his half-brother and sister, with power to B. to convey the property to the *cestui que trust* by deed or will, and B. by his will does devise and bequeath the property to his said two children, his will is inoperative, and the children by the last marriage take nothing under the deed from John.

IN May, 1842, Jonathan L. Carson and George M. Carson con- (576) veyed to William M. Carson lands, slaves, and other personal property by a deed which recites that it is made in consideration of the sum of $1, and the further consideration of the good-will and "affection the grantors have for Almyra Carson, the wife of William Carson, and the children of the said Almyra and William, namely, John, Martha M., Mary M., Matilda A., and William, and *such as they may have hereafter.*" After describing the property and limiting it to the grantee, his heirs, administrator, etc., the deed declares "that the said William shall hold and possess the property for the sole and separate use of his wife, the said Almyra, and the children aforesaid, and such as may be born and begotten by the said William hereafter," "and shall have power to receive and appropriate the proceeds, etc., towards the maintenance of his said wife and the children aforesaid, and such as he may have hereafter, and shall have power to apply the same towards the education of the said children, and as they come to years of maturity, to advance the same with such part of the said property and its increase as to him shall seem meet"; "and it is also provided, that in case the said Almyra shall depart this life before the said William, then her interest in said property of all kinds is to cease and determine, and the said William shall not only have power by deed to advance his said children out of said property in his lifetime, but he is hereby fully author- (577) ized at his death, by last will and testament, to devise and bequeath the said property and its increase to his wife and such of his children as he shall deem right; and in case he shall die without a last will and testament, then the said property, if his said wife be alive, shall be divided according to the laws regulating descent and dower and the laws distributing personal estate, and the said William is not to be liable to account to his said children—it being the true intent of this conveyance to provide for the wife of the said William and his present and future children, and to allow him to apply the property at his discretion to the benefit, support, nurture, education, and advancement of said wife and his present and future children."

Mrs. Almyra Carson died in 18..., and William M. Carson married again, and had two children of the second marriage—the defendants George S. and Catherine.

On 6 January, 1860, William M. Carson, by a deed purporting to be in consideration of the natural love and affection he bore to his son John (a son of Almyra), and for the purpose of advancing his son, and to be made in execution of the power given to him by the deed from Jonathan and George Carson to him, conveyed to his son a part of the property, real and personal, and on the same day John Carson reconveyed the same property to Willam M. Carson, in consideration of the natural love and affection he bore to his half-brother and sister, in trust for his half-brother and sister, George S. and Catherine. In 1862 William M. Carson died *testate*. By his will he devised and bequeathed the property conveyed to him by John to George S. and Catherine Carson, and appointed John his executor, who qualified and sues as such.

The other parts of the will are not here noticed, because the Court declines in the present stage of the cause to decide the questions arising thereon.

(578) *Merrimon for plaintiff.*
Fowle for defendants.

BATTLE, J. The main question presented in this case, and the only one which at present we think it proper to decide, arises upon the construction of the deed executed by Jonathan L. Carson and George M. Carson to William M. Carson on 6 May, 1862, in trust for his wife and children. The question is, whether the trust in favor of the children is confined to the children of the trustee's then wife, Almyra, or does it embrace also the children which he had by his second wife, Catherine?

We are clearly of opinion that upon any admissible construction of the deed it includes the children of the first wife only. The recital of the consideration on which the deed was made is the sum of $1 and "the good-will and affection they (the grantors) have for Almyra T. Carson, wife of said William, and the children of the said William and Almyra, namely, John, Martha M., Mary M., Matilda H., and William, and such as they may have hereafter." From this recital it is manifest that the purpose of the grantors to provide for the then wife of the grantee and such children as he and she then had and might have thereafter. The expression, "such as they may have hereafter," is too plain to admit of any other interpretation. In the clause which declares the trust it is said that the grantee shall have and hold the property conveyed "for the sole and separate use of his wife, the said Almyra, and the children as aforesaid, and such as may be born and begotten by the said William hereafter." It is contended for the children of the second marriage that the last words of this clause extend the trust to any children which the grantee might have by any future wife. This would be so if

the words were to be considered alone, unconnected with anything else in the deed; but that would violate a fundamental rule in the construction of deeds, "that the construction be made upon the entire deed, and not merely upon disjointed parts of it." 2 Bl. Com., (579) 379. These words, "and such as may be born and begotten by the said William hereafter," must be considered with reference to the recital of the consideration, which evidently is the good-will and affection which the grantors had for their brother's wife, Almyra, and the children which he then had and might thereafter have by *her*. Why the grantors should wish to exclude the children by any future wife we do not know. It may have been an inadvertent omission, but if it were, we cannot supply it.

There is a subsequent clause of the deed which provides "that if the said Almyra shall depart this life before the said William, then and in such case her interest in said property of all kinds is to cease and to determine." This is also urged as a manifestation of intention that she and her children were not the only objects provided for by the deed. It seems clear to us that the only purpose of this clause was to prevent the husband from taking any interest in the property *jure mariti*. The whole deed shows that his brothers thought they could not convey the property or any part of it, to be held by him for himself, and we have no doubt it was for the reason stated in the bill, that he was largely insolvent, and that if the property were conveyed to him without any trust declared in favor of his wife and children it would be taken to pay his debts. It was known to the person who drew the instrument that the equitable estate which the wife was to take in the property would, unless it were provided against, become her husband's upon her death; and hence the clause in question was inserted to prevent that consequence. The making her interest in the trust property cease and determine upon her death had the same effect in favor of her children as the limitation of it over to them would have had. See *Little v. McLendon,* 58 N. C., 216.

In all the clauses of the deed following that which we have just noticed it will be seen that the grantee's wife Almyra and her children were the only persons in the contemplation of the parties to the (580) deed; and such being the case, the hardship of excluding the children of the grantee by his second wife, no matter how great it may be deemed, cannot induce the Court to adopt a construction in opposition to the plain meaning of the instrument.

Having ascertained that there is no trust declared in favor of the children of the second marriage, in the deed executed to William M. Carson by his brothers, we are of opinion that he acquired no right to give such children by deed, will, or otherwise, the property, part of the trust fund which he conveyed to his son John on 6 January, 1860, and

took back by another conveyance of the same date. The deed to John purports to be an advancement to him by his father in execution of the power conferred on him as trustee; but the deed of reconveyance executed at the same time shows that the true purpose was not to advance the son, but the children of the second marriage. The execution of the two deeds is in effect but one transaction, and a court of equity cannot allow a trustee to change the objects of his trust by any such contrivance.

There are other questions presented by the pleadings which we are unwilling to decide without the aid of an argument. One of these questions is, whether the children of William M. Carson by his first wife had, during the lifetime of their father, such an interest in the trust property not advanced to them by their father, as trustee, as survived upon the deaths of some of them to their respective administrators. A second question is, whether the trustee had power to devise and bequeath by his will any part of the trust property to the children of his deceased daughter, Martha Burgin.

These questions will be reserved for future consideration; but there may be a decree now declaring that the defendants Catharine
(581) Carson and George S. Carson, children of William M. Carson by his second wife, do not take by the will of their father any part of the property, real or personal, conveyed to their father in trust by his brothers Jonathan L. Carson and George M. Carson, he having acquired no power to devise and bequeath it to them by reason of the conveyances of the same to and from his son John on 6 January, 1860. There may also be a decree for the sale of the land belonging to the trust fund, not specifically given or devised by the trustee to any of his children. And the parties may have a reference for an account of the trust fund, if they desire it.

Decree accordingly.

MARY B. SMITH v. DAVID SMITH, ADMINISTRATOR, AND OTHERS.

(Winst. Eq., 30.)

1. Gifts made by a husband to his wife during coverture will be supported in equity against the representatives of the deceased husband.

2. Contracts by the husband with the wife, for a valuable consideration, will be enforced against his representatives.

3. The widow of a deceased vendee of land, who has paid the purchase money, may by a bill against the heirs of her late husband and the heirs of the vendor compel a conveyance of the land by the heirs of the vendor to the heirs of the vendee, and an assignment of dower to herself.

THE plaintiff charges in her bill that at the time of her marriage with her late husband, Bryan Smith, she was the owner of a tract of land in Johnston County which her husband was desirous of selling, and at his request she consented to sell and convey it, upon his agreeing that he would convey to her, as a consideration for her land, another tract of land, or slaves of equal value with her land, or in some other way to secure her from loss. That her land was sold for $2,170, and in due form of law conveyed to the purchaser, and the price was received by her husband, who was tenant by the curtesy *initiate*. Before (582) his death he bought of one Whitley a tract of land which he intended to have conveyed to her in fulfillment of his promise to her; he paid the whole price to Whitley, but Whitley never made any conveyance to him. Her husband died possessed of the land bought from Whitley, and of many slaves, which are in the possession of David Smith, his administrator. The bill is against the administrator and heirs of her husband, and against the heirs of Whitley, and prays that the contract between her and her late husband may be specifically executed by the conveyance of the land bought of Whitley to her, by his heirs, or by the conveyance of slaves to her by the administrator of her husband; or that the money received by her husband as the price of her land may be paid to her, and that the heirs of Whitley may convey the land, sold by him, to the heirs of her husband, and that she may have her dower in it.

Moore for plaintiff.
No counsel for defendants.

BATTLE, J. The right of the plaintiff to a decree that the heirs at law of Thaddeus W. Whitley shall execute to the heir at law of her deceased husband, Bryan Smith, a conveyance for the tract of land mentioned in the pleadings, for the purchase of which there had been a contract in the lifetime of the parties, and that she may have dower therein, is undoubted. It is equally clear that she cannot have a decree for the specific execution of the contract made between her husband and herself, to have the said tract, or any other tract of land, or negroes of equivalent value, settled upon her in consideration of the price of the land sold under the circumstances mentioned in the bill. The contract which she made with her husband was by parol, and therefore void by the statute of frauds (Rev. Code, ch. 50, sec. 11), so far at least as a specific (583) execution is sought to be enforced. But, we think, the wife is entitled under the contract to the proceeds of her land, which was sold in consequence of it, subject to the interest which her husband, as such, had in the land. It is well settled that a husband may, after marriage, make gifts or presents to his wife which will be supported in equity

against himself and his representatives. *Lucas v. Lucas,* 1 Atk., 270; *Garner v. Garner,* 45 N. C., 1; Atherley on Mar. Set., 331. If a promise by the husband, made without a valuable consideration, to a wife, though imperfectly executed, will be enforced against his personal representatives after his death, where his intention had remained unaltered until that event, much more ought it to be enforced where she stands in the position of purchaser of the intended benefit for a full and fair value. See Adams Eq., 97.

The only question about which there can be any doubt is as to the amount to which the wife is entitled. After giving to the argument of her counsel that attention to which for its ability and ingenuity it is entitled, and after mature deliberation on the subject, we are of opinion that she cannot claim the whole price of her land, with interest from the death of her husband, but that the sum due her must be estimated upon the following principles: The contract for the settlement upon her of land or slaves, being made void by the statute of frauds, must be put entirely aside. So far as it entitles her to the money for which her land was sold, the contract must be considered in this Court as having been executed at the time when the price of the land was received by her husband; and as he had an interest for life in the land as tenant by the curtesy, he had the same interest in the proceeds of the sale. The relative value of his interest and hers must be ascertained as of that time,
(584) and as the facts then existed; otherwise the maxim in equity, that what ought to have been done will be considered as done, will be violated. See Adams Eq., 135. When the amount to which the wife is entitled is thus ascertained, she will be entitled to it, increased by the interest thereon from the time it came into the hands of her husband.

The argument against this mode of estimating the relative rights of the tenant for life and the owner of the reversion, founded upon the idea that it is better to make calculations upon certain and ascertained facts than upon uncertain and contingent events, will be found in practice more plausible than just. Suppose the owner for life of a valuable male slave were to agree with the owner of the ulterior interest to have him sold for the purpose of dividing the proceeds according to their respective ownerships, and the life tenant should die a week after the sale, would it be a just and fair execution of their agreement to give his personal representative nothing, or next to nothing? The death of the life tenant in so short a time was certainly not within the contemplation of the parties, and therefore ought not to control a division which was intended to be made between living men, having each his chance for a long or short life. At the time when the contract was made, it is manifest that the interest of the life tenant of such a slave would be regarded

as nearly his whole value, and it must be presumed that the parties had reference to that in making their agreement for a sale. Such being the case, subsequent events cannot fairly be allowed to change the principle upon which their contract was founded. The true rule is what we have above indicated, and the plaintiff may have a decree for the value of her interest in the price of her land, ascertained according to that rule.

Cited: George v. High, 85 N. C., 102; *Walton v. Parish,* 95 N. C., 263; *Cade v. Davis,* 96 N. C., 142; *Love v. McClure,* 99 N. C., 295; *Woodruff v. Bowles,* 104 N. C., 210; *Beam v. Bridgers,* 108 N. C., 279.

Dist.: Dula v. Young, 70 N. C., 454; *Hackett v. Shuford,* 86 N. C., 50.

NOTE.—Where there was an agreement between a husband and wife that if the wife would join him in a conveyance of a certain tract of land descended to the wife from her father, she should have another tract in lieu of the one so conveyed: *Held,* that when the husband received the money for the land so conveyed, he held it upon trust for his wife, and that his estate became responsible therefor. *Dula v. Young,* 70 N. C., 450.

Where land is purchased by a husband with his wife's money, the proceeds of the sale of her real estate, and title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband, with notice, stands affected by the same trust. *Lyon v. Akin,* 78 N. C., 258.

(585)

THOMAS HASKILL AND WIFE v. DANIEL FREEMAN AND WILLIAM J. LISK.

(Winst. Eq., 34.)

1. A. buys land from B. and pays the price, and directs B. to convey to a trustee for the sole and separate use of his (A.'s) wife and children. B. executes a deed with the intention of conveying the land accordingly, but from the ignorance of the draftsman the deed was inoperative. Afterwards A. conveyed the land to secure the payment of a debt to C. By virtue of an execution against C., his interest in the land is sold, and B. bought from the sheriff and took a deed from him for the price of $150. A. at the time of his purchase from B. was greatly indebted, and some of the debts which he owed then are still due. *Held,* A. and his wife may maintain a suit in equity to compel B. to convey to her sole and separate use.

2. The deed from the sheriff to B. is a security for the sum paid by B. ($150), and not for the amount of the debt due to C.

THE bill was filed to compel the defendant Freeman to convey certain parcels of land to a trustee for the sole and separate use of Mrs. Haskill.

The facts of the case are stated in the opinion of the Court.

Winston, Sr., for defendant Freeman.

PEARSON, C. J. The plaintiff alleges he held a bond on the defendant Freeman to execute title to certain lots of land on the payment of the purchase money; that he paid the purchase money and directed
(586) Freeman to make the title to the other defendant, Lisk, in trust for the separate and sole use of the plaintiff's wife and her children; and that the defendant Freeman executed a deed to the defendant Lisk for that purpose, but owing to the ignorance or mistake of the draftsman the deed is inoperative, because it sets out no consideration to raise the use upon which the statute can operate, so as to pass the legal estate; and the prayer is that the defendant Freeman shall execute a deed valid and sufficient for that purpose.

The defendant Freeman declines to do so, on the grounds, (1) that the purpose of the plaintiff in directing the deed to be made to his codefendant, Lisk, for the sole and separate use of his wife and children, was to defraud certain creditors who have debts against the plaintiff, contracted prior to the time when he made the first deed, which debts still remain unpaid; (2) because after the execution of the first deed, which turns out to be inoperative, the plaintiff assigned all his right and interest in the lots, and his equity to call for a reëxecution of a deed under the title bond, to D. Kendall and A. C. Freeman, to indemnify them as his sureties to a debt contracted for $275, and took from them a covenant to reconvey, provided he paid the debt on or before 1 January, 1855; that before that date he informed A. C. Freeman that he would not be able to pay the debt, and that he (A. C. Freeman) and D. Kendall must pay it, and reimburse themselves out of the land, and surrendered to A. C. Freeman the covenant for reconveyance; that accordingly A. C. Freeman paid off the whole of the debt and took possession of the land; that afterwards the land was sold under execution as the property of A. C. Freeman, when the defendant Freeman became the purchaser at the price of $150, and took the sheriff's deed therefor, and that Kendall has
(587) conveyed all his interest to him, and that he has been in possession, claiming the land as his own, since 12 May, 1857.

The proof offered by the defendant Freeman establishes the fact that there are several old debts of Haskill, contracted before the date of the deed to Lisk, still unpaid. But the defendant has not proved the allegation that Haskill surrendered to A. C. Freeman the "covenant for reconveyance." The testimony of A. C. Freeman is that Haskill told him he

and Kendall would have the debt to pay, and must try to save themselves out of the land, as he was unable to pay it; and that he (A. C. Freeman) did pay the whole debt. The witness adds that "after the execution of the deed to Kendall and himself, Haskill surrendered the house and lots embraced therein to deponent."

After Haskill paid the purchase money, Freeman held the legal title in trust to convey to Haskill, or *any one according to his directions,* and the attempt to convey to Lisk being ineffectual, by reason of the ignorance of the draftsman, the plaintiff's equity to call for a reëxecution is a very plain one, unless it can be opposed on one of the grounds relied upon by Freeman.

1. It seems not to have occurred to Freeman at the time he executed the deed to Lisk, according to the directions of Haskill, that he was relieved of the obligation to perform the trust, on which he held the legal title, by reason of the indebtedness of Haskill, of which he had notice; and we are not aware of any principle of law or equity by which he can now fall back upon and shelter himself behind the rights of Haskill's old creditors, with whom he is in no wise concerned. The deed which he is now called on to execute will not tend to "hinder or delay" the remedy of those creditors; on the contrary, it will aid them by getting the title out of him and freeing it from all complication. His deed will be valid between the parties, and is not rendered void by the statute 13 Eliz., which applies only to conveyances made by the debtor, and in respect to creditors the case will come under the principles (588) discussed in *Rhem v. Tull,* 35 N. C., 57.

2. The deed of Haskill passed his equitable interest to Kendall and A. C. Freeman, subject to Haskill's right of redemption. It is not proved that Haskill surrendered to A. C. Freeman the covenant for reconveyance, and the fact that "he was unable to pay the debt and he and Kendall must do it, and try to save themselves out of the land," did not operate to extinguish his right of redemption.

Indeed, we are inclined to think that if he had surrendered, that is, handed back the covenant, it would not have had that effect, for there was no consideration paid; it was a voluntary act, and did not amount to a release, without which the rule applies, "Once a mortgage, always a mortgage."

Had A. C. Freeman sold the land for the purpose of raising money to pay the debt, the purchaser might have stood on higher ground; but he chose to pay the money and keep the land, or rather the equitable interest, which he had acquired, and of course held it subject to Haskill's right of redemption until it was foreclosed or released, or presumed to be abandoned from the lapse of time. The defendant D. Freeman then comes in as a purchaser at sheriff's sale, and stands in the shoes of

A. C. Freeman, in respect to the title, for it is well settled that a purchaser at sheriff's sale takes only the interest or title of the debtor; and the deed of Kendall, taken by the defendant Freeman, with notice and without a valuable consideration, leaves the equitable interest in his hands, subject to the plaintiff's right of redemption, and the thing has worked around in such a way that he is now in a condition to execute the title, which he before made an ineffectual attempt to do.

It occurred to us at one time that Kendall and A. C. Freeman ought to be before the court; but we are satisfied it was not necessary to make them parties, as it appears by the answer of the defendant Free-
(589) man that he has acquired their title, and they have no interest in the subject of controversy.

Another question is presented. In making redemption, is Haskill to pay the amount of the debt paid off by A. C. Freeman, or only the amount paid by the defendant Freeman when he purchased at sheriff's sale, to wit, $150? How it would be if a third person had purchased, it is unnecessary to decide, for we are satisfied that all the defendant Freeman is entitled to is to be indemnified against his outlay, on the ground that he held the legal title as a trustee, and in making the purchase advanced money in order to buy in an outstanding encumbrance which clogged the estate of his *cestui que trust,* and is not at liberty to speculate upon it. This is a familiar doctrine of equity.

There will be a decree for the plaintiffs, and a reference to ascertain the amount due, charging Freeman with rents and profits since he has been in posession and crediting him with the amount paid to the sheriff and interest.

NOTE.—*Vide Blount v. Carraway,* 67 N. C., 396.

Where a purchaser at execution sale gets no title by reason of defective description, he was subrogated to the rights of the execution creditor to the extent such creditor was benefited and the execution debtor exonerated by the sale. *Pemberton v. McRae,* 75 N. C., 497. See *Rowland v. Thompson,* 73 N. C., 504.

A purchaser at execution sale takes subject to all equities against the defendant, whether he has notice of them or not. *Rollins v. Henry,* 78 N. C., 342; *Hicks v. Skinner,* 71 N. C., 539; *Richardson v. Wicker,* 74 N. C., 278.

REBECCA W. TURNER v. ROSA KITTRELL AND OTHERS.

(Winst. Eq., 39.)

Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property.

THE bill is filed by Rebecca W. Turner, the widow of the late (590) James A. Turner, and states that an order of sale of a tract of land belonging to certain infants had been made by the court of equity for Granville County, and at the sale made in pursuance thereof the plaintiff's late husband was the purchaser thereof; that the sale has been confirmed and the purchase money paid by Edward G. Cheatham, his executor. So much of the will of James A. Turner as relates to this suit is as follows: "I give and devise to my beloved wife, Rebecca W. Turner, all my property of every species whatever, to have and to hold for and during her natural life."

"It is my will and desire that any child or children which may be born during my coverture with my said wife Rebecca, or any child or children which may be born within the time prescribed by law after my decease, shall be coequal heirs with my wife Rebecca—that is to say, should there be one child, he or she shall be entitled to one-half of my property; if two children, one-third to each and one-third to my wife; to be held by them and their heirs in fee simple forever. Included in the above devise is any and all species of property which may accrue to me before or after my death, either by inheritance, gift, or bequest." The will was made in May, 1862, and the testator died in that year. There were no children born of the marriage. The suit is against the infants, who were owners of the land sold, and the heirs of James Turner. And the prayer is for a conveyance of the land to the plaintiff in fee.

MANLY, J. The rights of the complainant depend on the proper construction of the will of her husband, James A. Turner. After an attentive consideration of the whole body of the instrument, we are of opinion she is entitled to a conveyance of the entire parcel of land in fee.

This construction is necessary to avoid an intestacy in respect to the most important part of his estate, and to give effect to what seems to be the testator's manifest intention. The language of the will discloses a careful purpose to embrace in its bequests all his effects of every description. (591)

After sweeping up, as it were, and including everything, we cannot suppose that he would make so incomplete a disposition of it as to leave it entirely undisposed of in a contingency the most probable of those then in his mind.

He sets out by disposing of a life estate in his property of every kind. This he gives to his wife; and then turns to the task of carving out absolute estates in certain contingencies. The language of the will is peculiar. "It is my will and desire that any child or children that may be born during my coverture shall be equal heirs with my wife." This secondary disposition of his estate seems to be based upon the idea that the wife was an heir in any event, and proceeds to provide for children in case there should be one, two, or three.

The wife appears to be a primary object of care with the testator, and we cannot suppose that while he desired, in the event of having a child born to him, to give her one-half of his estate absolutely, he was unwilling to give her anything in case he had none.

Upon the whole, we think an intention is sufficiently apparent to give the wife an absolute estate in all his property, in the event the testator should have no children born to him from the marriage, and do so declare.

There should be a decree for a conveyance of the entire parcel of land described in the pleadings to the complainant, in fee.

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(592)

THOMAS WILKINS AND OTHERS v. C. L. HARRIS AND OTHERS.

(Winst. Eq., 41.)

1. The poverty of an executor is not of itself a reason for a court of equity restraining him from administering the estate.

2. There must be some maladministration on his part, or some danger of loss from his misconduct or negligence, for which he will not be able to answer by reason of his insolvency.

THIS was an appeal from the decision of the Court of Equity of RUTHERFORD, held by *Howard, J.*, at September Term, 1863, refusing to dissolve the injunction heretofore granted.

All the facts upon which the judgment of this Court proceeded are stated in the opinion of the Court.

No counsel for plaintiff.

Moore for defendant.

BATTLE, J. The jurisdiction of the court of equity in cases of the kind before us is undoubted. "But the mere poverty of the executor

does not authorize the court, against the will of the testator, to remove him by putting a receiver in his place. There must be, in addition, some maladministration or some danger of loss from the misconduct or negligence of the executor for which he will not be able to answer by reason of his insolvency. That seems to be the well-settled rule." *Fairlairn v. Fisher,* 57 N. C., 390. Hence, where the condition of the executor in property or credit has not been changed for the worse since the making of the will and the death of the testator, the court will not interfere. Such, it is contended by the counsel for the defendant Harris, is the case with him. He admits in his answer that at the death of his father he had been "unlucky in business" and was embarrassed with debt, but he alleges this circumstance was well known to his father when he appointed him one of his executors, and he avers that (593) his pecuniary condition has somewhat improved since then. If it were true that the full extent of his indebtedness was known to his testator at the time when he appointed him an executor, and also true that his pecuniary embarrassments had not increased since, then the court would not be authorized to remove him, nor to intrefere with his management of the estate. But is that true? We think not. The bill charges that the defendant Harris had, in the lifetime of the testator, been appointed guardian of one Joseph Whiteside, a lunatic, and as such had given a bond to which the testator was one of the sureties, and that since the testator's death it had been ascertained by a committee of the county court, by which the appointment had been made, that he was indebted to his ward in the sum of $10,000. This allegation is admitted in the answer, yet the defendant does not say that he has the assets of his ward in his hands ready to be accounted for, or that he has funds of his own wherewith to pay off the debt. He states only that there were good sureties besides his father to the guardian bond. The plain inference from these admissions and statements is that he had wasted or misapplied the effects of his ward, and was unable to make good his default. This very bad condition of his affairs does not seem to have been known to his father, and, having come to light since the testator's death, fully justified the court below in refusing to dissolve the injunction, from which the appeal is taken. As the case comes before us upon an appeal from an interlocutory order, and as we do not discover any error in that order, we can only affirm it, and send a certificate to that effect to the court where the cause is still pending. Any motions for a change of the order made in the court below must be addressed to that court. (594)

Cited: Camp v. Pittman, 90 N. C., 618.

NOTE.—Where an executor had remained in office as such for twenty years, and had never made a return: *Held*, he was properly removed from his office. *Armstrong v. Stowe*, 77 N. C., 360. The insolvency of an executor is not a sufficient cause for requiring him to give bond, and, failing in that, for removal, unless such insolvency was unknown to the testator or occurred after his death. *Neighbors v. Hamlin*, 78 N. C., 42.

J. W. CONLY, ADMINISTRATOR, AND OTHERS v. JOHN KINCAID AND OTHERS.

(Winst. Eq., 44.)

1. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold and the money equally divided among his children. *Held*, that by the direction to sell the land is converted into personalty.

2. One of the daughters of the testator died after the testator, in the lifetime of his widow, leaving a husband surviving. *Held*, that as her administrator he is entitled to one-seventh of the money arising from the sale of the property given to the widow for life.

ROBERT KINCAID, by his will, gave real and personal property to his wife for life or widowhood, the real property being land owned in fee by the testator, and made divers dispositions thereof, to take effect after the death or second marriage of his widow. Afterwards in 1836, he made a codicil, by which he gave to his wife a negro girl named Adeline, during her life, and at her death Adeline and her offspring, together with Alfred, and the plantation left to his wife, are to be sold for the most that can be got for them at public sale, "and equally divided between my seven children named in this will." "And further, I will and bequeath to my wife during her life my negro woman
(595) Sue, and at her death said woman Sue to be sold and the money divided equally between my children aforesaid." Patsy, the deceased wife of the plaintiff John Conly, was a child of the testator, and one of the seven named in the will. She died after the testator, in the lifetime of the testator's widow, and her husband is her administrator.

Merrimon for plaintiff.
No counsel for defendant.

BATTLE, J. The direction in the will of Robert Kincaid, that upon the death of his wife the land and negroes which he had given to her for life should be sold and the proceeds equally divided among his seven named children, had the effect to convert the real estate into personalty,

and in the events which have happened the plaintiff J. W. Conly is entitled to one share, as the representative of his first wife, Patsey. *Powell v. Powell,* 41 N. C., 50; Adams Eq., 150. Patsey had a vested interest in the property given to her mother for life, which upon her death in the lifetime of her mother belonged to her husband as her administrator.

This doctrine is so well settled that it is unnecessary to enter into a further discussion of it.

Cited: Falls v. McCulloch, 62 N. C., 140; *Kincade v. Conley,* 64 N. C., 390; *Benbow v. Moore,* 114 N. C., 270.

NOTE.—*Vide Britton v. Miller,* 63 N. C., 268; *Sutton v. West,* 77 N. C., 429. A legacy of property, "to be sold at my wife's death and equally divided among all my children," is *vested;* and therefore the representatives of such children as survived the testator and died before the wife are entitled to shares. *Falls v. McCulloch,* 62 N. C., 140; see *Kincade v. Conley,* 64 N. C., 387.

DAVID GARROW, ADMINISTRATOR OF JESSE WHITAKER, v. JOHN E. BROWN AND OTHERS.

(Winst. Eq., 46.)

Equity will annul a contract for the purchase of land by a man whose mental faculties are greatly impaired, at a price double its value, obtained from him when he was deprived of the counsel of his friends, by the fraudulent practice of the vendor.

THE bill was filed in the Court of Equity for BUMCOMBE, by the (596) administrator of Jesse Whitaker, to annul a contract made by the intestate shortly before his death, for the purchase of a tract of land to be conveyed to him by the defendant William E. Brown, in consideration of certain notes and bonds which were to be delivered to the vendor, and a sum of money. One of the bonds had been delivered to the vendor. The facts of the case are stated in the opinion of the Court.

Merrimon for plaintiff.

MANLY, J. If the case stood alone upon the mental incapacity of Jesse Whitaker, deceased, we might feel constrained to send it to a jury to have an issue on that point tried.

It seems an inquisition was had in Buncombe, according to the usages of law, which resulted in a verdict that the subject was *non compos*

mentis, which was reported to the county court at its April Session, 1857. From this there was an appeal to the Superior Court of the county, and this appeal was pending at the time of his death.

The evidence which has been laid before us preponderates, we feel at liberty to say, in favor of the finding of the jury; but as the inquisition was not finally acted upon and settled by a jury upon testimony *viva voce,* it would be more in accordance with the caution with which this Court proceeds in matters of so great importance to send it to the customary tribunal to have the fact established the one way or the other.

But we do not think the case necessarily turns upon this point. There are other well-settled principles of equity which dispose of it.

(597) Whatever may be the degree of doubt left upon the precise mental condition of Jesse Whitaker, about the time of the transactions in question, if he could not at that time be properly classed amongst *non compos mentis* technically, it is nevertheless certain that he was very old, was prostrated by disease and intemperance, and his memory and will, at least, exceedingly uncertain and fluctuating.

He was advised by friends, upon whose counsel he had theretofore relied, not to make the bargain without further information; and it was then understood and agreed, the defendant Brown being present, that no further action should be taken in the matter until the information needed was obtained.

After this arrangement, the friends of Whitaker left the house, and thereupon Brown, having remained, renewed the negotiation and effected the alleged sale of his land.

The further fact in this case is established to our satisfaction, that the price demanded and received for the land is twice its true value.

Here, then, are extreme imbecility of mind in the subject of the alleged fraud, an opportunity selected when he was "without counsel," in fraud of an agreement, secrecy in the transaction, and imposition in the price.

These are sufficient, we think, to call into action the interference and aid of this Court.

This occasion or source of equity jurisdiction is fully explained in *Amis v. Satterfield,* 40 N. C., 173, and *Freeman v. Dwiggins,* 55 N. C., 162.

The voluminous evidence which had been filed in this cause establishes with sufficient clearness the narrative we have given as the true state of the facts, according to the interpretation most favorable to the defendant, and the cases establish the principle that the Court will an-

(598) nul a contract made under such circumstances, and remit the parties, as far as it is practicable to do so, to their previous positions. To this end a decree may be drawn perpetuating the injunctions

heretofore granted, annuling the contract marked A in the papers, and directing a return of such notes, orders, or other securities as were given for the purchase money.

NOTE.—A conveyance will be set aside on account of the exercise of undue influence or of circumvention. *Burroughs v. Jenkins*, 62 N. C., 33; *Elliott v. Logan, id.*, 163; *Hartly v. Estis, id.*, 167; *Earl v. Bryan, id.*, 278; *Hill v. Brewer*, 76 N. C., 124. See, also, *Harshaw v. McCombs*, 63 N. C., 75.

WILLIAM EDWARDS v. JAMES PARKS, JOHN H. CARSON, AND JESSE GAMBLE.

(Winst. Eq., 49.)

1. Payment of the money due on a bill of exchange, promissory note, or bond for the payment of money, negotiable as a bill, etc., by the person liable to pay, to him who has *bona fide* possession of the instrument as a purchaser of it, though without indorsement, discharges the debt.

2. Authority from the husband to his wife to sell a negotiable bond and deliver it to the purchaser may be inferred from circumstances.

THIS was a suit, by bill in equity, to enforce the payment of a negotiable bond payable to the plaintiff, which was in possession of the defendant, the obligor. All the material facts are stated in the opinion of the Court.

Winston, Sr., for plaintiff.
No counsel for defendant.

PEARSON, C. J. The negro girl for whom the note in controversy was given was recovered by the plaintiff in right of his wife, in a suit in Virginia. When the negro was sold, the plaintiff said "she was his wife's property, and she could do what she pleased with her." (599) His wife joins the plaintiff in executing the bill of sale, and the note is *made payable to her and was delivered to her.* There is no proof that the plaintiff ever took the note into his possession, or had anything to do with it; and are satisfied by the pleadings and proofs that the plaintiff's wife traded the note to Gamble for a tract of land, and afterwards assigned her contract to Carson, who paid to her the amount of the note. This dealing by the wife of the plaintiff was done through the agency of Joshua Bracking, who indorsed the note to Gamble, to whom the defendant Parks paid the *full amount.* The allegation of the plaintiff, that he notified Parks not to pay the note *before* he had paid it, is not proved.

The case turns on the validity of the payment made by Parks to Gamble, which is a mere question of *law;* and the plaintiff comes into this Court, not on the ground of an equity against Parks, but on the collateral fact, that the note has, without his concurrence or consent, got into the possession of Parks, whereby the remedy at law is obstructed.

As the plaintiff neglected to notify Parks not to pay the note before he had paid it, and as Parks paid the full amount innocently to Gamble, a *bona fide* holder, having the indorsement of Bracking, a court of equity might hesitate whether it should not decline to interfere, and leave the plaintiff to his remedy at law, if upon the facts the court was of opinion that *strictissimi-juris* the payment was not valid. But we are of opinion that the payment was valid, and the debt thereby discharged.

The legal title to a bill of exchange, promissory note, or bond for the payment of money, negotiable by statute, can only be passed by indorsement; but the *equitable interest* may be acquired by purchase *without indorsement;* and payment to a *bona fide* holder without indorse-
(600) ment, who has purchased the note or bond, and on payment hands it to the obligor, is a valid payment, and discharges the bond.

The possession of the note or bond, connected with the fact that it had been acquired by purchase, is full evidence of an authority to receive the money. This is a matter of every-day occurrence, and when a man presents a note which he has "traded for," although there is no indorsement by the payee, the obligor pays the amount and "lifts the note," as it is usually expressed, on the ground that the possession of a note or bond by one who has purchsed it of the payee is evidence of a power of attorney which authorizes the holder to receive the amount to his own use.

The plaintiff's right to treat the payment by Parks to Gamble, who delivered the bond up to him, as a nullity, is put on the ground that Gamble was not a *bona fide* purchaser, for Bracking had no right to sell the bond. This depends on the fact whether the plaintiff's wife had authorized Bracking to do so, and that depends on the fact whether the plaintiff had made his wife *his agent* in respect to the transaction concerning the negro. So the case is reduced to this, Does the evidence sustain the inference that the plaintiff had, in respect to the slave Beck, and the note executed as a security for the price at which she was sold, expressly or by implication constituted his wife an agent to sell the slave and receive the purchase money? We are satisfied by the evidence that such is the fact. The plaintiff said "the negro woman was his wife's property, and she could do as she pleased with her." The wife joins in the execution of the bill of sale, and the note is made payable to her, and is never taken into his possession. All of which tends to show that

in respect to the negro and the note taken as her price, the plaintiff supposed his wife had a right to do as she pleased, and either expressly or by implication made her his agent to enable her to do so.

The plaintiff has failed to establish his equity. (601)

Bill dismissed.

ALBERT T. SUMMEY, ADMINISTRATOR OF WILLIAM A. PATTON, v. JAMES A. PATTON, WASHINGTON MORRISON, AND SAMUEL G. KERR.

(Winst. Eq., 52.)

1. Where land is purchased in fee by a partnership with partnership funds and for partnership purposes, and one partner dies, upon the settlement of the partnership debts his share of the land descends to his heir, in equity, as at law.

2. And it *seems* that upon a dissolution of the partnership by effluxion of time or otherwise, all the partners then living, the land will be regarded as real estate, as between them, the partnership being solvent.

WILLIAM A. PATTON, Washington Morrison, Samuel G. Kerr, and James A. Patton entered into partnership, in 1860, for the purpose of tanning leather, making shoes, etc., and William A. Patton conveyed to his three partners three-fourths of a piece of land in fee to be used, together with the other fourth part reserved to himself, by the firm, as a tanyard, and it was so used during the existence of the partnership. In 1863 William Patton died, and the plaintiff became his administrator. He filed this bill against the surviving partners for an account, praying among other things that they should pay to him such part of the proceeds of the sale of the tanyard lot as belonged to the estate of the intestate. The defendants submit the question to the Court, whether the money belongs to the heir or administrator of the intestate.

Merrimon for plaintiff.
No counsel for defendants.

PEARSON, C. J. The pleadings present the question whether (602) land purchased by a firm with partnership funds, for partnership purposes, and used as a part of the stock in carrying on the business—a tannery, for instance—in the absence of any agreement in the articles of copartnership, shall on the dissolution of the firm by the death of one of the parties descend as real estate to the heirs at law, or pass as personal estate to the executor or administrator of the deceased partner.

For the purpose of deciding the general principle, we will put out of the case the special circumstance that the intestate W. A. Patton was the owner of the land, and after the formation of the firm conveyed three-fourths of the lot to the other three members of the firm in fee simple, retaining the other fourth, and that the articles of copartnership provide that at its dissolution all the debts shall be first paid out of the joint funds, the capital advanced be returned to each partner, and "the balance of the *partnership assets* shall then be *equally divided* between the four copartners."

It is the settled doctrine of equity in the English courts that as between the partners, and for the purposes of the firm, real estate belonging to the partnership will be treated as personalty, if the partners have by the articles of copartnership or otherwise impressed upon it the character of personalty.

But it is a vexed question whether, after the dissolution of the firm by the death of one of the members, the debts being all settled and no purpose of the firm requiring it, the share of the deceased partner in the land shall still retain its character of personal property and pass to his personal representative, or shall descend as real estate to his heir at law.

Upon this point Mr. Justice Story in his work on Partnership, sec. 93, remarks: "There has been a great diversity of judicial opinion,
(603) as well as of judicial decision, and the doctrine may be considered as open to many distressing doubts."

The idea that *land* shall be considered and treated as personal property is not readily comprehended by a plain mind, and requires explanation. It is an artificial and refined doctrine, adopted by the chancellors in England in reference to copartnerships, on the principle of giving effect to the agreement of the copartners, and originated in this wise: By the common law, on feudal reasons, land could not be sold for the payment of debts. By virtue of legislative enactments, the writ of *elegit* and *statutes merchants and staple* subjected land to the claims of creditors in a modified way, that is, by giving the creditor a right to have the land extended at a yearly value, and to have an estate and receive the rents and profits until, at the extended value, the debt was satisfied. This, however, did not cause land to answer the purposes of trade and become the means of extended credit as fully as if it could be sold out and out like personal property. Again, land held in joint tenancy was subject to the doctrine of survivorship, by which on the death of either tenant the whole estate belonged absolutely to the surviving tenant. This was a great drawback to the formation of copartnerships in which the business made it necessary for the firm to own land. To obviate these difficulties, the articles of copartnership in many instances contained an agreement that the land required and owned as part of the

stock in trade should be considered and treated as personalty, and in others the acts of the parties furnished ground for the inference that it was the intention to impress on land the character of personalty in all such cases; and the courts inclined to extend them by construction and implication. It was held in equity that the agreement and intention of the parties should be carried into effect, and to do so the land must be considered and treated as personalty. This was all well enough and plain sailing, as between the copartners, and for the purpose (604) of the firm, but when it was attempted to carry the principle further, and make it apply to land ater a dissolution by the death of one of the parties, and after the business is closed, so as to disinherit the heir at law, and allow the personal represenative to take the land and dispose of it as personal property, the doctrine became much more refined and too attenuated for practical purposes, and calls for the remark of Mr. Justice Story, that "the doctrine may be considered open to many distressing doubts."

In this State land can be sold out and out, under execution, and the doctrine of the common-law survivorship is abolished. So the two rules of law which gave rise to this doctrine and were the foundation on which it was built have been taken away; and we are inclined to the opinion, under the rule *cessante ratione, cessat lex,* the doctrine is not applicable to the relation of copartners, even between the parties themselves; and we are clearly of opinion that it does not apply as between the heir at law and the personal representative. And in the absence of any adjudication by which it is fixed in our law, we regard it as another of those *refined doctrines* of equity jurisprudence which render the English system so extremely artificial and complicated; and add it to the list of "pin money," "part performance," "the lien of a vendor for the purchase money," "the duty of the purchaser to see to the application of the purchase money," and the wife's equity for a settlement. *McKimmon v. McDonald,* 57 N. C., 1.

There will be a decree declaring that the plaintiff is not entitled to that part of the fund in the hands of the defendants arising from the sale of the tanyard lot.

The cost to be paid by the plaintiff. (605)

Cited: Stroud v. Stroud, 61 N. C., 526; *Mendenhall v. Benbow,* 84 N. C., 650; *Sherrod v. Mayo,* 156 N. C., 148.

DUNCAN F. McIVER AND DANIEL McIVER v. JOHN R. RITTER, THOMAS W. RITTER, A. A. SEAWELL, AND KENNETH H. WORTHY.

(Winst. Eq., 56.)

A writ of *fi. fa.* cannot continue by relation a lien on property created by previous writ, unless it purports on its face to be an *alias*.

THE bill was filed in CHATHAM Court of Equity, alleging that in 1853 the plaintiff purchased a tract of land in Moore County, of Jesse L. Bryan, at a public sale made in that county. That the defendants were present at the sale, and the defendant Worthy, then sheriff of that county, had in his hands at the time an execution in favor of (606) John R. Ritter against Bryan, issued from the county court, on a judgment obtained in 1851, which Worthy knew to be unsatisfied, but that in order to defraud the plaintiffs, he declared to the people assembled there that the execution was satisfied, and the other defendants heard his declaration and concurred in it for the same fraudulent purpose, thus inducing the plaintiffs to buy. That John R. Ritter, one of the defendants, had obtained a judgment against said Bryan in Moore County Court, in 1851, and executions regularly issued thereon from term to term (and were put into the sheriff's hands), until the land was sold in 1857 by virtue of one then in the sheriff's hands, and John R. Ritter became the purchaser, who afterwards conveyed to Thomas W. Ritter, and he to Seawell. All of the conveyances are charged to have been made for the purpose of defrauding the plaintiffs and obscuring their right and obstructing their remedy; and the plaintiffs insist that the defendants are *trustees* for them. The prayer is, that the "defendants John and Thomas Ritter and Seawell may surrender up said deeds to be canceled," and for such other and further relief, etc.

It appeared that though writs of *fi. fa.* issued from term to term, from the rendition of the judgment until the sale by the sheriff, no one appeared to be an *alias* on its face.

No counsel for plaintiffs.
Phillips for defendants.

MANLY, J. The plaintiffs purchased lands, described in the pleading, of Jesse L. Bryan, at a public sale in December, 1853.

At that time, as they allege, there were executions running upon a judgment against Bryan, obtained in October, 1851. At the sale the defendants (the sheriff, in whose hands were the writs of *fi. fa.*, (607) combining) fraudulently represented the debts to be satisfied, and thus induced the plaintiffs to buy the land in question.

Notwithstanding the writs of *fi. fa.* were continuously sued out upon the judgment until January, 1857, when there was a levy upon the land,

a sale, and a purchase by Ritter, the plaintiffs charge a fraudulent combination on the part of Ritter and other defendants to encumber their title, and pray to have the cloud removed.

An exemplification of the entire record of the case of *Ritter v. Bryan* has been filed as an exhibit, from which it appears that, although writs of *fi. fa.* were regularly issued from the date of the judgment in 1851 to the sale in 1857, yet none of them purported to be *alias* writs, which we deem necessary in order to keep up a lien. *Yarborough v. Bank,* 13 N. C., 23; *Palmer v. Clark, id.,* 356; *Arrington v. Sledge, id.,* 359, and *Harding v. Spivey,* 30 N. C., 63. The discussion of this matter has generally arisen upon the question whether an *alias* as such would attach as a lien from the test of the original. It seems to have been a conceded point at all times that if it were not an *alias* the lien would not attach.

The law does not tolerate deception in its process, by which purchasers and creditors may be entrapped. If a creditor desires to continue his lien, he must cause the necessary writs to appear truly upon their face what he claims them to be, and each must go into the hands of the sheriff of the county where the property lies.

It has been held when a levy is made under a *fi. fa.,* and a *fi fa,* again issues instead of a *vend. exp.,* the lien is lost. When a *fi. fa.* purports to be an *alias,* but the original did not go into the hands of the sheriff, but was held up by the plaintiff, the lien does not extend beyond the teste of the *alias.* Where the alias and original were sent to different counties, the property not being in the county to which the original was sent, the *alias* was not a lien, except from its own teste. See au- (608) thorities already cited.

It will be seen from these principles that although at the time of the sale to the plaintiffs in 1853 the land was under the lien of a *fi. fa.* from October, 1853, to January, 1854, yet this lien was lost. The execution which issued from January to April, 1854, did not purport to be an *alias,* which was necessary, as we have seen, in order to impart to it efficacy as a lien from the teste of the previous writ. The *fi. fa.* under which the land was sold in 1857 was an original, and did not operate as a lien beyond its own teste.

We hold, therefore, that the title of the plaintiff is not obscured in such wise as to entitle him to call on this Court for aid. He may vindicate his rights in a court of law. The bill must be dismissed, but without costs except as to the defendant Worthy, who is entitled to costs.

Note.—The decree declares "that the defendants have no legal title to the land mentioned in the pleadings, and therefore are not trustees for the plaintiffs." Wherefore, it is ordered, etc., that the bill be dismissed, etc.—*Reporter.*

Under the Code of Civil Procedure an execution does not bind property, but the judgment itself binds land from the docketing, and personal property is bound only from the levy. So it makes no difference now whether an execution is issued as an original or an *alias*.

RACHEL McLANE, Administratrix of WILLIAM H. McLANE, v. JOHN MANNING and Others.

(Winst. Eq., 60.)

1. A person acting as an officer of the law under a judicial order or judgment ought not to be made a party defendant to a bill for an injunction to restrain the execution of such order or judgment.
2. The State courts have no jurisdiction to restrain persons from acting under the orders or judgments of the Confederate courts, unless they have been obtained by fraud. Whether they have jurisdiction then, this Court declines to express any opinion. They have no jurisdiction to review the proceedings of the Confederate courts.
3. The Court cannot give relief on the ground of frauds, unless it be positively and distinctly alleged.

(609) The bill charges that a corporation was created by the General Assembly of this State for the purpose of working the coal and iron mines at Egypt, in Chatham County, by the name of "The Governor's Creek Coal and Iron Manufacturing and Transportation Company"; that they engaged extensively in the business for which they were created, and the original plaintiff, William H. McLane, was employed as mining engineer and manager in 1852, and has continued to act as such until November, 1862, he being also a large shareholder—and the largest shareholder who is a citizen of the Confederate States; that nine-tenths of the stockholders are citizens of the United States; that the company are indebted to him in the sum of $4,870, or thereabouts, for arrears of salary and advances made by him; that suitable buildings had been erected by him by order of the stockholders, for the officers of the company, and that one of them has been occupied by him, by assignment of the company, as a dwelling-house ever since it was built, and is now occupied by him; the plaintiff was served with process from the District Court of the Confederate States for the District of North Carolina to appear at said court to be holden at Goldsboro on .... November, 1861, to make a disclosure of all he knew concerning the company and its affairs; he appeared at court and filed his garnishment. Such proceedings were had that an order was made by the district judge at chambers that the plaintiff should be removed from his office as manager and a successor appointed, and in obedience thereto Manning, the receiver,

appointed J. N. Clegg manager. Clegg was afterwards removed by order of the court, made without notice of any proceeding intended to be had in the matter, and the defendants Brown and Mallett appointed managers. The plaintiff charges that in the proceedings (610) of the District Court the requirements of the sequestration act were not pursued, and that no decree sequestrating the Egypt property has ever been made. He charges that secret information has been given by one of the defendants, not saying which defendant, nor what the information was, nor that it was false, and he also charges that the "defendants Brown and Mallett have from the first court held in November, 1861, to the last of November, 1862, been unceasing in their efforts to have him (the plaintiff) removed, without cause, and solely with the view of being put into the management themselves." The bill contains no other charge or insinuation of fraudulent conduct or bad motives on the part of the defendants. It then charges that an order was made by the District Court at November Term, 1862, that the plaintiff should be turned out of possession of the house in which he dwells, and that notice in due form of law had been given to him that the order would be executed on the Monday next following the day on which the bill was presented to the judge. The prayer is for an injunction.

An injunction was issued in pursuance of the order of a judge in vacation. At the return term the defendants demurred to the bill, and the cause was transferred to this Court by consent.

Pending the suit the plaintiff died, and Rachel McLane, his administratrix, was made plaintiff.

No counsel for plaintiff.
Phillips for defendants.

Battle, J. The fiat for an injunction in this case was made by me in vacation. The application for it was presented under such circumstances as to allow me no time for an examination of the authorities bearing upon the questions involved, and very little opportunity for (611) reflection. Having now had the aid of an argument and of a conference with my brethren, I have, after mature consideration, come to the conclusion with them that the order was improvidently granted and that the demurrer must be sustained and the bill dismissed.

It is necessary for us to notice only one or two of the questions raised by the pleadings, as they are sufficient to dispose of the case.

The defendant Manning, appointed a receiver under an act of the Provisional Congress of the Confederate States, entitled "An act for the sequestration of the estates, property, and effects of alien enemies, and for an indemnity of the citizens of the Confederate States, and persons aiding the same in the existing war with the United States" (see acts of

the third session of the Provisional Congress, No. 269), was only an officer of the law, and was as such improperly made a party defendant, and as to him the bill must therefore be dismissed with costs. *Edney v. King,* 39 N. C., 465; *Lackay v. Curtis,* 41 N. C., 199.

As to the other defendants, Mallett and Brown, if the Court could entertain jurisdiction at all to restrain them from acting under the orders from the Confederate Court, it must be on the ground of fraud practiced by these defendants in obtaining the orders. Now, in this case no such fraud is positively and distinctly charged in the bill. In one place it is said that one of the defendants—whether Mallett, Brown, or Manning is not stated—was a secret informer, but whether the information given was true or false is not alleged. In another part of the bill it is charged that "the defendants Brown and Mallett have, from the first court held in November, 1861, until the last held in November, 1862, been unceasing in their efforts to have him (the plaintiff's intestate) removed without cause, and solely with the view of being
(612) put into the mangement themselves." These are rather insinuations of fraud than positive and distinct charges of it, and when taken in connection with the fact that the relief sought is not put upon the ground of fraud, but upon other and different grounds, the Court cannot make that the basis of a decree for relief, where there are no other elements of equity. (See *Witherspoon v. Carmichael,* 41 N. C., 143.)

This Court has no jurisdiction to review the proceedings of the Confederate Court; and without deciding whether it might not restrain parties from availing themselves of its orders or decrees, when obtained by fraud positively charged and proved or admitted, it will not interfere in the absence of such allegations. The demurrer must be sustained and the bill dismissed with costs as to these defendants also.

Cited: *Harshaw v. McCombs,* 63 N. C., 77; *Gilmer v. Hanks,* 84 N. C., 320; *Stout v. McNeill,* 98 N. C., 3; *Anderson v. Rainey,* 100 N. C., 334.

NOTE.—It is improper to make a sheriff a party to an order of injunction against process in his hands. *Jarman v. Saunders,* 64 N. C., 367. Conflict of jurisdiction discussed in *S. v. Hoskins,* 77 N. C., 530.

If fraud be the ground of relief, it must be distinctly and positively alleged, and either admitted or supported by proof. *Harshaw v. McCombs,* 63 N. C., 75.

W. G. BOWERS AND WIFE v. EDMUND STRUDWICK AND OTHERS.

(Winst. Eq., 64.)

In taking an account under a decree, which directed that the mortgaged property in possession of the mortgagee should be retained by him in satisfaction of the mortgage debt, at a valuation to be fixed by the clerk, the valuation must be made according to what the property would bring in specie.

IN obedience to the decree made at the hearing of this case at June Term, 1862 (see the report of it, 41 N. C., 283), the clerk made his report, and the defendant excepted because he was charged with the sum for which the slaves would have sold in Confederate notes, as so much money. (613)

Graham for plaintiff.
Phillips for defendant Strudwick.

PEARSON, C. J. The first exception of the defendant is allowed.

A debtor cannot, with a good conscience, offer to pay in depreciated notes a debt contracted while the currency was at par, and a creditor is not obliged to receive depreciated notes in payment of his debt. Dr. Strudwick had a right to demand gold and silver, or par funds, in payment of his debt; and if the debt was to be in negroes, it follows as a matter of course that the negroes were to be rated at specie value; otherwise the debtor would be doing indirectly what could not be done directly.

According to the practice in England, a debtor who seeks to redeem must in the first place pay the debt in gold and silver or par funds, and then take the property. In this State, as an indulgence to the debtor, he is allowed to have the property sold, and to take the excess after paying the debt out of the proceeds of the sale. In this case there was no evidence that Dr. Strudwick removed the negroes from the State with a fraudulent intent to evade the plaintiff's right of redemption, but, on the contrary, the court was satisfied that he removed them after the settlement with the other distributees of Dr. Witherspoon and legatees of Mrs. Witherspoon, upon the well-grounded belief that the value of the negroes was not equal to the claims he held on them, and that the right of redemption would never be set up—in fact, that he was obliged to take the negroes in satisfaction of his claims, although the value was not supposed to be equal to the amount. The decretal order directed an account on the basis of charging Dr. Strudwick with (614) the value of the negroes in payment of his claims; which is the same thing as if the negroes had been ordered to be sold and the proceeds applied to the payment of the claims of Dr. Strudwick. Suppose

the order had been that Dr. Strudwick should bring the negroes back to this State for the purpose of a sale, and they had been sold for Confederate notes: Dr. Strudwick would not have been required to take such notes in payment of his claims. He would have had a right to insist on being paid in gold and silver, or par funds. So it comes to the same result, that is, he has a right to insist that he should be charged only with the specie value of the negroes, in the extinguishment of his claims. The specie valuation of the negroes must be at the date of the filing of the bill, when the plaintiff notified the defendant of his intention to set up his right of redemption. It is not necessary to pass on the second and third exceptions, as they are merely in aid of the first.

The exception of the plaintiff is overruled. She was not bound by the settlement made with the other distributees or legatees, and of course she can claim no benefit under it; and as against her, Dr. Strudwick is entitled to hold the land as a purchaser at execution sale. For this reason it was not included in the terms of the reference.

It is proper to say, this case was held under advisement at the last term, not on account of the difficulty of the question of law, but because the Court was not willing, in the condition of things then existing, to *declare by a decree* that Confederate notes were depreciated. That difficulty is now out of the way. It is conceded on all hands, even by the Confederate Government, that its notes are depreciated and much under par.

The clerk will state an account charging the defendant with the value of the slaves in specie at the date the bill was filed.

Decree accordingly.

CASES IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DECEMBER TERM, 1864

WILLIAM D. PICKETT AND JOHN L. PICKETT v. DAVID J. SOUTHERLAND AND OTHERS.

(Winst. Eq., 68.)

A bequest in these words (after a bequest to A., a daughter of Mary Pickett), "I give and bequeath to all the rest of my nieces, Mary Pickett's children, that she now has or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands, etc.," Mary Pickett having, at the same time when the will was made, no other daughter than A., but two sons, is a gift to all the *children* of Mary Pickett which she then had (except A.) or might at any time thereafter have, whether in the lifetime of the testatrix or after her death.

THIS cause was removed from the Court of Equity of DUPLIN to this Court for trial.

Mary Rhodes died in 1832, having a short time before made (616) her will, by which she gave to Mary Jane Pickett, the daughter of the testatrix's niece, Mary Pickett, some property; and then bequeathed as follows: "I give to all the rest of my nieces, Mary Pickett's children, that she now has, or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands of the manager of my will," etc.

When the will was made, Mary Pickett had three children, Mary Jane and two sons. No others were born during the life of the testatrix; but after the testatrix's death she had five children, some of each sex.

The words and the punctuation of the will are copied with exactness in the foregoing quotation.

The plaintiffs are the survivors of the two sons of Mary Pickett, who were in existence when the will was made, and the administrator of the other, who died after testatrix's death. They claim the whole of the legacy, on the ground that the word "nieces" should be read as if written niece's, and the words "she may hereafter have" should be construed as if the words "during my lifetime" were added. The defendants are the children of Mary Pickett, born after the death of the testatrix. The sons claim that the legacy should be divided among all the children of Mary Pickett; the daughters claim the whole legacy by force of the word *nieces*. Mary Pickett was the niece of the testatrix, and is so described in a preceding part of the will.

Strong for plaintiffs.
No counsel for defendants.

PEARSON, C. J. By its proper construction, the clause in the will of Mary Rhodes which has given rise to this controversy should read: "I give and bequeath to all the rest of the children of my niece, Mary Pickett, as well those she may hereafter have as those she now has, two slaves, Maria and Jim, to share equally."

(617) This removes all obscurity, and by it all of the children (except Mary Jane) as well males as females, and as well those born after the death of the testatrix as those born before, are entitled to a share. *Shinn v. Motley,* 56 N. C., 491; *Shull v. Johnson,* 55 N. C., 202, are directly in point, and the question in regard to after-born children, when there is an express intention to include them, although there be no intervening estate, is fully explained.

Decree accordingly. Costs to be paid out of the fund.

NOTE.—Where a legacy is given to a class, as to the children of A., with no preceding estate, such only as can answer at the death of the testator can take, for the ownership is then to be fixed, and the estate must devolve upon those who answer the description. When, however, there is a preceding life estate, so that the ownership is filled for the time, and there is no absolute necessity to make a peremptory call for the taking of the ultimate estate, the matter is left open until the determination of the life estate, with a view of taking in as many objects of the testator's bounty as come within the description and then answer to the call, when it is necessary for the ownership to devolve and be fixed. *Walker v. Johnston,* 70 N. C., 576.

JOSEPH A. WORTH, THOMAS S. LUTTERLOH, AND AUGUSTUS W. STEEL v. THE COMMISSIONERS OF FAYETTEVILLE.

(Winst. Eq., 70.)

1. A court of equity will entertain a bill against a municipal corporation for the purpose of trying the legality of a tax imposed by the corporation.

2. The General Assembly may authorize a municipal corporation to lay taxes on the town property, the persons, and subjects of taxation incident to the person, of those who have a business residence in town, though they have a residence also out of town.

THIS was a suit brought in the Court of Equity of CUMBERLAND.

The bill states that the plaintiffs have their places of business in the town of Fayetteville, and reside with their families in the county of Cumberland, in the neighborhood of said town. The plaintiff (618) Worth is a commission merchant, and agent of the Cape Fear Steamboat Company. The corporation demands from him a tax on money on hand, dividends received from money invested in steamboat company, salary as steamboat agent, and a riding vehicle. The plaintiff Lutterloh is a merchant, and the owner of a steamboat plying between Fayetteville and Wilmington. The corporation demands from him a tax on money on hand, capital in steamboat company, riding vehicle, State bond, money in Beaver Creek Cotton Factory, located out of town, and dividends received from money invested in that factory. The plaintiff Steel is a merchant. The tax demanded from him is on some of the articles above mentioned.

The bill charges that the right to tax the plaintiffs in respect to these articles is founded on an act of the General Assembly ratified on 28 May, 1864, entitled "An act to enlarge the powers of the mayor and commissioners of the town of Fayetteville," the fourth section of which enacts, "That the mayor and commissioners of the town of Fayetteville be and they are hereby empowered to impose the same taxes, for municipal purposes, upon all persons whose ordinary avocations are pursued within the corporate limits of the town, although residents beyond the corporate limits, in like manner and to the same extent as upon persons resident within the corporate limits: *Provided,* that nonresidents thus taxed shall have the right to vote at municipal elections"; and the act of 1862-'63, ch. 19, entitled "An act to enable all the incorporated towns in this State to lay additional taxes."

The bill was filed by the plaintiffs on behalf of themselves and others having the same interest.

The prayer of the bill was for an injunction.

The defendant demurred, and the cause was removed to this (619) Court for argument.

Moore for plaintiffs.
Winston, Sr., for defendant.

PEARSON, C. J. The Court has had great difficulty on the question of jurisdiction. In this State the courts of law and the courts of equity are held by the same persons, and there is a strong tendency to disregard the distinction between questions of law and equity, and to allow the jurisdiction of the courts to run into each other and become confounded; that is especially so when, as in this case, both parties wish to get a speedy adjudication, and the defendants waive all objections so as to put on the court the duty of raising the question as to jurisdiction and the burthen of deciding it, without the aid of an argument on both sides. *Manly v. Raleigh,* 57 N. C., 370, was a case like this: Both parties wished a speedy adjudication; the question was not raised, and passed *sub silentio;* but that case is now relied on to sustain the jurisdiction of a court of equity to determine on an injunction bill "a dry question of law." It is admitted the question could be presented in a court of law by paying the tax under protest, and bringing an action for money had and received; but it is said, according to the mode of proceeding at law, every taxpayer must bring a separate action, and it is necessary that jurisdiction should be assumed in equity to prevent the "multiplicity of suits." That is a head of equity jurisdiction under which the Court has in some special instances interfered by injunction, and as *Manly v. Raleigh* was a bill against a municipal corporation, and not against its tax collector, and is a precedent directly applicable to the present bill, we have concluded to act upon it, and take the jurisdiction. No injury can (620) result, for if the operations of a corporation are likely to be seriously impeded by having its sources of revenue stopped, it may insist on an injunction bond being filed, and it will become the duty of the court to require a bond large enough for full indemnity, and it is apprehended that the few who file bills for themselves and "on behalf of all others in like condition" will not be willing to bind themselves to answer the whole default for the sake of raising an equity on the ground of avoiding "the multiplicity of suits." We take occasion to say, in order to "exclude a conclusion," that this decision is confined to bills against *municipal corporations,* and will not be considered an authority to sustain an injunction bill against tax collectors of the Confederate States, or of the State or of a county. That subject involves other and far graver considerations, which are left open, and in respect to which we do not wish to be at all committed. I will suggest one or two:

1. An injunction against tax collectors, the effect of which is to stop all collections, might seriously obstruct the operations of the Government—a consequence in comparison with which the notion of preventing

a multiplicity of suits sinks into insignificance, and which consequence is avoided when the taxes are paid to the collectors under protest, and he pays them over to the Government, taking its indemnity in respect to such actions as may be brought against him.

2. Equity acts *in personam,* and enforces its orders and decrees by process of contempt. When one having judgment at law is about to use it against conscience, a bill is not entertained against the court of law or the sheriff, but against the party to the action; an injunction goes against him and he is put in contempt for disobeying it. A bill cannot be entertained against the Government, and it would seem it ought not to be entertained against the officer of the Government; for, should he be enjoined, he cannot be put into contempt, for he cannot obey the order of the court unless he violates his sworn duty and is guilty of direct disobedience to the orders of the Government of which he is (621) an officer.

3. A court of equity has no machinery and no officers by which it can enforce its orders against an officer of the Government. For illustration: Suppose a bill to be entertained against a sheriff, and he is enjoined from the collection of taxes, the copy, subpœna and fiat are handed to him (say by the clerk); he disobeys the order. What officer has the court by whom the sheriff can be taken into custody and brought before it for the alleged contempt? Who is to call out the *posse comitatus?* I will pursue the subject no further.

On the question presented by the bill we have had but little difficulty. By the proper construction of section 4 of the act of May, 1864, the taxes which may be imposed upon all persons whose ordinary avocations are pursued within the corporate limits of the town, although resident beyond the corporate limits, are restricted to property owned by them in the town, and to their persons, and *subjects incident to their persons.* The only question made is in regard to the latter, when one has a business residence in town, which is the meaning of the description, "persons whose ordinary avocations are pursued within the corporate limits." The money he has on hand, the salary which he earns there, the income which he receives there, whether it be interest on bonds, the debtors residing elsewhere, or dividends on stock in a factory situate out of town, or in a steamboat company, are subjects incident to his person; and in respect to the particulars enumerated by the three gentlemen who filed this bill, we do not see that the commissioners have exceeded the power given them by the act. We understand the "riding vehicle" to mean the buggy used to come into town every morning and go out every night, and consider it adjunct to their town residence, and incident to its enjoyment. In respect to the other gentlemen in behalf of whom the bill

(622) is filed, the allegations are not sufficiently distinct to enable us to express an opinion. The question, then, is narrowed to this: Had the Legislature power to authorize the mayor and commissioners to impose such a tax on persons who transact their business and live in town during the day and live in the country during the night?

It was earnestly contended by Mr. Moore that the Legislature has no power to authorize the imposition of such a tax upon strangers who may occasionally visit the town. That question is not presented by the case; for although the act refers to these gentlemen as persons resident beyond the corporate limits, in contradistinction to persons resident within the corporate limits, it also refers to them as persons whose ordinary *avocations are pursued within the corporate limits,* and the facts being stated at large, the question of residence is left open to be governed by the application of principles of law whereby these gentlemen are put on very different footing from mere strangers. They have two residences, a business residence in town and a domestic residence in its vicinity, and may be called *amphibious* citizens, who enjoy the conveniences and comforts of their double residence. They have the benefit of a town residence for the transaction of business, the advantage of town society for themselves and families, of attending church, sending their children to school, etc., and the benefit of a country residence for cheapness, healthfulness, and the pleasure of country life. They *live in town* nearly if not quite half of the twenty-four hours of every day in the year, and must be considered in part residents of the town. Taking that to be so, there can be no reason on general principles why they should not contribute to the expenses of the town, excluding their country residence and property out of town (which pay no town tax), on the same ground that (623) every man contributes to the expenses of the community in which he lives. The provision which confers on these amphibious citizens the right to vote at municipal elections meets the objection which might otherwise have been made on the footing of the time-honored maxim, "representation and taxation should go together."

Manly v. Raleigh, 57 N. C., 370, cited on the question of jurisdiction, is an authority in support of the power of the Legislature. It is there held that the Legislature has power to extend the limits of an incorporated town, without the consent of the persons included by the extension. In a general view the act under consideration does in effect the same thing. These gentlemen and their country residences might have been included by extending the limits of the town, whereby all would have become liable to a town tax. The greater includes the less. Perhaps the object has been answered by making them to some purposes citizens of

the town, without the inconvenience of extending its territorial limits. That, however, is not a question of power, but of expediency, with which as a Court we have no concern.

The bill is dismissed.

Cited: *Huggins v. Hinson,* 61 N. C., 128; *Brodnax v. Groom,* 64 N. C., 246; *Commissioners v. Capehart,* 71 N. C., 160; *R. R. v. Lewis,* 99 N. C., 64; *Mace v. Commissioners, ib.,* 67.

(624)

MARY TROY, EXECUTRIX OF ROBERT E. TROY, AND ALEXANDER TROY, AN INFANT, WHO SUES BY HIS GUARDIAN, MARY TROY, v. ALEXANDER TROY.

(Winst. Eq., 77.)

1. A gift by will to A. for life, remainder to B. in fee, with a power to A. to sell all or so much of the property as in her judgment may be necessary, vests in A. an estate for her life, with a power of sale *appurtenant* to her life estate.

2. And the expression by the testator, in a subsequent part of his will, of a doubt whether the power of sale would not make A. the absolute owner of the whole estate, and a direction that in case such should be the construction in law, that C. should have the legal estate in fee in the property, in trust, etc., do not convey to C. any estate or interest in the property.

3. The will declares the expense of the education of his son to be a charge on all his property. A. holds the proceeds of sales, made under the power, in trust to pay debts, for her own support, and for the support and education of B.

THIS cause was removed from the Court of Equity of COLUMBUS to this Court for trial.

The bill states that in 1862 Robert E. Troy, the husband of the *feme* plaintiff and the father of the other plaintiff, died, leaving a last will and testament, which has been proved; of which the plaintiff Mary is the executrix. After stating, in substance, the contents of the will, and that the sale of some of the property is necessary to pay the debts of the testator, the bill charges that the defendant sets up a claim to the legal estate in the testator's property and denies the right of the plaintiff Mary to sell; and so obstructs the exercise of the power given to her. The prayer is for a declaration of the rights of the parties, and that the defendant be restrained from setting up any claim to any part of the property, or that he may be declared to be a trustee according to the claim he has made. (625)

The material parts of the will (which is made a part of the bill) are as follows:

"It is my will and desire that all my property and estate of every kind and description shall belong to my beloved wife Mary during the term of her natural life, and at her death to my son Alexander. Should it be necessary, however, in the judgment of my wife, that any of the property, real and personal, should be sold, then I authorize and empower my said wife to sell *all,* or such part thereof as she may think proper, either at public or private sale, for cash or otherwise, and to convey the purchaser an absolute title in fee simple. But if my said wife should marry, this power of disposing of my property shall cease and determine."

"Item. As I have some doubts whether the above disposition of my property would not be construed in law to vest in my wife the entire estate and title, notwithstanding it is expressly limited to her life, I therefore desire, in case the intervention of a trustee be necessary in law to carry into effect the disposition which I have made of my property, that the whole of my said property shall be held by my brother, Alexander Troy, for the purpose of carrying into effect my wish and desire above expressed: that is to say, in trust for my said wife during the term of her natural life, and at her death, in trust for my son, Alexander, or in trust for such person or persons as she may sell any of the property to while she remains a widow, and their heirs forever. But my said brother, Alexander J. Troy, is to be appointed trustee only in case that it should be necessary in law for carrying into effect said provisions."

"It is my will and desire that as soon as practicable after the probate of this my last will and testament, my executor hereinafter named shall procure a bill to be filed in the proper court of equity, for the purpose of having it declared whether or not it be necessary for the inter-
(626) vention of said trustee; which bill shall be removed into the Supreme Court for final hearing."

"Item. In case my wife die or marry before my son arrives at the age of 21 years, or shall have completed his education, then I desire and request that my brother, Alexander J. Troy, shall see that my son, Alexander, shall be properly educated, the expense of which education I will and direct shall be a charge upon the whole of my property, whether my wife be living or not."

The answer admits the facts alleged in the bill. The cause was set for hearing on the bill and answer.

PEARSON, C. J. The will gives an estate to Mrs. Troy for life, with a remainder in fee to the infant son, subject to a power of sale by her in

respect to all and every part of the property, in the event that, in her judgment, it should be necessary. This is a power *appurtenant* to her life estate; and the estate which may be created by its exercise will take effect out of the life estate given to her, as well as out of the remainder.

A power of this description is construed more favorably than a naked power given to a stranger, or a power *appendant,* because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously than one given to a stranger, or one which does not affect the estate of the person to whom it is given.

From the whole will it is clear the intention of the testator was to confide in the judgment of his wife in respect to the necessity of selling property either to pay his debts or for the support of herself, or for the support and education of their infant son; and for these purposes (as long as she remains unmarried) he gives her as full power to sell as he would have himself if living. There is no reason why this (627) intention should not be allowed to take effect. The apprehension of the testator that, possibly, the power of sale conferred on his wife might be construed "so as to vest in her the absolute title in fee simple" was groundless; for as an estate is expressly limited to her during the term of her natural life, and the remainder in fee is also disposed of, there is no room for construction. It follows that the provisional appointment of a trustee has no legal effect, and the defendant, Alex. J. Troy, has no estate or interest in the property; and these provisions have no other effect than a tendency to show the fullness of the power conferred, and that the object was to give his wife as ample power to sell, if in her judgment it was necessary for the purpose above stated, *as if* she was the absolute owner.

The exercise of the power will vest in the purchaser an estate in fee simple, and he will not be bound to see to the application of the purchase money. That will constitute a fund to be held by Mrs. Troy, in trust for the payment of the debts of her husband, and in trust for the support of herself and the support and education of the infant child. And in such part as may not be required for these purposes she will take a life estate, with the remainder in fee to the child. Like all other trustees, she will be subject to the control of a court of equity in respect to the proper application and management of the trust fund.

There will be a decree declaring the rights of the parties. The costs will be paid by the plaintiff, Mary Troy, out of the assets of the estate.

Cited: Parks v. Robinson, 138 N. C., 271; *Herring v. Williams,* 153 N. C., 235; *s. c.,* 158 N. C., 4, 9, 18; *Mabry v. Brown,* 162 N. C., 221, 223.

(628)

THOMAS C. MILLER, EXECUTOR OF FREDERICK J. HILL, AND OTHERS, v. HENRY A. LONDON AND OTHERS.

(Winst. Eq., 81.)

1. Testator bequeaths slaves to A., B., and C. He directs A., B., and C. to purchase a tract of land, on which the slaves were to live, and to cultivate it. The executors are directed to pay to A., etc., $500 for the purpose of stocking the land.

2. This is a *quasi* emancipation, and is void, independently of the act of 1860, ch. 37.

3. Testator gives to his wife all his slaves except those bequeathed as above stated, and concludes his provision for her by giving her all his "property and estate of kind and description" "which is not hereinbefore or hereinafter excepted or disposed of." This is a special residue, and the slaves intended to be given to A., etc., and the legacies intended for their benefit, belong to the next of kin of the testator (his widow having died) after payment of his debts; for the payment of which they constitute the primary fund.

THIS was a suit removed from the Court of Equity for NEW HANOVER County to this Court for trial.

Dr. Frederick J. Hill died in 1861, having made his will, which has been proved by his executors, of whom the plaintiff Thomas C. Miller is one. The will contains the following disposition: "I will, devise, bequeath, and direct that my executrix and executors hereinafter named purchase in the county of Chatham, North Carolina, 100 acres of land, the location of which I desire my friend, Henry A. London, of Pittsboro, to make, and to be paid for out of my estate. And I give, devise, and bequeth the said 100 acres to my worthy friends, Henry A. London, Frederick S. Davis, William E. Boudinot, and Thomas C. Miller, them and their heirs and assigns; and I also give, devise, and bequeath unto my said friends, etc., my faithful and trusty servant, Charles, and his wife, Louisa, and his son, Jim; and I hereby direct that my executrix and executors pay over to my said friends, etc., out of my estate,

(629) the sum of $500, to be laid out by them in stocking said farm of 100 acres, and that Charles and his wife, Louisa, and their son, Jim, live on said farm and cultivate it."

Another clause of his will is as follows: "I also give, etc., to my wife all my negroes in fee, except Charles and his wife, Louisa, and their son, Jim, hereinbefore disposed of"; and he concludes the provision made for his wife by this clause: "and finally I give, etc., unto my said wife all and every kind and description of property or estate, real, per-

sonal, or mixed, of every kind whatever, of which I may die seized or possessed of, or entitled to, and which is not hereinbefore or hereinafter excepted or disposed of."

The bill was filed for the purpose of having the advice of the court on the parts of the will set out. The answers admitted the facts stated in the bill, and the cause was set for hearing on the bill and answers.

Moore for plaintiffs.
No counsel for defendants.

BATTLE, J. This will was filed by the executors of the late Dr. Frederick J. Hill for the purpose of obtaining the advice and direction of the court as to the true meaning and effect of certain clauses of his will. The case has been fairly presented to us by the plaintiffs' counsel, and we are satisfied that the construction contended for by him is correct.

The bequest in favor of the slaves, mentioned in the pleadings, was manifestly for their *quasi* emancipation, without being carried from the State, and is, therefore, void as being against the often declared policy of the law. See, among other cases, *Lea v. Brown,* 56 N. C., 141. The residuary clause in favor of the testator's wife is shown, by the same case of *Lea v. Brown,* to be a special one, which does not (630) include the slaves nor the legacies intended to be given for their benefit. The effect of this is that the said slaves, and the legacies intended for them, are undisposed of, and go to the next of kin; forming, however, the primary fund for the payment of debts and general legacies. *Kirkpatrick v. Rogers,* 42 N. C., 44; *Swann v. Swann,* 58 N. C., 299.

As the land directed to be provided for the slaves cannot be appropriated for those purposes, it cannot be purchased at all; and this disposes of all the questions asked in relation to it. So far as the money with which the purchase was directed to be made, as well as the money with which it was directed to be stocked, is concerned, it is the same as if the clause was stricken from the will.

The act of 1860, ch. 39, which prohibits the emancipation of slaves by will, need not be invoked in aid of this construction which we have put upon the will, as the result may be the same without it.

A decree may be drawn in accordance with this opinion.

MARGARET H. LANE AND OTHERS v. THOMAS H. LANE, EXECUTOR OF LEVIN LANE.

(Winst. Eq., 84.)

A bequest to grandchildren, or children and grandchildren, *eo nomine*, with a direction for equal division among them, is a gift to them *per capita*.

THIS cause was removed from the Court of Equity of NEW HANOVER. The nature and facts of the case are stated in the opinion of the Court.

(631) *Person for plaintiffs.*
Moore for defendant.

MANLY, J. The bill is filed for the settlement of the estate of Levin Lane, of New Hanover County, and the answer of the executor submits an inquiry in reference to two paragraphs of the will, a proper understanding of which is necessary to enable him to make settlement. The paragraphs are the fifth and sixth, and are in these words:

"5. I give and bequeath unto my grandchildren, the children of my deceased daughters, Eliza, Augusta, Susan, and Virginia, all the rest, residue, and remainder of my negroes, to be equally divided between them, share and share alike, to have and to hold, etc.

"6. It is my will that my plantation be sold by my executors, hereinafter mentioned, and the proceeds of the sale thereof invested for the benefit of my beloved wife, Margaret, during her life; and, upon her death, that the said proceeds be distributed equally between my children, Thomas, Walter, and Margaret, and the children of my deceased daughters, Eliza, Augusta, Susan, and Virginia, share and share alike."

The inquiry is whether, in these paragraphs, the grandchildren take *per capita* or *per stirpes*.

To our minds, the words, in themselves, clearly import a purpose to give *per capita*, and upon an examination of the entire will we find nothing to unsettle this manifest import.

Analogous cases were before this Court in *Hill v. Spruill*, 39 N. C., 244, and *Harris v. Philpot*, 40 N. C., 324, in both of which many auhorities are cited and reviewed. They are decisive of the point that
(632) when a bequest is to grandchildren or children and grandchildren, *eo nomine*, with directions that there shall be an equal division among them, they take *per capita* and not *per stirpes*.

The purpose to give to each of the *individuals* embraced by the language an equal share is more clear in the case before us than in any of the cited cases examined by me, by the addition of the words, "share and share alike," which cannot be satisfied except by equality, *per capita*.

Spivey v. Spivey, 37 N. C., 100, does not conflict with the current of authorities. That case turned upon the force of the word "heirs," and more especially upon a plain intent to be gathered from the context of the will, that the heirs spoken of were, as a class, to account, and be accounted to, for advancements; and that in the settlement of that estate they were to be regarded as an unit.

The Court, then, is of opinion that the division directed in the fifth paragraph of the will should be equally among the grandchildren, according to their whole number, alloting to each an aliquot part.

And that the division directed in the sixth paragraph should be made upon the same principle among the children and grandchildren, according to their whole number, alloting to each an aliquot part.

Let a decree be drawn to this effect; the costs to be paid by the executor, out of the estate.

Cited: Thomas v. Lines, 83 N. C., 199; *Culp v. Lee,* 109 N. C., 677.

NOTE.—As to when the division is *per stirpes,* and when *per capita, vide Grandy v. Sawyer,* 62 N. C., 8; *Harper v. Sudderth, ib.,* 279; *Waller v. Forsythe, ib.,* 353; *Britton v. Miller,* 63 N. C., 268; *Tuttle v. Puitt,* 68 N. C., 543.

JOHN W. PATRICK AND FRANKLIN THOMAS v. ELIAS CARR AND HOOKERTON FEMALE INSTITUTE.

(Winst. Eq., 89.)

A court of equity will not entertain a bill by a purchaser of land at execution sale, against the sheriff, to compel him to convey.

THIS was a demurrer to a bill in the Court of Equity for GREENE. The cause was removed to this Court for argument. The object and allegations of the bill are stated in the opinion of the Court.

Strong for defendants.
No counsel for plaintiffs.

PEARSON, C. J. The demurrer raises the question whether the jurisdiction of a court of equity can be invoked to compel a sheriff who has sold land under an execution (the judgment, and execution, and sale being in all respects regular) to execute a deed to the purchaser, who offers and has always been ready to pay the purchase money; in other words, to *compel a sheriff to do his duty.* This has hitherto been considered the exclusive function of the court under whose authority he acted in making the sale. We are at a loss to conceive under what head of

equity this jurisdiction is supposed to be embraced, in the absence of an argument in support of the equity, or of any reference to a precedent for the exercise of the jurisdiction. The purchaser has a plain, and an adequate, and a speedy remedy at law, by putting the sheriff under a rule.

We can see no special ground for the interference of this Court. It is true, the bill alleges that after the sale, and in fraud of it, the execution continued to be issued, the sheriff having made no return of the sale, and thereupon a second sale was made by the new sheriff, at which sale the old sheriff, one of the defendants in this csae, became the pur-
(634) chaser. But there is no allegation that a deed has been executed to the defendant Carr, the old sheriff. We are inclined to the opinion that if a deed had been executed to him by the new sheriff, in completion of the second sale, that would have been a ground for coming into this Court; for thereby the title would have passed to him as an *individual,* which might have rendered it impossible for him to comply with a rule of the court out of which the execution issued, to make title, under his power of sale as *sheriff,* to the plaintiff; and thereby made it necessary to convert him into a trustee, holding the legal title, on the ground that he had acquired it by fraud.

But there is no allegation that there was a deed to him. So he has not acquired the legal title, and there is no ground for equity to assume jurisdiction in order to convert him into a trustee.

Demurrer sustained, and bill dismissed with costs.

Cited: Skinner v. Warren, 81 N. C., 376; *Fox v. Kline,* 85 N. C., 177.

JOHN COLEY, EXECUTOR OF SCARBOROUGH SPIVEY, v. EDMUND BALLANCE AND OTHERS.

(Winst. Eq., 89.)

1. The general rule is that property given to legatees, who die in the lifetime of the testator, falls into the residue.

2. If property be given to A. until B., an infant, arrives at the age of 21, and then to B., and B. dies under the age of 21, in the lifetime of the testator, A. has an estate in it until B. would have been 21 if he had lived.

3. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship in joint tenancy his share falls into the residue.

(635) THIS cause was removed from the Court of Equity of WAYNE to this Court for trial.

The bill alleges that Scarborough Spivey died in April, 1864, having made her will, of which the plaintiff was appointed executor, and that he has qualified as such.

The material parts of the will are as follows:

1. "I give and devise to Zilpha Ballance one negro woman, named Harriet, to her and her heirs forever."

2. "I give and devise to Ruffin Ballance all the cattle that I have at my death, and their increase, till his son, Tawboro Ballance, arrives at the age of 21 years old; and then I give and devise all the cattle and their increase above named to his son, Tawboro Ballance, and his heirs forever."

3. "I give and devise to Francis Allgood Ballance and Allgood Francis Ballance two beds and bedsteads, to them and their heirs forever."

4. "I give and devise to Ruffin Ballance and Aaron Ballance the residue of my property, of every description, not above mentioned, to them and their heirs forever."

The legatees, Zilpha Ballance, Tawboro Ballance, and Francis Allgood Ballance, died in the lifetime of the testatrix. The plaintiff prays the advice of the court as to the effect of these bequests and the death of the legatees last above named. The answers admit the truth of the facts stated in the bill, and the cause was set for hearing on the bill and answers.

Strong for plaintiff.
No counsel for defendant.

PEARSON, C. J. All of the property embraced in the legacies which lapsed by the death of the legatees falls into the residue. This is the general rule, and there is nothing to take this case out of its application.

2. The cattle and increase fall into the residue, subject to the estate of Ruffin Ballance, until Tawboro would have been 21 years (636) old, if he had lived.

3. The interest of Francis Allgood Ballance in the beds and bedsteads does not survive, but falls into the residue. The effect of the act of the Legislature abolishing survivorship among joint tenants is to change the rule which had in bequests of this kind allowed the whole to pass to the surviving legatee.

Decree according to this opinion; costs to be paid by the executor out of the estate.

Cited: Mabrey v. Stafford, 88 N. C., 604.

NOTE.—Upon the death (before the testator) of a residuary legatee, the real and personal estate given to him lapses for the benefit of the testator's heirs and next of kin. *Robinson v. McIver,* 63 N. C., 645.

SARAH PLOTT v. WILLIAM L. MOODY, EXECUTOR OF AMOS PLOTT.

(Winst. Eq., 91.)

1. A bequest of "all my farming utensils of every description that are not otherwise disposed of" is a gift to the legatee of a wagon used on the farm, and of blacksmith's tools used in doing the work necessary for the farm, and occasionally in doing work for the neighbors, there being in the will no other gift of them specifically, and the will containing no residuary clause, nor any other clause which could pass them.

2. A bequest of "all my present stock of hogs, or that I may have at the time of my death, together with their increase," passes the testator's interest in hogs in his possession at the time of his death, which belonged to the estate of his son, dead intestate and without issue, there being no administration on the son's estate.

THIS was a suit in the Court of Equity for HAYWOOD, removed to this Court, after being set for hearing on bill and answer.

The purpose of the suit as to have a settlement of the estate of Amos Plott.

(637) The only controversy was on the construction of two clauses in the will of Plott.

The opinion of the Court contains a statement of everything relating to the questions decided.

Merrimon for plaintiff.
W. H. Bailey for defendant.

MANLY, J. The bill is filed by the widow of Amos Plott, demanding settlement of her husband's estate. The executor seems to be desirous of making a settlement, but they entertain conflicting views of the disposition which has been made of certain property; and the case is brought to this Court to obtain a construction of the will.

In the fifth clause of his will the testator gives to his wife "all my farming utensils of every description, together with my steel traps and guns, that are not otherwise disposed of." And the question is, whether a *wagon* used on the farm, and blacksmith's tools used in the same way generally, and occasionally in working for neighbors, are embraced in the act. In looking into the will, we find these articles are not *"otherwise disposed of,"* either specifically or by such general terms as could possibly pass them. There is no residuary clause; so that if the articles in question are not embraced in the clause under consideration, there must be an *intestacy* as to them.

A person who undertakes to dispose of his property by will is presumed to intend a complete disposition, unless the contrary be manifest. With-

out, therefore, deciding the force and effect *ex vi termini* of the words "farming utensils," or the extent of their application in other connections or cases, we think in this they embrace the wagon and smith's tools. The words are, at any rate, not of such import as to overrule a manifest intent. And the intent must therefore determine the application. This point seems to have been under consideration in the construction of the will of James P. Doggett (*Elliott v. Poston,* 57 N. C., 433), where it was decided that a wagon would pass under the term *"farming* (638) *utensils,"* nothing appearing to show a different intent.

In the sixth clause he gives to his wife "all my present stock of hogs, or that I may have at the time of my death, together with their increase." It seems that amongst his lot of hogs were a number which had belonged to testator's son, Vernon Plott, then deceased. These he had taken possession of, claiming them as his own as next of kin and distributee of his son; but no administration had at that time been taken. Since the death of the father, administration of the son's effects has been granted to the defendant. The question made is, whether the hogs belonging to the son's estate pass by the bequest in the sixth clause. We think this is a plain matter. It was obviously the intention of the testator to give to his wife all the hogs of which he was in possession, and to which he set up a claim, at the time of his death; and *all,* we think, will pass by the terms of the will. Of course, the testator could only transfer such rights as he had; and as his right to a portion of the hogs was subject to such powers as an administrator might previously exercise in relation thereto, the wife took, under the bequest, no more than a right to call on the administrator for the hogs or their value. It can make no difference, it seems to us, whether the right of the testator to the hogs was legal or equitable; that right, whatever it was, would pass.

Having thus decided the rights of the respective parties in the matters of controversy, we suppose they can have no difficulty in settling the estate.

There may be a decree declaring their rights, and, if either party desires it, a decree for an account; costs to be paid out of the estate.

(639)

WALTER P. CALDWELL AND OTHERS v. LEONIDAS COWAN AND ROBERT Z. COWAN.

(Winst. Eq., 94.)

None can take a distributive share of an intestate's estate, with his next of kin, by force of the act of 1862-3, ch. 49, but those who, by representing an ancestor, can put themselves in the same degree of kindred to the intestate as his next of kin.

THIS cause was removed from the Court of Equity of ROWAN to this Court.

The purpose of the suit was to have a distribution of the personal estate of J. Pinckney Cowan, who died intestate in May, 1863. The plaintiffs are the brother and sister of the intestate's mother, the sisters of his father, the grandchild of a deceased brother of the intestate's father, and the children of deceased sisters of his father, who claimed a right to distributive shares with the defendants, who are the children of a deceased brother of the intestate.

Sharpe for plaintiffs.
Boyden for defendants.

PEARSON, C. J. The act of 1862-'3, ch. 49, ratified 12 February, 1863, which repeals the proviso of section 2 of the Statute of Distributions, "In the distribution of the estates of intestates there shall be admitted among collateral kindred no representation after brothers' and sisters' children" (Revised Code, ch. 64), will, in cases to which it has application, make a very important change in a long established rule of law, and let in remote kindred who have heretofore been excluded for the purpose of avoiding the inconvenience of splitting up estates of personal property into so many parts.

This change in the law is only made when, by the right of representation, and taking the place of an ancestor, a party can bring him-
(640) self up to an equality with others who claim the estate. For instance, if there be a brother, or children of a deceased brother, and *grandchildren* of another deceased brother, the latter will, by this change of the law, be able to bring themselves up to an equality, and take the share their ancestor would have taken if living. So if there be an uncle, and children of a deceased uncle, the latter, although excluded by the old rule, will now take a share by representation.

In the case under consideration there is no change in the law; for the right of representing an ancestor, however remote, will not bring up the other claimants to an equality with the defendants, who are the children

of a deceased brother of the intestate; for by representing their grandfather, who was the father of the intestate, they are in *one degree* of the intestate; whereas none of the others can, by representing any ancestor, bring themselves nearer than two degrees.

Allow the brother and sister of the intestate's mother to represent their father; he was the grandfather of the intestate on the mother's side: that leaves them two degrees removed, if standing in place of their ancestor. Allow the grandson of the intestate's uncle to represent his great, great grandfather; he was the grandfather of the intestate: that leaves him two degrees removed. Or allow the children of intestate's aunts to represent their grandfather; he was the grandfather of intestate: and that leaves them two degrees removed after their right of representation is carried as far as it will reach.

The defendants are, therefore, entitled, being the nearest of kin; and the unlimited right of representing an ancestor cannot, in this instance, aid the other claimants.

Let the bill be dismissed at plaintiffs' costs.

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(641)

DAVID V. McCRACKEN v. JAMES R. LOVE.

(Winst. Eq., 96.)

A statement, in a bill for the sale or partition of lands and an account of the rents and profits received by the defendant, that the defendant "has received the rents and profits and appropriated them to his own use and benefit," does not imply that the defendant is possessed adversely to the plaintiff, and is, therefore, no cause of demurrer.

THIS cause was removed from the Court of Equity of HAYWOOD to this Court for argument, upon a demurrer to the bill.

So much of the pleadings as is necessary to the understanding of the case is stated in the opinion of the Court.

W. H. Bailey for defendant.
No counsel for plaintiff.

MANLY, J. The bill is filed to obtain from the defendant an account of the profits of certain land which, it is alleged, the parties hold as tenants in common; and to obtain a sale, or a division of the same, in accordance with the rights of the parties, which are set forth.

A general demurrer to the bill is put in, which, we are informed, is based upon a supposed allegation in the bill that the defendant is in adverse possession, claiming to be sole seized of the lands.

We have examined the bill, and do not find anything which can bear such an interpretation. The words relied upon are these: "Your orator further showeth that the said James R. Love has received the rents and profits arising from said lands, and has appropriated the same to his own use and benefit."

This is but the common language of one tenant in common, who thinks his cotenant has wronged him by the reception of profits, and by no means implies a denial by the defendant of the plaintiff's interest in the land and rights to any profits.

(642) The defendant may plead that he is sole seized, and thus bring forward the matter which he is endeavoring here to interpose to prevent a partition; but the pleadings are not now in a condition to raise any such point. The demurrer must be overruled, and the defendant required to answer.

ABRAHAM SCOTT v. WILLIAM MOORE AND OTHERS.

(Winst. Eq., 98.)

1. The word "children" in the grant of a remainder, after the death of A., to *her children* living at her death, embraces *grandchildren*, if other parts of the conveyance show that it was the intention of the grantor to provide for grandchildren.

2. An additional reason for this construction is furnished by the fact of such a provision being made in a marriage settlement.

THIS was a cause removed from the Court of Equity of GASTON to this Court for trial.

In 1816 Mary J. Scott, a widow, living in Lincoln County, married John Moore of the State of Georgia. Before the marriage, and in contemplation of it, the parties, together with Logan Henderson, executed a deed of this tenor, viz.: "This indenture triparte, made this 29 July, 1816, between, etc., witnesseth: That whereas a marriage is intended shortly to be had between the said John Moore and Mary Scott, and upon the treaty of the said marriage it was agreed that previously to the marriage Mary Scott should assign and make over the following negroes, with their increase, which are the property of Mary Scott, to Logan Henderson, upon the trusts hereinafter expressed: Now, this in-

denture witnesseth, that in consideration of the intended marriage and in performance of that agreement, Mary Scott does hereby sell and assign to the said Logan Henderson the following negro slaves, to wit, Candis, etc., to hold them upon the trusts and for the inter- (643) ests herein expressed, to wit: that he will permit John Moore and Mary Scott to take into their actual possession the said negro slaves, and possess and use them for their joint lives, and also for and during the life of the survivor of them; and upon the further trust, that immediately after the deaths of John Moore and Mary Scott, he will divide the said slaves and their increase fairly and equally, having regard to their value, among all the *children of the said Mary Scott* that may be *then alive,* share and share alike, as well those children that may be the issue of the intended marriage with the said John Moore; but if it should so happen that there be not any issue of the intended marriage, then the whole of the said negro slaves and their increase to be divided between the present children of Mary Scott; and in case it should so happen that Mary Scott should survive John Moore, the trustee shall permit Mary Scott to dispose of one-half of the negroes and their increase; provided she dispose of them to and among her children that may then be alive, or among the children of such children as may then be alive, or that may be alive at the time she makes such disposition, or to any one of her children or grandchildren; and upon the further trust, in case Mary Scott should survive John Moore, and she should have no child nor grandchild, the negroes and their increase shall be subject to the disposition of Mary Scott by her last will or otherwise; and if she should die without making any disposition of them, the same shall descend to her heirs at law; and if John Moore should survive Mary Scott, and, at the time of his death, there should not be a child or grandchild of Mary Scott then living, the slaves and their increase shall descend to the right heirs of Mary Scott, according to the statute of distribution in the State of North Carolina."

Mrs. Moore, at the time of her marriage with Moore, had one (644) child by her first marriage, the plaintiff. By her second marriage she had two children—Lee Moore and Elizabeth Moore—who survived their father, but died in the lifetime of their mother, leaving children (the defendants) who were alive at the time of her death. Mrs. Moore made no disposition of the property during her second widowhood.

The plaintiff claimed the whole of the property, he being the only *child* of his mother living at her death. The defendants contended that the word *"children,"* in the direction to the trustee how ot dispose of the property on the deaths of Moore and his wife, embraced *grandchildren.*

Henderson, the trustee, never possessed any part of the property, or exercised control over it, and removed from this State many years ago; and it was generally supposed that he died in the State of Tennessee; but that fact had not been ascertained, and the parties had no information whether he died testate or intestate, if he were dead.

Besides special prayers for relief, according to the plaintiff's claim to the whole property, there was a general prayer for such relief as the plaintiff was entitled to under the marriage settlement, in the existing state of facts.

Winston, Sr., for plaintiff.
W. H. Bailey for defendants.

MANLY, J. The object of the bill is to get a construction of the marriage settlement between John Moore and Mary Scott entered into shortly before their intermarriage.

The deed provides that, "after the death of both, the slaves therein conveyed shall be equally divided between all the children of the said Mary Scott that may be then alive, share and share alike, as well former chidren as those born of the intended marriage." It seems the (645) event upon which this disposition is made of the slaves has happened. Both are dead, without making effectual disposition of any of the property, and it remains to be divided according to the deed.

Mary Scott, who was a widow at the time of her intermarriage with Moore, had one child, who survives her, and is the present plaintiff. She had two children by her second marriage, Elizabeth and Lee Moore, both of whom died before her, leaving children. The family of Fites, mentioned as defendants, are the children of Elizabeth, and William and Maria Moore are the children of Lee.

In this condition of the family the question is, whether Abraham Scott, the surviving child, takes the whole, or whether the grandchildren, the children respectively of Elizabeth and Lee, take parts.

A consideration of the whole deed satisfies us that the grandchildren may, according to the manifest intent, come under the designation of children, and take shares. One provision of the deed is, in case the intended wife shall survive, she shall have, with regard to a portion of the negroes, a power to dispose of the same to and among her children and *grandchildren,* at will. Another provision is, in case the wife survives and dies without leaving child or *grandchild,* any disposition which she shall make of the property by will shall be good.

In this last provision there is a necessary implication that if she had, in that contingency, left a grandchild, it would take according to their

understanding of the deed. Both show that grandchildren, as well as children, were in the minds of the parties, and regarded as proper objects to be provided for.

Another consideration may be added, arising out of the particular kind of deed before us. One of the principal objects of a marriage settlement (it seems to be so of this) is to provide for offspring, all of whom must be equally the objects of bounty, as none can have forfeited (646) it or placed himself in a situation to dispense with it. There is the greater reason, therefore, for construing this class of deeds, in case of ambiguity, in such way as to accomplish equal justice amongst offspring and satisfy natural affections.

The Court is of opinion that the grandchildren are embraced within the provision of the deed for children who shall survive; but as they come in upon the principle of representation, they must come in as classes, and take only the shares to which their parents would have been entitled had they survived.

Let a decree be drawn declaring these rights, and appointing commissioners to make division accordingly.

The costs must be paid by plaintiff from the estate.

Dist.: Carson v. Carson, 62 N. C., 59; *Powell v. Morisey,* 98 N. C., 430.

NOTE.—When it appears from other parts of a will that the testator understood the distinction between "children" and issue more remote, grandchildren and great-grandchildren cannot be included in a division directed to be made among children. *Boylan v. Boylan,* 61 N. C., 160.

THOMAS J. WILSON, EXECUTOR OF A. J. STAFFORD, DECEASED, v. CORNELIA S. STAFFORD AND OTHERS.

(Winst. Eq., 103.)

1. A widow's dissent from her husband's will, by which his estate was made a common fund for the support of herself and his children, until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate.

2. The administrator of a child, who has died since the testator, is entitled to the share of the deceased child.

3. If property be given by will to the testator's widow for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession.

(647) THIS cause was transferred to this Court for trial from the Court of Equity of FORSYTH.

The bill was filed by the plaintiff as executor of A. J. Stafford, and prayed the advice of the court as to the construction and execution of his will.

The material parts of the will are:

"3dly. It is my desire that all such personal property as may not be essentially necessary for the use of my family be sold at public sale, and my lots in Winston, except the one whereon I now reside, if there can be anything like a fair price obtained; if not, to be rented. The other lands, to wit, the Britz place and the Wilson field, to be kept for the benefit of the family, if thought best.

"4thly. It is my will and desire that my family carriage, with the harness, be kept for the use of the family; also two horses, farming tools, etc.; also my negroes to either be hired out or worked on the plantation as thought best; but if either of them should become insolent or unmanageable, then to be sold and the money put at interest for the benefit of my family.

"5thly. I wish all such property to be left with my family that they may think necessary to carry on the business, and nothing to be sold except such as may be of little use and the family make out without it.

"6thly. After this provision for my dear wife and family, if she should think best and proper to marry again, then and in that case I desire that all my property, either real or personal, shall be sold or divided equally between my surviving children, to share and share alike. It is my wish that my children, that are too small to be put at some business, be left with my wife until they are old enough to be put at business of some kind, and not to be permitted to grow up in idleness.

"7thly. I desire, if my estate should appear sufficient, at the age of 21, my sons shall receive $500, if they are steady, etc.

(648) "8thly. It is my will and desire that as long as my beloved wife remains my widow, to be well provided for, and never to want any of the necessaries of life, if there is a sufficiency to make her and family comfortable, but not by any means to be extravagant.

"9thly. It is my will that my daughters receive, at their marriage or full age, the like sum of $500, etc.

"10thly. My desire is that at the marriage of my dear wife, or her death, that all of my money or property of every kind be either sold or divided, as may be agreed upon by my children, to share and share alike; and if any of them should die leaving heirs, for them to receive the share or shares of their deceased parents."

The testator died in 1862, leaving his wife and eight children surviving him. Two of the children have since died under age, and without issue.

The widow dissented from the will, and has had dower assigned her. The testator's personal property consisted of cash on hand, securities for money, seven negroes of unequal ages and values, and various other articles.

The defendant J. M. Stafford is the administrator of one of the deceased children, and the defendant Cornelia is the administratrix of the other.

Phillips for plaintiff.
No counsel for defendants.

BATTLE, J. The main, if not the only, difficulty in the will which is now presented to us for construction has arisen from the dissent of the widow from it. The whole scope of the will prior to the tenth item, in providing for the testator's family, is manifestly framed upon the supposition of the continued existence of his wife as a widow. He foresaw that her death or marriage would entirely derange his (649) plans, and he therefore declares, in the tenth item, that should she die or marry, his desire was that all of his money, and all of his property of every kind, should either be sold or divided, as might be agreed upon by his children, each taking an equal share.

There was another event which might happen, and which if it did occur would as effectually break up his family arrangement as either of the other two, but which he seems not to have anticipated, and therefore made no provision against it. This was the dissent of the widow and her claiming her share of the property as if he had died intestate. The effect of this upon the disposition made for his children in the will must, after the assignment of her dower and the giving her an equal part with the children, of the personal estate, be the same as if she had died or married. The executors must, therefore, proceed to dispose of the property as directed by the tenth clause of the will. The administrator and administratrix of the children who have died since the death of their father will be entitled to their respective shares of the personal estate. The case of *Adams v. Gillespie*, 55 N. C., 244, shows that where there is the legacy of a slave to a wife for life, with remainder, the dissent of the widow will hasten the vesting in possession of the remainder.

The plaintiff may have a decree in accordance with this opinion.

NOTE.—The decree declares that "upon the dissent of Cornelia S. Stafford, the widow of the testator, the personal estate in the hands of the plaintiff as executor became subject to distribution among the widow and next of kin of the testator, as *if he had died intestate*." And it is adjudged and decreed that "the plaintiff pay her one-ninth part of said estate remaining after pay-

ing the debts of the testator and the costs and charges of administration, to be held by her in her own right, and one other ninth part to be held by her as administratrix," etc. And the cause is retained with liberty to any of the parties to apply for further direction therein.—*Reporter.*

Cited: Baptist University v. Borden, 132 N. C., 485, 506.

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(650)

JOHN M. HORAH, ADMINISTRATOR, WITH THE WILL ANNEXED, OF GEORGE HORAH, v. SOPHIA HORAH, WILLIAM H. HORAH, AND OTHERS.

(Winst. Eq., 107.)

1. The personal representative has no right to ask the advice and direction of the court in the settlement of the estate of the deceased, except as to matters in which he is interested *as* executor or administrator.

2. A legatee for life or years is not bound to give a bond for the benefit of remaindermen, unless it is shown that there is danger of the property being wasted or eloigned.

THIS cause was transferred to this Court for trial from the Court of Equity of ROWAN.

The bill was filed by the administrator, with the will annexed, of George Horah against the testator's widow, and his brothers and sisters and the children of deceased brothers and sisters. It sets out a clause of the testator's will by which he gives his estate to his wife, the defendant Sophia, for life, with remainder to the other defendants; and the same clause provides that the defendant James shall have a certain house and lot given to the defendant Sophia, upon his (James) paying to her $4,000; and the bill states that controversies have arisen among the defendants concerning the right of the defendant Sophia to receive property given to her, without giving a bond with surety for the benefit of the remaindermen; and also concerning the right of the *heirs* of James (who is dead) to have the lot on payment of the $4,000; and it is also a matter of controversy between the administrator of James and his heirs, which of them must pay the money. The plaintiff asks the advice and direction of the Court concerning these several matters.

W. H. Bailey for plaintiff.
Blackmer for defendants.

(651) BATTLE, J. This bill has been filed by the administrator, with the will annexed, of the testator, against the devisees and legatees, to obtain the advice and direction of the Court in relation to his duties in the settlement of the estate.

It has been repeatedly declared by the Court that, upon such a bill, it will give no advice and direction upon any matter in which the executor is not interested as such. In the will now before us the whole estate of the testator is given to the widow for life, with certain limitations among the testator's brothers and sisters. The only question asked by the administrator with the will annexed, in which he is interested, is whether the widow can be required to give a bond as a security for the personal estate, which she takes for life only; and it is clearly settled that she cannot. See Williams on Executors, 1, 198. Unless a case of danger can be shown, she can only be called upon to sign and deliver to the executrix an inventory of the articles, admitting their receipt, expressing that she is entitled to them for life, and that afterwards they belong to the remaindermen. The assent of the executor to the legacy for life will vest the interest in remaindermen, which they must take means to protect, should they find that it is likely to be endangered by the act of the tenant for life. So any questions which may arise between the remaindermen as to their respective rights in the property must be settled in a suit among themselves, as the executor will have no interest in it, and will not be allowed to meddle with it.

A decree may be drawn in accordance with this opinion, but the plaintiff must pay the costs, as there was no necessity for his bill.

Cited: Bass v. Bass, 78 N. C., 375; *Whitehead v. Thompson,* 79 N. C., 454.

(652)

ARCHIBALD BAKER v. MARY ANN EVANS, EXECUTRIX OF THOMAS N. McLERAN.

(Winst. Eq., 109.)

The performance of a trust created by a conveyance of property to a trustee for the use of an insolvent person upon an inadequate consideration, or gratuitously, will be enforced against the trustee, at the suit of the *cestui que trust.*

THIS cause was transferred to this Court for trial from the Court of Equity for CUMBERLAND.

The facts are stated in the opinion of the Court.

Leitch for plaintiff.
No counsel for defendant.

MANLY, J. The facts as established by the pleadings and proofs are that the land of complainant being sold under execution for debt, was

purchased by Daniel McMillan for the small sum of $10. The purchaser was afterwards induced, through the representations of neighbors, to compassionate the condition of complainant and to convey the land to Thomas N. McLeran for the consideration of $25, the said McLeran agreeing to hold the land in trust for the benefit of plaintiff. At the same time some other small effects were conveyed in augmentation of the trust fund.

After the lapse of a few years, McLeran concluded, for the more convenient management of the trust property, to sell the land and to hold the proceeds thereafter as an interest-bearing fund. He accordingly sold for $750 and took the bond of the purchaser.

It seems that at the time of the execution sale, and since, down to the time of the sale to McLeran, the complainant was indebted to a larger amount than he could pay.

After the death of McLeran, the validity of the trust being denied by his executrix, complainant filed his bill, setting forth the above
(653) facts and praying for an account of the funds and the paying the balance found to belong to the same into the hands of Geddie, as a trustee.

The answer of the executrix, Mary Ann Evans, does not deny the above state of facts in any material particular, but makes the point, whether an arrangement made as his was, for the ease, favor, and comfort of a debtor, is a trust which will be enforced in the courts.

Such is the case presented, and, upon proper consideration of it, we see no reason why the trust should not be enforced. No injustice has been done to creditors. A *bona fide* and indefeasible title was acquired by McMillan through his purchase, and it was entirely competent for him to do with it as he pleased—to keep it, or to convey it away; to convey it either with or without full consideration, and either with or without conditions or trusts annexed thereto. When, therefore, McMillan responded to the call made on his pity, and assigned over the benefit of his purchase to Baker in such a way as to secure it from seizure by his creditors, he conferred, it is true, a benefit upon the debtor, but did no wrong to the creditor, for it was not at his expense. The advantageous bargain which he assigned over had not been acquired by any covinous or fraudulent contrivance or understanding between the debtor and purchaser. The sale was by execution, and the purchase was in good faith for the purchaser's benefit. That he afterwards changed his mind and made an almost gratuitous conveyance of it for the benefit of complainant, is no discredit, but is a transaction eminently fit to be enforced. There is no rule of law or equity which forbids liberality among men, provided they are liberal with their own, and do no injustice to the rights of others.

Whether the fund may not be reached by creditors upon proper proceedings, instituted for this purpose, we express no opinion, as such question is not now before us. (654)

This Court is of opinion the plaintiff is entitled to an account of the trust fund, to the end that it may be put into the hands of the proper trustee for plaintiff's use.

Let there be a decree for an account.

Cited: Ferguson v. Haas, 64 N. C., 778.

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ACCOUNT.

In taking an account under a decree which directed that the mortgaged property in possession of the mortgagee should be retained by him in satisfaction of the mortgage debt at a valuation to be fixed by the clerk, the valuation must be made according to what the property would bring in specie. *Bowers v. Strudwick*, 612.

ACTION ON THE CASE.

Where it had been made to appear by the plaintiff's testimony that his horse had been injured on a railroad, by the running of a train against the animal, and it was left doubtful, from the defendant's testimony, whether the brakes had been applied to the wheels of the train after the horse was seen on the track, it was *held* that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled. *Clark v. R. R.*, 109.

ADMINISTRATORS. See Executors and Administrators.

AGENCY.

Authority from the husband to his wife, to sell a negotiable bond and deliver it to the purchaser, may be inferred from circumstances. *Edwards v. Parks*, 598.

APPEAL.

1. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for some irregularity in the judgment of the county court, it was *held* that all such objections were considered as waived by the delay and acquiescence. *Johnson v. Murchison*, 286.

2. Every court must enforce its own rules; and, therefore, it is not a ground for dismissing an appeal from the Superior Court that the county court failed to enforce a rule made by itself incidentally in the progress of a cause. *Ibid.*, 286.

3. An administrator has a right to appeal from an order of the county court affirming the year's allowance made to the widow. *Saunders v. Russell*, 97.

4. Where, on a petition for the partition of slaves, the county court ordered that partition should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed and the division ordered in different proportions, it was *held* that the Superior Court was not in possession of the whole case, by the appeal, and that a *procedendo* to the county court was proper. *Millsaps v. McLean*, 80.

5. Where the object of a writ of *habeas corpus* is to inquire whether there be probable cause for commitment, the decision on it is not the subject of review by writ of error or *certiorari*. *Walton v. Gatlin*, 310.

APPEAL—*Continued.*

6. Where the question on a writ of *habeas corpus* is concerning the power of the committing magistrate or court, or the legality of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

7. The decision on a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and the subject of review by a writ of error or *certiorari*. *Ibid.*, 310.

8. The Supreme Court has the power to review the action of the Superior Courts, and of the judges in vacation, upon questions of law in all cases under section 10 of the *Habeas Corpus Act*. *Ibid.*, 310.

9. A principal cause of challenge involves matter of law, and the decision upon it in the court below may be reviewed, upon appeal, in the Supreme Court. *Blake v. Harris*, 271.

10. The Superior Court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision, in pursuance of sec. 63, ch. 31, Rev. Code, or when it is offered to be read in evidence on a trial; therefore, an appeal under ch. 4, sec. 23, of Rev. Code, from the decision of a judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways. *Hix v. Fisher*, 474.

ARBITRATION AND AWARD.

1. Parol evidence is admissible to show what matters are submitted to arbitration, and what matters are brought to the notice of arbitrators. *Walker v. Walker*, 255.

2. An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision. *Ibid.*, 255.

ASSAULT AND BATTERY.

1. A husband cannot be convicted of a battery on his wife unless he inflict a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement. *S. v. Black*, 262.

2. It is not the belief, simply, of a man that he is about to be stricken, which will justify him in striking first, but his belief founded on reasonable grounds of apprehension. *S. v. Bryson*, 476.

3. One who seeks a fight, or provokes another to strike him, cannot justify returning the blow on the ground of self-defense. *Ibid.*, 476.

ATTACHMENT.

A. dies intestate, seized of land in fee simple in this State, which descends to her heir at law resident in another state. His creditors here sue out attachments which are levied on the land, and final judgments are obtained therein and writs of *venditioni exponas* issued. The land is sold by B., the administrator of A., under an order of the county court, for the payment of the debts of the intestate. After payment of them, the administrator is bound in equity to pay the

ATTACHMENT—*Continued.*

residue to the creditors who attached the land, notwithstanding that the administrator has paid it by order of the nonresident debtor to another *bona fide* creditor. *Sloan v. Mendenhall*, 553.

AWARD. See Arbitration and Award.

BAIL.

1. If a sheriff fail to take bail, the plaintiff need not file exceptions nor give notice, to fix him as bail. *Adams v. Jones*, 198.

2. A sheriff fails to take bail when the paper returned by him as a bail bond is so defective and imperfect as to be adjudged not to be such. *Ibid.*, 198.

BEQUEST.

1. A testator in 1819 bequeathed to his daughter a negro woman in the following words: "to her and her heirs of her own body forever; and if none, to return after her death to the rest of my children equally." The limitation over to the testator's other children is not too remote. *Blake v. Page*, 252.

2. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together and not to *hand over* any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed." *Held*, the last clause has relation only to what is given in the residuary clause. *Patton v. Patton*, 572.

3. Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property. *Turner v. Kittrell*, 589.

4. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold and the money equally divided among his children; it was *Held*, that by the direction to sell, the land is converted into personalty. *Ibid.*, 489.

5. One of the daughters of the testator died after the testator, in the lifetime of his widow, leaving a husband surviving. *Held*, that as her administrator, he is entitled to one-seventh of the money arising from the sale of the property given to the widow for life. *Conly v. Kincaid*, 594.

6. A bequest in these words (after a bequest to A., a daughter of Mary Pickett): "I give and bequeath to all the rest of my nieces, Mary Pickett's children, that she now has, or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands, etc.," Mary Pickett having, at the same time when the will was made, no other daughter than A., but two sons, is a gift to all the *children*

BEQUEST—*Continued.*

of Mary Pickett which she then had (except A.) or might at any time thereafter have, whether in the lifetime of the testatrix or after her death. *Pickett v. Southerland*, 215.

7. Testator bequeaths slaves to A., B., and C. He directs A., B., and C. to purchase a tract of land, on which the slaves were to live, and to cultivate it. The executors are directed to pay to A., etc., $500 for the purpose of stocking the land. This is a *quasi* emancipation, and is void, independently of the act of 1860, ch. 37. *Miller v. London*, 628.

8. Testator gives to his wife all his slaves except those bequeathed as above stated, and concludes his provision for her by giving her all his "property and estate of every kind and description" "which is not herebefore or hereafter excepted or disposed of." This is a special residue, and the slaves intended to be given to A., etc., and the legacies intended for their benefit, belongs to the next of kin of the testator (his widow having died), after payment of his debts; for the payment of which they constitute the primary fund. *Ibid.*, 628.

9. A bequest to grandchildren, or children and grandchildren, *eo nomine*, with a direction for equal division among them, is a gift to them *per capita*. *Lane v. Lane*, 630.

10. The general rule is that property given to legatees, who die in the lifetime of the testator, falls into the residue. *Coley v. Ballance*, 634.

11. If property be given to A. until B., an infant, arrives at the age of 21, and then to B., and B. dies under the age of 21, in the lifetime of the testator, A. has an estate in it until B. would have been 21, if he had lived. *Ibid.*, 634.

12. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship his share falls into the residue. *Ibid.*, 634.

13. A bequest of "all my farming utensils of every description that are not otherwise disposed of" is a gift to the legatee of a wagon used on the farm, and of blacksmith's tools used in doing the work necessary for the farm, and occasionally in doing work for the neighbors; there being in the will no other gift of them specifically, and the will containing no residuary clause, nor any other clause which could pass them. *Plott v. Moody*, 636.

14. A bequest of "all my present stock of hogs, or that I may have at the time of my death, together with their increase," passes the testator's interest in hogs in his possession at the time of his death, which belonged to the estate of his son, dead intestate and without issue, there being no administration on the son's estate. *Ibid.*

15. A widow's dissent from her husband's will, by which his estate was made a common fund for the support of herself and his children until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate. *Wilson v. Stafford*, 646.

BEQUEST—*Continued.*

16. The administrator of a child who has died since the testator is entitled to the share of the deceased child. *Ibid.*, 646.
17. If property be given by will to the testator's widow, for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession. *Ibid.*, 646.
18. These words in a will, "I give to my daughter Susannah, four slaves, named, etc., to her and her heirs. *Provided, nevertheless,* if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of the country," do not import a *condition* that Aaron shall return to this country. *Harris v. Hearne*, 481.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An indorsement of a negotiable bond by the payee, in this form, "Eli Olive for sixty days, 19 November, 1858," imposes no liability on the indorser after the expiration of the limited time. *Johnson v. Olive*, 231.
2. A negotiable bond for a certain sum of money, payable to A. or order, with interest from a day preceding its date, is payable immediately, although it purports to be given for the price of bricks to be delivered at a subsequent day. *Watson v. Bledsoe*, 249.
3. Payment of the money due on a bill of exchange, promissory note, or bond for the payment of money, negotiable as a bill, etc., by the person liable to pay, to him who has *bona fide* possession of the instrument as a purchaser of it, though without indorsement, discharges the debt. *Edwards v. Parks*, 598.
4. Authority from the husband to his wife to sell a negotiable bond and deliver it to the purchaser, may be inferred from circumstances. *Ibid.*, 598.

BURDEN OF PROOF. See Evidence.

BURGLARY.

1. A charge in a bill of indictment that the prisoner committed a burglary by feloniously breaking and entering into the dwelling-house of the prosecutor with intent to steal his goods is supported by proof that his intent was to rob the prosecutor. *S. v. Cody*, 197.
2. If a man breaks and enters into a dwelling-house by night with intent to commit a felony, the crime of burglary is consummated, though after entering the house he desists from an attempt to commit the felony, through fear or because he is resisted. *S. v. McDaniel*, 245.
3. The intent to commit a felony may appear from antecedent circumstances, and if there be a forcible entry into the house in the night, the intent so appearing, it is burglary. *Ibid.*, 245.
4. It is not burglary to break and enter a smokehouse thirty-five steps from a dwelling-house, which has no inclosure around it. *S. v. Jake*, 471.
5. A log cabin belonging to the owner of a tobacco factory, in which the superintendent of the factory usually sleeps, is a dwelling-house in which burglary may be committed. *Ibid.*, 471.

CARTWAY.

1. Where the applicant for a cartway over the land of another has already one or more convenient rights of way over the land of another to the public road or other public place to which he seeks access, his application shall be rejected, and if an order for a cartway has been previously obtained, the cartway will be discontinued on the petition of the owner of the land under sec. 38 of ch. 101, Rev. Code. *Plimmons v. Frisby*, 200.

2. If there be two private ways, though not cartways, leading from the land of a petitioner for a cartway, under ch. 101, sec. 37, Revised Code, to the public road to which he seeks access, and if the petitioner have also by a parol license an unobstructed passage through the lands of a third person to the public road, the petitioner is not entitled to have a cartway laid off for him, unless it appear to the court trying the case that notwithstanding such private ways and license it is "necessary, reasonable, and just" that the petitioner should have it. The inference from evidence tending to show that a way over and through a man's land is a public road may be rebutted by evidence of nonuser for more than twenty years. *Burgwyn v. Lockhart*, 264.

CERTIORARI.

1. Where the object of a writ of *habeas corpus* is to inquire whether there be probable cause for commitment, the decision on it is not the subject of review by a writ of error or *certiorari*. *Walton v. Gatlin*, 310.

2. Where the question on a writ of *habeas corpus* is concerning the power of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

3. The decision of a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and the subject of review by writ of error or *certiorari*. *Ibid.*, 310.

4. The Supreme Court has the power to review the action of the Superior Courts, and of the judges in vacation, upon questions of law in all cases under section 10 of the *Habeas Corpus Act*. *Ibid.*

CLERK.

A clerk can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years, where he has *admitted money to be due* in the manner prescribed by section 1 of chapter 73, Revised Code. *Summey v. Johnston*, 98.

COMMISSIONERS FOR LOCATING A COUNTY-SEAT.

Where commissioners are appointed by an act of Assembly to "select and determine a site for the permanent seat of justice" in a county, and are directed, when they have selected a site, to give notice thereof to other commissioners appointed by the same act, for the purpose of acquiring title to the site selected, the commissioners for location may make a conditional selection; and if the condition be broken by the owner of the land selected as the site, the commissioners may make a new selection. *Herbert v. Sanderson*, 277.

CONDITION.

These words in a will, "I give to my daughter Susannah four slaves, named, etc., to her and her heirs: *Provided, nevertheless*, if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of the country," do not import a *condition* that Aaron shall return to this country. *Harris v. Hearne*, 481.

CONFESSION.

Where a person suspected of murder was arrested and brought before a jury of inquest as a witness, and subjected to a rigid examination, it was *held* that this examination was not competent evidence against him on a trial for the offense. *S. v. Young*, 126.

CONSCRIPTION.

1. A person liable to military service, as a conscript, under the act of Congress of April, 1862, and who, by virtue of section 9 of the act, regularly procured a discharge by furnishing a proper substitute, cannot again be enrolled as a conscript under the act of September, 1862. *In re Bryan*, 1.

2. Soldiers who had been "placed in the military service of the Confederate States in the field," under the conscription act of April, 1862, and were so at the time of the passage of the exemption act of 11 October, 1862, were *held* not to be entitled to exemption under that act. *In re Guyer*, 66.

3. But where a blacksmith, after being so enrolled, was at the time of the passage of the exemption act not so placed in service in the field, but was detailed to work on a Government contract, and did so work at his trade, at accustomed wages, not having received any bounty, pay, rations, or clothing up to that time, it was *held* that he was entitled to exemption. *Ibid.*, 66.

4. The conscription act requires that the trade on which the claim of a mechanic to exemption is based shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times. *In re Grantham*, 73.

5. A schoolmaster whose occupation had been suspended for twelve or eighteen months, within the term required for his previous pursuit of the business, is not entitled to an exemption under the act of Congress, passed on 11 October, 1862. *In re Dollahite*, 74.

6. A person who has been *drafted*, and who had put in a substitute that was accepted by the officer appointed to act on that business, was *held* not liable to be conscripted under the act of September, 1862. *In re Ritter*, 76.

7. The circular of the War Department, dated 20 October, 1861, allowing substitutes to be received after the companies were formed and actually in the service, applies, by a liberal construction, to companies while in the condition of being formed and organized or recruited; and when a substitute is received under the latter circumstances several of the formalities for obtaining a discharge become immaterial. *Ibid.*, 76.

CONSCRIPTION—*Continued.*

8. The applicant held, by *Judge Pearson* in vacation, to be exempt from conscription, upon the ground that he was an overseer on a farm where twenty hands or more were worked. *In re Huie*, 165.

9. The applicant held, by *Judge Pearson* in vacation, to be exempt from conscription upon the ground of having fairly and *bona fide* furnished a substitute under the act of Congress, passed for that purpose. *In re Boyden*, 175.

10. The applicant held, by *Judge Pearson* in vacation, liable to military service under the conscription act by becoming a substitute, though he was previously exempt as a minister of the gospel. *In re Curtis*, 180.

11. The applicant was held, by *Judge Pearson* in vacation, to be exempt from conscription upon the ground of his being a militia officer, though he was such in the county of Yadkin, in which county the Governor of the State had ordered that the militia officers should be arrested as conscripts. *In re Fisk*, 186.

12. The applicant was held, by *Judge Pearson* in vacation, to be exempt from conscription, by having put in a substitute, though such substitute was under 18 years of age, and had afterwards arrived at that age, as this transaction occurred before the passage of the conscription act calling into service persons between the ages of 18 and 35. *In re Prince*, 195.

13. The acts of Congress of 5 January and 17 February, 1864, concerning the conscription of the principals who had put substitutes into the military service of the Government, are constitutional and valid. *Gatlin v. Walton*, 325.

14. If a contract was made between the Government and the conscript, by reason of the latter's furnishing a substitute under section 9 of the act of 16 April, 1862, the Government had a right to annul the contract by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power. *Ibid.*, 325.

15. But *it seems* that no contract was made by the Government with the conscript furnishing a substitute. *Ibid.*, 325.

16. A dentist is a physician, within the meaning of the act of Congress, and is exempt from conscription by reason thereof. *In re Hunter*, 372.

17. A conscript who has furnished a substitute under the act of Congress is exempt from military service. He is entitled to be discharged under *habeas corpus*, although after furnishing a substitute he has been forced to serve sixteen months in the army, and is absent from his command without leave when he sues out the writ. *In re Wyrick*, 375.

18. A. was elected and qualified as constable in March, 1863. In April, 1863, he was conscripted, and on 5 May, 1863, was sent to the army, where he served six weeks, receiving bounty. *Held*, that he was exempted as a State officer, under act of Congress of 1 May, 1863, enacted while he was in service. *In re Bradshaw*, 379.

CONSCRIPTION—*Continued.*

19. A soldier in the army, who becomes a mail contractor, is as such exempted from further military service, and should be discharged under *habeas corpus*. *In re Sowers*, 384.

20. An officer in the army who has been reduced to ranks, and thereupon appointed county commissioner, is exempt from military service, and must be discharged from custody as a conscript. The validity of his appointment, on the ground of infancy, can only be impeached by a *quo warranto* or other proceeding in which the matter can be put directly at issue and the office adjudged forfeited or vacated. It cannot be impeached collaterally. *In re Russell*, 388.

21. One who is a local preacher of the Methodist Episcopal Church, South, regularly officiating as such, without salary, but who supports himself by keeping a hotel, is exempt from conscription under act of Congress of 17 February, 1864, as a "minister of religion." *In re Cunninggim*, 392.

22. A substitute never liable to conscription, being over 50 years of age, is not discharged from military service by the conscription of his principal under the act of Congress of 4 January, 1864. *McDaniel v. Trull*, 399.

23. A man between 45 and 50 years old, enrolled as a conscript under the act of Congress of 17 February, 1864, is entitled to a discharge when he becomes 50 years of age. *Kesler v. Brawley*, 402.

24. The Congress of the Confederate States have no power to conscribe an officer of the State; and a policeman of an incorporated town is such a State officer as is exempt from conscription. *Johnson v. Mallett*, 410.

25. The Constitution and laws of the State determine conclusively and exclusively what officers are necessary for the administration of its government. *Ibid.*, 410.

26. The certificate of the Governor of a State is not necessary to entitle a State officer to exemption from conscription. *Ibid.*, 410.

27. A man who has been enrolled as a conscript becomes thereby a soldier in the army of the Confederate States, and his appointment afterwards to an office under the State Government does not entitle him to exemption from military service. *Smith v. Prior*, 417.

28. The Governor's certificate has no effect in such a case, for the person is not an officer, his appointment being void. *Ibid*, 417.

29. One who, as an agriculturist, is exempt from military service in the field, is yet in the service of the Confederate States by force of the act of Congress of 17 February, 1864, sec. 10, clause 4, paragraphs 1, 2, and 3, and, therefore, is not liable to serve in the Home Guard of the State. *Wood v. Bradshaw*, 419.

30. Application for exemption from military service in the field on account of being the owner and manager or overseer of fifteen able-bodied slaves, must have been made in a reasonable time after 1 January, 1864; and it was *held* that an application in the month of November of that year was too late. *White v. Mallett*, 430.

CONSCRIPTION—*Continued.*

31. A person enrolled in March, 1864, under the act of 17 February, of that year, who was under 45 at the time of enrollment, was held bound to serve in the regular army during the war. *Haswell v. Mallett*, 432.

32. A written paper, signed by the enrolling officer, which is in its terms an exemption, is but a furlough or detail, if the officer had no right to grant an exemption. *Ibid.*, 432.

33. Free negroes are compelled to render the services required of them by the act of Congress of 17 February, 1864. Congress has the power to assign conscripts to any branch of the service. If a free negro sells his services for a valuable consideration, by deed, for ninety-nine years, he does not thereby cease to be a free man. *Casey v. Robards*, 434.

34. The appointment to an office, under the State Government, of a citizen of the State who is in the military service of the Confederate States is void; unless, *perhaps*, the office be one recognized by the *Constitution* of the State as essential to its government. *Bridgman v. Mallett*, 500.

35. One who has been enrolled as a conscript is not exempt from military service under the act of 17 February, 1864, by becoming the driver of a mail coach. *Johnson v. Mallett*, 511.

36. A contractor to carry the mail is a civil officer of the Confederate Government, and is, therefore, exempted from service in the Home Guard by the act of the General Assembly passed at the session of July, 1863, ch. 10. *Bringle v. Bradshaw*, 514.

37. A man who was between the ages of 18 and 45 at the date of the passage of the act of 17 February, 1864, and arrives at the age of 45 before he is enrolled, is exempt from the regular service for the war, but is liable to serve in the Senior Reserves. *Goodson v. Caldwell*, 519.

38. A man between the ages of 17 and 50 is exempt from conscription under the act of Congress of 17 February, 1864, by becoming the employee of the editor of a newspaper at any time before enrollment. *Upchurch v. Scott*, 520.

CONSIDERATION.

1. Where a witness, who had an interest in a cause, gives or accepts a release in order to extinguish his interest, which expresses to be given in consideration of a sum of money named therein, it is competent for the other party to ask him whether there was in fact any consideration. *Johnson v. Murchison*, 286.

2. A deed absolute on its face which is intended to operate as a mortgage is void in law. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them. A. and B. were partners in trade in 1851 and 1852; an account is taken in 1857, by which a balance is ascertained to be due to B. In 1855 A. conveys his property to C. without a valuable consideration; the conveyance is void as to B., for he was a creditor of A. from 1852. *Ibid.*, 286.

CONSIDERATION—*Continued.*

3. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation. *Ibid.*, 286.

CONSTABLE.

1. Where the record of the county court showed that A. was appointed a constable for one year, and it was proved that he acted as such during the year, although the condition of the bond did not express the time for which he was appointed, and although the appointment was not made at the term prescribed by law for such appointments, yet it was *held* that he and his sureties were liable for a breach of the bond occurring within the year. *Shipman v. McMinn*, 122.

2. The provision of section 3 of chapter 78, Revised Code, giving the whole amount of debt as damages for the failure of an officer to collect a claim put into his hands for collection, when the debtor is solvent, only applies to claims within the jurisdiction of a justice of the peace, and does not apply in cases of noncollection of process issuing from court. *McLaurin v. Buchanan*, 91.

CONSTITUTION.

1. Clause 19, section 86, Schedule B, of the act of the General Assembly of 1862-3, imposing a tax of all the net profits above 75 per cent on the cost of production on every person or corporation manufacturing cotton or woolen cloth, etc., is constitutional. *Murchison v. McNeill*, 217.

2. The acts of Congress of 5 January and 17 February, 1864, concerning conscription, are constitutional and valid. *Gatlin v. Walton*, 325.

3. If a contract were made between the Government and the conscript, by the latter furnishing a substitute under section 9 of the act of 16 April, 1862, the Government has a right to annul the contract by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power. The Constitution does not forbid it. *Ibid.*, 325.

CONTRACT.

1. Where the proprietors of a school, on being applied to by a father to receive his sons as scholars, inform him of their willingness to receive them, and send him a statement of their terms, one of which is, "When a place is engaged, the session's charge is considered due, unless the boy be prevented from coming by act of God," and the father by letter expressed his acceptance of the terms, though he does not send his sons to the school, he is liable for a session's board and tuition; the proprietors proving their ability and willingness to comply with the contract on their part. *Bingham v. Richardson*, 215.

2. If there be only one event on which money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is competent for the parties to fix a given amount of compensation, in order to avoid the difficulty. *Ibid.*, 215.

CONTRACT—*Continued.*

3. Contracts by the husband with the wife for a valuable consideration will be enforced against his representatives. *Smith v. Smith*, 581.

4. If a contract were made between the Government and the conscript, by the latter furnishing a substitute under section 9 of the act of 16 April, 1862, the Government has a right to annul the contract, by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power. *Gatlin v. Walton*, 325.

5. But *it seems* no contract was made by the Government with the conscript furnishing a substitute. *Ibid.*, 525.

CORPORATION.

The treasurer of the trustees of Davidson College is not a corporation sole; on a bond, therefore, payable to one as such, and his successors, a suit cannot be sustained in the name of a successor. *McDowell v. Hemphill*, 96.

COUNTY-SEAT, COMMISSIONERS FOR LOCATING.

Where commissioners are appointed by an act of assembly to "select and determine a site for the permanent seat of justice" in a county, and are directed, when they shall have selected a site, to give notice thereof to other commissioners appointed by the same act, for the purpose of acquiring title to the site selected, the commissioners for location may make a conditional selection, and if the condition be broken by the owner of the land selected for the site, the commissioners may make a new selection. *Herbert v. Sanderson*, 277.

COVENANT.

Testator gave to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, says: "All my property that is *not named*, both real and personal, is to be sold and, after paying all my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal." The reversion in the land devised to the wife for life falls in the residue, and must be sold for an equal division. No action can be sustained on a covenant made by one of the heirs who had received more than his share, to secure excess so received by him, until the reversion has been sold. *Cline v. Latimore*, 206.

CREDITOR.

A. died intestate, seized of land in fee in this State, which descended to her heir at law, who resided in another State. His creditors here sued out attachments, which were levied on the land, and final judgments were obtained therein, and writs of *vend. expo.* issued. The land was sold by the administrator of A. under an order of the county court for the payment of the debts of the intestate; it was *held*, that after the payment of such debts, the administrator was bound in equity to pay the residue to the creditors of the heir who attached the land, notwithstanding that he had paid it, by order of the heir, to another of his *bona fide* creditors. *Sloan v. Mendenhall*, 553.

DAMAGES.

1. The provision in section 3 of chapter 78, Revised Code, giving the whole amount of the debt as damages for the failure of a sheriff or constable to collect a claim put into his hands for collection, when the debtor is solvent, applies only to claims within the jurisdiction of a justice of the peace, and does not apply to cases of the noncollection of an execution issuing from court. *McLaurin v. Buchanan*, 91.

2. If there be only one event on which money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is competent for the parties to fix upon a given amount of compensation in order to avoid the difficulty. *Bingham v. Richardson*, 205.

DEED.

1. Where a father, by a deed, gave to his daughter a tract of land, and provided that "if the said daughter should die and leave an heir or heirs of her body, in that case, said heirs being her children or child, is to have, occupy, and possess all the property herein given, to them and their heirs forever," it was *held* that the children of the daughter took as purchasers, and that the rule in *Shelley's case* did not apply. *Williams v. Beasley*, 102.

2. Whether the rule in *Shelley's* case would apply where the limitation is to A. for life, remainder to the heirs of her body and their heirs, *quere*. *Ibid.*, 102.

3. Where it is established that the deed offered by one of the parties in ejectment, claiming under the same person with the other, is void, he is not estopped from denying the title of the other party. *McDougall v. McLean*, 120.

4. A deed absolute on its face, which is intended to operate as a mortgage, is void in law as against creditors. *Johnson v. Murchison*, 286.

5. If any part of the consideration of a deed be feigned or fraudulent as to the creditors, the whole deed is void as to them. *Ibid.*

6. A. and B. were partners in trade in 1851 and 1852; an account is taken in 1857, by which a balance is ascertained to be due to B. In 1855, A. conveys his property to C. without a valuable consideration; the conveyance is void as to B., for he was a creditor of A. from 1852. *Ibid.*, 286.

7. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation. *Ibid.*, 286.

8. A conveyance of property, absolute on its face and declared to be made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened, and may never happen. *Ibid.*, 286.

9. Where a deed recites that it is made in consideration of good will and affection to A., the wife of B., and the children of A. and B., namely, C., D., etc., *and such as they may have hereafter*, and property is con-

DEED—*Continued.*

veyed by it to B. in trust "for the children aforesaid and such as may be born and begotten by the said B. hereafter": the trust is for the children of A. and B., and the children of B. by an after-taken wife have no interest in the trust property. *Carson v. Carson*, 575.

10. B. having power by the deed to him to advance the children of himself and A. by conveying to them or any of them a portion of the trust property, on 6 January, 1850, conveys to his son John, a child of himself and A., a part of the trust property by way of advancement, as the deed declares, and on the same day John reconveys to B. the same property in consideration of the natural love and affection he bears his half-brother and sister, the children of his father by an after-taken wife, in trust for his half-brother and sister, with power to B. to convey the property to the *cestui que trust* by deed or will, and B. by his will does devise and bequeath the property to his said two children, his will is inoperative, and the children by the last marriage take nothing under the deed from John. *Ibid.*, 575.

DEPOSITION.

The Superior Court has no jurisdiction to decide whether a deposition has been regularly taken, except on appeal from the clerk's decision in pursuance of the Revised Code, ch. 31, sec. 63, or when it is offered to be read in evidence on the trial; hence an appeal under the Revised Code, ch. 4, sec. 23, from the decision of the judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways. *Hix v. Fisher*, 474.

DESERTER.

1. An admission by a defendant, indicted under the act of 1863, for "aiding, assisting, harboring, and maintaining" a deserter, that the person so aided, etc., belonged to Captain Galloway's company in the army; that he had been at defendant's house two or three weeks, and defendant believed he was absent from the army without leave, in the absence of all other proof, is not competent evidence that the person aided, etc., is a soldier in the Army of the Confederate States, or that he is a deserter. *S. v. Lewis*, 300.

2. Whether an indictment under that act must not aver that the person aided, etc., is a soldier in the Army of the Confederate States, as well as that he is a deserter, *quære*. *Ibid.*, 300.

DEVISE.

1. Testator gave to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, says: "All my property that is *not named*, both real and personal, is to be sold, and, after paying all my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal." The reversion in the land devised to the wife for life falls into the residue, and must be sold for an equal division. *Cline v. Latimore*, 206.

2. No action can be sustained on a covenant made by one of the heirs who had received more than his share, to secure the excess so received by him, until the reversion has been sold. *Ibid.*, 206.

DEVISE—*Continued.*

3. A devise of a tract of land to the son of the testator, "if he be living and returns to the county of Orange," is a gift of the land on condition that the son returns to Orange as his domicil, especially when other provisions of the will seem to show the testator's expectation and desire that the son should reside there after testator's decease. *Reeves v. Craig*, 208.

4. Whenever a testator shows an intention to dispose of all his property, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass. *Page v. Atkins*, 268.

5. Testator gave a tract of land to his wife, and after several bequests of money and specific legacies says: "My desire is that all the property that I have not willed away shall be sold after my death and equally divided between my six children," etc.: *Held*, that the reversion in the land after the end of the widow's estate for life passes by the residuary clause. Until the sale, the reversion descends to the heirs at law, and this whether the sale is to be made by the heirs or by the executor. *Ibid.*, 268.

6. A devise "to Alexander Riley, for him and his mother and the rest of the children to live on until the youngest becomes of age," is a gift of the fee simple to A. R. *Riley v. Buchanan*, 279.

7. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together, and not to *hand over* any of the devises or legacies until my existing contracts in Tennessee and North Carolina are completed." *Held*, the last clause has relation only to what is given in the residuary clause. *Patton v. Patton*, 572.

8. Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property. *Turner v. Kittrell*, 589.

9. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold, and the money equally divided among his children. *Held*, that by the direction to sell, the land is converted into personalty. *Conly v. Kincaid*, 594.

10. One of the daughters of the testator died after the testator, in the lifetime of his widow, leaving a husband surviving. *Held*, that as her administrator, he is entitled to one-seventh of the money arising from the sale of the property given to the widow for life. *Ibid.*, 594.

DISTILLING.

1. A person who leases his still-house and still, knowing that the lessee takes them for the purpose of distilling spirits from corn, which pur-

DISTILLING—*Continued.*

pose is accomplished by the lease, is not guilty of a violation of the act forbidding the distillation of spirits from corn, if he has no interest in the liquor distilled. *S. v. Summey*, 496.

2. Liquor obtained by running the beer once through the still is *"spirituous liquor"* within the meaning of the act. *Ibid.*, 496.

DISTRIBUTION.

No person can take distributive share of an intestate's personal estate with his next of kin, by force of the act of 1862-'3, ch. 49, but one who by representing an ancestor can put himself in the same degree of kindred to the intestate as his next of kin. *Caldwell v Cowan*, 639.

DOWER.

1. Where real estate of an inheritance is purchased by a partnership, for partnership purposes, and is so used, on the death of one of the partners, his widow is entitled to dower. *Patton v. Patton*, 572.

2. The widow of a deceased vendee of land, who has paid the purchase money, may by a bill against the heirs of her late husband and the heirs of the vendor compel a conveyance of the land by the heirs of the vendor to the heirs of the vendee, and an assignment of dower to herself. *Smith v. Smith*, 581.

EJECTMENT.

1. A judgment that the defendant recover his costs from the lessor of the plaintiff in an action of ejectment, where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper. *Blount v. Wright*, 89.

2. Where A. agreed to let B. put a sawmill and houses and fixtures on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished*, it was *held* that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Held, also*, that ejectment would lie to recover such an interest. *Stancel v. Calvert*, 104.

3. In ejectment, a landlord who is permitted to defend the suit in the place of his tenant is confined to the same defense as his tenant would have been confined to. *Sinclair v. Worthy*, 114.

4. In an action of ejectment against the debtor by a purchaser at sheriff's sale, the defendant needs only a judgment, execution, and sheriff's deed. *Ibid.*, 114.

5. There is no principle of law or practice of the courts by which, after a plaintiff in ejectment has obtained a judgment against the tenant in possession, upon whom a declaration has been served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession on the suggestion that the title was in some other person. *Ibid.*, 114.

EJECTMENT—*Continued.*

6. Where it is established that the deed offered by one of the parties in ejectment claiming under the same person as the other is void, he is not estopped from denying the title of the other party. *McDougald v. McLean*, 120.

ELECTION.

Where one, by will, gave *all his slaves*, equally to be divided among his four children, and afterwards by deed of gift gave two of them, *by name*, to one of his children, there is no rule of law preventing the donee of the two from coming in for an equal share of the residue. *Millsaps v. McLean*, 80.

EQUITY OF REDEMPTION.

1. The interest of a purchaser of land, when the purchase money is not paid, and the title is retained as a security for its payment, is considered and treated as an equity of redemption. *Schoffner v. Fogleman*, 564.

2. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate, upon discharging such part of the mortgage debt as remains unpaid. *Ibid.*, 564.

3. In sales of land under execution, there is a distinction between the cases in which the defendant has an interest subject to execution, and cases where he has not such interest. In the first mentioned cases the purchaser becomes the owner of the defendant's interest. If it be an equity, upon discharging the encumbrances on it, he has a right to call for the legal estate. In the last mentioned cases the purchaser only succeeds to the equity of the debtor, to the extent of holding it as a *security* for the money paid. *Ibid.*, 564.

4. An equity of redemption cannot be sold under an execution for the mortgage debt. *Ibid.*, 564.

5. Where land is sold, and the purchaser gives a bond with a security for the payment of the purchase money, and the title is retained as a further security for its payment, the surety for the original purchase money has the first equity to be indemnified, and his claim is preferred to that of a purchaser of an equity of redemption at sheriff's sale, or of any encumbrancer who comes in by assignment, or otherwise; and the question of notice has no relation to such cases, because neither party has the legal estate. *Ibid.*, 564.

ESTOPPEL.

1. Where it is established that the deed, offered by one of the parties in ejectment, claiming under the same person with the other, is void, he is not estopped from denying the title of the other party. Estoppels must be mutual. *McDougald v. McLean*, 120.

2. One who has made a gift of slaves, void by the act of 1806 (Rev. Code, ch. 50, sec. 12), cannot be estopped to assert his title by any act *in pais*. Nor is he estopped by the record of a partition of the slaves by a suit, some of the parties to which, being infants and his wards, sue by him *as their guardian*. *Branch v. Goddin*, 493.

ESTOPPEL—*Continued.*

3. It *seems* that the defendant would be *estopped* by the recital that, "Upon application to the judge, he had ordered that the prisoners be allowed bail in the sum of $2,000 each, and had authorized the two justices to take the recognizance." *S. v. Edney*, 463.

EVIDENCE.

1. A person whose land has been sold at sheriff's sale is a competent witness in an action of ejectment against the purchaser at such sale, to show that his own title was defective. *McDougald v. McLean*, 120.

2. Any person who had an opportunity of knowing and observing a party whose sanity is impeached may give his opinion of such person's capacity, though he may not be an attesting witness. *Ibid.*, 120.

3. Where a person suspected of murder was arrested as a witness, and brought before a jury of inquest and subjected to a rigid examination, it was *held* that the examination was not competent evidence against him when he was afterwards put upon his trial for the offense. *S. v. Young*, 126.

4. It is erroneous for the court, in the trial of a capital case, to order that an affidavit made by the prisoner for the continuance of his cause shall be read as evidence for the affiant, with leave to the State to offer testimony in contradiction, he, the prisoner, objecting and insisting on a continuance. *S. v. Twiggs*, 142.

5. Where a defendant in a criminal prosecution offered in defense proof of the character which he sustained at the time of the alleged offense, it was *held* to be error to permit evidence to be given by the State of his character at a subsequent time. *S. v. Johnson*, 151.

6. In an action by a passenger on a railroad against the company, to recover damages for the loss of his trunk, the plaintiff is not a competent witness to prove the loss of his trunk, or its contents, though he offer to swear that he has no means of proving those facts, or either of them, except by his own oath. *Smith v. R. R.*, 202.

7. Personal chattels proved to have been taken, found in a house occupied exclusively by the defendant and his wife, is in effect found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt. *S. v. Johnson*, 235.

8. Where a witness, who had an interest in a cause, gives or accepts a release in order to extinguish his interest, which release is expressed to be given in consideration of a sum of money named therein, it is competent for the other party to ask him whether there was in fact any consideration paid and received. *Johnson v. Murchison*, 286.

9. An admission by the defendant, indicted under the act of 1863 for "aiding, assisting, harboring, and maintaining," a deserter, that the person so aided, etc., belonged to Captain G.'s company in the army, that he had been at the defendant's house two or three weeks, and defendant believed he was absent from the army without leave, is not, in the absence of all other proof, competent evidence that the person aided, etc., is a soldier in the Confederate Army, or that he is a deserter. *S. v. Lewis*, 300.

EVIDENCE—*Continued.*

10. Parol evidence is admissible to show what matters are submitted to arbitration and what matters are brought to the notice of the arbitrators. *Walker v. Walker*, 255.
11. When a question arises on a jury trial concerning the competency of a witness, and the parties disagree about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which in his opinion the evidence proves, this Court cannot revise his decision. In such case the prisoner is entitled to a *venire de novo*. *S. v. Norton*, 296.
12. The inference from evidence tending to show that a way over and through a man's land is a public road may be rebutted by evidence of nonuser for more than twenty years. *Burgwyn v. Lockhart*, 264.
13. When it is proved that one has killed intentionally, with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him, and the jury must be satisfied, by the testimony, that the matter offered in mitigation is true. The doctrine of reasonable doubt does not apply. *S. v. Ellick*, 450.
14. The declarations and admissions of a party to a suit, civil or criminal, pertinent to the issue, may be given in evidence against him by the other party. *S. v. Bryson*, 476.
15. The Superior Court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision, in pursuance of sec. 68, ch. 31, Rev. Code, or when it is offered to be read in evidence on a trial; therefore, an appeal under ch. 4, sec. 23, Rev. Code, from the decision of a judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways. *Hix v. Fisher*, 474.

EXECUTION.

1. A writ of *fi. fa.* cannot continue by relation a lien on property created by a previous writ, unless it purports on its face to be an *alias*. *McIver v. Ritter*, 605.
2. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid. *Schoffner v. Fogleman*, 564.
3. In sales of land under execution, there is a distinction between the cases in which the defendant has an interest subject to execution and the cases in which his interest is not so subject. In the first mentioned cases, the purchaser becomes the owner of the defendant's interest, and if it be an equity, upon discharging the encumbrances on it, he has a right to call for the legal estate. In the last mentioned cases, the purchaser only succeeds to the equity of the debtor to the extent of holding it as a *security* for the money paid. *Ibid.*, 564.
4. An equity of redemption cannot be sold under an execution for the mortgage debt. *Ibid.*, 564.
5. A judgment that the defendant recover his costs from the lessor of the plaintiff, in an action of ejectment, where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper. *Blount v. Wright*, 89.

EXECUTION—*Continued.*

6. If an article of property laid off to a housekeeper by freeholders be exchanged for another article, the article received in exchange is not exempt from execution. It *seems* that the debtor might have procured the article received in exchange to be laid off to him by a second allotment, and then it would have been exempt. *Lloyd v. Durham*, 282.

7. Where A. agreed to let B. put a sawmill and houses and fixtures on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished*, it was *held* that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege, were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Held, also*, that ejectment would lie to recover such an interest. *Stancel v. Calvert*, 104.

EXECUTION, CAPITAL.

Upon the conviction of the prisoner in a capital case, the sentence of the court must be carried into execution by the sheriff of the county where he was tried and convicted, and it is erroneous for the court to order execution to be done in the county whence the cause was removed, or by the sheriff of that county. *S. v. Twiggs*, 142.

EXECUTORS AND ADMINISTRATORS.

1. A widow cannot be appointed an administratrix upon her husband's estate while she is under 21 years of age; but the court may appoint an administrator during her minority, and may, on her arriving at full age, grant her the administration, or it may grant the office to her appointee. *Wallis v. Wallis*, 78.

2. On an appeal to the Superior Court from a grant of administration by the court it is not proper for the former court, on the reversal of the order below, to make an appointment itself, but it should order a *procedendo* to the county court. *Ibid.*, 78.

3. The poverty of an executor is not of itself a reason for a court of equity restraining him from administering the estate. *Wilkins v. Harris*, 592.

4. There must be some maladministration on his part, or some danger of loss from the misconduct or negligence of the executor, for which he will not be able to answer by reason of his insolvency. *Ibid.*, 592.

5. The personal representative has no right to ask the advice and direction of the court in the settlement of the estate of the deceased, except as to matters in which he is interested *as* executor or administrator. *Horah v. Horah*, 650.

6. No person can take a distributive share of an intestate's personal estate with his next of kin by force of the act of 1862, ch. 49, but one who by representing an ancestor can put himself in the same degree of kindred to the intestate as his next of kin. *Caldwell v. Cowan*, 639.

7. An administrator has a right to appeal from an order of the county court, affirming the year's allowance made to the widow. *Saunders v. Russell*, 97.

EXECUTORS AND ADMINISTRATORS—*Continued.*

8. A. dies intestate, seized of land in fee simple in this State, which descends to her heir at law resident in another State. His creditors here sue out attachments which are levied on the land, and final judgments are obtained therein and writs of *venditioni exponas* issued. The land is sold by B., the administrator of A., under an order of the county court, for the payment of the debts of the intestate. After payment of them, the administrator is bound in equity to pay the residue to the creditors who attached the land, notwithstanding that the administrator has paid it by order of the nonresident debtor to another *bona fide* creditor. *Sloan v. Mendenhall*, 553.

EXEMPTION.

1. If an article of property, laid off to a housekeeper by freeholders, be exchanged for another article, the article received in exchange is not exempt from execution. *Lloyd v. Durham*, 282.
2. It *seems* that the debtor might have procured the article received in exchange to be laid off to him in a second allotment, and then it would have been exempt. *Ibid.*, 282.

FORCIBLE ENTRY.

An indictment at common law for a forcible entry into "the house of John Bell, Mary Bell being then and there present, and forbidding the same," is fatally defective for want of an averment that it is the dwelling-house of J. B., or that M. B. is the wife, daughter, or other member of the family of J. B. *S. v. Morgan*, 243.

FORCIBLE TRESPASS.

If three men break open the prosecutor's crib and take and carry away his corn therefrom, his son being present and forbidding them, they are guilty of an indictable trespass, and the taking may be averred to be from the presence of the prosecutor. *S. v. Drake*, 236.

FRAUD.

1. A deed absolute on its face, which is intended by the parties to operate as a mortgage, is void in law as to creditors. *Johnson v. Murchison*, 286.
2. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them. *Ibid.*, 286.
3. Where A. and B. were partners in trade in 1851 and 1852, and upon an account taken in 1857, it was found that a balance was due to B.: it was *held*, that a conveyance of his property by A. to C. in 1855, without a valuable consideration, was void as to B., because he was a creditor from 1852. *Ibid.*, 286.
4. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation. *Ibid.*, 286.
5. A conveyance of property absolute on its face, and declared to have been made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened, and which may never happen. *Ibid.*, 286.

FRAUD—*Continued.*

6. The State courts have no jurisdiction to restrain persons from acting under the orders or judgments of the Confederate courts, unless they have been obtained by fraud. Whether they have jurisdiction then, this Court declines to express any opinion. They have no jurisdiction to review the proceedings of the Confederate courts. *McLane v. Manning*, 608.

7. The court cannot give relief on the ground of frauds, unless it be positively and distinctly alleged. *Ibid.*, 608.

FREE NEGROES.

1. If a free negro sells his services for a valuable consideration, by deed, for ninety-nine years, he does not thereby cease to be a free man. *Casey v. Robards*, 434.

2. Free negroes are compellable to render the services required of them by the act of Congress of 17 February, 1864. *Ibid.*, 434.

GRANT.

Where A. owned a tract of land in the form of a parallelogram, of which he had an actual possession on one end, and severed the two ends by selling a piece from the middle, and at the end of twenty-two years he conveyed the southern end to B., who continued the possession until the possession of the whole extended beyond thirty years, and then conveyed the northern end by a separate deed, but had no actual occupation of that end, it was *held* that holding it thus for more than thirty years was not sufficient to authorize the presumption of a grant to this northern end. *Newsom v. Kinnamon*, 99.

GUARANTY.

A justice of the peace has no jurisdiction of a guaranty. *Johnson v. Olive*, 213.

HABEAS CORPUS.

1. The courts and judges of the States have concurrent jurisdiction with the courts and judges of the Confederate States in the issuing of writs of *habeas corpus* and in the inquiring into the causes of the detention, even where such detention is by an officer or agent of the Confederate States. *In re Bryan*, 1.

2. The courts of this State, as well as the individual judges, have jurisdiction to issue writs of *habeas corpus*, and to have the return made to them in term-time, and, as a court, to consider and determine the causes of detention. *Ibid.*, 1.

3. Where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for the commitment of the person charged with the crime, the decision on it is not the subject of review by writ of error or *certiorari*. *Walton v. Gatlin*, 310.

4. Where the question in a writ of *habeas corpus* is concerning the power of the committing magistrate or the court, or the legality of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

HABEAS CORPUS—*Continued.*

5. The decision on a writ of *habeas corpus*, to free a person from restraint for any other cause than the commission of a criminal offense, is a *judgment*, and is the subject of review by writ of error or *certiorari*. *Ibid.*, 310.

6. The Supreme Court has the power to review the action of the Superior Courts, and of the judges in vacation, upon questions of law in all cases arising under the *Habeas Corpus Act*, Rev. Code, ch. 55, sec. 10.

7. The applicant was held, by *Judge Pearson* in vacation, to be entitled to have the writ of *habeas corpus* issued in his favor, notwithstanding the suspension of the privilege by the act of Congress. *In re Roseman*, 368.

8. A soldier actually and rightfully in the army can have no relief by the writ of *habeas corpus* against any alleged abuse of military authority. *Cox v. Gee*, 516.

9. If he be *wrongfully* held as a soldier, yet he is not entitled to the writ of *habeas corpus* while he is undergoing punishment or awaiting trial for a military offense. *Ibid.*, 516.

10. Held, by *Pearson, C. J.*, in vacation, that the act of the Confederate Congress suspends the writ of *habeas corpus ad subjiciendum* only, and then when the party is charged with the commission or with the intent to commit some criminal offense. *In re Cain*, 525.

11. Held, by *Battle, J.*, in vacation, that the act of the Confederate Congress suspending the benefit of the writ of *habeas corpus* applied to the case of a person who was claimed as a conscript under the act of 17 February, 1864, and that the judge, when the cause was shown in the petition, was prohibited from issuing the writ. *In re Long*, 534.

12. Held, by *Manly, J.*, in vacation, that when the return of the officer to the writ of *habeas corpus* disclosed the fact that the petitioner was held as a conscript, under the act of Congress, the judge could not proceed any further with the case, but must remand the petitioner. *In re Rafter*, 537.

13. Held, by *Pearson, C. J.*, in vacation, that when the officer certified to a writ of *habeas corpus*, that he held the petitioner as a conscript under the act of Congress, and for that reason did not return the body of the petitioner, the judge could not proceed to render a judgment of discharge. *In re Spivey*, 540.

14. Presenting a petition to a judge for a writ of *habeas corpus* gives him jurisdiction of the subject, and the parties may waive all errors and dispense with all forms in the proceedings on it. *S. v. Edney*, 463.

15. Where a petition for *habeas corpus* was presented to a judge in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition, that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it, and, by the consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on

HABEAS CORPUS—*Continued.*

the petition, and fixed the amount in which bail should be taken, and named the justice of the peace to take it, and the prisoner was afterwards discharged from prison, on his entering into the recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance, this is plenary proof of a waiver of all errors in the proceedings. *Ibid.*, 563.

HIGHWAY.

The inference, from evidence tending to show that a way over and through a man's land is a highway or public road may be rebutted by evidence of *nonuser* for more than twenty years. *Burgwyn v. Lockhart*, 264.

HOME GUARD.

1. A member of the Home Guard cannot, under the act of Assembly of July, 1863, be compelled to assist in arresting deserters or recusant conscripts. *In re Austin*, 544.

2. A citizen of Maryland, being an alien enemy, is not liable to service in the Home Guard under the act of Assembly which requires such service from all foreigners who have been residents of the State for thirty days. *In re Finley*, 191.

3. A bonded exempt is in the service of the Confederate States, by force of a constitutional act of Congress, 17 February, 1864, sec. 10, clause 4, paragraphs, 1, 2, and 3; and, therefore, he is not liable to service in the Home Guard, under State laws. *Wood v. Bradshaw*, 419.

4. A contractor to carry the mail is a civil officer of the Confederate Government, and, therefore, exempted from service in the Home Guard by the act of the General Assembly passed at the session of July, 1863, ch. 10. *Bringle v. Bradshaw*, 514.

See Conscription.

HOMICIDE.

1. Where a defendant, in a State's warrant, charging a misdemeanor, put himself in armed resistance to the officer having such warrant, and the officer, in attempting to take him, slew him without resorting to any unnecessary violence, it was *held* that he was justified in slaying the defendant. *S. v. Garrett*, 144.

2. The principle of "self-defense" does not apply to the case of one who puts himself in the posture of armed defiance to the process of the State. *Ibid.*, 144.

3. A person to whom a State's warrant is specially directed is bound to show it and read it, if required to do so; but where the defendant in such warrant had notice of the process and was fully aware of its contents, and had made up his mind, beforehand, to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant when demanded by such defendant. *Ibid.*, 144.

HOMICIDE—*Continued.*

4. Whether, where the manner of a homicide, charged in a bill of indictment, is by cutting the throat of the deceased with a knife, and the proof is that it was done by blows inflicted on the head with a gun, the variance is material, *quœre*. *S. v. Murph*, 129.

5. It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses, upon whose testimony the indictment was found, were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

6. If A. is about to strike B., who is unwilling to enter into a fight, and shows it by words or actions, and A. presses on and strikes, or attempts to strike, and thereupon B. kills A. with a deadly weapon, it is *manslaughter*. *S. v. Ellick*, 450.

7. If on a sudden quarrel the parties begin a fight by consent, at the instant, with deadly weapons, and, after blows pass, one uses a deadly weapon and kills, it is *manslaughter*. *Ibid.*, 450.

8. If on a sudden quarrel the parties fight by consent, at the instant, with deadly weapons, and one is killed, it is but *manslaughter;* provided the parties fight on equal terms and no undue advantage is taken. *Ibid.*, 450.

9. Where words passed between the prisoner and the deceased, who were sitting on the doorsill, and the prisoner got up; the deceased then got up and reached his hand inside the door and got a stick, which was a deadly weapon, and, as he was turning around with the stick, the prisoner stabbed him with a bowie-knife: *Held*, to be *murder*. *Ibid.*, 450.

10. If on a trial of an indictment for murder the judge instructs the jury that if they believe the witnesses on either side, the prisoner is guilty, it is equivalent to a charge that the prisoner is guilty upon his own evidence alone, taken in the most favorable view for him; and there is no error if his evidence did not, in such view, tend to prove his innocence or to mitigate his offense to a lower grade. *Ibid.*, 450.

11. When it is proved that one has killed intentionally, with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him, and the jury must be satisfied by the testimony that the matter offered in mitigation is true. The doctrine of reasonable doubt does not apply. *Ibid.*, 450.

12. If an indictment for murder charge that the prisoner killed the deceased, and that others were present aiding and abetting, and it is proved that the deceased was killed by some one with whom the prisoner was acting in concert, and that he was present, aiding and assisting, the jury should be instructed to find him guilty of *murder*. *S. v. Cockman*, 484.

13. If several armed men go to a dwelling-house in the night-time, for the purpose of seizing the body of the owner, without lawful authority, and one of them be killed by the owner to prevent the execution of their purpose, such killing is not *murder*. *S. v. Medlin*, 488.

HUSBAND AND WIFE.

1. A husband cannot be convicted of a battery on his wife unless he inflict a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement. *S. v. Black*, 262.

2. A conveyance of land to a man and his wife and their heirs vests the entirety in each of them, and upon the death of one of them, the survivors take the whole in severalty. *Woodford v. Higley*, 244.

3. Gifts made by a husband to his wife during coverture will be supported in equity against the representatives of the deceased husband. *Smith v. Smith*, 481.

4. Contracts by a husband with his wife for a valuable consideration will be enforced in equity against his representatives. *Ibid.*, 581.

INDICTMENT.

1. Whether, where the manner of a homicide, charged in a bill of indictment, is by cutting the throat of the deceased with a knife, and the proof is that it was done by blows inflicted on the head with a gun, the variance is material, *quære*. *S. v. Murph*, 129.

2. It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment a "true bill," nor that the witnesses, upon whose testimony the bill was found, were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

3. An indictment, upon sec. 29, ch. 107, Revised Code, is sufficient, if it avers that the defendant did "permit the slave Peggy to keep house to herself as a free person," and in the second count did "connive at the said negro slave keeping house to herself as a free person." *S. v. Duckworth*, 240.

4. An indictment at common law for a forcible entry into the house of J. B., Mary B. being then and there present, forbidding the same, is fatally defective for want of an averment that it is the dwelling-house of J. B., or that Mary B. is the wife, or daughter, or other member of the family of J. B. *S. v. Morgan*, 243.

5. Whether an indictment under the act of 1863, for "aiding, assisting, harboring, and maintaining" a deserter, must not aver that the aided, etc., is a soldier in the army of the Confederate States, as well as that he is a deserter, *quære*. *S. v. Lewis*, 300.

6. Buying of and receiving from a slave corn or other forbidden article on the slave's own account, the owner of the slave being present and knowing what is done, but giving no *written* permission, and the slave not knowing of the master's presence, is indictable under the Revised Code, ch. 34, sec. 85. *S. v. Honeycutt*, 446.

7. If a slave, living in a house to himself, keeps a boarding-house for his own livelihood, and the master, knowing it, exercises no control over him or his business, this is an indictable offense under the Revised Code, ch. 107, sec. 29. *S. v. Brown*, 448.

INDICTMENT—*Continued.*

8. It is not a ground for the arrest of a judgment that the two offenses of permitting a slave to go at large as a free person and of permitting him to keep house as a free person are joined in the same count of an indictment. *Ibid.*, 448.

INJUNCTION.

1. Where the bill alleged that the plaintiff had conveyed his land and his horses, mules, hogs, etc., wheat, hay, corn, etc., to the defendant by a deed absolute on its face, but which was intended to be only a security for the payment of money, and it was put in the form of an absolute conveyance by the fraud and oppression of the defendant, and that defendant had advertised a public sale of all the property, it was *held* that the plaintiff was entitled to an injunction; and although the answer positively denied any fraud or imposition, or that there was any agreement or understanding that the plaintiff should have any right of redemption, yet as the answer contained admissions which, taken in connection with the allegations of the bill, furnished a probable ground of belief that the latter were substantially true, the injunction should be continued until the hearing. *Peeler v. Barringer*, 556.

2. The State courts have no jurisdiction to restrain, by injunction, persons from acting under the orders or judgments of the Confederate courts, unless, *perhaps*, where they have been obtained by fraud. The State courts have no jurisdiction to review the proceedings of the Confederate courts. *McLane v. Manning*, 608.

3. If the State courts have power to give relief against an order or judgment of a Confederate court obtained by fraud (which is not decided), they would not do so unless the fraud were positively and distinctly averred. *Ibid.*, 608.

4. A person acting as an officer of the law under a judicial order or judgment ought not to be made a party defendant to a bill for an injunction to restrain the execution of such order or judgment. *Ibid.*, 608.

5. A court of equity will entertain a bill against a municipal corporation for the purpose of trying the legality of a tax imposed by the corporation. *Worth v. Commissioners*, 617.

6. Whether courts of equity will interfere by injunction to restrain collection of State and county tax, *quære*. It seems they cannot. *Ibid.*, 617.

INSOLVENT DEBTOR.

1. If an article of property laid off for an insolvent debtor (who is a housekeeper) by freeholders be exchanged for another article, such article received in exchange is not exempt from taxation. *Lloyd v. Durham*, 282.

2. It *seems* that the insolvent debtor might have procured the article received in exchange to be laid off to him by a second allotment, and then it would have been exempt from execution. *Ibid.*, 282.

JOINT TENANCY.

1. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship in joint tenancy his share falls into the residue. *Coley v. Ballance*, 634.

2. Where land is purchased in fee by a partnership with partnership funds and for partnership purposes, and one partner dies, his share of the land descends to his heir, in equity, as at law. *Summey v. Patton*, 601.

3. And it *seems* that upon a dissolution of the partnership by effluxion of time or otherwise, all the partners then living, the land will be regarded as real estate, as between them. *Ibid.*

4. A conveyance of land to a man and his wife and their heirs vests the entirety in each of them, and upon the death of one of them the survivor takes the whole in severalty. *Woodford v. Higly*, 234.

JUDGE'S CHARGE.

1. The judge is not bound to give special instructions to the jury, at the request of the counsel, on a hypothetical case. *S. v. Murph*, 129.

2. Where there is a conflict of testimony, which leaves a case in doubt before the jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead the jury, the Supreme Court will order a *venire de novo*. *S. v. Bailey*, 137.

3. It cannot be assigned for error by a party that the judge did not charge the jury upon a point which the party did not make at the trial. *Higdon v. Chastaine*, 210.

4. Where evidence is direct, leaving nothing to inference, and, if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that if they believe the witness they may find for the plaintiff or for the defendant. But this is not allowed where the evidence is circumstantial, or where the evidence offered on the other side tends to explain it, or to rebut the inferences sought to be drawn from it, or to contradict the witness. *Gaither v. Ferebee*, 303.

5. Any remark made by a judge, on the trial of an issue by the jury, from which the jury may infer what his opinion is as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is error; and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of the evidence, and that they are not bound by his opinion in regard to it. *S. v. Dick*, 440.

6. It is error for the judge to leave to the jury the decision of a fact on which the admissibility of evidence depends. But if the party excepting cannot possibly be injured by it, it is not a ground for a *venire de novo*. *Ibid.*, 440.

7. If on the trial of an indictment witnesses are examined by the State, and other witnesses are examined by the defendant to maintain his defense, and the judge instructs the jury that if they believe the

JUDGE'S CHARGE—*Continued.*

witnesses on either side, the defendant is guilty, the Supreme Court considers the charge only in its application to the evidence offered by the defendant, and assumes everything to be proved on his part which a jury would be at liberty to infer from that evidence. *S. v. Ellick*, 450.

8. The judge, in his charge, is required to put the case to the jury in such a way as to make it appear by the record what facts the jury find, and what is his opinion as to the law. *S. v. Summey*, 495.

JUDGMENT.

1. A judgment that the defendant recover his costs from the lessor of the plaintiff, in an action of ejectment, when the plaintiff failed in the suit, and a writ of *fi. fa.* issued thereon, were held to be proper. *Blount v. Wright*, 89.

2. The decision of a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and the subject of review by writ of error or *certiorari*. *Walton v. Gatlin*, 310.

JURISDICTION.

1. A justice of the peace has no jurisdiction of a guaranty. *Johnson v. Oliver*, 213.

2. The courts and judges of the States have concurrent jurisdiction with the courts and judges of the Confederate States in the issuing of writs of *habeas corpus*, and in the inquiring into the causes of detention, even where such detention is by an officer or agent of the Confederate States. *In re J. C. Bryan*, 1.

3. The courts of this State, as well as the individual judges, have jurisdiction to issue writs of *habeas corpus* and to have the return made to them in term-time, and, as a court, to consider and determine of the causes of detention. *Ibid.*

JURISDICTION, CONFLICT OF.

The State courts have no jurisdiction to restrain persons from acting under the orders or judgments of the Confederate courts, unless they have been obtained by fraud. Whether they have jurisdiction then, this Court declines to express any opinion. They have no jurisdiction to review the proceedings of the Confederate courts. *McLane v. Manning*, 608.

JURORS.

1. It is no ground for a challenge to the array, in a capital case, that it does not appear from an order for a special *venire facias* that it was made in the case of the prisoner. It is sufficient if it appear that it was made at the term at which the trial was had. *S. v. Murph*, 129.

2. A challenge to the array of jurors is generally founded on a charge of partiality, or some default in the sheriff or other officer summoning them. *Ibid.*, 129.

JURORS—*Continued.*

3. Where an action *on the case* brought by A. against B. for fraudulently removing a debtor was tried and a verdict found for the defendant, and afterwards the same jury was tendered in a cause of C. against B. for the same act of removing, and were challenged by the plaintiff, it was *held* that this was a principal cause of challenge to the polls and not to the array, and ought to have been allowed, because the jurors were necessarily under a bias from having decided the previous cause. *Baker v. Harris*, 271.

4. A principal cause of challenge involves matter of law, and the decision upon it in the court below may be reviewed upon appeal in the Supreme Court. *Ibid.*, 271.

5. Jurors ought not to be asked, either on oath or otherwise, whether their minds are in such a state that they can try a case fairly and impartially. Their answer can have no influence on the question of their competency, and it is improper practice to ask them. *Ibid.*, 271.

6. If a challenge by the prisoner for good cause be disallowed, and the juror be challenged peremptorily by him, and the panel is completed before the prisoner has challenged peremptorily as many as twenty-three jurors, this is no cause for a *venire do novo*. *S. v. Cockman*, 484.

7. A juror, challenged by the prisoner because he had formed and expressed an opinion that the prisoner was guilty, says on his examination by the court that he has formed and expressed his opinion from rumor only, but that he thinks he can give an impartial verdict on the trial, and is judged to be indifferent by the court, and is tendered to the prisoner; this is no error of which the prisoner can complain. *Ibid.*, 484.

JUSTICE OF THE PEACE. See Jurisdiction.

JUSTICE'S EXECUTION.

Where A. agreed to let B. put a sawmill, houses and fixtures, on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished*, it was *held*, that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege, were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Stancel v. Calvert*, 104.

LARCENY.

Property proved to have been stolen, found six weeks after the theft, in a house occupied exclusively by the defendant and his wife, is found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt. *S. v. Johnson*, 235.

LEGACY. See Bequest.

MANSLAUGHTER. See Homicide.

MARRIAGE SETTLEMENT.

1. Courts of equity will not reform a marriage settlement by which property is conveyed to the separate use of the wife, when the bill does

MARRIAGE SETTLEMENT—*Continued.*

not allege any fraud, imposition, error, or mistake in respect of the contents of the deed or its execution, and there is no allegation that any provision of the deed has been found hurtful to the fund, prejudicial to the interests of the parties, or of marked inconvenience in execution. *Crossland v. Shober*, 562.

2. In a marriage settlement, the word "children" in the grant of a remainder, after the death of A., to "*her children* living at her death," will embrace *grandchildren*, if other parts of the conveyance show that it was the intention of the parties to provide for grandchildren. *Scott v. Moore*, 642.

MORTGAGE.

1. A deed absolute on its face, which is intended to operate as a mortgage, is void in law against creditors. *Johnson v. Murchison*, 286.
2. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them. *Ibid*, 286.
3. A conveyance of property absolute on its face, and declared to be made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened, and may never happen. *Ibid.*, 286.
4. In taking an account under a decree that property, in possession of the mortgagee, should be retained by him in satisfaction of the mortgage debt at a valuation to be fixed by the clerk, the valuation must be made according to what the property would bring in specie. *Bowers v. Strudwick*, 612.

MURDER. See Homicide.

NEGLIGENCE.

1. Where it had been made to appear by the plaintiff's testimony that his horse had been injured on a railroad by the running of a train against it, and it was left doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on the track, it was *held*, that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled. *Clark v. R. R.*, 109.
2. An officer who has received the note of a *feme covert* within a magistrate's jurisdiction for collection is not guilty of negligence so as to subject him on his official bond in failing to take out a warrant on the claim. *Graham v. Buchanan*, 93.
3. Where the deputy of a sheriff received the bond of a married woman within a magistrate's jurisdiction for collection, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, it was *held* that there was no breach of the former sheriff's official bond. *Ibid.*, 93.

NEW TRIAL.

1. When on a trial of a criminal case a question arises as to the competency of a witness offered by the State, and the parties disagree

NEW TRIAL—*Continued.*

about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which, in his opinion, the preliminary evidence proves, the Supreme Court has no means of reversing his decision, and, in such case the defendant is entitled to a new trial. *S. v. Norton*, 296.

2. Where there is a conflict of testimony which leaves a case in doubt before a jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead. this Court will order a *venire de novo*. *S. v. Bailey*, 137.

3. If a challenge by the prisoner for good cause be disallowed, and the juror be challenged peremptorily by the prisoner and the panel is completed, the prisoner having challenged peremptorily a smaller number than twenty-three, this is no cause for a *venire de novo*. *S. v. Cockman*, 484.

4. A juror, challenged by the prisoner because he had formed and expressed an opinion that the prisoner was guilty, says on his examination by the court, that he has formed and expressed an opinion to that effect, from rumor, but that he thinks he can give an impartial verdict on the trial, is adjudged by the court to be indifferent between the parties, and is tendered to the prisoner; this is not error of which the prisoner can complain. *S. v. Cockman*, 484.

See Judge's Charge.

NONSUIT.

1. Where a rule was obtained against a plaintiff in the county court to give oyer of his cause of action by a given day, at the next term, it was *held* to be regular for the plaintiff to submit to a nonsuit before the day assigned at the next term, and take an appeal to the Supreme Court. *Johnson v. Murchison*, 83.

2. A nonsuit may be entered before defendant's appearance or before pleading or at any day of continuance in the cause. *Ibid.*, 83.

NUNCUPATIVE WILL.

Where a person in his last sickness desired the physician to write his will, and the physician declined to do it, but told him that A. and B. were on the piazza, and that he might make his will by oral declarations in their presence; and A. and B. were called into the sick man's presence by his direction, and addressing A. by name, he stated to him, in the presence of B. and the physician, how he wished his property to be divided, and named A. and another as his executors: that is sufficient *rogatio testium* to make a valid nuncupative will. *Haden v. Bradshaw*, 259.

OFFICERS.

1. If an officer of the State accept another office from the State, or from another government, the duties of which are incompatible with those of the first, such former office will thereby be vacated. *In re Martin*, 153.

2. The office of brigadier general, under the Confederate States, was held to be incompatible with that of adjutant general under the State of North Carolina. *Ibid.*, 153.

PARTITION.

1. Where on a petition for the partition of slaves the county court ordered that it should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed, and a division directed in different proportions, it was *held* that the Superior Court was not in possession of the whole case by the appeal, and that writ of *procedendo* to the county court was proper. *Millsaps v. McLean*, 80.

2. A statement in a bill for the partition of lands and an account of the rents and profits received by the defendant, that the defendant "has received the rents and profits and appropriated them to his own use and benefit," does not imply that the defendant is possessed adversely to the plaintiff, and is, therefore, no cause of demurrer. *McCracken v. Love*, 641.

3. One who has made a gift of slaves, void by the act of 1806 (Rev. Code, ch. 50, sec. 12), cannot be estopped to assert his title by any act *in pais*. Nor is he estopped by the record of a partition of the slaves in a suit, some of the parties to which, being infants and his wards, sue by him as their guardian. *Branch v. Goddin*, 493.

PARTNERSHIP.

1. Where a partnership has had continuous dealings with a distant correspondent for some time, actual notice of its dissolution must be given to such correspondent to prevent a liability of all the members of the firm for subsequent dealings, carried on by one of the partners in the name of the firm, though without the knowledge or consent of the late partners. *Scheiffelin v. Stephens*, 106.

2. Publication of such notice in a local newspaper in this State was *held* not to be actual notice, nor was it evidence from which actual notice could be inferred. *Ibid.*, 106.

3. Where land is purchased in fee, by partners, with partnership funds, and used for partnership purposes, and one of the partners dies, his share of the land descends to his heir, as well in equity as in law. *Summey v. Patton*, 601.

4. And it *seems* that upon a dissolution of the partnership by effluxion of time, or otherwise, all the partners being alive, the land will be regarded as real estate, as between them. *Ibid.*, 601.

5. Where real estate of an inheritance is purchased by partnership, for partnership purposes, and is so used, on the death of one of the partners, his widow is entitled to dower. *Patton v. Patton*, 572.

PAYMENT OF MONEY INTO COURT.

1. Where a defendant in a justice's warrant, after a trial and judgment against him, but before an appeal, paid a part of the claim to the justice, who held it till the trial above took place, and then paid it to the officer of the appellate court, it was *held* that under the pleas of "tender and refusal" and "always ready" the measure was unavailing. *Cope v. Bryson*, 112.

2. The proper way for a defendant to avail himself of a payment into court is to have a rule of court to permit him to do so. *Ibid.*, 112.

PAYMENT OF MONEY INTO COURT—*Continued.*

3. Whether a justice of the peace can make a rule to pay money into his hands which will avail an appellate court, *quære*. *Ibid.*, 112.

PLEADING.

1. The treasurer of the trustees of Davidson College is not a corporation sole; and therefore, if a bond be made payable to him and his successors, as such, no suit can be brought on it in the name of a successor, but should be brought in his name, if living, or in that of his personal representative, if dead. *McDowell v. Hemphill*, 96.

2. If the general issue be pleaded together with special pleas, and the jury find all the issues in favor of the defendant, the Supreme Court cannot reverse the judgment for error in the charge of the judge respecting the matter of the special pleas. *Higdon v. Chastaine*, 210.

POSSESSION.

1. Property proved to have been stolen, found in a house occupied exclusively by the defendant and his wife, is found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt. *S. v. Johnson*, 235.

2. Where a tract of land had marked trees all around it demarking 300 acres, and a person held a small isolated parcel within these bounds for five years, but there was no evidence to connect him with the marked trees or with the grant under which the marks were made, it was *held* that he had not *prima facie* evidence of title to the land, according to these bounds, under the act of 1850. *Kron v. Cagle*, 118.

3. Where A. owned a tract of land in the form of a parallelogram, of which he had an actual possession on one end, and severed the two ends by selling a piece from the middle, and at the end of twenty-two years he conveyed the southern end to B., who continued the possession until the possession of the whole extended beyond thirty years, and then conveyed the northern end by a separate deed, but had no actual occupation of that end, it was *held*, that holding it thus for more than thirty years was not sufficient to authorize the presumption of a grant to this northern end. *Newsom v. Kinnamon*, 99.

POWER.

1. A devise to A. for life, remainder to B., her son, in fee, with a power to sell all or so much of the property as, in her judgment, may be necessary, vests in A. an estate for her life only, with a power of sale appurtenant to her life estate. *Troy v. Troy*, 624.

2. In such a devise an expression in a subsequent part of the will of a doubt whether the power of sale would not make A. the absolute owner of the estate, and a direction that in case such should be the construction in law, that C. should take the legal estate in the property in trust, etc., does not convey to C. any interest in the property. *Ibid.*

3. Where in such a devise as the above the expense of the education of the son is made a charge on all the property, A. will hold the proceeds of such sales as she may make under the power, in trust to pay debts, and then for her own support and for the support and education of her son B. *Ibid.*

PRACTICE.

1. Where a rule was obtained against a plaintiff, in the county court, to give *oyer* of his cause of action by a certain day, at the next term, it was *held* to be regular for the plaintiff to submit to a judgment of nonsuit before the day assigned at the next term, and to take an appeal to the Superior Court. *Johnson v. Murchison*, 83.

2. A nonsuit may be entered before the defendant's appearance, or before pleading, or any day of continuance in the cause. *Ibid.*, 83.

3. Where a defendant in a justice's warrant, after a trial and judgment against him, but before an appeal, paid a part of the claim to the justice, who held it until the trial in the appellate court took place, and there paid it to the clerk of that court, who produced it on trial, it was *held*, that under the pleas of "tender and refusal" and "always ready" the payment was unavailing. *Cope v. Bryson*, 112.

4. The proper way for a defendant to avail himself of a payment of money into court is to obtain a rule of court to permit him to do so. *Ibid.*, 112.

5. Whether a justice can make a rule to pay money into his hands which will be of any avail in the appellate court, *quære*. *Ibid.*, 112.

6. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for some irregularity in the judgment of the county court, it was *held*, that all such objections were considered as waived by the delay and acquiescence. *Johnson v. Murchison*, 83.

7. Every court must enforce its own rules; and, therefore, it is not a ground for dismissing an appeal from the Superior Court that the county court failed to enforce a rule made by itself incidentally in the progress of a cause. *Ibid.*, 83.

8. An administrator has a right to appeal from an order of the county court, affirming the year's allowance made to the widow. *Saunders v. Russell*, 97.

9. If a sheriff fail to take bail, the plaintiff need not file exceptions, nor give notice to fix him as bail. *Adams v. Jones*, 198.

10. A clerk can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years, where he has *admitted money to be due*, in the manner prescribed by section 1, chapter 73, Revised Code. *Summey v. Johnston*, 98.

11. A judgment that the defendant recover his costs from the lessor of the plaintiff in an action of ejectment, where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper. *Blount v. Wright*, 89.

12. In ejectment, a landlord who is permitted to defend the suit in the place of his tenant is confined to the same defense as his tenant would have been confined to. *Sinclair v. Worthy*, 114.

13. In an action of ejectment against the debtor by a purchaser at sheriff's sale, the defendant needs only a judgment, execution, and sheriff's deed. *Ibid.*, 114.

PRACTICE—*Continued.*

14. There is no principle of law or practice of the courts by which, after a plaintiff, in ejectment, has obtained a judgment against the tenant in possession, upon whom a declaration has been served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession on the suggestion that the title was in some other person. *Ibid.*, 114.

15. A writ of *fi. fa.* cannot continue by relation a lien on property created by a previous writ, unless it purports on its face to be an *alias*. *McIver v. Ritter*, 605.

16. It is erroneous for the court, in the trial of a capital case, to order that an affidavit made by the prisoner for the continuance of his cause shall be read as evidence for the affiant, with leave to the State to offer testimony in contradiction, he, the prisoner, objecting and insisting on a continuance. *S. v. Twiggs*, 142.

17. On an appeal to the Superior Court, from a grant of administration by the county court, it is not proper for the former court, on the reversal of the order below, to make an appointment itself, but it should order a *procedendo* to the county court. *Ibid.*, 78.

18. It is no valid objection to the record of an indictment and conviction thereon in a capital case, that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses, upon whose testimony the indictment was found, were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

19. The judge is not bound to give special instructions to the jury, at the request of the counsel, on a hypothetical case. *S. v. Murph*, 129.

20. Where there is a conflict of testimony, which leaves a case in doubt before the jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead the jury, the Supreme Court will order a *venire de novo*. *S. v. Bailey*, 137.

21. It cannot be assigned for error by a party that the judge did not charge the jury upon a point which the party did not make at the trial. *Higdon v. Chastaine*, 210.

22. Where evidence is direct, leaving nothing to inference, and if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that if they believe the witness, they may find for the plaintiff or for the defendant. But this is not allowed where the evidence is circumstantial or where the evidence offered on the other side tends to explain it or to rebut the inferences drawn from it, or to contradict the witness. *Gaither v. Ferebee*, 303.

23. It is no ground for a challenge to the array, in a capital case, that it does not appear from an order for a special *venire facias* that it was made in the case of the prisoner. It is sufficient if it appear that it was made at the term at which the trial was had. *S. v. Murph*, 129.

24. A challenge to the array of jurors is generally founded on a charge of partiality, or some default in the sheriff or other officer summoning them. *Ibid.*, 129.

PRACTICE—*Continued.*

25. Where an action *on the case* brought by A. against B. for fraudulently removing a debtor was tried and a verdict found for the defendant, and afterwards the same jury was tendered in a cause of C. against B. for the same act of removing, and were challenged by the plaintiff, it was *held* that this was a principal cause of challenge to the polls and not to the array, and ought to have been allowed, because the jurors were necessarily under a bias from having decided the previous case. *Baker v. Harris*, 271.

26. A principal cause of challenge involves matter of law, and the decision upon it in the court below may be reviewed upon appeal in the Supreme Court. *Ibid.*, 271.

27. Jurors ought not to be asked, either on oath or otherwise, whether their minds are in such a state that they can try a case fairly and impartially. Their answer can have no influence on the question of their competency, and it is an improper practice to ask them. *Ibid.*, 271.

28. When, on the trial of a criminal case, a question arises as to the competency of a witness offered by the State, and the parties disagree about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which, in his opinion, the preliminary evidence proves, the Supreme Court has no means of reversing his decision, and in such case the defendant is entitled to a new trial. *S. v. Norton*, 296.

29. Where, on a petition for the partition of slaves, the county court ordered that it should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed, and a division directed in different proportions, it was *held* that the Superior Court was not in possession of the whole case by the appeal, and that a writ of *procedendo* to the county court was proper. *Millsaps v. McLean*, 80.

30. Where the bill alleged that the plaintiff had conveyed his land and his horses, mules, hogs, etc., wheat, hay, corn, etc., to the defendant by a deed absolute on its face, but which was intended to be only a security for the payment of money, and it was put in the form of an absolute conveyance by the fraud and oppression of the defendant, and that the defendant had advertised a sale of all the property, it was *held* that the plaintiff was entitled to an injunction; and although the answer positively denied any fraud or imposition, or that there was any agreement or understanding that the plaintiff should have any right of redemption, yet as the answer contained admissions which, taken in connection with the allegations of the bill, furnished a probable ground of belief that the latter were substantially true, the injunction should be continued until the hearing. *Peeler v. Barringer*, 556.

31. If the State courts have power to give relief against an order or judgment of a Confederate court obtained by fraud (which is not decided), they would not do so unless the fraud were positively and distinctly averred. *McLane v. Manning*, 608.

PRACTICE—*Continued.*

32. A person acting as an officer of the law, under a judicial order or judgment, ought not to be made a party defendant to a bill for an injunction to restrain the execution of such order or judgment. *Ibid.*, 608.

PRESUMPTION.

1. Where A. claims a tract of land in the form of a parallelogram, of which he had an actual occupation of one end, and severed the two ends by selling a piece from the middle, and at the close of twenty-two years he conveys the southern end to B., who continued the possession for more than eight years longer, and then A. conveys the northern end by a separate deed, but had no actual occupation of that end, it was *held* that there was no such possession by A. of the northern end for thirty years as to authorize the presumption of a grant of that end. *Newsome v. Kinnamon*, 99.

2. The inference from evidence, tending to show that a way over and through a man's land is a public road, may be rebutted by evidence of nonuser for more than twenty years. *Burgwyn v. Lockhart*, 264.

RAILROAD.

1. Where it had been made to appear by the plaintiff's testimony that his horse had been injured on the railroad by the running of a train against it, and it was left doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on the track, it was *held*, that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled. *Clark v. R. R.*, 109.

2. In an action by a passenger on a railroad against the company to recover damages for the loss of his trunk, the plaintiff is not a competent witness to prove the loss of his trunk, or its contents, though he offer to swear that he has no means of proving those facts or either of them except by his own oath. *Smith v. R. R.*, 202.

RAPE.

An infant under 14 years of age cannot commit the crime of rape; nor, if he be a colored person, can he commit the crime of an assault upon a white female with intent to commit rape upon her. *S. v. Sam*, 293.

RECOGNIZANCE.

1. A judge, being possessed of jurisdiction over the person of a prisoner by any proceeding before him, may adjudge that he be allowed bail, and make an order that his recognizance be taken by a justice or justices named by him, in a sum fixed by him; and a recognizance taken according to such order is valid. *S. v. Edney*, 463.

2. An instrument of writing, executed with an intention to comply with such an order, in the form of a bond, signed and sealed by the prisoner and his surety, on the prisoner's being let out of prison, and received by the justices named, by them returned to the proper court and by its order filed as a record, is a recognizance. *Ibid.*, 463.

RECOGNIZANCE—*Continued.*

3. Taking a recognizance consists merely in making and attesting a memorandum of the acknowledgment of a debt due to the State, and of the condition on which it is to be defeated. *Ibid.*, 463.

4. Presenting a petition to a judge for a writ of *habeas corpus* gives him jurisdiction of the subject, and the parties may waive all errors and dispense with all form, in the proceeding on it. *Ibid.*, 463.

5. Where a petition for a *habeas corpus* was presented to a judge in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it; and, by consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on the petition, and fixed the amounts in which bail should be taken and named the justices of the peace to take it, and the prisoner was afterwards discharged from prison on his entering into a recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance, this is plenary proof of a waiver of all errors in the proceedings. *Ibid.*, 463.

6. It seems that the defendant would be estopped by the recital that "upon application to the judge, he had ordered that the prisoner be allowed bail in the sum of $2,000, and had authorized the two justices to take the recognizance," *Ibid.*, 463.

RECORD.

It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses upon whose testimony the indictment was found were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

REMAINDER.

A legatee for life or years is not bound to give a bond for the benefit of the remainderman, unless it is shown that there is danger of the property being wasted or eloigned. *Horah v. Horah*, 650.

RETAILERS OF SPIRITUOUS LIQUORS.

Although it seems that one who has been licensed to retail spirits cannot assign his license, he may lawfully employ an agent to conduct the business for him, although he leaves the county for an indefinite time, as for instance, in the military service of the Confederate States for three years or the war. *S v. McNeeley*, 232.

REVERSION. See Devise.

RULE IN SHELLEY'S CASE.

1. Where a father, by deed, gave to his daughter and the heirs of her body a tract of land, and provided that "if the said daughter should die and leave an heir or heirs of her body, in that case said heirs,

RULE IN SHELLEY'S CASE—*Continued.*

being her children or child, is to have, occupy, and possess all the property herein given, to them and their heirs forever," it was *held* that the children of the said daughter take as *purchasers*, and that the rule in *Shelley's case* does not apply. *Williams v. Beasley*, 102.

2. Whether the rule in *Shelley's case* would apply where the limitation is to A. for life, remainder to the heirs of her body and their heirs, *quære*. *Ibid.*, 102.

SALE OF SLAVES.

1. Where a parol agreement was made between A. and B. for the change of slaves, and A.'s slave went immediately into the possession of B., but the slave of the latter being a runaway at the time, it was agreed that A. should, at his own risk, take him into possession whenever he could do so, it was *held* that on A.'s afterwards taking possession of the slave, the title passed to him. And it was *held further*, that such a contract made with the attorney of B., under a *parol authority*, followed by delivery, was valid to pass the title. *Bailey v. Moore*, 86.

2. A., being the owner of a female slave, left the State, but before going away conveyed the house and lot in which the slave lived to the defendant, and gave him a note for $50 in consideration that he, the defendant, would support the slave and her husband (both being old) for their lives; it was *held* that this was a sale of the slave to the defendant. *S. v. Duckworth*, 240.

SELF-DEFENSE.

1. Where the defendant in a State's warrant, charging a misdemeanor, put himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take defendant, slew him, without resorting to unnecessary violence, it was *held* that he was justified. *S. v. Garrett*, 144.

2. The principle of *self-defense* does not apply to the case of one who puts himself in the posture of armed defiance to the process of the State. *Ibid.*, 144.

3. One to whom a State's warrant is specially directed is bound to show it, and read it if required; but where the defendant in such warrant had notice of the process, and was fully aware of its contents, and had made up his mind beforehand to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant on demand. *Ibid.*, 144.

4. It is not the belief, simply, of a man that he is about to be stricken which will justify him in striking first, but his belief founded on reasonable grounds of apprehension. One who seeks a fight or provokes another to strike him cannot justify returning the blow on the ground of self-defense. *S. v. Bryson*, 476.

SHERIFF.

1. A sheriff who has received a note given by a *feme covert*, for collection, is not guilty of negligence in failing to take out a warrant on that claim (it being within a justice's jurisdiction), so as to subject him on his official bond. *Graham v. Buchanan*, 93.

SHERIFF—*Continued.*

2. Where the deputy of a sheriff received the bond of a married woman within a justice's jurisdiction for collection, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, it was *held* that there was no breach of the former sheriff's official bond. *Ibid.*, 93.

3. If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. *Adams v. Jones*, 198.

4. And the sheriff is said to fail to take bail when the paper returned by him as a bail bond is so defective and imperfect as to be adjudged not to be such. *Ibid.*, 198.

5. The provision of sec. 3, ch. 78, Revised Code, giving the whole amount of debt as damages for the failure of an officer to collect a claim put into his hands for collection, when the debtor is solvent, only applies to claims within the jurisdiction of justices of the peace, and does not apply in cases of noncollection of process issuing from court. *McLaurin v. Buchanan*, 91.

6. A court of equity will not entertain a bill by a purchaser of land at execution sale against the sheriff, to compel him to convey, because the court of law, from which the execution issued, can compel him to do so. *Patrick v. Carr*, 633.

SLAVES.

1. One who has made a gift of slaves void by the act of 1806 (Rev. Code, ch. 50, sec. 12) cannot be estopped to assert his right by any act *in pais*. Nor is he estopped by the record of a partition of the slaves by a suit, some of the parties to which, being infants and his wards, sue by him as their guardian. *Branch v. Goddin*, 493.

2. Buying of and receiving from a slave corn or other forbidden article on the slave's own account, the owner of the slave being present and knowing what is done, and giving no *written* permission, is indictable under sec. 85, ch. 34, Rev. Code. *S. v. Honeycutt*, 464.

3. It is not ground for arresting judgment that the two offenses, of permitting a slave to go at large as a free person and of permitting him to keep house as a free person, are joined in the same count of an indictment. *S. v. Brown*, 488.

4. If a slave, living in a house to himself, keeps a boarding-house for his own livelihood, and the master, knowing it, exercises no control over him or his business, this is an offense within ch. 107, sec. 29, Rev. Code. *Ibid.*, 488.

SOLDIER. See Conscription and Habeas Corpus.

TAXES.

1. Clause 19, section 86, schedule B, of the act of 1862, imposing a tax of all the net profits above 75 per cent on the cost of production, on every person or corporation manufacturing cotton or woolen cloth,

TAXES—*Continued.*

etc., is constitutional, though the calculation of the profits commences from a time prior to the passage of the act. *Murchison v. McNeill*, 217.

2. A court of equity will entertain a bill against a municipal corporation for the purpose of trying the legality of a tax imposed by the corporation. *Worth v. Commissioners*, 617.

3. The Legislature has the power to authorize a municipal corporation to levy a tax on the town property, the persons and subjects of taxation incident to the person, of those who have a business residence in towns, though their family residence is out of town. *Ibid.*, 617.

4. Whether courts of equity can interfere, by injunction, to restrain the collection of State and county taxes, *quære*. It *seems* they cannot. *Ibid.*, 617.

TRUST.

The performance of a trust, created by a conveyance of property to a trustee, for the use of insolvent persons, upon an inadequate consideration, or gratuitously, will be enforced against the trustee at the suit of the *cestui que trust*. *Baker v. Evans*, 652.

VENDOR AND PURCHASER.

1. Equity will annul a contract for the purchase of land by a man whose mental faculties are greatly impaired, at a price double its value, obtained from him when he was deprived of the counsel of his friends, by the fraudulent practice of the vendor. *Garrow v. Brown*, 595.

2. A. bought land from B., paid the price, and directed B. to convey to a trustee, for the sole and separate use of his (A.'s) wife and children. B. executed a deed with the intention of conveying the land accordingly; but from the ignorance of the draftsman the deed was inoperative. Afterwards A. conveyed the lands to secure the payment of a debt to C. By virtue of an execution against C., his interest in the land was sold, and B. bought from the sheriff, and took a deed from him for the price of $150. A. at the time of his purchase from B. was greatly indebted, and some of the debts were still due: it was *held*, that A. and his wife might maintain a suit in equity to compel B. to convey the land to the sole and separate use of the wife; and that B.'s deed from the sheriff was a security for the sum of $150 paid by him, and not for the amount of the debt due to C. *Haskill v. Freeman*, 585.

3. A court of equity will not entertain a bill by a purchaser of land at execution sale, against the sheriff, to compel him to convey because the court of law, from which the execution issued, can compel him to do so. *Patrick v. Carr*, 633.

4. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid. *Schoffner v. Fogleman*, 564.

5. In sales of land under execution there is a distinction between the cases in which the defendant has an interest subject to execution

VENDOR AND PURCHASER—*Continued.*

and the cases in which his interest is not so subject. In the first mentioned cases the purchoser becomes the owner of the defendant's interest, and if it be an equity, upon discharging the encumbrances on it he has a right to call for the legal estate. In the last mentioned cases the purchaser only succeeds to the equity of the debtor to the extent of holding it as a *security* for the money paid. *Ibid.*, 564.

6. The widow of a deceased vendee of land who has paid the purchase-money may, by a bill against the heirs of her late husband and the heirs of the vendor, compel a conveyance of the land by the heirs of the vendor to the heirs of the vendee and an assignment of dower to herself. *Smith v. Smith*, 581.

WAIVER.

1. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for irregularity, it was *held* that all such objections were considered as waived by the delay and acquiescence. *Johnson v. Murchison*, 83.

2. Where a petition for a *habeas corpus* was presented to a judge, in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it; and, by the consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on the petition, and fixed the amount in which bail should be taken, and named the justices of the peace to take it, and the prisoner was afterwards discharged from prison on his entering into the recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance: this is plenary proof of a waiver of all errors in the proceedings. *S. v. Edney*, 563.

WARRANT.

One to whom a State's warrant is specially directed is bound to show it, and read it if required; but where the defendant in such warrant had notice of the process, and was fully aware of the contents, and had made up his mind beforehand to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant on demand. *S. v. Garrett*, 144.

WIDOW.

1. Where real estate of inheritance is purchased by partners for partnership purposes, and is so used, the widow of one of the partners buying is entitled to dower in such real estates. *Patton v. Patton*, 572.

2. The widow of a deceased vendee of land who has paid the purchase-money may, by a bill against the heirs of her late husband and the heirs of the vendor, compel a conveyance of the lands by the heirs of the vendor to the heirs of the vendee, and an assignment of dower to herself. *Smith v. Smith*, 581.

WIDOW—*Continued.*

3. A widow's dissent from her husband's will, by which his estate was made a common fund for the support of herself and his children, until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate. *Wilson v. Stafford*, 646.

4. If property be given by will to the testator's widow for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession. *Ibid.*, 646.

WILL.

1. Where the certificate of the probate of a will set forth that it was duly proved in common form by the oath of A., one of the subscribing witnesses, and then proceeded to state what the witness swore to, and there was no assertion among these particulars that A. subscribed the will as a witness in the presence of the testator, it was *held* that the probate was defective. *Leatherwood v. Boyd*, 123.

2. Had the certificate stated that the will was *duly* proved in common form by the oath of A., one of the subscribing witnesses thereto, without attempting to set forth what the witnesses swore to, it would have been deemed sufficient. *Ibid.*, 123.

3. Where a person, in his last sickness, desired his physician to write his will, which he declined to do, but told him that A. and B. were on the piazza, and that he might make his will by oral declarations in their presence, and A. and B. were called into the sick man's presence by his direction, and, addressing A. by name, he stated to him, in the presence of B. and the physician, how he wished his property to be divided, and named A. and another person as his executors, it was *held* that this was a sufficient *rogatio testium* to make a valid nuncupative will. *Haden v. Bradshaw*, 259.

4. A testator devised to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, added: "All my property that is *not named*, both real and personal, is to be sold, and after paying all my just debts, to be equally divided between my lawful heirs, in such a way as to make them all equal": it was *held*, that the reversion of the land devised to the wife for life fell into the residue, and must be sold for an equal division; and it was *held further*, that upon a covenant made by one of the heirs to pay to the executor such sum as might be necessary to make the shares of the other heirs equal with his, no action could be brought until such reversion was sold. *Cline v. Latimore*, 206.

5. A devise of a tract of land to the son of a testator, "if he be living, and return to the county of Orange," is a gift of the land on condition that the son returns to Orange as his domicil, and not as a mere transient visitor, especially when other provisions of the will seem to show the testator's expectation and desire that the son should reside there after the testator's decease. *Reeves v. Craig*, 209.

6. Whenever a testator has shown an intention to dispose of all his property, and uses words sufficient for that purpose, any estate to which he is entitled in reversion will pass. *Page v. Atkins*, 268.

WILL—*Continued.*

7. Where a testator devised a tract of land to his wife for life and after several bequests of money and specific legacies, added: "My desire is that all the property that I have not willed away shall be sold after my death, and equally divided between my six children," etc., it was *held* that the reversion in the land given to the widow for life passed by the residuary clause, and was to be sold and divided among the six legatees. *Ibid.*, 268.

8. A gift by will to A. for life, remainder to B. in fee, with a power to sell all or so much of the property as in her judgment may be necessary, vests in A. an estate for her life, with a power of sale appurtenant to her life estate. *Troy v. Troy*, 624.

9. And the expression by the testator, in a subsequent part of his will, of a doubt whether the power of sale would not make A. the absolute owner of the whole estate, and a direction that in case such should be the construction in law, that C. should have the legal estate in fee in the property in trust, etc., do not convey to C. any estate or interest in the property. *Ibid.*, 624.

10. The will declares the expense of the education of his son to be a charge on all his property. A. holds the proceeds of sales, made under the power, in trust to pay debts, for her own support, and for the support and education of B. *Ibid.*, 624.

11. A testator, in 1819, bequeathed to his daughter a negro woman in the following words: "to her and the heirs of her own body forever, and if none, to return after her death to the rest of my children equally." The limitation over to the testator's other children is not too remote. *Blake v. Page*, 252.

12. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together, and not to *hand over* any of the devises or legacies until my existing railroad contracts in T. and N. C. are completed." The last clause has relation only to what is given in the residuary clause. *Patton v. Patton*, 572.

13. Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property. *Turner v. Kittrell*, 589.

14. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold, and the money equally divided among his children; it was *held*, that by the direction to sell, the land is converted into personalty. *Ibid.*, 589.

15. A bequest in these words (after a bequest to A., a daughter of Mary Pickett), "I give and bequeath to all the rest of my nieces, Mary Pickett's children, that she now has or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands,

WILL—*Continued.*

etc." Mary Pickett was a niece of the testatrix, and had, when the will was made, no other daughter than A., but had two sons, and it was *held* that the bequest was to all the *children* of Mary Pickett, which she then had, except A., or might at any time thereafter have, whether in the lifetime of the testatrix or after her death. *Pickett v. Southerland*, 615.

16. Testator bequeaths slaves to A., B., and C. He directs A., B., and C. to purchase a tract of land, on which the slaves are to live, and to cultivate it. The executors are directed to pay to A., etc., $500 for the purpose of stocking the land. This is a *quasi* emancipation, and is void, independently of the act of 1860, ch. 37. *Miller v. London*, 628.

17. Testator gives to his wife all his slaves except those bequeathed as above stated, and concludes his provision for her by giving her all his "property and estate of every kind and description" which is not hereinbefore or hereinafter excepted or disposed of." This is a special residue, and the slaves intended to be given to A., etc., and the legacies intended for their benefit, belong to the next of kin of the testator (his widow having died), after payment of his debts, for the payment of which they constitute the primary fund. *Ibid.*, 628.

18. A bequest to grandchildren or children and grandchildren *eo nomine*, with a direction for equal division among them, is a gift to them *per capita*. *Lane v. Lane*, 630.

19. The general rule is that property given to legatees who die in the lifetime of the testator falls into the residue. *Coley v. Ballance*, 634.

20. If property be given to A. until B., an infant, arrives at the age of 21, and then to B., and B. dies under the age of 21, in the lifetime of the testator, A. has an estate in it until B. would have been 21 if he had lived. *Ibid.*, 634.

21. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship his share falls into the residue. *Ibid.*, 634.

22. A bequest of "all my farming utensils of every description that are not otherwise disposed of" is a gift to the legatee of a wagon used on the farm, and of blacksmith's tools used in doing the work necessary for the farm, and occasionally in doing work for the neighbors, there being in the will no other gift of them specifically, and the will containing no residuary clause nor any other clause which could pass them. *Platt v. Moody*, 636.

23. A bequest of "all my present stock of hogs, or that I may have at the time of my death, together with their increase," passes the testator's interest in hogs in his possession at the time of his death, which belonged to the estate of his son, dead intestate and without issue, there being no administration on the son's estate. *Ibid.*, 634.

24. A widow's dissent from her husband's will by which his estate was made a common fund for the support of herself and his children,

WILL—*Continued.*

until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate. *Wilson v. Stafford*, 646.

25. The administrator of a child who has died since the testator is entitled to the share of the deceased child. *Ibid.*, 646.

26. If property be given by will to the testator's widow for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession. *Ibid.*, 646.

27. These words in a will, "I give to my daughter, Susannah, four slaves, named, etc., to her and her heirs: *Provided, nevertheless*, if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of this country," do not impose a *condition* that Aaron shall return to this country. *Harris v. Hearne*, 481.

28. A devise "to A. R. for him and his mother and the rest of the family to live on until the youngest becomes of age," is a gift of the estate in fee simple to A. R. *Riley v. Buchanan*, 479.

29. A testator gave to his wife real and personal property for life, and directed that at her death it should all, real and personal, be sold and the money be equally divided among his children: it was *held* that, by the direction to sell, the land was converted into money; and that as such the husband of one of the testator's daughters, who had survived her father, but died in the lifetime of her mother, was, as the administrator of his wife, entitled to her share. *Conly v. Kincaid*, 594.

30. A testator gave to his wife all his slaves except two, bequeathed in the last section, and concluded his provision for her by giving her all his property and estate of every kind and description "which is not hereinbefore or hereinafter excepted or disposed of"; and it was *held*, that this was a special residue, and the slaves intended to be given to A., B., and C., and the legacies intended for their benefit, were undisposed of and went to the next of kin, and constituted the primary fund for the payment of the testator's debts. *Ibid.*, 625.

WITNESS. See Evidence.

WRIT OF ERROR.

1. Where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for the commitment of the person charged with the crime, the decision on it is not the subject of review by *writ of error* or *certiorari*. *Walton v. Gatlin*, 310.

2. Where the question in a writ of *habeas corpus* is concerning the power of the committing magistrate or the court, or the legality of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

WRIT OF ERROR—*Continued.*

3. The decision on a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and is the subject of review by *writ of error* or *certiorari*. *Ibid.*, 310.

YEAR'S ALLOWANCE.

An administrator has a right to appeal from an order of the county court affirming the year's allowance made to a widow. *Saunders v. Russell*, 97.