Supreme Court of North Carolina

State v. Manuel

20 N.C. 144 (N.C. 1838)
Decided Dec 1, 1838

December Term, 1838.

Constitutional Law — Working Out Court Costs.

1. The act of 1831, ch. 13 (1 Rev. Stat., ch. 111, secs. 86, 87, 88, 89), providing for the collection of fines imposed upon free negroes and free persons of color convicted of any criminal offense, by directing them to be hired out under certain rules, regulations, and restrictions, is not so clearly repugnant to the 39th section of the Constitution, which provides that debtors shall not be continued in prison after delivering up *bona fide* their property for the use of their creditors, nor to the 19th section of the same which gives to the Governor the power of granting pardons, nor to the 10th section of the bill of rights, which prohibits the imposition of excessive fines or the infliction of cruel or unusual punishment, nor to the 3rd section of the same which declares that no man nor set of men are entitled to exclusive or separate privileges from the community but in consideration of public services, nor to the spirit of the 12th section of the same, which forbids the deprivation of liberty to a free-man "but by the law of the land," nor to the principles of free government, as to warrant the courts in pronouncing it unconstitutional and void.

2. The act of 1838, which provides that *if any person* shall be convicted in any court of record in this State of any crime or misdemeanor, and shall be in execution for the fine and costs of prosecution, and shall have remained in prison for the space of twenty days, he may be discharged in the manner therein prescribed, does not repeal the act of 1831, ch. 13, but as the last expression of legislative will, necessarily abrogates so much of that act as stands in the way of its provisions.

3. The primary purpose of the Constitution was the well being of the people by whom it was ordained, and the political powers reserved or granted thereby, must be understood to be reserved or granted to the people collectively, or to the individuals of whom it was composed.

4. But that section in the Constitution which prohibits the imprisonment of debtors, applies to debtors, whether citizens or foreigners, dwelling among us — and all those sections which interdict outrages upon the person, liberty or property of a freeman, secure to that extent all amongst us who are recognized as persons entitled to liberty, or permitted the enjoyment of property. They are so many safeguards against the violation of civil rights, and operate for the advantage of all whom these may be lawfully possessed.

5. According to the laws of this State all human beings within it fall within one of two classes, to wit, aliens and citizens.

6. Foreigners, unless made members of the State, continue aliens. Slaves manumitted here become freemen — and if born within North Carolina are citizens of North Carolina — and all free persons born within the State are born citizens of the State.

7. Naturalization is the removal of the *disabilities* of *alienage*. Emancipation is the removal of the
115 *incapacity* of *slavery*. The latter depends *115
wholly upon the internal regulation of the State —

the former belongs to the government of the United States, and it would be a dangerous mistake to confound them.

8. The possession of political power is not essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes are not citizens.

9. Free negroes and free persons of color are entitled as citizens to the protection of the 39th section of the Constitution, and the 10th section of the Bill of Rights.

10. The cases of *Burton v. Dickens*, 7 N.C. 103, and *Jordan v. James*, 10 N.C. 110, approved.

11. The 39th section of the Constitution, under the operation of the act of 1778, Rev. ch. 133, prohibits the imprisonment of an insolvent debtor, after that insolvency has been ascertained to be *bona fide* in any manner directed by law, either before or since the adoption of the Constitution.

12. A fine imposed for an offense against the criminal law of the country is a punishment.

13. And as, after it has been judicially imposed, the same means may be used to enforce its collection, which by law the State may employ to collect its debts, it may, for this purpose, be regarded as a debt due to the State.

14. But it is not a debt within the meaning of the 39th section of the Constitution.

15. Constitutions are not themes proposed for ingenious speculation, but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that formed shall think proper to change them.

16. The costs of a convicted offender are not a debt.

17. The sentence pronounced against a convicted criminal that he shall pay the costs of prosecution is as much a part of his punishment as the fine imposed *eo nomine*, and it has never been held that he could discharge himself therefrom by taking the oath of insolvency, except by virtue of statutory enactments authorizing or supposed to authorize such a discharge.

18. The right of the Legislature to prescribe the punishment of crimes belongs to them by virtue of the general grant of legislative powers. It is a power to uphold social order by competent sanctions unless they be restricted, and so far only as they are restricted by constitutional prohibitions, it is a power in the Legislature to accomplish the end by such means as in their discretion they shall judge best fitted to effect it.

19. The 39th section of the Constitution has no application to, or bearing upon debts due to the State.

20. Its object, and sole object, was to protect unfortunate debtors who had been unable to comply with their private engagements, from the malignity, resentment and cruelty of their offended
116 creditors. *116

21. The language of the 10th section of the bill of rights is addressed *directly* to the judiciary for the regulation of their conduct in the administration of justice.

22. No doubt the principles of humanity, sanctioned and enjoined in this section, ought to command the reverence and regulate the conduct of *all* who owe obedience to the Constitution. But when the Legislature, acting upon their oaths, specifying the fines to be imposed, etc., as the reasonable or excess of them, are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a co-ordinate branch of the government. Certainly in no case can it be, unless the act complained of contain such a flagrant violation of all discretion as to show a disregard of constitutional restraints.

23. Whatever might be thought of a penal statute, which in its enactments make distinctions between one part of the community and another

capriciously and by way of favoritism, it cannot be denied that in the exercise of the great powers confided to the Legislature for the suppression and punishment of crimes, they may rightfully so apportion punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend, as to produce in effect that reasonable and practical equality in the administration of justice, which it is the object of all free governments to accomplish.

24. The execution of every sentence of a court is under the control of the court, and the court is bound by obligations too sacred to be disregarded to allow time to make applications for a pardon in every case where time is *bona fide* desired for that purpose.

25. Appeals in criminal cases annual the sentences rendered below, and whether the sentences be approved or disapproved, they are not to be affirmed or reversed in the Supreme Court; but the decision of that court is to be certified to the court below with instructions to proceed to judgment and sentence thereon agreeably to that decision *and the laws of the State.*

THE defendant, at the Spring Term, 1838, of the Superior Court of Sampson, before his Honor, *Judge Dick*, was convicted of an assault and battery, and thereupon was sentenced to pay a fine of twenty dollars, and it appearing to the court that he was a free person of color and unable to pay the said fine; it was further ordered and adjudged by the said court that the sheriff of the county of Sampson should hire out the defendant to any person who would pay the said fine for his services for the shortest space of time. From this judgment the defendant appealed to the Supreme Court.

Strange for the defendant.

The Attorney — General for the State.

GASTON, J., after stating the case as above, proceeded as follows:

There is thus directly presented for our decision the question which was heretofore raised and argued in the case of *Oxendine* (*ante*, 2 vol., 435),
117 *117 but which it was then deemed neither necessary nor proper to determine, that is to say, whether the act of 1831, ch. 13 (See 1 Rev. Stat., ch. 3, secs. 86, 87, 88, 89), "to provide for the collection of fines imposed upon free negroes and free persons of color," be unconstitutional and void. Every case seriously questioning the constitutionality of a statute is entitled to the most deliberate consideration, because it invokes the exercise of the highest and most delicate function which belongs to the judicial department of the government. The case before us not only seriously raised this question — but raises it upon grounds so plausible at least, if not so strong, as to render a full examination of them a task of some difficulty. We have therefore felt it our duty to examine the question with diligence and care, and if the conclusion to which we have arrived be not right, the error will not have resulted from the omission of our best efforts to form a correct judgment.

The act of 1831 directs that when a free negro or free persons (148) of color shall be convicted of an offense against the criminal law and sentenced to pay a fine, if it shall appear to the satisfaction of the court that he is unable to pay the fine imposed, the court shall direct the sheriff of the county to hire out the free negro or free person of color so convicted to any person who will pay the fine for his services for the shortest space of time. It further makes it the duty of the sheriff during the week of the court, or as soon thereafter as may be convenient, publicly, at the door of the courthouse, to hire out the convict to any person who will pay the fine so imposed for his services for the shortest space of time, and to take from the person so hiring, bond and security in double the amount of the fine so paid, payable in the same manner and with the same conditions for the proper treatment of the free negro or free person of color during the time for which he is so hired, as are contained in apprentice bonds, except the condition of teaching

him to read and write. It declares that such hirer shall have the same authority over and the same right to require and control the services of such free negro or free person of color, and shall be liable in all respects to the same obligations and duties as masters now have, and are liable to, in cases of apprentice bonds. It further enacts that if no person can be found who will pay the fine so imposed for the services of the free negro or free person of color so fined for a space of time not exceeding five years, it shall be the duty of the sheriff to hire the free negro or free person of color to any person who will pay the highest sum for his services for five years, which sum shall discharge the fine; and it shall be the duty of the sheriff after deducting five per cent commissions to account for and pay over the money collected by virtue of this act as other fines. Provided that if any free negro or free person of color hired out under the provisions of this act shall abscond or
118 leave the service of his master *118 before the expiration of his time, he shall be liable and bound to make up such time so elapsed by serving double the time thereof; and provided further that the fine imposed shall in all cases be at least equal to the amount of the costs of such prosecution.

(149) On the part of the defendant it has been objected that the act in question comes in direct conflict with that section in our Constitution which protects the person of a debtor after ascertained insolvency from imprisonment for debt, and with those sections in our declaration of rights, which prohibit the imposition of excessive fines and the infliction of cruel or unusual punishments, and the destruction or the deprivation of life, liberty or property of a free-man otherwise than by the law of the land. It was insisted, however, in argument by the Attorney-General that it was unnecessary to enter into the examination of these constitutional prohibitions, for that the defendant can set up no right and claim no benefit from them, because he is not a citizen of North Carolina. The positions of the Attorney-General are, first, that these provisions, being contained in the fundamental law by which the people of North Carolina, theretofore a colony and dependency of Great Britain, rising in revolt against the oppressions of the mother county, constituted and declared themselves a sovereign and independent state; *all* the securities provided in that fundamental law, either for persons or for property, and all the inhibitions against wrong, were designed exclusively for the benefit of those who were constituent members of that State, and of such as by inheritance or subsequent incorporation into that political body should thereafter become members thereof; and, secondly, that persons of color, whether born free or emancipated from slavery, were not originally members of that political body and never since have been incorporated into it. We do not yield our assent to either of these positions in the extent in which they have been asserted.

No doubt the primary purpose of the Constitution was the well-being of the people, by whom it was ordained, and the political powers reserved or granted thereby must be understood to be reserved or granted to that people collectively, or to the individuals of whom it was composed. But as justice is the great object, highest duty and best interest of every community, that people wisely deemed it essential to the well-being of themselves as a community so to consecrate by their most solemn sanctions certain great principles of right as to cause them to enter into the (150) very elements of their association, in order that their violation should never be permitted to any who might be entrusted under the Constitution with the powers of the State. For instance, the 39th section of the Constitution is express that *"all prisoners* shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." Can it
119 be contended that this universal *119 command may be disregarded unless the prisoner be a citizen? Take the 9th section of the declaration of rights, *"all men* have a natural and inalienable right to worship Almighty God according to the

dictates of their own consciences." Is this declaration to be understood as of a right belonging solely to the citizens of North Carolina? Take the 7th, 8th, and 9th sections of the same instrument, by which it is declared that every man accused of a crime has a right to be informed of the accusation against him, to confront his accusers and witnesses, and no man shall be compelled to give evidence against himself — that no free-man shall be put to answer any criminal charge, but by indictment, presentment, or impeachment — nor convicted of a crime but by the unanimous verdict of a jury of good and lawful men in open court. Is it believed that these great principles in the administration of criminal justice may be set at nought if the accused is not a citizen? By the 40th section of the Constitution it is provided that every foreigner who comes to settle in this State, having first taken an oath of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land or other real estate, and after one year's residence shall be deemed a free citizen. If such a person, under the sanction of this clause, purchase land here, will it be doubted whether the land thus acquired is secured to him by that Constitution, so that it cannot be taken away, even before he becomes a free citizen, otherwise than by the law of the land? We understand the section in the Constitution, whatever may be its meaning, prohibiting the imprisonment of debtors as applying to debtors whether citizens or foreigners dwelling amongst us — and all the sections which interdict outrages upon the person, liberty, or property of a free-man, as securing to that extent for all amongst us who are recognized as persons entitled to liberty, and permitted the enjoyment of property. They are so many safeguards against the violation of civil rights and operate for the advantage of all by whom these rights may be (151) lawfully possessed.

It is not necessary to examine very particularly the argument upon the second position, which in its course assumed on both sides very much the character of a political discussion. According to the laws of this State, all human being within it who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their color or complexion, were native born British subjects — those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity — or disqualification of slavery
120 was removed — they became *120 persons, and were then either British subjects or not British subjects, accordingly as they were or were not born within the allegiance of the British king. Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina free-men. Foreigners until made members of the State continued aliens. Slaves manumitted here become free-men — and therefore if born within North Carolina are citizens of North Carolina — and all free persons born within the State are born citizens of the State.

A few only of the principal objections which have been urged against this view of what we consider the legal doctrine, will be noticed. It has been said that by the Constitution of the United States the power of naturalization has been conferred exclusively upon Congress — and therefore it cannot be competent for any State by its municipal regulations to *make* a citizen. But what is naturalization? It is the removal of the *disabilities of alienage*. Emancipation is the removal of the *incapacity* of *slavery*. The latter depends wholly upon the internal (152) regulations of the State —

the former belongs to the government of the United States. It would be a dangerous mistake to confound them.

It has been said that before our Revolution, free persons of color did not exercise the right of voting for members of the colonial legislature. How this may have been it would be difficult at this time to ascertain. It is certain, however, that very few, if any, could have claimed the right of suffrage, for a reason of a very different character than the one supposed. The principle of freehold suffrage seems to have been brought over from England with the first colonists, and to have been preserved almost invariably in the colony ever afterwards. In the act of 1743, ch. 1 (Swann's Revisal, 171), it will be seen that a freehold of fifty acres was necessary to entitle the inhabitant of a county to vote, and by the act of 2d Sept. of 1746, ch. 1, *ibid.*, 223, the *freeholders* only of the respective towns of Edenton, Bath, Newbern, and Wilmington were declared entitled to vote for members of the Colonial Legislature. The very Congress which framed our Constitution was chosen by freeholders. That Constitution extended the elective franchise to every freeman who had arrived at the age of 21, and paid a public tax, and it is a matter of universal notoriety that under it free persons without regard to color claimed and exercised the franchise until it was taken from free men of color a few years since by our amended Constitution. But surely the possession of political power is not essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes are not citizens — and free white men who have paid public taxes and arrived
121 at full age, but have not a freehold of fifty *121
acres, inasmuch as they may vote for one branch and cannot vote for the other branch of our Legislature, would be in an intermediate state, a sort of hybrids between citizens and not-citizens. The term "citizen" as understood in our law, is precisely analogous to the term *subject* in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people — and he who before was a "subject of the king" is now "a citizen of the State." Considering, therefore, the defendant as having a right to the protection of the clauses in the Constitution and declaration of rights on which he relies, (153) we proceed to the examination of the alleged repugnancy between these and the act of 1831. The 39th section of the Constitution is in these words "The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up *bona fide* all his estate, real and personal, for the use of his creditors in such manner as shall be hereafter regulated by law." The argument of the defendant's counsel is that this declaration of the will of the people is found where details are not to be expected; that by it there is thus embodied into the Constitution a great principle which pronounces imprisonment of the body of an honest but unfortunate insolvent debtor, unjust and oppressive; that the restraint of his person, whether in jail or under the constraint of a master or keeper, is substantially imprisonment; that a fine to the State, though imposed because of crime, is debt; and that an act of the General Assembly commanding imprisonment of such insolvent to enforce satisfaction of this debt is therefore in direct conflict with this paramount law of the land. The argument is relieved from one great difficulty with which it would otherwise have had to contend, by the adjudication of this Court in *Benton v. Dickens*, 3 Murph., 103, and *Jordan v. James*, 3 Hawks., 110. In its terms the injunction of the Constitution would seem mandatory on the Legislature, and to be carried into execution only by the Legislature. The continuance in prison was forbidden after the surrender *bona fide* of the debtor's estate for the use of his creditors in such manner as should be thereafter regulated by law; and until such regulations would be made by law it was not in the power of any court to ascertain whether the required surrender had been or had not been made. But in the cases referred to it was

decided that as the General Assembly in the year 1778, Rev., ch. 133, had *declared* all the acts of the colonial legislature which were in force before the Revolution to be yet in force, so far as they were not inconsistent with the freedom and independence of the State, and with the new form of government; and as by an act of the colonial legislature of 1773, it had been provided that a prisoner for debt, on surrendering his property for
122 the use of his creditors in the manner therein *122 (154) directed, or without any surrender where he was not worth forty shillings sterling, and upon taking an oath of insolvency, should be set at liberty, and be forever discharged, both as to his person and property as against the creditor at whose instance, and for the debt upon which he was imprisoned — the act of 1778 was a substantial reenactment of the regulations for ascertaining a *bona fide* insolvency, and therefore *under the constitution*, the insolvent complying with those regulations was protected from imprisonment for any antecedent debt to any creditor. Submitting, as it is our duty to submit, to the authority of these adjudications of our predecessors, we hold, therefore, that the 39th section of the Constitution does prohibit the imprisonment of an insolvent debtor, after that insolvency has been ascertained to be *bona fide* in any manner directed by law either before or since the adoption of the Constitution. And we also agree that the principle thus sanctioned by the Constitution is not to be honored in form only, and disregarded in substance by a literal adherence to the words "continued *in prison.*" A delivery over of his person from the public prison to a master or private keeper is as much forbidden as his *continuance* in the prison. But the same rule of construction which commands that effect should be given to the constitutional will of the people, to its full extent, without regard to verbal subtleties, equally forbids that we should interpolate into the Constitution what the people did not will, by an artificial and technical stretching of their language beyond its ordinary, popular and obvious meaning. *Ultra citraque nequit, consistere rectum*. A fine imposed for an offense against the criminal law of the country is a punishment — an evil or inconvenience in the form of a pecuniary mulct, denounced and inflicted by human laws, in consequence of disobedience or misbehaviour, not by way of atonement or compensation, but as a precaution against future offenses of the same kind — to correct the offender and as a terror to evil-doers. After it has been judicially imposed the same means may be used to enforce its collection, which by law the sovereign may employ to collect his debt — because by the imposition of the fine the right of the sovereign to that amount of money from him who has been sentenced to pay it has been conclusively ascertained (155) of record. For this purpose it may be regarded as a debt due to the sovereign. But it is incontestible, we think, that the section of the Constitution which we are now considering did not embrace — and cannot without violence to many other provisions in it be held to embrace — fines imposed on conviction of crimes. It speaks of a *debtor* honestly surrendering all his effects for the *use* of his *creditors*. Neither of these terms, "debtor or creditor," is appropriate to describe the relation in which the convicted offender and the offended State stand towards each other. Again, the Constitution itself
123 discriminates between *123 debts and fines. In this section it provides against unnecessary and wanton imprisonment for the *collection* of *debts* — but in regard to *fines* its language is "excessive bail shall not be required, nor *excessive fines imposed*, nor cruel nor unusual punishment inflicted." Declaration of Rights, sec. 10. Here we find a fine classed where it ought to be, among the means used in the administration of *criminal justice*, and in immediate connection with other punishments *imposed* or *inflicted*, in the course of that administration. Moreover, the 19th section of the Constitution confers on the Governor the power of granting pardons, but no part of the Constitution gives him any power over the public property, whether consisting of debts due to the State or of any other kind except the naked authority "to draw for and apply such sums of

money as shall be voted by the General Assembly for the contingencies of government," and for these he is "to be accountable." Now if a fine of this character be a debt — a mere debt — creating the simple relation of debtor and creditor, between the individual who has been sentenced to pay and the State who is to receive it — certainly the Governor has no power to remit or release it. Yet from the institution of our government down to this day it has been the uniform, constant, and with one exception *unquestioned* usage of the Governor to grant a *pardon* remitting fines thus imposed — and on the only occasion when the question of his right so to do was raised, this Court held that it did not admit of discussion. *State v. Twitty*, 4 Hawks, 193. Nay, up to the last session of our legislature it has been considered as undoubted law — (and because the law was so deemed the legislature at that session passed the act to which we (156) shall hereafter have occasion to refer) — that there was no power under the law except the pardoning power of the executive which could relieve an imprisoned offender from his fine. It has been the understanding of every branch of the government, legislative, executive and judicial — of the whole community ever since the constitution was ordained, that a fine might be remitted by pardon, because it was a punishment, and that a prisoner could not be discharged from a fine under the insolvent acts, because in the sense of the Constitution it was not a debt. It is too late now, if it ever could have been permitted, to entertain a doubt upon the subject. Constitutions are not themes proposed for ingenious speculation; but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that formed shall think proper to change them. The argument, therefore, which we have been considering fails in this, that the fine imposed by the sentence below is not a debt within the meaning of the 39th section of the Constitution. But the argument presents another view in relation to the character of the fine which is proper to be
124 considered. The last proviso in the act *124 makes it the duty of the court before whom the conviction of a free negro or a free person of color shall take place, on ascertaining his insolvency, to impose in every case without regard to the character of the offense, a fine at least equal to the cost of prosecution. Now by antecedent acts the several counties in the State are charged in cases of insolvent criminals with the costs of prosecution, and all fines levied on convicted offenders, belong to the counties respectively in which the convictions are had. In pursuance of these acts the statute before us makes it the duty of the sheriff to account for any pay over the money collected under it, after a deduction of his commissions, as other fines. It is, therefore, manifest, say the counsel for the defendant, that the very purpose of the enactments in this statute is to reimburse the county the expense of prosecution, and that the fine *so* directed to be imposed, and all the machinery for collecting and discharging the fine, are *in effect* so many provisions for collecting costs, and whatever may be (157) thought of a fine really imposed for punishment, yet costs consequent upon conviction do constitute a debt. There are difficulties in interpreting the act with which, of course, we should not hesitate to grapple were it necessary. For instance, it would seem that the fine, the *minimum* of which is fixed, is required to be imposed before the insolvency is ascertained. This may, however, be a mere inaccuracy of language or arrangement. But, however this may be, a very strong, if not insuperable difficulty is felt by a portion of the court in asserting for the judicial branch of the government, a right to understand an act of the Legislature as professing one thing and meaning another, or to suppose the Legislature designed to do indirectly what was directly interdicted to them. Another portion of the court feels no such embarrassment, but thinks that the purpose of the act to secure to the counties the costs of prosecution is manifest, and that there is no indelicacy in thus interpreting its enactments. It

feels itself bound indeed to believe that the Legislature did not intend to violate the Constitution, and that they had no doubt of their right under the Constitution so to relieve the counties from the inconvenience of paying the costs of prosecuting insolvent free negroes. It conceives, therefore, that the Legislature being satisfied of the rightfulness of their object, might for very sufficient reasons of expediency have preferred to accomplish this object rather by ordering the *costs* to be *included* in the fine, than by the ungracious mode of *excluding* the persons convicted from the benefit of the laws which permitted insolvency to exonerate from costs. But in the judgment of the Court it is unnecessary to determine whether this be or be not the true construction of the act, for the costs of a convicted offender are not a debt. The general rule of the common law was that the sovereign neither pays nor recovers costs. It is not easy now to say when
125 this rule was first departed *125 from in North Carolina, by making the payment of costs a part of the sentence of the court. The change was antecedent to the Revolution, for in an act of 1762, for laying a tax on several counties of the District of of Halifax Superior Court, to repair the public prison thereof, and for other purposes (Swan's Revisal, 299), the new practice seems to be recognized. We find it there enacted "that the charges of committing and keeping a criminal shall, *if such criminal have not* (158) *sufficient estate to satisfy the same*, be paid by the public." Since the Revolution it has certainly been the usage in every case of conviction when a fine was imposed, to add thereto "and pay also the costs of prosecution." The existence of this usage was recognized in an act of 1778, ch. 4. (Iredell's Revisal, 363.) Up to that time the State's witnesses were not entitled to demand fees for their attendance. The act recites this as an injustice to these witnesses, and for the cure thereof directs that thenceforth they shall be allowed the same pay for their daily attendance as is allowed to witnesses attending in civil suits, and such fees for attendance shall be paid *by the defendant upon conviction;* and if the State shall fail upon the prosecution of any offence of an inferior nature the court may, at their discretion, order the costs to be paid by the prosecutor in case such prosecution shall appear to have been frivolous or malicious; and *in case defendant shall not be able to pay costs*, or the court shall not think fit to order the prosecutor to pay the same, that then, and in that case, the clerk shall grant a certificate to such witnesses in manner as certificates are directed to be granted to witnesses in civil cause; and such certificates may be received by the sheriffs in payment of public duties. The provision in this statute for the case in which the defendant shall not be able to pay costs, was construed, or rather misconstrued, into a legislative permission for a defendant sentenced to pay a fine and the costs of prosecution, to discharge himself from the costs by taking the oath of insolvency. The act of 1787, ch. 11 (Iredell's Rev., 613) recites that many persons convicted on indictments take the benefit of the insolvent act, either neglecting or refusing to pay fee office, and sheriffs' and gaoler's fees that are remedy thereof, enacts that every person who shall be found guilty of any charge exhibited against him by indictment or presentment, and shall be unwilling or unable to pay the office and gaoler's fees that are or may be consequent thereon, shall be hired out by the sheriff of the county where such person is convicted, for such time as any person will take him, to serve for the said fees and charges, the said sheriff first advertising the time and place of hiring at least ten days previous thereto. This act, which was sometimes, though seldom, (159) enforced had the effect to put an end to the practice of discharging criminals from costs by taking the oath of
126 insolvency. It has never *126 been directly repealed, but it was regarded as harsh and offensive by a large portion of the community; and upon provisions being made by subsequent statutes for the payment of costs incurred by the state in prosecutions where the defendant was convicted but unable to pay, containing, it was thought, a clear indication that the defendant

might be wholly discharged from the costs if insolvent, the act of 1787 was decided by the courts to have been impliedly repealed thereby. From this review of our usages, legislative acts, and judicial interpretation of them, it follows that the sentence pronounced against a convicted criminal that he shall pay the costs of prosecution is as much a part of his punishment as the fine imposed *eo nomine*, and that it was never held that he could discharge himself therefrom by taking the oath of insolvency, except by virtue of statutory enactments authorizing or supposed to authorize such a discharge. The right of the Legislature to prescribe the punishment of crimes belongs to them by virtue of the general grant of legislative powers. It is a power to uphold social order by competent sanctions. Unless they be restricted, and so far only as they are restricted by constitutional prohibitions, it is a power in the Legislature to accomplish the end by such means as in their discretion they shall judge best fitted to effect it. If they choose to annex as a penalty to guilty, that the offender shall in every case be mulcted, whatever other punishment may be inflicted, with the cost of prosecution, there is no authority in the land to gainsay it. If they think proper to provide that either the whole pecuniary penalty, or any part of it, fine and costs, or costs, only, shall not be exacted when the prisoner is ascertained to be unable to pay, it is an act of grace which the judiciary will cheerfully carry into execution. But if they do not so provide, the relief of the unfortunate offender must then be sought not from the judiciary, but from the Governor, who can remit all punishment or any portion of it.

But there is another answer to this argument which is alike decisive. The argument assumes that the thirty-ninth section of the constitution restricts the power of the State in the collection of debts due *to (160) the State*. We are satisfied that the assumption is unfounded, and that the section has no application to or bearing upon debts of this character. We think that this conclusion follows from the established rules for the interpretation of laws; from the nature of the provisions contained in the section; and from the uniform exposition which has been given to it. The rights and interests of the sovereign, whether that sovereign be a king or a people, are not to be restrained or diminished by general words not clearly referable to them. Upon this principle it was a well known rule of the common law that the king was not bound by any act of parliament wherein he was not named, unless it was an act in assertion of *public rights* or
127 in suppression of *public wrongs*, *127 and not interfering with his acknowledged interest. It is a principle founded in good sense. Public rights exist for the support and well-being of the whole community. Every individual of that community has an interest in their preservation and maintenance. They are of too great importance and of too general concern to be curtailed by construction and implication, and it is a natural presumption that when an interference with *them* is designed, the purpose will be unequivocally expressed. The language of the section is not applicable to public dues. It speaks of a *bona fide* surrender of all the estate, real and personal, of the debtor *"for the use of his creditors."* Can it be believed that it was intended thereby impliedly to abolish the principle embodied in the institutions of our forefathers and supposed to be kept inviolate to this day, that the debt to the sovereign shall be preferred to all other debts? Was a surrender "for the use of the creditors of the debtor" which would violate this order of preference to the injury of the State, to draw down the special favor of the State upon the debtor? Was public delinquency to be excused because the property taken from the State was applied to the use of the defaulter's creditors? The exposition of this section which has always prevailed is, we are convinced, the true one. The object, and sole object, of the provision was to protect unfortunate debtors who had been unable to comply with their private engagements, from the malignity, resentment, and cruelty of their offended creditors; to take from *these* the power which the common law gave of incarcerating (161) the person of their

debtor for life, although he had honestly surrendered to them all the means he had of discharging their claims, and although this imprisonment deprived him of the ability to procure other means to pay what remained due. Upwards of thirty years ago it was decided in the case of the *State against Exum*, in Hillsborough superior court (then the exchequer court of the State), where the defendant had been surrendered by his bail and committed in execution upon a judgment against him as a district treasurer, that he could not be discharged form imprisonment as an insolvent; and it is confidently believed that there never has been a case in which a public debtor has been allowed the benefit of this supposed constitutional right.

The next ground on which it is urged that the act is unconstitutional is for that it is repugnant to the tenth section of the bill of rights, which declares "that excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." The act, it is argued, violates the principle of that part of this section which forbids the imposition of excessive fines, because it compels the court, whatever may be the nature of the offense — however trivial — to impose a fine at least equal in amount to the costs of prosecution. And what, it is asked, are the characteristics of the offense thus peculiarly
128 visited by *128 legislative severity? They are two: that the offender is a free person of color and that he is unable to pay a fine. His color and his poverty are the aggravating circumstances of his crime. Whether a fine be reasonable or excessive ought to depend on the nature of the offense and the ability of the offender. But the nature of the offense is left out of consideration and the *in*ability of the offender to pay is made the cause for raising the *minimum* of the fine.

Whatever force there may be in this reasoning, addressed to a body intrusted with a discretion over the subject, we are compelled to regard it solely and exclusively so far as it tends to show that the act is one which we can pronounce to be forbidden by the constitution. Now there are great, if not insuperable, difficulties in a court undertaking to pronounce any fine excessive which the legislature has affixed to an (162) offense. It must be admitted that the language of this section of the bill of rights is addressed *directly* to the judiciary for the regulation of their conduct in the administration of justice. It is the courts that *require bail, impose fines*, and *inflict punishments*, and they are commanded not to require excessive bail — not to impose excessive fines — not to inflict cruel or unusual punishments — and it would seem to follow that this command is addressed to them only in those cases where they have a discretion over the amount of bail, the quantum of the fine, and the nature of the punishment. No doubt the principles of humanity sanctioned and enjoined in this section ought to command the reverence and regulate the conduct of *all* who owe obedience to the constitution. But when the Legislature, acting upon their oaths, declare the amount of bail to be required, or specify the fines to be imposed, or prescribe the punishments to be inflicted in case of crime, as the reasonableness or excess, the justice or cruelty of these are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a co-ordinate branch of the government. Without attempting a definitive solution of this very perplexing question it may at least be safely concluded that unless the act complained of (which it would be almost indecent to suppose) contains such a flagrant violation of all discretion as to show a disregard of constitutional restraints it cannot be pronounced by the judiciary *void* because of repugnancy to the constitution.

With respect to the act in question we cannot say that it does contain such a violation. If, which seems to have been believed below, for the sentence is to pay a *fine* only, and which, as it is a penal statute, ought to be taken to be its true construction, the court is *required* to inflict no greater or other pecuniary penalty than *the fine*,

then the offender's pecuniary punishment is not necessarily greater than that which in effect is denounced and imposed on all other offenders
129 upon conviction; *129 and the objection as to excess will then be that he cannot have the benefit of regarding the fine *to this extent* as a sentence to pay costs, and of obtaining a discharge from that part of it by reason of insolvency. The distinct effect of the objection thus considered will be hereafter examined.

After what has been said on the subject of excessive fines it (163) cannot be necessary to say much on the subject of cruel and unusual punishments. Our power to question the validity of a legislative act, because it denounces a punishment which we think too severe or not of an usual kind — if it can exist at all — certainly exists only in cases so enormous that there can be no doubt but that all discretion has been thrown aside. This act, whatever objections it may be exposed to because of its liability to abuse, is not subject to imputations of this kind. It contemplates, where the offender has not money nor property whereby he may be visited for his offense, that he shall not therefore escape all punishment, but shall be compelled to work out his fine. There is no penitentiary or public workhouse here, and therefore he must be put out to work under the charge of someone. Whether it was *expedient* to make that selection of that individual by an auction, and whether adequate precautions have been devised by the act to secure a proper keeper, and take from him adequate security for the humane discharge of his duties and exercise of his powers, are all inquiries exclusively belonging to legislative discretion. But the act does devise precautions designed to effect these purposes; makes the relation thereby created one well known to the law, that of master and apprentice, and subjects the master to legal visitation for inhumanity or improper treatment of such apprentice.

But it was insisted that the act in thus discriminating between the punishment of free persons of color and other free persons is arbitrary, repugnant to the principles of free government, at variance with the spirit of the third section of the bill of rights denouncing exclusive privileges, and not of the character properly embraced within the term "law of the land." We do not admit the validity of this objection. Whatever might be thought of a penal statute which in its enactments makes distinctions between one part of the community and another capriciously and by way of favoritism, it cannot be denied that in the exercise of the great powers confided to the Legislature for the suppression and punishment of crime; they may rightfully so apportion punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend as to produce in effect that reasonable and practical equality in the administration of justice which it is the object of all free governments to accomplish. What would be cruelty if inflicted on a woman or a child, may
130 be (164) *130 moderate punishment to a man. What might not be felt by a man of fortune would be oppression to a poor man. What would be a slight inconvenience to a free negro might fall upon a white man as intolerable degredation. The legislature must have a discretion over this subject, and that once admitted this objection must fail for the reasons already assigned in examining the objections as to the exercise of the powers admitted to be discretionary.

One more objection remains to be considered. The constitution gives to the Governor the power of granting pardons, except where the prosecution shall be carried on by the General Assembly or the law shall otherwise direct, and in this case he may, in the recess, grant a reprieve until the next sitting of the General Assembly. Now this act directs the sheriff to execute the judgment of the court during the week of its session or as soon thereafter as may be convenient, and thereby enables the sheriff to deprive the person convicted of an opportunity

to apply to the Governor for a pardon or reprieve. The answer to this objection is that the execution of every sentence of a court is under the control of the court, and that the court is bound by obligations too sacred to be disregarded, to allow time to make application for a pardon in every case where time is *bona fide* desired for that purpose. Whether the Governor's pardon could or would not come too late after the offender was hired out and the fine paid, is a question not necessary to be now decided. If the remaining in service be a part of the punishment, certainly the Governor could remit what remained unexecuted of it. If the fine be the punishment and the hiring be but the mode of procuring the fine, the Governor's power over the subject would probably cease with the payment of the fine.

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 1831 as to warrant us in declaring that act unconstitutional and void, and we are therefore of opinion that there was no error in rendering judgment against the defendant agreeably to the provisions of that act.

(165) Appeals in criminal causes annul the sentences rendered below, and whether the sentences be approved or disapproved they are not to be affirmed or reversed here. The law directs that the decision of this court shall be certified to the court below with instructions to proceed to judgment and sentence thereon agreeably to that decision *and the laws of the State.* This imposes upon us the necessity of adverting to a law which has been passed since the appeal, and since the argument, and which has an important effect on the sentence to be rendered. It is enacted by a law of the last session that *if any person* shall be convicted in any court of record in this State of
131 any crime or misdemeanor and *131 shall be in execution for the fine and costs of prosecution, and shall have remained in prison for the space of twenty days, it shall be unlawful for the person so in execution to be discharged from imprisonment under the same rules and regulations as are prescribed for the discharge of debtors in execution under the first and fourth sections of the fifty-eighth chapter of the Revised Statutes, entitled "Insolvent Debtors," provided that the act shall not be so construed as to release any person from imprisonment who shall be in prison for any definite length of time under sentence of any court. This act does not repeal the act of 1831, but as the last expression of legislative will, it necessarily abrogates so much of that act as stands in the way of its enactments. The last act is one of mercy and grace, and in favor of human liberty, and is entitled to a favorable interpretation. But independently of this consideration it embraces in express terms all persons convicted of offenses of whatever kind, and imprisoned for the payment of fines imposed by reason of conviction, and therefore we cannot intend any such person to be excluded from the benefit of its provisions. We hold, therefore, that the defendant may discharge himself of the fine to be imposed under the act of 1831, by remaining in prison twenty days, and complying with the provisions referred to in the chapter of the Revised Statutes. It will be necessary, therefore so to modify the sentence as after infliction of the fine to direct that the defendant be imprisoned until the said fine be paid or he be discharged therefrom by due course of law, and that if the prisoner shall not, within thirty days (or whatever period the court may think reasonable) be discharged by taking the oath of (166) insolvency as authorized by law, then that the sheriff be ordered to hire him out under the directions of the act of 1831.

This opinion is to be certified to the Superior Court of Sampson, with instructions to proceed to sentence accordingly.

As the defendant has not shown any error in the judgment below he must pay the costs of the appeal.

Cited: State *v. Newsome*, 27 N.C. 253; State *v. McIntire*, 46 N.C. 5; State *v. Glen*, 52 N.C. 324; State *v. Driver*, 78 N.C. 431; State *v. Cannady, id.*, 541; State *v. Davis*, 82 N.C. 612; State *v. Wallin*, 89 N.C. 580; State *v. Massey*, 104 N.C. 878; State *v. Parsons*, 115 N.C. 732; State *v. Nelson*, 119 N.C. 800; *Guilford v. Commissioners*, 120 N.C. 132 26. *132