THE STATE *vs.* ELIJAH NEWSOM.

Dec. 1844. The Act of Assembly passed in 1840, ch. 30, entitled "an act to prevent free persons of color from carrying fire arms," is not unconstitutional.

It is the settled construction of the constitution of the United States, that no limitations, contained in that instrument upon the powers of government, extend or embrace the different States, unless they are mentioned, or it is expressed to be so intended.

Free people of color in this State are not to be considered as citizens, in the largest sense of the term, or, if they are, they occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them—so that they do not violate those great principles of justice, which lie at the foundation of all laws.

The cases of *the Raleigh and Gaston Rail Road Company* v. *Davis*, 2 Dev. & Bat. 459, and *State* v. *Manuel*, 4 Dev. & Bat. 20, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Fall Term, 1844, his Honor Judge BAILEY presiding.

The defendant, a free person of color, was tried upon the following indictment, viz:

"The jurors for the State, upon their oath present, that Elijah Newsom, a free person of color, late of the county of Cumberland, on the 1st day of June, in the year of our Lord, 1843, at Cumberland aforesaid, unlawfully did carry about his person, one shot gun, without having obtained a licence therefor

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The following is a copy of the act:

Be it enacted, &c. That if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence therefor from the Court of Pleas and Quarter Sessions of his or her county, within one year preceding the wearing, keeping or carrying thereof, he or she shall be guilty of a misdemeanor, and may be indicted therefor.

from the Court of Pleas and Quarter Sessions of the county of Cumberland aforesaid, within one year preceding the carrying thereof, to the evil example of all others in like manner offending, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Upon the trial, the jury found the defendant guilty; whereupon, on motion of the defendant's counsel, the court arrested the judgment, and the Solicitor for the State appealed to the Supreme Court.

Attorney General for the State.

W. Winslow and *D. Reid* for the defendant.

NASH, J. We are of opinion there was error in the judgment pronounced by the presiding judge. On the argument here it has been urged, that the act of 1840, (ch. 30,) under which the defendant was prosecuted, is unconstitutional, being in violation of the 2d article of the amended constitution of the United States, and also of the 3d and 17th articles of the Bill of Rights of this State. We do not agree to the correctness of either of these objections. The Constitution of the United States was ordained and established by the people of the United States, for their own government, and not for that of the different States. The limitations of power, contained in it and expressed in general terms, are necessarily confined to the General Government. It is now the settled construction of that instrument, that no limitation upon the power of government extends to, or embraces the different States, unless they are mentioned, or it is expressed to be so intended. *Barrow* v. *The Mayor, &c. of Baltimore*, 7 Peter's Rep. 240. *Raleigh and Gaston Rail Road Company* v. *Davis*, 2 Dev. & Bat. 459. In the 2d article of the amended Constitution, the States are neither mentioned nor referred to. It is therefore only restrictive of the powers of the Federal Government. Nor do we perceive that the act of 1840 is in violation of either of the articles of our Bill of Rights, which have been referred to. The 3d article forbids the granting of

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exclusive privileges or separate emoluments, but in consideration of public services. Its *terms* are certainly not violated. Is it so in spirit? If it is, we are as much bound to declare the act unconstitutional, as if in terms it was so—where the violation is plain and palpable. The act of 1840 imposes upon free men of color, a restriction in the carrying of fire arms, from which the white men of the country are exempt. Is this a violation of the 3d article in spirit, or is it such a palpable violation, as will authorize the court to declare it void? If so, then is the whole of our legislation upon the subject of free negroes void. From the earliest period of our history, free people of color have been among us, as a separate and distinct class, requiring, from necessity, in many cases, separate and distinct legislation.

The relation of master and servant, of free and bond, of white and colored, excluded the idea that the latter ought or could be safely admitted to testify against the former. Accordingly, in the year 1762 an act was passed, which excludes all colored persons within the fourth degree from being heard as witnesses against a white man. And in 1777 it is, in almost so many words, re-enacted, and still remains upon our statute book unrepealed. This was the code at the time our constitution was formed, and the statute of 1777 was framed by many of the men, who aided in forming the constitution. From the time of the first enactment to the present, innumerable cases have been tried in our various courts, in which white persons and colored have been parties litigant, and in which the testimony of colored witnesses would have been important; and yet, in no instance, has the constitutionality of the act of 1777 been questioned. It is admitted that, if the act of 1840 does violate the spirit and meaning of the 3d article, it cannot be sustained, because the legislature have passed other acts equally infringing it; but it is believed, that the long acquiescence under the act of 1777 by all classes of society—legislative, judicial, and private—has given an exposition to the 3d article of the bill of rights, which is obligatory on the courts. The extent and operation of this article were brought under

the consideration of this court in the case of the *State* v. *Manuel*, 4 Dev. & Bat. 20. That case underwent a very laborious investigation, both by the bar and the bench. In the year 1831, the legislature passed an act, providing, that when a free person of color was convicted by due course of law of a misdemeanor, and was unable to pay the fine imposed on him, the court should direct the sheriff to hire him out at public auction, to any person who would pay the fine for his services for the shortest space of time. Manuel, was a free man of color, and, being convicted of an assault and battery, and unable to pay his fine, was ordered by the court to be hired out. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care, worthy of the principle involved, and which gave it a controlling influence and authority on all questions of a similar character. The act of 1831, it was urged, was unconstitutional, as violating, among others, this 3d article of the Bill of Rights. The court decided, that it did not conflict with that article; yet it cannot be denied, that it introduced a different mode of punishment, in the case of a colored man and a white man for the same offence. If the law in that case, in which one class of citizens is condemned to lose their liberty, by being hired out as slaves, while another class is exempt from that ignominious mode of punishment, and subjected to one much less revolting to the feelings of a freeman, is not a violation of the 3d article under consideration, much less can the act of 1840 be so. Other acts of the legislature might be pointed out, equally liable to the constitutional objection. The act of 1840 is one of police regulation. It does not deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall. This brings us to the consideration of the 17th article of the Bill of rights. We cannot see that the act of 1840 is in conflict with it. That article declares "that the people have a right to bear arms for the defence of the

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State." The defendant is not indicted for carrying arms in defence of the State, nor does the act of 1840 prohibit him from so doing. Its only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of fire arms or other arms of an offensive character. Self preservation is the first law of nations, as it is of individuals. And, while we acknowledge the solemn obligations to obey the constitution, as well in spirit as in letter, we at the same time hold, that nothing should be interpolated into that instrument, which the people did not will. We are not at liberty to give an artificial and constrained interpretation to the language used, beyond its ordinary, popular and obvious meaning. Before, and at the time our constitution was framed, there was among us this class of people, and they were subjected to various disabilities, from which the white population was exempt. It is impossible to suppose, that the framers of the Bill of Rights did not have an eye to the existing state of things, and did not act with a full knowledge of the mixed population, for whom they were legislating. They must have felt the absolute necessity of the existence of a power somewhere, to adopt such rules and regulations, as the safety of the community might, from time to time, require. "Constitutions are not themes for ingenious speculations, but fundamental laws, ordained for practical purposes." As a further illustration of the will of the people, as to the light in which free people of color are to be considered as citizens, the present constitution of the State entirely excludes them from the exercise of the elective franchise. Rev. Stat. 21. Nor does the new constitution, in any of its provisions, over-rule or contravene the preceding legislation on the subject we are considering. We *must*, therefore, regard it as a principle, settled by the highest authority, the organic law of the country, that the free people of color cannot be considered as citizens, in the largest sense of the term, or, if they are, they occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them; so that they do not violate those great principles of justice, which

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ought to lie at the foundation of all laws. In conclusion, we would adopt the language of the court in the case of Manuel, "Upon full consideration of all the objections, urged by the prisoner's counsel, we do not find such clear repugnancy between the constitution and the act of 1840, as to warrant us in declaring that act unconstitutional and void." We are therefore of opinion, there was error in rendering judgment against the State.

This decision must be certified to the Superior Court of Cumberland County, with directions to proceed to judgment and sentence thereon, agreeably to this decision and the laws of the State.

PER CURIAM, Ordered accordingly.

THOMAS H. McGEE *vs.* EDWARD E. HUSSEY.

Where A. conveyed negroes to B. in trust, "to be kept, hired out, or otherwise disposed of, for the maintenance and support of C.—*Held* that C. had no such equitable interest, as was the subject of execution under the act of 1812, (Rev. Stat. ch. 45, s. 4.)

The principle, well established by our courts, is, that the legal estate is not to be transferred or divested out of the trustee by an execution, unless that may be done without affecting any rightful purpose, for which that estate was created or exists. Where the *cestui que trust* has not the unqualified right to call for the legal estate and to call for it immediately, as where the nature of the trust requires it to remain in the hands of the trustee, who, by the terms of the deed, is to do acts from time to time, the act of 1812 authorizing the sale of equitable interests does not apply.

The cases of *Gillis* v. *McKay*, 4 Dev. 174, and *McKay* v. *Williams*, 1 Dev. & Bat. 406, cited and approved.

Appeal from the Superior Court of Law of Duplin County, at the Fall Term, 1844, his Honor Judge DICK presiding.