NORTH CAROLINA REPORTS.

VOL. 8.

CASES ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

DURING 1820 AND 1821.

THE FORMER PART BY

THOMAS RUFFIN.

THE LATTER BY

FRANCIS L. HAWKS.

ANNOTATED BY

WALTER CLARK.

REPRINTED FOR THE STATE BY
COMMERCIAL PRINTING COMPANY,
RALEIGH, N. C., 1910.

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JUDGES OF THE SUPREME COURT.

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE:

JOHN LOUIS TAYLOR.

JUDGES:

JOHN HALL. LEONARD HENDERSON.

A. D. MURPHEY.*

ATTORNEY-GENERAL:

WILLIAM DREW.

CLERK:

.....

REPORTERS:

THOMAS RUFFIN. FRANCIS L. HAWKS.

MARSHAL:

SHERIFF OF WAKE (Ex-officio.)

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* Hon. A. D. Murphey, Judge of the Superior Courts, presided during the June Term, 1820, in several causes instead of Judge Henderson, who had been concerned in them at the bar.

JUDGES OF THE SUPERIOR COURT
1820 and 1821.

JOSEPH J. DANIEL,
FREDERIC NASH,
*A. D. MURPHEY,
JOHN R. DONNELL,
†WILLIAM NORWOOD,
†GEORGE E. BADGER.

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* Resigned 1820.

† Elected 1820.

PREFACE.

The cases reported in this volume were prepared in part by the former Reporter: the result of Mr. RUFFIN's labors will be found in the first 248 pages of the book. The residue of the volume is by the present Reporter; and, prepared as it was under many disadvantages, he is aware that it is not exempt from imperfections. Few of the arguments were heard by him, as they were made at a period when it was not his duty to report them; and, with all the assistance which has been kindly afforded him by the gentlemen of the bar in furnishing their notes, he has yet to regret that in many instances briefs were entirely lost, and it was not possible in others to learn more of the argument than the name, perhaps, of some solitary case referred to. Anxious, since his appointment, to present as speedily as possible the unreported decisions of the Court to the profession, he had but little opportunity of revisal before publication. He aimed only at fidelity as a Reporter; and he cannot but believe there are defects, which, though now obvious to himself, yet were not so readily perceptible to a mind wearied with almost constant application to the business. With this statement, however, he submits the work to the candor of his brethren, and the object of his ambition will be attained should it to them be useful. To some it may seem necessary to explain the insertion in the volume of cases apparently unimportant, as involving principles the most common and of the most familiar application. The recollection of the members of the bar will readily furnish an apology. The act under which the Reporter is appointed leaves him no discretion, but enjoins the publication of *all* the cases.

NEW BERN, July, 1823.

CASES REPORTED.

CASES CITED.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1820.

THE STATE v. JAMES DALTON.

1. A paper writing in these words, "*Received of J. D. his book account in full.—J. L.*," is a receipt *for money* within Laws 1801, c. 6, it being proved, that at the day it bears date, J. D. was indebted to J. L. in a sum of money upon open account. So likewise these words, "*Received the above in full*," at the foot of an account.

2. All debts are to be understood as received or paid *in money*, unless explained by some other circumstance.

INDICTMENT for forgery, from RUTHERFORD, under the act of Assembly passed in 1801, ch. 6, and charged that the prisoner forged a certain *acquittance and receipt for money* in the words and figures following, that is to say, "September 8, 1816. *Received of James Dalton his book account in full. John Logan,*" with intent to defraud said Logan. It was proved upon the trial that on 3 September, 1816, the prisoner was indebted to Logan in the sum of $7 by book account, for which he was warranted and judgment obtained before a justice of the peace. The prisoner then warranted Logan for the same money, alleging that he had before paid it, and in proof thereof he offered the said paper-writing in evidence. The jury found the prisoner *guilty*, and he moved for a rule for a new trial upon the ground that the said paper-writing was not an acquittance or receipt *for money* within the meaning of the statute, which was refused and sentence passed on the prisoner, who appealed therefrom (4) to this Court.

The case was submitted without argument.

TAYLOR, C. J. The sole question is whether the paper-writing which the prisoner has been convicted of forging is a receipt for money, within Laws 1801, ch. 6. The necessary effect of setting up such a paper against Logan, provided it was genuine, was to discharge the prisoner from all such demands of Logan

as come within the denomination of a book account. To acknowledge the receipt of a book account in full is equivalent to an acknowledgment that the amount of the account has been paid. Had the paper omitted the words *"in full"* its meaning would have been equivocal, and it might have been difficult to pronounce whether Logan had received a book account belonging to Dalton or himself, that is, a book account kept by Dalton against Logan, or payment of an account which Logan exhibited against Dalton. But the language in which it is expressed leaves no doubt that it purports to be a receipt or acknowledgment of payment on the part of Logan of his account against Dalton. Is it then to be understood as a receipt *for money?* An account is a register of facts relating to money which, when kept in a book, is thence called a book account. Money has become the universal instrument of commerce, by the intervention of which goods of all kinds are bought and sold. Accounts are kept in money, and a creditor may always exact it in preference to any commodity. When debts are paid in money it is according to the usual mode of business; when they are paid in anything else it is in consequence of some special agreement of the parties. When one says he has paid or received a debt we understand without further explanation that he has paid or received it in money. If a creditor put at the foot of an account, *"Received the above in full,"* we infer that he has received the
(5) money, because the account is so kept. It would be doing violence to the import of language and to our understanding of the settled mode of transacting business to construe this receipt in any other manner. The law must bear upon the dealings of men in the way of their daily course and practice; but if this paper be not a receipt for money then all the purposes of forgery may be successfully accomplished without incurring the penalty of the crime. A paper shall be available as a receipt for money because it is so understood by every man who reads it; still as it omits the word *money* it does not come within the statute!

We think the conviction is proper and that the judgment of the law, as prescribed in the act of 1801, ch. 6, ought to be passed on the prisoner.

No error.

(6)

THE STATE v. MILES ALLEN.

1. A witness who hath never seen a person write, nor received letters from him, and who hath no knowledge of his handwriting but that derived from having received bank notes in the course of business, which purported to be signed by the person as the president of the bank, and were reputed to be genuine, is incompetent to prove his handwriting, or to prove that a bank note, purporting to be signed by him, is counterfeit; at least, unless the ordinary occupation of the witness is such as to render it probable that he has received and passed large sums, so as to become a skillful judge, and unless it appear that he has actually passed them so long ago as to allow time for the return of them, if spurious.

2. The modes of proving handwriting are by the evidence of those: (1) who have seen the person write, which is most certain; (2) who, in the course of correspondence, have received pertinent answers or other letters of such a nature as renders it highly probable that they were written by the person; (3) who have inspected and become acquainted with ancient authentic documents which bear the signature of the person.

3. Adjudged cases have not yet laid down other rules, though new cases may arise that will come within the reason of these.

4. And hence it seems that a witness having no knowledge of the handwriting of a person but that derived from the signatures to the bank notes, who is a banker, and, in that character, has habitually, for several years, received and paid away large sums in such notes, which he believed to be genuine, and were so reputed, is competent to prove that a note, purporting to be a bank note and to be signed by the same person, was not signed by him, and is counterfeit.

5. Although sufficient legal evidence be before the jury to justify the verdict, yet if improper testimony be admitted, after objection, a new trial will be ordered, because it cannot be known on which the jury relied.

THE prisoner was indicted in the Superior Court of ASHE for a deceit in fraudulently passing a false and counterfeit bank-note purporting to be issued by the Bank of Augusta, in Georgia, and to be signed by Thomas Cumming as president, and E. Early as cashier of that bank. Several witnesses were called by the solicitor on the trial to prove that the note was counterfeit. None of them had seen Cumming or Early write, or had received letters from them, but they all swore that in (7) the usual course of their business they had received considerable sums of money in notes of the Bank of Augusta, which had the names of Cumming and Early signed to them as president and cashier; that the notes thus received by them were reputed to be genuine, and passed currently as such; that in this way and this only they had acquired a knowledge of the hand-

writing of Cumming and Early; and if the notes received by them were genuine that which was then before the court was counterfeit. Another witness, A. Erwin, proved that he often received, and had seen received in the State Bank at Morganton, large sums in the notes of the Bank of Augusta, which had been paid out again by the bank in the course of business at various times for several years; that the notes thus received were reputed to be good, and that he believed them to be so; and if they were genuine the note in question was undoubtedly counterfeit in his opinion. It was objected on behalf of the prisoner that such evidence ought not to go to the jury because none of the witnesses had become acquainted with the handwriting of Cumming or Early by either seeing them write or in the course of correspondence; but the court suffered the evidence to go to the jury, and instructed them that if they believed the witnesses they were authorized upon that evidence to consider the note as counterfeit. The jury found the prisoner guilty, and he moved for a new trial for misdirection, which was refused and sentence passed on him, from which he appealed to this Court.

Attorney-General for the State.
Seawell for the prisoner.

TAYLOR, C. J. The only methods of proving the handwriting of a person sanctioned by law are:

1. By a witness who saw him sign the very paper in dispute.

2. By one who has seen him write and has thereby
(8) fixed a standard in his own mind by which he ascertains the genuineness of any other writing imputed to him.

3. By a witness who has received letters from the supposed writer of such a nature as renders it probable that they were written by the person from whom they purport to come. Such evidence is only admissible where there is good reason to believe that the letters from which the witness has derived his knowledge were really written by the supposed writer of the paper in question.

4. When a witness has become acquainted with his manner of signing his name by inspecting other ancient writings bearing the same signature, and which have been regarded and preserved as authentic documents. This mode of proof is confined to ancient writings, and is admitted as being the best the nature of the case will allow.

Other modes of proving handwriting not yet sanctioned by adjudged cases may possibly come within the reason of the cases enumerated, but I think they ought to appear clearly to do so

before they are admitted. The court ought to be well satisfied that the person who proves the signatures on a bank bill, without having seen the signers write or having been engaged in a correspondence with them, were from their situation and pursuits likely to acquire a correct knowledge on the subject; and, particularly, that they must have known of the return of those bills they believed to be genuine if they had been spurious. The first witnesses in this case only knew that they had received bills in the course of business which purported to be signed by the president and cashier of the Augusta bank; that they passed them away, and *if they* were genuine the note in question was counterfeit. What was the occupation of the witnesses, whether they were likely to receive many bills and to acquire an accurate knowledge of the signatures are facts to which no evidence is directed. They may have received counterfeit (9) bills which may yet return, for it is not said when they received and passed them away. Such evidence, I think, inadmissible, especially as it requires much experience and a more than ordinary skill to detect counterfeit signatures to bank-notes. The fraudulent ingenuity of men has brought this crime to such perfection that even the signers themselves have sometimes been imposed upon. Hence, before witnesses are allowed to give evidence to the jury, the court ought to be satisfied that they are skilled in the knowledge of bank-notes. The evidence of Erwin approaches very nearly to my conceptions of what is proper on such a question, and if I were certain that the verdict was founded on his evidence and not on that of the other witnesses I should hesitate in agreeing to a new trial; but, as some improper testimony has been admitted, a new trial must be awarded.

HENDERSON, J. The law requires that he who deposes to a fact should have the means of knowing it. Grounds of conjecture and opinions are not sufficient. A knowledge, therefore, of the handwriting of a person should be founded on specimens of writing known to be his. Having *seen* him write is the most certain. But it is said to satisfy the rule if the specimens be obtained in the course of a correspondence in which pertinent answers have been received or if they be ancient authentic documents. I am not disposed to go further, for there is nothing more dangerous than a relaxation of the rules of evidence. Their object is more to prevent imposition by falsehood than even to get at the truth; my meaning is, that the law prefers that many truths should be omitted than that one falsehood should be imposed on the court. The rules, therefore, guard more against

the introduction of falsehood than against the suppression of the truth. In this case it is more than probable that the bank-notes which the witnesses had seen and from which they had
(10) drawn their knowledge of the handwriting of the president and cashier of the bank were genuine, and therefore that the note passed by the prisoner was counterfeit. But this rests on bare probabilities, for it might well have happened that most or all of the notes from which they derived their knowledge were spurious. We cautiously refrain from giving any opinion upon the doctrines laid down in *U. S. v. Holtsclaw,* 3 N. C., 379. It does not appear here what the ordinary business of the witnesses was, how or when they received the notes, at what time they had passed them, or whether they had passed them at all, so as, if spurious, they might be returned upon them. All that those witnesses said may therefore well be true and yet the note in question be genuine. It is certainly better that the prosecutor should be put to the trouble of procuring better testimony than that a man should be punished in a case where it is quite possible he may be innocent. Many of these observations do not apply to Mr. Erwin; certainly he had a better opportunity of forming a correct judgment than any of the other witnesses. But even if *he* was admissible a new trial should be granted, because we cannot say on whose testimony the jury relied. Let there be a

New trial.

HALL, J., concurred.

Cited: S. v. Harris, 27 N. C., 291; *S. v. Vinson,* 63 N. C., 338; *S. v. Shields,* 90 N. C., 695; *Williams v. Telephone Co.,* 116 N. C., 562; *Jarvis v. Vanderford, ib.,* 152.

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(11)

ARMSTRONG and ARRINGTON v. SHORT.

1. It is most proper that an inquisition should distinctly find the party to be a lunatic or an idiot, but it will be sufficient if an equivalent description be used, as that he is of insane mind.

2. An inquisition finding the party "to be incapable of managing his affairs" only is defective and void.

3. No person is entitled to a traverse to an inquest of office in its proper and technical sense, under st. 2, ed. 6, so as to vacate the office, unless he be interested at the time of finding it.

4. But such inquest, when offered in evidence, is only presumptive proof against persons not parties or privies.

5. *Held, therefore,* in debt on bond given after office found, where an inquisition was pleaded for the defendant, that the plaintiff might in his replication traverse the truth of it, and, upon the trial, give evidence to verify the replication.

THIS was an action of debt from NASH, on an obligation executed by the defendant to the plaintiffs, and on the trial in the court below the plaintiffs had been nonsuited and appealed to this Court. The case as stated in the record, for the decision of this Court, is as follows: Short was found by inquisition before the execution of the bond "to be of insane mind and incapable of managing his affairs," whereupon the county court appointed S. Westray his guardian, who, being duly notified to appear and defend this suit, did appear accordingly and pleaded the inquisition. The plaintiffs replied, and therein, confessing that Short was found to be of insane mind, said that Short was not at the time of executing the obligation nor of taking the inquest, nor at any other time, *non compos mentis,* but that he had a sound mind and memory, and they traversed the truth of the finding in the said inquisition. The plaintiffs offered evidence to support their replication, which the court rejected because the bond declared on had been executed after the inquisition which, being still in force, was conclusive.

Seawell for the plaintiffs.
Mordecai for the defendant.

TAYLOR, C. J. As the Legislature designed that guar- (13)
dians should be appointed for idiots and lunatics alone, it is highly necessary that the inquisition, upon the authority of which the county courts exercise the power confided to them, shall distinctly state that the person is an idiot or lunatic, or by an equivalent description present the same meaning. Very mischievous consequences might ensue from a laxity in this respect, since by a jury undertaking to measure the degrees of intellect persons might be subjected to this guardianship whose free agency the law had not restrained, however wise it might be thought on general reasoning to tie up the hands of spendthrifts and drunkards, as is done in some of the States. An inquisition should therefore be regarded as a nullity which barely found that the party was of such weakness of mind as to be incapable of managing his own affairs, for this does not import a total privation of understanding, and conse- (14)
quently does not meet the legal acceptation of lunacy. The objection taken to this inquisition is that it uses the terms *"insane mind,"* and does not find Short to be a lunatic; but I

think those words are of like signification and do substantially conform to the requisites of the act. "Unsound mind," which has the same meaning in the law with insanity, is frequently used in statutes in that sense. *Lord Coke* translates *non compotes,* "persons of nonsane memory"; and "insanity," both in law and according to the Latin word whence it is derived, imports madness.

It is argued by the appellee that none can traverse the inquisition but those who had an interest at the time it was found; and, in support of this position, the words of the statute, 2 Ed. VI, are cited, and several authorities relied on. In the technical sense of a traverse to an inquest of office, this is certainly correct; for the specific design of passing the statute was for the benefit of such persons as were sometimes deprived of their rights by untrue findings of offices. Persons holding terms for years were often put out of possession by reason of inquisitions, because such terms for years were not found; after which they had no remedy during the king's possession, either by traverse or *monstrans de droit,* because such interests were not freehold. 4 Reeves's Hist., 462. Those persons only are entitled to traverse the inquisition, which is done by suing out a *scire facias* according to the statute. Hence, a person claiming under a deed from a lunatic, after the inquisition, was a stranger, and had no right to a traverse. But the true inquiry here is, in what degree shall an inquisition be considered as evidence against a person claiming from a lunatic who is under guardianship? It is possible that a person may be found a lunatic who is really not so;

and very probable that a lunatic may have lucid inter-
(15) vals, in which no one could detect his incompetence.

Hence, serious mischiefs might arise to innocent persons if they were concluded by an office. The rule of law, that no one shall be bound by a proceeding to which he was neither party nor privy, ought not to find an exception in a case where the whole proceeding may be consummated without any notoriety beyond the neighborhood in which it is transacted. The case cited from 2 Atk. is an authority to show that such an inquisition is not conclusive; for the Chancellor heard witnesses to disprove the lunacy found by it, and on the strength of their testimony, decreed that a purchase made by the supposed lunatic should stand. This shows that the sense in which he used the word "traversible" was that it might be contradicted by witnesses. In the case *Ex parte Barnsley,* 3 Atk., 184, the Chancellor says that inquisitions of lunacy are not at all conclusive; for they may bring actions at law, or a bill to set aside conveyances, so that it may be disputed afterwards upon the issue to

be directed. In Collinson on Idiots and Lunatics it is distinctly laid down that an inquisition is only presumptive evidence of insanity, and not conclusive; so that, in an action in respect of any contract or deed, it is for a jury to determine whether, at the time of executing it, the party was *non compos,* though, by the inquisition, he was found to be *non compos* at such period. When, therefore, it is said, in Bacon, that if a lunatic contract with another after office found, it is at the peril of him who makes the contract with him, it must be understood in reference to the risk he runs in not being able to disprove the inquisition. In such case he would be concluded, since he would have no right to a traverse, under the statute, being a stranger when the office was found. But if he had contracted with a lunatic, who was not so found by office, the defense could not be set up against him, since no man can stultify himself. The reason of the thing, therefore, coincides with the authorities, and the nonsuit must be set aside and a new trial granted, and the plain- (16) tiffs be allowed to offer evidence to verify the replication.

HALL, J. Upon the strength of the case of *Faulder v. Silk,* cited 2 Mad. Chan., 578, and that in 2 Atk., 412, as well as some others that might be referred to, I concur in the opinion that the inquisition is only *prima facie* evidence, and that evidence contradictory is admissible. If a lunatic, so found by inquisition, afterwards have lucid intervals before such inquisition be superseded, and during such interval enter into a contract, the other party may certainly prove the fact and have the benefit of it. The effect of an inquisition is to permit the committee of the lunatic to plead the lunacy, which, without such inquisition, the lunatic himself could not do.

HENDERSON, J., having been concerned in this cause at the bar, did not sit; and MURPHEY, J., sat for him, and concurred.

Cited: Moffitt v. Witherspoon, 32 N. C., 192; *Christmas v. Mitchell,* 38 N. C., 540; *In re Anderson,* 132 N. C., 247; *Sprinkle v. Wellborn,* 140 N. C., 180; *In re Denny,* 150 N. C., 423.

(17)

THE JUSTICES OF WAYNE v. ARTHUR CRAWFORD et als.

If a party to a cause in the Supreme Court die pending the suit there, his representative may be made a party by process from that Court.

SINCE this case came into this Court, Crawford, one of the defendants, died, which Mordecai, for the plaintiff, now suggested. He then moved for a *scire facias* against his administrator, to make him a party to the suit here; which the Court, after consultation, allowed.

HARKEY, Administrator of Russ, v. POWELL.

(IN EQUITY.)

A mortgage of a slave was made in 1789 to secure a debt due in March, 1793, and the mortgagee took possession at the date of the deed and continued it until 1815 without any account or acknowledgment. *Held*, that the mortgagor could not redeem; such a lapse of time creates the presumption that the right of redemption has been abandoned.

THIS was a bill filed in August, 1815, from MECKLENBURG Court of Equity, for the redemption of a negro slave, Grace, and her issue, and was transferred from the Court of Equity for Mecklenburg to this Court for trial.

The bill charged that complainant's intestate borrowed from Powell, the defendant, the sum of eighty pounds in the year 1800, and for the purpose of securing the payment of it executed a bill of sale to Powell for the said slave, subject to a proviso of redemption on payment of the said sum; that defendant took possession of the slave at the time of making the deed, and had continued it ever since; that she had issue, several children, who were also in his possession; that Russ in his lifetime paid forty pounds, part of the mortgage money; that he then died intestate; that complainant had obtained letters of administration of his estate, and had offered to pay the residue of the said mortgage money and interest, but at the same time alleged that it had been already satisfied out of the hire and profits of the slaves. Complainant then prayed an account and that he might be let in to redeem.

The defendant admitted in his answer that he lent Russ eighty pounds, but it was on 21 March, 1789, and that he then took a

bill of sale from Russ conveying to him the slave Grace, with a condition that if the money should be repaid on or before 1 March, 1793, the deed should be void; that eighty pounds was the full value of Grace when he took her in 1789. He denied that Russ or the complainant had ever paid or (18) offered to pay the eighty pounds, or any part thereof, or had requested him to give up the negroes or to come to an account. He stated that Grace had issue, six children, which he had raised and then held as his own.

The answer then insisted that the defendant had been in the peaceable possession of the slaves for more than twenty years after 1 March, 1793, before suit brought, and that as he gave a fair price this Court would not aid complainant. With his answer the defendant exhibited the deed, which bore date and was of the tenor as stated in the answer and in the usual form of mortgages except that in the conclusion it contained this clause, "that if the said money was not paid at or before 1 March, 1793, this deed shall remain in full force and virtue *as if there had been no condition annexed to it.*" It was proved and registered in May, 1793.

It did not appear by the bill or answer when Russ died or when complainant administered, though the letters of administration, which were filed among the papers in the suit, bore date in August, 1815. Nor did the bill charge when Russ paid the forty pounds nor when complainant offered to pay the residue.

Several issues were submitted by the court to a jury, who found that in 1789 the sum of eighty pounds was something less than the value of Grace; that at the time of filing the bill she and her increase were worth greatly more than that sum; that there was no evidence that Russ or complainant had paid or offered to pay any part of the eighty pounds; that Russ did not, in his lifetime, set up any right to redeem after March, 1793, and that the defendant had held the said slaves adversely and claiming them as his own property for twenty-one years, or thereabouts, before suit brought.

A. Henderson for the defendant.
Wilson for the complainant.

TAYLOR, C. J. The slave mortgaged was delivered (20) into the possession of the defendant in March, 1789, when the deed was made. By the condition of the deed the money became payable 1 March, 1793, from which time to the filing of the bill is a period of twenty-two years and five months. Throughout this long possession there is no act, no acknowledg-

ment shown on the part of the defendant by which the transaction was recognized as a mortgage. The right of redemption must, under these circumstances, be presumed to have been abandoned. The bill must be dismissed.

HALL, J., and HENDERSON, J., concurred.

ROBERT GULLY v. J. G. GULLY and WATSON.

(IN EQUITY.)

1. The act of 1800, c. 9, does not require a bond of any particular form to be given for obtaining an injunction.
2. The condition of a bond will be so construed by rejecting insensible words as to fulfill the intent of the parties.
3. Hence, if a bond given upon obtaining an injunction be conditioned, "if the said R. G. (the complainant) should dissolve the injunction and pay the sum recovered at law, and interest," the words "*should dissolve the injunction and*" will be rejected as insensible.
4. It is no objection to such a bond that it is taken for double the amount of the recovery at law, nor that it provides in the condition for the payment of interest on the sum recovered, should the injunction be dissolved.

THIS was a case from WAYNE Court of Equity, and appealed to this Court.

The defendants here had obtained a judgment at law against the complainant for the sum of $1,203.20, besides costs of suit. The complainant then exhibited his bill in equity and obtained a judge's *fiat* for an injunction upon his entering into bond with security according to law. The master took the bond
(21) with security in the sum of $2,406.40, with condition (reciting the judgment and the order for the injunction) that "if the said Robert should *dissolve* the injunction and pay into the clerk and master's office the said sum of $1,203.20 and interest then the obligation to be void, otherwise to remain in full force."

Upon the coming in of the answers the case was heard upon the bill and answers and a motion to dissolve the injunction, which was done, and then a decree made against the complainant and his surety "on their bond for $2,406.40, the sum mentioned therein, to be discharged by the payment of the judgment at law and all costs." From which decree the complainant appealed to this Court.

Mordecai for plaintiff.
Gaston for the defendants.

TAYLOR, C. J., after stating the case, proceeded to de- (23) liver the opinion of the Court: The act of Assembly does not prescribe the form of the condition of the bond, but the obvious design of it was to provide for the payment of the sum stayed and all costs upon the dissolution of the injunction. Any condition, therefore, which by a reasonable construction stipulates for that object ought to be supported. That the complainant should dissolve his own injunction is what we may safely conclude was never meant. It is manifestly a clerical error, and inserted instead of the words "if J. G. Gully and Watson shall dissolve the injunction," etc. In that sense it ought to be construed to fulfill the intent of the parties according to the case of *Bache v. Proctor*. But if those words be rejected as insensible and impossible the condition still provides for the payment of the amount of the judgment. When complainant has had the full benefit of this bond, by the advantage of a trial on the equity of his claim, it would be highly unjust that he should be allowed to defeat it by a critical objection, and in such (24) a case I should yield to express authorities with reluctance.

The decree below is affirmed.

THE STATE v. MASON SCOTT.

1. A person called as a juror in a capital case said, on oath, that he had not formed nor expressed an opinion respecting the guilt or innocence of the prisoner; and, after the verdict, it was proved that he had declared a few minutes before to a third person, "that he could not serve because he had made up his opinion," which was unknown to the prisoner at the time he accepted the juror.

2. *Held*, that there shall not be a new trial—*first*, because such declaration was not on oath; and, *secondly*, because it is contradicted by the juror on oath.

3. If the insanity of a juror be alleged as a reason for a new trial, being a disqualification so easily perceptible from its nature, it must be proved by clear and full evidence.

4. The declarations of a party cannot be offered in evidence on his behalf in any case, unless they accompany acts and be *pars res gestae*, and are offered as such. They are not admissible even to show the insanity of a prisoner.

5. *Held, therefore*, where a prisoner had committed homicide at 10 o'clock at night of one day, that evidence of what *he said the next morning* could not be received to prove his derangement.

6. The property in a slave is not of the essence of the offense of the murder of him, and it is immaterial whether it be laid in the indictment or not; hence it need not be proved upon the trial as laid. *Quere*—if the property be proved to be different from that laid?

7. If a statute take away clergy from any *offense*, and another statute, either prior or subsequent, create that offense by its known, legal and technical name, all the qualities of its name will attach to it; hence it will stand ousted of clergy.

8. The statute, 23 Hen. 8, c. 1, ousted *murder* of clergy. Our act of 1817, c. 18, gives to a slave the character of a human being and places him within the peace of the State, so far as regards his life.

9. Hence, *it is held*, that one convicted of willfully killing a slave with malice prepense is guilty of *murder* and not entitled to the benefit of clergy.

THE prisoner was indicted, tried and convicted at the Superior Court for WAKE at April Term, 1820, before *Paxton, J.* He was charged with the murder of "a negro man slave,
(25) Caleb, the property of Frederick S. Marshall"; and the indictment concluded "contrary to the form of an act of the General Assembly and against the peace and dignity of the State."

The prisoner was allowed to ask the jurors upon oath as they were called to the book whether they had expressed or formed an opinion unfavorable to him? One Daniel Peck, being called, was thus interrogated, and replied that he had not formed nor expressed any opinion respecting the guilt or innocence of the prisoner, and he was then elected and sworn on the jury. The deceased was slain with a dagger about 10 o'clock at night. One ground of defense taken on behalf of the prisoner was that he, the prisoner, was insane at the time, to prove the truth whereof his counsel offered to give in evidence his own declarations in connection with his conduct the next morning after the homicide to be considered by the jury in connection with his conduct before the homicide, and on the same night and within a few minutes of the time of giving the stroke. But the court rejected the evidence of the declarations and conversation of the prisoner on the morning succeeding the homicide.

For the purpose of showing the deceased to be the property of F. S. Marshall the Attorney-General called a witness who proved that he had long known Caleb; that he had formerly belonged to one S. Marshall, and continued to be his property until he died several years ago, leaving an only child, who is the said F. S. Marshall, a minor. The prisoner's counsel moved the

court to instruct the jury that the evidence did not sufficiently prove the property as laid in the indictment; but the court refused to give the instructions as prayed for, and, on the other hand, instructed the jury that the evidence, if believed, was sufficient.

After the verdict a new trial was moved for upon the four grounds following:

1. That the juror Peck had made up an opinion against the prisoner before he was sworn. (26)

2. That the same juror was insane and without capacity to be a juror.

3. Because proper evidence offered on behalf of the prisoner had been rejected.

4. For misdirection of the court upon the proof of the title of the deceased.

The first reason was supported by the affidavit of a person who swore that he was standing near to Peck when he was called as a juror, and that he asked him if he meant to serve on the jury, to which he replied "no, I cannot, for I have made up my opinion," and that in a few minutes he was sworn and took his seat in the jury. The second reason was also supported by two affidavits; the one made by a physician, who swore that twelve months before that time Peck had been deranged by intemperance; that he had seen him within the week of the trial intoxicated, and from that circumstance thought it probable that his mind was deranged; the other made by a mechanic, who swore that Peck came to his shop before breakfast on the day of the trial and his conduct was so strange and his expressions so absurd that he believed him to be deranged. The court overruled the motion. The prisoner then prayed the benefit of clergy, but the court refused to allow it and passed sentence of death on him, and he appealed to this Court.

Attorney-General for the State.
Seawell and *Manly* for the prisoner.

TAYLOR, C. J. All felonies were clergiable at the com- (27) mon law; that is, all who could read were burnt in the hand. The question is whether murder has not been ousted of clergy.

HENDERSON, J., after stating the facts and the ques- (32) tions as they appear upon the record: The ground of the first reason for a new trial is not sufficiently proved. Ruth states that Peck *informed* him that he had formed an opinion. When Peck said so he was not on oath, and when offered as a

juror he denied it *on oath.* The second reason is in the same situation. It does not appear what was the state of Peck's mind at the time he took his seat as a juror. One of the witnesses speaks of his situation twelve months past; and although he saw him drinking during the week of the trial he does not pretend to say that his mind had actually become affected, but concludes that possibly it might. The affidavit of the other witness does not prove anything; and both taken together can scarcely raise a doubt much less satisfy us that the juror was deranged when he was sworn on the jury. The nature of the disqualification would render it perceptible to many of the numerous bystanders who commonly surround a court, and more full and satisfactory evidence of the fact, if true, should have been produced.

Were I left to myself, unshackled by adjudications, I must confess that I should be inclined to respect the third reason; but it is in vain for me to contend against precedents; I must submit to the law as I find it written, and my brothers entertain no doubt of the correctness of the decisions upon principle. The declarations of the party, say they, cannot be offered in evidence in his behalf unless they accompany acts. They then form part of the acts, and as such are heard. But, with due deference to these opinions, it appears to me that a man's acts are as much within his control as his words, and that both ought either to be received or both rejected. Yet it is the daily practice to give the party's acts in evidence for him. I do not contend that the party's declarations should be given in evidence for him to prove the truth of the facts declared or asserted by him, but only that the jury should be at liberty to draw inferences from his having made such declarations.

(33)

The last reason is that the court refused to instruct the jury as to the effect of the testimony, allowing it to be true, relative to the title of the slave Caleb. This is a demurrer to evidence *ore tenus.* Observing that the evidence does not prove the property in the deceased to be otherwise than as laid, is it then a fatal defect, even if it be admitted that it does not prove the property to be as laid? We think it is not. The ownership forms no part of the offense; it is equally criminal to kill the slave of one person as of another. The prisoner is no further interested in having that stated than for the sake of identity. We give no opinion upon a case where it is proved that the property is in a different person from the one alleged in the indictment. Had the prisoner been acquitted by the jury for this defect of proof there can be no doubt but that on a second indictment for killing the same slave Caleb, charging him to be the property of some other person than F. S. Marshall, he could

safely rely on a plea of such acquittal, with proper averments that the slave Caleb mentioned in one indictment is one and the same person with the slave Caleb mentioned in the other. This incontestably proves that the title or ownership of the slave is not of the essence of the offense of killing him. For then an acquittal upon the charge of killing a slave, the property of A, could not be an acquittal for killing a slave, the property of B. This case is within the principle of *Pye's case* and that of *Susanna Johnson.* Pye was charged with robbing a person in the dwelling house of A; the robbery was proved to have been from the person, but it was not proved to whom the house belonged. Upon conference of all the judges it was held to be immaterial. 2 East Cr. L., 785.

The motion for a new trial must therefore be overruled.

To avert the punishment which the law has affixed to *murder* the counsel for the prisoner insists that he is en- (34) titled to *clergy.* This depends on the construction of the act of 1817, in connection with former acts on the subject of murder. As a preliminary remark I will observe that at the common law all felonies (murder inclusive) are punishable with death. But a clergyman, from the veneration in which the clerical character was held by the founders of our law, was exempted from the punishment of death if the bishop would claim him as a clerk, and of his being so, reading was the evidence. Hence came the benefit of clergy. In process of time this benefit was extended to all persons, and thence it came to pass that the most enormous crimes were unpunished. The Legislature, perceiving this, hath proceeded from time to time to take away the benefit of clergy from certain offenses. The consequence is that clergy is allowable in all felonies but where it has been expressly ousted by statute. The question therefore is reduced to this, is the benefit of clergy taken away from *the offense* of which the prisoner is convicted?

The statute, 23 Hen. VIII, ch. 1, ousteth clergy in cases of willful murder, of malice prepense. Our statute (1817, ch, 18) declares the offense of killing a slave shall thereafter be considered and denominated homicide, and shall partake of the same degree of guilt, when accompanied with the like circumstances, that homicide does at common law. The prisoner has been convicted of killing the slave Caleb with malice aforethought; and such a killing of a human being is, at the common law, murder. Of murder, therefore, is the prisoner guilty. The effect of the act of 1817 is to give to a slave the character of a human being, and to place him *within the peace* of the State as far as regards his life. This latter act, therefore, virtually de-

clares this offense to be murder, and the statute, 23 Hen. VIII, takes away clergy. Nor does it make any difference whether the benefit of clergy be taken away by the same statute which creates the offense, or by any other, prior or subsequent. For
(35) when the supreme authority creates an offense, giving it a well known legal and technical name, the offense assumes all the qualities of its name, that is, it becomes the thing the Legislature declares it shall be. Our statutes of bigamy, mentioned in the argument, bear no analogy to this case. The statute, 1790, provides that bigamy shall be felony, and that the felon shall suffer death; yet a person convicted under it was allowed his clergy, because it was not taken away by that *or any other statute,* and at common law it still remained. We are not, however, left to our own reasoning alone upon this question, the authorities are the same way. Foster, in his Treatise, lays down the law thus, Fost. Tr., 190, 191: The statute, *de Clero,* 25 Ed. III; provides that clerks convict for treasons or felonies touching all persons other than the king himself, or his royal majesty, shall have privilege of Holy Church. Treasons created by after statutes relative to the coin, the establishing of the king's regal and abolishing the papal supremacy, were ousted of clergy without express words, as coming within the exception of the statute *de Clero,* because they were treasons touching the king's royal majesty.

We are therefore of opinion that the prisoner is not entitled to the benefit of clergy, and that judgment of death be awarded against him.

Cited: S. v. Kimbrough, 13 N. C., 439; *Norwood v. Marrow,* 20 N. C., 589; *S. v. Brandon,* 53 N. C., 466; *S. v. Penland,* 61 N. C., 224; *S. v. Vann,* 82 N. C., 634; *S. v. Reitz,* 83 N. C., 637; *S. v. Mills,* 91 N. C., 596; *S. v. Rhyne,* 109 N. C., 795.

(36)

THE STATE BANK OF NORTH CAROLINA v. CLARK & McNEIL.

1. Acceptance and payment of a check is *prima facie* evidence that the acceptor had the necessary funds of the drawer, and it is incumbent on the former to show that he had not.

2. The State Bank of North Carolina is a mere private corporation; hence, the books of accounts kept by the bank of the dealings between it and a customer are not evidence for the bank in a suit between it and the customer.

MANNING *v.* SAWYER.

THIS was an action of *assumpsit,* from CUMBERLAND, for money had and received and money laid out and expended to the use of the defendants. Upon the trial the facts were that the defendants, being merchants at Fayetteville, were customers of the branch bank at that place, and kept large deposits for which they had drawn checks from time to time, that had been honored and paid. The checks were produced in court by the plaintiffs and admitted by the defendants. The plaintiffs further alleged that those checks were for larger sums than had been deposited, and that defendants had *overdrawn.* To prove that fact they offered to give in evidence the books of accounts kept at the bank with the defendants, whereby it would appear that their deposits did not equal the amount of the checks by the sum of three thousand dollars and upwards. The court rejected the evidence and the jury returned a verdict for the defendants. The plaintiffs moved for a rule for a new trial, which was refused by the court, and an appeal taken to this Court.

Ruffin for the defendants.

TAYLOR, C. J. The acceptance and payment of a check is *prima facie* evidence that the plaintiffs had in deposit money of the defendants wherewith to pay it; and if the fact were not so it is incumbent upon the plaintiffs to prove by the (37) state of the accounts that the defendants have overdrawn. But that cannot be shown by the books of the bank, which is only a private corporation, and they are inadmissible in favor of the plaintiffs. The judgment below is

Affirmed.

Cited: Fox v. Horah, 36 N. C., 360; *Bland v. Warren,* 65 N. C., 374; *Durham v. R. R.,* 108 N. C., 402; *Dyeing v. Hosiery Co.,* 126 N. C., 294.

MANNING v. SAWYER.

1. The Court will not entertain an appeal, but will direct a certificate under the act of 1818, c. 2, s. 7, unless the appellant bring up the appeal bond with the record and file it in due time.

2. The appellant filed the record in due time but omitted to file the appeal bond with it. *Held,* that on a mere suggestion and motion on behalf of the appellant a *certiorari* will not be granted, but that on a proper case appearing by affidavits a *certiorari* will be granted.

3. A declaration in assumpsit that defendant promised to pay the plaintiff for a certain house what "A, B and C should *say it was worth*" is supported by giving in evidence a written agreement, that defendant would pay what "A, B and C should *say*."

THE plaintiff obtained a verdict and judgment below for a large sum of money, and the defendant appealed to this Court. He brought up and duly filed the transcript of the record, but omitted to file the appeal bond. From CHOWAN.

Gaston, for the appellee, moved to dismiss the appeal for want of the bond.

Hogg, on the other side, opposed it and moved at the same time for a *certiorari* to the court below to get up the bond. He argued that the Court ought to grant it because a refusal would be so penal to the appellant. Appeals are beneficial and ought to be favored, and the Court will always presume that they have been regularly taken and, of course, a bond given. The
(38) appellant has brought up the record, which shows that he has not intentionally abandoned his appeal; and he does not now ask the Court to go to trial without the bond being here, but on the contrary to have it brought up so as to satisfy the Court that the appellee is secured in his recovery. It is obviously the fault of the clerk in not giving the whole record to the appellant, who cannot be presumed to have sent up only a part of what he received.

HENDERSON, J., said that he thought the Court was indeed to presume that a bond was given when the appeal was granted. But, admitting that to be so, the absence of the bond must be accounted for by the appellant, to whom the law confides the record and his own bond as part of it. As he has the custody of the bond it is not too penal, but is quite just to dismiss or, rather, not to receive the appeal; otherwise an appeal would be always taken for delay. The *certiorari* ought not, therefore, to be granted unless a proper case be made upon *affidavit;* but the appellee is entitled to a certificate under the act of Assembly.

The rest of the Court concurred.

Some days afterwards *Hogg* renewed his motion and supported it by affidavits, that the appellant had duly applied to the clerk below for the record and received the transcript which he filed; that he fully believed that he had done all that was required of him, and that he and the clerk were both ignorant that it was his duty to bring up his own bond; that he had never intended to abandon his appeal or delay the appellee; therefore the writ was granted, and was returned, together with the bond and whole record, to a subsequent day of the same term.

And by the record as now filed the case appeared to be this:

The plaintiff declared in assumpsit on a special agreement that in consideration that he, the plaintiff, agreed to sell to the defendant certain buildings and houses described in the (39) declaration, he, the defendant, agreed to pay the plaintiff therefor whatever sum of money *any three disinterested men should say they were worth;* that J. S. and two others, being disinterested and appointed by the parties, valued the buildings at $1,750, whereof the defendant had notice; that plaintiff had always been ready and offered, etc., but that the defendant refused, etc. The plea was *"non assumpsit."*

Upon the trial the plaintiff produced in evidence a written agreement between him and the defendant whereby Sawyer "agreed to give to Manning the sum that any three disinterested men *shall say* for the property whereon M. lives, taking into view all the circumstances of the case, consisting of dwelling house, etc."; and they thereby appointed "the said J. S. and the other two, and bound themselves to abide by the decision of the said persons." Manning had built those houses on Sawyer's ground, and the referees fixed the value at $1,750, and gave them notice of it; and the plaintiff offered to comply and demanded the money but the defendant refused to make payment or accept the houses. For the defendant it was objected that the agreement produced did not support the declaration but varied from it, that the declaration set forth a contract to pay what "J. S. and the others might say *the houses were worth"*; whereas the agreement itself was that he would pay "what they might *say,* taking all circumstances into view," and therefore that it ought not to go to the jury. But the court overruled the objection and suffered the evidence to be read, and the jury found a verdict for the plaintiff according to his demand. The defendant prayed for a new trial, which the court refused, and gave judgment, from which he appealed to this Court.

Hogg, for the appellant, relied again upon the variance, what the arbitrators might *say* and what they might *say* the houses *were worth* are two different things, more especially in this case, where one person had built on another's ground and it was left to friends to determine, *under all the circum-* (40) *stances* of the case, how much the owner of the soil should pay to another who had erected buildings upon his land, innocently it may be, or by design for aught we can see from the case. At all events the contract, such as it was, ought to have been set out exactly, and then the law and not the jury would decide whether the plaintiff could recover.

Gaston, for the appellee. The contract, as shown in evidence and that stated in the declaration, are substantially the same.

The appellant was to pay what three men would *say*—what ought they to say? What ought and what would the law say? that he should pay what the houses were *worth*. That must have been the meaning of the parties. It could not have been intended that the arbitrators should, without any rule, and from a mere arbitrary authority, fix a sum to be paid by the defendant to the plaintiff, and there could be no other rule than the value of the buildings.

As to the point of pleading it is not necessary to set out a contract in its very words; it is sufficient and proper to set it out according to its substance and legal effect. 1 Chitty's Pl., 299-302; 1 Saund., 233, note 2; 10 Mass., 230. And a material word will be supplied, if necessary, as in *King v. May,* Doug., 183. So the Court will look to the context to determine whether the variance be in substance or not, 5 Johns., 1, and will make the words *"U. States"* mean *"United States."*

TAYLOR, C. J., said that the agreement between the parties leaves no doubt as to their intent in making the contract, and it may be well doubted whether the insertion of the word *"worth"* would have made it more clear. In the award of the persons chosen the true import of the contract is declared, and
(41) the declaration truly pursues its meaning. If there be a variance between the declaration and the agreement it is too literal and insignificant to affect the case, and there must be judgment for the appellee.

The other judges did not deliver any opinions, but agreed that the plaintiff was entitled to judgment.

MURRY v. SMITH.

1. A sold to B a tract of land on 6 November, 1811, and took from him in payment therefor a bond given by H to C, of which B was then the holder, without endorsement to or from B, under this special agreement, that A should sue H in a short time, and if H failed, B would then pay it. A brought suit against H in September, 1812, tried it in October, 1815, and failed to recover; and in October, 1816, he sued B, and declared—*first*, for the price of the land sold; and, *secondly*, upon the special agreement.

2. *Held*, upon the pleas of the statute of limitations and *non assumpsit*, that A could not recover upon either count, for the statute of limitations began to run from the making of the contract, as laid in the first count; and the *laches* of the plaintiff in not bringing suit against H for ten months discharged B upon the special agreement set forth in the second.

3. "*Reasonable time*" means that a party shall do an act as soon as he conveniently can, and it seems the court is to judge of that.

4. When a cause is once ordered to the Supreme Court, that Court acquires jurisdiction, and the Superior Court cannot take any further step in it. The Supreme Court, therefore, will not regard any subsequent proceedings in the court below.

THIS was an action of *assumpsit*, from BUNCOMBE, in which the declaration contained many counts, but the two hereinafter mentioned were the only material ones. The first was for the sum of four hundred dollars, due from the defendant to the plaintiff as the balance of the price of a tract of land sold and conveyed by the latter to the former; the second was upon a special agreement of the defendant that in consideration of his being before that time indebted to the plaintiff in the (42) sum of four hundred dollars, as and for the price of a tract of land sold and conveyed by him to Smith, and that he, the plaintiff, would take a bond given by one S. Hogsett to one I. C. for four hundred dollars, that became payable on the ____ day of January, 1811, without the endorsement of the defendant, and sue the said Hogsett thereon, and if Hogsett should fail to pay the same he, the defendant, would make the said bond good and pay to the plaintiff the moneys therein mentioned. The plaintiff then averred that he took the bond on 6 November, 1811, and brought suit thereon, and that Hogsett failed to pay the money, and that thereof he gave the defendant notice.

The pleas were "*non assumpsit*" and "*the statute of limitations.*"

The cause came on for trial before *Seawell, J.*, at October Term, 1818, when it appeared in evidence that in November, 1811, the plaintiff sold to the defendant a tract of land, and received the bond in the declaration mentioned in part payment; that it purported to be signed by S. Hogsett, who was then dead, and was payable to one I. Carson, who had not endorsed it, nor did the defendant endorse it; that at the time of passing it to the plaintiff there was a doubt of the sufficiency of the assets of Hogsett, and it was agreed by the defendant with the plaintiff that if he would bring suit in a short time and Hogsett failed he, the defendant, would pay it. The plaintiff brought suit, in the name of Carson, in September, 1812, all the parties living in the same county, and at October, 1815, brought the same to trial, when a verdict was rendered for Hogsett's executor upon the plea of *non est factum*. This suit was commenced on 4 October, 1816. The court charged the jury that as to the implied premise which the law might raise to pay the price of the land sold the act of limitations began to run from the time of the

bargain, and therefore barred the plaintiff's recovering
(43) upon the first count, inasmuch as he did not bring suit until October, 1816. That to enable the plaintiff to recover on the special agreement he was bound to bring suit against *Hogsett's* representative within a *reasonable* time, and that reasonable time meant as soon as the party conveniently could. The jury found a verdict for the defendant upon both counts, and a rule was granted for a new trial which was adjourned by the judge to the late Supreme Court for determination.

The record, however, was not sent into the late Supreme Court before the act of 1818 abolished it and created the present court; and the court below, after several continuances entered, ordered a new trial. The case came on for trial again before *Mangum, J.*, at April Term, 1820, when the jury under the charge of the court, found a verdict for the plaintiff on the count upon the special agreement; and from the judgment rendered thereon the defendant appealed to this Court.

Wilson for the plaintiff.
Gaston for the defendant.

HALL, J. This suit was ordered to the Supreme Court for decision by the Superior Court of BUNCOMBE at October Term, 1818, and by that order and the act of 1818, ch. 1, this Court acquired jurisdiction over the case. The Superior Court had no power to proceed further in it until after the decision of this Court upon the question submitted to it. The proceedings, therefore, of April Term, 1820, cannot be regarded as any part of the record upon which this Court is to pronounce judgment. We can recognize that record only which comes from the court held in 1818.

By that it appears that the suit was brought in October, 1816, more than three years after the contract was entered into, which was in November, 1811. The defendant hath pleaded the statute of limitations, and in order to avoid its operation the
(44) plaintiff relies upon that part of the contract by which it was made his duty to bring suit against Hogsett before he could bring the present suit. I am of opinion that the charge of the judge was correct, as well as the finding of the jury in conformity thereto. Ten months had elapsed from the time the contract was made before suit was brought against Hogsett, which was more than a reasonable time for that purpose, and cannot be supported by the contract, by which he was bound to do it *in a short time*. I therefore think that the plaintiff's claim in this action for the money for which he sold his land to the

defendant is not taken out of the operation of the statute of limitations. As to the circumstance of the defendant's having no effects in the hands of Hogsett, as evidenced by the plea of *non est factum* being found for him, it may be observed that that issue might have been so found for want of testimony; the subscribing witness might not have been present or, if none, other sufficient testimony perhaps was wanting. But if it were otherwise there was a reason still why the obligation raised by law of suing in a reasonable time and giving notice to Smith should not be dispensed with, when it is recollected that Hogsett's bond was not given to Smith but to Carson; and if the note were not genuine Smith might be ignorant of that fact and would naturally look to Carson for redress. But this inquiry is unnecessary; the plaintiff's delay in suing Hogsett makes it so. That delay will not admit of his availing himself of any excuse for not bringing the present action within three years after the cause thereof accrued. Let the rule for a new trial be discharged.

Cited: S. v. Reid, 18 N. C., 379; *Walton v. McKesson,* 101 N. C., 434; *Fisher v. Mining Co.,* 105 N. C., 124; *Claus v. Lee,* 140 N. C., 554; *Stone v. R. R.,* 144 N. C., 225.

(45)

DEN ON DEMISE OF TATE v. SOUTHARD.

1. Under the act of 1791, c. 15, it is sufficient to show that, by common reputation, a tract of land has certain known and visible lines and boundaries, although those lines and boundaries belong to adjacent tracts and were not made for the land in dispute, nor, in any deed thereof, are recognized as the lines of such tract, for reputation and hearsay are of themselves evidence of boundary.
2. A verdict which finds a fact contrary to a legal presumption is repugnant and void.
3. It seems that the return of the sheriff upon a *fi. fa.* is a colorable title under the act of '91, though no deed be made by the sheriff.
4. A new trial will be granted for misdirection, although the record does not show that the verdict ought to have been otherwise, if the court had directed otherwise.

THIS was an action of ejectment, from BURKE, in which the lessor of the plaintiff claimed title to the lands in dispute by a grant from the State bearing date 11 October, 1814. The defendant claimed the land under a sheriff's sale made to one James

Greenlee, under a judgment and execution against one T. Kennedy in 1783; and that Greenlee and the defendant, who claimed under him, had a continued possession for upwards of twenty-nine years before this suit was brought, and defendant was then in possession. The defendant showed no grant to Kennedy or any other person for the land, nor any deed from the sheriff to Greenlee or from Greenlee to himself. He proved, however, that the land claimed by him was surrounded by other tracts, and that it was understood and believed by all the neighbors that the land thus enclosed by the lines of the surrounding tracts was Kennedy's at the time of the sale in 1783, and it had been called Greenlee's ever since; that although the witnesses had never known any lines run and marked for Kennedy's tract yet an old grant for adjoining land (which was produced) called for Kennedy's lines; that about thirty acres were cleared and fenced at the sale in 1783, and had continued to be enclosed and culti-
(46) vated ever since. It was also proved that many years ago a branch was shown to a witness by a person now dead as one of the dividing lines between Kennedy's and another tract; and another witness proved that he also had been told long ago, by a person now dead and who lived in the neighborhood, where another of Kennedy's lines crossed a certain road, and by those lines the defendant claimed now to be bounded. According to these facts the defendant insisted that under the act of Assembly of 1791, ch. 15, he had title to the land in dispute. The case was tried before *Mangum, J.*, who charged the jury that if the lines which surrounded the land in controversy were not originally run for that tract but belonged to the adjacent tracts, then the land in question was not included in such known and visible lines and boundaries as are required by the act of 1791, unless by some matter subsequent, as a grant or *mesne* conveyance of the land in dispute, those lines of the surrounding tracts had been recognized as the lines and boundaries of the land in question, and here no such deed was produced. The jury, under the charge of the court, found a verdict for the plaintiff, and also found the fact expressly that no grant from the State had ever issued to any person for the tract of land mentioned in the declaration until the one to the lessor of the plaintiff of 11 October, 1814.

A rule was obtained by the defendant for a new trial for misdirection of the court, which was discharged and judgment rendered against him, and he appealed to this Court.

Wilson for the plaintiff.

TATE *v.* SOUTHARD.

HENDERSON, J. I think the circuit judge erred in that part of his charge wherein he directed the jury that the lines of the surrounding tracts of land, if not made for the lands claimed by the defendant, did not satisfy the words of the act 1791, that is to say, *"known and visible boundaries,"* (47) unless they had been recognized as the boundaries of this tract by some grant or *mesne* conveyance thereof. Boundaries frequently exist in common reputation, and it is for that reason that hearsay is evidence upon the question of boundary. It would, therefore, have been sufficient for the defendant to have shown that it was the common reputation and understanding of the neighborhood that his land was bounded by the lines of those surrounding tracts, although they were not originally made for it. Another question obscurely appears upon the record, which does not seem to have been made at the trial, it is whether a title derived from a sheriff's sale without a deed from the sheriff is a *colorable* title under the act of 1791. But the facts do not sufficiently appear to warrant the Court in going farther than barely to notice them; for it is not shown by what evidence the defendant proved Greenlee to be a purchaser at sheriff's sale—whether by parol or by the sheriff's return. As to the fact found by the jury that there never was a grant for the land before the one to the plaintiff's lessor; if a grant is necessary to be presumed to support the defendant's title, and he brings himself within the provisions of the act of 1791, the finding of the jury is against a legal presumption, which cannot be contradicted, and is therefore void. But at all events there must be a new trial for the misdirection upon the question of "known and visible boundary," although it does not distinctly appear that the defendant can show a colorable title as required by the act of assembly.

The Chief Justice and Judge HALL accorded, and a new trial was ordered.

Cited: Atkinson v. Clarke, 14 N. C., 175; *Graham v. Houston,* 15 N. C., 235; *Hartzog v. Hubbard,* 19 N. C., 243; *Wallace v. Maxwell,* 29 N. C., 137; *Dula v. McGhee,* 34 N. C., 333; *Neal v. Nelson,* 117 N. C., 402; *Hemphill v. Hemphill,* 138 N. C., 506; *Bland v. Beasley,* 140 N. C., 631.

(48)

HORTON v. HAGLER'S Executor.

1. When the clerk of a court of record certifies that an instrument has been "duly proved" in that court, it is implied that everything required by law has been proved—upon the maxim, *res judicata pre veritate accipitur.*

2. But when he also states *how* it was proved and omits a material circumstance required by the law, the certificate of *due proof* is disregarded, because, by the certificate itself, it appears it was not duly proved.

3. *Held, therefore,* that where a clerk of a county court certified that a bill of sale for a slave had been "duly proved by the oath of D. H., who proved that the handwriting of B. H., the subscribing witness, and of J. H.; the maker of it," the bill of sale is not evidence for the want of proof of the death or removal of B. H.

THIS was an action of *assumpsit,* from WILKES, brought upon a warrant made by the defendant, upon a contract of sale of a slave, Peter, to the plaintiff, and was tried before *Mangum, J.,* at March Term, 1820.

To show the sale and the warranty, the plaintiff offered in evidence a bill of sale of the slave from the testator, John Hagler, to the plaintiff, witnessed by one Benjamin Hagler, who was dead at the time of the trial. On the bill of sale was a certificate, endorsed by the Clerk of the County Court of Wilkes, "That the execution thereof had been duly proved in that court by the oath of D. H., who proved the handwriting and signature thereto of B. Hagler and of the testator, J. Hagler." And upon that proof it had been registered and certified accordingly. The court suffered the plaintiff to read his bill of sale to the jury, without further proof, although it was objected to by the defendant; and the jury, without other evidence of the contract, found a verdict for the plaintiff upon the *general issue.*

A motion for a new trial, upon the ground that the bill of sale ought not to have been received in evidence, was overruled,
(49) and judgment given for the plaintiff, from which the defendant appealed.

TAYLOR, C. J. If the clerk had certified only that the bill of sale was *duly proved,* it must have been understood that the death of the subscribing witness was proved, and that his handwriting was likewise established in a proper manner. So much respect is paid to the acts of a court of record that they must be received as regular, when so certified by the proper officer. *Res judicata pro veritate accipitur.* But when the certificate enters into detail, and goes on to show in what manner the deed has been

proved, the inquiry into the legality of the proof is open to the court. In this case, what is meant by being "duly proved" is explained by the statement that D. H. swore to the signature of Benjamin Hagler, the subscribing witness; and that shows that the paper was *not* duly proved, since the death or absence from the State of B. Hagler was not proved. It may be that he was then alive and in the court yard; and therefore the bill of sale was not proved by the best evidence the nature of the case admits of. That B. Hagler was dead at the time of the trial below is stated in the record, but there is no proof that he was dead or had removed when the bill of sale was proved.

There must therefore be a

New trial.

Cited: Carrier v. Hampton, 33 N. C., 310; *Barwick v. Wood,* 48 N. C., 311; *Starke v. Etheridge,* 71 N. C., 246; *Quinnerly v. Quinnerly,* 114 N. C., 146.

HOLLOWAY v. LAURENCE.

The subscribing witness to a bond must be produced to prove it, upon the plea of *non est factum;* but the parties are not confined to his testimony, and the obligee is at liberty to give evidence also of the handwriting of the obligor, or of any other fact tending to establish that it is his bond, as his acknowledgment or the like.

DEBT on bond. Plea, *non est factum.* Plaintiff produced the subscribing witness, who swore that he signed the bond, as a witness, at the request of the obligor or obligee, but that he did not recollect which. He further said that he did not (50) see Laurence sign the bond, nor hear him acknowledge it, and that it was not delivered in his presence. The plaintiff then offered other witnesses to prove the handwriting of the defendant, and they were received by the court, and proved the signature to the bond to be in the handwriting of Laurence. The jury found it to be the deed of the defendant. He moved for a new trial, because improper evidence had been received, but it was refused, and he appealed to this Court. From WILKES.

The case was not argued here.

TAYLOR, C. J. The subscribing witness has given extraordinary testimony. He swears that he signed the bond, as a witness,

either at the request of Laurence or the obligee; yet he further swears that he neither saw the defendant sign the bond nor heard him acknowledge it, and denies that it was delivered in his presence. From his own admission, his attestation might have been at the request of the defendant; and if the jury so considered it, they might properly infer from it the defendant's acknowledgment of the execution.

Where there is no subscribing witness, or where the subscribing witness swears that he did not see it executed, the deed may be proved by evidence of the handwriting of the party to the bond. *Ley v. Ballard,* 3 Espin., 173; *Fitzgerald v. Elsee,* 2 Campb., 635. And in *Grellier v. Neale,* Peake N. P. Cases, 23, the subscribing witness had been requested to put his name to the deed by one of the parties who had signed it—so, where the person who subscribes as a witness does so without the knowledge or consent of the parties, as in *McRaw v. Gentry,* 3 Campb., 232. In all these cases the handwriting of the obligor, or his acknowledgment, is the best evidence the nature of the case admits of, and must be submitted to the jury. The judgment of the Superior Court must therefore be

Affirmed.

(51) HENDERSON, J., said that, after the testimony of the subscribing witness had been produced, either party is at liberty to give evidence as to the handwriting of the obligor. A bond is not absolutely proved because the subscribing witness swears to its execution, for the jury may not believe him; nor is it destroyed by his denying his handwriting or by his saying he did not see it executed. Other testimony may be given to prove that it is, or is not, the bond of the defendant, nor, indeed, are the parties confined to evidence of the obligor's handwriting, but may give any other testimony tending to establish that it is the parties' bond.

HALL, J., assented, and the motion for a new trial was refused.

Cited: Blackwell v. Lane, 20 N. C., 248; *Bell v. Clark,* 31 N. C., 242.

BRYAN v. SIMONTON.

1. When a defendant in execution once obtains his liberty by the assent of the plaintiff he cannot be retaken, and if he be one of several defendants in the same suit, the plaintiff can neither retake him nor take any of the other defendants.

2. *And hence it is held*, that if there be judgment against two, and the plaintiff take one in execution, and discharge him, the bail of both is exonerated.

THIS was a *scire facias*, from WILKES, against Simonton, as bail for one Patterson, against whom, jointly with one Moody, the plaintiff obtained judgment in debt for $490. The writ set forth the judgment and *ca. sa.*, and that Moody was arrested thereupon; and the return, that the other defendant, Patterson, could not be found, and that the defendant was bail for both of the original defendants. Pleas: (1) *Nul tiel* record; (2) a special plea that upon the *ca. sa.* against Moody and Patterson, the former was duly arrested and in execution until (52) the plaintiff discharged him from execution and set him at liberty. The plaintiff took issue on the first plea and demurred to the second, in which the defendant joined. It came on for argument before *Mangum, J.*, who sustained the demurrer and gave judgment for the plaintiff, and the defendant appealed.

A. Henderson and *Wilson* submitted the case without argument.

TAYLOR, C. J. After stating the case, he said the demurrer admits that Moody was taken in execution, and discharged by the plaintiff; and the question presented is whether that operates a discharge of the bail.

The position is well established by authority that if a plaintiff once take a defendant in execution, and consent to his discharge, he cannot afterwards sue out any execution on that judgment. 4 Bur., 2482; 1 Term, 557; 2 East., 244. There is but one case where a debtor in execution, who obtains his liberty, may afterwards be taken again for the same debt, and that is when he has escaped; and the reason for that is because he is not *legally* out of custody. But where a prisoner obtains his discharge with the consent of the plaintiff, he cannot be retaken, it being considered that the plaintiff has obtained a satisfaction in law by having his debtor once in execution. 7 Term, 421. This is uniformly the rule where there is but one defendant; and it is equally well settled that if the plaintiff discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake such de-

fendant or take any of the others. 6 Term, 525. Where, indeed, the discharge is without the consent of the plaintiff, as by an insolvent law, a different *rule* prevails. 5 East., 147.

(53) The defendant in this case can only be proceeded against according to the rules laid down relative to bail, who is not chargeable until an execution be first returned that the principal is not to be found in his proper county; nor can *sci. fa.* issue until such execution shall have been so returned. Therefore, the judgment on the demurrer must be reversed. And the whole Court gave judgment for the defendant.

Cited: Ferrall v. Brickell, 27 N. C., 70; *Jackson v. Hampton,* 28 N. C., 35; *s. c.,* 32 N. C., 589; *Hawkins v. Hall,* 38 N. C., 384; *S. v. Cooley,* 80 N. C., 399.

THE STATE v. KEARNEY.

1. In a penal statute, "*or*" will never be construed "*and*," so as to make it more penal.
2. *Held, therefore,* that under the act of 1816, c. 20, corporal punishment and fine cannot both be imposed on a person convicted of a felony, within clergy.
3. *Held, also,* that the infamous punishment of whipping therein provided ought to be restricted to infamous crimes, so that the true construction of the statute is, to refer the fine to manslaughter and the whipping to larceny and the like.

THE prisoner had been convicted of manslaughter, before *Paxton, J.,* at April Term, 1820, from WARREN, and, after praying the benefit of clergy, which was allowed him, he was sentenced by the court to pay a fine of $250 and *receive thirty-nine lashes* on his bare back and stand committed until the fine and costs of prosecution were paid. The prisoner appealed from the sentence, upon the ground that the court could not, in law, render such judgment.

Seawell for the prisoner.
Attorney-General for the State.

(54) TAYLOR, C. J., afterwards delivered the opinion of the Court: The legality of the judgment in this case depends upon the construction of the act of Assembly 1816, ch. 20, the object of which was to change the punishment of grand larceny

and manslaughter. The former punishment was burning in the hand, a relic of ancient barbarism, of little effect in the way of reforming the culprit or of example to the spectators. It seemed very absurd, too, that a person convicted of petit larceny should suffer whipping on the bare back, when, if the property stolen was over the value of a shilling, the convict could only be burnt in the hand.

The general rule of the common law was that the punishment of all infamous crimes should be disgraceful, as the pillory for every species of *crimen falsi,* as forgery, perjury and other offenses of the same kind. Whipping was more peculiarly appropriated to petit larceny and to crimes which betray a meanness of disposition and a deep taint of moral depravity. Lord Coke advises all judges and magistrates to be very careful how they inflict the pillory on common misdemeanors, and to reserve it only for the more heinous offenses (3 Inst., 219), which is a proper caution, when the effect of disgrace on the character is considered, and how much it tends to make a man throw off all moral restraints. The rule of confining infamous punishments to infamous crimes was so generally observed that the crime and punishment became associated in the mind, and it was formerly thought that the latter, and not the former, disqualified the party as a witness. Co. Lit., 6. Though the law is now settled on better principles, yet it is nevertheless true that public corporal punishment for any offense impresses an indelible stigma on the character, and ought to be inflicted on those offenses only which are infamous in their nature. It seems to be altogether misapplied to manslaughter, even the highest grade of which the law regards as the effect of human frailty; and (55) it certainly has been, and may be again, committed by men whom neither cupidity nor revenge could prompt to the commission of a base or dishonorable action. The best of men may be overcome by momentary anger, and incited by strong provocation to an act of violence before the judgment has time to parley with itself.

If it be said that the court will not direct the punishment but in cases where it is justly merited, the answer is, it is too great a power to be confided to the discretion of any court to determine whether a man shall be consigned to infamy or not. It is repugnant to the whole genius and spirit of our law, in which there is no example of a court being empowered to decide whether whipping shall be inflicted or not, where the crime is not in its nature infamous. A court may, in the discretion of the judge, adapt the degree of whipping to the crime, but the law must have previously designated that species of punishment. And wherever

the law has already determined and fixed the nature of the punishment, its duration and quantity must of necessity depend on the discretion of the court, guided by the circumstances of the case.

The words of this act of Assembly may be well satisfied by referring the punishment of whipping to those crimes with which our feelings and moral sense have been accustomed to connect it, and cannot, without violating its spirit, be applied to manslaughter. In this respect we think the judgment erroneous. It is clearly wrong in imposing both corporal punishment *and* a pecuniary fine; for the words of the law are in the alternative: "to order and adjudge him or her to receive one or more public whippings, *or* to pay a moderate pecuniary fine, in the discretion of the court, under all the circumstances of the case." If "or" could under any circumstances be construed "and" in a penal law, it must be to lessen, not to aggravate, the evil of punishment.

(56) The judgment must therefore be reversed, so far as it orders that the prisoner be whipped, and affirmed as to the fine.

Cited: S. v. Upchurch, 31 N. C., 462; *S. v. Walters,* 97 N. C., 490; *S. v. Taylor,* 124 N. C., 803.

DEN ON DEMISE OF MURRY v. SERMON.

If a navigable lake recede gradually and insensibly, the derelict land belongs to the riparious proprietor, but if the recission be sudden and sensible, such land belongs to the State, and it seems is the subject of entry under the act of 1777, c. 1.

THE defendant claimed title to the land in dispute, under a patent, bearing date in 1761, in which the boundaries were described as follows: "Beginning at a poplar *on the south side of Mattamuskeet Lake;* thence running west *with the lake* 86 poles to a corner; thence different courses and distances to a corner *on the lake* again; and thence *with the lake* to the beginning." The lessor of the plaintiff had obtained a grant, of late date, covering lands, as he alleged, between the defendant's lines and the lake, which had become dry by the recession of the lake since the patent to the defendant was issued, as stated by the plaintiff. Both sides gave evidence of what had been actually

run for the lines of the defendant's land, and it was proved that the lake was a navigable water.

The cause was tried at November Term, 1818, before *Hall, J.*, while he was on the circuit bench, and he directed the jury that, whether the lake had in fact receded or not, it must still be considered a line of the defendant's grant. A verdict was accordingly found for the defendant, and, upon a rule for a new trial, he ordered the case to be transmitted to the late Supreme Court for an opinion whether he had misdirected the jury or not. From HYDE.

Gaston for the plaintiff. (57)
A. Henderson for the defendant.

HALL, J., delivered his own opinion and that of the Court: I think that I was incorrect in my charge to the jury below in this, that I directed them to find for the defendant, whether the lake had receded or not, for in either case it remained his boundary. Now, if the recession of the lake was sudden and sensible, the land which it had covered, and which by its dereliction became dry, would not, and ought not, to be included in the defendant's grant; but if the waters receded gradually (58) and insensibly, the charge would be right, and the lake ought to be considered one of the defendant's boundaries. 2 Bl. Com., 261; Harg. Law Tr., 5; Dyer, 376; Vattell L. N., 193. It is therefore necessary that the fact be found whether the waters of the lake receded imperceptibly or not from the land in dispute, because on that question the rights of the parties depend; and to do that, the rule for a new trial must be made absolute.

Cited: Hodges v. Williams, 95 N. C., 335.

ODOM et als. v. THOMPSON et als.

In a petition to have a probate of a will set aside, and a re-probate in solemn form, all the heirs at law and distributees need not be made parties; it is sufficient if the petition be brought by one of them, and all the executors, devisees and legatees claiming under the will be made defendants.

THIS was a petition filed by Odom and others against Thompson and others, from BERTIE, in which the petitioners set forth that one Hinton died seized of real estate in fee, and possessed of personalty, and that the petitioners were heirs at law and distributees of Hinton; that after his death some of the defend-

ants caused a certain paper to be proved in the county court as his last will, and the persons named therein as executors thereof being dead, obtained letters of administration; and that the other defendants claimed an interest in the said real or personal estates as devisees or legatees under the said will. It was also charged that Hinton was totally incapable of making a will, and that the said probate had been effected *ex parte* and without notice to the petitioners, and prayed for a solemn probate. The defendants filed an answer in which they set forth,
(59) amongst other things, that certain other persons therein named were heirs at law and next of kin of Hinton, and traced their pedigree so as to show that fact. The case was set down for hearing upon the petition and answer, and brought up from the county court to the Superior Court, where it came on for hearing at April Term, 1818, when it was objected, on behalf of the defendants, that a re-probate of the will in solemn form would not be ordered by the court unless all the heirs at law and next of kin and all the devisees and legatees were made parties; and the case was adjourned to the Supreme Court for a decision upon the question "whether the petitioners were bound to make any other parties?"

The case was submitted without argument.

TAYLOR, C. J., remarking that the case had been transmitted here under the former organization of the Court, and therefore only the question submitted could be decided, said, as to that question, that all the persons interested in supporting the will are made defendants in the case, and upon a controversy whether the will ought to be re-proved or not there is no necessity of making any others, and the cause was remanded for further proceedings.

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(60)

TYSON v. RASBERRY.

The Acts of 1777, c. 25, and 1782, c. 29, do not apply to cases of burning the woods from necessity, but only to voluntary firing. *Held, therefore*, that one who sets fire to woods by necessity need not take "effectual care," or any care to extinguish it, so far as regards the penalty inflicted by those statutes, though he may be liable to an action on the case for the damages actually sustained by another.

THIS was a warrant, from GREENE, for the penalty of twenty-five pounds, under the act of 1782, ch. 29, sec. 2, for firing the woods. It came on for trial on the *general issue*, at April

Term, 1820, when the case appeared to be this: That on 25 March the defendant put fire to *his own woods* to burn around a tar kiln, which afterwards communicated with the plaintiff's fence about half a mile off, and consumed it; that on the morning of 24 March a fire was discovered to be burning in the woods about two miles distant, which created some apprehension for the safety of the kiln, and induced the defendant to believe that it would be necessary to burn around it, and that he gave notice to the owners of the adjoining lands of his intention; that the fire in the woods continued to approach the kiln during both days, until it came within a quarter of a mile, and that then the defendant burnt the woods around the tar kiln for the purpose of saving it; and that but for such burning the kiln would have been lost. No evidence was offered to show that the defendant had taken care to extinguish the fire which he kindled, nor to prove that he had been negligent. The court instructed the jury that under the emergency of the case, if the burning around the kiln was necessary to save it, the defendant was not subject to the penalty for the act of setting fire to the woods; but that it was incumbent on him to use effectual exertions to prevent the fire extending to other lands than his own, which the defendant had not shown, and therefor the plaintiff was entitled to recover. The jury found a verdict for the (61) plaintiff for the twenty-five pounds, which the defendant moved to set aside for misdirection; but it was refused, judgment rendered against him, and he appealed to this Court.

Gaston & Gaston for the appellant.
Seawell for the appellee.

TAYLOR, C. J. The act of Assembly was evidently in- (62) tended to prevent a deliberate or a wanton setting fire to the woods by the owner of land, without giving the requisite notice. It certainly did not contemplate the case of a man setting fire to his own woods to save his property or his land from the ravages of an approaching fire. To make the firing in such a case unlawful without notice was to compel a man to become a passive spectator of the destruction of his own property.

It is then only in cases where a notice must be given that the penalty can be incurred for not taking effectual care to extinguish the fire. If a person does not come within the act he cannot be liable for not doing anything enjoined by it; and the obligation to take effectual care is imposed on those only who are bound to give notice. There is another reason for this construction. The act requires *effectual* care to be taken to ex-

(63) tinguish the fire, so that the party must extinguish it at all events, otherwise his care is ineffectual and he must pay the penalty. Although this might perhaps be exacted from a person who is at liberty to choose his own time to set the fire, and who may accordingly provide himself with the aid of his neighbors to prevent its spreading, yet it would be unreasonable to expect it from one who fires the woods from a sudden emergency and in his own defense. Nor is there any necessity for so harsh a construction of the law, for a person injured by the negligence of him who does the act has a remedy at common law. I therefore think the judgment ought to be reversed.

HENDERSON, J. Were it not for the word *"effectual"* in the statute I might possibly concur with the Circuit Judge. But it seems very unreasonable that a man should not be permitted to set fire to his own woods to preserve his own property from destruction unless he should take effectual means to extinguish the fire; his *best exertions* will not do. If such were the law the right of property would not be worth possessing. In such a case it would seem enough for him to repair the actual damages sustained by him who may have been injured; and if the present plaintiff is of that class let him bring his action for that purpose.

As the defendant is not within the penalty of the law, the firing being from necessity, he need not show that he took effectual *or any* care to extinguish the fire, for the last would be unavailing if he were within the penalty. There is good reason that the endeavors should be effectual in case of a voluntary firing, for as that is a thing of his own choice, in which he may select his own time, it is not unreasonable to compel a man to see that the means which he provides to extinguish the fire be sufficient for that purpose. That it was a voluntary firing which the Legislature intended to prohibit under a penalty I think is quite evident from the provision that notice should be given.

(64) To prohibit a man from doing what he is strongly impelled to do by his very nature is not to be inferred from anything short of plain and evident words; and even if the words would well bear that meaning and another sensible construction can be given the latter shall be preferred as the true one. I think, therefore, that the court erred in instructing the jury that the defendant incurred the penalty, because he did not prove that he took effectual means to extinguish the fire. In this case it was not necessary that he should take any means, and I am of opinion that the rule for a new trial must be made absolute. Rule made absolute.

Cited: Lamb v. Sloan, 94 N. C., 537.

BROCKET v. FOSCUE.

1. When a deed for land contains an acknowledgment of the bargainor of the receipt of the consideration, and a clause exonerating the bargainee therefrom, it amounts to a release, and is a bar to an action for the purchase money.

2. In assumpsit for such purchase money, no parol evidence can be received to show that it is unpaid, because it is contradictory to the deed.

3. A bargain and sale is good, although the deed does not express that the consideration money has been paid.

THIS was an action of assumpsit, from JONES, in which the plaintiff declared for the price of a tract of land sold and conveyed by him to the defendant. Upon the trial it was proved that some months after the deed had been made for the land the defendant acknowledged that a balance of 200 pounds was still due to the plaintiff, which he was to pay him within two years thereafter. The pleas were the *"general issue and set-off"*; and the defendant, upon the first issue, relied upon the deed, which expressed to be made by the plaintiff, "for and in consideration of one thousand dollars to him *in hand paid* (65) by the said F., *the receipt whereof the said B. doth hereby acknowledge, and thereof doth exonerate the said F., his heirs and executors,"* and insisted that it was a release; but the court held that the clause in the deed was not conclusive, and that parol evidence was admissible to show that the consideration money had not been paid. The defendant then offered evidence of payments and set-offs subsequent to the period at which the acknowledgment aforesaid was made, so as to reduce the plaintiff's demand to £117 10s., for which the jury gave him a verdict.

The defendant obtained a rule for a new trial upon the ground that the court ought to have instructed the jury that the deed contained a full discharge and release; but the rule was discharged and judgment entered for the amount of the verdict, whereupon an appeal was taken to this Court.

Gaston for appellant.
Mordecai for appellee.

TAYLOR, C. J., after stating the case, said that the (66) defendant contends that the deed, which contains a receipt and a release, cannot be contradicted by parol evidence. The manifest justice of the claim and the unconscientious nature of the defense has made me desirous to ascertain some solid ground of law on which the former can be supported; but I

cannot discover how it is to be done without breaking in upon the rule that you cannot by parol contradict a deed.

Two cases have been cited where such evidence has been admitted; but they do not quite come up to this, nor are the reasons for the decision satisfactory. It is truly said that the end of inserting a consideration in a deed is to raise an use, and that the slightest consideration of value is sufficient for that purpose. Still it is not necessary for the same end that a release should be inserted, nor is it, strictly speaking, consistent with the form of a bargain and sale. I may go further and say that the use will arise without an acknowledgment of the receipt of the consideration, as if a man bargain and sell his land in consideration of so much money to be paid at a day to come. Dyer, 337, a. If it be contended that, although you cannot contradict the consideration so far as it is necessary to the efficacy of the conveyance, yet, for any other purpose, it may be done, it ought first to be shown that the only indispensable form of stating the consideration is adopted in this deed. The deed may still be effectual with other modes of stating the consideration by which, if it be not paid at the time, the seller's right to it may be secured and enforced. It might subserve the justice of this case to allow the plaintiff to recover in the face of his deed, but the precedent would be fraught with mischief to the community. The effect of adhering to the rule of law will only be to make men
(67) cautious in executing deeds; but if it be understood that a solemn acknowledgment under seal is insufficient to prove the payment of money, it is to be apprehended that many perjuries will arise. To the cases cited at the bar I will add one from 5 Mass., 67, where a deed of tenant in tail purported to be made for good and valuable consideration, but in order to get the judgment of the Court on its effect the parties agreed, in a case stated, that no consideration was paid. *Chief Justice Parsons* observed that if the parties had not expressly agreed that there was no valuable consideration, it would have been difficult to get over the express averments of the deed. There is also a case to the same effect in 1 Campb., 392. So the judgment must be reversed and a new trial granted.

The Court was unanimous and the judgment was reversed.

Cited: Graves v. Carter, 9 N. C., 580; *Spiers v. Clay,* 11 N. C., 26; *Woodhouse v. Williams,* 14 N. C., 510; *Lowe v. Weatherley,* 20 N. C., 355; *Waddell v. Hewitt,* 37 N. C., 253; *Bruce v. Faucett,* 49 N. C., 393; *Mendenhall v. Parish,* 53 N. C., 106; *Shaw v. Williams,* 100 N. C., 280; *Barbee v. Barbee,* 108 N. C., 584.

SPIERS and Wife v. ALEXANDER.

1. When a gift of a chattel is found or stated in a case, a delivery is presumed, because without it it is not a gift; and such possession of the donee will be presumed to continue unless the contrary be found or stated, especially if it appear that another claimed and exercised ownership from a particular subsequent period.

2. Husband and wife cannot join in detinue for a chattel, if the husband had actual or constructive possession after marriage, for by the marriage and such possession the whole vests exclusively in the husband.

DETINUE for negro slave Violet; pleas, *non detinet* and statute limitations. From CABARRUS. Upon the trial the title of the plaintiffs appeared to be derived by a parol gift to the *feme* plaintiff, while *sole* and an infant, by her stepfather, J. Means, in whose house she lived at the time of the gift and afterwards until her intermarriage with the other plaintiff, which happened before she was of full age and several years (68) after the gift had been made. The plaintiffs were married at Means's, and resided a few days with him and then removed to Spiers's own house, which was in the neighborhood, and lived there from that time, viz, 1799, till Means died, in 1818. The slave had remained on Means's plantation with the wife from the period when she was given until Spiers removed from his house; and from that time Means claimed and exercised the right of ownership over her until he died, when the defendant succeeded to her as one of his next of kin. This suit was brought in April, 1819.

The defendant moved for a nonsuit upon the ground that the action ought to be brought in the name of the husband alone, and also that the plaintiffs were barred by the statute of limitations; but the court directed a verdict to be taken for the plaintiffs, with leave to the defendant to move to set it aside and enter a nonsuit, which was afterwards done, and the plaintiffs appealed to this Court.

It was contended on behalf of the defendant that the plaintiffs were barred by the statute 1715, ch. 27, secs. 5, 9, notwithstanding her infancy at the time of her marriage and her continued coverture since, for there is no saving for *successive or cumulative* disabilities. That question was argued at much length on both sides, but as the opinion of the Court was not given on it it is deemed unnecessary to report the arguments.

A. Henderson for the defendant.
Wilson for the plaintiff.

(69) TAYLOR, C. J., delivered the opinion of the Court. The only proper conclusion that can be drawn from the statement of the case is that the slave Violet was delivered to the female plaintiff by Means when the gift was made, for a transfer of possession is implied, since without it a gift is not (70) valid. This continued up to the time of the marriage, inclusive, and Spiers, the husband, then acquired, in right of his wife, the possession of the slave, which he continued to hold during the time he remained in the house of Means. It signifies nothing that he left the slave with Means upon departing from his house, for his separate right of action had attached upon the marriage; the property was a chose in possession, and would have devolved upon his representatives had he died the next day. That Spiers's wife, before his marriage, and he afterwards had possession, is further to be inferred from the fact stated that Means claimed and exercised an ownership over the slave *from the time* the plaintiffs left his house until his death; from which the implication is necessary that while the plaintiffs continued at his house he did *not* claim or exercise ownership over them. The right of Spiers, therefore, was effectually barred in 1802. In the cases heretofore decided in which it was held that the wife was properly joined in detinue, no possession in the husband appeared, and he was consequently suing for a chose in action which, without such possession, would survive to the wife. From this view of the case it results that it is unnecessary to decide the other question arising out of the operation of the supervening coverture of Mrs. Spiers upon the statute of limitations.

The judgment was therefore affirmed.

Cited: Ferrell v. Thompson, 107 N. C., 428.

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(71)

AUSTIN v. RODMAN.

1. A record is deemed in law authentic beyond all contradiction, and when regularly certified by the proper officer it is conclusive upon the plea of *nul tiel record.*

2. But where a clerk made an entry by order of the judge of the court in the record of a cause the day after term, and at the next succeeding term a motion was made to strike the same out: *Held,* that such entry is in fact no part of the record and that the court should order it to be annulled and expunged. *Held also,* that the affidavits of the party and the clerk will be heard in support of such motion.

3. But, by HALL, Judge, although such entry is in fact no part of the record, yet if it appear upon the record, duly certified by the clerk, it is conclusive, and no proof can be heard against it, nor can the Court order any alteration of it; as, however, the clerk wrongfully made it he may expunge it and restore the record to the truth; and if he will not, but issues process on it, he will act upon it at his peril.

A SUIT pending between the parties was tried before *Daniel, J.*, at April Term, 1819, of HALIFAX, in which a verdict for a large sum of money had been rendered for the plaintiff. A rule had been granted on the plaintiff to show cause why there should not be a new trial, returnable immediately; and the counsel of Rodman urged his Honor several times in court to hear the argument, but it pleased him to defer it from time to time until late on Saturday evening, and he then said that he would hear it at his chamber on Saturday night. Accordingly the counsel on both sides and the defendant attended the judge, and the rule was argued at a very late hour in the night, but no decision was made until *Sunday* morning, when the judge declared that he would not grant a new trial, and the clerk made the following entry on the trial docket: "On argument new trial refused," and judgment was entered. At October Term following the defendant, making these facts appear by the affidavit of himself and the clerk and swearing also to merits, and that he had been prevented from appealing to the Supreme Court by the decision not being made in term-time, moved for and (72) obtained a rule on the plaintiff to show cause why so much of the record as went to discharge the former rule for a new trial should not be expunged, so as to leave the cause standing upon the rule for the new trial. And this latter rule was returnable to March Term, 1820, when the plaintiff showed cause and the rule was discharged, and an appeal was taken to this Court.

Gaston for the plaintiff.
Seawell and *Mordecai* for Rodman.

TAYLOR, C. J. A record is a memorial of a court of (75) justice, which the law deems authentic above all contradiction. Its purity ought, therefore, to be guarded with anxious vigilance lest any entry should go forth to the public as the act of a court which has not in reality become such according to the forms of law. The certificate of the clerk as to the truth of a record would have been conclusive upon the issue of *nul tiel record*, and parol evidence to prove that it had not regularly become such would have been inadmissible. Yet, when the in-

quiry is now made as to the manner in which this apparent record was made up, it appears most satisfactorily that the entry was made by the clerk after the expiration of the term, and that the judgment was, in fact, pronounced by the judge after the right to do so had ceased. This is known to be frequently done and for the purpose of justice and the convenience of suitors, under the best intentions on the part of the judge, but still it cannot stand the test of legal examination. The effect of such a precedent might be most mischievous if the entry of a clerk, made upon his records after the term, were allowed to bind men's rights and property to any extent. Whereas few inconveniences can ensue from making the record speak the truth, provided an inquiry be instituted recently after the entry complained of has been made. In *Slocumb v. Anderson,* 4 N. C., 77, there was the consent of all parties, and the intent of the transaction was perfectly fair; but, inasmuch as the judgment was entered up in vacation, it was held to be a nullity,
(76) and the entry on the record ordered to be vacated. That case is an authority for a like order in the present one. The judgment must be reversed and the entry of the clerk, made after term, be annulled and expunged.

HALL, J. *Lord Coke* says that "records, being the rolls or memorials of the judges, import in themselves such incontrolable verity and credit that they admit of no proof or averment to the contrary. Insomuch that they are to be tried only by themselves, for otherwise there would be no end of controversies. But during the term wherein any judicial act is done the roll is alterable in that term, as the judges shall direct. When the term is past then the record admitteth of no alteration or averment or proof that it is false." Co. Lit., 260, a; 4 Rep., 52. If this be the legal definition of a record the entry here, that "on argument a new trial was refused," and the judgment of the court consequent thereupon being made on Sunday, after the expiration of the term, as the affidavits state is the fact, forms no part of the record of the suit between the parties. If it should be so considered any entry made in vacation must be considered in the same light, which, in the words of *Coke,* would give rise to innumerable controversies; and where a clerk certifies entries so made he certifies that as a record which, according to the same authority, is not a record. This is an answer to the affidavits. But a record is certified by the clerk in due form, and it is required that we should direct the clerk to alter it upon the strength of those affidavits. That, I think, we cannot do. The record appears to be perfect, and it can only be tried by itself. But we can advise the clerk that if he made it up as he

himself states in his affidavit he did, it is no record; that he is to consider nothing as the record between the parties but what was entered *in term-time;* and that as *he* did wrong in making the entry, *he* and not we may correct it by expunging from the record that which really never be- (77) longed to it. When this alteration shall be made the truth will be seen, and the rule for a new trial will remain undisposed of. But if the entry made on Sunday be considered as disposing of that rule it may also be considered as an authority for him to issue execution on the judgment obtained, which surely cannot be, for the rule for a new trial was obtained in term-time and is a record, and the discharge of it was entered in vacation and was not a record, and therefore the question whether there shall be a new trial still remains open. If the clerk should issue execution he will do it at his peril. *His* better way is to expunge from the record book any entry that was made after the expiration of the term.

MURPHEY, J., sat in the place of HENDERSON, J., who had been of counsel in the cause at the bar. He concurred in the opinion given by the Chief Justice.

So that the decision of the court below upon the last rule obtained by the defendant at October Term, 1819, was *reversed,* and this Court *ordered* the said entry of the clerk, made after the expiration of April Term, 1819, to be *annulled* and *expunged.*

Cited: Reid v. Kelly, 12 N. C., 315; *Isler v. Murphy,* 71 N. C., 438; *Harrell v. Peebles,* 79 N. C., 30; *Jones v. Henry,* 84 N. C., 323; *Taylor v. Gooch,* 110 N. C., 392.

(78)

THE STATE v. YARBROUGH.

1. To an indictment for an assault in the Superior Court the defendant pleaded in abatement that a prior indictment was still pending against him in the county court for the same cause. *Held,* that the plea is good, for the courts have concurrent jurisdiction, and to avoid the mischief of having two indictments carried on for the same cause against the same person the jurisdiction shall attach in the county court by the prior finding of the bill, and shall exclude that of the Superior Court, except in its appellate capacity, unless it be shown that the first is carried on by fraud and covin, which may be replied by the State to such a plea.

2. There is no method by which an indictment can be removed from the county court to the Superior Court for trial but by appeal after a final decision.

3. Where, upon words of reproach on both sides between Y. and B. the latter approached the former and struck him a violent blow with his fist, which staggered him, and the company separated them and were taking B. away when Y., within one minute, advanced upon B., who extended his arm to take hold of him, and Y. immediately stabbed him with a knife, which he had not shown before. *Held*, that if death had ensued, it would not be murder, but manslaughter, notwithstanding the separation for a minute, and the weapon, for the wrath of the accused, kindled in the highest degree by the blow, would not reasonably subside within that period, and in such case the instrument makes no difference.

4. Necessity distinguishes between manslaughter and excusable homicide and not between the former and murder; its absence is common to both murder and manslaughter.

THIS was an indictment, from FRANKLIN, containing two counts: the first for an assault on one Benton with intent to kill and murder, and the second for an assault only. The defendant appearing, pleaded in abatement that before the filing and finding of this indictment he was indicted in the Court of Pleas and Quarter Sessions for Franklin County for the same cause and acts upon which this indictment is founded, and that said indictment is still pending, and that the county court hath jurisdiction of the case.

To this plea the Attorney-General entered a general de-
(79) murrer in which the defendant joined, and upon argument the court sustained the demurrer. The defendant, being allowed to plead over, pleaded "not guilty," and on issue joined the case came on for trial at October Term, 1819.

The prosecutor and several witnesses stated that the defendant came up in front of the prosecutor in a menacing manner, but with his hands in his breeches pockets, when the prosecutor raised his hand to push him back, and the defendant immediately stabbed him with a knife in a vital part of the body, and that the wound was likely to produce death.

One W. Taylor, at whose house the affair happened, proved on behalf of the defendant that Benton and a brother of Yarbrough were in conversation relative to some part of the defendant's conduct, who was then absent, but came up soon afterwards, and the brother then said to the prosecutor, "Now tell him to his face what you have to say of him." Yarbrough seated himself in a chair in the porch where the company were, and remarked to Benton that there was no occasion for casting flouts on him, and that he wished for peace. They continued to talk, until words of reproach were used on both sides, when Yarbrough rose and stood up, and Benton came to him and struck him a violent blow with his fist, which staggered him, though it

did not knock him down. The company immediately interfered, separated them, and were attempting to carry Benton into an adjoining room, when Yarbrough advanced up and the prosecutor extended his arm to take hold of him, and immediately the traverser stabbed him. The witness further said that he did not see nor hear anything of a knife until the stab was given, and that it was about one minute after the blow had been given by Benton.

The counsel for Yarbrough moved the court to instruct the jury that, according to the evidence of Taylor, if believed, if death had ensued, it would have been manslaughter (80) only; but the court refused to give such instruction and charged the jury that it would have been murder, inasmuch as the parties were then separated, and there was then no necessity on the part of Yarbrough to stab the prosecutor. Under this instruction, the jury found the defendant guilty. He moved for a new trial, upon the score of misdirection, which was refused, and he appealed to this Court.

Seawell and *Gaston* for the appellant.
Attorney-General and *Williams* for the State. (82)

TAYLOR, C. J., delivered the opinion of the Court, which was composed of himself, *Hall* and *Murphey*.

The first question relates to the validity of the plea, which is demurred to. It must be assumed, upon the pleading, that the first indictment was prosecuted in good faith (83) and with the view of bringing the defendant to trial. There is truth in the remark made by the counsel for the State that public justice may be sometimes evaded by an offender procuring a friend to indict him in the county court, where a trivial punishment would secure him from another prosecution in the Superior Court. While the first indictment is pending, and before judgment, the evil arising from a fraudulent prosecution may, in general, be obviated by replying that the indictemnt was prosecuted by fraud and covin between the prosecutor and the defendant, and the verification of this fact before the jury would destroy the validity of the plea.

It is a familiar rule of law that a man cannot bring a second action for the same cause, for which he has a prior action depending. This extends to *qui tam* actions, where the plaintiffs are different, if the cause of the actions is the same; to informations *qui tam,* and to indictments to recover forfeitures on penal statutes; but informations and indictments for crimes are excepted from it. That the rule should not extend to those modes

of prosecution, the consequences of which are most grievous to the accused, seems at first view to be unjust and in conflict with the maxim, *Nemo bis debet vexari, si constet curiae quod sit pro una et eadem causa.* This anomaly in the English law is only to be accounted for by the extensive criminal jurisdiction of the King's Bench; for it was formerly thought that no acquittal in any other court could be effectually pleaded in bar to a prosecution in the King's Bench. Into that court indictments may be removed from all inferior courts by writ of *certiorari,* and are thus under its control for all the purposes of justice.

If there be any criminal courts of local and independent jurisdiction, from which an indictment could not be removed into the King's Bench, that court would, I apprehend, be compelled by the reason and the rule to sustain such a plea as the one now relied on. This may be inferred from a passage in Haw-
(84) kins: "If an appeal be commenced before Justices in Eyre, and afterwards another appeal be brought in King's Bench, it will be a good plea that another appeal is depending, which shows that the King's Bench ought not, without a *certiorari,* to intermeddle in an appeal whereof another court is legally possessed before; *and the reason seems to be the same as to indictments."*

The County and Superior Courts of this State have concurrent jurisdiction of the offense charged in this indictment; and where the jurisdiction of the former attaches, it must be exercised throughout before the Superior Court can take cognizance of the case, and then it can act only in its appellate capacity. There is no method by which an indictment can be removed from the County to the Superior Court before trial; so that, if a party were precluded from pleading the pendency of another indictment, he might be not only *bis vexatus,* but *bis punitus, pro una et eadem causa.* This reason is sufficient to show that the plea ought to be sustained.

With respect to the exception taken to the charge of the judge in relation to Taylor's testimony, it seems to me to be incontrovertible that if death had ensued, it would have been a plain case of manslaughter. The defendant received from the prosecutor a blow so violent as to stagger him, and in a minute afterwards gave the wound. We deem such a provocation a legal one, and the law presumes that it may kindle wrath in the highest degree, so that a person is rather to be considered as acting under the suspension of reason than from the impulse of malice. The homicide would have been not the less extenuated, because he used a deadly weapon, since the passion, excited by an attack on his person, was continued to the moment of the act.

The jury were incorrectly instructed when they were told that it would have been murder, because there was *no necessity* on the part of the defendant to do what he did. The task was to distinguish between murder and manslaughter; but the (85) absence of *necessity* is common to both of them. Had such necessity existed, it would not have amounted even to manslaughter. In considering whether a homicide amounts to manslaughter or is excusable, the inquiry as to the necessity of it would have been all-important; and had the judge been called on to instruct the jury that it would have been no more than excusable homicide, he might properly have refused to give such instruction, and for the very same reason that is given for calling it murder.

I am consequently of opinion that, upon both grounds, the judgment must be reversed, and the demurrer to the plea in abatement overruled and the plea sustained.

So the plea was sustained.

Cited: S. v. Tisdale, 19 N. C., 161; *S. v. Willeford,* 91 N. C., 530; *S. v. Moore,* 136 N. C., 584.

RAMBAUT, GERNON & CO. v. MAYFIELD & DAVIS.

(IN EQUITY.)

R. being a creditor of D. by bond, files his bill against D. & M., charging that D. had fraudulently conveyed property to M. sufficient to pay his debt, and praying a discovery, account and satisfaction. Bill dismissed upon hearing, because R. had not reduced his debt to a judgment, and actually issued execution.

FROM WARREN. The bill charged that the defendant Davis was indebted to the complainants in a large sum, by bond, that was then fully due; and after the said debt was contracted and had fallen due, the said defendant had conveyed all his real and personal estate and assigned choses in action to Mayfield, the other defendant, fraudulently, and to a much larger amount than would discharge complainant's demand, and that Davis owned all the said property at the time they trusted him, and prayed for a discovery and an account, and that they might be paid their debt out of the estates and effects so conveyed (86) and assigned to Mayfield.

Both defendants answered, and denied the fraud; and the

cause, being set down for hearing after testimony taken, was transferred to this Court for trial.

Upon the hearing, it was now, by Mordecai, for the defendants, objected that complainants could get no relief upon this bill, as it appeared that they were creditors of Davis by bond only. Before they can come here, even for discovery, they must reduce their debt to a judgment and take out execution, so that it may appear, in that way, that the debt is just and that satisfaction cannot be otherwise had from Davis. And to that effect he cited the cases of *Angel v. Draper,* 1 Vern., 399; *Sherly v. Watts,* 3 Atk., 200, and *Hendricks v. Robinson,* 2 John Ch. Rep., 296.

And for these reasons, PER CURIAM, the bill was dismissed, with costs, but without prejudice to complainants bringing another suit.

MURPHEY, J., sat for HENDERSON, J., in this case.

Cited: Hines v. Spruill, 22 N. C., 100; *Brown v. Long,* 36 N. C., 192, 3; *Peeples v. Tatum, ib.,* 415; *Wheeler v. Taylor,* 41 N. C., 227; *Bridges v. Moye,* 45 N. C., 173; *Brittain v. Quiett,* 54 N. C., 330.

PRICE v. SYKES and ISLES.

(IN EQUITY.)

1. I. made a deed to S. for land, which was destroyed before registration by a combination of I. and S. to defraud a creditor of S., and afterwards, but before the act of 1812, c. 4, the land was sold under an execution against S., who was present at the sale and declared the land was his and urged P. to buy it, who accordingly did purchase it.
2. *Quere,* Did the legal title of the land pass by the sheriff's sale? *Held,* that it was unnecessary to decide that here, because P. had no means of showing it at law as the deed was destroyed, and that gave him the right to resort to equity. *Held also,* that he might do so after an ineffectual attempt to defend himself at law against I. *Held, also,* that if S. was only the equitable owner, his conduct at the sale would constitute P. his assignee in equity and authorize him to call for the legal title.
3. Infants who prosecute an unjust claim at law and thus compel the defendant there to come into equity for an injunction and relief, and who here again set up an inequitable defense, shall pay costs.

FROM HALIFAX. The bill stated that one Crawley, being seized in fee of the land in dispute, bargained, in 1805, with the defendant Sykes for the sale thereof, at a stipulated price, which was secured by the bonds of Sykes and one Hawkins as his surety, and also by retaining the title of the land; that he gave Sykes a

bond to make him a deed when the purchase-money should be paid; that Sykes paid a part, and that in 1808 Crawley obtained against him and Hawkins a judgment for the residue of the purchase-money; that execution was issued and the land was sold, when Rhodam Isles became the purchaser, at a small sum, and took a sheriff's deed, and Hawkins paid the balance; that the purchase of Isles was fraudulent; for Sykes, in fact, furnished the money secretly, and also transferred to Isles the bond given by Crawley for the title, who then, by the consent of Sykes, made a deed to Isles; that Sykes continued in possession, sold part of the land to one Gammon and received the purchase-money, though Isles made the deed; and that finally, in (88) 1809, Isles secretly conveyed by deed the balance of the land to Sykes, except thirty acres which adjoined Isles' own land and which he proposed to pay Sykes for and keep; that Sykes being still indebted to Hawkins, and wishing to delay the payment or defeat the debt, it was afterwards agreed between him and Isles that the deed should be burnt, and that Isles should convey again at some future period, and the deed was accordingly destroyed; that Hawkins sued Sykes in 1811 for the money which he had paid as his surety, as aforesaid, and obtained judgment, on which execution issued, and was levied on the residue of the land, viz., sixty acres, described in the bill by metes and bounds, and including the thirty acres which Isles had wished to keep, and the same was purchased by the complainant, who took a deed from the sheriff therefor, and immediately actually entered into the land by the permission of Sykes, who was present at the sale, and urged complainant to purchase, expressing much anxiety that it should bring enough to satisfy Hawkins, and declaring that Isles (who was then lately dead) had never paid anything for the land and had no just claim to it, but held it in trust for him; that Mary Isles, the widow, and Lenoir Isles and the other defendants (some of whom were infants), heirs at law of Rhodom Isles, brought ejectment against complainant, and recovered, because the court of law refused to hear evidence of the foregoing facts, inasmuch as they would not constitute a legal title, by reason of the deed from Crawley to Isles, and the destruction of that from Isles to Sykes. The bill then contained a prayer for an injunction, that Sykes and Isles should convey to complainant and that he should be quieted in possession.

Upon the filing of the bill, the injunction was issued.

Sykes did not answer, and the bill was taken *pro confesso* against him.

The answer of the other defendants admitted the con- (89) tract between Crawley and Sykes, the bonds for the pur-

chase-money and that for the title, and that Isles had purchased under the judgment and execution charged in the bill, and stated that Isles doubted whether the sheriff's deed was a good title, and, therefore, by Sykes' consent, he took a deed from Crawley. It wholly denied that Sykes furnished any part of the purchase-money, or that the purchase was in trust for him. It insisted, also, that Isles took possession and held it during his life, and that, although Sykes occupied a part of the land, he paid rent. It denied that Isles made any secret or other deed to Sykes, or ever agreed to do so. It admitted that a part of the land was sold to Gammon; but they say that Isles sold it, made the deed, received the consideration, and held it to his own use. The defendants also insist that Sykes had fraudulently surrendered the possession which he held under them to the complainant.

Upon the coming in of this answer, the injunction was dissolved, and the defendants, lessors of the plaintiff at law, were put into possession under a writ of possession. But the cause was continued, as upon an original bill; and, the testimony being completed, in numerous depositions, the case was sent to this Court for trial.

It was much debated upon the facts by Gaston for complainant and by Seawell and Mordecai for the defendants, Isles, before the jury, to whom issues were submitted. The jury, however, found that the purchase by Isles was made with Sykes' money and in trust for him; that Isles afterwards made a deed to Sykes, which was destroyed, as charged in the bill, and that complainant bought at the sheriff's sale by the consent of Sykes, who then represented that the land belonged to him.

Upon this state of the case, Mordecai moved to dismiss the bill. If the complainant purchased a legal title, he might have availed himself of it at law; if Sykes' title be an equita-
(90) ble one, then it did not pass, because the sale was before the act of 1812 (ch. 4). The legal estate did pass; and, therefore, the bill must be dismissed. If the deed from Isles to Sykes was registered, it is clear that it conveyed the land. If it was not registered, which probably we must now consider to be the case (as the contrary is neither charged nor found), the question arises whether registration is necessary to pass the title to lands.

I am informed that *Chief Justice Marshall,* in *Hamilton v. Sims,* in the Circuit Court for the North Carolina District, decided that registration is only necessary for the purpose of notice, but that between the parties the deed takes effect by delivery and is valid without registration. In conformity with this, *Judge Hall* decided a case on the circuit at Northampton.

The cases of bills of sales of slaves, upon the act of 1789 (ch. 59), are in point. The act declares, unless they be proved and recorded, they *shall be void;* but as it was apparent that the ceremony of recording was only to give notoriety to sales of slaves, sales were held good between the parties without it. So the words of Stat. 1715, ch. 38, are: "That no conveyance of lands shall be *good and available in law* unless they be acknowledged or proved and registered." There can be no reason why these expressions, of the same import and enforced by the same sanctions, should receive a different interpretation.

The title did not revert to Isles by the destruction of the deed. The right to a thing which lies merely in grant is destroyed by the destruction of the grant; but when the thing exists independent of the deed, and the deed is but evidence of it, the destruction of the deed does not affect the thing which is the subject of it. Gilb. L. Ev., 95. The plaintiff ought, therefore, to have defended himself at law. If he could not do it effectually, he should have applied to equity for relief, pending the suit. He cannot take both chances—first at law, and, if that fail him, then come into this Court. 1 Dick. Rep., 287, 313. (91) He, however, does not allege that there was any obstacle at law, except that the judge rejected his evidence. If the judge did right, he has no cause of complaint; if wrong, it is not for a court of equity to correct the error.

If Sykes had only an equity, the writ of *fi. fa.* could not reach it. The creditor ought to have taken out his execution and then applied to equity against the debtor and the holder of the equitable fund for satisfaction. The necessity for this arises from the inefficacy of the execution. Then nothing passed by the sale, in this point of view.

The jury have found that Price purchased by the assent of Sykes, who encouraged him to buy. But the bill does not allege that he bought *from Sykes* nor from the sheriff as his agent, but it states that the sale was upon *execution.* The sheriff, therefore, acted as the officer of the law, and not as Sykes' agent.

Gaston, on the other side, was stopped by the Court.

The Court having thus intimated an opinion, Seawell contended that if complainant got a decree he could not recover costs. The defendants are heirs at law, having no knowledge of the facts upon which the equity of Sykes and Price rested, and some of them are *infants,* who are not to blame for the defense set up here or the claim asserted at law for them by their next friends. Infants never pay costs. 3 Atk., 223; 2 N. C., 371.

TAYLOR, C. J. Whether the complainant had a legal title to the land for which he was sued, it is unnecessary to decide, because he was unable to establish it upon the trial at law, in consequence of the destruction of the deed, which was effected
(92) by the fraudulent combination of Sykes and Isles. That gives this Court jurisdiction, and his remedy is properly sought here. With respect to the other thirty acres, Sykes was the equitable owner, and might for a valuable consideration assign his equitable title to Price, who, purchasing *bona fide,* could compel Isles to convey to him the legal title.

When, therefore, Price became the purchaser at the sheriff's sale, at the request of Sykes, and after his declaration that the land belonged to him, he stood upon the ground of an assignee, and is well entitled to a deed.

With respect to the costs, they ought to be paid by the defendants, since they prosecuted an unjust claim at law, and have set up an inequitable defense in this Court. In such case the infancy of the defendants forms no excuse.

The Court consisted of the Chief Justice, *Hall* and *Murphey,* and the *decree* was that the defendants, who were of full age, should immediately execute a conveyance to complainant for the whole tract of sixty acres, with covenants of title as against themselves and those claiming under them; that the infant defendants should, within one year after full age, execute similar conveyances, respectively; that complainant should forthwith be let into possession and be quieted therein, and an account of rents and profits was ordered, and that defendants should pay all costs at law and in equity, reserving to the *infants* six months after full age and service of the decree to show cause against it.

Cited: Morris v. Ford, 17 N. C., 418; *Hardin v. Barrett,* 51 N. C., 162; *Vestal v. Sloan,* 83 N. C., 557; *Ray v. Wilcoxon,* 107 N. C., 523; *Arrington v. Arrington,* 114 N. C., 171; *Patterson v. Ramsey,* 136 N. C., 566; *Dew v. Pyke,* 145 N. C., 305.

ARMSTRONG v. WRIGHT.

1. The refusal of an inferior court to allow pleadings to be amended, or to continue a cause, or any other exercise of a mere power of discretion—*held*, not to be an error for which the judgment will be reversed on appeal or writ of error.
2. Nor is it an error to refuse a new trial which is moved for on the ground that the verdict is against evidence. (See Note.)

DEBT on bond. Plea, *non est factum* and issue. From DUPLIN. After the cause had been pending some time and stood for trial, the defendant moved the court, on affidavits, to amend by adding the pleas of *infancy* and the statute against *gaming*, which was refused and a verdict taken, and judgment rendered against him on the pleadings as they then stood. The defendant appealed to this Court, upon the ground that the court erred in not allowing the amendment.

Henry for the appellant.
Mordecai for the appellee.

HENDERSON, J. I think this Court cannot look into the question arising upon the motion to amend, for two reasons: the first is, that it is a question of discretion, and in all cases of discretion as much is confided to the inferior court as to the Superior Court. The second reason is, that the very act of vesting a *discretionary*

NOTE.—With this opinion of HENDERSON, J., corresponds *Insurance Co. v. Hodgson*, 6 Cranch, 217, in which the opinion of the Court was expressed by LIVINGSTON, J., in these words: "The Court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned for error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of each case than by any precise and known rule of law, and of which the Superior Court can never become fully possessed, that there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion. It may be very hard not to grant a new trial, or not to continue a cause, but in neither case can the party be relieved by a writ of error—that is, if the motion for a new trial be because the verdict is against evidence. Nor is the Court apprised that a refusal to amend was ever made the subject of complaint in this way." And, in *Woods v. Young*, 4 Cranch, 238, the Court asks, "Has the party, *by law*, a right to a continuance? Is it not merely a matter of favor and discretion?" And they decide that a refusal to continue cannot be assigned for error. See also *Insurance Co. v. Young*, 5 Cranch, 187. The Reporter will be excused for these references by the contrariety of opinion and practice among the profession upon this question in different parts of the State.—REPORTER.

power proves that the subject-matter depends on such a variety of circumstances, where each shade may make a differ-
(94) ence, that it is impossible to prescribe any fixed rules or *laws* by which the subject can be regulated. And, although it be said that a sound discretion means a legal discretion, yet, when we ask what the legal discretion is, we are as much at a loss as we were before the definition to declare the rules or laws by which the discretion shall be regulated. To prescribe fixed rules for discretion is at once to destroy it.

This opinion is very much supported by the practice in England. I do not know a single case where any decision depending on discretionary power has been the subject of a writ of error, and I think that the power of this Court to correct errors in law extends not to those errors which may be committed in the exercise of a discretion, but only to those where the fixed and certain rules, emphatically called *laws,* are mistaken.

To entertain this question would compel us to take notice of questions on motions to continue, and all other collateral questions arising in the progress of a cause, a full view of which can never be taken from the abstract facts put down upon the record. Besides, the delay and the inconvenience of unraveling and undoing all that had been once done in the court below, after the decision of the point complained of, would overwhelm any good arising from the interference of this Court. We are not unapprised that the Court of Appeals of Virginia entertain jurisdiction even in cases of continuances. There may possibly be something in the constitution of their courts which warrants it, but there is nothing in ours.

Without looking into the motion for the amendment, we think that the judgment of the Superior Court must be affirmed.

Cited: Williams v. Averett, 10 N. C., 311; *Turner v. Child,* 12 N. C., 134; *S. v. Raiford,* 13 N. C., 215; *McCurry v. McCurry,* 82 N. C., 298; *Edwards v. Phifer,* 120 N. C., 406.

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(95)

COBB v. WOOD.

After the term at which a cause was decided, the Supreme Court will not amend the judgment *nunc pro tunc* on the motion of one party without notice to the adverse party; but upon such notice, the amendment will be allowed.

GRIFFIN *v.* GRAHAM.

IN this case a judgment had been rendered against Wood, the defendant, in the court below, which, upon appeal by him, was affirmed in this Court, at May Term, 1819. The record, by some omission of the clerk below, did not state the precise sum of the recovery and costs, so that execution could not be issued from this Court.

Gaston, for the appellee, moved now to enter it *nunc pro tunc,* and he had brought up the whole record.

But the Court said that the parties were now out of court, and it would be a dangerous practice to allow it, as a spurious record might be brought up, or the judgment (96) may have been satisfied; and the motion was refused.

At a subsequent day, Gaston renewed his motion, having in the meantime served the appellant with notice of it, and he not appearing to oppose it, it was allowed, and the judgment for the specific sum entered *nunc pro tunc.*

GRIFFIN v. GRAHAM et als.

(IN EQUITY.)

1. Moses Griffin made his will, containing the following devises and bequests: "I appoint E. G., W. G., etc., trustees of my estate, and executors of my will; I give the remainder of my estate (after certain legacies and payment of his debts) to my said trustees and executors in trust, to be managed by them to the best advantage for the purposes hereinafter mentioned. I desire my landed property shall not be sold, but rented out to the best advantage. I desire that my trustees and executors, out of the issues and profits of my estate—real and personal—shall purchase two acres of ground in New Bern, and as soon as the funds arising from the profits of my estate be deemed by them sufficient to make a commencement, that a brick house shall be erected on said land, suitable for a school-room, and finished in a plain manner, fit for the accommodation of indigent scholars, and be called 'Griffin's Free School.' And it is my desire that, as soon as the house is finished, and the funds arising from the profits of my estate will admit, a proper schoolmaster shall be employed to teach and educate therein as many orphan children, or the children of poor and indigent parents, who, in the judgment of my trustees, are best entitled to the donation, as the funds are found equal to; and it is my wish to clothe and maintain the indigent scholars as well as school them; and when they shall arrive at the age of fourteen, it is my desire that my executors bind them out to suitable occupations. And to prevent misconception, my meaning is,

that the amount of my estate—real and personal—be considered as a principal sum, and remain undiminished forever, and that the issues and profits only shall be appropriated to the support of the said free school. And it is my desire that all interest arising from money shall be put out at interest again and be deemed principal, and continue at interest until by my executors it shall be deemed sufficient to put the institution in operation."

2. The heirs at law and next of kin filed this bill against the executors and trustees, praying to have the trusts declared void and that the defendants might be declared the trustees for them, and for an account.

3. *Held, by a majority of the Court*, that the statute of the 43d of Elizabeth, c. 4, is in force in this State, and that the court of equity by virtue of it has jurisdiction of all charities.

4. *Held, also*, that independent of that statute, and although the jurisdiction of charities in England belong to the Court of Chancery, not as a court of equity, but as administering the prerogative of the Crown, the court of equity of this State hath the like jurisdiction, for, upon the revolution, the political rights and duties of the King devolved upon the people in their sovereign capacity, and they, by their representatives, have placed this power in the courts of equity by the Acts of Assembly of 1778, c. 5, and 1782, c. 11.

5. But if this were not so, *it is further held*, that as there are trustees and a trust for a definite charity, and a specific object pointed out, the Court would, as a mere matter of trust, take cognizance in this case by virtue of its ordinary jurisdiction as a court of equity.

6. *Held, also*, that if the court of equity had no jurisdiction of charities, as such, nor of a trust relating to them, and could not, upon a bill by the trustees or others, establish the charity by decree, yet, inasmuch as the estate of the trustees is good at law, and the condition or trust is certain and not unlawful, no trust results in this case for the heir or next of kin, and, therefore, the bill is dismissed.

7. *Held, also*, that this will doth not create a perpetuity, for the trustees have the power of alienation, and though notice to the purchaser might affect him in equity, yet that being a circumstance collateral to the power of selling will not affect the question of perpetuity; and the clauses in the Bill and of Rights and Constitution were designed only to prevent dangerous accumulations of individual wealth and referred to estates-tail alone; the establishment of a permanent fund for charitable uses does not come within the mischief and is not prohibited by either of those clauses nor by the common law.

(97) FROM JOHNSTON. Moses Griffin died in 1816, having made his will, in which he devised and bequeathed as follows: "I appoint Edward Graham, William Gaston, and three others, trustees of my estate and executors of my will. I will that all my debts and funeral expenses be paid out of my personal estate; and as to the remainder of my estate, both real

and personal, I give the same to my said trustees and (98) executors, in trust, to be managed by them to the best advantage for the purposes hereinafter mentioned." The testator then directs that his money shall be vested in bank stock or put out to interest, as also the debts due to him, when collected. He adds: "I desire my landed property, consisting of houses and lots in the town of New Bern, shall not be sold, but rented out to the best advantage. I desire that my slave, Jane, be hired out, and as soon as her wages amount to a sum agreeably to what the law requires for setting negroes free, that she be set free, according to law," with similar provisions as to several other slaves. Then follows this clause: "I desire that my trustees and executors, out of the issues and profits of my estate, real and personal, shall purchase two acres of land in some convenient and healthy place in the town of New Bern, and as soon as the funds arising from the profits of my estate be deemed by them sufficient to make a commencement, that a brick house shall be erected on such part of said land as my executors shall determine on, which shall have a large room laid off and finished on the first floor, suitable for a schoolroom, and the remainder of the house finished in a plain manner, fit for the accommodation of indigent scholars, and be called 'Griffin's Free School.' And it is my desire that as soon as the house is finished and the funds arising from the profits of my estate will admit, a proper schoolmaster shall be employed for the purpose of teaching and educating therein as many orphan children, or the children of such other poor and indigent parents as are unable to accomplish it with their own means, and who, in the judgment of my trustees, are best entitled to the benefits of the donation, as the funds are found to be equal to; and it would be my wish, should the funds, by good management, prove equal to it, to clothe and maintain the indigent scholars as well as school them; and when the scholars shall arrive at the age of fourteen years, it is (99) my desire that my executors bind them out to trades or other suitable occupations. And, to prevent misconception, my meaning is that the amount of my estate, real and personal, at the time of my decease, shall be considered as a principal sum, and is to remain undiminished forever, except the payment of my debts and legacies hereinbefore bequeathed; and that the issues and profits only shall be appropriated to the support of the said free school; and I would have it understood that it is my desire that all interest arising from money put out at interest shall be again put at interest and deemed principal, and continue at interest until by my executors it shall be deemed sufficient to put the institution in operation."

The complainants are the heirs at law and next of kin of the testator, who filed this bill against the executors and trustees, praying to have the trusts expressed in the will declared void, and that the defendants may be held to be trustees for them and for an account.

There was a demurrer, and the cause was transferred here for a decision of this Court.

Gaston, in support of the demurrer.
Mordecai and *Seawell* for the complainants.

(126) TAYLOR, C. J., delivered the opinion of himself and *Murphey, J.,* who sat for *Henderson, J.* It is impossible to read this will without wishing the objects of it may be lawfully accomplished, since their nature is so purely benevolent, and they promise to afford such extensive benefits to the part of the State where the trust is to be carried into execution. But this very circumstance admonishes a judge to be cautious in every step he takes; to recollect that his office is to ad-
(127) minister the law as he finds it, and not as he wishes it to be, and to arm himself with new resolution in a case so peculiarly calculated to enlist the judgment on the side of the affections.

The subject, too, is in a great measure new in our courts, and is acknowledged to be entangled with difficulties even in the country whence we derive our legal notions; so that it is not easy from the multitude of conflicting decisions to extract the true principle on which the case ought to be placed.

The bill is filed to attain an account and division of the real and personal estate of Moses Griffin, and to have his executors declared trustees for the complainants, who are the heirs at law and next of kin of the testator. The bill is demurred to, and the argument has involved many interesting and important topics towards the illustration of which numerous authorities have been adduced and commented on.

The principal objections to the will are that it tends to produce a perpetuity; that the objects of the trust are vague and indefinite, and that as it is discretionary with the executors whether they will fulfill the trusts or not, there is no one to call them to account. Hence it is alleged that the property ought to be given to the next of kin and the heirs.

It is deemed material to remark, in the first place, that the executors do not seek the aid of the court at present to establish the charity, whatever they may do in future, but this application is made by the heirs and next of kin to defeat the will, so that

if the trust be valid at law and the objects of it sufficiently certain it seems superfluous to inquire into the powers of the court in relation to charitable devises and bequests; for if it were conceded that a court of chancery in this State is invested with no such jurisdiction over such subjects, yet if the disposition of the will is valid at law, the demurrer must be sustained, and the executors left to manage the fund in such way as the law prescribes and under such protection as it affords. If the trust were unlawful the Court would decree the property (128) to the complainants as in the case of Craven's will; but if it be lawful and sufficiently definite to be carried into execution it cannot be subverted in this Court.

There is no principle of law which forbids the appropriation of property to charitable uses since the power of alienation was introduced. A devise to individual trustees by name, for any purpose, not made unlawful by the statutes of Mortmain, has ever been deemed valid since the statute of wills, independent of the 43 Eliz. The civil law was distinguished for the protection it afforded to such bequests, and the first decisions under the statute of wills were probably influenced by a like disposition in the courts. To maintain a charity expressly declared by the testator seems to follow naturally from the former power of the ordinary to apply a part of every man's personal estate to charity. *White v. White,* 1 Bro. C. C., 12; *Maggridge v. Thackwell,* 7 Ves., 36, 69. In *Porter's case,* 1 Rep., 22, the devise was to the wife on condition that she should grant the lands for the maintenance forever of a free school which the testator had erected, and of alms-men and alms-women attached to it. By those who argued in support of the devise one reason given was that the statute of Hen. VIII avoids superstitious and not charitable uses. Another was, that if it extended to this it made the use and not the conveyance void. And the devise was sustained by the Court. The condition was held to be a lawful one and such as the trustee might execute. It was because the condition was not performed that the heir was permitted to enter. This case is commented on by the Chief Justice of the United States in the *Baptist Association v. Hart,* 4 Wheat., 35, and it is taken for granted that the trust was a lawful one and might have been performed.

In enumerating the trusts not executed by the statute of uses, Sanders, p. 62, puts this case: If a man enfeoff (129) two or three persons and their heirs *in trust,* and to the intent that the inhabitants of such a place should have a free school, or in trust to maintain poor children, this trust is not executed by the statute of 27 Hen. VIII, for the land must re-

main in the trustees to answer the purposes of the trust, and therefore not a use executed by the statute. One reason for this construction is because a *use* cannot be limited to a parish or any indefinite multitude by a general name, it being no corporation and without any public allowance. But this limitation of the use *is good as a trust.* Another reason, because it is a rule in chancery that where lands are given to trustees in trust to pay the profits over the lands must continue in the trustee in order to perform the trust.

These two instances of valid trusts at law, where the objects of the trusts are not more certain, and in the last case less so than in that before us, show that the will is sustainable at law.

In *Baptist Asso. v. Hart,* 4 Wheaton, 35, the bequest was to the Baptist Association that for ordinary meets at Philadelphia annually for the education of youths of the Baptist denomination, and it was held that the association, not being incorporated at the testator's death, could not take the trust as a society. The Chief Justice observes, "The *cestui que trust* can be brought into being only by the selection of those who are named in the will to take the legacy in trust; and those who are named are incapable of taking it." In the case before us, on the contrary, the executors are capable of taking the estate in trust, and are therefore capable of selecting those who are to be benefited by it. If then the widow in *Porter's case* might lawfully grant the land for the maintenance forever of the free school and of alms-men and alms-women, and the feoffees in the case from Sanders might lawfully provide a free school or maintain (130) poor children, I cannot perceive any reason why the executors in this case may not purchase land, erect a school and select the poor children to be educated and bound out. The trust may be carried into complete execution by an act of incorporation, as was suggested in *Porter's case;* and by the same means also the objection may be obviated that there is no person to call the executors to account. This inconvenience, however, arises from the act of the testator himself, who may fairly be presumed to have known where he might safely confide so large a trust; and as he might have given the property absolutely to the executors, no reason is perceived why he might not invest them with discretionary powers for so beneficient an end.

It is true that a court of equity assumes a control over trusts in general, and if the objects be uncertain, will consider the property undisposed of for the benefit of the heirs and next of kin. But here the objects are distinct, viz, the education of poor children and the binding them out as apprentices. As all the poor children in that part of the country could not receive the

benefit of the fund, a discretion was necessarily confided to the executors to select such as stood most in need of that aid. Without so much discretion as this no charitable institution could ever have been established; for, though it might be possible for a testator to designate existing objects, how could he point out those hereafter to be admitted.

The devises and bequests are next objected to on the ground that they tend to a perpetuity. The meaning which the law annexes to this term is that of an estate tail so settled that it cannot be undone or made void. As when if all the parties who have interest join they cannot bar or pass the estate, but if, by the concurrence of all having the estate tail, it may be barred, it is not a perpetuity. It is in reference to estates tail that the word is used in the bill of rights, for there was no other estate that had a tendency that way. A condition not to alien, annexed to a fee simple, is void; and the rules relative to executory devises, by which their duration is limited, had (131) effectually checked their tendency to a perpetuity. In obedience to the declaration of the bill of rights and to the injunction in the Constitution the Legislature of 1784 abolished entails, giving as a reason that they tended to raise the wealth and importance of particular families, and to give them an undue influence in a republic. This shows plainly that they designed to prevent the accumulation of individual wealth, and did not contemplate the possibility of any evil likely to arise from the establishment of a permanent fund for charitable uses. The probable effect of this was the reverse of what they meant to guard against, as it promised to increase the equality of the republic. It would afford the means of instruction to those who could not otherwise procure them; it would diffuse knowledge and morality amongst that class of society which stands most in need of them, and by rendering them useful and efficient members add to the strength and happiness of community. Assuredly, then, property applied to these ends never entered into the common law notion of a perpetuity; otherwise the objection would have been taken in *Porter's case* and the many others to be found in the books where similar dispositions have been made. The common law has always been adverse to perpetuities, and it is acknowledged on all hands that executory devises, on account of their tendency that way, are not the legitimate offspring of it but a privilege gradually insinuated into its system. The opposition to mortmain did not arise from the mischiefs likely to ensue from the stagnation of property, but from the loss occasioned to the barons of the profits of their tenure. It is true that one of the last mortmain acts in England recites this as an

evil, but that proves that it was not an inherent objection to such dispositions in point of law, otherwise they would not have subsisted for so long a period. I am thus led to conclude that a perpetuity which the law would deem void must be an
(132) estate so settled for private uses that by the very terms of its creations there is no *potestas alienandi* in the owner. There is no such restraint imposed upon these executors. They, like other trustees, may sell for a valuable consideration, but whether the purchaser can acquire such a title as will prevail against the *cestui que trust* will depend upon his having notice—an incidental circumstance wholly independent of the right of selling.

The next inquiry is whether a court of equity in this State has jurisdiction of the subject. At the period of the first settlement of this State, then a colony, the chancery in England was in the regular exercise of jurisdiction over charities under the 43 Eliz. A similar court was established here by the Lords Proprietors under the general powers given them by the charter. It was held by the Governor and council and continued until the year 1777, when the separation from the mother country took place. The following year the Legislature declared all such parts of the common law to be in force as were heretofore in force and use within this territory, or so much as is not inconsistent with the independence of the State. Under a similar provision in the laws of New York Chancellor Kent thought the equity system was of course included. *Manning v. Manning,* 1 Johns. Ch., 535. From the Revolution to the year 1782 there was a suspension of equitable remedies, and sometimes of legal ones, from the courts of justice being shut up. Equitable rights continued to subsist notwithstanding, and in 1782 courts of equity were established with all the powers and authorities that the former court of chancery used and exercised and that are properly and rightfully incident to such a court, agreeably to the laws in force in the State, and not inconsistent with the Constitution. That the cognizance of charitable devises and bequests was taken by the chancery in England, and that it was a power "rightfully incident" to such a court at the date of the charter, is shown by the adjudged cases; whether the court of
(133) chancery in this State actually exercised a similar jurisdiction there are now no means of ascertaining.

The objection in this case is founded on the peculiar nature of the subject as it is viewed by the laws of England. It is laid down in the books that the king, as *parens patriae,* has the general superintendence of all charities not regulated by charter, which he exercises by the keeper of his conscience, the chancel-

lor; and therefore the Attorney-General, at the relation of some informant, where it is necessary, files *ex officio* an information in the court of chancery to have the charity properly established and applied. 3 Bl. Com., 427; 2 Fonb. Eq., b. 3, c. 1. It is also said that the jurisdiction thus established does not belong to the court of chancery as a court of equity, but as administering the prerogatives and duties of the crown; and that the duties vested in the chancellor by the statute of Elizabeth are personal and not in his ordinary or extraordinary jurisdiction in chancery; the same in fact which he exercises with respect to idiots and lunatics. Admitting this to be so in the broadest terms it does not, to my mind, present any real difficulty to the like power being exercised here. It opens a wide field of investigation, which I have reflected upon, but which I do not think it essential to enter into. The short ground upon which I should place it is that upon the Revolution the political rights and duties of the king devolved upon the people of this State in their sovereign capacity. That they, by their representatives, had a right to deposit the exercise of this power where they pleased, and that they have placed it in the hands of the courts of equity. Whether this be a correct view or not does not affect the principle of my opinion in this case, because I think that where there is a trust and a trustee with some general or specific objects pointed out, or trustees for general or indefinite charity, a court of equity may, as a matter of trust, take cognizance of it in virtue of its ordinary jurisdiction. This position is maintained by the authorities quoted in a learned note to the appendix of (134) the fourth volume of Wheaton's Reports, which cases I have examined as far as I have had access to them—some in the Reports and others in abridgements. The cases further show that in indefinite trusts or trusts where some general objects are pointed out the distinction most acted upon is that in a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual. But where the execution is to be by a trustee, with general or some objects pointed out, the administration of the trust will be taken by the court of chancery, either as delegate of the crown or as a court of equity, and managed under a scheme reported by a master and approved by the Court. 7 Ves., 36, 86; 1 Merir., 55; 14 Ves., 364; 15 Ves., 231; 17 Ves., 371; 16 Ves., 206.

I am consequently of opinion that the demurrer be sustained and the bill be dismissed.

HALL, J., dissented. He said that writers on the English court of chancery divide its jurisdiction into four parts: the

common law jurisdiction, the equity jurisdiction, the statutory jurisdiction; and, lastly, the specially delegated jurisdiction.

The subject-matter of this bill cannot fall within the first. If it fall under the second it must be under that division of it which we call *trusts*. In that light it must be regarded merely as a trust, and unconnected with the statute of the 43 Eliz. In order that it may be supported on that ground there must be trustees and a trust to some person or persons, or to some particular definite object, marked out so that the trustees can be compelled to carry the trust into effect by those who are the objects of it. Here there are trustees, but it depends upon their will and discretion to point out and select persons as objects of the testator's bounty. There is no *cestui que trust* who (135) can call for the execution of the trust. The charity cannot therefore be carried into effect and established independent of the statute of Elizabeth for want of an equitable devisee. Another objection to this devise is that it cannot be sustained at law. Our Bill of Rights declares that perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed. And the 43d section of the Constitution declares that the future Legislature of the State should regulate entails in such manner as to prevent perpetuities. At that time perpetuities appeared most prominent in estates tail, and the clause in the Constitution just recited was inserted with a view to them. But the clause in the Bill of Rights was inserted to prevent perpetuities generally. To make the present devise sustainable it must harmonize with that high authority. If the trustees die the legal estate given to them will pass into other hands, and in contemplation of law will last forever. And the trust, which cannot exist without it and is wholly dependent upon it, will have a co-equal existence. Thus a portion of property would, by a decree of this Court, be locked up forever and withdrawn from any ownership by which it might be aliened. It cannot be disposed of without a breach of trust, except such disposition be for the benefit of the charity. It cannot go in debt. It is doomed to its course, and will admit of no deviation. It is not a good executory devise which may last for a life or lives in being and twenty-one years afterwards, but it is a devise that may last forever, and must not be interrupted. The devise may be laudable, but the end cannot sanctify the means. Were these trustees a corporation these objections might vanish. But this Court, in the exercise of its ordinary powers as a court of equity, does not possess the power of creating corporations.

I will now inquire for a moment whether this case falls within either the third or fourth division of the chancellor's jurisdic-

tion, and this inquiry I will make as to both at the same time.

The king, as *parens patriae,* has the general superintendence of all charities, which he exercises by his chan- (136) cellor, the keeper of his conscience. The chancellor possesses and exercises this power by virtue only of such delegation; and such power thus delegated is the foundation of which the statute, 43 Eliz., ch. 4, is the superstructure. To that power of superintending charities which the chancellor, as the keeper of the king's conscience, possesses, the statute adds the power of inquiring into all abuses of charitable donations and rectifying the same by decree. Thus then the power which the king possesses of creating corporations, the power which he delegates to the chancellor of inquiring into abuses of charitable trusts and correcting the same, are powers when united sufficient to determine all questions relative to charities, and sufficient to establish corporations, and then vest in them all donations agreeably to the will of the testator or donor. In the case before us the trustees could be converted into a corporation, and the property vested in it to be applied as the testator has directed. In that case there could be no objection to it as a perpetuity. Our court of equity, clothed with all the power which the statute of Elizabeth could give, cannot create a corporation.

Cited: S. v. McGowan, 37 N. C., 15; *S. v. Gerrard, ib.,* 39; *White v. University,* 39 N. C., 20; *Miller v. Atkinson,* 63 N. C., 539; *Academy v. Bank,* 101 N. C., 488; *Keith v. Scales,* 124 N. C., 510.

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THOMPSON v. ENGLAND.

(IN EQUITY.)

D. entered a tract of land in 1777 which T. claimed in virtue of an improvement and occupancy; T. could not caveat the entry, because he would not take the oath of allegiance to the State, and for that reason he assigned his right to M., who was to enter the caveat at the expense of T. and in trust for him. M. caveated, and finally obtained a grant, and T. filed his bill for a conveyance. The bill is dismissed, because the Acts of April, 1777, and November, 1777, expressly require the oath to be taken by all persons who enter land, and T. could not, therefore, have made the entry or caveat himself; and the agreement between him and M. was an evasion of those acts and a fraud upon the State.

FROM BURKE. The bill charged that in 1775 one Killian was entitled to four hundred acres of land in Burke, then Rowan

County, by virtue of an *improvement* thereon of a cabin, orchard and ten acres of cleared and cultivated land, and sold it to complainant for £55, paid to him, who took possession in 1776. That soon after the land office opened in 1777 one Duckworth entered two hundred acres, part thereof, and that complainant, "not then having taken the oath of allegiance to this State, could not caveat the entry"; but to prevent Duckworth from getting a grant he applied to one McKenny to befriend him, and it was agreed between them that McKenny should caveat the land in his own name and at the charges of complainant, and that the grant should issue to McKenny in trust for complainant; and "in order to give McKenny the apparent right" complainant assigned to him the right of entry for the land, and took his bond for £250 as the purchase-money, though the same was never to be paid and never had been paid, and was now ready to be surrendered. The bill further charged that McKenny did caveat Duckworth's entry and obtained a verdict in his favor
(138) and judgment for a warrant to issue in his name, and that complainant paid all the expense; that complainant "afterwards became a citizen of this State" and thereby became entitled to the land, but that McKenny, about the year 1780, sold or assigned his entry to one Alexander, who obtained a grant and sold or assigned the land to the defendant, and that each of them had notice of the trust and paid no valuable consideration, and prayed for a conveyance and account, and to be let into possession.

The answer admitted the caveat and the transaction between complainant and McKenny, but insisted that it was an absolute sale, and that McKenny had offered to pay the purchase-money in 1778, but that complainant refused to receive it on account of the depreciation of the paper money. It was also insisted that the sales to Alexander and by him to the defendant were *bona fide,* for a valuable consideration, and without notice of any equity in complainant, and that they had been in possession from 1781 to the time of filing the bill, which was in September, 1799.

The case was transferred to this Court under the act of 1818, and now came on for a final hearing.

Wilson for the complainant.
A. Henderson and *Gaston* for the defendant.

HALL, J., delivered the opinion of the Court. An act of Assembly passed in April, 1777, prescribes an oath of allegiance to be taken to the State by all persons living therein. Another

act, passed in November of the same year, established offices for receiving entries for claims of land in the several counties in the State, and declares "that it shall and may be lawful for any person, who is or hereafter may become a citizen of this State, and performs the requisites by this act required, to enter with the entry-taker of any county a claim for any vacant lands lying in such county; and, by the fourth section, "every person but a guardian for an orphan or a person absent (139) in the military service, before he shall enter lands, shall take and subscribe the oath of allegiance and abjuration prescribed by the laws of the State"; which oath the entry-taker is to administer. It appears from complainant's own showing that at the time when the entry was made under which he claims he had not taken the oath of allegiance prescribed by law and which was indispensably necessary before he could make an entry. This he knew very well. He was fully sensible of his own incapacity when he applied to McKenny to caveat Duckworth's entry, and when he clothed him with power to do so successfully by conveying to him Killian's improvement, which he had before purchased.

I am of opinion that if he was not qualified to make entries and hold titles to land himself he could not do it by the agency of another person. The sound policy of the times forbade it. It was entirely against the spirit and meaning of the laws. It matters not that he has since taken the oath of allegiance; if his claim was originally invalid that circumstance will not make it good. He will not be allowed to take his chances and then side with the strongest. For these reasons the bill must be dismissed with costs.

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AVERY v. WALKER.

(IN EQUITY.)

W. A. made an entry of land, paid the fees and the purchase money, and got a warrant of survey, and applied several times to the county surveyor to make the survey, but he declined doing it, and made W. A. a deputy for that purpose just before the entry would lapse. W. A. proceeded to make the survey as deputy, returned it into the office and obtained a grant. F. W. had entered the same land with notice of W. A.'s entry, and, being also a deputy surveyor, fraudulently made out a plat of survey from W. A.'s field-book, which he returned into the office and obtained a grant prior to that of W. A. W. A. filed a bill for relief and a convey-

ance of the legal title from F. W.; he did not state that either he or the chain-carrier had been sworn.

Held, that W. A. was not entitled to relief, and his bill dismissed, because the survey had been made by himself and not on oath.

Quere, Whether the extinguishment of the Indian title by the treaty of Holston, made in July, 1791, with the Cherokee Indians, rendered the lands ceded by that treaty subject to entry in this State without a further and express legislative act?

THIS case was transferred under the act of Assembly of 1818 to this Court for a final hearing, from BUNCOMBE.

The bill stated that the complainant on 22 April, 1795, made and paid for an entry of land in the following words: "No. 3626. W. Avery enters a claim for 400 acres of land lying in Buncombe County, on both sides of a large creek or river that falls into Tuckaseegee River on the northeast side, at the Twelve Mile Town; the said creek called Big Creek by some, by whatever name or names the said town or creek may be called by others: Beginning immediately above where the Indian line, by the treaty of Holston, made in the year 1791, crosses the said creek, or on that part of the said creek nearest to the Indian line, and extending upon both sides of the said creek for complement." That he then also made seven other entries, which are particularly set forth in the bill, each for 400 acres, and

(141) each calling to lie, above the last in order, on the same creek called by him Big Creek, and extending up the creek on both sides of it for complement. That on the entry book at the foot of his said entries were written the following remarks, viz: "1. Nota Bene: It is supposed that the Indian line does not cross any other water course as large as Big Creek between Big Creek and the territorial line." "2. Nota Bene: No other water courses falling into Tuckaseegee or Tennessee as far west and as large as Big Creek lie in that part of North Carolina wherein the Indian claims were extinguished by the treaty of Holston in 1791." That in May, 1796, he paid into the public treasury the purchase-money to the State and took a receipt therefor; that at the time he made the entries the country was wild and infested with Indians, and that he had never seen the lands or been near them; that he obtained the locations from Col. James Hubbard and Capt. John Hill, who had been members of Col. George Doherty's party, and explored that section of country shortly before, and had been attacked by the Indians on that creek and at or near the place where his first entry was laid; that he made repeated applications to John Patton, surveyor for Buncombe County, to survey the lands after obtaining the warrants, and that Patton declined doing it

as the lands were on the frontier and the Indian boundary had not then been actually run out, and it might be dangerous to survey near the line; that Patton offered to make a deputy to survey the lands; that none could be obtained except the complainant himself, and that in consequence thereof he accepted a deputation in 1798; that in November, 1798, he set out from Burke (where he resided) to make the survey, but he then again applied to Patton and requested him to make the survey, and he again refused; that the period was near at hand when the entries would lapse or become forfeited to the State if the surveys were not made, and he was under the necessity therefore of doing it in person; that he procured one Dever (142) as a pilot and chain carrier, who had been a huntsman and was well acquainted with the woods and water courses in that part of the country, and could identify the creek mentioned in the complainant's entry; that when they reached the wilderness they met with the defendant Felix Walker, who informed complainant that he had several entries on a creek called Soko, which he had come out to survey under a deputation from Patton to himself, and proposed that complainant should survey his, the defendant's, entries, and the defendant in turn would survey as many for the complainant, to which both parties agreed; that Dever took them to Soko Creek, being the main south fork of Big Creek, and that on 14 November, 1798, complainant made several surveys for the defendant, running down the creek to a point within one mile and a half of its mouth, and that he then showed to Dever and the defendant Walker exact copies of his entries, and stated that the Big Creek called for in them and designated to him by Hubbard and Hill was the creek on the banks of which Doherty had been attacked by the Indians; that Dever declared that Soko emptied itself into that creek and that Doherty's battle-ground was in fact at the mouth of Soko; that above the mouth of Soko the Indians called the creek Raven's Fork; that below the confluence they called it Unnia and Nonahut, but Doherty and his men and other whites called it Big Creek. That complainant also showed to the defendant a copy of the Nota Benes and the original receipts of the entry taker and treasurer for the fees and purchase-money, and stated to him that he had never been upon or seen the lands and depended upon Dever to show them; that Dever repeated his declarations several times in the presence and hearing of Walker, and asserted that they were then near the land entered by complainant; that Walker, deceitfully and for the purpose of defrauding complainant of his land by inducing him to survey it and certify for him instead of the complainant him-

(143) self, denied the correctness of Dever's opinion, and said that the large creek into which the Soko fell was not Big Creek called for in complainant's entries and warrants; that the true name of that creek was Oconalufty, and it was excluded by the Nota Bene annexed to the entry, for there was another creek lower down, which was much larger, and fell into the Tuckasejah on the northeast side, fifteen miles below, near the Big Bear's village, and was called Deep Creek; that he had lately been there and seen it and there were much larger bodies of good land on it than on the creek where they then were; that there were no town or Indian old fields at the mouth of *this* Big Creek, or Oconalufty, as he called it, but there were at the mouth of the other creek; that he moreover declared that he had lately seen and conversed with Hubbard and Hill and others of Dohorty's men who had removed to Tennessee, and at a great distance from complainant, and that they had all stated that complainant's land was situate fifteen miles below and on the other creek, and that he was willing to make oath to the truth of all these statements and facts; that he, the defendant, had entered the lands on Soko and the creek into which it emptied, and which was named Oconalufty; that Dever asserted the truth of his own declarations, and that complainant, being uncertain which to credit, proceeded in the surveys with the determination of making plats and certificates of survey according to his convictions resulting from subsequent investigation; that in fact all the representations of the defendant were false, and were so known to himself at the time he made them; that there was no other large creek emptying into the Tuckasejah on the northeast side below this Big Creek; that Big Creek corresponded with the call for the Twelve Mile Town; that the attack on Dohorty was made at the mouth of Soko; that the true name was not Oconalufty, and that such name had been given to it by (144) the defendant himself when he made his entries for the purpose of defeating complainant's entries; that defendant had notice of complainant's entries, and that all his declarations aforesaid were made with the view of entrapping him by getting him to survey his own lands for the defendant; that a water course fifteen miles below would not fall into the Tuckasejah at all, but would fall into the Tennessee river. The bill further states that complainant ascertained these facts during the surveys by his own observation, aided by the knowledge of Dever, and that he thereupon distinctly informed Walker that he would make plats and certificates for him for the lands on Soko, and for himself for those on Big Creek below the mouth of Soko, and on the Raven's Fork above the mouth of Soko; that much

altercation took place between them, and that Walker, still insisting for the surveys to be made for him, remained with complainant during the surveys, and thus had an opportunity of taking notes of the surveys himself or of copying them from complainant's field book; that after the surveys were completed they separated, complainant returned to Burke and Walker to his residence in Rutherford County; that in a few days the defendant sent a messenger to the complainant with a letter requesting him to make out the plats and certificates of survey for all the lands in the name of the defendant, or if he would not do that he requested him that after he had made them out as he might think proper he would take defendant's house in his way to Raleigh, that they might accompany each other to the public offices to contest the right to the grants; that the said letter was a mere device to deceive complainant, and that defendant instructed his messenger to detain complainant at home as long as he could in making out the plats and certificates, or by any other pretense, until he, the defendant, could make out plats and certificates in his own name for the lands, and without any notice to complainant forward them to the secretary's office and obtain the first grants; that in fact the (145) complainant made plats and certificates in Walker's name for all the lands on Soko, which he sent to him by his messenger, and proceeded to make out plats and certificates in the name of himself, the complainant, for the lands on Big Creek, including the mouth of Soko; that in a short time he completed his plats and certificates and filed them in the office of the Secretary of State, and obtained grants for the respective tracts, bearing date 24 December, 1798. The bill further states that the defendant Walker, in pursuance of his original scheme of circumventing and defrauding the complainant had, in the meantime and while he and his messenger were amusing him at his own house with invitations to travel together to Raleigh, and employing him in making out the papers for the Soko lands for Walker, and soliciting him to make out those for the Big Creek lands in the same way, been busily engaged himself in making out plats and certificates for the latter lands in his own name; that in truth he did so make them out, and before complainant had completed his, and without any knowledge or suspicion of it on his part, the defendant posted off one James Holland, an attorney, to Raleigh to procure the grants, and did obtain grants bearing date 5 December, 1798, for 3,832 acres of land in his own name, and for 640 acres in the name of Holland, as a compensation for his trouble or as his share of the profits. The bill further states that the entries of Walker were made on 9 May,

1795, and that he then had full notice of complainant's previous entries, as well as at the time of making the survey, and that he, the defendant, had not paid the purchase-money to the State before he applied for his grants.

The prayer was that the grants to Walker might be declared void, or that he should convey to complainant the lands in dispute and surrender his grants into court, and for an ac-
(146) count of rents, profits and waste.

The answer was much in detail and denied many of the allegations of fraud stated in the bill. The reliance, however, was chiefly on the position that Big Creek and Oconalufty were two different and distinct branches of the Tuckasejah River, and that the information given by the defendant to Avery upon that point was correct in point of fact. It also insisted that the surveys had been actually made by complainant for the defendant, and that he had no suspicion that complainant designed to appropriate the land to himself until the surveys had been completed. When Avery informed him of his intention he was much astonished, and having no other means of defeating Avery's fraudulent purpose he determined to exercise the functions of his office of deputy surveyor for himself, and thereby secure this land from the unjust spoliation meditated by the complainant. He admits that he hurried home and immediately on his arrival proceeded to prepare plats and certificates for himself for the lands on the Oconalufty, with which he dispatched Holland to Raleigh in order to have the titles quickly perfected by grants; which was accordingly done as stated in the bill. He also admits that he sent the messenger to Avery for the plats and certificates, and says "that with honest truth he declares that he had a design to procrastinate and prevent the complainant from obtaining grants first, and that he also had it in view to obtain the titles for himself, as he believed the lands to be justly his." By engaging the defendant in platting the Soko lands he hoped to detain him and thereby gain time for himself. He also wished to put an end to all controversy and lawsuits upon the subject, which he hoped to do by getting the first grants, as he expected that complainant would then abandon his claim. "Actuated by these pure motives he had in view only to prevent the complainant from committing a fraud on him and not himself to perpetrate one. He therefore
(147) determined to obtain by any fair means the first grants."

Holland had then gone to Raleigh and he wished to detain complainant until the business could be completed. The defendant insists that he acted *bona fide* throughout, and denies that he had notice of complainant's entries on Oconalufty, but

says that he conceived then and now asserts that they were on *another* creek.

The proofs and exhibits were voluminous; but as the case was decided upon a motion to dismiss the bill upon the matter stated in it the report is not burdened with the other matters.

The lands entered by both parties are stated in the bill to be within the territory ceded by the Cherokee tribe of Indians to the United States by the treaty made 2 July, 1791, commonly called the treaty of Holston or Blount's treaty.

Upon the hearing *Mordecai* and *Seawell,* for the defendant, moved to dismiss the bill upon two grounds: (1) Because the land was not subject to entry; (2) because the complainant surveyed his own entries.

The act of 1778, ch. 3, ascertains the Indian boundary, and declares "that all entries or surveys heretofore made, or which hereafter may be made within the said Indian boundaries, shall be utterly void and of no force or effect." By the act of 1783, ch. 2, certain lands are reserved to the Indians and entries within the reservation declared void, and a penalty of £50 imposed for each entry on the person making it.

These lands were once, therefore, not the subject of entry; the statutes forbade it. They have not yet lost their efficacy. There is no time limited in them during which they should operate and afterwards expire; they do not provide that "so long as the Indian title shall exist entries shall be made." If the courts say that they impose a limitation to the law, where the Legislature has placed none, these acts have not been expressly repealed; nor are they repealed by implication—by subsequent laws inconsistent with them. The extinguishment of the Indian title by the treaty of Holston did not affect the operation of these prohibitions. That treaty did not repeal our laws; it was not made by North Carolina but by another government—that of the United States. Besides these acts do not forbid entries within the Indian boundary, *merely as Indian boundary.* There are defined territorial limits, and all entries within them are prohibited, and although those limits then constituted Indian boundary, it does not follow that when their title should cease the prohibition would also cease; the State might not wish to sell that land, and there has been no declaration of the legislative will to that effect. The repeal of these statutes being to exercise the highest act of sovereignty, by disposing of the territory of the State, nothing short of the express words of the Legislature is sufficient therefor. It is natural to expect that a change of so much importance should be plainly and expressly declared. This question seems to have been settled

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in *Avery v. Strother,* 1 N. C., 558. It is true that the entry there was made between the signing and the ratification of the treaty; but the Court does not lay any stress on that circumstance nor intimate that the judgment would have been different had the entry been made after the ratification. That case has been recognized as law by the Supreme Court of the United States, and made the foundation of their opinion in *Danforth v. Thomas,* 1 Wheat., 158, in which it is declared that the mere extinguishment of the Indian title did not subject the land to appropriation until an act of the Legislature should authorize it.

But this land was not the subject of entry for another reason: The right of entry is given and regulated by the act of 1777, ch. 1, sec. 3, a mere perusal of which will show that the land in question could not be entered. The words are, "that it
(149) shall be lawful for any citizen to enter with the entry-taker of any county in this State a claim for any lands lying in such county *which have not been granted by the crown of Great Britain, or the Lords Proprietors of Carolina,* or any of them, in fee simple, before 4 July, 1776, *or which have accrued or shall accrue* to the State by *treaty or conquest.*" These words "which have accrued or shall accrue by treaty or conquest" are words of exception and not words of grant; such is the natural construction of the sentence, and any other would produce an absurdity. The first part of the section authorizes an entry of any lands in any county in the State. These are general words and embrace all the lands in the State; the expressions therefore relative to ceded or conquered territory cannot be construed words of grant, for there is nothing for them to operate on. They could not apply to lands without the State; such a case was not at all contemplated. Indeed, it is expressly provided that the entry shall be made with the entry-taker of the county of all lands within the county. The treaty of the Long Island of Holston was made on 20 July, 1777, by which certain lands were secured to the Indians; and it neither comported with the policy of the country, as declared in the preamble of the act, nor with the provisions of the treaty, to subject those lands to entry. That treaty was fresh in the minds of the Legislature, and probably suggested the exception. It is true that speculators spied out an apparent ambiguity in the expressions, and some of them immediately made entries. But very soon afterwards we find a legislative construction upon the clause in question corresponding with that now contended for. By the act of 1778, ch. 3, entries within the Indian boundary are prohibited thereafter, and all entries and surveys of land within those boun-

daries made *before* that time are *declared* void, and the purchase-money refunded. Whatever conflict of authority there may be upon the construction of the acts of '78 and '88, there is none upon the point arising out of the act of '77. That (150) is now presented, for the first time, in this State, and the Court can give an exposition of the statute, untrammeled by any precedent whatever.

Gaston and *Wilson* for the complainant. The act of '77 opened the whole State for entries. The policy of (151) the State was to have all the vacant lands appropriated, and that act was intended to provide for it in the full extent. The broad terms of it embraced even the lands that had been expressly reserved to the Cherokees by the treaty of July, 1777. That was soon perceived and the act of the subsequent year, statute 1778, ch. 3, was passed to remedy that error and fulfill the treaty. The land office was shut by the act of 1781, but was again opened for the whole State by that of 1783, ch. 2, reserving the Indian lands as defined by the treaty. It is obvious that the object was to reserve these lands *as* Indian lands from entry, because all the lands to the east were then within the white settlements and subject to entry, and by the (152) third section of the act the western boundary for entries is enlarged to the Mississippi. The general construction then was that those lands could be entered unless expressly prohibited. Hence the necessity for the passage of the act of 1778; and hence, too, the necessity for the restrictive clauses in secs. 4, 5, 6, 7 and 8 of the acts of 1783. The cases of *Preston v. Browder,* 1 Wheat., 115, and of *Danforth v. Thomas, id.,* 155, do not oppose this position. The entries in both of those cases were made at a time when they were expressly forbidden. The same remark is applicable to the case of *Avery v. Strother,* 1 N. C., 558, because the treaty did not become consummated, and was indeed no treaty until it was ratified. The circumstance of the restrictive clauses being introduced into the act of 1783 shows very clearly that without them it was considered that the Indian lands would be subject to entry even while occupied by the Indians. To prevent that and that alone was the intention of the Legislature so far as regarded the Cherokees. It had always been practiced in this State to make entries of any lands to which the Indian title had been extinguished; and also to enter lands even on which the Indians were actually seated. This custom had the sanction of legal provisions, as is proved by the act of 1748, respecting the Tuscarora tribe, whereby entries of their lands were forbidden in future, but the previous

grants declared valid and the grantees authorized to enter whenever the Indians should desert the lands. This is incontestably confirmed by the act of 1809, ch. 16, which is a legislative exposition of the former laws, and declares that the Cherokee lands could be appropriated by entries of individuals "so soon as their title should be extinguished by treaty," though it was then unlawful to make such entries; and, to arrest the speculation then on foot, to enter all the valuable lands as soon as a treaty should be made, it is enacted "that those lands
(153) shall not be subject to be entered; but *when the Indian title shall be extinct they shall remain and inure to the sole use of the State.*"

The construction attempted to be imposed upon the act of 1777, respecting the lands that might accrue by treaty or conquest, is not correct. It is contradicted by the case of *Preston v. Browder, supra,* in which those words are distinctly considered as words of grant of all the lands within the territorial limits of the State then held by Indians, and which might be subsequently obtained from them by cession or conquest; and the ground of decision in that case was that the entry had been made before any such treaty or conquest, and while they remained Indian lands. But even if those words in the act of '77 operate by way of exception and not of grant they will not affect this entry, because the act of 1783 again opens the whole State for entry, without using any such words, and restrains entries only within the Indians' lands as such. The same act of 1809 also supports this construction.

The facts as regards the other point made in the case are that the complainant made his entries, paid the fees and the purchase-money, obtained warrants of survey directed to the county surveyor, to whom he frequently applied to execute them, and who declined, and gave complainant a deputation; that complainant waited for the surveyor to make the surveys, until a forfeiture was close at hand, for the want of surveys; that he again applied, was again refused, and to prevent a lapse of his entry finally made the surveys for himself; his surveys have been certified into the proper offices and there accepted and grants thereon issued to him. The defendant, with a full knowledge of his first purchase and of all the attendant circumstances, has by spoliation and deceitful practices contrived to get the first grants.

The motion to dismiss upon this ground can only be supported because, *by law,* a survey made under any circumstances
(154) by a surveyor for himself, however, fair, although accepted at the public offices and approved as the foundation

of a grant, is utterly nugatory. It is the business of courts to expound, not to give law. What says the written law? The act of 1777, ch. 1, sec. 3, tells us that *any* citizen may enter; of course it is lawful for a surveyor to enter. There is to be but one surveyor in each county—sec. 2—and no provision is made for a deputy. By sec. 14 the surveyor takes an oath and gives bond for the faithful discharge of his duty. The only mode of ripening the entry into a grant is upon a survey made by him; sec 10. By sec. 15 he incurs a penalty of £500 and a forfeiture of office by any misconduct. And the act in sec. 18 makes a special provision for the entry-taker making entries for himself before a justice of the peace, and prohibits his entering in any other mode. But there is no clause prohibiting entries or surveys being made by the surveyor; there is not an expression or intimation in exclusion of *this* officer; but as far as general words and necessary implication can go he is permitted to survey for himself. The attention of the Legislature was evidently drawn to the subject: they have made the distinction between the entry-taker and the surveyor, and it is decent to presume, upon good reasons; but if there be a defect it is not our duty nor in our power to remedy it. The act of 1779, ch. 6, authorized the surveyor to appoint a deputy who should be qualified as his principal and for whose conduct the principal should be responsible. A deputy may do any act which it is lawful for his principal to do. 1 Salk., 95; 5 Cranch., 243, 248. The acts of Assembly do not therefore present any such prohibition.

But it is said to be a principle of the common law that in all offices of trust the act of the officer is null where he has a personal interest. Should this even be true at the common law, and as to common law officers, it does not follow that the Legislature may not depart from it as to an office created by statute. The expediency is with them. The express provision (155) made respecting the entry-taker, and the omission as it respects the surveyor, was an adoption of this supposed principle in part and a rejection of it in part. But there is in fact no such principle of the common law. If there be, important, extensive, and highly active as it would be, we should find it frequently stated in judicial decisions, or in authoritative treatises of the law. But nothing like it is found. "No man shall be a judge in "his own cause." 8 Rep. 118; Com. Digest, Title Justices, 1, 3. This position is admitted. In its terms it applies to judicial decisions. It is of the essence of the administration of justice—of the expression of law—that the arbiter be neuter. The restriction of the principle to judicial functions is a negative as to all others.

Offices are judicial, or ministerial. There are many important distinctions between them. The former cannot be exercised by deputy, is not grantable in reversion. The latter may be. 1 Inst. 3. b.; Cro. Car. 279, 555, 557.

The case of a sheriff has been relied upon by the other side, upon the authority of Comyn's Digest, in which it is said that a sheriff cannot execute process in which he is concerned. The office of sheriff is of great antiquity, and is regulated by many rules of which the origin is now unknown, and applicable to it in particular. But the principle thus broadly laid down must be restrained by the case put in illustration of it. The case is that of an Extent, and the only authority is Moor. Upon an Extent, the sheriff acts judicially. Bingham, 230, 1, 2, 3. So likewise does he on all inquisitions. Com. Dig. Tit. Return, B. 2. The sheriff executes all writs directed to him; but where it is alleged that he is of kin, a party, or partial, they are then directed to the coroner. 1 Bl. Com., 449; Dyer, 188;
(156) Bing., 222. The case of *Weston v. Coleson,* 1 Wm. Bl., 506, cited on the other side, proves that the direction of a writ to the sheriff in his own cause is irregular, and it will be set aside without costs. But the act is not null; it is only irregular. The rule that a sheriff shall not buy at his own sale is founded on a different principle than that stated. There must be two parties to every contract of sale and purchase. Parties are essential, and therefore a man cannot sell to himself. The cases referred to by Sugden, establish only a principle in equity, that a trustee, purchasing at a sale of his *cestui que trust's* property, buys liable to his equity, if he comes in due time to set it aside. The true doctrine is stated in 5 Ves. 580. If it be objected, that public policy requires such a principle: the answer is, that the judges of policy, and not the judges of law, must decide on the force of that assertion. Both tribunals have determined against the existence of such a general principle; and clerks issue writs in their own causes, and record the verdicts and judgments, and keep the records; a register records and certifies his own deeds; the Secretary of State and the Governor issue grants to themselves; the speakers of the General Assembly certify their own pay. The case of *McKinzie v. Crow,* 2 Bin., 105, decides the survey to be good, if previously authorized by the principal surveyor, or subsequently ratified by him. Both have been done here; and, indeed, the act of the deputy is that of the principal in every case.

But if the objection be good, this defendant cannot make it. Both parties have grants for the same land: his by means of

fraud, are of an elder date. The complainant's prayer is to be put into the same state in which he would have been but for the defendant's fraud.

Every kind of artifice by which another is deceived, is a fraud, and equity has an universal jurisdiction of them, except as to frauds in obtaining wills. 1 Mad. Eq., 203, 205. A verdict, decree, probate, allotment of dower, and fine, ob- (157) tained by fraud will be set aside. *Id.*, 236, 237. We were entitled to suspend his grant by caveat, and prevent its issuing—his fraud prevented the exercise of right, and we now ask to have it on proving the fraud. His fraud has converted the defendant into a trustee for us, and we have a right to consider his legal title obtained for our benefit. The entry and payment of the purchase money, gave complainant an equitable title, and he was entitled to have it perfected into a legal title by grant. The defendant has improperly obtained that himself, with notice of our right, and, therefore, in trust for us. He cannot object that we have not surveyed. If we were asking a grant from the State, she might perhaps deny it on that ground. But the State is satisfied: the survey was fairly made, and she has given us a grant. We are not, therefore, seeking a grant from the State, but the benefit of one which the defendant, as our trustee, has obtained. The defendant cannot cavil against the title of his *cestui que trust*. Nor the perpetrator of fraud be allowed to clothe himself with the defensive rights of the State, whose title he has improperly assumed. Fraud will never be encouraged in that way. 2 Wash. Rep., 116. At all events, the Court will decree a cancellation of the defendant's grants, and leave the validity or invalidity of the complainant's grant to be determined between him and the State.

In Reply.—The rule with regard to sheriffs is founded on their interest, and extends as well to their ministerial as their judicial functions. It would seem, that an interested person should not act in either capacity. In the case in Wm. Bl. the sheriff did not act judicially. His judicial authority consists in holding the county courts: his ministerial office in executing all writs and process, Com. Dig. Tit. Viscount, C. 1, and embraces an extent. In inquisitions, he does not (158) act judicially; for a deputy may preside in inquiries upon default, and the judicial officer cannot be deputed.

If, from necessity, the surveyor may survey for himself, the privilege should not be extended farther than the actual necessity requires. It could not be necessary that the complainant should survey for himself. He might have compelled the surveyor to do

it for him, or had his remedy upon refusal; or he might have obtained another deputy.

Again: If a deputy may survey for himself, he should show that both he and the chain-carriers have been duly qualified by taking the oaths prescribed. They are facts within the complainant's own knowledge, and are necessary parts of his case, and ought to be stated in the bill; although third persons need not state them, because the acts of an officer, *de facto,* are valid as to them.

It is said, that the proceedings have been ratified by the proper officers, and therefore are good, upon the authority of 2 Bin., 105. That case does not decide that such ratification validates the survey; it only says, that it is clearly bad without it. And the judges there complain of the inconvenience arising from such evidence of title; which is a warning to us to make no such precedent here. The ratification is of no force in this State. The governor issues the grant as a matter of course, when the survey is returned, and the grantee takes it at his peril, as to the regularity of his previous proceedings. And if the Court sees that it has issued improvidently, they will not aid the complainant, but leave him where he is.

The complainant is not entitled to relief, by having the defendant's grants put out of his way, or by converting him into a trustee. If the first be done, the Court will aid in cheating the State, or the decree will be nugatory. If the State has (159) any means of revising the grants, the decree will do him no good; for they ought to be vacated. If they can be vacated on account of the surveys, then he has no title which this Court can uphold or aid.

Nor can Walker be converted into a trustee. If his grants be regular, Avery should place himself in the same situation to ask a conveyance from him, as to ask one from the State. But by the showing in the bill, the grants of both parties are liable to the same objections, and both have been guilty of the same offense against the State. A complainant must come here with clean hands, and the Court will never, for him, separate the foul from the fair part of his case, for the sake of giving him relief. Where parties are *in pari delicto,* courts refuse to interfere, except in cases where public policy requires it. 1 Fonb. Eq. 25, 138; 2 Chan. Cas. 15; 1 Vern. 452; 2 Vern. 603; 1 Chan. Cas. 202; 6 T. R. 409; Ves. 581; 4 East., 372; 1 Ves. 277, 206; 4. Ves. 811; 2 Vern. 156. Justice to the State requires that both parties should be stripped of their titles. Walker's grants ought not to be cancelled and Avery's be let to stand, nor ought Walker to be

compelled to convey his title to Avery, to enable him the better to defend himself against claims of the State.

HALL, J., delivered the opinion of the Court, as follows: This case comes on upon a motion to dismiss the bill. In support of that motion, the defendant's counsel allege that the lands were not the subject of entry at the time when the complainant made his entry—they were parts of the lands reserved to the Indians for their hunting ground, as is declared by the act of Assembly passed in 1783, ch. 2. And it is contended that, notwithstanding the treaty with the Cherokees, of 1791, by which their title became extinct, the lands did not thereby become the subject of entry, without some further legislative act. We do not deem it necessary to decide the question at this time; (160) because, admitting the entry to be good, there is another objection, which, being sustained, must have the effect to dismiss the bill.

The bill states that the surveys were made by the complainant himself, under an authority to do so from the surveyor for the county. It does not state, that he or the chain-carriers were sworn.

An act of Assembly passed in 1777, ch. 1, directs the manner in which a surveyor shall be appointed, and prescribes the oaths that shall be taken, and directs that bond and security shall be given for the faithful discharge of his duties of office. By another act, passed in 1779, ch. 6, s. 5, surveyors are authorized to appoint deputies; but, before entering on the duties of office, they also must take an oath of office. The first mentioned act declares, that no surveys shall be made without chain-carriers, who shall actually measure the land surveyed, and shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor, who is authorized to administer such oath.

There was, at that time, much vacant land in the State, and it was deemed expedient by the Legislature, to dispose of it to individuals. The entry-takers, surveyors, and chain-carriers were the persons on whom the trust devolved of parcelling it out, as the different acts direct. When an entry was made of land, and a warrant of survey issued, it was the duty of the surveyor to survey as much land as the warrant called for, and no more or less; nor has the law authorized or trusted any other person to do it.

If the complainant had qualified as a deputy surveyor, he could not be permitted to survey his own land: there would be no necessity for it. Such surveys may be made by the surveyor or other deputies. Whether the principal surveyor can survey

land for himself, need not be decided in this case. The complainant, as deputy surveyor, surveyed for himself, without being sworn, or having sworn chain-carriers. Upon his
(161) location thus made, we are called on to superadd the legal title which, it is charged, is in the defendant. The bill further states that Walker was authorized by the surveyor to survey land for himself; but, that in fact, he never did survey them, but took the surveys from the complainant's field-book: and that upon such surveys, he obtained his grants from the State. We are called upon to recognize that title, and compel the defendant to transfer it to the complainant—a title, however improperly obtained, which would complete the complainant's right to the land; though he has as few merits on his side, and as little equity to call for it, as the defendant had when he acquired it.

The complainant's surveys were not made as the law requires; and if they are to be countenanced, and it shall be said that every person may be his own surveyor, those strong guards which the law fixed against fraud and imposition, will be at once broken down. What security have we, that twice the quantity of land is not included in the complainant's surveys, that he entered and paid for? I cannot doubt in the case. The bill must be dismissed with costs.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1820.

DAVIDSON et als. v. DAVIDSON'S Executors.

(IN EQUITY.)

A. devises lands and slaves and other personal property to M. L. D., but if she "dies without having heirs, then, and in that case, the property bequeathed to her shall be divided into four equal parts between his brothers, J. H. and S., and B.'s children. *Held*, that the limitation over is too remote, and that the whole estate vests absolutely in M. L. D.

THIS was a bill filed for a legacy, from MECKLENBURG; and it stated that Thomas Davidson made his will and died in the year 1800, and that by his will, he bequeathed as follows, that is to say, "I give and bequeath to my daughter, Mary Long Davidson, my negro woman, Nanny, and all her children, together with all my lands and tenements, and the remaining half of my household furniture and personal estate; also, my will is, that she be allowed out of her own part, what my executors shall think a sufficient sum for clothing, schooling, and boarding with her mother, according to her income, or the interest of the money; *Likewise, my will is, that if the said Mary Long Davidson dies without having heirs, then and in that case the* (164) *property bequeathed to her shall be divided into four equal parts between my brothers, James, John and Samuel, and Hugh Bryson's children.*" It further stated that Mary L. Davidson was the only child of her father, and an infant at the time of his death, and shortly thereafter departed this life herself, at the tender age of four years, and without ever having had issue. The complainants were the remaindermen, to whom the estates were limited, after the death of M. L. Davidson, and brought this suit against the executors of the will of Thomas Davidson for an account and payment of the legacy.

The defendants put in a general demurrer, and the cause was transferred to this Court for a decision.

Seawell, Mordecai and *Ruffin* for the complainants.
Henderson and *Gaston* for the defendants.

(180) TAYLOR, C. J. The general principle on which this case must be decided is, that where such words are used in a will, in relation to personal property, as would have created an estate-tail in real property, they give the absolute prop-
(181) erty in personalty, and the limitations over are void. The exception to the rule is, that if it appear from any clause or circumstance in the will that the testator intended to give it over, only in case the first taker had no issue living at the time of his death, then the subsequent limitation will be good as an executory devise. It was impossible for M. L. Davidson to die without heirs while the ulterior legatees were alive; the word "heirs" must therefore be construed heirs of the body, and would, if applied to real estate, before the act of 1784, have constituted an estate-tail.

It is not material to inquire whether the words of the will would have created an express estate-tail, or an estate-tail by implication; because, in either case, a limitation over, after an indefinite failure of issue, is too remote. If the limitation depend alone upon the import of the words, "dying without issue," the question still recurs, are there any circumstances or expressions in the will from which it can be justly inferred that the intention was to confine the signification of the words to a dying without issue "then living"?

It has been conceded by the complainants' counsel that a limitation over, after a general dying without issue, is too remote; but it is argued that the words, "dies without *having* heirs," restrict it to the death of M. L. Davidson; that they show the intention of the testator to have been so; and that this ought always to be effectuated, where the Court is not compelled by the law to give a different construction to the words.

The foundation of this argument must be laid by proving that the words used in this will have a different signification from the words, "if he dies without heirs"; for, if the two sets of expressions mean the same thing, the Court is not at liberty to depart from the established judicial sense of words, whatever may be the intention. *Chandless v. Price,* 3 Ves., 102.

(182) It is probable, though I am aware that there are some very respectable opinions to the contrary, that a limitation over, on the event of dying without issue, is always intended to apply to a failure of issue at the period of the death of the first taker; yet the authorities uniformly construe it an indefinite failure, unless the words are controlled by the intention appearing from other parts of the will.

This construction is highly technical and refined, and seems generally considered to be derived from the statute *de donis,*

which recites, "and whereas, if such feoffees had no issue, and even if there had been any issue which had afterwards died, the land ought, by the express form of the gift, to revert to the donor or his heirs."

If the question were new in this State, I will hazard the conjecture that this Court would construe these words in their natural sense, and reject the artificial one; but this cannot *now* be done without overturning a long train of authorities which have been repeatedly confirmed and acted upon by all the tribunals of this country, and according to which controversies have been adjudged from the first settlement of the State. We could not change the legal operation of these words without removing landmarks and throwing a very large portion of the property of the citizens into litigation and insecurity.

Between the words, the settled construction of which has thus become a part of the law of the land, and those employed in the will before us, I am unable to perceive a difference; and I collect from the authorities that they always receive the same construction, whenever the question is, as to the remoteness of the limitation.

In *Boden v. Watson,* Ambl. 398, 478, there was a bequest of personal estate to one for life, and if he has no heirs, over. The chancellor held it to be the same as if given to him for life, and to the heirs of his body, and if no such heirs, then over; that the failure of heirs was not confined to a particular time, but was general. Upon this case, it need not be remarked, (183) that the words would seem, to a person who receives their meaning from common acceptation, to restrain the failure of heirs to the death of the devisee; and that if "having" has any peculiar force from being a participle of the present tense, "has" is at least of as much efficacy, from being a verb of the present tense.

In *Crook v. De Vandes,* 9 Ves. 202, there was a devise and bequest to A. for life, and the heirs of his body, with a limitation over, if he has no such heirs. It was held to be an estate-tail in the real, and an absolute interest in the personal estate, the limitation over being void. Why could not the word "has" have restrained the failure of heirs to the death of A. in that case? Because it imported the same thing with a general dying without heirs. The word "having," in this will, can signify neither more nor less.

In *Tate v. Talley,* 3 Calls Rep. 354-361, a devise was made of land to I. T., one of the testator's sons, with a proviso that if the said I. T. should die, not having any lawful heir of his body, then the said land should go to another son. This was held to

be an estate-tail in I. T. The equivalent import of the words is further shown in *King v. Mellish,* 1 Vent., 231, and *Wylde v. Lewis,* 1 Atkyns, 433.

It is further argued for the complainants, that the words "then and in that case," show the intention to be to confine the having no heirs, to the period of the death of M. L. Davidson.

The word "then" was relied upon in *Beauclerk v. Dormer,* 2 Atkyns, 311, but the chancellor laid no stress on it, holding that, though in its grammatical sense, it was an adverb of time, yet in the limitation of estates, it is a word of reference, and relates to the determination of the first limitation. In *Biggs v. Bensley,* 2 Bro. Ch., 187, the words were, "in case of the death (184) of F. H. without issue," and it was argued that the death of F. H. was the circumstance to regulate the question; it was to be decided then; if the ulterior legatee took then, he took absolutely; if he did not take then, he never took. But it was held, in conformity with the case of *Beauclerk v. Dormer,* that the word then could not, and never did make the difference; that it was merely a word of relation, and not an adverb of time. In *Royall v. Eppes,* 2 Mun., 479, the words of the will were, "it is my will and desire, that in case my son should die without heir of his body, lawfully begotten, that then and in that case, I give to my wife, Lucy," etc. These expressions were relied on by the counsel for the ulterior legatee for the same purpose as in the cases before quoted. But the Court in giving the opinion, say, "that while, even in relation to personal estate as to which a more liberal rule of construction has prevailed, the Court does not see that either the terms, then and in that case, or the word heir, used in the singular number, would justify them in adopting the restrictive construction, under the decisions on this subject, either in this country or in England." They then proceed, and do adopt the restrictive construction, from another, and a stronger circumstance in the will. This point, then, seems to be completely settled by authority.

That numerous class of cases has been referred to, which shows what slight circumstances have been laid hold of, to tie up the generalty of the expression, "dying without issue," and to confine them to dying without issue, living at the time of the person's decease.

In *Target v. Gaunt,* 1 P. Wms., 432, a term was devised to A for life, remainder to such of his issue as he shall appoint, and if A die without issue, remainder to B. It was held to be a good limitation to B, because the testator must have intended such of A's issue as he might appoint the term to, and that must be intended *issue then living.*

This case contains a pretty clear explanation of what (185) was meant by *"dying without issue,"* for it could not be indefinite, if A was to make the appointment. Indeed, in every one of these cases, which it would be unprofitable toil to restate, the legal meaning of the words was narrowed by expressions or circumstances that raised a fair inference of restrictive intention, or, as it has been expressed, the construction was varied by circumstances arising on fair demonstration. There do not appear to me to be any such in this will that will justify the Court in wandering from the settled construction; and I therefore think the bill should be dismissed with costs.

HALL, J. By the statute *de donis* it is declared that the will of the donor of lands and tenements shall be observed; and the tenements given to a man and the heirs of his body shall go, at all events, to the issue, if there be any; or, if there be none, shall revert to the donor; or the same may be limited over to another person by way of remainder. If land were thus given to a man, and, "if he die without issue," remainder over to another, this remainder need not vest in possession at the time of the death of the donee in tail. It did not depend upon the contingency of his having or not having issue living at the time of his death; but the remainder might thus vest at any future period, when the issue, if the donee left any surviving him, might become extinct. 2 Bl. Com., 113. Thus it vests in possession *whenever* the issue shall fail, and, as there can be no specific time fixed for that event, we call the period indefinite, and the remainder limited to take effect upon such an estate, we call a remainder to vest in possession after an indefinite failure of the issue in tail. The same rule of construction prevailed when the lands were limited over after a dying without "leaving issue," or "having issue," or "if he shall die and has no issue," or when any similar expression was used. They were all construed to mean an indefinite failure of issue, in order that the "will of the donor might (186) be observed."

Without the same reason, the same rule of construction was adopted in regard to personal property (which was not within the purview of the statute) with some few exceptions. The construction as applied to the two kinds of estates, was followed by very different consequences. The limitation over of lands was lawful, and held to be good, but the courts did not decide that limitations after an indefinite failure of issue, were lawful limitations of personal property. On the contrary, the courts holding a limitation of personal property after a "dying without issue," to mean, after an indefinite failure of issue, adjudged it,

as such, to be unlawful, because it tended to a perpetuity; and they would not therefore allow such a limitation to take effect, but made the whole vest absolutely in the first taker. *Leventhrop v. Ashby.* 10 Rep. 87.

There can be no doubt but the construction is contrary to the vulgar and grammatical sense of the expressions, but it has become a fixed rule of property. It is a legal and technical construction which it is too late to depart from.

It is true, that in limitations of personals, the Court will lay hold of any clause in a will which affords demonstration that the testator intended to tie up the contingency to the time of the death of the first legatee. But such words as those before adverted to, that is to say, "dying without issue," and others, will not *per se* have that effect. The words "dying without leaving issue," in limitations of personals, are an exception from the general rule from the strong import of *leaving.*" 1 P. Wms., 667; 3 Atk., 288; 2 Ves., 610, 180, 125. It has been argued that the word *"having"* is (like "leaving") a participle of the present tense, and means and marks the same period of time. It is true that it (187) does in its grammatical and vulgar sense. So does the expression "if he dies and has no issue"—the word *"has"* is in the present tense and, grammatically speaking, would tie up the contingency to the time of the death—yet the legal and technical meaning is otherwise. Amb., 398, 478. The same may be said of the words "dying without issue." In their vulgar and grammatical sense, they mean the same as "leaving no issue"; but their technical sense is very different. 2 Atk., 308, Duke of Norfolk's case, 3 Ch. Ca. So that if we were to give a vulgar and grammatical construction to the word "having" in this case, and to the other expressions which mean the same thing, the technical and legal rule of construction which has so long prevailed, would be abolished. However much it is to be regretted that such is the rule, I think we cannot now alter it; and that we must decree for the defendants. It matters not whether the property be viewed in this case as real or personal. If real, the act of 1784 converts into a fee-simple in the first devisee; if personal, the limitation over is too remote, and the same consequence follows, that is, the first taker has the whole.

HENDERSON, J. I cannot better express by opinion than by using the words of a celebrated English Judge: The construction outrages grammar, and what is worse, it outrages common sense; it is a bitter pill, but we must swallow it because others have done the same"; we are bound to follow and not to lead. The judicial construction put upon the words is too uniform and

of too long continuance now to be altered. It would unsettle too much property, and open the door for a flood of litigation. I am therefore bound to say, that the demurrer be sustained and the bill dismissed with costs.

Cited: Brown v. Brown, 25 N. C., 136; *Weatherly v. Armfield,* 30 N. C., 26; *Gibson v. Gibson,* 49 N. C., 427; *Leathers v. Gray,* 101 N. C., 164.

(188)

THE STATE v. ROBINSON.

There cannot be an appeal to the Supreme Court from the judgment of the Superior Court granting a new trial for matter of law; nor from a judgment of *respondeat ouster* given on demurrer to a plea in abatement; nor from a decree disallowing a plea to a petition for distribution and ordering the defendant to answer, because these are not final judgments, sentences or decrees.

THIS was an indictment for perjury, from IREDELL, which charged that the prisoner was *sworn* in due form of law, before A. B., a justice of the peace, *upon the Holy Gospels of Almighty God.* The evidence upon the trial was that the prisoner was not sworn on the Gospel, but that he said he was scrupulous of taking a book-oath, and prayed the benefit of the act of 1777, ch. 4, and therefore that he was sworn with uplifted hand, according to the provisions of the second section of that act. The jury found him guilty, and a rule for a new trial was granted upon the ground that the indictment was not supported in that particular by the proof, which upon argument, was made absolute. Mr. Solicitor Wilson, being dissatisfied therewith, appealed to this Court.

Henderson, for the prisoner, submitted whether this Court would entertain the appeal, because he conceived that the order for a new trial is not the *final* judgment or sentence meant in the act of 1818, ch. 1.

He was proceeding to make some observations upon the point of law stated in the record, but he was stopped by *Taylor, C. J.,* who said that the appeal was certainly premature, and that *Pierce v. Sneed* (unreported case) was decided upon the very point in this Court at June Term, 1819.

BY THE WHOLE COURT. Let the appeal be dismissed (189) and the cause remanded.

There came on two other cases at this term, which involved a similar point, and were disposed of in like manner.

The first was that of *The President and Directors of the State Bank of North Carolina v. Raiford and others,* which was debt in WAKE Superior Court of Law. The defendants all resided in CUMBERLAND, and there the process was served. For this cause they pleaded in *abatement.* The plaintiffs replied that they could sue in any court, and set forth the charter of the bank; and the defendants demurred; upon argument the demurrer was overruled and judgment of *respondeat ouster* given, and the defendants appealed to this Court. Here the appeal was dismissed, because the judgment from which it was taken was not final; and the cause was sent back for further proceedings in the court below.

The other case was that of *Wilson v. M'Dowell,* from BURKE. It was a petition against the defendant as an administrator of the estate of an intestate, for a distributive share; there was a plea in bar that the defendant held the estate of which a share was sought in a different right, and that it belonged to the defendant and others in their own right and never in fact belonged to the intestate; and the plea set forth the particulars of the title. Upon argument of the plea, it was disallowed, and the defendant ordered to answer. From that he appealed to this Court, and here his appeal was dismissed for the reasons assigned in the foregoing cases.

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(190)

AINSWORTH v. GREENLEE.

The handwriting of a magistrate to his official acts need not be proved by himself, though within the process of the court, but may be proved by any person acquainted with it.

THIS was an action on the case for malicious prosecution, from BURKE, instituted by the defendant against the plaintiff, who had been arrested on a warrant, carried before a justice of the peace, and by him duly tried and acquitted. To prove these facts upon the trial, the plaintiff offered the judgment of the magistrate, which he verified by the testimony of witnesses proving the handwriting of the justice. On the part of the defendant, it was objected that the magistrate himself, who lived in the State, ought to be called. The evidence was, however, received, and a verdict rendered on it for the plaintiff, subject to the opinion of the court upon the competency of that evidence. The court after-

wards decided upon the point reserved, that the evidence was inadmissible, and directed a nonsuit to be entered. From that judgment, the plaintiff appealed to this Court.

TAYLOR, C. J. To prove the acquittal of the plaintiff from the charge exhibited against him, the judgment of the justice was produced and proved by calling witnesses acquainted with his handwriting. It is supposed that by the admission of such evidence, the rule of law is infringed, which requires the best evidence to be given of which the nature of the thing is capable; and that the justice himself, who was within reach of the court's process, could better prove his own handwriting than any other person. But this is an incorrect view of the subject; for although the best evidence is (191) to be given which the nature of the case admits, yet the rule does not require the strongest possible assurance of a fact. A deed attested by several witnesses would be more fully proved by calling upon all of them; yet it is sufficient to prove the execution by one, or, if none of them can be produced, proof of the signature of one of them will be sufficient. Such proof is not inferior in its *kind* to any that can be produced. Nor will the withholding of additional proof of the same kind warrant the inference that such proof would be inconsistent with that already produced. Whether the signature is proved by the person who made it, or by one acquainted with his hand-writing, the kind of proof is exactly the same. They are both primary—since the knowledge of both is acquired by the same means; although it may be that the evidence of the writer is in a degree, stronger than the other. This principle is fully illustrated in Gilbert Evidence, 5, and in Phillips Ev., 170, and its application to this case shows that the evidence was regularly admitted. Consequently, the nonsuit must be set aside, and judgment entered for the plaintiff.

(192)

SCROTER v. HARRINGTON.

In actions on penal statutes it is necessary in the declaration to name the statute, or recite its provisions, or refer to it in some manner as by the general terms, "contrary to the statute in such case made and provided," so as to give the party notice of the law, with the violation of which he is charged.

SCROTER *v.* HARRINGTON.

Held, therefore, that a warrant against H. to answer S. "in a plea of debt of £5 for obstructing and turning the public road leading, etc., from etc. to etc., being one month," is insufficient.

Held further, that this is a defect in substance and is not cured by verdict, nor to be overlooked in proceedings before a justice of the peace, in which mere matters of form are not regarded.

THIS was a warrant returnable originally before a justice of the peace against *Harrington,* from ANSON, to answer the plaintiff *Scroter, "in a plea of debt of five pounds for turning and obstructing the public road leading from Haley's Ferry to Sneedsborough from Little Creek to Jones's Creek from* 23 *April, last past, until* 23 *May, following, being one month."* Upon this warrant, judgment was given for the plaintiff for the five pounds and costs, by the justice of the peace; and upon successive appeals by the defendant to the county court and Superior Court, upon the plea of *nil debet,* verdicts were given for the plaintiff, and similar judgments rendered in those courts. The point made in the Superior Court, as stated in the record was, that the plaintiff could not maintain the suit in his own name only, under the act of 1784, ch. 14; because the fine belonged to the county, under the 17th section of the act, as was contended. This Court, however, did not consider that question at all, but without argument, decided for the defendant upon the insufficiency of the warrant.

Judge Henderson delivered the opinion of the Court:

(193) That the defendant may be informed of the nature of the charge against him, the law requires that the *facts* constituting it should be stated with precision, and, in cases where it is practicable, the *law* also against which it is said he has offended. In cases of penal statutes, which are written laws, and therefore may be referred to with ease and certainty, it is required that they should in the charge, be stated or referred to—anciently, by naming the statute by its title, or reciting its provisions; in modern times by referring generally to it in the following or similar terms *"contrary to the statute in such case made and provided."* The Common Law, being unwritten and traditionary, such reference to its provisions were impracticable, and therefore dispensed with. They are not made to apprise the court of the particular law, or to inform the judge what the law is; he is bound to take notice of all public laws, as well statute as common. The only case in which it has been said that this rule might be departed from in actions on penal statutes, is that of *Coundell v. John,* 2 Salk., 505. The same case is reported in Fortescue, and in Holt's Reports, and was decided by *Holt.* I confess that the opinion of the Chief Justice as stated in this latter book is to me unintelligible; it looks both ways. But if the

reports stood free from all objections on the ground of inaccuracy, it is but a solitary case, and is contrary to principle and all the decisions before and since, and must be disregarded. A long string of these cases might be cited but I will only refer to one, in *East.* 2 East., 333. That case is much stronger than this, for there the couclusion is *"whereby and by force of the statute in that case made and provided, an action hath accrued,"* etc. But it is not being stated that the defendant *did the act contrary to the statute,* it was held sufficient and the judgment of the Common Pleas reversed. Whether that was a mis- (194) application of the principle is not now the question—the principle was there acted on and professed to be applied. I think therefore, it follows very clearly that as this is an offense against a statute, and that statute is not recited nor referred to in the pleadings, the judgment must be reversed. These proceedings, it is true, originated before a justice of the peace, and as to matters of form, are not to be critically scrutinized; yet matters of substance ought not and cannot be overlooked. This defect is of this latter character, and therefore the judgment must be reversed, and judgment entered for the appellant.

Cited: Gardiner v. Sherrod, 9 N. C., 177; *Worke v. Byers,* 10 N. C., 232; *Dowd v. Seawell,* 14 N. C., 187; *Turnpike Co. v. McCarson,* 18 N.C., 307; *S. v. Muse,* 20 N. C., 466; *S. v. Sandy,* 25 N. C., 575; *Turner v. McKee,* 137 N. C., 263; *Stone v. R. R.,* 144 N. C., 222.

AUSTIN v. RODMAN.

1. The drawer of a bill of exchange is entitled to notice of its dishonor, though the drawee be not indebted to him either when the bill was drawn or fell due, provided the drawer had reasonable ground to believe that it would be honored; and a written authority from the drawee to the drawer for the latter to draw is a sufficient ground.
2. If the bill be payable *after sight* it must be presented within reasonable time for acceptance, and immediate notice of non-acceptance given to the drawer. It is not sufficient to give notice of the non-acceptance and non-payment together after the day of payment has passed.
3. If, in such case, the drawer be discharged by the laches of the holder from his liability on the bill itself he will not be liable on a count for money had and received.

AUSTIN *v.* RODMAN.

THIS is the same case which has been before in this Court, *ante,* 71, and now comes here by appeal of the defendant, from HALIFAX. It was an action of assumpsit, and the declaration contained a special count on the bill mentioned hereafter, and also a count for money had and received. By the opinion of the court below, the plaintiff had a verdict for the principal money
(195) and six per cent interest, and judgment accordingly.

Mordecai and *Seawell* for the defendant.
Gaston for the plaintiff.

The facts of the case, and also the points made at the bar, are fully stated by the Chief Justice.

TAYLOR, C. J. The only question to be decided in this case is whether the plaintiff be entitled to recover on the count for money had and received—the count upon the nonacceptance of the bill having been abandoned because there is nothing in the case tending to show notice of such nonacceptance.

The material facts are, that on 11 and 20 April, 1815, E. Riggs, the drawee of the bill wrote two letters to Rodman, the drawer, informing him that he had chartered the *Aurora* to go to Washington, in this State, for a cargo of naval stores, and directing Rodman to draw on him at Georgetown. The vessel arrived and began to load on 15 May, and completed her loading on 9 June; but as part of her cargo was to be taken in at Occacock, she did not finally depart from our waters until 23 June. On 13 May, two days before the ship began to load, Rodman drew this bill on Riggs, at Georgetown, for one thousand dollars payable thirty days after sight, in favor of the plaintiff or order. There is a memorandum on the bill of its being noted on 27 May; but the only protest is that for nonpayment, which was made on 30 June; and on the same day, the notary put a letter into the post-office at Georgetown, giving Rodman notice of the nonpayment and protest. From these facts, we shall be able to ascertain whether there has been any laches on the part of the holder of the bill; for it is a very clear position that if the drawer is discharged upon the bill by such laches, it is not competent for the plaintiff to recover upon the other count, for money had
(196) and received. As this bill was payable within a certain period after *sight,* a presentment for acceptance was necessary, and notice ought immediately to have been given of the nonacceptance to the person meant to be charged. It is not sufficient, in such case, to wait till the time of payment has arrived, and then to give notice of nonacceptance as well as non-

payment. 12 East., 434. It is a presumption of law that the drawer is prejudiced by the want of notice, and the circumstances of this case demonstrate the wisdom of the rule. If notice had been given to Rodman of the non-acceptance, it would have reached him before the departure of the ship from the State, and have thus given him an opportunity of indemnifying himself for any advances for the cargo. The notice of non-payment could have been of no use to him in this view, for it was put into the post-office after the ship had sailed on her voyage.

It is, however, relied upon by the plaintiff that this is a case where the law dispenses with notice, since it appears in the case that Riggs owed Rodman nothing, either when the bill was drawn or when it was protested. That such an exception to the rule of giving notice was established in *Bickerdike v. Bollman,* 1 Term, 410, and has been acted on in many cases since, cannot be disputed. But it is equally true that the inconvenience of relaxing the rule has been the subject of regret; and a strong disposition has been manifested by the judges to qualify and restrain the exception itself. They have accordingly said that actual value in the hands of the drawee at the time of drawing the bill was not essentially necessary to entitle the drawer to notice in case of a dishonor; but if the drawer had good ground to think that he had a right to draw, as where he had made a consignment to answer the bill, though it might not have reached the drawee when the bill was presented for acceptance, or where an acceptance is expected to be made on the ground of a fair mercantile agreement, and in several other cases de- (197) pending on the same reason, it has been held that notice is not dispensed with. In the case before us, Rodman had not only ground to believe that his bill would be honored, but he drew it under the express written authority of Riggs, and this I should deem sufficient of itself to entitle him to notice. The law, therefore, arising upon the facts before us, is clearly for the defendant. If there be other circumstances belonging to the case which are not incorporated in the statement, the parties will have an opportunity of establishing them upon another trial.

The judgment must be reversed and a new trial awarded.

Cited: Johnston v. McGinn, 15 N. C., 278; *Love v. Raper,* 39 N. C., 479.

(198)

BANK OF NEW BERN v. PUGH.

1. A. being indebted to the plaintiffs, came to an agreement with them that he should make a sale on credit and take bonds payable to the plaintiffs, of which the bank would take such as might be approved in payment of its debt. A sale was accordingly made by A., who gave notice of the kind of bonds required, and he took from P., for his purchases, a bond payable to the plaintiffs, which was offered to the bank and refused as a payment and returned to A. to proceed on as he might think proper.

Held, that by this agreement A. became the agent of the bank to take and receive the delivery of the bond from P., and that the bond, by the delivery to A., was therefore complete.

Held further, that the subsequent refusal of the bank to give A. credit for it was not an attempt to undo the delivery and avoid the bond.

Held further, that if such attempt had been made, it would be ineffectual, for if an obligee once accept a bond he cannot afterwards disagree to it so as to make it void.

2. It seems that, without any previous agreement between the bank and A., this was the bond of P., because the plaintiffs had never rejected it *in toto*.

Held further, that it is the province of the jury to decide, not only on the veracity and credit of the witnesses, but also on what facts are proved by their testimony; and it is error in the court to direct the jury to infer one fact from another.

Quere, Can the Bank of New Bern take a bond payable directly to itself? It seems that it may, for a debt due to itself.

THIS was an action of debt upon a sealed note. Plea, *non est factum*. From PITT. Upon the trial the plaintiffs gave in evidence the note, of which the following is a copy:

"Six months after date, we promise to pay to the president and directors of the Bank of New Bern thirty-one hundred and five dollars, for value received; to which payment we bind ourselves and our heirs. This 5 March, 1818.—$3,105.

JOHN ALLEN. (Seal.)
WILLIAM PUGH. (Seal.)"

The plaintiffs proved the signature of "William Pugh" to be that of the defendant. The defendant then proved by M. C. Stephens, the cashier of the bank, that the said note was
(199) offered to the bank by John Mooring for discount, in lieu and payment of one of David Smith, the intestate of said Mooring, for a like amount, and that the bank did not accept it when so offered. Upon his cross-examination, he further proved

that Smith was, at the time of his death, a large debtor to the bank, and that the president and directors had authorized his administrator, the said Mooring, to take bonds with approved sureties from the purchasers at the sale of Smith's effects, payable to the said president and directors, and had agreed with Mooring to receive such of those bonds as they should approve, in payment of David Smith's note to them; that the bond now sued on was one of those taken in pursuance of such authority and agreement; but the bank, doubting its sufficiency, would not accept it in payment, and that the cashier returned it to Mooring, to be proceeded on as he might think proper. This witness likewise stated (the same being objected to by the plaintiffs) that the president and directors had not, to his knowledge, in express terms, either verbally or in writing, directed this suit to be brought, or authorized Mooring to sue on the note in their name; but they were privy to the suit, and were actually indulging Mooring for a portion of his intestate's debt, awaiting the result of this suit, which was carried on by him for his own benefit.

It was further proved on the part of the plaintiffs that it was made an express condition, at the time of the sale of David Smith's effects by Mooring, that the purchasers should give bonds, with security to be approved by him, in the form of that now sued on.

It was further offered to be proved that, since the note was returned to Mooring, he exhibited it to the defendant, who, with a knowledge of these circumstances, offered to give another bond. This last evidence was rejected by the court.

The court charged the jury that, if they believed the evidence of Stephens, the paper writing had not been received by the plaintiffs, or by any one under their authority, as the (200) bond of the defendant; and, therefore, that it was not the deed of Pugh. The jury found accordingly; and plaintiffs moved for a new trial, because the court misdirected the jury, and because the court admitted improper testimony, and because the court rejected proper testimony. But the motion was refused and judgment given for the defendant, from which the plaintiffs appealed to this Court.

Gaston for the plaintiffs.

TAYLOR, C. J. This principal question in this case re- (204) lates to the delivery of the bond, as to which the evidence is that the bank authorized Mooring to take bonds, payable to the president and directors, reserving to itself the right of receiving such as it should approve in payment of Smith's debt. In

pursuance of this authority, the bond was taken; and it appears to me that the delivery was complete and irrevocable from (205) the moment it was delivered to Mooring. The language of the books is clearly to this effect. A deed may be delivered to the party himself, to whom it is made, or to any other person by sufficient authority from him, or it may be delivered to a stranger for and on behalf of him to whom it is made, without authority. Shep. Touch., 56. It is true that the bank afterwards refused to accept it in payment of Smith's debt, and returned it to Mooring to be proceeded with as he might think fit. The evident meaning of this was that the bank did not think proper to relinquish the security which it already had, for the sake of one which it deemed weaker, but allowed Mooring to proceed and recover the money from the obligor, if he could. This did not amount to even an attempt to undo the delivery. But if it had been accompanied with even the strongest declaration to that effect, it could not have been effectual; for when the obligee once by his agreement has made the deed good, he cannot afterwards by his disagreement make it void. Shep. Touch., 68. An opposite doctrine would be pregnant with mischiefs; and in this very case all the bonds not selected by the bank must become void, though taken by its authority and with full notice to the purchasers that they were to be so taken. As there must be a new trial, and as the whole record is not now before us, I will abstain at this time from giving any decisive opinion on the other points which have been discussed in the argument. It is possible that, upon a more attentive consideration of the subject, I may doubt the right of the bank to take a bond for a debt due to itself; but from every aspect in which I have yet seen the question, and from frequent perusals of the act creating the corporation, the strong impression on my mind is that the bank may, for debts due to itself, take securities of any form or denomination recognized by law, particularly bonds, bills or notes. Act of Assembly 1804, secs. 5, 7, 11, 12. Whether the bank can take all or any of these securities for debts not due to (206) itself, but merely as a trustee, is a question on which I have not formed an opinion, nor should I willingly pronounce it if I had, until the pleadings shall be amended.

HENDERSON, J. I agree entirely with the Chief Justice in the very satisfactory opinion which he has given; and I go further and say that a new trial ought to be granted, even if the previous agreeemnt had not been made, unless the jury were of opinion that the bank had *in toto* rejected the bond. In that case it would want an essential part of all contracts—the assent of both

parties. But it is quite probable, from the evidence, that the jury, if properly instructed, and if their attention had been called to the question, would have been of opinion that the bank only rejected it *as a credit to Mooring,* and did not intend entirely to annul it; for all declarations or words or signs must be judged of by the intent. The manner in which the judge instructed the jury is, to me, also sufficient to warrant a new trial. He charged the jury that, if they believed the testimony of Stephens, they should find the paper-writing not to be the deed of the defendant. Now, *what* Mr. Stephens' testimony *proved was a thing on which he could not decide;* that belonged to the jury. In the opinion of the court, it might prove a total rejection of the bond, while in that of the jury only the qualified and *sub modo* rejection just spoken of. The nature of the rejection is an inference of fact to be drawn from the evidence, which the judge has improperly drawn for himself and the jury both, leaving to the latter only to say whether the witness swore truly or not. The jury are the constitutional judges, not only of the truth of testimony, but of the conclusions of *fact* resulting therefrom. I would repel the interference of juries, as far as the law will warrant, in all questions of law, and in like manner the interference of the judge in matters of fact.

With regard to the objection raised in the argument in (207) this Court, that the bond is void because it is not a subject of traffic allowed by the charter of the bank, unless under special circumstances, those the plaintiffs must show in the declaration, and prove, and need not be pleaded. I do not think it would be proper to decide on it on this record; for the pleadings are very defectively stated, and the point is for the first time agitated. *Non constat,* but that the plaintiffs can (if at all necessary) bring this bond within its capacity to take according to the terms of the charter; and, on the other hand, should it be necessary to plead it, that object cannot be effected in this Court, which can make no amendment.

JUDGE HALL concurred with his brethren; and

BY THE WHOLE COURT. Let a new trial be ordered, with leave to the plaintiffs to amend the declaration in any way they may think proper, and to the defendant to plead *de novo.*

Cited: Moore v. Collins, 14 N. C., 134; *Morrow v. Alexander,* 24 N. C., 392; *S. v. Daniels,* 134 N. C., 678; *S. v. Turnage,* 138 N. C., 570; *S. v. Garland, ib.,* 683; *S. v. Simmons,* 143 N. C., 617; *S. v. Godwin,* 145 N. C., 463; *S. v. R. R., ib.,* 571; *S. v. R. R.,* 149 N. C., 513.

THE GOVERNOR v. JEFFREYS.

By the true construction of the act of 1806, the certificate of the adjutant-general is evidence only in such cases of delinquency of the officers of militia in making returns, as consist in not making returns to himself.

Held, therefore, that he cannot certify that a colonel of cavalry did not make his return to the major-general.

THIS was an action of debt, from WAKE, brought by the adjutant-general of the militia of this State, in the name of the Governor, to recover from the defendant, a colonel of cavalry, the penalty of £50, incurred by failing to make his military
(208) return to the major-general of the seventh division, in 1818. Plea, *nil debet*. Upon the trial the attorney-general offered in evidence, to prove the delinquency of the defendant, the certificate of the adjutant-general only, that the defendant was colonel of cavalry in the seventeenth brigade of militia, A. D. 1818, and that he did not, as colonel aforesaid, make his return to the major-general of the seventh division of militia for that year, in conformity with the directions of the act of the General Assembly in such case made and provided. On the motion of the defendant's counsel, the court instructed the jury that the evidence was not sufficient to maintain the action on the part of the plaintiff, because by the act of 1806, sec. 7, the certificate of the adjutant-general is only evidence, if "it contain such matter as would be sufficient to convict the officer, if delivered by the rules of law in open court"; and here the adjutant-general certifies as to a thing not relating to any transaction in or concerning his own office, but as to a matter which he could only know by the relation or return of the major-general, who therefore ought himself to be in court to prove it. The attorney-general submitted to the opinion of the court, and suffered a nonsuit; but, thinking the law to be otherwise, he brought the case to this Court by appeal. The case was submitted here, and

The opinion of the Court was delivered by CHIEF JUSTICE TAYLOR: The single question is, whether the adjutant-general's certificate is sufficient evidence that the defendant, a colonel of cavalry, did not make his return to the major-general according to law. By the act of 1806 the certificate is made conclusive evidence against a delinquent officer, provided it contain such matter as would be sufficient to convict the officer if delivered by the rules of law in any court of record. The certificate
(209) here points directly to the defendant's delinquency, and therefore it does contain such *matter* as would be sufficient

to convict him if delivered *ore tenus* by the adjutant-general. But it is not to be expected that, if so delivered, the examination would proceed no further; for, as, by the same act of Assembly (section 3), the defendant is directed to make his return, not to the adjutant-general, but to the major-general to whose division he is attached, the knowledge of the adjutant-general of the defendant's delinquency could only be officially derived from information given him by the major-general. Such testimony, therefore, resting on hearsay, would be clearly inadmissible; otherwise the adjutant-general's certificate would be conclusive, even in cases where the officer informing him had received his information from the one next below him in command, and so down to the commandant of a regiment. It is certainly competent for the Legislature to make such a certificate evidence, though founded upon hearsay; but the intention to innovate upon so important a rule ought to be manifested by declaration plain. If the law be susceptible of another and more rational construction, it ought to receive it; and its design appears to me to be extended no further than to relieve the adjutant-general from personal attendance in those cases where he could give legal proof of the defendant's delinquency; and this will embrace all those cases where it is made the duty of the officer to make his return directly to the adjutant-general. Further than this, the act cannot be extended by a fair construction of the words or the evident intent of the framers. Wherefore, the judgment must be

Affirmed.

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(210)

THE STATE v. TACKETT.

1. It is competent for one charged with the murder of a slave to give in evidence that the deceased was turbulent; that he was insolent and impudent to white persons.

2. The whole design of the act of 1817, "to punish the offense of killing a slave," was to make the homicide of a slave extenuated by a legal provocation, manslaughter, and to punish it as such; it does not go further and determine the degrees of the homicide, but leaves them to be ascertained by the common law.

3. At common law, and between white persons, a slight blow will not excuse a homicide, for that must be on mere necessity.

4. Nor will words extenuate it to manslaughter. But it is not correct to say "that a slight blow not threatening death or great bodily harm will not extenuate, if the weapon used by the slayer be a deadly

one," because that authorizes the inference that a blow to constitute a legal provocation must threaten death.

5. The true principle of the law is, that if he, on whom an assault is made with violence or circumstances of indignity, resent it immediately by killing the aggressor, and act therein in heat of blood and under that provocation, it is but manslaughter.

6. The general rule should therefore be laid down, "that words are not, but blows are a sufficient provocation to lessen the crime of homicide to manslaughter." From this there are a few cases which appear to be exceptions, but they depend on very particular circumstances.

7. But it exists in the very nature of slavery, that the relation between a white and a slave is different from that between free persons, and, therefore, many acts will extenuate the homicide of a slave which would not constitute a legal provocation if done by a white person.

THIS was an indictment for the murder of Daniel, a slave, from WAKE; and on the trial the evidence was that the deceased had a free colored woman for a wife, who lived on the lot of one Richardson, a carpenter, in Raleigh, and in a house near to that in which Richardson himself lived; that the deceased was generally there of nights; that the prisoner was a journeyman in the employment of Richardson, and lived in the house with him; that on the night when the deceased was shot, he (Richardson) had gone to sleep, and was awakened by the firing of a (211) gun, and soon after heard some person come into the room and set something down, like a gun, where his generally stood, and that he then turned over and saw a person going out, whom he thought to be the prisoner, and that in a short time he heard groans and complaints out of doors, as of one injured; that his gun had a buck load in it, and his family had been admonished not to use it; that Richardson saw no more of the prisoner that night, and that he did not sleep at home; that about a week or ten days before, the prisoner told Richardson of a fight between himself and the deceased on that day, and said that he would kill him, but the prisoner was drunk when he said so. In consequence of this threat, and of the rumor and belief that the prisoner kept the deceased's wife, Richardson discharged him, but took him back again in a few days, upon his promise to behave better. It was proved by other witnesses that the prisoner went to a house in the suburbs of the city about 9 o'clock of that night, to which he had before promised to go; that soon after he went in he said several times *"that he was uneasy,"* and upon his being asked why, he said that he had been down town and got into an affray, and was afraid the constables would have hold of him; that soon afterwards he said that he had shot a man—a black man, belonging to Mr. Ruffin—and that he believed that

he spattered him well, for he took good sight at his legs and thighs, and the fellow hollowed. The prisoner then gave this account of the affair to the witnesses: that he had that night (which was very dark) been down town and was returning home the back way, through the lot, and found the deceased lying on his belly on the ground, at the window of the house in which the prisoner slept; and the prisoner said that he would then have blown out his brains if he had had a pistol; that he asked the deceased who he was and what he was doing there, to which the deceased replied only by asking who he was and what he was doing there; that the deceased then got up and told him that Richardson was not at home, and they then went into the yard together, where they remained a short while, and (212) the prisoner went into the house, took Richardson's gun and returned and shot the deceased while he was dodging around the turning lathe. The prisoner did not appear to be drunk, and asked permission to stay all night, and went to bed and seemed to be asleep when the constables came to arrest him; upon being taken, he remarked, without any previous communication of the charge against him, that it was hard to go out of a good warm bed to jail. In a short time after the deceased was wounded, some of the neighbors, alarmed by his groans, came to him, and a surgeon was sent for, who examined his body and found a very large mortal gunshot wound in the front and lower part of the abdomen. It was also proved that, two or three weeks before the homicide, the deceased had said to a witness that the prisoner kept his wife, and showed a large stick, with which he said that he had given the prisoner a beating, and that if the prisoner did not let his wife alone he would kill him; and that on another night, about a week or ten days before the homicide, the deceased was seen standing at Richardson's gate, and, upon being asked "who he was," said that he was not afraid to tell his name, that he was Daniel, and that the devil had been to pay there; that Richardson had whipped him and driven him off his lot, but he would be the death of Richardson or Tackett one. Another witness, who also was a carpenter and worked in Richardson's shop, further proved that, about ten days before the deceased came to his death, he came up to a work-bench where Tackett was working in the street, very near to Richardson's house; that the prisoner ordered him off, and the deceased said he was in the street and would not go; a fight then took place between them, but the witness did not see and could not tell how it began; when the witness took notice of them, the deceased had the stile of a window sash in his hand, and he struck the prisoner several times with it, and at one of the blows hurt his eye; and the deceased also

(213) caught hold of the adze which the prisoner took up to strike him with; they scuffled for it, the deceased butted the prisoner and finally succeeded in getting the adze from him and carried it off. This witness also stated that, very early in the morning of the next day or the day after, he found the deceased lying in wait in Richardson's garden, with two stones in his hands, and the deceased said that he thought the witness had been Tackett, and he had intended to knock his brains out; that after dinner of the day of the homicide he saw the deceased down town, and was asked by him where Tackett was, and the deceased then said that he did not intend that Tackett and Lotty (the deceased's wife) should outdo him; that she had behaved so meanly that he would not have her, but that the prisoner should not take her away from him, and that if he did not let her alone he would kill Tackett or Tackett should kill him.

The prisoner then offered to prove that the deceased was a turbulent man, and that he was insolent and impudent to white people; but the court refused to hear such testimony, unless it would prove that the deceased was insolent and impudent to the prisoner in particular.

In the charge to the jury the court instructed them that, under the act of 1817, this case was to be determined by the same rules and principles of law as if the deceased had been a white man; that murder was the felonious killing of a human being with malice aforethought, which might either be express, as by declarations or lying in wait, or implied, as from the instrument used; that no words would justify or extenuate homicide and make it less than murder; that, by the common law, a slight blow, if it did not threaten death or great bodily harm, would not excuse or extenuate, if the instrument used be a deadly one, as a loaded gun or the like; and that it was of no consequence at what part of the body the aim was directed, if death or great bodily harm were intended.

The jury found the prisoner guilty of murder. A motion was made for a new trial, because proper evidence had been (214) rejected, and because the court erred in the charge to the jury; but it was refused, and sentence of death was pronounced upon the prisoner, who appealed therefrom to this Court.

Seawell for the prisoner.
Attorney-General for the State.

(216) TAYLOR, C. J., after stating the points, observed: That it does not appear, from any direct proof in the case,

what was the immediate provocation under which the homicide was committed. The evidence relative to that is altogether circumstantial and presumptive, and its weight and effect required the most careful examination and deliberation of the jury. The conclusion they might arrive at was all-important to the prisoner, since the degree of the homicide depended on it; and whether it was malicious, extenuated or excusable, must have been determined by them from such lights as they could gather from the facts actually proved, and such inferences as they might deduce from them. It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing on this inquiry, and, according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under a strong and legal provocation. If, on the contrary, the behavior of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of the other circumstances. They must still depend upon their own weight, and the probability be lessened that the prisoner had received a provocation sufficient in point of law to extenuate the homicide. The evi- (217) dence therefore ought to have been received; and this will be the more apparent when the charge to the jury is considered.

The court directed the jury that, under the act of 1817, the case was to be determined by the same rules and principles of law as if the deceased had been a white man. The act referred to had no design beyond that of authorizing a conviction for manslaughter in cases where a slave was killed under a legal provocation. If, before that time, a white person had killed a slave under such circumstances as constituted murder, he might have been convicted and punished for that offense; but if the homicide was extenuated to manslaughter, no punishment was annexed to that offense, and the accused persons were uniformly acquitted. It seemed just to the Legislature that the manslaughter of a slave should be punished in the same manner with that of a white person. This they have provided for, and it is all they intended to provide for. They did not mean to declare that homicide, where a slave is killed, could be only extenuated by such a provocation as would have the same effect where a white person was killed. The different degrees of homicide they left to be ascertained by the common law of the country—a system

which adapts itself to the habits, institutions and actual condition of the citizens, and which is not the result of the wisdom of any one man or society of men, in any one age, but of the wisdom and experience of many ages of wise and discreet men. It exists in the nature of things that, where slavery prevails, the relation between a white man and a slave differs from that which subsists between free persons; and every individual in the community feels and understands that the homicide of a slave may be extenuated by acts which would not produce a legal provocation if done by a white person. To define and limit these acts would be impossible, but the sense and feelings of jurors, and the
(218) grave discretion of courts, can never be at a loss in estimating their force as they arise, and applying them to each particular case, with a due regard to the rights respectively belonging to the slave and white man—to the just claims of humanity, and to the supreme law, the safety of the citizens. An example may illustrate what is meant: It is a rule of law that neither words of reproach, insulting gestures nor a trespass against goods or land are provocations sufficient to free the party killing from the guilt of murder, where he made use of a deadly weapon. But it cannot be laid down, as a rule, that some of these provocations, if offered by a slave, well known to be turbulent and disorderly, would not extenuate the killing, if it were instantly done under the heat of passion and without circumstances of cruelty.

The charge of the court proceeds to state "that, by the common law, a slight blow, if it did not threaten death or great bodily harm, would not excuse or extenuate, if the instrument used was a deadly one." It does not appear from the case that a blow of any kind was given by the deceased to the prisoner, or that any struggle immediately preceded the homicide; but as it was impossible for the court to foresee what inferences might be drawn by the jury from the testimony adduced and the circumstances proved, this part of the instruction was given them, that they might be enabled to estimate the provocation, in the event of their being satisfied that a blow was given. In such a case the jury might have been misled if the charge be incorrect; and I think it was so, because it lays down, as a general rule, what is true only under peculiar circumstances and in cases where a slight blow is cruelly revenged.

The first proposition, that such a blow will not *excuse,* is legally correct; for, in order to reduce a homicide to excusable self-defense, it is incumbent upon the accused to prove that he killed his adversary through mere necessity in order to avoid immediate death. It is manifest that such necessity never could

be produced by such a blow as that described. But when (219) the charge affirms "that a slight blow, not threatening death or great bodily harm, will not extenuate a homicide, if the weapon be a deadly one," it authorizes the inference that a blow, to constitute a legal provocation, *must* threaten death or great bodily harm. This, however, is no part of the description of a blow which all the authorities hold sufficient to extenuate; for, if it amount to a breach of the peace, and offer an indignity to the person receiving it, it is generally conceded that it will extenuate the homicide to manslaughter, although a deadly weapon be used. Accordingly, it is laid down by Hawkins: "If one man, upon angry words, shall make an assault upon another, either by pulling him by the nose or filliping him upon the forehead, and he that is so assaulted draw his sword and immediately run the other through, that is but manslaughter." The same passage is quoted with approbation by Kelyng, 135; and I take the sound principle to be that if any assault made with violence or circumstances of indignity upon a man's person be resented immediately by the death of the aggressor, and he who is assaulted act in the heat of blood and upon that provocation, it will be but manslaughter. When, therefore, a court is called upon to pronounce the general rule, it should be that "Words are not a sufficient provocation, but blows are a sufficient provocation to lessen the crime into manslaughter." *Taylor's case,* 5 Bur. Rep., 2796. Some cases, however, have been attended with peculiar circumstances, showing the necessity of a more critical and precise limitation of the rule. The first is *Stedman's case,* quoted in East's Crown Law, 234. In that case the provocation first disclosed was a box on the ear, given by a woman to a soldier; in return, he struck her on the breast with the pommel of his sword, and afterwards he pursued her and stabbed her in the back. Holt was of opinion that this was murder, a single box on the ear from a woman not being a sufficient provo- (220) cation to kill *in this manner,* after he had given a blow in return for the box on the ear. But it was afterwards held to be manslaughter, because it appeared that the woman struck with an iron patten and drew a great deal of blood. The other case is *Rex. v. Reason,* 1 Strange, 499, upon which, as reported, *Mr. Justice Foster* calls it an extraordinary case, that all the circumstances of aggravation—two to one—Mr. Luttrell helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol—that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane. These cases speak plainly for themselves, and do not amount even to an exception

to the rule, but are evidently founded upon the protracted and unrelenting cruelty with which the prisoners pursued their revenge out of all proportion to the provocation. But if in *Stedman's case* he had instantly, upon receiving the box on the ear, stabbed the woman, and the officer in the other case had stabbed Mr. Luttrell upon receiving the blow with the cane, the cases must have been pronounced to be manslaughter. Upon the whole case, therefore, I think the prisoner is entitled to a

New trial.

Cited: S. v. Jarratt, 23 N. C., 82; *S. v. Barfield,* 30 N. C., 350; *S. v. Cesar,* 31 N. C., 401; *S. v. Hogue,* 51 N. C., 384; *S. v. Carter,* 76 N. C., 23; *S. v. Turpin,* 77 N. C., 477; *S. v. Kennedy,* 91 N. C., 577; *S. v. Byrd,* 121 N. C., 687; *S. v. Quick,* 150 N. C., 824.

Doubted: Bottoms v. Kent, 48 N. C., 155.

(221)

DEN ON DEMISE OF HUNTER v. WILLIAMS.

An instrument, purporting to be a grant for land, which was under the great seal of the State, was signed by the Governor and recorded in the Secretary's office, but was not countersigned by the Secretary, will not pass the land, and is void.

UPON the trial of this ejectment, from HERTFORD, the plaintiff offered in evidence an instrument purporting to be a grant from the State to Blake Baker (under whom he claimed), bearing date in 1791, which covered the land in dispute. It was under the great seal of the State and was signed by Alexander Martin, who was then Governor, and had been recorded in the office of the Secretary of State and registered in Hertford County, where the land was situate, but it had not been signed by the Secretary of State nor by any person for him. The court received it in evidence, but reserved the point whether it was admissible, and the jury gave a verdict for the plaintiff. Afterwards the court decided upon the point reserved, that the said writing was not a good and valid grant, and was therefore inadmissible, and directed the verdict to be set aside and a nonsuit to be entered, and the plaintiff appealed to this Court.

The case was not argued here; and

The opinion of the Court was delivered by HALL, J.: To the General Assembly alone belongs the power of disposing of the

vacant lands within the boundaries of this State. The Constitution, sec. 36, declares that all grants shall run in the name of the State and bear test and be signed by the Governor. The year after the adoption of the Constitution, the Legislature, at their November session, declares that the Secretary shall make out grants for all surveys returned to his office, which (222) grants shall be authenticated by the Governor and *countersigned* by the Secretary. Act of Assembly 1777, ch. 1, sec. 11. This is the only mode pointed out by the Legislature whereby individuals can acquire a right to the unappropriated lands; and if it be not pursued, no right can be acquired in any other way, sooner than if no mode at all had been pointed out. Nothing therefore, passed by this instrument, as it is not pretended that Mr. Martin had title individually. The nonsuit must therefore stand and the judgment be

Affirmed.

NUNNERY v. COTTON.

Any alteration of a deed or writing, if made by the party claiming benefit under it, avoids it, whether the alteration be in a material and obligatory part or in an immaterial or in an useless part: provided, it be done by design.

THIS was an action of debt on a bond, payable originally to one Myrick, and by him endorsed to the plaintiff. From WARREN. The defendant pleaded *non est factum* and the statute against gaming. Upon the trial the plaintiff proved the bond by the testimony of witnesses who knew the handwriting of the defendant, which was received, as the bond was unattested upon the face of it. It was contended on the other side, however, that it had been witnessed and that the plaintiff or his assignor had cut off the witness's name to prevent his disclosing that the bond was founded on a gaming consideration or with some other fraudulent intent; and upon the inspection of the paper itself it appeared probable enough that the suggestion was true. It was originally written on a small piece of paper, and from the right-hand side of it where the defendant's signature was (223) it appeared to have been cut so as just to leave the obligor's name and to go in a sloping direction to the left, where a bond is usually attested, so as just to leave the writing of the body of the bond; and the upper part of the letters of the word *"Teste"* remained still plainly enough to be made out upon a

critical examination. They could not have been entirely separated without cutting off some of the words of the bond. The defendant also called a witness, who lived with Myrick at the time the bond bore date, who said that he did not know upon what consideration the bond was given; that he knew that Myrick and Cotton often played at cards about that time, and did not know of any other dealings between them; but that he had no knowledge of the defendant's executing a bond for his losings. The plaintiff objected to the evidence of the gaming unless the defendant could show that this particular bond was infected therewith, but the court received the testimony. The judge also charged the jury that if they believed that a witness's name had been cut off by the plaintiff or the endorser while he had it, or if the word "Teste" alone or any other word had been cut off by them with the view of altering the bond, they should find for the defendant, for that, in point of law, the paper was thereby avoided and was no longer the act and deed of the defendant. And the jury accordingly returned a verdict for the defendant upon the general issue. The plaintiff moved for a new trial because improper evidence had been received and because improper instructions had been given to the jury, but the court refused the motion and gave judgment for the defendant, and the plaintiff appealed.

The judgment was affirmed here without argument by the opinion of *Taylor, C. J.*, and *Henderson, J.; Hall, J.*, dissenting.

(224) TAYLOR, C. J. That a fraudulent mutilation has been made of this bond is manifest from an inspection of it, for parts of the letters which form the word *"teste"* are still remaining; whence the jury probably concluded that the witness's name had been taken off for the purpose of suppressing evidence of the consideration. If the witness's name were taken away it clearly destroyed the deed, by whomsoever done, since it was altering it in a material part. But if no witness's name were there and only the word "teste" has been cut off (a supposition difficult to make), still, if done by the obligee, it equally avoids the deed, and that question of fact was left to the jury. The only doubt is whether the word "teste" forms a part of the deed. I think the rule, if stated in precise terms, is that any alteration in the writing which the parties make to evidence their agreement, if made by the party claiming benefit under it, avoids it, whether the alteration be made in an obligatory or useless part; and more especially if done, as in this case, with a fraudulent design. If the party to whom a bond be given alter it in a material part it is conceded on all hands that it will avoid it. The

reason of the rule is equally applicable to an alteration in an useless part, and *in odium spoliatoris* ought alike to avoid it. It would be dangerous to countenance the least relaxation of a rule which guards so effectually the purity of written documents upon which the most cherished interests of men depend; nor do I think that the plaintiff should escape merely with the loss of the debt if the name of the subscribing witness were cut off with a fraudulent intent. The person doing the act and he who offers the paper in evidence with a knowledge of its having been done are guilty of a serious offense. The judgment must be

Affirmed.

HALL, J. It is very probable, from the whole complexion of this case, that the finding of the jury is right, but a new trial is moved for because the judge received improper evi-
dence and because he misdirected the jury. As to the (225)
first, I agree perfectly with the judge that the testimony was proper; but I do not altogether agree with him as to what was said relative to the alteration of the note or the paper on which the note was written. I admit that if the bond was altered by the obligee in either a material or immaterial part it thereby became void. But if a word or words be written on the same paper on which the obligation is written and they be neither a material nor immaterial part thereof, if in fact they do not belong to it and are no part of it, and those words be cut off, the obligation will not thereby be avoided. So, in the present case, admitting that the word "teste" (and no other part of the obligation) had been cut off, I think that circumstance would not avoid it, let the intention be what it might. But a bad intent ought not to be inferred from an innocent or useless act. If the charge had been to the jury that if they believed that not only the word "teste" but also the name of a witness had been separated from the paper, they should find for the defendant on the plea of *non est factum,* there could be no objection to it; for, although the attestation of a deed is said not to be of its essence, yet it is a mode of proof agreed upon by the parties and is so far a part of it. For these reasons it seems to me there ought to be a

New trial.

Cited: Smith v. Eason, 49 N. C., 38.

(226)

MANN v. MCVAY.

The certificate of the justice of the peace required by the "act to punish persons for removing debtors out of one county to another" is intended solely for the benefit of the person who removes the debtor, it is only a mode of proof that the debtor has duly advertised.

Held, therefore, that it may be obtained at any time, either before or after the removal, and it may be dispensed with altogether if the party can make the same proof by other testimony.

THIS was an action on the case, brought under the act of 1796, for the removal of Morgan, a debtor to the plaintiff, from the county of PERSON to the county of ORANGE. The removal was on 23 December, in the evening. On 13 December, in the morning, Morgan advertised his intention to remove at a store and at a tavern in Person, which were both public places, and also at the dwelling-house of J. B., one of the justices of the peace for that county. B. lived on the main road leading through the county, and gave private entertainment to travelers for compensation. The advertisement that was set up at B.'s was handed to him by Morgan himself, who remarked that he was indebted and intended to remove, and was unwilling to subject any other person to the payment of his debts, and requested B. to set it up where he thought proper upon his premises, and to do whatever was necessary under the act of Assembly to enable any person to remove him safely. B. then set up the advertisement at his own door, and told Morgan that was all that was necessary; and he did not then give him the *certificate required* by the act. The plaintiff lived five or six miles from Morgan and from B., but he knew of the removal and took no steps to prevent it or to have process served upon Morgan. After the bringing of this suit the justice of the peace gave a certificate of these facts, which was read in evidence upon the trial; and the defendant also

(227) proved them by the testimony of B. and other witnesses given in open court. On the part of the plaintiff the court was moved to instruct the jury that the plaintiff was entitled to recover, notwithstanding the certificate and the testimony of the witnesses, because the certificate was not given *before* the removal, and because the facts could be proved by such a certificate only, which instruction the court refused to give. The counsel for the plaintiff then moved the court to instruct the jury that he was entitled to recover because the house of B. was not a public place, which instruction the court also refused to give. The jury found a verdict for the defendant, who had judgment, and the plaintiff appealed to this Court because the

court refused to give the instructions as prayed for. The judgment was entered in the court below on the second Monday of September, 1820, and the appeal was of course taken to the present term of this Court.

The case was not argued on the part of the appellant.

Ruffin for the appellee.

TAYLOR, J. C., delivered the opinion of the Court: (230) After repeating the words of the statute he proceeded to state that the certificate is intended exclusively for the benefit of the defendant to enable him to ascertain whether a person whom he is about to remove has advertised according to law. If he can assure himself of that fact and chooses to run the risk of proving it by other evidence he may do so, and it is of no importance at what time the certificate issues or whether it ever issues. If he can satisfy the jury at the trial that the party did advertise according to law, the substantial provisions of the act will be complied with. It seems also to be the clear intent of the act that the justice's house shall be deemed a public place within the object of the law, and any other public place on the premises of the justice which he may direct must equally be considered so, because the debtor could exercise no control over the justice who was to a certain degree in the performance of a judicial act. The charge of the court appears to have been perfectly correct.

Nothing was said upon the last point taken in the argument, but by the whole Court the judgment was

Affirmed.

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(231)

FRAZIER v. FELTON and Wife.

1. Motion by appellant for *certiorari* to bring up the record to this Court denied on the circumstances of the case.

2. If the appellee file the record in this Court he can afterwards obtain a certificate of the failure of the appellant to bring it up, but the Court must look into the record and affirm or reverse the judgment.

3. It is not ground for this Court to order a new trial, that the court below has not stated the case on the record, for the appeal is not necessarily from the opinion of the court on points arising out of the facts at the trial, but may be for error in the pleadings. It is not error for husband and wife to appear by "their" attorney, for although they are but one person in law, the husband may make an attorney who shall appear for him and her.

4. In an action against husband and wife for a libel, the declaration had two counts. In the first it was charged that "the defendants combined and contrived to cause it to be believed that the plaintiff was a sot and common drunkard." In the second, it is charged that the defendants "further contriving and intending as aforesaid," composed, etc., the libel, etc., with inuendos applying the words to the plaintiff. Upon plea of not guilty a verdict was found for the plaintiff upon the second count only.

Held, that the words "further contriving and intending as aforesaid," refer to the allegation contained in the introductory part of the first count and constitute a sufficient averment in the second count, "that the defendants contrived and intended to cause it to be believed that the plaintiff was a sot and common drunkard," without repeating those words in the second count.

THIS action had been tried in the Superior Court of HERTFORD in September, 1820, and a verdict and judgment had been rendered for the plaintiff, from which the defendants appealed, and duly entered into bond. The appellants did not file the record in this Court on or before the third day of the present term, but about the middle of January moved the Court upon the affidavit of Felton himself, as stated in the opinion of the Chief Justice hereafter, for a *certiorari* to bring up the appeal and have the case and record fully made out for the revision of this Court.

(232) The motion was supported by *Seawell* and opposed by *Gaston* for the appellee. After argument the Court refused the *certiorari*.

The opinion was given by the Chief Justice: The defendants have appealed from a judgment rendered against them in Hertford Superior Court, but have neglected to bring up the appeal within the three first days of this term of this Court, as required by the act of 1818. A *certiorari* to bring up the cause and place it on the docket is now moved for on behalf of the defendants upon an affidavit stating that the defendant, Boon Felton, gave bond to prosecute the appeal; that the case to be sent up was to have been made out by the judge and counsel who tried and prosecuted the cause, and that he believed everything had been done in the case necessary to a fair trial in this Court. The affidavit further states that the defendant is just informed that no case has been sent up from the Superior Court, for which he is unable to assign any reason. This affidavit is made before the clerk in Hertford, and is dated 7 January, eleven days after the expiration of the time within which the transcript ought to have been filed by the appellants, whose duty it is made by the act of Assembly. It does not appear that Felton made any effort to inform himself before the day the affidavit was sworn to whether the case had been made out, nor is there any allegation that he

applied to the clerk of the court below within due time for the appeal, or that he was prevented by accident from doing so. No step appears to have been taken by him to place the cause here before the affidavit was made. Though the judge might make out the case it was not to have been expected that he would bring up the transcript; and as the appellant did not know until 7 January that the case was not made out, that circumstance could have no influence in preventing him from applying for and bringing up the transcript. For these reasons it appears to me that the affidavit furnishes no ground on which a *certiorari* can be awarded. (233)

The appellants also present a transcript of the record to the Court, and urge as another reason for a *certiorari* that it appears therefrom that they did appeal and gave bond, and that a case was to have been made out by the judge, and that his omission to do so ought not to prejudice the party. It is certain that in practice an appeal is most frequent from decisions which do not otherwise appear upon the record than as they are connected with it by the case made out. It is competent, nevertheless for a party to appeal from the judgment on the record as well as from points made at the trial.

By the whole Court.—Therefore the motion is denied.

It turned out, however, that the appellee had, after the third day of the term, actually filed the record with the clerk and directed him to docket it, but at the same time observed that he reserved to himself the right of obtaining from him a certificate of the failure of the appellants to file it. He now applied for the certificate, but the clerk declined giving it as the record was now filed by himself, unless the Court should direct it.

In this manner the case was brought before the Court again, when

Seawell, for the appellant, insisted that this was not a case for a certificate. The act of Assembly of 1818 gives two modes of proceeding to the appellee, which are in the alternative. He may "*either* file the record at any time during the first or the next succeeding term, *or* obtain a certificate." If he file it, it is to be presumed that his object is to have an affirmance of the judgment and take the benefit of a judgment in this Court against the appellant and the sureties for the appeal. For that advantage he must run the risk of having the judgment reversed. It is too late for him to ask for a certificate now, for when (234) the record is once *regularly* in this Court the whole must be looked into, and such a judgment given as it will warrant.

He then proceeded at length to state divers reasons why the

judgment should be reversed, which are all taken notice of in the opinion of the Court, and need not be stated more particularly.

Gaston contended that the appellant had, by his failure to file the record, forfeited all right to open it again, and could not be heard against the judgment. He admitted that if the appellee opened the record to the Court the whole case was subject to the opinion of the Court, which must then give such judgment as the court below ought to have given. But he urged that the provision allowing the appellee to file the record was for his benefit and he was at liberty to waive at any time before he actually asked for an affirmance of the judgment. He was entitled to be the first mover, and if he did not choose to ask anything from the Court the appellant could not.

He likewise submitted arguments in support of the judgment below, if the Court should think proper to go into that matter.

From the record it now appeared to be an action for a libel, commenced in the Superior Court, and the declaration was as follows, viz:

"Superior Court of Law,

"September Term, 1819.

"*Hertford County—ss.*

"James Frazier complains of Boon Felton and his wife, Eliza Felton, in custody, etc., of a plea of trespass on the case, etc., for that whereas the said James now is a just, moral, temperate and well-behaved man and citizen of the State, and as such hath always conducted himself, and until the committing of the several grievances by the said Boon and his wife Eliza, as hereinafter mentioned, was always reputed and esteemed by all his neighbors and other good and worthy citizens to whom he was in any wise known, to be a person of good name, fame
(235) and credit; and whereas also the said James hath not ever been guilty, nor until the committing of the several grievances by the said defendants, as hereinafter mentioned, been suspected to have been guilty of the offenses and intemperate misconduct hereinafter mentioned to have been charged upon and imputed to the said James, or of any other such misconduct and infamous manner of living, by means of which said premises he, the said James, before the committing of the said several grievances by the said defendants, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy citizens to whom he was known. Yet the said defendants, well knowing the premises and greatly envying the happy state and condition of the said James, and contriving and wickedly and maliciously intending and combining together to injure

the said James in his good name, fame and credit, and to bring him into public scandal, infamy, disgrace and contempt with and amongst all his neighbors, and other good and worthy citizens to whom he was known, and to cause it to be believed that he the said James was a common sot and habitual drunkard, and with intent to vex, harrass and bring him, the said James, into contempt and disgrace, as aforesaid, the said Eliza Felton, wife of the said Boon, on the 20th day of July, A. D. 1819, at Hertford aforesaid, falsely, wickedly and maliciously did compose and publish and cause and procure to be published of and concerning the said James a certain false, scandalous, malicious and defamatory libel, containing amongst other things the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said James, that is to say: 'His father' (speaking of John H. Frazier, and meaning the said James) *'has given so much way to the pleasures of Bacchus that the old man is at all times utterly unqualified for business'* (meaning and intending to have it believed that he, the said James, was a common sot and habitual drunkard and thereby incapacitated for business)."

"And the said James further saith that the said Boon and his wife Eliza, further contriving and intending as aforesaid, afterwards, to-wit, on the same day and year last aforesaid, falsely, wickedly and maliciously, wrongfully and unjustly, did compose and publish and cause and procure to be published a certain other false, scandalous, malicious and defamatory libel of and concerning the said James, containing, amongst other things, certain other false, scandalous, defamatory and libelous matters of and concerning the said James, as follows, that is to say, *'His father* (speaking of John H. Frazier and meaning the said James) *has given so much way to the pleasures of Bacchus that the old man* (meaning the said James) *is at all times utterly unqualified for business'* (meaning and intending thereby to have it believed and understood that the said James was a common sot and habitual drunkard); by means of the committing of which said several grievances by the said Boon and (236) his wife Eliza, as aforesaid, he the said James hath been and is greatly injured in his said good name and reputation, and brought into public scandal, infamy and disgrace with and among his neighbors and other good and worthy citizens to whom the falsity of the said charge was unknown, and who thence have believed him to be an habitual drunkard and sot, unfit for business and unqualified for the usual intercourse of social life; wherefore, the said James saith that he is injured and hath sus-

tained damage to the value of three thousand dollars, and therefore he brings suit, etc."

The defendants appeared by *their* attorney, L. M., and pleaded not guilty—justification; to which the plaintiff replied generally, and issues were thus joined. The jury found a verdict for the plaintiff upon both issues upon the *second* count in the declaration, and assessed five hundred dollars damages, and found the defendants not guilty upon the *first* count. There was no bill of exceptions tendered by either side, nor did the record show any point reserved nor any case stated. In this Court no objection was taken to the pleadings other than those noticed in the opinions of the Judges.

TAYLOR, C. J. The transcript having been filed by the appellee, we are now asked to inspect it and to withhold an affirmance of the judgment if such errors appear upon the face of the record as would be sufficient to reverse it. The Court is of opinion, for the reasons that will be given by my brother, *Henderson,* that under the circumstances of this case it is proper to look into the record. We therefore have considered the errors pointed out and will now give an opinion on them.

The first is that the husband and wife *both* come by *their* attorney, whereas, being but one person in law, they could not do so. In support of the objection is cited the case of *Maddox v. Wynne,* 3 Salk., 62; but the error assigned there was that the husband and wife came by their attorneys—*per attornatos* (237) *suos*—in the plural. The principle to be extracted from the case is that as they are but one person in law the wife cannot appoint an attorney. Therefore if an action be brought against husband and wife, if the husband appear by attorney, he shall enter an appearance for both. 5 Com. Dig., Pleader, b. 4. Nor is it error for them to appear by attorney, though the wife be under age, because the husband may by law make an attorney and appear *both* for himself and wife. 1 Show. Rep., 15. The doctrine is further illustrated by the form of defense given in the precedents: "And the said C. D. and E. F., his wife, by G. H., *their* attorney, come and defend the wrong and injury," etc. 2 Chitty's Plead., 409. In the case before us the husband was obliged to join in the plea with his wife, Cro. Jac., 239, 288; and the attorney employed by him necessarily became the attorney of both, and must have pleaded for both. For these reasons I think the objection untenable.

It is further objected that as the words themselves contained in the writing do not impute any offense, but are libelous only by being understood to imply something, it is necessary that the

design in using the words should be first averred by way of introduction, and then their meaning stated by *inuendo;* and although an inuendo is stated here, yet the office of an inuendo is not to charge but merely to act as a *videlecit* to what has been stated.

Without pausing to consider whether the words charged in this declaration are so written, by way of allusion and reference, as to require explanatory allegations, whether it was necessary for the jury to find that they meant to convey the imputation of the plaintiff's being a sot and a drunkard, in order to enable the Court to understand them in that sense; but admitting, for the purpose of this argument, that such technicalities were necessary, I will proceed at once to inquire whether the necessary averments are put upon the record. (238)

The first count in the declaration charges that the defendants combined to cause it to be believed that the plaintiff was a common sot and habitual drunkard. The second count, upon which alone the judgment was rendered, charges them with "further contriving and intending as aforesaid." This further combination and contrivance relates to the same object, viz, to cause it to be believed that the plaintiff is a common sot and habitual drunkard. The introductory averments in the first count are thus connected with the second count, which then proceeds to state the libel, and concludes with an inuendo that its meaning and intention was to have it believed that the plaintiff was a sot and drunkard. The inuendo, therefore, does not enlarge or change the sense of the previous words, but is only explanatory of the matter previously expressed, by applying the libel to it. Nor is it of any consequence whether the extrinsic matter is introduced on the record by averment, recital or general inference, for if the introductory matters and inuendos appear upon the record they amount to sufficient averments. Cowp., 684. Upon the whole case, therefore, I think the judgment must be affirmed.

HENDERSON, J. The appellee, upon the failure of the appellant, has filed the record here, but he now prays nothing from the Court and only demands a certificate from the clerk. I am of opinion that he is not entitled to it, and that we are bound to look into the record and pronounce such judgment as the court below should. Upon the failure of the appellant to file the papers in time two modes of proceeding are given to the appellee by the act establishing this Court. The first is to obtain a certificate of the clerk of such failure and to proceed to enforce his judgment in the court below by process from that court.

For an appeal to this Court does not, like one from the (239)

County to the Superior Court, entirely annul the judgment of the inferior court, but only *sub modo,* that is to say, provided the record is received and the appeal entertained by this Court. It is otherwise with appeals from the county court. Before the judgment can ever be acted on it must be affirmed by the Superior Court. The other mode is for the appellee to file the transcript himself at any time within the first or second term of this Court after the appeal was granted, and move for judgment of confirmation. By the act of filing the record the appellee moves for judgment of affirmance. It is the only legal construction which can be put upon his act, for he can have no other legal object in view. And his act points with so much certainty to this object that he shall not at the time of doing it, nor at any other time, aver a contrary design. The words can neither qualify nor give to the act an explanation contrary to the legal intent. We must, therefore, reject the appellee's declarations, made at the time of filing the transcript, and view the appeal as here. Suppose he had not filed the record at this term, but had taken a certificate on which he had acted, but could not obtain satisfaction by execution from the court below against the appellants. He could not at the next term bring up the record, for the sake of his chance for an affirmance, that he might have execution against the sureties also. No more can he have a certificate after once asking for an affirmance, which he does by filing the transcript. He must take one course or the other from the beginning and abide by his choice.

The appellant's counsel has urged as a reason why the judgment should be reversed and a new trial granted that the judge omitted to make up a case. He contends that an appeal presupposes a case; and as none appears the remedy must be by new trial, for otherwise irreparable mischief would be done; and none will arise from it, because if the merits be with the
(240) plaintiff the result will be the same upon a second trial. This reasoning would be unanswerable were the premises correct, but they are not. An appeal does not necessarily presuppose a case to be stated by the judge, from whose opinion on the case the appeal was taken. For the appeal can as well be from a judgment on what is called emphatically the record, that is to say, the writ, declaration, pleas, replication, etc., to the issues, verdict and judgment, as from any opinion of the judge given on points arising in the progress of the cause. This matter is verified in the very case now before us, for the appellant now urges that this judgment ought to be reversed for alleged defects in the declaration and other errors appearing on the face of the proceedings. For these and the reasons given by the Chief Jus-

tice I am of opinion that there ought not to be a new trial and that the judgment must be affirmed.

HALL, J., concurred upon all the points, so that by the whole Court the judgment was

Affirmed.

Cited: Vick v. Pope, 81 N. C., 27; *McLeod v. Williams,* 122 N. C., 456; *Smith v. Bruton,* 137 N. C., 89; *Rutherford v. Ray,* 147 N. C., 260.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1821.

JUSTICES OF WAYNE v. CRAWFORD.

1. Devise as follows: "I lend to my wife the plantation whereon I now live, and after her decease I give and bequeath the said land unto my child that my wife is now pregnant with, if a boy; and if it should be a girl, I give the said land to my son H. upon his paying unto the said child, if a girl, £100."
2. The legacy of £100 is not payable until the death of testator's widow.

THIS was an action of debt on the bond given by Crawford as guardian of Elizabeth Hooks. From WAYNE. The defendant, after oyer, pleaded conditions performed, and the plaintiff replied by assigning as a breach that the defendant had not collected and accounted with his said ward for a legacy of £100 bequeathed to her in the will of her late father, R. Hooks.

The case was that R. Hooks in 1793 made his will, and after giving to his wife one-fifth part of his personal estate devises and bequeaths as follows: "I also lend to my wife all the plantation whereon I now live, and *after her decease* I give and bequeath the said land unto my child that my wife is now (242) going with, if it should be a boy, and if it should be a girl I give the said land to my son Hillery Hooks, to him and his heirs forever, *upon the said Hillery's paying* unto the said child, if it should be a girl, one hundred pounds." The testator then devises to his son Washington and to the said Hillery other lands in fee and directs that his personal estate after the share of his wife shall have been allotted to her shall be kept together until his eldest child shall come of age, and then divided equally amongst all the children, including the one with which his wife was pregnant, and that the profits in the meantime shall be laid out in the education and maintenance of all his children. The child with which the wife of testator was pregnant at the time

of making the will was a daughter, Elizabeth, for whose benefit this suit was brought. Soon after the date of the will the testator died, and the will proved. Hillery was then four or five years of age, but has now come of full age, and has claimed the remainder in the land after the death of his mother, who is still living. The defendant was appointed the guardian of Elizabeth many years ago, and gave this bond; and a demand was made of this £100 legacy before this suit was brought.

Under the instruction of the Court the jury found for the plaintiff and assessed damages £244; being the principal sum of £100 and interest thereon from 1795. From the judgment given thereon the defendant appealed to this Court.

Gaston for the appellant.
Mordecai for the plaintiff.

(245) TAYLOR, C. J. I think it is to be collected clearly from the language of the will and the authorities applicable to the subject that the £100 legacy is not payable until the death of the testator's widow. After lending her the plantation the testator gives the same land after her decease to the child his wife is then pregnant with, if a son; but if a daughter, he then gives them to his son Hillery in fee, upon his paying to the daughter the legacy. Upon the birth of the daughter the remainder, which was before contingent, vested in Hillery, and at the same time the legacy vested in the daughter. But the period at which it is payable is prescribed and pointed out by the same expressions which give the remainder to Hillery, viz., "after his wife's decease." In the face of so plain a declaration of the testator I do not feel at liberty to conjecture that the legacy is payable before Hillery comes into the possession of the land. Although this legacy is chargeable upon land and the general rule in such case is that if the legatee die before the time of payment it shall lapse, yet I think this case comes within the exceptions to that rule. For it was as much the intent of the testator that the daughter should have the legacy as that the son should have the land, to whom it is given on condition of paying the £100. As this is not payable before the death of the widow the postponement is made for the convenience of the estate and family, according to the cases cited in Mr. Coxe's note to the case in 2 Pr. Williams, 613.

HALL and HENDERSON, Judges, declined saying whether the legacy was vested in Elizabeth and transmissible to her representatives or would lapse by her death before the day of payment, as the point was not now before them. For the other

reasons given by the Chief Justice they concurred with him in opinion that it was not payable during the life of the widow.

Judgment reversed.

(247)

DEN ON DEMISE OF SANDERS v. HYATT.

Devise to A., and if he dies without any lawful begotten heir of his body, then to his brothers and sisters. *Held*, that the devise to A. is of an estate tail which, by the act of 1784, is converted into a fee simple, and the ulterior limitation is therefore void.

EJECTMENT, from GATES. The lessor of the plaintiff claimed title to the premises in dispute under the wills of Jesse Sanders and Lawrence Sanders, as follows: Jesse made his will, bearing date 8 August, 1811, and thereby devised the premises in the following words: "I give unto my son Lawrence the plantation where I now live and all the land adjoining thereto; and *if he dies without any lawful begotten heir of his body*, then to his brothers and sisters." Jesse died soon after, and Lawrence entered, and by his will devised the same land to the lessor of the plaintiff in fee and died, without having ever married, and leaving brothers and sisters under whom the defendant claimed and took possession.

By the direction of the court in the matter of law the jury found a verdict for the plaintiff, and the defendant moved for a new trial upon the ground that the limitation over to the brothers and sisters was good and sufficient to vest the title in them. But the court gave judgment for the plaintiff, and the defendant appealed.

Eure for the appellant.
Seawell for the appellee.

HALL, J. The clause in the will gives the land over if Lawrence should die without a lawfully begotten heir. Now he cannot die without heir as long as the persons live to whom the ulterior limitation gives it upon the happening of that event, for they may become heirs at law after the death of others more nearly related. The word *heir*, in the singular number, must therefore mean *issue;* and by that means the estate (248) first given in fee is turned into an estate tail, and by the

act of 1784 is converted into a fee simple again in the first taker. The ulterior limitation is therefore void, and nothing passes by it.

By the Court, judgment
Affirmed.

Cited: Hollowell v. Kornegay, 29 N. C., 262; *Weatherly v. Armfield,* 36 N. C., 26; *Buchanan v. Buchanan,* 99 N. C., 311; *Leathers v. Gray,* 101 N. C., 164.

EXECUTORS OF JAMES REEL v. JOHN REEL.

Evidence is admissible of the declarations of a testator made at any time subsequent to the execution of the will, which goes to show that the testator believed the contents of the will to be different from what they really are, or declarations by testator of any other circumstances which show that it is not his will, are admissible.

FROM PITT. The following is the case as it appeared reported to this Court in the statement made by the court below:

This was a case of a contested probate of a will between the executors and one of the heirs and next of kin, the paper-writing purporting to have been published and declared as the testator's last will and testament in the presence of two witnesses; they declared on examination that the will was executed at the house of William Blackledge, in New Bern, between sunrise and breakfast time on some day in August, 1815; that they were called to the house by William Blackledge for the purpose of attesting a paper, where they found Blackledge and James Reel alone; that they either saw James Reel write or heard him acknowledge his signature; that they did not at the time know what was the nature of the instrument, but subscribed it as witnesses in James Reel's presence. They believed that James Reel was not drunk but sober; that they had no conversation with him; re-
(249) mained but a few minutes, and left Reel and Blackledge together. One of the subscribing witnesses stated that he believed on his entering Blackledge's house Reel met him at the door and asked him to witness the paper; that the witness, from a fear that he might be signing some obligation or instrument whereby he might incur liability, attempted to look over the instrument before fixing his signature, when Reel intimated to him not to do so, and said that it was nothing that

could hurt him. It appeared further in evidence that Reel left Blackledge's house that morning before breakfast; that the will was left with Blackledge, and after Reel's death was produced by Blackledge, enclosed in an envelope with three seals. The will was in the following words:

"In the name of God; Amen:

"I, James Reel, of Craven County, being of sound and disposing mind and memory, do make and ordain this my last will and testament, in manner and form following:

"*Imprimis*—I direct that all my just debts be paid.

"*Item.*—I give the sum of two hundred dollars to the children of my brother, John Reel, to them, their executors, administrators and assigns forever.

"*Item.*—I give to my brother, Levi Reel, one hundred dollars, to him, his heirs and assigns, forever.

"*Item.*—I give to my sister, Sally Wintly, fifty dollars, to her, her heirs and assigns forever.

"*Item.*—I give to my sister, Alicia Willis, in Georgia, one hundred dollars forever.

"*Item.*—I give to my sister, Polly Ernull, one hundred dollars forever.

"*Item.*—I give to my nephew, Aaron Ernull, the debt he owes me and one hundred dollars, besides a reasonable reward for his trouble in superintending my business to him and his heirs forever.

"*Item.*—I give to my nephew, Robert Reel, and my niece, Susanna Pringle, each five dollars, forever.

"*Item.*—My friends William Blackledge and Vine Allen, having heretofore borne the greatest burden of the expenses and labor in supporting the Republican cause in the county of Craven, and being myself of the same political principles and very desirous of having them supported, I, the better to enable them to continue their support of these principles, do give to them, their heirs, executors, administrators and assigns (250) forever, the whole of the residue of my estate, both real and personal, except so much as shall be necessary to pay two-thirds of the expenses of building a Baptist meeting house, at such place in the neighborhood as a majority of the Baptists of the same sect of which my parents were, shall appoint or pitch upon, and to be paid as soon as the other third of the cost of the building shall be properly secured by the members of such Baptist church. My desire is that no sale be made of any of the property, but that the legacies be paid out of the debts due as they are collected, and if there be not enough due, then that such as my executors cannot pay out of that fund be postponed pay-

ment till the income of my estate shall pay them, and my executors to have choice in paying whatever legacy first they please.

"*Lastly.*—I constitute William Blackledge and Vine Allen, sole executors of this my last will and testament, and revoke all other or former wills by me heretofore made.

"In witness whereof, I have hereunto set my hand and seal.

"This 23 August, 1815, at New Bern.

"JAMES REEL. (L. S.)

"Signed, sealed, published and declared by the testator as his last will and testament in presence of us:

"Thomas C. Masters.

"David Lewis.

"As a part of this my will I further give to my nephew, Radford Ernull, the debt he owes me and fifty dollars to him, his heirs and assigns forever.

"As witness my hand and seal, this 23 August, 1815.

"JAMES REEL. (L. S.)

"Acknowledged by the testator at the same time, with the foregoing as a part of this his will.

"THOMAS C. MASTERS.

"DAVID LEWIS.

"As a further part of this will I give to my nephews, Moses and Allen Ernull, each twenty-five dollars, and to Stephen Ernull I give the amount he owes.

"As witness my hand and seal, this 23 August, 1815.

"JAMES REEL. (L. S.)

"Acknowledged, etc., as before:

"Thomas C. Masters.

"David Lewis."

On the part of the defendant many witnesses were brought forward who swore that James Reel lived in the county of Craven, some miles from the town of New Bern; some of them (251) stated that he had always been a man of a very weak understanding, and from his youth up addicted to intoxication; that his habits of intemperance had exceedingly impaired the little understanding he had from nature; that a short time before the date of the will he had been confined with a severe fit of sickness, after his recovery from which his habit of drunkenness became, if possible, more inveterate; that he *always* became intoxicated when the means could be procured, and by one witness he was represented as the greatest drunkard

he ever had seen. Two of the witnesses stated that in New Bern, a place which he often visited, and where they frequently met with him, they *never* had seen him sober; and one of them further swore that he had never seen him in the town, when in his opinion he was in a state competent to dispose of his property with reason and intelligence. These witnesses admitted he was parsimonious, disposed to use trick in his bargains, asking too much for what he had to sell, and unwilling to give the value for what he bought. The defendant further proved that James Reel came to New Bern at the election on the second Thursday in August, 1815, and remained there several days afterwards, during all which time he was seen drunk; that some time after the election he came drunk to the house of one of the witnesses, who resided in New Bern, and remained there during the night; he then talked of his disease; said his home was a terror to him; while others slept he was walking; sometimes he thought himself in Tennessee, sometimes in England, and sometimes in the West Indies; he expressed a fear that the house of the witness was haunted; that he should be taken and carried away through the window in the night; he spoke of a design to travel for his health and to make William Blackledge and Vine Allen trustees to manage his business during his absence. On the morning of the succeeding day, Reel did not appear to have been relieved by sleep, but talked as incoherently as on the pre- (252) ceding night, and left the witness to seek for Blackledge, after repeating his design of making Blackledge and Allen his trustees. This witness, who had known Reel from his childhood, was so struck by his strange demeanor as to express at the time an opinion that Reel was becoming crazy or was about to die shortly. On the same day, this witness again met Reel coming down the street that led from Blackledge's house, evidently intoxicated, and was informed by Reel that he had not completed his business, but would do it if he thereby was caused to remain a week longer. It was further proved that, in the afternoon preceding the morning on which the will was executed, Reel went to the house of Blackledge, and there spent the night; that he and B. were in the front room, alone, and that in the course of the evening Reel went into the supper room, sat at the table and took supper with the family; that at the table he talked of making his will and leaving Blackledge heir to his property, and that he was then intoxicated. It was proved that Reel had been taught at school to read and write, and the elements of arithmetic; that he could calculate with figures, read writing badly; that if sober he might possibly with much difficulty have read the will, but if drunk it would be utterly out of

his power. Other witnesses said that when he was not too much intoxicated to stand, he could read small pieces of writing, notes of hand, etc. There was no evidence that the will had ever been read to him; the whole was in the handwriting of Blackledge, and no person besides saw any part of it written. It was proved that Blackledge had been Reel's lawyer on some occasion, and was a man in whom he placed much confidence.

James Reel died on 30 June, 1818, and it was proved by the defendant that, repeatedly, from August, 1817, down to four days previous to his death, the supposed testator sent messages to Blackledge to bring or send him his packet of papers. It was not shown that these messages had been received; further
(253) than that, it appeared, the supposed testator had expressed great dissatisfaction at one time that Blackledge had not come, as he said B. had promised; and at other times was angry at the failure of these attempts to procure the papers, and declared that Blackledge had treated him ill and was not the man he had supposed. It was further proved, in regard to the reason assigned in the will for making B. and A. residuary devisees and legatees, that the former had borne as great a part as any other individual of the expense and trouble of supporting what was called the Republican cause in the county of Craven, but that the latter had not contributed as much as others for that purpose. The defendant then offered to prove that, at various times, between the date of the supposed will and the death of James Reel, the said James had repeatedly mentioned what he believed to be the substance of the will left in the hands of Blackledge; and that, according to that representation, the said Reel understood the contents of the will as materially different and indeed utterly variant from what it appears on its face, particularly in regard to the residuary clause giving his estate to Blackledge and Allen, which Reel believed to be a gift to the public. This evidence the court refused to receive, unless it should be of declarations immediately upon the transaction, or so soon thereafter as to form part of the *res gestæ*. The residue given to B. and A. was supposed to be worth $3,000. The testator had no wife or children, but left brothers and sisters and the children of deceased brothers and sisters, with whom, according to the defendant's witnesses, he had always associated on terms of affection.

On the part of the executors, several witnesses testified that James Reel, though never a man of bright intellect, had *ordinary* capacity, and, whenever sober enough to stand, had understanding sufficient to manage his business; that he was the owner of a farm and a mill, and generally lived alone, sold the products

of his farm and mill, lent money at interest, took obli- (254) gations for the payment of it; was not easily defrauded, and took care of his property; that at the periods of elections, he sometimes became angry with his brother, the defendant, because their political sentiments were different, and that then he would declare defendant should have none of his property; that the fit of sickness, before spoken of, occurred about three years before his death, and that he complained that his relations neglected him. About two months before he died, he gave the key of his chest, containing bonds, accounts and money, to a witness, with instructions to return the key to him when demanded, or to deliver it to Blackledge; that he said he had a will in Blackledge's hands, and had told one of his sisters, who had asked him for one-half of his mill, that her legacy was in New Bern, under three seals, and asked her what she would do with a mill. Some time before his death, on being told that if he disliked his will he had power to revoke it and make another, he replied he knew that, but he believed his relations cared no more for him than for a brute, except for what they might obtain from him, and that he was willing and, indeed, preferred that his will should stand, remarking at the same time to the witness, who proved this, that he should have as good a share of his property as any of them.

The presiding judge instructed the jury that the first point to be considered by them was whether Reel had a capacity to make a will, and that if he had sense to make a legal contract, if he knew how to read, write, cipher and manage a plantation, it was sufficient evidence he had capacity for such a purpose.

That the second inquiry was whether he was so drunk at the time of executing the will as not to know what he was doing, and that as to the inquiry the testimony of the subscribing witnesses, if believed, proved that he was not so drunk as not to know what he was about.

Thirdly, that if the jury could discover any evidence (255) that the testator was imposed on by Blackledge in making the will, so as to sign a disposition of his property which he did not intend, they might on that ground set the paper aside, but that there ought to be proof to that effect; and,

Lastly, that there was no evidence of revocation.

The jury found the paper writing produced to be James Reel's will.

The defendant moved for a new trial, on three grounds: (1st) the rejection by the court of material and proper evidence; (2d) misdirection of the court; (3d) because the verdict was against evidence and law. The motion was overruled, and the

judgment of the court pronounced, that the will was duly proved Whereupon, defendant appealed.

Gaston for the appellant.
Mordecai and *Seawell* for appellees.

(267) HENDERSON, J. We are of opinion that a new trial should be granted, because the declarations of the alleged testator were rejected. What weight they might have had with the jury it is not our province to decide; but, coming from a source not interested to declare anything but the truth, and not affecting the rights of others (for no one here could have an interest in the will), we are at a loss to perceive any solid grounds for their rejection, as the ascertainment of truth is the object of all trials.

The reasons assigned by the presiding judge are, in our opinions, entirely insufficient, although he is supported by two decisions in our sister States. When declarations of a party are offered in behalf of the person making them, on the ground of their being a part of the *res gestæ,* it is when some of *his acts* are offered in evidence against him; and in order that the jury may view the whole transaction, what he says when he does the act is also to be heard, the declarations being in law a part of the act itself.

But the declarations of a person *affecting the rights of others* can afford no rational ground of conviction that such declarations are true. To receive them in the case first put, when they affect only the party who makes them, and to reject them when they affect the rights of others, is conformable to the (268) object of all trials—the ascertainment of truth.

To our minds, to reject the declarations of the only person having a vested interest, and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and, in doing the one or the other, could interfere with the rights of no one, involves almost an absurdity; and (with due deference to the opinions of those who have decided to the contrary, we say it) they are received, not upon the ground of their being a part of the *res gestæ,* for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial to their *competency.* Those circumstances only go to their weight or credit with the tribunal which is to try the fact, and the same tribunal is also to decide whether the declarations contain the truth or are deceptive, in order to delude expectants and procure peace.

The English books are full of cases where the declarations of

the testator were received, and without any objection as to their *competency;* generally the question being as to their *weight.* In *Pemberton v. Pemberton,* 13 Ves. Jun., 290, before two successive chancellors, the declarations of the party at *various times* were received; so in *Warner v. Matthews,* 4 Ves. Jun., 186. Nor is it an objection that in some of the cases it was not a question on the probate of a will, the will having already been proved in the spiritual court; but in cases where relief was sought under the will, the relief was objected to, because the complainant claimed under a will irregularly obtained. As was urged at the bar in this case, if the declarations of the testator were competent to be heard in the Court of Chancery to prevent relief being afforded under the will, they were competent to be heard on the issue *devisavit vel non,* the establishment of the truth being the object in each case.

For these reasons, and those given by *Judge Spencer,* (269) who, together with *Judge Tompkins,* dissented from the opinion of the Court, and because of the doubt which rested for some time on *Judge Livingston's* mind, we think we are bound to disregard the opinion of a majority of the Court in 2 Johns., 31, and also the case in 1 Gallison, 170. And, indeed, we have only to read the case in Johnson to cause us to pause long before we adopt a rule which, by its operation, would palm upon the world the writing there under consideration as the will of the deceased.

I am aware that some part of the reasoning in this case, although not important to a correct decision of the cause, impugns the case of *Shenk v. Hutcheson,* 4 N. C., 315. I then thought both the act and the declarations stood on the same ground, and that a weak prop was given to the declarations by making them part of the *res gestæ.* Both or neither should have been received. A man's acts which he can perform are as much within his power as his words; in each case he was making evidence for himself. For these reasons, we think, there should be a New trial.

Cited: Howell v. Barden, 14 N. C., 444, 448; *Patterson v. Wilson,* 101 N. C., 597; *In re Burns' will,* 121 N. C., 338; *Evans will case,* 123 N. C., 117; *In re Shelton's will,* 143 N. C., 221; *Linebarger v. Linebarger, ib.,* 233.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1821.

EXECUTORS OF JOHNSON v. TAYLOR and the Admr. of Dew.

The proper construction of the act of 1795, c. 15, is that is it incumbent on an infant after arriving at full age, not only to "call on his guardian for a full settlement," but to have a final adjustment of all accounts, matters and things with his guardian within three years, and either sue for any balance which may be due him or notify the securities to the guardian bond of the situation in which he stands to the guardian. Without such conduct on the part of the infant the securities are discharged.

THIS was an action of debt, from EDGECOMBE, brought on a guardian bond against Taylor, the principal, and the administrator of Dew, a deceased security. The breach assigned was the nonpayment by the principal to the ward, upon his arrival at age, of the estate to which he was entitled. Among other pleas put in by the administrator of Dew were the following: First, that his intestate had been dead more than seven years before claim made by the ward; and, secondly, that the ward had not, within three years after coming of age, called on the guardian for a full settlement of his guardianship. To these pleas there were replications and issues thereon. The ward (272) came of age in October, 1814, and this suit was instituted 26 August, 1818. Dew died, and administration was granted on his estate in 1806. In September, 1817, Taylor, the guardian, made payments to the ward on demands made on him as guardian by the ward.

Upon the charge of the court below, the jury found a verdict against the administrator on both pleas, and, a motion for a new trial having been overruled and judgment rendered against the administrator, he appealed to this Court.

Gaston for the appellant.
Mordecai for the appellee. (273)

HALL, J. The policy of the act of 1795, undoubtedly, is to lighten the burden of securities and free them from stale demands, when a remedy might have been had if promptly prosecuted against the real debtor.

The intent of the Legislature would not be effectuated if the injunction upon the creditor to call for a full settlement meant a *mere call* for such a settlement and nothing more. If that is the case, such call, and a total disregard of it by the guardian
(274) within three years after the infant's arrival at full age, would leave the securities in the same situation in which they were before the passage of the act.

I think it is incumbent on the infant, after arriving at full age, not only to call for a full settlement, but to have a final adjustment of all accounts, matters and things with his guardian within three years, and either sue for any balance that may be due him, or notify the securities to the guardian bond of the true situation in which he stands to the guardian. In the latter case, the securities, if they apprehend any danger from their securityship, may by legal process compel a speedy adjustment of accounts between the creditor and debtor, so as not to be injured by any future and distant call that may be made on them for the insolvency of their principal. Nothing short of such conduct towards the securities will, in my opinion, satisfy the act of 1795, ch. 15, on which the defendant rests his defense; and as such has not been observed, I think a new trial should be granted.

TAYLOR, C. J., and HENDERSON, J., concurred.

Cited: Jones v. Blanton, 41 N. C., 129; *S. v. Harris,* 71 N. C., 175; *Williams v. McNair,* 98 N. C., 334; *Self v. Shugart,* 135 N. C., 186.

DELACY v. NEUSE RIVER NAVIGATION COMPANY.

When a corporate body strikes off the name of one of its members without giving him previous notice of their intention so to do, and affording him an opportunity of being heard in his defense, a mandamus to restore will be granted.

THIS was an application for *mandamus,* originally made to the Superior Court of WAKE, and, upon its refusal to grant the writ, brought by the appeal of the petitioner to this Court.

(275) The petitioner stated, on affidavit, that he subscribed for 250 shares in the Neuse River Navigation Company,

established by acts of the Legislature, passed in 1812, ch. 89, and in 1816, ch. 16; that, for the purpose of paying his first installments on 1 May, 1818, he entered into a contract with the president and directors of the company, whereby he engaged, on his part, within six months, to afford a passage between Stone's Mills and Fort Barnwell, on the river Neuse, for boats carrying seven tons, and within three years for boats of fourteen tons. The president and directors, on their part, contracted, at the end of six months, or sooner, if the stipulated work were sooner completed, to pay to him $1,000, in addition to what he might be indebted for his stock, including the first payment of $10, and all further sums which the directors might have called for, and at the end of three year, or earlier, on completion of the work, to pay as much as would, with what he should have received, make up $30,000. If, at the end of three months from the date, the petitioner should not have begun and made proportionate progress, the president and directors were at liberty to annul the contract, and claim of petitioner a penalty of $1,000; and so at any other time in the progress of the business, if the work should be unnecessarily delayed, a like power was reserved to them to annul the contract and claim the penalty. The petitioner further stated that, in pursuance of this contract, he immediately commenced his labors and effected the object, as far as time would permit, but was stopped by order of the directors, who, on 4 February, 1819, put an end to the contract, declaring it null. That the president and directors (without authority, and without giving the petitioner notice of their intention) had stricken his name from the list of subscribers, in consequence of which he had been denied his franchise of voting at a general meeting of the company. He therefore prayed a *mandamus,* to be restored to his franchise of a corporator, from which he (276) had been wrongfully removed.

A notice issued from the court below to the president and directors, by name, to show cause why a *mandamus* should not be granted, on the return of which the application of the petitioner was refused.

Gaston in support of the *mandamus.*
Seawell, contra.

TAYLOR, C. J. This is a motion for a notice to issue to (278) the defendants to show cause why a *mandamus* should not issue against the defendants to restore the relator to his franchise as a corporator in the company. It appears from the affidavit that Delacy became a subscriber on 13 April, 1818, and

was admitted as a corporator from thenceforth until after he made a contract with the president and directors, by which he was to pay for the stock he had subscribed to. If, after this contract had been put an end to, Delacy had been called upon to pay his subscription, and upon neglecting to do so, or on not showing a satisfactory reason for the neglect, he had been ejected from his place as a corporator, it would have been incumbent on the court to inquire into and give an opinion on the right of the stockholders so to proceed. What he could have shown on such a notice, either as payment or excusing the neglect, cannot be told; but, *prima facie,* we must take it to be the undoubted right of every man to receive notice of any proceeding against him by which he is to be deprived of acknowledged rights; and, for want of such notice in the present case, the rule ought to issue as prayed for in the petition.

(279) HALL, J. By the fourth section of the act of 1812, ch. 88, which, by the act of 1816, ch. 16, as well as many other sections of the act of 1812, are adopted as part of the charter of the Neuse River Navigation Company, it is declared: "That each subscriber shall pay for every share by him or her subscribed, at the first general meeting, the sum of ten dollars to the treasurer of the company; and the names of those who fail to pay then and there may be struck off the books, and others complying with this regulation may take such shares." The name of Delacy was not struck off at the first meeting, nor did he make any payments on account of the shares subscribed for by him; but he states that, in lieu thereof, he contracted with the president and directors to do certain work on the river Neuse. He admits that the work was not completed, and that the president and directors declared the contract to be at an end, according to the power reserved to them in the contract to do so if they thought proper.

When this declaration was made, the parties stood in the same situation they were in at the first meeting, except that that meeting had passed away and it was too late to pay the first installment at that meeting. But when it shall be kept in view that it was by the consent, and no doubt at the request of Delacy, that payment had not been made, and that he had failed to do that which was a substitute for it, I think the equity and justice of the case, and the fair construction of the act of Assembly, would place the parties in the same situation at a subsequent meeting as they stood in at the first, so far, at least, as that Delacy then had the power and privilege of making payment, and, if he did not, that the stockholders had the right of striking his name

from the list of subscribers for shares. But it seems that his name was struck off by the president and directors, and not by the stockholders at one of their meetings. I think the president and directors, in doing this, transcended the limits of their authority; but this entry, by which the name of (280) Delacy was stricken off, was afterwards virtually adopted by the stockholders as their act; for they refused to receive Delacy's vote at an election for president and directors, and, had he had due notice of such procedure before it took place, I think, from that time he would have ceased to be a member of the corporation. Nor do I think the case would have been altered from the consideration that he had been a member from their first meeting up to that time; for every person who had subscribed for shares before he paid his first installment was a member to many purposes. He might, perhaps, have voted for president and directors; for passing by-laws for the government of the corporation. He had, perhaps, to the last moment of the meeting to pay his first installment. And for the same reason Mr. Delacy might have exercised the right of a corporator at any subsequent meeting before his name was struck off for failing to make payment. But I suppose he possessed no more rights at any subsequent meeting before his name was struck off than he did at the first meeting. It has been said that Delacy possessed more shares than the stockholders who struck off his name from the books, and that there were not a majority, of course, at that meeting. If those who were present were qualified by having paid up their installments, and were a majority of those that had done so, I think they were authorized to act as they did; for Delacy, owing to his delinquency, might by them be stricken off, as he might at the first meeting have been. But what is to be done if Delacy refuses to pay anything due on his shares? I cannot think the law contemplated a sale of them; for, besides the positive words in the act that directs the names of delinquents to be stricken off, the fourth section of the act of 1816, speaking of sales (not, to be sure, with a view to this question), speaks of sales of *balances* due, meaning, no doubt, balances due after payments had been made. To purchase a share when nothing had been (281) paid would be to subscribe for a share. But another circumstance ought not to pass unnoticed, and that is, that Delacy *had not notice* that the corporation was about to strike off his name from their books. If he had had notice, he might have shown, for aught that appears, that he had paid his installments or that he was ready to do so. For this reason, and for this reason only, I am willing that a *mandamus* should issue.

HENDERSON, J. The applicant was once a corporator, for it was not imperative on the stockholders at their first meeting to strike off those who failed to pay. They did not do it; they received him and others without requiring payment; he voted with them as a corporator; in fact, their order of removal shows that he was, before the removal, one of their body. I shall pass over every other point made in the case but one; that is, that the applicant was removed by the stockholders at some meeting subsequent to the first, for failing to make payment, and this *without any notice* to him; for it may be considered as a removal by the stockholders; they recognize the act of the directory. It is a fundamental principle of our law, and recognized in every court of justice (and this corporation was a court when passing on the rights of its members), that no man shall be condemned or prejudiced in his rights without an opportunity of being heard. No matter how desperate his case may appear to be, the humanity of the law says, perchance he may have something to say in his defense. We will, therefore, not forestall him by saying he can allege nothing; but, after having heard him, will pass upon his case. For this reason, I think the *mandamus* should go; for, without prejudging the case, we do not know but that the applicant might have paid, or shown some satisfactory reason for not paying, or that he then might have paid, for it was not
(282) even then too late. As to some cases which are to be found in Term Reports, that no notice is required when it appears clearly that the applicant has nothing to offer in his defense, for the present it is a sufficient answer to say that it does not appear that Delacy had nothing to offer, or could not, by paying the money, avert the forfeiture. When a case of that kind arises, it will then be time enough to examine the soundness of the doctrine. I am therefore of opinion that the Superior Court of Wake should issue a *mandamus* to the corporation, commanding it to restore the applicant to the rights of a corporator, or show cause to the contrary.

Cited: S. v. Jones, 23 N. C., 134; *McCall v. Justices,* 44 N. C., 303.

TISDALE v. GANDY.

Where a suit was referred to arbitrators, who returned their award in vacation, when the clerk entered it on the record as a judgment rendered in court, such entry was ordered to be expunged and the whole proceeding was held to be void in law; and this, although the party to be affected by the entry gave a subsequent release of errors, for the consent of parties can never alter the law.

THIS was a motion to vacate a judgment, made upon the following facts: A suit depending in NASH County Court between the plaintiff and defendant, in *May,* 1815, was referred to arbitrators, and the order of reference was renewed from term to term until *August,* 1815. On 25 *September,* 1815, the arbitrators returned an award in favor of the present defendant, and thereupon a writ of *fi. fa.* issued against the present plaintiff, bearing *teste August Term,* 1815. On this *fi. fa.* the sheriff returned a levy, and writs of *ca. sa.* issued afterwards against the plaintiff, until February Term, 1817, when the sheriff returned that he had committed the body of the plaintiff to prison. At November Term, 1818, the plaintiff moved, pursuant to (283) previous notice to the defendants, to vacate the judgment whereon execution had issued, first, on the ground that the writ of *fi. fa.* had been levied and the property was not sold or the levy otherwise discharged; and, secondly, for that the said judgment was not rendered or entered of record in *term time.* The County Court vacated the judgment, and the defendant appealed to the Superior Court. During the pendency of the proceedings in the Superior Court, Tisdale, the plaintiff, executed to Gandy, the defendant, a release of all claim to vacate or reverse the judgment by reason of any errors and irregularities in the proceedings. The Superior Court affirmed the order of the Court below; whereupon defendant appealed to this Court. There were several affidavits filed in the court below to support the facts on which the motion was made, and these affidavits made part of the record sent to this Court.

TAYLOR, C. J. This is a motion to vacate a judgment on an award, on the ground that it was entered up in vacation instead of during the term; and the first inquiry is, was it so entered? If we look only at the transcript of the record sent up by the clerk of the Superior Court, we perceive that the cause was referred at May Sessions, 1815, and the judgment is entered at August of the same year. This, however, is but a transcript of the record sent from the County to the Superior Court, and can

at best be only a copy of the record accompanying the appeal. A certified copy of the record of the proceedings in the County Court is filed in this Court, and relied upon by the plaintiff, by which it appears that the cause was referred at May Sessions, 1815, and that the order of reference is brought forward to August Sessions of the same year, when it is renewed, and an agreement subjoined that the award of the referees, made between that time and the Superior Court, is to be entered
(284) as a judgment of the term, by consent of parties. It is evident, then, that no award was made at that time; otherwise the parties, to whom it must have been known, could not have consented to the future making of the award. The entry of judgment made at the same sessions was in pursuance of the agreement, and must, in the nature of things, have been inserted by the clerk after the award was returned. If any doubt remained on the subject, it is completely removed by the date of the award, which forms a part of the same transcript. It was made on 25 September, 1815, in the vacation, and after the Superior Court, the first day of which was the 18th of the same month. It is thus shown, without traveling out of the record or referring to the affidavits of the referees, that the judgment of the County Court was entered up in vacation, by the clerk, in partial execution of the previous agreement of the parties, though contrary to it as to the time of making the award.

This whole proceeding is therefore void in point of law, nor could any agreement of the parties, even if the award had been duly made in other respects, give it a legal existence. It was the judgment, not of the *court,* but of the *clerk,* whose acts cannot acquire a judicial authority by the consent of the parties, which can never alter the law. Nor can any subsequent release of errors by the party to be affected by this entry give it the validity of a judgment. Such a release is not of more forcible obligation than a previous consent, which, in *Slocumb v. Anderson,* 4 N. C., 77, was held to be utterly unavailing, though it was a confession of judgment for a just debt. In that case it was decided that no acquiescence, admission or acknowledgment of the party being any more competent to validate than the first acknowledgment was to create. The judgment of the Court is that the entry on the docket of the County Court, purporting to be a judgment, be expunged.

(285) HALL, J. I agree in the result that the clerk should be directed to expunge the judgment by him entered in vacation; and to me it seems a sufficiency appears on the record sent to this Court by the appeal to authorize it. The affidavits read

in the court below were the grounds on which the motion was made there; the same affidavits form part of the record sent here. It is not necessary that they should be entitled or have a caption. The caption of the record of which they are a part is sufficient.

HENDERSON, J., concurred; and

BY THE WHOLE COURT. Let the entry on the docket of the County Court of Nash, purporting to be a judgment, be expunged.

Cited: Reid v. Kelly, 12 N. C., 315.

DOE ON DEMISE OF JOHN STEPHENSON v. JACOCKS.

A., by his will, devised to his son W. certain lands, reserving to his wife a life estate in part thereof, and declared it to be his will; in case the child with which his wife was then pregnant should be a male, that after her death, the portion in which she had a life estate should descend to such child; and in the event of the death of his son W., or the death of the child with which his wife was pregnant, if a male, that the survivor should have the whole; if either died without lawful issue—if both died without issue, then that J. S., a nephew, should have a portion of the land. The wife was delivered of a daughter, and it was held that J. S. took nothing, for a precedent estate becomes a precedent condition, or otherwise to an ulterior limitation, according to the intent, and as no son was born, the contingency upon which the testator designed his nephew to take never happened. The language of the will made the birth of a son a condition precedent, and there was no evidence of intent to dispense with the performance of the condition.

EJECTMENT, from PERQUIMANS. The following special verdict presents the facts of the case: Thomas Stephenson, being seized and possessed of the premises in dispute, by (286) his last will and testament, duly executed to pass lands, dated 21 February, 1800, devised as follows, viz.: "I give and bequeath unto my son, William Stephenson, the land and plantation whereon I now live, called Stephenson's Point, containing four hundred acres, more or less, reserving the part lent to my wife during her natural life; also, I give unto my son William the land I bought from the executors of William Humphreys, deceased; also fifty-three acres of land on the west side of Deep Creek, reserving and excepting, nevertheless, and it is the true

intent and meaning of this my last will and testament that in case the child which my wife Elizabeth is now pregnant with should be a male, my will and desire is that the part of my land and plantation which is lent to my wife during her life, as aforesaid, should descend at the death of my wife to the said child she is now pregnant with, in case it should be a male, to him and his heirs, forever. Further, it is my will and desire that, in case of the death of my son William, or the death of the child which my wife is now pregnant with, if a male, my will and desire is that the survivor shall have the whole of the estate mentioned herein to them both, if either should die without lawful issue. But in case of the death of them both without lawful issue, then it is my will and desire that John Stephenson, son of Hugh Stephenson, should have that part of my land which was my mother's dower; and my will is that the other part of my said land should be rented out annually for the benefit of my daughter Polly Stephenson during her natural life; and in case she, my said daughter Polly, should have lawful issue, my will is that such lawful issue should have and enjoy the said land forever; but in case my said daughter Polly should die without lawful issue, then my will is that the said land shall be rented out annually, and the money arising therefrom to be equally divided among the sons of my sister, Parthenia Wyatt, viz., William, John,
(287) Thomas, Ambrose and Worley, and their heirs, forever."

The said Thomas Stephenson died in the year 1801, without having altered or revoked the said will, which has been duly proved and recorded; that William Stephenson, the first devisee above mentioned, died in the year 1806, intestate and without issue; that Polly Stephenson died in the year 1809, without issue; that the child with which the testator's wife was pregnant at the time of making the said will was afterwards born a female, and is the wife of Jacocks, the defendant; that the defendant's wife is now the sole heir at law of Thomas Stephenson, the testator, and also of William Stephenson, the devisee; that John Stephenson, the devisee mentioned in the will, is the lessor of the plaintiff; that the premises claimed by him in this suit are the same devised to him in the above will, being a part of those devised to William in the first-recited clause, and that the defendant is in possession of the premises.

On this finding judgment was rendered below for the defendant, and the plaintiff appealed.

Ruffin for the plaintiff.
Gaston for the defendant.

STEPHENSON *v.* JACOCKS.

TAYLOR, C. J. The substance of Thomas Stephenson's (293) will is a devise to his son William in fee, a devise to his wife, for life, of part of the land, and, taking notice that his wife is *ensient,* a devise of that part to the child, if it should be a son, with cross-remainders to him and William. In the event of the death of both without issue, he devises part to his nephew, John Stephenson, in fee, and part to his daughter Polly. William, the son, and Polly, the daughter, are both dead, without issue. The testator's wife was pregnant, but instead of a son she was delivered of a daughter, who is the only remaining child of the testator, and is heir at law to William and Polly. This ejectment is brought by the nephew, John, against the posthumous daughter, and the question is whether the limitation over to John can take effect, inasmuch as the contingency, viz., the birth and subsequent death of a son, upon which it was made, never happened. The effect of a construction of the will according to its words, and, as I think, the apparent intent, will give (294) to the testator's only child the land in controversy. An opposite construction will, according to all appearance, disinherit this child in favor of a nephew—a child for whom it was impossible the testator could cherish other feelings than those of parental tenderness, and the purity of whose lineage he asserts by the provision made for the eventual birth of a son.

It is not within the range of probability that a man, knowing his wife to be pregnant, should deliberately make an ample provision for the child, if a son, and *intend* at the same time that it should be wholly unprovided for if a daughter; but it is probable that he omitted to provide for a daughter, only because such an event did not present itself to his contemplation, and that his mind was diverted from it by arranging the limitations over in the event of the birth of one son, and the death of both without issue.

The testator, when he made his will, had a son and a daughter to provide for; and, confining his views exclusively to the chance of having another son, he prefers the interest of these two to that of his daughter Polly; but if both his sons die without issue, he, under the supposition that he should then have but one daughter, which must have been so, unless his wife had twins, calls in his nephew, John, to share the land with her. In such a state of things, he might probably think there was enough for both. But had he foreseen that, instead of two sons and a daughter, he would have a son and two daughters, it may be conjectured that, though he might postpone them to William, he would, at least, have placed them on an equality with each other. It has been argued, on the part of the nephew, that where a devise is made

after a preceding executory limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation never should arise or take effect, the remainder (295) over will, nevertheless, take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitations.

That words of condition have been construed as limitations instead of contingencies, appears from many cases cited for the plaintiff, and from none more distinctly than *Jones v. Westcombe,* in Eq. Ca. Ab., and *Strathan v. Bell,* in Cowp.; the first of which is a leading case, which has been cited in almost every subsequent one. In that case the intention could not be doubted that, failing the child, the estate should go over to the devisees, in all events. They were the next objects of the testator's bounty, and there were no children to be provided for. In the other case the testator had a wife and a daughter, and he devised to a son, of which he supposed his wife to be *ensient* at the time of making his will, when he should attain his age of twenty-one years; but if a daughter, then one moiety of his estate to his wife, and the other moiety to his two daughters (there being one alive at the time) when they should attain their ages of twenty-one, with survivorship as between the daughters; if both die before twenty-one, their moiety to go to the wife and her heirs, forever; if she died, her share to go to them. The wife proved not to have been *ensient;* the testator died, and so did the daughter, without issue and under age. It was held that the wife should take the whole estate.

In the last case there were no children, and the words were construed as a limitation to carry the estate to the wife, rather than as a condition, which would perhaps have given it to a distant heir at law. The construction was evidently made to support the intent; and, although I will not say that words have in every case been construed as a limitation or condition for the sake of supporting the intent, yet, in the only case I can find, where children have been born after making the will, who (296) were not provided for, or probably thought of, when the will was made, such a construction has been made of the words, either to construe them as limitations or precedent conditions as would most effectually guard the interest of the after-born children.

White v. Barber, 5 Burr, 2703, is a very strong instance to show how far a court will go towards effectuating the intention, even by supplying words for that purpose. There the devise was to such child or children as the testator's wife should happen to be *ensient* with at the time of his death. The testator had

only one son at the time of making the will; two were born after the will was made and before his death, but his wife was not *ensient* at the time of his decease; yet the Court held that it was manifestly the intention of the testator to comprehend all the children which should be born of his then wife, whether before or after his decease; the Court thinking that a father, in making an express provision for any children his wife should be *ensient* with at the time of his decease could never intend to give his estate to such children in exclusion of, or to his nephew (as the event has happened), in preference to any child or children that might be born in his lifetime. 5 Burr., 2703. In another case, words have been construed as a condition precedent, rather than a term should go to a devisee, a grandson, where there was a daughter born after making the will. There a term was devised to an infant in *ventre sa mere,* if it should be a son; and if it should be a son and die under age, then to the testator's grandson. It proved a daughter, and it was adjudged, upon special verdict, that the executrix, and not the grandson, should have the term, because the grandson was not to take but upon a precedent condition, viz., the birth of a son, which did not happen. *Grascott v. Warren,* 2 Eq. Ca. Ab., 361. If the position I have advanced needed further confirmation, it will receive it from *Doe v. Shippard,* Douglas, 75. There the words were, "and in case my said daughter Rachael shall happen to survive (297) the said Thomas Shippard, her husband, then upon trust," etc., after which follow the limitations over after the daughter's death. It happened in event that the husband survived his wife, and it was held that the limitations over did not take effect, the contingency affecting all the limitations and operating as a condition precedent.

The case was argued and decided on the ground of intention, to support which the words were construed a precedent condition. With the same object in view, the words in *Jones v. Westcombe,* 1 Finch Ca., 316, were considered a limitation. A court may supply the omission of express words if they can discover a plain intent; otherwise, they cannot. And, although it ought always to be considered what a testator meant to do, as well as what he actually has done, and we are not at liberty to decide according to what he probably might have done, had a different view of events presented itself to his mind, yet the title of the heir must prevail against mere conjectures.

It is upon this principle, I think, that the contingency upon which the testator designed his nephew, John, to take the estate, has never happened; that the fee devised to William, the son, was never displaced or modified, because a son was not born;

and that, upon William's death without issue, it descended upon his heir at law. My opinion, therefore, is that judgment be rendered for the defendant.

HENDERSON, J. I am now satisfied that when this case was here before (7 N. C., 558) the facts then stated were sufficient for a proper decision, and that it was quite immaterial whether the daughter Polly died during the life of William or not; the life estate given to her being a circumstance relied on to tie up the general words, dying without issue.

(298) On the question now presented, I am of opinion, in the event which has happened, that Stephenson, the lessor of the plaintiff, takes nothing in the lands in question; for a precedent estate becomes a precedent condition, or not, to an ulterior limitation, according to the intent. Thus, if an estate is devised to A and his issue, and if he should die without issue, then to B, and A should die leaving issue in the lifetime of the devisor, whereby the estate never vested in A or his issue, B would take, although A left issue; for, by whatever means A's estate was out of the way, whether by commencing and expiring, or by not commencing at all, and whether he left issue or not, if that issue could not take, B, by the plain intent, shall take; for the postulatum is, is the estate *out of the way?* and not *how it became* out of the way. So, if a man devise his land to the child with which his wife is pregnant, and if that child should die without issue, then to B, and no child should be born, his wife not being pregnant, B would take. In each of these cases the words give way to the intent, there being nothing to control it. But put this case: a man, having no child devises, devises that if his wife should be delivered of a daughter (the wife being pregnant), that his daughter should have his estate during her life, and after her decease to go to his nephew, and a son is born. The words here do not give the estate to the nephew; he is only to have it *after the death* of the daughter, and there was no daughter *to die.* The Court, in this case, will make the estate to the daughter a condition precedent—that is, they will not vary the natural meaning of the words to carry the estate to the nephew, and leave the son totally unprovided for. We do not want authorities or precedents for this, for they are to be found running through all the cases, either openly avowed or occultly governing the decision; and were there artificial rules intended to aid in establishing the intent (for at last it is nothing but a question of intention) which would lead to a different result, it would

(299) become us to examine them well, and be assured that the rules were genuine, and that we understood their proper

application. Let the principles governing the cases before stated be applied to the one before us: suppose no child had been born, the intent then would have justified a departure from the words, and carried the estate to Stephenson; for, upon the death of William, without issue, there would be no child but was provided for in the manner the testator designed. Polly, his only surviving child, would divide with the nephew as the testator intended. But a daughter is born, and we are called on to put a construction on the words different from that which they naturally bear, to aid a nephew and leave a child entirely destitute—a child who never had offended, and which the testator recognized as his by directing that, should it be a son, he should divide the lands with William. I am aware that if the limitation to Stephenson is not sustained, the one to Polly must fall. Be it so; it is better that the lands should remain in William, in fee simple, and descend to his heirs, and Polly be deprived of her limitation, than that Stephenson should take, and a daughter be excluded by constructions only. There are no sufficient grounds afforded to vary the words of the will, and on the will rests the plaintiff's title. Were I to hazard a conjecture why no further disposition was made by the devisor in case a daughter should be born, and not a son, I would say that, having by the first part of the will given the whole of his lands to William, which were to be divested only by the birth of a son, the ulterior limitations were all bottomed on that event; and if a son was born he did not expect a daughter also at the same birth; if a son was born, which excluded a daughter, he was willing that, on failure of his male descendants, his nephew should share with his daughter Polly, for in that view of the case there could be but one of his issue to take.

But the strong basis of this decision is, that the claims of the after-born daughter are stronger than the claims of (300) the nephew, and we will not vary the common meaning of the words to let in the claim of the nephew, and thereby leave the daughter entirely destitute. In other words, the devisor has, by the *very language* of the will, made the birth of a son a condition precedent, and there is no evidence of intent for the Court to dispense with the performance of the condition; indeed, the birth of a daughter furnishes evidence the other way. I think that the defendant is entitled to judgment.

HALL, J. I concur in the opinion delivered by *Henderson, J.* The great and important object is to ascertain the intention of the testator. Agreeable to the letter of the will the plaintiff is not entitled, because the testator only gives it to him after the death of his son William and the death of the child which his

wife was then pregnant with, if a male, without lawful issue; it must be a male and must die without issue to give him a title. Now I agree that courts will put such a construction on wills as to support limitations over where particular estates are by any means put out of the way, as the plaintiff's counsel have contended. Yet they ought not to do it, against the letter and words of the will, when the consequence will be to leave a child altogether unprovided for; they ought to lean to support such limitations over when they think from every circumstance that the persons taking under them are the next objects of the testator's bounty, after the persons to whom the particular estate was given. But in this case I cannot agree to support the limitation over for the benefit of a nephew, and that too against the words of the will at the expense of a child who would be left altogether without the means of support, by a father bound by all the ties of nature to make provision for her. Nor can I think that such could have been the wish of the testator. *White v. Bar-*
(301) *ber,* 5 Burr., 2703; 2 *Fearne* (5 Ed.), 410, *in notes.*

Cited: Davis v. Shank, 9 N. C., 119.

JAMES WHITE v. MORRIS.

Wherever an injury is done to goods in the actual possession of a servant, carrier or bailee, if the owner have the immediate right of possession, he may sue for such injury in his own name. Therefore, where A loaned a horse to B during the will of A, and the horse was seized by virtue of an execution against B, A may maintain trespass against the officer refusing to deliver him up.

THIS was an action of *trespass vi et armis,* from CRAVEN, brought by the plaintiff, against the defendant, for taking and carrying away the horse of the plaintiff. It was found by the special verdict on the trial below that the title to the horse was in the plaintiff, but that he had loaned him to his brother, Paul White, to work during the pleasure of the plaintiff. While the horse was in the possession of Paul White, and employed in carrying provisions to market for him, the defendant, a constable, seized the horse and took him into possession by virtue of an execution against Paul White. The defendant refused to deliver the horse to the plaintiff, who claimed the same, and afterwards sold him to satisfy the execution. If under these

circumstances the plaintiff could maintain *trespass* then the jury found for the plaintiff. The Court held that trespass could not be supported, and on motion rendered judgment of nonsuit, whereupon plaintiff appealed.

Gaston for plaintiff.

TAYLOR, C. J., delivered the opinion of the Court: (303) The plaintiff, notwithstanding the loan to his brother, had a constructive possession of the horse when the trespass was committed, and had a right to the immediate actual possession if he thought proper to exercise it. This makes the distinction between the cases; in *Ward v. McCauley,* 4 Term, 489, it was held that the landlord, who had leased the goods for a certain time, could not maintain an action of trespass against the sheriff for seizing them because he had parted with the right of possession during the term, and had only a reversionary interest. But whenever the injury is done while the goods are in the actual possession of a servant, carrier or other bailee, if the owner have the immediate right of possession, the action may be brought in his name. The same principle applies to real property, for if a stranger does a trespass to a lessee at will which prejudices the land the lessor may have trespass against him for damage to the land; for the possession of the lessee is his possession (Comyns' "Trespass, B. 1"). The very case before us is put in the books to show that the owner has the right of present possession. So if a man lend his cattle to J. S. to plough his land and a stranger takes them away J. S. may maintain trover or trespass against him (Bro. "Trespass, 90"). *Carson v. Noblet,* 4 N. C., 136, was decided on the same distinction and is directly in point with the one now before us. That was the case of a loan resumable at pleasure in which trespass was held to lie by the owner for a taking from the actual possession of the bailee. The nonsuit must therefore be set aside and judgment entered upon the verdict in favor of the plaintiff. (304)

EXECUTORS OF WALKER v. M. CAMPBELL, Executor of W. Campbell; and Green, Administrator *cum test. ann.* of Orme.

A debt barred by the statute of limitations is not revived by a direction in the debtor's will, that certain property be sold, "and with the proceeds thereof, after paying my debts, they," etc.

THIS was an action from NEW HANOVER, brought on a negotiable promissory note made by William Giles, dated 16 April,

1812, payable to W. Campbell sixty days after date. The note became the property of plaintiff's testator after having been endorsed by the payee and by Orme. Payment was regularly demanded and the note protested for nonpayment; due notice was also given to the endorsers, Campbell and Orme. The defendants severally pleaded that the cause of action did not accrue within three years, to which proper replications were made; and the only question was whether the action should be barred by the statute of limitations.

No further evidence was offered on the trial to show the liability of Campbell's executor, but the will of Orme was introduced to prove a revival of the remedy against him and to show that the action as to him was not barred by the statute. Orme died in July, 1818, having first duly made his last will and testament, bearing date 20 June, 1818, which contains the following clause, viz: "I will and direct that my executors hereinafter named sell all my negro slaves except Katy and Maria and her child, and upon such credit as they may deem advisable, and that with the proceeds thereof, *after paying my debts,* that they redeem my bank stock, or such amount thereof as the said proceeds may enable them." The will was regularly ad-
(305) mitted to probate, and the executors therein named duly renounced the execution of said will. and administration with the will annexed was granted to the defendant Green. The writ in this case was issued 2 February, 1820. The jury found that the testator of the defendant, M. Campbell, did not assume within three years, and they further found that the testator of the defendant, Green, did assume within three years. On the part of the defendant Green a motion was made for a new trial, which was refused, and judgment was rendered in pursuance of the verdict, whereupon Green appealed.

TAYLOR, C. J. As the date of Orme's endorsement is not specified it must be understood to have been made on the same day with the note, viz, 16 April, 1812. The note became due 16 June of the same year, when the statute began to run and had taken away the remedy in 1815, three years before the death of Orme. His will directs his executors to sell certain negroes, and with the proceeds to redeem his bank stock *after paying his debts;* and the inquiry is whether this debt is revived by such a direction. I consider the law to be clear that the debt is not thereby revived, but that the remedy is entirely gone. The utmost extent to which any of the cases have gone has made debts payable only when lands have been devised in trust for that purpose; and as lands in England are not liable for simple con-

tract debts when they are made chargeable with all debts, the executors who are directed to pay them are made trustees for that purpose. It is there appropriating a fund for the payment of debts which is not liable by law; but it may well be doubted whether such a doctrine if well established by the authorities would be applicable here, where lands are liable to the payment of all debts, after the personalty is exhausted. In this State as well as in England the personal estate is the primary and natural fund for the payment of debts, a fund which the (306) testator cannot exempt as against a creditor, though he may against the devisee of the land, by making that a fund for the payment of his debts. I should not hesitate to conclude that a bequest of personal estate in trust to pay debts would not revive a debt barred by the statute for the reason given in 3 P. Wms. 90, *in notes;* and in this State the same result would follow in relation to a bequest and devise of personal and real estate. But the only question now to be decided relates to a bequest of chattels, and it will therefore be sufficient for the purposes of this case to show that in all the authorities relied upon to establish the general position the trust was created of lands. The anonymous case in 2 N. C., 243, does not state what species of property was devised, and the cases it refers to in 1 Salk., 154, 2 Vern., 141, and 2 P. Wms., 373, are all cases of the devises of lands. In the last case from P. Williams, of *Blakeway v. Ld. Strafford,* the statute of limitations was pleaded to a bill to have the benefit of a devise in trust for the payment of debts, and the plea was overruled; but this decree was reversed in the House of Lords, who ordered the plea to stand for an answer (3 Bro. P. C., 305). There is a *dictum* of Lord Mansfield (in Cowp., 548) very much in favor of the doctrine contended for by the plaintiff, but there is reason to believe that it is very far from being settled. For when the case from 2 P. Williams was cited in proof of the position insisted on the Chancellor of Ireland doubted if there was such a determination as is there reported, and stated that a devise in trust for the payment of debts does not prevent the setting up the statute if it had run before the death of the testator; for if the statute has run in the lifetime of the testator the debts are presumed to be paid (1 Scho. and Lef., 110). The case before us, however, is not a devise in trust for the payment of debts, but simply a direction to the executors what they are to do with the proceeds of the surplus of slaves after the debts are paid. (307) The will has declared in relation to the debts what the law would have said without it, that they must be paid out of

the personalty in the first place. The judgment must consequently be reversed and a new trial granted.

HALL and HENDERSON, Judges, concurred.

Cited: Underwood v. Lane, 12 N. C., 175.

PALMER v. POPELSTON.

Under the act of 1792, a sheriff's bill of sale for a slave is like the bill of sale of any other person; and when the purchaser takes the actual possession of the slave the conveyance must be recorded in the county where such purchaser resides.

DETINUE for two negro slaves, from MARTIN. The plaintiff in support of his title proved by the subscribing witness a bill of sale from the sheriff of Washington County for the slaves in suit. At the time of the execution and registration of this bill of sale the vendee lived in Martin County; the bill of sale had been registered in Washington County. It was objected by defendant that as the paper produced had not been registered in the county in which the vendee lived it could not be read in evidence, and the court sustained the objection. Plaintiff then submitted to a nonsuit and made a motion for a new trial, grounding his application on an affidavit stating that the bill of sale had been recorded in the county in which the vendor and the individual against whom the process under which the slaves were sold, had issued, both lived; that he was ignorant of the laws relative to registration, and supposed in this case the bill of sale had been regularly and properly recorded, particularly as he had submitted it to counsel and had recovered an-
(308) other negro by a former suit, on the trial of which this bill of sale was read in evidence without objection. The motion for a new trial was refused and judgment rendered against the plaintiff for costs, whereupon he appealed.

Gaston for appellant.
Drew, contra.

TAYLOR, C. J. The act of 1792 requires all written transfers or conveyances of slaves to be registered in the county where the purchaser resides, provided he be in the actual possession of the slave. It makes no distinction between a sheriff's bill of

sale and any other; and therefore, where the title is set up under such a one, there can be no doubt that the requisites of the law must be complied with. Hence the nonsuit was (309) properly awarded; but as the objection was not taken on the former trial the plaintiff was surprised by it. The justice of the case therefore renders it fit that a new trial should be awarded, and this is done upon payment of the costs of this and the Superior Court.

SNEED v. CREATH.

Under the act of 1796, a judge may say to a jury, that a particular fact is proved, if the jury believes the witness deposing to such fact. If a witness is proved to be a minister of the gospel, that fact may with propriety be mentioned to a jury, but it does not necessarily entitle his testimony to more weight than that of another man.

THIS was an action of debt from GRANVILLE, brought on a bond made payable to Samuel Creath for £25 of the currency of Virginia, executed by the defendant on 9 March, 1808, and on 23 September, 1818, endorsed by the executrix of the original obligee to the plaintiff. The defendant pleaded payment, and to support the defense introduced as a witness his brother William Creath, a minister of the gospel, who deposed that sixteen or seventeen years before the obligee of the bond now in suit informed the witness that a final settlement of accounts had taken place between himself (the obligee) and the obligor, and showed him the bond on which this action is founded, and also a deed of trust for a certain horse, to secure the payment of the bond; the witness also stated that he was informed by the obligee that this bond was founded *in part* upon a judgment obtained in court in favor of his mother. This witness also stated that the obligee had afterwards informed him he had received partial payments on the bond, and that in 1810 the witness was present at the house of the obligee, together with the defendant, when a final settlement took place; the bond now sued (310) on was produced and fully satisfied and the witness wrote a receipt in full against it, which the obligor signed and the witness attested, and that he left all the papers on the table.

The executrix of the obligee was introduced by the defendant to prove declarations by the obligee admitting payment of the bond. She stated that some short time before the death of the obligee he caused her to get this bond with the view of sending

it to the obligor for payment, but that he declined afterwards sending it and directed her to put it away, which she did, and after his death was not able to find it until a short time before she endorsed it to the plaintiff. While it was lost, as the witness supposed, she applied to the defendant for payment, and was asked by him where the bond was? She answered it was mislaid, and defendant assured her he would not in consequence of that circumstance withhold anything from her or hers. This witness was present at the settlement spoken of by William Creath, and though not particularly attentive understood it to be a settlement of accounts and transactions different from those of which he spoke. Further, she stated that she at the time thought the witness Creath was intoxicated, that she understood the bond in question was given in consequence of the defendant's having sold a horse which the obligee owned. William Creath was then called again to explain his situation at the time of the settlement, when he stated that he was perfectly sober, and explained the circumstances and acts which had induced the belief in the last witness of his intoxication.

The plaintiff then produced the record of the judgment spoken of by Creath as being part of the consideration of the bond. The suit was in the name of Susannah Creath, but the bond had been transferred to Samuel Creath, who as agent for Susannah managed the suit. The judgment had been obtained (311) in the month of May *after* the date of the bond, on a bond in the penalty of £50 currency of Virginia, conditioned for the payment of £25 of the same currency, and the execution appeared to have regularly issued until February, 1809, when it was returned "stayed by order of plaintiff's agent, Samuel Creath, according to the order filed." A witness was then introduced who proved the drawing of a bond by Wynne (the subscribing witness to the bond in suit) for the sum of £25 currency of Virginia, which he understood from all parties was in some way connected with a transaction relative to a horse. The bond sued on was in the handwriting of Wynne, and appeared to have been written and executed at the same time.

The judge in his charge to the jury stated that the evidence of William Creath, if believed, proved a settlement of the bond on which the action was brought; that it was given in consideration of a bond in which Samuel was interested, made by John, the defendant, payable to Susannah Creath, the mother of the witness, the defendant, and Samuel, for the penalty of £50, conditioned for the payment of £25. That it did not appear that the witness William had any inducement to commit a perjury, that standing in the situation of a relation to the defendant, to

Samuel the obligee, and to the individual who transferred the bond to the plaintiff, they ought in charity to believe the witness; that there was nothing to impeach his testimony, and being a preacher it ought to add weight to his evidence. If the jury believed the testimony of the witness William they should find for the defendant.

The jury found a verdict for the defendant. A motion was made for a new trial, which was refused, and judgment rendered pursuant to verdict, from which the plaintiff appealed.

TAYLOR, C. J. A judge cannot, under the restraint (312) imposed by the act of 1796, give an opinion in charging the jury whether a fact is fully or sufficiently proved, "such matter," in the language of the act, "being the true office and province of the jury"; and if the charge in this case had simply stated that the settlement was proved by the witness it would have been in conflict with the law; when, however, it proceeds to state that the settlement is proved *if the jury believe the witness* it explains the sense in which the word *proved* is used as synonymous with *evidenced,* in which latter sense it would probably be understood by the jury, who would then feel themselves at liberty to estimate the weight of the evidence. It were to scan the instruction with too critical an exactness to award a new trial on this ground.

As to the other point, the profession of a preacher does not necessarily invest a man with that purity of morals which renders him more scrupulous in declaring the truth than another man, for it sometimes happens that even the members of that sacred vocation are overpowered by the temptations to vice. That a witness is a preacher ought if proved to be stated to the jury that they may judge how far that circumstance entitles his testimony to additional weight; but even then a jury would draw their conclusions from his individual character and its correspondence with his profession rather than from the profession itself. The instruction given in this case can only be sanctioned by assuming the position that a preacher *ex vi termini* denotes a person whose evidence is entitled to greater weight than that of another man; whereas a preacher whose life and profession are at variance is less entitled to confidence than another man, since to his other vices he adds that of hypocrisy; and he who could impiously aim to deceive the Deity would not scruple to mislead his creatures. On this part of the charge, therefore, a new trial must be awarded. (313)

HALL and HENDERSON, Judges, concurred.

LOVE v. WALL.

If two individuals endorse a note in virtue of a mutual understanding with each other to lend their names for the accommodation of the maker, evidence may be left to a jury of such mutual understanding or agreement.

THIS was an action from ANSON, brought to recover the amount of a promissory note made by Edward G. Williams, negotiable and payable at the Bank of Cape Fear, in Fayetteville. The note was made payable to and endorsed by the defendant and afterwards by the plaintiff; both these endorsements were made for the accommodation of the maker, who procured the note to be discounted at bank and applied the proceeds to his own use. When the note arrived at maturity it was regularly demanded at the bank, protested and due notice given to the defendant and plaintiff. The plaintiff being sued by the bank paid the amount of the note, and brought this action against the defendant as first endorser. On the trial below the defendant contended that both the plaintiff and himself were to be viewed as joint securities of Williams, having both endorsed for his accommodation, and that the plaintiff was therefore only entitled to recover one-half of the note. The court instructed the jury that there appearing no evidence of any special agreement between the parties this case was to be regulated by the law merchant; and that the defendant, being the first endorser, was liable to any subsequent endorser who was a *bona fide* holder
(314) of it or who had been compelled to pay the note to a *bona fide* holder, whereupon the jury returned a verdict for the full amount of the note. A new trial was moved for on the ground of misdirection of the court, which was refused, and from the judgment rendered pursuant to the verdict defendant appealed.

Gaston for plaintiff.

HENDERSON, J., delivered the opinion of the Court: It does not distinctly appear whether the plaintiff endorsed the note in virtue of a mutual understanding with the defendants to become bound or lend their names for the accommodation of Williams, or whether after the note was made by Williams and endorsed by the defendant for Williams's accommodation the plaintiff, without any previous agreement with the defendant to that effect to give the note additional credit for the accommodation of Williams, also endorsed it. In the case first put I think the evidence was to be left to a jury of a mutual agreement to

stand as joint securities, and there is certainly nothing in the form of the writing which forbids the defendant from showing the special agreement and on what consideration (315) the parties respectively signed their names or agreed to become bound. I therefore think the presiding judge was wrong in requiring a special agreement of mutual liability to be proven in words. The jury should have been instructed that in law a mutual liability arose from a mutual agreement to become bound for accommodation, unexplained or uncontradicted by other circumstances. If the case be as put in the latter part of the foregoing statement authorities may be found to show that a joint liability does not arise, which is as far as the cases relied on by the plaintiff's counsel go (Chitty on Bills, 155, 357, 160; 7 Johns. R., 361; 5 Cranch, 49, 142), from which I am strongly inclined to believe that the foregoing opinion is supported by authority—at least is not contradicted. We were without the aid of an argument for the defendant, and although strongly inclined for the plaintiff, if the case be as last stated, do not wish to express an opinion on it. But as from the statement it is doubtful how the facts are, and if as first stated we think the law has not been administered, the judgment of the Court is that there must be a new trial.

Cited: Hill v. Robinson, 48 N. C., 503; *Mendenhall v. Davis,* 72 N. C., 154; *Smith v. Haynes,* 82 N. C., 450.

DENBY v. HAIRSTON.

In a case of trespass to a man's possessions, attended with circumstances of aggravation, such as wantonly exposing a crop to the incursions of cattle, this Court will not, on the ground of excessive damages, disturb a verdict giving the highest price at which the crop might have been sold.

TRESPASS, from ROCKINGHAM. The plaintiff was one of the tenants of Gen. Izzard on a large tract of land in the county of Rockingham. The landlord had given instructions to the plaintiff as well as to his other tenants to sow small grain, stating to them that should he sell the land he would re- (316) serve for them the privilege of reaping and securing the crop. The plaintiff accordingly sowed a quantity of wheat and rye in the fall of 1817, and in January, 1818, Gen. Izzard contracted to sell the lands occupied by the plaintiff to the defend-

ant, but did not execute a conveyance until August of the same year. At the time of the contract Izzard informed the defendant that the plaintiff was to have his crop of wheat and rye then growing, to which defendant assented. In March, 1818, the defendant came to the land with his slaves, and entering on the premises against the will of the plaintiff tore down his fences and exposed his fodder to his cattle; ploughed up his yard and sowed oats in it; ordered off the plaintiff and threatened him with the payment of five dollars rent per day while he remained. The plaintiff at length consented to leave the place provided he might be permitted at harvest time to reap and carry away his crop. This the defendant refused to permit; claimed the wheat and rye, and afterwards reaped and kept it.

The cause was tried before *Daniel, J.*, in Rockingham Superior Court, at its spring sessions, 1818, and in its instructions to the jury the court told them that upon this evidence the plaintiff was entitled to recover, and in assessing damages they were permitted to give the *highest price* the wheat and rye were worth, and also damages for the loss of the fodder, and for all other injuries which the plaintiff had sustained by reason of the trespass of the defendant. The jury found a verdict for the plaintiff; damages $450.

A motion was made for a new trial on the ground of excessive damages, but was denied, and from the judgment rendered the defendant appealed.

(317) TAYLOR, C. J. Every principle of law and every dictate of justice combine to entitle the plaintiff to the full value of the wheat and rye taken by the defendant and to compensation for the other injuries done by him. No ground is perceived in which the verdict is exceptionable, for the defendant refused permission to the plaintiff to enter for the purpose of gathering in the crop when it should be ripe, but claimed it as his own notwithstanding his assent to the plaintiff's right when told of it by Izzard; can it be doubted, therefore, that he is justly responsible for the full value of the crop? In addition to this the defendant was a trespasser upon the plaintiff's possession, because when he entered he had received no title from Izzard.

HALL, J. I think there can be no ground for a new trial; the plaintiff was in possession of the premises under a parol lease from Izzard prior to any contract entered into between Izzard and the defendant. When the defendant committed the trespass the legal title to the land had not vested in him; he had by his contract a right to enter on the land but the rights of the plain-

tiff were not thereby impaired; he had a right under his lease to the property he had on the land as well as to the growing crop. Let the rule for a new trial be discharged.

HENDERSON, J., concurred.

(318)

REYNOLDS v. PUTNEY'S Administrator.

1. An administrator against whom a suit, originally commenced against his intestate, is revived by *sci. fa.* may confess judgment on a writ subsequently issued against him as administrator, and give in evidence the record of such judgment in support of his plea of fully administered to the suit revived by *sci. fa.*
2. An administrator may retain assets to satisfy a debt due to himself on a note of his intestate, endorsed to him after the death of the intestate, but prior to the granting of administration.

THIS was an action of debt, from BERTIE, originally brought against Putney, and after his death revived by *scire facias* against his administrator. The defendant, among other matters of defense, pleaded fully administered former judgments against him, retainer, and no assets ultra, and in support of his pleas produced a record of a judgment confessed by him, as administrator of Putney, in favor of one Cunningham in the County Court of Bertie, on the second Monday of May, 1820, on a writ bearing teste March, 1820. The pleas were entered in the suit on trial on the fourth day of the same term at which the judgment was confessed. The plaintiff's writ of *sci. fa.* was dated and executed on the defendant on 14 February, 1820. In support of the plea of retainer the defendant produced the obligation of Putney, payable to Joseph H. Bryan, and endorsed by said Bryan to the defendant; he proved the execution of this obligation by Putney and that it was endorsed and delivered to him by Bryan for valuable consideration, before administration granted, but after the death of his intestate.

The court told the jury that the administrator might confess a judgment in favor of Cunningham and plead it in bar of the plaintiff, and that on the obligation of Putney, endorsed by Bryan, he had a right to retain. The jury found that the administrator of Putney had fully administered and had no assets to satisfy the plaintiff's demand or any part thereof. A new trial was refused and judgment rendered for the (319) defendant, whereupon plaintiff appealed.

PER CURIAM: No error is perceived in the charge of the court as contained in the record, and a new trial is consequently refused.

WEAVER v. PARISH.

Where a magistrate who had rendered a judgment on a warrant, afterwards, at the request of an individual, signed the name of that individual in his absence as security for an appeal, it was *held* that though the individual might have given authority to another to sign his name, yet that the magistrate was an unfit person for that purpose as he thereby blended the characters of party and judge.

FROM ORANGE. The defendant in this case was charged as the security on a judgment rendered by a magistrate in favor of the plaintiff, and on the trial it appeared from the testimony of the magistrate that a few days after the judgment was rendered he signed the name of the defendant as security, having been requested by the defendant so to do, and witnessed it by his own signature as a magistrate. The court was of opinion that this signature was a signature by the defendant within the meaning of the law, and so instructed the jury, who returned a verdict against the defendant; judgment having been rendered thereon plaintiff appealed.

TAYLOR, C. J. The act of 1794 requires the acknowledgment of the security to be entered by the justice and signed by the party, but it was here entered and signed by the justice in the absence of the party. The act designed to make this an authentic document equivalent to a confession of judgment since
(320) execution issues upon it without further notice. Whatever authority the party may communicate to another by a proper power the justice is an unfit organ for its exercise in thereby blending the two functions of party and judge. There must be a new trial.

HALL, J. Laws 1794, ch. 13, sec. 1, declares that when any defendant prays a stay of execution upon a judgment obtained before a justice, he shall, if required, give sufficient security, and the acknowledgment of such security entered by the justice and *signed* by the party shall be sufficient to bind him; the acknowledgment alone was not sufficient, and the justice had no right or authority to sign for him; it was his duty to take security, and if a third person had been directed to sign for the

security he must have had a written authority for that purpose. I think the rule for a new trial should be absolute.

Cited: Brickman v. Williams, 32 N. C., 127.

TROTTER v. HOWARD.

Whether a deed be fraudulent or *bona fide* is a question of fact, and possession or the want of possession is but evidence tending to establish the question one way or the other.

THIS was an action of *trover* for a negro girl, from BEAUFORT. The plaintiff showed title to the slave under a bill of sale from Thomas A. Cabarrus, executed in the town of Washington on 1 June, 1818. This bill of sale represented the property as being at the time of the conveyance in the possession of the widow of the vendor's brother at Ocracoke. It appeared in evidence that the plaintiff and Thomas A. Cabarrus lived in Washington; that the negro in suit accompanied the wife of Thomas A. Cabarrus to Ocracoke in the spring of 1817, (321) and Mrs. Cabarrus dying the fall of the same year at the house of her brother-in-law, Augustus Cabarrus, at Ocracoke, the negro remained there until Augustus Cabarrus died, when she continued with his widow until and after the bill of sale to the plaintiff. In the last of February or first of March, 1819, the plaintiff authorized an agent living at Ocracoke to take possession of the slave and send her home. The agent applied to Mrs. Cabarrus, who requested permission to keep possession of the slave until it could be ascertained whether the plaintiff would sell to her. The bill of sale was in the handwriting of the plaintiff, and the subscribing witness stated was attested by him at the request of Cabarrus, the vendor, who brought it to witness requesting him to attest it. The plaintiff was not present when it was attested nor had the witness ever seen the consideration mentioned in the bill of sale paid by plaintiff. The plaintiff offered no evidence of the payment of the consideration further than that which arose from the bill of sale itself.

The defendant claimed the negro under a sheriff's sale. He produced in evidence the record of the County Court of Carteret, showing that on 18 May, 1818, a writ issued at his instance to arrest Thomas A. Cabarrus in a plea of debt; that the writ was duly executed and returned the 3d Monday of August,

1818; that judgment was rendered against Cabarrus at the November Term following; a writ of *fi. fa.* issued and was levied on the slave on 17 May, 1819, and on 15 July, 1819, she was sold by the sheriff, and the defendant became the purchaser. The defendant did not prove the day when the writ was executed, but proved that on the day when the writ was delivered to the sheriff Cabarrus was at the same place with the sheriff. Cabarrus was much indebted at the time of the sale to plaintiff, and defendant relied upon the record of Carteret court to prove that he was a creditor of Cabarrus.

The judge instructed the jury that the record between
(322) Howard and Cabarrus was evidence against the plaintiff and proved that Howard was a creditor of Cabarrus; that it was incumbent on a purchaser in a suit where his purchase is attacked by a creditor on the ground of fraud to prove by other testimony than his deed the actual payment of a consideration, and that if he did not do so it was a strong presumption of fraud; and that if a negro was at a distance from the place of sale the vendee must go or send for it in a convenient time; that the circumstance of the slave's continuing with the sister-in-law of the vendor from the date of the bill of sale to the plaintiff until the sale by the sheriff was too long a time, and that such a possession was in law fraudulent against the present defendant.

The jury found a verdict for the defendant. A motion for a new trial was refused and judgment rendered, from which plaintiff appealed.

Ruffin for the appellant.
Gaston for appellee.

HALL, J. I will not say in this case that the bill of sale, unaccompanied with possession, was not fraudulent under the 13 Eliz., ch. 5, nor will I say that the jury ought not so to have found it; but in my opinion the decision of that question properly and of right belonged to the jury. 'Tis the province of the court to expound the law, and it is as much the province of the jury to pass upon the facts. The trial by jury is guaranteed by the Constitution of the State, and Laws 1796, ch. 4, was passed for the purpose of preventing judges from giving opinions to the jury on matters of fact. The statute of 13 Eliz., ch. 5, declares that all conveyances made with intent to defraud creditors shall be void and of no effect; and whether a conveyance comes
within the operation of that statute, whether it is made
(323) with intent to defraud creditors or not, is a question of

fact which under all the circumstances of the case properly belongs to a jury to decide. In the absence of all other testimony a jury are at liberty to say, if they think fit, that a deed not accompanied with possession is *per se* fraudulent and void. Whether it is so or not is a matter of fact and not a question of law.

If in an action of trover a demand and refusal be found by special verdict a court would not give judgment on such verdict because a demand and refusal is not a conversion but only evidence of it; so when the question is whether a deed is fraudulent or not. If a jury should find the facts that a deed was absolute on the face of it but that the vendor remained in possession of the property conveyed by it, such finding would not authorize the court to give judgment because the facts so found would not *per se* make the deed void but would be only evidence of fraud; and I must here repeat what I said in *McCree v. Houston,* 7 N. C., 450, that the law was so understood when we separated from the mother country in 1776, for in the case of *Codogan v. Kennith* (Caw., 434) *Lord Mansfield* said that the statute of 13 Eliz. said not a word about possession, but that if the vendor remained in possession after a sale of goods as the visible owner it was evidence of fraud, because goods pass by delivery.

It is under these impressions that I regret my concurrence with the opinion given in *Gaither v. Mumford,* 4 N. C., 600. Nor have I formed the opinion which I am now giving without due consideration of the case of *Edwards v. Harben* (2 Term, 587), and *Banford v. Bason* (*ib.,* 594, note A), and also *Hamilton v. Russell* (1 Cranch, 310, 316). The line of demarkation between the functions of the court and those of the jury is so strongly drawn by the Constitution of the State and the act of 1796 (the latter declaring that it shall not be lawful for a judge to give an opinion to the jury, whether a fact is proved or not) that to yield to those authorities would be to (324) transcend it.

HENDERSON, J. I accord with *Hall, J.,* for the reasons which he has given. Whether a deed be *fraudulent* or *bona fide* is a question of fact and possession, or the want of possession, is evidence tending to establish it one way or the other. To make the deed void because possession does not follow it is making it so not because it is fraudulent but because possession is wanting. It is true that the want of possession is so strong an evidence of fraud that the *evidence* is taken for the *fact* because it almost invariably follows that a conclusion of fraud is drawn by the jury as a demand, and refusal is frequently confounded with

a conversion for the same reason. But I should think that even in England, where it has been certainly decided of late that possession not accompanying the deed is *per se* a fraud and incapable of explanation, that if issue were joined whether a deed was fraudulent or not, and the jury should find that the deed was absolute, but that the possession did not accompany it, they would be told that they had found the evidence and not the fact.

It is unnecessary for me to undertake to account for the late change in the English decisions, but I apprehend a solution may be found in the great disposition prevailing in all commercial countries to make the possessor of a chattel its owner, where purchasers or creditors are concerned, of which disposition a strong evidence is afforded by the statute of James relative to the possession of goods by a trader who afterwards becomes a bankrupt. Nor do I feel myself bound by the decision of the late Supreme Court in *Gaither v. Mumford,* 4 N. C., 600, for however I may be disposed to follow precedents, and particularly those of our own Courts, yet I cannot yield my assent to a decision which converts a question of fact into a question of law, and transfers from the jury to the court that which (325) by the fundamental laws of our State and jurisprudence exclusively belongs to the jury. How the jury would have found in this case, whether or not they would not have drawn the same conclusion which was drawn by the judge, it is not my province to determine. Let a new trial be granted.

ALLEMONG and LOCKE v. ALLISON and KELLY.

When a sheriff had levied an execution on certain lands, and a *venditioni exponas*, together with a special writ of *fi. fa.* issued afterwards on the same judgment, and was levied by the sheriff on goods which, seven days prior to that time, he had seized by virtue of a *fi. fa.* issuing on a younger judgment, the court directed the proceeds of the sale to be paid in satisfaction of the *fi. fa.* which first came to hand, and was first levied.

FROM ROWAN. This was a motion to have money which had been paid by the sheriff of Rowan to the clerk of the court applied in satisfaction of an execution against one Pearson, in favor of Allemong and Locke; the motion was opposed by Allison and Kelly. The facts were these: At August Term, 1820, of Rowan court, Allemong and Locke obtained a judgment

against Pearson on which a writ of *fi. fa. issued,* tested of the same term, and came to the hands of the sheriff on 26 August, 1820, and was by him levied on the same day on Pearson's goods and chattels.

At May Term, 1820, of Rowan court, Allison and Kelly obtained a judgment against Pearson on which a *fi. fa.* issued to the sheriff, and was levied on four and a half lots in the town of Salisbury. This *fi. fa.* was returned to August Term, 1820, when a writ of *venditioni exponas* and a special *fi. fa.* issued, commanding the sheriff to sell the lots before levied on, and also to make the *residue* of the debt and costs out of the goods and chattels of Pearson. These writs of *ven. ex.* and (326) *fi. fa.* came to the hands of the sheriff on 2 September, 1820, and the sheriff levied on the goods and chattels on which he had before levied under the *fi. fa.* of Allemong and Locke. The property was advertised and sold under both writs of *fi. fa.,* and the money arising from the sale was not sufficient to satisfy both executions. The lots levied on under the first *fi. fa.* of Allison and Kelly were on the same day exposed to sale, but in consequence of certain encumbrances on them, discovered on 26 August, 1820, no purchaser could be found. The sheriff paid into the office of the clerk the money arising from the sale of the goods and chattels for the benefit of the persons who might be thereto entitled. On these facts the Superior Court of Rowan ordered the money to be applied in satisfaction of the *fi. fa.* in favor of Allemong and Locke, whereupon Allison and Kelly appealed.

Ruffin for Allemong and Locke.

HENDERSON, J. When a sheriff has seized property (327) under a *fieri facias,* and before he has completed execution another *fieri facias* comes to his hand with a prior lien or, to speak more properly, having the preferable right of satisfaction, he should satisfy the last-mentioned execution first. Without entering into a question as to the propriety of issuing this special writ of *fieri facias* (the value of the land (328) levied on not being returned by the sheriff, which appears to be the English practice) I must confess I am strongly disposed to support such a writ as an easy and convenient remedy. I think there did not come to the hands of the sheriff before he had completed the execution, that is, before he was compellable to return the writ and pay over the money, at which time the execution was certainly completed (though he might have completed it before the return by paying it over, if he thought

proper), any *fieri facias* or other process which had a preferable right to satisfaction, the special writ of *fieri facias* being a mere blank and perfectly dead until life and activity were given to it by selling the lots levied on by virtue of the original, for by the very words of the special writ the sheriff could not seize one cent's worth of property until the balance was ascertained, which could not be done until the lots were sold. Whether an alias execution can be connected with the original execution when execution creditors are competing with each other, either as to its test or delivery, whether executions bind at the common law between persons of the above description, from their test or delivery, are questions of too much moment and difficulty to be decided on an *ex parte* argument in a case which does not require it.

I therefore think that the money should be paid to Allemong and Locke; the special *fieri facias* forming no objection thereto, as being perfectly inoperative until the sale of the lots which had been levied on.

Cited: Cannady v. Nuttall, 37 N. C., 268; *Dunn v. Nichols,* 63 N. C., 110; *Motz v. Stowe,* 83 N. C., 438; *Worsley v. Bryan,* 86 N. C., 345.

(329)

DOE ON DEMISE OF LANIER v. STONE.

1. Where a levy was made by a constable under a magistrate's execution on the defendant's land and returned on the same day to the county court, which commenced its session on that day, it was *held* that this was a return "to the next court" within the meaning of the act of 1794, s. 19.

2. Where, on the return of a constable that he had levied on land, a *venditioni exponas* was moved for, and a writ issued as follows, "ordered by the Court that the lands, etc. (describing them), levied on by the constable be sold," though the order of sale and the paper called a *ven. ex.* are blended together, yet it sufficiently appears there was such an order.

3. Where a record states that a *ven. ex.* was returned on the first day of the term, satisfied by the sale of land, and it appears from the case that the sale was actually made on the second day of the term, it will be presumed that the clerk made such entry on the record with reference to the legal fiction that the sessions consist of but one day.

4. If a sheriff has levied an execution against chattels in due time, he may complete the levy by a sale after the return day, though he cannot levy after that day.

5. Where a magistrate issues an execution in the first instance against goods and chattels, lands and tenements, such execution is not in the form required by the act of 1794; but if the constable return that in default of chattels he has levied on land, it corrects the irregularity, and the informality is also cured by the sixteenth section of the act of 1794.

6. It is not necessary that a *venditioni exponas* issuing on a constable's levy should be made returnable to any given time.

7. Where a return to an execution against land is signed by a deputy sheriff, but the deed to the purchaser is executed by the sheriff, it is a ratification of the acts of his deputy, and a title thus consummated cannot be impaired by the return on the execution.

8. If the plaintiff, in a magistrate's judgment, knows that the defendant has personal property sufficient to satisfy his execution, and permits the constable to levy on land, and return no personal property to be found, moves on such return and levy for a *ven. ex.*, causes a sale and becomes himself the purchaser of the land, it is not a fraud in law, but should be left to a jury to draw their conclusion from.

THIS was an action of ejectment, tried in ROCKINGHAM Superior Court, before *Daniel, J.*

The lessor of the plaintiff exhibited in support of his title four several judgments obtained in his favor on war- (330) rants before a justice against one Ezekiel Bowen, for the sum of $218. Execution on these judgments had been stayed by the defendant, and after the expiration of the stay executions regularly issued against the lands and tenements, goods and chattels of Bowen and the defendant, which were levied on the lands of the defendant by the deputy sheriff, and the return was made in his name on the same day on which the levy was made, viz, 27 February, 1809. The County Court of Rockingham, to which the executions were returned, commenced its session on 27 February, 1809, and at that term on motion the land levied on was condemned and ordered to be sold to satisfy the plaintiff's judgments. A writ accordingly issued from Rockingham County Court in these words, "Ordered that so much of the lands of Ezekiel Bowen and Burgess Stone already levied on by the constable be sold," etc. The sheriff advertised the land forty days, and exposed it to public sale in the court yard on the second day of the succeeding court, in May, when the lessor of the plaintiff became the purchaser and obtained the sheriff's deed.

It appeared in evidence that both Bowen and the defendant had at the time of the levy by the constable on the defendant's land personal property sufficient to have satisfied the executions,

and that the lessor of the plaintiff well knew their situation and circumstances.

The presiding judge instructed the jury that if Bowen or Stone, or either of them, had any personal property to be found it was the duty of the constable to levy on that and expose it to sale, and if it did not produce sufficient to satisfy the executions then he should levy on the land, and the magistrate should return it to court. etc.; that if they believed that Lanier, knowing that Bowen and Stone had personal property sufficient or nearly so to satisfy his executions, had permitted the constable to
(331) levy on the land and return "no personal property to be found"; had moved the court for a condemnation of the land, taken out a writ of *ven. ex.*, caused a sale of the land and become himself the purchaser, it amounted to a *fraud in law* and the lessor of the plaintiff could not recover. The jury found a verdict for the defendant. Plaintiff moved for a new trial on the ground of misdirection in matter of law, and taking nothing by his motion judgment was rendered, from which he appealed.

Gaston for plaintiff.
Ruffin for the defendants.

TAYLOR, C. J. A verdict was found in this case for the defendant, and a motion for a new trial made on the part of the plaintiff on the ground of misdirection; this was over-
(332) ruled and he has appealed. The proceedings which were had before the justice and in the county court under which the plaintiff derives his title are made part of the record, and several exceptions are made to them which it is first necessary to examine, since if it shall appear that the plaintiff's title is legally defective it would be worse than useless to award a new trial.

The first exception is that the levy on the land bears date 27 February, 1809, and that the judgment and levy were returned to the county court on the same day, which was the first day of the session, in violation of the act of 1794, sec. 19, which requires the return to be made to the next court of the county. But an attentive view of the act will show that its design was to give the plaintiff as quick a remedy against the land as could be had consistently with the ceremony it prescribes of obtaining an order of sale from the court, and to avoid the intervention of a session, or the day of a session, between the levy and the return to court. The proceeding is *ex parte* in its nature, the defendant having no day in court, and no possible inconvenience can arise from returning the levy during the sessions on one

day of which it may happen to have been made; it is the *first* court after the levy is made, and the meaning of the law is the next court when there is an opportunity of making the return. On the other hand to pass over the sessions because a levy was made on one day of it might operate as an injurious delay to a plaintiff whose judgment may have been already stayed, as it was in this case, for six months, and might further have a tendency to perplex titles by dormant liens. It therefore seems to me that the law would not be rightly construed unless February sessions were considered the next court in relation to this levy.

It is objected in the next place that there was *no order of sale.* But an inspection of the record will show that there was an order of sale. A *venditioni exponas* was moved for by (333) the plaintiff's attorney, which was granted by the court, and then a writ issued in the following words, "Ordered by the court that so much of the lands of Ezekiel Bowen and Burgess Stone already executed by the constable be sold," etc. The order of sale and the paper called a *venditioni exponas* are blended together, but the order of sale was nevertheless made and the clerk of the county court certifies that the transcript is a copy of the proceedings had in that court, from which it may be concluded that the *venditioni exponas* was first entered on the minutes and a copy then issued to the sheriff to authorize him to sell.

The proceeding might have been more formal, but it is right in substance.

It is said that the *venditioni exponas* was returned on the first day of the session and the sale took place afterwards, whereby it is void. With respect to an execution against chattels if a sheriff has levied in due time he may complete the levy by a sale after the return day, though he cannot levy after that day; whether he may sell land after the return day, a levy being made before, is a question not necessarily presented in the case and one on which I give no opinion. The return of the execution is collected from the record which states it to have been made on the first day of the session, and that it was returned satisfied by the sale of land. Is this true or not? If it be true the sale was within time, for the day on which an execution is returnable is the utmost time allowed by the law to execute it. But the case states that the sale was made on the second day of the court, and assuming that to be the fact it is impossible that an execution could have been returned on the preceding day, satisfied by a sale of land which had not then taken place. The fair and unavoidable conclusion therefore is that the entry was so made by the clerk in compliance with the fiction that the sessions con-

sist of one day, and that whatever is transacted during
(334) the session is referred to the first day of it in legal contemplation; in strictness an execution is returnable the first day of the sessions, though there is no act of Assembly which makes it imperative on the sheriff to return it on that day. It is true that the plaintiff may call upon the sheriff and obtain a rule against him to return his writ, but if he fails so to hasten him it is understood by every one that the return of an execution during the session is sufficient; and on whatever day it is made it is constantly and uniformly in legal parlance referred to the first day. I will go one step farther and say that the practice of selling land upon execution after the first day of the sessions has prevailed so extensively and for so great a length of time that to call it now in question would shake a very large proportion of the titles in the State.

Another exception is that the execution is *not directed.* The answer is, the warrant has the usual direction, and the execution being on the same paper has virtually the same direction, viz, "to any lawful officer," etc.

It is further objected that the execution of the justice is issued against goods and chattels, lands and tenements, whereas it ought to have issued against the *goods* only, according to the act of 1794. The execution is certainly not in the precise form required by that act, but the return of the constable corrects the irregularity and renders it harmless. By his return he has done not so much as the execution required him to do, but only what the law directed, viz., to levy upon land in default of chattels. Allowing, however, all possible strength to these objections they are informalities merely, and cured by section 16 of the act of 1794.

Another exception to the proceedings is that the execution under which the land was sold is not made *returnable to any given time.* It is, however, as a matter of course, returnable at the next sessions, and being merely an authority to the sheriff to
sell, he might be called upon to show how he had exe-
(335) cuted it. The reason of the different rules applicable to the *capias* in *mesne* process and a *capias* in *execution* shows that it is not essential to its validity that a return day should be specified in the writ.

In *mesne process* if a term be omitted the writ is void in all actions personal, and the sheriff shall not be charged, because the party not having a day in court as he ought by the return of the writ may be injured in the meantime.

But in *executions* a *ca. sa.* omitting a term is not void, for the party is not to have a day in court; his cause is at an end, and

he must be in prison whether the writ be returned or not, nor is it necessary it should be returned (2 Salk., 700).

The remaining objection is that the return on the execution is signed by the *deputy sheriff*. The answer to this is that the deed was made by the high sheriff who can take notice of the act of his deputy in selling the land and ratify it by making a title to the purchaser; a title thus consummated cannot be impaired by the return on an execution. *Smith v. Kelly,* 7 N. C., 507, was stronger, for there the deed was by the sheriff to one person, whereas the return stated that a different person became the highest bidder.

As to the objection made to the plaintiff's title at the trial on the score of *fraud,* the various circumstances adduced in evidence and relied upon were proper to be considered by the jury, and whatever conclusion they might draw from them ought to remain undisturbed by the court. It is possible that the jury were convinced by that evidence the plaintiff's title was founded in fraud; and could we be assured that the conclusion was thus derived we must let the verdict stand. But as it is also possible that the jury were influenced by the instruction of the court to find against the plaintiff it is our duty to consider whether such instruction was correct in point of law. And I cannot subscribe to the doctrine that the plaintiff *knowing* there was personal property sufficient or nearly so to satisfy the execu- (336) tion, and the plaintiff's permitting the constable to return that there was no personal property and to levy on the land, etc., amounts to a fraud in law. I think there must be something beyond a knowledge and permission of those things; there must be a direction or active interference to make the plaintiff a party to the fraud. The officer is not the agent of the plaintiff but of the public, and is responsible to any one who may be injured by his disobedience of the law prescribing his duty. It is not sufficient to invalidate the plaintiff's title that he knew there was personal property sufficient, and with this knowledge passively allowed the sale of the land, but he must have been an actor and participator in the irregularity of the officer. To render a purchase at a sheriff's sale, though he be the plaintiff in the execution, chargeable with the irregularity of the officer because the purchaser knew and permitted it, is to extend the doctrine beyond the cases cited, in both which the attorneys sued out irregular writs and procured the wrong to be done. Finally, if it had been left to the jury to consider from all the circumstances in this case whether Lanier had taken an active share in the irregular levy and sale, the Court could not have

interfered with the verdict; but for the reasons before given I think there ought to be a new trial.

Cited: Forsythe v. Sykes, 9 N. C., 56; *Governor v. Bailey,* 10 N. C., 465; *Tayloe v. Gaskins,* 12 N. C., 296; *Mordecai v. Speight,* 14 N. C., 429; *Collins v. Wall, ib.,* 458; *Grandy v. Morris,* 28 N. C., 436; *Brooks v. Ratcliff,* 33 N. C., 326; *Smith v. Bryan,* 34 N. C., 16.

(337)

DOE ON DEMISE OF PRITCHARD et als. v. SAWYER.

EJECTMENT. From PASQUOTANK. The lands in controversy in 1790 descended, on the death of one James Pritchard, to his brothers, Enoch, Elisha, David and John. Of these, Enoch and Elisha were lessors of the plaintiff, and the other lessors were the children and heirs at law of John and David, both of whom died intestate. David Pritchard came of age in 1803, and died in 1817, leaving his heirs at law infants, and they are still such; John came of age in 1805, and died in 1807, leaving his heirs at law infants, and they still remain infants. Enoch came of age in 1808, and Elisha in 1811. The declaration in this case was dated 21 October, 1819.

The defendant, and those under whom he claimed, had been in actual possession of the lands described in the declaration, claiming them under deeds of conveyance, from 10 June, 1794, up to October, 1819.

On these facts there was a verdict and judgment in the court below for the defendant, and plaintiff appealed.

TAYLOR, C. J. The defendant, and those under whom he claims, have been in actual possession, under a color of title, of the land in controversy from June, 1794, to October, 1819, a period of more than twenty-five years. David came of age in 1803, and lived fourteen years afterwards. The statute therefore ran against him, and his heirs are consequently barred.

John came of age in 1805, and lived two years; so that, the statute began to run against him, and completed the bar against his heirs in 1812. The statute had run out against Enoch in 1815, and against Elisha in 1818, about six months before (338) the date of the declaration in ejectment. All the lessors

have therefore lost their right of entry, and the judgment must consequently be affirmed.

HALL and HENDERSON, JJ., concurred.

THE EXECUTOR OF LYNCH v. ASHE.

1. Under the act of 1784, relative to the transfer of slaves, a transfer by parol is good as between the original parties and volunteers under them, and is void only where creditors and purchasers are concerned.
2. Under the act of 1806, three years' adverse possession of a slave only barred the remedy of the legal owner, but gave no title to the possessor.

THIS was an action of *detinue* for certain slaves, tried before *Daniel, J.,* in ORANGE Superior Court, Spring Term, 1821. The defendant pleaded *non detinet,* the act of 1806, and the act of limitation. It appeared on the trial that the father of the plaintiff's testator died in March, 1781, and, shortly after, the mother of the testator made a parol gift to him of the negro woman, for whom and whose increase the action was brought. The plaintiff's testator took the negro woman into his possession, but afterwards loaned her to his mother. In 1793, his mother intermarried with one Hargrove, an old servant in the family of Major Strudwick. The mother, during her widowhood, always stated the slave and her children to be the property of her son, plaintiff's testator, as did also Hargrove after his marriage, and at one period Hargrove sent them home to Lynch, but soon after they were sent back. In 1804, Hargrove and his wife separated; he removed to a tract of land which he obtained from Mr. Strudwick, carrying the slaves in dispute with him. On (339) 10 August, 1805, Hargrove gave Mr. Strudwick a bill of sale for the slaves, and at the same time Strudwick conveyed to Hargrove an estate for life in a tract of land, by deed, in which it was mentioned that Hargrove was to retain possession of the slaves during his life. In October, 1805, Hargrove reconveyed his interest in the land to Strudwick. It was proved that Strudwick had paid some small debts for Hargrove and expressed a wish to have the use of the slaves while Hargrove lived, saying that at his death they should go to the rightful owner. In March, 1815, Hargrove died, and plaintiff's testator obtained possession of the slaves, and kept them about a month, when

Strudwick again obtained possession of them. The defendant claimed as a distributee under Strudwick. Lynch died, and his executor brought this action within three years next after Strudwick got the slaves out of the possession of Lynch.

The court instructed the jury that (without deciding whether the purchaser intended to be protected by the act of 1784 was one from the donor or might be from any person claiming under the donor) it was at least necessary to show that Strudwick was a *bona fide* purchaser for a valuable consideration; that a *colorable consideration* would not destroy the plaintiff's title; that if they believed from the evidence that Hargrove's possession was not an *adverse possession,* it availed the defendant nothing; and that the act of 1806 did not merge or destroy the plaintiff's title, although Hargrove or Strudwick had the negroes in adverse possession upwards of three years after that act went into operation, because Thomas Lynch, the plaintiff's testator, had regained the possession in 1815 and kept them in his undisturbed possession for one month, or thereabouts, at which time the title and possession were united in Lynch, and as this was in three years next before the commencement of the action, the act of limitation did not protect the defendant. The jury found a verdict for the plaintiff. A motion for a new trial was
(340) moved for, on the ground of misdirection as to the law.

The motion was overruled, and from the judgment rendered defendant appealed.

HENDERSON, J. I am of opinion that the law was correctly laid down by the presiding judge in his charge to the jury; for, however much we may now regret that the act of 1784 was not construed as a statute of frauds, avoiding all parol gifts of slaves, as well between the parties as where creditors and purchasers were concerned, it is now too firmly settled by a uniform train of decisions to be even questioned, that, as between the parties, and volunteers under them, the transfer is good, and that it is void only where creditors and purchasers are concerned; nor can we adopt the expedient, pressed upon us from the bar, that we would in this case give to the act what we consider to be its true construction, as there has been no decision that a fraudulent or colorable purchaser was not within the prohibition of the act. This would, to our understanding, be something like a subterfuge. The protection of the act is afforded to a purchaser on account of his merits—not his demerits. We cannot perceive the situation of a fraudulent and colorable purchaser to be better than that of the person from whom he purchased. Can title be strengthened by adding a fraudulent link to the chain? It ap-

pears to me that, if either is to be preferred, it is the original party. If Strudwick, therefore, was a fraudulent or colorable purchaser (and this fact was properly left to the jury), he and his voluntary representatives stand in the situation of the husband, Hargrove, from whom he purchased; and, as the parol gift, if made, was binding upon Hargrove, it is binding on the defendant Ashe, who is a volunteer under Strudwick. The judge was also correct in informing the jury that a possession, to be aided by the statute of limitations, must be adverse. He was correct also in stating that three years' adverse possession since the act of 1806 did not give a title, but only barred the remedy. *Skinner v. Skinner,* 7 N. C., 535. And as the case of (341) *Skinner v. Skinner* is mentioned, I take the opportunity of retracing an erroneous *dictum* which fell from me in that case. I there stated that three years' adverse possession would protect a plaintiff in the action of *replevin,* because the defendant became the actor in the suit. In this I was wrong. The adverse possession for three years in the plaintiff barred the defendant's *action,* not his *right;* and when he, in the action of replevin, justified his taking under his title, it was no answer to say that his action was barred, for the justification rested on his *title,* and not on his *right of action.* This *dictum* did not affect the case of *Skinner v. Skinner,* nor does it the present one.

BY THE COURT. In this case the rule for a new trial must be discharged and judgment entered for the plaintiff.

Cited: Palmer v. Faucett, 13 N. C., 242; *Bell v. Culpepper,* 19 N. C., 21.

SMITH and STANLY v. NIEL et als.

1. The circumstance of possession not accompanying the conveyance of a chattel is not *per se* fraud, though it may be evidence of it.
2. Whether a conveyance comes within the operation of stat., 13 Eliz., c. 5—*i. e.*, whether it is made with an intent to defraud creditors or not is a question of fact and not of law.

THIS was an attachment, sued out by the plaintiffs against Niel, and levied on a negro slave. From BERTIE. Wood, who claimed the slave, interpleaded, and an issue was directed to determine in whom the property in the slave was. It appeared in evidence, among other matters, that on 30 June, 1819, Niel

executed an absolute bill of sale to Wood for the negro, but that the possession of the slave did not accompany the convey-
(342) ance, but remained continually in Niel until ten days before this attachment issued, when Niel absconded, leaving the negro. On these facts the presiding judge instructed the jury that, if there was nothing but the absolute conveyance without possession, that, in point of law, was fraudulent against creditors. The jury found that the slave was the property of Niel, and from the judgment rendered, pursuant to this verdict, Wood appealed.

PER CURIAM: We will not say that the bill of sale, unaccompanied with possession, was not fraudulent, under the 13 Eliz. Ch., 5; nor will we say that the jury ought not so to have found it; but, in our opinion, the decision of that question, properly and of right, *belonged to the jury.* It is the province of the court to expound the law, and it is as much the province of the jury to pass upon the facts. The trial by jury is guaranteed by the Constitution of the State; and the act of 1796, ch. 4, was passed for the purpose of preventing judges from giving opinions to the jury on matters of fact. The statute, 13 Eliz. Ch., 5, declares that conveyances made with intent to defraud creditors shall be void and of no effect; and, whether a conveyance comes within the operation of that statute, whether it is made to defraud creditors or not, is a *question of fact,* which, under all the circumstances of the case, properly belongs to a jury to decide. In the absence of all other testimony, a jury are at liberty to say, if they think fit, that a deed not accompanied with possession is, *per se,* fraudulent and void; whether it is so, or not, is a matter of fact, and not a question of law. If, in an action of trover, a demand and refusal be found by special verdict, a court would not give judgment on such verdict, because a demand and refusal is not a conversion, but only *evidence* of it. So, when the question is whether a deed is fraudulent, or not, if a jury should find the facts that a deed was absolute on the face of it, but that the vendor remained in possession of the property con-
(343) veyed by it, such finding would not authorize the court to give judgment, because the facts so found would not, *per se,* make the deed void, but would only be evidence of fraud. And we must here repeat what was said in *McRee v. Houston,* 7 N. C., 450, that the law was so understood when we separated from the mother country in the year 1776; for in *Codegan v. Kenneth,* Cowp., 434, *Lord Mansfield* said that the statute, 13 Eliz., said not a word about possession, but that if a vendor

remained in possession after a sale of goods as the visible owner, it was evidence of fraud, because goods pass by delivery.

Nor have we formed the opinion which we are now giving without due consideration of *Edwards v. Harbin,* 2 Term, 587, and *Bamford v. Baron, ib.,* 594, note A, and also *Hamilton v. Russell,* 1 Cranch, 310, 316. The line of demarkation between the functions of the court and those of the jury is so strongly drawn by the Constitution of the State and the act of 1796 (the latter declaring that it shall not be lawful for a judge to give an opinion to the jury, whether a fact is proved or not), that to yield to those authorities would be to transcend it. The rule for a new trial is therefore made absolute.

(344)

STATE v. M'LEOD.

1. The testimony of a witness taken down in writing by a magistrate cannot, on the trial of the same matter in court, be used as evidence in chief, particularly when the witness is present, but may be used to show contradictory statements made by him.
2. Misconduct on the part of a jury, to impeach their verdict, must be shown by other testimony than their own.

INDICTMENT for perjury, tried before *Paxton, J.,* at the Spring Sessions, 1821, of SURRY. The perjury was charged to have been committed in making oath before a magistrate to obtain a warrant against one Smith for feloniously taking the horse of the defendant. The horse had been taken out of the defendant's stable after dark, and on the next day was in the possession of Smith, who was a constable, and had levied on the horse by virtue of executions in his hands against the defendant. Smith advertised the horse publicly for sale, and the defendant saw the advertisement. On the oath of the defendant, one Campbell, a magistrate, issued a warrant against Smith, on which he was apprehended, and, on examination by Campbell, discharged. The defendant was then cautioned by one Simonton of the danger of taking such oaths as he had taken. Some time afterwards, the defendant applied again to Campbell for a warrant against Smith. Campbell refused to issue it, advised the defendant to be cautious, and at the same time told him that he thought Smith committed a felony in taking the property in a clandestine manner, by night; but that, if he wished to be certain, it was advisable to go and consult the solicitor for the State in that circuit.

The defendant went away, was absent two days, returned and told Campbell that the solicitor was not at home (as was the fact), but that he had consulted Mr. Connor, an attorney,
(345) and again requested a warrant, which Campbell still refused to grant. He, however, wrote one for the defendant, and declined putting his signature to it. The defendant then applied with this warrant to another magistrate, Morrison, for his signature. Morrison at first refused, until the defendant assured him that he had consulted Mr. Connor, and procured him to write the warrant, to which he requested Morrison's signature. Morrison then took the oath of the defendant to the warrant, which was, in substance, the same with the former one, and signed it. On this evidence the jury found the defendant guilty, and a motion for a new trial was made, on two grounds—(1st) the examination of Smith, the prosecutor, taken down in writing, by the magistrate, on the return of the second warrant, was rejected by the court, on the ground that Smith was present and might be sworn; (2d) misconduct on the part of the jury, as proved by their affidavits, which the court refused to hear, on the ground that their verdict must be impeached, if at all, by testimony other than their own.

The court refused the new trial, and passed sentence, from which defendant appealed.

HENDERSON, J. The inferences to be drawn from the opinions of Campbell, the magistrate; from Connor, the attorney, and the attempt to consult the solicitor for the circuit, are all questions of fact, on the point whether the oath was corrupt; and these circumstances were all properly left to the jury. The examination of the defendant in the warrant and prosecutor here would have been proper evidence to impeach the testimony given by him on his trial, as any other statement made by the witness on the same subject would be, for the purpose of showing a contradiction; but it is not evidence in chief that is to show the truth of the facts contained in the examination; and it is more clearly so, if possible, when the witness himself was in court. In this
(346) case it appears that it was offered as evidence in chief; it was therefore properly rejected. As to the misconduct of the jury, it has been long settled, and very properly, that evidence impeaching their verdict must not come from the jury, but must be shown by other testimony. We can therefore perceive no grounds for a new trial; and

BY THE COURT: It is ordered that the motion for a new trial be overruled, and that the Superior Court of law for Surry

County proceed to judgment against the defendant agreeably to this opinion and according to law.

Cited: S. v. Taylor, 61 N. C., 513; *S. v. Smallwood,* 78 N. C., 563; *S. v. Grady,* 83 N. C., 646; *S. v. Royal,* 90 N. C., 755; *Jones v. Parker,* 97 N. C., 34; *S. v. Bailey,* 100 N. C., 533; *S. v. Best,* 111 N. C., 643, 644.

STATE v. HOWORTH.

By an act of the Legislature passed in 1810, three commissioners were appointed, whose duty it was made to examine a certain turnpike road and make report of its state and condition at each county court, and if from their report it appeared that the road was not kept in good order, a prosecution was to be instituted against the proprietors. By an act of 1819, the power of appointing the commissioners was vested in the county court, their number reduced to two, and it was made part of their duty to give information to the grand jury of the Superior Court when the road was out of repair. On an indictment against the proprietors, the commissioners under the act of 1819, who reported the road to the grand jury as being out of repair, may be permitted to prove the state of the road, notwithstanding the act of 1810 declares that the proprietors shall not be indicted except upon the view and report of the commissioners appointed by the act of 1810, for by the appointment of those under the act of 1819 those under the former act ceased to exist, and yet the proprietors must be liable as the convenience of the public and their interest in a highway cannot be surrendered by implication.

THE defendant was indicted as one of the proprietors of the turnpike road, leading from the Tennessee line, by the Warm Springs, to Asheville, in the county of BUNCOMBE. (347) William Brittain and Henry Dryman were appointed commissioners, under and by virtue of an act of Assembly, passed in 1819, and, as commissioners aforesaid, reported to the grand jury said road to be out of repair at the time set forth in the indictment, and on the trial below they were sworn and offered as witnesses to prove the charge. It was objected by the defendant that the evidence was inadmissible, because that he could be indicted as overseer and proprietor of said road no otherwise than upon the view and report of commissioners appointed by an act passed in 1810. The objection was overruled, and the de-

fendant convicted. A new trial having been refused, and sentence pronounced, the defendant appealed.

The case was submitted without argument, and

TAYLOR, C. J., delivered the opinion of the Court: The question presented by the record (for the case has been submitted without argument) is whether the defendant has been properly convicted of not keeping the road in repair, upon the evidence of the commissioners appointed under the act of 1819, ch. 110. The objection to the conviction turns upon this: that by the act of 1810, ch. 35, three commissioners were appointed, whose duty it was made to examine the road and make report of its state and condition at each County Court; and if it appeared from their report that the road was not kept in good order, then a prosecution was to be instituted against the proprietors. By the act of 1819, above referred to, the power of appointing the commissioners is vested in the County Court of Buncombe, the number reduced to two, and their duty prescribed—amongst other things, of making information to the grand jury of the Superior Courts, when the road is out of repair. Upon this verdict it must (348) be taken for granted that all the allegations in the indictment necessary to show the defendant liable under the two acts were supported at the trial, and that Brittain and Dryman were duly appointed commissioners. If the defendant's objection were to prevail, this unjust consequence would follow: that he might avail himself of the extension of the charter granted by the act of 1819, and yet be irresponsible for the neglect of keeping the road in order; for there would be no persons empowered to make the view and give information of the condition of the road, since the commissioners appointed by the act of 1810 must have ceased to exist, as such, when others were appointed according to the act of 1819. What is to become of the public interest in the meantime? Was it the meaning of the charter to sacrifice that altogether to the emolument of the proprietors, or to combine both objects together? That the road should be kept in order was a duty of paramount obligation, which the public had a right to enforce; and if the regulations made by the first act should appear ineffectual for that end, the Legislature might change them from time to time. If no commissioners ever had been appointed, the proprietor of the road was nevertheless liable; for the convenience of the public, and their interest in a highway, cannot be surrendered by implication. The evidence was admissible in every view, and the conviction is right.

(349)

STATE v. ROBERTS.

A killing on sudden quarrel, to avoid great bodily harm, places a man under circumstances amounting to legal provocation, and though such circumstances cannot justify or excuse the act, yet on account of human frailty the homicide is extenuated, and is but manslaughter.

THIS was an indictment for the murder of Hugh Allison, from RUTHERFORD, and the facts were these: The prisoner and one Freeman came to the house of the deceased, and at length commenced shooting at a mark, for a wager, with the prisoner's rifle. The deceased soon joined in the amusement with his own gun; and, after concluding their sport, and drinking together, the deceased went into his house, leaving the prisoner at the place where they had been shooting. Some time afterwards, the prisoner came to the door of the house and proposed to his brother, who was in the house, to shoot with him for a wager. The wife of the deceased then spoke to the prisoner and ordered him to go away, telling him that he had been the cause of trouble enough already; that he knew she did not allow him to come there, and at the same time put her hand upon his forehead and pushed him. He refused to go, and she then told him, if he did not go, she would throw water in his face; he still refused, when she did throw water and struck his hat, and, according to the statement of some of the witnesses, threw a part in his face. She then threatened, if he did not depart, to scald him, and accordingly poured some water from a kettle, and, as she returned to the door, the deceased told her to let him alone, and, as she stated, she threw the water out at the door, by the side of the prisoner, without touching him; but, according to the testimony of other witnesses, a part of it fell on his breast. At the instant of her throwing the water, the prisoner placed one of his (350) feet within the door, and struck her a violent blow on the breast with his rifle, which, passing down her body, lodged on her left thigh. She sank down on the floor and fainted. At this moment the deceased exclaimed, "Lord! how pale Sally is!" and immediately, in company with one Dunn, stepped out of the door and advanced upon the prisoner, without speaking. The prisoner told them twice or thrice to stand off or he would shoot, but they still continued to advance and the prisoner to retreat to the edge of the road, a distance of nineteen or twenty paces from the door, when he fired and gave the mortal wound. At the time the gun was discharged, the deceased was endeavoring to catch the muzzle. It was in proof that the deceased said, after he was shot, that he intended to have taken the gun from the prisoner

and to have beaten him, and shortly before his death he said he was convinced the prisoner intended to kill him when he shot the gun. The deceased was a stout, athletic man; when irritated, he was violent, and by some deemed dangerous, and these facts the prisoner was well acquainted with.

The judge instructed the jury that, if they considered the facts deposed to, as proved by the evidence, in point of law, the defendant was guilty of murder, and not of manslaughter; that the stroke given to the wife of the deceased with a rifle, under such circumstances, manifested a malicious and revengeful disposition, and, the homicide having ensued from and in consequence of the stroke given by the defendant to the wife of the deceased, he was answerable for the consequence.

The jury found the prisoner guilty, and a motion for a new trial having been refused, sentenced of death was pronounced, whereupon the prisoner appealed.

Attorney-General for the State.
Seawell (by request of the court) for the prisoner.

(351) HENDERSON, J., delivered the opinion of the Court.

Murder is a homicide committed with malice aforethought. Manslaughter, as far as this case renders a description necessary, is homicide committed under the influence of sudden passion, for the law pays such regard to human frailty as not to put a hasty and a deliberate act on the same footing, with regard to guilt. So, also, if a man be greatly provoked, as by pulling his nose, or other great indignity, and he *immediately* kills the aggressor, this is manslaughter, and not murder. Manslaughter, therefore, on a sudden provocation, differs from excusable homicide, *se defendendo,* in this, that in the one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other, no necessity at all, being only a sudden act of revenge, and this is manslaughter. Place the wife and the prisoner in the same grade, as to the commencement of the quarrel and affray (and she certainly commenced it, and by her rudeness forfeited the protection due to her sex), and, had she died of the blow, the prisoner would have been guilty of manslaughter, and not murder. The husband then places himself in her situation, and commenced an attack on the prisoner, aided by Dunn; the prisoner retreats, and tells them to stand off, having the gun in his hands from the first; they approached so near as to get hold of the muzzle of the gun, and the prisoner discharges it and inflicts the mortal wound. If the foregoing definitions of murder and manslaughter be right, and they are taken

from Justice Blackstone's Commentaries (and I think there cannot be a doubt of their correctness), this is a killing upon a sudden quarrel and to avoid great bodily harm; for, if we are to take the acts as evidence of the intent, the conduct of the deceased and Dunn show their object to have been to chastise and beat the prisoner, and he was not bound to submit to a whipping; he was (to use an expression of Beville) in a state of legal provocation, which did not justify or excuse the act, but, on account of human frailty, extenuated the homicide to manslaughter. (352) There is but one possible view by which the transaction can be made to be murder; it is this: the prisoner had inflicted an apparently dangerous wound; it was the duty of those present to arrest him, and it was his duty to submit, if required to do so. If this had been the intent of the deceased and Dunn, and they had so declared it, and acted in such a manner as to cause it to be believed, and, to avoid the arrest and not a beating, the mortal wound had been inflicted, it would have been murder and not manslaughter; but it was not put in this manner by the presiding judge. The jury were told that the evidence, if believed, proved the offense of murder, without any regard to the question, what was the object of the deceased and Dunn in pressing on the prisoner, and what, from their conduct, would a person placed in the prisoner's situation conclude to be their motives? I think the jury was improperly instructed, and that there should be a New Trial.

Cited: S. v. Quick, 150 N. C., 824.

STATE v. CAIN and PRICE.

When a bill is found by the same grand jury that made the presentment upon the testimony of some of their own body, not sworn in court as witnesses, such proceeding is in opposition to the act of 1797, c. 2, s. 3, and the bill must be quashed.

THIS was an indictment under the act of Assembly against fornication and adultery, from MARTIN, and was founded upon a presentment of the grand jury. The *bill* was found by the same jury that made the presentment upon the testimony of some of their own body, none of whom were sworn in court as witnesses. These facts were admitted by the prosecuting officer, and the court, on motion, quashed the bill. The prosecuting (353) officer appealed to this Court.

The case was argued by the *Attorney-General* for the State.

HALL, J. The act of 1797, ch. 2, sec. 3, declares "that no person shall be arrested or charged before any court on a presentment made by a grand jury, before the attorney acting for the State shall prepare a bill and the bill be found by the grand jury to be a true bill." It is the province of the grand jury to make presentments from the knowledge of any one of their own body or from the testimony of any witness who may give evidence before them, having been sworn in court and sent to them by the court, if they think fit so to do; and I think the proper construction of the act is, that, on every presentment that is made, a bill of indictment shall be framed, and the witnesses in support of the bill shall be *sworn in court* and *sent* to the grand jury, that they shall be examined *de novo,* and the grand jury shall find the bill a true bill, or not, as they shall judge right from that examination, without regard to any information they might have been possessed of when they made the presentment. I think this is the true construction of the act. If so, the bill in question, it is admitted by the attorney for the State, was not so found, and for that reason ought to be set aside as a nullity and judgment entered for the defendants.

TAYLOR, C. J., and HENDERSON, J., concurred.

Cited: S. v. Roberts, 19 N. C., 542; *S. v. Barnes,* 52 N. C., 21; *S. v. Horton,* 63 N. C., 596; *S. v. Allen,* 83 N. C., 681; *S. v. Hines,* 84 N. C., 811; *Scroggs v. Stevenson,* 100 N. C., 540, 541, 542; *S. v. Harrison,* 104 N. C., 732; *S. v. McBroom,* 127 N. C., 536; *S. v. Sultan,* 142 N. C., 573.

(354)

STATE v. BRICKELL.

A caption of an indictment forms no part of the indictment, and therefore it is not a ground for arresting judgment, that the indictment does not show in its caption that it was taken before a court in North Carolina. While the indictment stood on the records of the court below, it appeared to be an indictment of that court, and when sent to this Court, the caption of the record of which it is a part, officially certified, renders it sufficiently certain.

THIS was an indictment for an assault and battery, tried in HALIFAX Superior Court, on which the defendant had been con-

victed. A motion was made in arrest of judgment, for that it did not appear, either in the caption or any other part of the indictment, that it was taken before any court in the State of North Carolina.

The caption and commencement of the indictment were as follows:

"HALIFAX—*ss.*

"Superior Court of Law for the County of Halifax.

"Fourth Monday after the fourth Monday of March, 1820.

"The jurors for the State, upon their oath, present, that William Brickell, yeoman," etc.

The case was argued by the *Attorney-General* for the State, and submitted on the part of the defendant.

HALL, J. The Clerk of the Superior Court of Law for the County of Halifax and State of North Carolina certifies the record sent up in this case as a record of that court, and that record has the following caption: "State of North Carolina, Halifax County, Superior Court of Law." He then sets forth the indictment, commencing in these words: "Halifax County, Superior Court of Law," etc. "The jurors for the State, upon their oath," etc. It is insisted that the judgment should be arrested, because it is said that in the caption of the indictment it is not stated that the county of Halifax is in the State of North Carolina. The objection surely cannot be sus- (355) tained, because a caption to an indictment is no part of it (Chitty Crim. Law, 326; 1 Saunders, 250d, N. 1), nor is it necessary that it should have any, because the caption to the record clearly shows in what court, county and State the indictment was found. While the indictment remained on the record of Halifax Court, it appeared to be an indictment of that court; when sent into this Court, the caption of the record (of which it is a part) is a copy of the style of the court at which it was found, and renders it thereby sufficiently certain. I think the reasons in arrest of judgment should be overruled.

TAYLOR, C. J., and HENDERSON, J., concurred.

Cited: S. v. Arnold, 107 N. C., 861.

STATE v. SAUNDERS et als., Securities of Sarah Jeffreys.

Practice—Costs.

This case was heard before *Daniel, J.,* at the Spring Term, 1821, of CASWELL Superior Court, when it appeared that Sarah Jeffreys had been convicted of murder, and sentence of death had been pronounced, with judgment against her for the costs. The prisoner appealed to the Supreme Court and gave the defendants as securities to the appeal bond. The Supreme Court overruled the prisoner's exceptions, and final judgment was pronounced by Caswell Superior Court. The Governor afterwards pardoned the prisoner, and she took the insolvent's oath. *Vide, S. v. Jeffreys,* 7 N. C., 480. The defendants were charged with the costs, and contended they were only liable for the costs
(356) of the Superior Court. The solicitor-general contended they were liable for the costs of the Supreme Court and the costs of the Superior Court, including prison charges. The court decided that the defendants were liable for the costs of the Superior and Supreme Court, but that the prison charges were not to be taxed in the bill of costs, and rendered judgment against the defendants accordingly, from which the solicitor-general appealed.

HENDERSON, J., delivered the opinion of the Court. This Court passes no judgment in criminal cases, except for the costs expended in this Court. It acts directory to the court below, and its power to award costs expended here arises only from construction. Caswell Superior Court will therefore enter up judgment for all costs, except the costs of this Court. The jailer's fees form no part of the costs, consequently they are not to be included in the judgment.

Cited: S. v. Patterson, 27 N. C., 89.

(359)

EDWARDS v. MASSEY.

(IN EQUITY.)

1. The affidavit on which an order of sequestration is awarded should state positively the existence of the facts on which the application is grounded, or if only matter of belief, the grounds of that belief. Though a bill, deficient in matter, cannot be aided by

the defendant's answer or by proofs in the cause, yet where sufficient matter is stated, but insufficiently verified, the want of sufficient verification may be supplied by proofs or admissions.

2. The rule that courts of equity interfere by *ne excat* only in case of equitable demands, applies where money, not property, is the subject of controversy.

FROM WAYNE. The bill in this case set forth that complainant was the owner of a negro slave who had been in the possession of himself, and those under whom he claimed, fourteen years, when, by seduction or some other clandestine means, she was taken into the possession of the defendant; that an action of detinue was commenced against the defendant by this complainant for said slave, which suit is still pending, and that the defendant was in prison at the time of filing the bill, he having been surrendered by his bail. The bill then proceeded to state that complainant had been informed, and verily believed, that it was the intention of the defendant to take the oath of an insolvent debtor, and, when discharged from confinement, to remove the slave beyond the limits of the State, and thereby prevent complainant from a recovery of his right; and therefore prayed that defendant might be compelled to give bond and security for the forthcoming of the slave, to abide the decision of the suit at law; and, on failure to give such bond, that the sheriff might be commanded to take the property into his possession. The bill concluded with a prayer for writs of injunction and subpœna. Writs were granted accordingly, and, defendant (360) having failed to give bond, the property went into the possession of the sheriff.

The answer admitted that the slave was in the possession of the defendant, and also the existence of the suit at law, and stated that defendant *claimed title* to the slave as administrator to his father, and believed his right to be good, both in law and equity; that defendant was imprisoned for want of bail in the suit at law, but, having afterwards given bail, was discharged. The answer positively denied any intention of removing the slave out of the State, or any declarations of such an intention.

Upon the coming in of the answer, defendant prayed that the injunction might be dissolved, and complainant moved for leave to reply to the answer and take testimony to support the allegations in the bill. The court directed the case to be heard on bill and answer only, and decreed that the injunction be wholly dissolved and the bill dismissed, with costs, whereupon complainant appealed to this Court.

Gaston for the appellant.
Mordecai for the appellee.

(363) HENDERSON, J. The affidavit on which the order of sequestration was awarded is defective, in not stating *positively* the existence of facts on which the application was grounded, or, if only matter of *belief,* the grounds of the belief, that the court might judge whether it was a rational and well-founded belief, or an idle and vain one; and, did this case stand on the bill alone, I think the sequestration should be taken off. But I am of opinion that sufficient appears from defendant's answer to support it.

By this I would not be understood to mean that a bill, *deficient in matter,* can be aided by the defendant's answer or by proofs in the cause; but where sufficient matter is stated, but *insufficiently verified,* the want of sufficient verification may be supplied by proofs or admissions.

(364) In this case, taking bill and answer together, it is admitted that the plaintiffs, and those under whom they claim, have been in possession of the slave for fourteen years, claiming title; that, by *seduction or some other clandestine means,* the defendant lately obtained possession of them; that he was lately in prison, for want of bail, in the action at law brought for the slave, and that he has since given bail. The defendant also says that he is in possession of the slave, *claiming title* as administrator of his father; but the nature of the title he does not state, nor account for his long want of possession. In the action of *waste,* the law gave the writ of *estrepement,* to prevent waste, pending the action. An action *on the case* is now most generally brought for waste, and chancery interposes to prevent waste, because of the estrepement in the common-law courts. In the case of a *taking,* the common-law courts give the action of replevin, which was, at the commencement of the proceeding, now under consideration, and, indeed, yet is, almost out of use here, as the action of waste is in England. By replevin the plaintiff was restored to the possession of the goods before trial. The same principle which induces the chancery in England to interfere in the case of waste applies here with all its force in cases of property in slaves, at least where there has been a taking by seduction or clandestine means; for such a taking, I have no doubt, will support an action of replevin; for the nature of the property is such that possession may be lost by the most vigilant owner, without there being an actual taking or the commission of a trespass.

As to the objection that courts of equity will not interfere but in cases of *equitable* demands, that is the case where *money,* not *property,* is the subject of the controversy. In money demands, the common law gives no other security than bail. It would

overleap the intention of the framers of the common law for the courts of equity to go further. Not so where property is the subject-matter; then the court of equity will interfere (365) in particular cases. This, I think, is one of those cases where it will, for the reasons before given.

BY THE COURT: Let the sequestration be sustained.

NOTE.—There were five other cases against the defendant Massey, involving facts similar to those disclosed in the foregoing case. As the decision of the first necessarily governed the whole, and all were submitted to the Court on one argument, the Reporter deems a detailed statement of all unnecessary.

Cited: Miller v. Washburn, 38 N. C., 166; *DuPre v. Williams*, 58 N. C., 99.

MARY S. BLOUNT v. EXECUTORS AND DEVISEES OF THOMAS BLOUNT.

(IN EQUITY.)

A., by his will executed in North Carolina, appointed four executors, two of whom resided in Tennessee, and devised to his nephews and nieces certain lands in Tennessee, directing his executors, previous to a division of these lands among the devisees, to raise therefrom such sum as would be sufficient to pay all his debts; the rest of his property he directed the executors to sell, and the money arising therefrom he bequeathed to complainant. On a bill filed against the executors and devisees, showing that the acting executor in North Carolina had applied a portion of complainant's residue in payment of testator's debts, and praying that the lands charged might be sold and she reimbursed; it was *held* that, as the lands were without the limits of North Carolina, no decree could be made by this Court against the acting executor here to sell those lands.

FROM EDGECOMBE. The bill set forth that the complainant was the widow of Thomas Blount, who died in 1812, having first duly made and published a will, in writing, whereby he devised to the three sons and two youngest daughters of a deceased brother all his share of certain lands in Tennessee, owned by John Gray Blount and himself, to be divided among such of the five children of his deceased brother as should be living at testator's death, with a declaration that out of said lands, (366) before any division should be made, was to be raised by his executors, in such manner as they should think best, a sum of

money equal to all the just debts of the testator, which he directed to be appropriated to the payment thereof. The rest of his property the testator, by a subsequent clause, directed his executors to sell, and the money arising from the sale thereof, together with such sums of money as might be due to him, he devised and bequeathed to complainant. The will appointed four executors, whereof two resided in North Carolina and two in Tennessee, and the bill alleged that one only of the four named, Thomas H. Blount, a resident of North Carolina, had qualified. The bill then stated that the testator was at the time of his death considerably indebted, and that the acting executor had withheld a large portion of the estate bequeathed to her in the residuary clause, and, as he alleged, applied the sum of $9,382.16 in payment of the debts of the testator; that the lands in Tennessee charged with the payment of the testator's debts consisted of many valuable tracts, and were at the time of his death fully sufficient for that purpose. The bill then complained that the executors, on various pretences, evaded the claim made by the complainant to have reimbursed as much of her legacy as had been absorbed in payment of the debts of testator, alleging, among other reasons, that the lands had been sold, and the proceeds were to be applied to the payment of a judgment for twelve thousand dollars, confessed by Thomas H. Blount, the acting executor, to his father, John Gray Blount, who was also made a defendant in the bill. The bill further charged that this judgment was confessed on a bond made by testator and John Gray Blount to one Sumner, to secure the payment of a sum of money advanced to them by Sumner; that John Gray Blount received the benefit of Sumner's loan, and, upon a recovery effected by Sumner against him for this money, he prevailed on the executor, Thomas H. Blount, to confess a judgment in his favor
(367) for the amount of Sumner's recovery, notwithstanding it was notorious that had the debt been solely the testator's, yet he had claims against the said John Gray Blount to a very large amount, which might have been set off against the recovery of the said John Gray Blount. And as to a release, which it was alleged by the executors had been given by complainant to John Gray Blount, of any demands which she might have against him on account of transactions between him and the testator, the complainant averred that she signed it without any consideration and without knowing from what benefit she was excluding herself. The bill concluded with a prayer that the lands charged in the will might be sold and complainant reimbursed the sum withheld from her, and that if any part of the said sum had been disbursed by the executor, that she might have satisfaction out of

the lands so far as he had disbursed, and a decree against him personally for the residue.

The answer of Thomas H. Blount admitted the death of the testator, as charged in the bill, and that he qualified as executor in North Carolina, as did also William G. Blount in Tennessee. The devises in the will of the testator were set forth in the bill; and as the testator was at the time of his death largely indebted, and this respondent could not raise money for the payment of these debts by the sale of the lands, he was obliged to pay them out of the property devised to complainant, which he was advised was assets in his hands for that purpose. It was admitted in the answer that there were lands in Tennessee owned in common by the testator and John Gray Blount, but this respondent admitted nothing as to the boundaries or value thereof, having no personal knowledge of them and never having seen the title deeds. The management of the sale of these lands was left by this respondent to William G. Blount, from whom he had recently learned that a sale could not be effected. The respondent admitted that a judgment had been rendered against him as executor of testator, in favor of John Gray Blount, (368) for $9,267.10, with interest from June, 1815; which sum the respondent averred he believed was justly due to John Gray Blount, who as surety for his testator paid the same after his death in satisfaction of a bond given by testator and said John Gray Blount to one Sumner, the brother of complainant; that Sumner had presented the claim to this respondent for payment, alleging it to be the debt of his testator, and had agreed at one time to accept a conveyance of the Tennessee lands as security for its payment, and that afterwards, as this respondent knew, John G. Blount had been compelled to pay the debt at a considerable sacrifice; that this respondent knew of no set-off of which he could avail himself, more especially as the complainant had given him formal notice that she had executed a release to John Gray Blount by which she acquitted him of all demands which she might have against him in right of the testator; and further, this respondent knew nothing of the accounts which had subsisted between his testator and John Gray Blount as the books were retained in the hands of the surviving partner.

The answer of John Gray Blount set forth particularly the origin of the tenancy in common in the Tennessee lands between his brother, the testator and himself, and stated that the testator was entitled to one-third part of about fifty thousand acres of land in Tennessee, of the situation or value of which (as it was continually fluctuating) nothing could with certainty be said; that at the time of the testator's death this respondent expressed

a belief that the lands charged with the payment of his debts were sufficient for that purpose; that at this time he had no knowledge of any debts except those due Sumner and the firm composed of the testator and himself, and that this respondent did not expect or intend to demand payment of the debts due the firm if an arrangement for the settlement of the partner-
(369) ship transactions entered into between the testator and this respondent in testator's lifetime could be carried into effect after his decease, or if the complainant would sign a release. The answer averred that complainant did voluntarily sign the release without any practices of this respondent, and that the consideration therefor was a release of the claim he had against his brother, the testator; that the judgment obtained against Thomas H. Blount was fair and without collusion; that it was legally taken for money which this respondent had paid Sumner as the security of Thomas Blount; that this respondent never received any money from Sumner or any other person to secure the payment of which the bond was given to Sumner, nor does he indeed know the consideration of that bond as it was given on some transaction in which he was no party; nor is there any entry on the books of the firm to show that the money was applied to the use of John G. and Thomas Blount, and that Thomas Blount died indebted to the firm more than eleven thousand pounds. The respondent finally submitted that as it appeared from complainant's bill that the lands are in Tennessee, an independent government, the court could not entertain a suit with regard to them or make any decree affecting them.

Such of the five children of testator's brother as lived out of the State were made parties defendant to the bill, and publication as to them was regularly made.

Gaston for the complainant.
Seawell for the executor.
Ruffin for the defendants.
P. M. Miller (of Tenn.) for devisees.

(376) HALL, J. The justice of the complainant's claim cannot be for a moment doubted, but the remedy by which it is to be asserted is matter of more difficulty. This arises from the circumstance that the lands out of which her claim is to be satisfied are situated without the limits of the State, and most of those persons concerned in interest are nonresidents.

Nothing can be hazarded in saying that in many cases a court of equity may proceed against *the person,* although the lands which may be the subject of controversy are not within the

jurisdiction of the court, as where a defendant has contracted to convey lands he may be compelled to do so by executing a deed; where he is a trustee he may be compelled to execute the trust, although the trust relates to lands without the limits of the State. The court proceeds against him personally, but will make no decree to bind the title of the land.

It is equally clear that where the land lies within the jurisdiction of the court it may become the subject-matter of a decree; although the person in whom the legal title is is a nonresident they may proceed *in rem,* as in the case before put they may proceed *in personam.* But the difficulty here is that the lands and the persons who have the legal title to them are in the State of Tennessee. In every independent government the right to the soil is vested in the sovereign power, and it belongs to that power to grant titles to lands and regulate the transfer of titles from one individual to another in any way it may think proper, and to declare that all conveyances not conformable to (377) such regulations are null and void. Hence it follows that all laws, judgments and decrees made in any other government relative to such lands have no binding force.

I think it will be admitted that a court of equity ought not knowingly to do a vain thing—make a decree which it cannot enforce. We cannot, therefore, make a decree to bind the land, because it is not within our jurisdiction. Suppose we direct that Thomas Blount, one of the executors, should sell the land either upon the ground that he may sell *virtute officii,* or that the power to sell has devolved upon him by statute, 21 Hen. VIII, in consequence of the refusal to sell of the other executors, which statute is in force in North Carolina. If a purchaser from him should bring an ejectment to recover the lands so purchased, as the State of Tennessee has a right by law to regulate and lay down the mode by which the titles to land in that State shall be acquired, would it not be competent for her courts to judge whether Thomas Blount, as executor and *eo nomine,* could sell the lands or not? Whether, the other executors having refused to sell, he could sell by virtue of any statute or act of their Legislature authorizing a sale in such cases, as the statute of the 21 Hen. VIII does? If their courts should be of opinion in either case against the validity of the sale the purchaser could not recover. If the lands were in this State a court of equity here would have it in its power to protect a purchase made under its own decree.

Again, suppose by the laws of Tennessee *three* witnesses were necessary to a will of lands and only two should be necessary in North Carolina (as is the case), and lands were directed to be

sold by decree of this court which lay in Tennessee; and suppose that the executor clearly had a right to sell by the words of the will, will it be for a moment contended that a sale of lands under such authority would be valid? Our law says that a last
(378) will found among the valuable papers and effects of a deceased person or lodged in the hands of any person for safe keeping, if it be in the handwriting of the deceased, proved by the requisite number of witnesses to be so, shall be good and valid; but suppose there is no such law in Tennessee, would a devise in such will here be valid there, or a sale of lands in Tennessee by an executor clothed with authority for that purpose be valid? If we direct a sale to be made by Thomas Blount, whether such sale would be good or not would depend upon the laws of Tennessee. No decree made by us then would or could be enforced unless it should be sanctioned by the laws and by the courts of Tennessee. It might be enforced not because we made it, but because they approved of it. It would derive no authority from us, and therefore I think we would be doing a vain thing to make any decree respecting the sale of the lands. I think the laws of Tennessee must be consulted in order to raise money out of those lands, as directed by the will, and perhaps they can be consulted in no better way than by applying to the courts of that State. But it has been argued that all necessary parties are before the Court because publication has been made as to nonresidents, and that is an adequate substitute for the service of subpœna. 'Tis true that the law prescribes that mode of giving notice (where actual notice cannot be given), and no decree can be made without observing it; but when the property lies out of the State relative to which a bill in equity is brought, and the defendant is not actually before the Court, but publication has been made only, how is a decree to be enforced? Not *in rem,* because the property is not within the jurisdiction of the Court, nor *in personam,* because process of attachment or of any other sort cannot reach the person of the defendant so as to compel a compliance with the decree. There surely can be nothing in this argument.

No decree therefore ought to be made against Thomas H. Blount to sell the lands in Tennessee.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1821.

JONES v. FRAZIER.

An award ought not to be set aside unless it *certainly* appears to be against law, and that in a case where the arbitrators meant to decide according to law.

FROM RUTHERFORD. The question presented in this case was whether an award which had been set aside by the Superior Court of Rutherford was properly set aside and the plaintiff properly ordered to pay costs, and the following were the facts:

The plaintiff had purchased of the defendant a tract of land, and before he had fully paid for it, discovering that his vendor claimed the land under a younger patent, when it had been previously patented by Tench Coxe, he sued on the covenants in the deed; and before issue was joined the parties agreed to refer it to arbitrators and their award to be a judgment of court. Frazier had been in actual possession of the land for seven years, claiming under his patent. The award was in the following words: "We, the undersigned, being mutually chosen by, etc., to settle, determine and give an award about a (380) controversy existing between them respecting a certain tract or parcel of land which said Jones now lives on, having taken the claims of both parties into consideration, do award that Jones shall pay all legal costs upon his suit against Frazier. We do further award and say that as it doth appear to us the fee simple of the tract of land that Jones bought of Frazier was not in Frazier at the time of the sale, therefore Frazier shall give up the judgment or execution that he has against Jones for the sum that yet remains unpaid of the price of the land, and that in three and six months he shall pay back the purchase money that he has already received."

The affidavit of one of the arbitrators was read in the court

below, from which it appeared that their decision was founded on an opinion that the seven years' possession of Frazier could not give him title inasmuch as his patent was included within the bounds of the elder patent to Coxe; and that those claiming under Coxe, having been in uninterrupted possession of a part of the elder patent, were by construction of law in possession of the whole.

Mordecai for the plaintiff.

(382) TAYLOR, C. J. As I think the real and substantial justice of this case was settled by the award I should be unwilling to set it aside unless compelled to do so by some rule of law. When Jones bought the land he expected to obtain an undisputed title, but discovering that the vendor claimed under a younger patent, when the same land had been previously patented, he sued on the covenant in the deed, and before the cause was put to issue the parties referred it to four of their neighbors to settle. The arbitrators decided from the fact of the older patent and possession under it that the defendant's seven years' possession did not give him a title, and that the possession of those claiming under Coxe's patent was co-extensive with their claim. Admitting the law to be otherwise, still it gives Jones such a title as is liable to be drawn into controversy and which he cannot establish in the common way of land titles by producing recorded grants and deeds, but must resort to parol evidence to prove Frazier's possession. It may happen, too, that some of the parties claiming under the elder patent may have been under disability during the whole time of Frazier's possession, thereby preventing it from ripening into a title. Now an award ought not to be set aside until it *certainly* appears to be against law, and that in a case where the arbitrators meant to decide according to law. From the few facts set forth in the case I cannot draw this inference, and therefore think that the judgment of the Circuit Court setting aside the award should be reversed and judgment be entered according to the award.

HALL, J. This award sets forth no fact on account of which it ought to be set aside. If it was right to look into the affidavit which accompanies it that affidavit, instead of militating against it, furnishes the strongest reasons why it ought to stand. The plaintiff sold a tract of land to the defendant for which an older grant had issued, and whether the title under that (383) grant had been lost and acquired by the junior grantee by a seven years' uninterrupted possession had never been ascertained by a trial between the parties. The arbitrators were

at liberty and, I think, did right when they released the defendant from a contract for the purchase of land over the seller's title to which such a cloud was hanging; they were right in saying he should not be bound by a contract which would necessarily involve him in litigation. There is no evidence that he had any knowledge that the land was claimed by any other person than the plaintiff at the time of the purchase. I think the judgment of the Superior Court which set aside the award ought to be reversed and a judgment entered confirming it.

HENDERSON, J., concurred.

Cited: Allison v. Bryson, 65 N. C., 46; *Robbins v. Killebrew,* 95 N. C., 23; *Hurdle v. Stallings,* 109 N. C., 7; *Wyatt v. R. R.,* 110 N. C., 247.

(384)

HARRISON et ux. v. BURGESS et al.

1. Where a cause was removed to this Court at a period when the Court, on motions for new trials, considered matters of law only, and during the pendency of such suit, the Legislature declared that this Court *does* and *shall* possess power to grant new trials upon matters of fact as well as law, the Court may consider the case on matters of fact, for such law is not unconstitutional.

2. The wife of the testator may be the person to whose safe-keeping his will—all in his own handwriting—is entrusted, according to the acts of the last session of 1784, for in this there is nothing incompatible with that union of person and interest which exists in law between them.

3. Where a will is found in the drawer of a bureau, commonly kept locked, in which the testator's wife was in the habit of keeping her money, jewels, etc., and which the testator pointed out as the place for depositing his will, it is found among his valuable papers or effects within the meaning of the act.

4. The signature of a subscribing witness is no part of a will, and if there be but one to a will of lands, it may be proved to be all in the testator's handwriting, and to have been found among his valuable papers or effects.

THIS was an issue to determine upon the validity of the will of one Irvine, from HALIFAX. The will, which had but one subscribing witness, had been offered and proved in Halifax County Court by that witness, as appeared from the endorsement made thereon. It was afterwards offered for probate under the

act of the second session of 1784, by proof that it was all in the handwriting of the testator and had been by him delivered to some person for safe keeping, or that it was found among his valuable effects after his death.

It was objected below that the court could proceed no further to act in the case, it appearing that the paper had already been proven in the county court before the offering of it a second time. This question was reserved by the court and the issue, viz, "Is the paperwriting offered for probate a good will (385) to convey real estate?" was submitted to a jury.

It appeared from the testimony of the subscribing witness that a short time before the death of the testator he, taking the paper out of his bed, already signed by him, declared it to be his last will and testament, and called upon her to attest it. The plaintiff then offered evidence (which was objected to by the defendant but received by the court) to show that the paper was all in the handwriting of the deceased and was found among his valuable effects; and for this purpose the mother of testator's widow was called and stated that the paper was written several days before it was signed, and was kept by testator in his bed; that after it was signed by him and witnessed he handed it to the witness (the mother of his wife) and desired her to put it away in his wife's drawer and lock it up, and that she immediately did so. This drawer belonged to a bureau in which the wife kept her trinkets, jewels, money and clothes, and it was always kept locked. It further appeared by the testimony of another witness that he (the witness) accompanied the wife of the deceased home from the Shocco Springs, at which place Irvine died, and that in the room in which the paper was signed he saw the widow take the present will out of the drawer of a bureau. This witness did not know whether the drawer was locked and did not look inside of it. Three witnesses then swore that the whole of the paper except the signature of the subscribing witness was in the handwriting of Irvine. No counter testimony was introduced, but it was insisted that on the law arising from the facts disclosed the paper was not the last will of Irvine under the latter act of 1784.

The court instructed the jury that although the will had but one witness to it, yet if they were satisfied that it was all in the handwriting of the deceased and that it had been found among his valuable papers or effects, or lodged in the hands of (386) any person for safe keeping, that it was sufficiently proven under the act of the second session of 1784, and that under that act the wife might be a depositary. The jury found that the paperwriting was not a last will and testament

to convey real estate. A new trial was moved for and refused, and plaintiffs appealed.

Gaston for the defendants.
Seawell for the plaintiffs.

HENDERSON, J. This case was brought to this Court (390) before the commencement of the last Legislature, at which time this Court could grant new trials in matters of law only. At the last session of the Legislature an act was passed declaring that this "Court *does* and *shall* possess the same power to grant new trials, as well upon matters of fact as law, as the Superior Courts of law now have" (Note.—By act of 1822 this law is repealed.—Rep.), and the first question is, does the law of the last session embrace this case; and if it does is it unconstitutional, as interfering with vested rights? The words are plain and unambiguous; the intention cannot be mistaken; they prescribe a rule for the government of the Court thereafter; they profess not to interfere with the decisions of the Court under the former law. But it is said that if by law the Court did not possess the power can a legislative declaration that it does give the power? I answer that it does, not by operation of the old law but by the new law; it is only a short way of legislation; it is simply saying that by such words, to-wit, those used in the former law, we mean such a thing, and when, by the words used, the legislative will is made known it is the law of the land; the words are immaterial, and although the Legislature cannot make a thing to be which is not, by their declaration, as to make what is white black, yet it is competent for them to say by the word white they mean black; and whatever may be the meaning of the former laws upon the subject we have now a plainly expressed legislative will that this Court does and shall possess the power to grant new trials in matters of fact; and this is not a judicial act, which is an exposition of the laws in being and applying them to particular cases, but purely a legislative act, declaring the will of the Legislature, to be applied in all cases thereafter as the rule of action or decision. But it (391) is said in this case it interferes with the vested rights of the defendant, and if so the Court will not apply it to divest those rights. To declare that the property of A belongs to B has been by this Court decided to be beyond the power of the Legislature, in *Robertson v. Browne* (unreported), relative to Mrs. Browne's land.

To decide on this objection we must examine the nature of the rights of this defendant. In the court below the jury found

a verdict in his favor; the plaintiffs moved for a new trial, which was refused by the presiding judge, and judgment given for the defendant, upon which the plaintiffs appealed to this Court; and as regards matter of fact the judge below, who refused the new trial, was the only power which could redress any injury which the plaintiffs might have sustained in matter of fact at the time the appeal was taken and the cause brought into this Court; but this Court had jurisdiction in matter of law and was the proper appellate Court, and the appeal was, as it could be only, on the final judgment in favor of the defendant, and not on the interlocutory order refusing a new trial. By this appeal the judgment was annulled, and all rights derived from it fell to the ground. The alleged vested right of the defendant is not properly secured or belonging to him by the existing laws, but by that immunity (arising from the organization of our courts of justice) in the enjoyment of the consequences of an erroneous exposition of the law (if it be erroneous) by an interlocutory order in a cause still depending, and the legality in the final determination of which (speaking abstractedly) depends upon the correctness of this interlocutory order. This is not such a vested right as that the Legislature cannot extend the powers of the Court wherein the cause is still depending to examine into the alleged error, and if there is one to correct it by the rules which were in existence at the time the new trial was refused, and by which the presiding judge should
(392) have regulated himself in the decision. A right, to be inviolable by the Legislature, should be one derived from the laws, or at least under a final judgment of a court in a case decided and the parties out of court; not an immunity from a re-examination of a point in a cause still pending, which point could not be re-examined by the appellate court on account of its organization. I therefore think that this Court possesses the power to examine the alleged error in fact. See 3 Cranch, 79.

The next question is, has there been an error in fact? The first question presented is, is the wife capable of being a depositary of the husband's will under the latter act of 1784? The second is, does the finding of the will in a drawer of a bureau in the dwelling of the husband, and probably in this case in his bed chamber, and where the wife kept her money and jewels, and which was constantly kept locked, and the place pointed out by the husband for the depositing, comply with the requisitions of the act as to the will being found among the valuable papers or effects of the deceased? Third. Is a will all written in the handwriting of the devisor, except the signature of the name of one attesting witness, there being but one, a will in the hand-

writing of the devisor, within the meaning of the said act? Fourth. There being one subscribing witness can it be offered as a will under the latter act of 1784? Fifth. Being heretofore proven by one witness, can it now be proven in the manner pointed out by said act? There is an union of interest as well as of person between husband and wife, and the will governing this united person resides in the husband, and from this union follow many consequences. They cannot contract, they are but one; they cannot give to each other for the same reason; the wife cannot bind or affect their joint property, or even her own freehold lands, without the consent of her husband, for this requires will, and she has none (I speak not of her powers in a court of equity, and particularly where she has separate property); and a number of other cases might be put (393) as following from this union; but where the acts affect not the rights of the husband as husband she is considered as a human being and having a human existence; she is capable of contracting as agent of the husband, and her purchases or contracts bind the husband as his agent only and not as wife, for in the latter capacity she cannot bind him; she may perform a confidential trust for the husband as attorney or friend, because in this there is nothing incompatible with her character as wife or that union of person and interest which exists between them. Nor is it an objection that during the life of the husband she cannot be a witness as to the deposit. No evidence of that is or can be required during his life; after his death she is as competent as any one; if then rejected it must be on the score of interest or infamy, as others are liable to be. But allowing that she could not be a witness to prove the deposit the same situation would be produced by the death of any depositary during the devisor's life, and this I apprehend would not annul the will. I can see no reasons for disallowing her to be a depositary but many peculiar reasons for allowing it. I think also the place where it was found was among *his* valuable effects, if the wife could not be a depositary, for then it was his desk, his money, his jewels, and the key was kept by him by the hands of the wife; whether taken out of the drawer was a question of fact. As to the third objection, that it is not a will under the act of April, 1784, there can be no weight in it. The signature of subscribing witnesses is no part of the will. The witnesses put their names there to be enabled to identify the paper, and where the law requires subscribing witnesses it is for the same purpose. Originally the witnesses did not put their names to the paper, but *hiis testibus* was added by the parties concerned that they might know on whom to call in case of a dispute. The

will is not certainly worse by having one subscribing witness; it will certainly answer the purpose of more certainly show-
(394) ing that this is the paper which she saw deposited in the bureau; going beyond the requisitions of the act, in respect of proofs, certainly cannot annul that which comes up to them. I think the fourth objection has been already answered. I can see no reason for the fifth, for its probate as a will of goods does not impeach it as a will of land, and were I to express an opinion upon the third, fourth and fifth objections it would be that if they have any effect upon the law of the case, which I think they have not, they would go to support and not to destroy the will. I think the judge erred in refusing a new trial, and that there must be one.

TAYLOR, C. J., and HALL, J., concurred.

Cited: Gaskill v. King, 34 N. C., 215; *Brown v. Beaver,* 48 N. C., 517; *Hill v. Bell,* 61 N. C., 124.

GREGORY v. HOOKER'S ADMINISTRATOR.

1. The personal representative of a deceased person is not liable to pay for the funeral expenses of the deceased unless he contracts for them or subsequently promises to pay for them—there is no implied promise to pay for them.
2. Where an individual, of his own mere motion, buried a deceased person, and without giving notice to the administrator of the expenses, sued him, he was not allowed to recover.
3. A count against an executor, charging him upon his promise as executor, may be joined with a count upon promises of his testator.
4. Where, on the division of an intestate's slaves among his children, an allotment is made to A greater than that to B, another child, and to equalize the division A is directed, out of his share of the property, to pay a certain sum to B, this gives B a lien on the slaves for that amount; and if A's administrator sell the slaves allotted to A before such payment is made to B, the balance only of the purchase money will be assets in the hands of the administrator, after the sum directed is paid to B.

FROM HALIFAX. The declaration in this case contained five counts. The first was on an implied promise of defendant's intestate to pay plaintiff for board, etc. The second was in *in-*
debitatus assumpsit, laid on the promise of the adminis-
(395) trator as such. The third was a count *quantum valebat,*

laid on the promise of the administrator as such. The fourth was a count for funeral charges against the defendant as administrator, laying the promise to have been made by him as such. The last count charged that in consideration the plaintiff would give her note to the defendant for a debt due him as administrator, he as administrator promised he would set it off against so much of her account against the intestate, and then alleged a breach of the promise by compelling the plaintiff to pay the note, which increased the amount of his assets.

The plaintiff on the trial below produced in evidence an account for board of the intestate and of his servant during his lifetime, and for keeping and feeding intestate's horses, which was admitted; there were also in the account the two following charges, viz: "To making sheet and pillow-case, £0.50; to one pillow furnished him when deceased, £0.50." To establish these charges the plaintiff proved that the intestate, Dr. Hooker, died at her house; that he was buried before administration granted, and that after his death she rendered the services and furnished the pillow for his funeral. There was no evidence of an express promise by the administrator to pay the funeral expenses.

The defendant in support of his plea of fully administered produced an order of the County Court of Tyrrell to divide the negroes of Stephen Hooker among his distributees, and appointing several persons therein named to make such division, and a copy from the records showing that such division was made, from which it appeared that the negroes assigned to defendant's intestate exceeded his dividend of personal estate by $174, and by the return he was directed to pay that sum to his younger brother; the defendant then offered to the jury the receipt of the guardian of the younger brother for $174, dated before this suit was brought, to show an expenditure of assets (396) to that amount; the court would not permit it to be read on the ground that the testimony of the guardian was better evidence. The defendant also contended that as the sum of $174 was due from the intestate on the partition of the negroes, and that as two of the negroes divided were sold by the administrator after the death of the intestate, the administrator should not hold said sum as assets but was bound to pay it to the younger brother, who had a lien on the negroes to that amount. The court ruled that the whole value of the negroes was assets. The defendant pleaded outstanding bonds at the time of the plaintiff's suit brought, and proved a number of bonds outstanding. The court instructed the jury that although there might not be assets to pay bonds, that the administrator was bound to pay the plaintiff the ten shillings for the funeral charges in

preference to bond debts, and that if they believed the articles were furnished for the funeral that they would find assets to the amount of ten shillings to pay said funeral charges; and the jury found accordingly. It was admitted there were assets to satisfy the funeral charges provided they were entitled to priority of bonds.

A new trial having been refused, defendant moved in arrest of judgment for misjoinder of counts on promises of the intestate, with a count on the assumpsit of the administrator; this was overruled, and defendant appealed.

A. Henderson, Seawell, Ruffin and *Hogg* for the appellant.
Gaston and *Mordecai* for the appellee.

(401) TAYLOR, C. J. The heavy costs accumulated by a protracted litigation have made this suit very important to the parties; and though the two *items* for funeral charges amount together to but ten shillings, yet whether the defendant be liable to pay them depends upon principles which are not to be understood without some research. I must own that the argument, which has been able on both sides, has presented the subject in many lights which were new to me, and together with my own reflections has produced an opinion altogether different from what I have ever entertained on the subject. Notwithstanding the reasons drawn from propriety and decency tending to show the defendant's liability, the only inquiry I have permitted myself to make is, what is the law? My inquiries have ended in believing that it is in favor of the defendant.

Of the two classes of contracts, express and implied, this cannot belong to the former, since there was no debt owing from the intestate and no engagement entered into by him. Does it belong to the latter? It is said that it does, because the defendant was subject to a legal liability to pay this debt, and that in every such case the law implies a promise. His liability is inferred from the language in which the duty of an executor or administrator is stated in the elementary books with re-
(402) gard to the payment of debts. "Funeral expenses, according to the degree or quality of the deceased, are to be allowed of the goods before any debt or duty whatsoever, for that is *opus pium et caritatis.*" 3 Inst., 22. "He must observe the rules of priority in the payment of the debts; otherwise, on deficiency of assets, if he pays those of a lower degree first he must answer those of a higher out of his own estate, and first he *may* pay all funeral charges." 2 Bl., 511. "The expenses attending the funeral shall be allowed in preference to all debts and charges." Toller, 191. These writers and all others, I

believe, make a distinction between debts and funeral expenses; this position is warranted by them, that if the administrator or executor pays debts of inferior dignity in preference to those of a superior dignity, of which he has notice, he shall be liable to the latter *de bonis propriis.* Funeral expenses are not a debt but properly a charge upon the estate, and if the executor voluntarily pays them he shall be allowed such payment before all others, because it is a work of charity and piety.

I know of no case where an administrator is liable in his representative character on any contract not made by the intestate, for if he is sued on a contract made by himself, though relative to the estate of the intestate, the suit must be in his own right. Declaring on an *insimul computassent* against an administrator, as such, is not an exception to the rule, for that raises no new debt, but is merely an acknowledgment of the old one. He is liable as far as he has assets for the debts, covenants and contracts of his intestate, although the cause of action accrue not till after the death, as on a bond or note which became due after that event; but there the duty is created by the intestate. But if the duty arise after the death of the intestate the administrator is liable in his private capacity. For rent in arrear in the testator's lifetime his representative is liable in that character and can be sued only in the *detinet,* and may plead fully administered; whereas for the subsequent rent he is per- (403) sonally liable. Comyn's Digest, "Administration," 14, B.

So if he promise to pay a debt, in consideration of forbearance or of assets, he must be sued in his individual character; the law guarding with caution its principle that if an administrator is liable beyond the assets it must be by his own act, sustained by a proper consideration.

But admitting for the present that there is a legal liability on the defendant, and that the law therefore implies a promise (which I shall presently show not to be the case), it may be asked what has made the defendant a debtor to the plaintiff on these charges? The defendant's intestate was not buried by the plaintiff or at her expense, and besides the sheet and pillow there must have been other articles suitable to the sphere and condition in which Dr. Hooker had lived and which doubtless were furnished before the state of the assets was ascertained. Every individual who furnished any one article has the same right to sue with the plaintiff and to demand payment from the defendant in preference to creditors. A man is legally liable to pay his own debts, and the law implies a promise to his creditor that he will do so; but if another, voluntarily and unasked, pays the debt the law does not imply a promise to him. In such case

assumpsit will not lie without an express promise to repay it, for the debtor may have a set-off or some good reason to resist the payment, and another person shall not pay it for him whether he will or not. It is true that if a party derives benefit from the consideration it will be evidence to the jury of a previous request, as if a man pays money or buys goods for another without his knowledge or his request, and he afterwards agrees to the payment or receives the goods. But in this case there is no reason to believe that the articles charged were furnished with the knowledge of the defendant; of course
(404) his assent cannot be implied. The principle that as the charge accrued subsequent to the death of the intestate the defendant is not liable in his representative character is, as I conceive, fortified by a case I have met with since the argument wherein it is laid down "that an executor is not liable to pay for funeral expenses unless he contracts for it." *Aston v. Sherman,* Holt, 309. The case is quoted with apparent approbation by 1 Com. on Contr., 529, who states the reason of the decision to be that such a charge, if sustainable against an executor, would make him liable *de bonis propriis.* In other words, as neither debt nor duty was created by the testator, if the right to sue the executor as such were admitted, it would follow that he would be liable to pay for funeral charges whether he had assets or not; but as the law will not so charge him without his own act and consent it gives no remedy to a party voluntarily performing the service. As on this ground I am satisfied there ought to be a new trial, I have thought it unnecessary to give an opinion on any other points raised in the argument.

HALL, J. The defendant's intestate was never debtor for the amount claimed by the plaintiff for funeral expenses, and if the defendant is liable he became so after the death of his intestate, and if he became so after the death of the intestate it was by the act of the plaintiff, who furnished the articles for the funeral from her own mere motion and not at the request of the defendant; if so, he ought to have been acquainted with that fact prior to the commencement of this suit, otherwise he will be subjected to costs without having been guilty of any default or improper conduct. It is not like the case where the administrator is sued for a debt due by his intestate of which, until suit is brought, he had no knowledge. In that case his intestate might have been sued, and his death neither places the plaintiff in a worse nor the defendant (his administrator) in a
(405) better situation than he himself stood in before his death.

I entertain the opinion that the counts in the declaration are properly joined and that the amount due by the intestate on a division of his father's estate is not assets in the hands of his administrator, and that the rule for a new trial should be made absolute.

HENDERSON, J. This action is brought in part for a pillow and winding sheet furnished to bury the intestate of the defendant, without his previous request, subsequent promise or plaintiff's giving notice of the charge before action brought; and I am decidedly of opinion that that part of the case cannot be supported, and I will examine the consideration whether those acts, being done by a stranger, for no one and at the request of no one, but for the purpose of interring the dead, are not in law mere acts of charity and humanity, which create no debt or legal duty; but I am satisfied by reason and analagous authority that before an action can be sustained notice must be given to the executor or administrator. Where one person officiously pays the debt of another an action cannot be supported on such officious payment (for no person can make another a debtor without his consent); but it may be admitted that the intestate dying at the house of the plaintiff, and there being no administrator to bury the corpse, the act of the plaintiff was not officious; but certainly notice of the performance of the duty must have preceded the suit, for until notice the defendant was not put in the wrong, and it would be contrary to all our notions of justice to subject a person to an action and its consequences without a wrong committed by the defendant or the person whom he represents. The consequence of the doctrine contended for by the plaintiff would in such cases lead to this, that an administrator or executor who was not on the spot might be liable to many different persons; one might furnish the plank to make a coffin, another the nails or screws, another the lining, another the ropes, another the pillow, another the shroud, and so (406) on, perhaps, to the number of twenty, and if one could support an action without notice so might each one; but the law is not so unjust. Where the liability of a person arises from an act of which he is not bound to take notice, or where the knowledge rests more peculiarly with the plaintiff, there notice is necessary. An administrator or an executor is bound to know so far as to be liable to an action for the debts of the intestate or testator, for he is his privy, he represents him; but the assignor of a negotiable note is not bound to take notice of the omission of the maker to pay the assignee upon demand; he must have notice before suit; it must be laid and proven, be-

cause the omission to pay is more peculiarly known to the assignee, who has failed to get payment; so here the services are more peculiarly known to the person performing them than to the administrator. For these reasons I think the charge for funeral expenses cannot be sustained. I differ from the presiding judge below upon the question whether the difference due from the intestate on the division of the negroes among the children of his father is assets; in other words, whether the negroes allotted to him are assets to their full value or with a deduction of that sum. I think it formed a charge upon the negroes to that amount. The charge was made by the commissioners without the agency of the other children; their property to the amount of the difference was taken from them by men acting under the authority of the law, and the law would never take from them property and give them only the personal liability of the person to whom the more valuable lot was awarded; and the law which takes from them the possession of their property gives them the most ample security; in fact, so much in value of the negroes is theirs, and nothing but the impossibility of dividing them converts that property into a charge upon the negroes, together with a debt upon the child, for he takes them *cum onere*. Suppose the sheriff standing by
(407) when the division is made, with an execution to the full amount of all that child's property, and the moment the division is made he levies on the negroes so allotted and applies them to the discharge of the execution, and if the opinion below is right such, I think, would be the consequence. I think there is no misjoinder of counts. It is perfectly settled that you may join a count against an executor charging him upon his promise as executor, that is, to pay out of the assets, with counts upon promises made by his testator; in each case the executor is liable in his representative character, that is, out of the assets. It is true the precedents furnish only cases where the testator gave birth to the obligation or received the consideration of the promise, but the reason of the thing applies to all obligations thrown upon the executor by virtue of his office; and if in this case the executor was liable to pay the funeral expenses out of the assets, without a precedent request or subsequent promise, or had specially promised to pay out of the assets, the judgment would be *de bonis testatoris;* and although the testator could not have received the consideration of the promise in case of funeral expenses, yet in this view of the case the executor is performing a duty in his character of executor (to say the least) which the law tolerates by enabling him to retain for the expenses of them. As therefore the plaintiff might have made out

such a case as would have supported the count, and if she had the judgment would have been the same as in the other counts, I can see no reason for arresting the judgment.

Cited: Parker v. Lewis, 13 N. C., 22; *Jones v. Sherrard,* 22 N. C., 182; *Ward v. Jones,* 44 N. C., 131; *Ray v. Honeycutt,* 119 N. C., 512.

(408)

LOCKHART v. HARRINGTON.

The power of limited taxation for county purposes is necessarily confided to the several county courts, and its exercise is no invasion of the Bill of Rights.

THIS was an action of debt, from ANSON, brought on a penal bond, the condition of which was that, whereas, the plaintiff has taken into his possession by distress a horse, the property of the defendant, to satisfy the amount of a tax levied on the property of the defendant, for the purpose of defraying the expenses of building a new courthouse in the county; if the defendant should deliver the horse to the possession of the plaintiff on a certain future day, then the obligation was to be void. The breach assigned was the nondelivery of the horse. The defendant, among other matters of defense, contended that the bond was illegal, as being contrary to section 16 of the Bill of Rights, which declares "that the people of this State ought not to be taxed without the consent of themselves, or their representatives in General Assembly, freely given." A verdict passed, and judgment was rendered against the defendant below, and the only question presented by his appeal was, had the County Court of Anson the right and power to lay the tax referred to?

TAYLOR, C. J. The only question made by this record is, had the county court a right and power to lay a tax for building a courthouse? This question is answered as to the power by the several acts of 1741, ch. 33, of 1795, ch. 433, and 1816, ch. 911, which confer its exercise on the county courts. There is no ground for the constitutional objection, for the people (409) of the State have not "been taxed without the consent of themselves, or their representatives in General Assembly, freely given." Where a tax is to bear on all the citizens of the State or on all the property of the State, for general and public purposes, the Legislature can best judge of the amount

to be assessed and of the proportion in which it ought to be collected; and this power they have accordingly exercised themselves, without exception.

But the county courts can best judge of the public local wants of their respective counties and the resources of their citizens; and as these vary with almost every county in the State the power of limited taxation is necessarily and most conveniently confided to them. Without it it would be difficult, if not impossible, to conduct the affairs of the State; and its undisputed exercise for nearly a century, amidst a people watchful of their rights and never backward in resisting a lawless power, is a strong proof, not merely of its benefit to the community, but of the correctness of its principle. After an acquiescence so complete no court would declare an act unconstitutional with any evidence short of that producing perfect conviction.

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(410)

HERRIN v. MCENTYRE.

1. A covenant of general warranty is subject to the same construction that a covenant for quiet enjoyment is, and when the *habendum* in a deed is to a man and his heirs forever he may recover for an eviction on such general warranty, though the clause of warranty should not mention to whose benefit it enures, for it shall be intended for the benefit of the person to whom the conveyance was made.

2. A purchases a tract of land, and sells it to B, B is evicted by a better title; as soon as this fact is satisfactorily ascertained by A he may immediately make compensation to B, and sue his own vendor without any recovery at law by B against him.

THIS was an action, from BURKE, brought upon a general covenant of warranty in a deed, and the plaintiff assigned as a breach an eviction by paramount legal title.

The plaintiff on the trial below produced the deed of the defendant, dated 30 June, 1808, conveying to the plaintiff a tract of land, "to have and to hold to the said Abraham Herrin, his heirs and assigns, forever; and the said Thomas L. M'Entyre doth, for himself, his heirs, executors, administrators and assigns, warrant and forever defend the said land and premises from all manner of persons whatever laying claim thereto." Plaintiff then showed that he had conveyed a part of the land to one Nance and the residue to one Thompson, and that a recovery in ejectment had been obtained against them by one

Carson and another, and they had been turned out of possession by a title superior to that made by the defendant to the plaintiff. Plaintiff then proved that he had made compensation to Nance and Thompson for the injury they had sustained. The defendant contended that the deed contained no covenant for quiet enjoyment to the plaintiff, and that if it did plaintiff could not recover thereon until Nance and Thompson had recovered of him on his warranty to them. The court informed the jury that the deed did contain a covenant for quiet enjoyment by the defendant to the plaintiff, and also that the pleadings (411) in the cause did not raise the other legal objection made by the defendant; but if the pleadings had been proper to raise the question it would not have availed the defendant, for the plaintiff had a right to commence his action as soon as those claiming under him had been evicted by title paramount. Verdict for plaintiff; new trial refused; judgment, and appeal.

Wilson for plaintiff.

TAYLOR, C. J. This action is founded upon a covenant of general warranty, which is subject to the same construction with a covenant for quiet enjoyment; and it is essential in this action that the plaintiff assign as a breach an ouster or eviction by a paramount legal title. It is stated in the declaration that Nance and Thompson, tenants in possession under the plaintiff, were legally ejected; and the case more particularly specifies that the plaintiff had conveyed the land to those persons who defended the ejectment on the strength of his title. Two objections are made to the plaintiff's recovery; the first, that the deed from the defendant contained no covenant for warranty or quiet enjoyment to the plaintiff; second, that if it did the plaintiff could not recover until Nance and Thompson had recovered from him. The premises of the deed declare that the defendant has sold to the plaintiff a fee simple estate, and the *habendum* limits the said estate to the plaintiff, his heirs, executors, administrators and assigns forever; but the clause of warranty does not express to whom it shall enure. The ordinary rules of construction would seem sufficient to remove this difficulty, as it is the nature of a warranty to run with the estate; but *Coke* (412) states the case, "though in the clause of the warranty it be not mentioned to whom, etc., yet shall it be intended to the feoffee." Co. Litt., 384. The objection, therefore, cannot prevail. There is nothing conclusive in the recovery of the land by ejectment as against the defendant. He was still at liberty to controvert the title of Carson and the other plaintiff in the

ejectment, and show if he could that their title was not superior to the one he sold. It cannot make any difference to him, therefore, whether Herrin chooses to stand a suit or not. The only consequence would be an increase of costs, which he must ultimately pay. The plaintiff had a clear right to pay the money as soon as the eviction by a better title was ascertained to his satisfaction, and to bring this suit immediately afterwards. A new trial is refused on both grounds.

Cited: Lee v. Gause, 24 N. C., 446; *Webster v. Laws,* 89 N. C., 229; *Hodges v. Latham,* 98 N. C., 243; *Hodges v. Wilkinson,* 111 N. C., 61; *Britton v. Ruffin,* 123 N. C., 69; *Wiggins v. Pender,* 132 N. C., 639; *Fishel v. Browning,* 145 N. C., 75.

LOCKE v. ISAAC ALEXANDER and CHARLES T. ALEXANDER.

1. An attorney, acting for his principal, should perform the act in the name of the principal.
2. Mesne profits during the enjoyment under a defective title cannot be set off against the claim of interest upon the purchase money, because the possessor is liable to the rightful owner for them. But where it appears that the possessor has enjoyed the lands, and cannot be called to account for the mesne profits, the reason of the rule ceases, and it does not apply.

THIS was an action of covenant. From CABARRUS. On 10 May, 1810, the defendants executed to one Merrill an instrument of writing which, after reciting that the defendants acted in the execution of the instrument in their own behalf and as attorneys in fact for John Springs and Sarah, his wife, John M'Coy and Catharine, his wife, and Cunningham Harris
(413) and Mary, his wife, witnessed that the defendants, *"as attorneys aforesaid,"* received the consideration money and conveyed to Merrill in fee simple certain lands and all the estate, right, title, interest, claim and demand and property of the said defendants, *"as attorneys aforesaid,"* of, in and to the said lands. The conclusion of the instrument was as follows: "And the said Isaac and Charles T. Alexander, as attorneys aforesaid, for themselves and their heirs, the aforesaid lands and premises, and every part thereof, against them and their heirs, the claim or claims of all and every other person or persons whatsoever, to the said Jonathan Merrill, his heirs and assigns, shall and will forever warrant and defend by these presents. In witness whereof," etc. The paper was signed and

sealed by the defendants in their own names and not as attorneys. The power of attorney was as follows:

"Know all men concerned that we, John Springs, Cunningham Harris and John M'Coy, joint heirs with Isaac and Charles T. Alexander of the estate of Evan Alexander, deceased, have made, constituted and appointed, and by these presents do make, constitute and appoint the above-named Isaac Alexander and Charles T. Alexander our true and lawful attorneys, for us and in our names to lease, let, sell or demise all or any part of the real estate of the aforesaid Evan Alexander, deceased, to such person or persons and for such price or sum of money as they may in their judgment think fit, and to make and execute titles for the same absolutely in fee simple; and also in our names and on our behalf to seal, execute and deliver such deeds, conveyances, bargains and sales for the absolute sale or disposal thereof, with such clauses, covenants and agreements to be therein contained as our said attorneys may think fit and expedient, and we do hereby ratify and confirm all such deeds, conveyances, bargains or sales as shall or may hereafter at any time be made, sealed and executed by our said attorneys, touching or concerning the above-named premises. In witness," etc.

Merrill conveyed his interest to the plaintiff, and after the death of Springs and Harris, in 1816, both of whom in right of their wives had a life estate, the plaintiff was turned out of possession of three-fifths of the land mentioned in the deed. The plaintiff was in possession and enjoyed the mesne profits until the death of Springs and Harris. The case, by con- (414) sent of parties, was considered as being between Merrill, plaintiff, and the Alexanders, and the record amended accordingly. On the trial below it was contended that Merrill could recover no more than the value of the *life estate* of M'Coy, Springs and Harris, as nothing more was conveyed; but the court held that the plaintiff was entitled to the value of the fee simple.

It was further objected that as Springs and Harris had permitted Merrill to remain in the use and occupation of the land from the date of the deed until their death he was entitled to no damages during that period. The court instructed the jury to ascertain the value of the fee simple of the land at the time of the sale and to give interest thereon up to the rendition of judgment. The jury did so. A new trial was moved for and refused, and defendants appealed.

Wilson for the appellants.
A. Henderson, contra.

(415) HENDERSON, J. This case presents difficulties to the plaintiff's right of recovery on the merits, and I am not prepared to solve them. It is very doubtful whether anything, as between the parties, passed by the deed. In the first part of the premises it is said to be a deed between Isaac and Charles T. Alexander, in their own behalf, and as attorneys for Springs, Harris and M'Coy, in right of their respective wives (naming them), of the one part, and Jonathan Merrill of the other, and witnesseth: that the said Isaac and Charles T., as agents and attorneys as aforesaid, in consideration of two thousand dollars, to them as attorneys as aforesaid, paid by Jonathan Merrill, bargain and sell the lands mentioned in the deed and all their right, title and interest as attorneys; in the warranty or covenant for enjoyment they act in their own behalf as well as attorneys, and they execute the deed in their own names and not in their characters of attorneys. Attorneys are the mere instruments of their principals; the principals act by them, and the act, to be the act of the principal, must be done in his name; this deed is the act of the Alexanders, not of their principals; the attorneys are not the instruments of their principals but the actors in the transaction; nor does this reasoning at all (416) conflict with the opinion of this Court in *Potts v. Lazarus,* 4 N. C., 180. It was there decided that the agent was not bound; but it does not necessarily follow that the principal was. If the principal is not bound it is a strong argument to show that the agent was intended to be bound; but in this Court, a court of law, we look at what the parties really did, not what it is probable they intended to do; and as to the deed's passing the interest of the Alexanders, the whole of the granting part and the receipt of the consideration money by which the use was to be raised is in the name of them as attorneys, not in their individual names or rights. It is therefore matter of great doubt whether anything, even as between the parties, passed, either the interest of the principals or of the attorneys; and if the covenant is a dependent one it falls to the ground with the interest it was intended to warrant, defend or protect. It is the common doctrine of warranty that it is annexed to and dependent on the estate; that it ceases with it; and the plaintiff Locke must have himself considered this as annexed to the estate which passed with it from Merrill to him, otherwise it is a mere chose in action and incapable of an assignment, and if so the action cannot be sustained in his name; and it appears to me that it would be doing violence to the acts and intention of the parties as well as contravening the rules of law to construe this a mere personal covenant; it is plain from the face of the deed

that some interest in the lands was recognized in Springs, Harris and M'Coy in right of their wives; and it is quite evident that the parties intended to pass that interest; and that interest passing the Alexanders were willing to bind themselves personally that Merrill should quietly enjoy the land, for they had no fears that he would be disturbed by any other title or were willing to risk the others. Now to bind them to defend against a title which all parties thought the deed had vested in Merrill, would be contrary to every principle of justice. These, among other reasons, should induce the Court to lean in (417) favor of *construing* it a dependent and not an independent covenant. But at any event I think the charge wrong upon the question of interest. Mesne profits during the enjoyment under a defective title is not set off against the claim of interest upon the purchase money because the possessor is liable to the rightful owner for them, they are therefore left in his hands for that purpose; but when it appears that the possessor has enjoyed the lands and cannot be called to account for the mesne profits the reason of the rule ceases and the rule no longer applies, and the mesne profits shall be set off. Interest is in most cases an equitable demand and is left to the sound discretion of the court, but in this case it may be resisted without recourse to that maxim. It appears by the case the Alexanders had from Springs and Harris a power of attorney, executed to sell or transact any business in relation to these lands only, among other things that the attorney contracted with Merrill for the sale of the lands, received his money and put him in possession, where he remained unmolested by Springs and Harris during their lives; after their deaths the wives ousted him; they were entitled to the mesne profits only from the deaths of their respective husbands; they had no claim to those which arose during the coverture, they belonged to the husbands. The mesne profits could not be left in Merrill's hands to satisfy their claim for them, for they had none; the husbands could have none, for Merrill was placed by act of their agents duly authorized, and they had received Merrill's money; he was there by their consent, and could not be charged as a trespasser. Nor was he liable for use and occupation, there being no contract for that, either express or implied. (See the case of *O'Neal v. Holcom,* decided in this Court about four years ago; unreported.) Nor can I perceive in what form of action or upon what principle Merrill could be subjected by the executors of the husbands. I mean not to (418) express any opinion where the possessor is protected in the enjoyment of the mesne profits by the statute of limitations or any collateral defense. I therefore think the presiding judge

erred in directing the jury to give interest upon the whole of the purchase money from the time of its receipt; the defendants are not subject to the interest of two-fifths of the purchase money until after the death of Springs and Harris, respectively. Let a new trial, therefore, be granted.

HALL, J., concurred.

TAYLOR, C. J. I concur for making absolute the rule for a new trial on the score of damages. I desire to be understood as giving no opinion on the effect of the covenant generally.

Cited: S. c., 9 N. C., 155; *Cadell v. Allen*, 99 N. C., 547; *Wyche v. Ross*, 119 N. C., 178; *Pass v. Brooks*, 125 N. C., 132.

TATE v. O'NEAL et al.

1. Some degree of discretion in the punishment of slaves is necessarily allowed patrols.
2. If, in the exercise of this discretion, they inflict punishment, they are not liable in an action to the master, unless their conduct clearly demonstrates malice against the owner.

THIS was an action from WILKES, brought against the defendant and two others, for beating the slave of the plaintiff. The defendants were the regular patrol of the Morganton District, in the county of Burke, and, finding the slave not on his master's premises, they inquired for his pass, or permit, from his master, whither he was going, what was his business? To these (419) questions the slave returned no answer; and the defendants, together with one other patrol, composing a majority of those officers in that district, after consultation, inflicted on the slave fifteen lashes, having first made his body naked and confined him to the whipping-post. There was contradictory evidence as to the severity of the punishment, and one witness swore that some animosity existed between the family of one of the defendants and the plaintiff.

The court instructed the jury that the County Court of Burke had no power to appoint the defendants patrols; and if a majority of them was present, and agreed, they might legally whip a negro subject to punishment; that if they found the whipping to be so excessive as to manifest that it was not

inflicted with the view of executing the law, but with the intention of gratifying malice against the owner of the slave, such owner would be entitled to recover; but that in ascertaining that fact, they would not examine with the most scrupulous exactness into the size of the instrument or the force with which it was used, as some discretion must necessarily be allowed patrols; the excessive severity of the punishment must be such as a common observer would instantly perceive; that if the mode adopted by the defendants in whipping the slave was such as masters commonly adopted, they had not acted unlawfully; and that for the purpose of whipping the slave, they might confine him to the public whipping-post; that the refusal of the slave to answer the inquiries put to him authorized the patrol to believe he had been improperly or dishonestly occupied. Verdict for defendants, and motion for new trial; motion overruled; judgment, and appeal.

PER CURIAM: Upon looking into this case, we find nothing, either in the charge of the judge or finding of the jury, to justify us in interfering with the judgment of the court below. The rule for a new trial is therefore overruled, and the (420) judgment of the court below is affirmed.

Cited: S. v. Hailey, 28 N. C., 13.

STOUT v. WREN.

A man shall not recover a recompense for an injury received by his own consent, provided the act from which the injury is received be lawful; but where two fight by consent, and one is beaten, he may recover damages for the injury, because fighting is an unlawful act.

FROM RANDOLPH. The plaintiff and defendant had a quarrel and agreed to fight. After retiring for that purpose, defendant asked plaintiff "if he would clear him of the law." Plaintiff answered, "Yes," and defendant beat him. Plaintiff made no resistance during the beating, and, according to the testimony of some, was too much intoxicated to know what he was doing. Other witnesses thought otherwise.

The court instructed the jury that, if the plaintiff was so much intoxicated as not to know what he was doing, they ought to give

him a verdict; but if he was not ignorant of what he was about, he was not entitled to recover, having assented to the fight.

The jury found for the defendant. A new trial having been refused, and judgment rendered, plaintiff appealed.

TAYLOR, C. J. It is equally reasonable and correct that a man shall not recover a recompense for an injury received by his own consent; but the rule must necessarily be received with this qualification, that the act from whence the injury proceeded be
(421) lawful. Hence, in those manly sports and exercises which are thought to qualify men for the use of arms and to give them strength and activity, if two played by consent at cudgels, and one hurt the other, no action would lie. But where, in an action for assault and battery, the defendant offered to give in evidence that the plaintiff and he boxed by consent, from whence the inquiry proceeded, it was held to be no bar to the action; for, as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury. *Boulter v. Clark,* Buller, N. P., 16. The consequence of this distinction is apparent also in the law of homicide; for if death ensue from innocent and allowable recreations, the case will fall within the rule of excusable homicide; but if the sport be unlawful and endanger the peace, and death ensue, the party killing is guilty of manslaughter. Fost., 259. It is laid down in *Mather v. Ollerton,* Comberb., 218, that if one license another to beat him, such license is void, because it is against the peace, and the plaintiff recovered a verdict and judgment.

The case was very fairly put to the jury as to the evidence of the plaintiff's intoxication; but I think the law was misconceived in stating to them that if the plaintiff was sober, and assented, he was not entitled to recover. There must be a

New trial.

HALL, J. Upon principle, unconnected with municipal law or policy, I doubt how far a person is entitled to recover damages, after having agreed to take his chance in a combat, and after the event had proved the miscalculation he made upon his own strength. Considering it merely as a violation of a private right, I should say, *volenti non fit injuria.*

Where the State is a party by way of indictment, the consent of the party does not stand in the way of a conviction, because the fine goes to the State for the injury done her by a breach of the peace. However, the authority in Buller's N. P., 16, is the other way, and, I am inclined to believe, has policy for its sup-

port. For these reasons, I acquiesce and agree that the (422) rule for a new trial shall be made absolute.

HENDERSON, J., concurred.

YADKIN NAVIGATION COMPANY v. BENTON.

Some actions, local in their nature, and some transitory ones, must be brought where the cause of action arises; but with these specified exceptions, no action can be brought in a county in which neither party resides. *Semble*, the residence of a corporation aggregate is not to be considered co-extensive with the limits of the State.

THIS was a motion for judgment against a stockholder in the Yadkin Navigation Company on installments unpaid, pursuant to the acts of Assembly, from CABARRUS. The notice required by the acts was made returnable to Cabarrus Superior Court. The defendant admitted the service of the notice, and pleaded in abatement that neither the plaintiff nor defendant resided in Cabarrus. To this plea the plaintiff demurred, and the court sustained the demurrer. The defendant answer over, and final judgment was rendered against him, from which he appealed.

TAYLOR, C. J. The act of incorporation, authorizing the plaintiffs to recover judgment in any court of competent jurisdiction, renders it necessary to ascertain whether the Superior Court of Cabarrus became possessed of it in consequence of any act of Assembly. The first act on the subject (1777, secs. 9 and 10) provides that where the parties live in different districts, and the debt or demand amounts to £50, the suit (423) shall be brought in either district, at the option of the plaintiff. Here the case states that neither plaintiff nor defendant lived in the county of Cabarrus; consequently, that court cannot entertain jurisdiction of the suit. Some actions, local in their nature, and some transitory ones, must be brought where the cause of action arises; but, with these specified exceptions, no action can be brought in a district (or county) in which neither party resides. The question, whether a corporation can have a residence in a county, so as to bring a suit there against an individual who resides in a different county, is not made in this case, and therefore no opinion is given upon it; but the notion of its residence, being coextensive with the State, and

being therefore competent to sue in any county, seems to be at variance with the authorities cited in 5 Cranch, 61. The demurrer must be overruled and the suit abated.

DOE ON DEMISE OF HAM and Wife v. MARTIN.

An estate descends to A. from his mother, and from him descends to E., his niece of the whole blood. E. shall hold the estate to the exclusion of M., who is sister of the half blood to A. on the paternal side.

EJECTMENT, from PASQUOTANK. Mary Pritchard, then wife of Thomas Pritchard, Sr., died, seized and possessed of the land in dispute, before 1795, leaving her husband surviving her, and leaving two children by him, viz., Thomas Pritchard, Jr., and Elizabeth, who afterwards intermarried with William Clary. Thomas Pritchard, Sr., afterwards intermarried with another wife, and had issue by her, Mary, the wife of the plaintiff, and died. Thomas Pritchard, Jr., entered upon the premises in dispute as heir to his mother, and was seized and possessed
(424) of the same until his death, in 1802. He died intestate and without issue, leaving Elizabeth P. Clary, daughter of his sister, Elizabeth Clary, who had in the meantime died intestate, leaving the said Elizabeth P., her only child. The defendant claimed under Elizabeth P. Clary.

On these facts the court below nonsuited the plaintiff. Motion that the nonsuit be set aside and new trial granted; motion refused, and plaintiff appealed.

TAYLOR, C. J. The estate claimed in this case descended to Thomas Pritchard, Jr., from his mother, Mary, and from him to his niece of the whole blood, Elizabeth P. Clary, under whom the defendant claims. The plaintiff claims in right of his wife, who is sister of the half blood to Thomas Pritchard, Jr., on the paternal side. Had the question arisen between the plaintiff and Elizabeth, the wife of Clary, it would then have presented the same point with *Pipkin v. Coor,* 4 N. C., 14, which was a controversy between the brothers and sisters of the whole blood on the part of the acquiring ancestor on the one side and the half blood on the other; but it depends on the very same principles and is governed by the two provisos to the third clause of the act of 1784—the first giving preference, where intestate dies without

issue, to the brothers and sisters of the half blood, on the side of the acquiring ancestor, in exclusion of the brothers and sisters of the half blood on the other side. The act, by preferring one set of half blood to the other, must necessarily prefer the whole blood of the ancestor, from whom the estate descended, to the half blood of the one from whom it did not descend. This construction is unavoidable; otherwise, we must suppose that the Legislature meant to put the half blood in a better situation than the whole blood. The other proviso to the clause gives the same right to the issue of a brother or sister of the intestate (425) dying in the lifetime of the intestate, which their ancestor would have had if he had lived. Therefore, as Elizabeth Clary died in the lifetime of Thomas Pritchard, Jr., Elizabeth P. Clary stands in the place of her mother and represents her, and is entitled to the land, in exclusion of her aunt of the half blood on the paternal side. The motion for a new trial must be overruled and a judgment entered up for the defendant.

THE GOVERNOR, to the use of Robertson & Co., v. MATLOCK et als.

In debt on sheriff's bond for escape, it is proper for the jury to consider the damages really sustained by the escape; and they are not bound to give the whole sum due from the original debtor.

THIS was an action of debt upon a sheriff's bond against the defendant and his sureties, from ROCKINGHAM; and the declaration alleged that Matlock had voluntarily permitted the escape of one Hodges, who was in custody of a *ca. sa.* at the instance of Robertson & Co. The facts, as stated in the declaration, were substantially proved before *Nash, J.*, who instructed the jury that, whether the escape were voluntary or negligent, the liability of the defendant remained the same; and should they find for the plaintiff, that question, whether voluntary or negligent, could make no difference as to the *quantum* of damages to which plaintiff might be entitled; that as the suit was brought for damages for a breach of the covenants in the sheriff's bond, the plaintiff was entitled to damages, in either case, only to the amount of the loss sustained in consequence of the breach; and that loss depended on the ability of the debtor to pay.

It was proved on the trial that the debtor was insol- (426) vent, and the jury found a verdict for the plaintiff and assessed his damages to $25. Plaintiff moved for a new trial, on

the ground of misdirection in matter of law; motion disallowed; judgment, and appeal.

TAYLOR, C. J. That the act of 8 and 9 Will. III., ch. 2, sec. 8, was extended in practice to this State, and considered to be in force in 1777, is rendered plain by the Court Law, section 73 of which provides for rendering judgment in an action of debt which shall be final, "except where damages are suggested on the roll." No such practice was known at common law; for, when covenants and agreements were contained in the condition of a bond, the plaintiff, upon a breach, recovered the whole of the penalty, and the defendant was driven into equity for relief. The statute of William is the only one providing for bonds with covenants or agreements in the condition, and the very great necessity for the regulations it contains makes it difficult to suppose that our ancestors could have done without it. A sheriff's bond for the performance of his duty especially requires such a provision, and no breach that could be assigned under it more so than an escape, in which cases of great hardship sometimes occur against the sheriff. Taking the eighth section of the statute then to be in force, it is the settled law under it that it is not in the power of a plaintiff to refuse to proceed according to it, in cases within the provisions of the section, but that he must assign the breach of such covenant as he proceeds to recover the satisfaction for; and the jury, upon the trial of a cause, must assess damages for such of the breaches assigned as the plaintiff, upon the trial of the issues, shall prove to have been broken. 2 Wils., 377.

It was proper, then, for the jury in this case to consider the damages really sustained by the escape, and they were not (427) bound to give the whole sum due from the original debtor, as in debt upon the statutes of Westminster 2, and Rich. II. The rule for a new trial must be discharged.

Cited: S. v. Skinner, 25 N. C., 567; *S. v. Eskridge,* 27 N. C., 413; *Willey v. Eure,* 53 N. C., 322; *Harris v. Harrison,* 78 N. C., 217.

MANN v. VICK.

1. It is the duty of public officers who are paid for their services, to furnish blanks to be executed by individuals who have business to transact with them in their official characters.

MANN *v.* VICK.

2. Where a prisoner, desirous of being admitted to the prison bounds, applies to the sheriff, and offers to prepare a bond with ample security, and the sheriff refuses to admit him to the rules, or to take any bond, such conduct on the part of the sheriff is a waiver of any further act to be done by the prisoner, even supposing the law required him to prepare and tender a bond.

FROM HALIFAX. The declaration, which contained but one count, charged that Vick, being Sheriff of Nash County, and one Ricks his deputy, Ricks had refused to allow the plaintiff the bounds of the prison in the county of Nash, though sufficient security had been offered.

The plaintiff, to support his case, exhibited a writ of *ca. sa.* against him, returned "executed" by the defendant; and also proved by the records of the court that prison bounds had been laid off according to law. A witness, Arrington, then swore that he, as the agent and friend of the plaintiff, applied to the deputy, Ricks, and informed him that the plaintiff was desirous of being admitted to the bounds, and that the witness (whose sufficiency was proved) offered to become plaintiff's security. Ricks said he did not know how to prepare a proper bond, and the witness then offered to prepare it. When about to do so, the brother of Ricks suggested some objection, and Ricks then told the witness that he would take no bond and would not admit (428) the plaintiff to the bounds. The witness, in consequence of these declarations, proceeded no further, and no tender or offer of any other nature than that before made was proved.

It was contended below for the plaintiff that it was the duty of Ricks, as an officer, to prepare the bond; but, even if this were not the law, there had been proved a sufficient offer on the part of the plaintiff to do all that the law required, and a refusal by the officer.

For the defendant it was said that it was incumbent on the plaintiff to show that he had actually prepared a bond, had it executed, and tendered it at the time of the refusal.

The opinion of the court upon the law was that it was not incumbent on the sheriff to prepare a bond for the prison bounds whenever a person should ask the benefit of the rules, although the prisoner might have been able to refer to a person (a sufficient security), or even have such a person present, who would state his willingness to become security. But, although the court thought it the duty of the prisoner, and not of the sheriff, to have the bond prepared, yet, if in this case the jury should believe that the plaintiff, by Arrington acting for him, offered to give security for the bounds and to have a bond written and executed, and had at the time the ability to give sufficient security, and

that Ricks, the officer, then declared that he would not admit the plaintiff to the privilege of the bounds and would not take any bond, this was, on the part of the officer, a waiver of any further act to be done by the plaintiff, and rendered it unnecessary for the plaintiff to have a bond written and executed in order to maintain his action. The jury returned a verdict for the plaintiff, and a new trial having been refused, from the judgment rendered defendant appealed.

(429) *Mordecai* for plaintiff.

HALL, J. Viewing this as a question between the plaintiff and the defendant, as an individual and not as sheriff, I think the law is on the side of the plaintiff; and I think it was correctly stated by the judge to the jury, in his charge, when he stated "that if they should believe from the evidence that the plaintiff, then a prisoner, by Arrington acting for him and on his behalf, offered to give security for the bounds and to have a bond written and executed, and had at the time the ability of giving sufficient security, and that Ricks, the officer, then declared that he would not admit the plaintiff to the privilege of the bounds and would not take any bond, this was, on the part of the officer, a waiver of any further act to be done by the plaintiff, and rendered it unnecessary for the plaintiff to have a bond written and executed in order to maintain his action," and I think *Jones v. Barclay,* Doug., 684, an authority in point.

I think the first part of the judge's charge more questionable, when he says it was the duty of the plaintiff to furnish a bond to be executed for the prison bounds. It is certainly correct when applied to dealings between private citizens; but custom and the fitness of things require that public officers, who are paid for their services, should furnish blanks to be executed by individuals who have business to transact with them in that character. Much and serious injury and inconvenience would be the consequence of a different practice. Few men are acquainted with the forms necessary to be observed in drawing bonds which it is their duty to execute. The general and, I had thought, the universal practice was, that clerks, sheriffs and others furnished the necessary papers appertaining to their official duties.

(430) From this consideration, as well as from the ground first taken, as to the charge of the judge, I think the rule for a new trial should be discharged.

HENDERSON, J. In transaction between individuals, it certainly is necessary that he who is bound by his contract, or even by law, to give a bond, make an assurance (such as he by his sole

act can make), an acquittance, or release, must make such bond, assurance, etc., and it is not sufficient for him to show that he was ready and willing to do so; and if he does not do it in stating his excuse he must in general show that the defendant either prevented the performance or rendered it unnecessary to do the prior act by his *neglect* or by his discharging the defendant from his performance. These are the words of Chitty on Pleadings, 317, 318, which he extracted from the best authors, and are consonant to the rules of common sense. The plaintiff's ability to perform must also be shown; otherwise, the nonperformance could not arise from the prevention, neglect or discharge of the defendant, but from his inability to perform. What amounts to a discharge is matter of law; but the fact from which the legal inference is drawn is matter of fact. To constitute the discharge, it is not necessary that the word "discharge" should be used; any other word or act which goes to show that the plaintiff does not require the act to be done, as that it is unnecessary, or unavailing, or that the plaintiff would not accept of it if done, is the same thing, and has the same operation, and the meaning of it is, "I will not accept of it; it will profit you nothing; it will not be the basis of any act of mine, nor will you, by my act, obtain what you are seeking therefrom; it is perfectly useless and unnecessary for you to do it." The law, which requires nothing to be done in vain, dispenses with the performance of the act. It amounts, therefore, to a tender and refusal. Notwithstanding the construction given to *Jones v. Barclay*, Doug., 684, I consider it an authority for the plaintiff, (431) except upon the point of an independent ability, of which, hereafter. The declaration states that the plaintiff offered to assign the equity of redemption and a release, and tendered to the defendant a draft of the assignment and release for his approbation, and then and there offered to execute and deliver and would have executed and delivered the said assignment and release to the defendant, but that the defendant *absolutely discharged* the plaintiff from executing the same. The defendant pleaded that the plaintiff never did *execute* an assignment of the said equity of redemption, etc., to which plea the plaintiff demurred. This demurrer of the plaintiff put not only the validity of the defendant's plea, but the goodness of his own declaration, to the test; and if the facts set forth in it were not sufficient to support his legal inference, to-wit, that the defendant discharged him from the *execution* and delivery of the assignment and release, the declaration is bad; for a declaration is a compound of facts and legal inferences. It is the province of the jury to pass upon the facts, and of the court upon the legal inferences. The

decision of the court upon the demurrer was, that the declaration was good, thereby affirming that there was no necessity of making and sealing the assignment and release, but that an offer was sufficient, if the defendant refused to take *any* assignment or release; that is, that the refusal to take any assignment or release dispensed with the necessity of making one; for why should *one* be made which is to enable the court to see that it is a good one, when *none* would do? But the counsel says this was on a demurrer where the facts are admitted. What facts? Only those set forth. And the demurrer varies it from an issue in this only, that the court at once judges upon the correctness of the legal inference made by the declaration, the facts being admitted. On an issue, the facts are denied; but when on an examination (432) found to be true, the court must see, when passing judgment, that the legal inferences are correct; and in the case in Douglas the same question would have arisen if the defendant's plea had been found by the jury to be true; for by the judgment given to the plaintiff the Court thought it no answer to the plaintiff's declaration, for its truth was omitted by the plaintiff's demurrer. So far as regards this part of the case, the facts stated in the record amount to a discharge, if true, provided it appears that the plaintiff shows that he had the ability to perform, which, the counsel for the defendant contends, means the independent power to perform the act; and this is true where the act to be performed is one capable of being reduced under his absolute control, as in a tender of money or a horse. It is not sufficient to show that his friend was standing by, ready to lend the one or the other, if the defendant would agree to receive it; the things are in their nature capable of being placed entirely within the control of the person making the offer; and his being in that state, with regard to them, shows his inability to go farther, for the things are capable of being more within his control; but when he is to bind himself, with security, as a free agent is to be bound with him, and he has that security present and willing to become bound, a moral certainty would seem to be sufficient; and if he is prevented by the discharge of the defendant, I think it would seem to follow that the nonperformance arises from the discharge of the defendant, and not from the plaintiff's inability to perform the act. I repeat it again—a moral certainty of being able to perform is sufficient. It is said this might encourage spurious offers; that men would agree to be security merely to entrap another. The defendant may avoid all harm by being merely passive or by agreeing to receive the thing which he was bound to receive. There is no necessity of refusing or discharging the plaintiff from the tender; and whether this was

a delusive tender, was properly left to the jury; and, also, whether Arrington acted as the friend or agent of the (433) plaintiff, or merely as the enemy of the defendant Vick.

I am also induced to believe that, however the law may be between individuals, that whenever an officer is required to make his official conduct depend on his taking or receiving a bond from a person, that it is his business to prepare one. Custom and convenience require this. He is presumed to know the laws and the forms peculiar to his office better than a mere individual. A contrary practice would lead to oppression; and, although in this case no fee is fixed, from which it may be inferred that it was not his duty, it is either, I think, a *casus omissus* or it is included in his extra allowance; nor need we apprehend vexatious applications any more than in cases of bail, where it cannot be controverted that he is bound to furnish the bail bond, for he has a fee for it; for it is on his taking bond, and not for furnishing the bond, that the fee is due; and the sheriff might be equally vexed by the appellant's omitting to sign the bail bond, for no fee would then be due. To avoid these inconveniences and oppressions, I think, on sound principles, it is the officer's duty to furnish all official bonds, and that the sheriff now alleges, with a very bad grace, as an excuse for not giving the bonds, that it was not his business to prepare the bond, when he at the time declared that he would not take *any bond*. We should be well satisfied that this after-thought of the sheriff furnished a good defense; and if it was not an after-thought, he is guilty of a foul fraud in misleading the plaintiff.

PER CURIAM: Let the rule for a new trial be discharged.

Cited: Mayo v. Mayo, 9 N. C., 331.

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(434)

STATE v. BEN, the slave of J. B. Herrington.

Notwithstanding the act of 1741, a slave tried for a capital crime may be convicted on the testimony of a slave, though uncorroborated by pregnant circumstances.

INDICTMENT for burglary, tried before *Badger, J.*, from CRAVEN. In this case the fact of burglary was proved by the testimony of a white man, a witness above suspicion, but the only evidence to show any agency therein on the part of the prisoner was given by a *slave*, and that evidence was direct and positive. The counsel for the prisoner contended such evidence was insufficient to convict the prisoner, because not supported by "*pregnant*

circumstances." The court instructed the jury that whatever rules existed on the subject were rules of reason and prudence, addressed to their sound discretion, but that there was no positive rule of law which should prevent them, if they believed the testimony of the slave, from finding a verdict of guilty against the prisoner, although his testimony was not supported by other proof.

The jury found the prisoner guilty. A motion for a new trial was overruled, and sentence of death passed, from which the prisoner appealed.

TAYLOR, C. J. I have not been able to ascertain in what manner slaves, accused of capital offenses, were tried before ch. 24, Laws 1741. The collection of the laws which I have seen are silent on that subject; but it may be conjectured that the County Courts entertained jurisdiction.* Among the very few (435) events connected with the early settlement of the State, which history has condescended to notice, that of an insurrection of slaves, in 1738, has come down to us; and I infer, from the period of its occurrence, that it suggested the rigorous and detailed system of police which was established in two or three years afterwards. Accustomed, as our ancestors were, to the usages of the common law, and its solemnity in capital trials, they were probably impelled by a sense of common danger and the duty of self-preservation to vest this extraordinary jurisdiction in three justices and four freeholders, who might be hastily collected at the courthouse, and proceed to the condemnation and execution of a slave, without indictment, jury or notice to the owner. Had such a special jurisdiction, so wholly out of the course of the common law, been created without any specification of the sort of testimony it should require, it is to be apprehended that very slight circumstances would have led to a conviction; more especially in cases of conspiracy and insurrection, trials for which have in our own day produced monstrous injustice.†

* Among the early records of the county court of Craven may be found a history of the proceedings of "a special court of sessions, held at the courthouse in Newbern Town, 10 Aprill, 1740, truely to enquire into an accusation brought by Nicholas Fox against Rachael, a negroe woman belonging to Martin Franck." The prisoner in this case appears to have been charged with a capital felony, and the court was composed of four justices of the peace and three freeholders. This may perhaps furnish some evidence of the mode of proceeding in the case of slaves charged with capital offenses prior to the act of 1741.—REPORTER. There was a prior act, Laws 1715, ch. 46, sec. 11. See 23 State Records, 64.—ANNOTATOR.

† One of the first cases which probably occurred after the passage of ch. 24, Laws 1741, is also to be found on the records of Craven County court. The court met on 27 April, 1741, to inquire (in the language

It was a salutary caution to the triers not to infer from the unusual mode of trial that they should be satisfied with weaker evidence than the common law prescribes; and, (436) since every other form by which the law aims to secure an impartial trial was withdrawn from slaves, the Legislature prescribes that rather more evidence shall be demanded for their conviction than is in general necessary. Reasoning of this kind occasioned, as I think, the act of 1741, to declare that the triers should "receive such testimony of negroes, mulattoes or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing." When the act of 1793 extended the trial by jury to slaves, I strongly incline to believe that it was a virtual repeal of so much of the above section as differs from the common-law rule of evidence; and that conferring the right of trial by jury in open court does, *ipso facto*, draw after it, as an incident, the common-law principles of evidence and all the consequences of common-law proceedings. I do not, however, rest my opinion solely on this ground. It is to be observed that every time the Legislature have touched this subject since the Revolution, it has been for the purpose of improving the condition of slaves, more especially in admitting them to the benefit of an impartial trial in capital cases. The act of 1816, giving the Superior Courts exclusive jurisdiction of capital crimes committed by slaves, extends to those persons the full benefit of a common-law trial, indictment, the benefit of counsel and clergy, and the right of challenge for cause, withholding only the peremptory challenge, which could scarcely have been of any use to them. The first section directs "that the trial shall be conducted in the same manner and under the same rules, regulations and restrictions as trials for freemen are now conducted." This, it seems to me, is full authority to the Superior Courts to look at the common law for the rules of evidence, modified as they are in relation to colored persons by the act of 1777; and I cannot doubt that the first section, taken together with the repealing clause, does annul section 48, Laws 1741. (23 State (437) Records, 202.—ANNOTATOR.) But why should the act of 1816, which does the Legislature so much honor, be so construed as to place slaves on a better footing, in respect to

of the record) "for our Sovereign Lord, the King, concerning the murther of Robert Pitts." The inquiry—for trial it was not—terminated in the conviction and almost immediate execution of Jack, a slave of the deceased; and from the evidence, as given in detail on the record, one cannot but be forced to the conclusion that the excitement must have been wonderful, which could have induced men to doom to death a fellow-being on such testimony as, if laid before a grand jury of the present day, would not induce it to find a bill.—REPORTER.

evidence, than free persons? On the trial of the latter for a capital crime, sworn to only by one witness, the jury is instructed to judge of the credibility of the witness, and, if they believe him, that one is sufficient to convict, without any pregnant circumstances; whereas, if the rule of 1741 is still in force, the jury must be told that, however well satisfied they are with the testimony of one witness, or thoroughly convinced of the guilt of the slave, they must nevertheless acquit him, in the absence of pregnant circumstances; and this notwithstanding the previous finding of the bill by a grand jury, and the examination of the case in a way the most favorable to the discovery of truth. If the grand jury cannot find the bill upon the testimony of one credible witness, without pregnant circumstances, nor the petit jury convict, then the trial is not conducted "in the same manner and under the same rules, regulations and restrictions as trials of freemen are now conducted." If criminal slaves cannot be punished for crimes which are usually committed with the most studied secrecy, but through a species of evidence not always to be had, and which, if obtained, could not deepen the conviction arising from the testimony of a credible witness, it is to be apprehended that a mischievous state of impunity will be the consequence.

There is one circumstance tending to show that the Legislature of 1802 did not believe the provision of 1741 was in force, for in the act "to prevent conspiracies and insurrections among the slaves" the rule of evidence is re-enacted in relation to these crimes. Now, the act of 1741 made it applicable, not only to those offenses, but to all others; and if it were not repealed by 1793, must have been in force in 1802. The act last noticed was passed soon after some disturbances had arisen among the slaves in the lower part of the State, and the clause was prob-
(438) ably re-enacted for the purpose of tempering that excess which public excitement had produced in the trials for these offenses. Upon the whole, I think the conviction is right.

HENDERSON, J. Laws 1741, ch. 24, sec. 48, erects a court for the trial of slaves, composed of three or more justices of the peace and four freeholders, and empowers and requires them to take for evidence the confessions of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing, without the solemnity of a jury. As long as this court remained, under any modification, the testimony prescribed by the act remained with it. But when the trial of slaves was transferred, first to the County Court, by the act of 1793, and then to the Superior Court, by the act of 1816, courts proceeding

by known and established rules of evidence, the evidence prescribed to the court established by the act of 1741 was not transferred with the jurisdiction, but the rules established in the court to which cognizance of the offense was transferred or given became the rule of decision; and it is not at all like the case of treason or perjury, to which it was attempted to liken it, for in them the rules of evidence are attached to the offense, and will follow its trial to any court; but the rule prescribed to the court established by the act of 1741 is attached to the court and is confined to trials in that court, or to a court modified from that. I lay no stress on the words in the act of 1816, "rules, regulations and restrictions"; it is most probable they relate only to the form of the trial; nor shall I search for reasons which might have induced the Legislature to require *pregnant circumstances* in one court and not in the other; or why, by the act of 1802, to punish slaves for *conspiring* to rebel or make insurrection, or to commit murder, again prescribes the same rules as to the evidence, and particularly that the testimony of one negro or person of color shall not be deemed conclusive or sufficient to con- (439) vict, without *pregnant circumstances,* thereby strongly implying that it was considered that the rule of evidence prescribed to the court established by the act of 1741 was no longer in force; but I know in practice the same thing is often, for greater caution, re-enacted. I think this case is clear, upon the grounds that the rule as to pregnant circumstances was prescribed to another court than the one before which this slave was tried; that the latter court was in existence before the transfer of cognizance; that at the time of the transfer it had rules of its own, including the rules of evidence by which it ascertained the disputed facts; that by the act of 1777 negroes, Indians and mulattoes are declared to be competent witnesses against each other, without calling in the aid of legislative intention arising from other acts. I can see no error in the judge's charge, and no grounds for a new trial. Let the rule be discharged.

HALL, J., *dissentiente:* It is proper, in this case, to take a view of all the acts of Assembly which relate to it. Laws 1741, ch. 24, sec. 48, is the first.* It declares that "if three or more negroes or other slaves shall at any time hereafter consult, advise or conspire to rebel or make insurrection, or shall plot or conspire the murder of any person whatsoever, such consulting, etc., shall be adjudged and deemed felony, and the slave convicted thereof shall suffer death." It then declares

* There was a prior act, 1715, ch. 46, sec. 11. 23 State Records, 64. 25 *ib.*, 169. ANNOTATOR.

"that three justices and four freeholders, owners of slaves, are empowered, upon oath, to try all manner of crimes and offenses that shall be committed by any slave, at the courthouse, and to take for evidence the confession of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes or Indians, bond or free, with *pregnant circumstances*, as to them shall be convincing, without the solemnity of a jury."

Under this act, the uncorroborated testimony of a slave
(440) would not be sufficient to convict a slave of any crime. I do not think that Laws 1777, ch. 2, sec. 42 (24 State Records, 60—ANNOTATOR), has any bearing upon the present question. That act only incapacitates negroes, mulattoes and some other persons to be witnesses, except against each other. This act only recognizes their competency, as the act of 1741 had done, but it is silent as to their credibility. By Laws 1793, ch. 5, jurisdiction of all offenses committed by slaves is transferred to the County Courts and to a jury of good and lawful men, owners of slaves. Nothing is said in this act relative either to their competency or credibility. If the act of 1741 required pregnant circumstances to support the testimony of a slave or negro, until it is repealed it is still required. I cannot think that the transfer of jurisdiction from the three justices and four freeholders, owners of slaves, to the County Courts is, *ipso facto*, a repeal of it. Laws 1802, ch. 17, makes some new regulations as to the offenses of conspiracy and insurrection, and declares that, as to them, the testimony of a negro or person of color shall not be deemed sufficient or conclusive to convict the person charged, unless same shall be supported by such pregnant circumstances as to the jury shall appear convincing. It may be asked, why did the Legislature interpose this guard against convictions for conspiracy, etc., when the same guard was interposed by the act of 1741 against conviction of crimes of every description? The question I cannot answer, but I feel myself at liberty to say that re-enacting in 1802 what was enacted in 1741 is no repeal of the first act. The next law on this subject was passed in 1816 (New Revisal, ch. 912). This act transfers to the Superior Courts exclusive jurisdiction in all cases where slaves shall be charged with the commission of any offense, the punishment whereof may extend to life, limb or member, and under the same rules, regulations and restrictions as in trial of freemen for like offenses. The latter expression, I think, relates to the mode of conducting the
(441) trial. It is altogether silent, both as to the competency and credibility of witnesses. That, as I apprehend, was left to the law as it then stood—I mean the law of 1741. This

case has been likened to the cases of high treason and perjury (and I think not improperly). In each of those cases two witnesses were necessary to a conviction, and I think it would be required (until altered) upon a transfer of jurisdiction of those offenses from one tribunal to another. The only want of resemblance between those cases and the one before us is that in those cases, and those only, the testimony of one witness is not sufficient to a conviction in the case of freemen; and the testimony of one witness—I mean that of a slave—without pregnant circumstances, is not sufficient to convict slaves of any crime. It has been argued that when the Superior Courts acquired jurisdiction in these cases the rules of evidence attached to them, as in trials of free persons. I cannot come to the conclusion that a positive law should be repealed by subsequent laws in which so little intimation is given of legislative will that they should have that effect. That the policy of the law of 1741 was founded on a sense of the degraded state in which those unhappy beings existed, no doubt, will be ceded. Being slaves, they had no will of their own, and a humane policy forbade that the life of a human being (one of themselves) should be taken away upon testimony coming from them, unless some circumstance appeared in aid of that testimony. If this was a just policy, I am not aware, if we were now to examine their condition, that anything would be discovered so much more favorable to the cause of truth as to require a repeal of the laws now in force by the Legislature, or a construction of them by the courts tending to the same end.

My opinion, therefore, is that the rule for a new trial should be made absolute.

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(442)

STATE v. POLL and LAVINIA, slaves, etc.

1. The declarations of a deceased person, that he was poisoned by certain individuals, not made immediately previous to his death, but at a time when he despaired of his recovery, and felt assured his disease would prove fatal, are admissible as dying declarations.
2. When a common design is proven, the act of one in furtherance of that design is evidence against his associates, but the declarations of one of the parties can be received only against himself.
3. It is not competent for owners of slaves, or their counsel, to consent to the removal of a criminal cause against such slave; it cannot be otherwise removed than on affidavit.

THIS was an indictment against the prisoners and one John Skinner for the murder of Samuel Skinner, by poisoning, from CHOWAN. The bill was originally found by a grand jury of the

county of Washington, and, after arraignment and the plea of not guilty, recorded severally for each. The solicitor for the State, and the prisoner John Skinner consented to remove his case to the county of Chowan for trial, and the owner and counsel of the other two prisoners consented, with the State's officer, to a similar removal of the cases of Poll and Lavinia.

The indictment against Poll and Lavinia came on to be tried in Chowan Superior Court, before *Daniel, J.*, and the following outline presents such facts as are necessary for a correct understanding of the points raised. The poison alleged to have been given was white arsenic; and the object of the State was to show that John Skinner purchased the poison, under false pretences, and gave it to the prisoners (who were domestics in the family of Samuel Skinner), and that they mixed it with the food and drink of Samuel. The State, to prove a conversation between the prisoners, introduced a witness who accidentally overheard it, and he stated that they spoke of having put something into Samuel Skinner's soup which would kill him and all others who partook of it. Lavinia then advised Poll to carry some
(443) of that which they had put into the soup into the house, and if, during the night, Samuel Skinner called for water, to put some in the water, adding, "That is the way *he* said do it"; and Poll accordingly took down from a shelf something wrapped in paper, and, putting another wrapper of paper over the first, placed it in her bosom. On examination before the committing magistrate, Lavinia said that *he,* referred to in the conversation stated, was John Skinner, who had given to Poll something like *lime,* but it was heavier.

The solicitor for the State then offered to prove, by a declaration of John Skinner, that he had purchased a quantity of arsenic just before, under the pretence, as the State alleged, of curing the horse of one Mariner of poll evil. This declaration was objected to, but the court received it; and Mariner then proved that he never requested John Skinner to purchase arsenic to cure his horse, and, in fact, never had a horse diseased with a poll evil.

Samuel Skinner died on Thursday, and his declarations, from the Sunday previous up to his death, were offered in evidence. These were objected to, as not being dying declarations, but the court received them. He stated his belief that he should die, though he was occasionally better. He said he was poisoned, and, as he believed, by Poll, who had given him something in his food and drink.

The jury found the prisoners guilty, and a new trial was moved for—first, because Samuel Skinner's declarations were

improperly received; and, secondly, because the declarations of John Skinner, that he had purchased arsenic, were not evidence against the prisoner. A new trial was refused; and it was then moved, in arrest of judgment, that the Superior Court of Chowan had not jurisdiction of the cause. The motion was overruled and sentence of death pronounced, from which the prisoners appealed.

TAYLOR, C. J. The declarations of the deceased, made (444) at the time when he despaired of his recovery and felt sure that, though he was something better after the physician attended him, his disease would prove ultimately fatal, appear to me to have been properly admitted. The latest and most authoritative cases show that the court is to decide, and not the jury, whether the deceased made the declaration under the apprehension of death. 1 East Pl. Cr., 357—*John's case*. But, as to the declarations of John Skinner, I know of no principle upon which they could be received as evidence against the prisoners. Even if he were a party to the record, they could be evidence only against himself, and not against the other defendants. For this reason, there ought to be a new trial. Whether the Superior Court of Chowan had jurisdiction of this case depends upon the construction of Laws 1816, ch. 912. The words of the second section are: "That such cases may be removed for trial to an adjoining county upon affidavit of the owner, or, in his absence, of the counsel of such slave or slaves, in the same manner as causes may now be removed by freemen." By the preceding act of 1813, ch. 853, suits may be removed by consent; but there is nothing in the phraseology to warrant a belief that criminal prosecutions were intended to be included. On the contrary, where the Legislature provides for their removal, they use different language, as in Laws 1808, ch. 745, in which the words are, "that no cause, civil or criminal," and it then proceeds to require an affidavit for their removal. The same expressions, "all causes, civil and criminal," are used in Laws 1806, ch. 693. From all which, the conclusion is that, as criminal causes could not in 1816 be removed otherwise than by affidavit, it was not competent for the owner of the slaves and their counsel to consent to the removal of this. I am therefore of opinion that a new trial should take place in Washington Superior Court, unless the case be properly removed (445) by affidavit.

HENDERSON, J. By the act of 1813, N. R., 1274, the *parties* in a suit may remove it, by consent; and should the word *"suit"*

embrace criminal prosecutions for capital offenses, a removal, by consent of the owner or counsel of a slave, or the consent of both, is neither within the words or spirit of the act, for they are not parties. But it is inferred that, as a cause may be removed upon the affidavit of the owner or counsel, it may be removed by their consent. I think such inference is incorrect. The object of the law is to obtain an impartial trial, and when it is made to appear to the court that in all probability such object is unlikely to be obtained in the court where the cause is pending, the court is directed to remove it; and it is a matter of not much moment from what source the information comes. It is the act of the court upon such information. The court perceives, if the fact be true, that the purposes of justice will be forwarded by a removal; and, therefore, in conformity to the purposes before mentioned, the Legislature gave to the owner or counsel the power of showing on oath the facts upon which the court acts. But, whether the purposes aforesaid will be answered when the owner or counsel consents to the removal, do not appear. What are the reasons for such assent need not be stated. There may be none, and therefore it would be better, perhaps, for the slave to be tried in the county where the offense is alleged to have been committed. The character, both of the accused and witnesses, would be better known, or the motive may be to obtain an unfair trial; and it is no answer to say that the counsel or owner might obtain the same thing upon their affidavits. It is true they may, but in so doing they must commit a perjury, and every power or privilege may be abused. I therefore think that the cause
(446) was never properly in Chowan Court, and that the trial there was a perfect nullity. Judgment of death pronounced by that court must therefore be reversed. The court of Washington will proceed to the trial, as if no such proceedings had ever been, as have taken place in Chowan. This view of the case renders it not absolutely necessary to express an opinion on that part of the case which respects the declarations of John Skinner being given in evidence to the jury. But perhaps it will prevent another appeal to this Court, shortly to state the reasons why we think they ought not to have been received, as possibly our silence on the subject may be construed into an approbation. The rule has never been carried further than this, that when a common design is proven, the act of one in furtherance of that design is evidence against his associates; it is in some measure the act of all; but the *declarations* of one of the parties can be received only against himself. As to the dying declarations of the deceased, I concur in the opinion of the Chief Justice.

HALL, J., concurred.

Cited: S. v. Seaborn, 15 N. C., 313; *S. v. Reid,* 18 N. C., 379; *S. v. Haney,* 19 N. C., 395; *S. v. George,* 29 N. C., 327; *S. v. Blackburn,* 80 N. C., 478.

STATE v. MCCARSON.

Upon the facts found, the defendant unlawfully erected a toll gate across the public road.

From BUNCOMBE. The defendant was indicted for having erected a gate across a public road. The defense rested on several acts of Assembly, the view of which, as taken in the opinion of the Chief Justice, renders a detailed statement of them unnecessary.

TAYLOR, C. J. The special verdict is framed with a view to obtain the judgment of the Court upon the question whether the defendant committed a nuisance by erecting, (447) on 2 July, 1821, a toll gate across a public road leading from Asheville to the South Carolina line. The solution of this question depends upon the construction of five several acts of Assembly, passed at as many sessions, from 1809 to 1814, inclusive. The merits of the case cannot be understood without an examination of those acts, but I think a very brief one will suffice. The first section of the first act authorizes three persons, viz., Murray, Greer and Kyrkindall, to open and repair the road from Buncombe Courthouse, over the Saluda Gap, to the South Carolina line, and to keep it in repair, under the direction of certain commissioners. The second section appoints those commissioners, seven in number, and invests them with power to lay off and superintend the road, and to direct the manner in which the same shall be repaired. It further provides that, when the road shall have been completed to the satisfaction of the commissioners, or a majority of them, then, that Murray, Greer and Kyrkindall may erect and keep one or more turnpikes on the same, or such places as the commissioners may agree upon, for a term not exceeding ten years. The third section authorizes the County Court of Buncombe, at the next court after the road is completed, and so certified by the commissioners, to establish the rates of toll to be received during the time of the grant. It also gives to the County and Superior Courts of that county the same jurisdiction over the keepers of the turnpike roads as they pos-

sess over overseers. The fourth section imposes upon the commissioners the duty of making a return to each County Court of the state of the road; and the fifth section protects the gates, the toll and the road. Under this act, the commissioners reported in the manner stated in the special verdict, and it is not doubted that the grantees obtained a title to the turnpike for ten years, the time specified. The act of 1811 was passed for the
(448) purpose of changing the commissioners, which it did, giving to the new ones the same powers which were possessed by the former ones. The act of 1812 authorizes the grantees to extend the turnpike road from the north end of Big Mud Creek bridge to Samuel Murray, Sr.'s, old place. The second section changes the commissioners appointed in 1811, and, when the turnpike is extended, authorizes the new ones to determine the additional length of time which the proprietors shall retain the same, and the profits arising therefrom, in consequence of such extension, and to report the same to the next General Assembly. The commissioners performed this duty, and made a report accordingly, in which they recommend an additional twenty years to be added to the ten first allowed. This report was made to the General Assembly at the session of 1813. It is under this act of 1812 that the question arises, it being contended for the defendant that everything was done by the proprietors necessary to entitle them to the extended time, and that there is no ground on which to infer that the Legislature meant to deprive them of it. To this the answer appears to be that the Legislature, had they been so disposed, might have made the determination of the commissioners final, effectual to vest an additional right in the proprietors. They had so done in the act of 1809; but the commissioners appointed under the act of 1812 are directed to ascertain the profits arising from the road in consequence of the extension; and, though they are directed to determine the additional length of time, yet it is evident that such determination was not intended to be final, since they are to report both that and the profits to the next General Assembly. It was a preparatory measure, directed by the act for the purpose of enabling the Assembly to decide, upon a full view of the whole ground, whether any, and what, extension of the charter should be made. If the commissioners were to have acted finally on the subject, their report to the Assembly would have been perfectly
(449) useless. It was for the proprietors to determine whether they would extend the road, according to the first section of the act, and trust to the hope of the charter being enlarged. The public faith is in no degree pledged that it shall be; and in this sense it must have been understood by the commissioners,

for they *recommended* an extension of the term, urging reasons from the expensiveness of the work on the new road, and its advantages to the public, wherefore it would be just. But it did not appear in the same light to the General Assembly; for, at the very same sessions that the report was returned, they annul the powers of the old commissioners and appoint new ones, with different powers, which, however, were not exercised, in consequence of the commissioners refusing to act. In the subsequent law of 1814 there is nothing whence an argument can be drawn in favor of an extended term; and the case settles down to this, that as the report of 1813 was *not* confirmed, the proprietors have obtained nothing beyond their original charter, which having expired at the time when the offense is charged to have been committed, the defendant is, in point of law, guilty, in the manner laid in the indictment.

Cited: S. v. Godwin, 145 N. C., 464.

STATE v. McDOWELL and GRAY.

To support an indictment for taking away property, it must be a violent taking from the actual possession of the owner at the time.

INDICTMENT for breaking into the possession of one Sarah Somers and taking away her slave, from BUNCOMBE. The fact was, that the slave was not in the actual possession of Sarah at the time of the taking, but was in the field of another person, to which she had been sent with James Somers, a brother of Sarah. McDowell, after some conversation with James (450) and the slave (who were children), seized the slave and placed her on the horse of Gray, and Gray carried her off. James offered such resistance as he could to the taking. The court instructed the jury that Sarah Somers was, under the circumstances disclosed, in possession of the slave; that the resistance of James, her brother, was her resistance, and that the taking was with force and a strong hand. The defendants were found guilty. A new trial was refused them, and from the sentence pronounced they appealed.

TAYLOR, C. J. The indictment charges that the defendant broke in and upon the possession of Sarah Somers and took away

her slave. The truth of the case was, that the slave, under the immediate control and in the possession of James Somers, was five hundred yards distant from Sarah and in another's field. Though, for all civil purposes and to protect the right of Sarah, this possession of James' would be considered as hers, yet the principle on which such construction would be made does not apply to indictment in which there is "no latitude of intention to include anything more than is charged; the charge must be explicit enough to support itself." 2 Burr., 1127.

To sustain this charge, by such proof as was given of the possession, would be to convert an action of trespass into an indictment. If the latter will lie for taking away the slave, it must be for a violent taking from the actual possession of the person at the time. The injury done to Sarah in this case consisted in the loss of her property, which may be redressed by a civil action. But the injury done to the public, if any, consisted in the violence and outrage with which James Somers' possession was invaded. A new trial is consequently awarded.

Cited: S. v. Love, 19 N. C., 268; *S. v. Laney,* 87 N. C., 538.

(451)

STATE v. WYNNE.

An individual who acts as an ordinary keeper, without taking out license and giving bond, but who has a license to retail spirituous liquors, may be indicted on the act of 1798, ch. 501, for exacting more than the rates established by the court of his county, and he is estopped from denying the fact of his being a tavern-keeper.

THIS was an indictment against the defendant, as an ordinary keeper, for exacting more than the rates fixed by the County Court, from TYRRELL. The jury returned a special verdict, as follows: That the defendant did open and keep a certain public house, in which he entertained all persons, after the manner of an ordinary and tavern keeper, during the time and at the place mentioned in the bill of indictment; that he obtained and had, during the said time, a license from the Court of Pleas and Quarter Sessions to retail at his own house spirituous liquors, and did retail the same, but that he had not any license, nor did he enter into any bond, as required by act of Assembly, to keep an ordinary. They further find that the rates of fare mentioned in the indictment were established by the County Court, as the indictment charges; and that the defendant, knowing the rates aforesaid, did demand and receive the several sums as charged in the

bill of indictment. But the jury are ignorant whether the defendant can by law be considered an ordinary keeper without such license; they therefore pray the advice of the court; and if the court shall be of opinion that the defendant cannot in law be an ordinary keeper without such license and bond as is required by act of Assembly, then they find the defendant not guilty; if the court shall be of a contrary opinion, then they find the defendant guilty. On this finding the court gave judgment for the State and passed sentence, whereupon defendant appealed.

Manly for defendant.

TAYLOR, C. J. I am of opinion that judgment for the (454) State was properly entered up on this special verdict. The indictment is framed on the act of 1798, ch. 501, the second section of which authorizes the County Courts to grant licenses to keep ordinaries, and, at their discretion, to withhold them from immoral persons and those who are too poor to comply with the intent of the act. Persons obtaining licenses are required to give bond, conditioned for providing good and wholesome diet and lodging for travelers, etc. By the fifth section the justices are directed to rate, each year, the prices of liquor, diet, lodging, etc., *to be taken* by ordinary keepers; and the same section makes it the duty of the ordinary keeper to set up those rates in the public room, under the penalty of £20. The defendant violated the law in selling for higher rates than those settled by the court; but it is objected that, not having taken out a license, he is not an ordinary keeper and therefore not indictable; but I think it would be against all principle and authority to allow this defense to be available. The defendant has held himself (455) out to the world as an ordinary keeper; he has enjoyed more than the emoluments of one duly authorized, and has consequently assumed all the responsibilities of the character. To what end is the law made, if any man may set up a tavern, without a license, and sell at rates established by himself? He may be without character and without credit, and contribute with impunity to that depravation of the public morals against which the law aims to provide. He may also impose upon the public under the color of legal authority, and, when called upon to answer for his conduct, shelter himself under his own double wrong of disobeying the law and defrauding the revenue. I conceive that the defendant has precluded himself, in the way of estoppel, from denying the fact of his being an ordinary keeper, upon the same principle that, in an action against a clergyman for nonresidence, the act of the defendant as parson, and his

receipts of the emoluments of the church, should be evidence against him that he is parson, without requiring the plaintiff to prove the defendant's title, according to the case of *Berryman v. Wise,* 4 Term, 306, and the numerous cases in the books tending to prove that in the case of all peace officers, justices of the peace, constables, etc., it is sufficient to prove that they acted in those characters without producing their appointments. 8 Johns., 431; 6 Binney, 88; 9 Mass., 231; Leach. Cro. C., 585. It appears not less certain to me that the defendant is indictable under the act for selling at higher rates than those established by the court. The rule, well established on this subject, is, that where a statute creates a new offense by making unlawful what was lawful before, and appoints a particular remedy, that method, and that only, must be pursued. *Cartle's case,* Cro. Jac., 643. But when the offense was punishable at common law, and the statute prescribes a particular remedy, there the prosecutor may proceed, either at common law or according to the statute, because the sanction is cumulative. Accordingly, (456) it has been held that keeping an ale house without license was not indictable, because it was no offense at common law, and the statute which makes it an offense has made it punishable by committing the party for three days. *Stephens v. Watson,* 1 Salk., 45. That case affirms the principle that if the statute had not directed a particular mode of proceeding, an indictment would have lain; for where a new-created offense is prohibited by the general prohibitory clause of a statute, an indictment will lie. 1 Bur., 544. Though the act of 1798, ch. 501, imposes some penalties for the neglect of other duties, it imposes none for keeping an ordinary without a license, or for selling at illegal rates; and it appears evidently that such omission was the effect of design, when we look at the two former acts on the same subject (1741) in Swain's Revisal, and the act of October, 1799, in both of which a penalty is imposed for selling provisions at higher rates than those settled by the court. The first act imposes a penalty of ten shillings, and the last a penalty of £50. A comparison of the acts will show that the one of 1779 was before the Legislature of 1798; and I think the conclusion follows that they omitted the penalty in order that the proceeding by indictment should be alone pursued. In the language of Lord Mansfield, "It is to be presumed that the Legislature *then knew and considered* that disobedience to an order of sessions was an offense indictable at common law." 2 Burr., 804.

HALL and HENDERSON, JJ., concurred.

Cited: S. v. King, 25 N. C., 414.

(457)

STATE v. RUTHERFORD.

A well-grounded belief that a known felony is about to be committed will extenuate a homicide committed in prevention of the felony, but not a homicide committed in pursuit by an individual of his own accord.

THIS was an indictment for an assault on one Spurlin with an intent to kill him, from RUTHERFORD. The case, as proved before *Norwood, J.*, was that the defendant and one Magness, in whose employment Spurlin was, lived near each other; that during a temporary absence of Magness from his home one of his slaves had been much injured by the bite of a very fierce dog, owned by Rutherford; on the return of Magness, hearing what had happened, he requested Spurlin to take a gun, go to Rutherford's house and tell him that if he would permit his dog to be killed, he (Magness) would be satisfied; otherwise he would seek redress by law; and also instructed Spurlin, if Rutherford consented, to kill the dog. At dark, Spurlin accordingly went, and took the gun for the double purpose of defending himself from the dog and of killing him, should Rutherford assent. On arriving within eighty yards of the house, he coughed, and the dog immediately attacked him; after trying in vain to keep the dog off with the gun, he fired and injured the animal slightly. Rutherford thereupon immediately came out of his house, with his gun, encouraged his dog, and ordered his negroes to pursue the person who had fired the gun. Spurlin, hearing this, ran towards the house of Magness, which was at some small distance, and was pursued by Rutherford, who, when within forty paces of him, without speaking, fired and wounded Spurlin in the head. On discovering who it was, Rutherford expressed his regret that the whole load had not passed through Spurlin. The court, after instructing the jury generally as to the law, (458) was requested by defendant's counsel particularly to charge them that, if they believed the defendant, Rutherford, had a well-grounded belief that the person who fired the gun intended to commit a felony, it would extenuate the offense, and the defendant would be entitled to a verdict. The court declined doing so, and instructed the jury that there must be a felony committed, or strong and convincing evidence that a felony had been committed, or the party slaying summoned by a proper officer, to extenuate a killing in pursuit; and that, even then, if it should be apparent there was no necessity to kill, the offense would not be extenuated, but would be murder; and that an intention to commit a felony, abandoned by the party, would not warrant a

violent arrest. The jury found the defendant guilty, a new trial was refused, and from the judgment and sentence of the court defendant appealed.

HENDERSON, J. The defendant's counsel prayed the court to instruct the jury that, if they believed that the defendant, Rutherford, had a well-grounded belief that the person who fired the gun *intended* to commit a felony, it would extenuate the offense and the defendant be entitled to a verdict. The court declined to do so, and instructed the jury that there must be a felony *committed,* or strong and convincing evidence that a felony had been committed, or the party slaying summoned by a proper officer, to extenuate a killing in pursuit. The judge, if he erred at all, erred in favor of the defendant and against the State. A well-grounded belief that a known felony is about to be committed will extenuate a homicide committed in prevention of the act, but not a homicide committed in pursuit, by an individual, of his own accord. To extenuate a homicide committed in pursuit, there must be an actual felony committed; and it is said
(459) that no evidence, however convincing, even the finding of the grand inquest on oath, will supply the want of an actual felony being committed, where an individual, of his own accord, commits a homicide in pursuit, because the pursuit by the individual is an officious act, it not being his duty to arrest unless called on by an officer; and from the tenderness of the law towards the life of a citizen, with which, I presume, is intermixed some portion of policy, for it might be a means of gratifying private revenge, it is to be observed that some doubts are expressed by Mr. East, where the grand inquest has found that a felony has been committed; but no case is brought forward to support that doubt, and he concludes that, at least, it will be *prima facie* evidence that a felony was committed. But, as I said before, a well-grounded belief that a known felony was about to be committed will extenuate a homicide committed in prevention of the supposed crime, and this upon a principle of necessity; but when that necessity ceases, and the supposed felon flies and thereby abandons his supposed design, a killing in pursuit, however well grounded the belief may be that he had intended to commit a felony, will not extenuate the offense of the pursuer. This extenuation rests upon an actual felony committed and a *necessity* for the killing to prevent the escape of the felon. The request of the counsel, and the charge of the judge in answer thereto, have more the appearance of the discussion of an abstract proposition than the subject-matter then under consideration; for I am at a loss to perceive how, in this case, an

idea could be entertained by Rutherford that the person who fired the gun was about to commit a felony. A savage and fierce dog, at an early hour in the night, before bedtime, attacks a person in his owner's yard; a gun is fired at him, but misses him; the dog continues the attack; no attempt is made to take the dog off; the person who fired retreats towards a near neighbor's house, is pursued by Rutherford and fired upon, and struck with shot in a vital part. How it could be sup- (460) posed that Rutherford entertained a well-grounded belief that the person intended to commit a felony, under these circumstances, I am at a loss to say; and the judge might have expressed an answer to the counsel's request either way, without affecting the merits of the cause; the verdict of the jury would have been the same.

On the doctrine of reasonable ground to believe a felony was about to be committed, see East Cr. L., 273-4; Cro. Car., 538; *Sevil's case,* 1 Hale, 42, 474; *Browne's case* (1776), Leach, 151. That there must be a felony actually committed, East, 300, and the authorities there cited.

I think, therefore, that the defendant has no reason to complain, and that the rule for a new trial be discharged.

TAYLOR, C. J., and HALL, J., concurred.

Cited: S. v. Clark, 134 N. C., 713; *Martin v. Houck,* 141 N. C., 323.

STATE v. HANEY.

1. All that is necessary, as regards laying the time in a bill of indictment, is that the offense shall appear to have been committed before the finding of the bill, except in those cases where the time forms part of the offense.

2. In general, the time is not traversable, and if it be laid after a scilicet, and be repugnant to the time laid in a former part of the indictment, the scilicet will be rejected as superfluous.

THIS was an indictment for a libel, on which the defendant had been convicted before *Norwood, J.,* from RUTHERFORD. The indictment was as follows:

"The jurors for the State, upon their oath, present: That Timothy Haney, of the county of Rutherford, on 22 April, 1819, maliciously and falsely intending to defame one Richard Good, an honest and good citizen of this State, and to (461)

bring him into hatred and contempt among the citizens of this State, on the day and year aforesaid, in the county aforesaid, a certain false, scandalous and libellous writing against the said Richard Good falsely and maliciously did frame and make, and then and there did cause to be written and made, and also then and there did cause to be published in the form of an advertisement, the substance of which writing is as follows, to-wit (here follows the libellous matter); and that the said Timothy Haney, with an intention to scandalize the said Richard Good, and to bring him into contempt, hatred and disgrace, the said false, malicious and scandalous, libellous writing, so as aforesaid framed, written and made, afterwards, to-wit, on the said 22 October, 1818, and on divers other days and times, as well before as afterwards, in the county aforesaid, to divers good citizens of this State, then and there present, falsely, maliciously and scandalously did openly publish, to the great scandal, infamy and disgrace of the said Richard Good, against the peace and dignity of the State."

The defendant moved in arrest of judgment, because the days charged in the bill of indictment are repugnant and inconsistent, to-wit, the framing the libel is charged to have been on 22 April, 1819, and the publication to have been made on said 22 October, 1818.

TAYLOR, C. J. The objection to this indictment is that the publication is stated to have taken place on a day before the libel was framed, which, therefore, creates a fatal repugnancy. It must be observed, however, that the first part of the indictment contains a distinct charge of the making, as well as publication, on 22 April, 1819. The publication charged afterwards is preceded by a *scilicet,* introducing a repugnant date. Now, all that is necessary in regard to laying the time in an indictment is that the offense shall appear to have been committed before the finding of the bill, excepting in those cases where the time forms part of the offense, as in prosecutions which are limited to a certain period, and in murder, where the time of the death must be laid within a year and a day after the mortal stroke given. But, generally, where the time when an offense was committed is immaterial, and it is still indictable, whether done at one
(462) time or another, there it is not traversable if alleged after a *scilicet,* and its repugnancy to the premises will not vitiate, but the *scilicet* itself will be rejected as superfluous. 1 Saund., 170. Then, rejecting the date which is last stated in the indictment, for its repugnancy, together with all that is connected with it, from the words *"and that"* to the word *"publish,"*

inclusive, the offense was committed on 22 April, 1819, which is before the finding of the bill. I am therefore of opinion that the reasons in arrest be overruled.

HALL and HENDERSON, JJ., concurred.

STATE v. TAYLOR.

After a verdict of acquittal on a State prosecution, a new trial is not allowed by our statute.

FROM HALIFAX. This defendant stood charged on two indictments, which were tried in the court below and terminated in an acquittal of the defendant. On the trial below, the court refused to permit certain papers to be read as evidence on the part of the State, and the Attorney-General appealed.

TAYLOR, C. J. It would be to no purpose for this Court to decide whether the paper writings offered in evidence were properly rejected by the circuit judge, or not; for, upon the supposition that they were not, we could not grant a new trial after the acquittal of the defendant.

The act of 1815, ch. 895, gives the power of granting (463) new trials to the Superior Courts only where the defendant is found guilty. As, therefore, the judge trying this cause could not have awarded a new trial, we cannot reverse his judgment for having refused it. The verdict must consequently remain.

Cited: S. v. Martin, 10 N. C., 381; *S. v. Credle,* 63 N. C., 507; *S. v. Phillips,* 66 N. C., 646; *S. v. West,* 71 N. C., 264; *S. v. Lane,* 78 N. C., 550; *S. v. Powell,* 86 N. C., 643; *S. v. Ostwalt,* 118 N. C., 1214, 1220; *S. v. Savery,* 126 N. C., 1087.

STATE v. GOODE.

A receiver of stolen goods, under the value of twelve pence, who is tried and found guilty, when the thief has never been prosecuted, but is running at large, amenable to process, is not liable to be punished, and no sentence can be pronounced against him.

STATE *v.* GOODE.

THIS was an indictment from WAKE, for buying and receiving of a negro slave, Essex, certain goods, of the value of six pence, which defendant knew Essex had stolen, and the indictment concluded, "contrary to the form of the statute." It appeared that Essex had never been prosecuted, but was running at large, amenable to process. The court instructed the jury to pass upon the facts and find whether the defendant was guilty of them, as charged in the bill. The jury found the defendant guilty, and the court pronounced sentence, not according to the act of Assembly, but as for an offense at common law, from which the Attorney-General appealed.

HENDERSON, J. The defendant, if guilty of any offense, is so at the common law, for the act of the Legislature, passed in 1797, ch. 19, in making the receivers of stolen goods accessories after the fact, relates to such offenses only as are capable of having accessories. And that part which authorizes a prosecution for a misdemeanor for receiving stolen goods refers to such receivers as are embraced in the preceding (464) section (see 4 Bl. Com. Foster, 73). And according to *Goff's case,* in this Court, July Term, 1809, if he was within the provisions of this act he could not have been put upon his trial while the principal offender was unconvicted and amenable to the process of the Court (see Foster, 371). And I must confess that after a very diligent examination I am brought to believe that the act imputed to him is not punishable at all. In petit larceny there are no accessories, but all who are concerned are guilty as principals, if at all. In treason there are no accessories, for all concerned are traitors; but for opposite reasons the magnitude of the offense in treason renders criminal in the highest degree all who in any manner are concerned in it; their offense is not in truth and reality as great as that of those who actually perpetrate the treasonable act, but the law, knowing no greater crime than treason, and the aider or advisor being guilty of that offense, it has no standard by which the different degrees of guilt between the two species of offenses or treason can be measured or graduated, as the law punishes with death both the robber and the murderer, not because their crimes are equal, but because robbery is thought to deserve death, and no more than death can be inflicted on the murderer. In petit larceny and smaller offenses only those who are *concerned* in the *commission* of the offense, in other words, those who in higher crimes would be principals in the first or second degree, are deemed to be concerned or criminal at all, the law *barely* punishing the principals or actors for *de minimis*

non curat lex. If it is asked how it is shown that receivers of stolen goods are not concerned in the act I think it is capable almost of demonstration: a receiver of the *thief* in grand larceny is an accessory, and of course a felon; to receive *the stolen goods* in such case is a bare misdemeanor, which is less than felony. In petit larceny the receiver of the thief is neither an accessory nor a felon, it is no offense at all; therefore receiving the goods, which is shown to be a less criminal (465) act, cannot be any offense at all. I cannot distinguish this case from *Evans's case,* reported in Foster, 73. I understand that in that case the twelve judges decided not only that he was not subject to transportation under the 14 Geo. but that he ought not to have been tried at all, and he was discharged accordingly. If he was not guilty under the act of Geo., if the offense of which he was convicted was a misdemeanor at the common law, he would have received a common law punishment. I am therefore compelled to say that I can find no law for punishing the defendant. I am aware that 2 Hawkins, P. C., says that possibly to receive a person guilty of a bare misdemeanor is a contempt of law, as tending to thwart the administration of justice. He may be correct, but the books furnish no precedent of such a prosecution for such an offense; it may possibly be a contempt of the law to receive the offender, as thereby he may escape and the law be eluded; but to receive the goods can be made a contempt of the law in enabling the offender to escape by a very strained construction only. But if it was a misdemeanor at the common law to receive goods under the value of 12d., yet no judgment can be given against the defendant in this case: not at common law, because the principal felon has not been convicted, nor under the statute of 1797 (New Rev., 847, ch. 485). That statute, so far as regards making the receivers of stolen goods accessories after the fact, can only be applied to those cases which admit of accessories (Foster, 73; *Evans's case,* 4 Bl. Com.), and there are no accessories in petit larceny. But admitting that it does apply otherwise, the principal thief in this case is stated to be at large. See *Goff's case* in this Court, July Term, 1809. It appears by the preamble to the act that the mischief intended to be remedied was the immunity afforded by the rules of the comman law where the principal felon *eluded* the process of the law. Where the principal did *not elude* the process, but was (466) amenable, there was no mischief as the Legislature conceived, and it did not in that case intend to change the law. And this construction is much strengthened by the words at the close of the first section, to-wit: "Which shall exempt the

offender if the principal shall be afterwards convicted." The same inconvenience existed by the common law rule as to receivers of stolen goods, of which it appears the Legislature was aware by using the words, "and also make it their business to conceal such offenders"; the act then makes them accessories after the fact, and that they may be prosecuted as for a misdemeanor and punished as set forth in the preceding clause, although the principal felon be not before convicted of said felony, which shall operate as a bar and prevent the offender from being punished as *accessory,* if such principal felon be afterwards *taken* and convicted. From the whole of which it is quite evident that the Legislature intended to make receivers of stolen goods accessories where the principal offense admitted of accessories, and to punish them for a misdemeanor only where the principal offender was not *taken;* that where he was amenable they were satisfied with the rules of common law; and the only alteration introduced by this act is, by the first section, to subject accessories to trial and punishment for a misdemeanor where the principal offender *eludes* the process of the law; and by the second section, to make receivers of stolen goods accessories (in offenses capable of having accessories), and to subject them to trial and punishment for a misdemeanor where the principal was not taken, but eluded the process of the law (Foster, 373).

I am, for these reasons, of opinion that no judgment can be passed on the defendant.

TAYLOR, C. J., and HALL, J., concurred.

Cited: S. v. Ives, 35 N. C., 339; *S. v. Minton,* 61 N. C., 197.

Doubted: S. v. Cheek, 35 N. C., 121.

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(467)

Doe on Demise of ORBISON v. MORRISON.

Where a part of a tract of land is included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not included in both deeds, the possession of the part included in both deeds is in him whose deed or patent is the elder; but if one of them is actually settled for seven years together, upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby.

ORBISON *v.* MORRISON.

EJECTMENT. From IREDELL. The plaintiff's lessor claimed title to the land under a grant dated 21 May, 1791, and proved that defendant was in possession. Defendant claimed title by two grants, bearing date, respectively, in 1801 and 1809, and proved that he took possession by building a house on one tract and living therein and by clearing a field on the other tract in October, 1808; that he had retained the possession ever since, and that in both cases his possession was, upon the land, covered by plaintiff's grant. The plaintiff never had *actual* possession of that part covered by defendant's grants; but proved that in May, 1815, before defendant had held the possession seven years, plaintiff procured a surveyor to run the lines of his grant, and when they came to the defendant's lines he forbade them to proceed, and at that time the plaintiff, being on the land in dispute, claimed it as his; afterwards, in February, 1816, plaintiff, again being on the land and in presence of the defendant, claimed it. The suit was commenced in August, 1818. The court below instructed the jury that as to defendant's possession it would give him title, not only to that part of his grants in *actual* possession, but also to all the land included within the boundaries of his grants, unless controlled by the plaintiff's claim upon the land; and that if they believed such claim was made, it was such an entry and claim of the plaintiff as prevented the operation of the statute of (468) limitations, and the plaintiff was entitled to recover. Verdict for the plaintiff; new trial refused; judgment, and appeal.

TAYLOR, C. J. The land in controversy is within the boundaries both of the plaintiff's grant and of the two grants of the defendant. The latter, however, are younger grants, and the defendant has been in possession under them for seven years. A question is therefore presented which may be considered settled by very many adjudications, and which it would be dangerous now to disturb since it is familiar to the profession and has become a rule of property under which many titles are held. A long train of decisions, with very few to the contrary, has fixed the principle that where part of a tract is included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not included in both deeds, the possession of the part included in both deeds is in him whose deed or patent is the oldest; but if one of them, as in this case, is actually settled for seven years together upon the part comprehended in both deeds the possession is his, and

the other will be barred thereby. The entry made by the plaintiff was in 1815, but the suit was not brought till 1818; it cannot therefore interfere with the defendant's possession. The statute of 4 and 5 Anne, ch. 16, was in force in England when the act of 1715 was passed here, which was in the 2 George, 1; and the latter act enforces all statute laws made for the limitation of actions and preventing vexatious lawsuits. And according to the statute of Anne there must be an action commenced within one year after the making such entry and claim, and prosecuted with effect, otherwise it is of no force to avoid the statute. There must be a

New Trial.

(469)

Doe on Demise of NIXON'S HEIRS v. POTTS.

Tenants in common may recover on a joint demise.

EJECTMENT, tried before *Norwood, J.* From MECKLENBURG. The lessors of the plaintiff claimed title as heirs at law of Francis Nixon, and proved that Francis Nixon died seized and possessed of the premises in question, and offered evidence that they were the heirs at law of Francis Nixon. To this evidence the defendant's counsel objected on the ground that the demise laid in the declaration was joint, and the evidence offered was to prove title as tenants in common. The objection was overruled and the evidence received, and plaintiffs had a verdict. A new trial having been refused and judgment rendered, defendant appealed.

A. Henderson for the defendant.
Wilson, contra.

HALL, J. In England, when tenants in common sued in ejectment, it was necessary that a separate demise should be laid by each or that they should join in a lease to a third
(470) person, who would demise to the plaintiff in ejectment; and so the law has been considered here where tenants in common became such otherwise than by descent. In this case it is stated that the plaintiffs are the heirs at law of Francis Nixon, and under our law of descents hold as tenants in common. I apprehend the moving reason with the Legislature when they framed the law was to take away survivorship, which would have followed if they had held as joint tenants. But as

the law stands, what is their real situation? They are seized *per my et per tout;* have a unity of title, interest and possession, and each may demise the whole. If so, the title which they show supports the joint demise laid in the declaration, and judgment, I think, should be entered for them.

HENDERSON, J. A lease for years is defined to be a *contract* for the *possession of land.* The title remains in the lessor; the possession of the lessee is the possession of the lessor. All actions in which the title is demanded are to be brought against the lessor. It is a good plea in such actions for the lessee for years to say that he has nothing but a lease for years; and a recovery suffered, or a fine levied in an action brought wherein he is defendant, may be avoided by plea by any person against whom such fine or recovery is offered in evidence. He is not liable to be called on to perform the feudal duties; he cannot vouch, pray in aid, nor is he considered as having anything to do with the title of the land, and there is no privity as to title between him and the owner of the land. A recovery suffered by the owner discharged his right to the possession, for even that existed only in *contract* with his lessor, and all these flow from one source, to-wit, that his lease is a mere *contract* for the possession of the land, and as not having an interest in the title or land itself. From these principles I deduce that tenants in common may make a joint demise, that is, a lease for years; and that it can be truly said that they did demise—that is, jointly demise; for, having a joint possession, each (471) demises the whole possession as much as joint tenants.
It is true they cannot make a joint lease for life, gift in tail, feoffment or conveyance in fee, for they have not a joint title but a several one, therefore each possesses his title in severalty; and I cannot account otherwise for the uniform decisions on the subject that tenants in common cannot make a joint demise to try title in ejectment, or that it cannot be described as their demise in pleading, than in this way: that it being established that they could not make a joint lease for life, gift in tail or feoffment in fee, they could not make a joint demise for years, without reflecting that in the one case a joint estate must pass to justify the description that they *conveyed* or, which is the same thing, that they jointly conveyed, whereas the interest which they did pass was a several and not a joint interest, they being in by several titles; but that in a lease for years only a *right* to the *possession* passes, and they have a joint possession, the only unity which connects them with each other. It is to be observed that it is admitted on all hands, even in the very

authorities which say that this declaration would be bad, that the interest passes but that it should in the pleadings be called a several and not a joint demise. Were I overturning decisions which fixed the rights of property or persons, or changing in the least the rights of any individual, I would yield to such a current of decisions, but it cannot, by any probability, affect the rights of any one. *Chief Justice Kent,* in *Jackson v. Bradt* (2 Caine, 169), has shortly hinted at the same principle which governs me in this decision, and although for this and other reasons he decided in conformity to what I think should be the decision in this case, I cannot yield my assent to any other ground which he took, for certainly the question is not whether tenants in common can make a valid lease to pass their interests when they join in the conveyance, but whether it can be said in pleading that they did demise. I think the declaration
(472) is good and that there should be judgment for the plaintiff.

TAYLOR, C. J., concurred in the opinion that judgment should be so rendered.

ERWIN v. SUMROW.

Though from the publication of a libel unexplained, malice will be *prima facie* implied, yet as the act may be innocent, and in some cases justifiable, the circumstances under which it was done should be left to a jury.

ACTION for libel, from LINCOLN. The libel was found by the defendant at his shop door early in the morning. He carried it into the shop of a neighbor, Reinhardt, read enough of the paper to discover what it was, and handed it to Reinhardt, who read it. Defendant then proposed to burn the libel, but this was objected to by Reinhardt, who said that the plaintiff ought to have it, and observed that it should not remain in his shop, and asked the defendant to take it away. The defendant did carry it away, and placed it on the window of the shop of one Hoke, with intention, as he said, that it should be handed to Erwin, the plaintiff. Hoke's apprentice found the paper on the window shortly after it was placed there, read it, and kept it until evening, when he handed it to the plaintiff. The window on which the libel was placed was on the street, and the paper was exposed to the view of all persons passing. Defendant's counsel contended that if Sumrow placed the libel in the window

with intention that it should be handed to Erwin, and not with a view of making it public, he was not guilty; but *Norwood, J.*, before whom the cause was tried, charged the jury that a person, being in possession of a libel and knowing it to be (473) such, was bound to take care that the contents of it did not become known and public by his conduct; that placing the libel in Hoke's window was a publication, and that when a publication was proved, the law implied malice, and this implication would remain until removed by sufficient evidence. There was a verdict for the plaintiff, and a motion for a new trial. New trial refused. Judgment, and appeal.

Wilson for the appellant.
A. Henderson, contra.

TAYLOR, C. J. The essence of the charge in the declaration consists in the malice of the publication and the intent to defame the plaintiff; and, although from the publication of a libel, unexplained, malice will be *prima facie* implied, yet, as the act may be innocent, and in some cases justifiable, the circumstances under which it was done were proper to have been left to the jury. It is the same, in principle, with an action of slander, where the defendant may give in evidence, the manner and occasion of speaking the words, and repel, if he can, the implication of malice arising from utterance. If the defendant could satisfy the jury that the paper was left in Hoke's window with an innocent intention, it would have explained what otherwise wears the appearance of a malicious publication. There ought to be a
New trial.

Cited: Hoyle v. Stowe, 13 N. C., 321; *Allred v. Smith,* 135 N. C., 449.

(474)

McERWIN v. JACOB BENNING.

When A makes a fraudulent conveyance of his property prior to the recovery of a judgment against him by B for a tort, B, although not a creditor at the time the conveyance was made, is entitled, after judgment, to a *scire facias* under the act of 1806.

THIS was a *sci. fa.*, under act of 1806, to secure creditors against fraudulent and secret conveyances of property by insolvent debtors,* from MECKLENBURG. The fact on which the case turned was that the plaintiff had recovered a judgment for damages on a *tort*, against one David Benning, and that, *prior* to that judgment, the conveyance, alleged to be fraudulent, was made by David Benning to the defendant. *Norwood, J.*, who presided, on this point instructed the jury that the plaintiff was a creditor, within the meaning of the act, from the rendition of the judgment in his favor; and that, if the conveyance was fraudulent against *any* creditor whose debt was in existence at the time the conveyance was executed, the plaintiff's case would be within the provisions of the act of 1806; and if the bill of sale was void as to one creditor, it was void as to all creditors, as well those whose debts were contracted *after* the bill of sale was made as those whose debts were in existence at the time it was made. Verdict and judgment for the plaintiff, and appeal.

A. Henderson for defendant.

(475) HALL, J. It has been objected in this case, for the defendant, that the act of 1806 (ch. 700, New Revisal) does not afford the plaintiff a remedy; that the act only applies to creditors and debtors. 'Tis true the title of the act speaks of the fraudulent conduct of debtors in making conveyances to avoid or delay the payment of their just debts; but the enacting clause declares "that, upon any judgment rendered, if the plaintiff will make affidavit, stating that the defendant has no visible property to satisfy the same, etc., and that he has good reason to believe that the defendant has fraudulently conveyed away property, and that some other person is fraudulently possessed of it, etc., the court may order a *scire facias* to be issued against the person so claiming it." It appears, therefore, that, although the plaintiff was not a creditor before judgment rendered, yet, in the words of the act, upon the happening of that event, upon making affidavit, he is entitled to a *scire facias*. In doubtful cases the title and preamble of an act should have their due weight. In this case, I think, there can be no doubt, the remedy given by the act is substituted in the room of a more circuitous

* An Act to Secure Creditors Against Fraudulent and Secret Conveyances of Property by Insolvent Debtors.—Whereas, many frauds are committed by persons making conveyances upon some secret trust, and by persons concealing the property of insolvent debtors, so as to enable them to avoid or delay the payment of their just debts: For remedy whereof, Be it enacted, etc.

one, but the rights of the parties are left as they stood before. I, therefore, am of opinion that the judgment of the court below should be

Affirmed.

The other Judges concurred.

(476)

McQUEEN, Agent of McGregor & Darling, v. BURNS.

A, residing in North Carolina, contracted in New York a debt with B, who lived in that place; afterwards A paid to the agent of B in North Carolina a part of the debt, and credit having been given him for four months for the balance, interest at the New York rate (seven per cent) was calculated on the balance for four months and added thereto, and for that sum A gave his bond. *Held*, that this bond was not contrary to the usury laws of North Carolina.

DEBT upon bond, from CHATHAM. The defendant purchased in New York goods of McGregor & Darling, to a large amount. McQueen, as the agent of McGregor & Darling, settled the account with the defendant, who at that time resided in Chatham County, in North Carolina, and received from him a large payment. McQueen then agreed that the defendant should have a credit of four months for the balance of the debt that was due. Interest at the rate of seven per cent was calculated on the balance for four months, and added to it, and for that sum the bond in suit was given by the defendant to McQueen as the agent of McGregor & Darling. McQueen resided in Fayetteville, in this State. Among other matters of defense, the statute against usury was pleaded. The court below held the bond to be usurious, and the plaintiff submitted to a nonsuit. He afterwards obtained a rule to show cause why a new trial should not be granted; the rule was discharged, and from the judgment rendered plaintiff appealed.

Ruffin for the defendant.
Gaston for the plaintiff.

TAYLOR, C. J. It is a principle of justice, adopted and (477) enforced by the general consent of nations, that contracts shall be governed, as to their validity and construction, by the law of the country in which they were made, unless their consideration be immoral, or they were entered into with a view

(478) to their execution in some other country. This rule is confined to the contract itself, and its legal effect; for the law of the forum where redress is sought must of necessity adhere to its own forms of proceeding in administering the remedy. This rule is admitted by the defendant, in whose behalf it is contended that the *lex loci contractus* is the law of North Carolina, inasmuch as the bond was executed here; and that, as seven per cent is an illegal rate of interest by the law of this State, the bond is void. It is true that the bond was given here, but it was to secure the payment of a debt contracted in New York, with merchants resident there, and which debt was payable there, with seven per cent until paid. It would seem strange if the law were so that the creditors suing in our courts upon the simple contract should have recovered the New York interest, which all the authorities show, and it is admitted, they could do; whereas, by taking a bond for the purpose of securing and evidencing the debt, they shall lose the whole for contravening our usury law. That the law is not so is shown by a case, precisely in point, cited on behalf of the plaintiff. There the debt was contracted in New York, carrying seven per cent interest, and afterwards a security for that debt was taken in Connecticut, including the same rate of interest, both for the time then past since the debt was contracted, *and for ninety days to come,* at the end of which time it was to be paid; and it was held that the transaction was not usurious. The Court decided that the mode in which the note was taken, and the time given for payment, did not change the nature of the security for the same debt and the same interest to which the creditor was entitled by the contract. *Phelps v. Dent,* 4 Day, 96. I have examined every case cited in behalf of the defendant, and I cannot see any conflict between them and the case just quoted. In *Phipps v. Anglesea,* 1 P. Wms., 696, all the parties lived in England; the will and settlement were made there. It does (479) not appear that any contract was made in Ireland, or that any other contract was made between the parties, except the original will and settlement; certainly no new securities were taken in England. In *Stapleton v. Conway,* reported in 3 Atk., 727, and 1 Ves., 429, the contract was made in England, though this is rather gathered by inference from the report of the case in Atkyns; and, from the same case in Vesey, it does not appear whether the settlement was made in England or the West Indies. In the book last quoted, upon the West India interest being claimed, the chancellor makes a distinction between a contract and a voluntary disposition by will or deed, and nothing said about interest, admitting the obligation of the

court to give West India interest, in the first case, but leaving it discretionary in the last. The case of *Raneleigh v. Champante,* as reported in 2 Vern., 395, lays down the position that a party recovered English interest upon a debt contracted in Ireland, because the bond was executed in England. But the account of the same case, given in Eq. Ca. Ab., 289, pl. 2, and Precedents in Chancery, 108, is altogether different; and, according to these books, the debt was contracted in Ireland by Champante having accepted and paid bills there drawn by Lord Raneleigh, then being in England; that the latter sent over a bond for the balance he owed, payable in Ireland, and it was held that this bond, on a suit in England, should carry Irish interest. This account of the case, which is probably the true one, since it is referred to by the late editor of Vernon, is an authority in favor of the plaintiff. In *Dewar v. Span,* 3 Term, 425, the new bond executed by B. and D. reserved the same interest with the former one, which was usurious, because the 14th Geo. III., ch. 79, extended only to mortgages and the security respecting lands in Ireland and the West Indies, on which is allowed the foreign interest, but did not protect personal contracts. Where a contract is originally valid, and may be enforced, and a new one (480) is made, which only covers it and provides for its execution, according to the first agreement, in which light I understand this case, I think it is protected by law, and that therefore there ought to be a new trial.

HENDERSON, J. The question arising from this record is, for what was the additional one per cent reserved? Was it for forbearance, or giving day of payment? Or did it grow out of an original contract? If for the first, it *may be* usury; if on the second, it cannot be. I shall not trouble myself to prove that a debt contracted in New York, and without reference to the laws of any other government, is governed in its exposition by the laws of New York. The original debt, then, being contracted in New York, without reference to the laws of any other government, is governed by the laws of that government, and the *rate of interest* which the debtor shall pay is part of the contract, which seems to be admitted in the present case to be seven per cent. The debtor in this State executes a note, payable in four months, for the balance of the debt, in which is included the interest, at seven per cent, up to the time the note became payable. The sum secured to be paid by the note is precisely the sum which the defendant would have been bound to pay if no note had been given. It became due out of no new contract; it arose solely from the operation of the original debt, and was, in

fact, nothing more than giving a new evidence of that debt; and if, on the day it fell due, it was lawful for the plaintiff to have received that sum, it certainly could not be usurious to hold or have taken a note evidencing that obligation. The additional one per cent was therefore not taken for forbearance or giving day of payment, but arose entirely from the original contract, which very clearly was a legal one. What rate of interest the note shall bear after it falls due, the parties have not pre-
(481) tended to say; it is therefore left to the law, and is not now a subject of consideration. The defendant's counsel has offered a very ingenious argument, but I think it entirely unsound. I believe it is substantially noticed in the foregoing opinion. But, I think, in his argument, the opinion of Lord Kenyon in *Dewar v. Span* is not understood correctly. I think that his Lordship means that neither the original bond or the new bond was within the protection of the statute 14 Geo. III., under which act the contract was attempted to be legalized. That act declares that all mortgages and securities executed in England, of or concerning lands being in Ireland or the colonies, shall have Irish or colonial interest, as the case may be. The bond was given for part of the purchase money of lands lying in the West Indies; it bore on its face West India interest; that bond was afterwards surrendered up, and a new bond taken, bearing also on its face West India interest. Lord Kenyon says that the act relied on (to-wit, 14 Geo. III.) to support this case does not extend to it. He then repeats a part of the act, to-wit, *mortgages and other securities,* concerning lands in Ireland and the West Indies, reserving the interest allowed in those countries, shall be good. Now, this, says he, is a *mere personal contract,* and is not within the act; evidently meaning, I think, the old as well as the new bond. He speaks of the contract as a mere personal one, not one within the act, to-wit, a *mortgage or other securities concerning land;* for it would be strange that a new bond, given upon the surrender of an old bond between the same parties, in the same country, governed by the same laws and imposing the same obligations, and no other, with the old, should be void and the old bond legal. They both must stand, I think, or fall together. But should Lord Kenyon be mistaken as to the operation of the statute of George, it does not
(482) affect this case. I think the judge erred in informing the jury that the bond was usurious, and that a new trial should be granted.

HALL, J., concurred.

Cited: Arrington v. Gee, 27 N. C., 594.

WILSON v. SIMONTON.

The act of Assembly increasing the jurisdiction of a justice of the peace to $100 is not inconsistent or incompatible with the Constitution of the State.

THIS was an action of debt, originally brought in IREDELL County Court, for $25, to which defendant pleaded in abatement, pursuant to the act of 1820.* There was a demurrer to the plea; demurrer overruled, and plea sustained. The Superior Court, on appeal, also overruled the demurrer and sustained the plea; and plaintiff, by his appeal, presented the question to this Court.

PER CURIAM: The question made in this case was decided in 1811, on argument and consideration, in *Keddie v. Moore,* 6 N. C., 41, and we see no reason to disapprove the judgment. There must be judgment for the defendant.

(483)

CARTER, Assignee, etc., SMITH, Real Plaintiff, v. THE SHERIFF OF HALIFAX.

1. Where A pays to the sheriff the amount of an execution in his hands, in favor of B against C, if B afterwards assign his interest in the judgment to A, such payment shall be deemed a purchase and not a satisfaction of B's claim.
2. Where an execution is levied upon property, and the plaintiff in such execution, to favor the defendant, forbears to sell and holds on under the lien thereby created, the property may be sold under executions of a younger date.

THIS was a rule on the sheriff to show cause wherefore he should not return a *venditioni exponas,* Carter against Powell, satisfied. From HALIFAX. Several executions had issued and were in the hands of the sheriff, against Powell, returnable August, 1819. At the time the sheriff went to levy these execu-

* Be it enacted, etc., that the jurisdiction of justices of the peace within this State be, and is hereby extended to all sums due on bonds, notes and liquidated accounts, not exceeding one hundred dollars.

Be it enacted, etc., that all suits hereinafter commenced in the Superior or county courts in this State, on any bond, promissory note or liquidated account, for a less sum than one hundred dollars, shall be abated on the plea of the defendant.

tions, Smith told him he would pay the money at August Court, and, accordingly, on the first day of the court, he did pay it, and took the sheriff's receipt for the whole amount. At the time of the payment, both Smith and Powell expressed a wish that Smith's name should be endorsed on the executions as real plaintiff, and the sheriff accordingly did so. Smith at the same time requested the sheriff to ask the plaintiffs of record to assign over the executions to him; he did so, but none of them would so assign, except Carter, and the firm of Burrows & Shine, to whom the sheriff paid the money for their executions. Under the executions on which Smith was endorsed as real plaintiff, and others obtained in October and November, 1819, the property of Powell was sold, and the creditors, under the latter judgments, claimed to have them satisfied, insisting that Carter's judgment had already been paid by Smith. Smith, on the contrary, contended that he had *purchased* Carter's interest, but had not *satisfied* Smith's debt.

(484) HALL, J. From the facts of this case, it appears that Smith became the purchaser of Carter's judgment against Powell, and that it was his intention to do so when he paid Carter for it, but not to satisfy the execution which had issued against Powell; and by doing so, he did injury to no one. It does not appear what the sheriff's return on the execution was, but it is more than likely it was returned, levied on Powell's property; because, from the next court a *venditioni exponas* issued; also other executions issued from the same court on behalf of other creditors who claim to have their executions satisfied in preference to Carter's execution, which belonged to Smith. This cannot be done, because Carter's execution was first levied on the property, and the lien thereby created remained until it was sold under the *venditioni exponas,* unless, indeed, there was some fraud practiced by Carter or Smith; but no fraud appears, because the plaintiffs in those executions are not in a worse situation than if Powell's property had been sold under the first execution that issued against him. 'Tis true, where an execution is levied upon property, and the plaintiff in such execution, to favor the defendant, forbears to sell, and holds on under the lien thereby created, the property may be sold under executions of a younger date; but that is not the case here, because at the time the indulgence was given to Powell by the plaintiff no other execution had issued against him. After other executions issued, no indulgence was given.

Cited: Bank v. Griffin, 13 N. C., 353; *Palmer v. Clarke, ib.,* 357; *Foster v. Frost,* 15 N. C., 429; *Harrison v. Simmons,* 44 N. C., 81.

(485)

MYRICK v. BISHOP.*

Possession alone is sufficient to maintain trespass against a wrongdoer.

TRESPASS, *quare clausum fregit,* from HALIFAX. The plaintiff exhibited on the trial below a deed, dated in 1812, to himself, including within its boundaries the *locus in quo,* and showed that he was in actual possession of a part of the lands, and had been, but for a term of less than seven years; and the trespass complained of was on the uncultivated part of said land, and on a part of which he had no actual occupation. The defendant showed no title or possession, but insisted that the *locus in quo* was vacant land.

The judge charged the jury that if the land was vacant the plaintiff could not have such a constructive possession under his deed as would enable him to support an action of trespass; but whether the *locus in quo* was vacant, he left for the jury to say; that if the land had been granted, then the plaintiff had a deed covering the land, and an actual possession of a part, though for less than seven years, and this gave him such a constructive possession of the whole as would enable him to support an action of trespass against a wrongdoer.

TAYLOR, C. J. The plaintiff, having a deed covering the land where the trespass was committed, and being in possession of part within the boundaries of the deed, was in actual possession of the whole. The deed ascertained the extent of the possession. Whoever is in possession may maintain an action of trespass against a wrongdoer to his possession, because it is a possessory remedy, founded merely on the possession, and it (486) is not necessary that the right should come in question. 3 Burr., 1563; 1 East, 246. The judgment must be

Affirmed.

HENDERSON, J. Possession alone is sufficient to maintain trespass against a wrongdoer. 1 East, 244; *Graham v. Peat,*

* This cause and the two immediately following it, were decided at June Term, 1821, but from accident were omitted in the report of cases of that term.

and the cases there cited, to-wit, 3 Burr., 1563; 2 Stra., 1238; Willes, 221. And it is consistent with first principles, and, in fact, would be strange if it were not so; for wretched would be the policy which required the title to be shown in every instance where the peaceable possession was disturbed by an intruder who had no right. It would tend to broils and quarrels, and the possessor would resort to force to defend his possession if the law afforded him no redress. It cannot, therefore, for a moment be doubted that the law is as stated above; and, for myself, I would go further, although my brethren do not deem it necessary to express an opinion on the point that possession is *prima facie* evidence of title; and until the contrary shall appear, sufficient to maintain an action on the title against a wrongdoer, *ex. gr.*, an action of ejectment. This, of course, has reference to a case where the title is shown to be out of the State. I do not deem it necessary to say anything on constructive possession, for in the case before us the plaintiff's possession was an actual one. Possession of any part of a tract of land, there being no conflicting occupation, is an actual and not a constructive possession of the whole tract. If any part is adversely occupied under an inferior title, the possession under the good title extends to the actual adverse occupation. Here there was no adverse occupation, and the actual possession of the plaintiff was coextensive with his deed. A constructive possession is where a person has title, but no possession, and there is no one in possession, it being vacant; there the title draws to it the possession *in law*, or by *construction* of law. I think the rule for a new trial
(487) should be discharged and judgment entered for the plaintiff.

HALL, J., concurred that judgment should be so rendered.

Cited: Osborne v. Ballew, 34 N. C., 374; *Morris v. Hayes*, 47 N. C., 93; *McCormick v. Monroe*, 48 N. C., 334; *S. v. Reynolds*, 95 N. C., 619; *Frisbee v. Marshall*, 122 N. C., 765.

STATE v. FARRIER.

1. In an indictment for sending a challenge, it is not necessary to set out a copy of the challenge; and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, no ways

altering the sense, *semble*, such variance is not fatal and, after verdict, it is cured by the act of 1811.

2. A challenge to fight a duel out of the State is indictable, for its tendency is to rouse the passions and produce an immediate breach of the peace.

THIS was an indictment for sending a challenge to fight a duel, tried below, before *Nash, J.*, from JOHNSTON. The indictment was as follows:

"The jurors for the State, upon their oath, present: That James Farrier, late of the county of Johnston, attorney, on 20 September, 1820, with force and arms, at and in the county of Johnston, wickedly and maliciously intending and designing, as much as in him lay, not only to disquiet and terrify one John McLeod, but also the said John McLeod, maliciously, violently and wickedly to kill and murder, did unlawfully and wickedly provoke and excite the said John McLeod to fight a duel against him, the said James Farrier, with pistols or some other dangerous and mortal weapons; and that he, the said James Farrier, a certain challenge, in the name of the said James Farrier, in the form of a letter to the said John McLeod directed, did then and there maliciously write and cause to be written, which said challenge, so as aforesaid written and directed, he, the said Farrier, afterwards, to-wit, on the said 20 September, 1820, at and in the county of Johnston, aforesaid, maliciously and wickedly, to the said John McLeod did send and contrive to be delivered, and cause to be sent and delivered, and which said challenge in the form of a letter is as follows—that is to say: (488)

"'SMITHFIELD, 20 Sept., 1820.

"'MR. JOHN MCLEOD.

"'SIR:—Since our last interview, in which we talked over the *differences* between us, and in which you called on me to explain why I should say that I would as soon vote for Jim, the barber, as you—I say, since then, I have seen General Bryan, of this county, who informed me that you, in explanation of the cause of this difference between us, had said that it was likely, owing to a very unpleasant request that you had made to me, at the instance of your ward, to forsake your house, and your reason for doing this was, as defeated lovers sometimes prove desperate, you thought there was some danger to be apprehended from me; and if I be the defeated lover, there really will be some danger to be apprehended and your words verified, but not in the sense you intended. Instead of my revenge being directed against an innocent lady, in the exercise of her right, it shall be directed towards a man who has thus causelessly thrown a reproach on

the character of the innocent in order to palliate his own improper conduct. You say that your ward imagined to herself that I had a dirk and intended making an attack on her person. Permit me to tell you that I do not believe your ward ever *immgined* any such thing; neither do I believe that she ever told you so. So this story about the dirk never existed anywhere else than in your own imagination, for some cause best known to yourself; and remember, he that carrieth a dirk in his imagination, carrieth poison in his heart. I once cherished the hope that this storm of *clumny,* this spirit of evil reports which has so long raged between you, your family and myself would ere this have ceased, but all hope is now lost of there ever being a revival of our former intimacy. The affairs as they now stand between us may be worse, but I will assure you there is little probability of *there* being better. Since my memory, my character has never suffered such a gross, unjustifiable and unprecedented attack. It may be credited by those who are unacquainted with me, but those who are acquainted with my former conduct will give it but little credit; and if it is not credited by a solitary person, my feelings will not permit me to pass it over in silence and let it sink into the tomb of oblivion without revenge. I therefore ask of you to render that opportunity of redress which one gentleman is bound to render to another, whenever he thinks himself aggrieved; and in making this my request, you are not to presume that I acknowledge you a gentleman, for I do not consider you as such; neither do I believe you are unknown to the world in that character; yet, for the purpose of redressing my wounded feelings, I am bound to ask you once for your lifetime to act the part of a gentleman in accepting this my invitation to leave the State, in respect to the peace of North Carolina. JAS. FARRIER.

" 'N. B.—This letter will be lodged in David Thompson's store for your reception, and, if handed to you, the person handing of it will be unacquainted with its contents. The calls of my professional affairs prevents me from being in town for a few
(489) weeks. My friend, Doc. White, who will call on you for an answer to this letter, will do me the favor of receiving any communication from you yourself to me during my absence.'

"To the great damage of the said John McLeod, to the evil and pernicious example of all others in the like case offending, contrary to an act of the General Assembly in such case made and provided, and against the peace and dignity of the State."

On the trial, the introduction of the original letter was opposed, on the ground of variance from the letter as set forth in the indictment. The variance consisted in the words, *differences* instead of *difference, immgined* for *imagined, clumny* for *calumny,* and *there* for *their.* The objection was overruled and the letter received. It was then contended that the letter set forth was not a challenge to violate the peace of *this* State, and, therefore, without such intention, the defendant was not guilty of the crime stated in the indictment. The court instructed the jury that, under the law of the State, the act of sending a challenge to fight a duel in another State would render the defendant guilty of the charge in this indictment. The jury found the defendant guilty. A new trial was refused, and from the judgment pronounced the defendant appealed.

TAYLOR, C. J. The defendant was indicted for sending the prosecutor a challenge to fight a duel. The act of 1802, which alters the common-law punishment, does not change the nature of the offense, which consists in sending a challenge, either by word or by letter, to fight a duel. Upon the trial of the cause, the letter, containing the supposed challenge, was offered in evidence, but objected to by the defendant, on the ground of several variances from the statement of it in the indictment. It was, however, admitted by the court, and proved, and read to the jury. It was further insisted, in behalf of the defendant, that the letter was not a challenge to violate the peace of this State, and that, without such intent, the defendant could not be guilty of the offense charged in the indictment. To these objections, which appear on the record, it has been added in (490) the argument here that the indictment charges the defendant with an intention to provoke the prosecutor to fight a duel with pistols or some other dangerous and mortal weapons, whereas the letter specifies no weapon; and if its real meaning were to fight with weapons, the recital of the letter should have been accompanied with proper inuendoes to enable the jury to affix a judicial sense to it. The same observation has been applied in relation to its being a challenge to fight and to leave the State—a construction, it is said, which can only be put upon it by understanding something not expressed in direct words.

1. The fact to be inquired into by the jury was whether the defendant sent a challenge to fight a duel. The evidence relied on to establish the fact was the letter written by the defendant. But if no letter had been written, the fact might have been proved by other means, since neither the common law nor the

statute requires a challenge to be in writing in order to constitute a crime for sending one.

To recite the letter in the indictment is to set forth the evidence by which the fact is meant to be proved, and does not, upon principle, seem to be more essential than, in case of a verbal challenge, it would have been to set out the particular language in which the challenge was created. The law requires no more than that a complete offense should be shown in every indictment, so as to enable the court to give judgment upon it, in case a demurrer were joined or a writ of error brought. Upon this principle it is that indictments for sending threatening letters must set out the letters themselves, in order that the court may see whether they are of that kind which the statute renders criminal. The same rule extends to forgery. The instrument charged to be forged must be set out *verbatim,* in order that the court may see that it is such an instrument as the prohibition of the law extends to. But if the defendant had been sim-
(491) ply charged with sending a challenge to fight a duel, without any recital of the letter, the introduction of which as evidence, however, had satisfied the jury of the fact and enabled them to pronounce a verdict of guilty, the court must have seen, upon the face of the indictment, that a crime had been committed, and the specific degree of it pointed out, so as to enable them to apply the punishment annexed by the act of 1802. Supposing, however, that the recital of the letter is not merely a compliance with custom, but required by principle, it will admit of serious doubt whether the variances are fatal, even according to the English authorities, which, Lord Mansfield says, have been carried to a great degree of nicety, indeed. The rule laid down in *Dr. Drake's case,* 2 Salk., 660, was, that if an indictment undertakes to set forth the tenor of an instrument, though a literal variance is not fatal, yet if the mutilated word makes any other word, as *nor* for *not,* it is fatal. This was decided on a special verdict, where the court, looking at a record, can presume nothing, but is bound to pronounce the abstract proposition of law. But common sense seems to dictate that the inquiry before a jury should be whether the words used in the indictment signify the same thing, although misspelt and mutilated with those in the letter; and that a variance, no ways altering the sense of the letter, ought not to be fatal, according to the rule in reciting a statute, where the words *"sea* of Rome" were used for *"see* of Rome." 1 Vent., 172. Accordingly, in *The King v. Beach,* Cowp., 229, which came before the court on a motion to arrest the judgment on the ground of variance between the indictment and affidavit, the word *understood* being

written without the *s,* Lord Mansfield concludes his opinion by saying: "This is a case where the matter has been fairly tried, and where the omission of the letter *s* certainly does not change the word; therefore we are all of opinion that the jury were very right in reading it *understood.*" In *The King v. Hart,* 1 Leach, 172, it was also left to the jury to consider (492) whether the word *received,* in the indictment, signified the same thing with *received* in the bill of exchange. The prisoner was convicted, but the judgment was respited for the opinion of the judges, who thought it to be a proper question for the jury. In these cases the jury must have judged of the meaning from the context; and the principle upon which they are decided would seem to warrant the jury, in this case, to have found, as they have done, that *differences* signified the same thing with *difference; immgined, imagined; clumny, calumny,* and *there, their.* In relation to the last word, there is a remark of *Powell, J.,* in Holt's report of *Dr. Drake's case,* which is worthy of notice, "that he did not mark this to be so small a variance of a letter as if it had happened in false spelling or abbreviation." Now, if a word should be changed by false spelling into another word, but one having the same sound with that for which it was written, it cannot be difficult to judge from the context what the meaning is, as in the sentence where *there* is put for *their.* If, however, these inferences should not be correctly drawn, and the strict rule laid down in *Drake's case* is to govern where the jury has passed upon the meaning of a paper, we are satisfied that the act of 1811 applies to the case and cures the informality. It is a refinement, in the sense of that act, and there does appear to the Court sufficient in the face of the indictment to induce it to proceed to judgment. If the Court were not to listen to that act upon this occasion, they might be justly charged with being deaf to the legislative voice and permitting that "disease and reproach" of the law yet to remain by which a person convicted of an offense may seize upon the merest *apices litigandi* to evade the punishment.

2. A challenge to fight a duel out of the State is indictable, for the same reason that a challenge to fight in the State is because its tendency is to break the peace of the State. (493) Its natural and probable effect is to excite instant irritation and animosity, and to rouse the passions to an immediate breach of the peace.

WEST v. KITTRELL.

1. Where a suit is commenced in the county court and removed by consent into the Superior Court, such removal is good, provided the suit be one of which the Superior Court may entertain jurisdiction.

2. The county courts have the same powers with a court of equity to rectify mistakes in the settlement of a guardian's account, provided the mistakes be clearly shown.

THIS was a petition originally filed in the County Court of BERTIE, in February, 1818, setting forth that Kittrell, the defendant, had been appointed the guardian of the petitioner, and as such had taken into his possession property to a large amount, and received the rents and profits thereof until the petitioner came of age; that soon after this period, on the request of the petitioner, a settlement took place, between him and the defendant, of the guardianship accounts of the defendant, and the petitioner gave to the defendant a receipt in full for the sum of $----, which from the accounts appeared to be due; that on submitting these accounts to counsel, he was informed that there were in them many errors of law, as well as fact, and that he was entitled to a large sum over and above that already received; that the petitioner applied to the defendant, explained to him the errors, and requested him to correct them and pay over to the petitioner what was justly due to him, to which the defendant replied that the receipt he had was a sufficient discharge, and refused to settle the account again. The petitioner (494) charged that the receipt was given under a mistake of the facts and a misrepresentation of the law, and concluded with a prayer that defendant might be compelled to answer and state a true account, for general relief, and for process.

The defendant pleaded in bar that, pursuant to a proposition made by the petitioner, three persons had been selected to settle the guardian account of the defendant, and that the petitioner was then of full age; that the referees reported a balance due the petitioner of £826 2s. 7¾d., which the petitioner, after examination, approved, and received the defendant's note for the said sum, and in writing acknowledged that to be the true balance due.

Afterwards, at May Term, 1818, of Bertie County Court, the parties consented to remove the cause to the Superior Court of the county; and at Fall Term, 1819, the defendant's plea was overruled, without prejudice, and the petition was amended by leave of court.

The amended petition specifically pointed out the mistake in the settlement which had been made as consisting in a charge against the defendant for simple interest only, when it should have been for compound interest. It further stated the ignorance of the petitioner in matters of account, his mistake, and that he was under the influence of his guardian, the defendant.

A copy of the petition and amendment, with subpœna, having been served on the defendant, at the Fall Term, 1820, a judgment was entered *pro confesso,* and the cause was set for hearing *ex parte.* At the Spring Term, 1821, the defendant, on the cause coming on to be heard, moved to dismiss the petition. The court refused the motion, and from the decree pronounced the defendant appealed.

HALL, J. The first objection made by the defendant's counsel is, that the suit was carried into the Superior Court by consent of the parties, and not by way of appeal, or (495) in any other way known to the law.

The answer to this is, that the Superior Court had jurisdiction of the subject-matter of the petition, and the petition and plea were entered on the docket of that court by consent of parties, which might have been done, and the court would have had jurisdiction of it, if the suit had never been in the County Court.

It is again objected that the dispute had been referred to arbitrators to settle, and they have made an award, which ought to be binding on the parties. It does appear that there was a reference to three persons to state and settle the guardian's account; that they did make a statement of the account, and found a balance in favor of the petitioner; but I think the reference was made merely for the purpose of having the accounts examined and reported upon, rather than that any award should be made that should be obligatory on the parties. And I am the more inclined to think so, because the defendant himself states that the petitioner did approve and allow of the accounts so stated, after examination. If it had been an award in the sense insisted upon, it could not owe its obligatory force to the examination of the petitioner.

It is further objected in argument for the defendant that, although the County Court has jurisdiction in all cases of filial portions, etc., according to the act of 1762, ch. 5, in a summary way, yet that such jurisdiction and mode of proceeding are additional to the common-law jurisdiction (which alone the County Courts exercised before) and to the common-law jurisdiction of the Superior Courts; and that, even admitting an error has been committed in the settlement of the guardian's account, and

pointed out by the petitioner, yet that the Superior Court has not jurisdiction, because that error is protected by the petitioner's receipt, which has been given in full discharge of his demand, and that it is only competent for a court of
(496) equity so far to remove it out of the way as to correct that error.

I think it was not the intention of the Legislature, in giving this jurisdiction to the common-law courts, which before belonged to the courts of equity, to alter any principle or delegate less power than was possessed by the courts of equity when questions of this sort came before them. The remedy (except so far as it may be altered by the act of 1762) is transferred with the general power given, and is incident to it. Indeed, the Legislature seems to have been fearful that the jurisdiction thus given might be construed a complete transfer of jurisdiction from the courts of equity, when they declare, in section 26 of the act of 1762, that nothing in the act shall be considered as restraining or abridging the powers of the courts of equity, but that they shall continue to exercise them in the same way as if that act had never been passed.

I therefore think the County Court had the same power to inquire into and correct the error pointed out by the petitioner in his amended bill as a court of equity would have if the question had arisen there, and of the power of a court of equity to rectify mistakes after a receipt has been given, provided those errors and mistakes are distinctly and clearly pointed out, no one will doubt. The defendant has not answered the allegation of the petition pointing out the error complained of by the petitioner; he therefore admits it, and it only remains to say that the decree of the Superior Court shall be affirmed, with costs.

The other Judges concurred.

Cited: Harriss v. Richardson, 15 N. C., 281; *Boing v. R. R.,* 87 N. C., 364; *McMillan v. Reeves,* 102 N. C., 559; *Cherry v. Lilly,* 113 N. C., 27.

(497)

RYDEN v. JONES.

An executor shall not be permitted to become a purchaser at a sale made by him as executor, notwithstanding such sale be public, necessary, fair, for full price, and that those interested were present and assented to the sale.

RYDEN *v.* JONES.

THIS was a petition, filed originally in 1816, in the County Court of CRAVEN, by James Ryden, administrator of Elizabeth Ryden and Mary Savanoe, showing that Michael Hyman, the younger, being seized and possessed of a large real and personal property, in 1793 duly made and published his last will, whereby, after some specific legacies, he gave all the residue of his estate to his four sisters, Margaret, wife of Peter Vendrick; Sydney, wife of Edward Bowen; Mary Savanoe, the petitioner, and Elizabeth Ryden, the intestate of the petitioner, James. Of this will he appointed James Hyman executor, who qualified and took into possession the personal property of his testator. The petitioners stated that, among other personal property not specifically bequeathed, was a negro slave, named Frank, which Hyman, the executor, pretended to claim as his own property, whereas it belonged to the estate of his testator, and the residuary legatees were entitled to distribution of the said negro and of the profits of his labor from the time of Michael Hyman's death; that James Hyman died without making any settlement of his accounts as executor, but leaving a last will, whereof he appointed Jones, the defendant, executor, who qualified and took into his possession the assets of Michael Hyman left unadministered by James Hyman, and also the assets of James Hyman; that Jones also took into his possession and retained and employed the negro slave, Frank, and received large sums as the profits of his labor; that James Hyman, in his life- (498) time, and Jones, since his decease, had satisfied the claims of Peter Vendrick and Edward Bowen, but refused to make any satisfaction to the petitioners for their shares. The petition prayed that Jones might set forth an account of the assets of Michael Hyman that came to his hands and to the hands of his testator, James; that he might answer especially whether Frank was not part of the estate of Michael Hyman; that Frank might be sold or valued and the petitioners receive their respective shares of his value; and that a full account of the distribution or application of the estate of Michael Hyman by James might be shown.

The answer of Jones stated that he had no knowledge which would enable him to say what assets of Michael Hyman came to the hands of James, but referred to the returns of James Hyman made to Craven Court; that he, this defendant, never had any assets of Michael Hyman in his hands, to his knowledge or belief; that his testator, James, had paid and satisfied Lewis Savanoe, husband of the petitioner, Mary Savanoe, whatever legacy, right, interest or demand she had, and had the release of said Lewis and Mary to produce; that he was ignorant whether

James Hyman ever settled with Elizabeth Ryden and her husband, Benjamin, or either of them, for any claim they might have under the will of Michael Hyman, or not; that, as to the slave, Frank, he had understood and believed that he was part of the estate of Michael Hyman, sold by James Hyman, as his executor, and purchased fairly at a public sale of the effects of the said Michael, on credit, by Philip Turner, to the use of James Hyman, who had charged himself with the purchase money and accounted with all the persons named as interested therein, save Elizabeth Ryden; that James Hyman, by will, gave Frank to Fanny Hukins, and that Frank came to the hands of the defendant as James Hyman's property; and that, as
(499) executor, he disposed of him and was ready to account with any person lawfully entitled to call on him.

On the several issues submitted to the jury they found the facts to be as follows: That the negro, Frank, was sold at public auction by James Hyman, as executor, and purchased by Philip Turner for said executor, in March, 1794; that the sale was fair and necessary, and that the slave brought his full value; that all the residuary legatees of Michael Hyman were present at the sale, except Savanoe and his wife, and that all the persons entitled to distribution in the negro assented to the sale. They further found that Elizabeth Ryden died two or three months after the sale; that James Ryden obtained letters of administration on her estate in September, 1816; that she was covert at the time of the sale and at her decease; that Benjamin Ryden, her husband, died in 1797; that letters of administration on his estate were granted to James Hyman in September, 1797, and that Benjamin and Elizabeth Ryden left three children—James, the petitioner; Gatsey and Elizabeth Ryden, the last of whom was at that time eleven years old; that James Hyman made a settlement of his accounts, as executor of Michael Hyman, in March, 1796; that on 6 January, 1794, he returned an account of sales, which was signed by the then sheriff of the county.

On this finding, it was considered by *Norwood, J.*, who presided below, that the petitioners take nothing by their petition, but that the same be dismissed; whereupon the petitioners appealed.

Hogg and *Hawks* for the petitioners.
Gaston for the defendant.

(504) TAYLOR, C. J. It has now become a settled rule of equity, too firmly established to be shaken, that a trustee shall gain no benefit to himself by any act done by him in his

fiduciary character, but that all his acts shall be for the benefit of the *cestui que trust.* It is not necessary, in the view I take of the case, to inquire whether an executor comes within the rule as established in England, though in *Barden v. Barden,* 18 Ves., 170, it was decided that an executor cannot pur- (505) chase his testator's effects, because our local laws have materially changed the rights and duties of an executor. The act of 1723, ch. 15, explained and modified by several subsequent acts, restrains the executors from selling the unperishable estate without an order of court; and, as the law now stands, the County Courts are to judge of the necessity of a sale, either to make distribution or to pay debts. It has not entrusted the executor with the power of selling at his own discretion, nor is it any justification to him, acting without an order of court, that the sale was just and necessary. This, however, does not change the principle on which the law considers void a purchase made by a trustee, for it would still be so if the sale was authorized by an order of court. The general tendency of our acts in this respect is rather to limit than enlarge the powers of an executor, and shows that the doctrine relied on by the petitioners applies, *a fortiori,* to them.

The length of time cannot have any effect on the petitioner's rights, under the circumstances of the case. It is an open, unexecuted trust, and it is not pretended that the share of the price for which Frank was sold has ever been paid to Elizabeth Ryden or her representatives.

HALL and HENDERSON, JJ., concurred.

Cited: Cannon v. Jenkins, 16 N. C., 424; *Froneberger v. Lewis,* 70 N. C., 457; *s. c.,* 79 N. C., 428; *Tayloe v. Tayloe,* 108 N. C., 73.

(509)

FOSTER et al. v. COOK.

(IN EQUITY.)

A bill in equity may be framed in the alternative with a double aspect, and relief may be granted in either case, as circumstances may require; and relief may be given under the general prayer in a bill, provided it be in accordance with, and not contradictory to, the particular relief prayed for.

THIS was a bill, filed by the heirs of one Daniel Foster, to set aside a conveyance of land and a negro from said Foster to the

defendant, which, as they alleged, was fraudulently obtained. From FRANKLIN. The prayer of the bill was to have the conveyance set aside and a decree for a reconveyance, and it concluded with the general prayer for relief.

The defendant, in his answer, denied the facts set forth in the bill, as to fraud in obtaining the conveyance; and the facts, on the responses of the jury to the issues submitted, appeared to be these: The defendant, as the confidential friend of Foster, undertook to assist him in the management of his business. While acting thus as his friend, he purchased, fairly and *bona fide*, of Foster, a tract of land and a slave. The land was of the value of $1,420 and the slave was worth $400. The consideration for the sale was $1,400 and the support of Foster during his life. Of the $1,400, the sum of $991 was paid, the balance remained due, and the support of Foster during his life was worth $420. On the facts defendant moved to dismiss the bill, on the ground that complainants' remedy was at law. The court refused to dismiss, and decreed that the defendant pay to complainant $515.46, the balance of the purchase money, with interest on $409, and all costs. Defendant appealed to this Court.

(510) *Seawell* for the complainants.
Ruffin, contra.

(511) HALL, J. This bill is brought by the heirs of Daniel Foster to set aside as fraudulent the conveyance made by him of the land in question to the defendant, and for no other purpose; that is the prayer of the bill. It is true there is a general prayer, and under that general prayer relief may be given, provided it be in accordance with and not contradictory to the particular relief prayed for by the bill (5 Ves., 495; 3 Ves., 416; 2 Atk., 141); but that is not the case here. A bill may be framed in the alternative, with a double aspect, and relief may be granted in either case, as circumstances may require (6 Ves., 52); but that is not this case. The object of this bill is to have a decree for the land, but not for the money which may be owing for it, provided the sale to the defendant shall not be set aside.

But what is conclusive in this case is, that, if there is money due from the defendant, that money is due to the executors of Daniel Foster, and not to his heirs, and the executors are not parties. The decree made in the court below must be reversed and the bill dismissed, with costs.

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