ANNOTATIONS INCLUDE 172 N. C.

NORTH CAROLINA REPORTS

VOL. 9

CASES ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DURING THE YEARS 1822 AND 1823

REPORTED BY

FRANCIS L. HAWKS, ESQ.

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ANNOTATED BY

WALTER CLARK.

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ATTORNEY-GENERAL:

WILLIAM DREW.

REPORTER:

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CLERK:

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SHERIFF OF WAKE COUNTY, *ex officio.*

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CASES REPORTED

CASES CITED

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1822

STATE BANK OF NORTH CAROLINA v. TWITTY AND JOHNSON LEDBETTER.

1. The return of a sheriff is only *prima facie* evidence against his securities; it is not *conclusive.*

2. Where money has been paid into the hands of a sheriff by an individual, under a belief that the sheriff had an execution against him, when in fact he had none, and afterwards an execution comes to the sheriff's hands against that individual, which he returns, satisfied to the amount he before received of such individual, this return so made binds his securities.

3. If a person, when elected sheriff, voluntarily gives bond with security in a penalty *greater* than that required by law, and enters upon the duties of his office, and commits a breach of the condition, he will be liable to the full amount of the penalty if *sued* on such bond.

4. But a judgment cannot, *on motion,* be rendered against the securities to such bond, under the act of Assembly giving a summary remedy against sheriffs and other public officers.

MOTION, after due notice, to subject the defendants as securities of one Ally, who was the sheriff of Rutherford, heard before *Paxton, J.,* at BURKE, when the following appeared to be the facts: An execution issued from Burke at the instance of the State Bank against Richard Ledbetter and others, for the sum of $1,812.72, tested (6) March Term, 1820, and returnable to the September term of the same year. At September term, Ally, the sheriff, returned the execution indorsed: "Received of the within execution eight hundred dollars--F. F. Ally," without any date affixed to such indorsement. The defendants were two of the securities to the bond of Ally, as sheriff, executed in January, 1820, but were not securities to his bond given

in 1819. The defendants offered to prove that the sum of money returned upon said execution, as above stated, was collected by Ally in 1819; that when the writ issued at the instance of the bank against Richard Ledbetter in 1819, Ally told him he had an *execution* in favor of the bank, upon which Ledbetter paid him eight hundred dollars. The court rejected this testimony on the ground that it could not be received to contradict the official return made by Ally in 1820.

It was objected by the defendants that *no demand* had ever been made of Ally for the money so returned as collected, and that suit should have been brought on the sheriff's bond to recover it. The testimony on this part of the case was that application had been made for the money at the office of the clerk of the court to which the execution was returnable, and that Ally had absconded and been absent from the State from the time the execution was returned into the office until after the notice had issued to the defendants, the securities, pursuant to the act of Assembly. The court held that this application, under the circumstances disclosed, was sufficient to make the defendants liable, without any demand upon Ally.

The bond of Ally and the defendants was for £5,000. Before the pleas were entered in this case judgments had been rendered against the defendants, as Ally's securities, to the amount of £2,000; and on behalf of defendants it was contended that the penalty of the
(7) bond, viz., £5,000, was subject to the scale of depreciation which would reduce the value of the penalty to £2,000; and if so the penal sum in which the defendants were bound had already been recovered from them by former judgments. The court held that the penalty of the bond was not liable to the scale of depreciation, and the jury returned a verdict for the plaintiff for $800, with interest.

A motion for a new trial was overruled, and judgment rendered, from which the defendants appealed.

HALL, J. The return of the sheriff is only *prima facie* evidence against his securities; it is not conclusive. In the present case, however, the defendants rather support than deny the return; they say the money was received by Ally, their principal, but at a time when he was not bound as sheriff to receive it. That is true; but it appears that the money in question was paid into his hands by Ledbetter, for the purpose of discharging the debt due to the bank, and it does not otherwise appear but that this money remained in his hands when the execution issued in 1820, which gave him a right to levy the debt; he has returned the execution satisfied to that amount, and the return so made is obligatory upon the defendants. It is said, however, that the scale

of depreciation ought to be applied to this bond, because it was given in the penal sum of five thousand pounds, as directed by the act of 1777, when depreciation was two and a half for one. I cannot yield my assent to that, because the bond bears date in 1819. I am therefore obliged to view it either as good or bad *in toto,* the same as I would a bond given in any other penalty greater than £2,000. And, viewing it in this light, I cannot think it resembles that class of bonds which the law declares void because taken contrary to law, such as sheriff's bonds, custom house bonds, and others of the same description. Individuals, from their particular situations, are compellable to give them, and if the officers to whom they are given were at liberty to take them in any other way than that pointed out by law, they might (8) become instruments of oppression in their hands. Nor am I prepared to say that bonds like the one in question can be exacted by the court at pleasure. They cannot and ought not to require any of persons who may be elected to the office of sheriff but such as the law points out. But if a person, when so elected, voluntarily gives bond with securities in a greater penalty than that required by law, and enters upon the duties of his office, and becomes a defaulter in his office, there can be no reason why he should be released from such bond.

The court is instructed to take the bond payable to the Governor for the benefit of the people at large, or that portion of them whose money may come into the hands of the sheriff. It is a bond substantially taken to the people themselves, for their own benefit, and it would not do to set it aside because the persons they entrusted to take it and the person giving it thought proper not to take it in the same penalty which they directed, or, which is the same thing, in the same penalty which the law directed. For these reasons, I approve of the charge given by the judge below upon these points. But there is another circumstance observable on this record which ought not to escape the notice of the Court, and that is that the judgment rendered in this case is founded on a notice given to the defendants, under the act of Assembly giving a summary remedy against sheriffs and other public officers. If the bond given by the sheriff and the defendants in this case had been taken as the law directs, this remedy would be regular; but the bond is taken in a penalty different from that pointed out by law; and although, for that reason, we do not declare it void, but hold it good as a voluntary bond, yet we do not think that summary remedy attaches to it, but that the party grieved must have recourse to a common-law remedy, such as the common law would furnish on such a bond in case it was given by one individual to another. (9)

For these reasons I think the judgment must be arrested.

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

PER CURIAM. Reversed.

Cited: Chambers v. Witherspoon, 10 N. C., 413; *Governor v. Twitty,* 12 N. C., 156; *Governor v. McAffee,* 13 N. C., 17; *Branch v. Elliott,* 14 N. C., 87; *Ellis v. Long,* 30 N. C., 515; *S. v. Biggs,* 33 N. C., 413; *Walters v. Moore,* 90 N. C., 45.

ROSS v. TOMS AND WIFE AND ANOTHER.—From Perquimans.

The half-blood is entitled to inherit in purchased estate.

PETITION for partition of lands, founded on the following facts: Miles Harvey being seized and possessed of the premises described in the petition made his will, duly executed to pass lands, and therein devised the plantation whereon he lived to his wife for life, remainder to his son Miles Edward Harvey. Miles Harvey died in the latter part of the fall or beginning of the winter of 1784, leaving four children, viz., James, Miles Edward, Sarah, and Martha.

James and Sarah died, intestate and without issue, previous to 1800. Martha intermarried with Charles Blount, and died in 1806, leaving Sarah, now the wife of Toms, the defendant, and James Blount, the other defendant, her only heirs at law. Mary, the widow and devisee of Miles Harvey, intermarried with Martin Ross, senior, by whom she had issue Martin Ross, junior, the petitioner; but previous to her second marriage she conveyed to Miles Edward Harvey her life estate in the lands devised by the will of Miles Harvey.

Miles Edward Harvey died in 1800, intestate and without issue, leaving his sister Martha Blount of the whole blood, and Martin
(10) Ross, junior, his maternal brother of the half blood, surviving him.

The court below, holding that Miles Edward Harvey took by purchase and not by descent, decreed partition to be made as prayed for, and the defendants appealed.

TAYLOR, C. J. If Miles Harvey had died intestate in the fall of 1784, his two sons would have been his heirs, under the act which passed in the April of that year. But having devised the land in controversy to Miles Edward Harvey, he took under the will by purchase and, having

died intestate, his maternal half brother inherits one moiety of the land and the heirs of his sister Martha the other moiety. The partition between them must consequently be made according to the prayer of the petition.

PER CURIAM. Affirmed.

YADKIN NAVIGATION COMPANY v. BENTON.—From Anson.

1. The act of incorporation of the Yadkin Navigation Company makes the *subscription* of a certain sum, and not the *payment* of it, essential to the incorporation of the subscribers.

2. The charter of the company is not contrary to that clause of the Declaration of Rights which condemns perpetuities.

3. A law passed subsequently to the act of incorporation, without the assent of the subscribers, by which the place for the sale of shares forfeited is changed, cannot be deemed an invasion of the rights granted by the original charter.

THE defendant became a subscriber for stock in the Yadkin Navigation Company on 1 June, 1818, to the amount of five shares, at the price of $100 for each share. In 1819, 1820, and 1821, the president and directors demanded of the defendant the sum of $30 on each share by him subscribed for, and on his refusal to pay advertised (11) the shares for sale, pursuant to the provisions of an act of the Legislature. The shares, when exposed to sale, were bid off for the sum of $10 each, and for the difference between the sum for which they sold and that which the defendant by his subscription undertook to pay this action was brought. The declaration set forth the acts of Assembly relative to the company and the proceedings which had taken place under them, as stated above.

The defendant pleaded, first: That there was no such corporation as the Yadkin Navigation Company, because that, notwithstanding books were opened for subscription, pursuant to the act of 1817, and more than $50,000 were subscribed, yet at the first general meeting of subscribers they proceeded to elect a president and directors, and to appoint a treasurer, and did not pay to the treasurer the sum of $10 each, as by law required. And second: That the sales made of his shares at Salisbury was not authorized by the act, and that the act of 1820, authorizing the company to make sales at Salisbury instead of Halifax, was an alteration of the terms upon which he subscribed, made without his consent and against his will, and was unconstitutional and void.

To these pleas the plaintiff demurred, and the court sustained the demurrer, overruled the defendant's pleas, and gave judgment accordingly, from which the defendant appealed.

TAYLOR, C. J. The demurrer to this plea presents several questions to the consideration of the Court. The first is, whether the company was legally incorporated, inasmuch as the subscribers did not at the first general meeting after the return of the commissioner's books
(12) pay the sum of $10 each, as required.

The circumstances which are to precede the incorporation of the company are distinctly pointed out by the first section of the act of 1816. The only condition is that when it appears to the commissioners that $100,000 have been subscribed, *then* the subscribers, from the time of the first meeting, are declared to be incorporated; they are *then* to perform several corporate acts, such as electing a president, directors, and a treasurer.

By the fourth section of the act of 1812, for improving the navigation of the Roanoke, several clauses of which are adopted as the basis of the Yadkin charter, each subscriber is directed to pay to the treasurer of the company, on the first general meeting, $10 on each share; so that the incorporation and the appointment of officers are antecedent to the payment of the $10; for how can that sum be paid to the treasurer of the company if it has no existence? It would be to put a vain and absurd construction upon a law which is susceptible of a plain and sensible one.

Further, the section last referred to positively requires the payment of the money—"shall pay"; but the consequence of not paying, the penalty attached to delinquents, is left discretionary with the company as to the time of its infliction; the names of those who fail to pay "may be struck off the books" is the language employed to denote this discretion. What books? The answer is, the books of the corporation; but if they were not incorporated they would have no such power.

It seems evident that the Legislature fixed upon the *subscription* of a certain sum, and not the *payment* of it, as essential to the incorporation of the subscribers, who were completely clothed with the attributes of a corporate body before the time when the payment was to be made. As such, they were fully competent to judge how far the situation and exigencies of the company might call upon them for the vigorous and literal exercise of their right to demand money, and the supposi-
(13) tion is inadmissible that they were not equally capable of estimating the responsibility of the subscribers.

The constitutional objections appear to me to be equally untenable. Exclusive emoluments and privileges may be granted in consideration

of public services. The nature of such services, whether great or small, certain or contingent, is not a subject of judicial inquiry; it properly belongs to and may safely be intrusted with legislative wisdom. Nor is this charter forbidden by that clause of the Declaration of Rights which condemns monopolies and perpetuities. It requires no argument to prove that it is not included in the first term, and the other imports property locked up from the uses of the public, and which no person has power to alienate. Whatever emoluments are granted to these subscribers, the grant was made in contemplation of a great national benefit, to be derived from the union of their funds and intelligence, and under a certainty that without such incitement individual enterprise could not be raised into action, and the main services of the public property would continue as nature formed them. But others are not excluded from a participation in the profits, for, as the stockholders may transfer their shares, so every citizen, at his discretion, may invest his money in this property.

If changing the place where the shares are to be sold from Halifax to Salisbury is seriously insisted on as an invasion of chartered rights, it must be acknowledged that no one can be injured by it, and that its operation is altogether beneficial to the subscribers, the majority of whom, it may be supposed, live on the waters of the Yadkin. To require the president and directors to go to Halifax to conduct the sales, and the persons whose shares are sold to get the surplus, would have been an inconvenience to all concerned. It is merely the (14) correction of an error which crept into the first law, from inadvertently adopting the whole of the fourth section of the Roanoke act, which, fitly enough for that navigation, made Halifax the place of sale. It would ill become the gravity of a court of justice to pronounce this formal alteration, which could have no possible object in view but the benefit of the company, to be an infringement of their rights. For these reasons I am of opinion that the demurrer be sustained and the judgment be affirmed.

HALL and HENDERSON, JJ., concurred.

NOTE.—Questions similar to those involved in this case arose in a case which was also before the Court at this term, Navigation Company *v.* Craig. The opinion of the Court, as reported above, applies with equal propriety to both cases.

PER CURIAM. Affirmed.

SMITH AND STANLY v. NIEL AND OTHERS.—From Bertie.

If the appellee in the Superior Court suffers the cause to go to the jury, it is an implied waiver of any objection arising from the defectiveness of the appeal bond.

THIS case came before this Court, 8 N. C., 341. It is now here on a motion by Wood, one of the defendants, to dismiss the appeal on the ground of a formal defect in the appeal bond. The cause had once been submitted to a jury. At March Term, 1822, the Superior Court of BERTIE sustained the appeal and overruled the motion to dismiss, and Wood appealed. The facts appear in the opinion of the Court.

(15) PER CURIAM. The appeal was taken up to March Term, 1820, of Bertie, at which time it was continued. At the subsequent term, commissions were moved for by Wood, and the cause was continued. At March Term, 1821, the jury was impaneled, and from the judgment then rendered the first appeal was brought to this Court, where it was decided at June Term, 1821. It was not until March Term, 1822, that a motion was made in the Superior Court of Bertie to dismiss the appeal. This must be considered as an implied waiver of any defect in the appeal bond, according to *Ferguson v. McCarter,* 4 N. C., 544.

PER CURIAM. Affirmed.

Cited: S. v. Mitchell, 19 N. C., 238.

GRAY v. SWAIN.—From Bertie.

All the chattels of an intestate are assets, if the administrator by reasonable diligence might have possessed himself of them.

THIS was an action of *assumpsit,* to which defendant pleaded the general issue, no assets, and *plene administravit.* The plaintiff, to charge the defendant with assets, proved that the intestate died possessed of a personal estate much larger than would be sufficient to satisfy the plaintiff's demand, but that before administration was granted a trespasser took possession of all the assets and held them as his own. Administration was granted on 18 February, 1820, and the process of the plaintiff issued on 15 June, 1820. The trespasser was introduced

as a witness, and proved that the defendant had never demanded of him the goods of his intestate. It was insisted on the trial below that it was the duty of the administrator to collect the goods of his intestate, and if he did not do so within reasonable time he was liable to account with creditors for the value of the goods which he might have recovered, and that they were assets. The presiding judge instructed the jury that the issue submitted to them was whether (16) the administrator had assets at the time the process issued, and the issue must be found in the defendant's favor unless the plaintiff could show that assets had actually been in the defendant's possession. A verdict was rendered for defendant, and, a motion for a new trial having been refused, plaintiff appealed.

Ruffin for the appellant.

TAYLOR, C. J. The plea of fully administered avers that the defendant hath not, nor at the commencement of the suit or at any time since has had, any goods or chattels which were of his intestate at the time of his decease in his hands to be administered; and the replication to this plea puts in issue the question whether the defendant hath duly administered the assets up to the time of the plea pleaded (1 Saund., 336). The intestate died possessed of personal property to a greater amount than was necessary to pay the plaintiff's debt, but this was taken away by a trespasser before the defendant administered, and it appears that he has not demanded the property, nor made any effort to (17) possess himself of it. The question then arises, whether such property is, in contemplation of law, assets in the hands of the administrator? The property which an intestate possesses at the time of his death devolves on the administrator, who may bring trespass for an injury done to it, after the death of the intestate, and before administration. He may also bring trover, though he never had possession, and the sum recovered shall be assets in his hands, the property in these cases drawing after it the possession by relation. When the law thus arms him with these remedies, and enables him to convert into actual and productive assets everything personal which the intestate had a right to, it would be incongruous that his own negligence, fraud, or collusion, should furnish him with a defense against a creditor who can only reach the assets through the administrator. The correct principle is that all the chattels of the intestate are assets, if the administrator by reasonable diligence might have possessed himself of them. This the jury ought to have inquired into in the present case, but that being excluded by the court, there ought to be a

PER CURIAM. New trial.

JOHN REGISTER v. BRYAN.—From Columbus.

Where lands are sold for taxes under the act of 1798, if no person bids off a smaller quantity than the whole, the bid shall be considered as made by the Governor for the use of the State, but the title of the State is not completed before all the further requisites pointed out by the act are complied with.

EJECTMENT tried before *Paxton, J.*, in COLUMBUS, at Fall Session, 1821. The lessors of the plaintiff claim under a patent granted to Esther Rowan, and regularly deduced title down to James Regis-
(18) ter, who by deed on 7 July, 1819, conveyed to the lessors of the plaintiff. On 9 August, 1816, the land was exposed to sale for taxes by the sheriff of Columbus, and James Register became the purchaser, not having agreed to pay the taxes for a less quantity than the whole land; and on 28 February, 1818, the sheriff executed accordingly a deed to James Register. The defendant claimed the land under a younger patent, and relied on the act of 1798, which declares that when lands are sold for taxes, and no person shall bid for a less quantity than the whole of the said land, such bid shall be considered as a bid by the Governor for the use of the State. The jury, under the instruction of the court as to the law, found a verdict for the plaintiff, and defendant appealed.

HALL, J. The principal question here is whether the sale of the land for taxes divested the title of James Register. If it did not, the plaintiff is entitled to recover the land in the present action. When James Register became the highest bidder for the whole land, and bid therefor the amount of all the taxes that were due upon it, such bid became the bid of the Governor, by the act of 1798, ch. 492, Rev. Code. That act declares, sec. 4: "That if no person shall bid a smaller quantity than the whole, then the whole of the land so set up shall be considered as a bid for the Governor, and the sheriff shall strike off the same to him accordingly and execute a good and sufficient deed of conveyance to him and his successors in office, in manner hereinafter directed, for the use of the State." Further requisites are pointed out for a completion of title to the State, such as registration, etc. From this law it would seem that the Legislature considered the title of the State complete when the requisites pointed out by the act should be complied with by the proper officer. That has not been done, and I am not prepared to say that the legal estate has been divested out of
(19) James Register; of course he remained in of his old estate; for I view the conveyance of the sheriff to him as a nullity.

For these reasons, I think judgment should be entered for the plaintiff.

HENDERSON, J., concurred.

TAYLOR, C. J., *dissentiente:* The sheriff's deed to James Register, exhibited by the defendant, shows that these lands were sold for the taxes in 1816, when the said James Register became the purchaser, "not having bid off a less quantity than the whole." The latter circumstance, according to my construction of the act of 1798, relative to the land tax, operated to divest the title out of James Register, without any possibility of acquiring it again, except by a new entry as vacant land, after the several provisions in the act should have been complied with by the sheriff. The fourth section of the law enacts, in distinct terms, that if no person shall bid a smaller quantity than the whole, then the whole of the land shall be considered a bid for the Governor, and the sheriff shall strike off the same to him accordingly and execute to him and his successors a good and sufficient deed of conveyance. Here no person did bid for a *smaller* qauntity than the whole, but a bid was made for the *whole,* and consequently the case has happened which the Legislature intended should designate the Governor as a purchaser for the benefit of the State. The provisions for making a deed, registering it in the county court and recording it in the Secretary's office, are all intended to authenticate the transaction, so that it might be known what land was liable to entry. No person, having bid for a less quantity than the whole, vested a right in the State, and was equivalent to an office of entitling; but as the State, having but a *right,* and not a *seisin,* cannot make a grant of lands, the ulterior steps for completing the *seisin* are pointed out (3 Co., 10, (20) *Dowtie's case*). The sheriff's deed appears to me to be altogether void, upon principles as firmly established as any in the law, and which have been maintained with an uniformity and consistency of decision strongly indicative of their importance to the community. It professes to sell, by virtue of the act of 1798 and in pursuance of its directions, when, in truth, the sale, as evidenced by the deed, is in direct opposition to the act. To sustain this deed is to transfer the legislative power to the sheriff, and so allow him to sell land for taxes, not in the manner prescribed by the written law, but according to his private notions of what is right, and would place at his discretion the property of every citizen in the State. This case must be governed by the same rules as if the purchaser from the sheriff were a stranger, instead of being the owner of the land when the tax became due. If Bryan's land had been legally sold to him, it must have been sold with equal validity if a stranger had been a purchaser, and then the injurious operation of sanctioning the sale would have been manifest. The land was given in for taxation in two separate tracts, and it may be supposed that the taxes, which were only five and a half dollars, might have been

raised by the sale of either tract. The Legislature aimed to prevent a sacrifice of entire tracts of land while it was possible to raise the tax from the sale of a less portion; or if a sacrifice was unavoidable, that it should be made on the altar of the State for the benefit of the whole community. It is a well known rule of the common law that when a special authority is delegated by statute to particular persons, affecting the property of individuals, it must be strictly pursued and appear to be so on the face of their proceedings. This rule is rigidly adhered to in a case even where a jury was made necessary to assess the value of land of which a person was deprived. *Rex v. Croke,* Cowp., 26.

(21) How much more important is its observance where the whole authority is to be exercised by a single ministerial officer.

Nor are American decisions wanting in support of the same doctrine. By the tax law of Georgia, the collector was authorized to sell land only on the deficiency of the personal estate, and then to sell only so much as was necessary to pay the taxes in arrear. Under those laws, the sale of a whole tract, when a small part would have been sufficient to pay the taxes, was held void; and it was laid down that a collector selling for taxes must act in conformity with the law from which his power is derived, and that the purchaser is bound to inquire whether he has so acted, and is also bound to prove the authority to sell. 4 Cranch, 402. In the Court of Appeals in Virginia it has been decided, in a case arising under the tax laws, that an authority given by law to any officer whereby the estates or interests of other persons may be forfeited or lost must be strictly pursued in every instance. 1 Mun., 419.

And in a question on the act of Congress to lay and collect a direct tax, it has been decided that all the preliminary requisites of the law must be complied with, otherwise the collector has no authority to sell, and his conveyance passes no title. 9 Cranch, 65; 4 Wheat., 77. The latter branch of the decision has been recognized in the State courts. 4 Mun., 435. To these cases I will add *Jones v. Gibson,* 4 N. C., 480, in which it was held that where the sheriff sold an entire tract of land for taxes on the whole, when no tax was due for one-third part, the sale was void. The ground of the decision was that the sheriff, having transcended his authority, his whole act was void; in other words, that the sale could not be sustained even for the two-thirds of the land for which the taxes were due. These are the reasons and authorities which have led me to believe that the true construction of the act of

(22) 1798 would divest James Register of the land, when a bid was made for the whole, and vest the right in the Governor for the benefit of the State; and I know of no case to oppose to this construction, except *Martin v. Lucey,* 5 N. C., 311, decided in 1809. I was of

the same opinion in that case which I now entertain, for I had considered it, though I had no opportunity of delivering a judicial opinion. My brothers, however, differ from me, and there must be a judgment of affirmance.

Cited: Taylor v. Allen, 67 N. C., 351; *Land Co. v. Board of Education,* 101 N. C., 40.

ELLIOTT v. NEWBY.—From Randolph.

Judgment of condemnation will not be rendered in a case where a garnishee has in his hands as an administrator property in which the debtor will be interested as a distributee, after the settlement of the administrators' accounts.

AN ATTACHMENT was sued out against the defendant by the plaintiff, and one Gallimore was summoned as garnishee. Gallimore stated on his garnishment that he was the administrator with the will annexed of one Samuel Newby, and had in his hands certain property which he was directed by the will to distribute among the children of Samuel Newby, of whom the defendant was one. That the estate of Samuel Newby was not so far settled as to enable him with certainty to ascertain what sum would remain for distribution after payment of debts, costs, and charges of administration. On behalf of the plaintiff, it was moved that judgment of condemnation should be rendered against so much of the estate remaining in the hands of the garnishee, after payment of debts and costs and charges of administration, as the defendant in this attachment should be entitled to. The motion was refused, and plaintiff appealed.

HENDERSON, J. Every objection which has been successfully (23) urged against a court of law taking cognizance of claims for legacies and distributive shares applies with equal force against this case, for it is substantially an action at law at the instance of the absent or absconding debtor against the administrator for a distributive share of the intestate's estate. The court is as incompetent to take an account of assets, to order payment upon terms, to have all persons interested in the fund before the court for the administrator's safety, as if the distributee had himself brought the action, and yet all these things are as necessary in the one case as the other. It may seem strange to say that courts of law are incompetent to enforce *legal* rights,

and it seems to me that since the statute of distribution and the act of Assembly, taking the surplus from executors and directing them to pay the legacies, both distributive shares and legacies are claims or rights at law.

But the decisions are all the other way, and it is too late to question them; indeed the powers of a court of equity are much better adapted to the subject than those of a court of law, and I feel no disposition to disturb the question.

I think, therefore, that this claim is not subject to condemnation, and that the garnishee should be discharged.

TAYLOR, C. J., and HALL, J., concurred.

PER CURIAM. Affirmed.

Cited: *Gillis v. McKay,* 15 N. C., 174; *Coffield v. Collins,* 26 N. C., 491; *McLeran v. McKethan,* 42 N. C., 72; *Gaither v. Ballew,* 49 N. C., 491.

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(24)

ODOM ET AL. V. THOMPSON ET AL.—From Bertie.

1. When on a petition for a reprobate of a paper-writing purporting to be a will, the court below ordered a reprobate, and the defendants appealed, this Court refused to dismiss the appeal.

2. When a petition for reprobate sets forth that those interested in contesting the first probate were at the time under disabilities, and that the pretended testator had not capacity to execute a will, these allegations not being denied in the answer, a reprobate will be awarded.

PETITION setting forth that the defendants, in 1803, had exhibited for probate to the county court of Bertie a paper-writing, purporting to be the last will and testament of one Noah Hinton, and in the absence of all who were interested in opposing the proceeding the paper-writing was admitted to probate as a will. It was further alleged that no notice was given to the parties interested, and had there been they were under disabilities, being *femes covert* and infants, and therefore were not capable of opposing it. The petition also charged that the paper was signed by the said Noah Hinton when he was utterly incapable of executing a will. The petition prayed a revocation of the former probate, and that probate anew might be ordered. These statements were not denied in the answer of the defendants. Upon hearing the petition and answer, the court below ordered that the probate of

the will of Noah Hinton, deceased, be revoked, and that the defendants proceed to reprove the same in the county court of Bertie, in solemn form, from which order the defendants appealed.

Gaston and Hogg for petitioners. (25)
Seawell and Mordecai for defendants.

TAYLOR, C. J. There are two allegations in the petition which, if true, render it essential to justice that the will should be reproved: these are that the petitioners, who are heirs at law and next of kin to the testator, were either infants or under coverture when the will was proved, and that no notice was given to them. The other is that the will and the several codicils annexed were signed and executed by the testator when he was utterly incapable of making a will. These statements must, upon the face of the proceedings, be taken as true, since the defendants have made no answer to them; and although they might not be informed as to the state of the testator's mind when the will was made, since they are not the persons who offered it for probate, yet some answer should have been made to the charge; and, if they knew nothing about it, they should have answered so. For these reasons alone, without inquiring into the other questions made, I think there ought to be a reprobate.

HALL, J. This case seems to be peculiarly situated. If the question whether this petition contains matter sufficient to authorize the Court to say there shall be a rehearing of the probate of the will is not considered by this Court at this stage of the proceedings, it is difficult to say that any other opportunity will be afforded. Suppose it should be sent back to be finally settled by rehearing the probate (26) of the will; if that question should terminate favorably for the defendants, *they* would have no inducement to take the opinion of this Court on the merits of the petition. If the question should be otherwise decided, and the paper-writing should be found not to be a will, this Court would hesitate long before it would undertake to set that finding aside, although they might have thought in the first instance that the prayer of the petition for a rehearing of the probate of the will ought not to be granted; for that reason I think the merits of the petition should be now decided on.

HENDERSON, J., concurred.

PER CURIAM. Affirmed.

THE GOVERNOR v. ROBERTS.—From Wake.

The rule that the best evidence in the power or possession of a party shall be produced applies only to *grades* of evidence, *e. g.*, oral evidence shall not be received when there is written, a copy when the original may be had. But where the evidence is all of the same grade, as the testimony of living witnesses, one is not to be excluded because another had a better opportunity of knowing the fact deposed to, but the testimony should be left to a jury to be weighed by them.

DEBT brought upon the bond given by the defendant as assistant paymaster. The condition of the bond was as follows: "If the said John Roberts shall well and truly execute and faithfully discharge, according to law and to instructions received by him from proper authority, his duties as assistant paymaster-general aforesaid, and he, his heirs, executors, or administrators, shall regularly account for all moneys received by him from time to time as assistant paymaster-general with
(27) such person or persons as shall be duly authorized and qualified on the part of the State for that purpose, and moreover pay such balance as on a final settlement of the said accounts shall be found justly due from him to the said State, then this obligation shall be null and void," etc. The defendant craved oyer and pleaded "conditions performed and not broken." The Attorney-General offered in evidence the account of the defendant settled with the Comptroller, and also a paper which he alleged was the pay roll on which the account was founded. The Comptroller with whom the settlement had been made was dead, and this latter paper was in the possession of the Secretary of State, who testified in court that the present Comptroller was absent, and that previous to his departure he had delivered the keys of his office to the witness, with a request to him that he would attend to any applications which might be made in his office during his absence. The witness also stated that he *then* attended the court on behalf of the Comptroller or as his agent with the papers of the office relative to this transaction. The Comptroller was not summoned to attend the court. The court rejected the writing purporting to be a pay roll without further proof of identity, and the jury returned a verdict for the defendant. A motion for a new trial was refused, judgment rendered, and the Attorney-General appealed.

HENDERSON, J. On whom it devolved to prove the violation or performance of the condition of the bond depended entirely on the question, Who held the affirmative in the issue? But in the progress of the cause it became entirely unnecessary to consider this point, for it appears

that the Comptroller's settlement with the defendant, and receipt in full, was produced in evidence, which, if fairly obtained, was a complete bar. The only question, therefore, remaining for the consideration of the Court is, Was the court below correct in with- (28) holding the pay roll from the jury? which pay roll the plaintiff alleged was the basis of the Comptroller's receipt and settlement, and which, he said, he would show contained forgeries and misstatements. Mr. Secretary Hill stated that the Comptroller was absent on a visit to his family in Warren; that previous to his leaving Raleigh he put his keys into the witness's possession, with a request to attend to any business in his office, and that he then attended the court with the papers in this case, in the place or on the behalf of the Comptroller; from which I understand that this paper, the pay roll, was among the papers in the case. The question was as to the relevancy of the facts deposed to by Mr. Hill; that is, Could the jury rightfully infer from these facts (for the evidence is always admitted to be true when we are testing its relevancy) that this was the pay roll by which the settlement was made? The settlement presupposed a pay roll; that pay roll was in the office of that officer appointed by law to make the settlement and keep the vouchers; it was with the papers of this particular transaction; now whether this *would* satisfy the jury is not for the Court to say; if they are only part of the facts, do they throw any light on the issue? If they are the whole, which in this case is admitted, do they warrant the jury in drawing the conclusion that it is the pay roll? If the jury would be warranted so to do from the facts deposed to, the court did wrong; if they would not, the court did right. The rule that the best evidence in the party's power or possession shall be produced does not apply in this case, for that rule only applies to grades of evidence. Oral evidence shall not be received where there is written, a copy when the original can be had. The present Comptroller might, and no doubt would, be more satisfactory than Mr. Hill, not because his evidence is of a higher grade, for it would be oral in each case, but because it is probable he would depose to addi- (29) tional facts, to wit, that when he came into office he found, or he did not find, the pay roll among this file of papers; and if the late Comptroller was alive, he might be still more satisfactory; but still the evidence is all of the same grade, and tends to elucidate the subject, and from which the jury might rightfully draw the conclusion that it is the same paper. If the rule was that the most full and satisfactory evidence should be produced, it would follow that where it appeared there were others present they should also be produced, or where a person from his situation had a better view of the transaction, one who

had a less favorable position should not be received, or where it appears that another could give a more detailed account of the affair, one who could not give so full a one should be excluded, although there may be no doubt as to his knowledge of the facts to which he deposes. I therefore think that the paper ought to have gone to the jury. The judgment should be reversed and a new trial granted.

PER CURIAM. New trial.

Cited: *S. v. Smith,* 33 N. C., 35.

HAMILTON v. McCULLOCH.—From Orange.

When a defendant appeals to this Court, and on the record as sent up no error appears in the proceedings below, and no statement of facts accompanies the record, the Court will award a new trial for the purpose of having a case made up, as otherwise the party cannot have the benefit of his appeal.

DETINUE, which had been tried in ORANGE. No error appeared on the record of the proceedings below, and from the judgment rendered below defendant has appealed to this Court. No statement of the facts of the case accompanied the transcript of the record (30) from the court below, and,

PER CURIAM. A new trial is awarded in this case for the purpose of having a case made up; there is no other possible way by which the party can have the benefits of an appeal.

PER CURIAM. New trial.

Cited: *Anderson v. Hunt,* 10 N. C., 244; *Isler v. Haddock,* 72 N. C., 120; *Comrs. v. Steamship Co.,* 98 N. C., 167.

POTTER, ADMINISTRATOR, v. STONE AND OTHERS.—From Wake.

1. The allowance made to administrators is to be proportioned to the care and attention bestowed in each particular case, so as, however, not to exceed 5 per cent on each side of the account.

2. The office is not intended to be one of profit, and nothing more than a bare compensation can be allowed.

3. Payments made to distributees on account of their portions, whether before the administration is settled or at the close of it, are not considered as expenditures, and no allowance of commissions can be made on them.

MOTION by Henry Potter, originally made in WAKE County court, and carried by appeal to the Superior Court, for an allowance of commissions to him as administrator of the estate of David Stone, deceased. Administration on the estate of Stone was granted in November, 1818. In December, 1818, a sale of property was made in Wake. In January, 1819, a similar sale was made in Bertie. The administrator personally attended both sales and also went to Bertie one other time on the business of the estate. The administrator also claimed commissions on the payment of portions to the distributees. The county court of Wake allowed a commission of 5 per cent on $31,781. This sum was greater than either the debit or credit side of the account. The Superior Court allowed commissions to the amount of $1,000. (31)

It was referred to the clerk of this Court to ascertain the particular sums received by the administrator at different times and as arising from distinct and separate funds, and from his report it appeared that a portion of $25,000 (the largest sum received) was obtained from sales made by the administrator of lumber which he had caused to be cut at a sawmill owned by his intestate.

TAYLOR, C. J. Trustees were entitled to no allowance at common law for their care and trouble, but are merely indemnified for their actual expenses. The Legislature has thought fit to alter this rule and to make an allowance according to the actual care and attention bestowed in each particular case. A large estate, being unincumbered, may in fact require but a small portion of the attention of the administrator, and merit, therefore, a small commission; whereas a less estate, if much involved, and having many claims to liquidate, may call upon the court to go to the full extent of the law. As the *maximum* is fixed at 5 per cent, it is a plain declaration of the Legislature that, however great the degree of trouble may be with which the administra-

tion is attended, that shall be deemed an adequate compensation. But neither the law nor the reason and justice of the thing lends any countenance to the idea that such offices shall be considered as sources of profit to the incumbent, or desirable on that account. On the contrary, considering whose interests are most frequently concerned, that of widows, minors, and creditors, every consideration of policy and right strongly impels the Court to avoid any construction of the law which may lead to such a consequence. A bare compensation, and nothing more, is all they feel authorized to allow. The most troublesome part in the management of this estate was probably that which the
(32) administrator was not obliged to undertake, that of the sawmills, which probably belonged to the guardian of the children. For the labor thus bestowed, the administrator is undoubtedly entitled to compensation from those who have been benefited by his attention, but not as administrator; nor has the Court any power to take it into consideration on this motion.

To ascertain the degree of trouble which has been bestowed in the administration, properly so called, the Court has considered the duration of the trust and the sums received and paid away in a course of administration, and as the estate, though nominally large, was in fact unembarrassed with law suits or debts, and the latter for the most part of easy liquidation, the Court, upon a full view and due consideration of all the circumstances, thinks that 2½ per cent upon the receipts and 3 per cent on the expenditures will be a just compensation for the trouble of the administrator, so far as the law permits the Court to act in relation to the subject. For the sake of future cases, we think it right to add that payments made to distributees on account of their portions, whether before the administration is settled or at the close of it, cannot be considered as expenditures, and therefore no allowance of commissions is made on them.

The decision of the Court is that the orders of the county and Superior courts are set aside, and an allowance be made to the administrator upon the foregoing principles of $809.19. The rate of commission, in this case, is formed upon an average of the general payments and receipts; upon some receipts, singly considered, a half per cent would be a full allowance, and upon others we could with propriety go to the *maximum*. The case cannot therefore furnish a rule for any particular charge that may be selected.

PER CURIAM. Modified.

Cited: Ex parte Haughton, 14 N. C., 442; *Clarke v. Cotton,* 17 N. C., 55; *Peyton v. Smith,* 22 N. C., 349; *Bank v. Bank,* 126 N. C., 540.

(33)

ROBERT CAMPBELL AND OTHERS v. MCARTHUR.—From Bladen.

1. A deed altered after its execution is good, if the alteration be made with the knowledge and consent of the grantor; and the part altered need not be registered to make it color of title, for an unregistered deed is color of title.

2. A mistake in the course or distance of a deed should not be permitted to disappoint the intent of the parties, if that intent appears, and if the means of correcting the mistake are furnished either by a more certain description in the same deed or by reference to another deed containing a more certain description.

EJECTMENT. The land in dispute was granted to Thomas Locke on 20 February, 1735, and in the patent was described as being "640 acres lying and being on the northeast side of the northwest branch of the Cape Fear River, beginning at a hickory on the river bank, thence north 75 east 160 chains to a stake, then south 15 east 40 chains, thence south 75 west 160 chains to an elm on the river bank, thence with the river to the first station."

Thomas Locke conveyed to Leonard Locke, and Leonard Locke conveyed to Neill McArthur; these facts appeared from the recital in a deed from Neill McArthur to his son, Archibald McArthur, for the lands in dispute. This deed bore date 4 July, 1777, and under it defendant claimed.

The plaintiffs, declaring their inability to deduce title by a regular succession of conveyances, relied upon *color of title,* and to support it produced two deeds: first, a deed from James Burgess to Farquhar Campbell, dated in 1789, for one moiety of a tract of land described as follows: "Lying and being on the northeast side of the northwest branch of Cape Fear River, beginning at a hickory, thence north 13 east 160 chains, thence north 15 east 40 chains, thence south 70 west 160 chains to an elm on the river bank, thence with the river to the first station, containing 640 acres, patented by Thomas (34) Locke on 20 February, 1735."

Secondly, a deed from James Hogg, dated in 1789, conveying to Farquhar Campbell one moiety of the land included in the patent to Thomas Locke.

The hickory and elm mentioned in the deed from Burgess, it was contended, are the same which are referred to in the grant to Thomas Locke.

Farquhar Campbell, in 1798, took an actual, adverse, and exclusive possession of the lands which had been granted to Thomas Locke, and

his possession was continued by himself, or those claiming under him, without interruption, until February, 1807. Some time between 1798 and 1807, Farquhar Campbell died, having devised the lands to his sons Robert and James, as tenants in common; James died after the death of his father, leaving four children, who, together with Robert Campbell, are the lessors of the plaintiff.

In February, 1807, the defendant, acting under a power of attorney from Archibald McArthur, before mentioned, obtained the possession and has since kept it. This action was commenced in 1807.

Archibald McArthur was born in 1772. In 1782 he went to England, and has continued beyond seas ever since.

Defendants contended below, first, that the deed from Burgess to Farquahar Campbell was executed with blanks for the day of the date and the consideration, and that these blanks were filled up after the execution of the deed. In proof of this they produced two copies of the deed certified by two different registers, in which the day of the date and the consideration were omitted, and relied further on different shades in the ink with which the deed was written. Secondly, that the deed did not cover the land in dispute, if the boundaries were run as expressed therein according to course and distance, and that here no reason was furnished for a departure from course and distance.

Thirdly, that Archibald McArthur, being beyond seas, was not
(35) affected by the statute of limitations, and that his title was saved by the exception in the statute.

The court, leaving it to the jury as a matter of fact to ascertain what was the situation of Burgess' deed at the time of its execution, stated as the law that if the deed had been executed in blank, and the omissions were afterwards supplied, unless with the knowledge and consent of the grantor, the deed would thereby be avoided and could not operate as color of title; that color of title included, at least in its definition, such a deed or instrument as, if executed by the real owner, would pass the title in the land.

As to the second objection, the jury was instructed that all rules of construction and boundary were intended to ascertain and advance the real design of the parties; and that a mistake in a course or distance should never be permitted to disappoint the intent of the parties, if that intent appeared and the means of correcting the mistake were furnished, either by a more certain description in the same deed or by reference to another deed containing a more certain description. That here, as the deed called for the beginning of Locke's patent, as well as the elm, the termination of the third line of said patent, and as the deed declared the intention to be to convey the 640 acres of land

patented by Locke, the jury, if it was necessary, in order to accomplish the intent of the parties, should disregard a mistake in the courses of the deed, and pursue the real and true boundary of the patent, to arrive at the corner elm on the river.

As to the statute of limitations, the court charged that as Archibald McArthur was of full age in the year 1793, and was under no disability but that of being beyond seas at the time the adverse possession commenced, and as the saving in the statute for persons beyond seas has the proviso that they shall, "within eight years after the title or claim becomes due, take benefit and sue for the same," and as he had not done so within eight years, he was clearly out of the saving of the statute. (36)

There was a verdict for the plaintiffs, and defendant moved for a new trial on the grounds of misdirection in law and a finding contrary to evidence. The motion was overruled, and from the judgment rendered defendant appealed.

Seawell and Mordecai for appellant.
Gaston for appellee.

TAYLOR, C. J. This is a motion for a new trial on the part of the defendant, who alleges that the court misdirected the jury, and that the jury found against the evidence. It appears from the case that the father of the lessors of the plaintiff was in possession of the land claimed more than seven years claiming under a color of title by means of two deeds from Burgess and Hogg, each for a moiety of a tract of land granted to Thomas Locke, on 20 February, 1735. There is no controversy relative to the deed from Hogg; it is not denied that his moiety was duly conveyed by it, but the questions arise altogether from Burgess' deed. It is said this deed was registered, having two blanks, one for the date and the other for the consideration, and that as this fact appears from two official copies of two different registers, it follows that the deed must have been filled up since that time, (37) and is thereby avoided by this alteration. Whether the deed was altered after its execution was properly submitted to the jury as a question of fact; and if it was so altered they were instructed that the deed was thereby avoided, unless the alteration was made with the consent and knowledge of the grantor. In this instruction I think the judge is clearly sustained by undoubted authority. Where A. and B. sealed and delivered a bond to C., and afterwards the name and addition of D. was interlined, and he also sealed and delivered the obligation, with the consent of all parties, it was held to be a good obligation of all three.

2 Lev., 35. This case is cited by Comyns in his Digest, and has been repeatedly recognized as law. There is a case in 1 Anstruther, 228, where a bond was executed with blanks for the name and sum, and delivered by the obligor to an agent for the purpose of raising money; the plaintiff lent a sum, and the agent filled up the blanks with that sum and the plaintiff's name and delivered the bond to him, and on *non est factum* pleaded the bond was held good. And a party executing a bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may thus be filled up after he has executed the bond. Ventris, 185. The objection that even if the deed were filled up with the consent of the grantor, it ought subsequently to have been registered, has been decided on in this Court; and it has been held that an unregistered deed will make a color of title.

I am also of opinion that the charge of the judge was not less unexceptionable in stating "that a mistake in a course or distance should not be permitted to disappoint the intent of the parties, if that intent appeared, and if the means of correcting the mistake are furnished either by a more certain description in the same deed or by reference to another deed containing a more certain description."

(38) The land conveyed by Burgess to Campbell is designated by these several particulars, viz., a moiety of the tract thereinafter described, the courses and distances, a hickory at the beginning, an elm on the river bank or the end of the third line, and a reference to the patent of Locke, bearing date on 20 February, 1735, which consequently includes the boundaries and location of that land. There is an evident mistake in some of the courses and distances described in Burgess' deed to Campbell, so that if the land were laid off according to them it would not comprehend a moiety of Locke's 640 acres; but there is also so much correspondence between the lines and those in Locke's patent as to show an intention to convey a moiety of that land. In the corner trees, however, there is no mistake, for the same in number and quality are called for both in the deed and patent, and thus a reference to Locke's patent renders certain what an incorrect description of the lines had rendered uncertain. So that I cannot think any difficulty will present itself in ascertaining the land intended to be conveyed by the deed, when recourse is had to the patent. The grantor has referred to this as the means of correcting any mistake in the description of the land, and of ascertaining what his intent was in making the deed. 5 Wheaton, 359, 362. Words shall always operate according to the intention of the parties, if by law they may; and, if they cannot operate in one form they shall operate in that which by law shall

effectuate the intention. This is the more just and rational mode of expounding a deed, for, if the intention cannot be ascertained, the rigorous rule is resorted to, from necessity, of taking the deed most strongly against the grantor.

It is supposed that the judge erred in instructing the jury that Burgess' deed called for the beginning of Locke's patent, whereas it calls for a hickory, and that it called for the elm, the termination of the third line of the patent; whereas, it merely calls (39) for an elm on the river bank, thereby assuming two facts, of which proof should have been made for the consideration of the jury.

It is true that the deed does not in so many words describe the trees or boundaries of the patent, nor does it appear that any witnesses were called to prove their identity, but the construction of deeds is a question of law for the court, and if from a comparison of the lines, it appeared that the trees called for in the deed were the same with those called for in the grant, it was only stating the conclusion instead of the premises warranting it. It is not a fair intendment and necessary construction of the deed? There are but two trees on the bank of the river as boundaries of Locke's patent, a hickory and an elm. When Burgess' deed, therefore, conveying a moiety of the 640 acres, designates a hickory as the beginning, and an elm as the determination of the third line, it is not a forced construction to consider them as the same, more especially when the line leading from the elm does, both in the deed and the patent, go to the beginning. Upon the whole, it appears to me that the charge was correct, and that the law has been duly administered in this case. I therefore think a new trial must be refused and the judgment affirmed.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. No error.

Cited: Ritter v. Barrett, 20 N. C., 269; *Everitt v. Thomas,* 23 N. C., 256; *Cooper v. White,* 46 N. C., 392; *Hardin v. Barrett,* 51 N. C., 161; *Kron v. Hinson,* 53 N. C., 348; *Mizell v. Simmons,* 79 N. C., 190; *Credle v. Hayes,* 88 N. C., 324; *Davis v. Higgins,* 91 N. C., 387; *Baxter v. Wilson,* 95 N. C.,144; *Perry v. Perry,* 99 N. C., 273; *Ellington v. Ellington,* 103 N. C., 58; *Avent v. Arrington,* 105 N. C., 389; *Lewis v. Roper,* 109 N. C., 20; *Tucker v. Satterthwaite,* 123 N. C., 528; *Gudger v. White,* 141 N. C., 514; *Wells v. Harrell,* 152 N. C., 219; *Ipock v. Gaskins,* 161 N. C., 678; *Brown v. Brown,* 168 N. C., 10; *Lumber Co. v. Lumber Co.,* 169 N. C., 89, 95; *Mining Co. v. Lumber Co.,* 170 N. C., 276; *Byrd v. Spruce Co., ib.,* 433.

(40)

MITCHELL & CO. AND ANDERSON, ADMINISTRATOR, v. PATILLO & ALSTON.

Executions having issued against A., were levied on a horse in the possession of H., and H., with the defendants, gave bond to the sheriff for the production of the horse to the sheriff at a certain time. In this bond the plaintiffs in the executions were the obligees; and on the failure of H. to deliver the horse to the sheriff, notwithstanding the sheriff did not attend to receive him, the plaintiffs brought suit, and it was *Held*, that as the obligors had undertaken to do an act to a stranger over whom the obligees had no control, the obligors were not excused by the refusal or neglect of the stranger.

DEBT, brought by the plaintiffs, obligees, upon the bond of the defendants, executed on 22 September, 1820, and was tried below before *Norwood, J.*, at WARREN.

The condition of the instrument recited that writs of *fi. fa.* had issued from Warren County court, at the instance of the plaintiffs, against the goods and chattels of one Powell; that these writs had been levied on a certain horse, as the property of Powell; that the horse was in the possession of one Harrison, and provided that "if the said Harrison should produce and deliver the said horse to the sheriff of Warren County, in the town of Warrenton, on or before 24 November, 1820, then the obligation to be void," etc.

The subscribing witness to the bond proved that, in the evening of 22 September, 1820, he was in Warrenton, in company with the sheriff, Hawkins; that Hawkins said he believed he should have to carry home with him the horse, but hoped Harrison would be able to give security for his forthcoming. Shortly afterwards the witness was called into a room in which he found the sheriff, Harrison, and the defendants; the bond was then executed by Harrison and the defendants, and attested by the witness.

(41) A witness on the part of the defendants proved that Harrison arrived with the horse at Warrenton on the evening of 23 November, 1820, and declared that he had brought the horse for the purpose of surrendering him to the sheriff. About sunset on the succeeding day Harrison caused the horse to be carried to the door of the courthouse in Warrenton, and there publicly declared his readiness to deliver the animal to the sheriff, and that he then and there tendered him pursuant to the condition of the bond; but neither the sheriff or any person on his behalf was there to receive the horse. The sheriff had advertised the sale of the horse to take place in Warrenton on 24 November, 1820, but had not been seen in town during the day, nor had any of his deputies.

Any evidence *dehors* the bond to show that it was taken by the sheriff, and not by the obligees therein named, was objected to by the plaintiffs, but the court received such evidence. It was then contended by plaintiffs that to exonerate the defendants it was incumbent on them to show a notice to the sheriff to be at Warrenton, on the 24th to receive the horse. The court instructed the jury that if such notice were necessary they were at liberty to presume that the sheriff had it, from the facts stated in the condition of the bond, and from the evidence; and further, that if the bond were taken by the sheriff without the agency and contract of the plaintiffs it was void; if taken by the plaintiffs, on their own agreement with the obligors, it was good, and if the facts were as stated by the witnesses, defendants were entitled to a verdict. A verdict was rendered for the defendants; a new trial having been refused and judgment rendered, plaintiffs appealed.

HENDERSON, J. An obligation to perform an act is complied with by a performance only. The omission to perform it may be excused by the act of God, the act of the law, or the act of the (42) obligee.

The defendants rest their excuse on the *spirit* of the third ground, that is, by making the omission of the sheriff the omission of the obligees, and if they succeed in this, they certainly will prevail; otherwise, not. This case was not argued, and we are left to our own researches.

Coke in his Commentary on Littleton, 208b, says, "If a man be bound to A. in an obligation, with condition to enfeoff B. (who is a mere stranger) before a day, and the obligor doth offer to enfeoff B., who refuseth, the obligation is forfeit; for the obligor hath taken upon him to enfeoff him, and his refusal cannot satisfy the condition, because no feoffment is made, but if the feoffment had been made by the condition to the obligee, or to any other, for his benefit or behoof, a tender and refusal shall save the bond, because he himself, upon the matter, is the cause wherefore the condition of the bond could not be performed, and therefore shall not give himself cause of action." I am rather inclined to think that the case under consideration does not come within the latter branch of this rule; it is quite evident it does not within the first. To make the whole rule stand together I must consider the stranger in the latter branch as the agent or servant of the obligee, not barely one who was to do some ulterior act which might be for his benefit; or, that the act when done was beneficial to the obligee; for, in the case where the act was to be done to a mere stranger, the obligor might always get relief in equity by paying the damages which the

obligee has sustained by the breach, and if not interested in the act he could sustain none; at most, only nominal. Why, then, not excuse him, where the stranger refuses to receive the act? There can be no other rational ground than that the obligee is interested in having it done, and the obligor having undertaken to do it to a person over whom the obligee has no control, the obligor is not excused by the refusal or neglect of the stranger; but where the obligee is the person to
(43) whom the act is to be done, or where it is to be done to his servant or his agent, a refusal, in such case, shall not give an action, because no man can give himself a cause of action by his own wrongful act, and the act of the servant or agent is the act of the principal. Nor does the case put immediately after the above quotation bear upon the present. The case is, if A. be bound to B. that C shall enfeoff D.; in this case, if C. tender and D. refuse, the obligation is saved, for the obligor himself undertakes to do no act, but that a stranger shall enfeoff a stranger; for in this case one of the obligors, Harrison, is to do the act; he is no stranger to his coöbligors, and it is difficult to conceive a case where the principal is bound to do an act and the securities not, when the same obligatory words are used as applicable to both. The principle, I believe, is plain enough, and it is not disputed; it is to be found in all the books—the difficulty lies in its application. *Maunly v. Drake,* 10 John, 27, is very much like this. Indeed, in the view taken by the Court (although the facts do not entirely warrant it, for, according to them, there was neither a surrender or offer to do so, but only some talk about it), it is impossible to distinguish it from this; and there the opinion of the Court was that the defendants were not excused. I therefore think that the judgment should be reversed and a new trial granted.

HALL, J., concurred.

TAYLOR, C. J., *dissentiente:* Where the defendant undertakes to do an act at a certain time and place, to which the concurrence of the obligee is necessary, and the latter does not attend, the condition is considered as performed, because the other party hindered it. The law is the same where the act is to be done to the agent of the obligee, or to another for his benefit, for it is the duty of the principal
(44) to take care that his agent is at the place ready to receive a performance.

A condition to be performed to a stranger must be strictly and exactly performed, because the obligee has no control over him, and no man should rashly undertake to do an act to the completion of which the wish of another must unite with his own. The distinction seems

to be plainly drawn between the obligee and a stranger, and there is no middle term. If Hawkins was a stranger, the conclusion inevitably follows that the defendant has not done what the law, applied to his contract, demands from him. That he was not a stranger in contemplation of law I infer from these circumstances. The jury have affirmed the fact that the bond was taken by the agreement and contract of the plaintiffs, and as the record shows that the bond was taken by Hawkins and made payable to the plaintiffs, the substance of the finding is that the plaintiffs authorized Hawkins, as their agent in this respect, to deliver the horse to Harrison upon his entering into bond to deliver him to the sheriff by a certain time.

The record further shows that the horse was levied upon under the plaintiffs' executions, and therefore the delivery to the sheriff must have been for their benefit, and this alone would distinguish the sheriff from a stranger, since he is agreed upon by the parties as the person to whom an act is to be done, which, when performed, is to enure to the benefit of the obligee. It may be said that the plaintiffs were already secure in their remedy against the sheriff if he surrendered the property to Harrison. But they may have desired to accommodate Harrison; and they may have been willing to strengthen their security against the sheriff. For these reasons, I think the verdict is right.

PER CURIAM. New trial.

Cited: Peace v. Nailing, 16 N. C., 292.

(45)

DOE ON DEMISE OF WAGSTAFF v. CHARLES SMITH.—From Granville.

A defendant in ejectment produced deeds to himself to show that he was tenant in common with the lessor of the plaintiff; plaintiff to show that the defendant claimed the whole land, read a certified copy of a deed to the defendant, by which another claimant of plaintiff's interest had conveyed it to the defendant. The introduction of this copy, without a previous notice to produce the original, was made the ground of a motion for a new trial, and on the argument of the motion defendant refused to support the ground taken by an affidavit that he claimed nothing under the deed, a copy of which had been read. It was *Held*, that his refusal warranted a strong presumption that he did claim under the deed, and as no injustice appeared to have been done by the verdict a new trial was refused.

EJECTMENT. Richard Duty, being seized of a tract of land, died, having first made his last will and testament, in which he devised as

follows: "I will that my estate be equally divided between my eleven children, that is to say, George, Richard, Ann, Susannah, Benjamin, Thomas. Jabez, Rachel, Elizabeth, Samuel and Sarah." He appointed his sons George and Richard executors, and directed that his lands should remain in their hands until his youngest child was of age, and at that time that they should be sold in his own family. The lessor of the plaintiff claimed the shares of four of the above-named devisees, and deduced title as follows: Benjamin purchased the share of Jabez, and conveyed it, together with his own, to the plaintiff's lessor by deeds of 7 and 10 November; Thomas and Richard also, who it was contended had sold their share to Benjamin, but executed no deed, by direction of Benjamin, conveyed to plaintiff's lessor their shares respectively.

One James Smith, it appeared, had also claimed the above-named four shares, by virtue of a purchase made at a sheriff's sale in 1808 or 1809 on an execution against Benjamin. The deed from Benjamin
(46) to Wagstaff, the lessor of the plaintiff, was prior to the judgment on which this execution issued.

The defendant produced deeds to himself for the shares of Elizabeth, Sarah, Samuel, Susannah and Rachel, to show that he was a tenant in common with the lessor of the plaintiff, and admitted that he was in possession.

Plaintiff then introduced evidence to prove an ouster; and to show that defendant laid claim to the whole land offered to read a certified copy of a registered deed from James Smith to the defendant for the four shares claimed by the plaintiff.

The evidence was objected to on the ground that no notice to produce the original had been given, but as one witness swore that he had heard the defendant say he had a deed from James Smith for these four shares and a bond for his security, the objection was overruled and the copy was read.

The defendant then introduced witnesses to prove that the conveyance made by Benjamin to the plaintiff's lessor was to hinder and defeat creditors, and therefore was fraudulent; and also, that the conveyances made by Thomas and Richard to Wagstaff by Benjamin's direction were without any consideration moving from Wagstaff to them, and were also fraudulent and void as against Benjamin's creditors.

On this point the jury was instructed that as it did not appear that Thomas and Richard were debtors the conveyance made by them could not be intended to defeat *their* creditors, and that therefore plaintiff, notwithstanding this objection, was entitled to recover their two parts. A verdict was rendered accordingly, and defendant moved for a new trial, because, among other reasons alleged, the copy of the deed from James Smith to the defendant was improperly received in evidence. In

the argument on the rule for a new trial plaintiff contended that the defendant, who was then present in court, should support the ground taken by an affidavit stating that he did not claim under the deed from James Smith, a copy of which had been read in evidence. The defendant declined making such an affidavit, and the rule was discharged, and from the judgment rendered pursuant to the verdict (47) defendant appealed.

TAYLOR, C. J. The purpose for which the registered copy of the deed from James Smith to the defendant was offered in evidence was to show that the latter claimed title to the whole land, and that the agreement under which he entered had expired. If he did not claim under that deed, injustice was done him by its admission; if he did so claim, it tended to the right decision of the questions in dispute. The only advantage he could gain by having notice to produce the deed was that he might come prepared with evidence to repel the inferences which might be drawn from the deed. But, as upon a motion for a new trial, he refused to deny that he claimed under the deed, it warrants a strong presumption that he did; and, therefore (without giving an opinion as to the admission of the copy), as it does not appear that any injustice has been done by the verdict, the motion for a new trial must be overruled.

PER CURIAM. No error.

Cited: Clark v. Blount, 10 N. C., 211.

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(48)

ROBERTS v. ERWIN.—From Burke.

1. In a suit brought on the act of 1796, for the removal of a debtor, it appeared that public advertisement had not been made by the person removing, pursuant to the act of Assembly, but that distinct personal notice was given to the plaintiff of the intended removal. It was *Held*, that this personal notice accomplished the object of the law, and dispensed with the necessity of advertising pursuant to the statute.

2. Although a removing debtor has not procured a certificate of advertisement from a magistrate pursuant to the statute, yet the fact of the advertisement having been made may be proved on the trial.

ACTION for the removal of a debtor, founded on the act of 1796. The plaintiff produced satisfactory evidence of a debt due to him by one Craig at the time of Craig's removal. Defendant proved that on 20

January, 1819, he informed the plaintiff that he was about to remove Craig to the county of Buncombe, and told the plaintiff that he wished the creditors of Craig to take an inventory of his property, and that he (the defendant) would be answerable for it, to which the plaintiff replied that if he were made safe he had no objection to Craig's removal. A few days after this conversation, Craig, who lived a few feet from the plaintiff, removed, and was seen in the act of removal by plaintiff, who made no objection thereto, and did not arrest Craig for his debt. The defendant admitted that the debtor had not advertised agreeably to the provisions of the act of Assembly. Upon this evidence the court below instructed the jury that, although the plaintiff might have had personal notice of the intention of Craig to remove out of the county, yet, inasmuch as the defendant had not complied with the act of Assembly in advertising and obtaining a certificate, he was liable.

Verdict for the plaintiff, new trial refused, judgment and appeal.

(49) TAYLOR, C. J. The act on which this suit is founded was passed for the security of creditors, to enable them to arrest their debtors who were about to remove by enforcing them to give a public and general notice of such intention a sufficient time before the removal. But the debtor might neglect this, and depart in silence and secrecy, leaving his creditor wholly remediless; and it, therefore, seemed expedient that those who had enabled him to do so should become responsible to his creditors, who were thus deprived of their claims by his agency and assistance. The act, therefore, makes it the interest of the person removing to look to this general notice having been given by subjecting him to the debts if it has been omitted; and any one acquainted with the act, who was applied to to effect the removal of a debtor, would naturally inquire whether, by so doing, he was aiding him in escaping from his creditor, and evading the process of the law. The law ought, therefore, to receive such a construction as best comports with the justice of the case, and the evident purpose of the Legislature, instead of a strict one for the sake of making one man pay the debts of another, when, in reality, the creditor is placed in no worse situation by his conduct. If a creditor has received distinct and personal notice of the intended removal, the object of the law is accomplished; and here that notice was not only given, but the plaintiff declared his acquiescence in the propriety of the step, and said he had no objection if he were made safe. At this time he might have arrested Craig, for the bond was then due. A few days afterwards he knew that Craig was in the act of removing his effects, but took no steps to impede him. It is then evident that the plaintiff had timely notice, and quite as full and satisfactory as if advertisements had been exhibited in three public places in the

county. This view of the act of Assembly is in conformity with a decision recently made in this Court, in which it was held that, although the debtor had not procured a certificate from the justice, yet the fact of the advertisement being made might be proved on the trial. Without giving an opinion on the other point made in the case, (50) I think there ought to be a new trial.

HALL and HENDERSON, JJ., *concurred*.

PER CURIAM. New trial.

DUER'S EXECUTORS v. HARRILL.—From Hertford.

Where executors contracted to sell their testator's *interest* in certain lands, "no encumbrances guaranteed," and after the sale tendered a sufficient deed of conveyance to the purchaser, which he refused, it was *Held*, that the executors were entitled to recover without showing that the title to the land was in their testator.

ACTION on the case to recover damages for the breach of a contract. The plaintiffs, as executors of Duer and by virtue of authority given them in his will, exposed to public sale a tract of land which they described as land "which their testator purchased of Thomas Copeland, supposed to contain one hundred acres; Duer's interest or right to said land only; no incumbrances guaranteed." The defendant at the sale became the purchaser; a deed, duly executed by the plaintiffs, was tendered to the defendant, which he refused to accept. On the trial below, it was contended that, to entitle plaintiffs to recover, it was incumbent on them to show that the title to the land was in their testator; and, the court being of this opinion, the plaintiffs were nonsuited and appealed.

TAYLOR, C. J. Whether the plaintiffs have a right to call upon the defendant, for the nonexecution of the agreement to purchase depends upon the particular contract made between them. Though the general rule of law may require the seller to show what title he (51) has, or, according to the later decisions (6 East, 555), aver that he was seised in fee, and made a good and satisfactory title by the time specified, yet the contract set forth in this case evidently dispenses with any such averment. It is too clear to be disputed that the executors sold only the right of their testator, and that they would not warrant the title to the purchaser. In these cases it is the duty of the Court so to construe the terms of the sale as to collect the meaning of the parties

without laying too much stress upon technical words which may have been improperly introduced. Thus, where the purchaser of a term for years stipulated to pay a certain *rent* before the lease was granted, the Court held that, though the money to be paid could not strictly be called a rent, yet the parties intended the money should be paid, and it must be paid accordingly. Woodfall's L. and T., 241.

So, in this case, the terms "guarantee incumbrances" could not be meant in their literal signification without a manifest absurdity, and can only be taken to import that the executors would not warrant the title, and that the bidders must take the risk upon themselves. This imposed on them the duty of inquiring into the title before they bid for the land, but furnishes no defense to the action. As the executors have tendered a deed, they are entitled to damages for the nonperformance of the contract. The nonsuit must be set aside and a new trial awarded.

HENDERSON, J. In actions on executory contracts, where the promises or covenants are concurrent, the plaintiff must show a performance on his part, or a tender and refusal, or a discharge from the performance. In this case, the plaintiffs contracted to sell their testator's interest in certain lands, and the evidence shows that they tendered a suffi-
(52) cient deed of conveyance to the defendant for that interest, which he refused to receive. It appears to me that this was all that the plaintiffs had contracted to do, and that the judge erred in requiring more.

By the expressions "no incumbrances guaranteed," I understand the vendors to mean that they would guarantee that there were no incumbrances; if there were any, the defendants should have shown them—the plaintiffs should not have been called on to prove a negative.

HALL, J., concurred.

PER CURIAM. Reversed.

EURE v. ODOM.—From Hertford.

Words to support an action for slander should contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor. Words which convey only an imperfect sense or practice of moral virtue, duty, or obligation are not sufficient to support the action. The crime charged, too, must be such as is punishable by the common law; for if it be only a matter of spiritual cognizance it is not actionable to charge it; therefore, these words are not actionable: "I have said he was the father of his sister's child, and I say so again, and I still believe he was."

EURE *v.* ODOM.

CASE FOR SLANDER. The slanderous words charged in the declaration were as follows: "I have said he was the father of his sister's child, and I say so again, and I still believe he was"; and again, "Stephen Eure is the father of his sister's child, and I reckon I can prove it."

The court below nonsuited the plaintiff on the ground that the words were not actionable; whereupon he appealed to this Court.

Gaston for the plaintiff. (53)

TAYLOR, C. J. The principle seems to be well established in relation to the action of slander that the words spoken should contain an express imputation of some crime liable to punishment, some capital offense or other infamous crime or misdemeanor. Words which convey only the imputation of an imperfect sense or practice of moral virtue, duty, or obligation are not sufficient to support the action. The crime charged, too, must be such as is punishable by the common or statute law; for, if it be only a matter of spiritual cognizance, it is not, according to the authorities, actionable to charge it. Cro. Eliz., 205; Salk., 696; 6 Term., 694.

There are two offenses defined in the act of 1805 (C. 682, Rev. Code): One is "where a man shall take a woman into his house, or a woman a man, and they shall have one or more children without parting, or an entire separation"; the other is "where they bed or cohabit together"; and these alone are made indictable.

Both descriptions evidently point to a series of offenses committed in the course of their dwelling together; nor could an indictment, framed on this act, be maintained by proof of a single unlawful intercourse. Such offense is punishable only by fine, in the manner provided by the act of 1741.

As, therefore, the words laid in this declaration are such as, if (54) true, would not have brought the plaintiff within reach of the penalty of the act of 1805, they will not sustain an action of slander; for incest, however grievous it may be as a crime *foro cœli,* is not, as such, punishable in *foro seculi.*

As to the power of the court to order a nonsuit against the will of the plaintiff, I do not think the question fairly arises on this record, for *non constat* but the plaintiff submitted to the order and appealed from the merits of the decision.

If, indeed, the plaintiff had prayed that the jury should pass on the cause, and the court had refused it, the question would now be open. But on a motion simply for a nonsuit, because the words were not actionable, the court could only, under its view of the subject, pronounce the

judgment it has done. My opinion, therefore, is that the judgment be affirmed.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. Affirmed.

Cited: McCurry v. McCurry, 82 N. C., 300; *Gudger v. Penland,* 108 N. C., 599.

FORSYTHE v. SYKES AND OTHERS.—From Mecklenburg.

When a judgment and execution are written on the same paper with the warrant issued by a magistrate, and the warrant is properly directed, such direction will also extend to the execution, and it is not necessary to repeat it in the execution.

TRESPASS for taking ten barrels of tar. Plaintiff, on 8 January, 1820, purchased the tar of one Baggot at the kiln where it was made, and defendants afterwards took it away. The defendants, by way of justification, offered in evidence proof that Sykes was a constable, and (55) that the other defendants acted as his assistants in carrying into effect an execution against Baggot's property. The warrant against Baggot appeared to have been executed, and on it were the following endorsements:

The plaintiff proved his debt for the sum of $4.20 16 December, 1819.

WM. TAYLOR, J. P.

Execute and sell as much of the defendant's property as will satisfy the above judgment and costs.—19 December, 1820.

THOMAS POLK, J. P.

Levied on ten barrels of tar.—19 December, 1819.

Defendants produced also another warrant against Baggot, with the following endorsements:

Judgment against the defendant for the sum of $24.05 before me.—7 January, 1820. D. CURTHBERTSON.

Execute and sell according to law.—7 January, 1820.

D. CURTHBERTSON.

Levied on ten barrels of tar—7 January, 1820.

Defendants then offered to show that a levy was made on the tar, under the foregoing executions, prior to a sale of it to the plaintiff.

The court below rejected the evidence, and would not permit the executions to be read, because they were not directed to a "sheriff, constable, or other lawful officer." A verdict was returned for the plaintiff, a new trial was refused and judgment rendered; whereupon defendant appealed.

TAYLOR, C. J. The objection made to the executions is that they were not directed as the law requires. It is not stated in the record whether the judgment was written on the same paper with the warrant or not, but it is to be presumed that it was, since it is not probable that another magistrate would have issued an execution upon the judgment alone without seeing that a warrant had been returned, executed against the defendant.

That a warrant was issued and executed appears from the case, (56) and that it was directed in the manner required by laws seems plain from this, that no exception is taken to it on that ground. Assuming, therefore, that the judgment and execution were written on the same paper with the warrant, and that the latter was properly directed, it has been decided that such direction will extend to the other process, and that it is not necessary to repeat it in each one. It cannot be denied that the judgments and executions are loose and informal, but the law has prescribed no certain mode for the judgment, and it cannot be expected that it should be entered up with the technical precision used in courts of record. It must from necessity be upheld, if it be sufficient in substance. When a debt is proved before a magistrate, it is a conclusion of law that there be a judgment upon it, and it was only necessary to add the word judgment, and even without that it was readily understood by the justice who issued the execution. The executions are less exceptionable, for they refer to the law as the guide by which the officer is to be directed; and it has been held in *Lanier v. Stone,* 8 N. C., 329, that where the execution directs the officer to levy upon goods and chattels, lands and tenements, it shall not be set aside if it appear by the officer's return that he has levied only in such manner as the law directs in the 19th section of the act of 1794.

That a fair and liberal construction should be given to the civil proceedings before a magistrate is dictated by various considerations, and is made compulsory on the court by the 16th section, which requires only that the essential matters should be set forth in the process.

PER CURIAM. New trial.

Cited: Governor v. Bailey, 10 N. C., 464; *McLean v. Paul,* 27 N. C., 24; *Patton v. Marr,* 44 N. C., 378.

(57)

DOZIER v. BRAY.—From Camden.

In actions of debt founded on a specialty or contract the verdict cannot be for a less sum than is demanded, unless it be found that part of the debt is satisfied; but in debt on a statute giving an uncertain sum by way of penalty the verdict is good, although a less sum than is demanded is found to be due.

DEBT *qui tam* upon the statute of usury. The declaration claimed a penalty of $160, the amount loaned having been $80. On the trial below the jury found a verdict for the plaintiff for $155, and the defendant moved, in arrest of judgment, that the declaration claimed $160, and the jury had returned a verdict for a less sum. The motion was overruled, and judgment rendered pursuant to the finding; whereupon defendant appealed to this Court.

TAYLOR, C. J. The verdict shows that the unlawful contract set forth in the declaration had been made, and that the defendant had received the benefit of it usuriously.

It was an action of debt *qui tam,* upon the statute of usury, in which the sum borrowed was $80, and the penalty claimed in the declaration was $160. The verdict of the jury was for $155, and for this cause the defendant moves in arrest of judgment. The exception was properly overruled; for the distinction is well settled between an action of debt founded upon a specialty or upon a contract and one founded upon a statute giving an uncertain sum by way of penalty.

In the first case the verdict cannot be for a less sum than is demanded, unless it be found that part of the debt was satisfied; but in the latter case the verdict is good, although a less sum than is demanded is found to be due. The statute in this case gives a penalty of double the
(58) sum borrowed, and therefore it is a matter of calculation for the jury after the amount of the sum borrowed is proved. It is not to be distinguished from cases arising under the 2d and 3d Ed. VI, for not setting out tithes where the penalty given is treble the value of the tithes, yet the jury may find the value of the tithes substracted to be less than the value alleged in the declaration. Cro. Jac., 498. The judgment must consequently be affirmed.

HENDERSON, J. It is not correct to say that in actions of debt the precise sum demanded must be recovered. All that is required is that the contract stated in the declaration should be proven. The common opinion that the sum demanded and no other can be recovered arose from this: this action is most commonly brought on specialties and judgments which show a certain and precise sum due, and there could not

well be a different sum recovered without having proven a contract different from the one laid; the effect was taken as the cause of failure; it was the variance between the evidence and the contract stated, and not the verdict of the jury drawn from that evidence. This is abundantly proven in actions of debt, for not setting out tithes, actions of debt upon the usurious loan of goods, and debt upon simple contract. In this case there is no cause for arresting the judgment, nor is there cause for a new trial, for it does not appear that the evidence proved a different cause of action from the one stated in the declaration. For what cause, when the plaintiff proved an usurious loan of $80, the jury did not give him $160, to wit, double the sum loaned, but only $155, I am unable to say; but because the jury have given him less than he is entitled to is no reason that the court or the law should take that from him.

HALL, J., concurred.

PER CURIAM. Affirmed.

(59)

DAVIS v. MARSHALL & RUSSELL.—From Warren.

When a party appellant depended upon the clerk of the county court, who acted as deputy clerk of the Superior Court, to bring up an appeal, and the clerk of the county court was in the habit of bringing up all appeals, and had formerly brought up one for the present appellant, but on this occasion omitted it through forgetfulness, it was held that the negligence of the appellant was such that he was not entitled to a *certiorari*.

JUDGMENT having been obtained against the defendant, Marshall, in the county court of WARREN, a writ of *ca. sa.* issued thereon, and Marshall gave bond pursuant to the provisions of the "act for the relief of honest debtors," to which the defendant, Russell, became surety. This bond was returned to court, and in the absence of Marshall a judgment was rendered against Russell, who, on a subsequent day of the term, moved to set aside the judgment and that he might be permitted to surrender Marshall in discharge of himself. The county court refused to grant the motion, and Russell appealed. At the succeeding term of the Superior Court of Warren, as the transcript of the record had not been filed with the clerk of that court, Russell prayed the presiding judge for a writ of *certiorari* and filed an affidavit stating the foregoing facts, and also that he had believed the clerk of the county court would bring up the transcript, particularly as he had so done for the affiant on a former occasion. He read also the affidavit of the clerk of the county court, stating that he acted as clerk of the county court, and deputy clerk of the Superior Court, that it was his usual practice, on appeals

from the court below, to prepare the transcript and file it himself, in the office of the Superior Court, without waiting for an application to do so by the appellants; that on a former occasion he had done so
(60) for the defendant Marshall, and was prevented by hurry and oversight from pursuing a similar course on this occasion.

The presiding judge refused to grant the writ of *certiorari,* and the defendant appealed.

HALL, J. It seems that the appellant made no effort either to bring up the appeal himself or cause it to be done by any other person. He depended upon the clerk of the county court, he says, to bring it up, because (as the clerk admits) he had been in the habit of bringing up all appeals taken from the county court, but omitted through forgetfulness to bring up this one. Other instances of forgetfulness like this, to which the human character is liable, particularly as a good deal might be depending upon it, should have taught the appelllant the necessity of attending to the business himself. In cases of such negligence this Court cannot interfere and, however much it may regret it, it must say that the writ of *certiorari* cannot be granted.

PER CURIAM. Affirmed.

Cited: Collins v. Nall, 14 N. C., 226; *Hester v. Hester,* 20 N. C., 456; *Winborne v. Byrd,* 92 N. C., 9.

(61)

THE JUSTICES OF CAMDEN COUNTY, GRANDY, PLAINTIFF IN FACT, v. SAWYER'S ADMINISTRATOR.—From Camden.

The act of 1790 permitting amendment will not warrant a total change of parties to a suit except in a case where the parties were merely nominal, and the person concerned in interest had also been a party from the beginning; and accordingly an infant for whose benefit a guardian bond had been taken, payable to the justices, was in a case where his name had been permanently on the docket from the commencement of the suit as plaintiff in fact, permitted, on payment of costs, to amend the writ and declaration, which were in the names of such as survived of those who were justices when the bond was taken, and to declare in his own name as administrator of the last living justice named in the bond as an obligee, although the infant had obtained letters of administration after the suit commenced.

SAWYER, the defendant's intestate, was one of the securities to a guardian bond given by one Micheau, on his appointment as guardian to

James M. Grandy. The bond bore date, 5 February, 1800, and was made payable "to Joseph Jones and Stephen Sawyer, Esquires, and the rest of the justices assigned to keep the peace for Camden County." Joseph Jones died in 1800. Stephen Sawyer survived him about ten years and died intestate, and no letters of administration were taken out on his estate before November, 1821, when James M. Grandy became his administrator.

The writ in this suit issued 10 March, 1818, and described the plaintiffs as "the justices of the court of pleas and quarter sessions of Camden County." The declaration was made in the names of Joseph Morgan and William Neville, who were the surviving justices of those duly commissioned at the time the bond was executed. Before the jury was impaneled in the court below, James M. Grandy moved for leave to amend the pleadings, by declaring in his own name as administrator of Stephen Sawyer. The motion was refused and a nonsuit or- (62) dered, whereupon Grandy appealed.

TAYLOR, C. J. This is an application to amend the writ and declaration by striking out the names of the parties and the substitution of others who were not in existence when the suit was brought, and between whom and the original plaintiffs there is no privity. The very general provisions for amendments made by the act of 1790, after so many others on the same subject had been ineffectually passed, seem designed to overcome the remaining scruples of courts, and the act has generally been construed in the spirit by which it was dictated. But comprehensive as the words are, they can scarcely be thought to warrant a total change of parties, except in a case where the parties were merely nominal, and the person concerned in interest had also been a party from the beginning. Guardian bonds are directed by the act of 1762 to be taken in trust for the orphan by the justices, and this is so taken; and Grandy, the orphan for whose benefit it was taken has been permanently on the docket since the institution of the suit. The justices are parties merely to satisfy the form of the bond and are the instruments to effect a recovery for the benefit of the orphan. No wrong or injury can then arise to any one from such an amendment, and it ought to be made on payment of costs.

PER CURIAM. Reversed.

Cited: Grist v. Hodges, 14 N. C., 203; *Green v. Deberry,* 24 N. C., 345; *Quiett v. Boon,* 27 N. C., 11; *Lane v. R. R.,* 50 N. C., 26.

(63)

EXECUTORS OF JAMES REEL v. JOHN REEL.

The intimation by a judge below to the jury of his opinion on matters of fact is a ground for a new trial. And the enumeration to the jury of a variety of circumstances detailed in evidence, with a declaration that such circumstances are badges of fraud, and accompanied with the remark that "It is for the jury to inquire how it is possible for the circumstances to have existed without fraud," is too plain an intimation of the judge's opinion of the fraudulent nature of the circumstances.

APPEAL from *Norwood, J.*, at PITT.

This cause came before the Court again on an appeal from the judgment rendered on the new trial, had pursuant to the former decision of this Court. *Reel v. Reel,* 8 N. C., 248. The issue was *devisavit vel non,* and arose upon the offering for probate a paper-writing purporting to be the last will and testament of James Reel.

(85) The jury returned a verdict that the paper-writing was not the last will and testament of James Reel.

Whereupon it was considered by the court that the said paper-writing, offered as the will of James Reel, is not the will of the said James, and that the defendant go without day and recover his costs.

TAYLOR, C. J. This is a motion for a new trial, on the ground that the court intimated its opinion to the jury of the matter in issue. The act of Assembly relative to the duty of a judge in charging, forbids him "to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of a jury," and it directs him "to state, in a full and correct manner, the facts given in evidence and to declare and explain the law arising thereon."

The evident design of this law was to preserve the purity of the trial by jury, and thus to secure to every man whose rights were controverted a decision on the facts put in issue, which should be the result of the jury's investigation of the evidence, uninfluenced and unbiased by

(86) the opinion of the judge, whose province it is to pronounce whether testimony be admissible, and to instruct the jury as to the law, accordingly as they shall believe the facts proved or otherwise.

It is not for this Court to discuss the wisdom or expediency of this law, or to pervert its true construction, under a belief that no mischief can be produced thereby or even that justice can be more substantially administered. It is the will of the Legislature, and we are bound to obey it; so that every man who conceives himself aggrieved by a disobedience to the law has a right to be heard here, and if he can establish his case has a right to a new trial without any necessity on the part of this Court of inquiring into the merits of the verdict. For, although it

should appear to this Court that the evidence spread upon the record is such that if believed by the jury it well warranted the verdict, yet if it also appear that the judge in his charge "gave an opinion whether a fact was fully or sufficiently proved," it cannot be told how far the verdict was produced by the testimony, since the jury were to judge of its credibility, or by an intimation of the opinion of the judge. The propriety of the verdict then, or its conformity with the evidence, we leave out of the question, and desire to be understood as giving no opinion upon it. For, if the motion for a new trial were overruled because this Court approved of the verdict, and it should at the same time appear that the judge had departed from the direction of the law in charging the jury, it would be deciding, in effect, that disobedience to the law may be tolerated or not, according to the consequence which flows from it. If a verdict contrary to or unsupported by evidence has been produced by it, the party shall be entitled to a new trial. But if the evidence justifies the verdict, and the right of the cause has been duly administered, the charge of the judge, although deviating from the law, shall be overlooked. But this is not the rule prescribed by the Legislature; they have inhibited the declaration of the judge's opinion (87) on the proof of facts in every case, presuming that, in *every case,* it encroaches on the proper functions of a jury, and that, in *every case,* it imparts a bias to the judgment of the jury, which they are disposed to receive with confidence and seldom make an effort to resist.

I proceed to examine the charge with a single eye to the question whether it be conformable to the act of Assembly.

It begins with a caution to the jury against being influenced by party or political attachment, or by a former verdict on the will, which had been rendered in Craven County, and reminding them that they were sworn to decide according to the evidence and to that only. This was very necessary, and called for by the nature of the disposition in the will, which, being favorable to two persons on account of their personal exertions in a contest of party, was peculiarly calculated to awaken the ordinary passions and propensities on such occasions. The judge then directs their attention to the true questions of fact in issue, the capacity of the testator and whether the will was obtained by fraud or not. He first describes what the law considers a disposing mind, and its presumption that every man possesses it until a disqualification was shown, and in doing this the judge exercised his proper functions with equal skill and perspicuity. The general instruction that follows on the means by which fraud may be proved is also unexceptionable.

But when the judge proceeds to sum up the circumstances which he calls suspicious, and which, if they exist, the law will not support the will, that part of the charge cannot be read without a belief that it con-

veyed an intimation to the jury of his own opinion that they were suspicious and that they were proved to exist, *i. e.:* "and if, in addition thereto, there are other suspicious circumstances, such as I shall
(88) mention to you presently, the law will not support such a will. For instance, if the mind of the testator was weak; if it was made secretly and drawn when nobody was present and in the absence of the relations of the testator; if there was nobody present but the testator and the attorney, and it was in the night or early in the morning, after a course of habitual drunkenness before he could probably have recovered from the effects of his debauch; if the will upon the face of it contained a statement of the reasons which induced the testator to make certain bequests, and it appeared that the statement was untrue; if James Reel had relations against whom he had no resentment, and those relations, or some of them, were widows and orphans unprovided for; if, then, he appeared afterwards not to know with reasonable correctness the contents of the will; if he left the paper in the possession of his attorney and afterwards endeavored to regain the possession of it, and the attorney by contrivance or fraud withheld it; if shortly before the date of the will he made some other arrangement, or if, to make a will a different one, these would be evidences of fraud."

These circumstances, thus grouped together before the statement of the testimony, must unavoidably have been understood by the jury as the impression made on the judge's mind by weighing and comparing the evidence, as the result of his view of those parts of it which related to the subjects touched upon, and was calculated to make a lodgement in their minds, notwithstanding the conclusion of the paragraph: "that whether those circumstances or any existed in this case it was their duty to ascertain from the evidence."

The truth of some of these facts, thus hypothetically stated, depended upon the weight and comparison of conflicting testimony, which was a labor less likely to be encountered by the jury if they believed it had already been done by the judge. For example, "if James Reel had relations against whom he had no resentment."

(89) The witnesses, Jones, Tolar, Powell, and Whitford, depose that the testator was on good terms with his relations. The witnesses, Hall, Lewis, Dunn, and Rice, swear to the declarations of the testator, made at different times, "that his people should be no better for what he had, that they cared nothing about him, that his brothers differed from him in politics, and neglected him in sickness, and that his folks came like buzzards about carrion when he was sick."

"If the will, upon the face of it, contained a statement of reasons which induced the testator to make certain bequests, and it appeared that the statement was untrue." The only reason given in the will for any

bequest is that for Blackledge and Allen, and that is for their having heretofore borne the greatest burden of the expenses and labor in supporting the Republican cause in the county of Craven, and because the testator was of the same political principles, and very desirous of having them supported. Here are three distinct motives stated as inducing him to make the bequest, viz.: The legatees having borne the greatest burden of the expense and labor in supporting the Republican cause, his being of the same political principles, and his desire to have them supported. There is no evidence in the case tending to show in the least degree that the two last reasons are false. As to the first reason, the only evidence is that of J. F. Smith, who admits that Blackledge treated liberally, but Allen less than any other candidate, and had expended less in support of the Republican party than almost any man of note in it, and had not been generally known as of the party until party contests had gone a great way. Mr. Smith goes as far back as the period of Mr. Jefferson's first election, which was in 1800, but does not specify when it was that Mr. Allen was generally known as of the party; and the jury might have had some difficulty from this evidence to infer the falsehood of the reason that Blackledge and Allen had heretofore (90) (that is before 1815) borne the burden of labor and expense.

"If he left the paper in possession of his attorney, and afterwards endeavored to regain the possession of it, and the attorney by contrivance or fraud withheld it."

Of the several witnesses, Hutchins, Powell, Shackleford, Willis, and Hall, whose testimony relates to this point, none of them speak of the testator having endeavored to get his *will* from Blackledge; they all speak of papers or a packet of papers; and Thomas deposes that in 1815 the testator told him at New Bern that he meant to put his notes and accounts in the hands of Blackledge and Allen. It was therefore to be considered by the jury whether he had endeavored to regain possession of the *will*.

"In this case it is for you to inquire why all this precaution was taken of sending for Ernull, and having Cratch for a witness when the paper was taken out of the trunk, if there was no fraud."

The only witness as to this point is Cratch, who merely says that he saw Blackledge search in his trunk, and find the paper produced as a will. For what purpose the witness went to Blackledge's, or whether his abode was there, does not appear. The charge conveys the idea that Blackledge procured Cratch to be there for the purpose of attesting the finding of the paper, and that he was called upon as a witness. Nor is there the slightest evidence that Ernull was sent for, or was even present. Both circumstances are stated in the charge as if proved as facts. The law case stated by the judge of the servant being called upon by his mas-

ter to notice the time he left home, could only illustrate the suspicion, and even presumption, growing out of unusual precautions, upon the supposition that Cratch had been specially called upon by Blackledge to witness the finding of the will in the chest; and the very statement of the case was calculated to make the jury suppose that necessary
(91) fact was proved. On no other principle could it bear on the point.

"If the will was fairly executed and attested by the subscribing witnesses would not their evidence be sufficient to establish it, and would it have occurred to Mr. Blackledge to use these precautions if these be facts?

"You will consider of them and form your own conclusions."

This does not seem to leave the consideration of the evidence to the jury without an intimation of the judge's opinion upon its force and effect.

"Masters says that the testator always seemed to have a capacity to do business, whether drunk or sober; but this witness, when cross-examined, states that he forms this opinion from a single transaction in which he saw him attempting to bargain with Lewis for a chair." Upon looking at the testimony it does not appear that the witness had so formed his opinion, nor does he state upon what it is founded. He says that, whether drunk or sober, no man could take advantage of him, and he saw him attempt to jew Lewis for a bargain in a chair, which is the only instance of his attempting to bargain that he knows of. His general capacity for business is one part of the evidence; his freedom from imposition, whether drunk or sober, in a bargain is another, and as the witness never saw him attempt to bargain but once, it is an inference that his opinion may be founded on that.

"By the evidence of this witness and the other subscribing witness, it appears that the paper was executed by the supposed testator between sunrise and breakfast time; they have stated to you that he was sober. How a man who had been continually drunk for seven or eight days could be sufficiently restored to his understanding by one night's sleep to enable him to dispose of his property with reason, especially when it is proved by another witness that after a night's sleep at his house
(92) he seemed as drunk in the morning as he was the overnight, will be a proper matter for reflection and inquiry with you."

The latter circumstance is cited as a fact, which is put in opposition to the first fact, both being assumed as such; now, though evidence may be irreconcilable, facts cannot be.

Upon considering the whole of the charge, it appears to me that its general tendency is to preclude that full and free inquiry into the truth of the facts which is contemplated by the law—with the purest inten-

tious, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very right and justice of the case should be administered.

I am not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken and we have only to obey.

PER CURIAM. New trial.

Cited: *S. v. Davis,* 15 N. C., 614; *S. v. Howard,* 129 N. C., 673; *Withers v. Lane,* 144 N. C., 190; *Speed v. Perry,* 167 N. C., 128; *Starling v. Cotton Mills,* 171 N. C., 228.

(93)

THE JUDGES v. DEANS.—From Hertford.

1. A sale of real estate by the clerk and master in equity, ordered by the court, under the acts of Assembly authorizing a sale where it is necessary for an equal and advantageous division, is an *official* act, and as such comes within the scope of the condition of the bond of the clerk and master.

2. To express, in the condition of a bond, what the law would have implied from the other words inserted cannot affect the validity of the bond.

3. By the affirmative plea of performance of covenants the defendant undertakes to prove whatever is necessary for his defense.

DEBT brought against the defendant, as one of the securities of Howell Jones, who had been appointed clerk and master in equity for Hertford County. The bond was made payable to "the Honorable John L. Taylor, Chief Justice, John Hall, Samuel Lowrie, Henry Seawell, Joseph J. Daniel and Thomas Ruffin, judges of the Superior Courts of law and equity for the State of North Carolina, and their successors in office." The condition of the bond was that Howell Jones should "well and truly execute the office of clerk and master of Hertford, agreeably to the several acts of Assembly of the State of North Carolina, by safely keeping the records of the said office"; and further, that he should "well and truly pay all sums of money which he might receive as clerk and master aforesaid to the proper persons, their agents or attorneys, who might be authorized to receive the same." This suit was brought in the names of the present judges of the Superior Courts, and the declaration, which was in their names, assigned a breach of the condition of the bond generally, "that the defendant did not well and truly execute the office, etc.,

and that he did not well and truly pay all sums of money, etc."

(94) The defendant pleaded the general issue, and that the covenants were performed and not broken; the plaintiff in his replication set forth a special breach in the violation by Jones of a decree of the court in which plaintiff was interested; to which defendant rejoined that Jones was never called on to perform the decree. It appeared in evidence that at October Term, 1817, of Hertford court of equity a bill was filed by the parties for whose benefit this suit was brought, praying that the sale of a tract of land might be decreed to be made. A decree was accordingly made that the land should be sold by the clerk and master, after giving forty days notice, on a credit of six and twelve months; and at the ensuing term, the clerk and master reported that, in obedience to the decree of the court, he had advertised for forty days and exposed to sale the land mentioned in the decree; that Isaac Carter had become the purchaser, and that he had taken his notes for the purchase money, payable in six and twelve months. This report was confirmed, and it was ordered that the clerk and master should pay over to the complainants the bonds taken at the sale; and on his failure to do so the present suit was brought. There was a verdict and judgment below for the plaintiffs, from which the defendant appealed.

Gaston for the defendant.

(95) TAYLOR, C. J. This action is founded on the official bond of Howell Jones as clerk and master in equity for Hertford County. The bond and the breaches are set forth in the declaration according to a practice which is sanctioned by authority, and to which there appears to be no well founded objection. 2 Chitty, 153. The breach assigned produced the only question which was agitated in the Superior Court, viz., whether the sale directed to be made by the clerk and master was an official act and such an one as came within the scope of the condition of the bond. The sale of land, where a division among the claimants is inconvenient, is a power recently conferred upon the courts of equity; but a sale under a decree in a vast variety of cases belongs to its ancient jurisdiction, and is probably coeval with the court itself. The direction of such sales has been constantly confided to the master in chancery in England and to the clerk and master here; and it is better for the suitors that their interest should be managed by an officer of the court,

(96) whom it may control and whose responsibility is secured by a bond and an oath, than by a stranger. My opinion, therefore, coincides on this point with that of the judge who tried the cause.

It is objected in this Court that the condition of the bond varies from that prescribed by law, which is "for the safe-keeping the records and

the faithful discharge of his duty in office." But paying over moneys received by him in his official character to the person entitled is included in the faithful discharge of his duty in office; and to express in the condition of the bond what the law would have implied from the other words inserted cannot affect the validity of the bond. The specification was superfluous and did no good, but strike it out and the bond contains the condition required by law. Surplusage does not vitiate even in an indictment. It is further objected that no demand was made of these bonds by the persons entitled to receive them. I think the law imposes it as a duty upon the persons to whom these bonds were delivered to make a demand of them at the office of the defendant, who might by his pleading have called for proof of the fact. But the affirmative plea of performance of covenant waives it, and the defendant undertakes to prove whatever is necessary for his defense. 12 Mod., 414. The declaration appears to express sufficiently for whose use the action is brought.

HENDERSON, J. The plaintiff must appear upon the pleadings to have sustained an injury. It is not sufficient if it appears that the defendant has done wrong, if that wrong was not done to the plaintiff. Had the bond on which the suit is brought been made to the plaintiff, a breach alone would have given an action to the plaintiff and have entitled him to nominal damages at least; for a bare breach of the contract was an injury to him. He had a right to claim a performance, the defendant having stipulated *with him* giving him that right; but this bond not having been made payable to him or any of the covenants to be performed to him specially, he should have (97) shown in his declaration how he was injured thereby, and a demurrer would have been fatal; for upon the declaration it does not appear but that he is an officious intermeddler, and the act of Assembly of 1793, authorizing suits to be brought upon certain official bonds (and of this kind among the rest) without an assignment, is in accordance with the principle requiring the plaintiff in his declaration to show how he has been injured by a breach; but a defective declaration may be cured by the defendant's plea and the plaintiff's replication, provided that the replication is not a departure from the declaration, but maintains and fortifies it. In this case the breach is general—that the defendant did not perform his covenants or conditions. The defendant pleads that the conditions were performed, and that they were not broken. The latter plea goes to negative covenants, and as none such are in the condition it is therefore unnecessary to consider it; the other alleges a performance; the plaintiff replies and sets forth this special breach in violating a decree of the court in which he was interested.

This is no departure from his declaration, and is an answer to the plea. Taking the pleadings together, then, it appears that if the plaintiff's allegations are true, that he has sustained special damages by a breach of the condition, and that this is not an officious suit, and the defendant's rejoinder, either upon record or in evidence, is a clear departure from his plea. In his plea he says that he has performed the conditions; in his rejoinder he offers an excuse for his nonperformance, to wit, that he never was called on by the plaintiff to perform it. I think, therefore, the question whether the plaintiff ever called on the defendant to perform the service is not put in issue; and if it were it would be a departure; it would be taking the plaintiff by surprise to require proof of it; in fact, the defendant's plea admits it by alleging a performance. If the defendant intended to have made it a ground of defense he should have pleaded "always ready," etc. 1 Chitty (98) on Pleading, 401; 1 Saunders, 228. The cases cited and relied on by the plaintiff's counsel as to the second point, I think, are full and conclusive, particularly 12 Mod., 414. The other objection is that this was not an official act. For the reasons assigned by the Chief Justice, I think there can be little doubt that the clerk acted officially in every part of the business; but surely there can be none as to that part of the decree which requires that he should deliver over the bonds to the complainants, his office was the proper place for their deposit, and he as clerk was bound to act with regard to them according to the order of the court.

HALL, J., concurred.

PER CURIAM. No error.

Cited: *S. v. Gaines,* 30 N. C., 170; *Kerr v. Brandon,* 84 N. C., 131; *Smith v. Patton,* 131 N. C., 397; *Hannah v. Hyatt,* 170 N. C., 638.

STATE v. LEWIS, A SLAVE.

Two bills of indictment were found against a prisoner at the same term, the one for burglary and larcency, the other for a robbery, and both indictments charged the same felonious taking of the same goods. The prisoner was tried on the first indictment, and found guilty of the larceny, and not guilty of the burglary. *Held,* that he could not be put on his trial on the second indictment, because it would conflict with the principle "that no one shall be twice put in peril for the same crime," and on the refusal of the Attorney-General to pray judgment on the conviction for larceny the prisoner was allowed his clergy and was discharged.

STATE *v.* NEGRO LEWIS.

APPEAL from *Norwood, J.*, at PITT.

At September Term, 1821, of PITT Superior Court, two bills of indictment against the prisoner were found by the grand jury, the one for burglary and larceny, the other for a robbery. The larceny in the one bill and the robbery in the other were for the same goods and chattels, and there was but one taking. At the same term the prisoner was found guilty of the larceny and not guilty of the burglary. (99) On this conviction, the Attorney-General did not pray any judgment, nor was any pronounced; and at the time of the prisoner's arraignment no motion was made by his counsel that the prosecuting officer should elect on which indictment he would try the prisoner. At March Term, 1822, the prisoner was brought to the bar, and the Attorney-General directed a *nol pros.* to be entered on the indictment which had been tried at the preceding term, but *Norwood, J.*, refused to permit the *nol pros.* The Attorney-General then moved to arraign the prisoner on the indictment for robbery. This also was refused by the court until the first indictment should be disposed of, and on the refusal of the Attorney-General to pray judgment on the first indictment, the court quashed the indictment for robbery. On motion of prisoner's counsel, his clergy was allowed him on the conviction for larceny, and on the further refusal of the Attorney-General to pray judgment, the prisoner was ordered to be discharged; whereupon, in behalf of the State, the prosecuting officer appealed to this Court.

HALL, J. It is admitted in this case that both indictments are for the *same felonious taking of the same goods.* The defendant is found guilty of a grand larceny on that indictment which charges a burglary and stealing.

The other indictment is for a robbery. A robbery is a larceny, but of a more aggravated kind. The first is a simple larceny. The other is a compound or mixed larceny, because it includes in it the aggravation of a felonious taking *from the person.*

Now, suppose the defendant should be tried and found guilty on the second indictment? It must certainly follow that he had been tried twice for the felonious taking of the same goods. It is true, if the first conviction is a bar to a trial on the second indictment, the prisoner would go untried as to that which constitutes the differ- (100) ence between simple larceny and mixed and compound larceny, viz., a taking *from the person.* In such case he would be convicted of a *felonious taking,* but not of a felonious taking *from the person.* Whereas, should he be tried and convicted on both indictments, it might be said he had been convicted twice of a *felonious taking,* and once of

a felonious taking *from the person,* which I think would be at points with the principle "that no one should be twice put in peril for the same crime." This principle has such deep root in the criminal law, and is cherished by *so many* judicial decisions, that it is not deemed necessary to refer to any of them.

I therefore think the conviction on the first indictment for burglary and larceny a good plea to a trial on the second indictment for robbery. I also think that the record of these proceedings and the admissions of the Attorney-General were sufficient to authorize the judge below to *discharge* the prisoner. And in this opinion the rest of the Court concurred.

PER CURIAM. Affirmed.

Cited: *S. v. Cross,* 101 N. C., 779.

STATE v. WILLIAMS.—From Lenoir.

Where any unexpected accident prevents an appellant from bringing up his appeal, this Court will grant a *certiorari;* but when the appellant trusts to another to do what he ought to have done himself, and that trust proves to have been improperly placed, he must abide the consequence; a *certiorari* will not be granted.

APPLICATION for a writ of *certiorari,* on an affidavit of the defendant, in which he stated that, having appealed from the decision of the court below, to this Court, and having given bond and security to (101) prosecute his appeal, he applied during the term to the clerk below for a transcript of the record of the proceedings in order to convey the same in due time to this Court; that he was informed by the clerk that the transcript should be prepared and handed in due time to the counsel of the affiant, who would carry it up, and the affiant, knowing that his counsel would be at the court in time to file the record, felt perfect security that it was filed until some days after the session of the Court had commenced, when it was too late to file it.

HALL, J. Had any accident happened in this case, over which the defendant reasonably could not have been expected to have any control, which prevented him from bringing up his appeal, it would be the duty of this Court to grant the writ of *certiorari* as prayed for. But that has not been the case; he trusted to another to do what he ought

to have done himself, and as that trust has been improperly placed he must abide the consequence. I think the writ prayed for cannot be granted.

And of this opinion were the other judges. So the writ was refused.

PER CURIAM. Motion denied.

Cited: *Collins v. Nall,* 14 N. C., 226; *Hester v. Hester,* 20 N. C., 456.

(105)

IN EQUITY

KIRBY & GRICE v. NEWSANCE & AYCOCK.—From Johnston.

When an issue is submitted to a jury in equity, and their answer to it is insensible and contradictory, the court should not make a decree, but should order the issue to be submitted to another jury; and in such case, when it comes before this Court, neither party shall recover his costs in this Court.

THE bill set forth that, to secure the payment of two small judgments obtained against the complainant Kirby and assigned to the defendant Newsance, it was agreed in 1806 between them that Kirby should convey to Newsance a valuable tract of land, of which Kirby should retain the possession and Newsance receive the fruit of the orchard thereon growing in lieu of interest, and that whenever the judgments should be paid up, that then the lands were to be entirely free from any claim of Newsance; that in furtherance of this agreement, as the complainant Kirby believed, a deed was tendered to him by Newsance for his execution, and at the same time, as he, Kirby, was illiterate and unable to read or write, Newsance informed him that the paper was proper and necessary to carry into execution their agreement, and on this representation the complainant Kirby executed it; that the complainant Kirby had since discovered the said deed to be, on its face, an absolute conveyance to Newsance of his lands, without any condition or reservation, and it was charged that his signature to the paper was obtained by fraud and misrepresentation; that the complainant Kirby continued to hold possession of the land until 1810, when Newsance brought against him a writ of ejectment, and the complainant, believing that he could not be permitted to defend unless he paid the amount of the judgments before mentioned (a thing which his poverty prevented him (106) from doing), made no defense, and he was turned out of possession by Newsance. The bill then stated that in 1811 the defendant Newsance conveyed the land to the other defendant, Aycock, who purchased with full knowledge of the agreement which had been made by Kirby with Newsance; that the complainant Kirby, for good and valuable consideration, had conveyed his interest, right and title in the said land to the other complainant, Grice, and that Kirby and Grice, both individually and separately, had applied to the defendants in a friendly manner, and had tendered to them the amount of the judgments previous to the ejectment by Newsance and requested a reconveyance of the land, which was refused. The bill prayed an account of

the rents and profits since the land came to defendant's possession, and after payment of what was justly due a reconveyance.

The defendant Newsance by his answer denied the agreement as set forth, and affirmed the contract to be for an absolute conveyance.

The defendant Aycock answered that he was a purchaser without notice.

Among the issues submitted to the jury was the following, viz.:

"Was the deed from James Kirby to Joel Newsance, in the bill mentioned, obtained by fraud and misrepresentation?"

The jury to this issue responded that it was obtained by fraud and not by misrepresentation, and they also found that Aycock was a purchaser with notice of Kirby's equitable claim.

On this finding the court below refused to make any decree without the finding of further facts. The complainant's counsel declined submitting any other issues to a jury, and moved for such decree as the finding would authorize, whereupon the court dismissed the bill with costs, and the complainants appealed.

HENDERSON, J. I cannot perceive to what acts of fraud the (107) jury refer in this verdict. The fraud charged is in representing that the deed was in pursuance of and according to the contract of the parties, when in fact it was not. The jury find that the deed was obtained by fraud, as charged in the bill, but not by misrepresentation. It appears to me, therefore, that it involves a contradiction, and so far from satisfying the conscience of the Court as to the facts of the transaction, it rather clouds and obscures them. This part of the verdict should, therefore, be set aside and the question submitted to another jury, for the court should not have proceeded to a decree, however importunate the counsel for the complainant might have been, until all the important facts were either admitted or found by a jury. The order of dismissal must, therefore, be reversed and the cause remanded, with directions to submit the issue before mentioned to another jury. Neither party to recover their costs in this Court.

TAYLOR, C. J., and HALL, J., concurred.

PER CURIAM. Reversed.

(108)

BAILEY AND OTHERS v. DAVIS AND OTHERS, EXECUTORS OF THOMAS DAVIS.
From Pasquotank.

1. Devise as follows: "After the marriage of my wife, or either of my daughters, I want my estate equally divided between my wife, A., my daughter G., and my daughter S.; and in case either of my daughters should die without lawful heirs of her body, her proportion of my estate is to go to the other daughter; and in case both should die without lawful heir, I wish it to be divided between my brother Benjamin's four children." The daughters died infants and intestates, and on a bill filed by B.'s four children it was *Held*, that the expressions used did not limit the failure of issue of the daughters to the time of division.

2. When words would create an estate tail in real estate, they give the absolute property in personalty.

THE bill set forth that Thomas Davis, by his last will and testament, devised as follows: "It is my wish, after the marriage of my wife Ann or either of my daughters, I want my estate equally divided between my wife Ann, my daughter Georgette, and my daughter Susannah; and in case either of my daughters should die without lawful heirs of her body, her proportion of my estate is to go to the other daughter, and in case both should die without lawful heir, I wish it to be divided between my brother Benjamin's four children." The complainants (who are the four children of Benjamin) then alleged that the testator's two daughters, Georgette and Susannah, both died infants and intestate, and that the defendants qualified as executors to the will, and they claimed to be entitled to two-thirds of the estate of Thomas Davis, given by his will to his wife and two daughters. To this bill there was a demurrer, which by the court below was sustained, and the bill was dismissed with costs, whereupon the complainants appealed.

(109) TAYLOR, C. J. The complainants claim under a limitation in the will of Thomas Davis, on the ground that the failure of heirs of the testator's two daughters must take place within the period allowed by law. And it is argued in the first place, that, as the testator made his estate a joint fund, it was plainly his intention that if either or both his children should die before the division that the remainder over was to take place, as this could not be too remote. But there are no expressions in the will limiting the failure of issue to the time of division, and it was manifestly *not* his intention that the share of the daughter first dying should go to the complainants; for he expressly gives it to the surviving daughter upon the failure of lawful heir of the one so dying. He could not intend to deprive the issue of his

daughters if they happened to die before a division took place; but the presumption is the other way, that as long as there were issue of his daughters, they should take in preference to the complainants. If, indeed, he had made the limitation over to depend upon his daughters dying without issue before the division, fixing such a period for that as is allowed by law, and they had so died, the limitation would have been supported. But he has in fact directed the division amongst the complainants, "in case both his daughters should die without lawful heir"; so that if the limitation over is good, it would be effectual whenever the heirs of the surviving daughter should fail, however remote the period should be; and all this time it would be unalienable by them.

It is further argued for the complainants that, as the words in the will would not, if applied to real property, give an express estate tail, but only an implied one, they ought to be understood restrictively, and to relate only to the daughters dying without heir living at her death; in support of which are cited *Forth v. Chapman,* 1 P. Wms., 663, and *McKerson v. Hutchison,* 3 P. Wms., 258. Those cases do (110) notice this distinction, but in both of them, it will be observed, there were other expressions in the will, as "leave no issue" in the first and "without leaving issue" in the last, in addition to the material circumstances. And from the cases collected in Fearne, 365, it seems that the distinction no longer exists; and from more recent cases it appears that the rule is now understood to be that where the words would create an estate tail in real estate they give the absolute property in personalty; and that, in the absence of distinct expressions restrictive as to the time the law allows, the limitation over is void, whatever the intention may be. When the law has affixed a judicial sense to words, courts are not at liberty to depart from it; for by so doing the security of property would be impaired. The bill must be

PER CURIAM. Dismissed with costs.

Cited: *Rice v. Satterwhite,* 21 N. C., 71.

McLEOD v. PEARCE & PEARCE.—From Johnston.

Chattels, consisting of various specific articles, taken in execution, cannot be sold *en masse.* The sheriff should conform, as nearly as possible, to such rules as a prudent man would probably observe in selling his own property for the sake of procuring a fair price.

THE bill set forth that one Jesse Pearce, by his will, bequeathed to his wife Elizabeth during her life a variety of articles, and among others a negro man slave, and after her death to his son Levy Pearce forever; that the executor permitted Elizabeth Pearce to take possession of the said slave, and that in her possession he remained until he was sold by the sheriff of Johnston under execution as the prop-
(111) erty of Levy Pearce. The sheriff exposed to sale *the interest* of Levy Pearce in the property held by his mother for life, and executed to one Jesse Pearce who was the purchaser, a bill of sale for the interest of said Levy in the slave. The bill proceeded to state that Jesse, the purchaser, for a valuable consideration conveyed his interest in the slave to the complainant, McLeod; that Elizabeth, the widow, was still alive, and that after the sale by the sheriff the defendant Levy took the slave into his possession and removed him to a distant county, pretending that he had given him to his son, Bryan Pearce. The bill prayed that the defendants Levy and Bryan Pearce might be compelled to give satisfactory security for the delivery of the slave to complainant within a reasonable period after the death of Elizabeth Pearce, and that process might issue to the sheriff of the county of Anson, commanding him to take into his possession the slave unless satisfactory security for his production should be given.

The answer of the defendants admitted the bequest by Jesse Pearce as stated in the bill and admitted that Elizabeth Pearce had possession of the slave, and alleged that she delivered the possession to the defendant, Levy. Further answering, they said that the defendant Levy, in 1810, for a fair and valuable consideration, sold to the defendant Bryan the slave, and executed a bill of sale for him. It was not admitted that any sale of the slave was ever made by the sheriff of Johnston under executions against the defendant Levy, but if any sale was made by the sheriff, defendants averred that the slave was not present at such sale and that, if made, it was fraudulent and void; nor was it admitted that the complainant had purchased of Jesse Pearce, but it was averred that if such sale and purchase had been made it was illegal and void, because the said slave had not been out of the possession of one of these defendants, claiming him as their absolute property, from a period anterior to the pretended sale
(112) by Jesse Pearce to complainant. Defendants denied all intention of removing the slave out of the State.

The jury, on the several issues submitted to them, found, among others, the following facts on which the case turned, that *all* the interest of Levy Pearce in the property of Elizabeth Pearce left to her for life was set up by the sheriff and sold, *all together*, and bid off by Jesse Pearce.

DAVIDSON *v.* NELSON.

HENDERSON, J. It is unnecessary to decide the question so much discussed at the bar, whether the defendant Pearce had such an interest in the negro as could be sold by *fieri facias,* for we are of opinion that the sale is void, on the ground that the *whole* of defendant's interest in the property held by his mother for life, was put up by the sheriff and sold at one time and even without pointing out what the property consisted of. Such sale was unfair as tending to lessen the price, to give one bidder who might have a knowledge of the property an advantage over the rest, and to encourage speculation. The law, which constitutes the sheriff the agent of the parties without their consent, will see that he acts fairly, and it is upon this principle that it is necessary for the sheriff to seize the property and have it ready to deliver to the purchaser when from its nature it is capable of seizure. The Court would not be understood to say that where property consisted of a variety of small articles each article should be sold separately, or to sell separately where it is usual for the owners to sell in the gross; for instance, hogs in parcels, a flock of geese or sheep, or other things where it is customary for the owners of them to sell in such manner. Nor would a sale be invalidated, where there might be difference of opinion as to the common or proper mode; it must appear *palpably* wrong. No man would adventure here, unless he had a knowledge which it was not to be supposed others possessed, or was a mere specu- (113) later.

PER CURIAM. Dismissed with costs.

Cited: Blanton v. Morrow, 42 N. C., 49; *Bevan v. Byrd,* 48 N. C., 398; *Williams v. Dunn,* 163 N. C., 219.

DAVIDSON & BENSON v. NELSON.—From Lincoln.

A. settled upon lands under titles from the State and those claiming under it, honestly believing that the lands had been properly granted; and after a possession of some years by A., B. discovering that the lands were not situated in the county named in the entry and grant, but in an adjacent one, made an entry, obtained a grant, and filed a bill against A., charging him with fraud in obtaining and locating his grants, and praying that he might be compelled to convey to B. *Held,* that the bill must be dismissed, because, on general principles, a court of law is fully competent to decide upon the case, and it certainly his jurisdiction by the act of 1798, giving it in all cases where the patent has irregularly issued through the mistake of the public officers or of the party claiming under it.

BILL filed in 1804, stating that the complainants in 1791 entered in a part of Burke, now Buncombe County, a tract of land lying on the French Broad River, and that a grant regularly issued for the same in January, 1794; that the defendant was in possession of the said tract, claiming title thereto under two grants, the one to Henry Conway and the other to one Daggy, made before the issuing of that under which complainants claimed. These grants, it was stated in the bill, were issued on entries illegally made in the office of John Armstrong, entry officer of claims for western lands, and were therefore void. And the bill charged that the defendant, at the time he obtained possession under the grants of Conway and Daggy, well knew the same to have
(114) been fraudulently obtained and void; that he was a party to the fraud in procuring them to issue, notwithstanding he well knew of the better title of the complainants. The bill prayed that the grants under which Nelson claimed, with all mesne conveyances thereon, might be declared null and void, and be decreed to be delivered up to be cancelled, that complainants might be decreed to hold the possession under their grant, and that defendant might account, etc.

The answer of the defendant set forth an entry by Daggy, and stated that in 1783 a warrant issued from Armstrong's office to survey the said land; but as it appeared that an entry of the same land had been previously made by one Sherrell, Daggy caused his survey to be made on the south side of French Broad, and it covered part of the land now claimed by complainants, though at that time vacant; a grant issued on this survey in 1788, and the defendant was a purchaser from Daggy for valuable consideration. It was also stated in the answer that one Bacon, in 1783, entered in Armstrong's office a tract of land, describing it as being in Greene County, and in the same year a warrant of survey issued, but it appearing that this land also had been the subject of a former entry, Bacon caused his survey to be made on the French Broad, opposite Daggy's, and in 1788 a grant issued for the same to Henry Conway, by whom Bacon's interest had been purchased; if there was fraud in the transaction between Conway and Bacon, defendant declared his entire ignorance thereof. The defendant further stated that he was a purchaser of Conway's interest for a valuable consideration, and insisted that it was in perfect agreement with the rules of law to remove warrants and cause them to be executed as had been done in this case. All knowledge of complainants' claim was denied, and it was alleged that complainants had full knowledge of the facts set forth in the answer at the time they made their entry. The defendant also urged in his answer that he and those under whom
(115) he claimed had been in actual adverse possession of the lands

for more than seven years before the bill was filed, and prayed the benefit of the statute of limitations in the same manner as if specially pleaded.

The facts as admitted by the counsel were these:

The *grants* under which the defendant claimed issued for land lying in Burke County, without the limits of the land directed to be entered in John Armstrong's office, by the act passed in the year 1783.

The *entries* on which these grants issued were made for land lying within the limits of the territory directed to be entered in John Armstrong's office, and were made in his office.

The tract granted to Daggy was conveyed to the defendant in March, 1791. Sixty acres of the other tract were conveyed to him in June, 1790, and the residue in September, 1797, and the defendant had no notice of any fraud or illegality in the entries and grants under which he claimed.

The defendant and those under whom he claimed had possession of all the lands except the residue conveyed in September, 1797, for seven years before the filing of the bill.

The grants and mesne conveyances under which defendant claimed represented the lands so claimed as situate in Greene County, within the limits of the territory to be entered in John Armstrong's office. At the time these entries and grants were made the boundary of Greene County was uncertain, and it was believed by most of the settlers to comprehend the land in dispute.

TAYLOR, C. J. The facts of this case, which are not controverted, very clearly show that the equity is on the side of the defendant. The entries and grants were certainly obtained without *fraud;* nor had the defendant any knowledge of their *irregularity,* for when they were obtained a general belief prevailed that Greene County comprehended the land in dispute; and among the depositions in the cause there is one of an experienced surveyor, according to whose opinion (116) it would even now appear to do so, if the line were correctly run.

The sum of the case then is that the defendant settled upon land under titles from the State and those claiming under it, honestly believing that the land had been properly granted; and after a possession of some years, the complainants discovering that the lands were situated not in Greene, but in Buncombe County, made an entry and obtained a grant, and now pray that the grants under which the defendant claims may be located, or that he may be compelled to convey to the plaintiffs. Admitting the fact to be so, it requires no argument to prove that a court of law is fully competent to decide upon the case upon general

principles, I should think; but certainly, by the express creation of jurisdiction by the act of 1798, in all cases where the patent has irregularly issued through the mistake of the public officers, or of the party claiming under it. Cases of fraud depend upon other principles, and the authorities sustain the jurisdiction of this Court where a grant has been fraudulently obtained, to the injury of the State or an individual. This is one of the most ancient heads of equitable jurisdiction, where, from the secret nature of the transaction, a discovery by the oath of the party is necessary. But where a fraud can be clearly established, it will also be relieved against at law. 1 Burr., 396; 4 Inst., 84. But this Court would certainly transcend the proper limits of its jurisdiction if it were to set aside a title upon which a common law court is quite competent to decide, in favor of persons who cannot show a superior equity to the land in controversy.

I have not thought it necessary to enter upon a consideration of the common law jurisdiction of this Court in calcelling and repealing letters patent, because it seems to be clear that the act of 1782 neither did nor intended to confer such powers, but is confined to such proceedings as belong to the equity side of the British Chancery Court, in
(117) the form of bill, answer, and depositions.

PER CURIAM. Bill dismissed.

DAVIS, ADMINISTRATOR OF MEANS, v. SHANKS.—From Caswell.

A. bequeathed negro H. to his wife for life, and directs the negro and her increase to be equally divided between his son J. and his daughter M. at the decease of his wife. By a subsequent clause he lends *all the rest* of his estate to his wife during her widowhood, and at her marriage to be divided between her and the son and daughter, one-third to each; and then follows this clause: "But if my son and daughter should die before of age, then I give *their estate* to my wife to dispose of as she shall think proper." The son died under age. The widow died. *Held*, that the words "*their estate*" include the property bequeathed to J. and M. in the first clause, and, therefore, that the administrator of the son is not entitled to any part of the estate; for if the last limitation be a cross-remainder, then upon the death of the son under age his interest vested in the daughter, and if it be not a cross-remainder, then the interest went immediately to the wife of the testator.

THE bill stated that one Matthew Means died in 1780, having by his last will and testament devised as follows: "I lend to my beloved wife, Sarah Means, one negro girl named Hannah during her natural life,

but if the said Hannah should have any children before my son Joseph comes of age, I leave such children or child, if but one, to be equally divided, at the time of my son Joseph's being of age, between my son Joseph and my daughter Mary; and the above said Hannah and the rest of her increase to be equally divided between my son Joseph and daughter Mary at the decease of my well beloved wife." Sarah Means, the widow, intermarried with one Henry Davis, and (118) Hannah continued in her possession and use until the death of Mrs. Davis. Joseph Means died intestate a few days before his arrival at full age, and administration on his estate was granted to complainant. After the death of the widow Sarah the defendant intermarried with Mary, the daughter of Matthew Means, and took into his possession Hannah and her increase, claiming them as his property. Complainant claimed a moiety of them, and prayed a decree accordingly.

The defendant in his answer set forth a clause in the will of Matthew Means, connected with the former clause and in the following words: "and also the rest of my estate, be it of what kind or quality soever, I lend it to my well beloved wife, Sarah Means, during the time she remains my widow, and at her intermarriage I leave the same to be sold, and the money to be equally divided between my son Joseph and my daughter Mary, except one-third part, which I lend to my wife during her life, and at her death to be equally divided between my son Joseph and daughter Mary; but if my son Joseph and daughter should both die before of age, then I give their estate to my well beloved wife to dispose of as she shall think proper." The defendant admitted that Hannah and her increase, named in the bill, were in his possession, and that he claimed them as his property in right of his wife by virtue of the will of her father. That the slave Hannah had but one child within the time in which the said Joseph Means would have arrived at his full age, and that her increase which defendant now had in possession were all born after the time in which Joseph Means would have been of full age.

The cause having been set for hearing below, was transferred to this Court.

HENDERSON, J. Hannah and her increase are to be equally (119) divided between Joseph and Mary after the death of the widow. The rest of the estate is given to his wife during her widowhood, but if she marries the estate is to be sold, and two-thirds are to be divided between his son and daughter; the other third is to go to his wife during life, and at her death to be divided between his son and daughter, but if they should die before they came of age, then to his wife. I

cannot see upon what principles this bill can be sustained; for if it was a cross-remainder, then upon the death of the son under twenty-one it vested in the daughter; if it was not, it went immediately to the testator's wife. 4 Cruise, 414, *et seq.;* T. Ray, 452; 1 Show., 135; Dyer, 303, 330; Cro. Jac., 448; Saund., 104. These authorities I cite from Cruise; they are all to be found in Bacon, "Devises G." The death of the son *without issue* does away with the necessity of considering whether, if there had been issue, the court would not have supplied these words, *and without issue;* for I should be very unwilling to take the property from the issue of the son and give it to either the sister or mother by implication, for it is by implication alone that the sister takes, and by implication also that the mother can take before the death of *both* under twenty-one. *Stephenson v. Jacock,* 8 N. C., 285. It has been said that Hannah and her issue, who are the subject of this suit, are not within the operation of the clause in the will now under consideration; that it relates entirely to the perishable property in the clause immediately preceding it. But I think that the words *their estate* include everything given to them in the will. They are sufficiently broad to embrace it, and there is nothing to restrict them. I should think it was the plain and obvious meaning of the testator to subject all the property given to them by the will to the ulterior limitations.

PER CURIAM. Bill dismissed with costs.

Cited: Picot v. Armistead, 37 N. C., 232.

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(120)

HUCKABY AND WIFE AND OTHERS v. JONES AND OTHERS.—From Franklin.

A bequest of slaves to certain persons "to be their lawful property, and for them to keep or dispose of as they shall judge most for the glory of God and good of said slaves," where it could fairly be collected from other parts of the will that the testator did not mean by the bequest any personal benefit to the legatees, was held to constitute them trustees for the purpose of emancipation, and as such purpose is illegal, it was *Held*, that the legatees took the property in trust for those who were entitled under the statute of distribution.

IT appeared from the bill that Collier Hill died in 1799, leaving a last will and testament, containing the following clause, viz.: "I give and bequeath all my slaves to four men, namely, Hill Jones of the

county of Warren and State of North Carolina, to Edmund Jones of the county of Halifax and State aforesaid, to Stith Parham, merchant of the county of Sussex and State of Virginia, and to Richard Graves of the Methodist Church in the last mentioned State, to be their lawful property, and for them to keep or dispose of as they shall judge most for the glory of God and good of said slaves; but in case either of those men should be dead or deceased before they get the said negroes in possession, it is my will and desire, and I do in that case will and bequeath the said slaves to those of them who may survive or live to get the said negroes into possession," and appointed Hill Jones and Edmund Jones executors, of whom, as the bill stated, the former alone qualified. The bill, in which the next of kin of Collier Hill were the complainants, then set forth that the possession of the negroes was in the defendants, and they were claimed by the complainants on the ground that a trust in the negroes resulted for their benefit as next of kin. To this bill there was a demurrer, and the cause was removed into this Court by affidavit. (121)

TAYLOR, C. J. The question depends upon the meaning and construction of Collier Hill's will. He died, leaving a mother, three brothers and two sisters, and by his will bequeathed all his slaves to four persons, whom he names, and one of whom he describes as a member of the Methodist Church; "to be their lawful property, and for them to keep or dispose of as they shall judge most for the glory of God and good of said slaves." These words show that the benefit of the slaves was to be consulted by the legatees, and not their own personal emolument. That this formed no part of the motive to the bequest is further shown by the words, "but in case either of them should be dead or deceased before they get the said negroes in possession, it is my will and desire, and I do in that case will and bequeath the said slaves to those who may survive or live to get the said negroes in possession."

Giving the slaves to such of them as survived or got them into possession, shows clearly that he intended only an authority to them, for if a beneficial interest were intended, why not allow it to devolve upon the representatives of those who should die before getting the slaves into possession.

From the peculiar language of the will, I infer that the legatees named were trustees only, and that the purpose of the trust was to effect an emancipation of the slaves. This has been held to be an illegal trust, and the persons appointed to execute it hold the property in trust for those who are entitled under the statute of distributions.

PER CURIAM. Demurrer overruled.

Cited: *Stevens v. Ely,* 16 N. C., 495; *Redmond v. Coffin,* 17 N. C., 441; *Sorrey v. Bright,* 21 N. C., 114; *Thompson v. Newlin,* 38 N. C., 340; *Bennehan v. Norwood,* 40 N. C., 108; *Lemmond v. Peoples,* 41 N. C., 139, 140; *Grimes v. Hoyt,* 55 N. C., 274.

(122)

INGRAM v. TERRY ET AL.—From Richmond.

1. When a bequest of a negro woman is made to A., and of her issue, if she should ever have any, to B., the assent of the executor to the legacy to A. is an assent to the legacy to B. also.

2. If a bill be brought by B. against A. to compel the delivery of such issue to B., the bill will be dismissed.

3. In the case put, A. and B. constitute but one owner and the executor is not bound to assent to the legacy unless he gets bond for the value of the *whole interest.*

THE bill set forth that the complainants, Drusilla Ingram and Hannah Ingram, were the grandchildren of one William Terry, who, on 20 March, 1805, made and published his last will and testament, containing, among other clauses, the following: "I give and bequeath to my son, Matthew Terry, two negroes, viz., Nell and Boston, to him and his heirs forever; and should the said negro wench Nell have any children, it is my desire that they be given to Benjamin Ingram's two youngest daughters, Hannah and Drusilla." That the executors to said will assented to the legacy of the negro woman Nell to Matthew Terry, who accordingly took her into his possession; that after the executors had assented as above stated, Nell had issue, a male child, and that these complainants had demanded of one of the defendants, Matthew Terry, the possession of such child, and had also applied to the executors for their assent to the legacy of Nell's children to these complainants; that such assent had been refused, and that Matthew Terry refused to deliver the possession of Nell's child to the complainants. To this bill there was a demurrer for want of equity in the court below, which was sustained and the bill dismissed. Complainants appealed.

(123) HENDERSON, J. I cannot but view this as a bill brought upon a mere legal title. When the executors assented to the legacy of the mother, they thereby assented to the bequest of the issue, and they lost all control over the property as executors. The claim lost its

legatory character, and even viewing this as a residuary interest, which I think it very much resembles as far as respects the present question, the result will be the same; for I cannot think that the old law upon the subject is at all altered by the acts of our Assembly, requiring legatees to give refunding bonds. Those who argue in favor of the alteration contend that a legatee for life or other particular interest can compel an executor to assent to his legacy upon giving bond for the value of the particular interest only. I would admit that if the law were so it would follow. But it appears to me that the executor is not bound to assent to a legacy unless he gets bond for the value of the whole interest—that all the claimants, both immediate and ulterior, represent but one full owner. Nor do I think it reasonable that the law should divest the executor of the possession, and after the determination of the particular estate throw on him the burden of regaining it for the purpose of giving it over to those who have a residuary interest in it.

PER CURIAM. Bill dismissed.

Cited: Burnett v. Roberts, 15 N. C., 83; *Conner v. Satchwell,* 20 N. C., 206; *Saunders v. Gatlin,* 21 N. C., 94; *Howell v. Howell,* 38 N. C., 526; *McKoy v. Guirkin,* 102 N. C., 23.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1822

STANTON & LITTLE v. BELL & JOINER.—From Edgecombe.

1. Where a bailee undertakes to perform a gratuitous act from which the bailor alone receives benefit, there the bailee is liable only for *gross neglect.* Otherwise where the profession of the bailee implies *skill;* for then want of skill is imputable as gross neglect.

2. A mere *mandatory* who receives no reward is only liable for *fraud* or *gross neglect.*

THE declaration in this case contained two counts. The first (145) was in *trover,* to recover damages for the conversion of sixteen bales of cotton, and the second in *case* for tortiously omitting and neglecting to perform and transact certain duties relative to the said cotton which the defendants had undertaken to perform. The facts of the case were these: The plaintiffs were indebted to the defendants, and having a quantity of cotton ready for market on 14 February, 1820, they were informed by a letter of the defendants that they were willing to take the cotton, ship it to New York to a house that might be relied on, and to credit the plaintiffs for the net proceeds of its sale. They declined becoming themselves the purchasers of the article, (146) and urged upon the plaintiffs the necessity of sending the cotton immediately, adding that the interests of the plaintiffs would be more advanced by the proposed arrangement than they would be should defendants purchase the cotton. In March, 1820, forty-five bales of cotton were accordingly delivered by plaintiffs to the defendants, with power to ship it to any market which they thought best. On the first of April, 1820, the defendants shipped twenty-nine bales of the cotton to a house in New York, and sixteen bales, together with a quantity of their own, to the house of Sweeting & Sterret in Baltimore, informing

them that sixteen bales of the consignment were the property of Stanton & Little, and directing them to keep separate accounts of the sales. At the time of the shipment the firm of Sweeting & Sterret was in good credit, and no doubts of its solvency were entertained until the winter of 1820. In January, 1821, one of the firm of Bell & Joiner proceeded as far as Norfolk, on his way to Baltimore, but was there prevented by ice from prosecuting his journey. It appeared that in the spring of 1821 one of the defendants attempted to borrow $600 from a witness, Gray Little, and said they had funds in the hands of Sweeting & Sterret of Baltimore, but did not wish to draw for them; and the other defendant, some short time after, said they had drawn for $600, and the bill had been honored by Sweeting & Sterret. In June, 1821, one of the defendants did go to Baltimore, and commenced suit against the surviving partner of Sweeting & Sterret, but in consequence of the insolvency of that firm obtained nothing. The proceeds of the shipment to New York had been received and applied to the payment of the plaintiffs' bond which the defendants held.

The judge in the court below instructed the jury that the defendants were not liable, unless they were guilty of negligence in not
(147) drawing the proceeds out of the hands of Sweeting & Sterret, by which the same were lost, and what was negligence was for the jury to determine. All the court could say was that the defendants were bound to use that care and diligence which a prudent and discreet man would use relative to his affairs, and whether they did so was the proper subject of inquiry for the jury. The jury returned a verdict for the plaintiffs, and the defendants moved for a new trial, because the verdict was against evidence, and for a misdirection of the court in matter of law. The motion having been disallowed and judgment rendered for the plaintiffs, the defendants appealed to this Court.

Seawell and the Attorney-General for defendants.
Gaston for plaintiffs.

(148) HALL, J. From the facts stated in this case, particularly those disclosed by the testimony of Gray Little, I think the jury were at liberty to find a verdict for the plaintiffs.

When one of the defendants wished to borrow money of the witness in Tarboro, rather than draw for it on the house of "Sweeting & Sterret," to which the cotton had been consigned in Baltimore, it no doubt was because he considered the money would be more useful to him in Baltimore than it would be in Tarboro. By electing to keep it there he exercised an act of ownership over it; and by doing so he

made it his own, and this he had a right to do, for it was stipulated between the plaintiffs and the defendants that the proceeds of the cotton, when sold, should be credited on the debt due from the plaintiffs to the defendants. And if at that time the amount of sales had been known, and the plaintiffs and the defendants had come to a settlement of their accounts the plaintiffs would have had a credit (as they ought to have had) for the amount of those sales; and if the house of "Sweeting & Sterret" were solvent at that time, but failed afterwards, the defendants must have borne the loss.

But it does not appear whether the jury in finding a verdict for the plaintiffs took this view of the case, or whether, laying the testimony of Little out of the question, they were influenced in finding their verdict by the charge of the court. If their verdict (149) was found upon the testimony of Little, I think it ought not to be disturbed. If, laying the testimony of Little out of the case, it was so found in consequence of the charge of the court, it will be proper next to consider whether in that case it ought to be set aside. The court in its charge to the jury said "that the defendants were bound to use that care and diligence which a prudent and discreet man would use relative to his affairs; that the circumstance of the defendants losing their cotton was not the rule to govern them, but they must inquire whether they acted as prudent and discreet men in the business." Viewing the case as I have before done, connected with the testimony of Little, no want of diligence is imputable to the defendants. They in apt time elected to consider the money their own in Baltimore, and chose to leave it there rather than have it at home. But laying that testimony aside, the case assumes a different aspect.

It does not otherwise appear but that the house of "Sweeting & Sterret" merited their confidence when the defendants made a consignment of the cotton to it. That they thought so is proved from the fact that they made a consignment to it of their own produce, and some of the neighboring merchants did the same thing. The plaintiffs were not ignorant of the fact that such consignment was made of their cotton, for when they applied to the defendants for intelligence respecting it they were informed that no account of sales had come to hand. It does not appear that in this the defendants were incorrect. It seems that the defendants had made other consignments before that time to the same house; that they had drawn bills upon it which had been accepted and paid. From the spring 1820 until the winter 1820-1821, there was no distrust of the solvency of the house. The first intelligence of it was also intelligence that diligence was useless. What time the house failed does not appear, so that it does not ap- (150)

pear whether *any* diligence would have prevented a loss. The plaintiffs themselves, if they had apprehended danger, might have made inquiry, for it must be kept in view that the defendants were mere *mandatories;* they acted without a reward.

Under this latter view of the case I think the principle of decision will not steer clear of the circumstance that the property of the defendants shared the same fate with that of the plaintiffs; although it will not make it the standard of decision, nor will it altogether overlook the circumstance that others of the same neighborhood with the defendants were sufferers in the same way. These and other circumstances which make up the case make it necessary to inquire whether the defendants were guilty either of fraud or gross negligence, and if, referring the jury to that standard in making a decision, they had found a verdict for the plaintiffs, I should willingly acquiesce, even without the aid of Gray Little's testimony. There is a material difference between a bailee who acts for a reward and one who acts gratuitously. In *Shiells v. Blackburn,* 1 H. Bl., 158, it is laid down by the court and declared by *Lord Loughborough* that he agrees with Sir William Jones in that respect, that where a bailee undertakes to perform a gratuitous act from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence, but it is otherwise where the profession of the bailee implies skill, for in that case a want of skill is imputable as gross neglect. See, also, Cow., 480, to the same effect. Sir William Jones, in his law of Bailments, page 15, says that if the bailor only receives benefit the bailee is only liable for gross neglect. Therefore, if the jury had been instructed that the defendants were only liable for fraud or gross neglect, whether they had found a verdict for the plaintiffs on the testimony of Little or under that charge of the court, I should be of opinion the verdict ought to stand, but as the jury have been referred to another rule to go by—one that I think governs the case of a mandatory who acts for a commission or a reward, I
(151) think a new trial should be granted, and for that reason only.

HENDERSON, J., concurred with HALL.

TAYLOR, C. J., *contra:* It is to be collected from the letter of one of the defendants read in evidence, that the first proposition made by the plaintiffs was that the defendants should become purchasers of the cotton; and that the inducements presented by the defendants occasioned the consignment to them for the purpose of having a sale effected in Baltimore for the plaintiffs' benefit. To say nothing of the advantage derived to the defendants from storage at Washington and Tarboro, and the freight from one place to the other, it cannot be denied that it

was profitable to the defendants to have their funds in Baltimore, whence they could draw them by a premium on their bills, rather than in Tarboro; and that they were reluctant to forego this advantage appears from their having endeavored to borrow money from the witness Little rather than remove their funds from Baltimore. Up to the time of the sale in Baltimore, the interests of both plaintiffs and defendants were the same in relation to the cotton; it was important to both parties that a sale should be made as soon as it could be advantageously effected. But after the sale the interests of the parties took different directions. The money of Bell & Joiner was deposited where they most wished it to be—in the hands of the consignees, to serve as a fund on which they could draw as profit presented itself; but the money of the plaintiffs would have been most usefully employed in being applied to the payment of their debt and stopping the interest on their bond. As soon as the money came into the hands of Sweeting & Sterret, the defendants should have drawn for it, (152) or given credit to the amount on the plaintiff's bond. The sale must have taken place early in the spring of 1820, and the plaintiffs had a right to expect, from the common course of business and the usage of that trade, that within a reasonable time after the sale they should receive the amount in some shape or other or be apprized that they might draw for it on Baltimore. It is said by a respectable writer that if the factor have not given notice to his principal of the bargain in convenient time, and the vendee becomes insolvent, the factor is responsible. Malyn.

The excuse alleged for not giving this notice is that the defendants could get no account of sales from Sweeting & Sterret, and could not therefore tell when the sale took place or what amount they should give credit for. But does it appear from any part of the evidence that a single effort was made to procure these accounts of sales, until the time when Bell attempted to go to Baltimore, at which period Sweeting & Sterret were in failing circumstances? It is not credible that a house in Baltimore receiving consignments from Tarboro should suffer a period of six or seven months to elapse without apprising their consignor that a sale had taken place; and as to the other produce, shipped by the defendants to the same house, they knew what sale had been effected and how much they could draw for. But what seems almost conclusive on this point is the testimony of Sweeting, taken by the defendants and in his presence. His silence on the two heads of a sale and transmitting an account of sales is to me most expressive. If he had proved that either no sale had been effected until so short a period before the failure as to render notice unavailing, or that, though a sale was

promptly made, his firm had neglected to send an account of sales to Bell & Joiner, although frequently urged to it, it would have acquitted the defendants of the main strength of the charge of negligence.

(153) But as he was not interrogated on points with which he must have been perfectly well acquainted, and which it was so important for the defendant to maintain, the jury may probably have inferred from that very circumstance that the sale was soon made after the arrival of the cotton and that an account of sales was transmitted to Bell & Joiner in reasonable time. Assuming this to be so from the finding of the jury upon the evidence exhibited, it appears to be a case of gross negligence on the part of the defendants, in no degree extenuated by their own loss; for though they might risk their own funds in Baltimore for the sake of profit and convenience, they had no right so to act in relation to those of the plaintiffs.

The law has imposed certain obligations on an agent, which are not founded solely upon the reward paid for his labor, but in part by the confidence inspired by his acceptance of the charge, and although it is admitted that the responsibility of a voluntary or gratuitous agent is much inferior to that of a hired agent, yet it is nevertheless true that the former is bound to bring to the performance of the duty such a degree of care and diligence as may reasonably satisfy the trust reposed in him. This principle is fully recognized in the great case of *Coggs v. Bernard.* There was no consideration paid for the carriage of the goods, and no action could have been sustained for not carrying them, but because the defendant undertook to carry them, and they were spoiled by his neglect, he was made liable; and *Lord Holt* says if a man acts by commission gratis, and in the executing his commission behaves himself negligently he is answerable. This undertaking obliges the undertaker to a diligent management. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession.

(154) The case cited by the defendants from 1 Hen., Black., certainly proves that even in misfeasance in the actual performance of the undertaking the responsibility of a voluntary agent is inferior in degree to that of a hired agent. The latter is bound to possess such a degree of skill as would in general be adequate to the service. A gratuitous agent is not bound to possess such skill, but is only chargeable by proof of gross negligence. Hence the merchant who undertook without any compensation to enter at the custom-house a parcel of leather of a particular kind, which, being seized, together with a parcel of his own, by reason of the erroneous entry, it was held that he was

not answerable for the loss, having acted *bona fide* and to the best of his knowledge. It was said by the Court on that occasion that if a man be in a situation or profession to imply skill an omission of that skill is imputable to him as gross negligence. Apply that rule to the case before us and let it be admitted for the sake of the application that the defendants were voluntary agents, what will be the result? That the defendants undertook a task for which their situation and profession did imply skill, and therefore the omission to exert it may be considered as gross negligence. A more simple operation scarcely belongs to the duty of a mandatory than that of transmitting an account of sales and drawing money out of the hands of consignees in full credit for months after the consignment.

The case cannot be distinguished in principle from the recent one of *Wilkinson v. Coverdale*, 1 Esp., 75, decided in accordance with *Coggs v. Bernard*. It was there held that case will lie where a party undertakes to get a policy done for another without any consideration, if the party so undertaking takes any steps for that purpose, but does it so negligently that the person has no benefit from it. In whatever light I can see this case, whether of justice or law, the verdict of the jury appears to be correct, and ought to be supported.

PER CURIAM. New trial.

Cited: *Ivey v. Cotton Mills*, 143 N. C., 195.

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(155)

LOCKE v. ISAAC ALEXANDER AND CHARLES T. ALEXANDER.—From Cabarrus.

Where A. and B., having an interest in common with three others, executed a deed of bargain and sale for lands *in their own names*, professing in said deed to act as well for themselves as their cotenants, but acknowledging the payment of the purchase money, transferring the title and warranting it "*as attorneys aforesaid;*" it was *Held*, in an action of covenant on the warranty that the title of the cotenants passed not, because the deed was not signed in their names; that the interest of those who executed the instrument did not pass, because the deed did not show any consideration paid them in their own right, but only as attorneys for others; and that the warranty could not be considered as a *personal* or *independent* covenant, but that as no estate passed the warranty was not binding.

COVENANT. On 10 May, 1810, the defendants executed an instrument of writing to one Jonathan Merrill, which, after a recital in the

premises that the said Isaac Alexander and Charles T. Alexander acted in the execution of the instrument in their own behalf and as attorneys in fact for John Springs and Sarah, his wife, John McCoy and Catharine, his wife, and Cunningham Harris and Mary, his wife, witnessed that the said Isaac and Charles, *as attorneys aforesaid,* received the consideration money, and gave, granted, bargained, and sold, aliened, and confirmed unto the said Jonathan Merrill, his heirs and assigns forever, two certain tracts or parcels of land situated in the county of Rowan, and all the estate, right, title, interest, claim, and demand, and property whatsoever of the said Isaac and Charles, *as attorneys aforesaid,* of, in, and to the land and premises; and the instrument contained, further, the following clause: "And the said Isaac and Charles T. Alexander, as attorneys aforesaid, for themselves and their heirs, the aforesaid land 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,
(156) shall and will forever warrant and defend by these presents. In witness whereof the said Isaac and Charles T. Alexander have hereunto set their hands and affixed their seals the day and date above written."

The instrument was signed

"ISAAC ALEXANDER. (L. S.)
"CHARLES T. ALEXANDER. (L. S.)"

Jonathan Merrill on 15 July, 1815, conveyed by deed his interest in the lands to the plaintiff, and afterwards John McCoy and Catharine, his wife, and Mary Harris (the said Catharine and Mary being two of the *femes covert* for whom defendants professed to act as attorneys), brought an ejectment against the present plaintiff for their part of the land, recovered the same and obtained the possession. By consent of the counsel in the case it was considered as an action in which Merrill was the plaintiff, and the pleadings were amended accordingly; and it having been conceded by Gaston for the plaintiff that the interests of the *femes covert* were not conveyed by the instrument, the court desired of the plaintiff's counsel to discuss the question whether *anything* passed by the deed, and if nothing passed, whether an action could be maintained on the covenant against the defendants.

Gaston for plaintiff.

(158) TAYLOR, C. J. The titles intended to be conveyed by this deed are those of the Alexanders in their own right, and those of the three other coheirs by the defendants as their attorneys in fact.

There must be a valuable consideration to support a bargain and sale, the very name of which implies a *quid pro quo*. It is not essential that the bargainees themselves should pay the consideration money; for if it be paid by a stranger on their account, it will be sufficient to raise an use in the bargainee. Cro. Eliz., 819. Nor is it necessary that the money should be paid to the bargainor, but it must be paid either to himself or to some person for his use. Now the receipt of the consideration money is acknowledged by the Alexanders in their character as attorneys; and from no part of the deed can it be collected that any money was paid to themselves in their private right, although it may reasonably be supposed that two-fifths of the (159) sum were so paid, and that the deed does not describe the transaction truly. Yet we are not at liberty to depart from it on any private speculation, nor can the parties make any averment against it. It follows then that the title of the Alexanders was not conveyed by the deed.

Did the title of the other coheirs pass by the deed? I conceive that in point of form it is too essentially defective to convey their title. The land was *vested* in them and by them *alone* can it be conveyed. Their power of attorney, as such, conveyed no interest to the defendants, and consequently none could pass from them. Thus, where a lease was made in the name of the attorney, though it were added also by virtue of a letter of attorney, or by A. B. as attorney for D. D., it was held a void lease. Bac. Abr., Tit. "Leases," sec. 10. And a bond reciting certain differences between the obligee and obligor as attorney for F. F., was conditioned that the obligor should perform such award as the arbitrators therein named should make upon the premises. It was agreed that the submission in this form was not binding upon the principal, though it was resolved to be so upon the obligor. 1 Ld. Raym., 146. The part of the deed which attempts to convey the shares of the principals keeps them in the background, and presents alone the bargainors as their attorneys. The execution and delivery of a deed ought likewise to be in the name of the principal, and if it be the execution of the agent only it is void as to the principal, though the form of words used in the execution is not material, as where opposite the seal was written, *for* S. B. (the principal) M. W. (the attorney). 2 East, 142. Here, however, the deed is sealed and delivered as the act of the Alexanders, without any mention or recognition of their principals. It is evident, therefore, according to all the authorities, that no title passed from the other coheirs.

And this leads to the important question whether the defendants are personally bound by the covenants of warranty. Whether it be

(160) just on principle that the plaintiff should be indemnified for the loss sustained by his confidence in the defendants' having rightfully conveyed, I will not undertake to decide, because the law speaks a language which can neither be misunderstood nor disobeyed. The ancient rule was that to every good warranty in deed there must be some estate to which the warranty is annexed that may support it; for if one covenant to warrant land to another and make him no estate, or make him an estate that is not good, and covenant to warrant the thing granted, in these cases the warranty is void. Coke Litt., 378.

When the action of covenant was substituted for the *warrantia chartæ*, the same principle was continued in operation; and where the main act to be performed, as conveying an estate, granting a lease, etc., is void, relative and dependent covenants are void also; as where A., being possessed of a term, granted to B. so much of the term as should be unexpired at the time of his death, and covenanted for B.'s quiet enjoyment, the lease being there held void for uncertainty, the covenant was holden void also. T. Raym., 27. In *Frontin v. Small,* a lease was made by an attorney in fact, in his own name, and it contained a covenant on the part of the lessee to pay rent to the attorney. In an action of covenant brought by him to recover the rent, it was held that as the lease was void the covenant was so likewise. Strange, 706. In *Northcote v. Underhill,* the principle did not apply, because there was a separate and independent covenant, not referring to the estate intended to be granted nor waiting upon it; and in such cases the covenant may be enforced, although no estate is granted. Salk., 199. As, therefore, it appears on the face of this record that nothing passed by the deed, either from the defendants or their principals, the covenant of warranty never had a legal existence, and cannot be enforced. I (161) think the judgment is right, and ought to be affirmed.

HALL, J. If an estate in the lands in question passed by the deed from Alexander to the plaintiff, the clause of warranty, or covenant for quiet enjoyment, whichever it may be considered to be, will have its usual operation in favor of the plaintiff. But if an estate did not pass by that deed, and it is apparent on the deed that nothing passed, the question arises, What is the effect of the warranty or covenant? That nothing passed by the deed is apparent, I think, and it matters not whether the defendant was authorized and qualified by those who had title to the lands to sell them or not, because the deed is executed by him by signing his own name only, and therefore it is his own deed; and being his own deed only, and he having no title to the land, but the title of the land being in his principals which the deed sets forth, it

follows from viewing the deed itself that no title passed from the defendant to the plaintiff. In order to have passed title to the lands, had he authority for so doing, he ought to have signed the names of his principals to the deed, and then it would have been the deed of his principals, executed by them by their agent duly authorized by them so to do. That the law is so appears from *Comb's case,* 9 Reports, 77a, followed and supported by numerous decisions that have taken place since, 2 Ld. Raym., 1418; 2 East, 142; Str., 705. If, then, nothing passed by the deed, what effect can the clause of warranty have as such? In *Ed. Seymour's case,* 9 Coke, 96, it was said, and so decided by the Court, "That every warranty must be knit and annexed to some estate; that every warranty has its essence by dependency upon an estate, so that if a man maketh a gift in tail, with warranty to him and his heirs, and tenant in tail maketh a feoffment and dies without issue, the warranty bindeth not, because the estate to which the warranty was annexed is determined; that if no estate is conveyed the warranty is a nullity; that if any estate is conveyed the warranty annexed (162) to it becomes inoperative when the estate determines." So in the present case, if no estate was conveyed there is nothing to which a warranty can attach, and therefore the clause of *warranty as such* is inoperative and the plaintiff's claim cannot be sustained on that ground.

It is next to be seen whether it can be supported on the same clause as a *covenant* and from this inquiry I apprehend there will be the same result. In *Caponhurst v. Caponhurst,* 1 Lev., 45, and the same case reported in Ray, 27; 1 Keb., 164, 130, 183, where lessee for years of a long term assigned so much of the term as should be to come at the time of his death to the plaintiff, and *covenanted that he should enjoy it,* it was held that the assignment was void, and for that was cited 1 Co. Cheddington's case, and that the covenant for enjoyment was also void, and for that was cited Yelv., 18. In *Northcote v. Underhill,* 1 Salk., 199, also reported in 1 Ld. Ray., 388, the defendant by his deed granted, bargained, and sold to the plaintiff and his heirs; provided that if the grantor paid so much money it should be lawful for him to reënter, and that he *covenanted to pay the said money* to the plaintiff, and a breach was assigned in nonpayment of the money. It was argued for defendant that the deed was void for want of enrollment (which was admitted by the court), and that, like the case in Lev., as nothing passed by the deed the covenants were void. But *Lord Holt* said that in *Caponhurst v. Caponhurst* the covenant was relative and dependent; it referred to an estate, and was to wait upon it; if there was no estate the covenant failed, but in the case his Lord-

ship was then deciding he said the covenant was distinct, separate and independent; and it was not material whether any estate passed or not. So that both these cases are authorities in the present question, for the covenant for quiet enjoyment is annexed to and dependent (163) upon the estate granted, and if no estate or interest passed the legal consequence is that the covenant is void, of course. Were there a distinct, separate and independent covenant by which the defendant bound himself, as for the payment of money or anything else, he would be bound to the performance of such covenant.

I therefore think it is apparent from the deed itself that no estate passed, because the deed was not signed by the principals in their respective names by their agent, and that consequently the warranty or covenant (whichever it may be called) resting and depending upon it is void and inoperative, and that the judgment of the court below is right, and ought to be affirmed.

HENDERSON, J., concurred.

PER CURIAM. Affirmed.

TOWNS & CO. v. FARRAR.—From Chatham.

1. A. being indebted to B., assigned to him certain judgments against C., on which execution was stayed by D. as the security of C., and A. guaranteed the payment of the judgments to B. Before the assignment of the judgments, and before the stay of execution had expired, C. removed from the State with his property, and had, at the time of trial, sufficient property to satisfy the judgments. The security D. had become insolvent. *Held*, that B. was not bound to pursue C. when beyond the limits of the State before he could have recourse to A.

2. In general, a guarantee is not bound to the highest possible degree of diligence, but it is sufficient if he resort to such means as are within his power, in such time as a prudent and discreet man would in like circumstances, to collect his own debt; and if in using such diligence he fails to obtain satisfaction of the principal, he is entitled to resort to the guarantor.

ASSUMPSIT on a contract of guaranty, tried in CHATHAM, at Fall Term, 1822, before *Badger, J.*

The defendant Farrar, residing in Chatham County, being indebted by note to the plaintiffs, merchants of Fayetteville, on 15 Febru- (164) ary, 1820, in discharge of the debt assigned to the plaintiffs (acting by their agent, Thomas C. Hooper) sundry judgments obtained by defendant before a justice of the peace against Herndon

Haralson, having execution stayed thereon on the surety of A. D. Murphy; and on the same day executed to the plaintiffs a writing by which he contracted to guarantee the payment of the judgments, on which contract the action was brought. These were accepted by plaintiffs in satisfaction of the original debt. Before the assignment of the judgments and before the stay of execution had expired Haralson, the principal in the judgments, removed out of the State, carrying with him his property, which was more than sufficient to satisfy the judgments, and has continued since in parts out of the State and in solvent circumstances. The judgment and executions were placed by Hooper, at the request of the defendant, in the hands of one Lightfoot, and the defendant offered to show Lightfoot property belonging to the surety Murphy on which he might levy; but Lightfoot declined levying, alleging that the surety had promised to pay the money, and that the defendant need not trouble himself, as he (Lightfoot) would take the responsibility on himself and exonerate the defendant. Of this transaction between Lightfoot and the defendant no notice was given to plaintiffs or their agent. The defendant afterwards requested the agent to place the papers in the hands of one Crump, a constable, stating as a reason for the request that Lightfoot did not exert himself to collect the money. This was done, and though Crump repeatedly applied to the defendant to show him property belonging to the surety, the defendant failed to do so. In the meantime the surety met with losses which rendered him entirely unable to satisfy the judgments or any part thereof.

In every instance relative to the judgments assigned, the (165) agent asked and acted under the advice of the defendant, and always urged the collection of the judgments.

It was insisted on the trial below that the defendant was entitled to a verdict on one or all of the following grounds:

1. That the negligence and other conduct of Lightfoot, who was to this matter the plaintiff's agent, had discharged the defendant.

2. That Haralson, the principal, was now solvent, and the money should have been collected out of him, or proper efforts used therefor, before the defendant could be charged.

3. That the plaintiffs had, under the circumstances before stated, been guilty of such negligence as exonerated the defendant.

The judge instructed the jury that Lightfoot, under the circumstances disclosed (supposing them true), was not such an agent of the plaintiffs as had power to give a discharge to the defendant, and that therefore neither the neglect of Lightfoot to levy, nor what passed between him and the defendant, could, unless known, approved, adopted,

or in some way countenanced by the plaintiffs or their agent, release Farrar from his liability.

The court further instructed the jury that the plaintiffs were not bound, under the circumstances above stated, before having recourse to the defendant, to pursue Haralson when beyond the limits of the State, and that therefore, the fact of Haralson's being in possession of sufficient estate where he resided was, in this case, no sufficient answer to the plaintiffs' claim. And the court further instructed the jury that in general a guarantee was not bound to the highest possible degree of diligence, but it was sufficient if he resorted to such means as were within his power, in such time as a prudent and discreet man would in like circumstances, to collect his own debt; and if, using such diligence, he failed to obtain satisfaction of the principal, he (166) would be entitled to resort to the guarantor. And that in this particular case if the jury believed from the evidence that immediately after the assignment the judgment with executions were placed in the hands of Lightfoot, at the request of the defendant, who undertook to show property to satisfy them; that subsequently, at a like request, they were given to another officer designated by defendant, to whom also he engaged to show property, and that the defendant, living within the county of Chatham, where neither plaintiffs or their agent resided, had direction of the claim; that the plaintiffs and their agent were ignorant of the conduct of Lightfoot, and did not either authorize or adopt it; that no interference took place on the part of the plaintiffs by authorizing delay or otherwise, and that the defendant failed to show property to the second officer designated by him, Crump; then the defendant was not discharged, and the jury should find for the plaintiffs, unless it appeared to the jury that the plaintiffs, or their agent had possessed some opportunity or means of receiving the debt of which they had neglected to avail themselves.

The jury found a verdict for the plaintiffs, on which judgment being rendered the defendant appealed to this Court.

PER CURIAM. We think that the rule for a new trial ought to be discharged, and that for the reasons given by the judge in his charge to the jury, which it is unnecessary here to repeat.

PER CURIAM. No error.

Cited: *Eason v. Dixon,* 19 N. C., 78; *Beeker v. Saunders,* 28 N. C., 381.

(167)

RHODES v. VAUGHAN.—From Guilford.

When an act of the Legislature prescribes the substance of a bond, that bond so drawn as to include every obligation imposed by the Legislature, and to afford every defense given by the law, will be valid, notwithstanding it may be slightly variant from the literal form prescribed, and it is not necessary to insert in the condition of a bail bond every alternative contained in the 8th section of the Act of 1777, ch. 8, on which bail are dischargeable, because the right to be discharged is not given the bail by the words of the obligation, but is given them by a public law which the courts are bound to notice.

SCIRE FACIAS against the defendant as bail of one Jennings, against whom a judgment had been obtained at the instance of the present plaintiff in the Superior Court of Guilford County. The condition of the bail bond was in the following words: "On condition that John Jennings, one of the above bounden, should make his personal appearance before the judge of the Superior Court of law to be holden for the county of Guilford, at the courthouse in Greensboro, on the fourth Monday after the fourth Monday of March, 1820, then and there to answer Thomas Rhodes of a plea of trespass on the case to his damage £200, *and to stand to and abide by the judgment of the said court*, and not depart the same without leave." *Oyer* was prayed of the condition in the court below, and a motion in arrest was made on the ground that the condition of the bail bond was not in the manner and form directed by the statute. The motion having been allowed, the question was presented to this Court on the appeal of the plaintiff.

Seawell for appellant.
Ruffin for appellee.

HENDERSON, J. When an act of the Legislature prescribes (170) the substance of a bond, that bond, so drawn as to include every obligation imposed by the Legislature and to afford every defense given by the law, will be valid, notwithstanding it may be slightly variant from the literal form prescribed. This bond is alleged to be void under section 8 of the act of 1777, ch. 8, because it is taken by the sheriff from a person held in arrest, contrary to the provisions of that act; and the particular defect insisted on is that every alternative of discharge contained in the said section is not given to the defendant by the terms of the condition, to wit, that the bail should discharge themselves from the penalty by *surrendering the principal* as his special bail. And if this were true, the objection must certainly prevail—but I think it is not. This obligation upon its face purports to be

taken by a sheriff in his name of office from one whom he had arrested at the instance of the plaintiff, *conditioned to be void* upon the appearance of the defendant according to the command of the writ, and that he should not depart the court without leave. The obligations *here* imposed by law are those of bail to the writ, and bail to the action; for our Legislature have thrown on those who become bail to the writ the liabilities also of bail to the action, with a slight alteration, extending the time of surrender to the judgment on a *sci. fa.* instead of the return of the *ca. sa.*, as it was at the common law. By the exposure of the nature of the obligation, the liabilities created by law arising therefrom attach on the defendants, and the defenses incident to their situation are also accorded to them, notwithstanding an omission specially to insert them, for if they appear upon an inspection of
(171) the obligation they are as valid on the one side and the other as if specially made. The bail's right to surrender their principal (and by this bond they appear in the relation and capacity of bail) is a right given them, not barely by the words of the obligation, but a right given them by law, and that a public one which all courts are bound to take notice of. And the fact of discharge appearing to the Court by *plea or otherwise,* the law arising upon that fact must be pronounced by the court. If we test the validity of this bond by the declared motive of the Parliament of Hen. VI. (who passed the statute in relation to sheriff's bonds), or our own act of 1777 on the same subject, it will be found to be valid, as suppressing the mischief which was intended to be remedied—the taking of bonds by sheriffs of those held in arrest by them for other purposes than the object of arrest, and affording to the obligors every exoneration from the penalty of the bond which their situation entitled them to. And could I perceive that either of those objects could be frustrated by the obligation now under consideration, I would declare the bond to be void. As I cannot, I think the judgment of the Superior Court should be reversed and judgment rendered for the plaintiff.

TAYLOR, C. J., concurred with HENDERSON.

HALL, J., *contra:* According to the English practice *special bail* is understood to be that bail which a defendant when arrested gives to the sheriff for his appearance at a certain time and place; and bail *to the action* is that bail which the defendant at that time and place gives in a penalty conditioned to be void, provided he shall pay the condemnation of the court or surrender himself to prison, or provided the bail shall do it for him. 3 Black., 290, 291.

Although our act of 1777, ch. 115, sec. 19, declares that all bail shall be *special bail,* it further declares that such bail shall be liable to the recovery of the plaintiff. By this latter clause the (172) bail may be considered what in England would be called bail *to the action.* Then it may be said that the liability of the bail spoken of in this act is as broad as the liability both of *special* bail and bail *to the action* in England.

It is in the character of bail *to the action,* however, that the defendants are now called in question. By another act passed in the same session of 1777, ch. 118, sec. 8, it is declared that it shall not be lawful for any sheriff to take any bond otherwise than payable to himself as sheriff, and dischargeable upon the prisoner's appearance, etc., and rendering himself at the day and place required in the writ, etc., *and his securities discharging themselves therefrom as special bail of such prisoner.* What, then, under this act are the bail liable for? They are liable for the defendant's appearance—and are liable in the words of the act *to the recovery of the plaintiff,* unless the defendant shall discharge it or surrender himself to prison. But the former act (sec. 20) puts it in the power of the bail to discharge themselves from their liability by surrendering their principal, etc. This, then, is another condition on a compliance with which the bond becomes void, and it would seem that that condition should be inserted in the bond, because the act says that the bond taken shall be dischargeable upon the prisoner's appearance, etc., *and his securities discharging themselves therefrom as special bail of such prisoner.* Now, one mode of discharging themselves is paying the recovery of the plaintiff in case of failure by defendant. Another is surrendering the defendant to prison; and as the bond is to be void upon condition of doing the one or the other, it appears to me that each alternative should be inserted in it.

It is true the act prescribes no form of a sheriff's bond, but it should be taken substantially as the law directs. It therefore appears to me that when bail are liable as such to the recovery of the (173) plaintiff, and liable to be proceeded against in default of their principal's not either paying the debt or surrendering himself to prison, that there is but one plea allowed them, and that is a surrender of their principal, or death of the principal (which is the same thing in effect), and as they can save themselves by that plea, that it should be inserted in the bond as one of its conditions in their favor; otherwise I incline to think the bond is not taken conformably to the act; for, strictly speaking, the bond is forfeited unless by or under the condition something may be pleaded to prevent it.

If I have given to the act a wrong construction, I am glad when I

reflect that no bad consequences will flow from it, as a majority of the Court think differently from me. But, judging for myself, I am bound to say that judgment should be entered for the defendant.

PER CURIAM. Reversed.

Cited: Molton v. Hooks, 10 N. C., 347; *Ricks v. Hayworth,* 15 N. C., 588; *White v. Miller,* 20 N. C., 52; *Watt v. Johnston,* 48 N. C., 126; *McNeill v. R. R.,* 138 N. C., 5.

GARDINER v. EXECUTOR OF SHERROD.

The single act of assisting a debtor to remove, without stating more, is not sufficient to render a person liable for a debt due by the person removed, although that assistance may have been given with a fraudulent intent; because it is a case in which a plaintiff cannot *qualify* his injury, *i. e.*, its nature and extent cannot be stated, for it is quite uncertain whether he has lost the whole or any part of his debt, and it is necessary for a plaintiff to state in his declaration not only that he has sustained damage, but also *how* he has been injured.

THIS action was originally brought against defendant's testator, after the death of whom the present defendant was regularly made a party. The declaration contained two counts, in the first of which plaintiff set forth that one Robert Sherrod, on 15 October, 1817, at the county of Northampton, became indebted to the plaintiff in (174) the sum of $200, to be paid two days after date, and secured by the writing obligatory of the said Robert, dated of the said day and year; and the said Robert and the plaintiff both being on the delivery of the writing obligatory, and when it became due residents of Northampton aforesaid; that the said Robert afterwards, to wit, on 20 October, 1819, absconded from the county aforesaid and from North Carolina, the said sum of money and interest thereon being then due and unpaid; and the said John (the defendant) well knowing the premises and intending to defraud the plaintiff of the said sum of money, and the interest due thereon, did wrongfully, injuriously, and deceitfully, and with an intent to defraud the plaintiff of this said debt and interest thereon, and to hinder, delay, and defraud him of his actions for the recovery of the same, on the day and year last mentioned, aid and assist the said Robert to abscond from the said county and State aforesaid, without the said sum of money and interest due and in

arrears being paid, whereby the said plaintiff has been defrauded of his debt, interest, and actions, to his damage, etc., and therefore, etc.

The second count was framed on the act of 1796, which enacts that if any person shall remove, or knowingly assist to remove any debtor out of the county in which he shall have resided for the space of six months or more, who shall not have advertised his intention of removal and obtained a certificate of his having so advertised, then such person so removing or assisting to remove shall be liable for all the debts of the person removed in the county from which he removed. The act further provides that the said debts may be recovered by an action on the case, to be brought within twelve months.

By an act of the Legislature, passed in 1820 (subsequently to the commencement of this suit), the act of 1796 was repealed, and it was enacted that if any person or persons shall remove or shall aid and assist in removing, any debtor or debtors out of any county (175) in which he, she, or they shall have resided for the space of six months or more, with an intent by such removing, aiding or assisting to delay, hinder, or defraud the creditors of such debtor or debtors, or any of them, then the person so removing, aiding or assisting, shall be liable to pay all debts which the removed person justly owed in the county from which he removed, to be recovered by an action on the case brought within three years from the time of the removal.

On the trial below the plaintiff proved that Robert Sherrod was indebted to him in the sum named in the first count of the declaration; that at the time the obligation of said Robert became payable he had concealed himself for the purpose of avoiding his creditors; that John Sherrod acknowledged to several witnesses that he had fitted up a horse and cart to convey away Robert Sherrod's family from the State, and that he had furnished said Robert with money to enable him to remove; that he executed a conveyance of the horse and cart and certain negroes to the children of Robert Sherrod previous to the departure of Robert's family; that the cart, together with the family of Robert and the negroes conveyed, set out on their journey from the house of Robert in the night; that John Sherrod expressed apprehension from having been seen with the cart at the time it started; that on one of the witnesses who drew the conveyance before alluded to and to whom he acknowledged his having furnished Robert with money and the horse and cart, he enjoined secrecy, saying that Robert was in debt and lying concealed, and he did not wish his creditors to know it. It was also proved that Robert did remove out of the State and had not returned.

The presiding judge declined giving any opinion on the second count, but charged the jury that if they thought the first count was proved to

them that he was of opinion that the law would support a verdict rendered thereon; that the quantum of damages was for them, (176) not for him; that they might, if they thought proper, give the debt and interest. The jury found a verdict for the plaintiff on the first count. A rule to show cause was obtained by defendant, and afterwards discharged by the court, and from the judgment rendered according to the verdict defendant appealed to this court.

Attorney-General Drew for plaintiff.

HALL, J. I think the first count on which the jury have rendered a verdict cannot be sustained. The plaintiff states that the defendant's testator fraudulently, etc., aided and assisted the plaintiff's debtor to abscond. This he might have done, but it is not shown that it was on that account that the debt was lost; it might have been that the debtor was insolvent and would not have paid the debt if he had remained. The single act of assisting the debtor to remove without stating more is not sufficient to render a person liable for a debt due by the person removed, although that assistance may have been given with a fraudulent intent.

It must be remembered that this is a count at common law. Indeed, if this action could be supported it would have been unnecessary to have passed the act of 1820, ch. 1063. That act subjects any person to the payment of the debts of any other person whom they shall remove, provided they shall remove them with an intention of defrauding their creditors. I therefore think the action cannot be supported upon the count at common law, on which a verdict has been found for the plaintiff, and that the rule for a new trial should be made absolute.

HENDERSON, J. It is necessary for a plaintiff to state in his declaration, not only that he has sustained a damage, but also how he has been injured; for it is an inference of law and not of fact, that the (177) acts charged amount in law to a legal injury, or such a one as the law redresses. Admitting all the facts charged in the first count to be true, I think they do not amount to a legal injury. It is not stated how a damage arose to the plaintiff from the acts charged on the defendant. It is not alleged that the defendant had any property or other means of satisfying the plaintiff's debt. And if the avoidance of an arrest at the suit of the plaintiff be a legal injury, *non constat* that the plaintiff would have arrested him, for it is not shown that he was prevented from so doing, for it does appear that he had even taken out process against him. The case which goes farthest

upon this subject is to be found in Carthew. In that it is stated that the plaintiff had taken out process against the goods of his debtor, and that the defendant, with a design to injure the plaintiff, had eloigned the goods to distant parts, whereby the plaintiff lost his opportunity of having them taken, and thereby lost his debt. But that case is very distinguishable from the present, for in that an arrest of the goods afforded a means of satisfaction, and the wrongful act of the defendant is charged as the cause of its prevention, the plaintiff having taken out process to that end. The wrongful act of the defendant was intimately connected with the plaintiff's loss, and is stated to be the cause thereof, which deduction may well be called, I think, a legal one. But I think no legal injury can be deduced from the facts stated in this case. They all well may have happened, and yet may have afforded no actual impediment to the plaintiff's claim. Besides, in this case the plaintiff cannot qualify his injury, that is, its nature and extent cannot be stated, for it is quite uncertain whether he has lost the whole or any part of his debt. The defendant may return within a short time, or he may continue long absent, or he may never return, or he may be entirely insolvent, so that a suit against him would produce only trouble and expense. In fact, the plaintiff has given no standard (178) whereby his injury can be measured. I therefore think that at common law the plaintiff cannot recover. But if he had declared upon the statute (I mean that of 1796) I am rather inclined to think that he could have recovered, notwithstanding its partial repeal by the act of 1820. I call it partial, for some of its features are retained by the repealing act, for that declares that he who acts as this defendant is alleged to have acted shall be liable to pay the debts of the debtor. And it has been decided in this Court that a repeal of a penal law releases all penalties, even those given to the party aggrieved, although actions may be pending for them at the time of the repeal, upon the ground that there is no longer a legislative will to inflict the penalty, and that it is not an interference with the rights of individuals acquired under a law whilst it was in force, but the revocation of a mere gratuity which the Legislature have thought proper to confer upon an informer or the party aggrieved, and which it can revoke at pleasure. In this case we have no such legislative declaration, for at no time since the passage of the act of 1796 down to the present time has the Legislature signified its intention that persons guilty of acts such as charged in this case should be exempt from the penalties of that act, for that feature of the act which charges this defendant was retained in the repealing act, and was sanctioned *uno flatu* with it; there was not a moment of

time between them; but the Court is prevented from taking this view of the case, the act not being declared on. *Scroter v. Harrington,* 8 N. C., 192, and authorities there cited. For the reasons given in the foregoing part of this opinion, I think a new trial should be granted.

TAYLOR, C. J., concurred.

PER CURIAM. New trial.

Cited: March v. Wilson, 44 N. C., 152; *Booe v. Wilson,* 44 N. C., 184; *Jones v. Biggs, ib.,* 367; *Moore v. Rogers,* 48 N. C., 96.

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(179)

WHITLEY v. BLACK, McKINNIE AND BURN.—From Wayne.

1. Writs of error are necessary only when the court has *power to act,* but mistakes the law.

2. But when a court has by law *no authority to act* its acts are void and may be set aside on motion.

THE plaintiff had obtained a judgment against the defendants Black and McKinnie in the county court of WAYNE, at its session in August, 1821, whereupon a writ of *fi. fa.* issued returnable in November, 1821. On this writ the plaintiff directed that no proceedings should be had, and by his direction a writ of *ca. sa.* was issued, returnable in February, 1822. On 29 December, 1821, the defendants executed to the plaintiff a bond, pursuant to the provisions of the "act for the relief of honest debtors." At the sessions of Wayne County court held in February, 1822, the defendants Black and McKinnie failing to appear according to the condition of the bond, judgment for the penalty was, on motion, rendered against the defendants, pursuant to the act, and execution issued thereon. The "act for the relief of honest debtors" had been repealed by the Legislature in December, 1821, and was not in force at the time judgment was rendered against the defendants on the bond. At its session in February the county court of Wayne, *on motion,* ordered that the execution against the defendants should be set aside and the judgment of which it was a consequence should be vacated. The Superior Court of Wayne, on appeal, confirmed the order of the county court, whereupon the plaintiff appealed to this Court.

(180) *Gaston for plaintiff.*

Hawks for defendants.

TAYLOR, C. J. A proceeding is authorized by the Act of 1820, and an authority confided to the county courts, altogether different from the usual common law process in civil cases. When the first judgment was entered upon the bond the Act of 1820 had been repealed and made void, and from thence forward all proceedings had under it were *coram non judice;* they were not merely reversible for error, but (181) absolutely *null;* for it is clear that no proceedings can be taken under a repealed statute, though commenced before the repeal, without a special provision for that purpose. When an inferior jurisdiction is confined to some particular things, and the suit there is for something else of which they have no jurisdiction, all is void, and can by no admission be made good. 1 Salk., 202. One of the cases cited is very strong, for there the party had given in a schedule of his effects and was prepared to avail himself of an insolvent law then in force, but the court on an unjustifiable pretense postponed the application to a subsequent session, before which the law was repealed, and it was properly held that no step could be taken by the quarter sessions after the repeal. Upon the distinction between a void and a voidable judgment, I think the order to vacate was properly made in this case, and that the judgment should be affirmed.

HENDERSON, J. By the Act of 1821, the act for the relief of honest debtors was repealed, and all power of proceeding under that law ceased. The judgment in the present case was entered up under an impression in the court that the proceedings pending at the time the law was repealed were not affected by that repeal, and judgment was rendered according to the law as they understood it. That act authorized judgments to be rendered up in a summary way upon motion, against persons not brought into court by process. The judgment in the present case was therefore not only a judgment contrary to or in opposition to the law as to the liability of the defendants, but in opposition to the rules of practice and procedure prescribed to the court. For the law was repealed, not only as to the liability of the defendants, but also as to the summary mode of proceeding, for which latter reason I think the judgment not erroneous only, but absolutely void and liable to be vacated by any succeeding court. Writs of error are (182) necessary only where the court has power to act but mistakes the law; therefore for error of law only a superior tribunal can reverse the judgment. But where a court has not by law an authority to act its acts are void and may be set aside on motion. The propriety of considering a judgment void in cases of this kind, viz., where the court

affect to act in a summary manner without bringing the defendant before them, when the law does not authorize that summary proceeding is seen by viewing this as a judgment rendered in one of our Superior Courts, whose judgments cannot be examined into for error in law in any manner, but by an appeal to this Court, and before the establishment of this and the late Supreme Court in no manner at all. The consequence would be that a person might be ruined, as not having an opportunity of being heard, and this Court, not possessing the power of issuing a writ of error, and an appeal being attainable only by an application to the Court during the term at which the judgment was rendered.

HALL, J. I entertain some doubts in this case, because the judgment sought to be vacated might be reversed by writ of error; however, I am not prepared to say that it ought not to be vacated as moved for, and as done in the Superior Court.

PER CURIAM. Affirmed.

Cited: Swaim v. Fentress, 15 N. C., 604; *Pettijohn v. Beasley,* 18 N. C., 256; *Dobbin v. Gaster,* 26 N. C., 74; *Newsom v. Newsom, ib.,* 388.

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(183)

JOHNSON v. PATTERSON.—From Wilkes.

Where witnesses are called to prove declarations made by a witness inconsistent with what he deposes on the trial, it is perfectly regular in reply to show other declarations made by the same witness in affirmance of what he has now sworn, and that he is still consistent with himself.

TROVER, brought to recover damages for the conversion of a horse. On the trial below the plaintiff proved by one Bailey that it was agreed between the plaintiff and witness, who was on a journey to Tennessee, that a temporary exchange of horses should be made between them; that the witness should leave his horse with plaintiff and ride that of plaintiff to Tennessee and back again; and if on his return both were satisfied, to make a permanent exchange, witness to pay to plaintiff $25 as the difference of value between the horses, and if either were dissatisfied witness was to pay plaintiff $10 for the use of his horse. The witness proceeded on his journey with the horse, which is the foun-

dation of the present action, and in Tennessee was overtaken by the defendant, who had pursued him from this State. The defendant was agent for the firm of Waugh & Finley, and when he overtook witness charged him with having removed from North Carolina a person indebted to the firm of which he was agent. Witness then, on condition that defendant would permit him to go unmolested, and in satisfaction of the claim which defendant set up against him, surrendered the horse in controversy to the defendant. The defense relied on was that the exchange of horses between plaintiff and Bailey was complete, and plaintiff had no title. To prove this two witnesses, Austin and McNeilly, were introduced by defendant, who swore that in conversation with Bailey and plaintiff, both when they were apart and also in the presence of each other, they stated that an exchange had taken place between them, but said nothing of any conditions. The (184) plaintiff then called a witness, Foster, who proved that he heard plaintiff tell Bailey a few days before he started for Tennessee, and after the exchange, to take good care of the horse and not dispose of him before his return. The evidence of this witness was objected to by defendant, but received by the court. The court left it to the jury to collect from the evidence whether the exchange between Bailey and the plaintiff was permanent or made only for a special purpose. The jury found a verdict for the plaintiff. A rule for a new trial was obtained and afterwards discharged by the court, and judgment for the plaintiff. Defendant appealed to this Court.

TAYLOR, C. J. The question in controversy between these parties was whether the horse belonged to the plaintiff or to the witness, Thomas Bailey, under whom the defendant claims, and this depended on the fact whether the plaintiff and Bailey had made an absolute or conditional sale. For the purpose of proving that the contract was of the latter description, Bailey was called on as a witness for the plaintiff. To destroy the effect of his testimony Austin and McNeilly are introduced on the other side, who testify to declarations made by Bailey, tending to show that the exchange was absolute, which declarations, if believed, go to impair the credibility of Bailey. It is, therefore, perfectly regular for the plaintiff in reply to this evidence to show other declarations made by the witness in affirmance of what he has now sworn, and that he is still consistent with himself. Gilb. Ev., 135. It is admissible in another point of view: The defendant claims under Bailey, and what he said concerning the title while he was in possession is evidence against the defendant. *Guy v. Hall,* 7 N. C., 150.

(185) HALL, J. This case seems to have been fairly left to the jury under the charge of the court; evidence was offered on both sides, and the jury were the proper judges of it, and I cannot see any objection to the verdict they have found.

But it has been objected that the testimony of Austin ought not to have been received when he related a conversation between himself and the plaintiff, and also a conversation which had taken place at another time between himself and the witness Bailey. It must be kept in view that at the time when both these conversations took place the title to the horse was either in the plaintiff or in the witness Bailey, and that it was subsequent to that time that any claim was set up to the horse by the defendant. Under these circumstances, it was as proper that those conversations should be given in evidence, as any contract made at that time by the plaintiff and that witness. Evidence of those conversations may not be so strong to fix the title of the horse as a contract made by the parties, but it is evidence tending to the same end.

I therefore think the rule for a new trial should be discharged.

HENDERSON, J., concurred.

PER CURIAM. No error.

Cited: Hoke v. Fleming, 32 N. C., 266; *Satterwhite v. Hicks,* 44 N. C., 108; *March v. Harrell,* 46 N. C., 331; *Roberts v. Roberts,* 82 N. C., 31; *Magee v. Blankenship,* 95 N. C., 568; *Davenport v. McKee,* 98 N. C., 506; *Burnett v. R. R.,* 120 N. C., 517; *Cuthbertson v. Austin,* 152 N. C., 338.

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(186)

WATT v. GREENLEE.—From Burke.

1. A., having been arrested for a larceny at the instance of B., and on examination regularly discharged, brought an action for malicious prosecution against B. In this action, to rebut the defense relied on, *viz.*, information of another which afforded *probable cause*, A. may be permitted to prove that B. was present when two witnesses swore before a magistrate to facts proving the information which B. had received to be untrue, and A. need not produce the record of the proceedings or warrant before the magistrate to lay a foundation for the introduction of this testimony.

2. Evidence is also admissible to show malice in B. that A. was the only witness bound by recognizance to appear in support of a prosecution for felony then pending against the brother of B.

WATT *v.* GREENLEE.

THE forge of one Murphey had many years before been washed away, and the iron bands on one of the large wheels had for some time been missing. The defendant obtained a warrant against the plaintiff, charging him with having committed a larceny of one of these bands. On this warrant he had been apprehended, and after examination was discharged. The plaintiff then brought this action for a malicious prosecution. The defense was probable cause, and to support it the defendant proved that he had been informed by Martin, the smith, to whose shop Watt, the plaintiff, had sent a piece of iron, that he, the smith, believed it to be a part of Murphey's band. To rebut this testimony, plaintiff proved by one Shelton that previous to the issuing of the warrant against plaintiff the witness and one Pleasant Watt had both declared on oath before a magistrate, Brown, and in the presence of Greenlee, the defendant, that the iron sent to the smith's shop had been purchased by plaintiff of the witness Shelton; and for the purpose of showing malice in the defendant the plaintiff produced the record of a prosecution for felony against the brother of the defendant, from which it appeared that at the time the warrant was obtained against the plaintiff, Watt, he was the only witness bound by recognizance to appear in support of the indictment which was still pending (187) against defendant's brother.

The introduction of this record was opposed by defendant, on the ground that it was irrelevant to the issue, and the evidence of Shelton was objected to because Pleasant Watt, whose declarations on oath Shelton proved, was still alive, and plaintiff had not produced, as it was incumbent on him to do, a warrant showing the nature of the proceedings before the magistrate Brown. The presiding judge admitted the evidence, and there was a verdict for the plaintiff.

A rule to show cause why a new trial should not be granted because of the improper admission of testimony was obtained, and afterwards discharged by the court. Judgment for the plaintiff and appeal by defendant.

TAYLOR, C. J. This is a motion for a new trial on the ground that improper testimony was admitted by the court in two instances, viz., the circumstances related by the witness Shelton, and the record of a prosecution against David Greenlee, a brother of the defendant.

To entitle the plaintiff to a recovery in this action, it was necessary for him to prove that a warrant had been taken out against him as described in the declaration; that it originated in the malice of the defendant, and that the proceedings were determined; but the essential

ground of the action is that a legal prosecution was carried on without a probable cause which must be expressly proved and cannot be implied. *Legget v. Blount,* 4 N. C., 561. The existence of a probable cause was relied on by the defendant, and to prove that it was real he confided in the information of Martin relative to the piece of iron, and his belief that it was a part of the band of Murphey's wheel. Now any circumstances tending to show that the defendant had reason to doubt
(188) the correctness of Martin's relation, and that he was present when the fact of its being part of Murphey's wheel was actually disproved by Shelton on oath are relevant towards showing the want of probable cause. *Bundy v. Bethune,* 1 Marsh, 220, 5 Taunton, 580. It is of no consequence what was the nature of the proceedings on which such evidence was given, the only inquiry being whether the defendant was present when Watt and Shelton gave their explanations concerning the iron; for, if he was, it is a circumstance from which the jury will draw the inference whether or not there was probable cause. If there were none, malice would be implied, and it is pertinent, as giving strength to this inference, to show that the plaintiff was, at the time the warrant was taken out against him, the only witness in a prosecution for felony against the defendant's brother. No improper testimony, therefore, has been received, and the motion for a new trial must be overruled.

HALL, J. I think it was unnecessary to produce the warrant relative to which Shelton and Watt gave evidence before the justice of the peace, because in this case, the title to the iron is not in question, nor is it necessary for the same reason that Watt should be called to declare on oath what he swore to before the magistrate relative to the iron. That proceeding is given in evidence now collaterally to prove a knowledge in the defendant that the plaintiff had not improperly become possessed of the iron, and that there was no probable cause for the prosecution. I also think it was competent to show in evidence the indictment against the defendant's brother on which the plaintiff was indorsed as a witness, because it is from such circumstances that the jury are at liberty, if they think proper, to believe that the prosecution was malicious, and on that account give adequate damages. I
(189) therefore think the rule for a new trial should be discharged.

HENDERSON, J., concurred.

PER CURIAM. No error.

LONG v. LONG.—From Washington.

The act of Assembly of 1814 authorizes a dissolution of the marriage contract for two causes only; and a single act of adultery in a married man whereby he becomes infected with a disease which he communicates to his wife, is not a sufficient cause for a divorce, because the injury received by the wife is not communicated under such circumstances as constitute any one of the causes provided for in the act.

PETITION for divorce from the bonds of matrimony, and for *alimony*. The petitioner set forth that on 15 March, 1818, she intermarried with the defendant, and that after the marriage such indignities had been offered her by her husband as rendered her condition intolerable; that by the cruel treatment of her husband in communicating to her a most hateful and dangerous disease her life had been endangered; that she had been abandoned by the defendant, and that he had lived in adultery with other women after having abandoned the petitioner.

The defendant in his answer, admitted the marriage, admitted his having been guilty of a single act of adultery, admitted that he had reason to believe he had communicated a loathsome disease to the petitioner, but averred that at the time, he was ignorant that he was afflicted with it, and denied living in adultery with other women, or having left the petitioner with any intention of abandoning her; but averred that any separation which had taken place during the marriage was either by consent or owing to the voluntary departure of the petitioner. From the evidence on the part of the petitioner it (190) appeared that on 9 August, 1818, when the first separation took place, a division of property was made between the parties whereby the petitioner received a portion of the household goods. About 12 months after this separation the parties again lived together for a short period of time at the house of an aunt of defendant, where the petitioner becoming very sick she was removed to her father's. In the period between the first and second separation, Long, the defendant, spent a short time with his wife at the house of her father, but, being dissatisfied, did not remain. It was proved by two physicians that the petitioner was for some time diseased after she returned to the house of her father, and it was also proved that from the period of that return she had not received her husband to conjugal embraces. On the part of the defendant it was proved that the petitioner declared her willingness to live with her husband, that he had treated her with affection, that she was attached to him, and did not wish a divorce, but that her parents did, and that her separation from Long was not a voluntary

act, but was owing to others. In April, 1821, the petitioner had again declared that the separation between herself and her husband was not attributable to the fault of either, but to others. It was also proved that previous to any separation the defendant had been treated with great harshness by the mother of the petitioner, that he had uniformly treated his wife with affection, and after the separation had written frequently both to her and her father, entreating her return. The character of the defendant for sobriety and temperance was good, and at the time he communicated disease to his wife he was ignorant of having it, and upon discovering that he had done so reflected on himself in the severest terms of reproach.

Several issues were submitted to the jury, the 3d and 4th of which were as follows:

(191) 3d. Did the defendant, Myles Long, communicate the venereal disease to his wife?

4th. If he did so, has the petitioner, Charlotte, since admitted him into conjugal society and embraces, knowing that fact?

The jury found all the issues in favor of the defendant, and petitioner obtained a rule to show cause why a new trial of the 3d and 4th issues should not be granted. Upon argument the rule was discharged. It was decreed that the petitioner pay costs, and the petition be dismissed. Whereupon the petitioner appealed.

Gaston for appellant.
Rodman for appellee.

PER CURIAM. This is a petition for a divorce under the act of Assembly of 1814, which authorizes a dissolution of the marriage contract for two causes only. One of them is out of the question here; and the other, viz., living in adultery, though alleged in the bill, is denied in the answer, and it is not only not sustained by the evidence, but is distinctly disproved. In no view presented by the case

(192) could a divorce *a vinculo* be granted under the law.

The alternative prayer of the petition for a divorce *a mensa et thoro* is authorized by the act where the husband abandons his family, or turns his wife out of doors, or by cruel and barbarous treatment endangers her life, or offers such indignities to her person as to render her condition intolerable or life burdensome. The only charge coming within this description, is that which the third issue was framed to ascertain, which, though found in favor of the defendant, is nevertheless supported by the evidence of physicians, and even admitted in

the answer. This issue being found against evidence, we should be disposed to grant a new trial of it and the one following, as moved for, if a different verdict could change the result in point of law. But if those issues were found according to the allegations in the petitions, a divorce must still be withheld, the injury received by the petitioner not having been communicated under such circumstances as constitute any one of the causes provided for in the act. It is not meant to extenuate the adulterous act by which the defendant became infected, or to lessen the reprobation which it justly merits. That has lost no part of its original turpitude, and in the view of moral justice the defendant should bear the full weight of all its consequences. But we must estimate the character of the offense according to a positive law, and not attach legal effects to an act of one description which the law has connected with another. The evidence shows that the defendant was not impelled by any settled purpose of mischief, or moved by that brutal disposition which shows itself in repeated acts destructive of the happiness of the married state; that he was unconscious of his situation at the time; and when he afterwards discovered its calamitous effect on the petitioner he expressed his sorrow in the tones of unfeigned remorse. It is in proof that the defendant's general demeanor towards his wife was kind and affectionate, and the declarations of the wife to some of the witnesses show that these parties are very (193) far from being in a state of irreconcilable discord. The busy whispers of officious friends have fomented their occasional bickerings, and the intrusion of relations into the factions of the family has precipitated a separation which might have been avoided. It is to be hoped that the interposition of judicious friends will enable these parties to find their way back to domestic harmony, and the evidence in the case warrants the belief that their dislike towards each other will be found the least formidable obstacle to a reunion. A new trial is *refused.*

PER CURIAM. No error.

RHODES v. HOLMES, SURVIVING EXECUTOR OF SPILLER.—From Robeson.

1. Sales of slaves by *parol* are valid as between the parties to such sales, and where neither purchasers or creditors are affected.

2. The Act of 1784, chapter 225, section 7, was made for the benefit of creditors only.

3. When a bill of sale is not necessary, if one be given the vendor therein shall not set up want of registration against the vendee's title.

4. An unregistered bill of sale for a slave, as between vendor and vendee, may be used as evidence of title, and the execution thereof may be proved on the trial according to the rules of evidence in other cases of deeds.

COVENANT. The defendant's testator in his lifetime had sold and delivered to the plaintiff certain negroes, and in the bill of sale for said negroes he covenanted in the following words, viz.: "And I hereby promise for myself, my heirs, executors, and administrators, to warrant and defend the said negroes as before-named unto the said Rhodes, his heirs and assigns forever, against the claim of all persons whatsoever." The bill of sale was duly proven by the oath of the subscribing witness, and ordered to be registered 30 October, 1798, and the following indorsements were made thereon, viz.: "The 29 November,
(194) 1798, then was the within bill of sale registered in the register's office of Robeson County, registered in Book H, folio the 274th." Signed, "Wm. Regan, Ass't." "Registered in the register's office of Robeson County, Book H, page 274." Signed "Neill Buie, Register." It was admitted that this latter indorsement was made after the trial of the suit below.

The defendant below objected to the introduction of this bill of sale in evidence, because it appeared from the certificate of Wm. Regan that he was only an *assistant*, and he signed his name as such, and because the certificate of Neill Buie, the register, was without a date, and therefore that the bill of sale had never been *duly* registered. This objection was sustained by the court and the evidence rejected. The plaintiff then offered to prove the execution of the bill of sale by introducing testimony of the handwriting of the subscribing witness, who was dead, which also was refused him by the court, and he was nonsuited. A rule was then obtained to show cause why the nonsuit should not be set aside and a new trial granted and on argument the rule was discharged and judgment accordingly, from which judgment the plaintiff appealed to this Court.

Seawell for plaintiff.

TAYLOR, C. J. That sales and gifts of slaves by parol were valid under the act of 1784, as between the parties, and when there were neither purchasers nor creditors to be affected, is a construction of that act which was probably coeval with its passage. In a case decided in 1796, it was admitted by the court and bar to have prevailed anterior to that period, and it has not since been departed from. *Knight v. Thomas,* 2 N. C., 289. Now, if a sale by *parol,* and according to the *common law,* was available between the parties, the reason is stronger wherefore a *bill of sale* shall be so, since the evidence of the contract does not so much depend upon the memory of witnesses. The want of formal bills of sale and the want of a law for perpetuating them are the mischiefs pointed at by the Legislature as producing injury to others by secret sales and gifts. Where a bill of sale was *necessary,* it was essential to the title that it should be recorded for the purpose of giving full notice to purchasers and creditors. But where a bill of sale was *not necessary,* but merely made by the parties from (196) abundant caution, there can be no reason why the vendor should set up the want of registration against his vendee's title; for he does not want any notice of the contract, and no other person can suffer injury from the omission to register.

If the second section of the act of 1789, ch. 315, were a separate and unconnected statute, I admit that its effect would be to render "void and of no force whatever" this bill of sale for want of registration within *twelve months* after the making thereof. But it was not only made in *pari materia* with the act of 1784, but with the express and only view of allowing a further time for the recording bills of sale and deeds of gift where it was neglected before that period, and permanently enlarging the time within which future bills of sale and deeds of gift should be recorded. In other words, where bills of sale and deeds of gift are necessary under the act of 1784 they may and must be recorded according to the act of 1789. But where they are not required to be made by the first act they need not be recorded by the latter. The same remarks apply to Laws 1792, ch. 363.

HALL, J. In 1796, it was decided in *Knight v. Thomas,* 2 N. C., 289, that a *parol* sale of slaves was good as between the parties thereto, and that Laws 1784, ch. 225, sec. 7, which declares that all sales of slaves shall be in writing, and attested by one credible witness, and registered within nine months, was made for the benefit of creditors only.

In the present case it appears that the negroes, for the value of which this suit was brought, were delivered to the purchaser, and if

there had been no bill of sale the sale would be valid as between the parties, according to *Knight v. Thomas.* But the question is, Is the purchaser in a worse situation than if a bill of sale not regis-
(197) tered had not been executed? If the act of 1784 was made for the benefit of third persons, I cannot think he is; for if that act will dispense with a bill of sale altogether, I am at a loss to see why it will not dispense with a registration of one, for that too was required for the benefit of third persons. I cannot but think that an unregistered deed as between vendor and vendee may be used as evidence of title, as equal at least to parol evidence.

It may be thought that the act of 1784 in this respect is like Laws 1715, ch. 7, sec. 1. That act declares "that no conveyance or bill of sale for lands, in what manner or form soever drawn, shall be good or available in law unless the same shall be acknowledged by the vendor or proved by one or more evidences, etc., and registered by the public register within twelve months." It is to be observed that title to personal property of any kind passed at common law by *parol* contract *or* by deed as completely as slaves now pass by registered deeds, and as between the parties the title to slaves may still be conveyed as at common law. But as to lands at common law, title to them could only be conveyed by *livery of seisin;* it could not be conveyed like personal property. But the Statute of Uses, 27 Hen. VIII., ch. 10, has given use to other modes of conveying real estate in which *livery of seisin* is dispensed with; and it is of those kinds of conveyances that the act of 1715 speaks. Before the Statute of Uses a deed of bargain and sale did not convey the legal title to land; but by virtue of the statute it has that effect, *provided* it shall be *registered,* for without registration it conveys no title. So that an *unregistered* deed of bargain and sale of lands and an unregistered bill of sale for slaves are different in this respect, that the first conveys no title at common law, the latter does; hence, before the deed of bargain and sale for lands is registered nothing passes. I mean if it is not registered in the time
(198) limited by law nothing passes; if it is, the title by relation passed by the delivery. The Statute of Uses, ch. 10, declares that no lands, tenements, etc., shall pass from one to another, etc., except by writing indented, sealed, and enrolled at one of the courts of Westminster, or else within the county or counties where the lands are situated.

But it was not practicable to register conveyances in this State according to the directions of the Statute of Uses. Hence it became necessary that the Legislature should point out the mode in which reg-

istration should be made, and they have done so by the act of 1715, and it is indispensable that conveyances under the Statute of Uses should be registered according to that act, or they are void; and if, as before observed, they are void under the act, they cannot at common law (as an unregistered bill of sale for slaves would do) convey any title. Therefore (without giving an opinion on the other point made in the case), I think the rule for a new trial should be made absolute and that the plaintiff be at liberty to prove the bill of sale according to the rules of evidence as in other cases of deeds.

HENDERSON, J., concurred.

PER CURIAM. New trial.

Cited: Palmer v. Faucett, 13 N. C., 242; *Bell v. Culpepper,* 19 N. C., 21; *S. v. Fuller,* 27 N. C., 29; *Carrier v. Hampton,* 33 N. C., 309; *Tooley v. Lucas,* 48 N. C., 148.

(199)

JONES v. LOFTIN.—From Lenoir.

A sheriff, having levied executions on the property of a debtor, may, by the consent of the debtor and the plaintiffs in the executions, act as the agent of the debtor and dispose of the property at private sale on credit; and a promise of payment made by the purchaser to the sheriff, as agent for the defendant, will enure to the benefit of the latter, and he may have his action thereon, because the acts of the sheriff in such case are not official but done in his individual character.

THE sheriff having in his hands writs of *fi. fa.* against the plaintiff, had levied them on two negroes, took the property into his possession and advertised it for sale. The creditors at whose suits the executions had issued were willing that the property might be sold on a credit, and on the day of sale the plaintiff requested some of his friends, and among others the sheriff, to assist him in finding a purchaser. The sheriff accordingly offered the negroes to the defendant for the sum of $400 at a credit of six months, and the defendant, after having seen the negroes and made inquiry into their characters, agreed to take them on those terms. It was thought necessary in order to secure to the defendant a title to the property that the sheriff should expose it to public sale, and after some bidding by others they were struck down to the defendant at the price of $230, not, however, before he had declared, in answer to a question by the sheriff, that he considered himself bound to pay $400 for them, whether his bid amounted

to that sum or not. There was contradictory evidence as to the fact whether the sheriff was to receive any compensation from the plaintiff for his services. A few days after the sale, the defendant brought the negroes to the sheriff, requesting him to take them back and alleging that he was defrauded in the contract. This the sheriff declined doing,

but said he would endeavor to prevail on plaintiff to take them
(200) back. Plaintiff, however, refused to do so. The defendant then,

by the direction of the sheriff, paid *the amount of his bid,* $230, and took the sheriff's bill of sale for the property, which he afterwards sold for $230. It was proved that the negroes were, at the time of sale, about 45 years of age, and that when the sheriff made the contract with defendant he distinctly informed him that he could give him no information about the negroes, but referred him to one Dunn, with whom defendant had some conversation previous to contracting. One of the negroes was sickly in appearance, the other was a remarkably good servant, but indolent. One of the witnesses, Engram, swore that he attended the sale with the view of purchasing, but on examination of the negroes declined doing so.

The present action was brought to recover the difference between the sum contracted to be paid and the amount of the bid.

On the trial below, the presiding judge instructed the jury that, unless the plaintiff was guilty of a fraudulent misrepresentation or concealment, the contract made by the sheriff as his agent was a valid one on which he was entitled to recover, notwithstanding the levy, public sale, the payment of the sum bid by defendant, and the sheriff's bill of sale. With regard to the fraud alleged by defendant, the law required of every man in making a bargain to use that precaution which a prudent and diligent man should do; and if, in consequence of not using such precaution, the defendant was imposed on, it was his misfortune or his fault, and he was without remedy. One of the negroes was only *indolent,* and this was not a defect which diminished her value, because it might be remedied by correction. That if there was a latent defect not communicated, and not discoverable by the precaution which the defendant, as a prudent and diligent man, ought

to have used, this circumstance should *diminish the amount* of
(201) plaintiff's recovery, but could not entirely *defeat* it.

A verdict was rendered for the plaintiff, and defendant moved for a new trial; the motion was overruled and judgment rendered pursuant to the verdict; whereupon the defendant appealed to this Court.

Gaston for appellant.
Mordecai for appellee.

HALL, J. In the investigation of this case upon its own (202) merits and circumstances there is no danger of violating any principle or rule of sound policy, because what was done was by the consent of all parties concerned—not only by the consent of the parties to this suit, but by consent of the plaintiffs in the executions under which the property purchased by the defendant was sold. The legal progress of the executions was suspended by the consent of all parties concerned, and what the sheriff then did was not in his official capacity as sheriff, but in his individual character.

I see nothing objectionable in the charge of the court. The defendant made no inquiry of the plaintiff relative to the condition of the negroes, nor did he examine them as he might have done. It seems that the witness Engram learned their condition from an examination of them. I think the rule for a new trial should be discharged.

TAYLOR, C. J. The recovery in this case is resisted on several grounds, one of which is that the promise to pay the price of the slaves was made to the sheriff; that the property was vested in him and divested out of Jones by the seizure on the execution. But, (203) because the sheriff may bring *trespass* or *trover* for the property, it does not necessarily follow that all title is taken from Jones; for the same actions may be brought by a carrier against a stranger who takes the property out of his possession, or by a factor, pawnee, or other person having a special property, each of whom is answerable for it to the person having the general property. In like manner, as the sheriff is answerable to the plaintiff in the action for the value of the goods seized, and as the defendant is discharged from the judgment and execution if goods are taken to the amount of the debt, it is essential to the safety of the sheriff that he should be armed with the means of protecting the property in his possession. Nevertheless whatever remains after the debt is paid belongs to the defendant in the action, who may recover it from the sheriff if it is received by him. Therefore, upon a sale by the sheriff the consideration moves from him to the amount of the sum which he is commanded to raise; but for the surplus the consideration moves from the defendant in the execution, and consequently a promise made to the sheriff as agent for the defendant in the execution will enure to the benefit of the latter. The custom of selling property at auction which is taken in execution, sanctioned as it is by usage, and I believe by some judicial decisions, is in general the safest way for all parties, as well as the most likely one to guard against abuses. But when, by the assent of all who are

interested in the property, an arrangement can be made to prevent its sacrifice and insure a sale for something like the proper value, while there is no rule of law or principle of policy forbidding such a course, it is strongly recommended by justice and humanity; and its evident effect in this very case has been beneficial both to creditor and debtor.

As to the objection arising from the imperfection of the slaves,
(204) there was neither a warranty or a fraudulent concealment; and even a warranty is not binding where the defect is obvious, as in the case of a horse with a visible defect, and of a house without roof or windows warranted as if in perfect repair. Here the unhealthiness of the man was visible in his appearance, and with respect to the indolence of the other slave the purchaser might have made the necessary inquiries. I will not say that the concealment of some great moral defect may not be fraudulent in the seller, but such an instance does not occur in this case. The verdict and judgment appear to be right.

HENDERSON, J., concurred.

PER CURIAM. No error.

COWLES v. BRITTAIN.—From Burke.

The sheriff may proceed on Sunday by distress to enforce the penalty authorized by a revenue Act of the Legislature for peddling without license. The revenue law is not liable to the constitutional objection of depriving the party of the right of trial by jury; nor does it violate the spirit of that clause of the Federal Constitution which prohibits the State from laying any imposts or duties on imports and exports.

TRESPASS. The plaintiff in 1819 appeared at the town of Morganton, in the county of Burke, in the capacity of a peddler, and as such for the space of one week exposed for sale and did sell goods and wares not of the growth or manufacture of this State. The plaintiff was the owner of two wagons employed in the transportation of these goods, one of which was under his own immediate direction, and the other in charge of one Kelly, the agent of the plaintiff, who also, at the same time and place with plaintiff, offered for sale and did sell a part
(205) of the contents of his wagon. The defendant, who was at that time sheriff of the county of Burke, demanded of the plaintiff a tax of $10 on each of the said wagons, offering the defendant a receipt and *written* licenses to peddle and hawk goods. The plaintiff

refused to pay any tax on the wagon and goods in the possession of Kelly, and offered to pay the tax on the property in his own possession, provided the sheriff would furnish him with a *printed* license. This the sheriff was unable to do, and plaintiff refused to pay the tax. The plaintiff continued to sell the goods until the sheriff demanded and received from him the sum of $100, inflicted as a penalty by the revenue act of 1818. Kelly had left Morganton with the wagon and goods in his care previous to the payment by plaintiff of this penalty, and on Sunday, when the plaintiff was about to leave the place, the sheriff demanded from him the further sum of $100 as a penalty for the sales made without license by Kelly, the agent of the plaintiff. This sum plaintiff refused to pay, whereupon the defendant took into his possession certain of the plaintiff's goods sufficient to raise the amount of the penalty. This action of *trespass* was then brought, and on the trial below the judge instructed the jury that on the subject of levying and collecting taxes the will of the Legislature constitutionally expressed was the law of the land, and therefore the revenue act was not unconstitutional as related to the said penalty and the collection thereof; that the failure of the sheriff to be prepared to deliver to the plaintiff a *printed* license did not authorize the plaintiff to peddle and sell his goods, but might possibly have given him a remedy of a different nature; and that if he had sold his goods as alleged by the defendant without having paid the taxes and obtained printed licenses, he had incurred the penalty; and also that the seizure on Sunday morning was legal and the sheriff not subjected thereby. The jury returned a verdict for the defendant, and plaintiff obtained a rule to show cause why a new trial should not be granted. Upon cause shown the rule was discharged and judgment rendered pursuant to the verdict, whereupon plaintiff (206) appealed.

The cause was argued at a former term by *A. Henderson* for the appellant, and at this term by *Seawell* and *Wilson* for the appellee.

TAYLOR, C. J. The distress to enforce the penalty authorized by the Revenue Act of 1818 does not come within the meaning of the terms, "writ or other process," which are forbidden by the act of 1777, ch. 18, to be executed on a Sunday. The prohibition is confined to such original or judicial process as may as well be executed (207) on any other day; but it results from the nature of this proceeding that it may be executed on any day, for as the persons on whom the law is meant to operate are changing from day to day the scene of

their traffic, the penalty might frequently be evaded by neglecting to take out a license during the week and removing to another county on Sunday. The objection to paying the tax for want of a printed license is repelled by the positive terms of the act, which make paying the tax and obtaining a license a condition precedent to the right of peddling. The penalty is incurred by selling without a license, from whatever cause it may have proceeded that the seller did not procure one. Nor is the act imposing the penalty liable to the constitutional objection of depriving the party of the right of trial by jury. The mode of levying, as well as the right of imposing taxes, is completely and exclusively within the legislative power, which it is to be presumed will always be exercised with an equal regard to the security of the public and individual rights and convenience. The existence of government, depending on the prompt and regular collection of the revenue, must, as an object of primary importance, be insured in such a way as the wisdom of the Legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers intrusted with the execution of the laws transcend their powers to the injury of an individual the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue; and it is not believed that such a mode was contemplated by the Constitution.

The Court has thought it necessary to consider whether this tax
(208) might not violate the spirit of section 10, Article II, Constitution of the United States, which prohibits the State from laying any imposts or duties on imports and exports without the consent of Congress. But, upon reflection, this tax does not seem to come within the meaning of that part of the Constitution. It is certainly not a duty upon the articles imported, for they would have avoided the tax but for being vended in a particular manner. It is more properly a tax upon the calling or employment, which is a subject of internal police, which the Legislature has a right to regulate. It is true that foreign merchandise which has once paid an import duty to the United States may thus be incidentally subjected to an additional tax; but the same objection might be made to the tax on retail stores, licenses to taverns, and auctioneers, where foreign articles are vended. It has never been doubted that the States retain a complete power to raise their own revenue from every source that has not been surrendered to the United States and prohibited to the States, and the duties on im-

ports and exports are alone of that description. The judgment of the Superior Court appears to be correct throughout, and must be affirmed.

BY THE COURT: Affirmed.

Cited: Range Co. v. Carver, 118 N. C., 332.

(209)

McINTIRE & CO. v. OLIVER, SURVIVING PARTNER OF THOMAS & OLIVER.
From Duplin.

An acknowledgment of one partner, made *after* the dissolution of the firm, will prevent the operation of the statute of limitations on a claim existing against the copartnership.

ASSUMPSIT for goods sold and delivered, and the question presented was whether the acknowledgment of a copartner, made *after* the dissolution of the copartnership, prevented the operation of the statute of limitations on a claim existing against the firm?

Gaston for plaintiff.

TAYLOR, C. J. A partner cannot, after the dissolution, incur any responsibility for the firm which did not exist before; but this debt was contracted during its continuance, and the right to it still subsists though the remedy is suspended, and the acknowledgment of any one partner is sufficient to revive the remedy after the dissolution. This the authorities clearly show, and the later ones go further and admit the acknowledgment of one of the partners on the ground that their power continues with respect to rights created pending the partnership after the dissolution. But the case now to be decided does not call for an opinion on that point.

HALL, J. The dissolution of the partnership, I think, has no effect upon this case. It is true that event put it out of the power of either partner to exercise any power derived from the articles of partnership, such as entering into contracts on behalf of the firm; but obligations created during its continuance, as far as they relate to third persons, lose nothing of their force by its dissolution. But it does not appear to me that this case depends at all upon that considera- (210) tion. It appears that both before and after the dissolution of

the partnership, they were jointly bound, and if they had jointly assumed and were jointly bound it matters not whether they were partners of any particular firm or not. In their joint assumpsit and joint obligation to pay the debt to the plaintiffs they were *quoad hoc* to be considered *partners*. It has nothing to do with a general partnership; it is sufficient if they jointly owed the debt; they thereby, as to that transaction, made themselves partners, and as such I think the acknowledgment of one takes the case out of the statute of limitations. *Whitcomb v. Whiting*, Doug., 652, appears to me decisive of this case. There it was held that an admission of one of several drawers of a joint and several promissory note takes the case out of the statute as to the rest. *Wood v. Braddock*, 1 Taunt., 104, is in point. The admission made by one of two partners after the dissolution of the firm, concerning joint contracts made during the copartnership, was held sufficient to charge the other partner. Let the rule for a new trial be discharged.

HENDERSON, J., concurred.

PER CURIAM. No error.

Cited: *Willis v. Hill*, 19 N. C., 234; *Falls v. Sherrill, ib.*, 375; *Walton v. Robinson*, 27 N. C., 343, 344; *Cummins v. Coffin*, 29 N. C., 197; *Hubbard v. Marsh, ib.*, 205; *Green v. Greensboro College*, 83 N. C., 452; *Wood v. Barber*, 90 N. C., 79; *Wells v. Hill*, 118 N. C., 908.

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(211)

SHEEPSHANKS & CO. v. JONES.—From Hertford.

Freeholders of another State, owning no freehold in North Carolina are not qualified to serve on a jury in this State.

SCIRE FACIAS, under the act of 1806 to secure creditors against fraudulent and secret conveyances of property by insolvent debtors. On the trial of the issues below there was a deficiency of jurors of the original panel and the sheriff summoned of the bystanders as *talesmen* two who were freeholders of Virginia, but not of North Carolina. They were challenged by the defendant as incompetent jurors, being citizens of Virginia and owning no freehold in North Carolina, but the court disallowed the challenge, and they were sworn and impaneled on the trial of the issues. The jury found the issues in favor of the plaintiffs, and judgment was rendered that the sheriff expose to public sale the

houses and lots in Murfreesboro, which were bid off by the defendant upon a secret trust for the benefit of the debtor, one Howell Jones. From this judgment the defendant appealed to this Court. There were various other points, which it is deemed unnecessary to report, as in the opening of the case the Court directed the counsel of the appellant to confine themselves to the point stated above.

Gaston and Seawell for appellant.
Hogg for appellee.

TAYLOR, C. J. The several acts of Assembly on the qualifica- (213) tions of jurors, as far back as they can be traced, seem to warrant the position that talesmen shall be freeholders of the same description with the original panel; and in practice it has always been considered that a freeholder in another State only is not qualified. If our own laws do not permit our own citizens who are not freeholders in this State to serve on a jury, it cannot be considered as the denial of a right or privilege to the citizens of another State, who are not freeholders here, to consider them disqualified. For, upon the supposition that the right to serve on a jury here was claimed by the citizen of another State as a privilege or immunity, he must show that it is enjoyed by our own citizens not otherwise qualified than himself; otherwise it would be a claim, not of privileges *equal* to but *greater* than those of our own citizens. As the exception was taken by the defendant and overruled, there must be a

PER CURIAM. New trial.

(214)

ADMINISTRATRIX OF UFFORD v. LUCAS.—From Hyde.

Admissions made to the sheriff by an individual that he had no title to a slave on which the sheriff had levied an execution are not *conclusive* evidence of the want of title in the person making the admission. Where during the pendency of a suit leave is obtained to amend the writ and change the form of action, though such amendment be not made on the record, if the suit be tried in its amended form, this Court will consider the amendment as having been actually made.

FROM the record transmitted to the Court in this case it appeared that the writ was in *detinue* for a negro slave Lewis, and that during the pendency of the proceedings in the court below leave was obtained

to amend the writ, but it did not appear from the record that any amendment had ever been made. The case was considered and tried in the court below as an action of *trover*.

It appeared that in 1811 a judgment had been obtained against one Bell, on which executions had regularly issued to the coroner of the county of Hyde, who, after the death of Bell, levied on the negro Lewis, in the possession of one John Ufford, his executor, and on 7 July, 1818, sold the same at public sale to one Dukes.

It was proved on the trial that during the bidding Dukes was sent for by Ufford, who was sick at the time; that the bidding was suspended during his absence, and that on his return Dukes said that Ufford directed him to buy, and he accordingly bid off the negro. It further appeared that previous to the sale Ufford had been heard to request Dukes to purchase the negro for him. The coroner testified that Dukes paid him about $20 of the purchase money, that the balance of it was never paid him by any one, but from a belief that it had in some manner been settled by Ufford, he executed to Ufford a (215) bill of sale for the negro, and immediately after the sale the negro went into the possession of Ufford. Dukes testified that Ufford was indebted to him at the time of the sale in the sum of $200; that Ufford requested him as his agent to purchase the negro at the sale, stating that by the purchase he would be enabled to pay the debt of $200, and another debt due one Jordan. Dukes was instructed by Ufford to bid to the amount of $375 for the negro, and after the sale Dukes, at the request of Ufford, paid to the coroner $50, the amount of the execution. The testimony of a witness, Blount, proved that he had previous to the sale been requested by Ufford to act as his agent in the purchase of the negro, but afterwards Ufford declined his assistance. After the sale Ufford requested witness to ascertain what price could be obtained for the negro from a trader in slaves then in the place. This witness also proved that Dukes demanded from the coroner a bill of sale for the negro and that the officer replied it was not then convenient to give him one, but that he would do so at some future time; that the coroner demanded also of Dukes the amount that the negro sold for, and that Dukes replied it was unnecessary to pay the whole money, as the surplus would be immediately paid by the coroner to Ufford, to whom it belonged.

The defendant relied on a bill of sale from the sheriff and introduced evidence of a judgment against Dukes, obtained in Craven Superior Court, and execution thereon, a levy on the negro Lewis by the sheriff

on 10 July, 1818, by virtue of said execution and a sale on the 27th of the same month, at which defendant became the purchaser.

A witness, Moore, testified on the part of the defendant that he was present at the sale made by the coroner on 7 July; that he asked Dukes privately if he was bidding for himself, and Dukes in reply affirmed that he was. At this time Dukes was very much involved and in desperate circumstances. On the next day Dukes told the (215) witness that he had paid the amount of the execution and was going to get possession of the negro. On the evening after the sale Ufford told the witness that the title to the negro was in Dukes and not in himself. Another witness, Jordan, also testified that on 10 July, when the sheriff levied on the negro, Ufford told the witness that the title to him was in Dukes and urged him to buy of Dukes. The sheriff testified that he had several writs of *fi. fa.* in his hands against Dukes and that he could find no property to satisfy them. On 10 July, understanding that Dukes had purchased the negro at the coroner's sale, and that Ufford claimed title to him, he asked Ufford if he claimed the negro Lewis, to which Ufford replied that he had no claim or title to the negro; that Dukes owned him and that he had just informed Jordan of the same fact. The negro was then levied on as the property of Dukes, and on 27 July, the day of sale, Ufford told the sheriff that, notwithstanding the former declarations made by him, Dukes had no interest in the negro further than to sell him and pay himself the amount of the debt due from Ufford to him. Ufford forbade the sheriff to sell, but produced no bill of sale to himself. The deputy of the sheriff swore that he made the levy on the negro, who was at the time in the field of Ufford, but unemployed. Ufford never in the presence of this witness claimed the negro, and did not object to the levy.

The court instructed the jury that if they believed the conveyance taken by Ufford was intended fraudulently to cover the property of Dukes, the defendant was entitled to a verdict; on the contrary, if they believed it was fair and *bona fide,* the plaintiff ought to recover.

The jury found a verdict for the plaintiff, and defendant obtained a rule to show cause why a new trial should not be granted. The rule was discharged, and from the judgment rendered pursuant to the verdict the defendant appealed to this Court. (217)

Mordecai and Rodman for defendant.

PER CURIAM. Whether the title to the slave was in Ufford or Dukes depended on much conflicting evidence, which was fairly summed up and left by the judge to the jury. Their verdict ought not to be dis-

turbed, unless the evidence preponderates very strongly against it, which we do not perceive that it does. The jury probably knew the witnesses and were able to judge of their credibility. Neither were the admissions of Ufford conclusive against his title; they formed a circumstance fit to be weighed and estimated with the other circumstances. The parties having agreed to amend, and all the proceedings after the agreement being in *trover,* we must consider it the same as if an actual amendment had been made; and so it must have been viewed by
(218) the parties, for the evidence of it is contained in the proceedings up to the rendition of the final judgment.

PER CURIAM. No error.

Cited: Barnard v. Etheridge, 15 N. C., 296; *Holland v. Crow,* 34 N. C., 280; *S. v. Yellowday,* 152 N. C., 79.

DEN ON DEMISE OF SLADE & HAUGHTON v. GREEN & RYAN.—From Chowan.

1. The utmost extent of the decisions in cases of boundary has been to permit *marked lines or corners* to be proven or shown when such marked lines and corners were not called for in the deed.

2. This rule violates principle, but it is now too late to vary it; but this Court will not go further into error and permit parol evidence to contradict or vary the description where there is no mark or vestige left; and, therefore, where a deed calls for a course from a point on a river different from the course of the river, and not calling for it, parol evidence shall not be received to vary the description and show that the line actually run at the time of the grant was the river.

EJECTMENT. The points in controversy arose on the title and boundaries of the defendants, who claimed the lands under a grant from the State to Jonathan Jacocks, dated in 1786. The grant was regularly authenticated by the seal of the State, with the signature of the Governor, and countersigned by the Secretary, J. Glasgow. The only evidence that the grant had ever been recorded was an indorsement on it in the following words: "No. 91, Jonathan Jacocks, 300 acres, Bertie County. Recorded in the Secretary's office. A. Phillips, P. Sec. Registered B. N. P., 14 B. Amos Turner, P. R., Bertie Co." On the part of the plaintiffs it was objected in the court below that the grant

should not be read, on the ground that there was not sufficient evidence that it had been recorded. The court overruled the objection and the grant was read.

The description given of the lands in the grant was as follows: "A tract of land containing 300 acres lying and being in our county of Bertie, in an island in Roanoke River known by the name of Huff's Island; beginning at a small cypress at the thoroughfare, (219) then running S. 55 E. 40 poles *up Middle River* to a persimmon tree, then S. 14 E. 52 poles to a large cypress, then S. 28 W. 98 poles to a cypress, then S. 26 W. 114 poles to a cypress, then S. 14 E. 171 poles to Roanoke River, then N. 25 E. 98 poles, then N. 22 E. 118 poles, then N. 12 E. 530 poles, then *along the thoroughfare* to the beginning, as by the plat hereunto annexed will appear." The thoroughfare is a natural boundary, being a water communication connecting East River and Middle River, two branches of the Roanoke. It appeared *from the plat* annexed to the grant that the last line but one was *a straight line* running N. 12 E. 530 poles to the thoroughfare, while the river did not run that course, but various courses, and it was contended that the line should run N. 12 E., from the termination of the preceding line, agreeably to the terms of the grant and plat. The defendants then offered in evidence the declarations of one of the chain-carriers named in the original survey who was dead, as to the courses actually run at the time, from which it appeared that the *courses of Roanoke, and Middle rivers* were run, and not the course called for by the grant. The introduction of this testimony was opposed on the ground that parol evidence was inadmissible to contradict, vary, or explain the grant and description in the original plat, but was received by the court, and a verdict was found for the defendants. A rule was obtained to show cause why a new trial should not be granted, and on argument was discharged, and a judgment was rendered pursuant to the verdict, whereupon plaintiff appealed.

Hogg for appellant. (220)
Seawell for appellee.

HENDERSON, J. This evidence, if admitted, must be upon (224) some new principle, for there is nothing *dehors* the deed to create an ambiguity. It does not resemble that class of cases where there is a *line* or a *corner* or a marked *terminus* called for which does not correspond with the course and distance mentioned in the deed. Upon such being shown by parol evidence, or upon an inspection or

an examination of the lands themselves, an ambiguity is created which may be explained by *parol.* This is not to vary or contradict the deed, but to explain the ambiguity arising from the double description. Upon this principle *Person v. Roundtree,* 2 N. C., 378, and 1 N. C., 69, and *Eaton v. Person* may be explained, and numerous others of the same class. In *Person v. Roundtree,* the oak called for at the termination of the first line was actually south of the point of departure, which was designated by being marked as a corner, and there being a line of marked trees leading directly to it and corresponding in distance. The line running from it to the next corner was also marked and the corner ascertained. The next course and distance carried you to the creek, which was called for in the original grant. This ambiguity permitted the introduction of parol evidence to explain it. And, there being no line running north (the course called for in the patent) from the beginning, nor any marked trees, nor any oak or other marked tree at the termination, nor any line of marked trees from the termination of the first line, or any other line on the north corresponding with those called for in the deed, parol evidence was admitted, and the stronger description prevailed, that is, the course yielded to other marks of locality. But it must be confessed, however much to be lamented, that our courts have permitted parol evidence to contradict a deed. But the furthest they have gone is to permit *marked lines and corners* to be proven or shown when such marked lines and corners were not called for in the deed. Thus, where course and distance only are given in a deed, without reference to marked lines or corners, parol evidence has been admitted to vary that
(225) course and distance by showing *marked* lines and corners, which is in fact contradicting a deed by parol without there being an ambiguity; for in this case the deed refers to no such marks or boundaries as it does in those cases where not only course and distance are given, but marked lines and corners are called for. And it is now too late to vary the rule. But I am not disposed to go further into error by analogous reasoning, and to permit parol evidence to contradict or vary the description where there is no mark or vestige left. In the former cases there are some checks to frauds and perjuries, to wit, the *marked* lines and corners. In the latter there are none. For the former the courts of justice had something like an excuse arising from our processioning laws, which require the processioners to observe natural boundaries in the first place, marked lines and corners in the second (meaning, no doubt, when called for in the deed), and course and distance in the absence of the other two, and from our laws directing

surveyors to mark the lines and corners in surveying vacant and unappropriated lands. But I can see no plausible grounds for the admission of the evidence in the present case. It would place the boundaries of our lands at the mercy of perjured, ignorant, or forgetful men. And I do not think a stronger illustration can be given of the propriety of rejecting the evidence than the facts apparent upon this record. When running on the gut or thoroughfare, that thoroughfare is made the boundary. In this the surveyor was obeying the injunctions of the act. A boundary was at hand, and he availed himself of it in his description. When running next to the river, the lines are described by courses and distances, and they are numerous and tedious. For, had he designed to have made the river the boundary, the same causes which induced him to call for the gut would have induced him to call for the river. I therefore think the evidence should not (226) have been received.

There is another objection made in this case, that the grant to the defendants for the land in dispute was not registered in the Secretary's office under Laws 1777, ch. 1, sec. 11. It is directed to be registered there, but it is made the duty of the Secretary to have it done, and the grantee ought not to be injured by his neglect. By the same section it is made the duty of the grantee to have it registered in the county where the land lies, and in case of neglect it is declared void. But this penalty is not referable to the first part of the section, which directs registration in the Secretary's office. That would be inflicting the punishment upon the innocent which is due to the guilty. Wherefore I am of opinion that this objection cannot be sustained. But there should be a new trial upon the point first noticed.

HALL, J., and TAYLOR, C. J., concurred.

PER CURIAM. New trial.

Cited: Reed v. Shenck, 14 N. C., 69; *Van Pelt v. Pugh,* 18 N. C., 212.

DEN ON DEMISE OF TATUM v. SAWYER & PAINE.—From Pasquotank.

1. Lands covered by navigable waters are not subject to entry under the entry law of 1777.

2. It is the legitimate object of a particular description in a grant to designate with more certainty and precision what the parties suppose to be vague and ambiguous in the general one; and, therefore, wherever the

particular description restrains the general one to natural boundaries upon those boundaries being shown, the general description is confined to them.

THE lessor of the plaintiff claimed title under a grant from the State, bearing date 21 June, 1819, conveying certain lands in Currituck County, near Currituck Inlet, or *Betsy's Shoal.* The defendants claimed title under a grant issued 2 December, 1807, to Thomas Williams,
(227) Joseph Ferebee, and John Williams, in the following words:

"A tract of land containing 350 acres, lying and being in the county of Currituck, known by the name of *Betsy's Marsh* or *Island,* beginning at Herring Gut, the beginning place of John Humphrey's entry, running N. 79 E. 6 chains and 30 links, thence S. 86 E. 5 chains, thence S. 68 E. 40 chains to a turn in South Channel, then N. 13 E. 70 chains to a point opposite North Point, then S. 80 W. 40 chains along North Channel, then S. 69 W. 48 chains, then S. 58 W. 5 chains, then S. 32 W. 35 chains to the great shoal at the head of the channel, thence to the first station."

It was proved that from 1777 up to the present time the land to the westward of B. Channel, on the annexed diagram, has always been known by the name of *Betsy's Marsh,* while that to the eastward of the same channel, including the plaintiff's grant, has been called *Betsy's Shoal;* and also that the whole marsh on which plaintiff's grant lies has formed gradually since the year 1802, up to which time it was a sandy beach, always covered at flood tide and dry at ebb.

It also appeared in evidence that the plat annexed to the defendant's grant was not an actual survey, but had been made by direction of the grantees from some former plat of the same land. John Williams, and Thomas Williams, who was one of the grantees in defendant's grant and also named in the survey as one of the chain-carriers, proved that in the year 1800 the county surveyor actually surveyed the land, and in so doing extended the chain around the marsh now claimed by plaintiff; that this survey was made for John Williams and Joseph Ferebee, but that no grant issued thereon. The county surveyor proved that he did include in his survey the land now claimed by the plaintiff, but in making the plat he was directed by Williams and Ferebee to
(228) leave out the easternmost part of the land by drawing a line from the turn in South Channel N. 24 E. to a point nearly opposite North Point; that he did so, and thereby excluded the land granted to and claimed by the plaintiff. The term *marsh,* it was proved, is applied only to such land as is covered with salt grass, and not to that entirely destitute of vegetation.

For the defendant it was insisted below:

1. That the land included in the plaintiff's grant was not subject to the entry laws, as it was not land when the act of 1777 regulating entries was enacted.

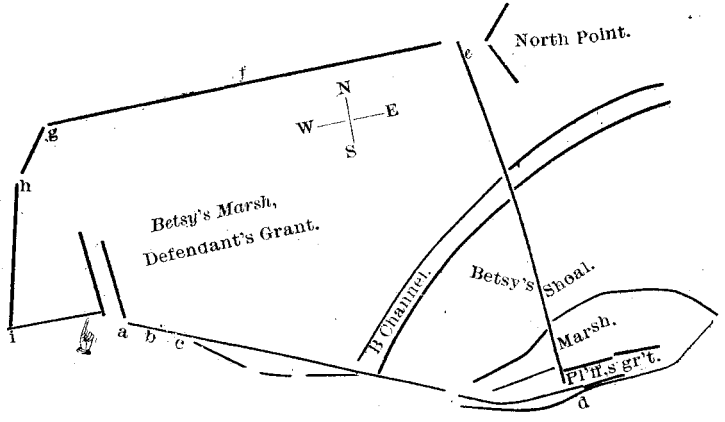
2. That the grant under which the defendants claimed, being a conveyance of Betsy's Marsh or Island, subsequent description was unnecessary, and the whole island passed.

3. That the plaintiff's grant was made by accession to the defendants' lands, and therefore pertained to them.

The presiding judge instructed the jury:

1. That the marsh claimed by plaintiff was subject to the entry laws passed in 1777.

2. That no accession could belong to the defendants, except such as was made since 2 December, 1807, the date of the grant under which they claim; that if the jury believed that the plat made for the grant under which the defendants claim was not intended by the surveyor and grantees to cover the lands claimed by the plaintiff, and which were not included within the defendants' grant or plat, that it did not cover contrary thereto. The jury found a verdict for the plaintiff, and a rule to show cause why a new trial should not be granted having been discharged, judgment was rendered pursuant to verdict, and the defendants appealed to this Court. (229)



HENDERSON, J. Lands covered by navigable waters are not subject to entry under the entry law of 1777, not by any express prohibition in that act, but, being necessary for public purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature. But when the cause of

that exemption ceased to operate, the exemption itself ceased; and they, like the other vacant lands of the State, became the subject of entry.

The next objection is that the description contained in the defendants' patent covers the whole of *Betsy's Marsh* or *Island,* notwithstanding the particular description given of the abuttals and boundaries of the grant. This would be to deny to the particular description its legitimate office; for it is the object of a particular description to designate with more certainty and precision what the parties suppose to be vague and ambiguous in the general one. The only limitation or restriction is that it must not totally contradict it. Its (230) identity should be plain and capable of ascertainment. In this case it restrains the general description to natural boundaries; and (independent of the parol evidence) upon the situation of those natural boundaries being shown, the general description would be limited and confined to them. But the parol evidence which is offered in its support is not contrary to the grant, but in affirmance of it, and points out very clearly the reason why the particular description was introduced, to wit, the ambiguity (as to their opinion of the extent of *Betsy's Island*) which a location of the patent upon the lands would produce. And although I am not satisfied with that part of the charge of the court which informs the jury that if they believe it the intention of the surveyor not to include the lands in controversy within the defendants' survey, that they would not be included contrary thereto; for it is not the *presumed or probable intent* of the surveyor or the parties which should govern the court or jury in ascertaining the bounds of a patent, but the actual description given in the survey or grant; yet, as the verdict is right upon the whole of the evidence, and every part thereof, it would be useless to award a new trial, for the result must be the same. As to the evidence given of the meaning of the word *marsh,* it may be observed that the meaning of words which are peculiar to a particular part or section of the country may be shown by witnesses, but not so as to words in general use throughout the State. They must be understood alike in all places. This being a word in general use, cannot have a local or sectional meaning put upon it by parol testimony.

PER CURIAM. No error.

Cited: *Ward v. Willis,* 51 N. C., 184.

(231)

DEN ON DEMISE OF THE HEIRS OF TATE v. GREENLEE.—From Burke.

Where the subject-matter of a grant is within the power of the public officer who makes it, the grant shall not be invalidated, when it comes incidentally before the court, by anything *dehors* the grant. *Aliter* where its validity is put in issue *ex directo*, as on a *sci. fa.* to repeal it.

EJECTMENT, in which the evidence of title on the part of the lessors of the plaintiff was a grant issued to William Tate on 23 November, 1802. The defendant offered to prove that William Tate, the grantee, was the surveyor of the land, and that the plat and certificate attached to the grant were in the handwriting of said grantee, with the exception of the signature of the county surveyor. The certificate was in these words, *"Certified by Wm. Tate, D. S.; Robert Logan, C. S."* The evidence was rejected by the court, and a verdict was returned for the plaintiff. A rule for a new trial was obtained, and afterwards discharged by the court, and judgment rendered for plaintiff. The defendant appealed to this Court.

HENDERSON, J. Where the subject-matter of a grant is within the power of the public officer who makes it, the grant shall not be invalidated when it comes only incidentally before the court (as in a trial of ejectment) by anything *dehors* the grant. But I cannot bring myself to believe, if the cause of its nullity is apparent upon its face, that the court must shut its eyes against the defect and declare the grant to be valid. But if, in such case, parol or other evidence *dehors* the grant is offered, it should be rejected; not because the grant, if true, is not sufficient to avoid it, but that the party comes unprepared to resist or to controvert it. But where the validity of a patent is put in issue *ex directo*, as on a *scire facias* to repeal it, there such fact may be proved by any competent evidence; nor is the doctrine first advanced above at all impugned in those cases where patents for (232) new inventions upon trials at law are declared void; for the patent, or its substance, is stated in the pleadings, and therefore its validity comes *ex directo* before the court. For this reason, I think the parol evidence was properly rejected, and that the rule for a new trial should be refused.

BY THE COURT: No error.

Cited: Gilchrist v. Middleton, 107 N. C., 679.

DOE ON DEMISE OF STAMPS AND OTHERS v. IRVINE.—From Caswell.

An execution binds property in the hands of the defendant and all others claiming under him from the *teste.*

EJECTMENT for a lot of land in the town of Milton. The facts of the case were as follows: One James Daniel, being seized and possessed of the lot in question, became indebted to the Bank of New Bern, and for the payment of this debt the defendant Irvine became security. A judgment was obtained at the instance of the bank against said Daniel in the county court of Caswell, which met on the second Monday of October, 1820. On the 1st of November following, a *fi. fa.* issued on said judgment, which was tested on the second Monday of October. By virtue of this *fi. fa.* the sheriff levied on the property in dispute and returned the execution to January, 1821. A writ of *venditioni exponas* was then issued, under which the sheriff exposed the lot to sale, and the lessors of the plaintiff became the purchasers. James Daniel, for the purpose of indemnifying his surety, the defendant Irvine, on 17 October, 1820, which was *subsequent* to the judgment obtained in Caswell County court, conveyed the land, which is
(233) the foundation of this suit, to one Ogilby, in trust to indemnify Irvine; and Ogilby, as trustee, conveyed the same to the defendant Irvine, after January, 1821, but previous to the sale by the sheriff under the writ of *venditioni exponas.* A judgment was rendered for the plaintiff in the court below, whereupon the defendant appealed.

Murphey for appellant.
Ruffin for appellee.

The case was submitted without argument.

HALL, J. The execution binds the property in the hands of the defendant, and all others claiming under him, from the time that it bears *teste.* 1 Term, 729; 1 Salk., 320; 1 Ld. Ray, 252; 1 Comyn's, 35; 16 East, 278, note. I therefore think the rule for a new trial should be discharged.

BY THE COURT: No error.

Cited: Palmer v. Clarke, 13 N. C., 357; *Deaver v. Rice,* 20 N. C., 569; *Harding v. Spivey,* 30 N. C., 65.

DOE ON THE DEMISE OF THE TRUSTEES OF THE PROTESTANT EPISCOPAL CHURCH OF NEWBERN v. THE TRUSTEES OF THE NEWBERN ACADEMY.—From Craven.

A possession of thirty-five years under an act of the Legislature gives good title in law, even though such act be *unconstitutional.*

EJECTMENT, brought to recover possession of a lot of land in New Bern. The lot was, prior to the year 1776, purchased and granted for the support of the ministry of the Protestant Episcopal Church of New Bern. The lessors of the plaintiff occupied the lot as a glebe under this grant until the year 1787, when the defendants entered into possession thereof, and have continued in the possession ever since, claiming title under an act of the General Assembly passed (234) in 1786, which after a recital in the preamble that the lot of land in New Bern, commonly known by the appellation of the glebe, would tend to increase the funds of the academy in said town if the same were vested in the trustees thereof, proceeds to enact that the same be vested in the said trustees, and authorizes them to take possession of the same. The above statement of facts was submitted, by the consent of parties, to the court below, with the question arising thereon, viz.: Whether the plaintiffs were barred of their right by the act of limitations? The court decided that they were so barred, and rendered judgment for the defendants accordingly. The plaintiffs appealed to this Court.

The case was submitted, without argument by *Hawks* for the appellant, and *Gaston* for the appellee.

PER CURIAM. A possession of thirty-five years under an act of Assembly must doubtless be considered a good title in law, according to the reason of all the decisions which have been made touching color of title. It is not perceived on what ground any valid objection could be made to it; for every presumption is to be made in favor of an act of the Legislature, and supposing it to be unconstitutional, *non constat* that this was known to the defendants, and it still afforded a color of title. The judgment must be

PER CURIAM. Affirmed.

Cited: Kron v. Hinson, 53 N. C., 348; *McConnell v. McConnell,* 64 N. C., 344; *Ellington v. Ellington,* 103 N. C., 58; *Neal v. Nelson,* 117 N. C., 405; *Burns v. Stewart,* 162 N. C., 366.

(235)

DOE ON DEMISE OF GWYN & WAUGH v. STOKES & WELBORN.—From Wilkes.

1. A. and B. are in possession of the same land adversely to each other. While in this situation a deed for the land is executed to A. by C., who has both possession and title. A. then having thus acquired title to the land, the law adjudges his possession the rightful one; and an acknowledgment by C. under these circumstances, at the time of executing the deed to A., that B. has the possession, shall not be sufficient to destroy the title made by his deed to A.

2. The maxim, "*Nemo audiendus est suam turpitudinem allegare*," does not apply, at least, to instruments not negotiable.

EJECTMENT, in which the lessors of the plaintiff made title under a grant issued 3 March, 1779, and by a regular succession of conveyances showed the title to be in one Joel Chandler on 1 August, 1812. They then produced a deed from Joel Chandler to James Gwyn, one of the lessors, and to David Waugh, who afterwards died, having devised his interest in the land to William P. Waugh, the other lessor of the plaintiff. It was proved that the land had been in the uninterrupted possession of some one of those through whom plaintiff deduced his title from 1779 until November, 1814. The defendants offered no evidence of title on the trial below, but introduced the deposition of Joel Chandler, from which it appeared that the deponent lived formerly on the lands in dispute, which were claimed by the Moravians; that in consequence of having heard that the defendants Stokes and Welborn had an indisputable title to the lands under the Moravians, deponent offered them for sale at a price much below their value, and accordingly contracted with James Gwyn, Jr., and David Waugh for the sale of the lands on the following terms: Deponent, upon the payment to him of $100 by Gwyn and Waugh, was to convey to them all the title which he had to the lands, but was not to deliver to them the possession
(236) thereof. On the day on which deponent removed from the lands the defendant Welborn came to the house of deponent on the lands and offered deponent ten dollars if he would say he (deponent) had no possession when he removed from the lands. Welborn, in a very short time after deponent left the house, took possession thereof; and soon after, on the same day, Gwyn and Waugh came to the house and found Welborn in possession of it. Having failed in an attempt to force Welborn out of possession, they asked deponent

if he would execute to them a conveyance according to the contract made between them. Deponent did execute to them such a conveyance, remarking to them at the time that they perceived Welborn had obtained actual possession of the lands in question and claimed them under the Moravians. The plaintiffs then proved by one of the subscribing witnesses to the deed from Chandler that, on entering the house on the day alluded to in the deposition, he found there the defendant Welborn, employed in fastening the windows of the house, who proposed to witness to become his tenant; that on leaving the house he saw Gwyn and Waugh, who, together with Chandler, came into the portico of the house, when the deed was executed by Chandler; that at this time Welborn was in the house and knew that the party was in the portico, but made no objection to their coming on the land or into the portico, simply remarking to Chandler that it behooved him to be careful of his acts. Chandler's wagon was then standing at the door, loaded preparatory to his removal. The plaintiffs objected to the reading of Chandler's deposition, but the court overruled the objection.

On this evidence a verdict was returned for the defendants, and plaintiffs moved for a new trial. The motion was overruled, judgment rendered pursuant to the verdict, and the appeal of the plaintiffs presented the case to the consideration of this Court, where it was submitted without argument.

HALL, J. The plaintiff's title, I think, is satisfactorily made (237) out from the first grantee. No objection is made to it before the deed from Chandler to them at which time it is alleged Welborn had an adverse possession, and on that account that deed conveyed no title.

It appears that Welborn had possession of the house at the time the deed was executed to Gwyn and Waugh, but it also appears that Gwyn and Waugh were upon the land at the same time, and they were all upon it by the consent of Chandler, and while in this situation the deed was executed to the plaintiffs; they then had title to the land, and having title the law adjudges their possession the rightful one. For this reason I think the rule for a new trial should be made absolute. With respect to Chandler's deposition, I see no reason why it should not have been read. It was offered by the defendants; if Chandler had warranted the land to the plaintiffs, and it proved anything in favor of the defendants, he would have been giving evidence against his own interest. The maxim, *nemo audiendus est*

suam turpitudinem allegare, does not apply, at least, to unnegotiable instruments.

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

PER CURIAM. New trial.

Cited: Gwyn v. Wellborn, 18 N. C., 313; *Judge v. Houston,* 34 N. C., 115.

BLOUNT v. PATTON.—From Buncombe.

A will was executed in Tennessee, and from the certificate of probate on the exemplified copy produced here, it appeared that but *one* witness swore that he subscribed the will as witness in the presence of testator, and the other witness to the will did not appear to have been sworn at all. *Held,* that such will should not be read in evidence.

TRESPASS, *quare clausum fregit,* in which it was necessary for the plaintiff to show title to the land in dispute. The title set up was a devise to the plaintiff in the will of John Strother of the State
(238) of Tennessee. The execution of the will appeared to be attested by two subscribing witnesses, and an exemplified copy thereof was produced in the court below, with a certificate of probate in the following words: "The last will and testament of John Strother, deceased, being exhibited in open court, was proven thus: John Drake, one of the subscribing witnesses, being sworn, says that he believes the testator was in his right mind at the time he executed said last will and testament, and that *he* subscribed his name as such in the presence of the testator. Ordered by the court that it be recorded at length."

The court below instructed the jury that the probate of the will as certified was not sufficient to convey real property under the laws of North Carolina, and a verdict was accordingly rendered for the defendant. A motion for a new trial on the ground of misdirection as to the certificate of probate was disallowed, and judgment having been rendered for defendant the plaintiff appealed to this Court.

Gaston and Seawell in support of the motion.

Wilson contra.

(239) TAYLOR, C. J. Whether the probate offered in this case is admissible evidence depends on the construction of several acts

of Assembly passed on the subject, and the just application of some legal principles, the observance of which is important to the security of property.

A comparison of section 11, ch. 204, Laws 1784, with section 5 of 29 Car. II., ch. 3, will show beyond controversy that our Legislature had that in view; and that, with the exception of the number of witnesses, the omission of the word "attested," and the adoption of that part of the Stat. 23 Geo. II., which renders void a devise to a witness, it was their design to avail themselves of so much of (240) the said statute as prescribes the essentials in executing a will.

Wherever title to land is claimed under a devise by that statute, the devisee must produce the *original* will in court, and establish its execution by proof in the manner required by law. But in this State *probates* are received in evidence, and attested *copies* of wills are made testimony, except where fraud or irregularity is suggested; and in such cases the *original* will must be exhibited. As the probate of a will upon the trial of an ejectment can be admissible evidence solely upon the ground that the county court receiving it admitted the will to record upon proper proof of its execution according to the act, it follows that the cases decided upon 29 Car. II. relative to the execution of wills must furnish criteria by which to ascertain whether a probate in this State has been properly received. There is no other sure way of enforcing the statute; since if every probate were admissible, the effect would be to repeal it, and thereby to leave to the county courts to pronounce on the manner in which a will shall be proved, whether by a witness or by evidence of the handwriting.

The effect of the act of 1784 is to prevent the court from seeing the intention of the testator to dispose of his real estate, if in truth he has not done it with the solemnities enjoined by the statute. It is true that the court cannot *read* a will without the words "real estate" in it, but the act of 1784 binds them to say that if a man by a will unattested by two witnesses gives his real estate he did not mean to give it all. 2 Ves., Jr., 652.

Where a will is not contested, one of the subscribing witnesses is sufficient to have it recorded; and so upon the proof of a will, upon a trial at law, one of the witnesses is sufficient to establish it. 1789, ch. 30.

By ascertaining what facts and circumstances such witness (241) is required to prove for that purpose, it will be readily seen what proof is necessary to admit the will to record. Besides the sanity of the testator and his signing or acknowledgment, both of which are

shown in this case, it is also necessary to prove the subscription of the witnesses in the testator's presence.

But although one witness is sufficient to prove the will, yet it is necessary for that one to prove all that is necessary to establish its validity. Holt, 744. And if the other witnesses even refused to verify their attestation, the proof of their handwriting is sufficient, if only one witness proved the other circumstances of the execution. Lord Camden, speaking of the method of proof in a court of common law, says: "One witness is sufficient to prove what all three have attested, and though that witness must be a subscriber, yet that is owing to the general common law rule that where a witness has subscribed an instrument he must always be produced, because he is the best evidence. This, we see, in common experience, for after the first witness has been examined the will is always read."

The objection that no notice is taken in the subscription of the fact of its having been done in the presence of the testator is not valid, for that ceremony is not required by the act of 1784, and whether it were so expressed or not, it must be proved to have been so done to the jury, under 29 Car. II., and now by analogy to the county court. This point has been directly decided. Comyn, 531; 2 Strange, 1109.

It then appears from the probate that a will of real property has been proved only by one witness; and there is no ground to presume either that proof of his subscription in the presence of the testator or of any subscription by the other witness was made to the court directing the probate, which, if so made in this State, would be clearly inadmissible in evidence. For the act requires the subscription of the witnesses

(242) to be made in the presence of the testator, for the purpose of guarding against fraud, and to prvent the substitution of a false will in the place of the true one.

I think it by no means probable that a probate of this kind would be deemed admissible in Tennessee, where the act of 1784 has been in force. But even if the law be altered, and a will of land attested by only one witness is sufficient to pass the title to land there, it can have no effect upon a title to land in this State; for it is a principle founded in reason, and confirmed by an uniform current of authorities, that a title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. Every person, says *Lord Kenyon*, having property in a foreign country may dispose of it in this, though, indeed, if there be a law in that country directing a particular mode of conveyance, that must be adopted. 4 Term, 492. And the devise of land must necessarily depend upon the law of the country,

for where an Englishman, being beyond sea, made a will disposing of land in England, it was held void because it had but two witnesses. 2 P. Wms., 290. A writer on the civil law whose decision on this subject is often quoted with approbation maintains that a State affixes certain rights to the dominion of real property and is therefore interested in its disposal, and could not, without great inconvenience, suffer it to be conveyed with its incidental rights by the laws of another and contrary to its own laws. 2 Huberus, 13; 1 Tit., 3.

In opposition to these principles and authorities, it would be giving a loose and mischievous construction to chapter 23, Laws 1802, to consider it as giving validity to deeds and wills executed in other States for land in this, and thereby to repeal all our acts which so anxiously prescribe the modes of transfer in all cases where (243) they happen to conflict with the laws of other States.

But its only object was to authenticate the copies of those instruments, such as they are—not to decide upon their legal efficacy or operation, but to leave that to the courts where a title might be controverted. This, I think, is conclusively shown by two expressions in the act itself: one is that a copy from another State can only be received where the original deed or will cannot be obtained to register in the county where the land lies; hence the copy, to be admissible in evidence, must be of such a deed or will as would be admitted to record in this State. This test, applied to the copy offered here, effectually excludes it; for it has been shown that a will so proved could not be admitted to record in this State. And the conclusion of the act points to the same criterion, "It shall be admitted in the *same manner* as a copy from any of the registers' or clerks' offices" in this State.

The Constitution of the United States and the Act of Congress of 1790, ch. 11, which have also been relied on in favor of this probate, do not advance the argument in its support. The act, after providing for the mode of authenticating the records and judicial proceedings of the State courts, declares "that they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." Admitting that a court in Tennessee should be called upon *indirectly* to decide upon the title of land in this State—for *directly* it could entertain no jurisdiction in the case—the established principles of judicature would necessarily lead to the inquiry, how land is devisable in this State, and upon ascertaining that two witnesses are necessary the probate now offered would be rejected there.

For these reasons I am satisfied that the evidence was prop-
(244) erly rejected, and that a new trial ought not be awarded.

HALL, J. By Laws 1784, ch. 204, sec. 11, no last will or testament shall be good or sufficient, either in law or equity, to convey or give any estate in lands, etc., unless such will shall have been written in the testator's life and signed by him, etc., and subscribed in his presence by two witnesses at least, no one of which shall be interested in the devise of said lands.

This is a general law and embraces the case of all wills wherever made in which lands are devised that lie within the limits of this State. It belongs to the Legislature to make such regulations as to them may seem right as to the titles of land within the State.

By Laws 1784, ch. 225, all probates of wills in the county courts shall be sufficient testimony for the devise of real estates, and attested copies of such wills, or the records thereof, by the proper officer shall and may be given in evidence in the same manner as the originals. By this act ample provision is made for giving in evidence all wills made within the State, and by the act of 1802, ch. 623, provision is made for giving wills in evidence, which may be made without the limits of the State, as follows: "A copy of the will or deed, after the same has been proved or deposited agreeably to the laws of the State where the persons died or made the same, being properly certified, either according to the act of Congress passed in May, 1790, or by the proper officer of said State, etc., that then the said copy shall be read as evidence in the courts of this State, and shall be admitted in the same manner as a copy from any of the registers' or clerks' offices therein." In this case there is no objection made to the authentication of the will of John Strother, but it is objected that it has been proved by but one witness, and the proof made of its execution by that witness
(245) is set forth *verbatim*, and the idea is excluded that it was proved by that witness in any other way. There is no ground on which to infer that this witness proved that the other witness subscribed his name in that character in the presence of the testator, and I think the objection a good one. I think the Legislature intended by the act of 1802 to point out the way in which wills made out of the State should be authenticated, but not to give validity to them, or, in other words, to repeal the act of 1784 requiring two witnesses, provided they were not made conformably thereto. This would be to require less proof of wills made without the State than of those made within it. I think they intended that the will might be read when properly authenticated,

but not to give validity to a devise of lands unless made agreeably to the law of the land. It has been thought in argument that chapter 308, Laws 1789, probably had some bearing on the case. That act declares that a written will with witnesses thereto shall be proved by at least one of the subscribing witnesses. The title of that act is, "An act to amend an act entitled an act concerning proving of wills, etc., passed in the year 1715." It points out the place and manner of proving wills, as above stated, and makes many regulations concerning the estates of deceased persons not connected with the present question. It never once speaks of the act of 1784 requiring two witnesses to a will, and I cannot bring myself to believe that the Legislature, by anything they have there said, intended to repeal it. Indeed, I think the two acts may stand well together, for, by the latter act, if the will is proved by one witness, who also proves that another subscribed as a witness, as the law requires, the act of 1784 is satisfied; besides, if it should be proved only by one witness, it would be sufficient to pass personal property, and on that account the will should be admitted to record. But in case the will is contested, the act of 1789 goes further than the act of 1784; it then requires the production of (246) all the living witnesses, if to be found.

For these reasons, believing that the act of 1784, requiring two witnesses to a will of lands, whether made within or without the State, has not been repealed, I think the rule for a new trial should be discharged.

PER CURIAM. No error.

Cited: *Morgan v. Bass,* 25 N. C., 245; *In re Thomas,* 111 N. C., 413; *Moody v. Johnson,* 112 N. C., 800; *Watson v. Hinson,* 162 N. C., 79.

THE STATE v. ARMFIELD & WRIGHT.—From Surry.

An officer cannot break open an outer door or window to execute civil process; and if the door be *partly* closed by those within, who are resisting the entrance of the officer, and be not *entirely* shut, the officer is guilty of a trespass should he oppose them with force, and thereby gain an entrance.

INDICTMENT for a forcible trespass in breaking and entering the dwelling-house of one William Patterson, the case presenting the following facts:

The defendant Wright was a constable, and had in his hands writs of *fi. fa.* against the property of William Patterson at the suit of the other defendant, Armfield. Wright, accompanied by Armfield, went towards the house of Patterson for the purpose of making a levy, when a member of the family of Patterson, seeing their approach, jumped into the house, and, for the purpose of preventing the entrance of the defendants, attempted to shut the outer door and while in the act of shutting it, but before it was entirely closed, the defendant Wright pushed against the door and entered the house. The door was so far closed that it could not have been opened without the exercise of some force. The other defendant, Armfield, was present.

The court below instructed the jury that if the defendant Wright forced the door in the manner represented, notwithstanding he came as an officer to execute civil process, he was a trespasser, and if
(247) the other defendant was present, aiding, abetting, and assisting, he also was guilty. The jury found the defendants guilty in manner and form as charged in the bill of indictment. A rule was obtained to show cause why a new trial should not be granted, which upon argument was discharged by the court, and judgment was rendered against the defendants, from which judgment the defendant Armfield appealed.

J. Martin for appellant.
The Attorney-General in reply.

TAYLOR, C. J. I am of opinion that the charge of the court was correct in this case and that the defendant was properly convicted. The law is clearly settled that an officer cannot justify the breaking open an outward door or window in order to execute process in a civil suit; if he doth, he is a trespasser. A man's house is deemed his castle for safety and repose to himself and family, but the protection thus afforded would be imperfect and illusive if a man were deprived of the right of shutting his own door when he sees an officer approaching to execute civil process. If the officer cannot enter peaceably before the door is shut he ought not to attempt it, for this unavoidably endangers a breach of the peace and is as much a violation of the owner's right as if he had broken the door at first.

The case cited for the defendant from 5th Coke's Reports only shows that the privilege of a man's house is confined to the occupier or any of his family who have their domicile there, and shall not protect any person who flies thither, nor the goods of any person conveyed there

to prevent any lawful execution or to escape the ordinary process of the law. There the owner shut the door to protect the goods of (248) a stranger after the officer had shown his process and offered to execute the same, and after he had given notice of the cause of his coming and requested to have the doors opened. And certainly shutting the door could not lessen the right which the officer had if he had found it shut on his arrival. The judgment must be affirmed.

BY THE COURT: No error.

Cited: *Sutton v. Allison*, 47 N. C., 341; *S. v. Whitaker*, 107 N. C., 804.

STATE v. ALLEN TWITTY.—From Lincoln.

1. Upon an indictment for uttering forged money knowing it to be forged, evidence may be received of former acts and transactions which tend to bring home the *scienter* to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he is tried.

2. An affidavit for the removal of a cause which does not set forth the reasons of affiant's belief that justice cannot be done in the county from which it is removed is insufficient.

3. An indictment for forgery should not only set forth the *tenor* of the bill or note forged, but should *profess* so to do.

4. In an indictment under the act of 1819 to punish the making, passing, etc., of counterfeit *bank notes*. if the note alleged to have been passed be of a bank not within the State, the indictment should *aver* that such a bank exists as that by which the counterfeit note purports to have been issued.

THE defendant was indicted under the act of 1819, more effectually to punish the making, passing, or attempting to pass counterfeit bank notes. The indictment contained two counts. In the first, the defendant was charged with passing as true to William Erwin "a false, forged, and counterfeited bank note, purporting to be a good, genuine note, issued by order of the president, directors and company of the Farmers Bank of Virginia, which said false, forged, and coun- (249) terfeited note *is in substance as follows*, to wit:" The note was then set out in the indictment, and appeared to have been issued by the president, directors, and company of the Farmers Bank of Virginia, payable to *"Ch. Johnson."*

The second count charged the defendant with an intent to defraud "the corporation of the State Bank of North Carolina," and with passing as true, to William Erwin (who was agent of the said corporation) "a false, forged, and counterfeited bank note, purporting to be a note issued by order of the *president and directors* of the Farmers Bank of Virginia, which said note, last above mentioned, *is in substance as follows,* to wit:" The note as set out in this count appeared to have been issued by the president, directors, and company of the Farmers Bank of Virginia, payable to *"C. H. Johnston."* On the trial below, the bill offered in evidence showed the name of the payee to be spelled *C. H. Johnston.* It was objected by defendant that there was a variance between the bill as set out in the indictment and that offered in evidence, and that therefore it should not be introduced, but the court overruled the objection and the bill was read to the jury.

The passing of the bill by the defendant to Erwin as agent of the State Bank was proved, and it was also proved that the bill was originally for five dollars, and had been altered to a bill for fifty. In order to show that defendant *knew* the bill to be counterfeit (a fact charged in the indictment, and material in constituting the crime under the act) the State called on witnesses to prove acts and declarations of the defendant at different periods previous to this transaction in relation to *other* counterfeit bank notes, as circumstances to show his general acquaintance with bank notes and his skill in ascertaining whether they were genuine. The evidence was objected to on the ground that it must be confined to notes of the *same kind,* or purporting to
(250) have been issued by the *same* bank as the one now in question. The court refused so to restrict the evidence. A witness, Terrell, then proved that twenty years or more ago he was intimate in the defendant's family, and defendant had on one occasion taken the witness upstairs and showed him in a chest a large bundle apparently of bank notes, in sheets and not signed, and observed to him that they were remarkably well executed and that a young man of character might make his fortune with them. It was further proved by two witnesses, Dalton and Lynch, that a tree had been seen in a secret place near defendant's house with a hole bored through it and some small flat blocks near it, and at the same place was a churn and a quantity of paper in the state of pulp; that the defendant had said that he had a way of making money, not, however, from his farm. Other witnesses proved that the defendant had been repeatedly seen at various times in the possession of large quantities of bank notes, and that he had also declared he was in the habit of making spurious money; that he could

at any time procure counterfeit money that could not be detected, and that the proper mode of altering bills was to extract the impression of the number from the bill, and to make a new number with a different plate. To witnesses with whom defendant had been intimate he had made these declarations, and in paying one of them money at different times he had said that particular bills, which he exhibited, were not good, and that therefore he would not pass them to *him*. Mr. Roane, a gentleman of the bar, testified that shortly after his coming to the bar, and when almost a stranger in the country, he had on some occasions been employed by the defendant to conduct suits for him, and that it was the habit of the defendant, after talking to the witness relative to the suits, voluntarily to make remarks as to the suspicions entertained of his (defendant's) counterfeiting; that on one occasion he said he could procure the services of master workmen, and, to convince the witness, produced a letter which he said was from a (251) workman who had quarreled with his employers, Murray, Draper, Fairman & Co., and who had offered to execute plates for the defendant, and as a specimen of his abilities had forwarded to the defendant a bill for five dollars; defendant then took a bill out of the letter; said it was a counterfeit, but notwithstanding it was very well executed; the defendant also said that he was in the habit of making and passing bad money. The agent of the State Bank proved that in 1814, when counterfeit notes of the Bank of Cape Fear for three dollars, signed with the name of John Hogg as cashier, were in circulation, he had refused to take any notes for three dollars on that bank; that, having declined receiving one offered by some person, the same note was brought back to the bank in a few weeks, accompanied by a letter from the defendant, which informed the witness that he "might receive this note, for none of the three dollar notes with the name of Joshua Potts were counterfeit," and added that the information might be useful to witness.

The court, in addressing the jury, called their attention to the principle upon which most of the evidence offered had been permitted to go to them; that it being incumbent on the State not only to prove the passing of the bill as charged and its falsity, but also to bring home to the defendant the knowledge of the bill's being counterfeit, and the intent to defraud as charged in passing it, they were to look more particularly to the part of the evidence relating to the passing of the note and more immediately connected with it, but that in ascertaining *the knowledge* of the defendant that the note passed was counterfeit they were at liberty also to look to the other acts and declarations of the defendant as going, in connection with the evidence more imme-

diately relating to the transaction, to show them how far he might have been deceived as to the genuineness of the note in question,
(252) or, on the contrary, as going to satisfy them that he must have been so well acquainted with bank paper that he could not well have been ignorant of the true character of this bill. That, in relation to these acts and declarations of the defendant, the more distant and detached they were in point of time the less relation they had to the transaction about which the jury were inquiring, and the less weight ought they to have in forming their opinion, and more particularly in relation to the evidence of Terrell, Dalton, and Lynch; that circumstances so detached must be exceedingly light, and that no part of the evidence in relation to the defendant's previous conduct or declarations was to be considered by them as offered for the purpose of proving that he had committed the crimes or acted improperly on other occasions, but only as circumstances which might aid the jury in ascertaining whether the defendant knew the note in question to be counterfeit at the time he passed it.

The jury found the defendant guilty; a motion was made for a new trial, which was refused, and the court pronounced judgment against the defendant, from which he appealed. This Court requested the defendant's counsel to confine his remarks to the grounds on which he relied for a new trial.

Gaston for defendant.
The Attorney-General and Wilson, solicitors, for the prosecution.

(258) HALL, J. The first question arising in this case is whether a new trial should be granted on account of the introduction of improper testimony on the trial below. The inclination of the mind of a majority of the Court is that it should not, and that impression is produced from the principles laid down by Foster High Treason, 245-6, and the cases read from 1 Bos. & Pull., new series, 92, and 1 Campbell, 323. These authorities seem to go the length of proving that where an offense consists in a knowledge of the thing done to be unlawful, evidence may be given to bring home that knowledge to the prisoner, although a disclosure of other facts and transactions for which the defendant is not then on trial may be the consequence. But such disclosure should not prejudice the prisoner; his moral character should be sacred under the maxim that every citizen is presumed to be innocent until the contrary appears, and that presumption ought to be done away with only by evidence proving circumstances connected

with the commission of the offense for which the prisoner is then on trial. For instance, if it were given in evidence that the prisoner had counterfeited bank notes, this evidence might be used to show that in all probability he had a knowledge that the note which he was charged with passing was a counterfeit note; but not to show that because he was wicked enough to forge bank notes at one time with an evil intention, it was to be presumed that he was wicked enough at another time *knowingly* to *pass* as good a counterfeit note. The *quo animo* with which he passed the note is to be collected from the concomitant circumstances. The ability to commit the crime may be shown from other distinct facts; the intention with which the thing was done (charged as a crime) must be proved only from all the circumstances of the case which attended the doing it. For these reasons, I think a new trial should not be granted.

One question that is brought before the Court, by way of arresting the judgment, is the affidavit made for the removal of the trial of the indictment from Burke to Lincoln. The first act on this subject was passed in 1806, ch. 693, sec. 12. That act declares that (259) a removal shall take place when a party states on oath "that there are probable grounds to believe that justice cannot be obtained in the county in which," etc. In the year 1808 another act was passed on the same subject, ch. 745. That act declares "that no cause, civil or criminal, which is or may be pending in any of the Superior Courts in this State shall be removed to the Superior Courts of any other county, unless on oath made, in which the facts whereon deponent founds his belief that justice cannot be obtained in the county where the suit is pending shall be set forth, so that the judge may decide upon such facts whether the belief is well founded." The affidavit for removal in this case states that deponent believes that the State cannot have a fair and impartial trial in the county of Burke. I think this affidavit falls short of the act in 1808, because the facts on which deponent founds his belief are not set forth; of course the Superior Court could not decide upon them. It was that the court might have it in its power to do so that the act of 1806 was amended by the act of 1808. The prisoner had a right to be tried in Burke, where the offense is charged to have been committed, unless the trial was removed to Lincoln in that way (and in that only) which the law points out. The affidavit for removal did not set forth the facts on account of the existence of which the trial was prayed to be removed; I think that the objection founded on that omission a good one. If such facts had been set forth, the judge of the Superior Court, and he alone, must have decided on them.

Another objection is made to the indictment, and is drawn from the act of Assembly on which this prosecution rests. Laws 1819, ch. 994, declares that if any person shall pass any false, forged, or counterfeited bill or note, purporting to be a bill or note issued by order of the
(260) president and directors of any bank or corporation within the State, or any of the United States or territories thereof, every person so offending shall, etc. The charge here is that the prisoner passed a counterfeited bank note purporting to be issued by the president, directors, and company of the Farmers Bank of Virginia, without setting it forth or making any averment that there was any law in Virginia establishing or creating such bank, or without averring that such bank had any legal existence. The banks of this State owe their existence to public laws, of which we are bound *ex officio* to take notice; but the laws of Virginia, as to this purpose, are foreign laws, and must be made to appear by proof. I do not think that the Legislature intended, by this act, to guard against the counterfeiting or passing the paper of voluntary, self-created unchartered corporations or banks, but left the punishment of such offenses to the law as it stood before with regard to other forgeries. But as to this objection I give no positive opinion.

It has also been objected that the note shown forth in evidence is not the same as the one set forth in the first count, because the one set forth in the indictment is payable to *Ch. Johnson,* and the one offered in evidence is payable to *C. H. Johnston.* I am inclined to think the variance fatal as to the count. Other objections have been taken in arrest of judgment but I deem it unnecessary to consider them in detail, because of the reasons already given in respect to the objection made to the affidavit of removal. I think the judgment ought to be arrested, and not pronounced by the court below against the prisoner.

HENDERSON, J. I agree with *Judge Hall* that the evidence was properly received. I also agree with him that the affidavit for the removal of the cause was insufficient, in not stating the grounds of the deponent's belief that a fair and impartial trial could not be
(261) had in the county of Burke, according to the express directions of the act of 1808. But had *any grounds* for such belief been contained in the affidavit, this Court could not interfere, although it might think that the grounds were insufficient; for it is matter of discretion. Therefore, the trial in Lincoln was *coram non judice,* and no judgment can be pronounced thereon.

It is objected that it should have been alleged to be a note of a chartered or incorporated bank within this State, or one of the United

States, or one of the territories thereof; but I am of opinion that the word *bank,* in the act of 1819, under which the defendant is indicted, means an unincorporated or unchartered bank as well as an incorporated or chartered one. For to the establishment of a bank an act of incorporation is not absolutely necessary. It may be established by an individual or a private association of individuals. An act of incorporation is necessary only for the purpose of conferring corporate rights. It is without it a *bank.* I am the more confirmed in this opinion by the fact of the Legislature's being apprised of there being many unchartered or unincorporated banks within the United States, and also by the words of the act, which are, bank or corporation *within* the State, or any of the United States, and not *of* the State or any of the United States. Nor do I think the words bank and incorporation are used as synonymous terms, for the Legislature was also aware that there were corporations within the United States (which were not incorporated as banks) which issue notes, to wit, the Bridge Company in Georgia and the Manhattan Company in New York. At the same time I confess that there must be an averment in this case that there is such a bank as the *Farmers Bank of Virginia.* For the passing of a note which upon its face purports to be issued by a bank which in fact *has no existence* is not an offense within the act; and as everything which is required to be proved upon the trial must be averred, and nothing else is necessary, it follows that it should be averred; but I think in this case it is averred. It is charged that the (262) defendant passed a note purporting to be issued by the president, directors, and company of the Farmers Bank of Virginia. To support such a charge, it must be shown that there is such a bank as the one mentioned. I therefore think the indictment is not defective in this. I think the indictment also should not only have set forth the tenor of the bill, but have *professed* so to do. For the verdict of the jury can only affirm the charges in the bill, and without such charge the court cannot judicially know that it is the tenor. In this case we are told in the bill that it is the substance only—that substance (for aught we know) may differ from the tenor.

There are many other objections taken to the indictment, but it is unnecessary to notice them, as I am well satisfied that the cause was improperly removed from Burke to Lincoln, and that the trial in the latter county was a perfect nullity. Therefore no judgment can be pronounced.

I wish it to be understood that I give no *positive* opinion on any of

the objections raised on the motion in arrest of judgment, except the removal of this cause from Burke to Lincoln.

TAYLOR, C. J. After an anxious consideration of this case, my opinion is that some improper testimony has been received, and that a new trial ought to be awarded. It will be admitted that the proper object of evidence is to ascertain the truth of the fact put in issue, and that evidence admitted on any point not put in issue has a tendency to surprise the accused, or to affect his conviction by the force of prejudice. The rule of rejecting all manner of evidence in criminal prosecutions (says Justice Foster) that is foreign to the point in issue is founded on sense and common justice. For no man is bound, at the (263) peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to be put to it. Our Bill of Rights has endeavored to guard against the mischief by providing that in criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony. The latter part of the privilege is unavailing and delusive, unless the first be distinctly observed. The charge against the prisoner here is uttering a forged bank note, knowing it to be forged; the essence of the crime consists in the knowledge of the accused, without which the act of uttering a forged bill is innocent, and I admit fully that any proof which tends directly to prove this knowledge is proper, although it should involve other crimes committed by the defendant. This is the extent to which the two cases have gone which were cited on the part of the State; it was proved in both that the prisoners had recently, before the last offense, uttered counterfeit notes of the *same* bank, or had the *same* money in possession. But the particular offense in this case consists in uttering a note altered from a five to a fifty, I suppose by some chemical process; and as this is an act requiring a kind of skill peculiar to itself, it may be possessed by one who knows nothing of the art of making counterfeit notes. And a person thoroughly versed in making them may still be altogether ignorant of this mode of alteration. If a knowledge of the one does not necessarily imply a knowledge of the other, it cannot be relevant testimony in the case; but still it must powerfully tend to a prisoner's conviction when it is proved that he has for twenty years and more been concerned in making and handling counterfeit notes, and that he is a person of evil dispositions and wicked habits. The most upright jury, sitting upon the trial of a prisoner whose criminal conduct is thus exhibited to

them in various shapes and degrees, will find their indignant (264) feelings too strongly excited to keep steadily in view the true point of investigation. Instead of traveling calmly to a conclusion through a patient consideration of the evidence, they will be too apt to be precipitated into a conviction of his guilt, from the probability that a man who has committed other crimes has also done this. The issue of this may sometimes be the punishment of guilt, but is there not danger that it may also lead to the conviction of the innocent, since circumstances of strong presumption may be adduced against them which they could have explained had they been apprised of their coming forward? Hence the law will not allow it to be proved on the trial of an indictment that the prisoner has a general disposition to commit the same kind of offense as that charged against him, or that he had committed a similar offense at another time. 1 Phillips' Ev., 137. Yet such proof would create a strong presumption of guilt, as part of the evidence adduced in this case would, without being connected as it ought to be with the particular fact on trial. So, in a trial for high treason where the overt act laid was that the defendant had cruised in a certain vessel, proof was rejected that he had gone cruising in another, for the fact charged was the only one he was then called to answer for. Foster, 246. Yet the proof rejected went to show a treasonable disposition and a familiarity with the crime. The law will not allow evidence of a prisoner's bad character to be adduced against him in chief, lest his case should be thereby prejudiced and converted into a trial for character instead of a specific crime. But if evidence of general character is thus excluded because it is dangerous, how much more so is the evidence of particular crimes and propensities extending through a great portion of the prisoner's life? It cannot in reason be expected that he is prepared for such a trial, for he has no notice of it, and the evidence must go to the jury with the full weight of the odium thus created. Circumstances may be brought forward in (265) the life of the most upright man, which, if taken singly and unexplained, are calculated to raise a presumption against him, but which upon a nearer view might more clearly show his innocence. I will briefly notice those parts of the evidence which I think improper because they do not warrant directly the inference that Twitty passed this bill knowing it to be counterfeit, though it must be admitted that the evidence cannot be read without leaving a strong impression on the mind unfavorable to his character. His knowledge of the genuine three dollar notes of the Cape Fear Bank; his having in his possession twenty years ago a quantity of untrimmed counterfeit notes, which

he said were well executed; the proof that he was a maker of spurious money and intimate with persons of the same description, are circumstances from none of which can I see a direct or necessary inference that Twitty was acquainted with the particular mode of altering notes which appears in this case; a mode which seems to be of modern invention, and which a person skilled in could probably follow to the exclusion of the greater labor and risk of fabricating bank notes and forging the signatures. I feel perhaps more strongly convinced of the impropriety of this evidence, because, after a consideration of the whole case, I think the probability is on the side of Twitty's innocence in this charge. It appears to me that he has been particularly cautious in respect to *passing* counterfeit money; that he has rather contrived the movements and directed the greater operations of a larger concern than encountered the dangerous details of guilt. His reflection upon the value of his counterfeit stock in the hands of a young man of good character implies that his own was suspected, and that he could not safely utter the money; and in no part of the evidence against (266) him does it appear that he had ever passed money of the description here charged. Now it strikes me as improbable, and by no means reconcilable with his former conduct, that he should venture upon the dangerous experiment of sending this counterfeit note to a man who, of all others, was most likely to detect it, the cashier of a bank, daily in the habit of receiving and judging of money, and who was not likely to lose any part of his skill and quicksightedness in detecting false money sent to him by Twitty. I should therefore be of opinion, for these reasons, that the defendant is entitled to a new trial. Upon the motion in arrest I will not enter into a particular examination, because I fully agree with my brothers that the affidavit on which the case was removed was wholly insufficient, according to the act of Assembly.

PER CURIAM. Error.

Cited: *S. v. Seaborn,* 15 N. C., 313, 320; *S. v. Barfield,* 30 N. C., 352; *S. v. Hill,* 72 N. C., 350; *Phillips v. Lentz.,* 83 N. C., 243.

(269)

IN EQUITY

EXECUTORS OF WILLIAM JONES v. ADMINISTRATOR OF THOMAS PERSON.—From Orange.

1. On a motion to dismiss a bill on the ground of length of time, the court will confine itself to the facts set forth in the bill, and if from them it can be collected that there was an *actual* or *express trust* subsisting between the parties, it adheres to the settled rule that, as between *trustee* and *cestui que trust* in such case, length of time has no effect.

2. *Aliter* in the case of an *implied* or *constructive* trust, which must be pursued within a *reasonable* time.

THE original bill in this case, which was filed in March, 1799, set forth that in 1764 an agreement had been entered into between the complainant therein, William Jones, and one Thomas Person, whereby the said Person was to advance to Jones the sum of £120, Virginia currency, and to secure the payment of the said sum with interest thereon the said Jones was to execute to Person a deed in trust for 850 acres of land in the county of Granville; that when the parties were about to execute the necessary writings, Person suggested that the trust on which the land was conveyed might be expressed in a separate writing and not in the body of the deed; and accordingly an absolute deed of bargain and sale to Person was executed by Jones; and on the other half of the same sheet of paper on which the deed was drawn was written a defeasance or condition that, if Jones did not repay the sum of money advanced, with interest thereon, when required by Person, the land should be sold by Person to pay himself, and the surplus, if any, was to be paid to Jones. The papers were executed in the presence of witnesses, who subscribed their names as such. The bill then charged the defendant Person with having fraudulently destroyed that part of the paper which contained the defeasance or condition, and proving only the absolute deed of bargain and sale, whereby the bill of sale only was recorded. The bill further stated that complainant continued in the possession of the lands until April, 1776, after which time Person took possession thereof and received the rents and profits to his own use; that during the time in which complain- (270) ant had possession Person repeatedly offered him another tract, provided he would remove from the land conveyed; that Person frequently told complainant he would give him more for the land than any other individual would, and thereby diverted the complainant from

an advantageous sale, particularly to one Wade; that the complainant repeatedly requested Person to comply with the original contract, sell the land and pay himself, which was always refused by Person, who assigned as a reason for not effecting a sale that the debt had so frequently been changed into *proc.* and Virginia money that no one would buy with that incumbrance; that in 1791 Person, claiming an absolute right to the land, conveyed the same to one Samuel Williams, who is charged in the bill with notice of the trust and made a defendant. The bill alleged as a reason why earlier application had not been made to the court, poverty and the false promises of defendant.

The defendant, Person, in his answer, insisted that he purchased absolutely and without any condition, the lands mentioned in the bill, for the consideration of more than £200; that of this sum he paid the complainant £120, and agreed to pay the sheriff of the county the amount of a certain execution which he held against complainant in favor of one Wright, and also a bond on which the said Wright had commenced suit against complainant; that the aggregate amount of this execution and bond made up the balance of the consideration for the sale of the land; that the agreement of the defendant to pay the sheriff and Wright, and complainant's receipt for the sum of £120 paid him, were written on the same sheet of paper with the deed
(271) of bargain and sale, and constituted what complainant alleged to be a defeasance or condition. The answer admitted that the deed only was recorded without the memorandum of the agreement, and affirmed the payment of the money to the sheriff and Wright, pursuant to the agreement. It alleged that, in 1768 (until which time complainant had been permitted to occupy the land, rent free) complainant became, and continued for some years afterwards, defendant's tenant, under an agreement to pay rent, a very small portion of which had ever been paid. It was admitted that the land had been sold by defendant to Williams, but it was denied that any offer had ever been made to induce complainant to remove from the land. The defendant, in his answer did not insist on the length of time during which the claim had been permitted to lie dormant, otherwise than in the following language, "This defendant cannot but be surprised that, in case any condition had been annexed to said conveyance from complainant to him, that complainant should have suffered the matter to lie dormant so long." Upon the issue joined on the plea of the defendant Williams, the jury found that he was a purchaser for valuable consideration, without notice, and he was discharged.

After the death of the defendant Person the suit was revived against his administrator, and at April Term, 1805, the executors of the complainant were made parties to the suit. It did not appear that any other proceedings had been had in the cause until March Term, 1811, when complainants obtained leave to amend their bill.

The complainants, in their amended bill, which was filed in August, 1811, after reciting the substance of the former bill, showed the death of two of the executors of William Jones, and set forth that William Jones, their testator, was illiterate and ignorant; that, at the time of the agreement mentioned in the original bill, Person (272) promised Jones that if he would convey to him the land he, Person, would reconvey it, provided Jones paid him the money advanced, with interest within a certain time; and further, that Person, imposing on the ignorance of Jones, induced him to believe that the condition mentioned in the original bill was contained in the deed which he executed. It further stated that Jones, for the space of twelve years after the execution of said deed, continued in the possession of said land, positively refusing to pay Person any rent, and that at the time Jones executed the deed he was in the power of Person, who, as sheriff of the county of Granville, had in his hands executions against Jones, who, being unable to satisfy them, was in the power and under the control of Person. But it did not charge the defendant with *assets*. Defendant in his answer to this bill denies that Person ever made to Jones any promise to reconvey, or ever made any representations to Jones of the contents of the deed inconsistent with the truth, and sets out in his answer a copy of the agreement or memorandum which was signed by the parties. Any undue influence on the part of Person is also denied, as is the fact of the poverty or ignorance of Jones, and the possession for twelve years, alleged in the bill, if true, is stated to have been by the permission of Person.

The cause having been set for hearing in the court below, was removed by affidavit into this Court.

Gaston for defendant.
Ruffin and Seawell for complainants.

TAYLOR, C. J. This is a motion to dismiss the bill on the (289) ground that the complainant has not prosecuted his claim within seven years, in analogy to the statute of limitations which bars an entry after that period. Whether that rule is applicable to this case must be ascertained by a careful examination of the charges contained in

the bill which, for the purposes of this motion, must be considered as true. [Here he stated the material parts of the bill.]

These facts present two inquiries: 1. What is the character of the original transaction? 2. Has it undergone any change?

1. By the terms of the contract, made before any writings were drawn, Jones agreed to give Person a deed of trust for a tract of land worth $2,000, to secure the repayment of the money borrowed, which was less than $400. Afterwards when the deed was executed, Person undertook to sell the land, if the money should not be repaid upon demand. His frequent promises to Jones that he would give more for the land than any other person diverted the latter from an advantageous sale, several of which were proposed to him, and particularly one by Andrew Wade. From the inadequacy of the price a strong inference arises that the sale was not *absolute*. The repeated promises of Person to make Jones a title for 300 acres of land in Granville if he would surrender the possession and confirm the title could proceed only from a consciousness that Jones had a valid equity; and in addition to this the various endeavors made by Person to procure an acknowledgment of the absolute deed without the trust, and the singular pretext for not effecting a sale, that the debt had so increased by its frequent conversion into *proc* and then into *Virginia currency,* that no one would buy with that incumbrance, produce altogether an irresistible conviction that Person was a trustee by his own express assent, and consequently not protected by the lapse of time. 17 Vesey, 97. A court of equity constantly recognizes the settled distinction between *actual* trusts (290) and trusts by *implication;* the latter must be pursued within a reasonable time; but in the former, as between *trustee* and *cestui que irust,* length of time has no effect; that is very different from the case of a constructive trust, which this Court allows a man to *establish* by facts and circumstances at any period after it happens. And even where length of time would render it difficult to ascertain the fact, as well as where the fact is easily ascertained, and relief would have been originally given on the ground of a constructive trust, it is refused after long acquiescence; and this from the danger that would otherwise arise to the security of property. "If a trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust;* and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar because his possession is according to his title; just as in the case of a lessee for years, though he does not pay his rent for 50 years, his possession is no bar to an ejectment after the expiration of this term,

because his possession is according to the right of the party against whom he seeks to set it up." 2 Schoale & Lefroy, 633.

2. Taking it then for granted that Person was, in the inception of this transaction, a trustee by express contract for Jones, has anything occurred to exempt him from the responsibilities of that character? His having committed the absolute deed to registration without the trust or defeasance (I confine myself strictly to the bill) was a fraud too gross and palpable to meet with a construction in the least degree favorable in this Court. There are many cases where a person who is not a trustee originally shall be constituted such by a decree of a court of equity founded on the fraud, and in such cases length of time will bar from the discovery of the fraud. But it would be an absurdity that a fraud superadded to a trust should extinguish or merge it; that men should be encouraged to commit crimes as the certain means of eluding their contracts. Nor can this pretense be reconciled (291) with the doctrine of equity that if a mortgagee, executor, trustee, tenant for life, etc., who have a limited interest, gets an advantage by being in possession, "or behind the back" of the party interested in the subject, or by some contrivance or fraud, he shall not retain the same for his own benefit, but hold it in trust; that a trustee shall gain no benefit by any act done by him as trustee, but that such benefit shall accrue to his *cestui que trust;* nor shall he purchase part or the whole of the estate of which he is trustee. 1 Ball & Beatty, 46, 47; 2 Ball & Beatty, 290, 298; 1 Brown, 198; 1 Ch. Cas., 191; 5 Ves., 707.

All these cases proceed on a rule of general policy, to presume the possibility of fraud and abuse since trustees, from their situation and the knowledge it enables them to acquire, may be induced to take advantage of their *cestuis que trustent.* It might be sufficient to test this by the principles of natural justice and the instinctive suggestions of every man's moral sense, even if there were no decided cases, for every honest mind would revolt at the bare statement of the transaction as set forth in this bill. Jones left the possession in the confidence of Person's promise to make him a title to 300 acres of land in Granville County, and Person obtained the possession by means of that promise. This I take to be the fair construction of the bill, though it is not so stated in precise terms. Now, if Person had complied with his promise, the trust would have been executed, and Person's possession be thenceforward adverse to Jones's; but while it remained unexecuted, Person was still the trustee to Jones under the first agreement. Until he made a deed for the Granville land he was still bound to sell Jones, under the original agreement, and the possession he acquired must enure to

the benefit of Jones. The possession comes from the same root
(292) with the title and is bound by the same equity, otherwise the nature of the contract might be changed, and the rights of the complainant be destroyed by a trick of the adverse party. If a trustee holds a lease for the benefit of *cestui que trust* and avails himself of his situation to obtain a new lease, he shall hold it for the benefit of *cestui que trust*. 1 Douglas, 269. So if a guardian takes a renewed lease for lives, the trust follows the actual interest of the infant, and goes to his heir or executor, as the case may be. 18 Ves., 274; 2 Johns., Ch. Ca., 33.

Under this view of the case, founded on the facts stated in the bill, I am of opinion that Person continued to be a trustee for Jones, under the original agreement, as long as he held the land, and that he is liable as such, notwithstanding the lapse of time.

HALL and HENDERSON, JJ., concurred.

On the several issues submitted to them, the jury found that there was a written agreement annexed to the deed, in the nature of a mortgage, by which Person was to sell the land, pay himself, and return the surplus to Jones if Jones did not pay the sum advanced by Person when called on, and that Person fraudulently destroyed this agreement. The jury also found that the actual consideration of the conveyance from Jones to Person was $400; that there was no additional contract between the parties, by virtue of which Jones surrendered the land and Person took possession thereof in 1776, but that Person proposed to Jones and agreed to give him two or three hundred acres of land in Granville County in the year 1776; that the land was worth at the time of the conveyance to Person by Jones, $1,000; that in the year 1776 the value of the land was $1,660; in the year 1791, at the time of the sale to Williams, it was worth $2,333, and in the year 1799, when the bill was filed, it was of the value of $2,830. The jury further found that in the year 1781, after Person had taken possession of
(293) the land, Jones demanded of him a compliance with his proposition to convey to him land in Granville, which Person at that time declined performing, but promised to do it at some future period.

On this finding of facts,

Ruffin and Seawell moved for a reference to the Master to ascertain the amount of mortgage money, with interest thereon, and to report the balance due complainant after satisfaction of the mortgage.

Gaston opposed the reference, contending that no decree could be rendered against William Person, who was not originally the defend-

ant, but was made so as administrator of Thomas Person; that as administrator he was chargeable in equity only by *reason of the fund* which he held in that capacity; that the bill in this case did not charge him with assets, and therefore defendant could not deny assets in his answer without impertinence. Coop. Eq., 69, 70; Mitford, 59; that the question as to time, which the court had not deemed it necessary to examine in deciding on the motion to dismiss, again presented itself, for nothing in the finding of the jury brought this case out of the rule of 7 years, for which it contended; that the mortgage, as found by the jury, was in the nature of a Welsh mortgage, and that in such mortgages a possession of twenty years, after the purposes of the trust were satisfied, would be a bar. *Yates v. Hambly*, 2 Atk., 360.

PER CURIAM. Let the case be referred and the Court after- (295) wards decreed according to the report of the master, against the defendant, to be satisfied *de bonis intestati.*

PEAGRAM v. LUDY EDWARDS KING AND RICHARD PEAGRAM KING.
From Cumberland.

1. Where a bill setting forth the fact of a former trial at law and the discovery, *after* that trial, of evidence which goes to fix a perjury upon the only witness whose testimony was important in the trial, this Court will not dismiss the bill, but will retain it until the hearing.

2. It is not sufficient that the newly discovered evidence goes to repel your adversary's charge, but it must destroy his proofs.

THE complainant in his bill set forth that Richardson Peagram, the brother of this complainant, in July, 1806, died intestate, possessed of certain negroes named in the bill, and that administration on his estate was granted to this complainant, who, by virtue thereof, took said slaves into his possession. That this complainant's intestate at some period during his life fell into the company of a certain lewd woman named Ludy Edwards King, with whom he was drawn into illicit commerce; that the said Ludy Edwards King was afterwards delivered of a child (the other defendant in this suit) which she alleged was begotten by complainant's intestate. That after the death of Richardson Peagram, the said Ludy Edwards King, in her own name, and as *prochein amy* of Richardson Peagram King, commenced an action of

detinue against this complainant in the county court of Chatham for certain of the slaves before mentioned, claiming them by virtue of a parol gift from said Richardson Peagram; that in said county (296) court a verdict was found against this complainant on the single and unsupported testimony of one Joseph Jenks, and judgment was rendered accordingly. That the cause having been removed by writ of *certiorari* into the Superior Court of Chatham, was there pending when the above named Joseph Jenks died, and on the trial of the issues in the said Superior Court, evidence of the death of said Jenks and of his testimony on the former trial being received, a verdict and judgment were obtained a second time against this complainant. After the trial in the Superior Court rumors having reached complainant of confessions made by Jenks as to the falsity of his former testimony, he moved for a new trial, but on the most diligent inquiry, not being then able to discover the persons who could prove such confessions, he withdrew his motion.

The bill then proceeded to state that a short time previous to the filing thereof complainant discovered that he could furnish evidence to prove that the said Joseph Jenks had declared on his deathbed that the testimony which he had given in the cause aforesaid was untrue, and that he had been induced to perjure himself by the promise of the defendant Ludy Edwards King to give him one of the negroes to be recovered; that the said Ludy Edwards King had applied to Jenks in his last illness to procure his deposition for the purpose of establishing the parol gift aforesaid, and that the said Jenks had refused to give it, declaring at divers times that the complainant's intestate had never, so far as he knew, given anything to either of the defendants to this bill; and further, that after the death of said Jenks the defendant Ludy Edwards King had declared that she would give to any person who would depose to the same facts which Jenks had testified the same compensation which Jenks was to have received, or even more. The bill prayed a perpetual injunction to restrain all further pro- (297) ceedings upon the judgment obtained against this complainant, and that a new trial of the issues might be directed.

Taylor for defendant moved to dismiss the bill for want of equity.

PER CURIAM. We do not entertain this bill barely upon the ground that the complainant has discovered evidence since the trial at law (and which he of course could not then avail himself of), but also from the peculiar nature of that evidence, it going to fix a perjury

upon the principal witness in the trial at law. It is therefore very unlike those cases where the newly discovered evidence goes to support a charge made in the case at law by the applicant, or to repel a charge made against him. But it resembles those cases where the principal witness on a trial at law has been afterwards convicted of a perjury in his evidence in that case. In such cases, relief should be granted some way or other; at least we will not dismiss the bill, but will retain it until a hearing. It is not sufficient that the newly discovered evidence goes to repel your adversary's charge, but it must destroy his proofs.

PER CURIAM. Motion to dismiss denied.

Cited: McNaughton v. Roberson, 31 N. C., 259; *Houston v. Smith,* 41 N. C., 268; *Burgess v. Lovengood,* 55 N. C., 460; *Stockton v. Briggs,* 58 N. C., 314.

(298)

TAYLOR v. PERSON.—From Halifax.

1. Placing the amount of a decree in equity in the hands of the master, in bank notes, is such a substantial compliance with the order of the court as will save the party from an imputed neglect or contempt, and authorize the filing of a bill of review.

2. It is sufficient cause to reverse a decree that the facts put in issue by the bill and answer were not decided by a jury before the decree was made.

BILL OF REVIEW, assigning various errors in former decree, and among others that the facts put in issue were not decided by a jury before the decree was made. To the bill was pleaded that the former decree had never been performed.

The former decree was made 24 April, 1812, for $1,328. On 11 July, 1812, it amounted, with interest, to $1,345.92, and at that time a payment was made of $700. The balance due on the decree, with interest thereon to 21 April, 1819, amounted to $909.53. On 21 April, 1819, the complainant paid to the clerk and master of Halifax court of equity the sum of $904.37, in bank notes, and in the receipt taken for the same from the clerk and master it was stated to be the balance due on the former decree. It was admitted that the calculation of the balance due and payment to the master, were made for the purpose of enabling complainant to institute this suit.

Seawell and Mordecai for complainant.
Hogg for defendant.

(299) TAYLOR, C. J. A payment to the clerk and master, where there is no order of court authorizing it, or no execution issuing from his office to raise the sum, is not, in general, regular. Neither is a tender of bank notes, if objected to on that account, sufficient at law to stop the interest of a debt, and the *deposit* here must be considered in the same light. But the real inquiry now before the Court is whether placing these notes with the clerk and master in the manner and with the receipt exhibited in the case amounts to such a substantial compliance with the standing order of the court as will save the party from an imputed neglect or contempt, and authorize her to be heard upon the bill of review? And I cannot for a moment doubt that it ought to be considered in that light, and that an opposite construction, tending to deprive the party of an important right, would be
(300) rigorous and unconscionable under all the considerations arising from the state of the country, the course of practice, and the character and object of the order itself. 1 Vern., 117, 264; 1 Eq. Ca. Abr., 82; 1 Ch. Ca., 42.

This view of the question will be strengthened by an examination of the cases showing the occasional relaxation of the order and in what degree questions touching obedience to it have been considered less as matters *stricti juris* than as governed by a sound discretion. This further appears by the doubt whether the objection can properly be made by plea, since the bill of review would not stay process for compelling payment of the money decreed. Mitford, 235.

Upon this preliminary point then the bill appears to be properly in court, and the next inquiry is whether the errors assigned are sufficient to reverse the decree. The bill is brought for error in law *apparent* upon the face of the decree; and the most important error assigned is that the facts put in issue were not decided by a jury before the decree was made. The decree is drawn up in general and in very informal terms, so that it is impossible to collect from it upon what facts found or admitted it was made. But if the decree does not state upon its face the material facts upon which it is founded, it is erroneous; otherwise a bill of review would be unavailing, since the party cannot assign for error that any of the matters decreed are contrary to the proof in the cause, but must show error in the body of the decree. 1 Vern, 166. It is for this reason necessary to recite in the decree the bill and answer, and the facts which were proved and were allowed by the court to be proved, must be particularly set forth; nor is it sufficient to state that upon reading the proofs and hearing what was alleged on either side the decree was made. 1 Harrison's

C. P., 108. If the facts on which a decree is founded are not mentioned in the decree they shall, upon a bill of review being brought, be taken as *not proved,* for else a decree could never (301) be reversed by a bill of review; and a plaintiff in a bill of review ought not to be concluded by the neglect of particularly stating the matters of fact in a decree. *Brend v. Brend,* 1 Ver., 213; *Benham v. Newcomb, ibid.,* 214.

The equity in this case mainly depended on the truth of certain facts charged in the bill and denied in the answer, and the truth of certain defensive allegations set forth in the answer. Were these facts decided on by a jury or admitted by the parties? The answer to this question can only be sought for in the decree, and the information thence derived is that they were not tried at all, for the decree is founded upon the *bill, answer, and exhibits.*

The foregoing reasoning and authorities apply with increased force to our courts of equity, in which the law peremptorily requires that issues of fact shall be tried by a jury. It is indispensable then that it should appear upon the face of the decree that they were so tried, for upon that basis alone the court's authority to pronounce a decree must rest.

At the same time it cannot be expected that under the organization of our courts of equity decrees can be drawn up with the same labored particularity that they are in England, where there is a register for the sole purpose of transacting such business; but it is reasonable to require that the substantial parts shall be briefly recited or preferred in order that the footsteps of the court may be traced. I have considered all the other errors assigned, but, entertaining no doubt of the sufficiency of this to reverse the decree, I forbear to give an opinion upon them.

HALL and HENDERSON, JJ., concurred.

In this case it was decreed by the Court that the decree of the court of equity for Halifax, complained of, be reversed; and it was further ordered and decreed that the complainant have leave to (302) withdraw from the clerk and master's office of the county of Halifax the sum therein deposited upon the filing of the bill, and that the defendant repay to complainant the sum paid by her to him, with interest thereon from the time of payment, and that defendant pay all costs of this Court and the court below.

Reversed.

LITTLEJOHN v. PATILLO.—From Granville.

1. An act which a party is bound to perform only by honor and moral duty can be enforced only by considerations addressed to his feelings, and would not be the subject of a legal action.

2. A bill to enforce performance of such an act will therefore be dismissed for want of equity, for equity must here follow the law, which designs to give effect to contracts founded on the mutual exigencies of society, and not to undertakings which are merely gratuitous.

THE bill stated that complainant had become the purchaser for the consideration money of $15,000 of the tract of land in the county of Granville on which the courthouse of that county was erected; that shortly after his purchase certain individuals excited discontent among the citizens of the county by representing that complainant enjoyed a monopoly in being sole proprietor of the public houses near the courthouse, and a petition to the Legislature of the State was circulated by them for subscriptions, praying that the seat of justice might be removed if complainant would not permit a town to be laid off on his land at the courthouse; that complainant, to prevent the ruin which would ensue to him from the removal of the seat of justice, assented to the petition to the Legislature, and accordingly, in 1811, an
(303) act was passed appointing commissioners to contract with complainant for fifty acres of land to erect a town upon; that to the application of these commissioners complainant replied that his situation forbade his fixing on a specific sum as the price of the land, but that he left the matter to their consideration and sense of justice, and expressed his intention of conveying to them the land for any sum which they might assign as its value; that the commissioners declared their wish that complainant should have the full benefit of all the said land would bring, and that by a private agreement among the commissioners, unknown to complainant, he was to receive such sum above that for which he sold it as the land would yield upon the sale of it in lots by the commissioners; that the sum of $2,636 was proposed by the commissioners and accepted by this complainant, and a conveyance executed accordingly; that this complainant was so situated that he was compelled to accede to any terms which might be offered by the commissioners, and therefore made no stipulations, but relied on the justice of the commissioners to adopt such measures as would secure to this complainant the value of the property. The commissioners sold the land in lots on credit for the sum of $4,360.84, and bonds were given by the purchasers to John F. Patillo, county trustee of the

county of Granville; that Patillo had assigned to complainant bonds to the amount of $2,636 and refused to assign the residue. The bill prayed that Patillo might be directed to collect the money due and pay it over to complainant, or that it might be decreed that the remaining bonds might be assigned by Patillo to complainant.

Ruffin moved to dismiss the bill for want of equity.
Seawell and *Gaston* opposed the motion. (304)

HALL, J. Consider this case independent of the *contract,* and the justice of it would be that the complainant should be entitled to the value of the land—that is, the amount it sold for. But, viewing it under the contract made with the commissioners and the law arising thereon, I think he is entitled to nothing. The complainant is not to be viewed in the light of an oppressed man; he had it in his power either to keep the land or sell it; he was not bound to take for it what the commissioners offered him, unless he had determined to have a town located there at any price they might value the land at, however low; if this was the fact, he had in view a greater benefit to himself than the difference in price between what he got for the land (305) and what it sold for. It is clear, if the land had sold for less than was given for it, the county could have had no deduction made from the sum contracted to be given. Any *ex parte* considerations or conclusions which the commissioners had or might have come to would have been urged in vain in support of such a claim, and rightly too. The contract was the rule to go by; when the commissioners executed that their agency was at an end.

If the price paid for the land by complainant on which the town was located was a great one on account of the courthouse being situated thereon, this Court cannot take that circumstance into consideration, because it must have been, or might have been, known to complainant when he purchased that the county had a right to remove it.

I do not doubt about the propriety of dismissing the bill.

TAYLOR, C. J. The bill does not make out a case which entitles the complainant to relief. The contract of sale was completed between the parties, and the price, an indispensable ingredient in such contract, fixed and agreed upon. The additional sum now sought to be recovered entered in no degree into the views and calculations of the parties; there was no mutual agreement and understanding between them concerning it, and it could form no part of the inducement with the complainant to sell the land, for from him it was concealed till an after

period; consequently no valid obligation to pay the money was incurred. If the commissioners, upon an after reflection, thought it an act of justice to allow the complainant the sum which the land might sell for above the stipulated price, the performance of an agreement to that effect must be left to the same sense of justice by which it was prompted. But it may be doubted whether they could bind their principals by an agreement relative to a purchase which was then completed, and as to which their authority was *functus officio,* even if a valid contract
(306) had been made. If the agreement to pay this money could, by any construction, form part of the price of the land, then it cannot be proved by *parol;* otherwise, part of the contract would rest in deed, the other depend on the memory of witnesses, but the deed is the best evidence of what the contract was. It may be confidently inferred from this that, however strong the sentiment of justice might be under which the commissioners made the agreement or however deliberate their purpose of fulfilment, they did not mean to subject themselves to legal responsibility. The law designs to give effect to contracts founded on the mutual exigencies of society and not to undertakings merely gratuitous, nor does equity differ in this respect. If damages are sought in the one court, the plaintiff must be able to state some valid, legal, contract, which the other party wrongfully refuses to perform; if a specific performance is sought here the party must state some contract, legal or equitable, concluded between the parties which the other refuses to execute. But a *voluntary* conveyance cannot be enforced in this Court, any more than damages can be given at law for the breach of a *voluntary* promise. 1 Ves., 133, 280; 3 Atk., 399; 18 Ves., 149. It would be impossible to frame a declaration at law upon the case made in this bill; the agreement was made amongst the commissioners themselves, and not with the complainant or any one in his behalf, and the consideration, if any existed, was altogether passed and executed. Dyer, 272; 2 Strange, 933. It may therefore be said, as it has been in another case, "This agreement resting on private contract and honor, may, perhaps, be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise, but legal obligations are, from their nature, more circumscribed than moral duties." 1 H.
(307) Blackstone, 327. Let the bill be dismissed without costs.

HENDERSON, J. Having been of counsel in this case, gave no opinion.

PER CURIAM. Dismissed without costs.

THOMPSON AND OTHERS v. O'DANIEL.

IN this case the defendant had filed exceptions to the master's report, but had not offered either affidavit or testimony in support of them.

PER CURIAM. The truth of the exceptions not appearing on the face of the proceedings, and not being supported by affidavit or otherwise, the Court cannot notice the exceptions.

PER CURIAM. Exceptions overruled.

JEFFREYS v. YARBOROUGH, EXECUTOR, AND OTHERS.—From Franklin.

1. When a master reports a sum to be due, on the admission of one of the parties, the more regular mode is for the party to *sign* such admission in the master's presence.

2. When a report is made upon accounts exhibited to the master, such accounts should accompany the report, that the court may see the correctness of the master's inferences.

IN this case the clerk and master of Franklin had reported in favor of complainant, stating in his report that several sums were admitted by the defendants, without taking down the admissions in writing and having them signed by the party making them. Exceptions filed to the report, which were overruled by the court below, and a final decree made by the judge below, from which an appeal was taken to this Court.

PER CURIAM. Where a master reports that any specified sum is admitted by the parties to be due it ought in general to be presumed *prima facie* to be true and to throw the *onus* on the other side to show the contrary by affidavit. But even in such case the (308) more regular, and certainly the safer way is for the party making the admission to sign it in the master's presence. 3 P. Wms., 142; Cursus Cancellariæ, 427. In this case, however, the report shows upon its face that the sums reported were raised by the master from accounts exhibited by the party, the items of which accounts were admitted; and such a report is clearly irregular, unless the accounts accompany the

report or are particularly referred to, so that the court may examine the correctness of the master's inferences.

The report must therefore be set aside, and the cause remanded for further proceedings.

PER CURIAM. Reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1823

GREEN v. JOHNSON.—From Warren.

An execution *bearing the first teste* will be satisfied before one of a younger *teste* first delivered and levied upon property, but not sold before that of the first *teste* comes to the sheriff's hands.

JUDGMENT had been obtained in the Superior Court of Warren (309) at October Term, 1821, against one Hawkins, whereupon a *fi. fa.* issued, tested of that term, which, on 15 March, 1822, came to the hands of the defendant, who was coroner of the county. At February Term, 1822, of Warren County court, judgments were obtained against Hawkins and executions issued to the defendant previous to 15 March, 1822. On that day, *after* the coroner had received the *fi. fa.* from the Superior Court, he exposed the lands of Hawkins to sale under the execution from the county court. A motion was made by plaintiff, who was interested in the Superior Court execution, for a rule on the defendant to show cause why the money raised by the sale of the land should not be applied in satisfaction of the execution from the Superior Court. The rule being discharged, the plaintiff appealed. (310)

TAYLOR, C. J. My inquiries in this case have led me to the belief that the plaintiff is entitled by law to the money in the hands of the sheriff, by virtue of the prior *teste* of his execution. I do not mean to give an opinion on any other facts than those stated on the record; nor particularly on the supposition that the money had been raised by a sale under the second execution.

The writ of *fi. fa.* in this State binds the defendant's goods from the *teste* of the writ, after which time any sale of them is void; because

from thence the goods are attendant to answer the execution. This is an old rule of the common law, founded on the reason that, as executions could issue only against goods which might if not so bound be sold by the party, he would thus be able to evade what is termed the life of the law, its effect and fruit. The common law, also, presumed that the sheriff would execute such writs immediately and thereby give such publicity to the transaction as would prevent imposition upon purchasers. The judgment did not bind, because, that being in force for a year, it would have been vexatious to restrain the debtor from his ordinary private dealings for so long a period.

When the term *lien* is applied to other subjects in the law its import is familiarly understood to be a binding or attachment of the thing spoken of for the benefit of him who is entitled thereto. The *lien* of a vendor on goods not yet delivered, of a carrier, a factor, or pawnbroker, entitles them, respectively, to a priority over others whose claims are posterior, upon the simple rule of justice that the first *lien* gives a right to the first satisfaction.

(311) So far from there being any reason wherefore this rule should not be applied and enforced to a certain extent between the conflicting claims of creditors under different executions, it seems to me demonstrable, from a slight view of the alteration of the law by the statute of frauds, that it is so applied and always has been.

When that statute was passed the priority arising from the *teste* was understood to subsist in theory in full vigor; every book that treated on executions laid it down as settled law, and the statute itself had no further view than to restore its practical utility by the substitution of a *lien* better fitted by its notoriety to prevent fraud and injustice to third persons.

It was not that the rule of the common law was defective in fixing on the *teste* of an execution to bind the defendant's goods, because in reality the law supposed the execution to be delivered to the sheriff immediately from the *teste;* and if, in point of fact, that had been done, the purposes of the statute would have been accomplished and its enactment rendered useless. Thus the *award* of an execution and the *teste* of an execution are convertible terms; but the former is chiefly used in cases before the statute. A *bona fide* sale of chattels is good after judgment, but not after execution *awarded.* 8th Co., 170. "By the *award* of execution the goods are bound, so that they may be taken in execution, into whose hands soever they come." Cro. Eliz., 174.

But the real mischief intended to be remedied was that creditors took out executions, one under the other, without delivering them to

the sheriff, whence the retrospect of the *teste* made sales uncertain, each plaintiff being entitled according to his relative priority; and it was utterly impossible for purchasers and strangers to tell without an inspection of the record, a process neither cheap nor easy, to what extent the goods were bound.

So far as other persons were concerned, who might have a title to the goods between the *teste* and delivery, the statute designed to restore the old law; but as to the party himself, his executors (312) and administrators, the goods, since the statute as before, are bound from the *teste*. 2 Show, 485.

If this position be correct I would infer from it this corrollary, that the cases since the statute of frauds, showing the force and extent of the *lien* created by the delivery of the writ of *fi. fa.*, will go very far towards explaining and proving the extent and operation of the *lien* arising frome the *teste* before the statute. A more direct mode of showing the question would be to adduce cases which occurred before the statute, but none such directly in point are to be found. There are, however, *dicta* and decisions of modern judges, relative to the common law on this point which, if correctly reported, are entitled to much consideration. *Lord Mansfield* decided that, though the sheriff had seized under one writ first, he was bound to sell under another delivered afterwards, if it had a prior *teste*. Cited in 4 East, 534, *in notis*. To the same effect is the opinion of the late *Chief Baron MacDonald*, who, having presided many years in the Court of Exchequer, may be supposed, was well instructed on the subject. His words are, "I take it, before the statute of frauds a writ of execution of a prior *teste* would have been preferred to a writ of execution of a subsequent *teste*, although the latter was first delivered to the sheriff and was begun to be executed, provided that the writ of prior *teste* came to the sheriff's hands before sale." Cited in 16 East, 279, *in notis*. If these opinions of these eminent men are to be relied on as authentic, they go to the whole length of the present controversy. They will be found, too, in accordance with the decisions since the statute.

Hutchinson v. Johnson, 1 Term, 729, shows that where two writs of *fi. fa.* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution shall have the priority, even though the (313) seizure was first made under the subsequent execution. I would remark on this case that the statute priority by delivery is preserved, notwithstanding a seizure under a second delivery. Can any reason be assigned why the common-law priority shall not be maintained, not-

withstanding a seizure under a subsequent *teste,* provided the first execution reaches the sheriff before the last is actually executed? If there cannot, then the case before us is decided by this authority. The case of *Smallcombe v. Buckingham* was a *sale* by the sheriff under a second writ of *fi. fa.,* the former *fi. fa.,* though first delivered to the sheriff, not having been then executed. According to the report of it by *Comyns,* the amount of the judgment was that, at common law, if there were two writs of *fi. fa.,* the one bearing *teste* on such a day and the other on the next day, and the last writ was first executed, such execution should not be avoided, and the plaintiff in the first execution must seek his remedy against the sheriff; for the sheriff ought to make execution at his peril, and if there was no default in him he shall be excused; as, if he who took the first writ out conceals it in his pocket, the sheriff may rightly make execution on another writ which bears the last *teste* but comes first to his hands. The law laid down in the case affirms every principle on which the plaintiff relies in the case before us, though it goes further and validates a sale made under the second execution, a question with which we have now no concern. *Rybot v. Peckham,* cited in Term, 729, is decided on the same principle, and while it admits the validity of a sale under the second execution, it shows at the same time that the sheriff makes himself liable to the plaintiff in the first, which could not be but for the priority of the latter. The courts have evidently gone far to support sales actually made under execution; and it is probably right, and according (314) to the general policy of the laws, that innocent vendees should not be disturbed by dormant liens, more especially as the plaintiff may obtain satisfaction from the sheriff; but, though a second execution *executed* may destroy the lien of the first, though it may be waived or lost by laches or fraud or overreached by relation of a bankruptcy or extent, yet nothing of that kind appears in this case. I am, therefore, of opinion that judgment shall be entered for the plaintiff.

HALL, J. It is submitted to this Court to direct to the discharge of which execution the money arising from the sale, and now in the hands of the coroner, shall be paid.

Executions at common law had relation to their *teste,* and from that time so bound the property of goods and chattels as against the defendants and all claiming under them, though for a valuable consideration, that they were subject to be taken in execution. 8 Co., 171; Cro. Elizabeth, 174, 440. But it does not so vest the property in the goods as to defeat a sale made of the same goods under another execution.

1 Lord Raymond, 252; 1 Salk., 320; 1 Com., 35. For otherwise, says *Lord Holt,* no one would purchase at an execution sale. 1 Ld. Raym., 252. Whether such sales were held good at common law for the reasons given by *Lord Holt,* or whether by the statute of frauds, as seems to be *Ashurst's* opinion in *Hutchinson v. Johnson,* 1 Term, 731, is not material in the consideration of the present question. It may be taken for granted that such is the law, and that the injured plaintiff, whose execution had a priority and which was postponed by such sale, had a remedy against the sheriff. See *Rybot v. Peckham,* 1 Term, 731, note. It has been said that because vendees under junior executions were protected, that was proof that executions of the first *teste* did not completely bind the property in the hands of the defendant. (315) If there had been no other remedy for the plaintiff in the first execution it is more than likely that the lien created by his execution would have been held valid. But it was thought more just and equitable to throw the burden on the sheriff who had done the mischief and make him liable to the creditor he had injured, rather than the innocent vendee under the younger execution, who was in no fault.

But the reason why such sales are held good does not apply to cases where goods have been levied upon but not sold, and perhaps would not apply to cases where sales had taken place and the money was still in the hands of the sheriff; because, although a sale had taken place, and the vendees were not to be disturbed, the money when not paid over might be applied to the discharge of the execution which had the prior right. But this question is not now to be decided, because in the case before us there had been no sale, but only a levy under the execution, which issued from the county court before the execution which issued from the Superior Court came into the hands of the coroner.

In England, by the Stat., 29 Car. II., ch. 3, sec. 16, executions bound the property of goods and chattels only from the time that such writs were delivered to the sheriff to be executed, so that the lien which executions had at common law from their *teste* upon goods and chattels commenced under that statute from their delivery to the sheriff. And it seems to me that the same law applied to executions delivered at different times to the sheriff as applied at common law, to executions bearing different *testes,* and that before the statute the delivery to the sheriff did not alter the lien created by the *teste* any more than since the statute the *teste* will affect the lien created by the delivery to the sheriff.

Supposing, then, the same rules applicable to executions bear- (316) ing different *testes* in this State that applies to different *deliveries*

of executions under the statute in England, we have authority for saying, from *Hutchinson v. Johnson,* 1 Term, that the execution first delivered to the sheriff shall be first satisfied, although the property might be first levied upon by an execution subsequently delivered; it follows that, as the statute is not in force in this State, an execution bearing the first *teste* ought to be satisfied before one of a younger *teste* first delivered and levied upon property, but not sold until the one of the first *teste* comes to the sheriff's hands; for if the property is bound from the *teste,* it cannot be the more bound from delivery, and the delivery operates nothing. It is true, *Lord Holt* says in *Smallcomb v. Buckingham,* 1 Salk., 320, that at common law, if two executions bearing equal *teste* come to the hands of the sheriff, he is bound to execute that one first that is first delivered. This was not the question before the Court. The question was whether goods sold under an execution could be again sold under another execution which had been first delivered to the sheriff. That *dictum* of *Lord Holt's* is differently reported by different reporters. In 1 Ld. Raym., 252, he is made to say "that if a *fi. fa.* had been sued out the first day of the term, and another *fi. fa.* afterwards, and the last had been first executed, the other had no remedy but against the sheriff." Comyn, in his 1st vol. 35, reports the *dictum* thus, "If at common law there were two writs of *fieri facias,* the one bearing *teste* on such a day, and the other on the next day, and the last writ was first executed, such execution should not be avoided, and the party had no remedy but against the sheriff." In this report the preference is given on account of the first *teste,* and nothing is said about a delivery to the sheriff.

But on the point of law involved in this *dictum* of *Lord Holt,* so differently reported, we have, by way of explanation, the *dictum* of another judge, for I admit that it was not the question then pend-
(317) ing for decision before the Court. In *King v. Wells,* decided in the Exchequer (16 East, 278, note), *Baron M'Donald* says, "Before the statute of frauds, the subsequent writ of execution of a prior *teste* would have been preferred to another subject's writ of a subsequent *teste* although the latter was first delivered to the sheriff and was begun to be executed, provided the writ of prior *teste* came to the hands of the sheriff before a sale." This position is laid down by *M'Donald,* in the decision of a case of comparatively recent date, with all the authorities on the subject before him. His meaning on the point cannot be misconceived or mistaken, and it is in *words decisive* of the present question.

I cannot see the effect that the case of bankruptcy is intended to

produce. I am not aware of any case where the assignees of a bankrupt have been adjudged to be entitled to property taken under an execution before an act of bankruptcy committed. If an execution issues into the hands of a sheriff, but is not levied upon property in the hands of the defendant, and the defendant in the meantime commits an act of bankruptcy, I admit that the lien created by the issuing of the execution is lost, and the assignees of the bankrupt are entitled, because Stat. 21st Jac. I., ch. 19, secs. 9, 11, expressly declares "that the property in the bankrupt's possession at the time of becoming a bankrupt shall belong to the assignees of his commissioners, whereof there is no extent or execution *served* or *executed* before such time as he shall become bankrupt." 1 Burr., 20. So that the lien created by issuing the execution is expressly destroyed by that statute; but if the property had been seized before the commission of the act of bankruptcy, the creditor in the execution would have the preference.

But laying aside authorities on this subject as contradictory and unsatisfactory, can there be any doubt as to the policy and justice of the case? If an execution of prior *teste* is held up by the party, or not issued, which is the same thing, and one of posterior *teste* (318) issues and is *executed,* there is no injustice in saying that the latter shall have the preference; *vigilantibus et non dormientibus leges subveniunt.* But when an execution of younger date happens by mere accident to reach the hands of the sheriff before one of an elder *teste* and is not executed before the other is received by the sheriff, I can see no injustice or inconvenience in giving a preference to the execution bearing the first or eldest *teste, qui prior est tempore potior est jure.* To adopt a contrary course would be going further, as it seems to me, than protecting those who are laudably vigilant, and would open a door to fraud. The law had better designate the rule by which justice shall be administered, than leave it to the physical ability of creditors or, in other words, give a preference to that execution that the most dispatch is used in first getting into the hands of the sheriff.

For these reasons I think the money in the hands of the coroner arising from the sale of the land should be paid to the plaintiff in the execution which issued from the Superior Court, bearing *teste* prior to the one under which the property was levied upon that issued from the county court.

HENDERSON, J., *dissentiente:* This case is submitted without argument, and I fear I have not been able to find all the cases on the subject or duly to understand and appreciate those I have found. The result

of my investigation is that neither at the common law nor since the statute of frauds did either the *teste* or the delivery of the writ of execution bind or fix upon the property, otherwise than to affect it in the hands of a voluntary purchaser; that as between the debtor and the creditor the property was not divested by either, and that at the common law, the first delivered writ of execution imposed upon the sheriff an obligation of executing it before writs subsequently
(319) delivered, upon this simple ground, that he who is prior in point of time has a prior claim to his exertions over those who are posterior upon the maxim, *vigilantibus non dormientibus servat lex.* I am not able otherwise to account for the numerous decisions, confirming the titles of those claiming property under executions subsequently delivered, and the frequent expressions to be found in the books that the property remains in the debtor after the delivery of the writ of execution, and that an act of bankruptcy supersedes an execution after it is actually begun. If the delivery of the writ binds or attaches upon the property, the property may be pursued in the hands of a purchaser who claims under an execution subsequently delivered, in the same manner that he may pursue it in the hands of a purchaser from the defendant himself. That he cannot do the *first* and that he can do the *second* is not controverted in any case. Nor does this arise in the first case, that purchasers may be induced to come forward and bid in execution sales, otherwise none would bid, as was said by *Holt,* in *Smallcombe v. Buckingham;* for the same result follows in a case where the sheriff delivers the goods to the plaintiff himself in execution. *Rybert v. Peckham,* note to 1 Term, 729. Nor is it any answer to say that the sheriff is responsible; for if the goods are bound, the plaintiff may pursue either. So in the case of an act of bankruptcy committed after the delivery of the writ of execution and even after its levy, and (I might add) actual sale of the property, the execution is superseded, and the property will pass by an assignment to the assignees of the bankrupt. Now, as none but that which was the property of the defendant at the time of the act of the bankruptcy committed can be assigned, it follows that the delivery of the writ of execution does not bind or attach upon the property; for if it did the property would pass subject to such lien, the contrary of which is admitted to be the case. It appears to have been the object of the statute of frauds,
(320) as appears in its preamble and enactment, to transfer from the *teste* to the delivery of a writ of execution its *binding* force; not to create anew any obligation, but barely to change the time of its operation. It follows, therefore, that the words *bind from the delivery*

have an operation only in those cases where the writ bound before, viz., between creditors under execution and those claiming by voluntary purchase from the defendant. In support of this opinion I might refer to the cases before the statute of frauds, which are quite silent as to the binding efficacy of a writ of execution from its *teste* as to competing creditors, whereas it has frequently been decided that, as between the creditor and a purchaser from the defendant, the property is bound from the *teste* of the writ. I might also avail myself of what was said by the judges in *Smallcombe v. Buckingham,* 1 Ld. Raym., 251, how the common law stood, for although I confess their expressions are somewhat ambiguous, yet certainly the preponderance is that a *preferable right to have an execution satisfied* arose at the common law in favor of the execution first delivered, although I should throw into the opposite scale the *dictum* of *Chief Baron MacDonald,* in *Rex v. Wills,* reported in a note of 16 East; for his opinion should weigh but little when opposed to the opinions of those who were at the bar when the statute of frauds was passed—more especially when it is recollected that he was then laboring to establish a theory by which he overruled two cases, if not more, going to put the rights of the subject on more equal ground when contending with the Sovereign. In addition to these, it is also to be observed that all the sayings of the courts as to what the law was before the statute of frauds were *obiter dicta,* entirely unimportant in the decision of the cause; for it was admitted on all hands that the priority of the right of having an execution satisfied arose from its delivery, it was therefore unimportant to ascertain when that priority was given by statute or arose at the (321) common law. I have forborne to examine other authorities because *Smallcombe v. Buckingham* has never been controverted. Indeed, it is the leading case upon the subject, nor have I stated a single decision which will be controverted. If, therefore, there is an error in my conclusion it arises from false deductions.

To sum up the whole, I think that the writ of execution first delivered imposes upon the sheriff an obligation to satisfy it if he has the means of so doing, and that the sheriff is responsible to him if he omits to do so, by taking the goods wherewith his execution ought to have been satisfied, and applying them to the discharge of an execution of posterior delivery; that the sale made under the posterior execution is good, they being still the goods of the defendant, notwithstanding the delivery of the prior writ; for, as has been said before, neither execution binds or divests the property, either from its *teste* or delivery, and for that reason, as well as from the words of the preamble, I think the statute

of frauds has no operation in this case, and that this cause is to be decided upon the same principles as if it was this day brought before the courts of England, viz., that a prior right arose to the plaintiffs in the county court executions, which were delivered before that of the plaintiff in this case, although it bears an anterior *teste.*

PER CURIAM. Reversed.

Cited: Davidson v. Beard, post, 324; *Frost v. Etheridge,* 12 N. C., 34; *Palmer v. Clark,* 13 N. C., 356; *Ricks v. Blount,* 15 N. C., 134; *Jones v. Judkins,* 20 N. C., 593; *S. v. Vick,* 25 N. C., 491; *Harding v. Spivey,* 30 N. C., 66; *Watt v. Johnson,* 49 N. C., 192; *McMillan v. Parsons,* 52 N. C., 166; *Faircloth v. Ferrell,* 63 N. C., 641; *Worsley v. Bryan,* 86 N. C., 345.

(322)

MARY GRAHAM v. THOMAS GRAHAM'S ADMINISTRATORS.—From Moore.

A deed to M. G. for a negro in these words, "Have given and granted *at my death,* and by these presents *at that time* do give and grant to the said M. G. my negro girl," etc., was held to resemble the common case of conveyance by deed of personal property for life, remainder to another after the determination of the life estate; and the remainderman took nothing.

DETINUE. On 16 May, 1817, the defendant's intestate executed an instrument of writing in the following words:

To all persons to whom these presents shall come, I, Thomas Graham, of the county of Moore and State of North Carolina, send greeting: Know ye that I, the said Thomas Graham, for and in consideration of the natural love and affection which I bear and have to my niece, Mary Graham, daughter to Robert Graham, and for divers other good causes and consideration hereunto, have given and granted at my death, and by these presents at that time do give and grant to the said Mary Graham, my negro girl named Sarah, with her increase, to have, hold, and enjoy the said negro girl unto the said Mary Graham, her executors, administrators, and assigns forever, clear and free against any person or persons claiming any right, title, or interest to said girl, I, the said Thomas Graham, shall and will warrant and forever defend by these presents. In witness whereof, I, the said Thomas Graham, do hereunto set my hand and seal this 16 May, 1817.

THOMAS GRAHAM, L. S.

GRAHAM *v.* GRAHAM.

Thomas Graham died intestate, and the defendants took into their possession the negro girl named in the bill of sale as part of the estate of their intestate. The present action was brought to recover the negro, and came before this Court on the appeal of the plaintiff from the judgment rendered below.

Ruffin for plaintiff. (323)
Seawell contra.
Curia adv. vult.

HALL, J. Originally, terms for years and personal chattels could not by deed be limited over by way of remainder after a life estate. Cro. Eliz., 216; 1 Co., 153; Chedington's case, Dyer, 253; Shep. Touch., 332. And however the law may be altered as to chattels real (Shep. Touch., 274; Bac. Abt. "Remainder a.," 1st Am., from the 6th London Ed.; 1 Burr, 282; 1 Hen. Bl., 540), as to personal chattels, it remains the same unless such limitations over is created by will or by way of trust. I am not aware of any case that can be shown to the contrary.

In the present case, no express estate for life is created by the deed to Mary Graham, with a limitation of a remainder over afterwards, yet the property in the negro is conveyed and granted at the death of the grantor, which is the same thing. If the grant is good the grantor has a life estate, and the remainder, at his death, vests in the grantee, the present plaintiff; so that it appears to me to resemble the common case of conveyance by deed of personal property for life, remainder to another after the expiration of a life (324) estate.

I think it a hard case that this species of property cannot be conveyed in a mode apparently so simple, when the reason upon which the rule was originally founded is no more, and cannot but regret that decisions upon the subject had not been made more conformable to the nature of this kind of property, and the convenience of those who possessed it. But, as it is my duty to expound and not make the law, I feel myself bound to give judgment for the defendant.

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

PER CURIAM. No error.

Cited: Foscue v. Foscue, 10 N. C., 544; *Morrow v. Williams,* 14 N. C., 264; *Hunt v. Davis,* 20 N. C., 37; *Foscue v. Foscue,* 37 N. C., 324; *Newell v. Taylor,* 56 N. C., 376; *Dail v. Jones,* 85 N. C., 225; *Outlaw v. Taylor,* 168 N. C., 512.

FREDERICK J. CUTLAR ET AL. v. ANNA E. CUTLAR.—From New Hanover.

If a man purchase land and die without issue, it descends for the present upon the brothers and sisters then in being; but if any are subsequently born, they become equally entitled; and the same law must prevail relative to half-blood, where, under the laws of this State, they are entitled to inherit.

PETITION for partition, filed by Frederick J. Cutlar, Jane Cutlar, and Euphemia Cutlar, setting forth that in 1790 their father, Roger Cutlar, intermarried with Ellen Spillar, by whom he had issue, James Spillar Cutlar; that Ellen, wife of said Roger, died in 1794; that James Spillar Cutlar acquired by purchase certain lands, and died intestate and without issue in August, 1797; that Roger Cutlar, in 1796, intermarried with Nancy Jones, mother of the petitioners; that the said Roger and Nancy Cutlar, in January, 1797, had issue (325) born, a daughter, Anna E. Cutlar. That after the death of James Spillar Cutlar the petitioners were born, Jane in 1798, Frederick in 1801, and Euphemia in 1803. The petitioners claimed as coheirs at law with Anna E. Cutlar of their half brother James Spillar Cutlar, and claimed *each* one-fourth part of the real estate of which James died seized and possessed.

To this petition there was in the court below a demurrer, which was sustained, and plaintiffs appealed.

TAYLOR, C. J. The petitioners are unquestionably entitled each to a fourth part of the estate of which J. S. Cutlar died seized; for, notwithstanding the great and radical changes in the law of descent, which are introduced by our statute, the principle relative to posthumous and after-born children remains unaltered and adapts itself to the course of descent instituted here. According to the British law, if lands are given to a son, who dies leaving a sister his heir, if the parents have at any distance of time afterwards another son, this son shall divest the descent upon the sister and take the estate as heir to his brother. Nor is it uncommon for the same estate to undergo frequent changes by the subsequent birth of presumptive heirs who are nearer before it finally rests upon an heir apparent. An estate may be given to an only child, upon whose death it may descend upon an aunt as the nearest presumptive heir, who may be deprived of it by an after-born uncle, on whom a subsequent sister may enter, and who will again be deprived of the estate by the birth of a brother. 2 Blackstone Com., 209; Chris., note. A more precise analogy is presented by the case where a man has issue,

a son and a daughter; the son purchases land in fee and dies without issue, the daughter shall inherit the land; but if the father hath afterwards issue another daughter she shall be coparcener with her sister. Co. Lit., 11b. So in this State, if the son purchases land and dies without issue, it descends for the present upon the brothers (326) and sisters then being, but if any are subsequently born they become equally entitled; and the same law must prevail relative to half-blood where they are entitled to inherit. It follows that the judgment sustaining the demurrer and dismissing the petition must be reversed and the cause remanded for further proceedings.

PER CURIAM. Reversed.

Cited: *Seville v. Whedbee,* 12 N. C., 171; *Burgwyn v. Devereux,* 23 N. C., 589; *Caldwell v. Black,* 27 N. C., 467, 468; *Rutherford v. Green,* 37 N. C., 125.

HARGRAVE v. DUSENBERRY.—From Rowan.

If a man receive in payment or exchange a counterfeit or forged bank note he may treat it as a *nullity* and recover back the amount, although the party passing the same may be guilty of no fraud.

THE plaintiff being a merchant in the town of Lexington, the defendant went into his store and asked his storekeeper, Carrigan, to change a fifty dollar bank note for him; Carrigan, after an examination of the bill, gave him small notes for it. Soon after it appeared that the note was a five dollar bill altered so as to appear on its face a fifty dollar bill, and this suit was brought to recover the value of the money given in exchange.

Carrigan acted as the agent of the plaintiff in the transaction, and there was no evidence of any fraud in the defendant, both he and Carrigan believing the note to be genuine.

The court on these facts instructed the jury that the law was in favor of the plaintiff. The jury rendered a verdict for the plaintiff, a new trial was refused, judgment rendered, and defendant appealed.

TAYLOR, C. J. There are but few cases to be found on this subject in the books to which we usually resort, and these are by no means decisive of the question. It is said in Sheppard's Touchstone, 140, in discoursing on a mortgage, if the payment be made, (327)

part of it with counterfeit coin, and the party accept it and put it up, this is a good payment, and consequently a good performance of the condition. In *Wade's case,* 5 Co., 115, we find this passage: "And it was said it was adjudged between *Vare* and *Studley* that where the lessor demanded rent of his lessee, according to the condition of reentry, and the lessee payeth the rent to his lessor, and he received it and put it in his purse, and afterwards, in looking over it again at the same time, he found amongst the money that he had received some counterfeit pieces and thereupon refused to carry away the money, but reëntered for the condition broken, that it was adjudged that the entry was not lawful; for when the lessor had accepted of the money it was at his peril, and upon that allowance he shall not take exception to any part of it."

As both these decisions were made to prevent a forfeiture in the one case and a reëntry in the other, it is probable that the court went further to establish the payment than they would have done under ordinary circumstances, for the principles of justice dictate that the contracts of men ought to be fulfilled according to the understanding of the parties at the time they entered into them; and it is clearly understood in every sale and exchange that the bank notes issued should be genuine, although the receiver may take upon himself the risk of the solveny of the bank, and such a rule seems to me to be entitled to support in the view of policy and convenience as well as justice, since by tracing the bad note back from hand to hand a detection of the first fraudulent utterer or maker is most likely to be effected. It has been remarked of the civil law, that, in the opinions which the Roman jurists deduced from the pure sources of genuine philosophy, innumer-
(328) able instances may be met with of the admirable union of wisdom and justice, in which the force of truth is so strongly manifest that to be assented to it is only requisite to be seen—that in that law are to be met with instructive and frequently perfect guides in the exposition of the various questions which are of continued occurrence, and which, in the absence of positive authority, must be decided upon general grounds of rational jurisprudence.

In the civil law, as quoted by Pothier, 1st vol., 346, the rule is thus stated: "The debtor is not only without any right of obliging his creditor to receive anything different from what is due as a payment, but even if the creditor by mistake receives some other thing upon the supposition of that being the thing which is actually due, the payment would not be valid, and the creditor may, upon offering to return what he has so received, demand what is really due." This is decided by

Paulus in b. 50, ff. *Si quum aurum tibi promississem, tibi ignoranti quasi aurum æs solverem, non liberabor.*

I am not apprized of any American decision on this point except *Markle v. Hatfield,* 2 Johns., 455, in which an opinion is given by *Chief Justice Kent,* with his usual ability, and concurred in by the Court, setting aside a payment made in a counterfeit bank bill.

Where the positive laws are silent, all courts must determine on maxims of natural justice dictated by reason; that is, according to the law of nature. We cannot recur to primary principles of right and wrong where the municipal institutions are express, for it is then presumed that they are founded on the laws of nature, or contain nothing repugnant to it.

BY THE COURT: No error.

Cited: Smith v. Amis, 10 N. C., 472; *Reid v. Reid,* 13 N. C., 249; *Lowe v. Weatherley,* 20 N. C., 355; *Page v. Einstein,* 52 N. C., 149.

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(329)

MAYO, CHAIRMAN OF EDGECOMBE COUNTY COURT, TO THE USE OF STILLMAN v. MAYO, PRICE, AND HARRELL.

In an action upon an administration bond it is not necessary for the plaintiff to tender a *refunding* bond to the defendant to give him a right of action.

DEBT on administration bond, tried before *Badger, J.,* at EDGECOMBE. The bond was given by the defendant Mayo, and the other defendants as his securities, upon obtaining administration on the estate of one Griffis, deceased. The real plaintiff, Stillman, was the assignee of the next of kin and sought to recover the surplus of the estate, which he alleged remained in the administrator's hands after payment of debts, etc. Three breaches were alleged: (1) In not returning an inventory, etc., within the time prescribed. (2) In failing to collect, etc. (3) In failing to pay over. The pleas relied on were "conditions performed and always ready."

On the trial it appeared that the administrator had not returned an inventory until after the time prescribed. In this inventory, among other debts due the intestate, the administrator stated three notes of his own, payable to his intestate, for about the sum of $350, and in the inventory these debts were described as *bad debts* It appeared that the administrator had properly administered, in paying debts and

funeral charges, a sum equal to the residue of the property contained in his inventory besides his own debts. If his own debts were *bad,* as stated in the inventory, he had nothing remaining for distribution; if his own debts were good, and properly chargeable aganst him, then he had in his hands a considerable sum to which the distributee was entitled.

There was contradictory evidence as to the solvency of the administrator and his ability, after qualification, to pay these debts.

(330) It was then contended by defendant's counsel that the plaintiff could not recover in any event, as no refunding bond had been tendered the defendant, and that was an indispensable precedent condition to be performed by him before any right of action accrued. The presiding judge instructed the jury that the plaintiff's right to demand anything from the defendants depended on the truth or falsehood of the administrator's return respecting his own debts; that the distributee should not be in a worse situation in consequence of administration having been committed to a debtor of the intestate than if it had been granted to a third person, but, on the contrary, had a right to be in a better; that if the administrator, when he obtained his letters, was in such a state of solvency that (had another person been administrator) the debt could by due diligence have been collected from him, then it was part of the fund for distribution, and the defendants were chargeable with it; and if the jury was satisfied such was the fact the plaintiff would be entitled to a verdict unless the want of tender of a refunding bond furnished an objection; and on this point the judge instructed the jury that if, in this case, they were satisfied that the administrator, so far from being willing or ready to settle with the plaintiff upon any terms, had from the first utterly denied his right, and had denied that he himself had any fund for distribution, and neither admitted plaintiff's claim nor his own liability to any amount, and that the want of a refunding bond was not at all the obstacle to a settlement, then the defendants were not at liberty now to avail themselves of the objection. If the jury believed the facts to be otherwise, then the objection was a good one. A verdict was returned for the plaintiff. Motion for new trial overruled, judgment and appeal.

TAYLOR, C. J. The single question in this case is whether it was necessary for the plaintiff to tender a refunding bond to the defendant to give him a right of action on the bond. The giving a bond

(331) is not made a condition precedent by the act of 1789, but that and paying out the distributive shares are made mutual acts.

It shall be paid over to such persons to whom it is due by law, "such persons giving bond with two or more able sureties." Even in covenants, if one party covenants to do one thing, the other *doing* another, it is a mutual covenant and not a condition precedent. 2 Black. Rep., 1312. But in whatever light it may be considered, it is clear from the circumstances of the case, that it was neither necessary for the plaintiff to prepare or tender a refunding bond; for the administrator, by a public official act, had dispensed with the obligation. He asserted in the inventory his inability to pay this debt and went as far as he could to assure those entitled to demand it that he would be no more able to pay upon the receipt of a refunding bond than without one. After this it would have been useless to prepare a bond, since the distributee had good ground to believe that the surplus would not be paid over and that he was discharged from what might otherwise be deemed a duty. The subject was fully considered in *Mayo v. Mayo,* 8 N. C., 427, and applies to this case. It was therefore very properly left to the jury to consider whether the want of a refunding bond was or was not an obstacle to the settlement. A new trial is refused.

HALL and HENDERSON, JJ., concurred.

PER CURIAM.

(332)

COGDELL v. BARFIELD.—From Sampson.

When a defendant, from the beginning, neglects his case on very insufficient grounds, whereby a default is rendered against him, and afterwards employs counsel to attend to the business who does not practice in the court, he is not entitled to the indulgence of the court, and shall not claim any because of the absence of his counsel.

THE plaintiff had issued a writ against the defendant for having committed an assault and battery on him, which was returned to September Term, 1822, of SAMPSON, at which term a judgment by default was entered, and at the succeeding term, in April, 1823, a writ of inquiry was executed, and a jury assessed the plaintiff's damages to five hundred dollars and costs. On Friday of that term the defendant moved on affidavits filed for a rule to show cause why a new trial should not be granted. The rule was granted, and on argument, afterwards discharged and judgment rendered, from which defendant appealed. The substance of the affidavits, which made part of the case sent up,

follows: "The defendant made oath, that before the writ was served on him he wrote to Mr. Henry, an attorney of Fayetteville, to employ him in the suit which he then anticipated would be commenced by this plaintiff; that receiving no answer to this letter, he was therefore induced to believe Mr. H. would appear for him; that he continued to entertain this belief until he was undeceived by Mr. H. in March, 1823, at Duplin Superior Court. The defendant then procured other counsel, who, after conference with plaintiff's attorneys, informed the defendant that, by an arrangement made between the counsel, the attendance of the defendant at Sampson court would not be necessary before Friday of the term, and that defendant believed, if he might be heard, that he could prove that the fight was as much owing to (333) the plaintiff as the defendant.

From the affidavit of Mr. Farrier, the defendant's attorney, it appeared that in March, 1823, the defendant employed him in Duplin court to attend to this cause; that the defendant preferred the services of Mr. F. because he had defended him on an indictment for the same cause in Duplin County court; that the defendant then informed Mr. F. that the next term of Sampson court was the *return* term of the writ, and his attendance would only be necessary to remove the cause to another county; but in the following week at Wayne court the defendant informed Mr. F. that the next term of Sampson court was the *trial* term of the cause. Mr. F. then had an interview with Mr. Meares, one of the attorneys for the plaintiff, and informed him that as Sampson Superior Court was held at the same time with Duplin County court, it would be impossible for Mr. F. to attend Sampson court earlier than Friday of the term, and asked of Mr. M. a postponement of the suit until Friday. Mr. M. stated that it was not in his power to postpone it, but he would state the facts to the court, and if it approved of it, he would make no objections, and on the whole thought it probable, as Thursday would be occupied with State prosecutions, the cause would not be reached before Friday.

Mr. Henry's affidavit stated that he had received a letter from the defendant, to which he had not attended from particular reasons; that the defendant had not sent him any retaining fee and he therefore did not consider himself employed, and that when he next saw defendant he informed him he was employed by the plaintiff.

Mr. Meares stated in his affidavit that in March, 1823, the defendant wished to employ him in this suit, but Mr. M., having been retained by the plaintiff, could not appear for the defendant, but informed him of several gentlemen of the bar unemployed in the case, who at-

tended Sampson court; that in the following week Mr. Farrier (334) and Mr. Meares had a conversation relative to the suit, and Mr. F. requested the cause might be laid over until Thursday of the term, to which Mr. M. replied, in substance, that he should have no objection, if the court would permit it, and it would not operate as a continuance, but that he believed the situation of the docket was such in Sampson that the delay could not take place without its operating as a continuance, and that he was not authorized to consent to a continuance.

PER CURIAM. The affidavits show that there is no ground on which the Court could grant a new trial. The defendant Barfield neglected the case from the beginning, on very insufficient reasons, whereby a default was taken against him, and afterwards on the trial incurred the risk of a counsel's attendance who did not practice in the court, while he was told of others that would be in attendance. To award a new trial for the reasons here offered were to encourage inattention and promote litigation.

PER CURIAM. No error.

TATE v. KINCADE AND OTHERS.

Practice—Costs.

Wilson read a notice, a copy of which had been served on the defendants, calling on them to show cause at this term of the Court why certain costs (certified witness tickets), omitted to be taxed in the former bill of costs in this case, should not now be charged; and

BY THE COURT: Let the costs be charged and execution issue.

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(335)

WOODARD v. RAMSAY.—From Hertford.

A covenant "to warrant and defend the right, title, and property to land against the lawful *claim* or *claims* of any person or persons whatsoever" is not a covenant for *seisin*. *Held*, therefore, that an action will not lie for want of title in the covenantor to the land when he conveyed it until some *claim* has been made or the covenantor otherwise disturbed in his possession.

WOODARD *v.* RAMSAY.

COVENANT on a deed, tried before *Nash, J.,* at HERTFORD. The deed purported to be a conveyance by the defendant to the plantiff of a lot of ground in Murfreesboro, and contained this clause: "And I, the said Henry Ramsay, do further bind myself, my heirs, executors, and administrators, to warrant and defend the right, title, and property of said lot unto him, the said Lewis Woodard, his heirs and assigns forever, against the lawful claim or claims of any person or persons whatsoever."

The alleged breach of this clause was that the defendant had no title to the premises at the time he executed the deed. The plaintiff admitted that he had never been in possession, nor had he brought any suit to obtain possession, and he rested his right to recover on the defendant's want of title and offered to show a good title in fee simple in another at the time of the conveyance by the grantor. The court ruled that the covenant contained in the deed was for quiet enjoyment *only,* not of seisin, and that it was not material whether the grantor had title; that the plaintiff, to recover, must show either an eviction or that he was kept out of possession on an action brought. The plaintiff was nonsuited and moved for a new trial. The motion was refused, and from the judgment plaintiff appealed.

The case was submitted without argument.

(336) HALL, J. I think in the present case the plaintiff cannot recover. The defendant has not entered into a covenant for *seisin,* in which case an action no doubt would lie in case the defendant had no title in the land when he conveyed it or attempted to convey it. The present action is brought upon a covenant "to warrant and defend the right, title, and property against the *claim* of any person or persons whatsoever." It is not alleged that any claim has been made or that the plaintiff has been in any respect disturbed in his possession. I therefore think that the rule for a new trial should be discharged.

The other judges concurred.

PER CURIAM. Affirmed.

Cited: Midgett v. Brooks, 34 N. C., 147.

McCULLOCH v. TYSON & PERSON.—From Moore.

Where an appeal has been taken from the county to the Superior Court the securities to the appeal may be released to become witnesses in the case, and others substituted.

THIS was an appeal from the county to the Superior Court of MOORE, in an action of *debt*, and on the trial in the Superior Court the plaintiff moved to be permitted to give a new appeal bond and other securities, in order to enable him to call on one of the securities to the original appeal bond as a witness. The court refused to grant the motion. The plaintiff then moved that he might be permitted to deposit in the clerk's office money sufficient to satisfy the costs to that time, for the purpose of releasing the security in the appeal bond and obtaining the benefit of his testimony. This was also refused, and the case now stands before this Court on a motion for a new trial.

HALL, J. I believe, in a great many instances, securities have (337) been released, and others substituted in their places, in order that they might thereby become competent to give evidence in the cause. I can see no inconvenience in the case at all comparable to that which might be experienced from a contrary rule or practice. Much injury might accrue to a person who had, unguardedly or unfortunately, procured one to become his security whom he might afterwards discover to be an important witness for him.

I clearly think a new trial should be granted.

And of this opinion was the rest of the Court.

PER CURIAM. New trial.

Cited: Brittain v. Howell, 19 N. C., 108; *Garmon v. Barringer, ib.*, 503; *Sawyer v. Dozier*, 27 N. C., 100; *Otey v. Hoyt*, 48 N. C., 411.

FRUIT v. BROWER.—From Randolph.

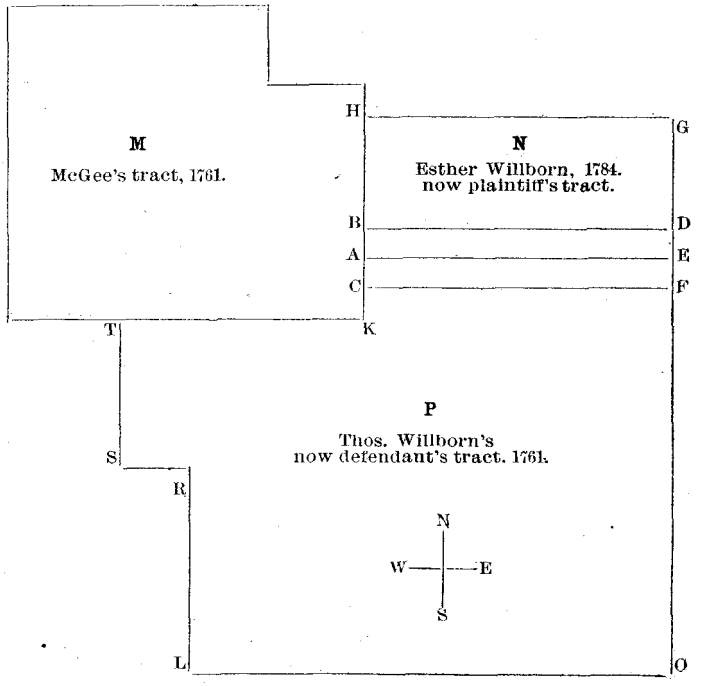
A tract of land is granted in 1761. In 1784 another tract adjacent is granted, and calls for a course "*along the old line* to the beginning." In 1794 a corner and line are marked, as the corner and line of the tract of 1784, parallel *to the old line*, and north of it: *Held*, that the line marked in 1794 was not conclusive; that it was the province of the jury to ascertain the *true boundary*, and that if they believed it to be "the old line," the plaintiff would go to it, notwithstanding the corner and line marked in 1794 as his line.

FRUIT *v.* BROWER.

TRESPASS *quare clausum fregit.* Pleas: General issue, Lib. ten., Stat. Lim., license.

The plaintiff claimed the lands described in the annexed diagram by the lines A, H, G, E. The defendant claimed those described by the lines K, B, D, O, L, R, S, T, and the question in dispute as to boundary was whether the plaintiff's tract was bounded on the north by the line B, D, or A, E.

(338)



The tract marked M was granted to John McGee in 1761; that marked P was granted to Thomas Willborn in 1761; and that marked N was granted to Esther Willborn in 1784. Esther Willborn conveyed N to James Fruit in 1794, and James Fruit conveyed to the plaintiff.

The grant to Esther Willborn was as follows: "Beginning at a stake, the corner of a tract she now lives on" (she then lived on P), "and running north along McGee's line 80 poles to a black oak, then east 100 poles to a small black jack, then south 80 poles to a black oak corner, then west *along the said old line* 100 poles to the beginning."

The plaintiff alleged that the beginning was at a stake at C, and that the *black oak* called for as a corner to the third line was at F. The defendant insisted the beginning was at a stake at B, and (339) that the black oak called for in the third line was at D.

The grant to Thomas Willborn, under whom the defendant claimed, was as follows: "Beginning at a *black oak sapling*" (at D, as defendant said), "then running south 61 chains to a white oak (O), then west 28 poles to a red oak, York's corner, then west 6½ poles to a white oak (L), thence north 32½ chains to a white oak (R), then west 10 chains to a hickory bush (S), then north 19 chains to a white oak on McGee's line (T), then along his line east 20 chains to a hickory (K), then along his line north 10 chains to a stake (B, as defendant contended, and C according to plaintiff's allegation), then east 25 chains to the beginning."

As to the line C F: It appeared that there were marked trees on it, two of which, as the surveyors judged from their external appearance only, might be as old as the year 1761. The other trees on this line were of the same age with the trees on the lines A E and B D, both of which were marked. It was not shown on the trial who marked C F, or for what purpose it was done.

As to the line A E: It appeared that in 1797, the year after the defendant purchased the tract P, Fruit, the plaintiff, and himself, erected a stone at A for the beginning of the land which Fruit had purchased of Esther Willborn; that there were on the line A E marked trees corresponding in age with Fruit's deed; that Brower acquiesced in the corner A and the line A E as Fruit's boundary until the year 18—, when Fruit had his land processioned; after which Brower, beginning at K and running north along McGee's line, discovered that the stone erected at A was short of 10 poles, the distance called for in Thomas Willborn's grant, but that the distance terminated at B, and Brower thenceforward claimed to B. It was not shown why or by whom this line was marked.

As to the line B D: Defendant called a witness, Jones, who (340) stated that for fifty-three years he had lived in the neighborhood and heard the black oak at D called Thomas Willborn's corner; that when he first knew it, it was a small sapling, and the marks were then visible, but that as it grew in size the marks disappeared. He further stated that in 1794, on the purchase by Fruit from Esther Willborn, Elliot, who had been for many years surveyor of Randolph, surveyed the land in Fruit's presence and then stopped at D, as Thomas Willborn's corner; the old marks upon the black oak at D had not then

disappeared; Elliot marked it then as Fruit's corner and also marked several dogwood trees as pointers, and running thence west to a stake at B, marked the line B D. The pointers, it appeared, were still standing, and the line B D corresponded in age with Elliot's survey and Fruit's deed.

As to the corner at D, it appeared in opposition to the testimony of Jones that the tree having been broken down by a storm, the heart for about an inch in diameter was rotten, and that the lamina or annual growths from the rotten part counted in 1822 forty-nine—that this tree was marked as the corner of Thomas Willborn's, and not of Esther Willborn's tract, in the same year with the lines B D, and A E and most of the trees on C F.

On these facts the defendant contended, (1) that the evidence proved the line B D to be Thomas Willborn's line—and (2) that if the evidence left the locality of Thomas Willborn's line doubtful, yet the plaintiff could not claim farther south than the line B D, as that line and the corner at D were marked as his line and corner when Esther Willborn conveyed to him. That although the grant to Esther Willborn and the deed to Fruit called for this line as running from the black oak corner "*along the said old line* west to a stake in McGee's line, yet it did not appear either from the grant or from her deed that the *said old line* was Thomas Willborn's line, inasmuch as *his line* had not been previously mentioned in the grant or deed nor any *old line* (341) except McGee's line.

The court instructed the jury that if from all the evidence they believed that Thomas Willborn's line was to the south of the line B D the plaintiff was entitled to hold to his line, and the line from G south was to be extended to it, notwithstanding the corner D and the line B D were marked as his corner and line. Verdict for plaintiff, new trial refused, judgment and appeal.

PER CURIAM. There was much conflicting evidence in this case, relative to where the old line was, of which it was the province of the jury to judge. The court instructed the jury that the plaintiff's boundary extended to Thomas Willborn's line wherever that was, notwithstanding that the corner D and the line B D were marked as his corner and line.

This is in conformity with *Blount v. Benbury,* 3 N. C., 354, and many other cases that have arisen. A new trial is refused.

No error.

Cited: Dobson v. Whisenhant, 101 N. C., 648; *Brown v. House,* 118 N. C., 880.

GILKY v. DICKERSON.—From Rutherford.

1. This Court will grant a new trial because the facts as stated are very imperfectly set forth.

2. When an execution is issued it creates a *lien* upon the slaves of defendant from the *teste,* so that he himself cannot dispose of them. When an *alias fi. fa.* is issued, this *lien* has relation to the *teste* of the first *fi. fa.*

3. If an execution be levied on slaves, but no return made, the benefit of this *levy* is lost, but the *lien* continues as much as if the levy had not been made.

TRESPASS for taking away two negroes, brought against the defendant, who was coroner of the county of Rutherford.

The evidence on the part of the plaintiff was that he purchased the negroes of one Alley on 19 September, 1820, for a valuable consideration of *bona fide;* that he took them into possession, and (342) afterwards on 7 October, 1820, the defendant levied on and sold them, by virtue of an execution issuing from September, 1820, returnable to March, 1821, at the instance of the State Bank, against Alley and one Elliott.

The defendant proved that the bank, in March, 1820, obtained a judgment against Alley and Elliott for the sum of $241.30; that an execution issued thereon and came to the hands of the defendant (Alley being sheriff of the county), which was tested March, 1820; that one-half of the judgment was paid by Elliott, and about the time of harvest the defendant went to Alley's house to get satisfaction of the balance of the execution, when Alley gave him a list of these negroes and some other property, sufficient to satisfy the claim, which property the defendant left in Alley's possession and afterwards said he had levied thereon. The execution was returned by the defendant to September Term, 1820, when the clerk barely altered the *teste,* and issued the same writ as an *alias,* from September, 1820, returnable to the next court. Under this the defendant, on 7 October, 1820, sold the negroes. In September, 1820, Alley carried off the property to Tennessee.

HALL, J. I think a new trial ought to be granted in this case because the facts seem to me to be very imperfectly set forth. I cannot see upon what ground a verdict has been rendered against the defendant. It seems he levied upon the property in dispute about harvest time; but this was before the sale by Alley to the plaintiff; that he afterwards, under an *alias fi. fa.,* levied upon and sold the property on 7

October; that Alley carried the property away sometime in September.

It does not appear that the property was ever in the possession (343) of the defendant. If that was the case, I cannot see on what ground a verdict and judgment could be rendered against him. But suppose that the defendant had levied upon and taken the property into his possession in September under the *alias fi. fa.* before Alley carried it away, I cannot see that he is liable for that, although the plaintiff's bill of sale was executed before that time, because the first *fi. fa.* that issued from March created a lien on the defendant's property, so that he himself could not dispose of it, and that lien was continued under the *alias fi. fa* and existed when the slaves in question were sold to the plaintiff in September. It is true that, although he had levied upon them under the first *fi. fa.* yet, as he had not made a return thereof and taken out a *venditioni exponas*, the benefit of that levy was lost, but still the lien continued as much as if that levy had not been made, so that the defendant could not dispose of the property. For all these reasons, I think a new trial ought to be granted.

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

PER CURIAM. New trial.

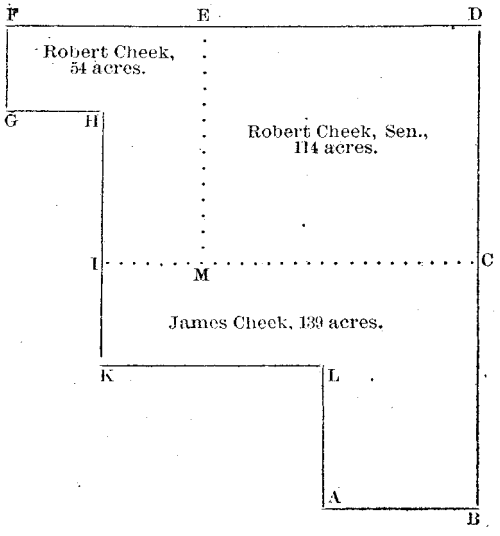
Cited: Dever v. Rice 20 N. C., 569; *Smith v. Spencer,* 25 N. C., 260; *Butts v. Patton,* 33 N. C., 265; *Dobson v. Prather,* 41 N. C., 34; *Watt v. Johnson,* 49 N. C., 192.

DEN ON DEMISE OF McKERALL v. CHEEK, TENANT IN POSSESSION, AND KIRKLAND, LANDLORD.—From Orange.

A sheriff's deed for 300 acres of land was offered in evidence. It was proved that the sheriff intended to convey but 125 acres; that he was ignorant of the courses of the land, and that he would not have signed the deed if the courses had not been inserted in such way as to deceive him with respect to the quantity. The court below held the deed to be conclusive; this Court grants a new trial because the judge should have left it to the jury to say whether the deed was fairly or fraudulently obtained, for a court of law has cognizance of the question as well as a court of equity.

EJECTMENT. The lessor of the plaintiff, to support his title, produced a grant from the State for the land in dispute (A, B, C, D, E, F, G, H, I, K, L,) to Robert Cheek, the elder, bearing date 13 (344) March, 1780; a judgment in Orange County court, obtained August Term, 1817, against Robert Cheek, the elder, and execu-

tion thereon; a judgment in Orange Superior Court, at September Term, 1817, against Robert Cheek, the elder, and execution on it, and the sheriff's deed to himself, dated 27 February, 1818, describing the land by the boundaries of the original patent and purporting to convey 125 acres of land.



The defendant admitted himself to be in possession of all the lands except those included in the lines C, D, E, M; of that part the plaintiff was in possession.

The defendant produced a judgment in Orange court against *James Cheek,* and an execution under which the lands A, B, C, M, I, K, L, had been levied on and sold by the sheriff to William Kirkland, by deed dated in August, 1820.

He showed also another judgment against Robert Cheek, the (345) elder, at March Term, 1818, of Orange Superior Court, an execution thereon and a sale by the sheriff to William Kirkland of the lands A, B, C, M, E, F, G, H, I, K, L, as the lands of Robert Cheek, the elder, on 7 August, 1820.

The defendant then called witnesses to prove that, more than 30 years before, James Cheek had purchased from Robert Cheek, the elder, the tract A, B, C, M, I, K, L, paid him for it, entered into possession, had it surveyed, the line C, M, I, marked between them, and that James had ever since lived on it and occupied it exclusively as his own. The court rejected the evidence of any agreement between Robert and James

whereby James became the purchaser, unless the land was actually conveyed by deed, upon the ground that such evidence would not show the legal title to be out of the plaintiff, which alone could be regarded in this action.

The defendant then alleged that the three pieces of land in the plat were separate and distinct from each other, and that McKerall had only purchased C, D, E, M; and to prove this point he called several witnesses, from whose testimony it appeared that the portions of land described in the diagram as James' and Robert's land were sold to them respectively many years ago by their father, old Robert Cheek; that no deeds were executed, but that they had exercised over them acts of ownership ever since they purchased; that their boundaries were clearly marked out, and that it was the general understanding through the neighborhood that Robert Cheek, the elder, owned only C, D, E, M. The officer who sold the land described it as the place where old Robert Cheek lived, and all his interest therein, supposed to contain 125 acres, more or less; he did not think it included the lands on which James and Robert lived, nor did he so represent it, and the sheriff, when requested to sign a deed describing the land by metes and bounds as containing 300 acres, refused to do so, from a
(346) belief that only 125 acres were sold.

The court charged the jury that it appeared all the three pieces of land had originally been one tract, whereof the title was in Robert Cheek, the elder, and he had never actually conveyed it to his sons or either of them, and that all the interest of Robert, the elder, had been sold and conveyed by the sheriff to McKerall, and that, although at the sale it was described as containing 125 acres, more or less, yet his legal interest extended to the whole tract of 300 acres, and the sheriff had conveyed it by metes and bounds, which included the 300 acres, whereby the whole tract passed, though called in the deed 125 acres, more or less. And that under these circumstances the sheriff's deed was the highest evidence of what land was sold, notwithstanding the testimony of the witnesses, and that it was *conclusive* evidence of the plaintiff's right and entitled him to recover. Verdict for the plaintiff, new trial refused, judgment and appeal.

HALL, J. It seems that the sheriff conveyed the land in question not only without knowing it, but contrary to a determination he had made not to do it, because he considered that he had only levied upon and sold 125 acres, the land on which Robert Cheek, the elder, lived. Nor could he have been prevailed upon to convey it if the courses including it had not been inserted in a way calculated to deceive him, by

estimating the whole amount conveyed at 125 acres, *more* or *less;* for he was altogether unacquainted with the courses.

Design or fraud practiced upon innocence and ignorance in this way ought not to have the effect to deprive men of their rights and put it out of the power of courts of common law to restore them. I do not concur in the opinion that the deed executed by the sheriff is conclusive and binds the title. I do not hesitate to say that the rule for a new trial should be made absolute.

HENDERSON, J. Whether the deed of the sheriff fairly ob- (347) tained shall be conclusive on the parties and all claiming under them, we do not deem it necessary to decide, for we think a preliminary question fairly grows out of the evidence, which should have been distinctly propounded by the judge to the jury, namely, whether the deed was fairly or fraudulently obtained; for a court of law has cognizance of the question, as well as a court of equity. This question fairly arises upon the evidence; the judge erred in telling the jury that the deed was conclusive without evidence of what the sheriff sold, without calling their attention to the circumstances under which it was executed and informing them that it did not pass the lands in controversy, if fraudulently obtained.

TAYLOR, C. J., concurred.

PER CURIAM. New trial.

Cited: *Dobson v. Erwin,* 18 N. C., 573; *McArthur v. Johnson,* 61 N. C., 320, 321.

SKILLINGTON v. ALLISON & GARDNER.—From Cabarrus.

It is a good replication to the plea of the statute of limitations that the plaintiff brought his action wihin one year after a *nonsuit,* and that it is the same cause of action.

CASE for malicious prosecution. Plea: Statute of limitations.

On 17 December, 1817, Allison, a justice of the peace, at the instance of Gardner, as the prosecutor, issued a warrant to arrest the plaintiff on a charge of felony, and after examination by Allison the plaintiff was committed. On 22 December, 1817, Allison issued a mandate to one Reed, as an officer, to receive the body of the plaintiff from the

jailer of the county and bring him up for further examination. On 23 December the plaintiff was examined by Allison together with (348) Harris and Young, two other magistrates of the county, and was discharged. Plaintiff then commenced a suit against the defendants for malicious prosecution, and it was continued until November Term, 1821, of Cabarrus court, when the plaintiff was nonsuited on the ground that there was no evidence that the plaintiff had ever been legally discharged on the accusation for felony, the warrants and proceedings thereon having never been returned to court and made matter of record. After this nonsuit, and at the same term, the plaintiff procured the warrants, etc., to be returned, and his discharge regularly entered, and on 17 April, 1822, issued his writ in the present suit. To the plea of the statute of limitations, plaintiff replied that he had brought his action within one year after the nonsuit, and that it was the same cause of action.

The court below held that the statute began to run from the time plaintiff was discharged by the magistrates, viz., 23 December, 1817, and that there is no saving in the act of limitations for a plaintiff who is nonsuited. The jury, on the plea of the statute, found for the defendants. The plaintiff moved for a new trial, which was refused. Judgment and appeal.

TAYLOR, C. J. That a plaintiff who is nonsuited is within the equity of section 6 of the act of 1715, has been uniformly considered in practice as a settled rule, and must be familiar to the profession. *Anon.*, 3 N. C., 63. And though the precise case of a nonsuit may not be found in foreign books, yet it depends upon the same principle which has admitted other cases than those enumerated in the statute, the words of which contain a clear indication that all the cases were not intended to be enumerated, by referring in general to "all such (349) cases." Hence, where a person brought an action before the statute had run, and died before judgment, the time being then expired, it was held that his executor or administrator might bring a new action within the year (2 Salk., 425), and this was when the death of either party worked an abatement of the suit. And a still stronger case was where a suit was abated by the marriage of a *feme sole* plaintiff. She and her husband were allowed to bring a new action within the year, though the second action could not, in the nature of the thing, be a continuance of the former writ. Willes, 259. The marriage of the plaintiffs was a voluntary act, and would seem less entitled to a favorable construction than a nonsuit occasioned by the neglect of the magistrates to return the warrant and discharge, which

the plaintiff had no means of hastening or compelling. The replication to the plea ought, upon authority and principle, to be sustained.

PER CURIAM. New trial.

Cited: Straus v. Beardsley, 79 N. C., 64; *Wharton v. Comrs.,* 82 N. C., 15; *Prevatt v. Harrelson,* 132 N. C., 254.

MULHOLLAND v. BROWNRIGG.—From Chowan.

Where water was thrown, by the erection of a mill, upon the highway, and the former proprietor of the mill had built bridges over the water, which, during his ownership, he repaired, and which were also repaired by the present proprietor, who did no other work on the roads, it was *Held,* that the present proprietor was answerable in damages to an individual who sustained injury by reason of defect in one of the bridges; and that the inquiry was properly left to the jury whether the mill or the road was the more ancient.

ACTION on the case, and the declaration contained two counts. In the first, the plaintiff complained of the defendant for having overflowed with water the public highway, by means of which the plaintiff's goods contained in his wagon which was passing were injured. The second count charged the defendant with having overflowed (350) the public highway by the erection of a dam near thereto and keeping and maintaining a bridge so rotten and decayed that the plaintiff's wagon loaded with goods was overturned on said bridge and thrown into the water, whereby the goods became wet and damaged.

On the trial the facts, as they appeared from the plaintiff's testimony, were that the millpond of the defendant overflowed the public road, and that there were three hollow bridges over the pond, but by whom erected did not appear; there was, however, no evidence that any of them were erected at the *public* expense. The road and millpond had, for twenty years, been in the same situation in which they were at the time of trial, and there was no evidence which was first made, unless the fact that the owner of the mill kept the road and bridge in repair furnished evidence that the road was the more ancient. The defendant, at the time of the trial, had owned the mill five years, and it did appear that the proprietor of the mill for the time being and his hands were in the habit of repairing the bridges and road over the millpond and

did not do any other work on the public road, and that the defendant had repaired the bridges since he owned the mill.

A wagon loaded with the plaintiff's goods, in passing, fell through one of the bridges which was not in sufficient repair into the pond, and the goods were damaged by the water. The stream was not fordable if there had been no millpond, but the bridge which broke was not over the channel of the stream, and had there been no pond there would have been no water on that part of the road. The defendant offered no evidence.

The judge left it to the jury to say whether the road or mill was first built, as a fact, and charged that if the *mill* was first built the defendant was not liable; but if the *road* was first made, and the mill had occasioned the overflow of that part of the road under the bridge which broke, then the owner of the mill was bound to abate the
(351) nuisance or to erect a convenience whereby the citizens might pass in safety. If a bridge was erected and was not in sufficient repair, and the plaintiff sustained an injury in passing it, he was entitled to damages.

There was a verdict for the plaintiff; new trial refused, and from the judgment rendered defendant appealed to this Court.

Hogg for the appellant.
Gaston contra.

(356) HALL, J. The objection in this case to the charge of the court is that it ought to have been left to the jury to consider whether the water and the bridge over it through which the wagon fell amounted to a nuisance originally when the bridge was first erected, and ought not to have been assumed as a fact. Because, if it were not originally a nuisance, it was not one at the time the accident happened for which this action is brought. If this conclusion is correct, I admit the judge erred in his charge; but it cannot be admitted. It is true, if a bridge is thrown over a road where it stands in need of it, by an individual, and the road is thereby rendered more convenient
(357) for the citizens at large, when that bridge falls into decay that individual is not answerable for a nuisance; but that is not a parallel case. In that case the bridge was not erected for the purpose of covering a nuisance of the party's own creating; in that case the public are not in a worse situation when the bridge rots down than they were before. In the present case the bridge was built to cover and render innocent the water thrown over the road by the defendant's milldam. When the bridge falls into decay it is not as if there was

no water under it. Although innocent at first, it afterwards became a nuisance. If no bridge had been erected over it, it would always have been a nuisance. It cannot be a less one when a useless bridge is over it. These remarks are made upon the ground that the bridge was erected and the milldam built since that road was laid off as a public highway. This fact was submitted to the jury and they have passed upon it. I therefore think it a matter of no consequence whether the bridge, when originally erected, was a nuisance or not. I think it was one at the time when this cause of action happened, and that the rule for a new trial should be discharged.

HENDERSON, J. For the defendant it is contended that if this bridge was a convenient one, that, although an individual might have created the necessity for its erection and in fact erected the present one to obviate the inconvenience created by his act, that the county was bound to keep it in repair and the individual exempt from liability for private injuries sustained thereby, and, I presume, also from public prosecution. By the law of England the county is bound of common right to build bridges where necessary and to repair such as have been built, unless they throw the burden on another by law, as by tenure or prescription, or by act of Parliament, as in cases of some of the turnpike roads. Allowing that the English authorities establish these positions completely, I do not think that it would follow (358) even in England that the individual would not be liable for a private injury such as this; but if he were not, and if all the consequences of the original wrong were taken from him and thrown upon the county because the bridge had been used by the public, I think the case is far different in this country, and that from the different policy as established by the legislative authorities of the different countries. By the law of England, if a bridge is necessary it must be built and kept in repair by some one—by the county, if they cannot show that some one else is bound, and that by law, as by tenure or prescription or an act of Parliament; and therefore it is no defense for the county to show that an individual, a mere wrongdoer, is bound, for, peradventure, he may not be able; for when by tenure the lands are bound, and prescription is a long acquiescence presupposing an agreement, and the act of Parliament is the law of the land. In these three cases the county is excused, for they have substituted a responsible person in their stead, and this is the reason that they have failed in all those cases where they attempted to excuse themselves by showing that some other person at first erected the bridge; for the bridge must be kept in repair, and should an individual, even for his own convenience, erect

one and the public use it, this usage is an evidence of its convenience, and therefore the county court should repair; for the law imposes on the county the erection and repair of bridges in all cases where necessary, and will allow of no excuse but those before mentioned. This suits the policy of a thickly settled and rich country. Want of ability, as it is false *in fact*, will not be attended to. But our situation is far different; and wretched would be the situation of some countries, particularly new and poor ones, if such was the case; and the Legislature here has therefore vested in the county court power of laying off (359) roads, settling ferries, building and repairing bridges; and if the law stopped here, perhaps it might be said that the parties were liable to an indictment if they permitted bridges to be out of repair, or refused to order them to be built where necessary. But the Legislature did not stop here; they placed at their disposal for these purposes only limited funds, and if they go to the extent of the funds, they certainly are not liable. This is by no means giving up their interest or, if you will, discretionary powers, which, if they do not intentionally abuse, I think they are not liable. I therefore think that the whole of the argument falls to the ground, and that the jury were properly instructed in the court below, and that the judge below committed no error in not informing the jury that if the bridge was used by the public the defendant was thereby exonerated.

TAYLOR, C. J., concurred.

PER CURIAM. No error.

Cited: Campbell v. Boyd, 88 N. C., 130; *Wardsworth v. Stewart,* 97 N. C., 121.

GOVERNOR TO THE USE OF ARUNDELL v. JONES.

The sheriff is not liable in *debt* upon his official bond for omitting to take bail when he executes a *capias* in civil cases; but he must be proceeded against as *bail* by *sci. fa.*

DEBT, brought on a sheriff's bond against the defendant, as security of a deceased sheriff, and was heard below before *Donnell, J.,* at CARTERET. The breach assigned in the declaration was that the sheriff, on a *capias ad respondendum* duly issued to him, served the same and took no bail bond. The defendant demurred to the declaration, and the court below sustained the demurrer.

Hawks for plaintiff. (360)
Gaston contra.

HALL, J. Upon the best considerations I have given this (362) case I do not think the Legislature intended that the sheriff should be liable upon his official bond for omitting to take bail when he executed a *capias* in civil cases. They have declared that in such cases "he shall be deemed and stand as special bail, and the plaintiff may proceed to judgment according to the rules thereinafter prescribed." If the sheriff was liable on his official bond for such omission he would be deprived of the opportunity of surrendering the defendant as other bail may do. I think he ought to be proceeded against as bail. But if the plaintiff cannot compel the sheriff in that character as bail to pay the money, I am far from saying that the party has no remedy upon his official bond against his securities.

HENDERSON, J. In omitting to take bail the sheriff does no wrong to the plaintiff in the writ of *capias ad respondendum*. All that the writ and the law requires is that the sheriff should have the body of the defendant ready to produce when the plaintiff should demand it to satisfy his recovery. Before any statute was made on the subject the sheriff was required to have the body of the defendant at the return of the writ, and whether the sheriff imprisoned the defendant or let him out upon bail or without bail, it was nothing to the plaintiff; the sheriff was exonerated from all liability if he produced the body, nor was he excused by showing that he let the defendant out upon bail, however sufficient that bail might be, and the law remained the same in this particular after the sheriff was commanded by statute to let to bail those whom he arrested on such process, for the (363) sheriff's liability remained the same; the bail was for his indemnity only. In 1777 the Legislature prescribed the manner of taking bail, altered the nature of bail to the writ, and declared that all bail should be held and deemed special bail, and defined what they meant by special bail, by declaring that the bail might discharge themselves by surrendering their principal at any time before final judgment on *sci. fa.* At the same time it was enacted that if he omitted to take bail, or took that which was insufficient, upon notice given at the first term he should stand as special bail. This notice was not necessary, as was contended in the argument, when he omitted to take bail, but only in those cases where he took bail that was insufficient in the estimation of the plaintiff; and it was required that the sheriff should have notice of the exception that he might justify, that is, show the bail to be

sufficient; and in such case he became bail, if he failed to justify. He was also required by the same act to assign the bail bond to the plaintiff; thus was the whole law relative to bail altered—there was no longer any distinction between bail to the writ and bail to the action; the bail taken by the sheriff became bail to the action, with this alteration, that the bail were not fixed with the recovery by the return of *non est inventus* to the *ca. sa.*, but might discharge themselves by surrendering their principal before final judgment on the *scire facias*. As the law now stands there is no necessity of having the body at the return of the writ, for the object is completely answered by turning the bail to the writ into the bail to the action, be that bail the sheriff or any other person. The plaintiff, therefore, is entirely uninterested in the fact whether the sheriff took or omitted to take bail; and were this action sustained it would deprive the sheriff of one of the privileges of bail, which was certainly accorded to him by the statute, to wit, the right of surrendering his principal; but it was contended that the
(364) sheriff became bail at the election of the plaintiff, which election was evidenced by giving notice, and to prove this to be the correct construction of the statute, it is asked, what would be done if the sheriff should die after the arrest and before the return term? Here there would be no person to whom notice could be given. In answer, I would say that the law, which requires not impossibilities, would permit a departure from the words of the statute and suffer *the first term* to be read the first term *after it was physically possible* for the act to be done. It is said that, by construction of the act, the sheriff, who might be an insolvent, might impose himself as bail on the plaintiff against his will. It is admitted; but for this reason I think it an *official* act of the sheriff, and that those who are bound as securities for his official acts are responsible. The sheriff will have omitted to discharge his official duty only where he shall have failed to pay the condemnation money or surrender the defendant before final judgment on the *sci. fa.* The demurrer must be sustained.

TAYLOR, C. J., concurred.

PER CURIAM. Affirmed.

Cited: Barker v. Munroe, 15 N. C., 415; *Gray v. Hoover, ib.,* 476.

MERA v. SCALES & McCAIN.—From Caswell.

1. *Certiorari* will be granted on affidavit that appellant applied in due time to the clerk of the court below for the record of a case to bring it up to this Court, and was informed by the clerk that he had sent it up, when the record reaches this Court too late.

2. Nonsuit will be entered where in covenant the plaintiff in the Superior Court recovers less than the sum of £50, unless he file an affidavit under the act of 1777.

CERTIORARI. *Ruffin*, in this case, moved for a *certiorari* on an affidavit made by *Scales*, stating that he was informed by his codefendant that several days before the meeting of this Court the defendant (McCain) sent to the clerk of the Superior Court of Caswell (365) for the record in this case, that he might bring it up, and was told by the clerk that he had made out the record and sent it up. The record reached the clerk of this Court on the fourth day of the term, and it was admitted by *Seawell*, for the plaintiff, that the facts stated should be considered as having been sworn to by McCain.

PER CURIAM. The affidavit is sufficient; let a *certiorari* issue.

And now, on the return of the *certiorari*, the record showed it to have been an action of *covenant* in which the breach assigned was the nonpayment of $2,650, which defendant, by his covenant, had bound himself to pay. The jury found that defendants had paid to the plaintiff $2,650.15 and assessed the plaintiff's damages to $39.29. Thereupon, defendant's counsel moved, but without success, to nonsuit the plaintiff.

HENDERSON, J. This action is not brought on a bond, note, or liquidated account, and therefore is not within the act of 1820, which declares that *in such cases* the jurisdiction of the Superior and county courts shall be ousted by plea in abatement. Nor did the act which gives concurrent jurisdiction in all cases for civil injuries to the Superior and county courts alter *the mode of ousting jurisdiction* in either. In this case, the declaration shows the nature of the demand, and the verdict of the jury the amount due, and there being no affidavit under the act of 1777, the court law, as it is called, there must be judgment of nonsuit.

PER CURIAM. Action dismissed.

(366)

THE GOVERNOR, SUING TO THE USE OF NATHANIEL HENDERSON, v. MATLOCK, ET AL.—From Rockingham.

1. If a person elected sheriff voluntarily gives bond with security in a penalty greater than that required by law, and enters upon the duties of his office, and is guilty of a breach of the condition, he and his sureties will be liable upon such bond, though not by a summary remedy.

2. When a sheriff gives bond payable to the Governor, and the bond is not exactly conformable to law, it is not necessary on suit on such bond to show that the Governor has sustained damages, for the bond is taken substantially to the people themselves for their benefit.

DEBT on sheriff's bond. This was an action brought against Matlock and his securities to recover $355.65 which Matlock as sheriff had collected on an execution issuing in behalf of Nathaniel Henderson against one Henry and returnable October, 1822.

On the trial below the plaintiff proved the execution of the bond by the sheriff, and that by virtue of the execution he had received the money as charged in the declaration.

For the defendant it was insisted there could be no recovery in this action,

1. Because the bond declared on is a sheriff's bond, and not having been taken pursuant to the act of Assembly, is void.

2. Because the bond declared on is given for the penalty of £5,000, whereas the law authorizes a sheriff's bond to be given for £2,000 penalty.

3. Because, admitting the bond to be good as a voluntary bond, the action cannot be sustained unless it be shown that the Governor and not Nathaniel Henderson has sustained damages—for the law does not make the bond enure to his benefit, unless taken pursuant to the act of Assembly as a sheriff's bond.

(367) 4. The bond could not be considered a voluntary one, but as a sheriff's bond, because it is only upon a sheriff's bond that Nathaniel Henderson, the person injured, is authorized to commence a suit in the name of the Governor to his use.

5. That if the sheriff should, as sheriff, be bound under this bond, yet his securities were not liable in this suit.

The court instructed the jury that if they were satisfied that the defendants had executed the bond declared on, and that Matlock had collected the money at the time and in the manner charged in the declaration the plaintiff was entitled to recover. The jury found a verdict for the plaintiff, motion for new trial, judgment and appeal.

MARTIN *v.* HOUGH.

TAYLOR, C. J. I believe that every point in this case has been settled by this Court in *Bank v. Twitty, ante,* 5, in which it was held that if a person elected a sheriff voluntarily gives bond with security in a penalty greater than that required by law and enters upon the duties of his office and commits a breach of the condition, he and his securities will be liable upon such bond, though not by a summary remedy.

As to the other objection in this case, that it ought to be shown that the Governor has sustained damage and not N. Henderson, it is virtually overruled in the case cited, in which the Court say that the bond is taken to the Governor for the benefit of the people at large, or that portion of them whose money may come into the hands of the sheriff. It is substantially taken to the people themselves, for their own benefit. As, then, the bond is valid and may be put in suit for the benefit of any one injured, there is no ground for a new trial in this case.

PER CURIAM. No error.

Cited: *Branch v. Elliott,* 14 N. C., 89.

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(368)

MARTIN v. HOUGH ET AL.—From Cabarrus.

On an issue *devisavit vel non* the security to the administration which had been granted *pendente lite* is admissible as a witness to support the will.

ISSUE *devisavit vel non.* Martin offered for probate the will of James Hough, and succeeded in its establishment below. Those who opposed the probate appealed to this Court, and the statement sent up presented two objections as the grounds of appeal.

The court received as a witness to support the will Martin Picket, notwithstanding the objection was made that administration *pendente lite* had been granted to James Martin, and that the witness offered was the security to the administration bond of Martin.

The sanity of the supposed testator being in question, to prove him insane a letter written by him was read by one of the counsel, and a physician was asked his opinion as to the state of mind of the writer, to be collected from the letter. He replied that part of the letter appeared to him nonsensical. The court then remarked to the counsel and witness that it had been read hastily and without regard to the punctuation; that if it were read slowly and as punctuated, it would be very intelligible; however, the jury, on retirement, would examine

for themselves, whether the opinion expressed by the physician arose from the manner in which the letter had been read or otherwise. It was contended that these remarks of the judge upon the letter amounted to an expression to the jury of his opinion upon matter of fact.

HALL, J. I do not think it was a legal objection to Martin Picket's competency as a witness that he had become the security of James Martin, who had obtained letters of administration *pendente lite* on the estate in dispute; because, whether the will is established or (369) not, Martin is liable and bound by it to somebody; to the executors if the will is established, to the administrators if it is not.

With respect to the objection founded upon the opinion of fact which it is alleged the judge gave in the hearing of the jury respecting the sanity of the testator, it seems rather to have been an opinion of the manner in which the letter was read. I think there is nothing in this objection; it is far-fetched; it is not founded upon the spirit of the act which forbids judges to give opinions to juries as to matters of fact. I think the rule for a new trial should be discharged.

The rest of the Court concurred.

PER CURIAM. No error.

SHEPPARD v. BRIGGS.

In debt on bond for a sum less than $100 since the act of 1820 advantage can be taken of the want of jurisdiction by plea in abatement only.

DEBT on three several bonds amounting to $394.50, tried before *Daniel, J.*, at SURRY. The plaintiff on the trial produced (1) a bond for $253.50; (2) a bond for $70, and (3) a bond for $71, all executed by the defendant and payable to himself. The defense was payment. The jury found that, after allowing the several payments made by the defendant, there was a balance due the plaintiff for principal $73.10, and they assessed his damage by way of interest to $5.34.

Upon the rendition and before recording the judgment, the defendant moved to nonsuit the plaintiff. The motion was overruled and judgment was entered, whereupon defendant appealed.

On motion for a nonsuit the plaintiff filed an affidavit which made part of the case, stating that he verily believed the balance justly (370) due him from the defendant was more than $100.

HALL, J. The parties have treated this case as if the cause of action had happened before the act of 1820, ch. 1045. By that act it is declared that all suits hereafter commenced in the Superior or county courts in this State on any bond, promissory note, or liquidated account for a less sum than $100, shall be abated upon the plea of the defendant. By this act the courts have not the power of nonsuiting in such cases, nor is it necessary for the plaintiff to file an affidavit as he has done. This was the mode pointed out by former acts of Assembly. By this act the suit can be abated only upon the plea of the defendant; of course the judgment of the Superior Court must be

PER CURIAM. Affirmed.

Cited: *Clark v. Cameron,* 26 N. C., 162.

DOE ON DEMISE OF THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA v. ROE AND JOHN HOGG.—From New Hanover.

When the lessors of the plaintiff introduced a writing signed by the defendant, acknowledging that the title was in the lessors, and showing also that the defendant had been in possession more than seven years under color of title, it was *Held*, that the paper was made evidence for the defendant by its introduction by the lessors, and that as the acknowledgment was not made until *after* his possession had ripened into title, he was not affected by it. It would have been otherwise if made *before*.

EJECTMENT. On the trial below it was admitted that the lands in controversy had been granted by the State. Two deeds were read, one from John Cowan and one from John Bradley, to Jonathan Jennings, for the premises, and seven years actual possession of Jonathan Jennings under them was proved. The will of Jonathan Jen- (371) nings was then read, whereby the land described in the declaration was devised to his wife Ann and her heirs. It was further proved that after the death of Jonathan Jennings his widow intermarried with Thomas Jennings, with whom she lived on the premises until her death in 1807 or 1808, and that Thomas Jennings lived there until he died in 1809. Two witnesses, who had known Ann Jennings for thirty years, swore that they had never heard of her having any issue; and one deposed that he had always understood she was an English woman. John Hogg had been in possession of the lot from the death of Thomas Jennings to the time of trial.

The plaintiff then introduced as evidence a writing signed by the defendant, in substance as follows, viz.:

To the Honorable the Trustees of the University of North Carolina:

The representation and memorial of Dr. Nathaniel Hill and John Hogg, executors and devisees in trust of Thomas Jennings, deceased, late of Wilmington, in the State aforesaid, respectfully showeth, That upwards of thirty years ago Jonathan Jennings, the uncle of your memorialists' testator, settled in Wilmington as a tavern and boarding-house keeper; that for many years he struggled on in low and, indeed, indigent circumstances; when, from perseverance and industry, his business improving and becoming profitable, he acquired and died seized and possessed of some property, chiefly gained by the attention and industry of his wife. The said Jonathan, having no children, devised and bequeathed the whole of his estate, real and personal, to his wife.

That the widow of Jonathan Jennings afterwards intermarried with Thomas Jennings, your memorialists' testator, who, of course, became possessed of said property, consisting, among other things, of a certain lot on Front Street in Wilmington.

That the wife of Thomas died in or about the year ...., without making a will, and that Thomas Jennings died afterwards, in or about the year ...., having made his will, of which he appointed the memorialists executors, and that, among other property devised by said will to the memorialists, is the lot in Wilmington, in trust to and for the use and benefit of George Jennings and George Tipler, nephews of Thomas Jennings.

That some time after the decease of Thomas Jennings, your memorialists were applied to by and on behalf of one Cocke, of Tennessee, for a debt due by Jonathan Jennings to him on bond. They, not being the legal representatives of Jonathan, were advised by counsel to constitute themselves such, in order to become parties to a suit at
(372) law at the instance of Cocke, rather than to be sued in chancery.

They accordingly took out letters of administration *de bonis non* on the estate of Jonathan, and suit was brought against them by Cocke, who obtained judgment; execution issued thereon, and was levied on the lot in Wilmington; and it was sold on or about 13 November, 1815, when it was bought in by and for the use of your memorialists for the sum of $1,044.55, by them paid to and for the use of George Jennings and George Tipler, under the devise in trust as aforesaid.

The memorialists, then averring and offering to prove the wish and intention of Thomas Jennings' wife to convey her right to her hus-

band, and that it was omitted only because of the ignorance of Thomas Jennings and his wife, that it was necessary, prayed the trustees to accept of a moderate compensation for the interest which had escheated to them.

This paper bore date 19 December, 1818. Defendant moved that plaintiff be nonsuited, not having shown title in himself. The presiding judge, on the evidence before stated, expressed an opinion that the memorial of John Hogg, being introduced by the plaintiff, was an admission and contained evidence of title in the defendant; whereupon plaintiff submitted to a nonsuit, and afterwards moved for a new trial. The rule was refused, judgment rendered, and plaintiff appealed.

Gaston for appellants.
Hogg for defendant.

HALL, J. I can see no objection to the opinion of the court in this case. It appeared in evidence that the defendant had (374) been in possession of the lot in dispute more than seven years. It also appeared from the plaintiff's own showing that the possession was under a color of title, namely, the will of Thomas Jennings. I say from their own *showing*, because, when the plaintiff introduces the petition in evidence he makes the whole of it evidence against him as well as for him. It is very true that from the tenor of the petition it appears that the defendant did not believe or think that he had title to the lot of land, but it is to be observed that this petition bore date in the year 1819, at which time the defendant had been in possession of the lot since the death of Thomas Jennings (a longer period of time than seven years), under the will of Thomas Jennings, and that he had thereby acquired title to it.

I think an ignorance of his title ought not to prejudice him. Had he presented this petition to the trustees before his possession had ripened into title, and when the title was really in the trustees, that would have been an acknowledgment of their title and that he held under them. In that situation no length of time would have given him title; but as there was no acknowledgment of this sort before his title became complete, one made after it will not affect the (375) case.

I therefore think the nonsuit was properly entered.

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

PER CURIAM. Affirmed.

DOE ON DEMISE OF RAYNER AND WIFE v. CAPEHART.—From Bertie.

Where lands were allotted a widow as dower, without previous notice given to the heir at law, who was an infant, it was *Held*, that however the allotment might be reversed or set aside by the heir or those claiming under him, still it was good title as against a *stranger*, when accompanied with seven years possession.

EJECTMENT. Thomas Collins was seized of the premises in the declaration at his death in 1800. Rayner's wife, the lessor of the plaintiff, was Thomas Collins' widow. Thomas Collins left a will duly executed to pass lands, to which his widow entered no dissent other than by her petition for dower, which was filed in August, 1800, and under which the lands in controversy were allotted her.

The court below held that the proceedings on the petition for dower did not vest a life estate in Rayner's wife.

The lessor of the plaintiff then offered the record of the said petition and proceedings as *color of title*, and the court permitted it to be read as such, and proof was made that under it the lessor of the plaintiff had been in quiet possession for fifteen years. The defendant then proved that the sole heir of Thomas Collins was an infant at the time of the assignment of dower, and continued such during the entire period of her possession. The judge ruled that the possession under such color of title would not divest the infant heir at law of title, and (376) that therefore the lessors of the plaintiff were not entitled to recover in this action against a stranger, and the plaintiff submitted to a nonsuit. A new trial having been refused and judgment rendered, there was an appeal by plaintiff.

Hogg for defendant.

TAYLOR, C. J. The true inquiry in this case was not whether the assignment of dower divested the heir at law of title, but whether such assignment, accompanied with seven years' possession, gave the plaintiff a right of recovery against a stranger. The defendant was a trespasser, and cannot avail himself of any irregularity in the proceedings by which the dower was assigned. They were had under the authority of a court possessing competent jurisdiction and must be regarded as conclusive, at least in this case, until they are avoided by due course of law. They constitute a presumption of right, which entitles the plaintiff to recover in the absence of any right or title in the defendant. The petition filed by the widow states the infancy of the heir, and prays that a guardian may be appointed to defend, which should have been done by the court, to enable the petitioner to give notice. Nothing,

therefore, can be inferred from the proceedings to show an intentional omission on the part of the widow. There must be a new trial.

Hall, J. It appears that the widow regularly dissented from (377) the will of her husband by filing her petition in time; that her dower was regularly laid off to her by metes and bounds, and that she held possession of it accordingly under a judgment of the court for a longer time than seven years. And I think she ought to recover, as against a stranger, upon that possession under that judgment. The judgment is not a nullity, although the heir at law at the time it was rendered was under lawful age and had no notice of it. However, it may be reversed or set aside by him, or those claiming under him, it is obligatory upon strangers. I, therefore, think the nonsuit should be set aside and a new trial granted.

Henderson, J., concurred.

Per Curiam. Reversed.

McCOY v. BEARD.—From Rowan.

A sheriff is not liable to a recovery for misfeasance in office by levying on lands when defendant in the execution had personal property sufficient to satisfy the debt, unless it be shown that he knew it to be the property of the defendant, or unless it be pointed out to him as such, and an indemnity bond tendered to sell it.

Case against the defendant as sheriff of Rowan County for a breach of official duty. The misfeasance assigned in the declaration was that the defendant when sheriff had neglected to levy a *fi. fa.* which came to his hands in favor of the plaintiff on the goods and chattels of one Pearson; but, instead thereof, had levied upon lands and tenements, which before the issuing of the *fi. fa.*, had been mortgaged by Pearson to secure a debt equal to their value, and in consequence of this misconduct of the defendant the plaintiff had lost his debt.

The plaintiff recovered a judgment against Pearson at May sessions, 1820, of Rowan County Court, and sued out a *fi. fa.* (378) returnable the ensuing August; the defendant levied this *fi. fa.* on four lots, with their improvements, in the town of Salisbury, which if unencumbered, were of value sufficient to satisfy the *fi. fa.* The defendant, in his return, set forth the levy and that on 26 August he offered the property for sale and the sale was postponed by plaintiff's attorney. The 26 of August was the last day of the term to which

the *fi. fa.* was returnable. Pearson, who was a carriage-maker, had on hand at the time of the levy and upon the lots levied on carriages and other personal property more than sufficient to discharge the debt, and this property was in no wise concealed or kept out of the sheriff's way. When the levy was made Pearson assented thereto and entered into a bond to the sheriff to indemnify him should he sell at the court ensuing without advertisement, in the event of the money not being paid. On 26 August the property was exposed to sale, but no bid was made for it, and it was at that time first ascertained by the sheriff that the property had been mortgaged by Pearson to secure a debt of its full value.

At August sessions, to which the *fi. fa.* was returnable, Allemong & Locke obtained a judgment against Pearson, and on the same 26 August, after the adjournment of the court, sued out a *fi. fa.* returnable to November ensuing, and on the same day the defendant levied the *fi. fa.* of Allemong & Locke on all the personal property of Pearson, who at the time urged upon the sheriff that his personal property should be applied to the satisfaction of the plaintiff's judgment. All the personal property was sold to satisfy the execution in favor of Allemong & Locke, and Pearson has since that time been insolvent.

The plaintiff sued out a *ven. ex.* with a clause of special *fi. fa.*
(379) upon the levy that had been made upon the lots, from the August sessions, returnable to the November sessions, and delivered it to the defendant after the levy had been made for Allemong & Locke. The sheriff then advertised the lots for sale, and they were bid off at the price of one dollar, owing to the incumbrance aforesaid. The mortgage deed had been proved and registered before the plaintiff had obtained his judgment against Pearson.

The court instructed the jury that, if they believed the testimony, the law was in favor of the plaintiff. The jury found a verdict for the plaintiff, and the case now stood before this court on a rule to show cause why a new trial should not be granted:

Ruffin for the sheriff.
Wilson contra.

Hall, J. I think in this case, before a verdict had been ren-
(383) dered against the defendant, a knowledge of the fact that the personal property spoken of was the property of Pearson should be brought home to him, or it ought to appear that the property had been pointed out to him as the property of Pearson, with an indemnity to sell it. It appeared that Pearson had on the lots carriages and other personal property more than sufficient to discharge the debt, and that

the property was not concealed. But it did not appear that the sheriff had a knowledge that those carriages (the other property is not specified) were the property of Pearson, the defendant in the executions. He might have thought that they belonged to other persons, and had been brought there for the purpose of being repaired. It is to be inferred from the case, but it is not stated that the carriages, etc., were the property of Pearson. Taking the facts as stated in the case to be true (and so we must take them) I think enough was not proved to warrant the jury in finding a verdict for the plaintiff, and that the rule for a new trial should be made absolute.

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

PER CURIAM. New trial.

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(384)

COWAN v. GREEN.—From Mecklenburg.

A mortgage not registered in time is ineffectual against purchasers subsequent to the mortgage whose conveyances are registered before the mortgage.

DETINUE for a negro slave, tried before *Daniel, J.* The slave had belonged to Andrew McBride, who made and executed a mortgage deed to the plaintiff, of the slave, dated August, 1814; this deed was proved in May, 1815, and registered in June, 1816. McBride retained possession of the slave until January, 1815, when he sold her to the defendant and gave him a bill of sale dated at that time; this bill of sale was proved and registered on 7 May, 1816, and Green took the slave into his possession.

The court charged the jury that if they believed Green was a *bona fide* purchaser of the slave, without any notice of Cowan's mortgage at the time; as his bill of sale was first registered he would, under a fair construction of Laws 1715, chapter 38, be entitled to hold the slave. The jury found a verdict for the defendant. A new trial was refused and judgment rendered, whereupon plaintiff appealed.

Gaston for the defendant.

HALL, J. Laws 1715, ch. 7, sec. 1, gives twelve months for (385) the registration of conveyances for lands (other than mortgages). By the same act, sec. 7, mortgages of lands or personal property must be registered within fifty days, otherwise subsequent mortgages first registered shall be preferred. By act of 1789, ch. 315, sec. 2, bills of sale for slaves are directed to be registered within twelve months.

By another act passed in 1814, ch. 875, it is declared that all bills of sale for slaves may and shall, within two years after the passing of that act, be admitted to registration under the same rules as heretofore appointed.

At the time when this act passed, the bill of sale to Green had not been executed, but it was executed the January following, and registered within the time prescribed by that act, so that no objection can be made to this deed for want of registration in due time. The mortgage to the plaintiff was not registered within fifty days, nor until the expiration of almost two years after it bore date. It was during that time and after the time had expired within which the mortgage ought to have been registered that the deed was executed to Green. For these reasons, I think the title to the slave in question vested in the defendant, and that judgment should be given for him.

The rest of the Court concurred.

PER CURIAM. No error.

Cited: Davidson v. Beard, post, 521, 523, 524.

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(386)

JINKINS v. LANGDON.—From Gates.

A. was summoned as garnishee, and stated that he had before been summoned at the instance of other plaintiffs, and that the sum in his hands was subject to the claim of the plaintiffs in the first attachment. On affidavit an issue was made up and submitted to a jury to ascertain whether the garnishee had in his hands any property of the debtor over and above the sum admitted in his garnishment. The jury passed upon the fact, and, *Held*, that it was not their province, but that of the court, to pass upon the record of the proceedings on the first attachment.

GARNISHMENT on attachment. Langdon being indebted, on 19 November, 1816, executed to one Morgan a deed in trust of certain property, for the benefit of certain of his creditors. After this, the plaintiff, having a claim against Langdon for $220.23, sued out his writ of attachment and summoned Morgan as a garnishee. In February, 1820, Morgan filed his garnishment, wherein he stated that he had taken into possession the property conveyed by the trust deed, and that before he sold the same or paid off any claims pursuant to the directions of the deed, he was summoned as a garnishee to appear in November, 1816, on attachments issued at the instance of Haggarty & Noble and J. & T. Garness; that after selling the property conveyed by the deed, and

paying the debts secured by it, with incidential expenses, there remained in his hands a balance of $57.88, which the garnishee believed was subject to the claims of Haggarty & Noble and J. & T. Garness.

The plaintiff Jinkins then filed an affidavit, stating that he verily believed Morgan, the garnishee, had in his hands property of Langdon subject to his claim, and prayed that the same might be inquired into on an issue before a jury, pursuant to an act of the General Assembly.

The issue submitted was as follows: "Whether James Morgan had any money or property, and to what amount, at the (387) time he was summoned as garnishee, liable to the plaintiff's demand, over and above the $57.88 admitted in his garnishment?" The defendant contended that he was not liable at law for anything more than the sum admitted to be in his hands; that if Langdon had any claim upon him, it was an equitable one, which could only be asserted in a court of equity. The objection was overruled by the court, and the jury found that there was in the hands of the defendant at the time he was summoned as garnishee the sum of $62.47 liable to the plaintiff's demand, over and above the $57.88. The defendant moved for a new trial; the motion was denied, and the court then, on motion of the plaintiff, and on inspection of the records in the cases of Haggarty & Noble and J. & T. Garness against Isaac N. Langdon, rendered judgment for the plaintiff against James Morgan for the sum of $62.47, and also for the sum of $57.88. Defendant appealed.

Hogg for garnishee.

HALL, J. The records of the suit were exhibited to the (389) court, in which it had been stated by the garnishee that he had given in his garnishment before that time; the court decided upon them and the jury decided upon the facts, and a general judgment was given against the defendant. If the court erred in any particular, that error should be set forth; none is perceived, and judgment must be affirmed.

PER CURIAM. No error.

BANK OF NEW BERN v. PUGH.

When a new trial is moved for on the ground that a verdict is contrary to law, and the charge of the court below is not erroneous as to the law, this Court cannot grant a new trial, for *it has not the power to ascertain that the verdict is contrary to law.*

APPEAL from *Badger, J.,* at PITT.

This case was before this Court, *Bank v. Pugh,* 8 N. C., 198. It appears from the statement that on the new trial which took place pur-

suant to the former decision of this Court, Marcus C. Stephens, the cashier of the bank, stated as follows: That David Smith was at the time of his death a large debtor to the bank; the president of the bank, after a consultation with the directors, informed Mooring, the administrator of Smith, that he was at liberty to take bonds with good securities from the purchasers, at the sale of Smith's effects, payable to the said president and directors, and that they would receive such of the bonds as they should approve in payment of Smith's debt; that the bond now sued on was one of those taken in pursuance of such agreement, and was offered to the bank by Mooring in satisfaction of one of his intestate's notes, and the bank refused to receive it, and the cashier, by direction of the bank, returned it to Mooring to do with it as he pleased. Stephens further stated that the bank refused to receive the bond when offered by Mooring as above, because it was not (390) thought to be as well secured as Smith's note, in lieu of which it was offered, but it had indulged Mooring for a portion of his intestate's debt, awaiting the result of this suit. It was further proved by plaintiff that it was made an express condition at the sale of Smith's effects by Mooring that the purchasers should give bond with security in the form of that now sued on. To such of the evidence of Stephens as related to the authority given by the president in behalf of himself and the other directors to Mooring, to take bonds payable to them, the defendant objected on the ground that an ordinance of the board of directors, made according to the provisions of the acts establishing the bank, was necessary to constitute him an agent for that purpose, but the objection was overruled by the court.

Badger, J., who presided, charged the jury as follows:

The decision of this case on the plea of the general issue depends on the inquiry, Has there been a sufficient delivery of the bond? It is contended by the plaintiffs that Mooring was their agent, intrusted to take bonds for their use, which is denied by the defendant. If Mooring was such an agent, then the bond when taken by him was *ipso facto* delivered to the bank, and became the defendant's deed, and cannot be affected by any subsequent disagreement. If Mooring was not an agent for the bank for this purpose, but a mere stranger, then the delivery to him for the use of the bank did not *ipso facto* become a delivery to the bank, but was a delivery to them or not, according to their treatment of the act of Mooring. If the bank refused merely to accept the bond as a *satisfaction or payment of Smith's debt* and did not reject it *altogether,* but accepted it except as to the satisfaction, then it became the defendant's deed, and the right of action vested in the bank. But if the bank refused to ratify what had been done by Moor-

ing, not only as to the condition of satisfaction, but also in tak- (391) ing a delivery of the bond to their use, or in other words rejected the bond generally, then it is not the deed of the defendant, and the plaintiffs cannot succeed in this action; and the court left it to the jury upon the evidence what the facts were.

The jury returned a verdict for the defendant on the plea of *non est factum*. A new trial was moved for because the verdict was contrary to law and evidence, and also on the ground of misdirection of the court; it was refused, and from the judgment rendered for the defendant plaintiff appealed.

Gaston for plaintiff.
Seawell contra.

HALL, J. I see nothing on the record in this case to authorize the Court to grant a new trial. No question of law is appealed from. The charge of the court below appears to be quite correct, and of course I think the rule for a new trial should be discharged. (393)

HENDERSON, J. We are called upon to grant a new trial in this case, not because upon the record the defendant is not entitled to judgment, not for error in law in the charge of the presiding judge, for to that no exception can be taken, but for that the judge below should have granted a new trial, because the verdict is contrary to law, for it is our duty to revise and correct his errors of every description. But it is believed that this error of the judge, if it be one, is not examinable by this Court, *for want of power to ascertain the fact that the verdict is contrary to law*. It is true that the judge below, having a power to set aside the verdict and grant a new trial, because the jury have found contrary to law or contrary to evidence, has, as necessarily incident thereto, the power to raise the veil which separates him from the jury and look into the evidence; but between *this* Court and the evidence there is an impenetrable wall; and the judge below cannot communicate to us his view of the evidence, so as to enable this Court to ascertain whether he has drawn a right or wrong conclusion from it, either in fact or in law, for he cannot draw the conclusion of law without first ascertaining how the facts are. Many other points were made in the argument, but it is unnecessary to examine them. The judgment of the court below must therefore be affirmed.

TAYLOR, C. J., concurred.

PER CURIAM. No error.

Cited: Bank v. Hunter, 12 N. C., 121; *McRae v. Lilly*, 23 N. C., 119; *Terrell v. Wiggins, ib.*, 173.

(394)

FITTS, CHAIRMAN OF WARREN COUNTY COURT, TO THE USE OF THE COUNTY TRUSTEE v. HAWKINS AND OTHERS.

The securities of a sheriff's bond for the year 1821 are not liable for any taxes received by their principal, under the lists furnished to him in 1820; but the securities of 1820 are liable.

THIS cause came on to be heard in WARREN, before *Badger, J.*, on the return of a writ of *certiorari*, which had issued to the court below.

The county trustee of Warren, on 1 February, 1822, caused a notice to be delivered to the defendant Hawkins, who was then sheriff, and to the other defendants, his securities to a bond, given 28 May, 1821, conditioned for the faithful and proper collection and return of the county and poor taxes, and also of the public tax. The notice informed them that at the next court to be held for Warren, on the 4th Monday of February, 1822, a motion would be made for judgment against them, in the name of the chairman of the court, for the full amount of the county tax, due for 1820.

The county court rendered judgment against the defendants, and on the return of the writ of *certiorari* it was insisted by the securities to the bond of 1821 that they were not liable for the noncollection or nonpayment of the taxes of 1820.

Hawkins, the defendant, had been elected sheriff in May, 1820, and was reëlected in May, 1821, and the securities to his bond for these two years were not the same.

The condition of the bond was as follows, viz.:

"The condition of the above obligation is such that, whereas the above bounden Joseph S. Hawkins is constituted and appointed sheriff of Warren County aforesaid, by the justices of said county, *for one year from the date* of these presents; now, therefore," etc.

(395) The judge below dismissed the writ of *certiorari*, and the defendants appealed.

Gaston and Ruffin for plaintiff.
Seawell and Mordecai for defendant.

TAYLOR, C. J. The question arising on this record is whether the securities to a sheriff's bond, executed in May, 1821, conditioned for the due collection and return of the county as well as the public tax, are liable for the taxes laid in the preceding year, viz., in 1820?

The sheriff, the principal in the bond in this case, was elected in May, 1821, and of course his term of service, according to law, would

expire in a year from that time, and his sureties can be made liable only for the taxes which the law imposed upon him the duty of collecting, or gave him a right to collect, within that period. The extent of this right and duty can only be ascertained by the collection and true construction of many acts of the Legislature, passed at different and distant periods.

The list of taxable property is to be taken within the last twenty working days in July by justices appointed by the county court which occurs after the first day of April. These lists are to be returned by the justices taking them to the court which happens after July, and are to be delivered to the sheriff within forty days after the return is so made; but he is not authorized to begin the collection until after the first day of April in the ensuing year, with the exception of the case where a person is about to remove to avoid the payment of taxes, from whom he may collect upon taking certain steps prescribed by law. These several provisions are abstracted and abridged from Laws 1801, ch. 570; 1814, ch. 872, and 1819, ch. 999, Rev. Code.

It is manifest, then, that the sheriff was authorized, by virtue of his appointment in 1821, to collect those taxes only with the lists of which he was furnished after July in that year; and that his right to collect such taxes, with the exception before stated, did (396) not begin until April, 1822.

A sheriff who is elected for the first time has nothing to do with the lists of the preceding year before he was in office; the clerk has delivered them to his predecessor, who alone has the authority to collect under them, and the law makes no provision for setting them over to the new sheriff, as in the case of prisoners and writs. If he receive the lists and collect the taxes, it must be in consequence of some private arrangement between his predecessor and himself, which undoubtedly cannot bind his sureties in this form of proceeding, for, if it could, they would then be responsible for two years instead of one.

If the sheriff is reëlected, as it happened in this case, he is then bound to collect the taxes of the preceding year, but this is by virtue of his former appointment and under the responsibility of his old bond; he collects as sheriff of 1820, not of 1821. Can the accidental circumstance of his being reëlected change the principle?

It is made the duty of the sheriff, immediately on receiving the lists of taxable property from the clerk, to set up at the courthouse an advertisement informing the inhabitants that he has received such lists and holds them ready for inspection, and requesting them to give him information of any lands, polls, or other taxable property not given

in, and if he receive information and neglect to account with the Comptroller agreeably to law, he is subject, besides a fine of a £100, to the penalty of £500; but this fine is not to be imposed when the sheriff shall account with the Treasurer within six months from the expiration of the time allowed by law for his settling with the Treasurer. 1796, ch. 449, sec. 4.

(397) The heavy penalty imposed by this law clearly implies that the sheriff is empowered and bound to perform the duties by which it may be avoided. He has six months from the time he ought to account to perform those duties and to be excused from the penalty. If, then, the plaintiff's argument is correct, and a sheriff elected in 1820 should not be reëlected in 1821, it depends not upon himself to escape from the penalty, but upon the acts and good pleasure of his successor, who is liable to no penalty for the omission that took place in the former years. The law would not do such palpable injustice as to give a sheriff six months after he ought to account to avoid this penalty without intending at the same time that he should have power to collect the taxes, by which alone he is enabled to account.

The clerk of the county court is also directed to return the lists of taxables to the Comptroller in September, but it is perfectly clear that it cannot be for the purpose of charging the sheriff in the succeeding October, for he cannot begin the collection, under the exception before stated, until April in the succeeding year. Why, then, it is asked, should this return be made in September, unless for the purpose of enabling the Comptroller to settle with the sheriff in the next month, October, when the sheriff is bound by law to account?

To this several answers may be given. The lists returned by the clerk in 1820 to the Comptroller will operate as a check upon the sheriff when he settles his accounts in the October of the next year and serve as a guide to the Comptroller in adjusting the balance, since he will have something more authentic to rely upon than the returns of the sheriff with whom he is to settle.

It may be highly important to the public interest that the fiscal officers should be furnished with the amount of the taxes laid for the current year, to the end that by a comparison with the revenue of the preceding year they may ascertain its defalcation or increase, and thence cause the necessary communication to be made to the

(398) Legislature.

But a decisive answer is that the time of the clerk's returning the lists to the Comptroller has been changed by the Legislature at different periods. By the act of 1787, ch. 269, the clerks were directed

to return the lists of taxables to the Comptroller on or before the first day of December in each year, though by the same act sheriffs are to settle with the Comptroller in the months of July, August, and September, and account with the Treasurer according to the Comptroller's report on or before the first of October. Therefore, the lists returned by the clerks to the Comptroller could not possibly be those by which the then sheriffs were to settle their accounts in that year.

In addition to the lists which the clerks are directed to furnish to the Comptroller, they must also return a certificate of the names of the sheriff and his securities, in order that the Treasurer may enter up judgment against them. Acts 1787, ch. 269, R. C. This regulation will bear no other construction than the name of the sheriff to whom lists were furnished, and against whom judgment cannot be entered up unless he fails to account for the taxes according to those lists. In other words, the sheriff is bound to account for the taxes in October, 1821, for which lists were returned to the county court by the justices appointed to take them—furnished to the sheriff by the clerk—and returned by the latter to the Comptroller in 1820.

The principal inconvenience adverted to as arising from this construction of the several acts on the subject is that, as the sheriff cannot begin the collection till April, there will not be time for him to collect the taxes while he remains in office, in the event of his not being reelected the following May.

But this inconvenience has been foreseen and provided for by the Legislature in the act of 1792, ch. 376, R. C., which gives the sheriff power to collect and distrain for the taxes, provided he does so within one year from the time he is accountable. Thus a sheriff elected in 1820, but not reëlected in 1821, has until October, 1822, to collect and distrain for the taxes laid in the first mentioned (399) year.

This act was passed to remove doubt which existed relative to the power of the sheriff to distrain after the time for which he was appointed had expired, and amounts to a plain legislative declaration that the sheriff for the year when the lists are returned, and not his successor, is bound to collect the taxes, according to them. To what end should the sheriff be armed with this extraordinary power to fulfill duties which the law did not exact from him, but had thrown upon his successor? If the securities of the latter were understood to be responsible for the tax of the preceding year, it is incredible that a private man should be invested with the whole armor of the law for ends unconnected with the public interest. But construing the several laws

so as to fix the liability of the sheriff for the taxes of the year for which he was elected, all is consistent and intelligible. Other subsidiary lights might be thrown on the subject by the oath taken on settlement with the Comptroller, from the power of the securities after the sheriff's death, and from the duty of the clerk to return the sheriff's bond and name; but it is thought the case is already rendered too plain to require a multiplication of arguments. The conclusion is that the securities for the year 1821 are not liable for any taxes received by their principal under the lists furnished to him in 1820, but that the securities given in 1820 are liable, and consequently there must be a new trial.

The other judges concurred.

PER CURIAM. Reversed.

Cited: Dickey v. Alley, 12 N. C., 454; *Slade v. Governor,* 14 N. C., 368; *Barker v. Munroe,* 15 N. C., 415; *S. v. Long,* 30 N. C., 419; *Coffield v. McNeill,* 74 N. C., 537.

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(400)

CHERRY v. SLADE.

1. When a record comes up to this Court, and with it a statement by the clerk that the appeal bond sent up is taken in a penalty less than that directed by the presiding judge, and it appears from affidavits that the penalty inserted in the bond was so inserted from a misunderstanding on the part of the clerk, the Court will consider the bond sent up as an appeal bond, if it appear that the penalty is sufficiently large.

2. A *certiorari* is granted by this Court, on facts uncontroverted, apparent on the records, or papers before the Court; but a *rule* is proper when the application is made on facts not so apparent. But in all cases when the *certiorari* is returned the facts may be controverted.

3. In ordinary cases, fixing the time of notice to take depositions belongs to the judge who orders commissions; but where it appeared from the record that an order was made granting commissions, but fixing no time of notice, it was *Held*, that if the parties disagreed on this point the judge who presided when the depositions were offered should determine on the sufficiency of the notice.

4. In an action for slander, in charging the defendant with having sworn falsely as to the residence of an individual, declarations made by that individual as to his residence, not in the presence of the plaintiff, are inadmissible as evidence against him; but on a mere abstract question as to the residence of an individual, that fact depends so much on *intent* that declarations made by the individual, accompanying and explanatory of his bodily presence, are admissible as part of the *res gestæ*.

CHERRY *v.* SLADE.

ACTION for slander tried before *Badger, J.*, at Spring Term, 1823, of MARTIN.

Gaston, in this case, suggested a diminution of the record because it did not show that an appeal was granted until after the adjournment of the court below, and moved for a *certiorari.*

The record stated that the issues in the cause were submitted to a jury, who found a verdict for the defendant; that a motion was made for a new trial; that the motion was overruled, and judgment rendered. These facts were officially certified by the clerk under seal, and then followed a statement by the clerk that an appeal was prayed and granted to this Court, and an appeal bond in the penalty of $1,000 was filed, but, owing to its escaping the recollection of (401) the clerk, no entry of the appeal was made on the record. The clerk also stated that the appeal bond was filled up with a penalty less by $500 than that which the judge had directed, which arose from the clerk's not having heard what amount the judge directed as the penalty of the bond, and this error was not discovered by the clerk until after the adjournment of the court.

A statement of the case made for this Court by the presiding judge below also accompanied the record and concluded with the remark that an appeal to this Court was prayed by the plaintiff.

Gaston then read the affidavit of the clerk below, containing the same facts set forth in his statement, and also the affidavit of the clerk of the county court of Martin, confirming that statement, and adding that the clerk was absent from the court room, preparing a bond when the judge directed the bond to be in the penalty of $1,500, instead of $1,000, the sum first agreed on. The affidavit of the defendant himself was then read, and from its contents it appeared that the defendant had signed the bond tendered him by the clerk, as had also his securities, presuming that all was properly done; that the defendant and his securities were willing to file a bond to any amount, and that $1,000 was far more than sufficient to satisfy all the costs of the suit; that as soon as he understood there was some difficulty as to the penalty of the bond he executed another for $1,500, with ample security, and now stood ready to give any further security this Court might require.

Hogg opposed the issuing of a *certiorari* and contended that the utmost that could be done under these circumstances was to grant a *rule;* that as to the affidavits, that of Cherry, the defendant, did not show that any securities were ever *tendered* to the court, nor (402) did it explain the cause of the omission; it did not show that either Cherry or his counsel was mistaken as to the amount of the bond

directed by the judge, and the other affidavits merely showed that the *clerk* was mistaken.

But the Court directed a *certiorari*.

HENDERSON, J., remarking that, to settle the point of practice, it might be well to observe that a *certiorari* is granted on facts uncontroverted, apparent on the record or papers before the Court, but a *rule* is proper where the application is made on facts not so apparent. But as in all cases we permit the facts to be controverted when the *certiorari* is returned, it is the same thing as granting a *rule* only.

On the return of the *certiorari* it appeared to be an action for slander, in charging the plaintiff with perjury, that had been tried before *Badger, J.*, at MARTIN Spring Term, 1823.

The jury having been charged with the cause, the plaintiff produced a notice to the defendant, returned by the sheriff executed on 9 January, 1821, to take the depositions of William Wilson and others on 12 February, 1821, at the house of Daniel Cherry, in Wilson County, State of Tennessee, and offered to read the depositions taken accordingly. This suit had been removed originally from Martin to Edgecombe, and from Edgecombe back to Martin, and the depositions were taken under a commission issued by the clerk of Edgecombe court. They were not taken by consent of parties, and there was no special rule to take depositions in this cause which prescribed the time of notice, nor did it appear that there was any general rule of Edgecombe court under which the depositions were taken. The presiding judge offered to receive any evidence of the existence and terms of
(403) such rule, and no such evidence being offered, he decided that the depositions were inadmissible. Upon the trial of the issues it was material for the defendant to show that a certain Daniel Cherry did not reside in the county of Martin on 6 April, 1809. Testimony was given of his having removed to Tennessee in 1802, and that he was in the habit, from that time up to 1810, of frequently passing and repassing between Martin County and Tennessee. The defendant then offered to prove declarations of Daniel Cherry, made in Tennessee and Martin County, between 1802 and 1809, before any controversy arose as to his place of abode, explanatory of his presence in the one place or the other. This testimony was objected to by plaintiff, but received by the court, and the jury was instructed that these declarations were not evidence of themselves against the plaintiff, but that, taken in connection with his coming and presence and business in Martin or Tennessee, and as explanatory thereof, they were proper to go to the jury, and from them they were at liberty to infer residence

from the facts and declarations taken together, if satisfactory to them. A verdict was returned for the defendant, and a new trial was moved for, because the depositions were rejected and the declarations of Daniel Cherry received. A new trial was refused; judgment and appeal.

Gaston for appellant.
Hogg contra.

HENDERSON, J. It does not appear upon the record for what (408) cause the depositions were rejected. If because the presiding judge conceived that in *this case* he had not the power to decide on the question of notice, I think he erred, and that this Court can interfere; but if he thought the notice too short, it was matter for his discretion, and this Court cannot interfere. I say in *this case,* for in ordinary cases the question of fixing the time of notice belongs to the judge or court which orders the commissions; but it appearing in this case from an entry on the record that commissions were to issue to both parties, and nothing being said about notice, it was thereby virtually agreed by the parties that, if they should disagree on this point, it should be decided by the judge who presided when they were offered in evidence; for who else was there to decide? And, besides, if the law was so imperative that the consent of the parties could not confer this power, the court would grant a new trial as the only mode by which one party should not obtain an advantage by violating his agreement relative to the conducting of the cause; but it may be that the judge acted on the other ground, to wit, he though the time of notice too short; if so, this Court cannot interfere. (409)

I think that the declarations of Cherry made in the absence of the plaintiff ought not to have been received, but had it been a mere abstract question as to the residence of Cherry, that fact depending so much on intent, declarations accompanying and explanatory of acts were admissible, for then they are properly a part of the thing done; but the question here was not whether Cherry resided in Martin or Tennessee, but whether the oath that the plaintiff had sworn to, to wit, that he was a resident of Martin, was false and corrupt. The mere declarations of Cherry, made in his absence and which never came to the knowledge of the plaintiff, ought not to affect him; but it is said that, after having proven Cherry's residence not to be in Martin by these declarations (for by offering the declarations it is admitted that the evidence is not sufficient without them), they will afterwards bring home a knowledge of these declarations to the plaintiff. The same evidence which would do this would prove that Cherry made them;

such, therefore, could not be their object, but to mislead, for if they should fail to bring the knowledge home to Cherry the evidence ought not to weigh anything, and yet what power could efface its impressions from the jury. It would be in vain that the judge should tell them to disregard it; the impression is made upon their minds and it cannot be effaced. I therefore think that a new trial should be granted.

TAYLOR, C. J., concurred.

HALL, J., *dissentiente:* I think, as long as an order had been made in this case that the parties might proceed to take depositions, it was competent for the court on the trial of the cause to judge of the reasonableness of the notice given of the time of taking them. However, it is not necessary to give any opinion on this point, as the court (410) might have been of opinion that the notice given was not reasonable, and of that I think the court had the sole right of judging.

With respect to the declarations of Daniel Cherry, I think they were properly received under the restrictions laid upon them by the court. They are not evidence of themselves, but only intended to explain the conduct and movements of the person from whom they came. It, like all other competent evidence, is open to observation when received, but no general rule can be laid down respecting it. If Daniel Cherry's declarations were different from the evidence given by the present plaintiff in the former suit in which he was sworn as a witness, it might be proper to ascertain whether Darling Cherry had had a knowledge of these declarations. If he had not, they should operate but little against him, for it might be that Daniel said he was, and really was, a citizen of Tennessee, and Darling might have believed he was a citizen of Martin. But these are considerations for the court and jury. From the consideration of all the circumstances in this case, I think the rule for a new trial should be discharged.

PER CURIAM. New trial.

Cited: Bank v. Hunter, 12 N. C., 122.

(411)

RUFFIN v. ARMSTRONG.

A. being embarrassed, and having a promissory note payable to himself, indorsed and delivered the note to H., his clerk, with instructions to raise money on it by a sale of it to the plaintiff, and at the same time directed the clerk to conceal from the plaintiff that the note was his (A's) property. The clerk sold it to the plaintiff at a discount of 33⅓ per cent, and represented it as his own property, and indorsed the paper to the plaintiff without recourse to himself in the event of the failure of others who were liable on it. In a suit by the plaintiff against A., it was held that the transaction was usurious.

APPEAL from *Donnell, J.*, at WAYNE.

In this case the plaintiff declared as indorsee of a promissory note against the defendant as indorser. The note and indorsements were as follows:

On demand 13 September next, with interest from 10 December next, we or either of us promise to pay to Joseph Armstrong, or order, $911.28, for value received. Witness our hands and seals, this 13 September, 1819.

JOEL ALTMAN, (L. S.)
JOHN DUNN, (L. S.)
BEN. SAULS, (L. S.)

I indorse the within note to Bennett J. Hallcome, for value received, this 2 October, 1819. JOS. ARMSTRONG.

I assign the within obligation and the above transfer to Henry J. G. Ruffin, or his order, but am not myself bound in case of failure.
October 2, 1819. B. J. HALLCOME.

The defendant relied on two grounds of defense: (1) the want of due diligence in the demand of the makers, and notice to the indorser; and (2) that the indorsement of the defendant was part of an usurious transaction, and therefore void. The facts were as to the indorsement, that the defendant, being the holder of the note, was desirous of raising money, and being informed by his clerk, Hallcome, that the plaintiff was in the habit of buying notes, it was indorsed by the (412) defendant to Hallcome, with a request that he (Hallcome) should sell it to Ruffin as his property. Hallcome accordingly did sell the note to Ruffin for $600, and at the time concealed the fact of his agency and represented the note as his own. In the whole transaction Hallcome (as he stated) was but the agent of the defendant, and paid over to him immediately the money which he received from Ruffin.

On this part of the case *Donnell, J.,* who presided, charged the jury that if they should believe the indorsement by Armstrong, the defendant, was made with a view of raising money by a sale of the note to Ruffin at a discount greater than the legal rate of interest, and that in the whole transaction Hallcome was merely the agent of the defendant Armstrong, having no interest in it himself, and that plaintiff took this note of $911.28 with the general indorsement of the defendant and paying therefor only the sum of $600, then the indorsement of the defendant might be considered as made immediately to the plaintiff Ruffin, and the transaction was usurious, although Ruffin was ignorant of the agency of Hallcome, and believed him to be the real owner of the note.

The jury returned a verdict for the defendant on the ground of usury. A new trial was refused the plaintiff, and judgment rendered, from which there was an appeal.

Gaston and Mordecai for appellant.
Seawell, Ruffin, and Hawks for appellee.

(416) TAYLOR, C. J. The act of Assembly which the defendant pleads and insists is violated by the indorsement sued on prohibits the taking, directly or indirectly, for loan of any moneys, wares, merchandises, or commodities whatsoever, above the value of £6, by way of discount or interest, for the forbearance of £100 for one year; and makes utterly void all bonds, contracts, and assurances whatsoever, made upon usury.

In the construction of this part of the act which sets aside the usurious transaction, the Legislature must be understood to
(417) comprehend every device and stratagem intended to evade the law, and although it be not proven in direct terms that there was a loan and a taking of more than legal interest for the forbearance of repayment, yet if the appearance of a loan and forbearance be evaded or concealed by some artifice contrived for that purpose, when in truth it was such, the law will equally avoid it, for as a great judge has observed, "Where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute."

The Legislature has fixed the rate of interest on principles of policy, which are at least as powerful now, under the improvement of the State, in all its aspects, government, population, manners, and commerce, as they were nearly a century ago, when the law was passed. It is not less important *now* than it was then to restrain the power of amassing wealth without industry, and to prevent those who possess

money from sitting idle and fattening on the toil of others. It is not less important to prevent those who desire profit from their money without hazard from receiving larger gains than those who employ it in undertakings attended with risk calculated to encourage industry and to multiply the sources of public prosperity. Nor is it less important to facilitate the means of procuring money on reasonable terms, and thereby to render the lending of it more extensively beneficial. Hence, courts of justice ought to watch with jealousy against any attempt to evade the statute, lest persons under the disguise of ordinary dealings should be allowed to obtain more than legal interest.

I have availed myself of the very full and able discussion which this case has undergone from the counsel on both sides, and of the authorities and illustrations which their industry and learning have furnished the Court; and after all these lights my mind has settled down in the conviction that the transaction now before us, though veiled with more than ordinary precaution and so dexterously contrived as to invest it with a plausible exterior, is in truth and substance a (418) shift to evade the statute.

It is contended, in the first place, that this was a fair sale of the bond, which the plaintiff might lawfully purchase for less than the sum due upon it, and afterwards receive the whole amount with interest. The legality of such a sale cannot be questioned. But the character and substance of this transaction bespeak it to be a loan of money, although the parties constantly speak of a sale, and not a whisper is heard relative to a loan.

But if it had been a sale in truth, Armstrong would have had nothing more to do in the affair than to receive the price and leave Ruffin to obtain the money as he could from the obligors. The money was to be raised for Armstrong's benefit, and if he had meditated a sale of the bond he would undoubtedly have withheld his indorsement. But by adding that to the bond, he undertook on his part to repay the money which should be raised on it in the event of the obligor's delinquency. This appears to me to be the unequivocal characteristic of a loan, that the money is in all events to be repaid with interest by the borrower himself or out of his funds, except in the cases where a contingency is introduced merely for color and for the purpose of avoiding the statute. A sale of the bond, on the contrary, would have left no recourse to Ruffin, except the liability of the obligors, on whose credit alone the bond would have been purchased, and who would have received no part of the price which he had paid for it.

The force of this conclusion is attempted to be weakened by the circumstance that there was no communication between Armstrong

and Ruffin, and that the latter dealt wholly with Hallcome, who represented himself as owner of the bond. But Hallcome was the agent of Armstrong, and authorized by him to create a privity between himself and any person to whom the bond should be transferred. And
(419) the law looks to the substance and essence of the contract, to the plot and structure of the drama, not to the *dramatis personæ;* for upon no other principle could it have been decided (as in *Lowe v. Waller,* Doug., 735) that a bill of exchange given upon an usurious consideration is void even in the hands of an indorsee for valuable consideration without notice of the usury. Is the plaintiff in this case entitled to the same consideration with an innocent indorsee? Did he not make an usurious agreement with Hallcome, not to be enforced against him, it is true, but against his principal, Armstrong? And I might add another question, Why was Hallcome's indorsement made without recourse upon himself? It is said in the case cited that the most usual form of usury was a pretended sale of goods; and in this State the most usual form, and that by which the statute is most successfully evaded, is a pretended sale of bonds and notes. If the statute can be evaded because the person who received the money represented himself as the owner of the note, when in truth he was not, and he by his indorsement could give a right of recovery against others which could not be had against himself, then nothing would be more easy than the process of committing the offense without incurring the penalty. But if it be, as the sages of the law tell us, a law made "to protect men who act with their eyes open, to protect them against themselves," then ought the construction of the law to be liberal enough to suppress the offense in whatever garb or form it may appear, more especially since the Legislature has studiously avoided particularizing specific modes of usury, because that only led to evasion, but to enact generally that no shift should enable a man to take more than the legal interest upon a loan.

If Hallcome had been in truth the owner of the bond, and had *bona fide* sold it to Ruffin with Armstrong's indorsement, but without his own, the transaction might have been sustained, for in that case
(420) there would have been no stipulation for the repayment of the money by the borrower. But as the case stands, Ruffin's title is vitiated by being derived through Hallcome's indorsement, made on an usurious consideration. Ruffin could not recover from Hallcome, for his indorsement was without recourse; Hallcome could not recover from Armstrong, for his indorsement was without consideration, except the usurious one which was paid to Hallcome for his use; nor could

Ruffin in a suit against Armstrong protect himself by those authorities which say that a note originally good shall not be vitiated by a subsequent indorsement that is usurious (which authorities, however, have been overruled by later cases cited at the bar), because here the suit is not against the obligors, but against the indorser, who indorsed it for the purpose of having it discounted for his own use; his indorsement therefore was a new contract. The opinion of a late distinguished judge in a sister State is so applicable to this view of the question, and conveys my sentiments so much more perspicuously than I could myself express them, that I beg leave to quote his words: "I take it to be clear that if a bill or note be made for the purpose of raising money upon it and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted, that then such discounting of the bill would be usurious, and the bill would be void." 15 Johns., 56. The same question again occurs in 17 Johns., 17, and is decided the same way. Every position stated in the opinion quoted applies to the facts of this case so exactly that it may be said *mutato nomine, de te relatio narratur.* Upon the whole I am clearly of opinion that the charge of the judge was perfectly correct, and that there ought not to be a new trial.

HALL, J. The bond in question was assigned by the defend- (421) ant to Hallcome, for the purpose of being assigned by Hallcome to the plaintiff, thereby to raise money for the defendant. The note was transferred accordingly for $900, and $600 only was loaned to Armstrong. I say it was loaned, because the plaintiff had taken the defendant's obligation or indorsement to return it, and I must say the contract was usurious, because a greater premium than 6 per cent per annum was reserved for the use of it. This appears to me to be the common case of usury. Hallcome had no interest whatever in the transaction. The contract really was between Ruffin and Armstrong; the one loaned the money, the other received it and made his indorsement to secure and repay it. But it has been argued that, as Hallcome declared to Ruffin that he was the real proprietor of the note, and as he did so in consequence of a fraudulent combination and agreement of Armstrong and himself, entered into for that purpose, Ruffin should be considered a fair purchaser of the note from Hallcome, and, let the contract between the plaintiff and Hallcome be what it may, Armstrong should not be considered as a party to it, but bound to pay the full

amount of the note to the plaintiff, because there was no usurious contract between Armstrong and Hallcome.

Whether the assignee of a bond upon a usurious consideration can recover against the obligor when the bond was given upon no illegal consideration, this case does not make it necessary to decide, because this is not that case. Armstrong never was indebted to Hallcome. Of course Hallcome never could have brought suit against him and recovered. Armstrong became debtor to Ruffin in the first instance. No doubt Hallcome deceived Ruffin when he declared himself to be the owner of the note, but his declaration to that effect did not make him the owner; facts were not thereby altered. All that Hallcome did was to make an assignment to Ruffin to enable him to sue Armstrong, to whom the money was in fact loaned. That assignment completed (422) the first contract that was made between those three persons. I therefore think the rule for a new trial must be discharged.

HENDERSON, J., concurred.

PER CURIAM. No error.

Cited: Collier v. Nevill, 14 N. C., 34; *Jones v. Cannady,* 15 N. C., 88; *McElwee v. Collins,* 20 N. C., 351; *Long v. Gantley, ib.,* 460; *Ward v. Sugg,* 113 N. C., 490, 496.

McKINNA v. HAYER AND THE EXECUTORS OF SAMUEL PICKENS.

A. became the subscribing witness to an instrument executed by his father. On the trial the handwriting of A., who lived without the State, was proved. The defendant then offered the deposition of A., taken after the death of his father, to prove that the instrument never was delivered. It appeared that the father of A. had made a will, and it was *Held,* that the deposition was admissible in evidence until the plaintiff, by the production of the will, showed an interest in A., the witness.

COVENANT, brought on an instrument signed by the defendant Hayer and by Pickens. On the trial at MECKLENBURG, before *Daniel, J.,* the plaintiff called on witnesses to prove the handwriting of William Pickens, subscribing witness to the instrument, who resided without the State. They proved not only the handwriting of the witness, but also that of the obligors. The defendant then offered to read the deposition of the said William Pickens, taken since the death of the obligor, Samuel Pickens, to prove that the instrument never was *delivered.* This testi-

mony was objected to because William Pickens was the son of Samuel Pickens, the obligor. The will of Samuel Pickens was not introduced, and it did not appear to the court that William Pickens had any interest under the will, or that any part of the estate of Samuel Pickens was left undisposed of by the will, but it was proved that if there was no will he was an heir and distributee of the said Samuel. The defendants further contended that they had (423) an interest in the testimony of W. P. at the time the transaction took place, and any subsequent interest thrown on the witness by the act of Providence or the operation of law, should not deprive them of his testimony. The court permitted the deposition to be read, and it appeared from it that the instrument had never been delivered, but was surreptitiously obtained by plaintiff and put in suit. The jury found that the instrument was not the act and deed of the defendants. A new trial was moved for on the ground that W. Picken's deposition was improperly received; the motion was overruled, and from the judgment rendered plaintiff appealed.

Wilson for plaintiff.
Gaston contra.

HALL, J. If the father of the witness whose deposition is (425) objected to had died intestate, I think the deposition ought not to be read for an obvious reason, that the rights and property of the father by law devolving on the son, he would thereby be interested in this suit and of course would not be competent to give evidence; but it appears that the father made a will, in which no doubt he has disposed of all his property; perhaps he may have given it, or part of it, to this very son, or may have given him nothing. By making a will we may conclude that nothing has fallen to him by operation of law, for if the father had been contented with the disposition which the law would have made of his property he would not have made a will. I think as an interest in the son was not shown by producing the will of the father, the court were right in receiving the deposition of the son, and a new trial ought not to be granted.

TAYLOR, C. J., concurred in this opinion.

HENDERSON, J., *dissentiente:* The deposition of William Pickens was offered in evidence by the defendants and objected to by the plaintiff, and the facts show that he is the son of Samuel Pickens, the testator of one of the defendants, which testator was one of the obligors

named in the bond sued on, to repel which objection it was answered that Samuel Pickens left a will, as it appears by the proceedings in this case, for——*one of the defendants,* is called in court as his executor; there was no other evidence that he made a will and of course none of its contents. The objection to the reading of the deposition was overruled. The deposition was taken after the death of Samuel Pickens. I think the deposition was inadmissible, for the interest of the child in the estate of his father is not divested by showing that there is a (426) will, without showing its contents also. How the laws of England may be on the subject, I am unable to say, for no authority was cited on the point. I have been unable to find any, but with deference to the opinion of my brethren, I am very clear that under *our law* the deposition was inadmissible. In England the making of a will is emphatically the appointment of executors, for by that appointment all the property passes to them and no use or trust arises to any one, unless they appear upon the face of the will either by express bequests or legacies, or by construction, that is, by showing that it was not designed that the executors should take beneficially. With our law it is directly the reverse. Executors are trustees for the next of kin, unless it is shown that the next of kin are excluded. It therefore appears to me that the witness being next of kin to the testator, it should have shown that he was excluded by the will, for unless the will disposes of all the property, he is interested—the reverse of the English law, which gives to the executor all the property but that which is taken from him by the will. I do not think that there is any weight in the argument that the plaintiff gave credit to the witness by proving his handwriting to the deed as evidence of its execution. At the time he did that act, to wit, attested the deed, he was disinterested. The plaintiff was willing to take his statement made at that time, but not since he became interested. I therefore cannot concur in the opinion of the Court, but think that the rule for a new trial should be made absolute.

PER CURIAM. No error.

(427)

STEPHENSON v. McINTOSH & MURCHISON.—From Robeson.

The act of 1820 relative to the removal of debtors must be considered a total repeal of the act of 1796 on the same subject, and, therefore, a plaintiff who sued out his writ in February, 1821, and declared on the act of 1796, was nonsuited.

THE plaintiff in this case sued out his writ 8 February, 1821, and declared on the act of 1796, and on the trial gave such evidence of a just debt due him from Roderick McIntosh, and of the removal of the said Roderick from the county of Cumberland to the county of Moore in October, 1820, and of the other material facts necessary to sustain his action, as was proper to be left to the jury. The defendant contended that the act of 1796 was repealed by the act of 1820, without any exception or saving by which this action could be maintained. The court, on this ground, nonsuited the plaintiff. He moved for a new trial, which was refused, and the defendants had judgment for costs. Plaintiff appealed.

ACT OF 1796.

Be it enacted, etc., that from and after the first day of May next, when any person who has resided six months or more in any county of this State shall be about to remove out of the same, either by land or water, it shall be his duty to advertise his intention of removal in at least three public places of the county ten days previous to his removing, one of which advertisements shall be set up at the door of the justice of the peace to whom such person may intend to apply for a certificate of his having so advertised, or at such other public place on the premises of said justice as he may direct; and if any person or persons shall remove, or knowingly assist to remove any debtor or debtors out of the county in which he shall have resided for the space of six months or more, who shall not have advertised himself in the manner as by this act required, and shall have procured a certificate of the same from under the hand of some justice of the peace of the county, then such person so removing, or knowingly assisting to remove such debtor, shall be liable to pay all debts which the person so removed might justly owe in the county from which he was removed; which debts may be recov- (428) ered by the person legally entitled thereto by an action on the case: *Provided,* suit shall be commenced for the same within twelve months from the time the proof of such removal shall come to the knowledge of the person to whom the debt was so due, any law to the contrary notwithstanding.

ACT OF 1820.

An act to repeal an act passed in the year 1796, entitled "An act to punish persons for removing debtors out of one county to another, or out of the State," and for other purposes.

1. Be it enacted, etc., That an act passed in the year 1796, entitled "An act to punish persons for removing debtors out of one county to another or out of the State," be and the same is hereby repealed.

2. Be it further enacted, That if any person or persons shall remove or shall aid and assist in removing any debtor or debtors out of any county in which he, she, or they shall have resided for the space of six months or more, with an intent by such removing, aiding or assisting to delay, hinder, or defraud the creditors of such debtor or debtors, or any of them, then such person or persons so removing, aiding, or assisting shall be liable to pay all debts which the debtors or debtor so removed shall or may justly owe in the county from which he was so removed; which debts may be recovered by the creditors respectively, who may be entitled thereunto, their executors or administrators, by an action on the case: *Provided,* such suit shall be commenced within three years from and after the time of such removal.

Gaston for plaintiff.
Ruffin contra.

TAYLOR, C. J. It appears to me that the two acts of 1796 and 1820 are constructed upon principles and intended to suppress acts so different from each other that the last would of itself have operated (430) a repeal of the first upon the rule *leges posteriores,* etc. An action under the first statute must be brought within a year from the time the removal came to the knowledge of the plaintiffs. An action under the law of 1820 must be brought within three years from the time of removal. If then an action is brought under the first law, upon the supposition that it is not repealed, and the limitation of the second act is applied because the offense was committed after it, and the plaintiff is able to prove a fraudulent removal, it follows that the defendant may be liable after the period when he stood acquitted by the first act. The effect of this construction is to give a highly penal law a retrospective force, for a person who removed a debtor, with whatever intention, is not liable at all under the act of 1796, provided advertisements were duly made; yet if by superadding a fraudulent intent he could be made liable, and be then relieved upon the limitation of the first law, he would be repelled by the answer that the act described in the declaration was not the one which the law of 1796 had barred within

a year. I cannot perceive what necessity there was for declaring on the act of 1796, when the wrong complained of was committed after the enactment of that of 1820.

Whatever doubt, however, there might be as to the consistency of these two laws, if that were the sole question, and if in obedience to the advice of *Lord Coke* in *Foster's case* the statutes ought not to be abrogated by any constrained construction out of the general and ambiguous words of a subsequent statute, but that it is "to be maintained with a benign and favorable construction," these two laws could stand together; yet when the latter was made expressly to repeal the former, and does repeal it in so many words, I feel myself directed by the legislative will, and in adjudging the act of 1796 to be repealed, that I am traveling over the "ancient highways" of the law. (431)

HALL, J. This action is brought after the act of 1820 had repealed the act of 1796, but the alleged cause of action happened before that time, and while the act of 1796 was in full force, and if it can be sustained it must be upon one or the other of these acts, or upon both of them, for at common law the removal complained of was no offense. I think it cannot be sustained upon the act of 1796, because the act of 1820 totally repeals it, and it would seem equally clear that it could not be sustained upon the act of 1820, because the alleged cause of action happened before its passage, and I should think it could not rest upon both acts for its support, because only the act of 1820 was in force at the time of the institution of this suit.

In addition to these considerations, it may be observed that that which would amount to an offense under the act of 1796 would be no offense under the act of 1820; and that which is an offense under the act of 1820 would not have been an offense under the act of 1796. Thus, if before the act of 1820, one person had assisted another to move out of the county with the most wicked and fraudulent intent, yet if he had given due notice thereof as the law directs, he was guilty of no offense for which an action could be sustained; but if such notice was not given, he subjected himself to an action, however innocently the act was done. Under the act of 1820 the person doing the act is only answerable if he does it with a fraudulent intent; notice is immaterial. Under the first act the intent was nothing if due notice was given; under the last act the intent is everything, whether notice be given or not. A new trial, I think, should be refused.

HENDERSON, J., *dissentiente:* The plaintiff in this case declares that the defendant, with an intent to injure and defraud the plaintiff, and

to deprive him of a just demand which he had against C. D.,
(432) aided and assisted the defendant, in the year 1818, to remove himself out of the county, with all the averments necessary to bring the case within the operation of the act of 1796. The judge before whom the cause was tried was of opinion that the act of 1820 so entirely annulled the effect of the act of 1796 that no penalty inflicted by that act could be enforced, although an action might be pending for the penalty when the act of 1820 was passed. It is in this way I understand the record, and shall so consider it. That the act of 1820 repealed the act of 1796 cannot be denied, for, independent of other reasons, there are express words of repeal, but it does not follow, in my understanding, that this penalty is waived or released by the Legislature. It is admitted that all penalties exist by the will of the Legislature, and that any time before they were actually inflicted the Legislature may remit or release, whether suit is pending for them or not, and whether at the instance of an informer or party grieved. It is also admitted that this is a penalty, for the amount of the debt is inflicted, regardless of the *actual* injury sustained by the plaintiff. When the act was done, to wit, in 1818, there was a law in being which made it penal, and the question is, Has the Legislature done anything from which it can be discovered that they no longer wish the penalty to be inflicted? In an act of repeal generally there is not any express declaration that the penalties incurred, and not inflicted, by the repealed act shall be remitted, but courts of justice, whose business and duty it is to construe the acts of the Legislature, have found or think they have found an intent in the Legislature to remit the penalties on the simple ground that if an act is not of itself criminal today it was not criminal yesterday, and if prevented yesterday, it arose either from mistaken principles of justice, or from some principle of policy which no longer existed, and the very act of repeal was evidence of the one or the other. The courts, therefore, by this or some such mode
(433) of argument, arrived at the conclusion that the Legislature no longer desired to inflict the penalty. This was in cases of simple repeal; but the Legislature might, as they have done in numerous cases, repeal the law, and by the words thereof give the repealing law entirely a prospective operation, as by declaring it should not affect any penalties incurred under the repealed law. In the law of 1820 there is no declaration that penalties incurred under the act of 1796 shall be remitted, but there are the strongest reasons to believe, nay, a doubt cannot be raised, that it was not designed to remit such a penalty as was incurred by the act charged in this declaration, for in the very act

of repeal this act is subjected to the very same penalty as it would have been under the act of 1796; without express words such intent cannot be inferred. In 1819 an act is done, which, under the act of 1796, is penal. In 1821 an act, in every respect the same, is done; the latter act is punishable under the act of 1820, and yet the very same act, without any express words, protects the act done in 1819 from punishment; that is, from an act of the Legislature declaring a certain act to be criminal and inflicting punishment, an inference is drawn that the act is no longer criminal, and that no punishment shall be inflicted on it; thus, the act of 1796 declares that if a person shall aid or assist in the removal of a debtor (and if he does it with a fraudulent design he is not bettered), certain requisites not being complied with, that such person shall pay the debts of the debtor; by the act of 1820 it is declared that if a person shall fraudulently assist a debtor he shall do the same thing; this, it is said, is evidence that the Legislature no longer designed to punish the act. The present defendant, in 1818, when the act of 1796 was in force and attached on his acts, aided and assisted a debtor to remove, that debtor not having given notice or taken the precautions required by the act, but he went further than what was necessary to render him liable under the act of 1796; for it is charged that he aided with a fraudulent intent, which I presume will not take the case without the act. I see nothing in the act (434) of 1820 which shows an intention in the Legislature no longer to inflict penalties for such acts. It is said that the act of 1796 protects the most fraudulent aider, if the requisitions of the act are complied with, and that under 1820 an innocent one is protected without precautions, and that a guilty one is not. This is admitted. This suit is not brought or supported by the act of 1820: it is founded entirely on the act of 1796. Anything necessary to charge him under that act must be shown, and every defense under that act is allowable. That statute attached on the transaction; it governs it. By that shall the parties be judged, not on the two together, farther than to look into the latter for the sole purpose to ascertain if the penalty is expressly or constructively waived or remitted.

In answer to the objection that more is stated in this declaration than is necessary to support the action, to wit, the fraud, and that the defendant must have the spirit of prophecy to foretell that it would be necessary; I find it here, and if a person not gifted with the same spirit should declare on the act of 1796, so as barely to bring the case within the act, and pending the suit the law of 1820 should have been passed, the court would permit the alteration to be made in the declaration, under their general power of allowing amendments, if the plaintiff should

require it and believe that he could superadd the proof of fraud to the other allegations, and thus exclude the idea of remission or release apparent in all cases depending under the act of 1796, where the assistance was not given fraudulently. I therefore think that the opinion of the presiding judge was wrong in declaring that the act of 1820 was a total repeal of the act of 1796, and that under no circumstances could the action be maintained.

PER CURIAM. Affirmed.

(435)

DOE ON DEMISE OF PRITCHARD ET AL. V. TURNER.—From Pasquotank.

When those who claim the inheritance are of equal degree, and none of them can claim a preference by representing the acquiring line, all are equally entitled, although some of them may be of the half blood.

SPECIAL verdict in ejectment. It was found by the jury that Thomas Symons was seized and possessed in fee of the lands mentioned in the plaintiff's declaration; that the said Thomas died intestate in 1790, leaving a widow, Ann, and leaving, as his heir at law, an only child, Sarah; that Sarah intermarried with Joseph Jordan, and died intestate 2 March, 1808, leaving as her heir at law an only child, Thomas; that Thomas died an infant intestate and without issue on 12 June, 1808; that Joseph Jordan, the father of Thomas, is also dead, and that the lessors of the plaintiff are brothers and sisters of the whole blood to Joseph Jordan; that Ann Symons, the widow of Thomas Symons, after his death, intermarried with Abraham Boswell, and died leaving issue by this last marriage an only daughter, Mary, who was living at the death of Thomas Jordan, the infant; that the defendant claims title under the said Mary, who intermarried with Benjamin Pike, and that the defendant was in possession.

The court on this finding rendered judgment for the defendant and the plaintiff appealed.

TAYLOR, C. J. The controversy in this case arises between the paternal uncles on one side and a maternal aunt, of the half blood, on the other side. The land descended to Thomas Jordan from his maternal grandfather, no portion of whose blood flows in the veins either of the lessors of the plaintiff or the defendant. The parties on both sides are in the same degree of consanguinity to the intestate;
(436) and hence, it appears that the principle governing the decision has been virtually settled in *Ballard v. Hill*, 7 N. C., 416.

In that case the half blood of the maternal line were preferred to a more distant collateral of the paternal line, although the land descended therefrom; and this construction seemed unavoidable under the several enactments of 1784, which admit the half blood of both lines equally into the inheritance, and declare a priority only where the contest is between those of the acquiring and those of the nonacquiring line. It is also declared that the same rules of descent shall be observed where the collaterals shall be further removed than brothers' and sisters' children; consequently, where those who claim the inheritance are of equal degree, and none of them can claim a preference by representing the acquiring line, all are equally entitled, although some of them may be of the half blood. An uncle of the whole blood, where he represented the acquiring ancestor, would exclude an aunt of the half blood who did not, upon the principle of the case cited, as well as that of *Pipkin v. Coor,* 4 N. C., 14; but to prefer him where he did not so represent the acquiring ancestor would virtually repeal the law entitling the half blood to inherit.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. Judgment accordingly.

(437)

DOE ON DEMISE OF BEASLEY AND WIFE v. WHITEHURST.—From Currituck.

1. A devise as follows, "The remainder of my plantation and lands that hath not been given away I leave to be equally divided between my three sons, A., B., and C., to them and their heirs forever, except either of the above said three should die without lawful heirs of their bodies; then my pleasure is that it should return to the other two, to them and their heirs forever": *Held*, that since the act of 1784, A., B., and C. take a *fee simple* and not an *estate tail.*

2. And upon the death of A., leaving issue, and the subsequent decease of B. without issue, B.'s share will be equally divided among his brothers and sisters of the *half blood* and whole blood, or the representatives of such.

EJECTMENT. The case as stated to this Court is as follows: The lessors of the plaintiff claimed title to the land in dispute under the will of Henry White, who devised to his three sons as follows, viz.: "The remainder of my plantation and lands that hath not been given away, I leave to be equally divided between my three sons, to wit: Solomon White, John White, and Caleb White, to them and their heirs forever, except either of the above said three should die without lawful heirs of their bodies, then my pleasure is that it should return to the other two, to them and their heirs forever."

Solomon White died first, leaving five children, Polly, Letitia, Malachi, Henry, and Solomon; Samuel Beasley, one of the lessors of the plaintiff, has since intermarried with Letitia, the daughter of Solomon White, deceased.

After Solomon's death, in 1805 or 1806, Caleb White died intestate and without issue, leaving the following brothers and sisters or their representatives, viz.: the children of Henry White, a half brother, Mary Williams, Lydia Beasley, Letitia Tolar, the heirs of Solomon White, Miriam Cato, John White, Nancy Taylor and Julian Jones, his heirs at law.

(438) Upon the death of Caleb White without issue, his third part of the land in said devise contained was divided by order of Currituck County court among his heirs at law before named.

The defendant, Whitehurst, purchased the shares laid off in the division to Henry White's children to Letitia Tolar and Nancy Taylor, the heirs of the half brothers and sisters of Caleb White, deceased, it being three-ninths of the whole, and of the part so purchased the defendant has possession; the other devisee, John White, is still living, and the lessors of the plaintiff are entitled (if to anything) to one-thirtieth.

TAYLOR, C. J. The part of Henry White's will which forms part of the case would, before the act of 1784, have conveyed to his three sons estates tail in the land devised, which by that act are converted into fees simple. The opposite claimants of the part devised to Caleb White are his brothers and sisters of the whole blood and representatives of deceased brothers and sisters on one side and the representatives of his half brother on the other side. It is altogether unnecessary to consider in this case whether Caleb acquired the land by descent or purchase, because there is but one side of half blood, and they are of the paternal side. So that in either case they or their representatives of equal degree with the whole blood are entitled to the inheritance under the third section of the act and its provisos, and the proviso of the second section. It follows that the representatives of Henry White, the deceased half brother of Caleb, are entitled to the share which their father might have claimed had he lived, and that the verdict is wrong in having excluded them. There must consequently be a new trial.

In this opinion HALL and HENDERSON, JJ., concurred.

PER CURIAM. New trial.

Cited: Buchanan v. Buchanan, 99 N. C., 311.

(439)

STATE v. CHANDLER.—From Granville.

1. Where an indictment is framed on a statute of thirty years standing, which prohibits an offense *after a specified time*, it is not usual, or necessary, it should allege *expressly* that the offense was committed after the making of the statute. *Aliter*, if the statute be a recent one.

2. In a bill of indictment indorsed "A true bill," and to the subscription of A. B., the foreman, the letters F. G. J. added will be sufficient to indicate that he acted *as foreman*, where it appears from the record that A. B. was in fact the foreman of the grand jury when the bill was found. And if no letters had been added after his name, his subscription to the indorsement could only be referred to his official act as foreman, and would therefore be sufficient.

INDICTMENT containing two counts. The first was framed on the act of 1791, ch. 339, N. R., to prevent malicious and unlawful maiming and wounding. The second was a count for an assault and battery. The charge in the first count was that the defendant, on purpose, unlawfully bit off the left ear of Henry Yancey, with an intent to disfigure him, and concluded *contra formam statuti.*

The defendant on conviction was sentenced to be punished under the statute by a fine of $50, and imprisonment for six calendar months; from which he appealed.

Seawell for defendant.

TAYLOR, C. J. An objection is taken to this indictment that (440) it contains no averment that the offense was committed after 1 May, 1792, which, it is alleged, is essential on an indictment upon a statute which prohibits an offense after a specified time. The authority referred to lays down the rule that, where the prohibiting statute is recent, it is usual to allege *expressly* that the offense was committed after the making of the statute; but where the statute is ancient this is not usual, and does not seem to be in any case necessary. Now, it must be presumed that a statute which was passed upwards of thirty years ago must be generally known, and that no persons can be surprised, at this time, by a charge under the act, when the indictment concludes against its form; nor would the averment that the offense was committed after 1 May, 1792, render the charge more certain than when it is specified to be committed in June, 1821.

It is also objected that the person who subscribes the indorsement on the bill does not appear to have done so *as foreman;* that the letters following his name are equivocal, and may import many things. But

it appears upon this record that William Bullock was foreman of the grand jury when the bill was found, and therefore, if no letters had been added after his name, his subscription to the indorsement could only be referred to his official act as foreman. The signature cannot be referred to Bullock's natural or private capacity, for that (441) gave him no right to authenticate an official paper, but his political capacity did, in the same manner as if a magistrate signs a warrant or a judgment without any letters indicating his judicial character the signature must, nevertheless, be referred to that. There must be judgment for the State.

PER CURIAM. No error.

Cited: S. v. Wise, 66 N. C., 121.

STATE v. TWITTY.—From Mecklenburg.

The printed statute book of another State is not evidence to show what the law of that State is; it can only be shown by a copy authenticated by the seal of the State which enacted it.

INDICTMENT for deceit. The only question presented to this Court arose from the judge below having received in evidence to prove that there existed such an incorporated company as the Farmers Bank of Virginia a printed book entitled, "Revised Code of the Laws of Virginia," containing what purported to be the act of incorporation.

Gaston for defendant.
Attorney-General Drew contra.

TAYLOR, C. J. The admissibility in evidence of the laws of another State, purporting to be printed by public authority, presents a question which has frequently occurred before our courts, but either from their imperfect organization before the establishment of the Supreme Court, or the diversity of opinion entertained by different judges on the (442) subject, has not received an authoritative decision. If it had been settled either way by solemn adjudication, or by the current of practice running in one channel, we should be very unwilling to unsettle what is understood to be the law of the country. But we are now called upon to say whether it is right or wrong; according to law,

and upon a review of all the cases and opinions we think the printed statute book of Virginia is not admissible in evidence. The printed statute book of this State is always received in evidence as to public acts, because it is presumed that the contents of it are already lodged in the minds of the citizens. But the States, although united under a federal head, are, as to their local laws, as distinct from each other as any foreign nations can be, and no legal presumption can exist that the judges or citizens of one State can have any knowledge of the laws of another. They must, in short, be placed upon the same legal ground with foreign laws; and then the rule applies that the best evidence which the nature of the case admits must be produced. It is admitted that in point of fact it would be a matter of great convenience to admit the printed statute books of those States which confine with this, and that the risk of a successful imposition would be too great for any man to encounter. But the rule which admits such evidence as to one State must satisfy its competency as to all the States, however remote from or unconnected with us in social or commercial intercourse, and this would certainly open a door for fraud and imposition.

We must then abide by the law which regulates the authentication of these public acts of another State; and as the act of Congress of 1790, made in obedience to the Constitution, has superseded the common law on this subject, it is essential that every law of another State offered in evidence in this should be authenticated by having the seal of the State affixed thereto, for that is the highest evidence (443) of authenticity. The case cited from 1 Dallas would be entitled to great respect if the decision had been made posterior to the act of Congress, but it was made when Congress had prescribed no mode of authentication. Due faith and credit are certainly to be given to the acts *et cetera* of a sister State, but the question is, are they such acts? and we can adopt no better mode of ascertaining this than the one prescribed by Congress. On this ground, therefore, a new trial must be awarded.

PER CURIAM. New trial.

Cited: *S. v. Patterson,* 24 N. C., 357; *S. v. Behrman,* 114 N. C., 804.

STATE v. WARD.

1. In an indictment, the words "false, forged, and counterfeited promissory note, commonly called a bank note, purporting to be a good and genuine bank note of $100, on the bank of the State of South Carolina," contain a sufficient averment of the existence of such a bank as the Bank of the State of South Carolina.

2. When any irregularity in forming a jury is silently acquiesced in at the time by the prisoner, and especially when he partially consents, for the sake of a trial, to such irregularity, he waives his right to except after conviction and thereby take a double chance.

3. After conviction for an offense not capital, and appeal to this Court, the prisoner is not entitled to be bailed, as a matter of right. It is a question addressed to the sound discretion of the judge before whom the appeal is taken.

APPEAL from *Daniel, J.*, at RUTHERFORD.

Indictment for passing counterfeit money, knowing it to be such. The indictment charged that the defendant, "designing and intending to injure and defraud one Millington Patillo, with force and arms, in the county aforesaid, did pass as good and genuine, to the said Millington Patillo, a false, forged, and counterfeited promissory note, commonly called a bank note, purporting to be a good and genuine bank note of $100 on the bank of the State of South Carolina, which said false, forged, and counterfeited bank note is as follows: that is to say (444) (the paper was here set out verbatim), with an intent then and there to defraud the said Millington Patillo, he, the said James Ward, at the time he so passed the said counterfeited bank note, well knowing," etc.

The defendant was convicted before *Daniel, J.*, and moved for a new trial, (1) Because the State's panel of jurors, summoned by the sheriff's officers on the morning of the day of trial, had been discharged by the court, and a *tales* jury ordered, by whom he was tried. The facts on this part of the case were that the defendant was placed at the bar and declared himself ready for trial; the solicitor declared *he* was not ready on the part of the State, and remarked that he should be compelled to file an affidavit for removal of the cause, because the State could not have justice done it, as there were not twelve of the original panel, and that several of the *tales* jurors summoned were men strongly suspected and implicated in the same species of offense with the defendant, but that he could not make it so appear as to support a challenge for cause. While he was preparing the affidavits, the court remarked that if the parties wished to try the indictment he would

discharge the *tales* already summoned and direct the sheriff to return another *tales,* giving him no direction as to whom he should return. No objection was made by either party, and the sheriff returned, on two pieces of paper, the names of bystanders summoned. The clerk called the names on one of the pieces of paper, when the solicitor observed that one of the names called was on the list of *tales* which had been discharged; that he had objected to it principally because of this man, and that if he was a juror he could not try. The court, not knowing that the return was on two pieces of paper, and thinking a jury might be obtained without reaching the objectionable name, ordered the clerk to call the first four names on the list; the clerk did call the first four on the other piece of paper, and they, with (445) the original panel, made up a jury.

Another ground on which a new trial was moved for was that the jury had taken out of court on retirement several bank notes which had been introduced in evidence to prove the note which defendant had passed a counterfeit. As to this part of the case it appeared that Colonel Erwin, cashier of the bank at Morganton, was called as a witness, and after stating that a very large quantity of the notes of the Bank of South Carolina had passed through his hands, proceeded to describe the vignettes, etc., of two-dollar bills and of one-hundred-dollar bills of that bank, and then stated that he believed this was a bill originally for $2, which had been altered to a bill for $100. He then exhibited two genuine bills of these several denominations, which the jury requested to take out with them, and, as no objection was made, did take out with them. The defendant's counsel on the trial admitted the bill in question to be a forgery, and rested the defense on Ward's ignorance of that fact.

The motion for a new trial was overruled.

It was then moved in arrest of judgment that the indictment did not aver that there was such a bank as the Bank of South Carolina.

This was also overruled, and sentence was passed, from which there was an appeal.

Another point in the case arose on the defendant's prayer to be bailed, the solicitor contending that, as there was a conviction, the defendant could not be bailed unless by consent of the prosecuting officer of the State, and the court refused to bail.

Gaston for defendant.

HENDERSON, J. The indictment must affirm every fact which (446) it is necessary to prove on the trial, and nothing else is required

to be proven; and, as in this case, the defendant cannot be found guilty under the act of 1819, for a violation of which he is indicted, unless the note which he passed purported to be issued by some bank within the United States or the territories thereof, it follows that such affirmations must be contained in the indictment; that the State of South Carolina is one of the United States we judicially know; she is a party to the Federal compact; we therefore want not a jury to inform us of that fact. But it must also appear that there is such a bank as the State Bank of South Carolina; of this fact we have no judicial knowledge. We must, therefore, derive our information from the affirmation of a jury, and that affirms the indictment to be true, and no (447) more; and that states that the defendant passed the note in question, which purported to be issued by the State Bank of South Carolina. There is no difference about the meaning of the word *purport;* it means substance, as appears upon its face, to every eye that reads, to use the language of Mr. Buller; but the question is, Does the word *purport* run through the whole description, and is that description satisfied if there be not such a bank? A note cannot be issued by the South Carolina Bank unless there be such a bank; neither can it *appear* to be issued by the South Carolina Bank unless there be such a one. The word purport stops at the word *issued;* all before, by the previous epithets is made false and fictitious; that which comes after is a reality. The word purporting relates to the foregoing falsities and fictions, and their criminality consists in the note not being what it appears to be, that is, a note issued by the South Carolina Bank. Had it been necessary to have shown that there was no such bank, the statement in the indictment would not have let in such evidence. There must have been an averment or clause that there was no such bank; this, though, is somewhat arguing in a circle.

The irregularity in forming the jury, if there was one, I think, was completely waived by the defendant; he shall not by consent of this kind, take a double chance. Upon the question of bailing the defendant after the allowance of an appeal, I am of the opinion that the conduct of the presiding judge was right. I think that the clause in the Constitution which declares that all prisoners shall be bailable by sufficient securities, unless for capital offenses where the proof is evident or the presumption great, relates entirely to prisoners before conviction; for although the words "where the proof is evident or the presumption great" relate to capital cases only, that is, to prisoners in capital cases, the meaning is evidently prisoners before conviction, for after conviction there is no such thing as proof and presumption; all is

certainty, and that the word prisoners must be understood alike (448) in each member of the sentence, that is, prisoners before conviction, and persons remain convicted of the offense, notwithstanding the appeal, for the appeal is for matter of law only; the facts remain unaffected by the appeal, unlike the cases of appeals for matters of fact as well as for matters of law, and where a new trial *de novo* is given, as on appeals from the county to the Superior Courts, or from a single justice to the county court, where the appeal annihilates the verdict and judgment both. It seems that in England the defendant, after conviction, cannot be bailed, even in petty misdemeanors, without the consent of the Attorney-General, not even after writ of error brought; but as a writ of error is not matter of right in a criminal case, but matter of favor extended by the Attorney-General, it is not so inconsistent to vest in him the power of assenting to bail; but here an appeal is matter of right. To compel the defendant, in all cases of appeal, even for the most petty misdemeanors, to go to jail but by permission of the prosecuting officer, would render useless the right of appeal; and an indiscriminate right of going at large, upon giving bail, after an appeal, would be rendering the criminal law a dead letter. We think the spirit of our law requires a middle course to leave it to the sound discretion of the judge before whom the appeal is taken. The court below will proceed to judgment.

TAYLOR, C. J., concurred with HENDERSON.

TAYLOR, C. J. I dissent from that part of the opinion of the Court which decides that the existence of the bank in question is sufficiently set forth and averred in the indictment; in other respects I concur.

PER CURIAM. No error.

Cited: *S. v. Douglass,* 63 N. C., 501; *S. v. White,* 68 N. C., 160; *S. v. Boon,* 80 N. C., 466; *s. c.,* 82 N. C., 647; *S. v. Gee,* 92 N. C., 762; *S. v. Shaw,* 92 N. C., 770; *S. v. Council,* 129 N. C., 517.

(449)

STATE v. TWITTY.—From Lincoln.

1. When a witness is called who, in the commencement of his testimony, states himself to be an accomplice of the accused, it is regular, *before the witness is attacked,* to call on another witness to prove that the first had related the facts disclosed in his evidence immediately after they happened, and to state other confirmatory facts. Such evidence is to be considered as substantially given *in reply.*

2. When an indictment charges a defendant with forging a bank note, purporting to have been issued, etc., *promising* to pay, it must be understood as descriptive of a bill purporting to promise as well as purporting to have been issued.

INDICTMENT against the defendant, charging that he "of his own head and imagination did wittingly, falsely and feloniously make, forge, and counterfeit, and did wittingly assent to be forged, made, and counterfeited, a certain promissory note, commonly called a bank note, purporting to have been issued by the president, directors, and company of the Bank of Cape Fear, promising to pay John Mitchell or bearer on demand $3, which said promissory note, commonly called a bank note, so falsely made, forged, and counterfeited, is as follows, that is to say (the note was here set out verbatim), with intention to defraud the president, directors, and company of the Bank of Cape Fear," etc.

On the trial below Langford was introduced as a witness for the State, and swore that he received the bank note in question, with eight others for the same amount, from the defendant, who told him they were counterfeit; and, further, the witness stated that he had frequently before received forged notes from Twitty, when it was well known to both of them that they were so. On the night previous to his obtaining these nine forged notes from Twitty, the witness stayed at the house of Foster, his brother-in-law, about three miles from Twitty's. Early on the following morning he went to Twitty's,
(450) received the notes, returned on the same day to Foster's and showed him the bills, telling him in confidence that he had obtained them from Twitty. Langford was admitted to be an accomplice, and, to corroborate his testimony, Foster, who was above suspicion, was sworn, and stated substantially what Langford had already deposed. Foster's testimony was objected to, but the court received it. There was much testimony of a circumstantial nature, which it is unnecessary to detail. The defendant was found guilty and moved for a new trial, on the ground that Foster's testimony should not have been received. A new trial was refused, and he then moved in arrest. (1) Because

the record sent from the county of Rutherford (whence the cause had been removed) to Lincoln, did not show that a grand jury had been appointed according to law, by whom the bill was found. (2) That the indictment contained no averment that the forged instrument was set out according to its tenor. (3) That the charges in the indictment, descriptive of the offense, were not in the words of the statute. (4) The record was not such as would authorize a judgment. The reasons in arrest were overruled and sentence passed. Defendant appealed to this Court.

Gaston for defendant.

TAYLOR, C. J. A motion for a new trial in this case is made upon the ground that the witness Foster was admitted to testify to Langford's (a witness) declarations made to him about the time when the occurrence took place, which Langford was introduced to prove. It is said that such evidence is merely hearsay, and if admissible in confirmation of Langford's evidence, could only be so in reply, after the credibility of the latter had been attacked, and that under no circumstance is it evidence in chief. The authorities relied upon are a note (452) in Phillips on Evidence, who remarks on the case of *Luttrell v. Reynell*, 1 Mod., 282, where such confirmatory evidence was offered in chief, that it would not now be allowed, and Buller's Nisi Prius, 294, where a doubt is stated whether it is good evidence in reply.

It seems to me not to be a just construction of the case of *Luttrell v. Reynell* to consider the confirmatory evidence as offered in chief; for suspicion may be thrown on the evidence of a witness, from the nature of his evidence, from the situation of the witness, or from imputations directed against him in the cross-examination, which may be not less effectual in discrediting him than direct evidence brought to impeach his testimony, and equally call upon the party introducing him for confirmatory evidence. The witness in the case cited appeared, from his own evidence, to have been equally concerned with the defendants in the trespass and was left out of the declaration in order that he might be a witness; but as he was giving testimony to discharge himself, which would be the effect of convicting the defendant, he appeared in a suspicious light, and therefore his declarations, formerly made, to the same amount with his evidence were introduced to restore him to the same degree of credit he would have had if no motive had ever existed for his departure from truth. Had he been free from suspicion, such confirmatory evidence would have been perfectly useless, and given as it was it must have been substantially in reply to these sus-

picious. Though an accomplice is a competent witness, yet his unconfirmed evidence is usually received with caution and distrusted by a jury, and I cannot but regard evidence of his previous declarations as proper in reply to those circumstances of discredit which arise from the relation in which he stands to the defendant. It appeared in the very beginning of Langford's evidence that he had been an ac-
(453) complice of Twitty's, and it is highly probable that he would have been discredited with the jury from this cause had not Foster proved that the witness had related to him the facts disclosed in his evidence immediately after they happened, and added such circumstances as seemed to preclude all doubt of the veracity of Langford. Considering the evidence there as having been given, and properly given, in reply, I think it is authorized by law, and am certain it has been long sanctioned by the practice of this State. For this reason I am opposed to a new trial.

It is moved in arrest of judgment that the indictment is repugnant in charging the defendant with forging a bank note, purporting to have been issued by the president, directors, and company of the Bank of Cape Fear, *promising* to pay, etc. In support of this objection was cited 6 Cranch, 167, where it was held that an indictment under the act of Congress, 1798, could not be maintained for forging a counterfeit paper purporting to be a bank bill of the United States, signed Thomas Willing, etc., since a forged bill purporting to be a bank bill could not be signed by the president. But in that case it appeared that the act of Congress was, in itself, repugnant, and would not support an indictment for uttering, as true, a forged paper purporting to be a bank bill of that bank, *signed* by the president and cashier. There is no repugnancy in the act of 1819, upon which this indictment is framed, for the offense consists in uttering as true any false, forged, or counterfeit bill or note, purporting to be a bill or note issued by the order of the president and directors of any bank or corporation within this State or any of the United States. The indictment unnecessarily goes further and states a promising to pay to John Mitchell, etc., but it is not repugnant, for if the Court reads it as others would, it must be
(454) understood as descriptive of a bill purporting to promise as well as purporting to be issued by the president and directors; and as purporting imports what appears upon the face of the bill, so this, when produced, corresponds with the description. In the other exceptions taken to the form and expressions of the transcript sent up to this Court, I see nothing substantial.

The other judges concurred.

PER CURIAM. No error.

Cited: *S. v. Haney,* 19 N. C., 398; *Whitaker v. Carter,* 26 N. C., 469; *S. v. George,* 30 N. C., 328; *March v. Harrell,* 46 N. C., 331; *S. v. Blackburn,* 80 N. C., 478; *Davis v. Council,* 92 N. C., 730; *S. v. Whitfield, ib.,* 834; *Burnett v. R. R.,* 120 N. C., 517.

STATE v. REED.—From Hertford.

An indictment for the murder of a slave which concludes at common law is good.

INDICTMENT for the murder of a slave, which concluded at common law. The prisoner was found guilty, and moved in arrest because of the insufficiency of the indictment. The motion was overruled and sentence passed, from which the prisoner appealed.

Hogg for prisoner.

TAYLOR, C. J. I think there was no necessity to conclude the (455) indictment against the form of the statute, for a law of paramount obligation to the statute was violated by the offense—the common law, founded upon the law of nature, and confirmed by revelation. The opinion I delivered in *S. v. Boon,* 1 N. C., 199, remains unchanged, to which, and the effect of the act of 1817, as stated in *S. v. Tackett,* 8 N. C., 216, I beg leave to refer as containing the reasons wherefore in this case there ought to be judgment for the State.

HENDERSON, J. This record presents the question, Is the killing of a slave at this day a statute or common-law offense? And if a common-law offense, what punishment is affixed to the act charged in this record? Homicide is the killing any reasonable creature. Murder is the killing any reasonable creature within the protection of the law, with malice prepense, that is, with design and without excuse. That a slave is a reasonable, or, more properly, a human being, is not, I suppose, denied. But it is said that, being property, he is not within the protection of the law, and therefore the law regards not the manner of his death; that the owner alone is interested and the State no more concerned, independently of the acts of the Legislature on that subject, than in the death of a horse. This is argument the force of which I cannot feel, and leads to consequences

abhorrent to my nature; yet, if it be the law of the land, it must be so pronounced. I disclaim all rules or laws in investigating this question but the common law of England as brought to this country by our forefathers when they emigrated hither, and as adopted by them, and as modified by various declarations of the Legislature since, so as to justify the foregoing definition. If, therefore, a slave is a reasonable creature within the protection of the law, the killing a slave with malice prepense is murder by the common law. With the services and labors of the slave the law has nothing to do; they are the master's by the law; the government and control of them belong exclusively to him.
(456) Nor will the law interfere upon the ground that the State's rights, and not the master's, have been violated.

In establishing slavery, then, the law vested in the master the absolute and uncontrolled right to the services of the slave, and the means of enforcing those services follow as necessary consequences; nor will the law weigh with the most scrupulous nicety his acts in relation thereto. But the life of a slave being no ways necessary to be placed in the power of the owner for the full enjoyment of his services, the law takes care of that, and with me it has no weight to show that, by the laws of ancient Rome or modern Turkey, an absolute power is given to the master over the life of his slave. I answer, these are not the laws of our country, nor the model from which they were taken; it is abhorrent to the hearts of all those who have felt the influence of the mild precepts of Christianity; and if it is said that no law is produced to show that such is the state of slavery in our land, I call on them to show the law by which the *life* of a slave is placed at the disposal of his master. In addition, I must say that if it is not murder it is no offense, not even a bare trespass. Nor do I think that anything should be drawn from the various acts of the Legislature on the subject. Legislative exposition is good while the system of law thus expounded is in force; but when the whole system is abandoned, as is done by the act of 1817, the exposition should be laid aside. But if legislative exposition is to have weight the last should be received, and the act last mentioned speaks the language of declaration, and not that of enactment. But it is not admitted that the acts prior to the act of 1817 are by any means a clear legislative declaration that it was no offense to kill a slave anterior to any statutory provision. The first enactment that we have on the subject is a simple declaration that if any person
(457) shall maliciously kill a slave, he shall suffer imprisonment; from this we are not absolutely to conclude that the Legislature thought that before that time it was no offense; it is quite possible that

juries had not applied the principles of the common law in their purity to the offense, for we see the spirit of the times by the legislative act, but that spirit is happily no more. I would mention, as an additional argument, that if the contrary exposition of the law is correct, then the life of a slave is at the mercy of any one, even a vagabond; and I would ask, what law is it that punishes at this day the most wanton and cruel dismemberment of a slave, by severing a limb from his body, if life should be spared? There is no statute on the subject; it is the common law, cut down, it is true, by statute or custom, so as to tolerate slavery, yielding to the owner the services of the slave and any right incident thereto as necessary for its full enjoyment, but protecting the life and limbs of the human being; and in these particulars it does not admit that he is without the protection of the law. I think, therefore, that judgment of death should be pronounced against the prisoner.

HALL, J., *dissentiente:* I dissent from the opinion of the court below in this case. Most of the reasons for this dissent are to be found in *S. v. Boon,* 1 N. C., 191, and it is unnecessary here to repeat them.

PER CURIAM. No error.

Cited: S. v. Samuel, 19 N. C., 184.

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(458)

STATE v. WHISENHURST.

When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury.

APPEAL by the State from *Daniel, J.,* at LINCOLN.

Indictment for perjury, which charged that the defendant "was sworn in due form of law." The jury found that the magistrate before whom the oath was taken swore the defendant with an uplifted hand, agreeably to the directions of the act of Assembly, but the magistrate did not tender the Gospels to the defendant before he was sworn, nor did the defendant request to be sworn in any other manner than as he was sworn, and, further, they found that the defendant was not conscientiously scrupulous of swearing on the Gospels; and on these facts the jury prayed the advice of the court.

Daniel, J., who presided, was of opinion upon the special verdict that the defendant was not guilty of perjury, and rendered judgment accordingly, from which Mr. Solicitor *Wilson* for the State appealed.

Seawell for defendant.
(459) *The Attorney-General contra.*

HALL, J. Laws 1777, ch. 108, sec. 2, sets forth the usual mode in which oaths are commonly administered, according to which the hand of the person sworn is laid upon the Holy Evangelists, and the oath is concluded by kissing the book which contains them. By section 3 it is declared that where any person is conscientiously scrupulous of taking a book oath in the manner as before pointed out, he may be sworn with an uplifted hand, the manner and form of which is also pointed out. When a witness comes before any tribunal, it is to be presumed that he has settled the point with himself in what manner he will be qualified and sworn to give evidence. It cannot be expected that the court or clerk can be the keeper of his conscience. It was for the defendant Whisenhurst to make known to the justice whether he objected to or preferred being sworn with an uplifted hand. If he did not object, it must be taken that he not only acquiesced, but preferred that mode of being sworn. If a different rule is laid down, the consequence will be that every person who shall be guilty of perjury will ward off the punishment due to it who can find a jury that will say he is conscientiously scrupulous or not, as his case may require. A person may as well say, after being sworn in the common way, that he was conscientiously scrupulous, as to say that he was not conscientiously scrupulous after having been sworn with an uplifted hand. He had a choice,
(460) given by the law, before he was sworn; when sworn he has made his election. Afterwards it is too late to retract.

I think judgment should be rendered for the State against the defendant upon the special verdict.

And of this opinion was the rest of the Court.

PER CURIAM. Reversed.

STATE v. SIMPSON.—From Columbus.

An indictment charging that the defendant unlawfully, wickedly, maliciously and mischeviously did set fire to, burn and consume 100 barrels of tar, etc., and concluding at common law, was sustained.

THE defendant was convicted and sentenced below, and on his appeal to this Court the following appeared to be the indictment:

NORTH CAROLINA—COLUMBUS COUNTY.

SUPERIOR COURT OF LAW, SPRING TERM, 1822.

The jurors for the State, upon their oath, present that Edward Simpson, late of Columbus County, on the 15th day of January, in the year of our Lord 1812, with force and arms, in said county, unlawfully, wickedly, maliciously, and mischievously, did set fire to, burn, and consume one hundred barrels of tar, of the goods and chattels of one Luke Yates, then and there being to the evil example of others, in like case offending, and against the peace and dignity of the State.

TAYLOR, C. J. Malicious mischief, in most of its forms, has been legislated upon in England for the purpose of annexing a severer punishment to it than the law allowed in misdemeanor. The number of these statutes has so overlaid the common-law offense that it is difficult to trace any distinct account of it, and it is the best in the commentaries. "Malicious mischief or damage is the next species of injury to private property which the law considers as a public crime. This is such as is done, not *animo furandi,* or with an intent of gaining (461) by another's loss, which is some, though a weak, excuse; but either out of a spirit of wanton cruelty or diabolical revenge, in which it bears a near relation to the crime of arson; for, as that affects the habitation, so this affects the other property of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree." 4 Blackstone, 254. The crime charged in this indictment is accompanied with every circumstance which brings it within the foregoing definition; and it is certainly consistent with the policy of the law to protect property from those modes of destruction against which all means of precaution and human prudence are unavailing. The offense in this case was done under circumstances and motives the absence of which led the Court to believe that the indictment against Landreth could not be supported. *S. v. Landreth,*

4 N. C., 331. I am therefore of opinion that there ought to be judgment for the State.

The other judges concurred in the opinion that judgment should be so rendered.

PER CURIAM. No error.

Cited: *S. v. Scott,* 19 N. C., 38; *S. v. Robinson,* 20 N. C., 131; *S. v. Helms,* 27 N. C., 365; *S. v. Manuel,* 72 N. C., 202.

STATE v. HADDOCK.—From Columbus.

An indictment containing in its caption a statement of the term in these words, "*Fall Term,* 1822," and in the body of the indictment charging the time in these words, "on the first day of August, *in the present year,*" was held good.

INDICTMENT for assault, with intent to kill. The indictment commenced as follows:

(462) NORTH CAROLINA—COLUMBUS COUNTY.

SUPERIOR COURT OF LAW, FALL TERM, 1822.

The jurors for the State upon their oath present, that John Haddock, late of Columbus, on the first day of August, in the present year, with force and arms, etc.

After conviction it was moved in arrest that the time when the offense was committed was not laid in the indictment with sufficient certainty.

Judgment was arrested, and the State appealed.

TAYLOR, C. J. The objection is that the caption does not state the term at which the court was held with sufficient certainty; but where is the necessity of stating in the caption any time at all? The record in this case shows that the indictment was found at a Superior Court held under due and legal authority, and, as it is known that the Superior Courts are organized and act under a public law, this Court is bound judicially to recognize its power. A court acting under limited and special powers may require a caption specifying its authority, but not a court sitting under the general law of the land. But "Fall Term" is certain enough, for we know the fall begins the first of September,

and that the circuit in which Columbus is located also begins in September. The time of committing the offense is stated with sufficient precision; the present year refers to the year mentioned in the caption. The judgment must be entered up for the State.

PER CURIAM. Reversed.

Cited: *S. v. Lane,* 26 N. C., 121.

(465)

IN EQUITY

TAYLOR ET. AL. v. SMITH.—From Granville.

1. The general ground on which this Court proceeds in cases of usury is to compel a discovery upon the complainant's bringing into court the principal money advanced, with the legal interest, and then the court will relieve against the usurious excess.

2. In a bill for discovery of an usurious contract it is not necessary to waive the penalty.

3. And in such cases the rule of practice requires a tender of the sum due or bringing into court. But where there is an *independent* ground insisted on in the bill, as going to avoid the whole transaction (though not entitled to that effect), it affords a justification to the court in relaxing this strict rule of practise.

THE bill stated that in 1820 one John Evans, being much in want of money, applied to the defendant Smith for his assistance in raising the sum of $2,000, and it was agreed between Evans and Smith that the latter would advance the sum at a discount of 25 per cent, provided Evans would make to him a bond with the complainants as sureties thereto; that a bond was accordingly executed for the sum of $2,500, and offered by Evans to Smith. Smith declined advancing the money upon the bond, alleging that the contract would be usurious, but told Evans that if he would bring him a note for the same sum made by the complainants, payable to Evans, and by him assigned to the defendant, he would advance the money at the rate of 25 per cent discount, and that by this proceeding the statute against usury might be evaded; that shortly thereafter the complainants, at the request of Evans and without any consideration, but solely for the purpose of enabling him to raise the money by a transfer to Smith at a discount of 25 per cent, executed a note payable to Evans twelve months after date for $2,500;

that when the note was presented to Smith by Evans, the former,
(466) perceiving the great anxiety of Evans to raise money, compelled him to consent to a deduction of 33⅓ per cent from the amount of the note, and on these terms Evans indorsed the paper to Smith. The bill proceeded to state that very soon after this transaction Evans became insolvent, and Smith commenced a suit on the note against the complainants in Granville County court, to which they entered appearance and pleas, and in support of their pleas had summoned Evans, the only person acquainted with the transaction, and made arrangement

to procure his testimony; that to defeat this Smith dismissed the suit against the complainants, and upon a judgment obtained against Evans by another person, procured a *capias ad satisfaciendum* to be executed on Evans at the very moment commissioners were taking his deposition to be used in the suit brought by Smith against the complainants; and that on this *ca. sa.* he had him imprisoned until he could issue on the note a writ against these complainants and Evans jointly; that such a writ had issued and was executed and returned to court, and was then pending; to this latter suit the complainants had pleaded that the note was founded on an usurious transaction, but they had no means of proving it, save by the testimony of Evans, who was made a party; that one of the complainants had asked Smith if he would receive the money advanced by him with legal interest thereon, with an intention of paying that amount, but Smith positively refused to receive it, and complainants, it was stated, were still ready to pay the same if it were required by the court. The bill prayed a discovery and relief, and in the meantime an injunction against the suit at law.

To this bill defendant demurred, showing for cause of demurrer that the complainants did not in their bill waive or release the forfeiture that this defendant might incur by making the discovery sought for; and further, that the complainants ought to show that they have brought into court the principal money, with the lawful interest (467) thereon, which they admit to be due.

The court below dissolved the injunction and sustained the demurrer whereupon complainants appealed.

Gaston for complainants.
Ruffin for defendant.

TAYLOR, C. J. The bill sets forth an usurious transaction, attended with circumstances of hardship and oppression, and is exhibited for the benefit of the securities of an insolvent person. There are two grounds of demurrer; one is that the defendant is not so bound to discover matter which might subject him to a penalty or forfeiture; the other is that the complainant ought to have brought into court the principal and interest actually received by Evans. The general ground on which this Court proceeds in cases of usury is to compel a discovery upon the complainant's bringing into court the prin- (468) cipal money advanced, with the legal interest, and then the court will aid as against the usurious excess. By this precaution the defendant is protected against any forfeiture, and is restored to all the money which he can equitably claim. It was not necessary to waive the

penalty in the bill, since none is incurred before the receipt of usurious interest.

In a bill for discovery of an usurious contract, the rule of practice requires a tender of the sum due, or bringing it into court, upon the principle that he who seeks equity must do equity. Besides the charge of usury in this bill, there is an independent ground insisted on by the securities as going to avoid the whole transaction as against them; but though I do not think it is entitled to that effect, it affords a justification to the court in relaxing the strict rule of practice as to the payment of the money into court, and, accordingly, this order must be made, that if the principal sum received by Evans, together with the interest, is paid to the clerk of this Court on or before the .... day of September next, then the demurrer is to be overruled, and the defendant is directed to answer; otherwise, the bill to stand dismissed with costs.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. Judgment accordingly.

Cited: *Hines v. Butler,* 38 N. C., 309.

(469)

EXECUTORS OF THOMAS HOLLIDAY v. TILLMAN HOLLIDAY.—From Greene.

Devise of certain lands to testator's wife for life, remainder to his son, and by a subsequent clause testator directs that in case his wife be living at his death the sum of $750 shall be appropriated by his executors for repairing the buildings for the reception of his wife and family at the place devised as above, the same to be completed within twelve months after his death. The wife survived the husband three days, and it was *Held*, that the money should not be applied in repairs for the benefit of the remainderman, but should be divided among the residuary legatees.

BILL seeking the direction of the court, and was founded on the following facts: Thomas Holliday died in 1818, having by his last will devised to his wife for life certain lands, and by a subsequent clause devising the remainder in fee in the same lands to his son Tillman Holliday, and by another clause directing, that in case his "wife be living at his decease, the sum of $750 shall be appropriated by his executors for repairing the buildings for the reception of his wife and

family at the place devised as above, the same to be completed within twelve months after his death." The wife survived the testator three days only, and the $750 were on the one hand claimed by the residuary legatees, and on the other it was demanded by the remainderman that the money should be applied to the repairs of buildings on the lands. The bill prayed that the conflicting parties might be required to interplead among themselves.

The case was submitted without argument.

Gaston for complainants.
Hawks for defendant.

HALL, J. When the testator directed the sum of $750 to be laid out in repairs upon the house in question, his professed object in doing so was the accommodation of the widow. If he had any other object in view he has not expressed it. If, then, the purpose for which this expenditure was to be made has failed, no other person not (470) intended to be benefited can call for its execution.

It is true, if the repairs had taken place, Tillman Holliday, the son, would thereby be benefited after the death of his mother; this would be the consequence of an act directed to be done, but not the motive which led to it. When property is given to a legatee through affection, charity, or any other motive, it is a consequence of that charity that some other person is benefited by that legacy after the death of the legatee. If the repairs were made the son would have the benefit of them because the law would give it to him; as they are not made, the executors or those entitled under them, should retain the money, because the widow, the only meritorious claimant, cannot assert a right to it, and the son's pretensions must fall with that right; as well, I think, might the next of kin of a deceased legatee expect to enjoy the benefit of a lapsed legacy. For these reasons I think the $750 should be divided among the distributees of the testator.

HENDERSON, J. The wife alone can call for the expenditure of the money directed to be laid out in repairs of the dwelling. It is expressly stated to be for the accommodation of herself and family, and on lands devised to her for life, and is made *dependent on her being alive at the testator's death.* On the latter ground, I think the reasons for this construction are unanswerable. Had it been intended for the benefit of another, for instance the ulterior devisee, it would not have been made to depend on her life. There is no connection between her existence and the benefit intended for him. If she had died the day before the testator, it was not to be expended; if the day after, it is contended

it must, unless by clear intendment, taking the whole will to-
(471) gether, we should arrive at such a conclusion, where one so plain and sensible and consistent with the other parts of the will is so obvious. To his wife he had given the lands for the convenience of herself and family, on which the repairs were to be made, and as conclusive evidence that to her alone his bounty was extended, it is made dependent on her being alive at his death. Then, if from the will she was the object, she alone can call for its execution. Were a testator to make a bequest on a contingency in no other ways connected with his bequest; if in the present case he had not given the lands to his wife for life; if the repairs were not to be made for her accommodation; if the testator had devised the money to be laid out on these or any other lands in which his wife was not interested, and had directed money to be expended on them, if his wife should be alive at his death, or upon any other contingency, as the death of A. B., and the contingency had happened, here, as there would be no clue by which the testator's object could be ascertained, his will should stand, for the reason it would be sufficient that he has so said, and there is nothing in the will by which the words in this particular could be explained or contradicted; but in this case it is far different; the wife, upon whose death before testator's nothing passes, is devisee for life of the lands on which the expenditure is to be made; it is expressly stated that it is for the accommodation of herself and family, and lest he should be misunderstood it is not to be laid out if his wife should die before him. It is said that the wife, having survived the husband even for a day, an hour, could call for its execution—admitted; but she alone could do so, and dying before she needed the provision, and before it possibly could be done, no other person can call for it; for none can call for it but those for whom the testator designed it. It is true, the ulterior devisee would have enjoyed it after the wife's death, if done, as the thing attached to the land (but not for his benefit, for if it was it
(472) would not have depended on the wife's being alive at the testator's death), and when done the testator would not detach it because it could not be done without much injury, and the detached thing would be of little or no value.

In coming at my conclusion, I disclaim all other guides but the words of the will. I have only made every part subservient to the whole, a liberty for which I will not cite authorities; the books are full of cases to the same effect.

TAYLOR, C. J., concurred.

PER CURIAM. Judgment accordingly.

TYSON & SUGG v. TYSON, ADMINISTRATOR OF MOAB ROUNTREE; WILLIAMS, GUARDIAN OF P. WILLIAMS; AND NOBLES, GUARDIAN OF B. ROUNTREE.—From Pitt.

In a marriage settlement very informally drawn the Court will look for the true intent of the parties; and as in this case it appeared that personal property which belonged to the wife, and was in her possession, was by the agreement in contemplation of marriage vested in trustees to the use of the husband for life, and after *his* death to the use of the wife *and her heirs, and to no other uses*, the Court, notwithstanding the language used, viewed the settlement as in restraint of the marital rights. The husband is neither heir nor next of kin to his wife; he answers not the description used, *heir of the wife;* for though, in determining the *quantity* of an estate, the word *heirs* would be received as a word of expansion or limitation, and the same force allowed it as if the words executors and administrators had been used, yet in arriving at the *intent* the Court will consider the common meaning of the word *heir*, though it be a technical word; and as here it was not used technically, because applied to personalty, it shall be taken to mean blood relations, on whom the law casts the inheritance on the death of the ancestor, and is the same with *next of kin*.

THIS was a bill setting forth that Susanna, the widow of one Richard Williams, having by her said husband a child, P. Williams, and, being possessed of considerable estate, and about to form a matrimonial connection with one Moab Rountree, in contemplation thereof (473) entered into a written contract with said Moab Rountree by which she conveyed certain property to the complainants, in the following words, viz.:

This indenture tripartite, made this 18 March, in the year 1813, between Moab Rountree, of the first part, and Allen Tyson and Peter Sugg, of the second part, and Susanna Williams, of the third part, witnesseth, That the said Moab Rountree, for and in consideration of a marriage intended, by God's permission, shortly to be had and solemnized between the said Moab Rountree and the said Susanna Williams; and, whereas, the said Susanna Williams is possessed of divers negroes, to wit (naming them), and that a competent jointure may be had, made and provided for the said Susanna Williams, in case the said marriage shall take effect, and for settling and assigning of the negroes 5 tables, 4 beds and bedsteads, and furniture, one dozen chairs, 4 looking-glasses, 19 silver spoons, hereinbefore mentioned, to and upon the several uses, interests, and purposes hereinafter mentioned and declared pursuant to the agreement made upon the contract of the said intended marriage, he, the said Moab Rountree, hath granted,

aliened, released, and confirmed, and by these presents doth grant, alien, and confirm unto the said Allen Tyson and Peter Sugg, and their heirs, all and singular, the negroes, 20 head of cattle, 5 horses before named, and also the reversion and reversions, remainder and remainders, and all the estate of him, the said Moab Rountree, of, in, and to the same premises, and of, in, and to every part and parcel thereof, with the appurtenances, to have and to hold, all and singular, the negroes unto the said Allen Tyson and Peter Sugg, their heirs and assigns, to and for the several uses, interests, trusts, and purposes hereinafter mentioned, limited, expressed, and declared; that is to say, to the use and behoof of the said Moab Rountree and his heirs, until the marriage between him, the said Moab Rountree, and his intended wife shall be had and solemnized; and from and after the solemnization thereof, to the use and behoof of the said Moab Rountree, for and during the term of his natural life, without impeachment of waste; and from and after the determination of that estate, by forfeiture or otherwise, to the use and behoof of the said Allen Tyson and Peter Sugg and their heirs, for and during the natural life of the said Moab Rountree, to preserve and support the contingent remainders hereinafter limited from being defeated and destroyed, and for that purpose to make entries and bring actions as the case shall require; yet, nevertheless, in trust, to permit and suffer the said Moab Rountree to receive and take the rents, issues, and profits thereof, to his and their proper use and benefit, during (474) his natural life; and from and after the decease of the said Moab Rountree to the use and behoof of Susanna Williams, intended wife of the said Moab Rountree, his heirs and assigns forever, and to and for no other use, intent, or purpose whatsoever. In witness whereof, etc.

MOAB ROUNTREE, [L. S.]
SUSANNA WILLIAMS, [L. S.]
ALLEN TYSON, [L. S.]
PETER SUGG, [L. S.]

The contemplated marriage took place, and one child, B. Rountree, was the issue thereof. Susanna Rountree died, leaving her husband, Moab Rountree, the child by her first husband, Williams, to wit, P. Williams, and B. Rountree, her child by her last husband, surviving her. Moab Rountree died soon after, leaving the children surviving him. Administration on his estate was granted to the defendant, Tyson; and the defendants, Williams and Nobles, were appointed guardians to the children respectively. Administration on the estate of Susanna Rountree was granted to Moses Tyson, the younger.

The bill, after reciting these facts, proceeded to state that most if not all of the property conveyed by the deed above, having been acquired by Susanna Rountree under the will of her former husband, Williams, a considerable part thereof was received on behalf of P. Williams, who was born after the making of her father's will; other parts were disposed of by Rountree after his marriage; but, as to the residue in the hands of complainants, they knew not how to dispose of it, because, for want of technical precision in the deed, they were unable to ascertain who were the beneficial owners thereof. It was severally claimed on behalf of P. Williams, B. Rountree, and by the administrator of Moab Rountree. The bill prayed that these parties might be made defendants, and litigate among themselves the several questions arising on the deed.

Moab Rountree's administrator insisted in his answer that (475) the intention of the parties was as expressed in the deed, and that the conveyance of the property in trust for the said Susanna and her heirs vested the same absolutely in her husband, the said Rountree.

Gaston for the guardians of the children.
Mordecai for the administrator of the husband.

HENDERSON, J. This case is not clear of doubts. I can find not one like it. On the one hand, it is plainly distinguishable from that class of cases where, after the determination of the marriage, part is given to the husband; there the husband is very plainly excluded, because he cannot take *part* by express words and the *whole* by construction. It is also unlike that class where the wife takes, provisionally, for the same reason. For the sake of brevity, with this class I arrange those cases where the wife may exercise a power. Nor is it like those cases where the next of kin take as *purchasers* (480) after an estate for life in the wife; for the husband is not *next of kin* to the wife, for all his claims under the law are *jure mariti.* The cases cited at the bar, 1 and 3 Vesey, jr., and Hen. & Mum., and 3 Mum., are illustrative of these principles, and although there are some strong expressions in some of them, such as that the husband takes all but what by contract he gives away, yet they are either to be understood in reference to the subject matter, or they were extrajudicial. It is also unlike those cases where the husband's property, or partly his and partly his wife's, is settled on the wife for jointure, for there the design of the settlement is to confer rights, not as in this case, to abridge them. In this case property, which was the wife's, and in her possession, and which, on the marriage, would have vested

absolutely in the husband, is, by an agreement made in contemplation of marriage, and solely in relation to the wife's property (for it does not appear that the husband had any), vested in trustees to the use of the husband for life, and after his death to the use of the wife and her heirs, *and to no other uses.*

I cannot but view this settlement as in restraint of the marital rights *throughout both limitations;* that his rights as husband, which, upon the marriage, would have given him an absolute estate in the property, are, by the agreement, cut down to a life estate; yet the reasons for this opinion are not of that strong and conclusive kind which I should wish to govern my judicial acts, yet they are much stronger than any that occur on the other side. The property belonged to the wife. The *intent* and *design* of the settlement were to restrain the rights of the husband, and the words used were proper to those ends. If his rights are extended to an absolute interest, his rights will be concurrent (a thing, I presume, not designed), for he does not pretend to claim, but only in the event of his wife's dying before him. His rights under the settlement continue during his life. He is neither heir or
(481) next of kin of the wife, and answers not to the description, or, if you will, expression, *heir of the wife;* for, although in determining the *quantity* of estate, we must take the word *heirs* as a word of expansion or limitation, and allow it the same force as if the words executors and administrators had been used, yet in arriving at the intent we may take hold of the meaning of the word *heir,* although it be a technical word; for here it evidently is not used technically, for they are speaking of personal property. Here the word *heir* means blood relation on whom the law casts the inheritance on the death of the ancestor (and is taken here as next of kin); and, anciently, when lands were not alienable the heir took by succession, and when afterwards lands became alienable, whereby the whole estate became vested in the ancestors, and the heir, by necessity, took by representation, the meaning of the word *heir* was not thereby changed; it still means next of blood on whom the law casts the inheritance on the death of the ancestor. The circuitous and complex mode in which the intention is expressed, if it is in favor of the husband, furnishes an argument against so construing it; for if such had been the intent, the mode of expressing it would have been so obvious, plain, and simple it would have been resorted to, to wit, to the use of the husband absolutely if the wife did not survive him, but if she did, to her absolutely; for this is, in substance, the only effect which the husband contends is produced by this long settlement; and if the intent be as the wife alleges, that

intent is expressed in a plain, short, and direct manner, perhaps the most appropriate that could be used; only substitute the words *next of kin* for *heirs*. Nor does it weaken, but rather strengthen, this exposition that the drawer was an ignorant man, for that would have led to an attempt to have expressed the intent directly, however awkwardly he might have executed it; and, lastly, that the trustees were to hold upon the trust expressed in the deed, and no other. Upon the whole, I think the whole scope and design of the marriage settlement was to bind and reduce the rights of the husband, of every de- (482) scription, to those given him in the deed, to wit, a life estate.

TAYLOR, C. J., and HALL, J., concurred.

PER CURIAM. Judgment accordingly.

Cited: *Gee v. Gee,* 22 N. C., 110.

DOZIER v. MUSE.

A married L, a widow, who was entitled to an undivided share of a deceased child's estate; and on 18 December, 1817, A executed to the defendant a mortgage or assignment of all his interest in this undivided share, to be void on payment of a judgment which the defendant had against him. The complainant also had a judgment against A, and on 6 December issued an execution on it, which was returned *nulla bona;* and on 13 April, 1818, he issued another, under which, on 17 June, 1818, a levy was made on the property mentioned in the assignment; and on 17 July, 1818, a sale of the property was made, by consent of complainant and defendant, under it, and under an execution which defendant had issued on his judgment, which was also levied on 17 June, 1818. At this sale, by agreement of the parties, defendant became the purchaser, reserving the question between them to be settled by amicable reference to counsel. The counsel did not settle it. The division of the deceased child's property and the allotment to L, wife of A, of her share, took place on 1 January, 1818. The bill was filed to compel the defendant to account for the proceeds of the sale, made by consent, and was dismissed because, though L's share, while it remained undivided, could not be levied on under complainant's execution, might yet be assigned by A, in such manner as to bind it.

APPEAL from *Nash, J.,* at CAMDEN.

The bill stated that complainant had a judgment, obtained against one William Shaw, in Camden Superior Court, for £2,097 11*s.* 2*p.;* that on 6 December, 1817, execution issued, and was *immediately*

(483) placed in the hands of the sheriff, and deputy sheriff Richard Pool indorsed thereon that it came to his hands 20 January, 1818, and the execution was in the hands of the sheriff or his deputy until the second Monday of the ensuing March, when it was returnable; that William Shaw was said at that time to be insolvent, but had previously intermarried with one Lydia Shannonhouse, who was the widow of James L. Shannonhouse, by whom she had two children, Elinor and Elizabeth, living at the time of her intermarriage with Shaw; that after such intermarriage, and shortly before the execution above spoken of issued, one of the children, Elizabeth, died, an infant intestate, whereby the wife of Shaw became entitled to a moiety of the personal estate of Elizabeth, consisting of negroes, money, bonds, etc.; that the sheriff, believing he might not lawfully levy the execution in his hands on this interest of Mrs. Shaw, returned the writ to March, 1818, indorsed "No property to be found"; that complainant issued another execution on the judgment on 13 April, 1818, and the officer indorsed thereon that it came to his hands on 15 April, 1818, and so remained until 7 July, 1818, and that he levied on the negroes 17 June, 1818; that at June Term, 1818, of Pasquotank County court the defendant Muse obtained letters of administration on the estate of Elizabeth Shannonhouse and obtained an order of court to divide the negroes of his intestate between Elinor Shannonhouse and Shaw, in right of his wife; that this division took place within the same week, and Muse procured an execution to issue from Pasquotank County court, at his own instance, as executor of one Boyd, and to be levied on the negroes by one Joshua Pool, who committed the negroes to prison and advertised them for sale; that on 17 July, 1818, Richard Pool and Joshua Pool, by virtue of the respective executions, met at the courthouse to sell the negroes, and both complainant and defendant attended; that

(484) Muse produced a mortgage for the negroes, dated 18 December, 1817, to secure the debt for which his judgment was obtained and this execution had issued, and it was agreed between complainant and defendant, that each party should bid for the negroes, and that the money arising from the sale should be paid over to him to whom counsel selected by the parties should say the same belonged; that under this arrangement the negroes were bid off by Muse, and a return made on complainant's execution accordingly; that Muse was the purchaser, and that the money bid was not paid by the order of the plaintiff; that the counsel selected by the parties did not settle the question between them, and that Muse now refused to pay over the money, alleging that he had a perfect title by reason of his mortgage.

The answer, admitting Shaw's marriage with Mrs. Shannonhouse and Elizabeth's death, stated that at December Term, 1817, of Pasquotank court, commissioners were appointed to divide the property of Elizabeth, and on 1 January, 1818, they did so, when the negroes alluded to in the bill were allotted to Shaw, and at the same term the defendant was made administrator to Elizabeth. It further stated that the defendant, as executor of one Boyd, being interested in a judgment against Shaw, obtained from Shaw, on 18 December, 1817, an instrument conveying to the defendant, as executor of Boyd, all the interest of Shaw to an undivided share of the personal estate of Elizabeth, with a proviso to be void if Shaw should pay the judgment aforesaid; further, that the defendant was the executor of James L. Shannonhouse, father of Elizabeth, and that all the negroes of Shannonhouse, including those alluded to in the bill, had remained undivided, and under defendant's control as executor up to the time of the division on 1 January, 1818, and that William Shaw never had possession of any of them.

The defendant admitted his having taken out an execution on the said judgment, which was levied on the negroes on 17 and 18 June, 1818, and that he bid them off at the sale as charged; and (485) further, that the agreement between himself and the complainant, as to a reference of the question and the result of such agreement was truly stated in the bill, and submitted that his title to the negroes, both in law and equity, was good until the debt which they were conveyed to secure was discharged.

NASH, J., who presided below, dismissed the bill ordering each party to pay his own cost. Complainant appealed.

HALL, J. If the controversy in this case rested on the question whether the complainant's or the defendant's execution was best, no doubt could be entertained but that the preference should be given to the complainants; but the controversy really is between complainant's execution and the mortgage made to Muse.

The property conveyed by the mortgage and levied on by complainant's execution was part of the estate of Shannonhouse, deceased, an undivided part of which William Shaw, in right of his wife, was entitled to; but at *that* time it could not be levied upon by an execution against Shaw; it was not recoverable except in a court of equity; no legal title vested in Shaw until the assent of the executor. But it was competent for Shaw to make such a disposition of it while in that situation as would bind it; he has done so; he has mortgaged it to

secure the payment of a debt due by him, so that, as it was not the subject of levy by execution, but was legally conveyed to Muse by mortgage. The present bill, brought to make Muse account for the proceeds of the sale made by consent, must be

PER CURIAM. Dismissed.

Cited: Burch v. Clark, 32 N. C., 173.

(486)

TATE, ADMINISTRATOR, ETC., OF JOHN BOWMAN, v. GREENLEE'S ADMINISTRATORS.—From Burke.

A bill was filed against executors, calling on them to account after a lapse of thirty-five years. Motion to dismiss on the ground of length of time refused, because, though it would be the height of injustice to suffer dormant claims to be brought forward after an unreasonable length of time when those and those only who could explain them were no more, and no satisfactory reason could be assigned for the delay, still, as in the case before the court the wife of the complainant was the meritorious claimant, as she married in her minority, and immediately upon her husband's death made herself a party to the suit, the bill ought not to be dismissed, but should go on to a hearing.

THE bill, which was filed in 1815 by Tate, as administrator *de bonis non* with the will annexed of John Bowman, stated that John Bowman died in 1780, leaving James Greenlee, Charles McDowell, and John Greenlee, his executors; that all were since dead intestate, and that administration had been committed to the complainant; that James Greenlee, one of the executors named in the will, took upon himself the management of the estate of John Bowman and had returned an inventory and account of sales, the amount of which was a large sum of money; that besides the property contained in this inventory other property to a large amount came to the hands of James Greenlee and had never been accounted for by him, to wit, a large number of cattle, indented certificates issued for property and services rendered the public by John Bowman during the War of the Revolution, a quantity of tobacco, the rents and profits of certain lands belonging to John Bowman, and it was charged that several negroes bequeathed by the will of John Bowman to Mary Bowman, now the wife of the complainant Tate, were hired out by James Greenlee, before his assent to the legacy and before they came into complainant's hands; that James

Greenlee died in 1813, and the defendants were his admin- (487)
istrators, and possessed of assets sufficient to satisfy all demands; that the complainant had required of the defendants to pay over to him the amount of Bowman's estate which had come into the hands of their intestate, but that they had refused to do so. It was further charged that the defendants had in their possession all the books of accounts and other evidences of John Bowman, also many memorandums and writings, which would disclose the certainty and amount of the several charges in the bill, and that the defendants had refused to deliver them to complainant, but fraudulently withheld them. The bill prayed particularly that the defendants might be compelled to disclose such facts connected with the charges of the bill as they had derived from papers in their possession belonging to the estate of John Bowman, and also might be decreed to account.

It was admitted by the complainant that, for seventeen years after his intermarriage with Mary Bowman, he lived in the immediate neighborhood of James Greenlee, and that Mary Bowman received the hire of the negroes mentioned in the bill; that Mary was the niece of James Greenlee, and married during her minority.

Wilson moved to dismiss the bill. (488)
Gaston in answer.

HALL, J. Replication has been entered to the defendant's answer, and the parties have proceeded to take depositions. The cause has been set for hearing and transferred to this Court for trial, and at this stage of it a motion is made to dismiss the bill on account of the length of time which has elapsed from the death of John Bowman until the filing of this bill. This motion might as well have been made when the suit was first instituted as at this time, because on such motion the matter contained in the bill only can be examined. The defendant's answer cannot be taken into view, because it is replied to, nor the depositions, because doubtful and disputed facts should be submitted to and be decided by a jury. Notwithstanding this, if a sufficiency appears upon the face of the bill to warrant a dismission of it, it ought to be done.

The bill states that John Bowman departed this life in the year 1780, and this suit seems to have been brought in the year 1815, after the lapse of about thirty-five years. It would be the height of injustice to suffer dormant claims to be brought forward after an unreasonable length of time, when those and those only who could explain them were

no more, and no satisfactory reason could be assigned for such (489) delay. In the spirit of this remark the conduct of complainant's husband in not sooner asserting the rights of his wife to the property claimed by the bill (in case she had any) cannot be viewed with an indulgent eye, because it seems that after his intermarriage with complainant he lived thirteen years within two miles of defendant's testator and did not commence this suit until about two years after his death, although he had as perfect a knowledge of all the transactions between them (except as to the cattle) as he had when this suit was instituted.

But we must keep it in view that the wife was the meritorious claimant; that she intermarried with William Tate in her minority, and that after the death of her husband (the first moment she became a free agent) she made herself a party to this suit; for this reason I think the suit ought not to be dismissed, but made dependent upon facts hereafter to be ascertained at the hearing.

It may be, as has been argued, that defendants are ignorant of the manner in which their intestate managed the estate of his testator, and cannot give anything like a definite answer to the allegations contained in the bill. For that reason it is to be regretted that he had not guarded against the event that has taken place by having made a settlement with complainant and her husband during their lives, which he amply had it in his power to do.

For all these reasons I think the bill should not be dismissed, but should go on to a hearing.

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

PER CURIAM. Motion to dismiss denied.

Cited: Falls v. Torrance, post, 491; *S. v. McGowen,* 37 N. C., 17; *Shearin v. Eaton, ib.,* 284.

(490)

FALLS AND OTHERS v. TORRANCE.—From Iredell.

Motion to dismiss a bill filed against an administrator for an account, after a lapse of thirty-seven years, disallowed because complainants were infants at the time of intestate's death; some of them married during infancy, and were yet *femes covert;* and the defendant, moreover, had induced them by his representations to believe he would settle without suit.

FALLS *v.* TORRANCE.

THE bill, which was filed in 1817, set forth that one Gilbraith Falls died in June, 1780, intestate, and that administration on his estate was granted in 1781 to his widow, who in 1784 married the defendant; that the complainants were the children of Gilbraith Falls, and at the time of his death were infants; that some of them (the daughters) married in infancy, and were yet *femes covert;* that among other property of their deceased parent taken into possession by his administratrix was a negro woman, Flora, now the mother of several children, and that distribution of this property had never been made among complainants. They assigned as a reason for not making earlier claim that Torrance, the husband of the administratrix, by his declarations induced a belief that he did not contest complainants' right to the property, but declared that they should be distributed among the next of kin of Gilbraith Falls.

The bill prayed that Torrance might be compelled to deliver up the property for distribution, and account for the intermediate value of the labor of Flora and her children.

Gaston and Wilson moved to dismiss.
Seawell and Mordecai contra. (491)

HALL, J. This case very much resembles that of *Tate v. Greenlee, ante,* 486.

It is a motion to dismiss the bill, thirty-five years or thereabouts having elapsed from the death of Gilbraith Falls, complainant's father, until the time of filing it. It appears that at the time of Gilbraith Falls' death that the complainants were infants; that some of them (his daughters) married in their infancy; that their husbands are yet living. They further state that a negro woman by the name of Flora, now the mother of several children, was part of the estate of their father; that division was never made of her amongst the distributees; and that the reason why they did not bring suit sooner was that they had reason to believe that Hugh Torrance, who had married their mother, who was the administratrix of their father's estate, would have directed the said negroes to be delivered up to them at his death, so that the bill is not brought for a general settlement only, but for a division of the negroes thus pointed out. For these reasons we think the bill ought not to be dismissed.

PER CURIAM. Motion to dismiss denied.

Cited: S. c., 11 N. C., 413; *Petty v. Harmon,* 16 N. C., 494; *S. v. McGowen,* 37 N. C., 17; *Shearin v. Eaton, ib.,* 284; *Grant v. Hughes,* 94 N. C., 237.

(492)

JONES v. ZOLLICOFFER.—From Halifax.

On the trial of issues in equity the copy of a copy of a will was read in evidence. The court refused to grant a new trial of the issue because since the first trial the original, properly authenticated, had been found, and corresponded with the paper read in evidence; and the court perceived, beyond a doubt, that, as respected the evidence obtained from the paper read, the jury was not misled.

ON the trial of the issues in this cause, a paper was offered in evidence as a copy of William Jones's will, with the following certificates of probate:

Halifax County, June Court, 1759. The within will was in open court exhibited by the executor within named, and proved by the oath of Augustine Bate, one of the subscribing witnesses thereto; and at the same time the executors aforesaid were qualified according to law, which on motion is ordered to be recorded.

A true copy. Teste: JAMES MONTFORD, *Clerk.*

Halifax County, February Sessions, 1793. Then this paper, purporting to be a copy of the last will and testament of William Jones, deceased, was exhibited in open court, and it appearing to the court that the same was a certified copy, and that the original and the record thereof had been lost or destroyed during the late war, therefore it was ordered by the said court that the said certified copy be recorded and filed away among the papers belonging to the clerff's office.

Witness: L. LONG, *Clerk.*

The paper was objected to, but the court permitted it to be read, reserving the point. And when afterwards *Drew* moved for a decree on the finding, *Ruffin* opposed it, and moved that the verdict be set aside and a new trial awarded, because of the introduction of the paper in evidence. *Gaston* then stated that the Secretary of State was in court with the original will, which had been found in his office since the trial, and that on comparison it agreed with the copy which had been read in evidence. He then argued that where the court was satisfied from the circumstances that the result must, on a new trial, be the same with that already attained, a new trial was useless and

(493) would be refused.

HENDERSON, J. The evidence (the copy of a copy) was very clearly inadmissible; but since the motion has been made for a new trial the original will, properly authenticated, has been produced, by which it

appears that the copy was correct. The Legislature, having made an office copy of a will, and *a fortiori,* the original itself properly authenticated, conclusive evidence where fraud has not been suggested, and none *in due time* has been suggested here, *in fact, none at all at any time,* we are thereby assured, *beyond a judicial doubt,* that the jury was not misled by the evidence which was offered to them on that point. Were the evidence by which the former evidence was shown in point of fact correct not conclusive upon the parties, a new trial should be granted, because we ought not to preclude them from litigating before the jury the truth of that evidence; but here it is a vain and useless thing, the evidence now offered being conclusive that the jury was not misled.

The rule for a new trial of the issue must therefore be discharged.

PER CURIAM. No error.

Cited: Peebles v. Peebles, 63 N. C., 658.

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(494)

CARRINGTON v. CARRINGTON.—From Orange.

Where both the securities to an injunction bond were dead this Court granted a rule on their administrators to show cause why execution should not issue as well against them as the principal in the injunction bond; and on the return of the rule refused to the adminstrators a new trial of the issues and decreed against them *de bonis intestati.*

THE issues in this cause had been submitted to a jury, and *Ruffin* on the finding moved for an account and a dissolution of the injunction, and as both securities to the injunction bond were dead, he moved further for a rule on the administrators of the securities to show cause why execution should not issue as well against them as against the plaintiff, and after a short consultation the court permitted him to take such a rule.

HENDERSON, J., remarked that it was obvious from the finding in the case that the injunction must be dissolved, and added that, from the peculiar organization of the Court, it not being open at all times, it might be absolutely necessary, and in this case was proper, for the administration of justice to grant several rules and orders at one and the same time, which, under a different organization of the court, would properly be granted the one before the other.

On the return of the rule *Seawell* read the affidavits of the administrators of the securities, stating that they believed injustice had been done by the finding, as they could show if an opportunity were afforded by another trial of the issues, and that the principal in the injunction bond was insolvent, and that the intestate of one of the affiants had been dead more than seven years, and that distribution had been (495) made among his distributees. And on this,

Seawell moved for a new trial, and was opposed by

Ruffin, who said that the application could not be heard from these parties. They could only be heard to rebut the propriety of making the final decree embrace them; they are no parties to the suit; they are bound for complainant at all events, and to them it is nothing how complainant managed his cause. But if the principal in the injunction bond made this application himself, the Court would not listen to it. The case has been pending ten years, and he never took a deposition. On a rehearing of the testimony before the court, it is not possible that any other result will take place, and this Court will not (at least without a satisfactory affidavit) permit further testimony to be taken. But if these persons were interested, they were bound to take notice of a *lis pendens.*

The Court refused a new trial, dissolved the injunction, and made a decree *de bonis intestati* on the finding against the administrators of the securities.

PER CURIAM. Judgment accordingly.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1823

CLANCY AND OTHERS v. DICKEY AND OTHERS.—From Orange.

1. A was appointed by the county court of Orange guardian to a minor, and gave bond payable to three of the justices by name, "and the rest of the justices of the court of pleas and quarter sessions for the county of Orange." In a suit on this bond, brought in the name of the three justices who were named as obligees, it was *Held*, that the nonjoinder of the other obligees as plaintiffs would be fatal on demurrer, on motion in arrest, or in error, if the defect appeared on the face of the proceedings; but as here it did not, it could be taken advantage of only by plea in abatement, or as ground of nonsuit on the trial upon the plea of *non est factum*.

2. The father of the minor appointed his wife an executrix to his will which contained the following clauses: "It is my will and desire that my negroes should be kept together until my children arrive to full age or marry, and then to be divided between my beloved wife and children, share and share alike equally"; and "it is my will and desire that whenever any of my children arrives at full age or marries, that his or her share of my estate be delivered to him or her immediately." The executrix took the slaves into her possession. A guardian was appointed to the minor, who afterwards married the executrix while she had the slaves in her possession. The guardian removed from the State and carried the slaves with him, and in a suit brought for the benefit of the minor, against the sureties to the guardian bond, it was *Held*, that the guardian did not hold the slaves after his marriage as *executor* in right of his wife, but as *guardian;* and further, that the minor had, under the words of the will, a vested present interest in her share of the negroes.

3. In debt on a guardian bond given in the penalty of £1,000, the damages were laid at £100, and the jury assessed the damages to more than £100. It was *Held*, that to the extent of the penalty of the bond, the obligee may recover damages for a breach of the condition, though the same judgment is entered on the verdict as before the statute 8 and 9

Will. iii, ch. 11, which is in force here, viz., to recover the debt and nominal damages for the detention of it and costs. The execution still issues for the amount of the judgment, but is indorsed to levy only the amount of the damages assessed for breach of the condition, together with the costs; it is not, therefore, of any moment what damages are laid in the declaration and writ, whether they are nominal or otherwise, provided the damages assessed by the jury do not exceed the amount of the penalty.

(498) DEBT brought by the plaintiffs against the defendants as the sureties of one James Dickey, who was appointed by the court of ORANGE, at February Term, 1817, guardian of Nancy Shutt, the infant plaintiff in this case. The bond was made payable to Thomas Clancy, Thomas Whitted, and James Mebane, esquires, and the rest of the justices of the county court of pleas and quarter sessions for the county of Orange, in the sum of £1,000, to be paid to the said justices, or the survivors or survivor of them, their executors or administrators, in trust for the benefit of Nancy Shutt, and bore date 27 February, 1817.

The condition of the bond was that Dickey should faithfully execute his gardianship "by securing and improving the estate of the said Nancy Shutt that should come into his possession, for the benefit of the said Nancy, until she should arrive at full age, or he be thereto sooner required, and that he should then render a true and plain account of his guardianship, on oath, before the justices of Orange County court, and deliver up, pay to, or possess the said Nancy of all such estate or estates as she ought to be possessed of; or to such other
(499) person or persons as should be lawfully authorized to receive the same."

The pleadings admitted the execution of the bond, and on the trial the plaintiff proved that at May Term, 1818, of Orange court, Dickey made a return as guardian of Nancy Shutt, exhibiting her portion of the estate of her deceased father, by which he charged himself with $668.20, balance due her. Plaintiff further proved that Henry Shutt, father of Nancy, died possessed of a sufficient personal property, *over and above his slaves,* to entitle Nancy to the sum returned by her guardian as her proportion of that part of the estate. Henry Shutt, at the time of his death, owned also several slaves, which, on 1 March, 1819, were worth $2,600, and Nancy's portion therein was worth $520. In February or March, 1819, Dickey, with his family, removed to Guilford County, and in a short time thereafter, he or some other person by his direction, carried the negroes beyond the limits of the State, and neither he nor they have ever returned. On the part of the

defendants it appeared that Henry Shutt died in 1811, leaving a last will and testament, which was admitted to probate May Term, 1811, at which time his widow, Elizabeth Shutt, qualified as executrix. The will, among other clauses, contained the following: "It is my will and desire that my negroes should be kept together until my children arrive to full age or marry, and then to be divided between my beloved wife and my children, share and share alike equally"; and "it is my will and desire that whenever any of my children arrives at full age or marries, that his or her share of my estate be delivered to him or her immediately." It further appeared that the executrix sold the personal property of the estate except the slaves, as by the will she was directed to do if she thought it expedient, and she continued in the possession and use of the slaves until she married Dickey in 1817. There had been no guardian appointed for the infant plaintiff, Nancy, (500) or for any of Henry Shutt's children, before the appointment of Dickey; and after his marriage with the executrix, and until the removal of the family from Orange, the negroes had remained in the use and service of Dickey. No other return had ever been made by Dickey as guardian but the one before referred to, and it did not appear that any division had ever been made of the negroes between the widow and children of Henry Shutt. After Dickey left the State he was removed from his guardianship by an order of Orange County court, and Thomas Clancy was appointed guardian in his stead. The writ in the case was, "to answer Thomas Clancy, Thomas Whitted, and James Mebane, justices of the court of pleas and quarter sessions for the county of Orange, who sue to the use of Nancy Shutt, an infant, who sues by her next friend Thomas Clancy, of a plea that they render and pay to them the sum of £1,000, which they owe and detain from them, to their damage £100."

It was insisted below, on behalf of the defendants, that plaintiffs were not entitled to recover in this case, because the act of the Legislature requires that a guardian bond shall be made payable to the justice or justices present in court, and granting such guardianship, the survivors or survivor of them, their executors or administrators in trust, for the benefit of the child; and in this case the bond was made payable to Thomas Clancy, Thomas Whitted, and James Mebane, and the *other justices of Orange County court;* and, secondly, if the plaintiffs were entitled to recover at all, they could not recover for Nancy her proportion of the value of the *slaves,* because Dickey never received or held the negroes as *guardian,* but as *executor* in right of his wife, or as *legatee* under the will, and in either event defendants were not

(501) liable as security for his guardianship; and defendant's counsel prayed the court so to instruct the jury; but the court refused, and charged the jury that the guardian bond bound James B. Dickey to take care of and deliver over to Nancy, on her attaining the age of 21 years, or marriage, or to such person as by law should be entitled to receive the same, all such property of hers as should come to his possession. That if it was proved to their satisfaction that Dickey had been in possession of the negroes, and had removed them from the State, that it was such a possession as rendered him liable to account with his ward for them, and that consequently the defendants were liable to answer to the plaintiff in this action for such damages as they should believe she had sustained by their removal from the State. If they should be of opinion that their removal amounted to a total loss, they ought to give the plaintiff Nancy her share of their full value. The jury found for the plaintiff, and assessed damages to $1,568.73. New trial refused, judgment and appeal.

Gaston for appellants.
Ruffin for appellee.

(511) TAYLOR, C. J. This is a motion on the part of the defendants for a new trial on the ground of misdirection in the court, which is alleged to have occurred on one point, viz., in refusing to instruct the jury that the plaintiffs were not entitled to recover for the infant Nancy her proportion of the value of the negro slaves, because Dickey never received them as guardian, but as executor in right of his wife or as legatee.

Another exception taken at the trial below was that the bond was made payable to the plaintiffs and the other justices of Orange County, whereas the act of 1762 requires a guardian bond to be made payable to the justices present in court, and granting such guardianship, the survivor or survivors of them, their executors or administrators, in trust for the benefit of the orphan.

An exception was also taken on the argument in this Court that the damages assessed by the jury exceed those laid in the declaration or writ, which are only one hundred pounds, and that for this cause
(512) the judgment should be reversed.

1. The condition of the bond binds the guardian faithfully to execute his guardianship, by securing and improving the estate of the ward that shall come to his possession for her benefit, until she shall arrive at full age, or be sooner thereto required, and then render a true and plain account of his guardianship on oath, etc. I admit that this

condition ought to receive a natural and reasonable construction, and should not be strained beyond its genuine import for the purpose of charging the sureties. The force of the argument on behalf of the defendants lies in this, that Dickey never was possessed of the negroes as guardian, but as executor in right of his wife; and although eloigning the property would have amounted to a breach of such condition if he had given bond as executor, yet it does not in his character of guardian. But by what evidence is the court to ascertain that he held the property as executor; for the testator does not direct his *executors* to keep the slaves, but only that "they shall be kept together." Every one acting in a trust of this kind shall be presumed, *prima facie,* to have done his duty; and as the law requires an executor to deliver over the property at the end of two years after the death of the testator to such persons as the will authorizes to receive it. An executor who is also guardian to one of the orphans, having possession of the property at the end of eight years, must be intended to hold it in the latter character. It is not an answer to this to say that here the property could not be divided until one of the children came of age, and consequently could not be delivered over; for, as the negroes were to be kept together, they must necessarily be kept by some one person, and who so properly to take such a charge, in the silence of the will, as the guardian to one of the orphans, who is married to their mother? On the strict ground of right, too, this possession might be maintained; the legatees were all tenants in common; any one had (513) as much right to the possession as another, and, having obtained it, could not be interrupted until the period arrived for dividing the property. As the testator appointed his wife one of the two executors of his will it was reasonable to expect that the negroes should be kept together by her as executrix so long as it was lawful to detain them in that character, viz., two years, and that after that period she would become guardian to the children, and keep them together as such till one of them came of age or married. The reason, then, is much stronger for considering Dickey's possession as that of a guardian than an executor, and the condition of the bond is consequently broken if Nancy Shutt, the orphan, had a vested legacy in her share. On this point the intention of the testator scarcely admits of a doubt. The negroes are to be kept together till one child arrives at 21 or marries, and then are to be divided between his wife and children. This must have been for the use and benefit of his wife and children in the meantime, for they could be but little benefited by the other devises and bequests of the house, cattle, and horses, unless they had also servants

to take care of them. He considered the negroes as belonging to his wife and children immediately upon his death, though the particular share of each one was not to be ascertained until the period prescribed. This is also shown by another clause in the will. The second clause provides that the negroes shall be divided when his children come of age, but probably thinking that this mode of expression might postpone the division till they all arrived at age, while each one would require his or her share as he or she came of age or married, the testator adds another clause: that whenever *one* of his children arrives at full age or marries *"that his or her share* of my estate be divided to him or her immediately."

(514) In the preceding parts of the will he had given nothing to his children except the negroes and a share of the stock, if his wife should think proper to dispose of any; and it is to be inferred that in speaking of their share of his estate he principally and emphatically means his negroes. Taking the whole will together and considering that the only legatees in it were his wife and children, who were also residuary legatees, it admits of the same construction as if he had left the negroes to be kept together by his wife for the benefit of the family until one of his children should arrive at age or be married, when it was to be divided between them and his wife, thereby disannexing the time of division from the substance of the legacy. This would place the wife in the situation of a testamentary guardian for the children. Cro. Eliz., 252. A devise to trustees till A. shall have attained the age of 24, and when he shall attain that age to him in fee, gives him a vested interest, which will descend to his heirs though he die before 24. *Doe v. Lea,* 3 Term, 41.

From the construction of the will and the authority of the cases I think that the orphan had a vested interest in her share of the negroes.

2. In support of the second exception, it is urged that the other justices of Orange to whom the bond is made payable ought to have joined in the suit, and authorities have been read to show that where there are several obligees, and one or more of them brings the action without averring in the declaration the death of the others, it is fatal. The rule is well established that in all cases of contract if it appear on the face of the pleadings that there are other obligees or parties to the contract who ought to be but are not joined in the action, it is fatal on demurrer or on motion in arrest of judgment or in error. 1 Bos. & Puller, 74. If the objection does not appear on the face of the pleadings the defendant may avail himself of it, either by plea in abatement or as ground of nonsuit on the trial, upon the plea of general

issue. 1 Saund., 153, n. 1. Then the first question is, Does (515) this objection appear on the face of the pleadings? The writ is brought in the name of the justices to whom the bond was payable, without taking any notice of the others, whose names are not mentioned in the bond. The declaration must be presumed to follow the writ, and it therefore makes a profert of the bond as it is there described; the defendant has not pleaded *non est factum,* but *performance,* and he consequently admits that he gave such a bond as is described in the declaration. And the jury were sworn to try the issue whether the defendants had performed the condition or paid the money demanded. Though profert be made of a deed, yet if oyer is not prayed the deed is not considered to be on the record; and if the defense be founded upon any objection to the form of the bond, and the defect do not appear upon the face of the declaration, oyer must be craved, and after setting forth the bond the defendant may demur. 2 Ld. Raymond, 1135; 2 Saund., 60, n. 3; 366, n. 1. So in pleading payment or performance of the condition of a bond, the defendant should set forth the condition after craving oyer. 1 Saund., 317, n. 2; and the want of oyer in a plea of performance is fatal. 5 Cranche, 257. It was argued that the mode of declaring upon bonds with collateral conditions, in the form recommended by modern writers, spreads the bond on the record and obviates the necessity of praying oyer. 1 Saund., 51. But the form of declaring, as exhibited in the best precedents, shows that only the condition of the bond is set forth and the breaches thereof. 2 Chitty's Plead., 163. It is perfectly clear, then, that this objection does not appear on the face of the record, and cannot therefore be availed of on demurrer, on motion in arrest of judgment or on error. The only other methods by which it could be taken advantage of were by plea in abatement, or as ground of nonsuit in the trial, upon the plea of *non est factum,* as a variance between the deed declared on and the one given in evidence. (516)

3. Before the statutes 8 and 9, Wm. III., ch. 11, the plaintiffs recovered the penalty of the bond, and might take out execution for it without regard to the real damage sustained; but, since that statute, he must assign his breaches, and the jury must assess damages for such as are proved to be broken. To the extent of the penalty the obligee may recover damages for a breach of the condition, though the same judgment is entered on the verdict as before the statute, viz., to recover the debt and nominal damages for the detention of it, and costs. The execution still issues for the amount of the judgment, but is indorsed to levy only the amount of the damages assessed for breach of the

condition, together with the costs. It cannot therefore be of any moment what damages are laid in the declaration and writ, whether they are nominal or otherwise, provided the damages assessed by the jury do not exceed the amount of the penalty. Here they are less than the penalty, and though the law is greatly beneficial to defendants it still considers the judgment as a security for the damages assessed. 2 Wash., 143.

HENDERSON, J. When an action is brought upon a deed, a profert of it is made, of course the deed remains in court until plea pleaded; it is then withdrawn, unless it be denied, and then it is left in the office for safe custody only. No vestige of the deed appears upon the record, but as the plaintiff has described it in his declaration, if for any purpose, either to show a variance between the deed, as described in the declaration, and the one offered under profert, or of availing the defendant of any matter contained in the deed, the party must crave oyer. It is then spread upon the record, and the defendant may demur for variance or take hold of any other matter contained in the deed for his defense; but, should he omit to crave oyer, he takes the (517) deed to be as stated in the plaintiff's declaration. There being no declaration in this case it is presumed that it is conformable to the writ, and if so, the bond is taken agreeably to law. In this case, strictly speaking, if the declaration should be according to ancient form, that is, upon the penalty only, the defendant having omitted to crave oyer of the condition, the plea of covenants performed or conditions performed is a nullity or no answer to the plaintiff's demand; it not appearing to the court that there was any condition to the bond or any covenants to be performed. But, perhaps, it is the fairer way to consider the declaration as setting forth both the penalty and condition, and as assigning breaches of the condition, yet, as oyer, neither of the one or the other has been craved, we must take the bond and condition as stated in the declaration; and, as we have before said, that it is presumed to be conformable to the writ, and in this view of the case the result will be the same.

The general issue not being pleaded in this case the plaintiffs were not compelled to produce the bond upon the trial, and if the defendants failed to support their pleas by evidence, a verdict would have been found for the plaintiff, and judgment rendered thereon without the court ever having had an opportunity of comparing the deed sued on with the declaration, and thereby perceiving the variance, if there be one.

It follows from this that as the obligees named in the writ are those prescribed by the act of 1762, to whom such bonds are directed to be made payable, and we cannot perceive from the record that there are others, the judgment is not therefore on this account erroneous.

It is objected on the merits of the cause that the condition of this bond has not been violated. The parties agree in the words of the condition; they are: "That whereas, the said Dickey has been appointed guardian to the minor named in the condition, now if the said Dickey shall well and truly perform his office of guardian by securing and improving the estate of his ward, which shall come to his (518) *possession*, then," etc. The defendants, who are Dickey's securities only, allege that the slaves never came to his possession as guardian, the interest of the ward, as they allege, being future and contingent, and not vested. This, although it would not be a defense for Dickey himself, when brought to an account, nor for the securities had the guardian bond been drawn as it ought to have been, for it is his duty to guard the interest of his ward, whether vested or contingent; yet, as the securities are no further bound than by their contract, and that only binds them that Dickey shall discharge his duty as guardian by improving and securing the estate of his ward, which shall come to his possession, it becomes necessary to examine whether the slaves in question ever came to his *possession;* and this depends upon the true construction of Shutt's will. By the third clause of the will, the testator directs that his negroes shall be kept together until his children arrive at full age or marry, and then to be divided between his wife and children. Another clause of the will directs that whenever one of his children arrives at full age or marries, that his or her share of the estate be delivered to him or her immediately. These two clauses taken together, convey a vested and not barely a future or contingent interest. There is no disposition of them in the meantime to any other person. The right of the executors to the undisposed property of their testator is, by our law, taken from them, and it cannot therefore be said that the executors were entitled until the time of the division arrived; therefore, after the trusts of the will were performed by the executors, and making the division was not one of those trusts, the children could have compelled them to have assented to their legacies, although they could not have compelled a division among themselves until the period arrived prescribed for that purpose in their father's will. Independent of this, I think it was a present gift to be immediately (519) enjoyed by them, and the division postponed to prevent inequality in the shares of the children when they were about to enter

into life, or for some other motive which the testator deemed a sufficient one. That Dickey, having the negroes in his possession as executor in right of his wife, after the time allowed by law for the performance of the trusts of the will, by being appointed guardian to the child, he *ipso facto* became possessed of the slaves in his capacity of guardian.

As to the excessiveness of the damages, I think that question was fairly left to the jury whether it was a total or a partial loss. As to the damages being greater than those which were laid in the writ, I think there is no error for the reasons assigned by my brothers. The statute 8 and 9, Wm. III., does not require that there should be an alteration in laying the damages, for at law by a breach of the condition the penalty becomes the debt; the damages demanded in the writ are merely nominal; the damages found for the breaches of the condition are only directory as to the sum to be raised by the execution and a substitution for the penalty of the bond, and therefore it is said they cannot exceed it. And I consider the precedents relied on in 2 Chitty's Pleadings to be merely matter of advice for greater certainty. No adjudged case has been produced to support the objection, and I am confident the cases are the other way.

PER CURIAM. No error.

Cited: Harrison v. Ward, 14 N. C., 418; *Clancy v. Carrington, ib.,* 530; *Hathaway v. Leary,* 55 N. C., 266; *DeVane v. Larkins,* 56 N. C., 380; *Harris v. Harrison,* 78 N. C., 213; *Ruffin v. Harrison,* 81 N. C., 216.

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(520)

DAVIDSON v. BEARD.—From Rowan.

1. A mortgaged certain slaves to B and retained possession of them. After the execution of the mortgage A contracted a debt with C, who sued him, recovered judgment, and had his execution levied on the slaves in A's possession. C at the time the debt to him was contracted had no knowledge of the mortgage, but at the time of the levy both C and the sheriff knew of the existence of the mortgage. At the time of the levy the mortgage had not been proved and recorded. In an action by B against the sheriff it was *Held*, that the mortgage had efficacy from the time of registration only, and that C's execution, binding the property from its *teste*, had priority over the mortgage.

2. An ordinary deed for the conveyance of land passes no title until duly registered within a prescribed time, and when so registered, it relates

back to its date and passes title therefrom; but a mortgaged deed, not registered within time, when registered operates from the time of registration only, and has no relation back to its date.

3. A subsequent *purchaser* is viewed, under the registry acts, as a subsequent mortgagee, and so is *any other* subsequent encumbrancer.

TRESPASS *vi et armis,* for taking certain negro slaves. The facts were as follows: George McCulloch being indebted to the Bank of New Bern, the plaintiff became his surety, and to indemnify him from loss McCulloch executed to him a mortgage deed for the slaves in question; this deed bore date 29 May, 1818. McCulloch lived in Rowan and the plaintiff in Mecklenburg, about thirty miles distant from him. The mortgage was a *bona fide* transaction. McCulloch remained in possession of the slaves, and after the execution of the mortgage aforesaid, contracted a debt with William and Jesse Hargrave, who sued him and recovered judgment, and sued out their execution, which was delivered to the defendant, the sheriff of Rowan County. The slaves were taken possession of by the plaintiff, claiming them under his mortgage before the issuing, but after the *teste* of the execution; and McCulloch at this time had failed to comply with the rules, regulations, and conditions of the bank, and a loss and damage (521) had actually been sustained by the plaintiff, in consequence of his being surety for McCulloch. The defendant levied the execution on the slaves in the plaintiff's possession by directions of W. and J. Hargrave, who, as well as the defendant, had notice of the mortgage at the time of the levy; but the Hargraves had no notice of this mortgage when their debt was contracted. The levy was made on 15 May, 1821, at which time the mortgage had not been proved and recorded. And whether the slaves were liable to be thus taken in execution, the mortgage deed not having been registered, but the debt to the bank still remaining unpaid, was the question submitted to the court. Verdict and judgment were rendered below for the plaintiff, and defendant appealed.

HALL, J. By Laws 1715, ch. 7, sec. 7, it is required that all mortgages of lands, negroes, goods, and chattels, which shall be first registered, shall be held to be the first mortgage, unless a prior mortgage shall be first registered within fifty days after its date.

It was held, *Cowan v. Green, ante,* 384, that an unregistered mortgage should yield to a bill of sale, which had been registered in due time, the mortgage not having been registered until nearly two years after its date. In this case the mortgage to the plaintiff was made in

May, 1818, and was not registered on 15 May, 1821, when the executions in question were levied three years after its date.

Although the section of the act just cited declares that when mortgages are registered in due time they shall be good as against other mortgages, there can be no doubt but they would be good also against other conveyances of the same property, afterwards made, or against liens subsequently acquired; but when they are not registered in due time as the act requires, they must give way to rights and
(522) liens acquired up to the time at least when they shall be registered.

It would not do to put a construction on the act, so as to give a preference to unregistered mortgages at any indefinite period of time. There is a greater necessity for the registration of mortgages than absolute bills of sale; because in the former case property mortgaged most commonly remains in the possession of the mortgagor; in the latter, it is generally delivered to the purchaser.

I therefore think that the rule for a new trial should be made absolute.

HENDERSON, J. By the registry act it is enacted that no conveyance or bill of sale for land other than mortgages shall be good and available in law unless the same be registered within twelve months. By section 7 of the same act it is enacted that every mortgage of lands, tenements, goods, or chattels, which shall be first registered, shall be taken and held to be the first mortgage, any former or other mortgage not before registered notwithstanding, unless such prior mortgage be registered within fifty days after the date. And the subsequent acts of the Legislature giving further time for the registration of deeds and mesne conveyances, apply not to mortgages; they were left under the sole operation of the act of 1715, until the passage of the act of 1820, which does not affect this case. The totally different phraseology used in the two sections of the act, requires that a different construction should be put upon them. Deeds for the *conveyance* of lands that is, not mortgages, pass no title until duly registered within a prescribed time, but when so registered they relate back to their date and pass title therefrom; but in regard to mortgages nothing is said as to their inefficiency unless registered within a prescribed time only, that is, a registered mortgage shall be held the first mortgage unless a prior mortgage shall be registered within fifty days of its date. And
(523) in *Cowan v. Green, ante,* 384, a subsequent purchaser is viewed as a subsequent mortgagee, and so may, I think, any other subsequent encumbrancer. A mortgage, therefore, not registered within

fifty days of its date has no relation back at all, yet it operates from its registration; there being no law saying unless registered within a particular time it shall pass no title, as there is in the case of absolute deeds. An unregistered mortgage, therefore, the fifty days having expired, may be considered as a mortgage without date, having efficacy from its registration only, and I think registration gives it efficacy from that period, not because I can find any act of the Legislature expressly authorizing such mortgages to be registered, but because there is no act prohibiting it. And section 7 of the act before mentioned speaks of their registration within fifty days of their date, and of course gives to them when so registered relation to that period, and principally because the words of the act are that *the first registered* mortgage shall be deemed the first mortgage; which clearly implies that the first executed mortgage was not then registered, for if it had been the second mortgage could not have been the first registered mortgage; both of which requisites to wit, that the first mortgage should not have been registered within fifty days, and that the latter should be the first registered mortgage, must concur, otherwise the preference was not accorded to it. It is plain from this that the Legislature contemplated the registration of mortgages after the fifty days had expired, and gave to them a priority over mortgages then unregistered, unless such unregistered mortgage should itself be registered within fifty days; for there it is admitted that the spirit of the act would give a priority to the second mortgage from the time of its date.

The creditor Hargrave, having reduced his demand to a judgment and taken out execution, which bound the property of McCulloch from its teste (*Green v. Johnson, ante,* 309), nay more, having delivered it to the sheriff, became an encumbrancer within the (524) principle held in *Cowan v. Green, ante,* 384, and the mortgage to Davidson, being at that time unregistered, and if registered afterwards, operating only from its registration, must be postponed to Hargrave's prior lien. The sheriff was therefore justifiable in seizing the property to satisfy Hargrave's debt. The rule for a new trial must be made absolute.

TAYLOR, C. J., concurs.

PER CURIAM. New trial.

There was another case before the Court, between the same parties, which resembled the first in all respects except that Cowan, the plaintiff in the execution, had credited *McCulloch before* the execution of the mortgage.

HALL, J. The difference between this case and the former is, I conceive, an unimportant one, and the opinion which I have already delivered is applicable to the present case.

HENDERSON, J. This case is in all respects analogous to the other case between the same parties decided at this term. The circumstance of Cowan's being a creditor before the mortgage was executed places him in no better situation than Hargrave, who became a creditor afterwards. Both of them, by reducing their demands to judgments and taking out execution thereon, the *teste* of which overreached all transfers made by McCulloch, and Davidson's mortgage not being registered, must be viewed as a transfer acquiring validity from registration only; it having no relation back, not being registered within fifty days of its date, gives to each of their claims a preference over his mortgage.

TAYLOR, C. J., concurred.

PER CURIAM. New trial.

Cited: Tate v. Brittain, 10 N. C., 56; *Cowan v. Davidson,* 13 N. C., 534; *Hargrave v. Davidson, ib.,* 535.

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(525)

YANCEY v. LITTLEJOHN.

1. A demand of the maker of a note, and notice of nonpayment given to the indorser within reasonable time, is necessary to charge the indorser; what is reasonable time must depend on circumstances. Four months, when the parties all resided in the same village, is unreasonable.

2. When the holder of a note procured a confession of judgment from the maker, and granted him a *cessat executio* during six months, when, had he regularly brought suit to the term at which the judgment was confessed, the execution would have been delayed but three months, it was *Held*, that by this conduct the holder virtually made a new contract with the maker, by which the indorser was exonerated from all liability.

THIS cause was tried before *Nash, J.,* at GRANVILLE, September Term, 1823, and the defendant had a verdict. The case stood before this court on a motion for a new trial, and the facts were these: Holden executed to the defendant a sealed note for $636, and dated 26 June, 1820. On 28 June, 1820, the defendant indorsed the note to plaintiff. At the county court of Granville, in August, 1820, the plaintiff, with-

out having issued any writ, obtained from Holden a confession of judgment on the note, and granted him a stay of execution until February Term, 1821, and an entry to this effect was made on the clerk's docket at the time. The plaintiff offered no evidence of a demand upon the maker except the judgment confessed by Holden. He, however, offered in evidence a deed of trust executed by Holden to Samuel Hillman on 4 November, 1820, and all in the handwriting of the defendant, by which Holden conveyed certain property in trust, for the benefit of the defendant and other creditors; and plaintiff contended that this amounted either to evidence of notice to the defendant or a waiver on defendant's part of notice.. The property conveyed in trust when sold was insufficient to satisfy the debts intended to be secured by it, and plaintiff, under the sale, received his proportionate share, (526) $440. It also appeared that in February or March, 1821, the sheriff sold property of Holden's not included in the deed of trust, by virtue of executions issuing on judgments obtained in November, 1820. Defendant contended, (1) that there was no sufficient evidence of a demand or notice; and, (2) that by taking the confession of judgment and granting a stay of six months, plaintiff had made a new contract with the maker of the note, and thereby released the indorser.

The court charged the jury that to entitle the plaintiff to recover it was necessary he should have made a demand of Holden, and have given defendant notice of it, and of the nonpayment of the bond, within a reasonable time; that what was reasonable notice depended on circumstances; the law, however, in all cases, required the assignee to use due diligence in presenting, and that he should, as soon as he conveniently could, give notice to the indorser of the demand and dishonor of the note; that the deed of trust having been taken up upwards of four months after the indorsement of the note, and only for part of Holden's property, in no way dispensed with the necessity of notice; that if it was received as evidence of notice, it was only evidence at the time of its date, which, being four months and more after its indorsement, was not in reasonable time, the parties all residing in the same village; but if they could infer from any other circumstance that the defendant had earlier notice they were at liberty to do so, and that plaintiff having taken a confession of judgment and given a stay of six months, when, if he had brought his suit regularly to August term, he could only have kept it off three months without appearing, in which event the debt would have been secured, he had virtually made a new contract with Holden by which the defendant was exonerated from all liability.

Hillman for defendant.

(532) PER CURIAM. We think the question whether the plaintiff made use of due diligence, and whether the notice to the defendant was given in reasonable time, were properly left to the jury by the presiding judge, and that he correctly explained to them the law arising upon the case; therefore we see no reason why a new trial should be granted.

PER CURIAM. No error.

PICOT v. HARDISON, ADMINISTRATRIX, ETC.

On an appeal from a justice's judgment the surety to the appeal is not bound, though he sign as such, unless the magistrate granting the appeal sign his name as a witness to the signature of surety.

SCI. FA., issued from BERTIE to the defendant as administratrix of one Asa Hardison, who was security of Rachel Hare in an appeal granted on a judgment rendered by a magistrate, against Rachel Hare, in favor of the present plaintiff.

The warrant was in the usual form, and on it were indorsements as follows, viz.:

Judgment against the defendant for twenty pounds, with lawful costs, this 19 January, 1811. EZEKIEL HARDISON.

The defendant craves an appeal; granted by giving for security
ASA HARDISON.

To the *sci. fa.* the defendant appeared and pleaded *"nul tiel record."* It appeared in the court below, from the testimony of Ezekiel Hardison that as a magistrate he gave the judgment indorsed on the (533) warrant on 19 January, 1811; that the defendant craved an appeal, which he granted on her offering Asa Hardison as surety; that Asa Hardison did not on that day sign the indorsement on the warrant, though he said he would be defendant's surety, but on the next day he did sign in the presence of the witness.

Another question was presented by the record which it is unnecessary to state, as the Court did not consider it.

TAYLOR, C. J. This case depends upon Laws 1794, ch. 414, sec. 17, the words of which are: "That in all cases where appeals shall be granted from the judgment of a justice, the acknowledgment of the security, and subscribed with his or her proper handwriting, attested

by the justice, shall be sufficient to bind the security to abide by and perform the judgment of the Court." The literal meaning of the word attest (*testor ad*) is to witness, and in that sense it would be sufficient for the justice to be present when the surety signed. But that is not the sense in which it is used generally by the Legislature, nor indeed by law writers; but to contradistinguish a witness, whose name must be signed, from one who may simply be called upon to prove the transaction without having signed the evidence; of this a strong instance is furnished by two of the acts concerning wills. In one they speak of "subscribing witnesses," 1 Rev. Code, 471, sec. 11; and in a subsequent reference to that expression they speak of it as meaning "attesting witnesses," 1 Rev. Code, 511, sec. 5; plainly denoting that they used them as convertible terms. The witnesses to a will are called attesting witnesses, because they must put their names to it, and it is the way in which the books generally express such witnesses as must sign any instrument.

The act designed to make the mode by which the surety was (534) bound an official, authentic act, which might be proved by an inspection of the justice's signature, which would probably be known by some one on the bench when judgment was moved for, and thus to guard against the risk of charging persons who had not in fact signed as surety. As a judgment may be entered upon motion, without any notice to the surety, it was a necessary provision that the fact of his being so should be verified beyond a doubt, and fraud and perjury prevented as effectually as possible. A man who becomes surety for an appeal is not to be presumed to render himself liable upon any other terms than those the law has prescribed, viz., that the magistrate shall attest his signature, for the next step would be to charge a man who had not signed his name upon the magistrate's proving that he had become surety. The law must receive such a construction as will impose upon the justice a strict execution of the power intrusted to him before a man can be rendered responsible as a surety in a summary way. Where a power was created to be executed by trustees, with the consent of the *cestuis que trustent,* certified by writing under hands and seals, attested by two or more credible witnesses, but the attestation expressed only that the deed had been sealed and delivered by the *cestuis que trustent,* and the other parties, in the presence of the subscribing witness, it was held that the power had not been duly executed. 4 Taunt., 214. And taking it, in this case, that to "attest" means to sign the paper as well as to witness, the justice has not well executed the power, and the defendant is not liable.

An opinion on this point renders unnecessary the consideration of another question presented by the record. The defendant was surety on the appeal to the county court, where the appellant prevailed, and then the original plaintiff appealed to the Superior Court, and
(535) prevailed. Is the first surety (supposing the law to have been complied with) liable? On this I give no opinion.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. Reversed.

ALEXANDER v. HUTCHESON.

There is a difference between such an acknowledgment as will take a case out of the statute of limitations and such as is necessary to defeat the plea of infancy. In the former case the slightest words are sufficient; in the latter, nothing short of an *express promise* will suffice.

APPEAL from *Paxton, J.*, at MECKLENBURG.

Assumpsit brought by the plaintiff as administrator of William Hutcheson for $320, the price of articles purchased as was alleged by the defendant, at the sale of the estate of William Hutcheson. The defendant relied on the plea of infancy to which there was a replication promise after coming to full age. Plaintiff, in support of his replication, introduced as a witness the former guardian of the defendant, who swore that five or six years after defendant arrived at full age the plaintiff and defendant met at his house, with several others interested in the estate, for the purpose of making a final settlement of their respective claims. The witness stated the account between plaintiff and defendant, as he understood it from both parties, and it appeared that there was a balance due plaintiff of $244. Defendant at the time insisted he was entitled to a further credit by virtue of a bequest in his father's will. Some of the property, which defendant had purchased at the sale, he had retained ever since in his possession. There was no proof of any *express* promise to pay by defendant after he arrived at full age and he never took any steps, after coming of age, to
(536) impeach or make void the contract of sale.

On these facts, *Paxton, J.*, who presided, instructed the jury that if they were satisfied from the conduct of the defendant after he came of age that he had confirmed the original contract they ought to find for the plaintiff, and that it was not absolutely necessary to prove

an express promise to entitle him to recover. A verdict was returned for plaintiff. New trial refused, judgment and appeal.

Wilson for defendant.

TAYLOR, C. J. An examination of the authorities applicable to this question leads irresistibly to the conclusion that the law is in favor of the defendant, and that the jury ought to have received an instruction that nothing short of an express promise to pay, made by the defendant after he had attained his age of discretion, would be sufficient to render him liable in this action. Such a promise must likewise be voluntary and given with a full knowledge that the party making it stood discharged by law. The form of pleading in such a case shows the light in which the law regards it, for the words of a replication to a plea of infancy are, *"that after he had attained the age of 21 years, he assented to and ratified and confirmed the said promise,"* thereby putting in issue whether a distinct, deliberate, and unequivocal promise were made.

The case cited from *Espinasse,* which is precisely in point, draws a strong and rational distinction between the acknowledgment necessary to take a case out of the *statute of limitations,* and such a one as is sufficient to repel the plea of *infancy,* and I have not been (537) able to find any case that in the least degree conflicts with that decision. It is too late now, after so many decisions running in the same channel, to question that a very slight acknowledgment will take a case out of the statute of limitations, though it was formerly held that a promise to pay was necessary. And this departure from the letter of the statute has been more than once a subject of regret with able lawyers. 2 Saund., 64; 4 East, 599.

The distinction established between such an act as shall deprive the defendant of the benefit of the statute of limitations, and such a one as shall destroy the defense of infancy, is founded in good sense and ought to be maintained. In the first case there was a legal obligation to pay, arising from the original *assumpsit,* against which obligation the length of time operates as a bar; and a mere admission that the debt is not paid shows that the presumption on which the statute is founded fails in its application to the case.

But in the case of an infant the law regards him as positively incapable of contracting a legal obligation except for necessaries, and therefore aims to prevent his being imposed upon by persons of more experience. Whether an infant be under a moral obligation to pay a debt must depend on the circumstances under which the contract was

made; and, if it can be clearly collected from them that advantage has been taken of his inexperience for the purpose of imposing on him, he may very justly shelter himself under his privilege. But, supposing the contract to have been equitable, and a moral obligation thus created, the mere acknowledgment of it can have no legal effect; for such an obligation can, at the utmost, only amount to a consideration for an actual promise. Therefore I have no hesitation in saying that a new trial ought to be awarded.

(538) HENDERSON, J. This is unlike the promise which revives the remedy, when barred by the statute of limitations, where the bare acknowledgment of an unsatisfied consideration is sufficient; for, in this case, there must be a new promise, an actual responsibility assumed, after arrival at full age. The original contract conferring no legal right, it being only a sufficient consideration to support a new promise. In the case of the statute of limitations, the original contract conferred a right; the remedy only is lost by a lapse of time, which raises a legal presumption that nothing is due, which presumption is repelled, or rather destroyed by the bare acknowledgment of a subsisting or unsatisfied consideration. This, I apprehend, gives rise to what is said in the books, that to support an action on a contract made during infancy there must be an express promise after arrival at full age; whereas, an implied promise will sustain an action, on a demand barred by the statute of limitations. If by an *express* promise is meant a promise *in words,* the law is not so; anything, either by words or *acts,* which amounts to an assumption or promise of the debt is sufficient as stating an account, for why state the account but to show the sum due, and why show that unless it is to be paid? But I think the judge erred in informing the jury that by the settlement in this case the original contract was ratified. The defendant incurred no other liability than he then assumed, and the balance which he then recognized to be due, or, which is the same thing, which resulted from such recognition, to be ascertained by calculation, not by inference, with every credit and deduction which he then claimed, is the extent of the obligation which he intended to incur; and no farther than such extent should the jury have been instructed to go. The rule for a new trial must, therefore, be made absolute.

HALL, J., concurred.

PER CURIAM. New trial.

Cited: S. c., 12 N. C., 14; *Dunlap v. Hales,* 47 N. C., 382; *Turner v. Gaither,* 83 N. C., 363; *Breesee v. Stanly,* 119 N. C., 281.

(539)

KIZER v. BOWLES.—From Stokes.

An action was brought in 1821 on the book debt law. From the books it appeared that the articles were delivered in 1815. *Held*, that the principle on which the statute is founded is the lapse of memory and the loss of evidence; but an acknowledgment of the account within three years before suit brought, though such account should be of more than five years standing, shall revive the original promise, because such acknowledgment furnishes evidence that the presumption on which the statute is founded does not exist in the particular case.

THIS case originated by a magistrate's warrant issued at the instance of the plaintiff against the defendant, to answer the complaint, etc., "in a plea of debt for the sum of fifty dollars due by a book accompt." The pleas were the general issue, payment, set-off, and the statute of limitations, and the plaintiff was required by notice to produce his books. On the production of the books it appeared that the articles named in the account were delivered in 1815; the warrant bore date June, 1821. The defendant objected that, as the plaintiff declared upon a book account, not signed by the defendant, and of more than five years' standing, the claim was barred by the operation of sec. 5, ch. 57, Laws 1756.* It was not alleged that defendant had been absent from the State, and the court sustained the objection. Plaintiff then offered to prove that the defendant had within three years next before suit brought acknowledged the justice of the account, and agreed not to take advantage of the statute of limitations. The court refused to receive the evidence, and a verdict was returned for the defendant; a new trial having been moved for and refused, and judgment rendered, plaintiff appealed.

Martin for appellant.
Ham. Jones for appellee.

TAYLOR, C. J. Where a plaintiff's claim, under the book-debt (541) law, is proved solely by his own oath, he is not entitled to recover for any articles delivered more than two years before the action brought. But if, instead of his own oath, he relies upon indifferent testimony, he may, under section 5, recover upon a book account for

*NOTE.—"Provided, also, that no book of accounts, although the same may be proved by witness or witnesses, shall be admitted or received as evidence in any action for goods, wares, or merchandise delivered, or for work done above five years before the said action brought; except in case of persons being out of the government, or when the account shall be settled and signed by the parties."

goods sold or work done within five years before the commencement of the suit; but even in that case the book of accounts shall not be received in evidence for goods sold or work done more than five years before the action brought.

It was thought by the Legislature that the plaintiff's memory could not be safely trusted, after the lapse of two years, biased as it might be by the interest he felt in the case; and that, after the lapse of five years, even disinterested witnesses could not be implicitly confided in, or that the defendant might have lost the evidence of payment.

(542) But it is objected that, five years having expired before the issuing the warrant, the account could not be established, even by indifferent witnesses. It is true that they could not, after that time, prove the entries in the book, for the mischiefs likely to arise from thence were precisely what the act by its limitation intended to obviate. But if indifferent witnesses prove an acknowledgment of the account within three years before issuing the warrant, what possible evil can thence arise? The effect of such an acknowledgment must be the same as it is in cases arising under the common statute of limitations, a revival of the original promise, not the creation of a new cause of action, for the lapse of time does not extinguish the debt, but only suspends the remedy. Such evidence places the case on the same footing as if it were brought within five years. That, in point of fact, there was no surprise on the defendant is manifest from this, that he pleaded the statute of limitations, thereby intending to insist that the book could not be proved by indifferent witnesses if the articles were delivered or the work done more than three years before the issuing the warrant.

Now the words of that statute are that suit must be brought within three years next after the cause of such action or suit, and not after; yet, the declaration, except against executors, charges and relies upon the original contract, and if the statute of limitations be pleaded, and the cause of action had, in truth, occurred more than three years before suit brought, the only question is whether the defense given by the statute is waived; and it is waived by a new promise. 16 East, 419.

Nor does even the replication to the plea state such new promise or acknowledgment; it simply denies the plea and refers to the promise as set forth in the declaration. 2 Chitty Plead., 605. The principle on which the statute is founded is the lapse of memory and the loss of evidence; but when an acknowledgment is proved to have been made within the limited period, it furnishes evidence that the pre-

(543) sumption on which the law proceeds is contrary to the fact in

the particular case. The very same reasoning applies to the book-debt law which, without such a construction, will put debts thus evidenced upon a worse footing than other simple contracts, and instead of convenience and beneficial effects which the Legislature meditated, will be productive of the greatest mischief.

HALL, J. It is not necessary that the book-debt law should be pleaded by the defendant in order to bring it into operation. It operates upon the claim of the plaintiff. It declares that no book of accounts, although the same shall be proved by witnesses, shall be admitted or received if the items in it were of five years standing when the suit was brought. This must be understood to mean when the plaintiff cannot establish them *independent* of the book. As when a witness declares that the entries in a book were in his handwriting, that he made no such entries unless he delivered the articles themselves, or saw them delivered by others, but that he has no recollection of the delivery of such articles, independent of the book in which the articles are charged. In such case the plaintiff's claim rests upon the book and the evidence given by the witnesses, and in such case the act forbids the book to be received in evidence.

But when the delivery of the articles, etc., can be proved by evidence, independent of the book, although they may be charged in a book, the case does not fall within the act which points out the method of proving book-debts; and so a promise to pay the debt, or an acknowledgment of it is competent and admissible evidence, and not within it. I therefore think a new trial should be granted.

HENDERSON, J., concurs.

PER CURIAM. New trial.

(544)

McINTIRE'S EXECUTORS v. CARSON, EXECUTOR.—From Wilkes.

Laws 1715, ch. 10, is intended for the protection of dead men's *estates*, and not for the *personal* benefit of the executor; an executor *de son tort* may, therefore, plead it, as well as a rightful executor. The true distinction is that what will protect the *assets* may be used by any executor; but those rights which the law allows to the executor on account of his office can be claimed by a rightful executor only.

ACTION brought against the defendant as executor of one James McDowell, to which defendant pleaded *ne unques executor, fully ad-*

ministered, act of 1789, and the act of 1715, reënacted in 1799. To the plea of *ne unques executor* there was a replication that the defendant, since the death of James McDowell, had acted as executor of the said James by administering divers goods and chattels which belonged to the estate of said James.

This suit was commenced 30 July, 1818, and at September Term, 1820, the case by rule of court was referred to arbitrators; no award having been made, the rule was set aside and the cause set for trial. It did not appear on the trial that the plaintiffs knew at what time defendant took the property into his possession. The jury found that defendant was executor *de son tort* of James McDowell, that he had assets sufficient to satisfy plaintiffs' demand, and further, they found that the act of 1715 was a bar to plaintiffs' recovery.

Plaintiffs moved for a new trial on three grounds: (1) that an executor *de son tort* is not within the protection of the act of 1715; (2) that it did not appear from the evidence that the plaintiff knew of the defendant's having possession of the negroes for more than seven years next before he brought suit; (3) That the reference to arbitrators
(545) took the plaintiff's claim out of the operation of the act of 1715.

The court held that an executor *de son tort* was within the protection of the act of 1715, and that the time began to run in favor of the defendant from the time he took possession of the property and openly and publicly used it, and that the reference to arbitrators did not take the case out of the act of 1715, and a new trial having been refused and judgment rendered, plaintiff appealed.

Gaston for appellant.
Seawell and Wilson contra.

(548) HALL, J. The question in this case is whether an executor *de son tort* can plead the statute of limitation, created by the act of 1715, ch. 10. If this were a plea that tended to the personal benefit of the executor *de son tort,* he ought not to be permitted to avail himself of it, but it is a plea pleaded for the benefit of the *estate;* the rights of the defendant are not in any respect thereby affected, and creditors have a right to bring actions against him; and I see no reason why they should succeed in making out their claims against him with more facility than they could do against the rightful executor; certainly other creditors and the next of kin would be thereby injured. If a rightful executor can plead such a plea for the purpose of protecting the estate, I think the defendant may do it in the present case.

The plaintiff will not be in a worse situation than if he had sued a lawful representative of the estate. No hardship or inconvenience is pointed out in this case that might not equally apply to the other. 1 Wentw., office of Exrs., 177; 3 Term, 588; 10 Ves., 93; Andrews, 328; 2 Str., 1106.

HENDERSON, J. The act of 1715, commonly called the seven-years bar, was intended for the benefit and protection of the estates of dead men; not for the protection of those who have the management of them, or may represent the dead men; and the plaintiff, (549) having chosen to consider the defendant an executor, and thrown on him the defense of the assets, shall not oust the estate of any defense to which it would be entitled in the hands of a rightful executor, for it would be very strange that a demand should be enforced against the estate, when the estate is defended by one person, and not when defended by another. I think the distinction is that what will protect the assets may be used in either; those rights which the law allows to the executor on account of his office can be claimed by the rightful executor only as the right of retaining compensation for his trouble and others; if there be any of the like kind, possibly the right of offering a set-off may be one exception from the above rule; this can be denied to the wrongful executor only on technical reasons, to wit, that as he cannot sustain suits for want of letters testamentary, he cannot set off against a demand upon the assets; and as the declared object of the statutes allowing a set-off is to prevent a multiplicity of suits, it can only be used where it can have that effect. The soundness of this reasoning it will be sufficient to examine when the case occurs. It may be taken either way without affecting the present question. Rule for a new trial discharged.

TAYLOR, C. J., dissented.

PER CURIAM. No error.

(550)

GIDNEY v. HALLSEY ET AL.

A judgment having been obtained against the defendant in the county court, a *ca. sa.* issued, and the defendant gave bond to keep the prison bounds. Afterwards the defendant obtained writs of *supersedeas* and *certiorari*, and on the return of the *certiorari* the cause was ordered to be placed on the trial docket. The defendant, after having obtained the writs of *supersedeas* and *certiorari*, left the bounds, and on a motion for judgment against the sureties to the bond it was *Held*, that as it appeared

that the cause was ordered to be put on the trial docket before the motion was made on the bond, this order drew after it all the consequences of an appeal from the county to the Superior Court, and totally annihilated the judgment, and rendered the security a nullity.

APPEAL from *Donnell, J.*, at TYRRELL.

Motion for judgment against the defendant, Hallsey, and two others, his sureties on a bond given by Hallsey, conditioned that he would keep within the prison bounds in the county of Tyrrell.

The case was this: Plaintiff brought suit against the defendant Hallsey in Tyrrell County court, and obtained a judgment by default, whereupon a *ca. sa.* issued, on which Hallsey was arrested and entered, together with the other defendants, into the bond on which the motion was made. After the bond was executed Hallsey obtained on affidavit writs of *supersedeas* and *certiorari* to the county court of Tyrrell, and at September Term, 1823, of Tyrrell Superior Court, the *certiorari* was returned, and the cause ordered to be placed on the trial docket, with leave to Hallsey to plead. This motion was then made on the bond, and plaintiff offered to prove that after the writs of *supersedeas* and *certiorari* had been granted and delivered to those to whom they were directed, Hallsey had been seen at large without the prison bounds. The presiding judge, *Donnell,* refused the motion, and the plaintiff appealed to this Court.

(551) *Hogg for appellant.*

TAYLOR, C. J. This is a motion for judgment on a bond to keep the prison bounds, the condition of which is alleged by the plaintiff to have been broken by the defendant Hallsey having gone beyond the limits in consequence of a *certiorari* and *supersedeas* issued by a judge of the Superior Court. It is urged by the plaintiff that Hallsey, being in custody upon a *ca. sa.*, the *supersedeas* could not have the effect of legally discharging him therefrom, and those authorities have been referred to, which show that if an execution has been begun it shall be completed notwithstanding the delivery of a writ of *supersedeas,* or the allowance of a writ of error. That the law is so in England, and that a person in custody upon a *ca. sa.* is not entitled to his discharge, notwithstanding a writ of *supersedeas* be delivered to the sheriff, is not to be controverted. It is there held that a capias, being a complete execution, a writ of error comes too late afterwards, and, therefore, the party shall remain in prison, notwithstanding the writ of error. This doctrine pervades the ancient cases, and is admitted, *arguendo,* in modern ones; but I have met with no case where it has been acted

on since the statutes of 3 James I., chs. 8, 16, and 17; Car. 2, ch. 8, where bail has been actually put in, to answer the debt and damages, pursuant to those statutes. It is revolting to common sense that a man who has carried his cause before a higher tribunal under a belief that the law has not been administered to him, or that injustice has been done him below, should be detained in prison after he has given bond as security to respond the ultimate recovery, and that, too, upon the principle that the execution has been executed and cannot be undone. But the Gordian knot might be cut by letting him out of gaol. But it is obvious that there is a very remote analogy between the writ of *certiorari* as used in England and in this State; they are scarcely alike in anything but name. There it sometimes issues out (552) of Chancery, and sometimes out of the King's Bench, and is an original or judicial writ. It does not issue after judgment but in very special cases, and from absolute necessity, as where the inferior court refuses to award execution, then a *certiorari* will issue after judgment for the sake of doing justice to the parties. So, where the inferior court acts in a summary method or in a new course different from the common law, a *certiorari* lies after judgment, though a writ of error does not. 1 Lill. P. R., 252-3; 1 Salk., 263. It is, therefore, only in a very few cases that the object of a *certiorari* can be to obtain a new trial; and when the record is removed before trial, the whole proceedings are begun *de novo*. It is also to be granted on matter of law only.

In this State the writ is invariably granted after trial in the inferior court; a case must be made out on the merits, upon affidavit, except where it issues to bring up a record appealed from but not filed in time, and the question in the Superior Court always is whether there shall be a new trial. In addition to this, security must be taken by the clerk of the county court to which it issues in the same manner as on appeals. This slight view of the subject shows how little similitude there is between the two writs, and how incongruous it would be to engraft upon ours the strict practice and rigorous principles enforced in the English courts, which may well harmonize with their systems, but are utterly discordant to ours.

The truth is, this writ has grown up with the exigencies of the country, and has been moulded to suit the convenience of the citizens, and although it has been highly assistant in the administration of justice, the principles and rules which govern it emphatically rest on the common law of the State. Much respect is due to long established usage, founded on public convenience, and implicitly sanctioned by legislative recognition. The great utility of the writ would (553)

at once be subverted if it did not restore property seized or deliver a man from prison, for the ultimate redress by a new trial would come too late after the worst consequences of defeat had been suffered. I am disposed to adhere to the settled practice of the country, and therefore think the judgment should be affirmed.

HALL, J. I think in this case the court was right in not giving judgment on the bond given to keep the prison bounds, because, had it done so, the plaintiff, as this record shows, would be entitled to a double remedy, namely, one on that bond, and also one upon the proceedings had under the *certiorari;* for a new trial had been granted on that, and the plaintiff, if he establishes his claim, will on that trial have another judgment. I think the first judgment was done away by granting a new trial, and of course the execution issuing from it is superseded. I see no injury likely to occur on that account, because the law directs that in granting a *certiorari* new security shall be taken for the debt, against which judgment may be entered up as security for an appeal.

HENDERSON, J. In this case it is not necessary to consider the effect of the *certiorari* and *supersedeas* before a new trial is granted in the Superior Court, for upon this record it distinctly appears that before the motion on the prison bounds bond came on a new trial had been granted in the original cause, and that it had been ordered to be transferred to the trial docket. I am well satisfied that by this order, to wit, for a new trial in the Superior Court, all the consequences attending an appeal from the county to the Superior Court follow, namely, a total destruction and annihilation of the judgment in the inferior court as if it had never been; and that the execution (554) which had issued thereon was not only superseded, as that term is understood when applied to the process to stay proceedings which issue after the allowance of a writ of error, but the execution is rendered a perfect nullity, as if it had never been issued; I think, therefore, that the judge did not err in refusing judgment on the motion on the prison bounds bond. A *supersedeas* should be considered only as auxiliary to the writ which it accompanies or the purposes for which the delay is required. If it be only to *review and examine* the correctness of proceedings in an inferior court, and to affirm or reverse them, as the case may require; there the *supersedeas* operates only to stay the proceedings in the situation in which it found them, but where the process is not barely to affirm or reverse the proceedings of the court below, but to annihilate and destroy them, and to examine the

case *de novo*, as if such proceedings had never taken place; there the *supersedeas*, and most certainly when combined with the proceedings of the court ordering it, annuls entirely the proceedings of the inferior court; it does not barely stay the proceedings in the situation in which it finds them, but certainly with the order of the Superior Court annulling the proceedings, annuls everything done under them. The *certiorari* in this case is substituted for an appeal, which by accident or some other cause the party is deprived of. What may be its effect when used for this purpose, accompanied by a *supersedeas* before the awarding of the new trial in the court above, as we have before said, it is not necessary to examine. But when the new trial is granted the whole proceedings become that for which the *certiorari* was substituted, to wit, an appeal and a trial *de novo*, both on the law and the facts, is had. This, when attained, either directly by an appeal or circuitously by a *certiorari*, annuls the judgment of the inferior court, and of course everything done under it must fall to the ground.

The *capias ad satisfaciendum*, the arrest of the defendant, (555) the bond to keep within the bounds of the prison, are means taken to enforce the performance of the judgment. When the object for which they were resorted to no longer exists, they must cease. There was nothing to pay, no judgment to satisfy and the defendant was left as if he had never been arrested.

PER CURIAM. Affirmed.

Cited: *Otey v. Rogers*, 26 N. C., 537.

JOHN MOORE v. WILLIS.

A. being much indebted, to defraud his creditors exchanged a negro girl with B. for a negro boy, and took from B. a bill of sale for the boy which conveyed him to A.'s infant son. Afterwards C. purchased the boy of A. and sold him to B., by whom he was sold to the defendant. In an action for the slave, brought by the infant son against the defendant, the last purchaser, it was *Held*, that the defendant was not estopped by the deed from B. to the plaintiff A.'s infant son; that an estoppel being the conclusion of the truth, is not to be favored; that where there is no mutuality there can be no estoppel; and that estoppels preclude a party from controverting *facts*, not *law;* that in the case put, the defendant controverts no *fact* in the plaintiff's bill of sale, but insists that the fraudulent intention of the father, combined with the consideration moving from *him*, made the slave in question the property of the father as to purchasers and creditors; and this was mere inference of *law*.

MOORE *v.* WILLIS.

APPEAL from *Daniel, J.*, at ROBESON.

Detinue for negro slave Jock. Plea, the general issue. Plaintiff claimed the slave by virtue of a bill of sale from James Smith to himself, made 20 December, 1802; at the time of this sale plaintiff was an infant; this suit was commenced before he came of age. The defendant claimed also under a bill of sale from James Smith, and the following facts appeared in evidence: George Moore, father of the plaintiff, was much indebted, and being in possession of a negro girl, Kate, declared his intention to exchange her with Smith for Jock and to pro-
(556) cure from Smith a bill of sale for Jock to his son, the plaintiff; he assigned as a reason for this that he could not pay his creditors and that there were some of them he did not mean to pay; that if he made the exchange Jock might be retained by his son and be of service to him (George) during his life, and afterwards to his son. George Moore did make the exchange, and Smith gave the bill of sale under which plaintiff claimed. A few days after this exchange one Pittman obtained two judgments against George Moore for £172, and the executions issuing thereon were returned *nulla bona;* after this Pittman purchased Jock of George Moore for a valuable consideration and sold him to James Smith before mentioned, for a valuable consideration, and Smith sold him to the defendant for a valuable consideration. The defendant contended that the plaintiff's claim was founded in fraud. Another point made in the case was whether the defendant might give in evidence a registered copy of the deed from Willis to George Moore.

Daniel, J., charged the jury that if George Moore designed and intended to defraud his creditors or subsequent purchasers when he made the exchange with Smith, yet if Smith did not know of his design, and was not intentionally aiding him in the plan, then the defendant would not be estopped by the deed of sale from Smith to the plaintiff, but would be entitled to consider the sale from George Moore to Pittman as good against the plaintiff; and the after circumstance of the negro Jock having been sold to Smith, and then to the defendant, could not prevent the defendant availing himself of all the rights which the law gave to Pittman, and if Smith was not concerned in the fraud (if any was committed) the defendant was not estopped by Smith's deed to the plaintiff. Verdict for the defendant; new trial refused, judgment and appeal.

(557) TAYLOR, C. J. Smith was a purchaser for a valuable consideration from Pittman, who was in possession of the negro under

a deed from George Moore. Pittman was a creditor of George when the exchange took place, and one of those whom the conveyance to John Moore was designed to defraud; it was consequently void against him, and he might have levied his execution on the property and had it sold. But if, instead of so doing, he thought proper to take it in part satisfaction of his debt, it was doing, by the agreement of the parties, what the law would have enforced in another mode. The act against fraudulent conveyances was intended for the protection of creditors and others having actions and debts against the fraudulent alienor, and when it makes the conveyance valid against him it is that he may derive no benefit from the property in opposition to their interests; but when they claim through him, the spirit of the act is obeyed. Pittman has a double claim, as a creditor and as a subsequent purchaser for a valuable consideration, opposed only by the claim of John Moore, the child of George, and a volunteer, who can only be favored at the expense of a claim more strong and meritorious.

This is considering the case as if George Moore, instead of procuring a deed from Smith to John Moore, had first taken a deed to himself and then conveyed to John; and this view of the case places all the claimants under Pittman upon safe ground. As to the objection that Smith, and consequently his vendor, is estopped from denying the title of John Moore, it is believed that the doctrine of *estoppel* has no bearing upon this case. Willis does not deny that Smith made a deed to John Moore, but contends that the title conveyed by it is at an end by the operation of law and the act of the parties. While that title subsisted it would not have been competent for him or Smith to deny it, but the property being restored to the purposes from which the deed attempted to divert it, the estoppel is at an end. So in an ejectment by landlord against a tenant whose lease is expired, the tenant is not estopped (558) from showing that the landlord's lease is expired. 4 Term, 682.

On the other question in this case it is clear that under the circumstances stated a registered copy of the deed to George Moore from Willis was proper evidence, the defendant not having, and having no right to the original.

HALL, J. It cannot be denied but that the title to the slave in dispute passed out of James Smith by his bill of sale to John Moore, the son. But I think the defendant's defense in this case is not weakened by that admission, because, according to the facts stated in this case, although the title passed out of Smith it did not vest in John Moore. Circumstances over which Smith had no control vested the right and title to the slave in George Moore, the father, at least as far as credi-

tors and others were concerned, and the title conveyed to Pittman by George Moore, and by Pittman to Smith, and by Smith to the defendant, is not contradictory to the title which passed out of Smith when he executed the bill of sale to John Moore, but sprung from it, is conformable to it, and built upon it. I therefore think, for these reasons, that the verdict is right, and the rule for a new trial should be discharged.

HENDERSON, J. An estoppel is the conclusion of the truth; it is, therefore, not to be favored, and it arises from solemn act, either of the party or of a jury or any other tribunal appointed by law to ascertain facts. Which, when once thus solemnly fixed, are forever conclusive on the parties and privies in all controversies between *them*. For estoppels are mutual, and where there is no mutuality there can be no estoppel. But it is the *fact* which the party is thus precluded from controverting, not the *law*. Facts being in themselves uncertain, (559) and resting in the knowledge of the parties, and to be shown by testimony, when once this solemn acknowledgment is made or found in manner aforesaid, it is ever after received as the real truth of the case, there being no touchstone by which the absolute truth can be ascertained, and also that there may be an end of litigation. But the law acts not upon the acknowledgment of the party; it is an open, notorious, and public rule. It is the same between A. and B. as it is between B. and C. No acknowledgment of the party can alter or change it, or preclude them at all times from insisting on its due administration. Thus, if A. bargain and sell to B. by indenture, he thereby affirms that he had title when he executed the deed, and should A. not have title at the time, but afterwards acquire one in an action brought by him against B., B.'s title prevails not because A. passed to him any title by his deed, for he had none then to pass, but because A. is precluded from showing that fact. But if a person through consideration of natural love and affection give lands to a stranger or to an illegitimate child, he may recover those lands of the stranger or the child, for to do so he controverts no fact affirmed in the deed; for they may all be admitted to be true, and yet the title to remain where it was, for the facts therein affirmed are not sufficient to pass the title for the want of a consideration. This is matter of law and will so be declared by the Court, notwithstanding any *declarations* in the deed by the party that the *deed* shall be *effectual to pass the estate*. In the case now under consideration the defendant controverts no fact in the bill of sale to the plaintiffs, but he insists that the fraudulent intention of the father, combined with the consideration moving from *him*, makes the slave in

question the property of the father as to purchasers and creditors. This is mere inference of law from the facts. The party cannot be estopped from showing the law.

PER CURIAM. No error.

Cited: Pass v. Lee, 32 N. C., 414; *Cuthrell v. Hawkins,* 98 N. C., 205; *Hallyburton v. Slagle,* 113 N. C., 955.

(560)

PRESIDENT, DIRECTORS, ETC., OF THE BANK OF CAPE FEAR v. JAMES SEAWELL.

The notice required by law to be given to an indorser is good if it be sufficient to put the indorser on inquiry. No particular form is required; it may be in words or in writing, it may be read from a memorandum or letter, either written or printed, signed or unsigned, bearing the name of any one or no one, for the person giving the notice adopts it as his own; and any person through whose hands a bill or note has passed may give notice to the drawer or his prior indorser of the dishonor of the bill, although the bill or note may not have been by him at that time taken up, and such notice may be given without his having then in his hands the protest. It is sufficient (if a protest be necessary in a case) that there is one in fact.

APPEAL from *Daniel, J.,* at Cumberland.

Assumpsit brought against the defendant as indorser of a bill of exchange, as follows:

$5,000. FAYETTEVILLE, 7 December, 1818.

Ninety days after sight of this, my first of exchange, second of same tenor and date unpaid, pay to the order of James Seawell five thousand dollars, value received, and place the same to account of

Your very humble servant,

D. OCHILTREE.

To Samuel Murley, Esq., Charleston, S. C.

The bill was indorsed by the defendant to J. R. Adam, and by him indorsed to the Bank of Cape Fear, and by that bank to the Planters & Mechanics Bank of South Carolina. On 12 December, 1818, the bill was accepted by the drawee, and on 15 March, 1819, was protested for nonpayment. On 19 March, 1819, the plaintiffs received a letter in-

closing the bill of exchange, the protest of the notary, and a notice addressed to "J. Seawell, Esq.," in the following words, viz.:

You will please to take notice, D. Ochiltree's draft on S. Murley, accepted by him for 5,000 dollars 00 cents, on which note you are indorser, is placed in my hands from the Planters and Mechanics Bank for protest. It not being settled by the drawer, payment is expected from you immediately. JOHN HINCKLEY MITCHELL,
(561) CHARLESTON, 15 March, 1819. *Notary Public.*

The runner of the Bank of Cape Fear proved that on the same day on which the foregoing notice reached Fayetteville he, by direction of the officers of the bank, handed it to the defendant; that he never gave him any other notice, and that the name John Hinckley Mitchell was printed, and there was no notarial seal affixed to it. It was further proved that the defendant a few days after made application to the bank of Cape Fear to bring suit against the acceptor, to which they replied that he was liable and more convenient to them; if he wished the acceptor sued he might take up the bill and bring suit himself.

The protest which made part of the case purported to have been made on 15 March, 1819, at the request of the Planters and Mechanics Bank of South Carolina; that to the demand of payment made on the acceptor, the reply was, "I cannot pay the bill, not having funds of the drawer"; and that written notices had been sent by mail to the drawer and the indorsers.

The defendant pleaded the general issue, and on the trial below, before *Daniel, J.*, the question was principally whether the defendant had received legal notice of the nonpayment of the bill.

The court in its charge told the jury that the plaintiffs were bound to make it appear in evidence that a demand had been made on the acceptor when the bill was payable, and on refusal of payment the defendant should have had notice in a reasonable time of *that fact.* That the act of Assembly of 1819 made the protest of the notary public *prima facie* evidence of the demand, and also *prima facie* evidence of notice; the manner in which he had done the same was set forth
(562) so that the court and jury could see that it was legally done, and done in a reasonable time.

The court left it to the jury to say whether they could collect from the manner of the notary's protest that Seawell had notice of a *demand upon the acceptor and refusal of payment in a reasonable time;* and if the protest, *in manner and form* as it now stood, raised a presumption in their minds that the defendant had been regularly notified; whether

the evidence of the runner of the bank did not rebut the inference that any other notice had ever been given to the defendant, except that stated in the printed letter purporting to be from John H. Mitchell to James Seawell, and thereby rebut and overrule any presumption that might arise from the protest that a demand had been made, and reasonable notice given the defendant of such demand and refusal to pay by the acceptor. If it did they would find for the defendant.

The court further informed the jury that if they should be of opinion that Seawell had not such reasonable notice as the law required, he would be still liable to pay the bill if he promised to pay the same, having a clear knowledge of all the facts which would have exonerated him from such liability; but if he made any promise to pay, after he might have been exonerated from the want of notice, if he was ignorant of such acts, he would not be legally liable on such promise. Was any promise made? was the first question.

The jury returned a verdict for the defendant; a new trial was moved for on the ground of misdirection by the court as to the law of notice. New trial refused, judgment and appeal.

Gaston for plaintiffs.
Ruffin and Mordecai for defendant.

TAYLOR, C. J. It seems to be agreed that there is no pre- (565) scribed form of notice, but that, as the only reason for requiring it is to give the indorser the earliest opportunity of resorting to the party liable to him, any notice from which he can reasonably collect the bill has been presented and not paid is sufficient. That the notice in this case was calculated to apprise the defendant of the presentment and nonpayment of the draft, and that he could not possibly be misled by it seems to me apparent from the circumtsances of the case. The bill is dated 7 December, 1818, and is accepted in Charleston the 12th of the same month, payable ninety days after sight, consequently it was due, allowing for the three days of grace, 15 March. Now the notice is dated the 15th, and coming from and signed by a notary public, who tells the defendant that payment is expected from him immediately, must have forcibly convinced him that a demand of payment had been made on the acceptor. Every merchant would anxiously watch the progress of a transaction to so large amount, and would know that he could not be looked to for payment, unless a demand had been made on the acceptor. That, in point of fact, the notice did answer the purpose for which it was intended is further apparent from the defendant's application to the bank; for how could they sue the (566) acceptor unless he had refused to pay the money when due?

The authorities generally tend to establish the position that the notice is sufficient if under all circumstances it is sufficient to put the indorser on inquiry; and that is properly a question of fact for the jury to decide. *Prudy v. Seixas;* 2 Johns Cases, 337. I am therefore of opinion that a new trial be granted.

HENDERSON, J. Any person through whose hands a bill or note has passed may give notice to the drawer or his prior indorser of the dishonor of the bill for his protection and indemnity, although the bill or note may not have been by him at that time taken up. And such notice may be given, as is almost universally the case, without his having then in his hands the protest, which may be the evidence of the bill's having been dishonored. It is sufficient (if a protest be necessary) that there be one in fact. Nor has the law prescribed any particular form of notice. All that is required is that the party be apprised of the fact of nonpayment. It may be in words, it may be in writing, it may be read from a memorandum or letter, either written or printed, signed or unsigned, bearing the name of any one or of no one, for the person giving the notice adopts it as his own. The only question in this case, therefore, is, Did the runner of the bank act as the agent or servant of the bank, and was that known to Seawell? Or did he act as an officious intermeddling stranger? If in the first capacity, it was the same as if the bank itself had, in words, given Seawell the same information as was contained in the printed letter, which the runner delivered to him. It should therefore have been left to the jury by the court, whether the runner of the bank acted as the servant or agent of the bank in this particular or as a mere disinterested
(567) stranger. If in the first capacity Seawell could not but regard it as a notice from his indorsee. If in the latter capacity he might look on it as an idle rumor or a malignant falsehood. This view of the case excludes entirely the necessity of the notary's sign manual, and his notarial seal being affixed to the letter for the notice in this case derives its validity as coming from the bank and not from the notary; although by our law it was competent for him also to give notice as the agent of all concerned. Seawell appearing a few days after at the bank and requesting the acceptor to be sued was matter for the consideration of the jury in ascertaining in what character he viewed the runner of the bank to act. The Court has nothing to do with it.

The jury being misdirected, I think a new trial should be granted.

HALL, J., concurred.

PER CURIAM. New trial.

PRACTICE

DOE ON DEMISE OF TE-GAN-TOSSEE v. ROGERS & BROWN.
From Buncombe.

Attachment for Contempt.

Wilson read an affidavit stating that at Buncombe Superior Court, Spring Term, 1823, an action of ejectment was tried between an Indian named Te-gan-tossee and Rogers & Brown; that there was a verdict and judgment for the plaintiff, from which the defendant appealed to this Court, but the transcript of the record never was sent up; that the affiant applied to the clerk of Buncombe Superior Court (who by special permission of the court was defendant's counsel in the suit) to know wherefore the record had not been sent up, to which the (568) clerk replied that he would not send it because the judge had not made a correct statement of the case or words of a similar import. The affiant further swore that at the last Superior Court of Buncombe he applied to the clerk to make out the case for the Supreme Court, but that it was not done; he then delivered to the clerk a letter from one of the plaintiff's counsel, which affiant first read. This letter demanded that the record should be made out without delay, but it has not yet been done.

On this affidavit, *Wilson* moved for a rule on the clerk to show cause wherefore an attachment should not issue against him for a contempt, which the Court granted.

ELLAR v. RAY.—From Ashe.

The execution from a justice binds lands from the time of the levy, and an order of sale subsequently made has relation back to that period.

CASE brought by plaintiff against the defendant, sheriff of Ashe County, to recover from him the sum of $65, which it was alleged the defendant had received on two executions, which had been issued at the instance of the plaintiff against one Brown. The facts were that on 8 July, 1821, two executions issued in favor of the plaintiff against Brown for the sum of $32.50 each, and on the 4th of the following

October these executions were levied on the lands of Brown. On the succeeding day, 5 October, George Bower sued out two executions against Brown for $68 each, which were levied on the same day on
(569) Brown's lands. These several executions were returned at the same term to Ashe County court, orders of sale were made in each, and writs of *venditioni exponas* accordingly issued, all of which came to the defendant's hands at the same time. Defendant, by virtue of the writs, sold the land for the sum of $156. On these facts plaintiff's counsel prayed the court to instruct the jury that as plaintiff's executions were issued and levied before the date of Bower's executions plaintiff was entitled to have his first satisfied out of the sale of the land. This the court declined, and the jury was instructed that the money must be apportioned among the writs of *ven. ex.* A verdict was returned for plaintiff for $40. A new trial was prayed and refused, and from the judgment rendered plaintiff appealed to this Court.

Wilson for plaintiff.

TAYLOR, C. J. The plaintiff claims by virtue of a prior levy of two executions issuing from a justice's judgment against Brown, who claims under a posterior levy. The executions were all returned to the same sessions of the county court, and judgment was then given that the land should be sold. It is impossible to distinguish this case from *Lash v. Gibson,* 5 N. C., 366, in which it was decided that the execution from a justice bound the land from the time of the levy, and that an order of sale subsequently made had relation back to that period. We see no reason to disturb that judgment, believing it to be founded on right principles, and it must govern the decision in this case. There must consequently be a

PER CURIAM. New trial.

Cited: Frost v. Etheridge, 12 N. C., 44; *Parish v. Turner,* 27 N. C., 282.

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(570)

JACOBS v. FARRALL.—From Iredell.

When a defendant admitted the justice of an account, an action on which would have been barred by the statute of limitations, but at the same time produced an account of equal amount against the plaintiff, which he (defendant) alleged was correct, it was *Held,* that all the defendant said must be taken together and left to the jury to believe such part as they might think proper.

JACOBS *v.* FARRALL.

ASSUMPSIT for goods sold and delivered. Pleas, the general issue. payment, set-off, and the statute of limitations. The plaintiff on the trial, to prove his account, produced one Harbin, who swore that he produced to the defendant the account and read over the items to him; and that the defendant admitted its correctness. This admission was made within three years before suit was brought, but at the same time that it was made defendant alleged that he had an account of equal amount against the plaintiff, which he produced, but plaintiff, who was present, denied that it was just. The court instructed the jury that the admission of the defendant, if the witness was believed, was sufficient evidence of an acknowledgment within three years, and that the account produced by the defendant was not proved by his declaration, but must be proved by other evidence. A verdict was returned for the plaintiff for the amount of his account. A new trial was refused and judgment rendered, whereupon defendant appealed.

TAYLOR, C. J. The opinion of the court below is excepted to because the judge separated the admission of the defendant by making that part which acknowledged the plaintiff's account to be just evidence against the defendant, and rejecting that part which asserted he had an account of equal amount against the plaintiff, which (571) the court required the defendant to prove by other evidence.

This opinion is certainly at variance with the whole current of authorities, which uniformly establish the principle that the whole of an admission must be taken together, to the end of discovering the true meaning and sense of the party making it. It is highly reasonable and just that it should be so since, if a man will honestly charge himself with a debt which it could not be proved he owed, he seems entitled to credit when he swears in his own discharge. It was decided so long ago as the time of Hale, "that the confession of a party must be taken whole, and not by parts; as if to prove a debt, it be sworn that he confessed it, but, withal, he said at the same time that he paid it; his confession shall be valid as to the payment as well as that he owed it." Trials per Pais., 363. This rule has uniformly prevailed at law as to the admission of the confession, but it still rests with the jury to decide whether they will believe the whole of it; for the matter of discharge may be rendered so improbable by circumstances as to make it unworthy of credit, while the other part may be sufficient to charge the defendant. He might allege, for example, that he had paid the debt in presence of several witnesses, none of whom, when called upon, would confirm his statement. There is no difference in this respect between courts of law

and equity; but the difference is between pleading and evidence, for if an answer in another cause is introduced by way of *evidence* in Chancery, the whole of it must be read, as it would be in a court of law. But when an answer is *put in issue* the defendant must prove all the facts on which he relies for a discharge, while the plaintiff may avail himself of every admission which he thinks material. So if in a court of law the plea confesses the matter in demand, but avoids it by other circumstances, the proof of avoidance lies on the defendant. (572) 13 Vesey, 47; 2 Ball and Beattie, 382. And the principles which govern the reading an answer in evidence in a court of law apply, though in a different degree, to every other confession; and it may be affirmed that no principle in the law of evidence is more firmly established than that if you rely upon the confession of the party you must take the whole confession together.

PER CURIAM. New trial.

Cited: *Walker v. Fentress,* 18 N. C., 18.

BRITTAIN v. SMITH.—From Buncombe.

A. sold to B. a negro boy defective in his eyes, and it was afterwards agreed between the parties that if A., who was going to Charleston, should bring back with him a negro boy, he would let B. have him, and would take back the defective negro. A. did bring back from Charleston a negro boy, and sold him to a third person. In an action brought by B. against A. on this agreement, it was *Held*, that the delivery of the defective negro was to be an act *concurrent* with the delivery of the one brought from Charleston, and that neither party could sue upon the contract without averring and proving a tender or readiness to perform his part.

ASSUMPSIT, and the declaration contained two counts: the first, framed on a warranty that the sight of a negro boy would not be lost or destroyed by a disease with which they were affected; and the second, on a mutual promise to exchange negroes.

The evidence was that the plaintiff, being about to purchase a negro boy from the defendant, wished him to warrant that a defective eye which the negro had would not become perfectly sightless; and to plaintiff's request defendant replied, "There is no doubt of the eye, in my opinion"; the plaintiff then took the boy and gave $400 for him.

The disease increased upon the eyes of the boy until he became (573) of small value, when the defendant, who was on his way to Charleston, stopped at the plaintiff's house, and there, together with the plaintiff, examined the negro's eyes. Plaintiff asked defendant if he intended to bring negroes back with him from Charleston, and understanding that he did it was agreed between the parties that if defendant brought back a negro boy with him he would let the plaintiff have him and take back the blind one if the boys were of equal size; but should the boy brought from Charleston be the larger, then plaintiff was to pay defendant the difference in value, considering both boys sound. Defendant did bring back another boy and sold him to a third person; plaintiff thereupon brought suit, but made no tender of the defective boy before issuing his writ.

The jury, under the charge of the court, found that there was no warranty as laid in the first count, but that the defendant did assume, as charged in the second, and gave damages for the plaintiff $492. A new trial was moved for and refused, and judgment rendered, whereupon defendant appealed.

Gaston for defendant.
Wilson contra.

TAYLOR, C. J. The contract between these parties, if there be one, was that if the defendant brought back a negro boy with him from Charleston he would let the plaintiff have him in exchange for the defective one. The defendant did bring a boy back; and the question is whether the plaintiff can sue him without averring and proving that he tendered the boy to the defendant, or that he was dis- (575) charged from it by the act of the defendant?

It is evident that the acts to be done respectively by the plaintiff and defendant were mutual, and were to be performed at the same time. The consideration of the defendant's promise was not the plaintiff's promise to deliver the defective negro, but an actual delivery or a legal discharge from it. In such cases it is essential that the plaintiff aver his readiness to perform his part, and either show that the defendant neglected to attend when necessary, or refused to perform his part or discharged the plaintiff from the performance. 2 Saunders, 352, n. 3. The delivery of the defective negro was to be an act concurrent with the delivery of the one brought from Charleston, and neither party could sue upon this contract without averring and proving a tender or readiness to perform his part. It certainly was not the intention of the parties that the defendant should deliver the negro, and trust to the

plaintiff's giving him the other at some future time. The plaintiff is supposed to declare against the defendant without showing that he was ready to perform his part of the agreement, and the defendant answers, "I brought a negro boy from Charleston, and I did not deliver him to you because you do not say that you are ready to deliver the defective negro to me; and if you were not ready I am not bound to deliver mine." If the plaintiff has any excuse for the nonperformance of his part of the contract, it ought regularly to be stated in the declaration, and, for the furtherance of justice, as no declaration is sent up, we are disposed to consider one as filed suited to the truth of the case. The case states that the defendant sold the boy he brought up before the suit was brought; but how long he kept him in possession, or whether he sold him as soon after he came from Charleston as
(576) to render a tender nugatory on the part of the plaintiff, cannot be collected from the case.

It is true that after a verdict the omission of a tender of an excuse for not tendering, may in some cases be aided by the common law intendment that everything may be presumed to have been proved which was necessary to sustain the action, since a verdict will cure a case defectively stated. But in this case such a presumption would be contrary to the fact stated in the case that "the plaintiff did not tender the defective boy to the defendant." Whether he had a legal excuse for not so doing we are not sufficiently informed with facts to enable us to decide. It can only be said that such facts do not appear. There must be a new trial.

HALL and HENDERSON, JJ., concurred.

PER CURIAM. New trial.

GRAVES v. CARTER.—From Caswell.

Parol evidence shall not be received to contradict an averment, in a deed, of the payment of the purchase money.

ASSUMPSIT to recover the balance of the purchase money of a tract of land, which it was alleged plaintiff had sold to defendant. The pleas were the general issue and the acts of 1819, entitled "An act to make void parol contracts for the sale of land and slaves." Upon the trial below the plaintiff proved that he and the defendant had entered into a parol agreement for the sale and purchase of a tract of land, and

that it was agreed between them that the land should be surveyed, that a deed should be then made, and the purchase money paid by delivering to the plaintiff a bond which defendant held against Thomas Haralson, for $600, and interest thereon, and for the balance (577) a note negotiable and payable at the Milton branch of the New Bern Bank. After the land was surveyed the plaintiff made and executed a deed and delivered it, with a plat of the survey, to Bedford Brown, who was, as he alleged, agent of the defendant to receive the deed. The deed remained in Brown's possession for ten or twelve days, when he went to the defendant's house and informed her that the plaintiff was anxious to close the business, and asked her for the bond of Haralson; she gave it to him, and he afterwards delivered it to the plaintiff. Brown at this time did not give her plaintiff's deed, but thought it probable that he mentioned to her the fact of his having it. Some days afterwards the defendant informed Brown that she would not comply with the contract or receive the deed, and it remained in Brown's possession until the trial of the cause.

On the trial plaintiff gave the deed in evidence, and it contained a recital that for and in consideration of the sum of $2,538, to him in hand paid by the defendant, "the receipt whereof is hereby acknowledged," he, the plaintiff, bargained and sold to the defendant the tract of land, etc. For the defendant it was contended: (1) That Bedford Brown could not be constituted an agent to accept the deed except by some writing signed by the defendant. (2) That if his acceptance of the deed did bind the defendant no parol evidence ought to be received to contradict the averment of the deed that the purchase money was paid to the defendant. This objection was overruled by the court, and parol evidence was admitted to show that the balance of the purchase money had not been paid, and the court instructed the jury that if the evidence satisfied them that the defendant had appointed Bedford Brown her agent to accept the deed, though the said appointment were not in writing, she was bound by his acceptance. A verdict was returned for plaintiff, and the case stood before this Court on a rule to show cause wherefore a new trial should not be granted.

Murphy in support of the rule.
Ruffin contra.

TAYLOR, C. J. *Brocket v. Foscue,* 8 N. C., 64, wherein this (580) point occurred, was decided in conformity with the clear rule of law that parol evidence shall not be received to contradict a deed; and however reluctant the court may be to apply a rule which produces

injustice in the particular case, yet the community is benefited upon the whole by an adherence to the law. In addition to the authorities cited in that case may be added *Rountree v. Jacob,* 2 Taunt., 141, where it was held that in an action for money had and received, if the defendant shows a deed of assignment of the money to himself, and a receipt for the consideration money indorsed, it is a good discharge, though there is strong evidence of suspicion that the consideration is falsely recited, and that the money never was paid. Though in a court of equity the vendee, who pays no part of the purchase money, will be considered as a trustee; yet in law the receipt cannot be got over, unless it is merely fraudulent. *Henderson v. Wild,* 2 Campb., 561. There must be a

PER CURIAM. New trial.

Cited: *S. c.,* 12 N. C., 75; *Rice v. Carter,* 33 N. C., 300; *Shaw v. Williams,* 100 N. C., 280.

STATE v. SIMPSON.—From Columbus.

A witness on a trial cannot be asked if he has not, in conversation, stated the facts of the case otherwise than he now deposes.

THIS case came a second time before the court, it not appearing from the certificate sent from this Court that any order or decision had been made here on the motion for a new trial. *S. v. Simpson, ante,* 460, and now another point was stated on the record sent up. On the trial below defendant's counsel asked a witness on the part of the prosecution if she had not held conversations with others, in which she stated the facts otherwise than as she now did. The court below would not permit the witness to answer the question, and this formed the (581) ground of a motion for a new trial.

The Attorney-General for the State.

TAYLOR, C. J. The tendency of the question put to the witness in this case was to invalidate her credibility and to cast a shade upon her moral character, but such evidence ought to be drawn from other sources than the witness himself. It is against first principles to compel a man to accuse himself of a crime, and to enforce an answer to such questions would tend to deprive the citizens of that protection which the law affords, and materially obstruct the administration of justice.

It is clearly established that a witness cannot be compelled to answer any question tending to render him the subject of a criminal accusation; nor to answer interrogations having a direct tendency to subject him to penalties, or having such a connection with them as to form a step towards it. 4 Esp., 117; 16 Vesey, 59.

It was for a long time doubted whether a witness was obliged to admit or answer to any matter which tended to lessen his moral estimation, although it did not involve an indictable offense, but it seems now to be settled that he cannot. 3 Campbell, 519. Thus, a woman prosecuting for a rape cannot be asked whether she is a woman of a dissolute character, nor can other witnesses be called to prove it. The principle of these cases applies to the question before us, which I think the witness was not bound to answer.

The other judges concurred.

PER CURIAM. No error.

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(582)

STATE v. HALE.

A battery being committed on a *slave*, no justification or circumstances attending it being shown, is an indictable offense. But *every* battery on a slave is not indictable, because the person making it may have matter of excuse or justification, which would be no defense for committing a battery on a free person. Each case of this sort must, in a great degree, depend on its own circumstances.

APPEAL from *Daniel, J.*, at CUMBERLAND.

Indictment charging the defendant with having committed an assault on a slave, and with inhumanly beating, wounding, etc.

The jury below found that the defendant committed personal violence on the slave mentioned in the indictment by striking him, and whether this amounted to the offense charged they referred it to the court to decide. Whereupon *Daniel, J.*, rendered judgment for the defendant, and the State, by Mr. Solicitor Troy, appealed.

TAYLOR, C. J. The indictment in this case is for an inhuman assault and battery, but the special verdict states that the defendant struck the slave. The question, therefore, presented to the Court is whether a battery committed on a slave, no justification or circumstances attending it being shown, is an indictable offense.

As there is no positive law decisive of the question a solution of it must be deduced from general principles, from reasonings founded on

the common law, adapted to the existing condition and circumstances of our society, and indicating that result which is best adapted to general expedience. Presumptive evidence of what this is arises in some degree from usage, of which the Legislature must have been long
(583) since apprised by the repeated conviction and punishment of persons charged with this offense.

It would be a subject of regret to every thinking person if courts of justice were restrained by any austere rule of judicature from keeping pace with the march of benignant policy and provident humanity, which for many years has characterized every legislative act relative to the protection of slaves, and which Christianity, by the mild diffusion of its light and influence has contributed to promote, and even domestic safety and interest equally enjoin.

The wisdom of this course of legislation has not exhausted itself on the specific objects to which it was directed, but has produced wider and happier consequences in securing to this class of persons milder treatment and more attention to their safety; for the very circumstance of their being brought within the pale of legal protection has had a corresponding influence upon the tone of public feeling towards them, has rendered them of more value to their masters, and suppressed many outrages, which were before but too frequent.

It is, however, objected in this case that no offense has been committed, and the indictment is not sustainable, because the person assaulted is a slave, who is not protected by the general criminal law of the State; but that, as the property of an individual, the owner may be redressed by a civil action.

But though neither the common law, nor any other code yet devised by man, could foresee and specify every case that might arise, and thus supersede the use of reason in the ordinary affairs of life, yet it furnishes the principles of justice adapted to every state and condition of society. It contains general rules fitted to meet the diversified relations and various conditions of social man. Many of the most important of these rules are not set down in any statute or ordinance, but depend upon common law for their support; of this description is the
(584) rule that breaking the public peace is an offense, and punishable by fine and imprisonment.

An assault and battery is not indictable in any case to redress the private injury, for that is to be effected by a civil action; but because the offense is injurious to the citizens at large by its breach of the peace, by the terror and alarm it excites, by the disturbance of that social order which it is the primary object of the law to maintain, and by the contagious example of crimes.

The instinct of a slave may be, and generally is, tamed into subservience to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission, for he knows the extent of the dominion assumed over him, and that the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights and to prompt the slave to a resistance, often momentarily successful, sometimes fatally so.

The public peace is thus broken as much as if a free man had been beaten, for the party of the aggressor is always the strongest, and such contests usually terminate by overpowering the slave and inflicting on him a severe chastisement, without regard to the original cause of the conflict. There is consequently as much reason for making such offenses indidctable as if a white man had been the victim.

A wanton injury committed on a slave is a great provocation to the owner, awakens his resentment, and has a direct tendency to a breach of the peace by inciting him to seek immediate vengeance. If resented in the heat of blood it would probably extenuate a homicide to manslaughter upon the same principle with the case stated by Lord Hale, that if A., riding on the road, B. had whipped his horse out of the track, and then A. had alighted and killed B.

These offenses are usually committed by men of dissolute (585) habits, hanging loose upon society, who, being repelled from association with well disposed citizens, take refuge in the company of colored persons and slaves, whom they deprave by their example, embolden by their familiarity, and then beat, under the expectation that a slave dare not resent a blow from a white man.

If such offenses may be committed with impunity the public peace will not only be rendered extremely insecure, but the value of slave property must be much impaired, for the offenders can seldom make any reparation in damages.

Nor is it necessary in any case that a person who has received an injury, real or imaginary, from a slave should carve out his own justice, for the law has made ample and summary provision for the punishment of all trivial offenses committed by slaves, by carrying them before a justice who is authorized to pass sentence for their being publicly whipped. 1 Rev. Code, 448. This provision, while it excludes the necessity of private vengeance, would seem to forbid its legality, since it effectually protects all persons from the insolence of slaves, even where their masters are unwilling to correct them upon complaint being made.

The common law has often been called into efficient operation for the punishment of public cruelty inflicted upon animals, for needless and

wanton barbarity exercised even by masters upon their slaves, and for various violations of decency, morals, and comfort. Reason and analogy seem to require that a human being, although the subject of property, should be so far protected as the public might be injured through him.

For all purposes necessary to enforce the obedience of the slave, and to render him useful as property, the law secures to the master a complete authority over him, and it will not lightly interfere with the relation thus established. It is a more effectual guarantee of his right of property when the slave is protected from wanton abuse from (586) those who have no power over him; for it cannot be disputed that a slave is rendered less capable of performing his master's service when he finds himself exposed by the law to the capricious violence of every turbulent man in the community.

Mitigated as slavery is by the humanity of our laws, the refinement of manners, and by public opinion, which revolts at every instance of cruelty towards them, it would be an anomaly in the system of police which affects them if the offense stated in the verdict were not indictable. At the same time it is undeniable that such offense must be considered with a view to the actual condition of society, and the difference between a white man and a slave, securing the first from injury and insult and the other from needless violence and outrage. From this difference it arises that many circumstances which would not constitute a legal provocation for a battery committed by one white man on another would justify it if committed on a slave, provided the battery were not excessive. It is impossible to draw the line with precision or lay down the rule in the abstract; but, as was said in *Tacket's case,* the circumstances must be judged of by the court and jury with a due regard to the habits and feelings of society. But where no justification is shown, as in this case, I am of opinion the indictment is maintainable.

HALL, J. I concur in the opinion given. I think it would be highly improper that every assault and battery upon a slave should be considered an indictable offense, because the person making it might have matter of excuse or justification on his side which could not be used as a defense for committing an assault and battery upon a free person. But where an assault and battery is committed upon a slave without cause, lawful excuse or without sufficient provocation, I think it amounts to an indictable offense. Much depends upon the circumstances (587) of the case when it happens; these circumstances are not set

forth in this case, and I think it material that they should appear. I therefore think the judgment of the court below should be reversed, and a new trial granted for that purpose.

HENDERSON, J., concurred.

PER CURIAM. Reversed.

Cited: *S. v. Mann,* 13 N. C., 263, 264; *S. v. Samuel,* 19 N. C., 184; *S. v. Jarrott,* 23 N. C., 83; *S. v. Caesar,* 31 N. C., 403, 410, 413; *S. v. Kennedy,* 169 N. C., 294.

IN EQUITY

DANIEL v. McRAE.—From Wake.

Indorsers on accommodation paper for the benefit of a third person, where there is no special agreement between such indorsers, and where neither is benefited, are to be considered *cosureties;* and, therefore, where A. and B. became at several times indorsers on a note made for the benefit of C., on which C. by discounting at a bank received the money, it was *Held*, that B., against whom the bank recovered, and who was the last indorser, was entitled to call upon A. for one-half only of the sum recovered by the bank; and that every indorsement is but *prima facie* evidence of the purchase of a note, and the contrary may be shown.

THE complaint as set forth in the bill was that the complainant had indorsed for the accommodation of one Lucas a promissory note, negotiable and payable at the office of the Bank of the United States, in Fayetteville, for about the sum of $900; that after such indorsement he redelivered the paper to Lucas, who applied to the defendant to indorse the same, as the rules of the bank required two indorsers before discounting any paper. The bill stated that McRae indorsed at the request and instance of Lucas alone, and not of the complainant, and the paper was discounted at bank for the sole benefit of Lucas. The note, when it came to maturity, was protested for nonpayment, and was paid and satisfied by McRae, who then commenced suit upon it against the complainant, contending that, as last indorser, he had a remedy gainst complainant as a prior indorser for the full mount of the note. The complainant being willing to do what he believed equity required, paid to the agent of McRae one-half of the principal and interest then due on the note, and it was agreed between the attorneys of the parties respectively that the suit should proceed to try the question of complainant's liability for more than one-half of the amount of the note, and, further, that to avoid unnecessary expense, the
(591) suit should abide the determination of one then pending in the Supreme Court, which was said to be similar in its nature; that afterwards, however, and notwithstanding this agreement, a judgment was rendered in the suit against the complainant for the full amount of the note at a time when neither of the attorneys who had entered into the agreement before stated were in court; that on this judgment (of the existence of which complainant was ignorant until after the adjournment of the court in which it was rendered) an execution had issued. The complainant further stated in his bill that he had pro-

cured an assignment of a part of the property of Lucas to secure himself in his indorsement that he doubted his title thereto, that he was ignorant of the value thereof, and that he always had been and was yet willing to give the defendant a full share of the benefit of such assignment. The bill prayed an injunction and relief generally.

The answer affirmed that defendant indorsed the note upon the faith of the responsibility of the complainant's prior indorsement, and positively denied any understanding or agreement between himself and the complainant that they should become bound as cosureties for Lucas on the note. It admitted that judgment was obtained against the complainant by defendant for the full amount of the note, and stated that since the judgment the execution had been credited by the amount of one-half of the note, which complainant had paid. It denied that any undue advantage was taken of complainant in obtaining the judgment, and also that any agreement was ever made, as set forth, that the suit should abide the decision of the Supreme Court on a similar question.

It was further insisted that the complainant had complete remedy at law.

Ruffin for complainant.
Seawell contra. (600)
Curia advisari vult.

HALL, J. The facts in this case are but few. The question is whether Daniel is bound to pay the full amount which the note given by Lucas to him calls for or only a moiety of that sum. I think the same principles should govern the case as if it was decided in a court of law, because the reason why this court assumes jurisdiction is that Daniel, owing to particular circumstances, did not make a defense at law.

When the note was given to Daniel there was no obligation on Lucas to pay it, because it was given on no consideration; the same remark may be made when it was indorsed by Daniel to McRae. McRae could not have effected a recovery against Daniel, because he had given nothing for it; nor was there any liability upon any person, after the indorsement, for accommodation made by McRae, until it was accepted by the bank, and by them discounted. At that time Lucas became absolutely bound to pay it, and both McRae and Daniel became securities for him. Lucas became bound because he received the money from the bank; McRae and Daniel became bound as his securities because he received it by their means and at their request. When McRae paid the debt to the bank he paid it as the security of Lucas. Had he pur-

chased the note from Daniel for value, and then indorsed it to the bank for value, and had either he or Lucas, by his consent, received the money raised upon it, and then Lucas had failed, and he had (601) been obliged to pay the money due to the bank, there could be no doubt but he could recover the full amount against Daniel. There would be the same result if he had paid for the note to Lucas, by the consent of Daniel. In either of these cases he would have had a remedy upon Daniel's indorsement for full indemnity, and this remedy would be authorized by the well known rules of law established in the mercantile world, with regard to bills of exchange and negotiable papers. I admit that the form of the note and the indorsements on it, without going further, would lead to the same remedy. Every indorsement is a *prima facie* evidence of a purchase of the note; but the contrary may be shown. In the present case it appears that McRae gave nothing for the note, and when he indorsed it he stood in the same situation with Daniel; it never had belonged to either of them when the bank discounted it and paid the money to Lucas; it was, in their hands, evidence of a debt both against the maker and the indorsers, and they had their remedy accordingly. If either indorser paid it, he had a remedy against Lucas for the full amount, but against the other indorser for a moiety only, and that upon a principle of justice and equity that, as they both stood in the same situation as cosureties, there could be no reason why one should be compelled to bear a greater burden than the other; their indorsements were both gratuitous, and on that account when made, *a prius* or *posterius,* gave no rule of liability.

It may be further observed that had not McRae or some other person indorsed the note Daniel's liability would have never happened, for the bank would not receive it without another indorser.

It is said that in a case similar to the present the court, in giving judgment for the plaintiff, relied upon the cases of *Smith v. Knox,* 3 Esp., 46, and *Charles v. Marsden,* 1 Taunt., 224. I allude to *Brown v. Mott,* 7 Johnson, 361. In both those cases the plaintiffs, the indorsees, were purchasers of the bill for *valuable consideration;* that was not the case here. McRae paid nothing for the note until he paid the debt due the bank as security in consequence of his indorsement for the accommodation of Lucas.

There can be no doubt but that the transaction may be looked at as it really happened. 15 East, 222; *Wright v. Latham,* 7 N. C., 298.

HENDERSON, J. This bill presents the question, Is McRae the *cosurety* of Daniel for Lucas or supplemental only? If he is the former Daniel is entitled to relief; if the latter he is not. Cosureties are those

who have assumed the same obligation, equal in all their liabilities; supplemental sureties are those who come in aid of the former. We are not precluded by the nature of the indorsement from examining the transaction as it really is, it affording only *prima facie* evidence of the nature and order of the liabilities of the different persons whose names appear upon the note; to prove this, authorities need not be cited. The discussions which daily arise in our courts of justice upon accommodation notes and bills prove sufficiently that the mercantile order of liability is only *prima facie* evidence, and, in fact, may be even inverted, as was declared in 15 East, 216, where a subsequent indorsee was held liable to a prior indorser (not indeed on the bill), it being shown that it was discounted for his benefit, which fact never could have appeared to the Court if the note and indorsements were conclusive upon the parties. I am at a loss to discover how it could ever have been doubted, for the admission of such evidence contradicts no express written agreement, but repels an implication only. The note in the hands of Daniel created no liability in Lucas, for Daniel had given nothing for it. The same may be said when it was in the hands of McRae, to whom it was delivered by Lucas, the maker, (603) which is evidence that it was made for Lucas's accommodation, and was not an evidence of a debt from Lucas to Daniel; for if so why was it left in the hands of Lucas, the maker? By this fact McRae was informed that the note was made for Lucas's accommodation. To enable him to raise money, he put his name there at Lucas's request and for Lucas's benefit. These are the facts of the case, and from them we will endeavor to ascertain the nature and extent of McRae's engagement. Every indorsement of a note is drawing a bill of exchange. It directs the maker of the note to pay its amount to the indorsee, and if the maker gives value for it, it imposes upon the indorser the obligation of paying it himself if the maker should not do so upon application, and he, the indorser, should be duly notified thereof. It imposes *no obligation* on the indorsee to apply to a prior indorser before he calls on a subsequent one, but he may do so if he thinks proper; for each indorser may be considered by him as drawing the bill in his favor, and he is substituted to all their rights; but he is called on to make proof of his endeavors to procure payment from the maker of the note, or acceptor of the bill of exchange only, and due notice thereof to such indorsee as he may think proper to call before the Court. Whether he has applied or given notice to any other indorser is entirely unimportant in that trial. The bank therefore recovered of McRae, regardless of what steps they might have taken against Daniel. Their

obligation was to use due diligence as regarded Lucas. The obligations of Daniel and McRae were precisely the same, equal in every respect to each other. They are therefore cosureties, and the one not supplemental to the other. It is true that an indorsee for value, when he indorses the note or bill over, has all his prior indorsers for his indemnity; and had McRae discounted this note by paying Lucas the money (for it is not necessary that the money should be paid (604) to his indorser; it is sufficient that it is paid to any one at his request) when he afterwards paid the money, and took up the bill from the bank, he would have been remitted to his former situation, and might then have looked to Daniel for an indemnity. The money which McRae paid to the bank was in satisfaction of his promise that he would pay if Lucas did not, and not as a purchaser of the note. That cosureties may be, by different instruments executed at different times, and without communication or mutual understanding to that effect is shown by *Deering v. Earl of Wilchelsea,* 2 Bos. & Pul., 270, and *Craythorn v. Sir John Swinburn,* 14 Vesey. In the latter case Lord Eldon refused relief, not because the parties were bound by different instruments, but because one surety was supplemental to the other. In which case, also, it is admitted that contribution arises, not upon contract, but upon the principle of equity that equality is equity; that is, that it was originally so, however it may be at present, since adjudications have been made upon the subject because men are presumed to act in reference to the law as expounded.

I think these principles are plainly deducible from the English authorities, although I can find none of *them* analogous to the present case. *Brown v. Maffey,* 15 East, 216, may on first view seem to be analogous. But I think it essentially differs. In that case a note was given to the payee to raise money to fulfill some obligation or promise which he was under or then undertook to the maker. The note was then delivered to the payee, and by him indorsed to the plaintiff without consideration, and by the plaintiff indorsed at the request and for the accommodation of the *payee.* The plaintiff was afterwards compelled to take it up, and *he* brought an action against the maker. The note, in that case was in possession of the person to whom it was payable, and this by the consent of the maker. The payee was thereby enabled to gain credit and cause others to incur liabilities for (605) him upon the faith of the note; and this by the consent of the defendant, who thereby gave evidence to the world that the payee had its amount in his hands, and that he would pay the same to his indorsee. Not so in the present case. For Lucas, the maker, retained

the note even after Daniel's indorsement, which was the most satisfactory evidence that it was made for his accommodation, and was not evidence of a real debt due from him to Daniel. All the circumstances when taken together speak the truth. *There* was no *danger* of *imposition.* Besides, it appears that the note in the case above referred to was a note for the sole benefit and accommodation of the payee. Another observation might be made on the case. The defendant succeeded in his defense *on other grounds,* and it was a matter of not much moment *how* he did so. I admit that *Brown v. Mott,* 7 Johns., 361, is an authority in point against the complainant. I have examined that case with respect and attenton, which is due to everything that comes from that court, and I do not think that the authorities on which it is professedly bottomed support it.

TAYLOR, C. J., dissented.

PER CURIAM. Judgment accordingly.

Cited: Hatcher v. McMorine, 14 N. C., 229; *Richards v. Simms,* 18 N. C., 49, 50, 51; *Dawson v. Pettway,* 20 N. C., 533; *Southerland v. Fremont,* 107 N. C., 569; *Atwater v. Farthing,* 118 N. C., 388; *Smith v. Carr,* 128 N. C., 152; *Shuford v. Cook,* 164 N. C., 50.

PEAGRAM v. KING & KING.—From Cumberland.

A bill was filed to set aside a verdict in detinue obtained in Chatham Superior Court by perjury, and to obtain a new trial, on the ground that the means of proving the perjury were discovered too late to obtain redress at law. These facts being affirmed by a jury here, this Court decrees a new trial, and directs it to be had in the county where the first trial was had, prohibiting both parties from taking advantage of the *time* which has elapsed since the former trial.

THIS bill having been retained at a former term (*ante,* 295) (606) several issues were ordered to be submitted to a jury, from whose finding it appeared that the verdict in the suit mentioned in the bill was founded on the false testimony of Joseph Jenks, who was corrupted by a bribe to swear falsely; that Jenks in his last illness declared that he had sworn falsely, and that complainant had no knowedge of this declaration, or of the means of proving the same before or during the term in which the suit was finally determined. And at this term

Ruffin opposed the making of any decree.
Gaston contra.

TAYLOR, C. J. The object of this bill is to set aside a verdict at law, obtained by fraud and perjury, and to procure a new trial of the issue, whether a gift was made or not by R. Pegram to the defendants. The general allegations in the bill are that Joseph Jenks, the witness by whose testimony alone the gift was established, perjured himself in the oath he took, incited by the promise of a bribe from the defendant, Leedy King; and that he declared in his last illness that he had (611) done so, betraying at the same time a deep sentiment of remorse at the recollection of his atrocity. That though a rumor to that effect was floating about, and had actually reached the ears of the complainant, in consequence of which he moved for a new trial, yet he was unable, with the utmost diligence, to ascertain any witness by whom he could prove it, and therefore relinquished the motion; but that afterwards, and too late to obtain redress at law, he discovered witnesses by whom it could be proved, and in consequence lost no time in applying to a court of equity for relief. The answer denies the allegations in the bill, but they have all been affirmed by the jury upon issues submitted to them; and upon a review and reconsideration of the evidence I see no reason to be dissatisfied with the verdict. It then results that the complainant has been deprived of a valuable property by a judgment at law, procured by fraud, perjury, and corruption, and the inquiry now is whether he can be relieved in this Court.

The general doctrine is that where a verdict has been obtained by fraud a court of equity will interfere by granting a new trial at law, but the power being one which may be abused to the purposes of injustice has always been exercised with extreme caution, and never extended to any case where the party applying has been guilty of any *laches,* and might have made use of the evidence at law, lest the Court should thereby encourage negligence or minister to the litigious passions of men. But where a judgment is obtained at law upon a forged bond, and the defendant was surprised in consequence of all the pretended witnesses to the bond being dead, a new trial was granted. 2 Vern., 240.

It is, in general, true both at law and in equity that a new trial will not be granted on the ground of newly discovered evidence, when it goes merely to impeach the testimony of a witness at a former trial, nor to let in cumulative evidence as to matter which was prin- (612) cipally controverted at the former trial; but that is very different from newly discovered evidence which goes utterly to destroy

the former testimony and cut it up by the root by showing that it was founded in perjury. Accordingly, both courts furnish instances of a new trial being granted for the latter cause.

A new trial was granted upon the ground that the testimony was a fiction, supported by perjury, which the defendant could not be prepared to answer; and that circumstances had been discovered since the trial to detect the iniquity. 3 Burr., 1772. And in a court of equity if new evidence is discovered which could not possibly be made use of in the first trial, the court will interfere. 1 Ch. Cas., 23. No evidence could have been given of the dying declarations of Jenks, wrung from him in an agony of remorse, when he had no motive to misrepresent; for the complainant shows (as far as such a fact can be affirmatively established) that he knew not by whom to prove it until after the trial, when *Peter Avent* gave him the information. It is admitted, Prec. in Chan., 193, that if a witness on whose testimony a verdict has been given was convicted of perjury a new trial may be granted. The death of Jenks before the complainant knew by what witness his declaration could be shown rendered a prosecution impossible, and brings this case within the reason of the decision.

The courts of chancery in this State are invested with all the powers and authorities rightfully incident to such courts, and may therefore direct a new trial at law in the county where the first trial was had. The direction in the act of Assembly relative to the trial of issues of fact is confined to such as arise in the course of a cause then on trial; as in this case, the facts which the court desired to be found, before they could judge of the equity arising from them, have been established by a jury here. The conclusion of law which the court pronounces is that a new trial be had in the court whence the case at law (613) came; and upon the trial the parties on either side will be at liberty to go into any legal evidence which tends to establish or destroy the gift. But the delays which have occurred in the cause, arising chiefly from the organization of the courts of equity, render it fit that neither party should avail himself of the time which has elapsed since the judgment below, and this must be part of the decree.

PER CURIAM. Decree accordingly.

Cited: Pemberton v. Kirk, 39 N. C., 180; *Dyche v. Patton,* 56 N. C., 334; *S. v. Turner,* 143 N. C., 649; *Moore v. Gulley,* 144 N. C., 85; *Mottu v. Davis,* 153 N. C., 163.

TURNER, ADMINISTRATOR, ETC., v. WILLIAM WHITTED & LEVI WHITTED.—From Orange.

1. Testator devised a part of his estate to his wife and his daughter Anne, and in case his wife should have another child or be with child at his death, a portion of the same to such child; "and if he should have no child at the time of his decease, *or* his wife should not be with child, *or* in case he should at his death have a child or children, and such child or children die before arriving at the age of 21 years, or without heirs lawfully begotten, then" over. *Held*, that the disjunctive *or* shall be construed *and*, to effect the intent of the testator, and that such limitation is not too remote.

2. The testator further, in the same clause of his will, adds, in disposing of the property: "given as aforesaid to his child or children; *if no such child or children*, to be equally divided between his brothers W. and L." etc.

3. Construed, that this is a limitation upon the contingency of the birth of a posthumous child, and the existence or nonexistence of his daughter Anne at the time of his death; and does not await all the limitations enumerated in the first part of the clause.

4. A direction in testator's will that "his executors shall use all lawful means to have his slaves set free, either by the General Assembly or other competent authority," held to be void, and they consequently result to the next of kin.

5 It is a general rule with respect to the profits of real estate that where the fee is vested in a devisee, subject to be divested upon a contingency, the profits which accrue from the death of testator until the divesting of the estate belong to administrator of devisee.

(614) THE bill stated that one John Whitted died seized and possessed of a large real and personal estate, and by his will, bearing date 13 March, 1804, devised and bequeathed to Susanna, his then wife, a part of his real estate, three negroes, together with one-half of the money on hand, and all the rest of his personal property, his negroes excepted, reserving also sundry small pecuniary legacies, afterwards mentioned in the will. That by the will he also gave to his daughter Anne all the residue of his lands and houses and six negroes, viz., Jack, Hetty, Duncan, James, Stephen, and Betty, together with one-half of the money on hand and one-half of the rest of his personal property, subject to certain small pecuniary legacies and reservations in the will expressed; and thereby gave, in case his wife should have another child before his death or prove with child at the time of his death, to such child certain parts of the land and personal property before given to his daughter Anne; but if either such chid or Anne should die before

his or her arrival at full age or without heirs lawfully begotten, the part and share so given to the one so dying should go to the survivor; and by the will the testator further directed that a certain mulatto slave named Fanny should be emancipated and set free, and that his executors should use all lawful means to have her set free, either by the General Assembly or other competent authority, and that his estate should defray the necessary expense, but that his "executors should not, on any pretence whatever, ever suffer the said Fanny to be removed out of Orange County"; and by the will testator further bequeathed: "If he should have no child at the time of his decease or his wife should not be with child, or in case he should at his death have a child or children, and such child or children die before arriving at the age of twenty-one years, or without heirs lawfully begotten, (615) that then and in that case his slaves Duncan, James, Stephen, and Betty, aforesaid, should be emancipated and set free in the same manner and under the same rules as before mentioned concerning Fanny"; and the testator further devised and bequeathed that "in case he should die *without a child,* or that his wife should not be with child at the time of his death, or in case of the *death of his daughter Anne* before she arrived at full age, or without heirs lawfully begotten, he gave to William Whitten, his brother, his house and lot No. 9, in the town of Hillsboro, and his negro Jack; and to his brother Levi Whitted he gave two tracts of land in Orange County, one purchased from James Hogg, the other from F. Dunn." And by his will testator further gave "that part of the money on bond debts due to him, and money arising from the sale of his personal property, given as aforesaid to his child or children, *if no such child or children,* to be equally divided between his brothers William and Levi, and all the interest of his lands in the western country also to his said brothers to be equally divided between them; and the negro woman Hetty to his brother Levi: *Provided* that each of them, the said William and Levi, pay unto my father, William Whitted, senior, in trust, for the use and support of Samuel Bigelow, the sum of £25, and the further sum of £25 in trust for the above mentioned mulatto child Fanny, to be paid to her when she shall arrive at full age; and, *Provided further,* that they, the said William and Levi, pay to Mary Bird, Hannah Harris, Elizabeth Holden, and Susannah Thompson the sum of £110 each, that is to say, the said William to pay £55 to each of them and the said Levi to pay £55 to each of them, *within the term of two years after my decease;* and in case of failure to pay the legacies aforesaid to my father and sisters within the time limited, then the property willed to the said Wil-

(616) liam and Levi shall be equally divided between them, the said William and Levi, and my father, for the purposes aforesaid, and my sisters, Mary Bird, Hannah Harris, Elizabeth Holden, and Susannah Thompson, share and share alike."

The testator further directed that his executors, for the use and benefit of his child or children, should lend into good hands on interest the money on hand, and take bonds for unsettled debts due to him, and also lend out as aforesaid all the rents received for houses and lands and negro hire, except so much as might be necessary for the support of his child or children, and to have the interest regularly paid and converted into principal once a year, and also immediately collect all unsafe and doubtful debts, and lend the monies collected on interest as aforesaid. The defendants, together with William Norwood, Esq., were left executors, but the defendants alone qualified and took into possession the personal estate, and also took the care and nurture of Anne, who was then an infant, and received the rents and profits of the real estate devised by testator to his child.

The bill further stated that at the time of making the will, and at the time of testator's death, he had no child but Anne, and that his wife, Susannah, was not at the time of making the will, nor at any time afterwards, enceinte of another child by the testator. That complainant, after the death of Jehu Whitted, intermarried with Susannah, the widow, who afterwards died intestate, and the complainant became her administrator.

The bill further stated that Anne died an infant, intestate, without issue of her body or having ever had any, and letters of administration on her estate were also granted to complainant, by virtue of which administrations complainant claimed to be entitled to all the personal estate bequeathed to Susannah and Anne, with the profits thereof, and the rents and profits of the land.

(617) The bill further stated that the defendants, for the purpose of emancipating said slaves, threatened to remove them to some state or country beyond the jurisdiction of the court, and prayed that they might be enjoined from removing the slaves, and that they might give security for their forthcoming at the order of the court, or otherwise that the slaves should be delivered to the sheriff for safekeeping; and also prayed the writ of subpœna. The defendants in their answer admitted the death of Jehu Whitted, and that he left a will containing the devises and bequests set forth in the bill; that they had qualified as executors to said will; they further admitted the intermarriage of complainant with Susannah, the widow, her subsequent

death as well as that of Anne, as charged in the bill, and that administration on both estates had been committed to complainant; that Susannah never had any child by the testator but Anne; that as executors they took possession of the personal estate of their testator, and were now and at all times ready to account. Further answering, they said that long since they had settled with complainant for Susannah's share of the estate, and annexed as part of their answer their general account of the estate of their testator, as also an account of so much of the estate as was given to Anne; an account of the rents of real estate and hire of negroes. The answer further stated that the defendant Levi Whitted was appointed by Orange County court guardian to Anne, and as such took into his hands or became responsible for her estate; and the account of the guardianship up to the court after Anne's death made part of the answer. The defendant admitted that the girl, Fanny, had been emancipated, as directed by the testator; and as to the slaves Duncan, James, Stephen, and Betty, defendants submitted whether the event had not occurred which, according to the testator's directions, had placed these negroes in the hands of the defendants, in trust, to use their best endeavors to have them emancipated. Defendants further insisted that the legal estate was in them, (618) and that neither the next of kin of Anne nor her administrator in their behalf had any right to claim them now, or under any circumstances which might hereafter occur. As to the negro Jack the answer submitted whether he did not under the will belong to the defendant, William Whitted.

As to the profits of Anne's estate, defendants submitted whether they did not belong to them, and go over with the estate according to the limitations of the will, and as Anne was dead without issue, they submitted whether the personal estate of Anne did not under the will belong to them, and as to Hetty it was insisted that she belonged to the defendant Levi.

TAYLOR, C. J. The limitations over of the real and personal property to the testator's brothers, in the two first sentences of the eleventh clause of the will, are certainly valid if the disjunctive word *or* is to be construed as the copulative *and*. Many cases have established the propriety of so construing it in wills of this kind, otherwise the property would be carried over, if the first devisee died under the age of twenty-one, though he had left issue, when the intent of the devisor was that both events should happen, the dying under twenty-one *and* without issue, before the estate should go over. So that at the age of twenty-one it was intended that the daughter should have the power of dis-

posing of the estate absolutely, and of making what provision she pleased for her issue, if she should have any; but in the event of her dying before twenty-one that her issue should not be deprived of the inheritance. Therefore the limitations over are not upon an indefinite failure of issue, but upon such events as must happen, if ever, within the time prescribed by law. To the cases quoted may be added the following decisions in this State. *Dickinson v. Jordan,* 5 N. C.,
(619) 380; *Lindsey v. Burfoot, ib.,* 494; *Arrington v. Alston,* 4 N. C., 727; *s. c.* 6 N. C., 321.

The construction of that part of this clause which disposes of the money on hand, debts due, money arising from the sale of property, and the interest of the testator's land in Tennessee, is attended with more difficulty, owing to the introduction of the words, "if no such child or children." Nor should I feel any insuperable obstacle to connect these expressions with all the contingencies so distinctly enumerated at the beginning of the clause, were it not for the provisions at the end. For the pronoun *such,* being a word of reference, would grammatically relate to the child or children, which had been previously described, viz., living at the testator's death or surviving him and dying without issue and under twenty-one years of age. But the supposition that the testator intended his brothers to have this property in the event of his daughter dying without issue under twenty-one is rendered inadmissible by his directing his brothers to pay his sisters one hundred and ten pounds each within two years after his death; and on their failure to do so admitting his father and sisters to participate with his brothers equally in the property. Such a provision would be rational and perfectly consistent in the event of the testator's dying without any child, for then his brothers would become immediately entitled to the property; but to compel them to pay the money at that time or to give them and the others the property at that time, in case of failure, when his daughter might live for years afterwards, and it remained in uncertainty whether she would die under age and without issue, was a provision which could scarcely have entered into the mind of any man. The other legacies contained in the proviso are alike inconsistent with the belief that this part of the bequest was to await all the limitations enumerated in the beginning of the clause. The provision for the support of Bigelow was payable as soon as any legacies can be
(620) demanded, at the end of two years; the sum to be paid to Fanny was due at the age of twenty-one, and might become due while the daughter Anne was yet alive, who might after all have left issue and died under twenty-one, after the lapse of a long period from the time

the legacy was payable; or might have attained the age of twenty-one, and thereby have defeated the limitation over.

The consequence of this construction is, that of the property left to his daughter Anne part of it is limited over to his brothers upon any one of several contingencies happening; whereas, the other part, viz., money, debts, the proceeds of the sales, and the western lands, are given to them only upon one contingency, viz., "if he has no such child or children," and his daughter Anne, having survived him, the event has not occurred upon which they were to take. If this is the necessary construction of the will it must prevail, although a good reason cannot be given why the testator should have made such an arrangement of his property. If I were making a will for him I should probably have made all the limitations dependent on the same events. But on the other hand he might have had some reason for so doing, and he had a right to dispose of his property as he pleased. Now, if he designed to make them different he could have used no expressions more apt for the purpose than he has done. He enumerates all the contingencies when he gives the house and lot and Jack to William; he repeats them when he gives the two tracts of land to Levi; and if he had taken no further notice of them the subsequent devises in the same clause would have been subject to them. The introduction of part of them only when he disposes of the residue of the property may therefore have been designed. It would be a dangerous latitude of construction to say that the testator did not mean what he said unless we could clearly collect it from the whole will, more especially as such a conclusion would render absurd and senseless all the provisos (621) which are dependent on the other events.

The direction in the tenth clause as to the emancipation of the slaves is void, according to the decision in *Craven's case,* they consequently result to the next of kin of the testator.

With respect to the profits of the real estate there is nothing in the will to take them out of the operation of the general rule; that as the fee was vested in Anne, subject to be divested on her dying under age and unmarried, the profits which accrued from the death of the testator until her death belong to her administrator.

HALL, J. The testator has in the first clauses of his will given his estate to his wife, his daughter Anne, and to his posthumous child, in case any such should be born.

In the 11th clause he directs as to *part* of the property before given away that in case he should die without child, or that his wife should not be with child at the time of his decease, or in case of the death of

his daughter Anne before she arrives at full age, or without heirs lawfully begotten, then he gives to his brothers Levi and William such property. There is no doubt entertained but that this is a good limitation. Then, as to another part of his estate, also before given away, namely, money on hand, debts due to him, money arising from sales of his personal property *given to my child or children. If no such child or children, then* to be divided between my brothers William and Levi. In the former limitation he uses very different words from those used in the latter; he could not designate the child that his wife might be enceinte of at his death by any particular name; he designates Anne by the term child, and her and the child that might be born by the term children. If he had had no such child as Anne, and had given
(622) over the property upon the contingency of his not having a posthumous child, it would be a natural expression to say if no such child then, etc. In such case the time was fixed when the event might be looked for on which the contingency depended. No doubt if there had been no such child in expectancy, having a daughter Anne, he might and probably would have used other words than those he has used, namely, *if no such child,* because the child he was speaking of was then in existence. But I think he placed the contingency of the property going over upon the birth of a posthumous child, which must happen, if at all, shortly after his death, and the existence or nonexistence of Anne at the time of his death; and as she survived her father, I think the property vested in her. I cannot bring myself to a construction that would refer the words *if no such child or children* to the preceding devise, where words of limitation of a very different import are used in a devise of other property. The legacies afterwards given to be paid in two years harmonize with this construction, but would not suit one by which the limitation in this case would be held good. I therefore concur in the opinion given.

I concur also in the opinion given as to the other points made in this case.

HENDERSON, J., concurs.

PER CURIAM. Decree accordingly.

Cited: Albritton v. Sutton, 31 N. C., 390; *Bennehan v. Norwood,* 40 N. C., 108; *Cheek v. Walker,* 138 N. C., 448; *Ham v. Ham,* 168 N. C., 491.

(623)

JONES AND OTHERS v. ZOLLICOFFER.—From Halifax.

1. A testator by his will gave to his wife the use of certain slaves for her life, and after her death the slaves were directed to be divided among testator's children; the wife and one of the testator's children were made executors; the wife took the property as legatee, and, for her own benefit, sold one of the slaves, and three of the children joined in the conveyance with her; the rest of the legatees filed a bill in 1794 against the purchaser under the widow, and the court dismissed the bill. In 1811, on a bill of review filed, the then Supreme Court reversed the decree dismissing the bill, and on a claim now set up by the purchaser to be substituted to the rights of his vendors to such share as they would be entitled to in the other parts of testator's estate, it was *Held*, that where one claimant has two funds, and another but one of them to which he can resort, then if a selection be made by him, having access to both, of that fund to which alone the other has access, and such selection be dictated by *mere caprice*, equity will restrain it, and confine the claimant to the fund not onerated by the claims of the other; but if *convenience*, and not caprice, dictate the selection, the most that equity does is to *substitute;* and in the case stated, if the property were of such nature that value alone is to be regarded, so that the Court might see that fraud or caprice induced complainants to pursue the property in defendant's possession, the Court might interfere; but with slaves, towards whom an attachment may exist regardless of their real value, the case is different, and the Court will not interfere, because a person who had right in common with another to a parcel of slaves might be actuated by other motives than mere caprice or fraud, who refused to validate a sale made in severalty by his copartner of some favorite slaves.

2. *Held further*, that in this case the double fund was lost without any default of the complainants, and by a decree of a court of supreme jurisdiction, and, therefore, the Court would not presume that the complainants fraudulently abandoned that fund with an intent capriciously to pursue, by a bill of review, the slaves in the defendant's possession.

3. *Held further*, that the accumulated rights of defendant's vendors, on the death of some of the children of the father, the testator, inured to the benefit of the defendant, whether such children died before or since the sale to him.

IN 1794 the complainants as legatees and next of kin to (624) William Jones, who died in 1758, filed a bill against Zollicoffer and others, and set forth that by the will of W. Jones the use of certain slaves named therein was given to his wife, Sarah Jones, for life, and testator by his will directed that after his wife's death the slaves should be divided by his executors among his children, and made his wife and his son William (one of the complainants) executors; that the wife died in 1793, and that Zollicoffer had possession of some of the slaves under a purchase for a small price and with notice of the children's

claim; that the wife had elected to hold as legatee, and that all the debts had been paid before the sale to Zollicoffer. The bill prayed that the slaves might be surrendered, and defendant decreed to account for their profits.

Zollicoffer by his answer admitted the purchase of a negro named Beck from the widow, and from Brittain and Elizabeth Jones, two of the children, and from Perry, who married another of the children, who assured him that they could or would make good title to her.

A jury found on an issue submitted to them that Zollicoffer had purchased Beck for a valuable consideration without notice, and that the sale was *justifiable*. The bill as to Zollicoffer was then dismissed.

A bill of review was afterwards filed, and in October, 1811, the then Supreme Court reversed the decree, dismissing the bill as to Zollicoffer. N. C. Term, 212. At the last term of this Court, the cause being here pending, the Court ordered certain issues to be submitted to a jury, and they found that at the time of the sale to Zollicoffer Sarah Jones, the widow, held the property as legatee and not as executrix, and that she sold the negro Beck for her own benefit. Whereupon the Court referred it to the clerk and master to take an account of the number of the negroes mentioned in the bill, and their increase, their value, hire, expense of rearing, and other expenditures relative to the
(625) said slaves, together with the proportionate shares of the respective claimants.

And at this term the clerk and master reported that George Zollicoffer obtained possession of Beck in 1774 by a conveyance from Sarah Jones, Brittain Jones, William Perry, and Elizabeth Jones, and that at his death in 1815 he had her and her increase in his possession. That the descendants of Beck were thirty-five in number, of whom, at the time of taking the account, William E. Webb, administrator of George Zollicoffer, had in possession eighteen, two had been sold, and the residue, fifteen, were in the possession of James Zollicoffer, who claimed them under a gift from his father, George, made some time after 28 June, 1807. The value of the negroes and the profits of their hire were reported pursuant to order.

The clerk further reported the respective shares of the complainants to be as follows: The complainants in the original bill were William Jones, James Winters (a purchaser from Simon Jones, one of the children of W. Jones the elder), James Carstaphen (a purchaser from Jones Nichols, issue of Winnie, another of the children of W. Jones the elder), and Richard Richards, who intermarried with Elizabeth Jones.

The defendants were Brittain Jones, Jeremiah Stephens, administrator of Simon Jones, George Zollicoffer, William Perry, and Sylvia, his wife. The complainants in the bill of review were William Jones, John Purnell, administrator of *James Winters,* and James Carstaphen. Since the cause was transmitted to this Court, John Purnell, administrator of *William Jones, Henry Jones, Brittain Jones,* and *Amey Westcoat* (all of whom were children of W. Jones the elder), was made a complainant.

George Zollicoffer's administrator, William E. Webb, is the defendant.

William Jones died in 1758, leaving the following children:

1. *William,* who is dead and left issue, *William. Sarah,* who (626) intermarried with Jones Nichols, both dead, leaving no issue. *Winnie,* who intermarried with Samuel Nichols, both dead, leaving an only child, Jones Nichols, who sold to James Carstaphen.

2. *Brittain,* who is dead; before his death he conveyed his part of Beck, under his father's will, to George Zollicoffer.

3. *Simon,* who is dead; he conveyed his interest in his father's estate to James Winters.

4. *Henry,* who is dead without issue. John Purnell is his administrator.

5. *Amey,* who intermarried with William Westcoat, both dead without leaving issue. John Purnell is her administrator.

6. *Silvia,* who intermarried with William Perry, both she and her husband alive. They conveyed Beck to G. Zollicoffer.

7. *Elizabeth,* who intermarried with Richard Richards. She died, her husband is living; no administration is granted on her estate.

From this statement the clerk and master reported each child of W. Jones the elder, or the lawful representative of such child, entitled to one-seventh; and that G. Zollicoffer, by the conveyance to him, was entitled to two-sevenths. What effect the transfer made by Brittain Jones, Elizabeth Jones, and William Perry and wife to Zollicoffer had upon the interest to which they might be entitled in the increase of Beck as next of kin to their deceased brothers and sisters, and whether by the conveyance they were estopped from so claiming was submitted by the clerk and master to the court, with a report in the alternative stating their shares if so permitted to claim, and if not.

To this report *Ruffin* filed exceptions, among others the following, viz.:

That the clerk had not taken or reported any account of any of the slaves mentioned in the bill except Beck and her increase, although directed to take an account of *all* mentioned in the bill.

That the clerk had reported George Zollicoffer to be entitled to only two-sevenths of the negro Beck and increase, whereas he is en-
(627) titled to three-sevenths thereof, and also to such further share as will be equal to the value of the shares which Brittain Jones, William Perry, and Elizabeth Jones had in the other parts of the testator's estate by substitution to their rights thereto so as to make good, as far as the said other parts will extend, the sale by them of the slave Beck to said George.

And on this day the cause came on to be heard on the exceptions.

Ruffin in support of the exceptions.
Gaston contra.

(642) HENDERSON, J. A court of equity will restrain a person in the *capricious* exercise of his rights, for benevolence becomes a *duty* enforced by courts of justice, when its exercise is in no wise prejudicial to the party, and a want of it is injurious to another. Thus, when a person may get satisfaction out of either of two funds, and another can get satisfaction only out of one of them, and they are both equally convenient and accessible to him who may get satisfaction out of either, and nothing but *mere caprice* governs him in making the selection, there equity will restrain him to the fund not onerated by the claims of the other; but if *convenience* and not *caprice* is his motive, the most that equity does is to *substitute* the disappointed claimant to his rights. The first is rarely done, for it is matter of extreme delicacy to restrain a person in the exercise of a legitimate right, in favor of one who has no claim upon him by contract, and whose only connection with him arises from being interested in the same common fund; yet where there is a fraud, moral or legal, or mere *caprice,* he will be restrained. The latter, to wit, substitution, is very frequently done, and is the foundation of marshaling assets in favor of legatees and simple contract creditors, and applies in cases where there is neither fraud nor *caprice;* it is sufficient that his fund has been exhausted by one who had a double means of satisfaction. The defendants call upon us, in this case, to restrain the complainants from interfering
(643) with Beck and her issue, and pray that they may be turned over to the other slaves and their issue, which belonged to William Jones, the elder, so far as the rights of his vendors extended in said residue, they having sold one of the common stock or fund to him in severalty. And were it money or a flock of sheep or anything of the like kind, where value alone is to be regarded, and one fund is as accessible to the complainants as the other, so that the court could per-

ceive that mere *caprice* or *fraud* induced the complainants to pursue the part in defendants' possession, the court might exercise the very delicate power before mentioned; but towards property of this kind it is far different. It is well known, as to slaves, we have our partialities and antipathies, regardless of their real value, and which may arise from feelings very different from those that debase the human heart; and a person who had right in common with another to a parcel of slaves might be actuated by other motives than mere *caprice* or *fraud* who refused to validate a sale made in severalty by his copartner of some favorite slaves. He might well say to the purchaser, Look yourself to the title of your vendor to the remaining slaves for compensation; it is sufficient that you should stand in his place and be substituted to his rights.

But there is another and perhaps stronger objection to the request of the defendant. This cause came on to be heard more than twenty years ago, and as to this question, presented the same aspect then that it does at present. With a full view of the case, the court, after dismissing the bill as to Zollicoffer, directed the remaining slaves to be divided among the representatives of William Jones, including Zollicoffer's vendors, that is, as if the negro Beck had never been. This double fund was therefore lost without any default of the complainants, and by a decree of a Court at that time of Supreme jurisdiction, and it cannot be presumed that the complainants fraudulently and voluntarily abandoned that fund as a means of satisfaction, with (544) an intent capriciously to pursue by a bill of review the negroes in Zollicoffer's possession; and therefore this double fund, which they once might have had for their satisfaction, has been lost, and that not by their default or consent, which cuts up the very grounds of the defendants' application. The exception must be overruled.

As to the advice asked by the master upon the accumulated rights of Zollicoffer's vendors on the death of some of the children of William Jones without issue, I conceive that such accumulation inures to the benefit of Zollicoffer, whether such children died before or since the sale to him, for certainly they can claim nothing in Beck or her issue, either by their then title or one subsequently acquired, they having sold her to Zollicoffer in severalty.

PER CURIAM. Judgment accordingly.

Cited: *Weeks v. Weeks,* 40 N. C., 119.

MARTIN AND WIFE v. BROWNING AND WIFE.

Where the facts charged in a bill are fully denied by the answer, there can be no decree against the answer, on the evidence of a single witness only, without corroborating circumstances to supply the place of a second witness.

THIS cause came on to be tried upon bill, answer, and depositions before the court, without the intervention of a jury, being the first case decided under an act passed at the last session of the Assembly, authorizing courts of equity to adjudge upon controverted facts without a jury.

The cause was argued upon the evidence by

Ruffin for complainants.
Murphey for defendants.

(645) TAYLOR, C. J. The questions made by the bill and answer relate to the existence of a deed for a tract of land in Orange County, which it is alleged was made by Robbs to Benjamin Cantrell, his son-in-law, and which the widow of the latter (since intermarried with the defendant Browning) has since his death destroyed or now conceals. The complainants are the children of Benjamin Cantrell and the defendant Sophia, and of course entitled to the inheritance if the fee ever vested in their father; otherwise it descended to Sophia, the defendant, from her father Robbs, and she is still seized.

The witness mainly relied on to prove that such a deed once existed is James Yancey, the substance of whose testimony is that on 6 February, 1816, he, together with John Henslee, met at the house of Benjamin Cantrell, deceased, for the purpose of taking an inventory of his estate; and in looking over the papers he saw a deed of gift from Robbs to Cantrell for eight or nine hundred acres of land in Orange County, of which part was reserved to Robb's widow during her life; and the boundaries of this part, as described in the deed, the witness states. In various conversations he had with the defendant Sophia after that time she always said she would divide the Orange land equally among the children, in which she persisted until after her marriage with the other defendant. This witness administered on Cantrell's effects, and went to the house after the defendant's marriage to possess himself of the papers; when for some time the defendant Sophia refused to let him have them, but at length allowed him to look over part of them. There was a small bag full of papers, which she took up, saying it was her father's old papers, which she would

suffer no one to have. When the sale took place she said she still had these papers in a trunk, which was sold after they were taken out. The witness does not recollect the date of the deed, but his impression is that it bore date in 1807 or 1809; he thinks there were two subscribing witnesses to it, but cannot remember who they were; (646) he did not sufficiently notice the handwriting of the body of the deed to recognize it, but the execution was in the handwriting of Robbs, of which he has no other knowledge than from seeing papers signed by him (as the defendant Sophia told him) among the papers of Cantrell, and the signature was in an indifferent, clumsy, old-fashioned hand. He read this deed over in the presence of John Henslee, now deceased, William Cantrell, and the defendant Sophia, audibly, to enable the first-named person to take down the number of acres, to the end of ascertaining each child's share, which was computed at 200 acres. After examining the deeds they were returned to the defendant Sophia, who put them in a small bag, which was deposited in a trunk, which bag he thinks was the same which Sophia withheld when he went to get the papers of the estate, saying they were the papers of her father, which no one should have. He had a conversation with Sophia the day after the inventory was taken concerning her dower, when she expressed a preference for the lands in Orange and a residence there; but upon the witness recommending to her rather to be endowed of the lands in Caswell she replied she would think of it. Afterwards, when her daughter was married, Sophia told him she would follow his advice as to her dower, and that the land in Orange, and the rest in Caswell, should be divided amongst her children. She did not, either when the deed was read or at any time till her marriage, set up a claim to the land in Orange. On further reflection the witness thinks the deed was executed with the name of Alexander Robbs and a mark made, he thinks an *"R."*

William Cantrell was present at the time, and heard *Yancey* read a deed, who, upon the witness asking him what he was reading, said it was a deed from Alexander Robbs to Benjamin Cantrell; but the witness does not know from what he heard of the reading (647) where the land lay, whether Yancey read the deed through or not, nor does he recollect anything that was read. This was the first knowledge he had of the existence of such an instrument of writing.

This evidence is opposed by the defendants: first, by Solomon Parks, who says that a short time before Cantrell's death he came to his house to borrow money, and remarked that he would have sold some land that lay in Orange County to Fonville, but that his wife was not will-

ing. The witness replied, Why is that an obstacle? for if it belongs to your wife it is your property. Cantrell said, that is not the case; it is her's, conveying to the mind of the witness that it had descended from her father, Robbs. During the widowhood of Sophia she came to the witness's house, who, being under the impression thus made, advised her to take her dower in Caswell, and to consult with a lawyer.

Some time afterwards the deponent requested the witness Yancey to come to his house upon business, and in the course of conversation concerning the estate of Cantrell asked him if he had inventoried the lands in Orange as part of the estate, and upon his saying yes, the witness asked how that could be, as he understood the land belonged to the widow. Yancey replied that he had seen among Cantrell's papers a deed for those lands from Robbs to Cantrell; and upon being further asked who was the subscribing witness, answered there was none to the deed. This conversation took place in the spring of 1817, and Yancey's deposition was taken in September following. Alexander Vincent says he was present when Yancey was looking over Cantrell's papers, and sat within five feet of him, and thinks he heard some papers read by him audibly, but none conveying title from Robbs to Cantrell.

Richard Jones had access to all Cantrell's papers during his life-
time, and not long before his death; that he brought a trunk to
(648) witness's house containing papers, who read them for him; they
were deeds from different persons to A. Robbs, but not one from Robbs to Cantrell. Cantrell confided much in this witness, often spoke to him about his affairs, constantly spoke of the Orange lands as his wife's, which he said he would sell and move away if she consented. Even when the widow of Robbs was petitioning for dower out of them, he mentioned them by no other description than as his wife's.

William Dickey and James Fawcett were called upon to take an inventory of Robbs' property, after his death, they examined a trunk containing his papers, chiefly deeds to him, but saw no conveyance from Robbs to Cantrell, whom they never heard claim the Orange land otherwise than in right of his wife.

Hardy Hurdle was much in the confidence of Robbs, who was an illiterate man, and got the witness to arrange his papers, and sometimes to write for him. Robbs said he could not make a will to please his wife unless he left his property at her disposal; that the law would make a will for him, and he desired Cantrell to be his heir, at the same time taking a trunk and key and delivering it to him as his property;

this trunk contained valuable papers, and the witness thought Robbs meant by this act to give all the right he could to Cantrell.

William Bronnich was intimately acquainted and connected with Cantrell and Robbs, whom he has often heard conversing about the land in Orange, but never understood from them that Cantrell had any other claim than in right of his wife, whom Robbs said it would devolve upon as his heir at law. After the death of Robbs, when the widow petitioned for dower in the Orange land, Cantrell opposed no claim against her.

Thomas Shanks heard Cantrell trying to persuade his wife to sell part of the land to Fonville, who would not agree to it unless Fonville would take the whole, notwithstanding Cantrell's urg- (649) ing his want of money.

Frederick Fonville offered to buy the land from Cantrell and his wife, telling Cantrell he had only a life estate, to which he answered he knew it was his wife's. Cantrell was pressed for money, and would have sold the land could he have got his wife to join in the conveyance.

E. Jones heard the defendant Browning say something about his wife's snatching some papers from Mr. Yancey some night when they were looking over papers, and said there had been such papers seen, but they would never be seen again he reckoned; and,

John West says that Browning was at his house one Sunday, and said the opposite party had been saying something about papers being snatched, but as for his part he knew nothing of it.

This is the substance of the evidence on which the Court has to decide whether a deed was made to Benjamin Cantrell by his father-in-law, Alexander Robbs, and whether it has been suppressed or concealed by the defendants. The first observation that occurs is that as the defendants distinctly and positively deny that such a deed ever existed, or that they have destroyed or concealed it, the Court must place as much confidence on the consciences of the defendants as on the testimony of a *single* witness; unless there be some circumstances in the case to invest the latter with a superior degree of credit. If there be any one circumstance to overbalance the credit of the denial, it is admitted that a court of equity will decree upon the testimony of one witness. A patient examination of the evidence will, I think, show that all the circumstances throw additional weight into the scale of the answer, and that none of them tend to confirm and strengthen the testimoney of Mr. Yancey.

His recollection of the manner in which the deed was executed (650) is vague and unsatisfactory; he at first thought it was in a

clumsy, old-fashioned hand, and that he believed it to be Robbs' from its resemblance to other signatures which his daughter told him were his. Upon further reflection he thought it was signed only with the letter *"R."* A particular description of the character of a handwriting seems to be consistent only with a distinct remembrance of it; and an impression that it was clumsy and old-fashioned does not seem likely to have been made on the mind by the inspection of a single letter made by a man who could, perhaps, make no other. The deposition was made in September, 1817; the reading of the deed occurred in February, 1816, an interval of time in which the remembrance of so important a circumstance as the execution of a deed on which depended the title of sixteen hundred acres of land would not in ordinary cases be effaced. But the boundaries of the part reserved to Robbs' wife were accurately remembered. The date was not remembered, but the witness thought it bore date in 1807 or 1809, which is impossible if it were a genuine deed, for several witnesses have deposed that Robbs died in 1805. When the deposition was taken the witness thought there were two subscribing witnesses to the deed; but in the spring of the same year, in a conversation with Parks, he said there were none. From this witness' deposition the only inference I make is that the circumstance is too indistinctly remembered by him, and too inconclusively proved, to authorize any court, even if there were no answer on oath to take away the defendant's inheritance.

Nor does this evidence derive any support from Cantrell, the only other witness now alive who was present on the occasion. He did hear Yancey read a deed, but from the reading he knew not what deed it was, or what land it was made for; Yancey told him, upon being asked, the nature of the deed; and that must still depend upon Yancey's testimony.

(651) If such a deed had existed, it is scarcely credible that neither Robbs nor Cantrell should have mentioned it to some of those persons upon whom, both being illiterate men, they had such frequent occasion to rely for the transaction of the most common business; that it should not have been seen by any in the lifetime of Robbs, nor after his death when all his papers were given over to Cantrell, who exposed them to Richard Jones a short time before his death. And what motive could exist for making such a conveyance? The defendant Sophia was the only child of Robbs, who made no secret of his resolution to die intestate, on account of the difficulty of making such a will as would be satisfactory to his wife, uniformly declaring that Cantrell should be his heir, and on one occasion delivering to him all his valuable papers.

The conduct of Cantrell in the latter years of his life is utterly irreconcilable with the belief that such a conveyance was made. Repeatedly suffering under pecuniary pressure, which he had an opportunity of removing by the sale of the Orange land he constantly asserted, and acted upon the belief that it belonged to his wife, whom he urged, but in vain, to join in the sale of part.

The widow of Robbs claimed dower in the very land, and filed a petition for it, yet instead of asserting his title from her husband, or in any way obstructing her claim, though fully apprised of it, he passively acquiesced, and suffered the dower to be assigned.

I do not think that any rational inference can be drawn from the claim or belief of the defendant Sophia one way or the other. All the parties seem to be sufficiently uninformed, and she, perhaps, was not the wisest among them. She might think, from her father's declarations, that her husband inherited the land from him, and at the same time believe that he could not sell it without her joining in the sale, while she might also think, as she seems to have done until her second marriage, that she was entitled only to dower upon the (652) death of Cantrell. The speculations or delusions of a woman ignorant of her rights can afford no safe ground for the judgment of a court.

I have laid no stress upon the testimony of Vincent, because I do not ascertain upon looking into the deposition that he was present on the occasion spoken of by Yancey, who says it was about the 6th, whereas Vincent speaks of a reading on the 9th. It is possible that they speak to different meetings, and therefore safer to omit it altogether. Nor have I noticed the testimony of E. Jones and J. West, as I cannot connect it with any other part of the evidence except the taking up of the bag spoken of by Yancey. If they were Robbs' papers Sophia had a right to them, and any inference that the deed was in it must depend upon the foundation that its existence was sufficiently proved.

Upon the whole, my opinion is that the bill be

PER CURIAM. Dismissed with costs.

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