CITATIONS INCLUDE 181 N. C.

NORTH CAROLINA REPORTS
VOL. 17

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM

JUNE TERM, 1831
TO
JUNE TERM, 1834

BY THOMAS P. DEVEREUX
REPORTER, ETC.
VOL. II

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA

JUNE TERM, 1831 TO JUNE TERM, 1834

(INCLUSIVE)

CHIEF JUSTICE*

LEONARD HENDERSON THOMAS RUFFIN

ASSOCIATE JUSTICES:

JOHN HALL† JOSEPH J. DANIEL

WILLIAM GASTON

ATTORNEY-GENERAL:

ROMULUS M. SAUNDERS

---

*CHIEF JUSTICE HENDERSON died 13 August, 1833, and was succeeded as a Judge by JUDGE GASTON, and as Chief Justice by JUDGE RUFFIN.

†JUDGE HALL resigned on 15 December, 1832, and was succeeded by JUDGE DANIEL.

JUDGES OF THE SUPERIOR COURTS

JOSEPH J. DANIEL	JAMES MARTIN
JOHN R. DONNELL	DAVID L. SWAIN
WILLIAM NORWOOD	HENRY SEAWELL*
ROBERT STRANGE	THOMAS SETTLE†

*Elected December, 1832, to succeed JUDGE DANIEL, promoted to Supreme Court.

†Elected to succeed JUDGE SWAIN, chosen Governor.

CASES REPORTED

☞ The Letter *v* Follows the Name of the Plaintiff.

CASES CITED

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1831

RICHARD ARNOLD ET AL. v. DANIEL BLACKWELL AND GEORGE BYARS.

1. Upon a reference of an executor's account to the clerk, he has power to determine whether a slave was the property of the testator or the executor.
2. Executors are not entitled to commissions on debts due from themselves to the testator, nor upon payments to legatees.
3. Neither are they allowed to a dishonest executor.

THIS cause was removed from RUTHERFORD. The plaintiffs were the residuary legatees of Joel Blackwell, who died in 1821, and the defendants were his executors. The bill, filed in 1823, charged that they had converted a considerable portion of the estate of their testator to their own use, denying that it was a part of the assets, particularly that the defendant Blackwell claimed a valuable negro man under a bill of sale from the testator, which the plaintiffs alleged was either fraudulently obtained or fraudulently set up as title; that the defendant was the general agent of his father, the testator, who was old, infirm, and intemperate; that when drunk the testator had agreed to sell this slave to a neighbor, one Simmons, for a small price, and in order to avoid performance of the contract, the defendant Blackwell persuaded the testator to execute a bill of sale for the slave to him, and antedate it, so as to overrun the date of the sale to Simmons, and thereby induce the purchaser to refuse a compliance; that the testator being anxious (2) to rescind the contract, complied, and that after his death the defendant Blackwell claimed the negro under this bill of sale. Other omissions in rendering his accounts were charged against the defendant Blackwell. There were no specific allegations of fraud or concealment against the defendant Byars.

The defendant Blackwell, in his answer, denied all the charges in the bill except that as to the negro. He admitted the agreement by the testator to sell the slave to Simmons, and his subsequent wish to avoid that sale, and averred that the testator told him if he would contrive to have the bargain rescinded he would give him (the defendant) that slave; that as well to induce the purchaser to rescind the bargain as to effect the gift, the bill of sale was executed. He denied the right of the plaintiffs to an account of the slave, and insisted that he had made a full return and account of all the assets in his hands.

The defendant Byars denied ever having received any assets of the testator, and stated that he had left the management of the estate to the defendant Blackwell.

A reference to the clerk was directed, who reported that the defendants had settled their accounts with the commissioners appointed by the county court; that after allowing them $35 for commissions, there was a balance of $29.76 in the hands of the defendant Blackwell; that upon examination of the testimony before him he had charged the latter with $500 for the value of the negro mentioned in the pleadings, and also with other small omissions, amounting to $19; and further, that upon the evidence he had charged the defendant Byars with $300 for the value of a female slave which he, the clerk, supposed to belong to the testator.

The defendants excepted (1) because the clerk erred in undertaking to decide upon the title of the negro claimed by Blackwell, and also because his decision was erroneous; (2) because the clerk had erred in charging Blackwell $19 for the small items mentioned in his report; (3) because he had allowed the defendants no commissions for settling the estate; (4) because he had erred in charging the defendant Byars
(3) with $300 as the value of a female slave.

Badger for plaintiff.
Hogg, contra.

HENDERSON, C. J. The case comes on upon exceptions to the report. The first exception consists of two parts: first, that the clerk had not power to try the title to the slave; secondly, if he had, that he had improperly charged the defendant Blackwell with his value, as part of testator's estate.

There certainly can be no force in the first objections. It is in substance saying that the court, for whom the clerk acts has no right to try the question. What he does has no force until ratified, directly or indirectly, when it becomes the act of the court, in which his agency is entirely lost. What he did only facilitated our labors, as we might have done the act without his aid.

As to the latter part of the exception, that the slave belonged to the defendant Blackwell, and not to his testator, we concur in the opinion of the clerk, notwithstanding the evidence proves a bill of sale from the testator to the defendant, as it at the same time proves a very foul fraud practiced by the latter on the former, by using a bill of sale for a purpose contrary to the intent to which it was given. This exception is, therefore, overruled.

The second exception must share the same fate, for it is satisfactorily proven that the small articles charged to the defendant belonged to the testator, and not to the defendant.

We are somewhat at a loss to understand whether it is meant by the third exception that commissions were not allowed on the additional articles wherewith the defendants are *now* charged by the clerk, or that they had not been allowed on their former settlement. If the former be meant, there are two objections. The first is, payment to a legatee or distributee is not a disbursement within the meaning (4) of the act of Assembly giving them, and receiving a debt from himself is not a collection, upon which they are allowed to an executor. But there is a second ground of objection, which must prove fatal to the defendant Blackwell. Commissions are allowed on fair transactions, and to honest and faithful agents. I speak now exclusively of the defendant Blackwell, who was willing, from his own answer, to join with (and, the probability is, to advise) his poor, old, superannuated father to cheat Simmons, by antedating his bill of sale, and now fraudulently uses it against the old man. If he means that commissions were not allowed on his former settlement, this is not a proper time to bring forward the claim. The presumption is that they have been allowed, or the claim brought forward and rejected. But it appears that heretofore, when a settlement of his accounts was made by commissioners under an order of the county court, $35 was allowed the executors for the payment of debts, and as compensation for services rendered before the division. And it is now eight or ten years since they ought to have settled their accounts. This exception is, therefore, overruled.

Strictly speaking, we ought, perhaps, also to disallow the fourth exception, in favor of Byars, the other executor, in regard to the female slave. But as he says he never acted on the estate, and as this bill is in its frame rather a bill to surcharge and falsify, and all the specific charges are against the other defendant, and nothing is alleged as to the administration of Byars except by general words, he might suppose that he was joined only for comformity, and may have been surprised by that charge. We will, therefore, refer the case again to the clerk on that point. The report is therefore confirmed, except as to the charge of

$300 against the defendant Byars, as to which it is again referred to the clerk, with power to examine the parties on oath, and to hear such proof as they may offer, and report to this Court.

(5) DECREE: It appears from the report that there is in the hands of the defendant Blackwell, exclusive of such interest as may be due thereon, $548, principal. Decree, that he pay the same, with interest thereon, to be computed by the clerk of this Court, at the rate of 6 per cent per annum, from the time of the death of the testator, taking the time of his death from the admission in the defendant's answer. And that in default of such payment, execution issue therefor. Let the defendant Blackwell pay all the costs of this suit, except the costs of the defendant Byars, which are reserved for further order.

JOHN SPEIGHT v. REDDICK GATLING ET AL.

1. A testator is presumed not to die intestate as to any part of his estate, and hence, where there is a residuary clause, all his property, not specially bequeathed, passes under it.

2. A division of an estate, honestly made, by an executor upon a wrong principle, may be set aside at the instance of a legatee who submitted to the division in ignorance of the rights.

THIS cause was removed from GATES. The plaintiff alleged that Joseph Speight died in 1792, leaving a will whereby he devised as follows: "I lend to my beloved wife, Annie Speight, during her natural life, one-half of the land and plantation whereupon I now live, also five negroes, viz., etc.; also, three horses, etc." That after giving the bulk of his estate to his sons, Francis and Henry, "and their heirs and assigns forever," he bequeathed 12s. to his grandchildren, Joseph Freeman, John Freeman, and David Freeman, to "them and their heirs forever, in full of their part of my estate." He also gave a negro to his granddaughter Anne Freeman, "to her, her heirs and assigns forever," with a similar declaration, that it should be in full of her share of his estate; and after bequeathing a riding-chair and harness to his wife, "to her and her heirs forever," he proceeded as follows: "It is my will and desire that (6) all the remainder of my estate, of every nature and kind whatsoever, shall be sold, and nine months credit given to the purchasers; the money arising therefrom to go to pay my just debts and funeral charges, and if there should be any remainder, for it to be equally di-

vided between my two sons, Francis Speight and Henry Speight, to them and their heirs forever," and appointed his sons, Francis and Henry, executors, who proved the will, paid all the debts of the testator, and both died intestate, before Anne Speight, the wife of the testator, James Gatling took out letters of administration upon the estate of Henry Speight, and upon the death of Anne, the widow, received the property given her for life by the will of her husband, consisting of the original stock of negroes, together with a large increase; that William Goodman administered upon the estate of Francis Speight, and died before Anne Speight, and that administration *de bonis non* upon the estate of Francis issued to Henry Speight, the younger; that James Gatling died in 1823, and that the defendants had administered on his estate. The bill then set forth the title of the plaintiff, as administered *de bonis non* of Henry *Speight,* the elder, and concluded with a prayer for an account of the profits of the slaves which the defendant's intestate received after the death of Anne Speight, and that the plaintiff's share of them might be delivered to him. Henry Speight, administrator *de bonis non* of Francis Speight, was made defendant, and upon his death the cause was revived against Thomas Sanders, who was also appointed administrator *de bonis non* of Francis Speight.

The defendants, in their answer, admitted the principal allegations of the plaintiff. They stated that their intestate not only administered upon the estate of Henry Speight, the elder, but that he also took out letters of administration *de bonis non, et cum testamento annexo,* of the testator, Joseph Speight, under which he had, by the advice of counsel, and with the consent and approbation of the plaintiff, distributed the property given to Anne, the widow, for life, "among the distributees of Joseph, the testator."

This division was made in 1819, under an order of the county (7) court, and the report of the commissioners was filed with the answer, from which it appeared that they had divided the negroes left by Joseph Speight to his wife for life, equally between all his grandchildren, *per stirpes,* excluding the Freemans, who he had declared should receive no further part of his estate. The several acknowledgments of the receipt of their shares, signed by the persons among whom this property was divided, were also filed with the answer. By consent, the clerk was directed to take an account of the value of the negroes, and of their annual profits.

In his report the clerk stated that no evidence had been filed with him as to the value of the slaves or the amount of profits received from their labor. He, therefore, had been governed by the valuation made by the commissioners, who divided them in 1819, and had allowed nothing for

the profits of their labor, but charged the defendants with interest upon that valuation, and that he had rejected a claim made by the defendants for an allowance on account of one of the negroes who died in 1820.

Hogg for plaintiff.
Gaston, contra.

HALL, J. On the argument of this case an objection was made because Francis Speight's representative was not a party. But upon an inspection of the record it appears that after the death of Henry
(8) Speight, administrator of Francis Speight, letters of administration *de bonis non* were granted to Thomas Sanders, and the suit has been revived against him.

The first question upon the merits of the case is whether the property in dispute passed by the residuary clause of Joseph Speight's will to Francis and Henry Speight. In the first clause the testator "lends unto my beloved wife, Anne Speight, *during her natural life,* one-half of the land and plantation whereon I now live, with one-half of the improvements thereon; also five negroes, Jenny, Henry, Stephen, Rose, and Pris," with various other articles. In a subsequent clause he says: "I give and bequeath unto my beloved wife, Anne Speight, my riding-chair and harness, *to her and her heirs forever.*" It is observable that in all the other clauses where the testator gives property he uses the same words of limitation, "*to them* and their heirs forever." This is pretty satisfactory proof that the negroes given to Anne were, like the land, given to her for life, and so far the remainder of them is undisposed of. The testator in a subsequent clause gives to his grandson, Joseph Freeman, 12s., in full of his part of the estate, to him and his heirs forever. He does the same to John Freeman and David Freeman. He also gives to his granddaughter, Anne Freeman, one negro named Luke, to her and her heirs forever, in full of her part of his estate. It is pretty clear that the testator did not intend that these last legatees should have any interest in the remainder of the negroes given to his wife, Anne, for life. Nor can it be supposed that he intended, as to that property, to die intestate. But I am of opinion that it passed to Henry and Francis Speight under the following residuary clause: "It is my will and desire that all the remainder of my estate, of every nature and kind whatsoever, shall be sold and nine months credit given to the purchasers; the money arising therefrom to go to pay all my just debts and funeral charges; and if there should be any remainder, for it to be equally divided between my two sons, Francis Speight and Henry Speight, to them and their heirs forever." This clause is sufficiently comprehensive to embrace it.
(9) It is argued that it is incredible that he intended the remainder

in those slaves should be sold to pay his debts. I answer that whether he intended it or not, he certainly subjected that interest to the payment of his debts; and his executors (who were Francis and Henry Speight) might sell it if they pleased; and if they paid the debts, need not sell any of it. It was given to them, subject to the payment of the debts, and until it was exhausted no other legacy could be touched for that purpose. I, therefore, conclude that the property in question devolved upon and became vested in Francis and Henry Speight by the residuary clause in the will of their father, Joseph Speight.

But it is stated, and relied upon, that the division was made amongst the four children of the testator by consent. This allegation, I think, has not been established. No doubt, James Gatling, acted honestly in making the division, and that he made it under legal advice. And this might have been the means, in some measure, of silencing the claimants, who were probably ignorant of their rights. The testimony of John Gatling and William Gatling would seem to show that the division was made by consent; but the testimony of Lewis Eure and Hillory Willey, who were the commissioners who made the division, clearly prove that some of the plaintiffs were dissatisfied with it; and if others were silent, it might be and probably was that they were ignorant of their rights. I, therefore, cannot consider the division to be a bar to the plaintiff's rights under the will.

A report has been made in this case by the clerk in which he values the negroes claimed by the plaintiff as they were valued in 1819, when the division took place. He states that no evidence was offered either as to their present value or as to their hire or annual value. As the plaintiff was entitled at the time the division took place, and as the negroes were thereby withdrawn from him, I see no objection to taking their *then* value.

Another objection is that part of the valuation was made (10) upon a slave that died shortly after the division. It is to be observed that the slaves are not produced by the defendants in discharge of themselves. If they were, it would probably appear that their increase would balance that loss. Or if there was no increase, the hire or annual value of the negroes might exceed the interest, so far as to cover it. I, therefore, think that the valuation of the slaves and property claimed by the plaintiff, which was made at the division, should be the basis of a decree against the defendants.

PER CURIAM. Decree Accordingly.

Cited: Saunders v. Gatlin, 21 N. C., 90; *Jones v. Perry,* 38 N. C., 202; *Hyman v. Williams,* 34 N. C., 94; *Calvert v. Peebles,* 71 N. C., 278; *Blue v. Ritter,* 118 N. C., 582.

SAMPSON WILDER v. CHARLES W. MIXON ET AL.

Where a testator directed his estate to be kept together until one of his five children married or should arrive at, etc., and then the one marrying or arriving at, etc., to receive a share, and the residue to remain undivided for the other children, "leaving the manor plantation, at a valuation of $4,000, for the youngest child that may be then living," *it was held* that the testator contemplated several divisions, that the manor plantation was to be taken by the child who was the youngest at the last division, and that in the division it was to be taken as land, and not as personalty.

THIS bill was originally filed in BERTIE. The case made by it was that Miles Rayner died in 1819, having executed his will, whereby, after providing for his wife, he devised as follows: "I give and bequeath the whole of my estate to my five children, Cynthia, Mary Ann, Martha, John, and William, to be and remain as a joint estate until one of them may marry or arrive at the age of 25 years, at which time that one to take its full share, and the balance to remain undivided for the other children, leaving the manor plantation, as a valuation of $4,000, for the youngest child that may be then living; but in no case shall any one of my children that has received an equal share have any part of
(11) the undivided residue, so long as there shall be a child that has not received an equal share." That William, one of the sons, died before the testator, and the others survived him; that Cynthia had married, and received her share from the executor; that at her marriage, of the surviving children, Mary Ann, Martha, and John, the last was the youngest; that soon after, he died; that Mary Ann had married the defendant Mixon, and Martha, the younger of the two, had married Augustus Holly, also a defendant. That the plaintiff was the guardian of Mary Ann and Martha, and had their joint estate in his hands, and was willing to settle with their respective husbands; that Mixon, who had married the elder, contended that Martha was, in the division, to take the manor plantation at a valuation of $4,000, and that this valuation should be taken into the estimate in dividing the personal fund as well as the land; that the defendant Holly claimed one-half of the personal estate, and insisted that upon the marriage of Cynthia the manor plantation vested in John, and that Martha was not compelled to take it at $4,000, but was entitled to one-half of it, under the will of her father. The bill prayed that Mixon and wife and Holly and wife might interplead, and the plaintiff be indemnified in his payment to them, by the decree of the court.

Hogg for plaintiff.
Gaston for Mixon and wife.
Badger for Holly and wife.

HENDERSON, C. J. This case comes before us on a bill of interpleader, and depends on the construction of Miles Rayner's will. The first point is, Are the words, "the youngest child then living," confined in their operation to the first division, or do they also apply to the other divisions contemplated by the testator? That he did contemplate other divisions is evident, as he directs the residue of his property to be kept undivided; and, also, that none of his children who have received an equal share shall have any part of the *undivided residue so long as there is a child that has not received a share.* I am of opinion that the (12) words *"then living"* go through and operate upon each successive division, and finally vest the manor plantation in the one who is the youngest at the time of the last division. Nothing personal governed the testator in giving the manor plantation to the youngest, as it was quite uncertain who would be the youngest, even when the first division was to be made. It must have arisen, therefore, from a fitness in his estimation, that the youngest child should have the manor lands, or it was better suited to the other provisions of the will, either of which motives may be said to be continuing, and operating until the last division. Besides, it was impossible that the residue of his estate should be kept undivided for his other children, and yet the manor plantation be given, or set apart in severalty, to the youngest child at the time of the first division. And if the words *"then living"* do not apply to the first division, they must apply to the others, on to the last division. We, therefore, think that the manor plantation vested in Martha, who was the youngest child at the marriage of Mary Ann, when she had a right to call for a division; and which would put an end to the joint possession. By the words of the will each child took a vested interest in right, but not in severalty. Upon the death of John, his estate descended to his heirs; but as they are his sisters, it makes no difference in this case.

The next question is, shall the $4,000, the testator's estimate of the value of the manor plantation, be considered in the division as land or money? And are the two funds, land and personal estate, to be kept separate and distinct in the division? We think, very clearly, that it is land, and should be thrown into the land division. There is nothing to make it personalty. The valuation of it, made by the testator, could not have that effect. It was only doing then what the commissioners would have had to do upon making partition. If, therefore, there are lands, equal in value, and no more, they may be allotted to Mary Ann. If more, the surplus will be equally divided between the sisters.
If less, then the difference must be made up from the personal (13) property.

The clerk of this Court will take an account of the estate, both real and personal, of the defendants Mary Ann and Martha, which was on the estate of their father, Miles Rayner, and was, or ought to have been, in the hands of the plaintiff, their guardian, at the time of the marriage of the defendants Mixon and Mary Ann, and state an account between him and each of his wards.

PER CURIAM. Decree accordingly.

JOHN T. CLANTON *v.* JOHN BURGES.

1. A vendor may complete his will, pending a suit to rescind the contract for defect of title, at any time before the hearing.
2. *It seems* that a purchaser who has given a bond for the purchase money, and is in the undisturbed possession, will not be relieved against the bond on the ground of a defective title, there being no allegation of fraud in the sale.
3. Where the land of the wife was conveyed by the husband to her separate use during life, remainder to the issue of the marriage, upon an executory contract by husband and wife for a sale, a specific performance will not be decreed. But if the sale be executed, so minute an outstanding interest as the trust in favor of the children, depending upon the curtesy of the husband, will not vacate the contract.
4. Where the vendee has taken his title, this Court will not rescind the contract because of a prior voluntary conveyance by the vendor, which is void against the vendee.

THIS bill was filed in HALIFAX, and alleged that in 1825 the defendant offered to sell the plaintiff a tract of land to which he represented that he had a good title in fee; that the plaintiff, confiding in these representations, purchased the land at a price of $1,240; the defendant executed to him a deed in fee, with a covenant for quiet enjoyment, and the plaintiff gave his bond to secure the purchase money; that, in truth, the defendant had not an estate in fee simple in the land; that he claimed under one William W. Alston and Mary, his wife, who, after their marriage, had conveyed the land of the wife to the defendant, by a deed to which the wife had never been privately examined. It further charged that the plaintiff was in possession, and could not sue at law upon his covenant, and that the defendant had obtained judgment on the bond given to secure the purchase money. The deeds from Alston and wife, and from the defendant to the plaintiff, were filed as exhibits. By the former the land was conveyed to the defendant in trust to pay over the rents and profits to Mrs. Alston during her life, for her sole and separate use, with a remainder in fee to the issue of the marriage. This

title was recited in the deed from the defendant to the plaintiff (14) The prayer was for an injunction and general relief.

The defendant, in his answer, admitted the principal charges in the bill, but alleged that the plaintiff was fully apprized of the nature of the title, and denied that he had ever represented himself as having full power to convey. Pending this suit, the defendant obtained from Alston and wife a deed conveying the land in fee simple to the plaintiff, to which the wife had been privately examined, and it was filed in the cause for the use of the plaintiff.

Seawell and Devereux for plaintiffs.
Badger for defendant.

RUFFIN, J. The defects of the title complained of consist in the want of a privy examination of Mrs. Alston to the deed to Burgess, so that it passed only the estate for life of her husband, and in the trust created by that deed in favor of Mrs. Alston, and to her separate use during her life, and after her death for her issue. Pending this suit, (15) Alston and wife have duly executed a deed to the plaintiff himself in fee, which has been filed in the cause by the defendant, for the use of the plaintiff. The bill does not charge any fraud on the part of the defendant. It alleges, indeed, that the plaintiff discovered, since he took the deed from Burges, the two defects above mentioned. But it is not charged that Burges concealed those facts, or that he knew the effect of them and did not communicate it to the plaintiff. On the contrary, the plaintiff exhibits the deed to him; and upon the face of it, there is an express reference to the deed of trust from Alston and wife. It might well be taken, then, that the plaintiff knew the state of the title. He would certainly be affected with notice in respect of the *cestui que trust* in that deed; for knowledge and the means of knowledge are the same, and the same fact which communicates knowledge for one purpose must be considered as doing it for all others. The case cited at the bar of *Abbott v. Allen,* 2 Johns, ch. 519, lays it down that a purchaser who has received a conveyance, and is in possession and not disturbed, will not be relieved on the mere ground of defect of title, where there was no fraud nor eviction, but must rely on his covenants. Much more must it be so when the very defects of title alleged were known to the party at the time he took his conveyance. The contrary would amount to this: that no obligatory contract can be made unless the vendor's title is perfect; and that any defect, secret or notorious—so notorious as to affect the price agreed on—should put it in the vendee's power to rescind, after receiving a conveyance with covenants against those defects. This would be

annulling contracts fairly made, and subject the vendor to circumvention because he himself acted honestly. But this cause does not demand a decision of this point, as those defects have been since cured.

It is undoubtedly the law of this Court that the vendor may complete his title pending the suit, and at any time before the hearing. He is allowed to make good his contract and buy his peace. The last
(16) deed from Alston and wife is an effectual conveyance of the fee to the plaintiff. Its validity cannot be impaired by an acknowledgment of the *feme* of the deed to Burges; for such acknowledgment does not relate back, and only makes it her deed from the time of her privy examination. The only possible *hiatus,* then, in the plaintiff's title is the trust in favor of the children, arising out of the estate of the husband as tenant by the curtesy, from the death of their mother until that of their father, if he should happen to be the survivor. Whether, if the contract rested in articles, the purchaser would be compelled upon a bill of the vendor to accept a conveyance, with even this small cloud over it, I will not say. Probably he would not. He would have a right, before he parted from his money, to ask a clear title. But so minute an outstanding interest, depending upon such a contingency, can never form ground for rescinding a contract, at the instance of a purchaser who is in possession under a conveyance executed, with full covenants for quiet possession, from a vendor not alleged to be in failing circumstances, who made, on the treaty, a full communication of his title. To grant the prayer of the bill would be to proclaim encouragement to dishonest dealing and an invitation to purchasers to expose latent defects in their vendor's title, instead of curing them by enjoyment.

In truth, however, even this trivial imperfection does not exist in the title. It is now complete. The deed of settlement from Alston to Burges was after marriage, and so voluntary, and void as against subsequent purchasers under Statute 27 Eliz. Of this there can be no doubt, whether the purchaser have notice or not of the previous voluntary conveyance. It is established by an uninterrupted series of cases from the passing of the statute until this time. And there can be as little doubt that the plaintiff must be regarded as the purchaser from Alston and wife, for the price paid to Burges is a consideration extending, under the circumstances, to them.

Smith v. Garland, 2 Mer., 123, and *Pulvertoft v. Pulvertoft,* 18 Ves., 93, were cited for the plaintiff, to show that though a voluntary deed be void, yet a purchaser could not be compelled to specific performance where the estate was encumbered with such a conveyance. That
(17) only means that a man shall not be forced to take a lawsuit

upon a bill of the vendor. But where he has already taken the title, the fetters which he has put on himself cannot be loosed by the court upon any such ground.

It has been objected that no notice can be taken of the deed now filed, because it is not within the pleadings. The title supplied pending the suit never is. It is, to be sure, the more regular way for one of the parties to ask a reference of the title and have it reported. But that is only for the ease of the court, which may act by itself, and is not obliged to ascertain any fact by way of inquiry, but may do so directly. There is no complexity in this title; and, therefore, Court has thought it proper to proceed without putting the parties to the expense and delay of an inquiry.

PER CURIAM. Bill dismissed.

Cited: Crawley v. Timberlake, 37 N. C., 467; *Hughes v. McNider,* 90 N. C., 252; *Freeman v. Eatman,* 38 N. C., 85; *Thigpen v. Pitt,* 54 N. C., 69; *Love v. Camp,* 41 N. C., 213; *Leach v. Johnson,* 114 N. C., 88; *Rainey v. Hines,* 121 N. C., 320; *Brooks v. Loughran,* 122 N. C., 671.

WILLIAM M. DAMERON AND JOSEPH GOLD ET AL. v. MARY GOLD, ADMINISTRATRIX OF JOHN DAMERON AND JOHN CLAY ET AL.

1. Upon a bill by children against the administrator of their father, charging that negroes had been advanced, upon the marriage to their mother, and vested in her husband, and that after the death of their father the negroes were claimed by the brothers and sisters of the mother, as having been a loan and not an advancement, there being no collusion between the administrator and the plaintiffs, and the former being in possession, and honestly defending his legal title, *it was held* that the court had jurisdiction to decree a distribution of the slaves by the administrator, but not to try the controversy between the latter and those claiming a legal title adversely to him.

2. Before the act of 1806 (Rev., ch. 701) if a father, upon the marriage of a child, put negroes into his possession, *prima facie* it is a gift and not a loan.

3. The children of a second husband cannot enforce distribution from the administrator of the first.

4. Because, if the share of the wife vested in her second husband, his administrator only can claim it; and if it survives to her, the children have no right to it.

5. A court of equity has a clear jurisdiction on the bill of the *cestui que trust* against the trustee.

6. But where a third person claims a legal title adversely to the trustee, a bill by the *cestui que trust* against the trustee and that third person drawing the question of title into litigation in equity, cannot be maintained.

7. It cannot be sustained as a bill of interpleader, because the plaintiffs are not in possession.

8. And *it seems* that the trustee cannot, to protect himself, draw the *cestui que trust* and a stranger into litigation.

9. Nor can one in possession under a legal title sue one out of possession, to have a pretended title of the latter declared void, unless upon some peculiar ground of equity jurisdiction.

THE bill was filed in CASWELL, in 1824, by the children of John Dameron and of William Gold, who were the first and second husbands of the defendant Mary Gold. It charged that upon the death of Dameron, the defendant Mary administered upon his estate; and that upon
(18) the subsequent death of Gold, Richard Atkinson, who was since dead, administered on his estate; that Mary Gold had a number of slaves, or their increase, in her possession, which her father, Edward Clay, put, by way of advancement, into the possession of Dameron about 1800, upon his marriage. That the slaves were given to Dameron, and had ever since been held by him, or by his administratrix. The bill further charged that Edward Clay died in 1819, leaving a number of children, besides Mary Gold, all of whom, and his executor, were made defendants. It was alleged that no division of those negroes had ever been made between the widow and children of Dameron, but that lately the defendants Mary and her brothers and sisters denying the gift to Dameron, asserted a title in themselves, as derived by a subsequent gift from the father, Edward Clay, to them, in exclusion of the plaintiffs; and were about effecting a division among themselves, by petition filed in the county court, against Mary Gold for that purpose.

The prayer was for an injunction against further proceedings towards a division amongst the defendants; that they might be compelled to set out their title, in order to have it litigated and determined in this cause, and that the slaves might be declared a part of Dameron's estate, and be distributed accordingly amongst the plaintiffs and the defendant Mary, with the other parts of the estate, of which a general account was sought.

The bill was taken *pro confesso* against Mary Gold.

The executors and other children of Clay filed their answers, and denied the gift to Dameron, affirming that the negroes were expressly lent him by their father, who afterwards, and after the death of Dameron and Gold, disposed of them amongst all his children equally. They admitted that the slaves were all in the possession of Mary Gold, and

averred that she asserted a title to them as administratrix of Dameron, by virtue of the gift to him; and that to enforce a division of those and other negroes given by their father to all his children, they had instituted the suit in the county court by petition. (19)

The cause was heard upon the proofs at June Term, 1830, when many depositions were read which rendered it very doubtful whether there was, in fact, a gift or a loan to Dameron. Under these circumstances an issue upon that question was directed.

This issue was tried in the last circuit, at Caswell, before SWAIN, J., who instructed the jury that where a father, immediately upon the marriage of his daughter, or shortly thereafter, sent home with her a slave, who continued in the possession of her husband for a great length of time, the law, before the passage of the act of 1806 (Rev., ch. 701) inferred that a gift of advancement to the child was intended by the father, and that the burden of proving there was no gift or advancement was upon the party who denied it. The jury found that the slaves were put into the possession of John and Mary Dameron as an advancement or gift, and not as a loan.

Nash for defendants.
Gaston for plaintiffs.

RUFFIN, J., after stating the case as above: This Court finds no reason to be dissatisfied with the mode of conducting the trial or the opinions held by the judge of the Superior Court. They seem to be correct and conformable to the settled law. But supposing the verdict to stand, whether all of the plaintiffs or which of them are entitled to a decree, or whether any decree can be made against any of the defendants except Mary Gold, are questions of more consequence, and remain to be disposed of.

The children of Gold have no right or direct interest in this property as the estate of Dameron. It is a question whether the distributive share of their mother vested in their father upon the intermarriage, or survived to her, upon his death, before an account of Dameron's estate had been taken and distribution made. The Court does not mean to determine that question, and, indeed, could not do it, (20) since Gold's administrator is not before the Court. If, however, it did survive to the mother, those plaintiffs have no interest whatever in the fund. If it vested in the father, it came to his administrator, who alone can call for the estate, for there may be debts. When an administrator *de bonis non* shall be appointed, and gets the property there will be a trust for the children and widow, after creditors are satisfied.

Under either aspect, the children of Gold cannot maintain this suit. And the bill must, therefore, as to them, be dismissed with costs, except as to the defendant Mary.

The children of Dameron can sustain this bill, as against the administratrix of their father, for an account and distribution. And as to the negroes in question, they are certainly, as between these parties, to be considered as those of Dameron. To that purpose, the verdict was not necessary. Mrs. Gold had confessed the right of the plaintiffs before. Indeed, I must suppose, from the proofs and the whole course of the proceedings, that she never contested it, and was made a defendant, not to try the right against herself so much as to bring a case into court in which the right might be tried against the other defendants.

But whether the right, as against those other defendants, can be tried in this manner is a very different and material question, and comes now to be considered. From their answer, which is supported by direct and divers proofs, it is clear that before and at the bringing of this suit the defendant Mary claimed the negroes for herself and her children, as the gift of her father to her husband, Dameron, and was in the exclusive possession under that claim. Indeed, the bill itself charges that the other defendants were then suing Mary Gold, to compel a division and delivery of them, and the answer of those defendants admits the fact. The case is, then, that of a trustee in possession, claiming to hold according to the trust, and a third party, out of possession, claiming by a different and distinct title, and denying the right, at law, of the
(21) trustee. In such a case the *cestui que trust* has filed a bill against the trustee and the adverse claimants to have the conflicting legal titles litigated and determined here. Can such a bill be supported?

It may be here remarked that this question is not at all connected with nor does any consequence from the former orders tend to determine it. The issue was directed because there seemed to be great doubt upon the question of fact, which might be found against the plaintiffs. If so found, it would be decisive against them. It is true, the court did not then consider the effect of a finding the other way, as has happened. But that finding leaves the equity and question of jurisdiction open for a decision upon their proper principles. Supposing, then, the gift to be established, as far as a verdict on an issue out of chancery establishes anything, the inquiry recurs, Can this bill be sustained?

The Court is of opinion that it cannot. It cannot be made a bill of interpleader, for which it seems to have been designed. That is for the relief of a debtor, or of one in possession, who owes a duty to or is trustee for one of two, and does not know which. If either of these parties could have brought such a bill, it would be Mrs. Gold herself,

against all the others; because she has the possession, and there are two claims. I should doubt, indeed, whether a trustee in possession, as such, could call the *cestui que trust* and a stranger into litigation, the latter not claiming by assignment from the former, nor any privity shown between them. *Dungey v. Angrove,* 2 Ves., Jr., 312. But a person in possession under a legal title, cannot sue a person out of possession, upon the ground of a pretended distinct title, and to have it declared invalid, unless there be a fraud imputed to it, or some other matter peculiarly within this jurisdiction. It certainly cannot be done upon the mere ground that the pretended title is bad, and his own preferable, as being prior or paramount. Those are pure questions of law, and the party in possession may well be content with the advantage that gives him. If this were not so, there never would have been such things as bills of discovery, or to perpetuate testimony, or to (22) examine witnesses *de bene esse.* The matter would have been drawn at once into this Court, to try the right and get relief, as attempted here, instead of getting aid to try in the proper legal forum. But it is said the plaintiffs are *cestuis que trust,* endeavoring to enforce the trust, and that creates the jurisdiction. By no means. It does, against the trustee. But as to third persons the possession of the trustee is that of the *cestui que trust.* If the legal estate out of which the trust arise becomes extinguished, the trust goes with it. While the former continues, the latter does also. To protect that estate, and to defend the legal title, is one of the objects of creating trusts. And the *cestui que trust* must rely on the trustee's doing his duty, or, in default of it, seek the appropriate remedy against the trustee in equity. Upon a suit at law against the trustee, or an adverse claim of the legal estate, the *cestui que trust* cannot, by bringing both the parties here, change the jurisdiction. If so, every estate once put into trust, or that got into executors' hands, would be made to cease being a subject of legal litigation. If the trustee transfer the legal title, he is responsible in his own person and estate. If the transfer be accepted with notice of the trust, that is a fraud, and the estate remains subject to the trust. If the trustee remain in possession, and is sued by a stranger, if he collude, or even be insolvent and negligent, equity will permit the *cestui que trust* to use the trustee's name in defending at law, and coerce the trustee to lend his assistance. But in all those cases the jurisdiction is not changed as to the adverse claimant, but the legal title is still tried by the appropriate tribunal. If, indeed, a recovery had been permitted by collusion, and the possession changed, it stands on the footing of a conveyance in fraud, and with notice, and is within the cognizance of this Court. But here the possession remains with the trustee; the title is

firmly asserted by the trustee; and the defense honestly and faithfully made by the trustee. The bill, it is true, charges collusion. But
(23) it is not the allegation, but the fact, that enables equity to give relief, and the fact is clearly proved the other way. If the petition in the county court were not a harmless thing—if an adverse possession, under an adverse title, could be disturbed by a decree in it, supposing a court could be got to make such a decree (even if partition of personal chattels could at all be effected in that way)—yet there is no truth in the charge that Mary Gold assented thereto, and intended, collusively, to betray the interests of her children, with the care of which she stands charged. What would be the effect of this proceeding? By making all the defendants, by allegation, a unit in the claim against the plaintiffs, the declarations of the defendant Mary might be made to destroy the rights of the other defendants, although the claim, in point of fact, in opposition to each other.

Such a feigned allegation of collusion will not authorize the *cestui que trust* to make a stranger a party to his bill to enforce the trust, or distribute the trust fund in possession of the trustee. All that he can ask is to get the property, so that he can defend it himself. If the trustee wants an indemnity against the adverse claimants, it is time enough to consider whether any shall be decreed, and the extent of it, when asked for by the trustee. The *cestui que trust* cannot say to a stranger, "You shall try your legal title with me in equity, and not at law, with my trustee in possession." There is no such jurisdiction.

The verdict must, therefore, upon this ground, be set aside as to all the defendants except Mary Gold, each party paying their own costs of the trial at law; and as to the same defendants, the bill must be dismissed with costs in this Court.

As between the plaintiffs, who are the children of the intestate Dameron, and the defendant Mary, the slaves in question are declared to be a part of the estate of the said intestate, and an account ordered, if the plaintiffs should think proper to risk it and bring on the case again, without making the administrator of the intestate, Gold, a party.

PER CURIAM. Decree accordingly.

Cited: *Green v. Harris,* 25 N. C., 218; *Nance v. Powell,* 39 N. C., 303; *Southerland v. Harper,* 83 N. C., 204.

(24)

JOHN PIKE ET AL. v. STARK ARMISTEAD ET AL.

Where a decree pronounced in the Superior Court does not ascertain any fact, nor declare any principle upon which it was founded, but simply dismisses the bill, on appeal, the decree is not of course reversed, but the cause will not be reheard upon the proofs.

THIS cause was heard at WASHINGTON, on the spring circuit of 1830, before MANGUM, J., when the following decree was pronounced by his Honor:

"This cause coming on to be heard on the bill, answer, proofs and exhibits, it is ordered and decreed that the bill be dismissed with costs." From which the plaintiffs appealed.

Badger for plaintiffs.
Gaston and Hogg for defendants.

RUFFIN, J. A preliminary point has been raised which, if decided in favor of the plaintiff, must reverse the decree, without entering into the merits. The decree finds no fact nor declares any principle on which it is founded. It professes to be made on a hearing on the bill, answers, proofs, and exhibits, and orders the bill to be dismissed. It is said there is nothing appearing to this Court on which that decree was founded, nor anything on which a decree in affirmance can be given, and so the decree must *ex necessitate* be reversed.

Generally, the material matters in issue are stated in the decree, and the determination of the court on them. This is requisite to enable the party to point to the error on which he brings his (25) bill of review. And if this were a proceeding of that sort, the decree could not stand, because there the evidence is not seen by the revising court, but only the pleadings and the decision. But it is otherwise in England, on an appeal in equity, for that is only a rehearing by a higher court, instead of being on a petition to rehear by the court which gave the decree. This is the known rule in chancery. But it is contended that we cannot look into the evidence, because this is a court of limited jurisdiction, and because before the act of 1818 the Supreme Court could only respond to such questions of law as were stated and sent from the circuit. This Court, it is true, has a limited jurisdiction; that is, it has no original jurisdiction. But where it has an appellate jurisdiction, not only to review and reverse decisions below, but also, after reversing, to proceed to give such a decree as in law and justice ought to have been given by the court below, the purposes of justice would seem to require that all the means of ascertaining the merits

should be possessed by us that were by the tribunal which first acted. At law, it is so; for the judgment rendered does not rest upon the evidence given, but upon the facts found by the jury. In equity, the judge finds the facts as well as the rule of decision. And as it is impossible often to separate the principle from the facts, as in cases of hardship, fraud, notice, and the like, it would be almost impossible that the judge below, or those here, could state with sufficient minuteness every circumstance on which the principal of equity arose. This difficulty was experienced by the Supreme Court of the United States, under the Judiciary Act, sec. 19, which requires the facts to be stated by the parties or the judge, on writs of error in admiralty or equity causes. In *Hills v. Ross,* 3 Dall, 184, it was decided that the Supreme Court must take those *facts* thus stated, and could not look into the *evidence.* But this restriction was admitted by the Court, not on the idea that theirs was a limited jurisdiction, but because it was imposed by the express words of the statute; and even then its extreme inconvenience,
(26) and the injustice it might produce, pressed so hard as to produce a division of opinion. This michief was remedied by the act of 1803, which repeals that clause, and thus left the court free to exercise the ordinary jurisdiction of rehearing. Our act of 1777 (Rev., ch. 115), allowing appeals on petitions, directs a rehearing, which shows the sense of the Legislature of what is the proper effect of an appeal in equity. But it is said that the act of 1818 only transfers to this Court the jurisdiction of the previous court. It likewise gives the power and enjoins on the court to make such decree as on the whole record ought to be made; which involves the duty of considering everything which the judge below had before him; for we are to determine what ought to have been done, and *then do it here.* In equity causes that duty cannot be performed without hearing all the proof he heard. To this it is objected that the act could not mean that, because at that time the court below could not pass upon the facts. True; but upon appeals under the act of 1810, were the facts stated in the decree, and was the Supreme Court to take them to be true as there stated? No; for, as the judge could not find them, the evidence of the facts was the finding of the jury. The Supreme Court had then the same evidence which was before the Superior Court, namely, the verdict; and if the record did not contain that evidence, the decree must be reversed, as being without evidence.

When the power to pass on the facts was conferred by a subsequent law on the court, that power and duty is imparted to this Court. Since, then, there is no express restriction in our statute, as there was in the act of Congress, and since it is in the nature of chancery proceedings that upon appeal there shall be a rehearing, and the useful execution

of the duties imposed on this Court requires it, I must conclude that the whole case is before us. The question is certainly not without doubt, and has been much considered by the court. There is an inconvenience in the expense of a transcript, which was not seen in 1818, because then only the issues and the verdict were sent here. But (27) that may be remedied by a legislative direction to send the originals, and, at any rate, ought not to impose on us the necessity of taking the facts, with all their coloring, from a single judge's hasty opinion on the circuit.

The decree will, therefore, not be reversed on this ground; but the cause will be heard on its merits, as appearing on the proofs.

PER CURIAM. Motion overruled.

HENRY BIZZELL v. WILLIAM SMITH.

1. If a creditor be bound to sue the principal at the request of a surety, his refusal does not discharge the surety, if no injury results to the latter—as where the principal debtor was insolvent when the liability of the surety was incurred.

2. *It seems* that the creditor is not bound to sue the principal debtor at the request of the surety.

THIS bill was filed in WAYNE, and alleged that the plaintiff in 1820 became surety for one John McKinnie in a bond to one Fellow; that the bond was assigned by Fellow to one William Bizzell; that when the bond was executed McKinnie was solvent, but that the plaintiff, being anxious to be relieved from his responsibility, applied to the holder either to commence suit on the bond or procure McKinnie to renew it with another surety; that Bizzell promised to do so, and in case of failure, that he never would call upon the plaintiff to pay it; that William Bizzell died, and administration on his estate had been committed to the defendant; that the bond was found among the papers of the intestate, and McKinnie having become insolvent, and removed out of the State, suit was commenced against the plaintiff alone. The prayer was for an injunction.

A statement of the answer and proofs is unnecessary.

W. C. Stanley for plaintiff.
J. H. Bryan, contra. (28)

RUFFIN, J. The principle assumed in the bill is that the delay or refusal of the creditor to sue the principal debtor, after request of the

surety, discharges the latter. This position is more than questioned by the Court. The very contract of the surety is that the principal will pay, and dispenses with active diligence on the part of the creditor, who ought not to be bound to incur the expense and trouble of litigation for the relief of the surety, since the latter, by performing the contract on his part, namely, by payment, may immediately have, in his own name and under his own contract, all the remedies which the law gave to the creditor himself. The question is nothing more than this, which of the two shall bear the burden of bringing and conducting a suit? And surely he for whose benefit and at whose instance it is instituted cannot complain that the task is imposed on him, especially as he has undertaken, with the creditor, to answer for the acts of the debtor.

But the Court will leave that point undecided, since the plaintiff has not brought his case within his own principle and the authorities from which it is drawn; for, clearly, if the creditor be bound to bring an action on the request of the surety, the rights of the creditor are not impaired, unless the party has received prejudice. There must be *laches* of the creditor, and consequent loss to the surety. And this loss ought to be clearly proved by the plaintiff. So far from this being done here, the proof in the cause is distinct that McKinnie was insolvent at the time the bond was given—much more when the intestate was requested to bring suit.

PER CURIAM. Bill dismissed.

Cited: Thornton v. Thornton, 63 N. C., 213.

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(29)

CHARLES WILSON v. TURNER D. WHITE ET AL.

Where executors having a power to sell lands honestly made an arrangement with the widow of the testator to waive her right to dower, and sold with notice to the purchaser of the widow's claim: *Held,* that the latter was entitled to no relief, upon the widow's interposing her claim.

THE plaintiff alleged that Thomas White died seized of a tract of land in Virginia, on which he resided; that he appointed the defendants executors of his will, and directed them to allot 50 acres of land to his widow, in lieu of dower; that these 50 acres did not include the dwelling-house and outhouses, and was of less value than the dower in the whole tract would have been; that under a power in the will the executors advertised the residue of the land for sale; but understanding that the

widow intended to claim her dower, they had agreed to give her a horse and one year's provisions, and build her a house, upon condition of her abiding by the will; that upon her acceding to these terms the land was exposed to public sale, subject to the life estate of the widow in 50 acres only, and was bought by the plaintiff; that the widow, alleging that the defendants had not complied with their agreement, had recently sued out process for the assignment of her dower. The bill concluded with an averment that by the laws of Virginia the widow was entitled to dower, and prayed for an injunction against a judgment on the bond given by the plaintiff to secure the purchase money.

The defendants denied all the equity of the bill, averring that they had made no promise to the widow to induce her not to dissent from the will; that she voluntarily avowed her determination to abide by it, and that all the defendants had done for her proceeded from motives of benevolence; and they alleged that the widow had been instigated by the plaintiff to dissent from the will solely for the purpose of giving him some foundation for this suit. They also alleged that the widow was present when the plaintiff purchased, and did not make known her claim; and upon this ground insisted that the plaintiff was protected (30) in equity against her dower. Testimony was taken which established the fact of the widow's consent to the sale, and of some disagreement between her and the defendants as to the latter not complying with the previous stipulations; but there was no proof of a stipulation by the defendants that the widow should not claim dower.

SWAIN, J., at CASWELL, on the last circuit, dissolved the injunction which had been granted, and dismissed the bill, and the plaintiff appealed.

No counsel for either party.

HENDERSON, C. J. Giving to the testimony its greatest weight, it proves only that the widow agreed to forego her right to dower, and take the 50 acres of land devised to her in her husband's will, in consideration of certain promises made to her by the executors in regard to building her a house on the 50 acres, giving her a horse, some stock, and some family supplies; and that they have not fully performed their promises; and that in making these promises and in failing to fulfill them, no fraud was intended on the purchaser of the land or any other person. I think that such a case affords no ground of relief to the purchaser. No assurance was given that the land was free from the widow's claim of dower. It was known, however, that there was a widow, for she was present at the sale; and knowledge that there was a widow was knowledge of her rights. The plaintiff was, therefore, a purchaser with full notice. If,

indeed, it had been proclaimed, in order to enhance the price, that the widow had consented to forego her claim to dower, then as those promises were the cause of such consent, they ought to have fulfilled them. But it appears that nothing was said about the widow's dower. The defendants sold, and the plaintiff bought, subject to that claim; and there being no fraud, there is no ground to rescind the contract.

PER CURIAM. Affirmed.

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(31)

JAMES S. BATTLE v. SPENCER L. HART ET AL.

Upon the insolvency of the principal debtor, a surety is considered, in equity, as a creditor, and may retain, against an assignee for value and without notice, any funds of the principal which he has in his hands.

THE bill was filed in EDGECOMBE. The facts charged and admitted were that one Joseph Bell and Robert Joyner, copartners in trade, becoming insolvent, by two deeds made a general assignment of their effects to a trustee, in trust to secure their endorsers among whom was one Barnes. That the plaintiff was a large creditor of Bell & Joyner, and entirely without security, and by an arrangement between them Bell & Joyner conveyed all their estate, already assigned as above, to Spencer D. Cotton in trust to secure the plaintiff, who gave bond and surety to discharge all the debts secured in the two deeds made before that time; that the plaintiff got possession of the two deeds, and, thinking he had a right to do so, refused to permit them to be registered. That a sale took place under the deed to Cotton of all Bell & Joyner's effects, at which Barnes purchased to a large amount, but refused to pay the sum bid by him, upon the ground that he had a right to retain until the debts to which he was surety for Bell & Joyner were paid, and that it was then agreed between Barnes and Cotton that he should retain the property purchased by him, but the title thereof was not to be changed, and it should remain subject to the claim of the plaintiff. Barnes paid the debts for which he was the surety of Bell & Joyner, and afterwards made a general assignment of his property to the defendants for the purpose of securing his endorsers, among whom was the plaintiff, and to an amount much larger than the sum which Barnes owed Cotton, the trustee, for purchases at the sale of Bell & Joyner's effects—and among the property thus conveyed were the specific articles bought by Barnes at that sale. Upon the property assigned by Barnes to the defendants being exposed to sale. Cotton, the plaintiff's trustee, interposed a claim on his behalf to the articles bought by Barnes at the former sale, and it

was then agreed between the defendants and Cotton that the sale (32) should proceed, the defendants binding themselves to hold the avails of it subject to the claims of the plaintiff.

Barnes was insolvent at the time the plaintiff made the arrangement with Bell & Joyner, and at that time the plaintiff was also his surety to a large amount.

The bill prayed that the sum which the defendants received from the sale of the property, bought of Cotton by Barnes, might be paid in exoneration of the plaintiff from his liabilities for the latter. Barnes was made a defendant.

Badger for plaintiffs.
Devereux for defendants.

RUFFIN, J. The state of this case is, shortly, this: The trustees in the deed made by Bell & Joyner for the benefit of the plaintiff made a sale, at which Barnes purchased. He declined paying, upon the ground that the plaintiff knew of the previous unregistered deeds of trust, in which Bell & Joyner had provided an indemnity for Barnes against the suretyships in which he was involved for them. The bill admits this equity of Barnes; for although he had not then paid the debts, yet he was liable for them, and the principals were insolvent. But the bill sets up an equity of the same nature, and founded on precisely a similar state of facts, against Barnes himself. The bill alleges, and the answer also admits, that at that time Barnes was also insolvent, and the plaintiff was surety for him. Upon the direct authority of *William v. Helme,* 16 N. C., 151, founded on the clearest principles, the plaintiff had then the right of getting any funds he could of Barnes, and retaining them for his indemnity; and he may thus retain against an assignee in equity for value and without notice. A surety in such a situation is a creditor; and the subsequent assignee only succeeds to his assignor's rights, and subject to the equity of the surety, which is prior. If, indeed, the contest was between the original creditors of Bell & Joyner, to whom Barnes was liable as surety, that might make a difference. Had they not been paid by Barnes, they might have asked for the (33) fund created for their satisfaction, both against the plaintiff and Barnes. But they are satisfied and out of the way. The question is whether Barnes, who was bound to pay to Cotton, the trustee, for the effects purchased at the sale, and who did not, under an agreement that the title should remain unchanged and subject to all the demands of the plaintiff, can claim that property or the price of it for himself—not for the creditors of Bell & Joyner—as against a man who was then his surety for his debts to a larger amount, and afterwards was obliged to

pay them. The equity of the plaintiff against Barnes is palpable, and must be felt by everybody upon the stating of it. An assignment of the property to the defendants confers on them no better claim. They did not get the legal title thereby; for it is proved by the deposition of Cotton, read by consent, that the title was reserved in him by express agreement between him, James S. Battle and Barnes, founded on the very claim now set up by the plaintiff.

The present defendants admit they disposed of the effects at Barnes' sale, under another agreement that the proceeds should be subject in their hands to the claim which the plaintiff or his trustee, Cotton, had to the specific effects; and that they yielded the sum of $1,163.62. This sum belongs to the plaintiff upon the principles assumed by the Court; if in point of fact the demand against Barnes, arising out of the debts paid for him, shall amount to as much, after deducting what may be in the hands of Cotton, or the plaintiff (if there be anything), arising from Bell & Joyner's sales, applicable to the satisfaction of the debts which Barnes or his assignees have paid. The bill, indeed, charges very large demands of the plaintiff on Barnes, after all those allowances; and the answer admits that a balance is due, on the whole, from Barnes, but does not confess a particular sum. This makes it necessary to have an inquiry, if the parties cannot themselves agree, after this declaration of the principle by the Court.

PER CURIAM. Decree accordingly.

Cited: Scott v. Timberlake, 83 N. C., 384.

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(34)

WHITMEL H. PUGH v. WILLIAM BRITTAIN.

Where the deed describes the land conveyed by metes and bounds, and by mutual mistake of the parties covers land which the vendor did not intend to sell, nor the vendee to buy, the mistake will be corrected.

THIS bill was originally filed in BERTIE, and alleged that the plaintiff and his brother, Augustine Pugh, being possessed of a term for years in a tract of land called the Briery Pocoson, contracted to sell it to William W. Johnston for $2,400. That before the purchase money was paid, Johnston died, having appointed the defendant his executor; that at the sale of Johnston's effects the plaintiff mentioned to the defendant the contract of sale, and the amount due him by Johnston, who induced him to purchase to the amount of the debt, upon an agreement

that the debt due the plaintiff should be set off against the amount of the plaintiff's purchases; that the plaintiff and his brother, in pursuance of this agreement, offered to assign the term to the defendant, for the use of the next of kin of his testator, but the defendant, expressing some doubts as to the solvency of Johnston's personal estate, proposed that the term should be sold by him, as executor, at public sale, as if it belonged to the estate of his testator, and that if it did not bring the sum of $2,400, which he, the defendant, as executor of Johnston, had paid for it, the assignment should be made directly to him, and that he would stand responsible, as executor, for the purchase money; that the land was, according to this agreement, sold, without mentioning the boundaries, but as a term for years in the Briery Pocoson; that it did not sell for $2,400, and thereupon the plaintiff and his brother assigned it to the defendant, with covenants for quiet enjoyment; that in the deed of assignment the land was described as containing 640 acres, and the boundaries thereof were set forth, but that it was the intention of the parties thereto, and of the testator, that the plaintiff and his brother should sell only that part of the Briery Pocoson to which they had title; that by mistake the boundaries set forth in the deed covered a tract of land to which the assignees had no title; that the land (35) thus, by mistake, included within the description in the deed at its execution belonged to one Malachi Chamberland, who was since dead; that Chamberland, and those under whom he claimed, had been for forty years in possession; that at the sale of the term by the defendant, no idea was entertained of selling the land of Chamberland, neither did the defendant ever think that Chamberland owned any part of the land; that upon a survey, it turned out that the boundaries of the deed executed by the plaintiff and his brother covered the land belonging to Chamberland, and that the defendant had, upon ascertaining this fact, commenced an action upon the covenant of quiet enjoyment contained in that deed. The bill averred that the land really owned by the plaintiff and his brother, after deducting from it, as described by the boundaries, that part belonging to Chamberland, exceeded in quantity 640 acres, and prayed an injunction against the action of the defendant.

The defendant, in his answer, stated that upon examining the will of the testator he found the Briery Pocoson bequeathed by the testator to two of his sons; that from thence he inferred either that the purchase money therefor had been secured or paid; that soon after probate of the will he discovered that he had not assets to pay simple contract debts. He denied that he had persuaded the plaintiff to purchase at the sale of his testator's assets, but stated that at the sale the plaintiff informed him that the purchase money for the Briery Pocoson had not been paid,

and asked him if he would set off his (the plaintiff's), bid for a quantity of corn against the debt due upon that purchase; that supposing the plaintiff had a bond for the amount, he, without making due inquiry, incautiously consented; that upon coming to a settlement with the plaintiff, and finding that he had no note or bond for his debt, the defendant refused to comply until he had taken counsel; that after taking advice, being very anxious scrupulously to fulfill his bargain, he agreed to allow the plaintiff the debt due him, but for his own indemnity
(36) sold the term, as the property of his testator, intending, if it brought more than $2,400, to give the benefit of the purchase to his testator's estate, and if not, to charge himself with the sum of $2,400, and take the term on his own account; that at the sale thus proposed nothing was bid for the land; and thereupon the plaintiff and his brother conveyed to him, and thus the purchase was forced upon him against his will, and solely to enable him to comply with a hasty pledge given the plaintiff; that the Briery Pocoson was originally leased for a term of years by the Tuscarora Indians to Thomas Pugh, the grandfather of the plaintiff, and under whom he claimed, who conveyed 100 acres thereof to one Samuel Williams, by whom it was assigned to Samuel W. Johnston, who conveyed to Chamberland; that the boundaries set forth in the deed of the plaintiff and his brother were those described in the original lease to Thomas Pugh; that neither he nor his testator, and, as he believed, neither the plaintiff nor his brother, knew anything of the fact that Chamberland's land was included within the boundaries by which the plaintiff and his brother conveyed, as the lands were low and subject to inundation, and no survey of them had ever been made. He admitted an eviction by one Bartlett claiming under Chamberland, and the pendency of the action upon the covenant, and insisted that as the plaintiff sold, and he bought, by the title papers alone, and that the conveyance to him intended to set forth the boundaries of the original lease, there was no mistake in the contract; but he got, and the defendant sold, exactly what was intended. And further, that if the contract was in any way altered, it should be rescinded, and submitted to reconvey to the plaintiff, and account for the rents and profits, upon receiving his purchase money, with interest.

Replication was taken to the answer at Spring Term, 1828, and a survey of the land was then ordered. At Fall Term, 1828, the cause was "set for hearing on the bill and answer," with leave to take testimony, and the survey was then returned, from which it appeared that
(37) within the boundaries of the plaintiff's deed to the defendant there were, without including the land belonging to Chamberland, 721 acres. No depositions were filed.

Gaston for plaintiff.
Seawell & Hogg for defendant.

HALL, J. A replication has been filed in this case to the defendant's answer; and the cause is put down for hearing upon the bill, answer, and survey. The case, can, therefore, be decided for the plaintiffs only upon the facts which the defendant admits, as responsive to the allegations of the bill. It is therefore important that those facts or admissions should be well understood.

His Honor then stated the substance of the answer as given above, and proceeded: It is, therefore, the opinion of the defendant that the plaintiff conveyed land to him which neither he nor his brother believed was included in the boundaries set forth in the deed, and which they both knew belonged to another person. The bill is filed to rectify the mistake.

But the defendant insists that as the parties were ignorant of the lines, and had not the means of ascertaining them by a survey, the vendors meant to sell, and he to purchase, all the lands described in the deed to the elder Pugh, grandfather of the plaintiffs; that he looked to the paper title only. If a person was purchasing another's interest in lands, in no respect located, there might be some ground for such a claim. But in this case the parties had a knowledge of the land sold, but not of its particular boundaries; for the defendant describes it as low, flat land, uncleared and covered with water in the winter. And neither party ever dreamed that Chamberland's land was part of it; for it seems that Bartlett, who claimed under Chamberland, was in actual possession of that land. (38)

The defendant certainly got a title for less land than the boundaries of the deed cover. But deducting the Chamberland tract, the deed conveys more land than 640 acres, the quantity it calls for.

PER CURIAM. Injunction perpetuated.

Cited: McKay v. Simpson, 41 N. C., 454; *Day v. Day,* 84 N. C., 409; *Anderson v. Rainey,* 100 N. C., 335; *Warehouse Co. v. Ozment,* 132 N. C., 849; *Maxwell v. Bank,* 175 N. C., 183.

THE ATTORNEY-GENERAL UPON THE RELATION OF GEORGE EASON v. JAMES PERKINS.

1. Where the owner of land adjoining an old mill site sought to enjoin the erection of a new mill, and it was ascertained by a verdict that the mill, though injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused; especially as the old mill was erected before the plaintiff purchased.
2. Where the right affected is clear, or the injury irreparable, injunctions are granted against private nuisances originating in establishments for personal gratification or private profit only.
3. But private right must, upon adequate compensation, yield to public convenience; and courts of equity will not interfere by injunction where the public benefits resulting from such an establishment exceed the private inconvenience.
4. The erection of mills where they are not nuisances being authorized by law, a court of equity will not restrain the erection of one simply because it affects the health of one family.

THE bill, originally filed in PITT, alleged that one Mooring had formerly erected a dam and built a mill near the house of the relator; that the millpond extended within 80 yards of the house; that while the mill was kept up it rendered the adjoining country, and particularly the residence of the relator, unhealthy, insomuch as to be a nuisance, and that it was of no public convenience, and only worked during the wet season; that in 1820 it was much injured, and that Mooring finding it unprofitable, had permitted it to go to ruin. That from this period there was an improvement in the health of the neighborhood, and particularly in that of the relator's family; that Mooring having died, the site of the mill was purchased by the defendant, who had commenced rebuilding the dam. The prayer was for an injunction to restrain the defendant from rebuilding the mill and dam.

The defendant, in his answer, admitted the fact of Mooring's having formerly owned the mill, and his purchase of the land on which it was situated, which he averred took place in 1828. He also ad-
(39) mitted his intention of rebuilding the mill, having formed that resolution in consequence of the earnest request of the neighborhood. He alleged that the old mill was in existence in 1795, when the relator purchased the land on which he lived; that it had continued in operation from that period until Mooring permitted it to go to ruin, without any complaint on the part of the relator. He insisted that Mooring had never abandoned the intention of rebuilding, but had actually prepared timbers for that purpose, and denied that the old millpond had, or that the new one would have, an injurious effect upon the health of the neighborhood.

The points on which the parties were at issue were submitted to a jury, who found that the proposed pond would overflow some land belonging to the relator; that the health of the relator and of his family would be injured thereby, but not that of the neighborhood; and that the erection of the proposed mill would be of public utility, and not a nuisance.

Gaston for plaintiff.
Attorney-General and Hogg for defendant.

RUFFIN, J. The arguments at the bar took a wide range, embracing a discussion of almost the whole jurisdiction of this Court, under the head of nuisance. It is not intended to notice all the points of controversy, because the Court is under no necessity of laying down any general principles for the decision of this case. It stands on very special circumstances, found upon issues requested by the parties.

It is admitted that for the ordinary damage to the plaintiff's land by flooding it, there is a remedy by action, and that it is an adequate remedy. On that score, then, the interposition of this Court is not asked.

But it is said that the injury to the plaintiff's health and (40) that of his family is one which cannot be ascertained at law; much less adequately compensated, and that a just apprehension of it forms a proper case for the preventive justice of equity, by injunction.

It may be so, where the nuisance thus operating upon an individual arises from an establishment made for personal gratification or mere private profit. It is certain that equity does, in some instances, restrain mere private nuisances. But it is equally certain that it is not forward to do so, unless they interfere with a clear right long previously enjoyed, or will be followed by irreparable mischief, which makes immediate action a duty founded on imperious necessity. These are general doctrines. And the destruction of health might well be considered a case of irreparable mischief, in a case where private emolument alone is looked to on the other side. But our views cannot be thus limited in the case before us. Mills are necessary public conveniences, and water mills the ordinary and almost the universal kind in this State. It is a maxim that private right must yield to public convenience, upon adequate compensation. Without adverting to the variety of subjects to which courts have applied it, it is sufficient for the occasion to remark that the Legislature hath by divers statutes extended it to mills. In a modern act it has been carried to the unusual extent of taking away the common-law action until the *quantum* of damage has been ascertained, by a peculiar method, to be more than £10 annually. If less, it amounts

to a compulsory lease for five years. It may be that the damages of the plaintiff will be less than the sum specified in the act. It would be strange if this Court were to prohibit the erection of a mill for which, if erected, the party, by positive enactment of the Legislature, can have no action at common law. If the plaintiff rely on the magnitude of the injury, he ought to have put it to the jury to assess the probable amount, or at least to have made proof to rebut an inference fairly deducible from the verdict. The jury have found that the mill will be a convenience to the neighborhood, and of public utility, and that the
(41) health of the neighborhood will not be injured, but that of the plaintiff's family will, though to what extent or what probable extent it is not said. The argument is that this is sufficient, for it is impossible for a jury to say which fever is caused by the pond or by the general insalubrity of the climate, and that though the lower part of the State be unwholesome, yet the pestilence ought not to be aggravated by artificial causes. True; that is, from wantonness or for mere gain's sake, which would be wicked gain, indeed. But where a general convenience is involved, it constitutes a preponderating consideration, unless in itself it also produce a general mischief, or no compensation is awarded for the invasion of private right. Compensation is in this case amply provided for by the inquisition of a jury upon the amount of damages. The general mischief consists in corrupting the atmosphere so as to affect the general health of the neighborhood. If it extend only to one family, it cannot, as a general rule, be held a nuisance, under this head, to be redressed by abatement or injunction. A case may arise, as supposed at the bar of the pond of an insignificant mill throwing off vapors destructive to the healthfulness of a large landed estate; a case in which between the public convenience and private suffering there is no kind of comparison; wherein the court would act. But the circumstances must be specially shown. None such appear here. There is nothing in this case but the interest of a single individual to weigh against public utility. This will not suffice. We must take notice that in this climate a less injury than that can hardly be expected from any mill. We must take notice that the Legislature was as much aware of that fact as we are, and yet that they have encouraged the building of mills by restraining successive actions for the private injury, and also authorized the county courts to order the building on the lands of another, unless the mill would "create a nuisance to the neighborhood." (Act of 1777, Rev. ch. 122). This is an exposition of a principle from the source of the law, which the Court must respect.

It might be material, too, that the plaintiff and those under
(42) whom he claims submitted for forty years to this grievance;

that he bought his land in 1795, while it subsisted, and allowed its continuance for five and twenty years. That is, indeed, no positive bar to a remedy; but it is a powerful reason why this Court should leave him to his legal remedy. He and the defendant must both have calculated the value and the inconvenience of the mill, and its attendant consequences, when they made their purchases.

But the stress of the case lies in the other circumstances. Less harm cannot follow the building of a mill in the alluvial region of the State than the rendering of one plantation less salubrious. To perpetuate this injunction would be to issue one against the erection of another mill below the falls in our rivers.

The cases heretofore in this Court are entirely distinguishable. *Bell v. Blount,* 11 N. C., 384, and *Raleigh v. Hunter,* 16 N. C., 12, were founded on facts diametrically opposite to the present. There the health of towns was put in jeopardy. *Crudup v. Carpenter** turned materially on the contract, and the extent of damage, ascertained by the verdicts at law, in comparison with the value of the mill property. Upon neither of those principles, nor any other compatible with legislative policy or chancery precedents, can this bill be sustained. It must, therefore, be dismissed with costs.

PER CURIAM. Bill dismissed.

Cited: Attorney-General v. Lea, 38 N. C., 304; *Clark v. Lawrence,* 59 N. C., 85; *Hyatt v. Myers,* 71 N. C., 273; *S. c.,* 73 N. C., 237; *Privett v. Whitaker, id.,* 556; *Brown v. R. R.,* 83 N. C., 131; *Daughtry v. Warren,* 85 N. C., 137; *Dorsey v. Allen, id.,* 363; *Cherry v. Williams,* 147 N. C., 459; *Berger v. Smith,* 160 N. C., 211; *Rope Co. v. Aluminum Co.,* 165 N. C., 576.

EDMUND D. McNAIR v. THOMAS RAGLAND.

1. As many executions, of any kind, as the plaintiff chooses may be sued out on the same judgment; but if executed wrongfully or irregularly, it is at his peril.
2. If a *fi. fa.* and a *ca. sa.* are both sued out, the latter cannot be executed until the former is returned.

AT this term, Seawell, Gaston, and Badger, for plaintiff, moved for several writs of *fieri facias* on the decree entered against the defendant at last term (16 N. C., 516), directed to the sheriffs of several different

*This case was not reported, as it was decided solely upon the special terms of an agreement.

(43) counties, suggesting that the defendant removed his slaves from county to county so as to prevent a seizure of them.

The counsel admitted that such practice had not been common in this State, but contended that it was perfectly well settled in England; and they cited Tidd's Practice, 1032; *Primrose v. Gibson* (16 Eng. Com. Law, 78), and *Miller v. Purnell* (1 *ib.*, 414).

Nash & Winston for defendant.

RUFFIN, J. A motion has been made in this case for liberty to sue out two or more writs of *fieri facias* to different counties. Such a practice has not yet prevailed generally in this State, though in one part of it, I learn, at one time, it was common to return, in vacation, a writ to one county and take out another for a different county. The convenience and utility of the practice are so apparent that the Court felt from the beginning no difficulty in granting the motion but the want of a precedent. It is just and reasonable to give a creditor every facility for the security and collection of his debt, which is the more necessary here, since a most valuable portion of the property of our citizens is so easily removed from one county to another. And we are glad to find that it is a well-known proceeding in England to sue out as many executions as the party chooses, he taking care how he uses them; for if he abuse the process, the court would unhesitatingly set it aside, and leave him exposed to the action of the person aggrieved. If he sue out a *fi. fa.* and proceed on it, he cannot execute a *ca. sa.* until a return of the other, and a proper credit on the process against the body. This is necessary, that the officer may know the sum for which he detains the prisoner. And he levies both writs of *fi. fa.* under a responsibility for seizing too much. He must take care not to sell upon the second seizure until he has done so under the first, and given the proper credit.

(44) Mr. Tidd states the suing out of two writs of *fi. fa.* to be a settled practice (Tidd's Pr., 1032). *Miller v. Purnell* and *Primrose v. Gibson* are instances of a *fi. fa.* and a *ca. sa.* issued at once. There were motions to set them aside, but the court said it was perfectly regular—only the *ca. sa.* could not be acted on after a levy of the *fi. fa.* until either a sale or due discharge of the effects. The result of our examination is that the plaintiff may sue out what executions, and as many of them, as he chooses; but he acts on them wrongfully, or irregularly, at his peril.

PER CURIAM. Motion allowed.

Cited: Ferral v. Brickell, 27 N. C., 69; *Wheeler v. Bouchelle, ib.,* 585; *Adams v. Smallwood,* 53 N. C., 259.

JAMES BROWNING AND ELIZABETH, HIS WIFE, v. WILLIAM N. PRATT AND MOSES S. PRATT.

1. No decree can be pronounced for the plaintiff upon a bill suggesting fraud in procuring a deed and praying to have it canceled, and for a reconveyance, where the answer and proofs do not support the allegations, but establish a case entitling the plaintiff, upon a proper bill, to a redemption.
2. The wife is an unnecessary party to a bill to set aside a deed for her land, fraudulently procured from her husband alone.
3. Proofs which are not material to any issue between the parties cannot be read upon the hearing.
4. The plaintiff sometimes obtains a decree solely upon the admission in the answer, but the admission must have some reference to the case made by the bill, and not be entirely in avoidance of it.
5. Relief never can be given which is directly contrary to the prayer of the bill—as if the prayer is that a deed be canceled, a decree in affirmance of it will not be made.
6. Costs are not given against a married woman in a suit for matters occurring after the coverture, and to which she is an unnecessary party.

THIS bill was filed in ORANGE, and alleged that the plaintiff James was seized in right of his wife, the plaintiff Elizabeth, of two tracts of land containing 225 acres, worth $500; that he had obtained a judgment before a justice of the peace against one James, execution upon which issued to the defendant Moses, who was a deputy sheriff, and was levied upon some horses, which the plaintiff James contended to be the property of the defendant in that execution. That the plaintiff, finding that they were claimed by one Warren, refused to litigate the question of property in the horses with him, but that the defendants, pretending great friendship for the plaintiff, advised him that there was no danger, and prevailed on him to have the horses levied on. That the defendants informed the plaintiff James that before a sale could take place it was necessary for him to sign a writing; that being entirely (45) illiterate, and confiding in the friendship of the defendants, the plaintiff James executed the writing, without having it read to him, and thereupon a sale of the horses took place, when they were bought by the defendant Williams, that afterwards Warren recovered of the defendant Moses in an action of trespass for seizing the horses, and the plaintiff was informed that the land must be sold to satisfy the judgment, as the paper he had executed was a deed conveying his land, in trust to secure the defendant Moses in selling under the execution. That at the sale the land was cried by the defendant Moses and was purchased by the defendant Williams for $80; that after the sale the defendants

tendered to the plaintiff James two deeds and informed him that the land now belonged to the defendant Williams, but that if he, the plaintiff, would sign those deeds he might redeem it by the payment of $100 within two months. That being as yet entirely blind to the arts of the defendants, and informed that the deeds contained a clause for redemption, the plaintiff not only executed those deeds, but procured his wife, the plaintiff Elizabeth, to do so likewise; that within two months John Redmond, the father of the plaintiff Elizabeth, tendered the sum of $100 to the defendant William, and demanded a reconveyance in behalf of the plaintiff Elizabeth, which was refused. The bill then charged, in strong terms, a fraudulent conspiracy between the defendants to take advantage of the confidence of the plaintiff James, and by false and fraudulent representations, rendered effective by his extreme ignorance, to cheat him out of his land, averring that the defendants had procured from him absolute conveyances, without paying any consideration, and prayed that the deeds might be canceled, and for a reconveyance.

The defendants, in their answer, admitted the fact of the plaintiffs having obtained a judgment against Jesse James, and of the levy upon the horses claimed by Warren; but they denied having, by any representations, induced the plaintiff to press a sale of those horses; on
(46) the contrary, they averred that the plaintiff had, of his own accord, applied to the defendant Moses to sell, and to the defendant William to buy; that the defendant Moses refused to sell under the execution unless the plaintiff would indemnify him, which the plaintiff then verbally agreed to do; that the defendant William refused expressly to purchase unless the plaintiff would give him a written indemnity against the claim of Warren, which the plaintiff agreed to do, and which was then drawn and executed; that Warren had recovered of the defendant William the value of the horses, and the plaintiff having absconded, an attachment against his property was sued out, upon the indemnity given the defendant William; that before the return day of the writ the plaintiff applied to the defendant William and entreated him to take it up, stating that if returned it would only cause an accumulation of costs, and averring his willingness to have his (the plaintiff's) property sold to satisfy the execution in favor of Warren against the defendant William; that this offer was accepted, and an agreement to that effect drawn and signed by the plaintiff; that in pursuance of this agreement a sale of the property of the plaintiff was advertised by him, at which many people attended; that the plaintiff attended, and delivered the property to the crier, who was the defendant Moses, and who acted at the request of the plaintiff; that the personal property of the plaintiff was very small, and did not produce a sum sufficient to

satisfy the execution, and thereupon a tract of land, containing 125 acres, was offered for sale, but the plaintiff Elizabeth refusing to join in the conveyance, the life estate of the plaintiff James was sold, and purchased by the defendant William for $20; that these sales left about $80 of the debt unsatisfied, which was more than the plaintiff James's life estate in the other tract, upon which he lived, would sell for, and that the defendant William, on the evening of that day, agreed to buy the tract for that sum if the plaintiffs would join in a deed to him; that the plaintiffs consented to these terms, upon condition of being permitted to redeem within two months, which was agreed (47) to, and thereupon a deed was executed by the plaintiffs to the defendant William for the land, but that the plaintiff Elizabeth had subsequently refused to consent to the same, upon her privy examination; that no clause for redemption was inserted in the deed, not for any fraudulent purpose, but because no expectation had been entertained of selling any title but that of the plaintiff James, and the deeds had been prepared before the sale. The defendant William denied positively that the agreement for redemption extended to both tracts, and insisted that it was confined to the home plantation. He admitted a tender of $100 by Redmond, and a demand for a reconveyance of both tracts, and his refusal to comply; but averred that he then stated to Redmond that he was willing to reconvey the home tract upon the repayment of $80, but that this proposal was rejected by Redmond.

Replication was taken to the answers, and many depositions filed. They all supported the answer, except as to the fact whether the agreement for redemption extended to both tracts, or was confined to the home plantation. Upon that point the evidence was contradictory.

Badger for plaintiffs.
Nash for defendants.

RUFFIN, J. The Court would gladly in this, as in every case, administer justice according to the true rights of the parties, as collected from any part of the pleadings or proofs. There seems to have been an agreement for the redemption of the home tract, and if the frame of the bill put it in our power, that would be decreed. But the case is there stated in a manner so foreign from the truth, and with a view to relief so entirely different, as not to put in issue the question of redemption, and render any of the examination of the witnesses to that point relevant or competent, or even to authorize a decree upon a particular admission of the defendants.

His Honor here repeated the substance of the bill as above stated, and proceeded as follows: The first observation which (48)

the case, thus stated, calls for is that the wife was improperly made a plaintiff. Her rights were not affected, as she did not execute the deed of trust, or any other conveyance, according to the charges of the bill. The deed, if any, was that of the husband, and operated upon his own estate only. For which reason the bill of the wife would necessarily be dismissed.

But upon the answer and proofs it turns out that not one material allegation of the bill is true. There was no deed of trust, nor a conveyance of any sort, obtained from Browning before the sale. There was no pretense of selling under such authority. There was no fraud or deception in obtaining a sale, or in the defendant's purchase. The answer states, and witnesses on both sides prove, that for a just demand the defendant William was about suing Browning, who besought him not to do so, and agreed to raise the money by a sale of his property without suit. That accordingly he himself advertised the sale, and was present at it; that he delivered the articles for sale, and got the defendant Moses to cry them; and that, at such public sale, the defendant William purchased one of the tracts of land, and on the evening of the same day, by agreement and deed, made and executed in the presence of a crowd of people, purchased from Browning and wife the other tract. This obviously answers the whole bill; and being proved to be true, annuls all the equity alleged.

But the answer, going beyond the matter of the bill, admits that at the sale the defendant William purchased one of the tracts of land at $20, and took a conveyance from Browning, whose wife would not join in the sale and conveyance, which caused it to sell so low. It further states that $80 yet remained to be raised, and that Browning's life estate in the other (home) tract would not bring it; but that he (William), proposed to give that sum for it, if the husband and wife would both convey that tract in fee to him; and it further admits that this last tract was to be subject to redemption by Mrs. Browning, if she
(49) should repay the same sum within two months, and that under that agreement Browning and wife did convey the home tract, though she refused to execute the deed for the other, and hath since refused to be privily examined to that which she did execute. To this statement there is full proof by many witnesses on each side, in every particular but one; that is, the point whether the agreement for redemption extended to both tracts, or related to the home tract alone. For it seems that Mrs. Browning's father afterwards tendered $100 on her behalf, and claimed a reconveyance, which the defendant refused as to the first tract, but offered for $80 as to the home tract. But that

was not accepted unless both pieces could be got; and thereupon this suit was brought. Upon the proofs on this disputed point, the preponderance is, in the opinion of the Court, with the defendants, were it proper to consider them. But as they are manifestly out of the pleadings, they cannot be heard; for they are not material to any issue between the parties, and consequently have no sanction for their truth.

Will the answer of the defendants authorize a decree to the extent of the admissions made in it? In some cases it might; for it is not necessary that the bill should precisely allege every matter in accordance with the proofs, or the admissions of the answer. But it is requisite that its statement should have some semblance of the reality, and that an admission in the answer, to be acted on, should have reference to or bearing on the case made in the bill, and not be in entire avoidance of it. Here a simple question of redemption, in which the real controversy is confined to the single point of fact whether one or two tracts of land should be redeemed, is altogether disguised, and turned into a case of aggravated fraud, made up of falsehood, oppression, breach of confidence, treachery, and undue advantage taken of an illiterate man; on which is founded a prayer to cancel the deeds, or for an absolute reconveyance. The Court cannot give relief contrary to that asked for, and on a case, though appearing in the answer, standing directly opposed to that stated by the plaintiff. When the plaintiff asks us to rescind a contract upon a fraud of this sort, we (50) cannot affirm an essentially different contract, and decree relief on it as affirmed. Upon a case and prayer to cancel deeds we cannot set them up upon the ground of a fair, specific agreement for redemption, and decree such redemption. The charge and the admission are nothing alike, and do not relate to the same transaction. It is not like holding fraudulent deeds to be a security for advances under them. Justice to defendants demands this much at least from the Court, that they should be enabled from the allegations in the bill to form some intelligible notion of the ground of complaint and the nature of the redress sought. And a respect for the perspicuity and certainty of judicial proceedings and professional proficiency likewise prescribe the duty to the draughtsman to put into the bill such statements as will convey to the Court, at least an outline of the case, and some idea of the principle on which the relief is sought.

To give any relief in such a case as the present would be allowing a latitude or laxity of statement incompatible with the rules of equity pleading, with the ease of the Court, and a just regard to the rights of the defendants generally. Indeed, it might be against the interests of

the plaintiffs themselves; for upon a proper bill they may be let into proof, and be able to prove that both tracts were included in the agreement for redemption.

The bill must, therefore, be dismissed at the cost of the plaintiff James Browning. No costs are given against the wife, because the suit is founded on matter happening altogether during coverture, in which her interest, according to the bill itself, is not in the least concerned. It is not considered her suit, therefore; and it is supposed that the defendants' costs are sufficiently secured by the prosecution bond. At all events, the wife was improperly, and without her consent, made by her husband, or the solicitor, a party, as far as appears to the Court; and therefore costs are not given against her.

PER CURIAM. Bill dismissed.

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(51)

MARY S. CLARKE ET AL. v. SPENCER D. COTTON ET AL.

1. An executor is not liable for *laches* in not enforcing the payment of a debt due the testator, from a coexecutor who becomes insolvent after the probate of the will.

2. An executor may retain for necessary expenses, in addition to his commissions at the rate of 5 per cent upon the receipts and disbursements.

3. Commissions are not allowed upon payments to legatees.

4. An executor is not liable, upon the insolvency of a coexecutor, for assets which he had never had under his control.

5. Legatees can come into equity to secure themselves against the insolvency of an executor.

6. But it does not follow that an executor can compel an insolvent coexecutor to account; and it seems that he cannot.

7. Executors have no right to charge a specific legacy, bequeathed to a coexecutor, with a debt due from him to the testator.

8. *Per* RUFFIN, J. Where one appointed an executor purchases at the sale of the assets, before he has proved the will, and his coexecutors deliver him his own note, and also others for collection, and the debtor afterwards proves the will, and becomes insolvent, the coexecutors are liable for the amount of his purchases and collections.

9. But disbursements by the insolvent in payment of debts of the testator, made by the directions of his coexecutors, shall exonerate them, *pro tanto*, and not be applied to a debt which he owed the testator in his lifetime.

10. *Per* HENDERSON, C. J. Where it becomes necessary for an executor to employ an agent, the appointment of one who was nominated as coexecutor, but never proved the will, is justified by the confidence reposed in them by the testator.

11. It makes no difference that the agent may, by proving the bill, place it out of the power of his coexecutors to call him to account.

12. *Per* HENDERSON, C. J. Where one executor delivers over assets to his coexecutor bona fide, and for a purpose apparently beneficial to the estate, he is not responsible for the conduct of his coexecutor.

THE bill, which was originally filed in EDGECOMBE, in 1829, alleged that Mary S. Blount died in 1823, possessed of a large personal estate, which she bequeathed, in different proportions, to the plaintiffs, some of whom were infants; that she appointed Spencer D. Cotton, Benjamin F. Jackson, Moses Modecai, and Hutchins G. Burton her executors, all of whom proved the will, and that Moses Mordecai died soon after the probate. The surviving executors and the executrix of Mordecai were made defendants; and the prayer was for an account of the personal estate of the testatrix and payment to the plaintiffs of their respective legacies.

The defendants Cotton and Jackson, in their joint answer, admitted all the allegations of the bill. They further stated that they, together with Mordecai, proved the will at February Term, 1823, of Edgecombe County Court; that the defendant Burton had, from the death of the testatrix, declared his intention to accept the office of executor, but was unable to join in that probate; that he proved the will at the succeeding August term; that the principal part of the estate of the testatrix came to their hands; that the defendant Burton owed the testatrix $2,889.50, with interest from 22 May, 1821, secured by a promissory note of that date; that the testatrix resided in Edgecombe, but had a small plantation in Warren County, in the vicinity of Burton's residence; that personal property on that estate was sold to the amount of $683.21, of which Burton purchased, to the amount of $420.85, and that the notes given by the purchasers at that sale, including his own, were handed to him for collection. They submitted to an account, but insisted that they were in no manner liable for the debt due from Burton to the testatrix, in her lifetime, nor with the collections, including his own pur- (52) chases, made by him since her death.

It is unnecessary to state the answer of the defendant Burton, as he was examined before the commissioner, and the facts stated in his answer appear in the report.

By an interlocutory decree, a reference was ordered of the accounts of all the defendants and the commissioner reported that the defendants Cotton and Jackson had received of the assets of their testatrix, including interest, $20,853.03; that after the payment of all the debts there remained in their hands, subject to the payment of legacies, $18,351.91; that they had paid legacies, including interest upon the payments, to

the amount of $8,156.98, and after allowing them commissions on the sum of $41,707.86, the amount of their receipts and payments, including legacies and interest at the rate of 5 per cent, there was a balance in their hands of $8,109.54, and that he had rejected a charge made by them of $473.20, for the expenses of two journeys to the State of Tennessee, upon the idea that the defendants were not entitled to their expenses, and also to full commissions: That the defendant Burton had received from the defendants Cotton and Jackson, including interest, $930.68, in notes due for purchases made at the residence of the testatrix near his house, and had disbursed for debts due from the testatrix the sum of $852.63; and that, after allowing him commissions on these disbursements, there was due him a small sum, to be applied to the payment of his note above mentioned. That as to the note of the defendant Burton, due the testatrix in her lifetime, Burton was a gentleman of large property at the death of the testatrix; that shortly thereafter his affairs became embarrassed, and he was forced to make a general assignment of his property, and was now insolvent; that the testatrix had in her will left him all her slaves, thirty in number; that these slaves were upon her estate in Warren, and that the defendants Cotton and Jackson, assenting to the legacy, Burton had taken
(53) them into his possession; that they had been sold at execution sales of Burton's effects, and that a part of them were purchased by Cotton.

The plaintiffs excepted to the report:

1. Because the commissions allowed to the defendants Cotton and Jackson were too large, and were allowed upon a wrong principle.

2. Because the commissioner had not charged the defendants Cotton and Jackson with the note for $2,889.50, and the interest thereon, due from the defendant Burton to the testatrix in her lifetime.

3. Because the commissioner had not charged the defendants Cotton and Jackson with the note of the defendant Burton for $420.85, and the notes placed by them in his hands for collection.

The other exceptions of the plaintiffs related to the account of the defendant Burton.

The defendants Cotton and Jackson excepted to the report because the commissioner had rejected the charge of $473.20, for the expenses incurred.

Devereux for plaintiffs.
Attorney-General and Gaston for defendants Cotton and Jackson.

RUFFIN, J. The only exception on the part of the defendants is that the commissioner rejected a credit claimed by them for actual expenses

and charges paid. The fact of payment and fairness of the payments are not disputed. The commissioner decided on the idea that the allowance could not be made because the commissions covered the claim. But he was wrong; for the act of 1799 (Rev., ch. 536) has an express proviso, that the executor may retain for charges, over and above his commissions. The charges of traveling, employing agents, or costs of suit might overgo the commissions; which are designed for the executor's risk and labor. The exception must be allowed.

The plaintiffs have taken several exceptions. One relates to the commissions allowed Cotton and Jackson. The commissioner has allowed 5 per cent on the receipts, and the interest thereon up to taking the account, and also 5 per cent upon the disbursements in payment of debts, and on payment to the legatees, and the balance now in the hands of the executors. Commissions cannot be given on the payments to the legatees, made or to be made. *Potter v. Stone,* 9 N. C., (55) 30. They may, in the discretion of the court be allowed on the other items; but as actual expenditures are claimed and given here, a commission of 5 per cent on the principal sums received, namely, $18,711.65, is an adequate compensation. This exception is, therefore, allowed.

Another, and the most important, exception is that which relates to the debt due from Burton to the testatrix at her death. He owed her upon his own bond the sum of $2,889.50, and hath become insolvent. The commissioner has not charged the other executors with that debt, and this exception is founded on that omission. It is said they are liable because the debt was lost by their culpable negligence, and evidence has been taken to show that Burton's circumstances became doubtful, and then ruinous, after the death of the testatrix, and that Cotton and Jackson were aware of it. The circumstances have been commented on. They are not gone over again now because the decision is on a general principle. Though if the defendant's liability depended on their knowledge and *bona fides,* it might be difficult to charge them here; for, according to the evidence, Mr. Burton's failure was sudden and caused by unforeseen circumstances, and at least unknown to the world and his coexecutors, until he made a general assignment of a very large estate, and converted himself, in an instant, from a man apparently affluent into an insolvent one. But it is a new position that one executor is responsible for the acts of another, where the former has done nothing. The rule has been often laid down that he is liable, not for standing by, but for parting with assets once under his control. An executor is not liable for money never in his power, upon the insolvency of a coexecutor with the effects in his hands. Suppose a testa-

tor appoints an executor insolvent at the time. Can a coexecutor say he shall not prove the will, nor receive the assets, contrary to the appointment in the will? By what authority can he say the testator had a false confidence? But it is said if the insolvency take place afterwards, it is the duty of the other to receive the fund, because he is a
(56) trustee, especially where there are infants and others not *sui juris*. That the legatees themselves may come into this Court to secure their legacies is very true. Upon that is bottomed the argument for the power of the coexecutor, and, thereupon, his duty. That does not follow. That an executor is a trustee is not denied. But how far, for what? is the question. He is trustee for what is in his hands, or what has been in his hands, or within his separate power and control. He is not the curator or guardian of the legatees, as against the insolvency of the other executor. It may be doubted whether he could call the other to account. Upon what principle could he ask the other to pay him the money in his hands, and thereby make him liable for his own insolvency, which may happen? Both, as against each other, derive their power from the same source, and hold an equal measure of it. But there is no necessity for such an obligation on the executor; for since the legatees may themselves sue, their redress is in their own hands; and they cannot complain that an executor did not sue, while they themselves lay by. But if one executor may call for the funds out of another's hands, is he bound to do it? The very power of the legatee, and his own *laches*, is an excuse for the executor. There is no need of a suit by both, and the legatee's example justifies the executor. But the want of a precedent is decisive upon this question. No case has been cited or found that looks that way. Those mentioned are altogether upon different points. *Atkinson v. Henshaw*, (2 Ves. and Bea., 85), and *Ball v. Oliver*, (2 *id.*, 95), established only that pending a litigation for probate in the ecclesiastical court the chancellor, upon a bill by anybody interested, will appoint a receiver, as a better security than an administration *pendente lite*. But that does not establish that after probate the executor shall not receive the assets, because he is insolvent, though the testator said he might, and the legatees are willing he should, or, at least, do not ask that he shall not. *Lepard v. Vernon*, 1 Ves. and Bea., 51, is a case where one executor (not insolvent) assigned a debt, not nego-
(57) tiable, and the debtor refused to pay, but brought the money into court. Upon the bill of the other executors, it was decreed to them for the general creditors, against the assignee, who had no legal battle, and no higher equity than the general creditors. But that is no authority that the executor, whose assignment passed nothing, could not have received from the debtor himself, if such had been the fact. This being a

debt from the executor himself, due to the testatrix in her lifetime, became assets in the executors' hands, upon her death, for the satisfaction of creditors and legatees. If he had paid it to the other executor, it would not have excused him to the creditors; and there ought, therefore, to be no means of compelling such a payment. The delivery of the negroes bequeathed to Burton did not alter it. He had, as executor, the same right to them that they had; and it was a specific legacy, which does not abate. This exception is, therefore, overruled.

The other exceptions relate to transactions occurring after the death of the testator. Before Burton qualified as executor he purchased at a sale made by the others to the amount of $420.85; and the executors also left with him, as an agent, for collection, the bonds of other persons residing in his neighborhood, which he received. The whole, including his own purchases and the interests, makes the sum of $930.68. This the commissioner has also charged to Burton alone; and the report is excepted to because he did not charge it to the three. I am free to say that if the question stood on these facts alone, the liability of the others is very probable, because they could have sued at law on the bond taken to themselves for $420.85; and as to the other, they appointed an agent who had it in his power, by acting as executor, to put them at defiance. But those difficulties are removed by other facts appearing on the report. Those moneys he did apply, under the authority of the other executors, to the payment of debts of the testatrix, except the sum of $78.05. Consequently, nothing was lost by the confidence reposed in him in this respect except the above small balance; and that is more than covered by the commissions allowed him, which makes a balance of $15.01 due him, and applicable to his large debt. Those excep- (58) tions are, therefore, overruled.

The exception as to Mr. Burton's account is partly correct, as the commissions allowed are too heavy; but the difference is so inconsiderable as not to induce the Court to interfere in such a way as to alter the state of the accounts of the other executors. It is therefore allowed, to the extent of $15.01, so as to leave the balance due from said Burton of $2,889.50, instead of $2,874.49, as reported; and for the residue it is overruled.

HENDERSON, C. J. I concur with RUFFIN, J., in the opinion that the two solvent executors should not be charged with the bonds delivered by them to Mr. Burton for collection, or for his purchases at the Warren sales; not only for the reason given by him, that Mr. Burton has accounted for both in his disbursements for the estate, but because they were not answerable if he had not. Mr. Burton must be viewed, in the collec-

tion of the bonds, either as the agent of Cotton and Jackson or as to their coexecutor. If as the first, they can be liable only because the appointment was an improper one or that they have failed to call him to account in due time; for I presume it will not be controverted that executors must sometimes act by agents, and that this was a proper case for the appointment of an agent (the collection of distant debts). As to the improvidence of the appointment, I will not examine the evidence to show that the appointment was not an improvident one, or rather that the plaintiffs cannot allege it to be so; for I view this as emphatically the case of Mrs. Blount. She, although in her grace, is the plaintiff. It is for a breach of the confidence reposed in the defendants *by her* that this claim is founded. It is her charities, her benevolence, which is alleged have been defeated by it. And therefore there can be no standard appealed to with so much propriety, to test the fitness of an agent to act in the business, as the one which she herself has left. There is a moral conclusion by which the plaintiffs are estopped to deny the fitness
(59) of the agent. But it is said that the appointment was improvident because the person selected had the capacity to assume a character which would render him entirely irresponsible, and that the defendants knew it, and the agent did in fact assume that character; that he qualified as one of the executors of the will. It is true that he had that capacity, that the defendants knew it, and that he has assumed that irresponsible character. But it is equally true that this capacity was given to him by the real plaintiff, the testatrix, with a view that he might act in this very charge, and in things of much more importance, which he has done, as her executor, in discharging the trusts of the will. Can this capacity be imputed to the agent as the disqualification or as rendering his appointment improvident and himself unworthy to be entrusted with the collection of a few hundred dollars out of many thousands which the testatrix contemplated coming into his hands? Can we impute the capacity which the testatrix gave him of assuming a character which would invest him with power over the whole estate, as calculated to render him an improper agent to act in a very small part of it. Much less can one who gave the capacity, or those who claim her charities or bounties, allege it as an act injurious to the estate. The reasoning which would lead to such a conclusion may be systematic, and therefore beautiful. We may admire it, as we are led from one stepping-stone or resting place to another; but in my estimation it will not stand the test of analysis.

The next ground to charge Cotton and Jackson is that they had the fund in their hands, and permitted it, or rather by their act caused it, to pass into the hands of their coexecutor, and on that ground they are

chargeable; and a great number of authorities were cited. I will not examine each case, but I think the result of the whole, taken together, is this: that where one executor has the fund or evidence of debt in his hands, and he voluntarily and unnecessarily, or without an apparently proper motive, permits it to pass into the hands of a coexecutor, he is responsible; for if no proper motive can be assigned, a bad (60) one must be imputed, as men seldom act without a motive; and if he who best knows will not show it, the presumption is that it is not a good one. The most charitable motive which under such circumstances can be assigned is a desire to avoid responsibility; which is a bad or, at least, not a good one. But where the apparent good of the estate—and I should add, the reasonable convenience of the executors—required, a fund or evidence of a debt may safely change hands. Here the apparent good of the estate required that the evidences of debts should be placed in the hands of him under whose immediate eyes the debtors resided, as a measure of safety to the estate. By attempting to guard the trust fund by unreasonably rigid rules a contrary effect from the one designed will be produced. Honest men will be driven from the office, and their place will be supplied by dishonest ones.

These principles also will protect the two executors from loss in taking Mr. Burton's acknowledgment of purchase made at the Warren sales. The case comes within the meaning and spirit of these principles.

PER CURIAM. Decree accordingly.

Cited: S. c., post, 301; *Ochiltree v. Wright,* 21 N. C., 342; *Peyton v. Smith,* 22 N. C., 349.

NATHANIEL HUNT AND WILLIAM HARRISON v. THE STATE BANK, MARMADUKE N. JEFFREYS, ET AL.

1. A bona fide purchaser from a trustee, holding upon a personal confidence to sell the trust estate, receive the purchase money, and divide it among the *cestuis que trustent,* is not bound to see to its application.
2. A *bona fide* vendee, who has notice that there is a personal confidence between the trustee and the *cestuis que trustent* to sell and divide the purchase money is not affected by equities subsisting between the latter.
3. And especially he is not bound to notice the right of the *cestuis que trustent* to portions of the purchase money where their amount is disputed.

THE bill, which was filed in 1821, alleged that in 1816 the plaintiffs, together with the defendant Jeffreys, and several other persons, were sureties for one Duke W. Davis, to the State Bank and the Bank

(61) of New Bern, in different notes, amounting in all to the sum of $10,000. That the plaintiffs and Jeffreys, to secure themselves from loss on account of their liabilities for Davis, procured him to convey to one William Moore a valuable tract of land, in trust to sell the same and apply the proceeds to the payment of the several debts for which they were sureties. That Davis becoming insolvent, and making default in the payment of the debts thus secured, the trustee, in obedience to the directions of the plaintiffs and Jeffreys, in 1818 advertised the land, assured to him by Davis, for sale, when it was purchased by the defendant Jeffreys; that no money was paid by Jeffreys upon this purchase, but that, with the consent of the plaintiffs, Moore, the trustee, conveyed the legal title to him, the sale being merely a means of barring Davis's equity; that Jeffreys was to sell the land for the joint benefit of the sureties of Davis; that in 1820, Jeffreys, being indebted to the State Bank on his own account, sold the lands thus held by him in trust, to that bank, and the purchase money was, by agreement, applied to the payment of the last mentioned debts; that the arrangement between Jeffreys and the bank was made by William Boylan, the president, and that he, (Boylan), before the conclusion thereof, had notice of the trust upon which Jeffreys held the land; that Jeffreys, and the other sureties of Davis, had become insolvent, and that the plaintiffs had been compelled to pay the whole debt for which they were bound with him for Davis.

The bill prayed a discovery from the president, Mr. Boylan, and specific relief by a sale of the land, and payment to the plaintiffs of the sums they had severally advanced as sureties of Davis.

The president and directors of the State Bank, in their answer, denied the existence of any trust in favor of the plaintiffs in the land purchased by them of Jeffreys, and insisted that they were purchasers for value and without notice. They averred that if Jeffreys held in trust for the plaintiffs, that they, the plaintiffs, had not only authorized him to sell, but had actually ratified the sale made by him, and that
(62) they were not bound to see that the purchase money was applied to the extinguishment of the claims of the plaintiffs.

Mr. Boylan, in his answer, stated that, believing several notes held by the State Bank, upon which Jeffreys was an endorser, to be doubtful, he, in March, 1820, made a treaty with Jeffreys whereby he purchased for the bank the land mentioned in the bill; that he gave for the land $5,000, which was at least $1,000 more than he would have given in cash or undoubted securities; that when the contract of sale was made, he knew nothing of the title to the land, further than from information then derived from Jeffreys, viz., that he (Jeffreys) had purchased it under a

trust deed to William Moore, and he denied notice of any claim or interest of the plaintiffs in or to the land, or that Jeffreys, in any way, held it in trust for them.

The bill was taken *pro confesso* as to Jeffreys, and he was examined under an order to that effect. He deposed that the plaintiffs and himself, together with several other persons, were sureties for Davis to a large amount; that to secure themselves they procured a conveyance of all Davis's estate, including the land in question, to William Moore; that at the sale by Moore he purchased that land, upon a verbal understanding and consent of the sureties of Davis that he should have the sole power of selling it, subject to an account with the sureties; that, in addition to that land, he also sold to the State Bank his manor plantation for $6,288; that upon these two sales he received sundry notes, including two notes of the plaintiff Hunt for $1,328 and $171, and one note of the plaintiff Harrison for $393; that when he mentioned to Hunt the terms upon which he had sold the land purchased of Moore, he (Hunt) expressed much satisfaction and delight; that afterwards the persons interested in the sale met at his house to settle the proportion of the purchase money respectively due them, but that an altercation ensued, and they separated without coming to any conclusion, and that then, for the first time, Hunt expressed his dissatisfaction with the sale. Upon his cross-examination he stated that while Mr. Boylan was at his house, when the treaty of sale was concluded, he wrote the following (63) letter to the plaintiff Hunt: "I have a chance of selling the Davis tract of land at $5,000 taken up in bank. As there has been something said about it, I wish you to come up immediately. Mr. Boylan is at my house, and will wait till I have a return." That Mr. Boylan did not, as he thought, know of the writing of that letter, but was aware of Hunt's claim on the land.

Seawell and Badger for plaintiffs.
Hogg and W. H. Haywood for defendants.

HALL, J., after stating the case: From every circumstance connected with this case I am led to believe that Jeffreys had authority to sell the land, but was to apply the purchase money for the benefit of the plaintiffs and others interested in the deed of trust to Moore; and as he was authorized to sell the land, no distrust of his fidelity in accounting for that purchase money was manifested at the time of the sale. The substance of the complaint, then, is not that he sold the land, but that the plaintiffs have been defrauded of the purchase money; and the question arises whether the bank is liable for the misconduct of Jeffreys, the

trustee. If there was any ground to believe that there was any collusion or contrivance between the officers of the bank and the trustee, our decision would be different. The defendant, the president of the bank, denies that he had notice of any trust on behalf of the plaintiffs; but I cannot rest upon that. Jeffreys in his deposition proves something very much like notice. He is asked whether Boylan knew that the plaintiffs Hunt and Harrison had any interest in the sale of the land in controversy. He answers that he had, so far as regarded Hunt; and this corresponds with the note of Jeffreys to Hunt, that "Boylan was at his house, and would wait till he had a return" to that note. But admitting that Boylan had notice, what was it? That Jeffreys had authority to sell the land, and that there was a personal confidence reposed in
(64) him that he would properly apply the proceeds of the sale for the benefit of those interested in the deed of trust executed by Davis to Moore. There was no trust or equitable lien upon the land in the deed from Moore to Jeffreys. Jeffreys held a clear title to the land. But it was admitted by all concerned that the sureties had an interest in it. And if Boylan knew it, also, how impossible it was for him to know of the particular advances made by each surety, and what particular part of the purchase money he was entitled to receive. It appears that some debts were paid by the sale of the land for which Jeffreys was personally responsible. But it also appears that he sold for a great price—more than $6,000—some of his own lands to the bank; so that, independently of his own debts paid off by the sale of the two tracts of land, he received bonds and money to a considerable amount, perhaps enough to enable him to do justice to the plaintiffs, if he had no other resources, but has not been called upon by process of law, as far as appears, to come to a settlement with the plaintiffs. And if the bank was even ultimately liable to the plaintiffs for the purchase money, it would be iniquitous that they should be called upon to pay it twice, when Jeffreys, to whom they had once paid it, had not been called upon to account.

I think, upon the whole view of the case, that as Jeffreys was trusted by those interested to sell the land, he was trusted to receive the proceeds of the sale; and that in the absence of collusion and fraud between him and the bank, the latter is not liable. None has been proved. Full value was given by the bank for the land, and it does not even satisfactorily appear that Jeffreys has misapplied the consideration which the bank gave for the land. But I have not particularly adverted to that, as it is not now in contestation between the parties in this suit.

I am of the opinion that the bill be dismissed, with costs.

PER CURIAM. Decree accordingly.

Cited: Grimes v. Taft, 98 N. C., 198; *Kadis v. Weil,* 164 N. C., 87.

(65)

WILLIAM S. BLACKLEDGE ET AL. v. JOURDAN NELSON ET AL.

1. The arrest of a debtor, upon final process, is not necessary to enable a guarantee of the debt to charge the guarantor.
2. Upon a bill of foreclosure, a sale of the mortgaged premises is directed.
3. Where a part of the mortgaged premises was sold by the mortgagor subsequent to the mortgage, a sale of the residue of the land will be ordered in the first instance, for the payment of the mortgage debt.

AFTER a decree for an account, made in this cause at the last term (16 N. C., 418), the clerk reported that in December, 1817, the plaintiffs sold the land mentioned in the pleadings to the defendant Nelson, and received among other notes, one made by Hardie and Henry Smith, for $1,436.10, due 6 November, 1818, "which notes were in full payment for the land sold the defendant Nelson, and which when paid off discharged the mortgage" given by him to the plaintiffs. That the plaintiffs commenced suit on the note, returnable to the first court after it became due; that the suit was not put at issue until August Term, 1819, of Pitt County Court, one of the defendants not being arrested until the return of a *pluries;* that the cause was continued until November Term, 1820, when judgment was entered up; that a *fi. fa.* issued, returnable to February Term, 1821, which was returned *nulla bona,* and thereupon a *ca. sa.* immediately issued, upon which the defendants in the execution were arrested, and discharged under the act for the relief of insolvent debtors. Upon these facts the clerk reported the amount of the debt, interest, and costs, as still due upon the mortgage.

Gaston for defendant.
Hogg for plaintiffs.

(66)

RUFFIN, J. It might well have been insisted by the plaintiffs that the omissions to arrest the Smiths on a *ca. sa.,* had it happened, could not have been imputed to them as *laches* which would have made that debt their own; for I know not of any rule which requires either an agent or an assignee of a bond to put the obligor in prison, unless such a course be stipulated for. It is sufficient if diligent and reasonable efforts be made to collect the money, and a failure happen by reason of the debtor's insolvency. Here the bond was put in suit at the first court after it fell due, and was prosecuted to judgment. The defendant's counsel urges the pendency of it till November Term, 1820, as evidence either of neglect or of collusion with the debtors. That is not sufficient evidence of neglect; for the delay might have arisen from the state of the business

in the court, or applications of the defendants for continuances allowed by the court; for we know that about that period our dockets were crowded and seldom gone through, and that debtors often use unjustifiable shifts to put off trials. The defendants ought, therefore, to show the actual cause of the delay. But the fact that at the next term after judgment the plaintiffs imprisoned the Smiths entirely rebuts all unfavorable inference from the delay and repels the idea of collusion. The exception must be overruled, and a foreclosure decreed on the footing of the report of the clerk, with costs to the plaintiffs. The course in this State has not been strictly a foreclosure, but a sale of the mortgaged premises, as most advantageous to both parties.

The defendant Little alleges a purchase by him from Nelson; and if he had produced his conveyance, or otherwise proved it, a sale of the residue only would be ordered in the first instance. As it is, that allegation must be disregarded, and the whole sold as mortgaged.

PER CURIAM. Decree accordingly.

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(67)

RICHARD NEWSOM ET AL. v. WILLIAM BUFFERLOW.

One who defends an ejectment upon an equitable title cannot in equity recover his own costs at law, but he may those he has paid the plaintiff at law.

AFTER the decree made in this cause (16 N. C., 379) for a reconveyance by the defendant to the plaintiffs of the land conveyed to him by mistake, an order was made that the defendant should repay the plaintiffs the costs of the ejectment, and a reference as to those costs was directed.

Badger for defendant.
Seawell for plaintiffs.

RUFFIN, J., after stating the order of reference: The clerk, in his report, does not distinguish between the plaintiff's own costs, when defendant in ejectment, and those which they paid the plaintiff at law as his costs. The last only can be decreed to be repaid by the defendant to the plaintiffs. Their own costs the defendants at law threw away by defending in that court upon an equitable title, and cannot recover back. *Keaton v. Cobb,* 16 N. C., 439. The clerk must again inquire upon that point, and in his report distinguish the taxed costs at law of the plaintiffs, or either of them, from those of the present defendant.

PER CURIAM. Order renewed.

CHRISTIAN L. BENZEIN ET AL. v. JESSE ROBINETT ET AL.

1. Interest upon rents and profits is not usually allowed until an account be demanded. But where the possession is *mala fide*, it is allowed from the receipt.

2. Promissory notes executed by the plaintiff, and payable to persons not parties, cannot be set off against the amount reported in his favor.

3. If payable to a defendant, and the plaintiff is insolvent, they may be set off upon petition.

4. But if not payable to a party, it can only be done by bill.

AFTER the decree in this cause, and in *Benzein v. Lenoir,* 16 N. C., 225, whereby payment was decreed of the mortgage made by Montgomery to the *unitas fratrum,* and the right of the plaintiffs (68) Stokes and Welborn to a reconveyance of the residue of the mortgaged premises was established, an account was directed of the rents and profits received by the defendants, and also of the waste committed by them upon the land mentioned in the pleadings.

The clerk at this term reported that the defendants, on account of rent and waste, owed to the plaintiffs Stokes and Welborn $1,208 principal and $863.50 interest. In coming to this result the clerk charged the defendants interest upon the value of the land from the end of every year in which the profits were received by them up to the time of filing his report. The clerk also reported the fact that the defendants had filed with him sundry notes of the plaintiff Stokes which they claimed to have set off against any balance that might be due him. Copies of these notes were certified with the report, and from them it appeared that none of them were payable to or endorsed to the defendants, but the legal title to most of them were in a copartnership, of which one of the defendants only was a member.

The plaintiffs excepted to the report because the clerk had allowed a smaller sum per annum, for rent, profits, and waste, than was justified by the testimony before him.

A statement of the facts proved before the clerk, and on which this exception was founded, is unnecessary.

The defendants excepted, (1) to the mode adopted by the clerk in estimating the interest upon the rents and profits, insisting that no interest should have been charged before the filing of the bill; (2) because the clerk had not allowed them credit for the above mentioned notes of the plaintiff Stokes.

Seawell and Gaston for plaintiffs.
Badger for defendants.

RUFFIN, J. The exceptions of the plaintiffs are both overruled, because the allowances both for rent and damages are more than ample. The clerk gives full rent, as if the landlord had kept up repairs,
(69) and at the same time charges the defendants with them. Had the other side excepted for this, the amount might have been reduced, but there is no reason to increase it.

Though rents do not usually bear interest until the filing of the bill, or an account be demanded, yet where the possession was, as here, *mala fide* from the beginning, the profits became a debt from their perception, and of course bear interest. The first exception of the defendants is, therefore, overruled.

The bonds mentioned in the second exception can, on no principle, form set-offs. They do not appear to belong to the defendants, except from the possession. They are not mutual debts at law or in equity, except by bringing in other facts and persons not before the court, and not stated in the answer. If, indeed, the obligor be insolvent, that would be a ground in this Court why they should be deemed a satisfaction of so much of the sum as may be decreed to that party; and to enable the defendants to avail themselves of that, a petition might be filed in the cause, had the bonds been assigned to the defendant. But as other persons, namely, the obligees in the bonds, would be necessary parties, a petition will not serve; and the defendants must be put to their bill, as in *Iredell v. Langston,* 16 N. C., 392. This exception must also be overruled.

PER CURIAM. Decree accordingly.

Cited: March v. Thomas, 63 N. C., 88.

NATHAN WILLIAMS ET AL. EXECUTORS OF ISAAC WILLIAMS, v. ALVIN WILLIAMS ET AL.

1. An administrator who has paid debts of his intestate to a larger amount than the assets in his hands is, in equity, substituted to the rights of the creditors, and may recover of the heirs the sum thus overpaid.
2. But an administrator, knowing the personal estate to be insolvent, had made such payment, with an intent to make the heir his debtor, and withdraw the question of fully administered from the proper forum, he would be entitled to no relief.

THE bill alleged that John Williams died intestate, possessed of a very large personal estate, and that administration upon his estate was com-

mitted to the plaintiffs' testator, who was his brother; that their (70) testator found the affairs of his intestate in much confusion, his estate encumbered with many debts and to a large amount; that with a view of preventing the accumulation of costs, and from motives of kindness to the family of his brother, and relying for his indemnity on the large amount of personal estate then in his hands, their testator advanced his own funds in discharge of the debts due from his brother; that after the death of their testator, upon a settlement of his accounts, it appeared that he was a creditor of his brother's estate to the amount of $3,649.27, of which sum the plaintiffs had received from the administration *de bonis non* of John Williams only the sum of $2,667.34, by which payment the personal estate was exhausted. The bill then charged that John Williams, the intestate, died seized of a large real estate, which had descended to his children, the defendants, and prayed that the plaintiffs might have satisfaction therefrom of the balance still due on account of the advances made by their testator.

The defendants demurred to the bill for want of equity. NORWOOD, J., on the last circuit, at JOHNSTON, sustained the demurrer, and dismissed the bill. The plaintiffs appealed.

Devereaux for plaintiffs.
Badger, contra, in support of the demurrer.

RUFFIN, J. The demurrer rests on two positions: the first is that an administrator makes payments beyond the personal assets at his own risk, and cannot found a claim against the heir upon such overpayment under any circumstances; the second, that if he can recover back the money at all, he has a remedy at law.

The bill is founded on a plain principle of natural justice. It is that the defendants are bound in conscience to pay the plaintiffs the money which their testator paid in discharge of the defendants' debts. In this stage of the case we must take the debts thus paid off to be true ones, and that Isaac Williams really paid the sum of $3,649.27 over and above the assets which came to his hands; and that his executors (71) have received of that only the sum of $2,667.34 from the administrator *de bonis non;* and that the personal estate is exhausted. If the personal assets had been sufficient, there can be no doubt of the right of the administrator to be reimbursed out of it for any payments made by him. His executors might retain the specific effects until their testator's demand should be liquidated; or in this Court his accounts would be settled, and a satisfaction decreed out of the personal assets, upon a bill against the administrator *de bonis non.* If the personal estate be fully

administered, the same equity exists against the heir. The payment by the administrator was not officious. It is not the act of a stranger, who endeavors to make one his debtor by payments on his account, against his will and without his request. If, indeed, the administrator had known the personal estate was insolvent, and voluntarily paid debts beyond it, that might be taken to be with a view of intermeddling with things that did not concern him, and place him on the footing of an officious stranger. He would not be permitted by an act of mere unauthorized forwardness, beyond his known obligations and duty, to make himself the creditor of the heir, and draw into this jurisdiction a question purely legal—debt or no debt. But the bill states here the embarrassments of the estate, its large but uncertain amount, and that the payments were made by the administrator from the best motive, namely, to save cost and promote the interest of the defendants, who were his nephews and nieces. I think a demand thus arising cannot but be felt by everybody to be just and entitled to satisfaction in some court.

Then as to the jurisdiction of this Court: It is denied, because there is a remedy at law. It is said that the question of debt or not is one of law. True; but for many debts which the law recognizes, a remedy may be sought in equity. Thus debt by simple contract to the executor himself may be enforced here, and a discovery had of the real estate. In truth, however, the demand of these plaintiffs is not a debt for which an action would lie at law, either against the heir or administra-
(72) tor *de bonis non,* or, at any rate, it is a very doubtful right. It is for money paid by the first administrator himself. Can that be said to be a debt from the intestate to the administrator, for which an action at law can be sustained against the heir or administrator *de bonis non,* as such? I suppose not, because it had its origin since the death of his intestate. It is only a debt in this Court, upon its principle of substitution, which places the administrator here, as the law does an assignee of the debt. No injury can arise to the heir, but rather a benefit, by the jurisdiction. The personal estate is still the primary fund, and hence the administrator *de bonis non* is a necessary party, and the heir is at full liberty to show assets in the hands of either the first or last administrator. The debt is fixed conclusively by a judgment at law against the administrator, unless the heir can show collusion. But here he is at liberty to contest the debt himself, with the aid of the administrator.

But even if there was a remedy at law, it must involve an account of the whole administration by the first administrator; and *per se* is a proper ground of jurisdiction in equity, concurrently with a court of law.

PER CURIAM. Declare, that the plaintiffs have the right in this Court to be substituted in the place of those creditors of the intestate whose

debts the testator of the plaintiff paid in good faith, so far as those debts exceeded the personal assets of the intestate which came to the hands of the plaintiff or their testator. Declare further, that such right of substitution exists against the present personal representatitve of the intestate, and against his heirs, after the personal estate shall have been exhausted; and reverse the decree of the court below, with costs against the appellees, and remand the cause.

Cited: Scott v. Dunn, 21 N. C., 427; *Perry v. Adams,* 98 N. C., 172; *Smith v. Brown,* 101 N. C., 350; *Turner v. Shuffler,* 108 N. C., 646; *Morton v. Lumber Co.,* 144 N. C., 34; *Publishing Co. v. Barber,* 165 N. C., 489.

(73)

SAMUEL CHUNN v. DAVID McCARSON.

1. Courts of equity in this State will not sustain a bill to enjoin a judgment at law upon a money demand where the amount in controversy does not exceed $50.
2. A receipt, not under seal, is only evidence of satisfaction, and may be explained by parol testimony.

THIS was an injunction bill, originally filed in BUNCOMBE. The bill alleged that in 1816 the plaintiff had, at the request of the defendant, given his bond for $30 to one Stokely, in discharge of a debt due Stokely by the defendant; that soon afterwards the bond was presented to the defendant, and was paid by him, but instead of canceling it, the defendant had taken an assignment of it to himself; that afterwards extensive partnership accounts subsisted between the plaintiff and the defendant, which eventuated in a lawsuit, and finally in a compromise, upon which the defendant signed the following receipt:

"I hereby relinquish to Samuel Chunn all claims, debts, dues and demands, of whatsoever nature, up to this date against the said Samuel. 12 April, 1823."

DAVID MCCARSON.

That after this compromise the defendant has sued out a warrant upon the note to Stokely, upon which the magistrate had rendered a judgment in favor of the plaintiff; that the defendant had appealed, and the cause had finally been decided against the plaintiff in the Superior Court. The bill prayed for an injunction and discovery.

The defendant, in his answer, denied all the allegations of the bill, and insisted that the acknowledgment above mentioned did not apply to the note, which he averred had been satisfactorily proved on the trial at law.

Winston for plaintiff.
Gaston for defendant.

RUFFIN, J. There is no testimony in this cause; and the equity of the plaintiff's case is answered and fully denied by the defendant. The receipt set forth in the bill is not under seal, and so only evidence of
(74) a satisfaction, and was open to explanation by either party on the trial at law; and the defendant says it was explained on that occasion to the satisfaction of the jury, who found that the present demand was not included in the settlement on which that receipt is founded.

The Court is gratified in coming to the conclusion to dismiss the bill on the merits, rather than on a principle which has been often acted on in this State, and of which the profession is perhaps not fully appraised.

The bill is for an injunction and relief against a judgment at law for a debt of $30. The sum is too small to call the powers of this Court into action. In England the chancellor will not take jurisdiction of a money demand of less than £10 sterling. There are, besides, other limitations on litigation in that court. For example, no appeal or bill of review lies for error as to costs, though they may exceed that sum—being a thing in discretion. The distinguished chancellor of New York, who has given reputation and a system to the court of equity in that State, hath adopted a like rule. *Moore v. Little,* 4 Johns ch. 183; *Fullerton v. Jackson, 5 ib.,* 276. This Court may well be justified in following examples so salutary. It is not that a court of equity hath not regard to rights, and doth not hold them sacred, however inconsiderable the subject, which induces the Court to refuse to enforce them, but the policy of the country, and the true interest of the parties, forbid fruitless litigation. No court, which has a discretion on the subject, ought to entertain a controvery in which the cost must exceed the sum demanded. And the institution of such a suit indicates such a wanton passion for judicial contest, regardless of consequences even to the complaining party, as it were criminal in a court to gratify. The present is an instance of the evil effects of such a temper. The suit at law began before a justice of the peace, and went by appeals to the county court and to the Superior Court; and finally, nothing yielding, the defendant at law claims the assistance of this Court.

The proceeding involves such a waste of time and expenditure of
(75) money as to place in a strong light the propriety of a declaration

by the Court of some restriction on parties, and of some limitation on the jurisdiction. It is impossible that a bill lie for any sum, however small. There must be some point at which we must stop. And the Court can fix upon none apparently more apt than the reasonable average of the costs of a suit in this Court, which is $50. That, too, is the amount in New York. Perhaps, seeing that the Legislature hath prohibited a jurisdiction in courts of law of contracts for less than $60, the Court might more properly adopt that sum. But as other courts of equity have adopted the smaller sum, so will we.

For the recovery of a money demand, or the relief against a judgment, or legal security for a debt, less than fifty dollars, the Court will not, in future, entertain a bill.

PER CURIAM. Bill dismissed.

SAMUEL McBRAYER ET AL., ADMRS. OF WM. McBRAYER, v. MARTIN ROBERTS.

1. A court of equtiy is bound by the statute of usury, *and although upon* the bill of the borrower aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose an usurious mortgage will be dismissed.
2. Where the bill alleges a transaction to be a loan and a mortgage, and seeks a foreclosure, the plaintiff cannot at the hearing ask relief as upon a conditional sale.
3. On the inquiry whether a conveyance of slaves be a mortgage or a conditional sale, the fact that no bond is taken to secure the money advanced is only one evidence of the character of the transaction.

THIS bill was originally filed in RUTHERFORD, and sought to foreclose a mortgage of slaves. It charged that the intestate of the plaintiff lent to the defendant, on 4 June, 1808, the sum of $260, and to secure it took a bill of sale for the negroes mentioned in the bill, which had been limited to the defendant by will after a life estate to two others. The deed was exhibited with the bill, and was absolute upon its face, and purported to be in consideration of $260; but the plaintiffs admitted that it was intended only as a security, and that McBrayer executed to the defendant at the same time a defeasance declaring the deed to be (76) void upon payment of the sum lent ($260) with interest, at the end of two years. The bill charged that the tenants for life were both dead, and that the defendant had lately come into possession.

The defendant in his answer admitted the bill of sale and the loan of money, but averred that instead of $260, the amount loaned was only

$208, upon an usurious contract. He charged that the intestate was to lend him $260, and did count it out, but that he immediately took back $52, for the interest in advance for two years, and that he then executed the defeasance to avoid the conveyance upon the payment of $312, on 14 June, 1810.

The defeasance was filed by the defendant as an exhibit, and was proved by the subscribing witnesses. The evidence was very short, and will be found stated in the opinion of RUFFIN, J.

Hogg for plaintiff.
No counsel for defendant.

RUFFIN, J., after stating the case: Upon the face of the transaction, as stated by the parties, it is clearly a mortgage to secure a debt contracted upon an usurious consideration.

The depositions of the subscribing witnesses to the bill of sale and defeasance have been taken. One of them disclaims any recollection of any of the incidents, except his attestation. The other directly sustains the answer. Indeed, if the whole sum of $260 had been advanced, the sum of $312 mentioned in the defeasance would itself prove the usury, as it is an excess of $20.80 above the legal rate of interest. And at any rate, it supports the statement of the answer and of the witness.

(77) Upon the case thus taken, the plaintiffs can have no relief in this Court, which can no more disregard the statute than a court of law. If the plaintiff can make anything at law of his legal title, he is at liberty; and when the borrower comes here we will make him do equity by paying the sum borrowed and the lawful interest, as the price of our assistance. But when the lender asks aid of equity, he must ask it on a contract not tainted by an unlawful and corrupt ingredient.

But it is urged for the plaintiff that here is no usury, because there was no loan, and the premium was no more than a fair compensation for the risk of losing the property, considering it as a conditional sale. The risk is supposed to consist in the perishable nature of the thing, namely, slaves, and the danger of their loss by being removed by the tenants for life, or the expense of securing them by process in this Court; and the argument that there was no loan is founded upon the fact that no security was taken for the repayment of the money, and so there was no obligation on the borrower, and if the negroes died or were removed, the loss must fall entirely on McBrayer.

The argument upon the nature of the contract might admit of consideration if the cause turned upon any construction now to be put upon it by the Court. We think, indeed, that the contract itself, if its character

were now to be determined by the Court, is plainly proved by the express provisions of it, and the testimony of the witness, to be usurious. But if this were not so, the Court could not help the plaintiffs upon this bill, because mortgage and loan, or not, is a question not open upon the pleadings. The bill itself states it to be a loan of $260, and declares the conveyances to have been intended as a mortgage and security. Now, though the Court is at liberty to construe a contract and put a meaning upon the words of it according to the sense in which the parties used them, however improper that may be, and contrary to their true import, yet no such liberty can be taken with pleadings. The plaintiff, with the aid of counsel, puts a construction upon the bargain, and admits it to be of a particular character, and upon it, as such, seeks a particular relief. Treating the contract to be of that sort, when the case turns (78) out against him he cannot ask the judge to declare the contract to be different and to give him a different relief. Here the bill charges a mortgage, and prays a foreclosure. Where the debt secured, if a debt, is proved to be usurious, we cannot, against the bill, say it was not a mortgage, but a sale. A party must be bound conclusively by his statement of facts, put plainly upon the record. If not, there is no certainty in judicial proceedings; and a bill making one case may be supported by proof of one diametrically opposite.

Before I conclude, I will make an observation upon the position that there was no loan, because no security nor covenant was taken for the repayment. The want of such a covenant, or a separate bond for the money, is certainly one of the *indicia* of a sale, as the giving of such a security is alike evidenec that the conveyance, though absolute in its terms, was in reality a mortgage. But it is nothing more than one evidence amongst many of the character of the transaction; for when it is established that the advance of the money was not as a price, but as a loan, the loan *ex vi termini* raises and involves a promise to pay as obligatory as a separate agreement under seal to the same effect. And this promise binds the party personally; so that the loss of the pledge does not include the loss of the debt; but the creditor may still proceed against the debtor himself. A loan, therefore, in its term includes a debt from the borrower, which it is not necessary should appear upon the mortgage or in writing, though certainly it is safest that it should, to put the fact—of loan or no loan—beyond dispute.

PER CURIAM. Bill dismissed.

Cited: Hines v. Butler, 38 N. C., 309; *Ballinger v. Edwards,* 39 N. C., 453; *Craig v. Craig,* 41 N. C., 192.

(79)

ANDREW ALLISON v. GEORGE L. DAVIDSON ET AL.

1. All the members of a partnership are necessary parties to a final settlement of the partnership accounts; and if after such settlement one leaves his share in the hands of the acting partner, he does so at his own risk. But if pending an account, and before its settlement, one of the partners receives his share of the profits without the consent of the others, upon the insolvency of the active partner he must account with the others for the amount thus received.

2. After the dissolution of a partnership each partner is a trustee for the others as to the partnership funds in his hands. But if one of them pays over to the acting partner the partnership effects, unless *mala fides* be improved, he is not liable upon the insolvency of the latter.

3. If several partners conspire to defraud their copartner out of his share of the profits, and act with a view to effect that purpose, it seems that each is liable for the balance due such copartner, on an adjustment of the partnership accounts.

4. A partner who has received none of the profits must first exhaust the partnership effects existing in specie before he can compel contribution from a partner who has received his share.

5. Where of four partners one died insolvent, largely indebted to the partnership, and two others, without the consent of the fourth, received their shares from his executor, the sum so received remains, as between the survivors, joint stock.

6. Where an acting partner dies insolvent, having appointed one of his copartners executor, who retains his profits as a debt due from the testator, he is bound to account with the other partners for the sum retained.

7. Where an acting partner takes bonds payable to himself for partnership debts, and dies, in equity these bonds are copartnership effects.

THIS bill was originally filed in IREDELL, in 1822, and was amended in the following year. It charged that in 1817 the plaintiff entered into partnership with the defendant Davidson, and with Robert Worke and Robert Simonton, who were also defendants, for the purchase of slaves in this State and the sale of them in the State of Mississippi; that each partner was to advance $4,000, and that the profits were to be equally divided; that in pursuance of this agreement a large number of slaves were purchased, which were carried by the plaintiff and Simonton to Natchez, in the State of Mississippi, and there sold; that a very large profit was made upon this adventure; that Simonton had, while at Natchez, the charge of the slaves, and received the money upon cash sales, and was the active partner; that in 1818 the plaintiff received from Simonton the capital advanced by him, but that all the defendants had, upon various pretences, refused to come to a settlement with the plaintiff

and pay him his share of the profits. The prayer was for an account and for payment of the plaintiff's share of the profits.

The defendant Simonton, in his answer, stated that previous to 1817 a copartnership had subsisted between the other defendants and himself in the purchase and sale of slaves; that in 1816 they sold a large number on credit in the State of Mississippi, and upon the debts becoming due, it was determined that the person who went to collect them should carry out a number of slaves with him; that Worke had left Iredell for the purpose of making purchases of slaves, and himself and Davidson were to have followed him, when he met the plaintiff's father, who proposed that the plaintiff should be taken into their copart- (80) nership, observing that as the plaintiff was a very young man and entirely inexperienced, he did not expect him to be admitted upon terms of perfect equality, and that he, the father, was principally anxious to get the plaintiff into business and enable him to acquire some knowledge of it from experience; that he (Simonton) being upon terms of great intimacy with Allison, the elder, replied that he was willing the plaintiff should be admitted, but that his admission must finally depend upon its meeting with the approbation of Davidson and Worke. He denied that any other agreement as to the admission of the plaintiff was ever made, and admitted that $4,000 was advanced by Allison, the elder, for the benefit of the plaintiff, in the speculation then on foot.

The answer contained a discovery as to the purchase and sale of the negroes. To an amendment averring that he had executed a memorandum in writing, whereby the plaintiff was declared to be equally interested in the profits, he answered that he had no recollection thereof.

The defendants Davidson and Worke both denied the right of the plaintiff to an account. Before the case was set for hearing both Simonton and Worke died, the former having appointed the defendant Davidson and Theophilas Falls and James Campbell executors; the latter, his wife and John Mushat, who were severally made parties by *sci. fa.*, and all denied assets liable to the plaintiff's demand.

Replications were taken to the several answers, and depositions filed, in one of which a written memorandum of Simonton was proved, whereby he declared the plaintiff interested in one-fourth of the negroes "now buying."

At December Term, 1829, by an interlocutory order, the right of the plaintiff to an account was established, and a reference of the partnership dealings was directed, and also an account of the assets of Simonton and Worke.

At this term the clerk reported that the net profits of the partnership dealings amounted to $9,507.10, of which each partner (81)

was entitled to $2,376.25; that a capital of $4,180 was advanced by the plaintiff and $4,420.91 by each of the defendants; that Simonton received for cash sales at Natchez, $20,275; that at the same time sales to the amount of $6,125 were made upon a credit, the notes for which were taken payable to Simonton; that after crediting him with his own capital and profits, and the capital of Davidson, which it was admitted by the latter was advanced by him, he owed to the copartnership $8,794.88. In relation to this balance, the clerk reported specially that Simonton, Worke, and Davidson had been copartners in the business before 1817; that Simonton and Worke both died before a settlement of their various copartnership dealings had taken place; that the executors of Worke filed a bill against the executors of Simonton for an account; that the matter in dispute had been referred to an arbitrator, who had decided that the executors of Simonton owed the executors of Worke $6,127.89, which had been paid them; that there was no direct evidence before him whether the whole or any part of this sum was on account of Worke's capital and profits in the partnership, of which the plaintiff was a member, but from the fact that nearly all the partnership effects were in Simonton's possession, he inferred that those profits and that capital did constitute a part of the said sum of $6,127.89.

As to the sum of $6,125, the amount of credit sales at Natchez, the clerk reported that $4,967 thereof had been collected by Davidson, to whom Simonton had delivered the bonds; that upon Davidson's return from that place he paid Simonton $3,468, and retained in his own hands $1,504, and that Falls, one of the executors of Simonton, had, since the death of his testator, received from the agent who collected the debts the balance thereof, including interest, amounting to $761.90; that Davidson had received of the partnership effects the sum of $1,504 above mentioned, and also $1,430.85, remitted him by the agent charged
(82) with the collection of the bond given upon the credit sales; that at the death of Simonton there existed an unsettled account between him and Davidson; that this account was, by an agreement between Davidson and his coexecutors, referred to arbitration, and that Davidson charged Simonton, and was allowed by the arbitrators, the sum of $3,250 as his share of the profits of this copartnership; that the balance in Davidson's favor, and which was awarded him after sundry credits, and among them the sum of $1,504 above mentioned, amounted to $2,389.98, and that in entering up judgments against the executors of Simonton, Davidson had uniformly retained this sum.

The clerk also reported that the plaintiff was entitled to interest upon the amount due him, as follows, viz., upon three-fourths thereof from the time when the copartnership operation closed, 1 June, 1818, and upon the balance from 1 June, 1819.

The clerk reported upon the account of Worke's and Simonton's assets; but as it was agreed by the counsel, at this term, to discuss the cause only so far as the defendant Davidson was personally liable to the plaintiff, upon the supposition that both Worke and Simonton died insolvent, it is unnecessary to state the result.

After the exceptions mentioned below were filed, the clerk, in a supplemental report, stated that he had overlooked an admission of Simonton's in his answer, which proved that he had improperly charged the defendant Davidson with the sum of $1,430.85, and that it was properly chargeable to Simonton.

The plaintiff excepted to the report as follows:

1. Because the master had not charged Davidson with the sum of $3,250 retained by him as his share of the profits of the copartnership.

2. Because the clerk had not charged Davidson with all the money received by Simonton, so as to render him liable for the plaintiff's capital and profits.

3. Because the clerk had not charged Davidson with the full amount of cash actually received by him, but only with that which he retained out of collections made at Natchez.

Other exceptions were filed as to the liability of Worke's (83) executors, one of which was that the clerk had not charged the executors of Worke with the share of the profits which he had received. These exceptions were not argued.

The defendants Davidson and Falls excepted, (1) because the clerk had improperly charged the former with $1,430.85, as received from the agent at Natchez; (2) because it did not appear whether the sum of $761.90, mentioned in the report as having been received by Falls, was partnership effects or the separate property of Simonton.

Of these two exceptions, the first was admitted by the counsel of the plaintiff to be well founded. The second was withdrawn by the defendants.

Badger & Devereux for plaintiff.
Gaston for defendant Davidson.

RUFFIN, J. It has been contended on behalf of the plaintiff that Davidson is liable for the insolvency of Simonton, because this, being a limited partnership, was dissolved on the completion of the trip, and after dissolution each partner has a lien on the effects for his share, and each is, as to the funds in his hands, a trustee for the others for their share, made several by the dissolution.

This proposition must be qualified at least thus far: that the expiration of the term leaves the copartnership in existence for the purpose of

closing its concerns. And if by the terms of the agreement and course of the business it is plain that one of the partners was to close it, was to be the acting and managing partner, a deposit of the effects of the firm with that partner by another is justifiable. Such a deposit is taken as made for the purposes of the business, that is to collect the effects into one fund, in the proper hand for adjusting the accounts, ascertaining the profits, and making actual division. That, in such a case, is to be taken as the intent until bad faith is made to appear. It is to be so taken because it was so agreed. This repels the idea that the payment to the acting partner of the money in which another partner
(85) had a share, was to defeat this latter one and so in breach of trust. A partner, thus holding property after the dissolution, may be a trustee for each of the others severally. But he is only liable as other trustees. He is not bound to pay to each one personally his share of that money if, by the agreement, the whole was to be paid to a particular partner for division; for then the payment to the partner, who is the general receiver, is according to and in execution of the trust.

In the case before the Court it is plain that this last was the nature of the agreement or understanding of the parties. The whole business had been conducted in the name of Simonton alone. The plaintiff accompanied him to Natchez to make sales, yet the sales were made by Simonton; he received all the money, although the plaintiff was present, and did not even then return his capital; the bonds for the price of the negroes sold on credit were made payable to Simonton. He was looked to and trusted by all parties, and more particularly by the plaintiff, who alone went with him in person on the trip. The next year Davidson received the bonds from Simonton, and went to Natchez to collect them. He did collect $4,967 thereon, and on his return paid to Simonton the sum of $3,463 and retained $1,504. The clerk has charged him with this last sum, and the plaintiff excepts because he has not charged Davidson with the whole sum of $4,967. If the payment had been wrongful, if it had been against the agreement, if it had not been according to the argument, the exception might be well founded. But under the understanding existing in this case, which we are obliged to see from the circumstances, the payment to Simonton was a proper one; and, therefore, this exception is overruled.

It is said, however, that the denial of the plaintiff's right, and of the partnership by Worke and Davidson, amounted to a combination to defeat the plaintiff by placing the funds in Simonton's hands, out of his reach, and so amounted to a conversion, and that renders each liable for the other.

If the purpose of paying the money into Simonton's hands,
(86) or if the purpose of denying the plaintiff's right in the answer,

was that the money might be there with a view of defeating the plaintiff of rights clearly known to those defendants, a case of flagrant fraud and perjury would be made out, which would induce the Court, as far as possible, to reinstate the plaintiff out of the effects of the defendants. But it does not appear that Worke and Davidson did know the terms on which Simonton had admitted the plaintiff. And if they had, it does not appear that the payment to Simonton was designed to defeat the plaintiff, or that he objected to such payment. On the contrary, Simonton's hands were those which the plaintiff wished to hold the money. He had no confidence in the others; he had in Simonton, and looked to him for what he was entitled to. The bill is filed upon the foundation that Simonton had, and rightfully had, the money. The others are not made parties for the sake of relief against them, but because they were necessary parties against whom the partnership was to be established, and between whom the division of profits was to be made. The liability of Worke and Davidson for Simonton is an afterthought, inconsistent with the scheme on which the bill is framed, and inconsistent with the true agreement between the plaintiff and Simonton. That those defendants must have been aware of an interest of some sort in the plaintiff, of a kind of partnership, cannot be doubted. But both sides trusted to Simonton to determine the particulars, and as the link of their union, and whatever might be the extent of the respective interests, the general fund was to be in Simonton's custody. The Court, therefore, sees nothing in this part of the case, more than in the other, to make either of those persons liable for more than remains in his hands. And therefore, the second exception of the plaintiff is overruled.

But that each of these defendants is respectively liable for what he has in his hands seems equally clear. When a partnership is closed by stating a final account, ascertaining the amount of the general fund, and of the shares of each partner, each hath a right then to receive his share. If one gets in from the holder his share, as his (87) share, and another delays to take his, but leaves it in deposit, it must be taken that he leaves it as his own, and not the property of the whole. Each partner is necessarily a party to such an adjustment in fact as well as interest, and must know the state of his property. He leaves it at his risk; and if the general receiver fail, the loss is that of the individual who trusted him. But until the concern be closed by taking a final account there is no power in any number of the partners to the prejudice of another, to declare either the sum or the shares of profits; and any effects of the concern received by one remain, in respect to the rights of the excluded partner, joint property. Upon a loss of the residue, he has a right to resort to any one for his proportion of the

effects in his hands. The injured partner has never consented to his receiving them as his own, and is, therefore, not bound by the division. It is true, he who has thus got a part may point out to the other how he may get his share—where the fund for his satisfaction may be found—and so far as that will go, he shall take it, and not disturb what has been done. But the arrangement is no further obligatory. For example: Falls has here $761.90, said to be of the partnership effects. If that turn out so, that will do to satisfy Allison *pro tanto,* and he shall look to it, if it can be got. But if it cannot be got, the loss must fall on all three of these partners, Allison, Worke, and Davidson equally; and the two last must make a common stock, for the three, of the moneys in their hands, because, as to the plaintiff, it remains joint stock, though as between themselves and as between them and Simonton it is several. Wherefore, the exception as to the liability of Worke's executors is allowed, because it is reported that the executors of Worke have received his capital, viz., $4,420.92, and full share of the profits, viz., $2,376.27½, and yet the clerk hath not charged him with the latter sum, or any part thereof. As to the plaintiff, that remains a joint fund, for the payment of profits.

The question yet remains, With what sum is the defendant Davidson to be charged? The clerk states an account in which he is charged with $2,934.85, which he collected of the funds in Mississippi, and
(88) gives him credit for $2,376.27½ for his profits; leaving a balance in his hands of $558.57½. To an item of $1,430.85 of those debits this defendant excepts; and the exception is allowed, because the evidence is that Simonton received that sum, and not Davidson. This reduces the sum chargeable to Davidson to $1,504, which he retained, as before mentioned. The sum this defendant claims, and the clerk submits the propriety of the claim, as for his own profits. This claim the Court has already discussed, and disallows upon the principle on which the exception relating to the liability of Worke's executors was allowed.

Is that the only sum which the plaintiff has a right to consider as debits this defendant excepts; and the exception is allowed, because the ception. That relates to this state of facts: Davidson is one of the executors of Simonton, and by arbitration between him and his coexecutors, their accounts were settled after the death of the testator. Upon that occasion Davidson gave Simonton credit for $1,504, and charged him with $3,250, as "his fourth part of profits on sale of negroes the last trip to Natchez," and a balance was awarded to Davidson, which he has retained. This was an excess of $873.72½ above his actual profit. It has been contended for, first, that this excess alone is open to Allison, because he received the other as his own profit. That has been already

answered. Next, that no part of it is accessible to Allison, because there are judgments against Simonton's executors for a very heavy amount, on specialties, not satisfied, and that Davidson will be bound to answer for this sum as assets, to those creditors. If such were the facts, the Court would not take them now; for if the act by which he attempted to appropriate that sum to his own satisfaction, did not effectually appropriate it, it must be left for the benefit of those whose legal priorities would overreach both these parties. But such is not the case. In taking all the judgments this retainer has been allowed, and the judgments (rendered since the receipt of the assets, and the appropriation of this portion of them) are all *quando*, as appears from the report (89) of Simonton's estate, which the defendant does not except to. Those judgments never can reach this money. *Mara v. Quin*, 6, Term 1. The case is then this: that this defendant has retained the money upon a ground which, as between him and the plaintiff, is for their joint benefit, and it can never be taken from him by anybody having a better right. Can he be permitted to keep off the plaintiff by allegation that he ought not to have retained at all? The very proposition pronounces its own answer. For these reasons, the plaintiff's first exception is allowed.

The defendant Falls excepts to the clerk's report charging him with having $761.90 of the partnership effects in his hands. This sum was received by him since the death of Simonton, as the balance due on bonds taken on the sale of negroes. That fact is clear. The bonds were payable to Simonton, who transacted the business; which enabled Falls to collect them. But they are not the assets of Simonton. They are, in this Court, the effects of the copartnership, and belong to the surviving partners. If the partnership property cannot be traced, it necessarily falls into the general funds of the possessor, as money. But if it remain in specie or securities, it is joint property, and survives. Wherefore the exception of Falls is overruled.

The effect of these several judgments is that Falls must pay into this Court, for the use of the plaintiff, the said sum of $761.90, with interest thereon from this day, unless the whole be paid to the clerk or the plaintiff within thirty days, and in default of such payment within that time, that execution issue therefor, with interest as aforesaid. As it does not appear that Falls is insolvent, that sum must be taken, for the present, as available to the plaintiff, and therefore the residue of the plaintiff's stock, namely, $180, with interest thereon from 1 June, 1818, to 1 September, 1831, viz., $145.80, making together the sum of $325.80, must be first satisfied thereout, which will leave a balance thereof (90) of $466.10 applicable towards the plaintiff's profits. The sum then due to the plaintiff as principal money, by way of profits, will be

$1,910.17½ which with the profit of $2,376.27½ belonging to the defendant Davidson, makes an aggregate of $4,286.45; towards which the said sum of $3,250, received and retained by Davidson, is applicable to the respective profits belonging to each—namely, to Davidson the sum of $1,858.05, and to Allison the sum of $1,391.95, with interest on $927.95 (part thereof) from 1 June, 1818, and $418 (the residue thereof) from 1 June, 1819, until paid; and it is decreed that execution may forthwith be sued therefor.

This sum is thus ordered to be presently raised from the defendant Davidson, as that which the plaintiff will be entitled to receive from him, upon the supposal that Robert Worke's estate is insolvent. Equity will adjust the loss equally between the three; but at present the estate of Worke is reported insolvent, and the counsel have not thought proper to dispose of the report upon that part of the case. Should it turn out to be otherwise, that estate will hereafter be compelled to pay its proportion of the plaintiff's demand, and Davidson will then stand in the plaintiff's shoes for such sum as he hereby is made to advance, which Worke's estate ought in the first place, if able, to do.

All the said matters are ordered and decreed accordingly; and the other matters excepted to, and all the other questions appearing upon the report and pleadings, are reserved for the further decision of the Court.

PER CURIAM. Decree accordingly.

Cited: S. c., 21 N. C., 46; *Leary v. Cheshire,* 56 N. C., 172; *Eason v. Cherry,* 59 N. C., 262.

DECEMBER TERM, 1831

THOMAS COMPTON ET UX. v. WILLIAM CULBERSON AND SAMUEL GREER.

1. Upon a bill to correct a settled account for specified errors, such errors only can be corrected as arose from fraud or mistake; and the plaintiff cannot surcharge and falsify as to an item of the account assented to at the settlement with a full knowledge of the facts.

2. And where the bill also sought to set aside the settlement as obtained by undue influence, it was held that the plaintiff, by consenting to a reference of the account upon the basis of the settlement, with liberty to surcharge and falsify, had waived the relief sought upon the ground of undue influence.

THE original bill was for an account of the estate of the intestate Samuel Greer, and was filed in 1818, by Thomas Compton and his wife, a daughter of the intestate, and by him as administrator of two others of the children who were dead, against William Culberson and Samuel Greer, Jr., the former of whom was administrator in conjunction with Margaret Greer, the widow of the intestate, and the latter the son of the intestate and the executor of his mother, Margaret. It charged that a considerable estate came to the hands of the widow and her coadministrator in 1790, when the intestate died; of which an account and distribution were sought. It was charged that although the children lived with their mother, they maintained themselves by their own labor, and therefore ought to have interest on their shares; that the administrators bought several articles at their own sale at an under-value; that the administrators having returned a false and fraudulent account (94) current to the county court, in which they did not charge themselves with interest, nor with several sums which came to their hands, and which were specified, pretended to come to a settlement, in 1809, with the children upon the basis thereof, and then paid to each of them $220 as their respective shares, without allowing interest, which the children, being young and unacquainted with their rights and with accounts, accepted. The prayer was for a general account.

Answers were put in to this bill, admitting one of the mistakes and denying the others alleged, and insisting that the children were fully paid after correcting that mistake, and also that the youngest of the children was, in 1809, 25 years of age, and that the items of the account were perfectly understood and assented to by them all, and particularly the omission of interest, which was not brought into account on either side because the family had lived together and been supported out of the profits. As to the allegation that the administrators had purchased

at their own sale at an under-value, the answer stated that the purchases were at fair prices, which were brought into account and fully assented to by the children. And it then set forth a settlement in 1809, on which the shares were ascertained and paid, and averred that it was fair and proper, and that thereupon each child, with a full knowledge of all the facts, gave to the administrator receipts and acquittances in full, which were relied on as a bar to further accounting, in the same manner as if pleaded.

An amended bill was filed in 1820, in which further specific errors in the settlement were pointed out, for which, together with the former, it prayed that the settlement might be opened. And it was further charged, in reference to the assent given, as stated in the answers, by the children to the omission of the interest, and the confirmation of the purchases of the administrators, that such assent was not freely given,

but was obtained by their mother by undue influence and by un-
(95) candid insinuations that her daughters would lose nothing by settling upon the footing desired by her, saying that she was old and infirm, and that her children ought not to break up her peace or be hard with her, for she could not live long, and then they would have amongst them all she had, thereby intending they should understand that at her death her estate would be equally divided. That moved by their mother's appeal, and in faith of her declaration for a future equal division, the daughters came to the settlement and executed the acquittances. But she afterwards gave her whole estate by will to her son, the defendant. And the prayer was that the acquittances might be set aside as unduly obtained, and the parties come to a new account; or, at any rate, that the settlement might be corrected in the matter of the errors pointed out, and particularly the interest.

The answer to the amended bill denied all other errors, and admitted that the intimation was given by the mother about the future disposition of her own estate, or to the effect charged; but denied that it was intended or understood as an engagement, or otherwise than as matter of maternal bounty then in her mind, or that it was intended to overawe or buy off the children from prosecuting their demands. That in all probability the purpose then expressed would have been fulfilled but for subsequent changes in the situation of the family. That of her three children then living one afterwards died, and another intermarried with the plaintiff Thomas, who was in easy circumstances, and treated his mother-in-law with extreme harshness, which induced her to bestow all her estate on the defendant, who continued to live with her. This answer also concluded by relying on the settlement as a fair one, and the acquittances as a bar.

Much evidence was taken to every point of the case, which it is not necessary to state, as to the decision did not turn on it.

A reference was made as upon the hearing, by consent of the parties, to the master to take the accounts of the estate upon the basis of the former accounts, with liberty to the plaintiffs to surcharge and falsify; and upon that the master reported that the plaintiffs were overpaid by the sum of £1 15 4, after correcting all the specified mistakes, unless interest was to be charged, and he submitted that question (96) to the Court.

Nash for plaintiffs.
Badger for defendants.

RUFFIN, J., after stating the case: The cause comes on now upon the matter referred by the master to the decision of the Court, and for further directions. It has been argued at large for the plaintiffs upon the evidence, and the rule of this Court touching the dealings between parents and children and settlements between guardian and ward.

The Court would examine the case upon those points, both as to the facts and the law, were the cause open for a decision in favor of the plaintiffs on the score of that settlement being unduly obtained. But it is not. The acts of the parties in making the special reference preclude us from going into that subject.

It is manifest that the grounds of the two kinds of relief sought are entirely different, as the two kinds of relief are in themselves distinct. The one is to open a settled account on the score of specific errors—a relief to which all persons in every relation of life, are entitled, and which depends merely upon showing errors made either through fraud and imposition or by mistake or accident. The settlement stands as right, except as to the particular errors pointed out, and having their origin in either of those causes. There is no accident alleged in this case. So far as this point is concerned, the question turns upon the false charges fraudulently made by the administrators, and the fraudulent omission of interest. But there can be no fraud, in the sense of that term applicable to this subject, nor mistake where the parties knew all their rights and all the facts, and were perfectly aware of the omission, and gave an express assent to it. When they come to surcharge and falsify, how can they do it as to an item absolutely agreed to at the settlement? But the other relief prayed is much broader. It is to set aside the whole settlement, and open the case to an account (97) *de novo,* not only upon the ground that errors exist and the party is deprived of rights, but upon the additional ground of a higher and different species of fraud; that the party was in a situation which put

him in the other's power; that he was in a condition to be worked upon, and induced to take less than he was entitled to, and knew he was entitled to, and that advantage was taken of that influence, and he unduly prevailed on to surrender his rights without a consideration. Then the knowledge of his rights does not negative the fraud. It only proves it the clearer; because it shows the extent of his weakness, and of the other's control over him, and the iniquitous use made of it. A settlement made under those circumstances concludes nothing, and receipts in full given under it only stand as acquittances for the sums actually paid. Far otherwise is it on a bill to surcharge and falsify. There the receipts do stand as conclusive until errors are pointed out, and the account is opened only as to them. And those errors must be shown not to have been known and assented to at the settlement, or some concealment on the one part or misapprehension of the facts touching the item of account on the other.

Here the item of interest was known, discussed, and given up by the children. They knew of their right, and they knew they were not to get it in that settlement. How, then, can it be said there was any mistake or imposition upon the point of excluding the charge of it? Whether they were fairly induced to relinquish it is another question. But that question is beyond our reach, because the plaintiffs have agreed to overrule that part of the relief prayed, by having the accounts taken on the basis of the former account, thereby trusting the decision of their ability to show actual mistakes, through ignorance, or accident, or fraudulent misrepresentation, or concealment. None such have been made to appear; and therefore the bill must be dismissed, with costs.

PER CURIAM. Bill dismissed.

Cited: James v. Matthews, 40 N. C., 30; *McAdoo v. Thompson,* 72 N. C., 409; *Garrett v. Love,* 89 N. C., 208; *Grant v. Hughes,* 96 N. C., 191.

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(98)

WILLIAM COOPER ET AL. v. HARDY PRIDGEON ET AL.

1. Where a testator devised personal estate to a child, "to her and her heirs forever," and added, "It is my will and desire that if my said daughter lives to arrive to the age of 18 years, for her to receive her said legacy, and take possession of it; and if she should die without a lawful heir begotten of her body, then the said property to revert back, and be equally divided," etc., *it was held* that the words "receive and take possession" were equivalent to "shall then be paid," and that the legatee took a vested and (the limitation over being too remote) an absolute interest.

2. Where the time is not annexed to the legacy, but to the payment of it, the legatee takes a vested interest.

THE bill, which was filed in NASH, in 1831, set forth the following clause of the will of David Pridgeon:

"I give and bequeath to my daughter Polly Harriet Pridgeon one tract of land, etc.; also one negro boy, etc.; also $600 in cash, to her and her heirs forever. It is my will and desire that if my said daughter Polly Harriet Pridgeon lives to arrive at the age of 18 years, for her to receive her said legacy that I have left to her, and take possession of it; and if she should die without a lawful heir begotten of her body, then the said property to revert back, and be equally divided between my two sons, Hardy and Abijah Pridgeon, and my daughter Cloe Atkinson."

Polly Harriet Pridgeon died under the age of 18, unmarried and without issue, and the administration of her estate was committed to the defendant Hardy.

The plaintiffs were her next of kin, and sought distribution of her personal estate.

The case made by the bill was admitted in the answer.

No counsel for plaintiffs.
Badger for defendants.

RUFFIN, J. I think the daughter, Polly Harriet, took a vested (99) interest. The gift is by distinct words, importing an immediate bequest. It seems to me that the subsequent clause is confined to the payment or personal possession of property, and so falls within the common rule. The first part certainly gives a present interest. Then come the words, "my will is, if my said daughter arrive to the age of 18 years, for her to receive her said legacy that I have left to her, and take possession of it." "Receive and take possession" are equivalent to "shall then be paid." But it is said that *if* is a word of contingency, and by annexing it to the period of payment upon an uncertain event, namely, her living to a certain age, the happening of that event becomes of the essence of the bequest; and as the legatee died under that age, the legacy is never to be paid, or, in other words, never vested. There are cases in which upon the plain intention of the will the general rule before mentioned must yield, if it appear upon the whole will that it was intended the legacy should be contingent, and not merely the payment postponed. Such was the case of *Mackell v. Winter,* 3 Ves., 236, 536. But that was upon the effect of the ulterior limitation over of the whole residue, upon the death of the three grandchildren under age, which forced an implication of cross-remainders between those grandchildren,

or rather that the fund was not to be divided, but kept for those children, or that one who did arrive at full age. But why should we give such an effect to the terms by which the period of payment is designated here? *If,* though generally denoting a condition, does not necessarily do so, if apparently not used in that sense. Here it is not referable to the interest in the legacy, but the enjoyment of it, and by a distinct sentence. Naturally, therefore, the case falls within the general rule. What is there to show the testator had a different meaning from that upon which the rule is founded? It is plain the testator did not mean to die intestate as to this legacy. Upon the death of the daughter without
(100) heir of her body, it is given over. And the contingency on which it is to go over is not confined to her dying without issue under 18, but to her so dying at any time, whether under or over that age. Nor can it be supposed that he meant it to fall within the residue upon any event but its abating by the death of all the takers, as well the remaindermen as the daughter. Yet if she had died under 18, according to the other construction, and had left a child, neither the first nor second takers could have it; the first, because she did not attain the requisite age; the second, because the daughter had left issue. And then it would either go to the next of kin or to the residuary legatees. We may safely say the testator could not mean that; and if not, it seems to follow that the legacy vested in the daughter, because that is the only construction which can prevent the other. The testator might well postpone the payment or possession to 18, and then direct it, because that is a usual age of marriage in this country. But when he gives over the property expressly upon her dying without issue, he could not mean that if she had issue at any time she should not have it in her power to provide for it. This is the prevailing circumstance which governs me. It has controlled the construction of many wills. But there is another which has no little influence. The legacy is a provision for an infant daughter, for whose support and education no other provision is made; and unless this legacy vested so as to give her the profits (there being no intermediate disposition of it to another), she would be wholly destitute. Did the father intend that? Besides, there is another reason, which is certainly slight and verbal, yet helps on to the same conclusion. The testator uses the word *revert back,* when he creates the remainder, which presupposes a vested title to have been in the daughter.

Upon the whole, I conclude that the daughter took a vested interest, subject to be divested upon the contingency of her death without issue; in which case there is a limitation over. But as the contingency is too remote, her interest remains absolute.

PER CURIAM. Declare, that Polly Harriet Pridgeon took, (101) under the will in the pleadings mentioned, a vested and transmissible interest in the legacy bequeathed to her therein, determinable upon the contingency of her dying without issue; and that the said contingency being too remote, the said Polly Harriet took an absolute interest therein, and reserve the cause for further directions.

JAMES HILL v. JAMES S. JONES.

1. Where a judgment on a bond was obtained, and, after a return of not satisfied, became dormant, and ten years afterwards was revived, when the defendant, having discovered evidence that the bond had been paid, obtained a verdict establishing that fact, upon an issue directed for the purpose, *it was held* (RUFFIN, J., *dissentiente*), that as the evidence was satisfactory to a jury, the lapse of time was not a bar to the relief.
2. Per RUFFIN, J. A court of equity requires active diligence as well as a just cause, because of the difficulty of ascertaining the truth in stale cases.
3. The rule prescribes no particular time; but where the statute of limitations bars at law, it bars also in equity.
4. Where the relief is sought against a judgment at law, to let in a legal defense unknown at the trial, the bill should be filed with the least possible delay.
5. This is in analogy to the rule at law on application for continuances for newly discovered testimony.
6. And also where a verdict is sought to be set aside by appeal or *certiorari*.
7. At any rate, the plaintiff should be held, in analogy to the act of 1800 (Rev. ch. 551), prohibiting the granting of injunctions upon judgments obtained at law more than four months after the trial, to file his bill within that time after the discovery of the evidence.
8. A judgment ought not to be set aside for testimony discovered after the time allowed the defendant to bring error.
9. Much more ought a bill to set aside a judgment for after-discovered testimony be dismissed, where, if it sought to reverse a decree, it would be barred by lapse of time.

THIS bill was filed in September, 1828. It charged that the plaintiff gave his bond to James Jones, the defendant's testator, for £44 3 6, in December, 1811, payable in ten days; that at three several days he made payments, the last of which Jones acknowledged to be in full, but excused himself from then delivering up the bond by saying that he was too busy and was going from home, so that he could not look for it, but

would surrender it whenever called for. The bill then charged Jones's death, and that he appointed executors, of whom the defendant was the survivor, who, finding the bond uncredited and uncanceled, brought suit on it and recovered judgment in August, 1818, and issued an execution, which was returned "Not satisfied," by their consent; that the plaintiff informed the executors, while the suit was pending or before, that he had paid the debt, and they declared they had no doubt of it, but that, being executors, they were compelled to sue, and leave him to his defense; that the plaintiff employed an attorney to defend the suit, who pleaded to it, but he could not support his defense, because one
(102) John Sessoms, the only witness within his knowledge who could prove the payments, died either before or immediately after the suit was brought, and in consequence thereof his pleas were withdrawn, and judgment by default entered; that only one execution ever issued, and the judgment became dormant. The bill then charged that some time after the judgment, and upon the circumstances becoming known in the neighborhood and much talked about, one Matthews told the plaintiff that he heard the testator, a short time before his death say to him (the plaintiff) that the bond was paid, and that he would give it up when convenient. The plaintiff then charged that from the execution not being issued again, he entertained the belief that the executors were convinced the claim was unjust, and had abandoned it; and, furthermore, that he was advised by persons in whom he had confidence that there was no danger of the claim ever coming against him, and that he was ignorant in such matters, and rested satisfied therewith—especially as he thought, if it ever should be revived, he could defend himself upon the testimony of Matthews.

It is then charged that a *sci. fa.* to revive was brought, and judgment obtained in May, 1828. Upon the trial the plaintiff offered Matthews as a witness, who was rejected as incompetent to prove a payment made before the former judgment.

The defendant in his answer stated that the bond was found among the testator's valuable papers, and that there was nothing to show that any part of it had been paid. He admitted that the plaintiff always said to the executors that he had paid it, but denied that they told him they had no doubt of the fact, or intimated to him that they would not enforce the collection. On the contrary, he alleged that although they did not, out of common courtesy, flatly contradict his positive assertion, they gave him distinctly to understand that nothing could be done in the matter, but in due course of law; and as to the defendant's own knowledge or belief, he said that he knew nothing, and that he believed that most probably the debt was not paid, for he was altogether igno-

rant that the plaintiff was able to make payment. He further (103) averred that the execution was not suffered to lie either from motives of compassion or a belief that the debt had been paid, but solely because the plaintiff was unable to satisfy it until just before the last suit was brought.

The plaintiff filed the deposition of Matthews, who swore that he heard the testator at his own house, a few weeks before his death, tell the plaintiff that the bond was fully paid, and that he would give it to him if he would apply in a few days. He also deposed that he gave this information to the plaintiff just before the last judgment was taken. The testator died in 1816.

Upon this case and this evidence, the court below submitted the following issue to a jury: whether or not the bond was paid to the testator; who found that it was. And thereupon, *Daniel, J.*, decreed a perpetual injunction, and the defendant appealed.

Gaston for plaintiff.
Hogg for defendant.

HALL, J. I think the decree made by the Superior Court ought to be affirmed. The argument of most strength against it is the length of time that elapsed after the first judgment was obtained upon the plaintiff's bond, in 1818, until the filing of this bill. However, I do not consider that sufficient. The plaintiff, it is true, has not informed us of the time when he first discovered the testimony of Matthews, which he ought to have done. If the discovery was made shortly after the judgment was obtained, it was to be expected that an earlier application would have been made to this Court for relief against it. This (104) may have been omitted through ignorance, or from a belief that the plaintiffs at law would not proceed further upon it, after being made acquainted with Matthews's testimony. Be those things as they may, the time that has run since the judgment was obtained until this bill was filed does not, of itself, form a bar to the relief prayed for by the plaintiff. And it is further from it, as the defendants issued no execution upon the judgment obtained by them at law, but remained still until they issued process upon it, and obtained judgment thereon in 1828. When this latter judgment was obtained, the plaintiff states that he offered to prove the payment of the debt by Matthews, to which the plaintiffs at law objected, as they had a legal right to do. It therefore appears that the defendant was slow in asserting his claim at law, and the plaintiff was backward in his application to this Court, perhaps on that account. But the question was submitted to a jury in the Superior Court,

whether the debt was paid to the defendant's testator in his lifetime. They have responded that it was so paid. I therefore think that the decree of the Superior Court upon that finding should be affirmed, and that the defendant pay the costs of this Court, but the plaintiff must pay the costs at law and the costs in equity incurred in the Superior Court.

RUFFIN, J., *dissentiente.* The decree, I think, is erroneous. In my opinion, if the plaintiff ever had equity and conscience on his side, he has lost it by his delay, and his bill ought to be dismissed.

A reasonable diligence is the best evidence of good faith and a just cause. It alike promotes private interest and public convenience. It is public policy to encourage it, because it prevents litigation, or, if that must be, truth is arrived at more easily and certainly. We are obliged to distrust him who prefers his claim at a great interval after its origin. We are still more forcibly impelled to distrust a defense set up ten years after the judicial ascertainment of the demand of the creditor. A judge, it seems to me, must be very confident of his (105) sagacity in detecting falsehood, of his patience of investigation, of his capacity to ascertain the exact truth and his ability to do exact justice, under all circumstances, if he be willing to enter into stale cases of this sort upon their particular circumstances. For my part, conscious of deficiencies and of the perplexities in which I should be involved, and the danger of oftener doing wrong than right to suitors by such an attempt, I gladly take refuge under the well established principle of this Court which requires from him who would be heard in it active diligence, as well as a just demand. After great delay, I cannot tell whether it be just or not. I therefore presume against it. I am obliged to seek some safeguard against my own fallibility and those special pretences which an artful man can contrive to mislead me as to remote transactions. This I find in a presumption against *laches.*

I admit there is no law of the Court prescribing a particular time for all cases. But in a case to which at law the statute of limitations is a bar it is equally positive here. And where there is no positive bar, yet equity, as its law, adopts the rule prescribed for courts of law in analogous cases.

The present, it is to be remembered, is not a suit for an equitable demand. The object is to get a new trial at law, to let in a strictly legal defense, namely, payment of the debt, for which there is a judgment at law. But relief is not granted here merely because an unrighteous recovery has been had at law. That court is as competent as this to do justice in cases within its jurisdiction, unless the defense has been lost by accident or fraud. Both facts must concur—right, and a failure of

right at law, without the party's fault, in order to put this Court in motion. And the question is, when this Court must be applied to. It seems to me most reasonable that the extraordinary interference of equity to set aside the solemn trial and judgment of another court ought to be asked for, if not forthwith, yet with the least possible delay after the occasion for it arises. The situation of a defendant at law is in such a case hazardous in the extreme. There may be execution (106) any day, or a new judgment without the possibility of defense, and then execution. Procrastination in such a situation can be imputed to nothing but the want of merits, or a most culpable negligence, ruinous to the parties and guileful towards the court. What is the legal analogy? If a party come to trial, the verdict cannot be set aside for a matter within his knowledge for which he could have a continuance. Why? Because the court will protect itself from the abuse of such experiments, and require the party to act at the proper period on his knowledge of facts. And as to the other two legal modes of correcting verdicts unduly obtained, namely, by appeal or by *certiorari* in the place of it, the former is required by statute to be taken immediately, and the latter, by the course of the court, to be applied for as soon as the party can. Would the extraordinary remedy of a *certiorari* to retry the facts be granted after a lapse of ten years since the matter came to the applicant's knowledge? Certainly not. Neither ought this extraordinary equitable new trial.

But it seems to me that we are not to decide this case upon such general reasoning alone. The Legislature, moved by the great evil of injunctions, restrained the courts by the act of 1800. It recites that injunctions are frequently applied for for the mere purpose of delay, and that the facility of obtaining them enables debtors to defeat creditors of their just claims; and then enacts that no injunction shall issue but within four months after the judgment at law is obtained, unless it shall appear by the oath of the plaintiff that the application has been delayed in consequence of the fraud or false promises of the plaintiff at law, practiced or made at the time or after obtaining judgment. I may admit that this does not apply to relief founded upon an equity distinct from the matters tried or triable at law: as in the case of a judgment on a bond for the purchase money of land, of which a defect of title or eviction has happened since the trial. I may admit, too, that although the injunction improperly issued, yet if the plaintiff's equity appear in the answer, it will not be dissolved, because the injunction, being collateral to and in aid of the relief, would be (107) immediately reissued. I think both of these positions right. But I must consider the statute imperative where the equity is not admitted

in the answer, and consists altogether of a legal defense, existing before the trial at law, which the party now wishes to make available by new proof, not kept from him by the opposite side. If the act does not apply to such a case, it does not to any.

But then it is said that this can only relate to a matter within the party's power at the trial at law. I do not admit that; because if it were in his power, he cannot come here at any time. But if it be granted, we are still bound to act in analogy to the statute and say, Come within the four months after the discovery. If the analogy to the statute of limitations be obligatory on this Court, still more clearly is the analogy to a statute applying specially to a peculiar jurisdiction of this Court to be adhered to in similar cases. Why does the Legislature tie us up to four months? Only because it is a reasonable time for men in common to apply to counsel and prepare their cases; therefore, a subsequent injunction must be for delay, and delay only. It is true, this bill was filed within four months after the last judgment, but the equity is against the first one. The last is not for too much on any other ground than that the first is unconscientious. If the ground of equity is gone as to the first, it must be as to everything built on it. If the plaintiff had filed his bill in 1825, against the judgment of 1818, would any judge have granted it, or hesitated to dismiss it on demurrer? I think the plaintiff at law cannot be worse off by a delay of three years longer.

But should I be mistaken in all this, there is another analogy, which is extremely strong. If time has hallowed the judgment at law, so that in no manner can it now be disturbed by a superior legal tribunal, it seems to be that it ought to be equally respected here. Five years bars a writ of error. By analogy to that, five years barred a bill of review; and we have now a statute to that effect. If, then, errors of law, which appear upon the record, and must always be the same in every
(108) court, which go to show that the whole judgment is to be annulled, cannot be rectified, still less ought an inquiry into facts involved in that judgment to be entered upon after that period. Why is a writ of error barred at all? It is not because that which was not law has become law, but because if the judgment be reversed, at that late period, the party may in the meanwhile have lost his witnesses, and upon a second trial justice be defeated, as much by a perversion of the facts as it was before by a mistake of the law. The Legislature, acting upon general principles, and not presuming to canvass each case upon its particular merits, has therefore interposed his positive bar in all cases. The same reasons influence the discretion of this Court in like manner. I have already mentioned the methods, by appeal and *certiorari*,

of retrying the fact at law, and remarked how strictly limited they are. I ask why equity should open the facts, after the courts of law are deaf to all errors, even of law.

But if this Court is not to respect legal analogies, it surely ought to have much regard to a statute establishing its own course. Five years is also, by a late act, a bar to a bill of review for errors of law or fact. If the debt here were due by decree, instead of judgment, the plaintiff would be clearly barred. I do not perceive that a verdict of twelve men, establishing a fact, is of less obligation than the opinion of the chancellor upon the same fact. Nor do I perceive that the principle on which we grant a new trial of an issue found in a suit at law differs from that on which we entertain a bill of review upon newly discovered evidence. Then equal diligence ought to be exacted in each case, and that should be that the party should apply as soon as he makes the discovery. The rule, indeed, is much stronger relative to injunctions against judgments at law, because the act of 1800 (Rev., ch. 551) enacts a distinct and express limitation.

If, however, we are to look into the circumstances, there is nothing here, in my humble judgment, to create an exception. The verdict is nothing. I lay it out of the case altogether. That is the very error of the court below; for the plaintiff ought not to have been permitted to proceed to his proofs. His equity was gone by his (109) *laches*. The very reason why he cannot have relief is that there is a presumption against him that he will not, after such a lapse of time, prove the truth. We will not, therefore, hear his proofs at all unless he establishes, in the first place, that he did not know of them before. But if it were otherwise, there is no sufficient proof here. In this Court a verdict upon an issue ordered is not conclusive. It is only in aid of the chancellor's conscience. *Bootle v. Blundel,* 19 Ves., 500. And if it be not satisfactory, he may set it aside, or decree against it without setting it aside. *Field v. Holland,* 6 Cranch, 8. It is only evidence to us, therefore, and cannot change the aspect of the case, for that would be to assume a jurisdiction upon the proofs, and not upon the allegations of the parties. Here the ground of my opinion is that the delay of asking for relief excludes the party from it.

But examine the circumstances further. It is said that the plaintiff was ignorant and poor. Poverty and ignorance are too vague for any court to act on. I shall be sorry to see the day when a man will get more or less justice for being either rich or poor. If poverty has been so extreme that the party trying to act was unable, that would prevent the effect of lapse of time as creating a mere presumption. But that cannot set aside a rule of law, or a positive bar interposed by an act of

Assembly. Poverty and ignorance cannot be replied to the statute of limitations. But there was no gross ignorance here of the party's rights, much less of the facts. The plaintiff consulted his friends and might have consulted counsel. The case is reduced to this, that he received bad advice. But that cannot govern us. The circumstances of the plaintiff do indeed appear, from the answer, to have been slender. But if I know anything of the spirit or habits of the people of this country, men in his situation are least likely to let a judgment hang over them. They regard it as a sword suspended by a hair, and are ready enough to embark in law to escape its fatal fall. But one thing is decisive on this point. The bill itself is not framed on that idea. The plaintiff does not even sue as a pauper. He has been able to give
(110) good sureties for the debt. His poverty is not hinted at in the bill, much less is it charged as the cause of the delay. It is brought forward in the answer; and there is no particular distress of the plaintiff, or oppression by the defendant. He accounts for the delay, from the advice he received that there was no danger, and from his belief that he could defend himself on Matthews's testimony. This might do if he were on the defensive merely. But at law he was indefensible; and in this Court he is the actor. He ought not, therefore, to have waited.

Then as to the delay of the plaintiffs at law: the plaintiff says he thought they had abandoned the claim from a conviction of its injustice. He had no right to think so, without better evidence. The defendant swears that he was mistaken in the motive of the delay. It does not appear—nay, it is not pretended—that any communication was had with the defendant to that effect. The plaintiff did not ask the defendant. He did not even inform him what Matthews would swear. I repeat, therefore, that he had no reason for his opinion. And I say he did not think so, for from the beginning the executors gave him fair and distinct notice, according to his own showing, that "they were compelled to sue, and leave him to his defense." There was, then, no "fraud nor false promise on the part of the plaintiff at law, at the time or after the judgment at law," and the plaintiff's negligence has been gross.

Lastly, as to the time when the testimony of Matthews came to the plaintiff's knowledge. The witness indeed swears that he told the plaintiff what he knew in May, 1828. Is that credible? It is directly contrary to the plaintiff's own oath. In his sworn bill he says that some time after the judgment this witness told him he heard the testator acknowledge to the plaintiff himself the full payment "Some time" is, by itself, an indefinite expression. But elsewhere it is explained to mean "a short time," for he says this information was received some

time after the judgment, and on its being known and much talked (111) in the neighborhood; and that he relied on that evidence, if any attempt should be made to revive the judgment. When was this talk? Surely at or about the time of the judgment, and not after it had gone out of people's minds by becoming dormant. And equally certain is it that the plaintiff could not rely on proof to defend a suit, if it should be brought, which did not come to his own knowledge until the very month of the trial.

The delay cannot, therefore, be accounted for in any of these ways. And it is, in my mind, without excuse, unless negligence, delay, and leaving things in doubt be merits of themselves.

I cannot imagine a case more happily illustrative of the soundness of the rules requiring active diligence, and making it a duty of conscience, in restraint of perjury, and in repression of the mistakes of courts. Were the plaintiff suing at law, he would be barred three times over. Were he prosecuting a writ of error or a bill of review here, for error of law or fact, both would be twice barred. Yet here he is to be allowed to proceed to his proofs, and by such proof as is false upon the face of his own bill, and relating to a conversation between the testator and the plaintiff himself fifteen years before, he is to deprive the defendant of the benefit of a judgment, rendered upon the withdrawal of his pleas, and, as it were, by confession, and held, without resistance and without fraud on the part of the defendant, for ten years. I cannot believe such to be the law, and therefore do not concur with the majority of the Court, that the decree below should be

PER CURIAM. Affirmed.

SPENCER L. HART ET AL. v. THE BANK ET AL.

A corporation has no right to retain the stock of an insolvent corporator to secure a debt due from him. Whether a by-law subjecting the stock of corporators to debts due to the corporation will give them this power, *quere.*

THE bill was filed in WAKE, and the case made by it was that one Barnes, being insolvent, conveyed all his property to the plaintiff for the purpose of securing his debts; that among other things there were five shares of stock in the State Bank; that the plaintiffs, (112) under a power from Barnes, applied to have the stock transferred upon the books of the bank into their names, which was refused. The bill prayed that the defendants might be compelled to transfer the stock.

The answer admitted the facts stated in the bill, but alleged that Barnes was indebted to them, and insisted that they had the right to retain the stock as a security for that debt.

The cause was heard upon bill and answer.

Devereux for plaintiff.
Badger, contra.

HALL, J. Stock in a bank is the subject of sale and of purchase, and the mode of transferring it is pointed out by law. It is free from encumbrances as any other part of the debtor's property. The president and directors of the bank have the management and control of it, for ordinary banking purposes; but they have no lien upon it for any debt which the holder of it may owe to the bank. The stockholder borrows money from the bank upon giving security for the payment of it, as any other person does who is not a stockholder; and the money is loaned upon the strength of such security, not upon any supposed liability of the stock.

In *Assignees of Evans, a bankrupt, v. Hudson Bay Co.,* reported at large in 7 Vin. Ab., 125, pl. 2, the company had made a by-law subjecting the stock of any of its members in the first place to debts which they might owe the company. *King, Chancellor,* thought that by-law not a good one. But *Raymond, C. J.,* and *Baron Price* thought otherwise. But they were all of opinion that without a by-law, or some other law subjecting the stock to the company's debts, they had no lien or claim upon it. That seems an authority much in point. The same case, perhaps, under another name, is to be found in 1 Strange, 645, and 2 P. Wms., 207, though much more briefly reported. I feel but little hesitation in saying that the prayer of the bill ought to be granted.

(113) PER CURIAM. Decree accordingly.

Cited: Boyd v. Redd, 120 N. C., 336.

THE FREE BRIDGE COMPANY v. JOHN WOODFIN ET AL.

Where the Legislature incorporated the plaintiffs for the purpose of building a bridge, and authorized them to collect such an amount of tolls as was necessary to keep the bridge in repair, and the defendants erected another bridge in the vicinity over the same river, which diverted the traveling, *it was held* that to entitle themselves to relief the plaintiffs must show that their bridge was always in good repair.

THE case made by the bill, answers, and proofs was as follows. The Legislature, by an act passed in 1822, incorporated the plaintiffs, and authorized them to build a bridge across the French Broad River in Buncombe, and to collect such an amount of tolls from persons passing it as should, in the opinion of Buncombe County court, be sufficient to keep it in repair. The bridge being at times out of repair, the defendants built one across the same river, which was entirely free, and thereby, as the plaintiffs averred, diverted the traveling from their bridge to such a degree as prevented them from being reimbursed by the tolls for the money which they had expended in repairing the bridge. The bill prayed an injunction to restrain the defendants from using their bridge.

Hogg for plaintiffs.
Gaston for defendants.

HALL, J. The Legislature, by the incorporation of the Free Bridge Company, had in view only the public good, not the private interest of the members who composed it. They, therefore, only authorized the collection of such tolls as should be directed by the county court for the purpose of keeping the bridge in repair. Except for that purpose they have no authority to collect anything. For the furtherance of the objects of the law, the plaintiffs have not made out a case that (114) requires the interposition of this Court. They state in their bill that they procured an order of the county court authorizing a gate to be erected and tolls to be collected. But they have neither produced a copy of such order nor stated what tolls they were authorized to collect. They have not stated, nor given any data from which it can be understood, what amount of money is necessary to keep the bridge in order for any given time. For aught that appears, the tolls collected are sufficient, or may be more than sufficient, to keep the bridge in repair, although the bridge erected by the defendants should be permitted to be used.

With these circumstances another reason combines to place relief beyond the reach of the plaintiffs, and that is that the bridge has not been kept in good and sufficient repair. If there was a necessity for another bridge because the plaintiffs' bridge was not kept in sufficient repair, it would be unjust to throw that bridge into disuse when the plaintiffs thought proper to put their bridge in order. A tollbridge should at all times be kept in order, except for causes which their owners cannot foresee and control. In the present case that has not been done, although the tolls which have been collected, or which might have been collected, are sufficient for that purpose.

The testimony taken in the case, without referring particularly to it, establishes the fact that the bridge at all times has not been kept in good and sufficient repair for the passage of travelers. For this reason, as well as for that before given, the bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

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(115)

NATHANIEL BROTTEN v. DANIEL BATEMAN ET AL.

1. A court of equity has jurisdiction at the suit of a legatee against the executor of an executor, who has the funds of the first testator in his hands, although there is a surviving coexecutor.
2. Creditors have no redress against the executor of an executor, where there is a surviving coexecutor, unless upon the ground of collusion or of the insolvency of the survivor.
3. A payment by the executor of one of two coexecutors to the survivor will discharge the estate of the deceased executor *pro tanto.*
4. Legatees may in equity recover of the executor of a deceased executor and the surviving executor the funds in their hands respectively.
5. Coexecutors who jointly administer are liable for each other's acts.
6. But upon an account of their administration, both are not jointly responsible to legatees in the first instance. He who has received the fund is primarily liable, and the other only in case of his default.

THE original bill was filed in 1818 by Brotten and his wife against Levi and Benjamin Bateman, the executors of John Bateman, deceased, who had been the former husband of *feme* plaintiff, for an account of the estate. It charged that she dissented from the will. The defendants filed a joint answer, and admitted their joint administration.

Pending the suit, both of the defendants died, and at September Term, 1820, a bill of revivor was filed, in which it was charged that Benjamin Bateman died and made Daniel Bateman and James Wood his executors, who took into their hands the assets of John and Benjamin Bateman to the value of £10,000; and it further charged that Benjamin died first, whereby the administration survived solely to Levi, and that he reduced into his possession all the property of his testator, John; that Levi then died, having made Harman Bateman and John Bateman, Jr., his executors, who reduced into their possession all the effects of the first testator, John, and also assets of Levi to very large value. The prayer was for process against Harman and John, Jr., only, and that the suit might stand revived against them, which was ordered accordingly.

In March, 1823, Eunice, the wife, died, and her surviving husband, having administered on her estate, then filed, in that character, a second bill of revivor against Harman and John, the executors of Levi, on which the suit was again revived against them.

In September, 1827, on leave granted to amend in that respect as well as to revive, the plaintiff filed an amended bill and bill of revivor, in which he set out the former proceedings, and charged that in the bill of September, 1820, it was charged by mistake that Benjamin Bateman died first, and that Levi, after that event, possessed himself of all the effects of their testator, John; and the amended bill charged, according to what was alleged to be the truth, that Benjamin sur- (116) vived Levi, and that in fact a large part of the estate of John, the first testator, was in the hands of both Levi and Benjamin, which came to the hands of their respective executors, besides large amounts of the proper estates of Levi and Benjamin themselves. A *devastavit* by Benjamin of the assets of John was also charged, and that a sufficiency of Benjamin's estate came to the hands of his executors, Daniel Bateman and James Wood, to make good the same. The prayer was for process against Daniel Bateman and Wood, and that the suit should stand revived against them.

To this bill an answer was put in by Daniel Bateman, who survived Wood, wherein he denied that Benjamin did survive Levi, and that any assets of John, Sr., came to the hands of Wood or himself, or that Benjamin had any of those assets in his hands when he died; and alleges that Benjamin had in his lifetime paid all that he ever had either to creditors or legatees, or to his coexecutor, Levi. He admitted assets of Benjamin in his hands, and further averred that in 1817 a settlement of the administration was made between the two executors, Benjamin and Levi, on which it was found that Levi had all the estate in his hands except the sum of $85.85, which, it was admitted, Benjamin then had. But he alleged that it was then agreed by Levi that Benjamin should pay that sum to two other legatees on account of their legacies, and that the defendant had done so, since the death of his testator, Benjamin.

Upon this, after a replication and an order setting the cause down for hearing, the case was heard at September Term, 1830, and a reference made to the master to take an account of the assets of John, the elder, which came to the hands of his executors, Levi and Benjamin, and of the same assets which came to the hands of the defendant Daniel, executor of Benjamin, and also of the assets of Benjamin which came to the hands of the same defendant.

At March Term, 1831, the master reported the account of the receipts and disbursements of the assets of John Bateman, the original

(117) testator, whereupon a balance was found due to the plaintiff of $296.14, with interest from March Term, 1830; that the administration of Levi and Benjamin was joint throughout, as long as Benjamin lived; that Daniel had assets of Benjamin to a much larger amount than the sum reported in favor of the plaintiff, but that it did not appear that any assets of John had ever come to the hands of Daniel.

To this report the defendant Daniel excepted, because the master charged the executors, Levi and Benjamin, jointly, with the estate of their testator, although Levi survived Benjamin, and without proof that Benjamin had wasted any of the estate or retained any of it in his hands unaccounted for. But notwithstanding the exception, the report was then confirmed by DONNELL, J. And at the next term the cause was finally heard before MARTIN, J., upon the report and pleadings, who pronounced a decree against the defendant Daniel alone for the sum of $296.14, with interest, and the costs of the suit, from which that defendant appealed.

No counsel for plaintiff.
Badger for defendant.

RUFFIN, J., after stating the case: Several objections are now made against the decree. One is that taken in the exception made below, namely, that there is no jurisdiction here against the executor of a deceased executor by a legatee, where a coexecutor survives, unless there be collusion or insolvency of the surviving executor. That is not so, in our opinion. It is true as to creditors of the testator. It is also true where the legatee proceeds against a debtor to the testator. But this case is altogether different from those. Money in the hands of
(118) the executor who died first is not, properly speaking, a debt to the estate, but a part of the estate itself. The statute of limitations does not run against it. *Bailey v. Shannonhouse,* 16 N. C., 416. It is true, the surviving executor may account with the representatives of the deceased executor, and receive payment. This is necessary for the benefit of creditors, who can only sue the survivor. Such a payment will discharge the estate of the deceased executor from further responsibility for that sum to anybody, because it has been made to him then entitled to the possession of the estate. But where one executor is made liable to the legatee for the acts of his coexecutor, as by a joint administration, or has committed a *devastavit,* or has the effects in his hands at his death, and no account has been had therefor between his executor and the surviving executor, a legatee may by a suit, in which all are made parties, call for the estate belonging to him, from whatever hand holds

or is liable for it. It is a favorite principle of this Court to follow the fund, wherever it is; and this for the benefit of him who is entitled to it, and also for the benefit of another, who is answerable for that fund, though not in his hands, as in the case of a joint administration. We are, therefore, of opinion that the decree ought not to be reversed and the bill dismissed, as to Daniel Bateman, on this ground. The trust upon which it was originally received attached to the estate, and passes with it to the executor of the executor, until it has been accounted for and paid over.

Another objection is that the decree is against Daniel Bateman alone, who is the executor of Benjamin, without its being ascertained that Levi's estate or his executors are insolvent, and when the master states that no portion of John's assets came to Daniel. The decree seems to have been pronounced in this respect upon the idea that as the administration had been jointly conducted, the executors were liable for each others acts; and being so liable, the legatee had a right to proceed jointly and severally against them, upon the footing of contracts at law.

The first part of the proposition is correct; but the last is not the (119) rule of this Court. The course here is to do exact justice between all persons concerned; and hence, where two are liable, in general both must be before the court; and in all cases he who is primarily liable and against him must be the decree for primary payment. For instance, at law a surety may be sued alone. But that cannot be done in equity. All the parties must be brought in. Again, equity may decree against a surety, but never that he pay the debt in the first instance, nor even jointly with the principal; but only that if the creditor cannot raise it from the latter, then he may from the former. So as between coexecutors, they may be jointly liable at law, but they are never so here. In this Court each is liable for what is in his own hands. It is true, he may also be liable for what is in the hands of the others; but not jointly. He is not liable for the estate as if in his own hands. He is only responsible for the other, and after him. They stand as reciprocal sureties for each other. Hence, although Benjamin's estate may be ultimately responsible for what Levi had not administered, it is not so in the first instance. It is manifestly unjust that he should pay the debt of Levi while the estate of the latter is well able to do it. If he did, what would be the effect? Either Benjamin must lose it altogether or begin another course of litigation with Levi's executors to recover it, in which all the accounts in this cause must be retaken, besides an account of the administration, as between the executors themselves. This is another reason why the decree is erroneous; for the very ground of requiring all to be made parties is that the whole controversy may be settled in one suit.

The reference, therefore, ought to have been extended so as to take an account of the receipt and disbursements of the assets of the testator, John Bateman, by each of his executors, as between themselves, as well as the joint account which has been taken; and also an account of the assets of Levi in the hands of his executors. As to such parts of the estate of John as are in the hands of each of his executors, the decree ought, in the first instance, to be against the executor of that exec-
(120) utor, if he hath assets of his last testator. If, indeed, it cannot be thus satisfied, then the decree ought to require the estate of the other to pay it; because, as the master finds a joint administration (and no exception is taken to the report on that fact, or to any item of charge or disbursement, and the report was properly confirmed), the legatees are to be paid at all events, if either executor be solvent. If the whole be found in Levi's hands, then his estate ought to pay, if able. If in Benjamin's, then the same rule applies to him. And here I will point out an inadvertence of the master, and a mistake in Daniel's answer, as to the fact of the assets of John Bateman coming to Daniel's hands. He may not have any now; but he expressly admits that Benjamin owed the estate $85.85 at his death, which he says that he (Daniel) afterwards paid to two of the legatees. If, indeed, the accounts were kept between the executors so loosely as to make it impossible for the master to determine in the hands of which of them in particular the assets are, no other course is left but to make each liable equally, that is, for one-half in the first instance, and ultimately for the other half if not obtained from the coexecutor's estate; for they stand as sureties for each other for what may be found in their hands respectively; and if that cannot be ascertained, then each is liable for one half himself, and, as the surety of the other, for the other half. So far, then, as the decree makes Daniel Bateman alone or primarily liable for the whole, it is, in the present state of the case, erroneous, and must be reversed with costs in this Court, and the cause sent back with directions to make the additional inquiries herein mentioned, and thereupon proceed to a decree.

PER CURIAM. Affirm the decree, so far as it establishes the right of the plaintiff to the sum of $296.14, as the share of his intestate, Eunice, in the estate of John Bateman, and reverse the residue of it by which the defendant Daniel is made primarily and solely liable therefor, and remand the cause with directions to inquire how much of said
(121) sum was in the hands of Benjamin and Levi Bateman respectively, in their lifetime, and came to the hands of their respective executors; and if any part thereof be found in the hands of Levi, or of his executors, the defendants, John and Harman, whether the assets of

the said Levi are sufficient to answer the same, and, if not, whether John and Harman are able to answer for any *devastavit* of the assets of John, the elder, or Levi, their testator, by them or either of them made; and also with directions to take all other steps necessary to a final decision between all the parties, and direct that the plaintiff pay the costs of this Court.

Cited: Thompson v. McDonald, 22 N. C., 478; *Lancaster v. McBryde,* 27 N. C., 424; *Spruill v. Johnston,* 30 N. C., 399.

THOMAS COX ET UX. AND NANCY HALL v. GAVIN HOGG AND WILLIAM M. CLARK, EXECUTORS OF DAVID CLARK.

1. Where a testator, having expressed his determination to disinherit one of his children, bequeathed as follows: "My negroes I wish divided equally among my wife, L., N., and O. (his other children and in the case of the death of either, that their share shall be equally divided amongst our survivors," *it was held* by HALL, J., that the words of survivorship were used solely to effect the testator's purpose of disinheriting one of his children, and that upon his death the estate vested in the survivors of L., N., and O., and was only divested upon their death without issue, when the share of the child so dying went to the survivors. But by RUFFIN, J., *held* that the words of survivorship were used only to prevent a lapse; and that at the death of the testator the estate vested absolutely in the survivors, and upon the death of either without issue, his share went to the next of kin.

2. Where a parent is making provision by will for his children, it is presumed that he intended to extend the benefit to their issue, unless the contrary expressly appear.

3. Where a clause of survivorship is attached to words which create a tenancy in common, it is construed as referring to some definite period.

4. This period is determined by the circumstances of each case.

5. In preference to a general survivorship, the death of the testator is taken as the true period.

6. In a bequest to A. and "in case of his death" or "if he happens to die," to B., A. is held, according to the circumstances of each case, to take for life, or to take absolutely, and B. is only to be substituted in case of a lapse.

7. If A. survives the testator, B. takes upon the death of A., unless a benefit to A.'s issue is intended, or unless by the bequest he is to have the principal as well as the profits.

8. Much more is this the case when B. is a stranger.

9. Where the share of each legatee was to be determined at the death of the testator, and a division to be made, and there was no trust and direction

to pay over the profits, especially where the legacy was of a residue, these are circumstances indicating that words of survivorship are to be restrained to the death of the testator.

10. An express estate in common is not cut down to a joint tenancy by words of survivorship; and they are held to be inserted for the purpose of preventing a lapse.

11. Where a general survivorship is created in a residuary clause, what sort of a surveyorship is intended may be ascertained from other parts of the will.

12. A clause of survivorship, superadded to words which in a will create a tenancy in common, is held to be inserted for the purpose of preventing a lapse, unless a contrary intention is apparent.

13. Because a different construction would cut off the issue of the legatee.

14. For the same reason a devise to A., but if he die before twenty-one or without issue, is construed to mean if he die before twenty-one and without issue.

15. But where the issue of the legatee are not injured by a natural construction, it is adopted.

This bill, which was filed in 1831, alleged that Marmaduke Norfleet, being possessed of a large estate in money, slaves, and other personal property, in 1802 made and published his will as follows: "First to my wife I lend the land, etc., during her life. Second, to Lucy Norfleet, otherwise Lucy Drew, for the purpose of preventing her from inheriting any part of my estate, I give the sum of five shillings, paper (122) money. And, besides, I here insert this article as a standing memorial, and to perpetuate to my descendants my abhorrence of her late union; that she has been to me an ungrateful and a most undutiful child; that when I was no more, should she fall into any distress, my children, I hope, will unrelentingly say, the distress is just; that she is only reaping the due reward of her ingratitude to the kindest and most indulgent parent. Third, the lands, etc., I give to Nancy Norfleet and her issue, but, for want of issue, to the other of my surviving children, Lucy Drew excepted, who it is my most earnest wish may not in any case of death of my children inherit from them. Fourth, all the residue and remainder of my lands I give, devise, and bequeath to the remainder of my children, to wit, Louisa, Olivia, my wife being pregnant, to that should she be safely delivered, to them share and share alike, and in the case of their death, to the survivors when they leave no issue. But to Lucy Smith Drew, proofs of daily ingratitude occur to determine, and I hereby provide, that she in no case shall inherit one stiver more, in any case of death, than the five shillings above given to cut her off. My negroes I wish divided equally among my wife, Louisa, Nancy, Olivia, and

the child of which my wife is pregnant, and in the case of the death of either, that their share be equally divided among the survivors, and also the remaining parts of my estate; provided in all cases, that Lucy Drew shall never inherit one stiver, in the case of the death of either of the above children or wife"; which was, upon his death in 1818, duly proved, and administration with the will annexed issued to P. R. T., who paid the debts of the testator and distributed the residue as directed by the will. That of the children of the testator, Louisa had intermarried with David Clark, the testator of the defendants; Olivia with the plaintiff Cox; and Nancy with William P. Hall, who was dead. That the child with which the wife of the testator was pregnant at the time of making the will was afterwards born and died in the lifetime of the testator. That Louisa, the wife of David Clark, died in 1828. The (123) bill then set forth the death of David Clark, and the probate of his will by the defendants, and charged that they had in their possession all the slaves which came to their testator, upon his marriage with Louisa Norfleet, and prayed a discovery, and that they might be decreed to deliver the negroes to the plaintiffs.

The defendants demurred generally, and on the Spring Circuit of 1831, Norwood, J., at the request of the counsel on both sides, gave judgment *pro forma* sustaining the demurrer and dismissing the bill, from which the plaintiffs appealed.

Seawell and Badger for plaintiffs.
Gaston, Iredell, and Devereux, contra.

Ruffin, J. By this will the land is limited over, upon the death of the first takers without leaving issue. The clause giving the negroes and the residue of his estate, and upon which this controversy arises, has not those words. The bequest is to the testator's wife and four of his children (of which one was then unborn), to be equally divided between them; and then come the words, "and in the case of the death of either, that their share be equally divided among the survivors." The bill states that the child of which the wife was then pregnant was born, and died without issue, in the testator's lifetime. It may be here remarked that this is the case which falls within the words of the will, which only provides for the death of one of the legatees, in which case the share is to go to the survivors, and not for a case where the survivors or survivor is to have all. "If either die, the share to go to the survivors." But I do not suppose this restricted construction is allowable in the case before us, because it would not give room for the exclusion of Lucy Drew upon the death of a second.

The bill further charges that Louisa married David Clark and is dead, as is also her husband, and that the negroes and other estate have come to the hands of his executors. It is not stated whether Mrs. (125) Clark left issue or not. The plaintiffs are the surviving sisters, and the bill claims all the share allotted to Mrs. Clark, as belonging to the plaintiffs and the widow as survivors.

If I were obliged to take it that Mrs. Clark, in fact, left no children, yet I am at liberty to consider that the possibility and probability of her leaving issue were within the testator's contemplation, if it be necessary to aid in the construction of the will. If the construction of this clause depended upon its own terms alone, that might aid in collecting the true one; for a father must be presumed to mean such a provision, consistent with the words, for his children as will best advance them. Their settlement in life and a provision for their children must be taken to enter into the testator's mind, and will be so understood, if the words do not forbid. In this case that conclusion is strongly fortified by the fact that the other parts of the will show that he actually had that in view. He gives the land over, upon death without leaving issue. It is true, these words are omitted in the residuary clause. But that does not prove that the testator meant to leave the families of all his children in poverty, to make an immense fortune accumulate for the benefit of the last survivor. It only shows that the personalty was not limited over upon a death without leaving issue, though the death happened after the testator's own death; as is the case with respect to the land. Considering, then, that this is the will of a father, who is presumed to intend a benefit to the families of his children, and who says in other parts of his will that he does so intend, such a meaning is to be put on it, consistent with the testator's words and the rules of law, as will best effectuate that end: which is by considering the bequest an absolute one to such of the children as should outlive the testator, and once take.

The authorities are in support of this construction. Wherever there is a tenancy in common, words of survivorship shall not defeat the effect of the other words creating the tenancy in common; because that would be to strike out altogether the words of partition; which (126) cannot be done. Whereas "survivor" may have some meaning in every case, by referring it to some particular period other than a survivorship at an indefinite period, which would constitute a joint tenancy and so contradict the provision for shares. Almost every case cited, from *Bindon v. Suffolk,* 1 P. Wms., 96, down, thus states it. There is, indeed, in several of the cases a dispute which is the true period of survivorship referred to, short of an indefinite period. And small

circumstances have been laid hold of to carry it forward from the death of the testator to that of the death of a tenant for life, or other period of vesting it in possession. Thus, *Bindon v. Suffolk* was reversed in the House of Lords because the fund was a contingent one, to fall in *in futuro,* and that constituted an era to which the survivorship referred. But the principle ruled by *Lord Cowper* was not impugned, namely, that the death of the testator is the era, if no other can be designated upon the will, or from the condition of the estate, short of a general survivorship. And that principle has been considered as decisive ever since. *Lord Hardwicke* felt bound by it; and in *Haws v. Haws* (3 Atk., 523. 1 Ves., 13 and 1 Wils., 165) ruled according to it, although there the expression was, "with benefit of survivorship." He says *Lord Cowper's* reasoning was very right; that the surviving "must be applied to some particular time, and not to a dying indefinitely." He says the House of Lords thought so, too, in *Bindon v. Suffolk,* but in that case fixed the time of payment as determining the survivorship, instead of the death of the testator, which last he calls an unnatural construction, as *Lord Thurlow,* in *Roebuck v. Dean,* 2 Ves., Jr., 265, has done after him. But what does he mean by unnatural construction here? Plainly, he is speaking in reference to a survivorship at some period short of an indefinite one. He says it is unnatural to tie it up to the testator's death, because one seldom provides by will for what is to happen in his lifetime. I am not sure that it is not very natural, under the idea that the testator may not come to the knowledge of the fact, though it should happen in his lifetime; or that he may provide at once for all, because he (127) may not conveniently do it when it does happen. But I will not set up my judgment against such names. Upon their authority I conclude, however unnatural that construction may be, when another period may be collected, not destructive of the tenancy in common, yet that it is to be taken as natural and reasonable, and intended, when opposed to the still more unnatural one of a survivorship indefinitely, whereby the whole estate accumulates for one.

This is the sum of what is said by those eminent judges. And with them accord others, no less able, both in chancery and courts of law. *Lord Alvanley,* in *Russell v. Long,* 4 Ves., 551 so says, in conformity to *Stringer v. Phillips,* 1 Eq. Ca., Ab., 292 and *Bindon v. Suffolk;* and in that respect agrees with the previous cases of *Roebuck v. Dean,* 4 Bro. C. C., 403, *Perry v. Woods,* 3 Ves., Jr., 204; *Bragrave v. Winder,* 2 *id.,* 634 and *Maberly v. Strode,* 3 Ves., 450. And *Lord Mansfield,* in *Rose v. Hill,* 3 Burr., 1881, held the same upon a devise of land, at law, upon the ground of a tenancy in common, created by the words "to be divided" —saying it was a provision by the testator for such of his children as

should survive him and be in existence at the time when the interest was to vest. The same doctrine is held in the later cases of *King v. Taylor,* 5 Ves., 806, and *Newton v. Ayscough,* 19 Ves., 534, besides others.

Another class of cases has been cited in which there is a bequest to one, "and in case of his death," or "if he shall happen to die," then over; in which, according to the circumstances, the first has been held to take a life estate, and the will to be read as if it was "upon his death"; or that the first is an absolute gift, if it take effect at all, and the meaning to be to substitute one legatee for the other, if the first, by dying before the testator, never takes. Of this description are the cases of *Cambridge v. Rous,* 8 Ves., 12; *Webster v. Hale, id.,* 410; *Ommaney v. Bevan,* 18 Ves., 290; and *Douglas v. Chalmer,* 2 Ves., Jr., 501. These slight circumstances show that the gifts are successive or alternative, notwithstanding the words of contingency applied to an event which is certain, but is uncertain as to the period of its happening. And the distinction contended for by the defendant's counsel, that the first taker in such cases, even if he survive the testator, must be held to take but a life estate, unless some expression in the will denote benefit to the issue or family, is material. Because the question is, What benefit was meant for each legatee? And even in those cases, if the will shows that if the first take at all, he is not to have the mere profits, but to receive the principal itself, then an absolute property is held to be given, although those who were to take in the alternative be the children of the first taker. *Webster v. Hale.* Much more is this so held when those who are to take on the contingency are strangers; as is the case in the other cases cited. In *Cambridge v. Rous, Ommaney v. Bevan,* and *Hinckley v. Simmons,* 4 Ves., 160, there were no words of limitation, as executors, or heirs, or issue, annexed to the gift to the first taker; and yet in each it was held absolute. And here, clearly, the share of each was to be determined at the death of the testator; the estate to be divided, and then received specifically by the wife and each child. There was no trust and direction to pay over the profits, though the legacy is of a residue, including money and perishable chattels. These are circumstances which cannot but point to the contingency contemplated by the testator as that which would be determined at his death.

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But if this were not so upon this last class of cases, the decision would be controlled by the former, which relate to a different subject, namely, the effect of survivorship and the application of words of joint tenancy, up to a certain period, to an express general tenancy in common to two or more in the first instance. *Lord Douglas v. Chalmer,* 2 Ves., Jr., 506. If the estate be a tenancy in common in creation, then the survivorship must be confined to the vesting of the estate or some anterior period; else the estate expressly created cannot exist, or, rather, would be turned

absolutely into a joint tenancy. In the one set of cases the (129) extent of interest is to be collected by circumstances controlling the words of contingency. In the other, the extent of interest is the result of the estate expressly given, to wit, in common, which shall not be cut down, after vesting, to a joint tenancy. In other words, the words of survivorship are introduced solely to prevent a lapse. And this is the stronger here, because it is a residuary clause, in which words of survivorship would have been unnecessary even to prevent a lapse, if a tenancy in common had not been intended and first created.

Thus I think the law stands upon the authorities, if this clause is to be construed by itself. The survivorship naturally refers itself to the period of the vesting of the estate. It may be extended, upon the intention, to the division of vesting in possession; or it may, in like manner, be restrained to the death of the testator. But every and any construction is admissible rather than an indefinite dying.

But it is said that here the anxious exclusion of Lucy Drew is predominant with the testator, and that the will must be so construed as to effect that at all events, which can only be by successive survivorships, unless we introduce "issue" into this clause, and a limitation to the issue.

There is no need of a limitation to the issue; for there is none annexed to the devise of the land, from which Lucy Drew is as strongly excluded as from the residue.

If necessary, the Court might, indeed, look to the first part of the will to show what sort of survivorship this general one in the residuary clause meant, and hold it to be after the death of one without leaving issue. Upon that construction, the plaintiffs would not be entitled, because the bill does not state that Mrs. Clark died without issue, and therefore does not make out a title in the plaintiffs. And this is a construction justified by the example of *Lord Hardwicke* in *Haws v. Haws*. There the testator gave his personal estate to his four younger children, and added, "If any of them should die under age, and unmarried, I direct the share of him so dying shall go to the survivors." In another clause he gave his estate in D. to the same four children, and their heirs, "equally to be divided between them as tenants in common, with benefit of (130) survivorship." The question was, What survivorship? At the death of the testator? or indefinitely? or upon the death of one of the children under 21, and unmarried? Certainly, not indefinitely, for the reasons before given. The will did not say, like survivorship; yet it was so held, because the bequest of the personalty showed that a survivorship of some sort between the children themselves, after his death, was meant; and none other could be meant, unless it was an indefinite one,

which is not admissible under any circumstances, where a tenancy in common is created. This will, therefore, might well be construed with reference to a death without issue; for that would effectually exclude Lucy Drew until the death of the last child without issue; and she could be excluded no longer without an ulterior limitation, in that event, to a stranger, which has not been inserted.

But without that stretch, the disposition to the children is absolute, notwithstanding the clause of disherison. The two provisions must have a meaning put on them, and must also have a consistent meaning. The exclusion of Lucy is not to defeat the others also absolutely, although she may derive an advantage by their taking. As suppose, upon the construction contended for by the plaintiffs, the whole estate to come to one child, the last survivor, and that to die without issue and intestate, Lucy Drew would then take by force of the law, for the want of another. Shall the possibility of that prevent the last survivor from taking? Certainly not. The truth is, the testator did not know how to effect his angry purpose, and has failed to effect it in the view we are now taking, by omitting an ulterior limitation to a stranger to Lucy Drew. So he has also failed to affect her succession to one of her sisters first dying, by giving to them in the first instance a vested several interest in his estate upon his death. For the very chain of reasoning which prevents words of joint tenancy, annexed to a tenancy in common, carrying out the survivorship to an indefinite period, equally opposes giving that effect to the clause under consideration. For if, to (131) exclude her, the estate must successively survive, then the tenancy in common, expressly created, must cease, or rather never existed, although it be clear that while the estate is enjoyed, each enjoys in severalty. The two objects, carried out fully, are inconsistent with each other. Then they must be made to stand together, as far as they can; and it must be supposed nothing inconsistent was meant; and, therefore, that each was intended only so far as it was consistent with the other. The exclusion of Lucy Drew is consistent with the idea of a lapse; but not with a tenancy in common in possession after the death of the testator. It must, therefore, be restrained to the former case. But if this were not so, the general intent must prevail over a particular one. Here that is to provide for all his children, except Lucy, and to enable them to advance their families; and this the testator has done in a mode by which, in a possible event, Lucy Drew may succeed to some of the children before the death of all of them. This possibility is not to defeat altogether the legacies to the primary objects of the testator's affections and bounty.

I am of opinion, therefore, that upon the death of the testator, which was in this case the period for the vesting and division, the legacies became absolute to his wife and such of his children as were then living.

Hall, J. The clause in the will that directly relates to the personal estate of the testator, which is the subject of the present controversy, is as follows: "My negroes I wish divided equally among my wife, Louisa, Nancy, Olivia, and the child of which my wife is pregnant, and in case of the death of either, that their share shall be equally divided among the survivors, and also the remaining parts of my estate."

In deciding upon this part of the will, I agree with my brethren, that the legatees took as tenants in common, and that the clause of survivorship by legal construction must be considered as having been added to prevent a lapse, in case any of the legatees should die (132) during the life of the testator.

In *Maberly v. Strode,* 3 Ves., 446, the chancellor says: "Words of survivorship, added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent." "It is true," says Lord Hardwick in *Hawes v. Hawes,* 1 Ves., 14, "this is certainly not a natural way of explaining the testator's intent, as one seldom provides by will for contingencies that are to happen in his life; but if no other reasonable construction can be found, the court may resort to this." And he approved of Lord Cowper's reasoning in *Bindon v. Lord Suffolk,* 1 P. Wms., 96, who adopted the same construction. It is certainly a more reasonable construction than one which would consign to poverty the issue of a legatee who might die after the testator, by causing the property to go to the survivors, instead of having vested it in the legatee, and becoming a support for such issue.

It is to avoid a similar evil that courts have frequently construed one word to mean another; as where an estate is given to a son, but if he dies before 21, or without issue, then over to another. Now, taking this devise literally, if the son had children, and died under the age of 21 years, the estate would go to the remainderman, and such children would be left unprovided for; for, as the father had lost the property, and could not make provision for them out of it, because he had not lived till 21, the remainderman would be entitled. To avoid this injustice, the courts have construed *or* as *and,* according to which construction the estate would not be divested out of the son, and the remainderman would not be entitled unless the son should die under 21 years of age and without issue. Such construction is so common that it is useless to cite authorities to prove it.

In the present case it might not be considered as going far out of the way to believe that the testator meant this: that if either of the legatees should die before (in common parlance) they got their legacy, or (133) before it vested in them, then the survivors should have it. However, the doctrine seems so well established that words of survivorship added to a tenancy in common are so construed as to prevent a lapse, and become inoperative at the death of the testator, that questions of that description may be considered as put to rest. *Trotter v. Williams Prec.* in ch. 78; *Bindon v. Suffolk,* 1 P. Wms. 96; *Stringer v. Phillips,* 1 Eq. Ca. Ab. 293; *Rose v. Hill,* 1 Burr, 1881; *Roebuck v. Dean,* 2 Ves., Jr., 265; *Perry v. Woods,* 3 *id.,* 204; *Russell v. Long,* 4 *id.,* 551; *Brown v. Higgs,* 5 *id.,* 506; *Brown v. Bigg,* 7 *id.,* 280; *Shergold v. Boone,* 13 *id.,* 375; *Webster v. Hale,* 8 *id.,* 410; *Ommaney v. Bevan,* 18 *id.,* 292; *Newton v. Ayscouch,* 19 *id.,* 535.

It is very true that there are some cases emanating from high authority which seem to look the other way. In *Billings v. Sandon,* 1 Bro., 393, a bequest was made of £1,000 to the testator's sister; and in case of her demise £800 was given to James and £200 to John Billings. Lord Thurlow held that the sister was entitled for life, and afterwards the legacy was to go over to James and John Billings. So also in the case of *Nowlan v. Nelligan,* 1 Bro., 489, the testator having a wife and daughter, devised as follows: "I give and devise to my beloved wife all my real and personal estate. I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness as well as mine to see her comfortably provided for, but in case of death happening to my said wife, in that case I hereby request my friends Staple and Hunter to take care of and manage to the best advantage for my lovely daughter, all and whatsoever I may die possessed of." In the first of these cases *Lord Thurlow* put a natural construction upon the will; because there was no injustice to be avoided nor great good to be answered by putting a legal or artificial construction upon it. With respect to the last case, it could not be intended that in case the wife survived the husband, her right to the legacy would be complete, because there was a trust and confidence reposed in the wife that she should provide for the daughter, which she could not execute until after the (134) death of the testator, and in case of death happening to her he substituted trustees to perform the trust. It is certain that a benefit was intended for the daughter after the mother's death, and that intention could only be carried into effect by allowing the mother a life estate.

In another case, *Lord Douglas v. Chalmer,* 2 Ves., Jr., 501,where a legacy was given to *Lady Douglas,* and in case of her death, to the use and behoof of her children, share and share alike, the chancellor thought the

natural construction was that the mother should take a life estate, and that the balance of the interest in the legacy should go to her children. In *Cambridge v. Rous,* 8 Ves., 12, legacies were given to two sisters, and in case of the death of either to devolve upon the other. The master of the rolls was of opinion that the contingency should be confined to the death of the testator, and that, afterwards, the legacies became vested. Here are two devises very much alike, and constructions very unlike each other put upon them. In the latter case the master of the rolls truly says that: "It is an incorrect expression to apply words of contingency to an event which is certain. A testator may mean the death of a legatee during his own life, or he may mean a death whenever it may happen. Accordingly, in every instance in which these words have been used, the courts have endeavored to collect from the nature and circumstances of the bequest, or the context of the will, in which of these two senses it is most likely this doubtful and ambiguous expression was employed." He says in another part of the same case that "Ordinarily in gifts between near relations, if any restraint is imposed upon the first taker, it is for the benefit of children." Upon this it may be remarked that parents are under a greater natural and moral obligation to provide for their offspring than collateral relations are under to provide for each other or for strangers. Hence, to carry the intent of testators into effect as to children, legal constructions are oftener resorted to than in the case of collaterals or strangers.

In the present case it must be taken that the testator's rul- (135) ing intent was to provide for his wife and children, except Lucy Drew. And this intent would be broken in upon, and the nature of the legacy and the context of the will disregarded, if only a life estate was given to the children, and they had not the power to provide for their issue, as I think will more fully appear by noticing other parts of the will, which are as follows: "To Lucy Drew, for the purpose of preventing her from inheriting any part of my estate, I give the sum of five shillings paper money. Besides, I here insert this article as a standing memorial, and to perpetuate to my descendants the abhorrence of her late union; that she has been to me an ungrateful and most undutiful child; that when I am no more, should she fall into any distress, my children will, I hope, unrelentingly say, The distress is just; she is only reaping the reward of her ingratitude." Again, in disposing of his real estate, he directs that if any of his children die without issue, it shall go to the other surviving children, Lucy Drew excepted. And in the clause which I have first noticed, in which he disposes of his personal

estate, he adds the following injunction: "provided in all cases, that Lucy Drew shall never inherit one stiver, in the case of the death of either of the above children."

From these clauses it appears that although the testator considered Lucy Drew to be a legal, component part of his blood, he also considered that the sin of ingratitude had transformed her into an excrescence, which he wished to lop off from his family. This is evident from repeated expressions of displeasure at her conduct. His great anxiety seems to have been to exclude her from participating in any part of his estate. There is no circumlocution in the devises or legacies. They are expressed in a pithy, laconic form. He seems to have been at no loss, either about the legatees or the *quantum* given to each. It was the common case of a father giving to his children. And had it not have been for his great excitement against Lucy Drew, we would probably read nothing in his will respecting survivors.

(136) In construing wills, the great fundamental rule is to catch the intent of the testator, and be governed by that, if there is no maxim or rule of law opposing it. Acting in this case under the influence of that salutary rule, and taking into view all the clauses of the will, I can see nothing that should confine the contingency of the death of any of the legatees to the life of the testator. I think it obvious that the insertion of the clause of survivorship was made for the purpose of disinheriting Lucy Drew. The clause was inserted more with that view than from any idea the testator had of preventing a lapse. I think, too, that it was not inserted for the purpose of confining the legatees to life estates, but that the legacies were intended to become vested at the death of the testator to all purposes but one; and that was, that if any of them died after the testator's death (or perhaps before it) without issue, and without having made any disposition of their legacy by will or otherwise, so that as in ordinary cases it would go to the next of kin, I say in such case the testator interposed and substituted the survivors in the place of the next of kin, for the purpose of excluding Lucy Drew. The testator's great purpose was to fix a guard upon his property, and have it conducted into futurity beyond the limits of his own life, free from any claim she might otherwise have to it. And he has done so, I think, as far as the death of the last survivor. There he has taken leave of it. And if the last survivor should die intestate, and without issue, or without having made any disposition of it, Lucy Drew will come in for a share. He has created no barrier against her in such case. But she could take nothing upon the death of any preceding survivor similarly situated. This, I think, was the testator's intention; and I am not aware that it is opposed by any maxim or rule of law.

In the present case it appears that Louisa, one of the legatees, intermarried with David Clark, and thereby transferred her legacy to him. And although she is dead, Lucy Drew can take nothing as next of kin; and, of course, the clause creating the survivorship is inoperative.

Thus the testator having shut up all the avenues through which (137) Lucy Drew could derive any benefit from his estate, until it might vest in the last survivor, and then, too, unless that survivor had died without issue, and without having made any disposition of it, his grand purpose was accomplished. Therefore, in either view I have taken of the case, whether upon the clause alone that disposes of the personal estate, or upon that clause connected with other clauses in the will, I am of opinion that the bill should be dismissed with costs.

PER CURIAM. Decree affirmed.

Cited: Haughton v. Lane, 38 N. C., 629; *Carter v. Williams,* 43 N. C., 183; *Hilliard v. Kearney,* 45 N. C., 234; *Vass v. Freeman,* 56 N. C., 223; *Murchison v. Whitted,* 87 N. C., 470; *Buchanan v. Buchanan,* 99 N. C., 314; *Galloway v. Carter,* 100 N. C., 121, 129; *Campbell v. Cronly,* 150 N. C., 468; *Ryder v. Oates,* 173 N. C., 575; *Bank v. Murray,* 175 N. C., 65.

MARY FINCH ET AL. V. ROBERT RAGLAND ET AL.

1. The court presumes against an administrator dealing with the estate for his own benefit, or that of a coadministrator; or claiming commissions while he keeps no accounts. Yet under special circumstances such dealings may be supported, and commissions allowed.

2. If a written statement, not on oath, of matters relevant to an inquiry before the master be received, and acted upon by him, the inadmissibility of such statement cannot be made the ground of exception to his report unless the objection was taken before the master. *Aliter*, where the master receives a written statement of matters which, if sworn to, would not have been admissible, because irrelevant without the production of a judgment or other record.

3. Written receipts for money of living persons are not strictly legal evidence of disbursements by an administrator, especially where the money paid is due by account. But if such receipts be received and acted on by the master, without objection made before him, the exception cannot afterwards be taken.

4. *Per* RUFFIN, J. Where the solvency of the debtor and the loss of the debt by the neglect of the administrator are alleged in the bill, and the defendant, in answer to an interrogatory framed upon that allegation, denies the solvency and neglect, the answer is proof for the defendant, and it is incumbent on the plaintiffs to disprove it.

5. Where in such case the fact of solvency or insolvency does not appear upon the proofs satisfactorily to the court, a further inquiry will be ordered before the master.

6. It is not a universal rule that an administrator who keeps no accounts shall be allowed no commissions. It is, however, a very general rule, and will only admit of an exception under very peculiar circumstances.

7. An executor who keeps no accounts is chargeable with interest.

8. The production of the intestate's notes by an administrator is not sufficient proof of a dsibursement. (Changed by The Code, sec. 1401.)

9. It is in itself a suspicious circumstance that one administrator should confess to another a judgment for a debt claimed from the estate; and no effect will be given to it as a judgment; but the creditor, if alive, must prove the debt. But where such administrator is dead, and many years have elapsed, so that the means of direct proof no longer exist and all the circumstances of the case repel the presumption of fraud, the court will allow weight to the judgment as a settlement between the administrators.

10. A judgment against an administrator is in general a sufficient coucher for him, without other proof of the debt. But a judgment by an administrator against his coadministrator, being a nullity at law, is not allowed by a court of equity to have the effect of a judgment.

11. But such judgment is evidence of a settlement between the administrators. And after the lapse of twenty years and the death of the administrator, who was a creditor, the court allowed the administrator credit for the judgment, without further evidence of the debt.

THIS bill was filed in August, 1827, in the court of equity of CHATHAM, by the plaintiffs, the widow and next of kin of Adam Finch, for an account and settlement of the estate. It appeared upon the pleadings that Finch died intestate in 1807, and administration was shortly after committed to the defendant Robert and to one Abraham Harper, who died in 1810, intestate, and upon whose estate the other defendants, Henry Branson and Thomas Ragland, administered.

In the court below it was referred to the master to state an account of the administration of Finch's estate, and to his report exceptions were taken by both parties; after which the cause was transmitted to this Court, and here, at December Term, 1831, the exceptions were argued by

(138) *W. H. Haywood for plaintiffs.*
Nash for defendants.

RUFFIN, J. The first exception of the plaintiff embraces a number of items of disbursement by the administrator, which it is said ought not to be allowed because the payments are not expressly proved, but evidenced only in some cases by the receipts of the creditors and in others by possession of the justices' judgments.

It does not appear that this objection was made before the master. It would be manifestly unjust to take the parties by surprise with it here. All the bonds are receipted, and also the judgments given against the intestate himself; and they appear to be fair upon their face. Such receipts of persons living are not strictly legal evidence to show a full administration, and especially upon accounts. But when they are taken and acted on by the master, without objection then made, one cannot be heard in a subsequent stage, unless it be founded on something unfair appearing. An instance of the last exists in the case before us. A receipt of John Farrar is offered by the defendants, which is dated in 1809. It is obviously of a later period, and was first written "1830." If this credit rested on the receipt, it would be rejected. But it does not. The judgment, to which it refers, was rendered against the administrators themselves in 1808; and a lapse of twenty-three years, and the possession of the paper by the defendants, is strong presumptive evidence of the payment by them. For these reasons, the first exception of the plaintiff is overruled. It might be referred back on this point, if the plaintiff had upon affidavit stated a well grounded belief that injustice was done.

A part of the second exception of that party is founded on the master's having received in evidence several receipts of sheriffs, expressed to be for money paid on judgments and executions in court, instead of having the record. This would be allowed, but has been (139) expressly abandoned by the plaintiff, and is therefore disallowed.

The third exception arises upon this state of facts: Early in 1806 James Finch purchased from the defendant Robert Ragland two negroes, at the price of $650, for which he gave his bond with the intestate, Adam, his surety, payable December, 1807. The intestate died in November, 1806, before which time James removed to Georgia. The bill charges that he was well able to pay the debt, but that the defendants lost it by neglecting to sue, and puts a direct interrogatory to the defendants whether James was not solvent. The defendant Branson, one of the administrators of Harper, says that he has no particular knowledge of the residence and circumstances of James Finch, but that he has always understood that he removed to Georgia, and was insolvent. The defendant Robert Ragland, the surviving administrator, says that James Finch became indebted here, and was obliged to sell one of the negroes to one Snipes in Chatham, who paid him (Ragland) $160 on his bond when it fell due; that he then transferred the bond to Harper; that James Finch was then insolvent, and has remained so ever since, as he believes. The plaintiffs have taken the deposition of Crawford, who says that he lived with James Finch in Georgia in 1805, and that he was then able to pay $600; for that in the next year, 1806, he came into this State

and bought two negroes, which he carried out. Upon this case, the plaintiffs contend that the administrators were bound to sue, or show the insolvency of James Finch, while the defendants insist, first, that they were not bound at all to go out of this State; and, secondly, that the insolvency sufficiently appears. Upon the first point the Court sees no reason to question the rule lately laid down. But it is not necessary to consider its application to the present case, because the insolvency of James Finch sufficiently appears. His solvency and the neglect of the defendants are directly alleged in the bill. They are as directly
(140) denied in the answer. That the defendants did make exertions to collect the money from him is not pretended; but if he was, in fact, insolvent, exertions would have been unavailing. That fact is positively affirmed in the answer in response to an express allegation of the plaintiff. It may be said that the defendant ought to discharge himself by proof. In such case, the answer is proof. If an administrator inventory a debt as desperate, he cannot be charged with it but by proof on the other side that it was collected or might have been. Here the plaintiffs have sought to charge the defendants upon their own oath. They must take their answer—subject, indeed, to be disproved. This the plaintiffs have attempted; but instead of succeeding, their case is rather weakened by it. James Finch is the brother-in-law and uncle of the plaintiffs, and it is presumed better known to them than to the defendants. Yet they have examined but one witness, and he in North Carolina, who only proves that in his opinion James Finch was able to pay this debt two years before it fell due. The reason he gives for that opinion is that he bought two negroes in this State in 1806. He does not mention any other property. It turns out that he had not paid for them, but that he bought them on the credit of his brother; that they are the very negroes for which the debt now in controversy was contracted, and that he was obliged to sell one of them before he returned to Georgia. The inference from this deposition cannot be that he was solvent; but as this is all the proof which the plaintiffs have been able to collect, the answer is rather fortified by its insufficiency. The third exception ought, therefore, in my opinion, to be overruled. But a majority of the Court is of opinion that the fact of James Finch's solvency or insolvency doth not sufficiently appear in the answers and proofs to enable the Court to determine the propriety of subjecting the plaintiffs or defendants to the loss of this debt, and that it is a proper case for a further inquiry by the master. This exception, and the credit to which it refers, will therefore stand for the present, as being neither allowed nor disallowed; and a further inquiry will be directed to be made on this point, in time
(141) to act on the report at the next term.

The fourth and fifth exceptions relate to the allowance of commissions. It is not a universal rule that commissions will not be allowed where an account has not been kept. But it will be a general rule in this Court, since it argues either a fraud or negligence which nearly amounts to it. Here it does not appear that the defendant ever returned to the county court on account of current, or got an allowance of commissions there. Neither does he exhibit an account with his answer. A trustee must be indifferent to the fairness of his conduct who is unable to render any account. It imposes upon the *cestui que trust* the burden of hunting up evidence to charge him; whereas an honest man would charge himself. Under these circumstances, all claim for commissions would be rejected were not the condition of the defendant very particular. He is a surviving administrator, and his coadministrator, who transacted much of the business, died nearly twenty years ago. The children of the intestate were infants, and the defendant avers that he frequently applied to their guardian to come to a settlement, and obtained the irregular but common order of the court appointing auditors; but the guardian would do nothing. This may serve for an excuse in the present case, considering the loose manner in which executors have been permitted to keep their accounts; but it will not be taken as a precedent. The Court doth not, therefore, positively allow these two exceptions (fourth and fifth) in their whole extent. But the exceptions are allowed so far as they relate to the commissions calculated on debts owing from the intestate to either of the administrators, or on debts due to the intestate from them; but this does not include the prices of property bought by them at the sale, because they are charged with the prices obtained upon the resales. In all other respects the matter of these two exceptions is reserved until the coming in of the report now to be ordered. If upon computation it shall turn out that the defendants had, including a reasonable commission, disbursed the whole estate or very nearly, then the presumption that the accounts were withheld from improper motives (142) will be rebutted.

Having disposed of the exceptions of the plaintiffs, we come now to those of the defendants.

The first is against the charge made by the master, of interest on the debts due the intestate, as mentioned in the inventory, from the time they fell due, and that on the sales made by the administrators, from the time they fell due. This objection rests upon the principle that executors are not liable for interest before the expiration of two years, unless it be proved they received it.

If debts bear interest, of course the executor receives it up to the time of payment. If he will not keep accounts, to show when he did

receive the money, and how much, there are but two things the Court can do. One is to charge him with interest, at the risk of making him pay it while the money lies by him. The other is to let him keep the interest actually received by him as his own, and use the testator's money for his own purposes; and that there may be no evidence of the amount of interest collected, or of the amount of principal used by him, encourage him not to keep accounts, or full and true ones. Which of these principles ought to govern, it cannot be necessary to say. There is no alternative but one of the foregoing. This exception is overruled.

The second exception is that the master refused to allow a credit for the debts to Griffis on two notes. The master states his reason to be that it was not proved that they were paid by the administrators, and there is no receipt on them. They are produced by the administrators. But that is not sufficient, as they may have been paid by the intestate. If the case rested there, the report would stand. But there appear with the notes, as exhibits in the suit, two warrants issued on them in 1808 against the administrators, in which the plaintiff was nonsuited, because the witness did not attend to prove the notes—from which the plaintiff appealed. It does not appear positively what was done on the appeals;

but it cannot be doubted that the defendants settled them. This
(143) evidence is conclusive that the intestate did not pay the debts,

and the possession of the notes shows that either he or the administrators paid them. This exception is, therefore, allowed.

The third exception arises on the following state of facts, specially reported by the master: In May, 1808, the defendant Robert Ragland and Abram Harper, the administrators, confessed two judgments: the one to Branson and Harper for £37 18, and the other to Abram Harper & Co. for £217 5. In each of these firms Harper, the administrator, was a partner; and the master reports that he had seen the books of those firms, in the former of which Finch is debited with £29 7 6, and credited November, 1804, by H. Branson with £4 17, and on 2 July, 1808, with cash from J. Sellers, £14 2 6, leaving a balance of £9 18. In the books of A. Harper & Co., it appears that Finch settled his accounts 28 August, 1803, and gave his bond for £141 19 1, and that before his death he had other dealings to the amount of £118 2 11—making in the whole £260 1. The books show sundry credits in 1804 and 1805, amounting to £153, which the master deducts from the debits, thereby producing a balance of £109 1, which he supposes the true debt. When the judgments were confessed, Mr. Harper drew up the accounts, which he swore to and filed in the cause. They are exhibited in this suit. That of Branson and Harper corresponds in the debits with the books themselves, with the exception of £6 10, for interest, and £2 0 6, money paid

after Finch's death. Both credits are, however, omitted. That of A. Harper & Co. does not correspond with the books as to the debits. It omits the note for £141 19 1 altogether. It omits some of the items which composed the sum for which that note was given, and includes others not appearing on the books. One charge on 22 August, 1803, against Finch is "to John Farrar" £98 1, which was sunk in the £141 19 1. Another charge on the same day after the note is "John Farrar" £16 10. The account filed in the action at law gave no credit for any part of the £153, but charges, in addition to what appears on the books, the sum of £18, assumed for Jenks and the sum of £8 13 6, assumed for Carpenter. Upon this state of the case, the master rejected the judgments altogether, and the defendants (144) except.

The Court views with extreme jealousy the dealings of an administrator, for his own benefit, with the intestate's estate; and in like manner the admissions of one administrator in favor of another. It is a suspicious circumstance that an attempt was here made to conclude the matter by judgments. They are a nullity in themselves, and no effect is given to them as judgments, but only as evidence of a settlement between the administrators. As such they may stand, except so far as they appear to be unjust. If Harper were now living, he would be held bound to prove the debt again. The judgment does not admit it, except under circumstances. We cannot say that an administrator cannot recognize the justice of a demand of his coadministrator, but that an acknowledgment will not be conclusive, nor even dispense with proof, when the situation of the parties is such as to enable them to give proof. There seems to be no reason in the case before us to believe that Ragland did, or had a motive corruptly to admit an unjust demand. He does not seem to have known or had reason to believe it unjust. Nor does Harper's conduct exhibit a fraudulent purpose. He made oath to his demand, and he filed the account of record, that resort might be had to it at a future day by those interested to investigate it. And it appears that a large part of the debt was due—that is, it appears from entries made in his books in Finch's lifetime, when there is no reason to suppose he had any expectation of administering. The whole demand may possibly have been just; and it might possibly stand in taking the accounts at this remote day, and long after the death of Harper. And clearly, I think, the whole is not to be rejected because the whole account cannot be supported. But as the books are produced, I think they must govern us, except as to the items added in the account filed, of which entries were never made on the books. These are the sums of £18, for Jenks, and £8 13 6 for Carpenter. If these be added (145)

to the sum of £260 1, the sum of £287 6 will be made, from which the sum of £153 being deducted, the balance will be £134 36, with interest thereon to be computed from the dates of the items in the books. For this sum alone, I think, the judgment ought to stand; and for that I think it ought, because that sum appears to be justly due. The exception is, therefore, allowed so far as respects the sum of £134 3 6, principal of the judgment in favor of Abraham Harper & Co.

After the foregoing opinion had been delivered and a decree entered according thereto, the plaintiffs' counsel filed a petition to rehear so much of the decree as allowed commissions to the administrators, and also so much thereof as sustained the defendant's exception to the master's report, rejecting entirely the credit claimed for the debts due to Abraham Harper & Co. and to Branson and Harper.

RUFFIN, J. To the grounds stated in the former decree for the allowance of commissions the Court has nothing to add. They then appeared to us sufficient; and they now seem so. The order must, therefore, stand as to that part of it. The other point raised in the petition was not free from difficulty when the decree was pronounced, and has been carefully reconsidered now. The result is an increased confidence in the correctness of the rule adopted.

The argument against it assumes that the Court dispenses with the production by an administrator of bonds alleged by him to have been due from the intestate to himself, or to have been paid off by him in the course of administration. The want of those bonds certainly presented an obstacle to the credit claimed by the defendant. But it is altogether a mistake to suppose that the Court acted upon such a principle, or allows such latitude to administrators, as to give them credit without the production of the evidence of the debt. It was so done in this case; but it stands upon very special and peculiar grounds.

(146) A judgment in general is a sufficient voucher for the executor, without going further back. Here there was a judgment. But being by one administrator to another, and therefore incapable of being enforced at law, it was held by the Court not to be conclusive as a judgment. But we could not say it was not evidence of a settlement between the administrators, whereby the claims of one of them against the estate were adjusted; nor that such a settlement appearing to be fairly made, should not, after more than twenty years and the death of the administrator, who was a creditor, be any evidence of the justice of the demand. Perhaps, under those circumstances, it ought to be taken as plenary evidence, and that if the Court erred, the error was in correcting the judgment, or rather settlement by the books of the creditor—as

was done. This correction was made for the want of the bonds, and the fear (not that we should do injustice in this case by allowing the whole debt, but) that it might be a precedent drawn to the aid of more fraudulent and more negligent representatives. The Court allowed the judgment, therefore, to stand as to so much of the debt as was contracted in the intestate's lifetime and would form debits on the mercantile books, only so far as the unexceptionable evidence of the entries, made in those books when there was no temptation or opportunity to commit a fraud by making false ones, sustained them. The reasons for this were, first, that thus far the debts were proved to be true ones; second, that there was no ground to impute to the administrator, Ragland, the dishonest admission of an unfounded demand; thirdly, that he had reason to believe it just, as well from the production of the evidences of debt as the oath of his coadministrator; fourthly, fraud on the part of Harper was repelled as well by the fact of his oath as the exhibition and filing in the suit of an account in detail of the demands, and his affidavit of their justice, so as to give full information to those interested in future to investigate it; fifthly, that the specialties ought to have been filed, and must be presumed to have been filed in the clerk's office with the record of the suit, and the loss of them must be taken to have (147) happened there, and therefore that the defendants, not being the persons to have the custody of them, are excused from producing them; sixthly, that the death of Harper twenty years ago puts it out of the power of the defendants, however just these debts may have been, to offer further evidence of their justice, which could be heard by way of proof; and lastly, that those debts are positively stated to be just in the answer of Henry Branson, who was the surviving partner of those firms, and who is made a defendant in this suit as administrator of Harper.

Whenever all these circumstances shall again concur to prove the probable justice of a credit, to repel the imputation of fraud or imposition, and to excuse the nonproduction of more direct and higher evidence, I shall be prepared to give to them, in combination, the same force and effect they had in this cause.

PER CURIAM. Petition dismissed.

Cited: *Whitted v. Webb,* 22 N. C., 452; *Moore v. Brown,* 51 N. C., 108; *Carr v. Stanley,* 52 N. C., 132; *Drake v. Drake,* 82 N. C., 445; *McNeill v. Hodges,* 83 N. C., 512; *Dickens v. Miller, ib.,* 548; *Jackson v. Shields,* 87 N. C., 441; *Wilson v. Lineberger,* 88 N. C., 429; *Grant v. Reese,* 94 N. C., 731; *Topping v. Windley,* 99 N. C., 10; *Costen v. McDowell,* 107 N. C., 549; *Coggins v. Flythe,* 113 N. C., 110.

SPENCER L. HEART ET AL. v. DEMPSEY BRYAN ET AL.

Where a testator died indebted to a bank, and his note was renewed by his executor as executor and afterwards discharged by a surety who became liable subsequently to the death of the testator, *it was held* that the surety had a right to be substituted to the claim of the executor and the bank against the assets; and the executor being in advance to the estate by reason of the debt which the surety had paid, that balance was decreed to be paid to the latter in preference to a subsequent assignee of the executor.

DAVID BARNES was the executor of Whitmell Bell, and upon a bill filed by the legatees against him for an account of his administration, the following facts appeared: The testator, at his death, owed the State Bank $1,500, of which Barnes was surety. Afterwards the note was renewed several times by other notes, signed by Barnes as executor, and by him and others as sureties, until it was reduced to $900, when a note (148) of Elizabeth Bell, the widow of the testator, for $2,500, was substituted for it. The excess was used for the benefit of Bell's estate, and to that note Barnes and Dempsey Bryan were sureties. After five renewals, the note was again taken up by the discount of another for $1,800, signed by Barnes as executor, and by him and Bryan as sureties. It was renewed several times and reduced to $1,600, when Barnes becoming insolvent, it was paid by Bryan. Upon taking the accounts of Barnes with the estate of his testator, and allowing him credit for the note of $1,500, due by the testator at his death, he was in advance to the estate the sum of $1,375, which was paid into court under an order directing a sale of the assets of Bell, the testator, and liberty was given for any person to apply for it by petition. Under this order Heart and others filed their petition setting forth a general assignment of "all the real and personal property, bonds, notes, or book debts of which the said David Barnes was seized or possessed," in trust to convert the same into money and pay certain enumerated debts, with a power to Barnes "to apply so much of the aforesaid funds as shall be requisite and necessary to the settlement of his accounts as executor of Whitmell Bell." The petitioners insisted that the fund in court was the property of Barnes at the execution of the assignment, and prayed that it might be paid to them.

Dempsey Bryan, on the other hand, in his petition, set forth the above mentioned particulars respecting the discount and payment of the note, and insisted that as the proceeds of the note went to the use of Bell's estate, he, the petitioner, being a surety, was to be substituted to the rights of Barnes against the estate of the testator, and had a better equity to the money in court than the other petitioners.

Devereux for petitioners, Heart and others.
Attorney-General and Gaston for Bryan.

HALL, J. The defendant Barnes, by his deed of assignment in favor of his creditors, transferred and assigned over to the trustees therein named considerable real and personal estate particularly described, and all other real and personal property of which he was seized or possessed, all book debts, bonds and notes of every description; and the trustees are directed to collect the debts, whether due by bond, note, open account, or otherwise. He also expresses that the trustees shall have and hold the real and personal estate, and choses in action, and accruing interests, with the appurtenances, etc., in trust, etc. I am inclined to the opinion that this general description of property includes any balance that might be due to Barnes from the estate of Whitmell Bell. *Bayard v. Hoffman,* 4 Johns, ch., 450. Neither is that opinion varied by a clause in the latter part of the deed of assignment, in which he reserves the right to apply so much of the funds as shall be requisite and necessary to the settlement of his accounts as executor of Whitmell Bell. This clause was only inserted to secure that estate against loss by his insolvency, and can have no application where it turns out that the estate is in debt to him. But this view of the case arises only from the deed of assignment, and the account that has been taken, and now made an exhibit, between Barnes and his testator's estate. From that account it appears that the estate of Whitmell Bell falls in debt to Barnes in the sum of $1,375. It is necessary to consider how that balance arose, and this leads us to the consideration of Dempsey Bryan's petition. It appears from an exhibit in the case, which is admitted to be evidence, that Dempsey Bryan became an endorser for Elizabeth Bell on a note to the bank at Tarboro for $2,500, in 1826; that in 1828 David Barnes, the defendant, renewed the note in his own name, and as executor for Whitmell Bell, with Dempsey Bryan as surety or endorser, for the balance of the money due on Elizabeth Bell's note, which was (150) $1,800. This note was renewed by the same parties on 9 December, 1828, for $1,600. Suit was brought upon it, and the judgment was paid off by Bryan. It is to be observed, too, that part of the money for which Elizabeth Bell gave her note to the bank had been received by her husband. After his death his note was renewed by Barnes as executor, with different endorsers, up to the time when Elizabeth Bell gave her note with Bryan as her endorser. It appears from this statement, and it is admitted by Barnes in his answer, that the money thus obtained from the bank was applied to the use of Whitmell Bell's estate; and it is owing, no doubt, to that application of it that a balance has been found in favor of Barnes in his settlement of that estate; for if Barnes had paid the

debt due to the bank, his claim to it would be both legal and equitable. But that debt was discharged by Bryan, and he ought to stand in the room of Barnes as to that balance coming from Bell's estate; for the money borrowed from the bank, which he had discharged, has produced it. No doubt, this construction of the transaction occurred to Barnes when he drew the deed of assignment; for if $1,600, the amount paid by Bryan, is deducted from his credit in his account with Barnes' estate, he would have fallen two of three hundred dollars in debt to it; and therefore it was that he made provision against loss to that estate on account of his insolvency.

It is for these reasons, and from this view of the case, that I think the prayer of the petitioner Bryan ought to be granted.

RUFFIN, J., dissented, but delivered no opinion.

HENDERSON, C. J. If Barnes, the executor, had borrowed the money of the bank himself, although he might have applied it to the payment of his testator's debts, perhaps the equity of Bryan, who afterwards paid the debt, would be too slight to charge the estate of Bell with its repayment. The justice of the claim would be felt by all; although,
(151) perhaps, it could be brought within no rule heretofore acknowledged by the Court. But I think any honest man would be unwilling to hold under the mere bounty of one whose assets were in conscience overrated with such a claim. The property is certainly benefitted to the amount of the money paid. This impugns not the equity of the petitioner Heart's claim, for he is a sufferer, and is contending *de damno evitando*. In this case the money was borrowed by Bell himself and went to his use. The debt has continued ever since, sometimes in the name of the widow and sometimes in the name of Barnes, the executor. Although by the forms of the bank this debt was extinguished upon each renewal, as it is called, by discounting a new note, and carrying the proceeds to the credit of the preceding one, yet in reality it is the same debt. I view this case, therefore, as if the original debt had continued until discharged by Bryan. And if this were the case, the equity is plain, and he is substituted to the rights of the bank when they held Bell's note. And notwithstanding it may have been canceled, or delivered by the bank to those who first renewed it, and by them thrown aside or destroyed, this Court will set it up, even if the cancellation was made with the consent and by the directions of those who first renewed it; for these were acts which ought not to have been done or assented to. The original note should have been preserved for those who afterwards paid the money given upon its surrender; for the executor gave no consideration for it. It is true, he promised to pay, but did not. Bryan has done

what he promised to do. Those not acquainted with the artificial rules of the bank, and who looked at the transaction itself as it really existed, considered it still the debt of the estate. Notes given for its renewal were signed by Barnes, as executor, as principal, and by himself as surety; and further, he swears that he thought the assets of the estate were bound for its payment. I am satisfied that the time is not far distant, if it has not already arrived, when upon a note given in a form not to preclude an inquiry into the consideration, as where it is signed as executor, and given for a debt due by the testator, the assets may be reached even at law. I concur, therefore, with HALL, J., (152) that there should be judgment for the petitioner Bryan.

PER CURIAM. Direct the fund to be paid to the petitioner Bryan, and let each petitioner pay his own costs.

MOSES L. WHITESIDES, W. W. ERWIN ET AL. v. WILLIAM GREENLEE AND JOHN SUDDERTH.

A purchaser cannot call for the execution of a contract procured from a vendor while in a state of intoxication.

THE bill stated that in August, 1820, the plaintiff Whitesides purchased for a valuable consideration from the defendant Greenlee eight lots in Morganton, and that Greenlee executed a bond with a condition reciting the contract, and providing for its execution; that afterwards Whitesides assigned for value to Erwin and the other plaintiffs all his interest in the lots, but that Greenlee, in order to defraud them, had conveyed the lots to the defendant Suddreth, who took the conveyance with full notice of the equitable title of the plaintiffs. And the prayer of the bill was that the contract might be established and a conveyance to the plaintiffs decreed.

Greenlee, in his answer, denied any recollection or knowledge of the contract or obligation stated in the bill, but admitted that he believed from the information of others that he had executed such a bond at the house of Whitesides, while he was in such a state of intoxication as to be utterly unfit for the transaction of any business, and even insensible of what he did. He also denied that he had ever received, so far as he knew or believed, any consideration for entering into the obligation to convey.

The answer of Suddreth admitted the purchase from Greenlee with notice of the plaintiff's claim, but averred that the plaintiff had procured it in the manner stated in the answer of Greenlee.

The proofs taken fully supported the answers, as to the situa-
(153) tion of Greenlee when the bond was procured from him, and there was no evidence to show what consideration Greenlee had received, or to show that he had received any, except an acknowledgment in the condition of the bond that he had "received full and ample compensation for the lots."

Gaston for plaintiffs.
Hogg for defendants.

HALL, J. The plaintiffs in this case claim the specific execution of a contract which they state was entered into by the defendant Greenlee for the conveyance of the lots specified in the bill, for a valuable consideration. It may be taken for granted that Greenlee signed a written contract for that purpose. But the fact appears to be well established by the depositions taken in the case that at the time when he signed it he was intoxicated, and not capable of making a contract; that the plaintiff Whitesides was not only conusant of his situation, but was instrumental in bringing it about. It is stated in the bill that the purchase was made upon a valuable consideration, but it was not stated what that consideration was, nor is any evidence offered that Whitesides ever paid any part of it, nor is it even intimated of what value the lots were.

From this short statement of the case the plaintiffs are not entitled to a decree for a specific execution of the contract; not because there are merits and equity on the side of the defendant, but because the plaintiff Whitesides has been guilty of a fraud in dealing unfairly with a helpless man, in procuring such contract to be entered into. He is at liberty to avail himself of any remedy the law will give him. But the bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

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NATHANIEL C. BISSELL v. JOSEPH BOZMAN.

1. The irregularity of a judgment at law is no ground of relief in equity. To entitle himself to relief, the defendant at law must show that advantage was taken of him, to preclude him from a defense against an unconscious claim.

2. If a judgment has been iniquitiously used, a court of equity will annul what has been done under it.

3. Where there is a confidential relation between the plaintiff and defendant at law, a court of equity will set aside a judgment by default unless some proof was offered.

4. Where a note is endorsed upon which nothing is due, it is a fraud, and notice is unnecessary to subject the endorser.

5. If the mortgagee obtains judgment and execution for the mortgage debt, and under the act of 1812 (Rev. ch. 830) sells the equity of redemption, and becomes the purchaser, how is the relation between him and the mortgagor affected thereby? *Quere.*

6. But where a mortgagee purchases at a sheriff's sale, and filed a bill to have his title confirmed, *held* that he thereby consented to open the estate for redemption.

7. If after foreclosure the mortgagee in any other way treats the debt as still due, the account will be opened.

THE original bill was filed in CHOWAN and charged that on 8 May, 1819, the plaintiff was indebted, upon a settlement with the defendant, in the sum of $1,975.50; for which he gave his bond, bearing interest from date; and to secure the same, mortgaged a house and lot in Edenton and a plantation in Chowan County, called New Sweden. This mortgage was not in the usual form, but by way of an absolute conveyance in fee, with a defeasance from the defendant. The bill further charged that a short time afterwards the State Bank obtained a judgment against the plaintiff and the defendant as his surety, under which two slaves, Mack and George, were sold by execution, and purchased by the defendant for $1,091, upon an agreement that the plaintiff might redeem them at any time upon payment of principal and interest, and that accordingly, the slaves remained in the possession of the plaintiff or his family.

The bill then charged that the plaintiff, a seaman by profession, went to sea and was absent from 1819 to 1824, but that his pursuits were well known to the defendant, and that his family continued to reside in Chowan; that on 10 November, 1819, he remitted to the defendant $800 to be applied to the first mortgage, and on the same account the sum of $1,025 in a draft, on 30 October, 1820. It also charged that the plain-

tiff while absent was obliged to pay M. Myers & Son of Norfolk, Virginia, the sum of $499, besides interest, which had been disbursed in 1816, in repairs of a ship belonging to the defendant, of which the plaintiff was master, and which had gone into Norfolk, consigned, with the cargo, to the Messrs. Myers; and that such payment ought in this Court to extinguish so much of the debts to the defendant; and that the defendant had during his absence sold New Sweden without the plain-
(155) tiff's authority, permission, or knowledge, and received therefor $1,500.

The bill then alleged that the plaintiff was not bound to repay the sum advanced as the price of the slaves, but at his own election, as the defendant had an absolute sheriff's deed, and had never offered to reconvey; and upon this footing claimed to be the creditor of the defendant in the sum of $636, on 29 September, 1829; or if he was bound for the said sum of $1,091, that he only owed on the said day a balance of $675.

The bill further charged that in May, 1823, the defendant instituted an action on the bond, and had the writ returned "Not found," with the view of issuing a judicial attachment, although he knew that the plaintiff was then at sea in pursuit of his calling; that he did issue the attachment, and in December, 1823, took a judgment by default, and upon an inquiry had damages assessed to the amount of $1,959, without offering any evidence of the debt except the bond, but that he filed several statements and accounts in the suit, showing the particulars of his demand; that execution issued on the judgment, under which all the defendant's property was sold, including the negroes and the mortgaged house and lot in Edenton, at great sacrifice, viz., for the sum of $1,821, though worth $6,000, and except the slaves, was mostly bought by the defendant. It stated that the plaintiff returned home only a few days before the sale and had not time nor means for stopping it; and that the defendant, for the purpose of buying at an undervalue, dissuaded others from bidding, and gave out that he would purchase the property for the plaintiff's benefit, and let him redeem it.

There were annexed to the bill, as exhibits, the several accounts charged to have been filed by the defendant in his suit at law.

In Number 2 the plaintiff had credit for $1,500 as the price of New Sweden, and was charged with cash paid as per receipt $150, and with various sums amounting in all to $1,308, in discharge of judgments ob-
tained against him— leaving a balance due him of $42. The bill
(156) charged that the plaintiff never received directly or by agent the $150, and that he did not owe the judgments, or, if he did, gave the defendant no authority to pay them.

Number 3 was a statement of the debt secured on Mack and George, in which credit was given for the $800, showing a balance due thereon to the defendant of $384.

Number 4 was an account of the proceeds of the draft for $1,025. In it the plaintiff was charged with a bond of one Tarkinton for $421 (endorsed by him to the defendant before the settlement in May, 1819) and interest; and he was credited with the net proceeds of that draft, and with the sum of $199, received on Tarkinton's note, showing a balance due thereon to the plaintiff of $880.

Number 5 was an account current, in which the plaintiff was charged with the bond for $1,957 and interest thereon, and $384, the balance on Number 3, and credited by the above balances due on Numbers 3 and 4, showing thereby a general balance due the defendant of $1,959, for which judgment was taken.

The plaintiff next submitted to consider Mack and George as mortgaged, and that he was personally liable for that debt (though not bound so to do), provided the defendant would account with him for their value when sold under execution.

And he insisted that he was not liable upon his endorsement of Tarkinton's bond, because the debt mentioned in it was justly due, and he endorsed it in April, 1819, and never received notice of its dishonor, though payable on demand.

The prayer was that the defendant might come to a just account and restore and reconvey all the property bought by him under his execution, thus unjustly and fraudulently obtained, upon receiving what might be found due, if anything, and for general relief.

The answer admitted the bond and mortgage, and also the sale and purchase of the slaves, Mack and George, and exhibited a covenant of the plaintiff to pay their value if they died in his service, and an agreement for their redemption; and averred that they continued in the possession of the plaintiff and his family until resold under the de- (157)
fendant's execution in 1824. It also admitted the payment of the $800, and the draft for $1,025, and averred that the former was applied to the mortgage on the slaves, and that a special receipt was taken from him therefor, and the latter to the bond debt as far as it would extend, deducting thereout the deficiency on Tarkinton's bond. And in relation to that bond, it was stated that it was endorsed in May, 1819, and immediately put in suit; that Tarkinton claimed and pleaded as setoffs mutual demands of his against the plaintiff, and had them allowed in the county court; that the defendant prosecuted the suit faithfully and diligently, and appealed to the Superior Court, where the same result took place. It was admitted that notice was not given to the plain-

tiff, and the reason was that he did not know where a notice would reach him abroad, and he was himself the plaintiff's agent here.

The answer denied any knowledge of the payment to Myers & Son, charged in the bill, and alleged that he did not owe them, and that according to the plaintiff's own showing it was due in 1816, and therefore barred by the statute of limitations, which the defendant insisted on. It also denied that he gave the plaintiff any orders or authority to make such payment, or that he did make it before the judgment at law.

The defendant admitted the sale of New Sweden for $1,500, but exhibited the plaintiff's letter written at sea, and dated July, 1819, requesting him to sell it at that price and pay himself; and it stated that about that time many of the plaintiff's creditors obtained judgments against him, and were about selling his property by execution, which induced the defendant, as his friend, to apply the $1,500 to the discharge of those, instead of retaining it; and he did pay the debts mentioned in exhibit Number 2, appended to the bill; and as to the $150 therein charged, that he paid it to the plaintiff's wife for the support of her family, and gave it to Mr. Barney, who was her friend and relative, and lived
(158) with her, to deliver to her, and took his receipt therefor, as defendant thought, but has since discovered that Mr. Barney wrote it, but did not sign it; but he averred the fact to be that he paid it.

The suit, attachment, and judgment were also admitted, and the answer stated that the long absence of the plaintiff, the large amount of the debt, and the reduction of his property formed the inducement to it. The defendant denied all the allegations of fraud in relation to the injustice of the recovery, his views in obtaining it, or the use of any unfair means; he averred that he stated the accounts and filed them to show to the plaintiff and to the world the fairness of the transaction; and that the suit was attended to, upon the trial, by the same Mr. Barney, who was an attorney of that court, and did not upon that occasion object to the $150 claimed upon his receipt. He denied expressly any unfairness in the sale, or that he induced any person not to bid, or wished to do so, or caused it to be understood that he would buy for the plaintiff, or that it was so understood; and he averred that when the plaintiff arrived at home he offered to stop the execution if his debt was secured to be paid in any reasonable time; but the plaintiff rejected the offer, and would do nothing; whereupon the sale took place, and he urged many persons to bid, as he was afraid his debt would not be satisfied, as turned out to be the fact, although the effects brought fair prices; and he averred that the whole debt recovered was just and true.

The defendant filed a cross-bill, seeking discovery from the plaintiff on many points, and charging various matters, in order that a final ad-

justment of all matters of controversy might be effected, the only parts of which it is material to state are that it recharged the matter stated in the original answer, touching the special receipt for $800; Tarkinton's bond; the payment of $150 to the wife of the plaintiff, or Mr. Barney for her, and the payment of the judgments against the plaintiff; and sought discovery whether the plaintiff had not appointed him, the defendant, his agent, or requested him to pay his debts; also whether the set-offs allowed to Tarkinton were not due; and whether the plain- (159) tiff had not been informed by his wife, and did not believe, that she received the sum of $150 from him; and that he might deliver up the receipt and defeasance originally given for the plantation and lots, to be canceled; and prayed further a final settlement of all matters between the parties, and particularly that the defendant might be foreclosed from all power or right of redemption in the mortgaged premises, if he had any.

The original plaintiff, in his answer to the cross-bill, insisted that the whole of Tarkinton's note was due, and that he was discharged at law and in equity upon his endorsement, for want of notice, especially as he was once in Edenton while the bond was in suit, and conversed with the defendant, who did not inform him that he was looked to.

He admitted the authority given by him to sell New Sweden, but denied that he recollected requesting the plaintiff to pay any debts for him, and averred that he did not believe he had; and insisted that if he had, payment ought to have been made before the costs were incurred. He did not deny that he owed the debts paid by the defendant. He exhibited the defeasance and the receipt for $800, which was expressed to be on account of the redemption of the negroes; but he alleged that this was done by the defendant contrary to his orders. As to the $150, the answer was evasive and unsatisfactory, qualifying a general denial made upon the information of the wife, as at first drawn, by interlineation, so as to make it special and equivocal, the defendant saying "he had no knowledge of the payment to M. A. Bissell (by the hands of G. W. Barney), and had understood from her, and so believed, that he never did pay said money (to Barney aforesaid.)"

Iredell and Kinney for plaintiff.
Gaston, contra.

RUFFIN, J., after stating the case: It is insisted for the original plaintiff, Bissell, that this is the case of a judgment obtained by fraud, where the defendant was precluded from his defense, and will be relieved in this Court. It is alleged, too, that it was irregular, and in a case not proper for a judicial attachment, and therefore this Court will put the party back into possession of the property bought under it by the plaintiff.

The first observation called for by these positions is that all matter of irregularity is out of the case here. This is a matter of legal jurisdiction, and not the foundation for coming into equity, except so far as it may be evidence with other things of a fraud—as where those proceedings denote an anxious hurry to put a demand, proved *aliunde* to be unfounded, through the forms of legal proceedings. The legal proceedings must be deemed right in this Court until the injustice of the recovery is shown by proof intrinsic of those proceedings themselves. If, therefore, the process of judicial attachment were not proper, that will, of itself, not avail the plaintiff. It was allowed by the proper tribunal, and the judgment founded on it must be taken to be conclusive here, although by it a recovery is made without having the party personally in court. It is not for us to say that it is iniquitous, when the court of law supports it; much less when the Legislature gives in certain cases that proceeding, and in others that by original attachment, in each of which personal defense is seldom made, though it is supposed that it may, and intended that it shall be at all. The plaintiff (161) must, therefore, further show that advantage was unduly taken of him by the use of this remedy in such a way as was intended and did preclude him from defense; and, secondly, that for want of such defense a recovery was effected, not merely of sums not duly proved on the trial, or of sums which could not upon defense be recovered from him in a court of law, but which the plaintiff at law could not recover, or, having recovered, cannot retain with a good conscience by the law of this Court. If, indeed, a judgment for a true debt be iniquitously used, the Court will annul what has been done under it. Such was the case of *Lord Cranstown v. Johnston* cited for the plaintiff from 3 Ves., 170, and 5 Ves., 277. The defendant was pretending to treat with the plaintiff in England for the purchase of the estate at private sale, and while he was thus amusing him, and putting him off his guard, and his propositions were made with that intent, he gave secret instructions to an agent to proceed according to some summary colonial method to bring the estate into market, and purchase it from him. It was brought to sale, and the proceeding so shocked those present that every one considered a good title would not be had under the sale, and nobody bid but the agent, and he purchased. No court could sustain such a transaction. The debtor was lulled to sleep, the creditor made the title doubtful, and under that disadvantage brought it to sale; competition was suppressed, and he bought at a great undervalue. His purchase was set aside on the score of fraud. Allegations are made in the bill of conduct on the part of Bozman at the sale, in some respects of the same character. But they are denied in the answer, and unsupported by proof.

He could not have held out the idea that he was buying for Bissell, and would allow him time to redeem; for the latter had just defied him, and given him distinct notice that he would not redeem, but seek to set the whole aside. And witnesses speak of facts which prove that Bozman urged bidders to give fair prices for all but the furniture, which he suffered to be bought in low by friends of Bissell.

Then the cause stands entirely as to the evidence of fraud, (162) upon the justice or injustice of the recovery. And upon that head I must repeat that in this Court the question is not whether the recovery was strictly proper by the rules of law, but whether it was against conscience to assert such a demand and to receive payment. Both the conscience and law of the case are in general presumed in favor of the judgment of the court of law—which is taken to be conclusive here as in another court of law, unless under particular circumstances. *White v. Hall,* 12 Ves., 324. The Court in an ordinary case would, therefore, not put the plaintiff at law to any reproof of his demand. But here, as there is some evidence of an express agency, and there certainly was a confidential relation to some extent between the parties, and the suit was actually undefended, some proof was necessary in this cause. And the defendant here has offered it of a kind entirely satisfactory, as far as it was necessary to repel the charge of fraud. He proves incontestably the payment of the several sums as and for debts from the plaintiff to other persons. There is no doubt he was out of pocket to the extent recovered for those items; and in answer to the cross-bill, Bissell will not deny either of those debts, nor that he requested Bozman to pay them, but only that he does not remember such a request, while two of the witnesses, one of them an officer who had some of the executions, prove that Bissell said Bozman was his agent, and referred the officer to him for payment. It is not certain that notice was required upon Tarkinton's bond. If one endorses a note upon which nothing is due, it is a fraud. Notice does no good, because the party already knew that payment had been made, and no further payment could be obtained. And if it clearly appeared here that the set-off was just, and that Bissell was aware of it, there would be an end of the question, even at law. But Tarkinton does not swear precisely that his demand was a true one. He proves, however, as the record of that suit does, that he pleaded and obtained the set-off; that Bozman contested both in the county court and upon appeal, and prosecuted the suit bona fide. It is to be recollected that our inquiry here is, Was there fraud? Had not Bozman a (163) right, then, to consider that Tarkinton's set-off was just? Was it dishonest in him who had lost the money by judgment of a court to treat that judgment as rightly given? The question carries its own answer.

The remaining item contested in Bozman's account is that of $150 paid to Mrs. Bissell. This is positively sworn to by him in his answer. A witness, his son, says he counted out the money to carry to her, though the son did not see him pay it. Mr. Barney says he has no recollection of receiving that sum, but that the receipt for it was written by him, and he cannot account for the want of his signature; that he was not the general agent of Bissell, but often acted in his affair, at the request of himself or his wife, and sometimes without request, because he thought it for his benefit; and he states that Mr. Bissell talked of getting money from Bozman, but he does not know whether she did or not. The direct testimony of Bissell's wife cannot be had to the point. But he is interrogated in the cross-bill as to the information derived from her, and his belief, to which he answers, as if making a special avoidance, not by way of general denial, but qualifying that denial, as first framed, by restricting the statement made by her to this: that she did not receive that sum by the hands of Barney, and that he believes that Bozman did not pay the money to Barney aforesaid. This is special pleading on oath, and so plainly evasive as almost to amount to proof of itself that Mrs. Bissell did in some way receive the sum; and at all events, with the other evidence, establishes the fact to an extent so nearly amounting to a moral certainty as to leave no ground for impeaching the judgment upon the score of conscience.

The remaining ground on which Bissell contests the judgment at law is that of a mutual demand for money paid Myers & Son for the disbursements of a vessel of the defendant. These disbursements occurred in February, 1816, when Messrs. Myers had effects of Bozman in their hands to a large amount. They several times rendered accounts
(164) to Bozman, and paid the balances, in which, they say, this sum was omitted through haste and mistake. In July, 1820, they applied to Bissell, then in Norfolk, for payment, which he refused upon the ground that he was not liable and of length of time, and referred them to Bozman. Of this Bissell advised Bozman under date 18 July, and on the same day Myers forwarded the account to Bozman, who refused to pay it; whereupon it was put into an attorney's hands, but no proceedings of law seem to have been had. Bissell had effects in the hands of Messrs. Myers, and among them a bill on the West Indies, which they were to collect for him. They failed, and made an assignment, and up to that time had received payment from no quarter. But in May, 1824, they wrote to Bissell, that in 1822 their correspondent in Jamaica had given them credit for the bill, which they had not noticed until a late overhauling of their books and papers. They then advise him that they have given him credit for that sum, and to liquidate it have charged to

him the brig William's disbursements. Whether Bissell was originally liable for that debt, or could pay it after eight years and his former refusal, and thereby charge Bozman upon the new contract to himself, after the latter had refused to pay Messrs. Myers themselves, or whether this charging by bankrupts in discharge of a debt from themselves be such a payment as renders Bozman a debtor therefor, are questions not necessary or proper now to be decided. They will come up more properly upon the accounts hereafter to be taken, on another branch of the cause. But taking Bozman to be now liable for that debt, it entirely fails as evidence of fraud in taking the judgment. In that point of view it is subject to this decisive observation: Bozman contested that claim as against the original claimants, and at the time of taking the judgment was not only ignorant that the debt was charged to Bissell, but the latter was also ignorant of it; for the judgment was in December, 1823, and the letter of Messrs. Myers to Bissell is dated 28 May, 1824.

It must, therefore, be declared that the judgment was for a (165) just debt, which Bozman might in good conscience receive.

This would dispose of the original bill, as it is not framed on the foot of the mortgages and the right of redemption. Indeed, it denies the obligation at any time on Bissell to redeem the slaves. The *gravamen* of it is the fraud in getting, by an irregular proceeding, a judgment at law for a debt not due, and using the execution iniquitously. It sets out, indeed, the original debts and mortgage, but it is only to show that they had been discharged; and there is no question made in the bill upon the right of the mortgagee to sell the mortgaged estates for that debt; but the prayer is to set aside the execution sale. Upon the grounds relied on, there is no foundation in the facts to support the prayer; and the bill ought to be dismissed, and would be dismissed at once were the plaintiff not entitled to relief upon other parts of the pleadings. For which reason, both causes will be retained until the case shall be finally disposed of.

It has, however, been further insisted for Bissell that the sale under execution does not bar redemption, but, being for the mortgage debt, leaves that equity untouched, especially as to those parts purchased by the mortgagee. This depends upon the construction of the act of 1812. The question was touched in *Cox v. Camp*, 13 N. C., 502, and was then said to be a difficult one. Upon further consideration I think it extremely difficult—in reference as well to the case where a stranger purchases when the sale is made for the mortgage debt, known so to be, as where the mortgagee himself does. In this case, however, it does not arise. As to the purchases by others, they are not made parties to the original bill, if that were properly a bill to redeem; and consequently

their titles are confirmed, and the price or the value taken as a substitute for the property. As to those made by Bozman himself: taking a sale under an execution to be a statute foreclosure, it must be admitted that it is, as yet, a doubtful and unsettled doctrine; and being so, the creditor has found himself under the necessity of coming here to ask that (166) his defeasance may be brought into court, his title confirmed, and the mortgagor foreclosed. Equity does not lean to foreclosure, especially at short hand. It is true that after what it deems reasonable time, it gives the mortgagee the benefit of the condition in law, and declares his estate absolute. Yet that is felt to be a case of hardship, and often to produce injustice. Hence any consent, express or implied, is seized as an occasion to open the estate to redemption upon payment of the debt, which is the real justice between the parties. If, therefore, upon a bill to redeem after any length of time, the defendant submit to redemption, it will be decreed. *Proctor v. Oats,* 2 Atk., 140. So if the mortgagee get a decree of the court of equity itself for foreclosure, and afterwards take out process upon any collateral security for the same debt, he waives the decree, if the mortgagor chooses. *Dashwood v. Blythway,* 1 Eq. Ca. Abr., 317. The reason is, he treats the debt as still due, and therefore his title as not absolute. Much more here, where the title is very doubtful in law, shall a bill for further foreclosure, if I may use the expression, remove that which I will not say has taken place, but may have taken place. It is true, the cross-bill does not unequivocally admit the right of redemption, but prays for foreclosure, in case the debtor has the right. For this purpose this is the same as a general prayer. The Court is asked to investigate the accounts, and settle the title. Upon the footing therefor of the cross-bill the case is open for redemption upon payment of principal and interest, allowing to the debtor, in the accounts, credit for the value or price of such parts of the mortgaged effects as third persons bought; and a reference will be ordered accordingly. No directions are given about the application of the payments of the proceeds of the sales to particular debts, as would have been necessary had the judgment at law been impeached by the decree; but as that stands untouched, and it is a common equity for mortgagees, as against the mortgagor himself, to tack judgments, the whole debt must be (167) considered as the encumbrance, subject to such reductions as the debtor can make appear before the master.

PER CURIAM. Decree accordingly.

Cited: S. c., post, 229; *Mining Co. v. Fox,* 39 N. C., 73; *Battle v. Jones,* 41 N. C., 573; *Champion v. Miller,* 55 N. C., 196; *Grantham v. Kennedy,* 91 N. C., 154.

ABRAHAM VILLINES ET AL. v. NATHANIEL NORFLEET.

1. Although an executor cannot purchase at his own sale, yet if he does, and there is no fraud, but he pays the purchase money for the use of the estate, and his accounts are settled and acquittances given by the legatees without the exercise of undue influence on his part, he cannot, after the lapse of twenty-nine years, be declared a trustee for the legatees of the slaves purchased by him.

2. A settlement of the account of an executor by commissioners appointed by the county court is not a bar to a future account, but it rebuts the presumption of fraud.

THE bill was filed in 1826 in CASWELL. The plaintiffs charged that their father, Hezekiah Villines, was a resident of Nansemond County, in the State of Virginia; that by his will he left several specific legacies, and all the residue to his wife and three children, to wit, the plaintiff Abraham, a son Thomas, who was dead, and whose administrator was a party, and a daughter, Nancy, and appointed his wife and the defendant executors, and died in 1784; that a large personal estate of the testator came to the hands of the executors; that the widow also died eight years after the testator, having intermarried with one Jones, who was also dead, when the assets came to the hands of the defendant alone; that the defendant at two several sales of the slaves of his testator, made by himself, bought negroes Edmund, Milly and Penny at an undervalue; that at the death of the testator his children were infants of tender years, and upon their arrival at full age were entirely unacquainted with the situation of their father's estate; that in 1789 the defendant went to Europe and was absent until 1797, when upon his return he became very anxious to settle his accounts as executor, and procured the plaintiff Abraham, then a minor, to be appointed guardian to the other children of the testator, and by his influence procured three incompetent persons to be appointed by the county court of Nansemond com- (168) missioners to settle his accounts; that by these means and from the confidence which the plaintiff Abraham had in him, the defendant procured a settlement of his accounts, and prevailed on the commissioners to sign it, and paid to the plaintiff Abraham a balance thereby appearing to be due, and took an acquittance therefor; that shortly after the settlement the defendant removed to the county of Person in this State, and prevailed upon the plaintiff Abraham to accompany him and bring with him his infant brother and sister, and for several years treated them with great kindness; that the plaintiffs and defendants had resided there ever since; that Thomas died in 1825, and that Nancy, one of the plaintiffs, while an infant, intermarried with one McKissack, who died in 1818.

The plaintiffs then charged that recently, upon a visit to Nansemond, they had discovered that the defendant, in his account taken before the commissioners, had not charged himself with the sales of any negroes made by him, nor with the hire of the negroes during the time they remained in his hands, and in fact had not returned any account of sales, but had charged himself a gross sum of £847 13 for sales of all kinds of property, and neither had he delivered to the plaintiff Abraham the slaves which he had purchased. The prayer was that the defendant might be decreed to be a trustee for the plaintiffs for the negroes bought by him, and their increase, and that he might come to an account of his administration of the estate of their father, and pay them any balance which might be due.

The defendant, in his answer, relied upon the length of time which had elapsed since the settlement, and insisted that the sales had been fairly and properly made and the account honestly stated. He also averred that as to the hire of the slaves, he had no recollection of having received any, and believed that the slaves had been kept by the mother of the plaintiffs for their support, for the first eight years after the death of the testator. He admitted the purchase of three slaves, but insisted that the same was legal by the laws of Virginia, and at
(169) any rate that it had been confirmed by a subsequent settlement between him and the plaintiff Abraham; copies of this settlement and of the receipts of the plaintiff Abraham were filed with the answer; they were made on 11 and 14 December, 1797.

A good deal of testimony was filed which it is not necessary to state.

Winston for plaintiff.
Nash and W. A. Graham for defendant.

RUFFIN, J. The bill was filed in 1826, and seeks a general account of the estate of the plaintiff's father, of whom the defendant is surviving executor; and particularly it prays a division of several slaves and their increase, which the defendant claims as having purchased at sales of his testator's estate in 1797 or before, and of the hires of them and other slaves before that time. The bill states the death of the testator forty-two years before the filing of it, and it admits a settlement in December, 1797, between the defendant and the plaintiff Abraham, in his own right and as guardian of the two other plaintiffs, his brother and sister, and seeks to avoid that settlement upon the grounds that Abraham was then an infant, wanting six months of full age; that the three slaves, Penny, Milly, and Edmund (claimed to have been purchased by the defendant), were not included in it, nor the hires of any of the negroes of

the estate; and that if those negroes were included in it, the defendant's purchase was fraudulent and void, being at his own sale.

There is not the least doubt that the negroes were accounted for in the settlement of 1797. The account current exhibited with the bill gives the estate credit for £816 6 10, as "amount of sales." What was that large sum for? The account was stated by commissioners appointed by the court on 11 December, and the receipts given by Abraham bear date 14 December; and the last sales of negroes were made at or before the last day. At the sales the plaintiffs, although some of them were infants, purchased; and the receipts clearly show that Milly and (170) Edmund were then claimed and admitted to be Norfleet's under his purchase, as Penny was under a former one. They are given for the negroes specifically bequeathed to each child, and also for those bought by them at that sale, being expressed to be for "negroes which the executor allowed them to buy at public sale"; and they are also for six negroes mentioned by name, "remaining of my father's estate after payment of his debts." Penny, Milly, and Edmund were known to all the parties as having belonged to the estate, and therefore must then have been considered as Norfleet's. Indeed, it is stated in the bill that Norfleet then claimed them, and procured Abraham to be appointed guardian, and took the receipt for the purpose of confirming the sales. With the knowledge of these facts, can there be a rational doubt that the commissioners must have included the prices of those negroes in the sum of £816 6 10, or that the plaintiff Abraham would have settled upon any other principle? for he was present at the sale and made purchases himself. Were his own included? If so, why not Norfleet's? But the receipts, as expressed, are conclusive.

I do not inquire, then, whether the commissioners or the executor made the sale, or whether in either case the executor could purchase by the law of Virginia, as to which there is evidence in the affirmative. The right of the defendant does not rest on the purchase itself. He accounted for the value, which was accepted by the legatees, who thereby confirmed the title. The Court does not mean to say that a guardian and executor can in an improper case, where there is no necessity for a sale or the like, bind the ward by such a confirmation. And it is true that the Court does not encourage transactions of this sort between trustee and *cestui que trust;* and will, if undue influence can be proved, or can even be slightly inferred, and advantage made by the trustee, be ready to give relief, if asked for in reasonable time. Was a sale necessary? The contrary is not even alleged. Indeed, the plaintiffs bought at it. Was the price inadequate? There is no allegation of that. It has already been shown that it was paid in account. Was (171)

the settlement unfairly made, and by means of undue influence acquittances obtained? It was not done in privacy, where such influence could be most effectually exercised over an inexperienced youth by an uncle; but with the assistance of three justices of the peace appointed by the court, and proved to be capable and upright men. I know of no principle even upon which such a sale, necessary and for a full price, followed by a settlement in which the price is accounted for—supposing the parties to be all *sui juris*—could be impeached, however recent the transaction. Much less where the express confirmation receives the sanction of twenty-nine years acquiescence.

There is an effort, however, to avoid the effect of that by alleging that the settlement is itself inoperative, because Abraham Villines was an infant; that soon after the sale Norfleet removed from Nansemond to Person County in this State, and brought the plaintiffs, his nephews and niece, with him, and treated them for a long time with great kindness, so that they did not suspect until lately (that is, in 1825) any unfairness; that the plaintiff Abraham then went to Nansemond, and discovered that no inventory nor account of sales had been returned, and that in the account current there were no particulars of the sales, but only a lumping credit of "account of sales"; and that there was no credit for the hire of negroes, though several of them were grown. But the bill admits the charges for debts paid to be just.

There is no distinct evidence of the age of Abraham. It must, therefore, be taken that he was of full age. He acted as if he was; the defendant, his uncle, treated with him as such; and the county court appointed him guardian of his brother and sister. But it is a circumstance of very little consequence, as the case is now situated, for he and the others have acquiesced many years after full age.

Then as to the new discovery. What has been discovered? Any unfairness? No; but there might have been unfairness, for aught
(172) that appears on the account current, because the particulars are not given. Is that a new discovery? It must have been known to Abraham when he settled. But suppose that he did not then know the manner in which the account was stated, it does not follow that the particulars were not exhibited both to the commissioners and to him, when the settlement was made; nor, especially, that the negroes were not accounted for therein. It has been already shown that the negroes were, in fact, included, notwithstanding that does not expressly appear upon the account. It cannot be supposed the commissioners would state the account without knowing the particulars. No force is given to their report *proprio vigore* as a bar; but it rebuts the presumption of fraud, and invoking their aid is a circumstance to show that the particulars

were then known to all the parties, because they as well as the plaintiff would naturally require them, although the account does not exhibit them to us now. The plaintiffs ought to show that an error was committed. The most material one suggested by them turns out to be unfounded in truth. The pretense of new discovery, then, can avail nothing. The only thing discovered is that the account is in a particular form. But that neither proves that the fact was not known at the time, nor that wrong was done to the plaintiffs, nor that the defendant ought not to retain the slaves, which other documents prove he paid for. Above all, the parties knew that some account had been settled, and that acacquittances had been given nine and twenty years before; and they were bound to look into any possible error sooner. Here the three commissioners are dead; the executrix who managed the estate exclusively for eight years, while the defendant was in Europe, and her husband, are also dead; the witnesses to the receipts, and every other person conusant of the sale and settlement, except the parties, are in their graves. It is impossible, then, to give further explanation; and the answer is precise as to the justice of the settlement. Time is evidence, from acquiescence in the exercise by another of an adverse right, of the grant of that right. But it is further respected upon a principle of public pol- (173) icy, as a bar to the investigation of that right, because the truth cannot be discovered. Here, indeed, the proof, by documents, happens to be clear as to the value of the slaves being accounted for; but these are only presumptions. As to the hires before that time, they may be included in the £816 6 10; they may not have been received by the defendant, who was in Europe, but by the executrix, and otherwise accounted for; or the negroes may have been kept together by the mother for the support of the family, as the evidence makes probable. The parties knew they were entitled to them; and they knew the estate was closed. After all witnesses are buried and vouchers given up, a new account cannot be ordered upon a bill filed twenty-nine years after the trust was last acted on—the parties all living in the same neighborhood, and for nearly the whole time under no disability. Transactions of that period are seen by two uncertain and obscure a twilight to be sufficiently clear for judicial action. The difficulty of arriving at the truth is insuperable and others would be encouraged to sleep upon their claims. The Court must say, you come too late. *Petty v. Harman,* 16 N. C., 191, is not as strong as this case.

PER CURIAM. Bill dismissed.

Cited: Tate v. Dalton, 41 N. C., 565; *University v. Hughes,* 90 N. C., 541; *Grant v. Hughes,* 94 N. C., 236; *Tayloe v. Tayloe,* 108 N. C., 73; *Coggins v. Flythe,* 113 N. C., 109.

NATHANIEL ROBARDS AND DELPHIA WASHINGTON, EXECUTORS OF JOHN WASHINGTON, v. JAMES L. WORTHAM, ET UX.

1. Where a testator in his lifetime subscribed for stock in the Roanoke Navigation Company, and died without completing the payments, and by his will gave specific legacies, and created a fund for the payment of his debts, *it was held*, the fund for the payment of debts and the undisposed of residue being exhausted, that the stock in the hands of the heir should be subjected to the payment of the balance due upon the subscription, in exoneration of a specific legacy.

2. Descended lands must exonerate a specific legatee from the payment of all debts for which the heir is bound.

3. The devisor cannot restrain the creditor from subjecting the personal estate; but where the latter has a right to resort to both the personal and real assets, and exhausts the former, a legatee will be substituted to the rights of the creditor against the heir.

4. If the heir pay the specialty debt of the ancestor, he may indemnify himself out of the residue of the personal property.

5. But the legatee cannot be indemnified out of the real estate, unless the debt paid by his legacy be a charge upon the heir.

6. And a subscription to the stock of the Navigation Company being a simple contract debt, the legatee, on payment of it, has no right to indemnify from the real estate.

7. But the subscription creating a specific lien, and being the ancestor's debt, the heir has a right to an indemnity from the residue, and a specific legatee from the real estate.

8. Where land is devised to be sold for the payment of debts, and the surplus given away as cash, it is primarily liable, even between the heir and the residuary legatee.

9. But where the land is charged with the debts, it is taken as only auxiliary to the personal estate, unless the contrary clearly appears to have been the intention of the testator.

10. Real assets in the hands of the heir, as well as personal estate, are the primary funds for the payment of specialty creditors and specific liens; and by specifically bequeathing the personal estate, the testator declares his intention that the land shall bear its own burden.

11. So by a devise of the land the testator declares his intention to exempt it, and hence a devise to the heir prevents the land from being subjected in exoneration of the specific legacies.

12. It is a question of intent; but to change the order of liability requires a clear expression to that effect.

13. And where the testator devised land to be sold for the payment of debts, and gave the surplus to his wife, and also gave her a large legacy and small legacies to others, and directed his executors, in case of a deficiency of the fund for the payment of debts, to sell such property as his wife

might point out, *it was held* that this direction charged the wife's legacy as between her and the other legatees, but did not exonerate descended real estate.

JOHN WASHINGTON in his lifetime subscribed for twenty-five shares of stock in the Roanoke Navigation Company, upon which he paid $65 per share, leaving $35 on each share unpaid at his (174) death.

By his will, of which he appointed the plaintiffs executors, he devised as follows:

"I give and bequeath to my beloved wife, Delphia, the land whereon I now reside, with all the appurtenances thereon belonging, known by the name of Potter's Bridge plantation, to her and her heirs forever.

"I give and bequeath to my beloved wife the following negro slaves (thirty in number). I give my wife all my household and kitchen furniture, and all my live-stock of every kind whatsoever, and all my plantation tools and utensils, such as wagons, carts, etc.

"I give and bequeath to Mary H. Wortham my negro woman Rhody and her son Burrel, to her and her heirs forever.

"I give and bequeath to James L. Wortham my three stills, and my library of books of every sort, and my blacksmith's tools now in his possession.

"And as to my just debts, I would have them paid as soon after my decease as can with convenience be done, and for that purpose authorize and request my executors hereinafter named to sell my two tracts of land, one lying on the Nap of Reed's Creek, etc., one other tract of land in Halifax County, Commonwealth of Virginia, lying on Little Blue Wing. Should not the proceeds of the land be sufficient to pay my just debts, that my executors sell other property such as my wife shall direct, to complete the payment of my debts. And it is my will and desire that should an overplus remain of the proceeds of the sales aforesaid, then the same shall be and remain with my wife, to her and her heirs forever."

After his death the directors of the Navigation Company obtained a judgment against the plaintiffs, his executors, for the sum of $1,124.96, being the balance of principal and interest due on his subscription, and upon the payment of the amount of the judgment, issued a certificate that "the late John Washington is the owner of twenty-five shares of the capital stock of the Roanoke Navigation Company, on which has been paid $100 per share." (175)

The plaintiffs in their bill averred that the fund created by the testator for the payment of his debts had proved insufficient for that purpose, and alleged that the stock, being real assets, had descended to the

wife of the defendant James, who was the only child of the testator, and prayed that it might be subjected to the payment of the debt in exoneration of the specific legacy to the plaintiff Delphia.

The answer admitted all the facts above cited.

Badger and Devereux for plaintiffs.
Nash, contra.

RUFFIN, J. Descended lands must pay all debts for which the real estate is liable, in exoneration of all but residuary legacies, or of other lands specifically devised for the payment of debts. And if the creditors go upon the personalty, the legatees may have an indemnity out of the realty. This is an old rule of the court of chancery. (Ch. Ca., 2 pl. 4.) It is founded on this: that a man who is able to pay all his (176) debts, and has something over to give away, may give it as he chooses. He cannot, indeed, restrain the creditor from resorting to any fund made liable to him by law. But if the creditor will, through mere caprice or convenience, go upon that fund which the testator meant for a particular donee, instead of that other left open alike by the law and the testator for his satisfaction, the donee shall be reimbursed out of the latter. And as to debts due by specialty in which the heir is bound, this principle has been extended to the protection of pecuniary legatees —much more specific legatees. *Hanby v. Roberts,* Amb., 127; *Galton v. Hancock,* 2 Atk., 430; *Aldrich v. Cooper,* 8 Ves., 396. If, therefore, the heir be made to pay such a debt, he may reinstate himself out of the executor, if there be a residue; because both at law and in this Court that is liable before land; but if there be no residue, but only things given away in legacies, he cannot, but must rest under the burden. *E converso,* if such legacies be applied to the discharge of such a debt, the legatee shall be reinstated by standing in the place of the satisfied creditor. *Hanby v. Roberts, supra.* It follows that in no case in England can the legatee be reimbursed out of the land for a simple contract debt paid out of his legacy; for the heir was not liable for that to the creditor, to whose rights and remedies only is the legatee substituted. It is the same here; because simple contract creditors can have recourse to the land only after exhausting the personalty, and therefore the legatee cannot ask the land to replace that personalty—which would be an absurdity, as was held in *Miller v. Johnston,* 7 N. C., 194.

This is a debt by simple contract, as the subscription does not purport to have been made by deed, and the charter does not make the heir liable. Merely as a debt, then, it would not entitle the plaintiff to relief.

But the charter expressly makes the stock, as well as the person of the subscriber, liable for a balance due on it. It is as legislative mortgage, which creates a specific lien. Rev., ch. 959, secs. 1, 8.

In that case the heir or devisee of the land has the same right to ask exoneration out of the general residue of the personalty as he had in the case of the specialty, unless the ancestor or devisor (177) was a purchaser of the estate, while under the encumbrance; for residuary legatees are *ex vi termini* only entitled to the surplus after payment of debts. But in like manner also as before, specific and even pecuniary legatees are protected, or rather are to be indemnified. *Oneal v. Mead,* 1 P. Wms., 693 is an instance of this, where the legacy was specific, and the mortgaged freehold devised. The devisee took it *cum onere. Rider v. Wager,* 2 P. Wms., 335, and *Tipping v. Tipping,* 1 *id.,* 370, carry the rule to pecuniary legacies. In the former there were both specific and pecuniary legacies; and it was held that neither should be defeated, but the devised land must pay the debt with which it was specifically charged. Much more is this the case where the land descends; for such lands are liable before estates devised, which are always specific. Ch. Ca., 2 pl. 4.

The general maxim, however, that the personalty is, as it is sometimes called, the primary and at others the natural fund for the payment of debts, has been much pressed, and many cases cited in support of it. Not one of them is denied; but they are misapplied. They relate to the case of land devised, charged in the will with the payment of debts. If, indeed, lands be devised to be sold for the express purpose of paying debts (as is here directed about the Blue Wing and Nap of Reeds land), and the surplus given away as money, there can be no doubt they are first liable, even as between them and a residuary legatee, unless some express interest is given to another in the land fund; for the residue is not given there in its general sense, after payment of debts, but it means the residue of the personal property after taking out such parts as are before given away. But where lands are merely charged, a question arises. Are they to pay before or after the personalty? And the general rule is that unless the contrary clearly (formerly, expressly) appear, the personal estate is to be first exhausted, and the real is only auxiliary; the charge being considered as an act of honesty in the testator to have his debts of all sorts certainly and speedily (178) paid, and not to change the fund in the first instance, to which resort is to be had. The law fixes the burden on the personalty, and that can only be altered by the testator; and the intention on his part to alter it is not inferred upon slight grounds. Charging the land is not

sufficient. However anxiously it is done, that will not of itself have the effect of exempting the personalty, says *Lord Rosslyn* in *Taitt v. Northwick*. And *Lord Thurlow* says in *Samwell v. Wake,* 1 Bro. C., 144, and at several other times, that the testator must not only charge the real estate, but must show his purpose that the personal should not be applied before the latter will be exempted. Many minute criticisms on wills have been made to ascertain the intention in this respect. The final result of the discussions has been that unless the personalty, although specifically bequeathed, be expressly or clearly exonerated by other parts of the will, a charge upon the lands will not have that effect. The reason is that after one fund becomes fixed with the debts or a particular debt, that fund can be relieved only by plain words postponing its liability and substituting another fund in its place. A general charge will not do, because that may as well be considered the creation of an additional fund, in aid of that already liable, as the provision of a sole fund for the payment of debts. But it is entirely different where the personalty is specifically bequeathed and the lands descend. So essentially different are the cases that I should not have felt bound to notice at large those cases of a charge, but for the purpose of exhibiting clearly their leading principle, which, in another point of view, has an important application to this case, adverse to the defendant.

That principle is that the order of liability once existing between two funds can be changed only by the intention of the testator; and to show such intent, express or plain words are indispensable, so as to make the intent manifest.

Where lands descend, they, as well as the personalty, constitute a primary fund for the satisfaction of specialty debts and specific
(179) liens. And the testator, by giving away the personalty by specific bequests, is held to show his intention that the land shall bear its own burden, unassisted. Hence, they may be called the order in which by law those funds, thus situated, are to pay. That order will not be disturbed but upon a plain intent, as if the land be devised to the heir. He takes, indeed, as heir, because the better title. Yet as denoting the intent, he shall for this purpose be considered as a devisee, who always holds exempt from debts until all the personalty is exhausted, unless the devise be for payment of debts, or there be a charge in terms which place the land in front of the personalty. No doubt, the whole is under the testator's control; and he may even effectually declare that lands descended shall be eased by his general personal residue, or even his particular legacies. But it will be admitted by every one, after considering the before mentioned cases and the principle on which they are founded, that to do that the words must be indeed strong.

It is argued that those in this will are sufficient. There is no residuary clause. That fund is therefore liable. The will gives to the wife the land on which the testator lived, a considerable number of slaves by name, his furniture, his stock and plantation utensils. There is then a specific legacy to his niece Mary of two slaves, and some other small specific legacies. The testator then directs his debts to be paid as soon as possible, "and for that purpose," he says, "I authorize my executors to sell two tracts of land lying, etc., and should not the proceeds of the land be sufficient to pay my debts, then that my executors sell other property, such as my wife shall direct, to complete the payment." And he gives the surplus of the sales of the land, if any after payment of debts, to his wife. The argument is that here is a direction to sell of the wife's legacy to supply any deficiency of the lands; that it must be of that legacy, because she is to point out the property—otherwise, she might defeat the other legatees by taking theirs. The position is thus far correct; for upon the deficiency of the funds provided, the legacies to the (180) wife and others would abate. That the testator did not mean; but, as between themselves, that the wife's legacy should pay the debts. And this is all that he did mean. When it is put that he intended also that the wife should pay all the debts out of her legacy, in exoneration of lands descending *cum onere,* the argument fails. There is no reason for giving the words that sense—much less a reason from the expression of a clear, manifest intent. The words are satisfied without that. We see why the wife is directed to pay, in favor of the legatees: because but little was left to them; because uncertain whether the sales of the land would not discharge all debts, and the surplus of them is given to her. It might as well be argued that this special direction—upon the score of intent—relieves the general residue for the benefit of the next of kin, as the descended lands for the benefit of the heir. We are not speaking now of the rule between those funds as established law, but of the substitution by the testator of another fund in case of both. As far as his words go, they denote his purpose to exempt one as much as the other. But other reasons were in the testator's mind—partly in favor of the small legatees, to ease their legacies, and partly in favor of the wife, to restrain the general power of the executors to sell any part, and give the selection to her. How, then, following *Lord Thurlow,* can we say, here is a declaration that the real estate descended (being the fund before fixed) shall not be applied? The words were used for a different purpose, and were satisfied without this. Consequently, there must be an account to ascertain whether the personal estate not given away and the proceeds of the land sold have been administered; and the stock being real estate by the charters, and descended, must be declared subject for

any deficiency of those funds for the payment of the balance due for the stock, or of debts by specialty in which the heir is bound.

PER CURIAM. Declare that the balance due on the original subscription is a specific lien on the stock, and that it is liable to refund to
(181) the plaintiffs that part of the subscription which they have paid, unless the undisposed of residue of the personal estate, and the proceeds of the two tracts of land devised for the payment of the testator's debts, be found inadequate to pay for the said stock and all the other debts of the testator; and direct a reference as to the sale of those lands, and an account of the undisposed of residue and of the administration of the plaintiffs; and let the clerk, in taking said account, distinguish such debts as were due upon specialties wherein the heir was bound.

Cited: Swann v. Swann, 58 N. C., 299; *Palmer v. Armstrong, post,* 270; *Graham v. Little,* 40 N. C., 411; *Kirkpatrick v. Rogers,* 42 N. C., 46; *Pate v. Oliver,* 104 N. C., 468.

HUGH L. WILSON v. MOSES WILSON ET AL.

1. Where a testator directed the interest of one-third of the valuation of his slaves to be paid to his son, and requested another son to take the slaves and pay the valuation to his executors, and appointed that son and another his executors: *Held,* upon the probate of the will by the son alone, and upon his electing to take the negroes under the will, that he might retain the value of the negroes, and that they were not bound as a security for the annuity.

2. Where the answer sets up a release as a defense to the matter stated in the bill, and the plaintiff replies generally, he cannot at the hearing read testimony impeaching the release as fraudulent.

3. No interrogatories can be put to witnesses which do not relate to some fact in issue between the parties; and testimony as to facts not stated in the bill or answer is to be rejected.

THE bill was originally filed in LINCOLN. The plaintiff alleged that David Wilson, his father, died in September, 1820, having, after sundry other legacies, provided as follows:

"I will unto my son Samuel Wilson, one-third part of the valuation of all my negroes.

"I will and bequeath to my son Moses Wilson (the defendant) one-third part of the valuation of all my negroes.

"I will that the other third part of the valuation of my negroes to be placed in the hands of my executors, for the support of my son Hugh L. Wilson, the plaintiff, and my executors to pay the interest of the amount annually during his life, then the principal to be equally divided among my children Samuel, William, and Polly. It is also my request that my son Moses take the negroes that may be valued for the support of Hugh L. Wilson, and pay the valuation into the hands of my executors"

—and that he appointed the defendant Moses and other executors; (182) that Moses only proved the will; that after the death of the testator the negroes were divided, when two girls were allotted for the support of the plaintiff; that the defendant Moses never had paid the valuation of those negroes to any person in trust for the plaintiff; that because of the renunciation of the other executor there was no person to whom it could be paid, and that therefore the defendant Moses held the slaves in trust for the plaintiff; that the defendant Moses had never paid the plaintiff any of the hire of the negroes, but had become insolvent, and for a nominal consideration had sold the slaves to the other defendants, who had notice of the plaintiff's claim. And the prayer was that another trustee might be appointed in the room of the defendant Moses, and the other defendants be compelled to reconvey to such trustee; and also for an account of the hire of the slaves and for general relief.

The defendant Moses, in his answer, set forth a valuation of the negroes of the testator, whereby two female slaves, the eldest of which was not 5 years old, were allotted to the plaintiff at $420, one-third of the whole value being $373.33. The defendant insisted that upon the true construction of the will he was only responsible to the plaintiff for the interest upon the latter sum for his life; and he averred that on 24 October, 1821, he for a full and fair consideration purchased of the plaintiff his interest in this annuity. The sales to the other defendants were admitted.

A general replication was taken to the answer, and the plaintiff filed proofs tending to impeach the fairness of the release set up by the defendant. A gentleman of the bar, who drew up the release and attested its execution by the plaintiff, deposed that at its execution the plaintiff was perfectly competent to make any bargain; that he, the witness, took the plaintiff aside and cautioned him against executing the release, which was disregarded by the plaintiff.

Hogg for plaintiff. (183)
Devereux for defendants.

RUFFIN, J. The bill assumes as the construction of the will that the negroes are bequeathed to the plaintiff; at least, that they are bequeathed to Moses in trust for him. If that were true, the defendants who purchased from Moses, with knowledge that he claimed the slaves under his father's will, would hold them subject to the trust declared in it. But I think it plain that the testator meant a sale of those slaves which should be allotted as the third provided for the plaintiff's support. He says that "one-third of the valuation of his slaves shall be placed in the executor's hands for Hugh's support." This is inaccurately expressed, but means that the executors should get and keep the value of those slaves in their hands. Then they could not keep the slaves themselves. But this is rendered clear by the further provision, "that the executors are to pay Hugh annually during the life the interest of the amount"—not the hire of the negroes and their increase. And then comes a disposition of the fund after Hugh's death, which is not of the negroes and their increase, but of "the principal," to be divided among three other children. If the will had stopped here, there could be no doubt that it would have been the duty of the executor to sell the negroes and put the money at interest for a life annuity to the plaintiff. Is this altered by the subsequent provision? That provision is expressed by way of request that the defendant Moses should take those negroes, valued (184) for the support of Hugh, and pay the valuation into the hands of the executors; and Moses and another are appointed executors, of whom the former proved the will. It is argued that if a sale was intended, a case has happened in which it was not so meant, and could not be made, because there was nobody who could sell to Moses, nor to whom he could pay the price. No act was necessary to complete the sale to Moses, but his own assent. The testator had already provided for that, and the terms, namely, that the negroes should be valued; which was only necessary in case Moses, being an executor, should take them under the bequest in the will. There is no complaint of an improper division or unfair valuation. That would be a distinct ground of relief, if it existed. But the bill affirms the division and valuation, and seeks the specific negroes allotted for Hugh. The meaning of the request to Moses to take those negroes could not be that he should hold them upon terms different, and with a less perfect and disposable interest than another purchaser. If he would not keep them himself, he might and ought to sell them, by the terms of the will; and in that case the purchaser would take them absolutely, and subject to no trust. If he kept them, why should his interest be less, or his title not as perfect? It is said, because he was executor. Not so. That might be a reason why they should be valued to him, and not to another; but none at all why he should not have

an indefeasible title, when he took them at valuation. The testator trusted him without security with the price, if sold to another. There seems to be no reason why he should not equally do so with the price in his own hands. I speak now of the meaning of the testator himself. Indeed, had the other executor proved the will, the defendant Moses would have been as much entitled as he to keep the price of the negroes. The intention, then, seems to be to sell those negroes to provide a certain support for Hugh by placing the value at interest. And this is the more reasonable inference when we find by the proofs that there were only five altogether, and that four of them were of little service. The two that were allotted for Hugh were young females, the eldest of (185) which was not 5 years of age, and would have been expensive for several years, instead of yielding anything towards the plaintiff's maintenance. But the testator wished the slaves to remain in his family, if his son was willing and able to buy them. This he requested him to do; but that request did not constitute a trust of the slaves, if the son took them as his own. The will is to be construed as a mode of proposing a sale, and not as encumbering the property with a trust, or embarrassing the purchaser in the disposition of it. Such a purpose would be inconsistent with the apparent strong desire that Moses should take them. For what more likely to prevent him than attaching such a trust to two slaves of their age and sex?

The interest of the defendant Moses must be declared to be an absolute one, if he assented to the purchase at all.

That he made an election in a reasonable time, and fairly, is placed beyond doubt by the contract and release executed to him by the plaintiff. The testator died in September, 1820. The negroes were divided and valued 25 October, 1820. And on 24 October, 1821, the plaintiff by his deed, in consideration of $107.50, released to his brother "the annuity" bequeathed by his father, and in his hands as the executor. From this it must be concluded that at that time it was perfectly understood that Moses had taken the negroes as his own property, and that all parties understood him to be responsible for the value. Upon the matter of the bill, therefore, touching any trust in the slaves, it must be dismissed as against all the defendants.

The bill, however, charges the insolvency of the executor, and prays general relief; which may be considered as a prayer to secure the fund and the annuity, if a proper case appears.

In the answer the release of October, 1821, is specially set up as a bar against this demand. While it remains in force, it is an absolute bar. Nor can it be annulled but upon a bill expressly impeaching it upon the ground of fraud, unless upon its face or from the rela-

(186) tion of the parties, the Court can declare it void. The fair execution of this instrument is proved by both of the subscribing witnesses; one of whom, an attorney, prepared it at the instance of the plaintiff himself. Other evidence has been taken by the defendant, going to show that the agreement on which it was founded was *bona fide* and fair; and the plaintiff has offered no proof to impeach it. If, therefore, the decision turned on the merits of the release, there seems to be no reason to suspect it upon the present state of the proofs. But the Court does not enter into that, because the pleadings do not impeach it, and the only matter in issue upon it is that made by the answer and replication, which is the fact of execution. The plaintiff cannot, therefore, offer proofs in this case impeaching the release; nor can the depositions of the defendant tending to sustain it be considered, because the whole is out of the pleadings. If the witnesses have sworn falsely, they have not been guilty of legal perjury, since they have been interrogated to facts not stated in the bill or answer nor in any manner put in issue. The Court cannot hear the proof; it would be error if we did. *James v. McKernon,* 6 Johns., 543; *Lyon v. Tallmadge,* 14 Johns., 501.

The relation between these parties was not such as to prohibit their bargaining altogether, and invalidate every treaty between them, however fair and advantageous to the plaintiff. The relation makes a dealing suspicious, and imposes the burden on the executor of showing very clearly that no advantage has been taken by him. The release is not therefore void, without proof *aliunde.* No proof has been or could be offered here. The release must, therefore, be established as a bar to this bill. But because the circumstances on which its validity depends are not open in this suit, the bill will be dismissed, without prejudice to filing another for the security or recovery of the annuity, and impeaching the release.

PER CURIAM. Decree accordingly.

(187)

JOHN HEATH v. JOHN COBB.

Where a judgment was confessed to the prosecutor by a prisoner confined in jail on a charge of larceny and arson, under circumstances which induced the court to enjoin it, but without any misconduct on the part of the prosecutor, *it was held* that it should stand as a security for the amount which might be recovered in another action to be brought by the prosecutor for the same trespass.

THE bill was filed in LENOIR, in 1826, and alleged that the plaintiff, being old, infirm, and poor, was falsely accused by the defendant, a man

of wealth and influence, of stealing cotton, and afterwards burning the gin-house to conceal it; that being arrested on this charge, and unable to find sureties for his appearance, he was confined in jail from 10 August, 1825, until the commencement of the term of the Superior Court in October ensuing; that during this period the defendant, by his agents, informed him that if he would confess a judgment for $150, it should not be enforced, if he, the plaintiff, suffered corporal punishment in consequence of the prosecution; that believing from this proposition that the defendant would not only abandon the prosecution, but wished him so to understand it, in consequence of his poverty, his forlorn situation, and his imprisonment, he consented to do so; and being brought into the courthouse from the jail, confessed the judgment. The plaintiff then averred his innocence, and that the grand jury, after examining the witnesses for the prosecution, ignored the bill of indictment against him. The prayer was for an injunction against the judgment.

The defendant, in his answer, insisted that the plaintiff was guilty of the theft with which he was charged, and that while awaiting his trial frequently made application to him to compound the prosecution, and offered to pay him $250, the estimated amount of his damages, which the defendant positively refused; that after repeated solicitation, he consented to permit the plaintiff to confess the judgment mentioned in the bill, in satisfaction of the damages he had sustained. But the defendant positively denied that he ever promised the plaintiff that the judgment should not be enforced in case corporal punishment (188) was inflicted upon him, or that he ever gave the plaintiff to understand, or any reason to hope, that the confession of the judgment should in any way affect the criminal prosecution.

A replication was filed and testimony taken, which is stated in the opinion of his Honor, Judge HALL.

Mordecai for plaintiff.
Gaston for defendant.

HALL, J. It appears from the testimony in this case that the plaintiff was a principal actor in selling the cotton that had been stolen from the storehouse of the defendant. From his advanced age, it is not very likely that he participated in fact in the arson which was committed to conceal the theft. But it is more than probable that he was privy to it. All the circumstances of the case form a mass of evidence against him, of a very suspicious character. Being in this predicament, it is necessary to ascertain whether he confessed the judgment to the defendant under a sense of justice, and with a view to make remuneration for the injury done him, or whether he did so from the influence of fear or

apprehension, arising from the prosecution then pending against him, and with a hope that the due course of law might thereby be averted; and whether the latter expectation was not cherished by the overtures made to him by the defendant and his agent.

Freed from all restraint, it is not very likely that a man whose conduct has been represented in so criminal a point of view should in the course of a few weeks return to a sense of reason and justice, and voluntarily make amends to the injured party for a crime that he had committed, and thereby tacitly acknowledge that he was the author of it. The defendant's first object seems to have been to be compensated for the loss he had sustained, rather than bring to punishment an infirm old man. In the first, he was governed by a sense of justice due to himself. In the latter, his humanity might have been predominant. He forebore making any settlement with the plaintiff, owing to an (189) apprehension that its interfering with the prosecution against the plaintiff might make it a nullity. But he took counsel, and was advised that he could not compromise the prosecution, but that if the plaintiff was found guilty, he could say that he would not crave a judgment against him. To this he assented; and of this the plaintiff was informed by the defendant's agent, Blount, whilst he was in jail. Connected with this part of the case is the testimony of Daniel Daughtry. He says that Blount, the defendant's agent, told him to tell the plaintiff that if he would come into court and confess judgment for $150, that he should have a credit of twelve months; and that if he suffered any corporal punishment, the judgment should be void. Daughtry states that he made this known to the plaintiff, and that the plaintiff asked his advice. He, Daughtry, told him he did not know what would be sworn against him. Plaintiff said it might be best to confess a judgment, for he was fearful of false swearing. Daughtry then informed Blount that the plaintiff was willing to confess a judgment. To a question asked Blount, he said he did not recollect having such conversation with Daughtry, but he does not say that such conversation did not take place. He states himself, however, that he told plaintiff if he was found guilty the defendant would not crave judgment against him. Frederick Jones says that Daughtry came to Blount and wished a compromise of Heath's business. Blount told him that if he would give $250, and leave the State or county, he would do so. Daughtry then asked what would become of the prosecution. Blount answered, he would see to it, or attend to it. John Stevens, who seems to have been a fellow prisoner of plaintiff, says that Blount went into the jail as often as twice, and proposed to the plaintiff to make up for a certain sum, and told him that he would not see him take the whipping he would have to take, for $20.

From this evidence, the impression on my mind is irresistible that the judgment was confessed under the influence of a hope held out by the defendant Blount, either that the due course of law would be averted or that if it was not, and the plaintiff was punished, the judgment should be of no effect. No doubt, the plaintiff may owe, (190) and in justice ought to pay, to the defendant the amount of the judgment confessed. But individual justice to the defendant is not to be preferred to the public justice that is due to the community. Sound policy forbids it; and the prosecution against the plaintiff may be some proof why it should forbid it. For the defendant says that although the testimony appearing in this case was presented to the grand jury, they found the bill not a true bill, as he supposed, through humanity to the aged prisoner. Might it not have been, too, through a favorable impression made upon the jury by the prosecutor, after the confession of the judgment to him?

I think the defendant ought to be enjoined from proceeding on or making any use of the judgment complained of. But it may be held as a security for any amount which the defendant shall hereafter recover against the plaintiff. And the plaintiff is enjoined from pleading the statute of limitations, in any suit that may be brought by the defendant to recover the amount due on account of the subject-matter for which the judgment was confessed.

RUFFIN, J. The evidence satisfies my mind that the judgment was confessed by the plaintiff for the sake, at least, of softening the prosecutor. It is not alone for the agreed damages for the civil injury. Nobody can believe that such a security would have been given had the indictment been at an end. The judgment is the original security given, and is therefore open for this Court to act on, as a bond would be at law. The plaintiff was under a duress in the eye of a court of equity. He was in prison, charged with an infamous offense, and hoped to conciliate both the injured party and the court. Securities thus obtained ought not to be obligatory. Free consent is wanting. I do not put it on the ground that the defendant or his agent practiced upon the plaintiff's fears, or used improper means to influence him. They acted as fairly as they could, and did nothing wrong, except in the single fact of taking a judgment from a man in the plaintiff's situation and (191) state of mind. He was not in a condition to be dealt with in reference to the act out of which grew the criminal charge. He could not and did not stand upon his rights. He felt himself in the other's power, and, with a spirit subdued, was willing to surrender them, without reference to the actual damage sustained by the defendant, and to

yield to any of his demands, upon the hope, clearly entertained by him, that he would fare the better upon the prosecution. I think both upon the principle of the public policy, which forbids the compounding of prosecutions, and of duress as understood in a court of equity, the plaintiff must be relieved.

But as I by no means consider the defendant obnoxious to the censure of actual oppression or imposition, and as his loss, by the theft and the burning connected with it, are established beyond doubt, and as the participation of the plaintiff in the former act is clear, and that in the latter probably to be inferred, I think the judgment is not forthwith to be perpetually enjoined. While the defendant cannot have full advantage of it, the Court must take care that he suffers no loss by it. During its existence, the defendant could bring no suit at law for the trespass. But the plaintiff is not to escape answering altogether for the trespass, and at the same time avoid the judgment in this Court. The defendant may, therefore, have liberty to institute now an action at law to establish the trespass alleged by him, and the damages sustained, in which the plaintiff shall not plead the statute of limitations; and the judgment must stand as a security for the damages that may be assessed by the jury; and after the verdict, the parties have leave to move for further directions.

PER CURIAM. Decree accordingly.

Cited: Meadows v. Smith, 42 N. C., 10.

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(192)

JAMES REEVES v. MEREDITH ADAMS AND ANDERSON BLACKWOOD.

Arbitrators, officers of corporations, and solicitors who have aided their clients to commit frauds may be made defendants. But the rule is different as to a mere witness, who has no interest in the cause, and against whom no relief can be given. If he answers, the bill, at the hearing, will be dismissed as to him, with costs.

THE plaintiff in his bill, which was filed in ORANGE in 1826, sought to set aside the sale of a lot in the town of Hillsboro, made by the plaintiff to the defendant Adams, under circumstances of gross fraud. The relief as to Adams was clear, and the only doubt was whether the defendant Blackwood was not unnecessarily made a party. As to him, the facts were that he went with Adams to the house of the plaintiff, at the time when the latter was made drunk by the former, and when

the deed for the lot was signed, which was witnessed by Blackwood, who endeavored to get a part of the purchase money to secure a debt due another person, in which he failed.

Nash and Winston for the defendant.
Ruffin and W. H. Haywood for plaintiff.

The cause was held under advisement several terms.

HALL, J. It appears to be a general rule that a person who is merely a witness shall not be made a party defendant; because, having no interest in the cause, no decree can be made against him, and because the party may have the full benefit of his testimony by (193) examining him as a witness. *Plummer v. May,* 1 Ves., Sr., 426; *Fenton v. Hughes,* 7 Ves., 287; *McNamara v. Williams,* 6 Ves., 143.

But to this rule there appears to be some exceptions. Arbitrators have been suffered to be made defendants. *Lingwood v. Croucher,* 2 Atk., 396; *Chicot v. Lequesne,* 2 Ves., Sr., 315. Clerks of corporations may also be made defendants, for the sake of discoveries, because the answers of corporations are not upon oath, and are therefore not evidence. *Wyche v. Meal,* 3 P. Wms., 310; *Moodalay v. Morton,* 1 Br. C. R., 469; *Dummer v. Chipenham,* 14 Ves., 251. And *Lord Redesdale* has decided that a solicitor, assisting his client in obtaining a fraudulent release, was properly made defendant, and liable for costs, if the principal was insolvent. *Bowles v. Stewart,* 1 Sch. & Lef., 227.

In the present case the defendant Blackwood appears to have no interest in the cause, and no decree can be entered against him. It was therefore unnecessary to make him a party. The plaintiff might have had the benefit of his testimony without doing so. For these reasons, I am of opinion that he should be allowed his costs.

PER CURIAM. Bill dismissed as to Blackwood, with costs.

DECEMBER TERM, 1832

RICHARD BOYD ET AL. v. JOHN D. HAWKINS ET AL.

1. Where one, who had become surety for an insolvent person, was, in order to obtain forbearance, compelled to convey his estate as a security for the debt, to a trustee nominated by the creditor, who also became assignee of the effects of the principal debtor to secure the surety, *it was held* that a subsequent agreement, whereby the surety gave the trustee one-fourth of the principal debt, as a compensation for managing it, was invalid.

2. To prevent frauds, courts of equity do not permit trustees to purchase the trust estate at their own sales.

3. The rule also forbids a trustee from purchasing for his own benefit an encumbrance on the trust estate.

4. And it extends to all persons standing in a fiduciary relation to the estate.

5. Bargains between trustee and *cestui que trust* are not void; but they are viewed with great jealousy.

6. If they result from the annexation, they cannot be sustained.

7. If a sale by *cestui que trust* to trustee be the effect of the unbiased judgment of the former, it must appear how this judgment was produced, and whether by pecuniary distress of which the trustee availed himself.

8. A sale by the *cestui que trust* to the trustee, made while the connection existed, the consideration of which was a discharge of duty by the trustee, cannot be supported.

9. Especially where the trustee was one for sale, imposed upon the *cestui que trust* by his creditor, having all the influence of the latter.

10. And where the *cestui que trust* was ignorant of the value of the estate sold in distress, and confided in the friendship of the trustee.

11. In this State trustees are entitled to nothing but their expenses.

12. A stipulation for compensation made when the relation was contracted will be supported unless the trustee be one for sale, nominated by the creditor.

13. If subsequently arranged, it is only evidence that gratuitous services were not intended, and will not be regarded as a measure for its allowance.

14. The purchase by a trustee of an encumbrance upon the trust estate enures to the benefit of *cestui que trust*, and a sale of one-fourth of the estate in consideration that the trustee will surrender the judgment is made by *cestui que trust* in ignorance of his right.

15. And such a sale made when the *cestui que trust* was in pecuniary distress, fearful of the sinister influence of the trustee, and under mistaken estimates of his services, cannot be supported.

16. And a subsequent deed will not help it, unless the *cestui que trust* knew that the first was invalid, and intended the second as a confirmation.

17. Where a deed is pleaded, or only stated in the answer as a bar to the relief, without having been mentioned in the bill, the replication puts only its execution in issue, and it cannot be impeached by proof of collateral facts.

18. But it is otherwise where the deed, with all its attending circumstances, is set forth in the answer, and is made the foundation of a charge against the plaintiff.

19. At the hearing a deed thus brought forward is not decreed to be canceled, because relief of that kind is not sought, not because it was not in issue.

THE bill charged that on 2 July, 1824, the complainant Boyd, being largely indebted (about $34,000) to the State Bank of North Carolina, as surety for his brother, Alexander Boyd, did, for the purpose of obtaining forbearance, and also securing the payment of that debt, convey to the defendants Hawkins and Robards, as trustees, eighty slaves and sundry large tracts of land, including one on the Roanoke in Warren County, containing 4,000 acres; that he had since paid the debts and received a discharge from the bank, and a declaration to that effect to the trustees, and had requested a reconveyance according to the terms of the deed, but that the defendant Hawkins alleged that the plaintiff was indebted to him for compensation for services rendered under the deed, and advances made in discharge of the debts, and refused to convey, but had in his name and that of his cotrustee advertised the Warren land for sale, and instituted an action of detinue for the slaves. The bill denied any debt from the plaintiff to Hawkins, and (196) averred a willingness to make a reasonable allowance for his services or by way of commissions (for which there was a provision in the deed, the amount to be determined by the bank), and insisted that Hawkins was largely indebted to Boyd upon his transactions as trustee in another deed, executed on the same day, and for the same purposes as the former, for certain property in Virginia, for the settlement of which a bill had been filed by Boyd in a court of chancery in that state; that Hawkins put in an answer to that bill, insisting upon sundry demands arising to him upon this last deed, and also for services rendered touching the estates in North Carolina, conveyed by the deed first mentioned. The bill then stated a subsequent mortgage by Boyd to the other plaintiffs, Thornton and Davidson. The bank and the trustees were made defendants, and a reconveyance prayed, and in the meantime an injunction against the sale and action at law, and general relief.

The answer of the bank admitted the payment of the debt, and submitted to a reconveyance, but not so as to interfere with any just claims the trustees might have against the estates.

The defendant Robards, in his answer, set up no claim on his own behalf, and admitted that it was understood when the deeds were signed that he was not to be active in the execution of the trusts, which were expected to be very troublesome, particularly in relation to the property in Virginia, but that the defendant Hawkins was to undertake the sole

management of it; that he did manage it successfully, and at much risk and trouble, and greatly to the advantage of Boyd in many particulars, which were mentioned in the answer of Hawkins himself.

That answer, upon which arose all the material questions in the cause, stated that Alexander Boyd, of Mecklenburg County in Virginia, owed the large debts for which his brother, the plaintiff Richard was surety, to the State Bank, and also a further debt of about $9,000 to Richard himself; and that becoming entirely insolvent, he (Alexander)
(197) conveyed by deed of trust to one Rainny and others, on 11 June, 1824, as a security to Richard Boyd, a very large estate consisting of many tracts of land in that county, about 140 slaves, the crops growing on sundry plantations, besides his stock, plantation wagons, tools, etc.; that he had before conveyed to Henry Fitts of Warren County, as a counter security for Richard Boyd's endorsements, several tracts of land and other property in this State. It further stated that the bank had a considerable part of its debt in judgment, and was about proceeding to a sale of R. Boyd's estate in Warren, and that such was the prospect of his distress from those and other debts which he owed, and the small sum which he expected to realize from Alexander Boyd's conveyances, in consequence of previous encumbrances, that Richard Boyd himself apprehended insolvency, which it was generally supposed would be the case in the winding up; that it was of the last consequence to him to gain indulgence, and also to have his claims under A. Boyd's assignment vigilantly attended to and pressed, and that the bank would not forbear unless he made a deed of trust to persons in whom the directors had confidence; that application was made to him (Hawkins) by Boyd and his friends, but he declined because he was aware, from the nature of the business, that it would occupy much of his time and take his attention from his own affairs, and also because he doubted Boyd's integrity from previous transactions, upon which a difference had arisen between them; but that at length, upon a second application urgently made, he gave his assent, being the brother-in-law of R. Boyd, and wishing to serve him, as he seemed greatly distressed by his embarrassments and impending ruin; that the parties came to Raleigh, and the deed mentioned in the bill was executed; that but little was then expected by the bank or R. Boyd to be received under the assignments of A. Boyd, but that the president of the bank, after the execution of the former deed, proposed that R. Boyd should transfer the benefit thereof to the same trustee, for the same purposes, which was immediately done; that
(198) Hawkins was to take on himself the active part of the trusts which all parties expected to be difficult, perplexing, and troublesome, and probably leading to much litigation; that he proposed to the bank

to give him the liberty of drawing for money to discharge other encumbrances, but was refused, unless he would become personally responsible, because the debt was considered as large as could be safely trusted upon the personal security of Boyd, or that of his property conveyed, which was all, or nearly all, he had. The answer further stated that all the property conveyed to Fitts by A. Boyd had been sold under executions, and could only be recovered by suits; and Boyd engaged the defendant to recover that, also; that R. Boyd himself was indebted to other persons in several sums mentioned, amounting to $6,000, for which there were judgments or deeds of trust, on which sales were threatened, as he had no funds, and was incapable of action himself, or had given over exertion in despair. It was further stated that Alexander Boyd owed a debt to one B. Burwell of about $20,000, for securing which there was a deed of trust for about ninety of the slaves mentioned in the deed to Rainny and others; that he was indebted to others by judgments in Virginia, on which executions had been sued, having a lien prior to the deed of 11 June, and amongst them one in favor of Thomas Brown, for about $8,000 and interest, which appeared from an exhibit to have been against R. Boyd. The answer proceeded that on 4 July the defendant heard that the executions of Brown and others, to the amount of $10,000, were levied on the slaves, work horses, and other effects, on the plantations, and that sales would be forced, which would prove destructive to the growing crops and ruinous to R. Boyd; that he went over to Mecklenburg, and urged the trustees there to assert their right, but found they could do nothing, because the executions had the preference; that the slaves conveyed for the security of Burwell were also advertised to be sold, and if the sales had then been made the executions alone would not have been satisfied; that R. Boyd, who went to Virginia with the defendant, returned and left him there to contest the matter; that (199) he proposed to Rainny and the other trustees in the deed of 11 June to assign their legal title to him (Hawkins), to which the two Boyds assented, and the conveyance was made on 8 July; that in this state of things, for the purpose of averting an immediate sale, he purchased from Brown, on 11 July, his judgment, and took an assignment to his own use, by giving his own bond for the amount; that this purchase was made without consultation with Boyd, and being without any understanding for an indemnity, or any funds in hand belonging either to Boyd or the trust, and when Boyd was believed to be insolvent, it was founded exclusively upon his own responsibility, and enured to his advantage; that under the executions a sale was made, at which Hawkins, acting by R. Boyd as his agent, purchased nearly all the property, to the amount of about $9,000; that he refused to deliver the negroes con-

veyed to Burwell until the crops were finished, and with those and his own purchases he did finish the crops, after guaranteeing to the overseers their wages; that he then surrendered the negroes to Burwell, for which he had a deed, and that the property bought at execution sale and the crops, upon a resale afterwards made, produced the sum of $17,855.94, besides a quantity retained by Boyd, and never resold, to the value of $4,257.99, making together $22,113.93.

The defendant insisted that as the judgment was his, and the purchases his, he was entitled exclusively to all the profit, but admitted that he told R. Boyd that although he had not acted as trustee in the purchases, he did not mean to speculate on his difficulties, for which great gratitude was expressed. It was further stated that R. Boyd owed large debts to several persons, secured by deeds of trust or judgments, among which was one to Fitts for $2,100, one to Palmer for $4,200, and one to Cannon for $800, and that Boyd was wholly unable to meet them, and made no effort to do so; that the last was satisfied by a bond of Boyd, with Hawkins as his surety; the first by a sale of one of the tracts of land
(200) conveyed in the deed of 2 July, and a new bond of Boyd, with Hawkins as his surety; and that to Palmer by a sale of another tract of land conveyed in the same deed, which was not worth more than $1,500, but was taken in full satisfaction of the debt, from the apprehension of Boyd's insolvency; that these responsibilities were dangerous in the situation of Boyd, at that time, before any part of the debt to the bank was paid, and made it necessary for him to indemnify the other trustee before he would join in conveying to the purchasers. The answer then proceeded that R. Boyd, being impressed with the value of the defendant's services rendered, and those to be rendered, which would for a long time cause the neglect of his own affairs, and especially in consideration that the defendant, after making the profitable speculation on Brown's judgment, had voluntarily given him the benefit of it, offered, without persuasion and with a full knowledge of all the premises, to give to the defendant one-half of all the estates, real and personal, which had been or might be secured from Alexander Boyd's property; that the defendant refused that offer, but that afterwards, on 13 September, 1824, the plaintiff Boyd, after free consultation with his own friends, and in the absence of the defendant, executed and then delivered to Hawkins a deed, which was exhibited, and which secured to Hawkins one-fourth part of those estates of every kind, thereby adding the inducement of interest to excite the defendant to the greater activity; that Boyd never had pretended to the defendant, personally, that he was in any manner deceived in the execution of the instrument, for he well knew that he had often offered more, and that under all the circumstances

it was not more than adequate, and that he confirmed it by another deed on 28 October following, which was also exhibited. That the defendant, although entitled to retain one-fourth as the funds came in hand, yet, as R. Boyd was pressed by the bank debt, had applied all its receipts to its satisfaction, and in so doing advanced what was his own, without even fully satisfying the bond debt of Brown, on which there was a balance due of $1,946.39. The answer pro- (201) ceeded to specify the lands and their value, amount of debts and effects obtained from A. Boyd, besides the chattels covered by the beforementioned executions, which amounted to the sum of $17,950 in value; of which the defendant claimed one-fourth, being an amount realized from the assignments of A. Boyd of $35,805.94, although it was deemed worthless when the defendant's trust commenced. It was further stated that the defendant afterwards essentially served R. Boyd in effecting sales of portions of his lands in North Carolina, by which he was enabled to discharge his debts and save all his negroes, and one-half of his manor plantation, worth $25,000, although Boyd himself, in his distresses, had offered to take $30,000 for the whole, which Hawkins refused to ratify, because he considered it far below the value, and believed he could himself get much more; that in making that sale and others, he was obliged to indemnify his cotrustee, and also became responsible to other encumbrancers for sums which had since been discharged by Boyd or out of the trust funds. The answer proceeded to state that after R. Boyd's affairs were thus rendered prosperous, a difference arose between him and the defendant about the claims of the latter for commissions, advances, etc., and that the defendant rendered an account and demanded a balance of $8,494.34½, which Boyd refused to pay, and that the defendant advertised the sale, and brought the suit as charged in the bill, for the purpose of satisfying himself. The answer admitted the pendency of the suit in Virginia, in which the transactions in this State were embraced; but the defendant averred that he was not restrained by any order therein from asserting his demands in this State, and insisted that the pendency of a suit in another state could not affect the jurisdiction here, between citizens of this State, and claimed the right of making a full defense and setting up all his demands. The answer further stated that the first deed of 2 July contained a clause allowing the trustees a reasonable compensation, and that it was omitted in the other by accident, or because the interest was then thought too inconsiderable to require a stipulation. It was further stated (202) that the defendant was prosecuting an action of ejectment in Warren against William Hunt and John C. Goode for a valuable tract of land which those persons had purchased under execution, as the estate

of Alexander Boyd, and which had been conveyed as before mentioned, by A. Boyd to Fitts as trustee for R. Boyd, of which, if recovered, the defendant also claimed one-fourth. The expenses of prosecuting this suit were charged in the general account against R. Boyd. The whole concluded by insisting that the defendant's attention had been faithfully bestowed for several years on the business of R. Boyd, to the injury of his own fortune; that he was entitled to liberal compensation; that the agreement for it was freely and fairly made and that such an agreement to buy his efforts ought, upon their success, to be fully executed. To the answer were annexed detailed accounts, showing the plaintiff Boyd to be the debtor of the defendant for about the sum above mentioned, if the defendant was allowed credit for a share of the proceeds of A. Boyd's estate; but if he was not so allowed the balance was on the other side; and also a list of R. Boyd's debts for his brother and on his own account, which in July, 1824, amounted to $59,439. A general replication was put into the answers.

There were numerous exhibits, among them the executions in Virginia, on which the sheriff had frequent sales from 27 August to 20 September, 1824, of which the principal ones were on 13 and 15 of the latter month. The deed of 13 September was in the following words:

"The undersigned, R. Boyd, is bound to the State Bank of North Carolina, as security for his brother, Alexander Boyd, to the amount of $32,600, or thereabouts, and Alexander Boyd is indebted, beside, to Richard Boyd nearly $9,000 individually; and to secure said Richard Boyd from the aforesaid bank debt, as well as to pay him his private debt as aforesaid, Alexander Boyd has consented that a conveyance be made to John D. Hawkins and his heirs in trust, and who is the assignee (by the consent of the parties concerned) of Philip Rainny and others, the original trustees, of sundry property, including the growing crops, etc., as will better appear by referring to the deeds themselves of record
(203) in Mecklenburg County. And whereas, by virtue of an execution at the instance of Thomas Brown, of Granville County, North Carolina, of $8,000 or thereabouts, the negroes as well as other property of Alexander Boyd were taken by the sheriff of Mecklenburg into his custody to pay said Brown's debt, which would have destroyed the crops of the said Alexander Boyd, and been attended with great expense beside, in keeping the property at the sheriff's house and injury to said Richard Boyd, for whose benefit said property was conveyed. And whereas John D. Hawkins, in order to benefit said Richard Boyd, purchased said judgment and execution, and had the property to remain upon the plantations, but at the said Boyd's risk, to advance the interest of the crops for the benefit of said Richard Boyd; and whereas said

Hawkins has moreover, by his timely advances and exertions, in other respects prevented said Richard Boyd's own estate from being sacrificed by R. H. J., who was about to sell as trustee, for the benefit of Henry Fitts; and whereas said Hawkins has been at unusual trouble and disadvantage in protecting the rights, credit, and property of Alexander Boyd for the benefit of said Richard Boyd, and also about the said Richard Boyd's property generally, which was vitally exposed; and whereas Alexander Boyd conveyed by deed to Henry Fitts, in trust for the benefit of Richard Boyd and Francis A. Thornton, to secure the payment of the aforesaid debts to the bank, and to Richard Boyd, a variety of property, as will appear by reference to said deed of record in the county of Warren, North Carolina; and Henry Fitts, by the consent of the parties, has assigned his powers, rights, and authority under the deed to John D. Hawkins and his heirs, also in trust for the same purpose; and inasmuch as the execution of this latter trust will involve much litigation and trouble, all the property conveyed by it having been sold by execution, and all the other property is more or less liable to legal difficulties and expense, which expense in all cases respecting the property in question, and the business attending it, said Richard Boyd is to pay: Now, in consideration of the premises and as well as that said John D. Hawkins is yet to be at much trouble in executing the premises, I, Richard Boyd, do hereby promise and agree to give said Hawkins 25 per cent upon all the proceeds of the sales of said Alexander Boyd's property which has been sold, and shall again be sold, and upon all sales hereafter to be made for the benefit and protection of said Richard Boyd, to satisfy said bank debt, and said Richard Boyd's private claims as aforesaid; and said Hawkins, as trustee as aforesaid, is hereby authorized to retain accordingly, for compensation, in his own hands. In witness, etc."

Two other agreements between R. Boyd and Hawkins were also exhibited by the latter, dated 25 October, and the other 7 December, 1824, whereby it was agreed that all the property bought by R. (204) Boyd as agent of Hawkins under the executions, and certain other of the estates of A. Boyd which had been bought in, should be resold to the best advantage by Hawkins for the purpose of paying the debt to Brown, and then giving Boyd the surplus for the payment of his debt to the bank, Boyd being responsible for the forthcoming of the property for a resale.

There were many depositions which are not material to the points on which the case was decided, except three. One of them was that of J. W. Hawkins, the brother-in-law of Boyd and the brother of the defendant, taken by the latter, who proved Boyd's extreme distress upon the failure

of his brother Alexander, and his expectation of being reduced to utter poverty; that he was extremely anxious to gain the favor and services of the defendant, and entreated the witness to intercede for him, and that Boyd's situation and wishes were, by the witness, made known to the defendant, who was ultimately prevailed on to undertake the trust. This witness saw Boyd upon his return from his first visit with Hawkins to Mecklenburg, and learned from him that he had fled to avoid being put in jail by his cosureties for the debt to Brown, and advised him to return; but he said he would not, for he thought nothing could be made of the wreck of Alexander Boyd's estate, and that he could be of no service, but would leave it to the defendant; that he further said that he did not know what to do, for he could not go home, because a *ca. sa.* against him was in the hands of the sheriff of his own county. At a sale of A. Boyd's property, at a plantation called Davis's (which the return of the sheriff on Brown's execution showed was on 1 September), R. Boyd told the witness that his prospects brightened, and that the defendant would save him much more than he had expected, and talked of a resale. The witness said that as he knew everything rested on the defendant Hawkins, he inquired the terms on which he was to manage the business, to which Boyd replied that he should have his own asking, if it were half, for he could not do without him, and readily agreed, upon the suggestion that (205) half was too much, to give one-fourth. He shortly afterwards heard Boyd say that A. Boyd's property would yield but little; that he had come to the determination to give up all chances of gain from it to the defendant, and, after satisfying some executions, sell his own property, and particularly his land, at $25,000, pay his debts, and move away. This witness further proved that the defendant was engaged the greater part of his time, until the latter part of 1826, in the execution of the trust, and that R. Boyd declared his own embarrassments to be such that he gave up the entire management to the defendant, whose exertions had saved him from bankruptcy.

The second deposition was that of P. R. Burwell, of Virginia, who stated that the defendant had told him that he had reconciled an old difference with R. Boyd, and had agreed to manage his affairs, as he viewed him to be incompetent and almost deranged, and that A. Boyd's other creditors must not blame him for anything he did, as he acted without fee or reward. The witness replied that it was surmised otherwise, and that his object was said to be to get Boyd in bonds, and secure to himself all the advantages of the wreck of A. Boyd's property; which the defendant desired him to contradict, as he intended to make no charge, except for his expenses.

The deposition of Mr. Young, the subscribing witness to the deed of 13 September, stated that R. Boyd brought the agreement to him, in the

courthouse yard at Mecklenburg, already signed, and requested him to witness it, which he did, and that Boyd seemed not to be dissatisfied with it, and although in private, expressed no reluctance in executing it, but seemed to do it freely. No particulars of the conversation were given.

The agreement was admitted to have been drawn up by Hawkins himself, and appeared, from the ink, to have been written at a different time from that of its execution. It was also admitted that Mr. Young married the daughter of Hawkins and the niece of Boyd.

Upon the coming in of the answers, an order was made for a dissolution of the injunction unless the plaintiff should pay certain sums alleged to be due to Brown, for which Hawkins continued responsible; and under that order he paid into court the sum of (206) $1,930.48 on 19 May, 1829, and $79.67 on 8 July, 1829.

By an order in the cause, the master was directed to take an account of all the transactions, upon the trusts in both states, and of Hawkins' responsibilities for Boyd. A report was made, in which the master allowed the defendant Hawkins the full benefit of the agreement of 13 September, and also the sum of $782.77 by way of commissions at 3 per cent on the sales of property in this State, and payments made to the bank. The effect was to give to Hawkins, for the execution of all the trusts, including interest, the sum of $10,036.10, and to leave a balance due to him of $7,026.03. All the expenses of every kind, including those of finishing the crops and getting them to market, and of lawsuits, amounting to about $2,500, were charged to Boyd; as was also the sums paid on the debt to Brown. So that the fourth part assigned to Hawkins was of the gross proceeds on a resale, or of the value of such parts as had not been resold, of all the estates obtained under the assignment of A. Boyd. If the claim of the defendant Hawkins under the deed of September 13 was not sustained, then by the accounts stated by the master he would have in his hands the sum of $2,505.16 as a balance for receipts on resales of the property bought under the executions, and the crops in Virginia, after allowing all expenses and payments thereout to the bank and others on account of R. Boyd, and also the further sum of $400 for the price of negro Patty, and a surcharge in account, making, together, the sum of $2,905.16, besides interest thereon, due to R. Boyd. This did not include the sums paid under the interlocutory order, because they went in satisfaction of the balance due to Brown, which balance the master had nowhere charged in the accounts to the plaintiff.

To the report the defendant Hawkins excepted because the allowance of $782.77 as a commission of 3 per cent on the payment to the bank was too small. The plaintiff also took numerous exceptions, the first of which was against any allowance of credits to Hawkins (207)

founded upon the deed of 13 September, and the others because, if any should be made, the allowances were too large, and extended to property to which it was contended the deed did not relate.

Attorney-General and Devereux for plaintiff.
Gaston, Badger, and W. H. Haywood for defendant.

RUFFIN, J., after stating the case: From the shape of the pleadings in this case the principal question arises upon the first exception of the plaintiff's to the master's report. That question is as to the validity of the deed of 13 September, 1824, which is brought forward in the answer of the defendant Hawkins.

The well established principle of equity, which has been repeatedly recognized by the courts of this State, is that a trustee cannot purchase the trust property, directly or indirectly, at a sale made by himself, either privately or by auction. It is founded on the notion that it exposes him to temptation and the *cestui que trust* to imposition. Although no actual fraud be proved, the contract is invalid by reason of the danger of fraud. The same policy forbids a trustee from dealing in encumbrances on the trust estates. His situation opens sources of information to him of the value of the estate, the necessities of his *cestui que trust,* and his capacity for encountering difficulties and clearing away the encumbrances, or his disposition to submit to hard terms for obtaining indulgence, or making satisfaction of them. Besides, most commonly, the trustee has in his own hands the funds out of which they are to be satisfied, and the profit which is made on such purchases should enure to the owner of the fund, which in fact causes the gain. A familiar instance of this is the purchase of a debt of the testator by the executor. He can hold it as a security only for what he paid; and this as well against creditors as lega-
(208) tees. This principle has been extended to every case which comes within the reason of it, and to all persons standing in a confidential relation to the fund. He who by contract, or the course of this Court, is charged with the interests of others, and therefore bound to protect and advance them as far as he honestly can, shall not be allowed to speculate either upon those interests or in anything else at their expense. Hence, solicitors, agents, stewards, and guardians, as being in the nature of trustees, are forbidden, as well as executors and express trustees, from buying the estate, or buying for their own benefit any charge upon it. This doctrine is so well settled as to need no reference to authority.

The prohibition of the trustee to purchase from the *cestui que trust* himself is not found to be so absolute. There are cases in which contracts between them have been supported. But the same danger that has

induced courts to declare transactions of the nature just mentioned to be void has imposed restrictions upon the power of contracting with the *cestui que trust* which, in effect, almost extinguishes it. Bargains between them are viewed with anxious jealousy. It must appear that the relation has ceased, at least that all necessity for activity in the trust has terminated, so that the trustee and *cestui que trust* are two persons, each at liberty, without the concurrence of the other, to consult his own interest, and capable of vindicating it; or that there was a contract definitely made, the terms and effect of which were clearly understood, and that there was no fraud or misapprehension, and no advantage taken by the trustee of the distresses or ignorance of the other party. The purchase must also be fair and reasonable. *Coles v. Trecotrick,* 9 Ves., 246; *Fox v. Macreath,* 2 Bro. C., 400. These cases are not allowed to turn on nice inquiries whether it might not possibly be for the benefit of the *cestui que trust* to make that particular contract rather than none at all; but when there is a fair judicial doubt, as some of the cases express it, whether the trustee has not availed himself of his confidential situation to obtain selfish advantages, the contract cannot stand. *Ormond v. Hutchinson,* 16 Ves., 107. In other cases the chancellors have (209) said that the trustee must show demonstratively that he had given the *cestui que trust* the advice he ought, were a third person in treaty; that he dealt with himself as he would with a third person, and did not take a bargain which he would not have advised his *cestui que trust* to make with another, or it cannot be supported. *Dunbar v. Tredennick,* 2 Ball. & Beat., 314. Were it to appear that the transaction was the effect of the free and uninfluenced judgment of the principal or *cestui que trust,* with a perfect knowledge of all the circumstances and consequences, gained from the communications of the agent, yet it will remain to inquire how that judgment and intention were produced, and whether it was not the effect of pecuniary necessity, of the knowledge of which the trustee was availing himself. *Hugonin v. Basely,* 14 Ves., 300. When it is said, therefore, that a contract between the trustee and *cestui que trust* is not *per se* void, but may be made under these restrictions, it is hardly taking a step; for it is requiring us to change our natures. It is telling a man that he must go out of himself, and in making a bargain must gain nothing, which amounts nearly to a total prohibition. Yet less would certainly not do, for it would leave the helpless a prey to those whose duty it was to protect them.

There will, with the aid of these authorities, be little hesitation in the mind of any how the Court is obliged to deal with the contract in question. The defendant, by the deed 2 July, became the assignee for Richard Boyd of the security created for him by his brother in the deed to

Rainny of 11 June preceding. On 8 July, upon the defendant's own proposition, he was also invested with the legal title in those estates, by a deed from Rainny in which the Boyds joined. He says he accepted this last trust because R. Boyd was altogether unable to manage his own interests, had no credit, and had left the county of Mecklenburg, or, as J. H. Hawkins proves, had fled in dismay, and because great energy was required to conduct it, which the original trustees would not
(210) exert. Hawkins then understood perfectly, when he assumed this relation to the plaintiff, the nature of the task he imposed on himself; and, indeed, the vast importance to Boyd of a correct discharge of them formed, he says, his inducement. When the agreement of 13 September was entered into, those functions had not been performed; they were in the height of their execution. The answer itself states that the object of Boyd in executing it was to add the inducement of interest to excite the defendant to greater activity; in another part, to buy his efforts. No price is given by Hawkins but those efforts; none else pretended in the deed itself, throughout its long recital, except the purchase of Brown's judgment. So far, then, was this contract for one-fourth of the trust fund from being made by a trustee, after the trust had been executed, or who had in this purchase divested himself of the character of trustee, that the purpose and consideration of it was to get the trustee to go on and execute the trusts undertaken by him. Can a court of justice permit a man who has become a trustee, and in that character caused various other conveyances to be made to him, so that the titles to very large estates, and all the estates of his *cestui que trust,* are concentered in him and within his power, then to say to his *cestui que trust,* You shall give me a fourth part of the whole, or I will proceed no farther? But this is not an ordinary trust; where the whole interest was in Boyd, so that he might call upon Hawkins to convey to him or to another trustee; it was not a nominal estate for the use of Boyd merely. Hawkins was not only Boyd's trustee, but that of the bank also, and charged with its interest, and Boyd could not remove him without a dilatory litigation, which would have exposed him to ruin. Can such a trustee avail himself of his advantages of trustee, and superadd thereto the powers and influence of the creditor, and demand such a conveyance as the price of his aid, either in the way of services or of mercy? Can it be permitted that a trustee should derive any benefit from such a conveyance, made by his *cestui que trust* in distress, embarrassed, incompetent to business,
(211) apprehensive of the great loss, and of eventual insolvency, when he was confiding in the friendship and ability of the trustee—and, moreover, ignorant of the value of what he was giving? If it could be sustained, there are no checks worth regarding to the unlimited de-

mands of those who have the care of others' affairs, even should their situation also give them power over them. The value of these estates, as claimed by the defendant, was in truth near $40,000; they realized that sum in about two years. Did Boyd have any just information upon that subject? So little did he know, or so incapable was he of judging, that the defendant himself says it was much doubted by Boyd whether they were worth pursuing; and at one time he told J. W. Hawkins he would give all up and rely on his own estate; and at another, expressed great expectations. Such was the state of his mind that it is obvious he threw himself into the custody and ward of the defendant, and was ready to do whatever he was required, or whatever he thought would be deemed a compensation, for the magnified services of his friend. He offered one-half. Why did not Hawkins take that? It would have had the same ground to stand on which this has, the offer and willingness of Boyd. The answer does not state the reason, but leaves us to infer that it was either generously declined, although merited, or that it was deemed too large, and that the defendant was only willing to receive adequate remuneration. But upon the score of contract, each would have been alike obligatory, and each is open to be impeached upon the ground of unfairness, unreasonableness, and advantage taken by one man of another in his power.

But it has been insisted that trustees are in this State entitled to compensation, and as none was provided for by the deed, it was a fair subject of treaty and adjustment, and, in that light, good. The Court does not understand that trustees are entitled to have more than their expenses. The contrary is the old rule of the court of equity, and no opinion has been given against it in this State, as far as we know. Nor does the Court see a reason to adopt a new rule. As far (212) as the operation of the statutes allowing compensation to administrators and guardians has been observed, it is thought far from being salutary. It makes those offices objects sought after and contested for, and it requires the courts to hold persons in those trusts to stricter account. If it be established that a trustee is entitled to compensation, it follows that *bona fides* will not excuse him, but he must answer for his acts as a paid man; and such changes we are not prepared to make. The farthest we can go is to permit a stipulation for compensation at the contracting of the relation; and then, not in a case where the trustee to sell is imposed on the debtor. If it be arranged pending the trust, it can only be taken as evidence that the parties did not intend gratuitous service, and the measure will be disregarded, and fixed at what is deemed reasonable by the court. Any other doctrine would subvert the whole law of this Court upon contracts between these parties; for, instead of

buying, the trustee would take what he pleased of the estate, without price, under the name of compensation, and every abuse would follow. The case in this respect, then, stands on the fairness of the measure of compensation; and upon that there cannot be a moment's doubt, when it is seen to be near $10,000 for a portion of two years attention, without the defendant being one cent out of pocket, or risking one penny of his money. Instead of serving this distressed man, it would be plundering him, as by the terms of the agreement the defendant is to have one-fourth of the gross estate. Every expense is to be borne by Boyd, even that of carrying the crop to market, although Hawkins shares in the increased price; and Brown's judgment is to be paid by Boyd out of his residue. Thus Boyd's interest is to satisfy encumbrances to the amount of eleven or twelve thousand dollars, and Hawkins none; which, in effect, nearly gives the latter the half which his own conscience had once rejected.

But it is not true that this was an adjustment of compensation for services. It is true that it was an arrangement to determine Hawkins' gains, and that they are called compensation in the agreement. (213) But services under the deed were not alone, or principally, in the contemplation of the parties. They are anxiously recited in the deed, and in a way to magnify them. But the principal service then claimed, and that which prevailed on Boyd to make such astonishing offers to the defendant, was the purchase of Brown's judgment and giving up the benefit of it to Boyd. The answer claims the exclusive ownership of it to be in the defendant, because he says he bought it with his own money, and without advice or indemnity from Boyd, or having any of his funds. This may be true in fact, but in this Court the purchase of the judgment enured to the benefit of the fund, which was bound, and was sufficient to discharge it. That judgment belonged to Boyd the instant Hawkins purchased it, and stood only as a security to him for what he gave for it. What did he give? Not a cent of his own money, but his bond, which has been satisfied out of the trust fund, or by Boyd. Hawkins has never paid anything out of his own pocket, never been in advance for Boyd, not even as alleged in his answer, except as it is therein stated that he advanced that which belonged to him under this very agreement itself, and all the expense of securing the whole. That such is the responsibility; for the judgment was against the two Boyds and three others, and execution was actually levied on much more than satisfied it, and ultimately yielded upwards of $17,000. This extra service in buying and extra kindness in transferring the benefit of the judgment (which here is taken to be but the discharge of a known duty) is exaggerated in the instrument itself into a principal reason why Boyd should give the other a fourth of the estate, and out of the residue pay the judg-

ment iself, and all the expense of securing the whole. That such is the true character of the transaction is deducible not only from its face and circumstances, but it is expressly admitted in the answer that Boyd executed it "especially in consideration that the defendant, after making the profitable speculation on Brown's judgment, had voluntarily given Boyd the benefit of it." (214)

Can one doubt either that Boyd was altogether into the belief that the judgment really was the property of Hawkins, and not his own, or that, knowing it to be his, he was constrained to treat it as Hawkins', from the apprehension that a person who put up such a claim, and had him in his power, would use that power so as to serve himself as effectually in some other way?

As to the other responsibilities incurred by Hawkins in becoming the surety of Boyd, and indemnifying his cotrustee, they are perfectly imaginary. R. Boyd's own estate was, and has been, proved to be an ample counter security, without any aid from Alexander's. Every responsibility is discharged, and eighty negroes and half of his Roanoke estate left; and although it be said that at that time he was willing to take half price for it, and expected insolvency in that event, yet his willingness to make that sacrifice is no very satisfactory evidence that he was capable or careful, in dealing with his own trustee, for the uncertain interests under his brother's assignments. The very facts that from his want of judgment or his agitations and distress he estimated his own resources so inadequately, and exaggerated so greatly the responsibilities incurred for him by the defendant, or, from the same causes, that the services of the defendant were really indispensable to Boyd, he being incompetent to the management of such ordinary concerns, though sustained by his large means, made it unconscientious and inequitable, according to the rule of this Court, to exact or to receive such a donation from him. Accordingly, we find it stated in the answer, by way of reproach to Boyd, that as soon as his affairs became prosperous he refused to comply with the demand of Hawkins; in plain words, when he became able to think for himself, and got clear of the terror of his trustee, and of insolvency, he was sensible of the enormity of the exactions, and resisted them, although he offered, and now submits to do, whatever may be thought reasonable.

The conclusion of the Court is that, regarding the relation (215) of the parties, the consideration moving them, and the purposes in view, the actual pecuniary difficulties of Boyd, magnified by his alarm, his ignorance of his rights, or his constraint from asserting them, and the extravagant estimates of the services and responsibilities of the defendant Hawkins, and exorbitant claim of compensation for them, the agreement of 13 September cannot be treated here as obligatory, and

as a discharge of Hawkins from accounting for the trust fund, or to found any charge on his part against Boyd.

As to the idea of a confirmation by the deeds executed in October and December, it will not bear stating. The confirmation is not direct, but only by inference. But if it were, the same objections existed then to such a contract as did in September. And to make an express confirmation of a void contract avail anything, it surely must appear that the party was then aware of his rights, and knew the first transaction, at least, was impeachable, and meant to make that valid which he did not before consider so. In any other sense the new deed is but a new imposition. *Lord Chesterfield v. Jansen,* 2 Ves., 146.

It has been, however, strongly urged that the validity of the agreement is not in issue, because it is not impeached in the bill, and, therefore, that the sole question is as to its execution. It is certainly true that no decree can be founded on a fact not in issue, and that, generally, it is safest to bring forward in the bill all matters in avoidance of a deed which the defendant means to use. It formerly was the course to do it by a special replication, but in more modern times the practice is to charge the facts in the bill originally, or to do it by amendment, which the court always allows when the deed is first stated in the answer, without its attending circumstances. If a release be barely pleaded or stated in the answer, and relied on simply as a release, it cannot be impeached by collateral matter, as having been unfairly obtained. So in *James v. McKernon,* 6 John., 543, cited for the defendant, where the defendant relied in his answer on the agreement as such, upon the mere
(216) fact of existence and its import, and there was nothing on the face of it to invalidate it, it was properly held that evidence could not be heard to impeach it upon the ground that it was obtained by fraudulent misrepresentations or was otherwise unconscientious. Neither the bill nor the answer contained any matter to which the proof was applicable, and therefore it would be a surprise to the other party, and the witnesses not guilty of perjury if they swore falsely. But it is not necessary that the facts upon which the validity of the deed depend should be put in issue in any particular part of the pleadings, as in the bill or by a special replication. It is sufficient if the issue is formed anywhere in the record. If the answer state the deed not only as existing, but also the circumstances which are relied on as giving it validity, and insist upon it as a fair deed freely given, claiming the benefit of it as an executory agreement which the court ought to execute by reason of the considerations upon which it is alleged to have been founded, and the purposes for which it was given; if also the deed be exhibited with and made a part of the answer, and upon its face contains recitals which were meant

to give a color to and sustain it; moreover, if the defendant sets up under this deed, not a discharge barely, but a satisfaction of the demands made on him in the bill, and also an original charge against the plaintiffs surely, a general replication to the answer puts in issue, as directly as can be, every circumstance specially stated in support of the deed, the general affirmations that it was fair and voluntary, and also the facts recited in the deed itself. All this is necessarily as much in issue by a general denial of the truth of all that is in the answer as is the execution of the deed. In the present case no fact is in proof which does not directly admit or deny some allegation of the answer, and the defendant himself insists in the answer that the cause shall be tried on the merits, and he assisted upon the footing of the agreement being valid under the circumstances disclosed by him.

But there is in truth no necessity for resorting to testimony for (217) the ground on which the court decreed.

The matters are confessed in the answer, and the plaintiff, as to the operation of that deed, might have set down the case on the bill and answer; and so the objection of surprise cannot arise. It is like a defendant claiming a set-off upon a bond admitted in the answer or stated on its face to be usurious. The court could not decree in favor of it, if the other party objected; and so here the defendant can found no claim on this instrument. It is true, it cannot be declared void and ordered to be given up; but that is not because it is not an issue, but because the plaintiff has not in any part of his pleading asked such relief against it. It is simply repelled here. The case is like a common one of a vendor bringing a bill against a purchaser for specific performance, which the court refuses on equitable circumstances, but cannot cancel the articles until the purchaser files his bill for that purpose. The Court must, therefore, allow the complainant's exception to so much of the report as is founded on the interests supposed to be derived by Hawkins under this agreement.

The question remains, What decree is the complainant entitled to? The bill is confined in its charges to the deed of trust for Boyd's estates in North Carolina, and sets out as a reason for not charging any matter relating to the Virginia deed, that a suit is pending in that State for an account under it. But the bill prays for a conveyance of the North Carolina property and for general relief. This prayer necessarily involves a general account of the whole trust fund, because the plaintiff cannot have even the specific relief prayed for until all the debts are paid and his trustees indemnified upon the whole transaction, as they had a right to look to all parts of the property for their outlays, as well as for the debt to the bank. Such an account has been taken; and the

defendant insists in his answer upon a full account, and that the whole controversy ought to be settled here, notwithstanding the suit in Virginia. The pendency of that suit is not considered an obstacle to a full investigation here, as it does not appear that any rights have been
(218) determined in it; for the decrees cannot come in conflict, and the parties here, being under the control of this Court, can be made to dispose of that suit as may be deemed right. Both cannot be carried on together, and the Court would put the parties to an election if they had not already made one—the defendant in his answer, and the plaintiff by asking for a general account, and bringing this cause to a hearing upon the whole merits. Besides, the plaintiffs Thornton and Davidson are not parties to the suit in Virginia, and have no rights in the fund in litigation there, but are subsequent mortgagees of the North Carolina property conveyed in the first deed of 2 July; and they have a right to a conveyance, if it appear that upon taking the accounts all the prior encumbrances upon it are discharged.

A doubt has been entertained by the Court upon the propriety of making a decree in favor of R. Boyd alone for the balance appearing by the accounts to be due to him, which arises from the silence of the bill respecting the assignments of Alexander Boyd, and the reassignment thereof by R. Boyd, out of which grew the principal part of the funds in the defendant's hands. But it does not appear by any proof, nor by the full statement of all the transactions given in the answer, that any part of that trust property remains specifically, or that the titles of it, if there be such, are now vested in Hawkins, or that Boyd has any ground of relief against him touching it, or Hawkins a demand on his part in respect of it, except that set up under any agreement which has not been sanctioned by the court. It results that no controversy exists upon that subject but that involved in the accounts of the receipts, disbursements, and charges of the trustees. Those accounts have been taken in this cause, and were necessarily taken; no objection is perceived, in this state of the case, to proceeding to a final decree upon the whole merits, care being taken to prevent the parties from further harassing each other in Virginia, by an order on them to dismiss that suit, which must be at the cost of the plaintiff, whose fault it was not to
(219) include all the subjects in one bill; and care being further taken, by an order to that effect, that this decree shall not prejudice any other suit by Boyd, or of an amendment to his present one, if he chooses it, by which he may seek a conveyance of the legal title of any property vested in Hawkins or Robards, or either of them, by any of the conveyances mentioned in the pleadings or the exhibits, or by which he may seek to have the agreement of 13 September, 1824, declared void

and canceled. It is the object of the Court not to conclude any of the parties as to the matters not fully tried and determined in this suit; and it is equally our object finally to settle all the matters of controversy of which the merits are fully before us. Such is the fact in relation to the balance of moneys arising out of the whole trust. The creditor is satisfied, and admits it by answer; the defendant Robards never has set up any demand, and disclaims in it his answer; the defendant Hawkins has rendered an account current of his whole trust, and detailed statements of it have been reported by the master, including even the expenses of the suits with Hunt and Goode, to no part of which has he excepted, save that of the allowance of commissions on the payments to the bank; and no exception is taken by Boyd to any omission by the master to charge Hawkins, but only to some of his credits. It must be assumed, then, that the matter of account need not be longer kept open, and may now be finally adjusted upon the basis of the report, as corrected by the court, in the decree; and, therefore, that it is proper that the cause should now proceed to a decree on that part of it.

By the reports the sum of $2,905.16 appears (after disallowing the claims under the deed of 13 September) to be in the hands of the defendant Hawkins, and to have been there, or nearly all of it, since 1825; and but few disbursements have been made since 1826. For this sum, therefore, and interest on it, Hawkins is the debtor of Boyd, subject to such deductions as shall be made for his compensation.

Upon this subject we have had some difficulty. It is not (220) thought justifiable to allow anything as a commission, because if a trustee can receive compensation at all, it must be for his actual time and labor, and not by any arbitrary rule of commission, if not specified from the first. For this reason, the seventh exception of the plaintiff to the allowance for the sales of the North Carolina property is sustained, and the defendants overruled. But the opinion of the Court is that Hawkins is entitled, in this case, to compensation for his time and labor, as well as the expenses with which he has been credited. This opinion has been founded upon the clear understanding at the origin of the business, that he should receive it; for which there is a stipulation in one of the deeds, and upon the express submission in the bill to allow a reasonable compensation. The trust was troublesome and at a distance from the residence of the parties; it required an active agent to manage it; and Boyd seemed to have had more confidence in the zeal and skill of this gentleman than any other, and probably would have been unwilling that Hawkins should, as he had a right to do, substitute the services of another agent for his own. The duties expected, nay required, were beyond the ordinary ones of a trustee, and involved the necessity of personal inter-

position in instances when perhaps no other agent could have served the same purpose. In general, the trustee can act by an agent, and it is best he should, because he will be under no temptation to pay him too much, though he is under the strongest to demand it for himself. But where that would not answer the purposes of the trust, nor satisfy the *cestui que trust,* and the trustee has been faithful, and the *cestui que trust* submits to what is reasonable, the Court does not think it an improper precedent to allow what the trustee might have fairly given to another competent person. In this case we think $750 per annum would have engaged such an agent, for the parts of the two years during which Hawkins was actually occupied in this business; and the Court allows the sum, namely, $1,500 in the whole, by way of remuneration for all
(221) his services touching the whole trust. For the residue of the $2,905.16, and for all the costs of this suit, there must be a decree in favor of the plaintiff Boyd.

PER CURIAM. Decree accordingly.

Modified: S. c., post, 329; *Allen v. Bryant,* 42 N. C., 281; *Baxter v. Costin,* 45 N. C., 265; *Barnes v. Brown,* 71 N. C., 510; *Froneberger v. Lewis,* 79 N. C., 430; *Cole v. Stokes,* 113 N. C., 273; *Threadgill v. Comrs.,* 116 N. C., 619.

LEWIS TAYLOR v. ARCHER CAWTHORNE.

1. Testimony in a suit in equity must be reduced to writing, and if a party upon a reference to the clerk examine witnesses *viva voce,* instead of taking their depositions, he must pay the costs of their attendance.
2. The costs of a suit to settle a partnership are generally charged upon the partnership effects, but improper conduct in one of the partners may be punished by taxing him with them.

THIS was a bill originally filed in the court of equity for GRANVILLE, for the purpose of having an account of a partnership business. The usual reference was made to the clerk and master of Granville court of equity, and a report made, which was, after the removal of the cause, set aside by consent, and another reference made to the clerk of this Court, whose report was in every respect favorable to the plaintiff, and no exceptions were taken by the defendant.

Devereux for plaintiff.
Nash, Badger, and W. H. Haywood, contra.

RUFFIN, J., after stating the substance of the motion: The court of equity requires all proofs to be in writing, for the purpose of allowing the judge full time for deliberation, and in order to give the parties the benefit of a bill of review, or an appeal to correct errors. The only exception relates to the execution of an exhibit, or the like. This is also the regular method of taking testimony to be read before the master. There is no rule that he shall not hear *viva voce* evidence, but only that he shall not act on any not reduced to writing, in order that the ground of his decision may be brought fully before the court. (222) If a party, then, for his own convenience or benefit, brings his witnesses before the master, instead of taking their depositions under a commission, he must bear the expense himself. The direction is, therefore, refused.

The report made by the clerk and master in Granville, having been set aside in this Court, by consent of the parties, the allowance for making it must, for that reason, be paid equally by the plaintiff and defendant.

In general, the costs of a suit to settle a partnership are to be paid out of the fund, or by the partners equally. But the conduct of the defendant subjects him exclusively to the costs. He was the acting partner, and failed to keep and render proper accounts. He made payments to the plaintiff of part of his share of the profits, but took notes for the sums as advances made by him, and commenced suits at law on them, when he owed the plaintiff a large balance over and above the amount of those notes. He has, moreover, deluded the plaintiff and the court by depositing with the clerk documents pretended to be evidences of uncollected partnership debts, due in distant parts of the country, and has caused a receiver to be appointed, who reports that after taking a long journey he has been unable to find or hear anything of such debtors, and has reason to believe that the claims are altogether feigned. Such conduct meets only with a small portion of the rebuke it merits, when it incurs the penalty of the costs of suit.

PER CURIAM. Decree accordingly.

SARAH A. FLEETWOOD ET AL. v. JOSEPH FLEETWOOD ET AL.

1. Bequest of negroes, to be divided between the children of A., when one of them arrives at the age of sixteen: *Held,* that children born after the death of the testator, but before the time of division, are entitled to a share.

2. A legacy to a class of persons, without any time fixed for its division, is to be divided among the legatees in *esse* at the testator's death.

THIS was an appeal from a decree of DONNELL, J., pronounced at PERQUIMANS, on the last circuit.

The facts were that George B. Newbern made his last will on 20 September, 1824, in which he bequeathed as follows: "I give my
(223) negroes to be equally divided, when Sarah A. Fleetwood arrives to 16 years, between Parthenia Fleetwood's children." At the date of the will Parthenia Fleetwood had four children, who are the plaintiffs. After the death of the testator, but before Sarah A. Fleetwood arrived at the age of 16, Parthenia Fleetwood had two other children, who are the defendants. And the only question was whether the slaves were to be divided among all the children or between those only who were born at the death of the testator.

His Honor directed the division to be made between all the children, and the plaintiffs appealed.

No counsel for either party.

DANIEL, J., after stating the case: Where a legacy is given to a class of individuals, as to children, in general terms, and no period is appointed for its distribution, it is due at the death of the testator. The payment of it being postponed for one year after that event, only for the convenience of the executor, in administering the assets, the rights of legatees are determined at the testator's decease. *Crone v. Odell,* 1 Ball & Beatty, 459. Upon this principle is founded the well established rule that children in existence at that period, or legally considered so to be, are alone entitled to participate in the legacy.

It is now also settled that when legacies are given to a class of individuals generally, payable at a future period, as to the children of B., when the youngest shall attain the age of 21, or to be divided among them upon the death of C., any child who can entitle itself under the description, at the time when the fund is to be divided, may claim a share, viz., as well children living at the period of the distribution, although not born till after the testator's death, as those born before, and living at the happening of the event. This rule is founded upon

the anxiety of a court of equity to effectuate the intention of (224) testators in providing for as many children as possible. It therefore does not unalterably confine the number to the time when the interests vest, which in general is at the death of the testator, but prolongs the period to the happening of an event upon which a determinate share of the fund becomes payable. *Andrews v. Partington,* 3 Bro., 402; *Vanhook v. Roper,* 5 N. C., 178. All the children of Parthenia Fleetwood that were in existence, or legally considered so to be (as a child in *ventre sa mere*) when Sarah Ann Fleetwood arrived at the age of 16 years, are entitled to a share of the slaves bequeathed in the will of George B. Newbern. The decree made in the court below was correct, and is

PER CURIAM. Affirmed.

Cited: Meares v. Meares, 26 N. C., 197; *Irvin v. Clark,* 98 N. C., 445; *Wise v. Leonhardt,* 128 N. C., 291; *Bowen v. Hackney,* 136 N. C., 191.

MARY TATE v. CHARLES D. CONNER AND ALFRED KERR ET AL.

1. A delay of thirty-four years after a contract for the sale of land, without any claim on it, is a bar to a bill for its specific performance, where the delay is not accounted for by reason of infancy, coverture, or the like.

2. The purchase money paid upon an agreement for the sale of land is, in equity, considered as land, and if the contract is vacated after the death of the vendee, it goes to his heir.

3. In an agreement for the sale of land, the vendor is considered to be a trustee for the vendee, and the statute of limitations does not, in equity, bar the latter. But that court respects the lapse of time in cases of implied trusts, and unless explained it is a bar to the relief.

THE bill was filed in September, 1820, and alleged that James Kerr on 2 May, 1786, entered into a written contract with W. Bowman for the sale, at the price of £100, for 45,000 acres of land, lying in what is now the State of Tennessee, and which was described as one-half of an entry made by Isaac Taylor and Kerr, for 9,000 acres, situate on the third little Chickasaw bluff on the Mississippi River, and that the said Kerr thereby bound himself to convey the said land as soon as a grant for it should be obtained; that Bowman died without issue, leaving the plaintiff, then an infant, his heir at law, she being the only child of a brother who died before him; that during her infancy the plaintiff married, and remained covert until 1817. The plaintiff then averred that a grant for the same land issued to Andrew Kerr, the brother of James, who

(225) was also dead, having by his will declared that he held the land in trust for James; that James was also dead, and that administration upon his estate had been committed to the defendants Conner and Kerr. The heirs of both James and Andrew Kerr were also made defendants. The prayer was that the contract might be specifically performed, or that the plaintiff might recover the value of the land at some period after the time when James Kerr might have had it located.

The defendants, by their answers, admitted that a grant issued in 1786 to Andrew Kerr for 5,000 acres, but averred that it was situated on the Tennessee River, and not on the Mississippi, and they for that reason insisted it could not be the land mentioned in the bill; they denied any trust between the brothers, and any knowledge of an entry by James, or of a grant to him of western land; they admitted the grant of administration and the descents, as charged by the plaintiff, but denied all the other facts charged in the bill, and put her to the proof of them, and relied upon the length of time which had elapsed and upon the statute of limitations.

At a hearing, had in the court of equity for the county of Burke at September Term, 1826, the trust between Andrew and James not having been established, the bill was dismissed as to those of the defendants who were the heirs of the former, and was subsequently prosecuted against the other defendants.

The contract was exhibited and proved, and a deposition taken, which proved the death of Bowman in Georgia, and that the plaintiff was his niece, and only relation, who was a citizen of the United States at his death.

No counsel for plaintiff.
Gaston for defendants.

RUFFIN, J., after stating the facts: Supposing the case to stand upon the original questions of right between the parties, it would not be difficult to give the plaintiff relief to the extent of the purchase money
(226) and the interest. It is a contract for lands, of which the original vendor had a right to a specific performance; and although it does not appear that Kerr was ever able to perform it, yet as there is no evidence that either he or Bowman treated it as broken or incapable of execution, it still continued to be land in this Court, at the death of Bowman. His heir had a right to the land, and if she could not get it, she had the right to the money payable in lieu of it, as against the executor of her ancestor, who made that money land as between his own representatives. It would be the least the defendant could ask, to get clear upon the payment of the purchase money and interest.

But the lapse of time excludes all consideration of those rights. The statute of limitation does not protect the defendants. The case does not come within it; the relief going on the vendor's being a trustee, in this Court, for the vendee. But equity itself respects time when the trust is not express, because it is difficult to ascertain the truth of old transactions, and therefore parties capable of acting shall not be allowed to impose that difficulty upon the courts; and because acquiescence for a long period, according to the ordinary experience of the actions of mankind, raises a presumption of performance or satisfaction. Where such a presumption is altogether excluded by the situation of the thing or the parties, the Court must undertake the investigation and get through it as well as we can, however remote the period be to which we are carried back. But it must appear that there is some disability, or other excuse for not sooner bringing forward the claim. The party who wishes to repel the effect of time must furnish the means of doing it.

There is a lapse of thirty-four years here between the making of the contract and the filing of the bill. Surveys were made, and grants issued by this State, for western lands, up to the cession in 1789, in which was reserved to this State the power of still issuing certain other grants; which was exercised for many years. Bowman could, therefore, have filed his bill in a very short time after 1786, for a conveyance, if Kerr had received a grant; or, if not, to compel him to complete (227) his survey and obtain a grant.

It is, however, charged in the bill that he died in the year ....., and left the plaintiff an infant, who married during infancy, and continued covert until within three years and a half before she brought this suit. This allegation is in itself defective, because it fixes the death of the vendee and the marriage of the plaintiff at no certain periods, and it may be that Bowman lived more than twenty years after 1786. If the marriage of the plaintiff could be carried back to her infancy, and that to the death of Bowman, which actually occurred before any reasonable presumption arose, then the objection would be met. The bill does not make that case—and the proof is more defective still than the allegations of the bill. The answers say nothing on the subject. Plaintiffs must not, at the hearing, take the silence of the defendants as admissions. If they want an admission, they must except to the answer, which is not fully responsive, and get a further answer, or a *pro confesso* upon the very point. The only deposition upon the subject proves the death of Bowman. The witness is asked the time and place of it, and answers as to the latter, that it was in Georgia, but gives no answer as to the former. Nor is there any proof that the plaintiff was an infant at this time, nor at the time of her marriage, nor that she was ever married;

but only that she is the heir of Bowman. These may all doubtless be facts, notorious where the parties live; and the events may have occurred at periods which would rebut all presumption from the great length of time. But in the absence of all evidence, the pressure of the presumption must be felt as would direct evidence of the fact of satisfaction. The particular circumstances tend to fortify the general presumption. The lands were in the actual occupation of the Indians, among whom it was so dangerous to go that almost all locations were made by a few persons who acted as general agents. It is highly probable that Kerr knew nothing personally of the land; and from the total failure (228) on each side to trace any entry for land, such as is described in the contract, or in his own name, we might perhaps justly conclude that both parties, discovering that the contract had been entered into under a total mistake, rescinded it, and settled. This would be morally probable if Bowman lived even for a few years. But the Court does not rely on particular presumptions. Our opinion is founded on the staleness of the demand, after thirty-four years, unaccounted for by the death, the infancy, coverture, distress, or ignorance of the several persons respectively entitled under the contract through that period.

PER CURIAM. Declare that the plaintiff has not proved the time of William Bowman's death, nor that it happened while the plaintiff was an infant, nor that the plaintiff married during her infancy, nor that she was ever married; and that the plaintiff hath not accounted for the delay of thirty-four years in filing her bill, after the contract in the pleadings mentioned was made, and that by reason of this delay the demand made by the bill is too stale to be enforced, and performance thereof decreed; and decree that the bill be dismissed, with costs.

Cited: Lewis v. Coxe, 39 N. C., 206; *Taylor v. Dawson,* 56 N. C., 94; *Young v. Young,* 81 N. C., 98; *Cedar Works v. Lumber Co.,* 168 N. C., 395.

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NATHANIEL C. BISSELL v. JOSEPH BOZMAN.

1. For the benefit of trade, the captain of a ship is liable for her disbursements in a strange port, but if he consigns to the person making them property of the owner sufficient to cover them, the consignee, by paying the funds in his hands to the owner, without deducting the disbursements, discharges him.

2. The captain is liable as the surety of the owner, and has, as to him, all the rights of one.

3. The captain when discharged from liability to the consignee cannot affect the relations subsisting between him and the owner; neither by a subsequent payment to the former can he make the latter his own debtor.

4. A master cannot act upon facts which are within his own knowledge.

5. A mortgagee who sells without a foreclosure is responsible for the value of the property sold.

AFTER the reference ordered in this cause (*ante,* p. 154) the master filed his report, from which it appeared that the account of Myers & Son against the brig *William,* amounted to $499.82, of which, $50 was charged as having been paid to the plaintiff and $223.14 as "cash paid the custom-house bill." The residue was for pilotage, sea stores, repairs, and commissions; the particulars of the custom-house bill were not given. In an account hereinafter mentioned, Myers & Son charge for storage $48.52, and for bond and permit and duties at the custom-house, $2,523.66; but Myers himself swore positively that no part of the bill for disbursements for the brig were charged to the defendant's account, and they nowhere appeared to have been, unless the custom-house bill was by mistake included in the large item for duties.

The plaintiff, as captain of the brig, had consigned the vessel and cargo to Myers & Son, as the property of the defendant, to whom he directed them to account. This was in March, 1816. The cargo sold for $4,774.45, and netted, over and above all charges then debited to the defendant, the sum of $1,994.57. The consignees took up a bill of the defendant's for $1,056.33, drawn in March, 1816, which, with other small matters, left a balance due him of $904.23, which Myers & Son acknowledged to him on 22 August following. Early in 1817 Myers & Son received another consignment of property belonging to the defendant, which netted him $203.71, and on 21 May of that year they rendered him their account, including that sum and the former balance of $904.23, and charged him with "W. P. Foster's note for sugar in sales per brig *William,* protested $301.25." This account showed a balance due the defendant of $806.11, which was remitted him on 29 July (230) following. The defendant then sent an agent to Norfolk, where Myers & Son resided, to demand the amount of Foster's note, claiming that he was not bound for it, as Myers & Son had never informed him of such a note being received for his sugar, and refusing to recognize it as his property. This claim was finally but reluctantly acquiesced in by Myers & Son. The plaintiff in a letter to the defendant dated 18 July, 1820, informed him that he had refused to allow Myers & Son their claim of $499.82, because they knew he was only the master of the brig, and because they had the owner's property in their hands, and might have paid themselves, and could not resort to him four years after pay-

ing over the moneys in their hands to the owner. One of the Mr. Myers proved that after their letter to the plaintiff, informing him of the collection of the bill on the West Indies, and of their charging against it the amount of the brig's disbursements, he applied to them for all the money collected for him, which was refused by them, because, as captain, he, as well as the owner, was liable to them, and that the owner had refused to pay them.

Myers & Son had become bankrupt, and had made an assignment of their effects, and it did not appear that the plaintiff had received any payment from them or their assignees.

On these facts, the master charged the defendant with the amount of the plaintiff's money retained by Myers & Son, and for this he excepted.

As to so much of the order of reference which directed the master to inquire as to the value of the mortgaged slaves, which had been bought by third persons, he reported that this was the fact as to one only; that the evidence as to his value was so contradictory he could not come to any just conclusion upon it; that in this uncertainty he had, from his own knowledge of the slave, charged him to the defendant at $400, deducting from it $153, at which he was credited to the plaintiff. To this both parties excepted, the plaintiff because it was too low, (231) and the defendant because it was too high.

Iredell and Kinney for plaintiff.
Gaston for defendant.

RUFFIN, J., after stating the facts: The first thing to be done in support of Bissell's claim is to establish a debt to Myers. In that view, it might be material to inquire whether a general advance of money to the captain is a disbursement for the ship, without showing the purposes to which it was applied, or at least was to be applied. The item of "custom-house bill" might also need explanation, for of itself it is not sufficient to charge a consignor, who has a right to the particulars, especially when there is a probability, from the nature of the charge and the delay in presenting the whole claim, that it might have been included in other general charges.

Questions might also be raised upon the right of a surety to charge his principal by the acknowledgment or voluntary payment of a debt, barred by the statute of limitations, on which Bozman insists. But as the protection to which Bissell was entitled against this demand has a foundation much more meritorious than mere lapse of time, I do not think it worth while to consider the effect of that.

Has Bissel paid Myers & Son? If he has, was he so liable to them as to enable him by paying them to make Bozman his debtor?

There seems to be no reason to doubt that in a port, not the vessel's own, proper disbursements on or for the vessel constitute a demand for which the vessel, the master and the owner are all liable. As to the master, this is a departure, introduced for the sake of trade, from the general principle that he who acts as agent, and is known as such, is not bound personally unless he expressly promise. Whatever may be the grounds of this rule in reference to strangers, as between him and his owner the master is in the nature of a surety. In that character he recovers back from the owner any moneys he has paid, and (232) has a lien upon the ship for advances, standing in the place of those whose claims he has satisfied. And in that light he must be viewed by the consignee of the ship and her cargo; at all events, as far as the proceeds of the cargo will serve to satisfy the consignee or indemnify the captain. If the consignee, as well as strangers, has the right to regard the captain in ordinary cases as the owner, because in possession, and another owner may not be found, yet a consignee with funds does know the owner in the most effectual manner. When the master thus leaves behind him the means of paying the debt for which he was liable, and in the hands of the man to whom the debt is due, he feels that he has no right to retain the vessel, and readily gives her up to the owner, thereby parting from the security given him by the law for his indemnity. The consignee can retain his whole demand out of the proceeds of the cargo. Common sense and common honesty say the debt is paid as to the surety. It is not the ordinary case of a creditor getting a security of his own provision. Even then the creditor is bound in good faith to take care of the surety. The relation between them calls for that benevolence. But here the surety himself provides the security. He does it for his own benefit as well as that of the creditor. The creditor cannot part from it to the prejudice of the surety. He cannot say he did it by mistake, but must bear the consequences of his own mistake, and ought not afterwards to look to anybody but the principal. Bissell was competently discharged, and I think in no court of justice could a recovery have been made against him.

Was he aware of his discharge? Expressly on that ground he refused to pay the demand in 1820, and so informed Bozman. Then could he afterwards pay Myers & Son, and make the debt his own? I am now supposing that Bozman owed Myers & Son, and that the latter had a remedy against him. Could Bissell interpose? I think not. The connection between them was dissolved. He was cut loose, and had no right nor power to untie Bozman from Myers, for the sake of (233) getting a faster hold himself. Bozman had a right to prefer Myers & Son for creditors; he might be able to pay them easier, or to

resist this demand altogether when made by them. Having gotten clear, Bissell could not again make himself a party but by a new request from Bozman, like any other stranger. This is not like reviving a debt barred by the statute of limitations, by the acknowledgment of a surety. Here there was no debt remaining as far as concerned Bissell. He was under no obligation, legal or moral, except not to interfere to the prejudice of either party. And that obligation was increased by the refusal of Bozman to Myers & Son, of which, no doubt, Bissell was informed, in answer to his letter of July, 1820—a refusal not founded on the ground that the disbursements had not been made, or had been paid for by Bissell, or anything else which Bissell could know to be false, but on the ground that Bozman had himself paid. And if Bissell did not get that information from Bozman in 1820, he did from Mr. Myers in 1824, before he assented to the arrangement made by Myers & Son of his debt. After Bissell was discharged, and he knew it; after Bozman had refused to pay, which he also knew; after the lapse of eight years, for four of which Myers & Son had abandoned their claim against Bozman, or not prosecuted it, it was out of the power of Bissell and Myers & Son by any act or agreement of theirs to resuscitate this demand against Bozman, and especially to transfer it to Bissell. But has Bissell paid it, or even agreed to pay it? Myers makes it appear in his books that he did. But the fact is not so. Bissell never assented to that application of his money. They promised a dividend on the balance. He rejected it, and demanded the whole. They assigned as a reason for their conduct the refusal of Bozman to pay them. Did that appear to Bissell to be a good reason? Did he think that he and Bozman were both bound, or that the refusal of the latter made him (Bissell) bound? Did he act on such a belief? No. He made no settlement with Myers; took no receipt for the money, no order on Bozman. He gave no acquittance to (234) Myers for so much of his own money, but kept his demand open, as a subsisting one, which he would have rendered available but for Myers' insolvency. When the present controversy arose, he thought he could use it to more advantage in it, and, therefore, pursued his claim against the others no further.

Upon no ground can the claim be sustained, and the exception must be allowed.

As to the other exception, the master says that he could form no satisfactory opinion of the value of the slave upon the testimony of the witnesses, because they differed so widely; and he fixed the value upon his own knowledge. That was not a proper ground for him to proceed on, for we cannot act on it, and must decide upon the evidence. Upon the weight of that, the Court ascertains the value to be $200. That

Bozman objects to, because he thinks the other party confined to $153, the price bid. The Court has already said the effect of that sale under the act of 1812, whatever it may be, is waived by the cross-bill to foreclose. We must now look upon it as a sale by Bozman himself; confirmed, indeed, by Bissell, by not making the purchaser a party to this bill. But how far does that confirmation go? Only to the title, not to the price. Suppose the slave sent to distant parts, so that Bissell could not reach him, or sold to a person without notice. The mortgagee who sells without a decree must be sure to get the full value, for he is parting with another man's property. The expression, "price or value," used in this case before, meant that if the price exceeded the value, Bissell was entitled to it; if less, then to the value. That is the risk a mortgagee must be made to run, to keep him straight.

PER CURIAM. Decree accordingly.

JOHN ARMSWORTHY ET AL. V. AQUILLA CHESHIRE.

1. A defendant at law has no relief in equity against a void judgment; as where no *sci. fa.* was served on the heir, and the creditor obtained a judgment and purchased his land, the judgment being void and the remedy at law complete, no relief can be had in equity.

2. An assignment by an executor of a bond due his testator to a creditor who has established his debt, and has a *sci. fa.* awarded against the heir, may be pleaded by the latter as an accord and satisfaction.

THE plaintiffs alleged that they were the heirs of one John Armsworthy, deceased; that the defendant had recovered a judgment against his executor, in which the plea of *fully administered* was found for the defendant; that by a subsequent agreement between him (235) and the executor, he had agreed to receive an assignment of a debt due the testator in South Carolina, in satisfaction of his judgment; that he had, notwithstanding this agreement, caused writs of *scire facias* to be issued against them, and had, without their knowledge, obtained a judgment, issued execution, and bought the land which descended to them at an undervalue, and had taken a deed therefor from the sheriff. The bill prayed a reconveyance and general relief.

The defendant in his answer admitted that he was to take an assignment of the South Carolina debt, but averred that it was collateral to his judgment, satisfaction of which was only to be entered in case of his collecting that debt. He stated that he had made efforts to collect it, but having failed, he had issued writs of *scire facias,* which were served on the plaintiffs, and judgment regularly entered.

The plaintiffs filed a replication to the answer, and took proofs as to the agreement to take the debt due the testator in South Carolina as a satisfaction; but a statement of them is unnecessary.

No counsel for plaintiffs.
Nash and Winston for defendant.

DANIEL, J., after stating the pleading as above: If the *scire facias* against the plaintiffs never was served, the judgment entered on the same at the return thereof was void, and they had complete relief in a court of law, and have no right to come into this Court for redress. Whether the writ was or was not served on the plaintiffs does not appear; no copy of the record of that suit being filed.

As to the next point in the case, viz., that the defendant agreed to take the South Carolina claim as a satisfaction of his judgment: it does not appear to the Court, in the first place, that such an agreement ever was made; and, in the second place, if the plaintiffs were able to establish it, they, instead of coming into this Court, should have pleaded
(236) the same to the *scire facias*. They could have defended themselves at law, under the plea of accord and satisfaction, and if the issue had been found for them, the defendant never could have had judgment against the lands. Equity does not relieve when a party neglects a proper defense at law. 1 Mad., ch. 77; *Ware v. Haywood,* 14 Ves., 28. We think that the bill, for these reasons, should be dismissed.

PER CURIAM. Bill dismissed.

JOSIAH TURNER AND THOMAS D. WATTS v. THE CAPE FEAR NAVIGATION COMPANY ET AL.

The Cape Fear Navigation Company having laid out a town and sold the lots under an impression that they would open the navigation to it, and it turning out that the funds of the company would not admit of it, whereby the lots were rendered worthless; but the company having made no fraudulent concealment or representation of their means, they and the vendors being under an honest mistake, *it was held* that the latter could not be relieved.

THE bill recited the several acts of Assembly incorporating the Cape Fear Navigation Company, and stated that at their passage, as a good natural navigation existed from Fayetteville to the ocean, it was the intention of the Legislature that the contemplated improvements should be made above that town, so as to enable the counties west of it to carry

their produce to market by water; that the Deep and Haw River Navigation Company had, before the incorporation of the defendants, purchased a large tract of land at the confluence of those two rivers, and laid out a portion thereof as a town, calling it Haywood; that by the act incorporating the defendants the property of the Deep and Haw River Navigation Companies vested in them, and they became owners of that land; that in accordance with the intention of the Legislature, the defendants having a capital of $150,000, in 1816, 1817, and 1818, avowed their determination to improve the navigation of the river up to (237) Haywood; that thereby a general expectation was created that Haywood would become a flourishing market town, which was increased by the defendants' advertising notices of their intended improvements and pretending to make contracts for digging canals and erecting locks; that from these causes lots in Haywood greatly increased in value, which value was enhanced to the utmost by the officers of the defendants; that in July, 1818, the defendants advertised in the public papers a sale of lots in Haywood, to take place in September following; that in the advertisement the defendants caused it to be stated that the lots "were near the center of the State, and convenient to the greatest part of the country raising the great staples of tobacco and wheat," and further to impress upon the public mind that the proposed navigation would soon be opened, and thereby to enhance the value of their lots, it was set forth in their advertisement "that the company expected in less than two years to have a commodious navigation to this town (Haywood) for boats carrying fifty hogsheads of tobacco," and the public were assured that no exertions should be wanting on the part of the defendants to complete that object. That the lots were sold at auction under the direction of the president of the company, and that during the sale the auctioneer in his hearing repeatedly declared that he was authorized to say that the improvements advertised would be completed within two years, as funds fully adequate thereto had been subscribed, and contracts therefor made. The plaintiffs then alleged that they, in common with many others, were misled by these representations, and purchased two half-acre lots, for which they bid $1,420; that they executed their bonds for the purchase money, and received a deed of bargain and sale. It was then stated that the defendants had wholly neglected to make any improvements in the navigation above Fayetteville, but were disbursing their funds below that town, and were making dividends to the stockholders from the moneys received by a sale of the Haywood lots, which were thus rendered worthless, except for the purpose of (238) agriculture, and for that were not worth more than any other land of the same quality; that the plaintiffs had avowed their determina-

tion to resist the payment of their bonds, but that the corporation had assigned them to the other defendants, who had notice of their intended defense, and had put them in suit. The bill concluded with a tender by the plaintiffs of a reconveyance of the two lots, and a prayer that the contract might be rescinded, and for a perpetual injunction against a judgment obtained on the bonds.

The corporation in their answer insisted that it was their duty and interest to improve the navigation below the town of Fayetteville, as well as that above it; that with a view to this, they had purchased a number of negroes, who were placed upon the river below that place to remove obstructions; that this course was dictated by their experience of the fact that white laborers could not be employed to work in the low country, and it was universally known at the sale of the Haywood lots that this was a permanent investment for the improvement of the lower part of the river; that as to the navigation between Fayetteville and Haywood, the improvement of it required more skill than that below the former place, because in the latter sand-bars alone were to be removed, whereas, in the former, canals were to be dug and locks built; that being entirely ignorant of the science of civil engineering, they had, just before the sale in September, 1818, after due caution, and as they thought, upon sufficient information, made a contract with one Stroud for the contemplated improvements between Fayetteville and Haywood; that at the sale it was distinctly announced by Stroud, who attended it, that there was no time specified in his contract within which it was to be completed, and that all its stipulations, together with the plans, etc., were fully disclosed; that the officers of the corporation honestly thought that they should be able to perfect the navigation, and participating in the common delusion, and thinking that the lots at Haywood were selling too low, they had stopped the sale. They admitted that the works (239) commenced by Stroud had failed, and finding the resources of the company much diminished, they had, in order to effect the greatest possible amount of improvement, confined themselves to working upon the river below Fayetteville; but that they intended to recommence above with more experience.

The answer of the other defendants it is not necessary to state, further than that they claimed under an assignment of the bonds by the corporation to them in payment of a debt.

Replications were put in to the answers, and proofs taken; the contract with Stroud was filed as an exhibit. It is not necessary to give a statement of the depositions, as they supported the answer on all material points.

Badger for plaintiffs.
Gaston for Navigation Company.
Winston for other defendants.

DANIEL, J., after stating the facts: The contract being executed, nothing is left for a court of equity to do in respect to it, provided the transaction is a fair one. If there was no fraud in making the sale and obtaining the bond, parol evidence is inadmissible for the purpose of annexing a condition to the written deed, which appears on its face to be absolute and unconditional. Any declarations made at the time of the sale by the vendor, relative to the property, if not incorporated in the written contract of sale, are presumed to have been abandoned by the parties, as forming no part of it. They are not to be proved by parol, to explain the contract, or in any way to affect it, except when it is alleged that they were false, and so known to be by the vendor at the time, and were spoken with a view to commit a fraud on the vendee. In looking into all the evidence in this case, I am unable to discover any declaration made by the agents of the company which were made with a fraudulent intent. The declaration made by the auctioneer at the sale in the hearing of the president of the company, and by the order of one of the directors, that the river would be made navigable by the company in a reasonable time thereafter, appear to me not to (240) have been made with any fraudulent intent to enhance the price of the lots. The large capital they had got subscribed, the contracts they had made with workmen to execute the work, the stop put to the sales of the lots by the company's agents the day the plaintiffs purchased, the large sums expended by the company in their endeavors to complete the navigation, and their continued efforts to effectuate the object to the present time, all these circumstances connected with the facts that the plaintiffs had full knowledge of the capital subscribed, the contracts entered into by Stroud and others to do the work, the plans and nature of the work to be done, all taken together repel the presumption that the agents of the company intended to commit a fraud at the time the sale of the lots was made. The company's agents were honestly mistaken in the declarations and in their expectations. It is a hard case for the plaintiffs, but that is no reason for this Court to interfere, much less to rescind this executed contract. I think this case is within the principles of the two cases cited by the counsel for the defendant. The first is the case of *City of London v. Richmond,* 2 Vern., 421. The city of London articled with a man by the name of Aldersen, to lay a new leaden pipe of 5 inches diameter for the carrying water to Cheapside and Stocks-market, which it was affirmed would carry twenty tons of water each

hour; whilst this was doing, the city, by a committee, treated with Haughton to grant him a lease of the water, reserving a portion of the same water for the prisons and certain conduits, and he agreed to pay a rent of £750 per annum for fifteen years. It so fell out that the pipe would not discharge but six tons an hour; and instead of being a beneficial concern, it would not produce above £300 per annum. Haughton assigned the lease, became insolvent, and the rent was in arrear; the bill was filed for payment, and to carry the covenants in the lease into effect. The chancellor said, as a beneficial bargain will be de-
(241) creed in equity, so if it happen to be a losing bargain, for the same reason it ought to be decreed.

In *Legge v. Croker,* 1 Bull & Beatty, 506, the Court determined that a lease deliberately executed could not be set aside on account of an unfounded, though justifiable, assertion of the lessor penning the treaty; there being no willful misrepresentation, nor on the grounds of mistake from an omission of a general warranty in the lease, such not constituting a part of the agreement. In this case, as the company have been honestly mistaken, and as there is no covenant inserted in the deed, or left out by mistake, and as there is no fraud, although it may be a hard bargain, we have no right to relieve against it. A failure in a speculation forms no ground to resist a specific performance. *Adams v. Weare,* 1 Bro. Ch. 569; *Mortimer v. Cupper, ib.,* 156. I think the injunction should be dissolved.

HENDERSON, C. J. Were this an application by the company to have this contract executed, I think that as it has turned out so contrary to the expectations of all parties, if we are to believe what is said on both sides, that this Court would not interfere, but leave the parties to their remedy at law. But the application comes from the other party to set aside what has been done. The Court is not invoked to do something upon the contract which the law cannot do, to give the plaintiffs aid beyond their rights at law, but to take from the adverse party rights to which at law they are entitled. A disappointment in their reasonable expectations, a hard or a bad bargain, do not afford sufficient grounds for the Court to undo what has been done, although it would probably be a good reason for refusing to do more than what the parties had done, on the ground that it was only agreed to be done, or more than the law would do for them. To rescind a contract in this Court, or to set aside an executed contract, there must be something like an actual fraud, which would give an action at law, or a vital mistake. Upon a careful examination, I can perceive nothing like a fraud. It was a mistake all round, as well among the purchasers as the sellers. The improve-
(242) ment was believed to be practicable with such means as the com-

pany might rightfully use in justice to the stockholders. It could not be understood that the river was at all events to be made navigable for boats carrying fifty hogsheads of tobacco, but that the means the company were then using, and which it was their interest, as a company, to use, would produce that effect. There was nothing like a condition that this should be effected, or that the company would use all their means to effect it, disregarding their other duties or interests as a company, and nothing like a fraudulent concealment of their intention, or the difficulties known to them, but unknown to the bidders. I think all was fair and *bona fide*. Although I would not hold the vendee to be bound if the representations contained in the printed or written advertisement were false, or if there was anything like a fraudulent concealment or misrepresentation, it is quite evident that what was said at the sale was nothing but an amplification—a picture of what was contained in the advertisement in more glowing colors, and nothing more was intended, or understood to be intended, than what was in substance contained in the advertisement; and should any expression have gone beyond it, it was clearly understood to be only matter of opinion, and had only the weight of an opinion, not of an allegation.

As to using the money arising from these sales for the purposes of opening the river elsewhere, or even in making dividends upon the stock, it is the undoubted right of the company to use it as they please, for I consider them to have contracted no obligation but what was contained in their advertisement and imposed by their charter. Therefore, although it may be a very hard bargain as it has turned out, I can see no ground of relief, without subverting the very principles upon which this Court acts. There has been no violation of any warranty or contract, no fraudulent representation or concealment, no violation of the terms of sale, no violation of their charter—nothing but what now appears to be a delusion in which all, both vendors and vendees, partici- (243) pated.

PER CURIAM. Bill dismissed.*

*Judge RUFFIN having been of counsel for the plaintiffs, took no part in the decision.

HARRIET FREEMAN ET AL. v. WILLIE PERRY ET AL.

Where the property of a female was conveyed to trustees upon trust to permit her intended husband to receive the profits during his life, and then in trust for the wife and the issue of the marriage, a purchaser of a slave, part of the trust estate, under an execution against the husband, with notice of the articles, who held possession adversely to the trustees more than three years during the life of the husband, and who, to a bill filed by the wife and children within three years after his death, pleaded the statute of limitations, was held—

By DANIEL, J., to be a trustee for the plaintiffs, although he acquired nothing by the sale, as the plaintiffs were not guilty of any laches, and had a specific right to the slave.

By HENDERSON, C. J., to stand in the place of the husband, and being a privy in estate to be affected with the trust declared in the settlement.

Per DANIEL, J.: The act of 1812, authorizing the sale of trust estates by execution, applies where the trust estate of the defendant is coextensive with the legal title; not where the trustee holds for the defendant for life, with remainder to others.

UPON the marriage of the plaintiff Harriet with William D. Freeman, he entered into articles whereby he agreed to convey to Jones Cooke and Marmaduke Jeffreys, defendants, all her property, in trust that they should "suffer and permit the said W. D. F. to have the use and enjoy the profits accruing from said property during his natural life, and upon the death of the said W. D. F. that the aforesaid property shall be and enure to the use and benefit of the plaintiff and her child or children and their heirs forever, as tenants in common," with remainders over in default of issue. By a deed of the same date with the articles, to which the plaintiff Harriet, then an infant, and her intended husband, W. D. F., were parties, all her estate was conveyed to the defendants Cooke and Jeffreys, in trust to permit "the said W. D. F. to have, use, and enjoy all and singular the profits arising from the said land and negroes (244) hereby conveyed, during his natural life, and, upon his death, that the same shall be and enure to the benefit of the said Harriet and such child or children of the body of the said Harriet as may be then alive, and their heirs forever, as tenants in common," with remainders over as in the articles. The marriage took place, and the other plaintiffs are the issue of it. The settled property went into the possession of the husband, who shortly thereafter became insolvent, and executions issued against him, under which several of the negroes conveyed in the marriage settlement to the defendants Cooke and Jeffreys were purchased by the defendant Perry, he having at the time of his purchase express notice of the articles, which were read by the trustees, and they, upon his

purchase, demanded the slaves of him. W. D. Freeman died more than three years after the possession of the defendant Perry commenced, leaving the plaintiffs, his wife and children, surviving him. This bill was filed within less than three years after the death of Freeman, the plaintiff Harriet having been under age at the time of her marriage, and the other plaintiffs being at the commencement of this suit infants of tender years.

The bill sought to have the negroes conveyed to the plaintiffs, and an account of their hires and, in case of failure therein, to subject the defendants Cooke and Jeffreys for a breach of trust.

The defendant Perry relied upon the act of limitations and the act of 1820 (Rev., ch. 1055) to quiet the title of persons in possession of slaves; and it was agreed that the questions made upon his answer should be determined before any others were discussed.

W. H. Haywood for plaintiffs.
Devereux and Winston for trustees.

DANIEL, J., after stating the facts: Such a trust as Freeman had in the property was not subject to be sold under an execution, by virtue of the act of 1812. That act operates as a legislative conveyance of the legal estate to him who purchases the use, for it declares that the purchaser shall hold and enjoy the property by force and virtue of the execution, freed and discharged from the legal title of the trustee, who was before the sale possessed in trust for the defendant in the execution. The Legislature meant to subject those trusts to sale under execution, of which the *cestui que trust* might, in a court of equity, have enforced a conveyance of the legal estate from the trustee to himself. The act embraces only such trust estates as are coextensive with the legal estate held by the trustee; so that the legislative divestment of the legal estate from the trustee should not operate to the injury of third persons or any ulterior remainders in trust.

If Freeman's life interest in these slaves could have been sold by execution under the act of 1812, the legal estate would have been, by operation of the sale, and the conveyance of the sheriff, transferred from the trustees to the purchaser. There would have been left no legal estate in the trustee to have upheld and fed the uses and trusts (246) contained in the ulterior limitations and remainders mentioned in the deed of settlement. These equitable remainders must have been all destroyed, for the want of a legal estate in fee, in the trustees, to have fed and supported them. The Legislature did not mean that the act should work such an extensive mischief; it meant that it should operate upon plain express trusts, which trusts were coextensive with the legal

estate in the trustee. It never intended that an execution should interfere with complex trusts, or where there was a series of successive trusts, arising in a deed or will, all fed from the same legal estate. The sale of the slaves made by the sheriff was void; Freeman's trust estate being only a life estate. There were by the deed of settlement ulterior limitations of trusts, led by the legal estate in the trustees; therefore, the execution did not reach any of the trusts, notwithstanding, the trustees, the sheriff, and Perry all believed that the trust interest of Freeman was by law subject to be sold; and under that belief the sheriff did sell, and Perry, with full notice of the plaintiff's title under the settlement, purchased the slaves at the sale, and took a conveyance of them from the sheriff. The trustees forbade the sale and demanded the slaves of the defendant, and he refused to deliver them, but they never brought any action at law to effect a recovery. The trustees were barred by the act of limitations, and had they brought an action of detinue for the slaves, against Perry, after three years from the time of his purchase, they would have failed in it. The defendant Perry now contends that the plaintiffs have a remedy against the trustees for breach of trust in neglecting to sue him, and recovering the slaves, before his estate in the same was ripened into a good title by the act of limitations.

I grant that the trustees are liable to the plaintiff; but have they not a right to elect to consider Perry as being a trustee for them under the circumstances of the case, and follow the property in his hands? The plaintiff Harriet was a *feme covert* until a less time than three years before the filing of this bill, and the other plaintiffs are infants. Sup-
(247) pose the trustees were insolvent, must the loss fall on the plaintiffs, and Perry be permitted to hold the property, although he had express notice of the contents of the deed of settlement? If the trustees had have made a conveyance to Perry of the slaves, with notice to him of the trusts, a court of equity would have held him a trustee to perform all the trusts in the deed. Will the manner in which he has obtained the possession of the slaves destroy the plaintiff's rights, although the legal title of the trustees is destroyed by the acts of 1715 and 1820, and by operations of the same their legal title is transferred to him? The sheriff sold the interest which Freeman had in the slaves; and although it was not subject to execution, yet the sheriff intended to pass that estate by the sale, and Perry intended to take the same, not by way of a trespass or tort, but by a contract of purchase, having full notice at the time of the trusts.

I admit that a disseisor, abater, or intruder, or any person who holds the estate in the *post,* although they have notice of a trust arising out of the estate, will not be considered by a court of equity as trustee. It is said

by the counsel for Perry that their client holds these slaves neither by privity of estate, privity of contract, nor by fraud. Furthermore, that the trustees, Cooke and Jeffreys, are barred of their legal title by the act of limitations, and that the defendant is answerable for the slaves neither at law to them nor in equity to the plaintiffs. The sheriff, when he levied on the slaves, did not intend to commit a *tort.* He levied under the belief that the equitable estate of Freeman could be sold by virtue of the act of 1812. Perry purchased under the same belief, and that the sale would by operation of law transfer to him both the legal and equitable estate during the life of Freeman. Shall Perry be now heard to say that there is no privity between him and the original trustees? That this Court cannot, consistently with its own rules, declare him a trustee, although he had notice of the ulterior trust of the settlement? I think he cannot be permitted to set up such a defense, and al- (248) though the original trustees are barred by the act of limitations, and cannot regain the legal estate, yet in consideration of the manner in which Perry obtained the slaves, viz., by contract, he must be declared and considered by this Court to hold them as a trustee for the plaintiffs. The rents and profits of the estate were liable in equity to the creditors of Freeman; he might have rented the land and hired the slaves, and received the money himself, or paid his debts with it. An assignment by Freeman, during his life, to raise money to pay his creditors would have been protected in equity, particularly where the assignee had seen to the application of the purchase money. The purchase money in the present case was applied to the debts of Freeman, and I think that this Court, under such an equity, set up by Perry, would have stopped the trustees in prosecuting a suit at law against him for the recovery of the slaves. But the court would have first seen that the fund was safe and subject to be surrendered to the trustees on the death of Freeman. *Townsend v. Windham,* 2 Ves. at p. 10; *Codagan v. Kennet,* Cowp., 432; Fearne on Remainders, 408, 9, 10, 13 Am. Ed. We cannot permit Perry to protect himself from the trust, of which he had notice, by hearing him now assert that either the sheriff when he levied was a *tort feasor,* or that he himself committed a *tort* when he took the slaves home; and that now he is beyond the reach of this Court. It may be stated as a rule in equity that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, and bound with respect to that special property, for the execution of the trust. *Daniels v. Davidson,* 16 Ves., 249; *Adair v. Shaw,* 1 S. & L., 262; 2 Mad., ch. 125. I think that Perry should be considered as a trustee of the slaves mentioned in the bill, for the plaintiffs, and that he be decreed to deliver them and their issue to either of the parties, and account for their hires.

(249) HENDERSON, C. J. It is not true that a new estate in the thing sold is acquired by the purchaser under a *fieri facias;* he succeeds to the interest or estate of the defendant, and to no other; nor is the case different where the defendant has made a fraudulent deed to another, *quoad* the creditor it is the debtor's estate. Perry by the purchase acquired Freeman's estate and no more, and he cannot now object that Freeman's interest could not be sold under a *fi. fa.;* he is concluded from alleging it; therefore, the claim of Perry in opposition to the trustees is a nullity, if Freeman could not support it. It is like the case of a tenant for life conveying in fee; the vendee, notwithstanding his deed in fee, and his claim in fee, is still tenant for life, and the reversioner may draw upon him as his tenant and compel him to perform the obligations of tenant for life, and although, if the conveyance be by fine or feoffment, the reversioner may consider it as a forfeiture, and enter upon the cognizee or feoffee, yet he may waive the forfeiture and demand the reserved services of the cognizee or feoffee. Their confidential relations connot be assumed and put off at pleasure. The joint act of the parties and the law created them, and they can be put an end to only in the same way. The purchaser, as to strangers, succeeds to the estate of his vendor, their declaration to the contrary notwithstanding. If an action were now brought against Perry for refusing to deliver up the negroes at the time of the sale, the statute of limitations would bar that action, for plainly it arose at the time of the refusal; but if the trustees chose to waive it, and consider Perry as in Freeman's place, and wait with him as long as they could wait with Freeman, that is, during life, and then do as is now done by the *cestui que trust* (Freeman being dead), called upon Perry to surrender the slaves, the statute is no bar, for there has been no adverse possession. The fact is that by Freeman's death there was no interest or estate in Perry to protect. Had he taken the negroes tortiously, he would have acquired a tortious estate;
(250) but having acquired a limited one, that is, during Freeman's life and the pleasure of the trustees, it expired by Freeman's death.

There is some difficulty as to the jurisdiction, for the trustees have the legal estate, and should have sued Perry immediately on Freeman's death; but as they will not or have not done so, and Perry as long as he holds is *quasi* trustee, I think this bill may on these grounds be sustained.

PER CURIAM. An account directed.

JOHN R. PIERCE ET UX. V. ROBERT W. PERKINS ET AL.

1. In a general reference of a matter in dispute, the arbitrator may decide upon moral and equitable considerations; and where he intended to decide according to law, a mistake, to vitiate the award, must appear upon its face.

2. An error of judgment in an arbitrator is no reason for setting aside his award.

3. A party to a cause is bound by any agreement respecting it made by his attorney, notwithstanding the latter may have disobeyed his instructions.

4. And where the attorney of a nonresident appears before an arbitrator and examines witnesses, his client is bound by the award, although the attorney was only to act in court.

5. An arbitrator can, with the consent of the parties, act upon the statements of witnesses not under oath; but it is misconduct in him, without consent, to examine a witness in private.

THE bill alleged that the *feme* plaintiff was one of the next of kin to William Perkins, deceased; that administration upon his estate had been committed to Frederica, his widow, and that the defendants were her sureties; that the administratrix refusing to make a distribution, the plaintiffs and one Burrows and his wife, who were also next of kin, put the administration bond in suit in Halifax County court; that pending that suit, the plaintiffs being residents of the state of Virginia, a rule of reference was made, whereby the matter in controversy was referred, with the consent of the present plaintiffs' attorney and of Burrows, to arbitration, the award to be a rule of court; that the plaintiffs had no notice of the rule of court, nor of the subsequent proceedings before the arbitrator, who returned an account taken by him of the assets of the intestate which came to the hands of his administratrix, and of her disbursements, from which it appeared that her payments exceeded her receipts, and thereupon he awarded that the suit should be dismissed, of which the plaintiffs had no notice in time to object.

The bill then specified several mistakes, both of law and fact, (251) which the plaintiffs insisted the arbitrator had made, and also several instances of misconduct on his part, particularly that he had not sworn the witnesses, and had examined the agent of the administratrix in her discharge, in private, when no one was present on the part of the plaintiffs; and they prayed for relief against the defendants, notwithstanding the bar at law created by the award.

The defendants denied all the material facts alleged in the bill, and proofs were taken, but it is not necessary to state their substance, as they can be easily understood from the opinion.

Devereux for plaintiffs.
Badger, contra.

RUFFIN, J. The reference was a general one for a decision of the matters in controversy, according to right, and not according to law; and the arbitrator could properly admit his judgment to be influenced by all moral and equitable considerations. It does not appear that he meant to be governed by the law, and awarded erroneously, supposing it to be one way, when it was the other. According to *Ryan v. Blount,* 16 N. C., 382, such a mistake can be made to appear in no other way than by the award itself. That disposes of thus much of the bill. But neither the award nor the evidence shows that the arbitrator acted upon any mistake, either of law or fact. His own deposition has been taken, and directly repels both allegations. He intended to decide according to what he deemed justice between the parties, without regard to strict law. If he erred in that, without any unfairness by either party, and without grossly mistaking material facts, the parties are bound by it; because he is a judge of their own choosing, and they have agreed to abide by his judgment. An error in judgment, as a thing possible, must have been in their contemplation, and they are, therefore, taken to have agreed to run that risk.

The evidence is equally inadequate to the establishment of any mistake of fact. The arbitrator now thinks the facts to be as he then thought them. Whether the evidence before him was sufficient to estab-
(252) lish them was left to him to decide. He did not misconceive the evidence by supposing it different from what it was, and certainly he drew no grossly wrong conclusion from it. He computed nothing falsely, and there is no reason to believe that the arbitrator would award differently if he were to pass on the same evidence again, or if every fact which now appears had then been made to appear before him. If, then, he erred at all, it was altogether in judgment, which all tribunals may do; and the parties stipulate not to except to an error purely of that sort in an arbitrator. It must be so, else this domestic forum is held more strictly to infallibility than any other passing upon both law and fact. There is nothing, it seems to us, in the decision of the arbitrator which furnishes a reason for setting it aside.

The plaintiffs charge, however, that the reference was made without their knowledge or consent, as were also the award and judgment. It does not appear affirmatively that they had a personal knowledge or agency in it. The facts are that the suit at law was brought at the relation of the plaintiffs and Burrows and wife, who appeared by Mr. Burges as their attorney; and that the agreement and rule of reference

was made between the defendant on one side and Burrows as one of the plaintiffs and Mr. Burges as the attorney of all the plaintiffs on the other. The authority of the attorney of record to make all agreements for the conducting or determining the suit cannot be disputed by his clients; other persons are not to take notice of his private instructions or his want of instructions. They have a right to consider his authority full to manage the suit as the party himself could; and the client must be bound by his acts, unless he can clearly establish collusion between the attorney and the opposite party, which here is not pretended. It is likewise true that the arbitrator did not give the plaintiffs notice of the time and place of hearing the case; but he gave notice to Burrows and Burges, and, indeed, sat in the office of the latter. Burrows and Burges were both present and produced and examined the witnesses, and (253) cross-examined the witnesses offered on the other side. This is proved both by the arbitrator and witnesses who were examined before him. Pierce himself lived in another state, and Burges and the other party plaintiff did not object to proceeding, but assented to and assisted in the trial. Mr. Burges, indeed, now says that he did not consider himself the attorney of Pierce out of court. The Court thinks he was not then at liberty to say so, his client being abroad, and that he and his client are less at liberty to say so now, after withholding his objection then and acting as the attorney. The opposite party was bound then to recognize him as representing Pierce, and have, therefore, a right that Pierce shall be bound by the acts of Burges as his representative. If he has suffered by it, his recourse is not against the party, but his attorney. The Court is, therefore, of opinion that the reference and award are obligatory, without the personal assent of Pierce.

There are two acts of irregularity upon which the award is impeached as constituting what is technically called in the Court misbehavior in the arbitrator.

The one is, hearing the testimony without swearing the witnesses. The answer to that is that it was proposed by Mr. Burges himself, upon his knowledge of the integrity of the witnesses and his belief that they would say nothing but what they would swear to, and the arbitrator can proceed upon the statement of the parties made by themselves or by others by their consent.

The other is, that the arbitrator heard at home, in the absence of the other parties, the statements of a person who was a witness and the agent of the defendants. This would form a good objection to the award if not satisfactorily explained, even if the award were otherwise unobjectionable.

The first principles of justice require that no private instructions should be received, nor evidence heard, without giving the other party an opportunity of being present. The arbitrator may be influenced by such representations insensibly to himself; and the party has a right to
(254) know the proof, that he may object to it if improper, or answer it if proper. But the evidence in this case is clear that the arbitrator proceeded at home only to examine the vouchers of the administratrix, and this at the request of Mr. Burges; that he did not decide on them, but suspended every doubtful one for further proof, which was to be taken at the meeting that afterwards took place at Mr. Burges's office. What had been done was communicated to him at that time and approved, and the witnesses then examined to the disputed items; and what renders this objection altogether unavailing is this decisive fact, that there is in the bill no allegation of an error or mistake in any item except those to which the testimony taken in the presence of the parties applied, and concerning which no other proof was heard but that given in the presence of the parties. The arbitrator heard nothing in the absence of either party on which he acted or on which he could act, in reference to the objections now made.

There is no precise charge of corruption in the bill; and what is faintly stated there has been properly abandoned entirely in the argument, for there is not the slightest evidence in support of it.

The bill must, therefore, be dismissed without examining into the strict propriety of the award upon the merits; though, if it were necessary to decide the cause upon that point, it seems to us that it might be difficult, upon the whole case, to have come to a conclusion differing much from that of the arbitrator. Nor has the Court thought it necessary to determine the effect of the judgment entered on the award, with notice to the attorney and without opposition by him; because we think the award itself good, and that no opposition to it ought to have been effectual.

PER CURIAM. Bill dismissed.

Cited: Eaton v. Eaton, 43 N. C., 112; *Hall v. Presnell,* 157 N. C., 294.

(255)

SAMUEL RALSTON v. HUGH TELFAIR ET AL.

A bequest of the residue, "to be disposed of as my executors think proper," is a gift to them for their own use, and since the act of 1789 (Rev., ch. 308), making executors trustees of the residue, it is a question of construction, and parol evidence is not admissible to prove the next of kin entitled.

SAMUEL RALSTON, the younger, a native of Ireland, died in the county of Pitt, without issue, having by his will devised as follows: "It is my will and desire that my notes and bond, amounting to between eight and ten thousand dollars, should remain in the custody of Churchwell Perkins, who has them now in possession, and that he should collect them as speedily as possible, and to pay the debts, and the remainder to be paid to the executors, to dispose of as they may think fit. It is my will that the remainder of my property should be disposed of as my executors think proper." He appointed the defendants his executors.

The plaintiff alleged himself to be the next of kin to the testator, and insisted that the executors were trustees for him. The bill prayed an account of the administration of the defendants and for payment of the residue.

The defendants denied that there was any trust for the plaintiff, and insisted that they, under the will, took the residue for their own use.

A replication was filed and proofs taken, but as the cause was decided without reference to them, a statement of them is unnecessary.

Gaston for plaintiff.
Hogg and Badger for defendants.

DANIEL, J., after stating the will and the pleadings: This is not a case where parol testimony can be received to repel or support presumptions. The plaintiff is entitled to a decree in his favor if the defendants do not take as legatees. To ascertain that fact we can only look to the written instrument. The whole will may be examined to find out the intention of the testator, but no parol proof is admissible to aid us in finding out that intention. It is contended for the plaintiff (256) that the clauses in the will before quoted only create a trust in the executors, without defining the objects, and that it results to the plaintiff as next of kin.

There is a distinction between an express trust for an indefinite purpose and those cases where, from the indefinite nature of the purpose, the court concludes that a proper trust could not have been intended, though words may have been used which, had the objects been definite, would

by construction import a trust. In the first description of cases the devisee does not take beneficially; in the latter he does. *Morris v. Bishop of Durham,* 9 Ves., 399, 10 Ves., 522, 537, is an instance of the first kind. That was an express trust, for an indefinite purpose, and it was declared to be a trust for the next of kin. The case was this: the testatrix by her will bequeathed all her personal estate to the Bishop of Durham, his executors, etc., upon trust to pay her debts and legacies, etc., and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham, in his own discretion, shall most approve of; and she appointed the bishop her executor. The chancellor said (10 Ves., 535): "If the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to authorities: that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion whether to make the application or not, it is absolutely given." He said the next consideration was whether there was a trust effectually declared, and as there was an intention to create a trust, but the object being too indefinite, it had failed. "The consequence of law is (page 543) that the bishop takes the property upon trust to dispose of it as the law will dispose of it, not for his own benefit or any purpose the court can effectuate," and he affirmed a decree at the Rolls in favor of the next of kin.

In *Price v. Archbishop of Canterbury,* 14 Ves., 364, the (257) chancellor says (page 369): "No case has gone the length of holding executors to be trustees for the next of kin, under a bequest for such purposes as they shall in their discretion think fit. If, as in *Bishop of Cloyne v. Young,* 2 Ves., 91, the testator declares that he gives it in trust, and then does not declare the trust, or, as in *Morris v. Bishop of Durham,* the trust declared fails, the executors being clearly intended not to have the benefit, must be trustees for the next of kin; but there are many authorities that a bequest to A. for such purposes as he shall think fit is a gift to himself. That must always depend on the particular terms of the will." In *Gibbs v. Rumsey,* 2 Ves. & Bea., 294, the testatrix gave the residue of her property to her executors, Henry and James Rumsey, "to be disposed of to such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion shall think proper and expedient." The master of the Rolls said (page 297): "Do these subsequent words import a trust? The testatrix has very frequently in the course of her will used the words, 'in trust,' but those words are not introduced here. I see

nothing here but a purely arbitrary power of disposition according to a discretion, which no court can direct or control. It is said (page 295) the testatrix meant the executors to give this property to somebody, and not to enjoy it themselves; but that might be said in every case of a bequest to give to objects not distinctly specified, and in every case of a general power of appointment." He further said (page 299): "The next of kin had no right to call upon the executors to account for the residue."

From the before-mentioned authorities we are of opinion that the executors in this case do not hold the property in trust, but take beneficially for themselves. The bill must, therefore, be dismissed.

RUFFIN, J. The evidence offered by the plaintiff does not establish anything in his favor; for it only shows that the testator knew he had relations in Ireland, and expressed sometimes an affection for them. There is no declaration of an intention to provide for (258) them.

But were it ever so explicit to that effect, it would be of no avail in this Court. It is inadmissible under our law. Since the statute, there is no equity nor resulting trust to be rebutted; upon which grounds alone such evidence has been heard in the English chancery. Here the executor, as such, can take nothing. He gets only what is given to him by the will, which must be construed as to his legacy, like it is as to all others, namely, on the words themselves. It is with us a question of construction of the instrument.

Upon the will itself, I think no trust can be raised. The cases cited at the bar establish that a devise to one to dispose of at his will and pleasure carries the beneficial and the absolute interest. *Powell v. Powell,* 6 N. C., 326, and *Gibbs v. Rumsey,* 2 Ves. & Bea., 294, are strong authorities. The words are too indeterminate to raise a trust, without turning every unlimited power of appointment into a trust, and a void trust, because indefinite. The discretion given to the legatee excludes that of all others, courts as well as individuals, and constitutes that *arbitrium* in the disposition which amounts to ownership. I concur that the bill be

PER CURIAM. Dismissed.

Cited: Rawls v. Ponton, 36 N. C., 356; *Morrison v. Kennedy,* 37 N. C., 380; *Thompson v. Newlin,* 43 N. C., 40; *Lea v. Brown,* 56 N. C., 150.

RALPH HOWELL, EXECUTOR OF ROBERT CRAWFORD, v. PHILIP HOOKS, ADMINISTRATOR OF ARTHUR CRAWFORD.

1. The terms of a written agreement cannot be varied by parol proof in equity more than at law, unless upon an admission by the defendant, or unless the provision sought to be established was a substantive part of the agreement, and omitted through fraud or mistake, as where an absolute bond was given to indemnify bail, and the proof was of admissions by the obligee of the intent, but nothing to show fraud or mistake, or that a condition was omitted. It was held to be single.

2. It seems that an executor who has been charged with assets in respect to a judgment which is enjoined is entitled to relief; but whether at law or in equity, *quere*.

3. A defendant whose judgment has, pending a suit in equity, become dormant, is not, upon a dismission of the bill, entitled to a decree for his debt, unless an injunction has issued.

THE bill charged that Arthur Crawford, the intestate of the defendant, at the request of his father Robert, the testator of the plaintiff,
(259) became the bail of one of his brothers in a criminal prosecution, and that the father agreed to indemnify him, and to give him a bond to that effect; that the defendant's intestate drew the bond, and taking advantage of the age, infirmities, and confidence of his father, wrote a bond for $500, payable absolutely to himself, at the death of the father, which was executed by the latter and delivered to the obligee. It was expressly charged that the omission of the condition of indemnity was by the fraudulent design of the obligee; or, if not, that it was the condition and sole purpose of the delivery. Arthur never suffered by his engagement for his brother. The bond, upon the death of both parties, which happened soon after the transaction, was put in suit by the defendant. The prayer was for a discovery and a perpetual injunction.

The defendant in his answer stated that he found the bond among the valuable papers of his intestate, and being absolute on its face, he considered it his duty to collect it; that he knew nothing of the execution, nor the consideration of the bond, nor of any condition on which it was delivered.

A replication was filed and proofs taken, which are stated in the opinion of RUFFIN, J.

W. C. Stanly for plaintiff.
J. H. Bryan and Mordecai for defendant.

RUFFIN, J. There is no proof of the age, infirmities, or mental capacity of the father, nor of any undue influence of Arthur over him;

nor any evidence as to the terms in which the instrument was directed to be drawn, nor of those in which it was represented to the father to be drawn; nothing to show that in its structure it was different from what it was then thought and intended by both parties to be. But several depositions, which were read *de bene esse,* contain full proof of declarations by Arthur shortly after the date of the bond, and subsequently, that his father gave him the bond as an indemnity; and that it was to be paid, if he suffered; otherwise, destroyed.

The question is upon the admissibility of the evidence to (260) establish the alleged condition. The case of *Mease v. Mease,* Cowp., 47, is an authority at law upon the very point, that such evidence cannot be heard. The rule of evidence is generally the same in both courts. In equity there is the advantage of the defendant's answer; but if that fails to confess or to open the case, and it is to be made out entirely by proof, the terms of an agreement in writing can be no more varied here than at law, unless it appear by clear proof that the provision sought to be established was a substantive part of the contract, and intended to be inserted in the instrument itself, but was not, through fraud or mistake. To these points there is no proof here; nothing as to what passed in coming to an agreement, or as to drawing it up, or to show that the father did not know it was absolute in its terms, or did not intend it to be. The evidence is as to the manner in which the son should use the bond upon certain contingencies, and that drawn from his verbal declarations. To act upon it would be to insert a condition inconsistent with the legal operation and contradicting the express terms of the instrument, which would break down all distinctions as to degrees of evidence and destroy the confidence that ought justly be reposed in solemn contracts. *Fordyce v. Willis,* 3 Bro. C. C., 577. This is altogether distinguishable from evidence impeaching a contract upon consideration which renders it void by the words of a statute, or a rule of the common law, or a principle of equity. There the terms are not varied; and I believe no case can be found in which a court of equity, more than a court of law, has received parol evidence of the agreement directly in the teeth of the contract as reduced to writing. This is as strong a case as could be, for the moral honesty is doubtless, if there be reliance in the party's words and the witnesses's oaths, on the side of the plaintiff; and there might be very probably such a confidence between father and son. But the relation cannot be allowed to set aside the rule of law; for there is no point at which we could say the relation of the parties should operate, and beyond which it should not; whether it should take in or exclude brothers, (261) very intimate friends, and the like.

The Court cannot, therefore, take notice of the evidence, and the bill must be dismissed, with costs.

PER CURIAM. Bill dismissed.

While the case above stated pended in the court below, and after the proofs were taken, the defendant, fearing that the plaintiff would obtain a perpetual injunction, filed a bill against the plaintiff and one Edwards, in which he charged that upon the faith of the judgment he had obtained at law, he had been fixed by the defendant Edwards with its amount as assets, and praying that the defendants might interplead, and that he might be protected in the final disposition that might be made of the cause.

W. C. Stanly for Edwards.

RUFFIN, J. It is not now necessary to decide the questions made for the defendant Edwards against the equity claimed by the plaintiff, upon the score of the pendency of the original suit against him, upon the bill of the other defendant. That suit is now decided in favor of the defendant therein; so that the sum recovered by him upon the bond of Robert Crawford is now found to be properly applicable to the debt to Edwards, as has already been decided at law. Whether Hooks could have any remedy against Edwards after the judgment at law, or whether the present be the proper remedy, especially at the period it was resorted to, cannot now be material, and are therefore not decided; though, upon the former point, there seems at least strong justice on the side of an administrator for relief in some way, had the suit of Howell against him resulted differently. In the event which has happened, this bill must be dismissed, with costs to Edwards.

A motion was made on behalf of Edwards for a decree here for the sum due him, upon the ground that his judgment was dormant.
(262) This might be under the statute, if an injunction had been granted and a bond taken; but no injunction has ever been awarded, nor does it appear that the judgment at law is dormant, or even not satisfied by a levy of the money. Consequently, the motion must be refused, and Edwards left to proceed on his judgment at law, if it be yet unpaid.

PER CURIAM. Declare accordingly.

Cited: Geddy v. Stainback, 21 N. C., 479; *Ray v. Blackwell,* 94 N. C., 14; *Moffit v. Maness,* 102 N. C., 463.

RANSOM SANDERS v. WILLIAM SANDERS ET AL.

1. An administrator who has, without neglect, been compelled to pay debts of his intestate to an amount exceeding the personal estate will be reimbursed out of the real assets.
2. But if the payment be voluntary, whether he will be aided, *quere*.
3. The heir is concluded by a judgment against the administrator as to everything but the amount of assets received by the latter.

THE case made out by the bill was that the plaintiff was appointed administrator of John Sanders by the county court of JOHNSTON; that he found among the papers of his intestate evidences of debt to the amount of $8,400, against Reuben Sanders, who was perfectly solvent; that this sum was subject to a legal set-off on the part of the debtor, which reduced it to the sum of $5,317, which was assets in the hands of the plaintiff, and for which he was charged in suits brought by the creditors of the intestate; that Reuben Sanders, the intestate, and one White had been copartners in trade; that the former had been charged before the death of the intestate with the settlement of the copartnership; that White had become insolvent, and Reuben Sanders had found that the copartnership dealing had eventuated in a loss, which from the insolvency of White was to be borne by him and the intestate; that he had obtained a decree in the court of equity for the county of Johnston, whereby the amount of the balance due at law by him to the intestate was reduced to $1,447; and that in consequence of this equitable set-off of Reuben Sanders against the debt above mentioned, not being a defense at law to the plaintiff against the creditors of his intestate, he had been subjected to the payment of debts to an amount exceeding the (263) assets which had come to his hands. The defendants were the heirs of John Sanders, the intestate, and the bill prayed that the real assets which had descended to them from their ancestor might be sold, and from the proceeds thereof the plaintiff might be indemnified for the amount he had paid over and above his receipts.

Copies of a judgment at law in favor of the plaintiff against Reuben Sanders and of a decree establishing the equitable set-off of the latter were filed.

Gaston and Devereux for plaintiff.
W. H. Haywood for defendant.

HENDERSON, C. J. We do not mean to decide the question whether an administrator or executor, who goes beyond his assets in payment of debts, without showing a special reason for doing so, can claim to be reimbursed out of the real estate. Here the administrator has made out

a very clear and strong case why he was compelled to pay debts beyond the amount of his testator's personal estate, and has given a very satisfactory reason why he, in his inventory, charged himself with the full amount of the apparent debt due his intestate from Reuben Sanders, and how it was afterwards diminished by throwing on the estate a claim which Reuben Sanders had on the copartnership, by the insolvency of White, one of the partners. We think that the plaintiff did not act improperly in charging himself with the full amount of that debt in his inventory, and that it was his duty to allow the decree obtained by Reuben Sanders against him, an account of White's insolvency, as a set-off against it. If by these means he was charged and did pay to creditors beyond his assets, he has a fair claim in this Court to a reimbursement.

Next, as to the proof. The decree in the suit of Reuben Sanders against the copartnership fixes, as to the defendants, both the amount of his claim and the liability of the administrator to the sum decreed against him for the insolvency of White, for that would have (264) been its effect in a suit at the instance of Reuben Sanders to subject the real estate to its payment, and such must be its effect in favor of those who are substituted to his rights. The conclusive effect of that suit arises from the peculiar relation subsisting in our law between the personal representatives and the heir. I call it peculiar, for I believe it nowhere else exists. Here they are not strangers as they are in England, but there is a *quasi* privity between them, as the former defends as well for the heir as for the other creditors, the legatees, and next of kin. The judgment against him, in the absence of fraud, is conclusive upon all, except as to the plea of fully administered. The law allows the heir to contest that, when brought in to show cause, not why the creditor should recover his debt, but why he shall not have his judgment, obtained against the executor or administrator, levied out of the real estate. It is upon this privity that an executor or administrator, who has disbursed beyond his assets, stands in a different situation from a mere officious intermeddler, who obviously pays money for another, and then claims reimbursement. What may be the effect of such a state of facts this case does not require us to decide. The debt being thus conclusively fixed on the heir, there being no fraud, no collusion, it remains to prove the expenditure of asset, and as to that an account must be taken.

PER CURIAM. Direct an account.

Cited: Scott v. Dunn, 21 N. C., 427; *Smith v. Brown,* 101 N. C., 350; *Publishing Co. v. Brown,* 165 N. C., 490.

JOHN WAGSTAFF v. CHARLES SMITH.

A tenant in common, in possession, is not protected by the statute of limitations from an account to his cotenant of the rents and profits until three years after a partition.

This bill prayed an account of the issues and profits of land of which the plaintiff and defendant were tenants in common. The defense by plea and answer was the statute of limitations. (265)

Upon the proof, it turned out that the bill was filed in the court of equity for Granville, in February, 1829, and a partition had been made of the land held in common in November, 1826.

Nash and Devereux for plaintiff.
Badger for defendant.

Henderson, C. J., after stating the above facts: The statute of limitations commenced running when the partition was made, for it is not the receipt of each particular item of an account which puts the statute in motion, but the *cesser* of the privity or connection from which the accountability arises. So long as that relationship or privity or connection continues the statute does not commence running. During that time there is nothing adverse, no withholding by the one to the prejudice of the other. The very act of receiving affirms the confidential relationship in law or in fact. Any other construction would destroy all confidence, and necessarily put a limit of three years to all those confidential connections in pecuniary matters which tend so much to facilitate the transactions of society. The defendant must come to an account.

Per Curiam. Decree accordingly.

Overruled: Gaskill v. King, 34 N. C., 212; *S. c.,* 36 N. C., 1; but since approved *Northcott v. Casper,* 41 N. C., 307; *Weisman v. Smith,* 59 N. C., 131.

KENNETH McCASKILL v. ARCHIBALD McBRYDE and ATLAS JONES.

1. A bill charging that the defendants were the agents of the plaintiff, and also executors of a former agent, and seeking by reason of their having received assets of their testator, to charge them with the balance due by him, is not multifarious.

2. Wherever the defendant is the agent, bailiff, or receiver of the plaintiff, a court of equity has jurisdiction for an account.

The bill charged that the plaintiff in 1819, being a resident of Moore County, and about to remove to Scotland, appointed one William Martin his agent to collect sundry debts due him, including one (266) from Martin himself, and to sell several articles of personal property and make remittances to the plaintiff; that Martin, under this agency, collected money, the particulars of which were specified, but made no remittances; that he was dead, having appointed executors, of whom the defendants were the survivors, and had received assets to an amount exceeding the debts due by their testator; that upon the death of Martin, the plaintiff executed a power of attorney, authorizing the defendants to collect all moneys due him in his state; that under this power they took into their possession all the evidences of debt due the plaintiff, and had made him some remittances, but still had in their hands a large sum due him—particularly, that the defendant Jones had collected $2,500, which he had not paid over, but had removed from the State, having placed notes in the hands of the other defendant to make good his default. The bill then charged that the defendants either had, or ought to have collected the balance due the plaintiff by Martin, as well for the debt he owed as for collections made by him, having as his executors assets to pay and discharge all his debts; that the plaintiff had, at the request of the defendant McBryde, commenced an action at law against him, as the executor of Martin, for the balance due to the plaintiff, to which the defendant had pleaded the several statutes protecting dead men's estates, and thereby defeated the action. The prayer was for a discovery, and an account.

The defendants demurred because the bill sought to charge them in the distinct character of agents for the plaintiff and executors of Martin.

Daniel, J., at Moore, on the last circuit, overruled the demurrer, and the defendants appealed.

W. H. Haywood and Winston for defendants.
Badger for plaintiff.

Henderson, C. J. This demurrer for multifariousness was certainly put in under a mistaken view of the case; for the bill seeks to charge the defendants on account of their own agency only, on their own undertaking, and in no way calls them to account for the agency of their testator. It is true, the agency of Martin is also stated, and that they are his executors, and that assets came to their hands; but this is only an unnecessary statement of the evidence, which it would be more proper

to show before the master to prove that they themselves had collected, or might have collected, the debts due from Martin, by proof of his assets in their hands. There is no pretence to say that the bill is multifarious, as calling them to an account both for Martin's agency and their own. As to the jurisdiction of the court, I do not know how it can be doubted, for the defendants certainly are the bailiffs, agents, or receivers of debts due from others to the plaintiffs, and the case is strengthened, if it needed it, by the removal of the principal to a foreign country. Can there be a doubt but that it is a proper case for an action of account at law?

PER CURIAM. Decree accordingly.

Cited: Dunn v. Johnson, 115 N. C., 257.

(268)

NATHANIEL J. PALMER ET UX ET AL. v. THOMAS ARMSTRONG AND WILLIE SHAW.

1. A testator gave land and goods to his executors to be sold, "and after payment of all my just debts, the residue of the moneys arising from them to," etc. The words, "after payment," etc., subject the land in exoneration of other legacies, but not in favor of the next of kin.

2. The rule exempting lands charged with the payment of debts until the personal estate is exhausted is not founded upon the notion of the testator's providing a fund not otherwise chargeable; but upon his presumed intent that his gift shall not fail while there is a surplus not given away. Or to distinguish between different devisees, and not between them and the heir, or next of kin.

3. The rule is the same when there is a conversion out and out, and the residue given away.

4. A pecuniary legacy charged with the debt of the testator is to be reimbursed out of the residuum, as well when that is undisposed of as when it is given away.

THE plaintiffs claimed under the following clause in the will of James Lapslie: "I give and bequeath to my executors, hereinafter named, my tract of piney land on the head-waters of Enoe and Back creeks, to be sold, together with my stock of every description, and, after the payment of all my just debts, the residue of the moneys arising from the sale to my said two supposed daughters (plaintiffs), to be laid out in their education and support," etc. There was no residuary clause in the will.

The defendants were the executors of the testator, and the only question presented to this Court was whether the property given in the clause of the will above set forth was charged absolutely with the payment of the testator's debts, so as to exempt the residue, or whether it was charged upon the failure of the residue, so as to exonerate other legacies.

From the accounts taken in the cause it appeared that if the residue was charged before the property bequeathed to the plaintiffs, they were entitled to $853.66, being the amount for which the land and stock sold; but if the property devised in the clause of the will above cited was primarily chargeable with the debts of the testator, then the plaintiffs were entitled to nothing.

STRANGE, J., at Orange, on the last Spring Circuit, dismissed the bill, and the plaintiffs appealed.

Nash and W. A. Graham for plaintiffs.
Winston for defendant.

RUFFIN, J. Most of the questions argued in this cause were considered and determined a year ago, in *Robards v. Wortham.* There the residue of the personalty was undisposed of, and there was a devise of land to be sold by the executor for the payment of debts, and the surplus of the proceeds given over. It was held that although both were liable before land descended, the former was liable to creditors before the latter.

The present discussion has not produced a doubt of the correctness of that opinion. It is admitted at the bar that it conforms to the rule in England; but it is insisted that our law, which subjects land to all debts, has altered it here. The idea is that the testator is under no necessity, in point of honesty, to provide a fund for creditors, since the law has effectually done that for him already; and, therefore, that there can be no motive for his charging a particular part of his land with the payment of debts, but to fix that charge conclusively upon it, in ease of all other parts of his estate. But this reasoning applies equally in England to a case of debts by specialty as between the devisee and heir. Yet nothing is more certain than that the latter pays those debts before the former, although the land devised be ever so anxiously and ex-
(270) pressly charged. The rule, then, is not founded on the reason supposed, but upon the notion of an intention in the testator that his gift shall not be defeated as long as there is a sufficiency of estate not given to anybody to satisfy all demands against him. Besides that suggested, there are many other motives, applicable as well to this

country as England, for making such a charge. It may be to discriminate between the liabilities of different devisees and not between them or either of them and the heir. So it may be to prescribe the order of payment as between the land made liable to the debts and specific legacies, and not as between either of them and the next of kin. And this is as strong here in relation to simple contracts as it is in England in reference to bond debts; for with us simple contracts cannot reach the land until all the personalty has been exhausted, as well that given specifically as the residue bequeathed and the surplus undisposed of. The land may then be charged for the purpose of exonerating and in a manner to exonerate particular parts of the personal legacies, and for that purpose alone, not to exonerate the whole personalty. It is in fine a question of intention, and we cannot here, more than in England, infer from the charging of one fund an intention to ease another, liable by law before it.

This, however, is stated not to be a case of a charge upon land, as such, but a case of conversion of the whole into personalty. Such I take it to be; and perhaps for that reason it is different from *Robards v. Wortham, ante,* 173, as discussed. Although the defendant was there both heir and next of kin, no question was made by him upon the undisposed surplus. He gave that up and contended only for the exoneration of the realty descended. Nor did it occur to the Court that there could be a doubt about it. For that reason it was not accurately considered whether there was to be a sale at all events or only in case it was necessary for the payment of debts, nor the effect, in the one case or the other, upon the residue of the personalty. It was not material in the determination of the point made by the defendant as heir; for if it be admitted, as I suppose it must be, that where the principal intent of a sale of the land is to provide for the payment of debts, and (271) upon the supposition that the purpose expressed will require a sale to be in fact made, the surplus is given over as money, and not as land—if, I say, in such case it be admitted that the purpose of the sale show that it was not absolutely to be made, and create a trust in the nature of a charge for creditors, which the donee of the surplus may elect to satisfy by paying the debts, and thereupon call for a conveyance of the land: yet that is between the executor and trustee on one side and the donee of the surplus on the other. It would not alter the order of liability intended by the testator. And the devise to sell for payment of debts, although that was the only purpose of the sale, denoted the intention, as much as a sale out and out would, that as between the devisee and the heir the land devised should be first liable. And the only question made there was between those parties.

Here there is a conversion out and out. There is to be a sale at all events, and not for the sole purpose of paying debts. The legatees are infant children, who could not elect, and who needed a provision for maintenance and education. The testator has elected for them and chooses to provide money, the mingled proceeds of land and perishable stock.

Taking it, then, to be a general pecuniary legacy, I do not perceive that it will make any difference. The question is between a pecuniary legatee and the next of kin. It is of the same nature with that before stated between the devisee of land and the heirs, only stronger against the distributee, who is not so great a favorite as the heir. The rule is general that legatees of all sorts are to be satisfied before the next of kin. Debts and legacies must be satisfied before there can be a residue. The remainder after paying all is what constitutes the surplus. The *hœres natus* must yield to the *hœres factus,* because the testator meant effectually to give a part of his property, as he had a right to do. He who claims by law, and not by gift, must take subject to the law and all its encumbrances, unless the testator positively and expressly (272) directs otherwise. He to whom a thing is given subject to a charge must bear it as against one to whom another thing is given clear of charge; but not as against him to whom nothing is given, and who succeeds, by law, and without any intention of the testator, to what is by law also subject to the same charge, and subject in the first instance. The legatee can, indeed, only have what is given to him; and if this legacy can be said to be a gift of the balance of the proceeds of the land and stock after paying all debts out of those proceeds, then the argument for the defendant would be good. As if a particular thing be given to A., he paying £100 to B. or to my executor, or estate, or the like: then the question is, What is given, or on what condition? But that is very different from the inquiry, In what order is a general charge to be borne by different parts of the estate? Charging a particular debt on a legacy, specific or general, will attach it to that legacy in the same manner as if it be expressly given, minus so much. But these words, "after payment of debts," generally, do not mean that this legacy, and this alone, should answer creditors. It so means as against other legatees, but not as against other personalty not disposed of. The testator intended to provide for his legatees, and not for his next of kin; and the latter can claim only upon the score of intestacy, in which case the debts must be paid before a distribution, unless the testator has expressly ordered otherwise. The words do not cut down the legacy, but only charge it. Suppose a testator says in the beginning of his will, "after

payment of my debts, I give," etc., and then proceeds to devise lands, and also bequeath personal legacies, specific and pecuniary, and the residue generally. Such words doubtless charge the lands devised, but not in exoneration of lands descended nor equally with the legacies of either kind. There is no partial exoneration of the personal estate by the real, and as to the personalty, the order of liability amongst the different parts of it is not at all affected; because, as to that, the words mean nothing, since every part of it was liable to debts before. Pecuniary legacies would still be subject before specific, and the residue bequeathed before either; for the words, "after payment of debts," (273) go also to it, and disposing of it as a general residue shows that it was to be first applied, because, *ex vi termini,* residue generally means what remains after debts are paid. Much more is this the case when the surplus is undisposed of. The argument is the same when those words, "after payment of debts," are applied to a general pecuniary legacy, in reference to the order of liability between that and the residue or surplus. The subject that legacy before others of the like kind, but not before legacies liable in law before it, without the latter be expressly or clearly exonerated, or the charge on the first be in terms that make it exclusive of all others. It is a question of intention, and leaving a residue as a residue proves the meaning to be that it should pay in the first instance; much more where it is not given at all; for then there is nothing to show the testator meant that the law should not take its course in the administration of his assets. Consequently, I conceive the undisposed surplus is to be first applied in satisfaction of the debts, and as there is a sufficiency of that for that purpose, the petitioners are entitled to the whole proceeds of the land and stock.

PER CURIAM. Decree reversed.

Cited: Swann v. Swann, 58 N. C., 299.

JONATHAN ELLIS v. RODERICK AMASON, BLAKE LITTLE, AND ELIJAH PRICE.

1. The obligee of a bond in suit having assigned it verbally as a security to a creditor, and given him the custody of it, with authority to conduct the suit, and the obligor, with notice of the assignment, having paid the debt to the obligee and taken a release from him: in equity the interest of the assignee will be protected, and the obligor enjoined from pleading the release to the action at law.

2. Notice of the assignment of a bond should be direct, in order to charge the obligor with a wrongful payment of it; but notice may be proved otherwise than by a personal communication from the assignee.

THE bill was filed in September, 1830, and charged that in August, 1829, the plaintiff became surety for the defendant Roderick
(274) Amason, in a note to one Barnes for $400, and that Amason becoming soon afterwards embarrassed, the plaintiff applied to him to be counter-secured, and thereupon Amason agreed to transfer, and did verbally transfer, to him a claim which Amason then had in suit against the defendant Little in Edgecombe County Court, for $600; that the plaintiff prosecuted the suit personally, and at a subsequent term obtained a judgment in the name of Amason, from which an appeal was taken by Little, who had before, and at the trial, notice that the plaintiff claimed the beneficial interest in the suit. The bill then charged the insolvency of Amason and the payment of the debt to Barnes by the plaintiff, and that pending the appeal the other defendant, Price, pretended to have an assignment from Amason of the claim on Little, and that he and Little had induced Amason to execute a release of the said demand, and to attempt to dismiss the suit. Process was prayed against the three, and an injunction against using the release, or dismissing the suit, or otherwise interfering with the plaintiff's receiving whatever sum might be recovered at law from Little. The bill did not charge any specific notice given by the plaintiff to Little or Price, or anything from which it might be inferred, but the plaintiff's participation in the management and trial of the suit in the county court.

The three defendants put in separate answers. That of Amason stated the demand against Little to be on his endorsement of a note made by one Speight, and admitted the assignment to the plaintiff for the purpose mentioned in the bill; he added, however, that besides this claim he transferred to the plaintiff other notes, which he mentioned; and that the whole was intended as an indemnity against the debt to Barnes, and to satisfy certain moneys (about $300) which Ellis then agreed to pay for Amason, who had been arrested for that sum on a *ca. sa.;* that at court Ellis refused to pay any part of the $300, but surrendered him, and he would have gone to jail but for the friendship of Price, who advanced the amount for him, and took a written assignment of
(275) the demand on Little by way of security for that and other debts for which he was Amason's surety. He admitted that he told Price of the transfer to Ellis, but stated also that Ellis had refused to perform his part of the agreement, and that he felt himself released from it. Of the assignment to Ellis, he said that he never gave notice to

Little until he understood from him and Price that they had settled, and Price received full payment; and that he then told Little of what had passed between him and Ellis as he had represented it to Price.

The answer of Price stated the transaction between Amason and himself as set forth in the answer of the former, and said that he took his assignment at February court, 1830; he then applied to Ellis for the note, for the purpose of trying the suit, but he refused to deliver it up, saying that he claimed it under the transfer to himself; upon which Price informed Ellis what Amason said was the agreement between them for the discharge of the *ca. sa.*, which Ellis admitted to be true, and finally consented that the assignment to Price should be preferred to his, and that he would take the residue after Price's claims were satisfied. The suit was then tried, and an appeal taken by Little. The answer then averred in positive terms that Price never at any time gave notice to Little of the assignment to Ellis, or of that to himself, or any intimation that either he or Ellis had an interest in the claim; but that being about to leave the State, shortly after the judgment, he, Little, and Amason got together and they came to a settlement, upon which Little paid the full amount of the claim, which was received by Price and an acquaintance given by Amason alone in full discharge of Little, which, he said, was with no purpose of favoring Little, or taking an advantage of Ellis, but only to secure himself.

The answer of Little stated that he was sued to November Sessions, 1829, and that in January following, in a conversation with Ellis, he informed him that he should be pleased if he could get the suit settled, to which Ellis replied that he would pay the debt to Barnes for which Ellis was surety for Amason, he thought he could get clear;
but that he gave him at that time no notice of an assignment to (276)
himself; that at February Term Price gave him notice of the
transfer to himself, and showed him the written assignment, and shortly before the trial came on Price and Ellis were in private conversation together, and in a little while Price informed him (Little) that he and Ellis had come to an understanding that the suit was to be tried, and Price was to be first satisfied out of the recovery, and account for the surplus to Ellis; and Price further informed him that he had engaged Ellis to attend to the trial, as he was best acquainted with the facts. This defendant denied that Ellis then gave him notice of any interest in the claim, and averred that from the transfer to Price in writing he supposed him to own it exclusively. He then stated the nature of the agreement between Amason and Ellis, as set forth by the other defendants, as he had since understood it from them. It was then admitted

that on 26 March, 1830, a settlement took place between him (Little) and Price and Amason, when he discharged the whole debt by paying $554 to Price, and the balance of $15 or $20 to Amason himself, and took his receipt, which he intended to use on the trial of the suit. He denied all intention to defraud the plaintiff, and said that he never conversed with Amason upon the subject of the claim until the settlement, and Amason then averred that Ellis had no interest in it. He further stated that Price was sued as surety for Amason for another demand, and that a recovery would probably be effected against him for about $200, which Little, as the agent of Price (who had removed) was to pay. The insolvency of Amason was fully admitted.

The depositions of several witnesses proved the acknowledgments, at various times, of Amason in November, 1829, and thence on to the succeeding February, that he made a verbal assignment to the plaintiff of the note endorsed by Little as a counter-security for his responsibility for the debt to Barnes. None of them spoke of any further payment to be made for Amason on the *ca. sa.* or otherwise, but confined the
(277) purpose of the assignment to the debt due Barnes, which Ellis proved he had paid.

Several witnesses were examined as to the notice to Little. One of them proved that after hearing Amason in November, 1829, acknowledge the assignment to Ellis, he also heard Little, during the same week, say that Amason had made such a transfer, and that he thought he should get clear of paying anything. Another swore that after the trial at February, 1830, Little said that they had got judgment against him, and Ellis took an active part in the management, but that he had appealed, and thought he should cast them. A third proved that in the spring Little came to Amason's and asked for him, and upon some person's inquiring what he wanted of him, he replied that he wished to see him about the debt he had transferred to Ellis, and that he knew they could work Ellis about it; and a fourth, that Little showed him Amason's receipt, and stated that the suit should be dismissed, and Ellis was not as safe as he had thought himself. He then observed that Amason had made a verbal transfer of the debt to Ellis if he would become his surety, but as soon as he got him to court he had surrendered him, and then he (Amason) was obliged to apply to Price, to whom he gave a written transfer, and that the three, Amason, Price, and Little, had made a settlement, upon which he got a receipt.

Devereux and Mordecai for plaintiff.
Attorney-General and Gaston, contra.

RUFFIN, J. The first observation called for by the case is that the statements in the answers, that it formed a part of the contract between the plaintiff and Amason that the former should discharge the latter from execution, is entirely unsupported. No witness speaks of it, and the answers themselves, as to that, go out of the charges of the bill and bring this matter forward as a new and substantive defense. The defendants ought, therefore, to prove it. They have not been able by anybody but themselves, and their answers are not evidence for any more than against each other. The gross contradictions between them (to be accounted for, perhaps, by the circumstances that Price's (278) answer was drawn at his present residence in Alabama) may be the reason, and it seems to be a good one, why they have not respectively taken each other's depositions to that and other parts of the case. At present, their case is without evidence on this point.

As the answers of the defendants respectively are not evidence against the others, each can be charged only on his own answer and the depositions.

The fact of the assignment to the plaintiff is distinctly proved by several witnesses as early as November, 1829, and this is evidence which affects all the defendants as to that fact, and as to the purpose of the transfer.

The answer of Price contains a distinct acknowledgment of notice of this assignment, qualified, indeed, by stating other terms besides those alleged by the plaintiff, but without any support as to that qualification. And the whole is put beyond a doubt as to him by the fact, admitted by him, that Ellis had the paper in his possession, which, no doubt, caused him to be so anxious to obtain a written assignment, though advised by counsel that a verbal one would be equally good against Amason. Under these circumstances the subsequent receipt of the money charges him to the full extent of the plaintiff's demands; that is, for the debt paid by him, and interest and reasonable expenses incurred, or to be incurred, in the prosecution of the suit at law, of which an account must be taken. Price is thus chargeable, whatever may be the issue of the suit against Little; for he cannot say that Little did not owe the debt, though Little himself may. Price has received it, and he received it in trust for Ellis. But as that may not be an effectual security to the plaintiff, he has also a right to proceed at law against Little, notwithstanding the payment to the others, if made with notice of Ellis's rights, and in bad faith.

Upon the question of notice, the Court concurs with the counsel for Little, that it ought to be plain, positive, and direct information. A rumor, or that which might put men upon inquiry in ordinary cases, will not do to affect a debtor with notice of the assign- (279)

ment of a chose in action. Debtors are bound to seek their creditors, but they are not bound to search the world, but may pay the original creditor, unless distinct notice of the rights of the assignee be brought home. But that need not be by proof of such notice from the assignee personally, though, in general, it is safest and would be required except in those cases of palpable collusion to arrange the demand with the sole intent of defeating the assignment. Such conduct is in itself evidence that a personal demand has been made, or whatever is necessary has been done. If, for instance, the original creditor inform the debtor that he has made a parol assignment, and for that reason he cannot give up the note which he delivered to the assignee, and, in order to defeat it, seeks and obtains payment, it is a case of plain fraud, which carries conviction with it, and dispenses with further proof of notice.

Such I conceive this case to be. The witnesses speak precisely to Little's declarations of his knowledge of the plaintiff's assignment, and of his efforts to get a receipt from Amason, expressly with the view to defeat it, and boasting that he had done it. And although his answer affects to deny notice, his own statements corroborate the testimony. The denial is special that Ellis did not give him notice, but not that he had none from any other person. He admits, too, that when Price showed him his assignment (which Price says he never even informed him of) he understood that Ellis had a prior claim, but that Price and Ellis had come to some arrangement between themselves; and he admits that the latter conducted the trial. But above all, the circumstances of the settlement are convincing. He says that he settled in March, within a few weeks after taking the appeal, which he had expressed such strong hopes of prosecuting successfully, and that he paid the full amount of the former recovery. This is most unusual conduct in a person who has been harassed at law. So unusual as not easily to be credited, unless in making the settlement with that person he was gaining some advantage which he could not expect if made with another, or with the view (280) of particularly accommodating the individual with whom the settlement was then made, or defeating another. I doubt but little that all these motives concurred upon this occasion, for Price seems to have left the State immediately, and Little admits himself to be his agent; and the purpose was to put or pretend to put into Price's hands the whole sum, that it might be out of the reach of Ellis—all thinking that Amason's receipt would defeat the suit, and consequently defeat Ellis. They settled upon terms to suit each other, and Amason got his share, though a small one. Little repeats that Amason then told him that Ellis had no interest. How came he to make that inquiry, or the other to volunteer the information? But why did he not ask for the

note on which he had given his endorsement or guaranty? That would have been a much more effectual discharge than a release, and would have disposed of the suit without the trouble of pleading and calling witnesses. The circumstances seem conclusive to establish his perfect knowledge of the plaintiff's claim, and of the dishonest purpose to embarrass and frustrate him. He well knew that those men with whom he was settling had not the right; and he ought not to use the acquittance obtained from them.

The injunction must, therefore, be continued, and the parties be at liberty to move for further directions after the trial at law, and in the meanwhile an account be taken of the plaintiff's demand.

PER CURIAM. Declare that the assignment mentioned in the pleadings to have been made of the note, also mentioned in the pleadings, to the plaintiff, is established; and that the defendant Price had notice of that assignment when he took one to himself, and that his subsequent receipt of the money due upon the note from the defendant Little makes him a trustee thereof for the plaintiff. Declare further, that the defendant Little had notice of the assignment to the plaintiff at the time he made the payment mentioned in his answer, and that said payment was made in bad faith, and with the fraudulent intent of defeating the plaintiff of the benefit of the assignment made to him, and that the (281) plaintiff hath a right, notwithstanding the said payment, to prosecute the action at law for the purpose of indemnifying himself out of the judgment for his suretyship and the costs of prosecuting the said suit, unless he be paid the amount of the said note by the defendant Price. Direct an account to be taken of the amount due the plaintiff, and let the injunction heretofore granted be continued, and let the defendant Little be restrained from pleading or offering in evidence upon the trial of the said suit at law the release obtained by him from the defendant Amason, and reserve the cause for further directions.

Cited: Crawford v. Woody, 63 N. C., 102.

JOHN W. POTTS ET AL. v. THOMAS TROTTER.

1. A trustee who is obliged to employ an agent, and does so in good faith, is not responsible for any loss to the trust fund arising from the subsequent insolvency of the agent.
2. A party having filed exceptions, will not be permitted to extend them unless originally prevented from completing them by accident or surprise.

THIS was a bill filed by the plaintiffs as executors and residuary legatees of Ralph Potts, deceased, against the defendant, also an executor, praying an account of moneys received by the defendant under an assignment by one Scott of three vessels and their cargoes, upon trust to pay a debt due him, and, after the satisfaction of that, a debt due the testator.

The defendant in his answer submitted to an account, and a reference was made by the court of equity for the county of Beaufort, and a report was filed at Fall Term, 1829, from which, and the pleadings in the cause, it appeared that the defendant, who resided in Beaufort, had insured one of the vessels assigned to him, in Norfolk; that he had employed one Armistead, a man then in good credit, to effect this insurance, and, not having the money, had sent him (Armistead) his note for the premium, which had been subsequently taken up; that the vessel and her cargo was lost, and after a tedious lawsuit a recovery was effected upon the policy; that it was then discovered that Armistead had never paid the insurers the amount of premium, but was dead insolvent,
(282) and it had been deducted from the amount recovered. The commissioner allowed the defendant the amount thus paid by him to Armistead, and charged him with only the net sum received from the insurers. The plaintiffs filed several exceptions, which it is unnecessary to state further than that the first presented the question as to the propriety of the above allowance of the commissioner.

Gaston, for plaintiffs, moved at this term to be allowed to file additional exceptions, supporting his motion by a reference to the report, and the exaggerated amount of sundry allowances made the defendant, to which he intended the proposed exceptions to apply.

Hogg and J. H. Bryan for defendant.

RUFFIN, J. The first exception of the plaintiff is founded on the idea that as the premium of insurance was deducted by the insurers when they paid the loss, Trotter cannot be allowed for it again, as having been previously paid to Armistead.

Armistead was the agent of Trotter to effect the insurance; to whom the latter, not having the money by him, sent his note for the amount; and instead of paying Trotter's note to the company, he kept it and gave his own. Trotter in due time remitted cash to take up his note, but

Armistead did not pay it to the insurers, and converted it to his own use. When the loss afterwards arose, the amount of Armistead's notes for the premium was taken out of the sum assessed for loss, according to the usage in such cases, and was lost to all parties by the failure and death of Armistead.

Trotter was under the necessity of employing an agent to effect the insurance, and the evidence is that Armistead was in good credit, both in point of ability and personal character. It was in the usual course to send him the money to make the payment subsequently, nor does it appear that Trotter knew or had reason to suspect that payment had not been made to the insurers until the failure of Armistead and the loss had both happened. Trotter acted in good faith and in the common course of those who have to effect insurance at other places, and is entitled to a credit for the money paid to Armistead. Some (283) difficulty has been made upon the question of fact whether Trotter's note to Armistead was for the premium. But there seems no reason to doubt that. The sums do not agree precisely, but are so near that a small commission, postage, and the like, might make the difference. And it seems certain that Trotter must have given that note, or another sum in cash, to Armistead for the notes of the latter, which were given for the insurance. Money was not paid to the insurers, but Armistead's notes were deposited as a security. How were they obtained? Armistead would not have given them without a counter-security from Trotter. That he had in Trotter's note to him and the subsequent payment. The first exception is, therefore, overruled.

The counsel for the plaintiff has applied for leave to file further exceptions. This application is not founded upon an affidavit setting forth any special grounds, as surprise or accident, which prevented him from excepting to the items now objected to, when he excepted to others, but merely on the unreasonableness of the allowances themselves. The application must be refused. The order of proceeding is essential to a right decision. Parties have a right to know the points in controversy, and the court has a right to require that their attention shall be directed to the questions to be contested. The same reasons which would prevent the court from looking into the accounts without any exception forbid an exception to be now taken upon such a ground; for that would be to leave the whole matter open to the last moment, and would be a surprise on the other party, and a great inconvenience to the court. Exceptions must be taken at the proper time, and parties must know that the court cannot take care of them if they will not take care of themselves.

PER CURIAM. Let the first exception of the plaintiffs be overruled, and their motion to file additional exceptions be disallowed.

(284)

THE BANK OF NEW BERN v. HENRY A. JONES ET AL.

1. Where two creditors obtained judgments against their common debtor, at the same time, and the clerk wrongfully issues an execution to one of them, whereby the other obtained a priority in the absence of a fraudulent combination between the clerk and the creditor thus preferred, a court of equity will not deprive the latter of the advantage he has thus gained.
2. An agreement between two creditors to refer the decision of their rights to a court will in equity prevent either of them from acquiring a priority pending the reference.
3. If a debtor can at law give one creditor a priority, a court of equity will not restrain him from doing so.
4. Because the favored creditor gets nothing but what he has a right to receive.
5. Where two creditors are equally entitled to executions, and the clerk refuses to issue in favor of one of them, it is not a case of preference.
6. And it seems that the creditor has no redress against the other unless, perhaps where the latter induced the clerk not to issue the execution of the first.
7. His only remedy is upon the official bond of the clerk.
8. And the measure of damage is the actual loss sustained by his misconduct, without reference to his motives.
9. Whether the insolvency of the clerk and his sureties would make any difference, *quere.*

THE bill, which was filed in CRAVEN, charged that writs of *scire facias,* returnable to the August Sessions, 1829, of Craven County Court, issued against the heirs of John Harvey upon two judgments obtained by the plaintiffs against Mary Harvey, a defendant, his administratrix, in which the issue of fully administered had been found for the defendant, whereby the plaintiffs sought to subject the real assets of the intestate in the hands of his heirs; that at the same term a similar *scire facias* issued upon a judgment in favor of the defendant Jones; that James G. Stanly, the clerk of the county court, and also a defendant, was one of the heirs of John Harvey and the agent of his administratrix; that judgments were rendered for the plaintiffs in those suits at the return term, but that some of the heirs of the intestate, being infants, appeared by their guardian, the defendant Mary; that a combination had been formed between the defendants Jones and Stanly to give the former a preference, so that he might obtain satisfaction from the real assets of the intestate, to the prejudice of the plaintiffs; that in the execution of this combination the defendant Stanly, as clerk of the county court and agent

of the defendant Mary, made an entry upon the record of the judgments in favor of the plaintiffs that execution thereon was stayed according to law, and on that of the defendant Jones's judgment that the stay of execution was waived by the defendants, and immediately afterward issued a writ of *fieri facias* on the latter judgment; that the plaintiff then demanded writs of *fieri facias* upon their judgments, which were refused because of the stay above mentioned; that all the parties desiring to have their rights ascertained, it was agreed to present the questions between them to the judge of the Superior Court of Craven; (285) that accordingly, at the ensuing term of that court, the plaintiffs applied for a mandamus to the defendant Stanly, commanding him to issue writs of *fieri facias* upon the judgments in their favor, or, if they could not succeed in this, that a *supersedeas* might issue as to the execution of the defendant Jones; that the judge of the Superior Court refused the mandamus, but awarded the *supersedeas,* from which order both the plaintiffs and the defendant Jones appealed; that at December Term, 1830, of the Supreme Court the orders made in the court below were reversed, and the mandamus directed to be issued and the *supersedeas* set aside (*Bank v. Stanley,* 13 N. C., 476); that while this litigation was pending in the Supreme Court, the defendants Jones and Stanly, in the prosecution of their combination, had issued and had a levy returned upon a *fi. fa.* of the former, so that when the plaintiffs only had writs of *fieri facias* upon their judgments, the defendant Jones had a *venditioni exponas* upon his, and that thereby he had obtained an unjust and iniquitous priority over them. The bill then charged that the defendant Stanly was insolvent and unable to answer to the plaintiffs for any judgment they might recover against him, and if they were driven to an action upon his official bond, the damages which they might recover would be an inadequate compensation to them, and prayed a discovery and an injunction against a sale under the *venditioni exponas* in favor of the defendant Jones, and that he might be compelled to waive the priority he had obtained, and take out a *fi. fa.* bearing even *teste* with that of the plaintiffs.

The defendant Mary Harvey, in her answer, denied any fraudulent contrivance, either by herself or by her agent, the defendant Stanly. But she admitted that she was desirous of giving a preference to the defendant Jones, who was a creditor of her intestate, and had received but a small portion of his debt, whereas her intestate was but a surety for the debts due the plaintiffs, who had from the personal estate received a large portion of their claim; that under these circumstances she instructed her agent and her counsel to give the defendant Jones a preference, provided it could be legally and honestly done; that (286)

being ignorant of the mode by which this could be affected, she had taken no part in the arrangement of it, but had sanctioned what had been done by her agent and counsel.

The defendant Stanly, in his answer, stated that, being the son-in-law of the defendant Mary, he had aided her in administering the effects of her intestate; that he had no consultation with the defendant Jones or the defendant Mary as to any plan by which the former might obtain a priority over the plaintiffs; that the first he knew of such an attempt was from a suggestion of the administratrix that she wished it might be done, as the debt of Jones was for services rendered her intestate, and that of the plaintiffs' was founded on his being a surety to them for another person; that all the judgments mentioned in the bill, when entered up, were accompanied with an entry of a stay of execution for twelve months, which had been universally the practice in that court for twenty years; that afterwards, and during the same term, the attorney of the heirs of the intestate, by an entry in his own handwriting, made with his consent as one of the heirs, waived the stay of execution as to the judgment of the defendant Jones; that after the August Term, 1829, of the county court of Craven, the defendant Jones called at his office and inquired what was the situation of his suit against the heirs of John Harvey; and upon being informed of the facts above mentioned, requested him to make out a writ of *fieri facias* upon the judgment, and hand it to the sheriff, which was done according to the established custom of the office; that afterwards he was applied to by the counsel of the plaintiff for writs of *fieri facias* upon their judgments, which he declined issuing, because of the entry above mentioned, whereby executions thereon were stayed; that the counsel thereupon gave him, in writing, notice to do so, which was accompanied with the reasons upon which it was thought the plaintiffs were entitled; but that he still doubted of the propriety of issuing the execution, and being apprized that the
(287) question would be presented to the next Superior Court, he concluded that it was safest for him to await the decision which would then be made, especially as if it should be in favor of the plaintiffs, they would not lose their priority, if their executions were issued after the next term of the Superior Court; that after the refusal of the judge to award a mandamus, the plaintiff applied to the county court for an order upon the clerk to issue their executions, which was also refused. He denied all combination with the defendant Jones, and averred that but for the entry waiving the stay of execution in his case, he should not have issued one on his judgment.

The defendant Jones also denied any combination, and averred that he did not know of the entry waiving the stay of execution on his judg-

ment until after the term of the county court when it was made, and that he had before that time no expectation of having a priority given him; that after the term of the county court at which the judgment was entered up, he called at the clerk's office, and, ascertaining the facts, he ordered out an execution upon his judgment. He expressly denied any agreement to submit the question to the Superior Court, or in any way to injure the priority which he had gained. He stated that for the purpose of preserving his priority, he had his *fi. fa.* returned, and sued out a *venditioni exponas,* and that he forebore to press a sale because he was advised that he might postpone it and not thereby lose his priority.

A replication was filed to the answers, but no depositions taken. Copies of the record of the several judgments were filed as exhibits.

By an interlocutory order the sheriff was directed to sell, and pay the amount into the office of the clerk and master.

Gaston for plaintiffs.
J. H. Bryan for defendant Jones.
W. C. Stanly for other defendants.

RUFFIN, J. The form of the proceedings at law gave to the (288) defendant Jones the advantage of acting on his execution before the plaintiffs could regularly communicate to the county court the judgment of this Court upon the several appeals mentioned in the pleadings. The bill does not and could not properly complain of that in itself. But it alleges that there was an agreement or understanding that the rights of the parties should then abide the opinion of the Court upon the question whether the parties were originally equally entitled to immediate execution. Such an agreement would certainly give the plaintiffs the equity claimed by them. The conduct of Jones in not selling pending the appeal affords, by itself, a fair ground to infer such an agreement. But that is the only evidence of it, and that inference is entirely rebutted by the express and positive denial by this defendant of such an agreement on any other by which would be given to the judgment of this Court any other effect than by its own force it would have. His appeal from the order of a *supersedeas* left him at liberty to continue his process of execution. He did continue it pending the appeal, for the purpose, as he says, of preserving the preference he then supposed himself to have. He admits he did not proceed to a sale, but he avers that he refrained solely upon the ground that the judgment might be against him, and not because of a new contract, of which he denies the existence altogether.

It is, however, chiefly insisted for the plaintiffs that there was a combination of the defendants to give Jones an undue preference by entering

the judgments in such manner as would apparently justify the clerk in refusing to issue the execution of the bank, and in issuing that of Jones immediately, and that accordingly Stanly did so act in reference to the executions.

It is to be considered how the facts assumed in this proposition are in reality, and also how far the conclusions of law are correct.

Supposing that it were in the power of the parties to give the preference alleged, it becomes a question (without now adverting to the
(289) official character of Mr. Stanly) whether a court of equity could relieve against it. It is quite unnecessary at this day to discuss the considerations which may in conscience justify the satisfaction of one creditor to the total disappointment of another; or, on the other hand, review the arguments upon which courts of equity have adopted the maxim that equality is equity. It is perfectly settled that at law an insolvent debtor, or his executor or heir, may pay which creditor he chooses. This Court acts upon its own maxim when called on to apply a fund, the subject of its own exclusive jurisdiction. But it has never been able to restrain the exercise of the power at law. This is not because it is a just right of the person exercising the power. He may, perhaps, have acted against sound morals. Possibly the disappointed creditor may be an infant ward, or otherwise the most meritorious. Or perhaps nothing may justify the dealing with an unequal hand with creditors. Yet it is allowed to stand here when the law permits it. Why? Only because the favored person has got nothing that was not due to him. Being a just creditor, he can with a safe conscience keep as much of his debts as he can get. There is no equity against him. Each creditor takes care of himself, and is not charged with the interest of the other, when there exists between them no other connection but that of being the several creditors of the same insolvent. The mere fact of the preference of Jones, if such had been gained by the method of letting the judgments pass, does not render him liable to share with the plaintiffs.

But in truth no such preference was obtained, however it may have been designed. No doubt that was the design of the defendants Mrs. Harvey and Mr. Stanly. But the attempt proved ineffectual. The opinion of the Supreme Court determines conclusively that notwithstanding the forms of entering up the judgments, the bank was entitled to immediate execution as well as Jones. The plaintiffs might have demanded, and did demand, execution forthwith, and after the decision of the Supreme Court again demanded it.

To these demands the clerk returned positive denials, although at the time of the last he was informed, not officially, of the opinion of
(290) this Court.

I think the case is reduced to the single inquiry, how those denials and the subsequent conduct of the parties affect them respectively.

There is nothing to charge Mrs. Harvey with a knowledge, much less a concurrence in this part of the transaction.

The acts of the clerk are plainly wrongful. He was guilty of an official malfeasance, and is responsible for it.

It is insisted further that the defendant Jones cannot, with a safe conscience, take benefit from that wrong.

If there were evidence that Jones participated in the wrong, by advising or procuring the clerk to refuse the plaintiffs an execution, it would be necessary to consider the effect of such active interference. Perhaps it might be distinguished from the common case of a sheriff paying money upon indemnity, or otherwise, to an execution creditor who was not entitled; in which the sheriff is clearly liable, but in which there is no adjudication of relief at law or in equity as between the creditors. If there were a remedy for the one creditor against the other, it would seem to be at law, and upon this ground, that one had received more than by law he was entitled to. But no case of the sort is found, nor anywhere the satisfied creditor has been made to reimburse to the sheriff the money he has been compelled to pay to the other creditor. In other words, the sheriff acts upon his own responsibility, and must answer without reference to inadvertence or mistake on his part, or he must provide an indemnity for himself by contract. I do not perceive any solid distinction between the two cases. But this cause does not at all depend upon that analogy, and is decided without reference to the rights and liabilities which might arise upon a state of facts showing an active participation in the refusal to give the plaintiffs their execution.

The least incitement or suggestion on the part of Jones to the clerk to that effect, explicitly denied by Jones, and disclaimed by Stanly. All the former did was to sue out his own execution. That he (291) had a right to do. He did not interpose the slightest obstacle in the way of the other creditor. There is no fault in Jones in this respect. It is that of the clerk exclusively. Whatever aid a sense of private justice may prompt Jones to extend to Stanly, upon the score of the benefit accruing to him from the other's default, I do not see that he is liable to either party upon legal principles; for Stanly avows that he acted on his own opinion; and it is to be collected that if Jones had requested the clerk to issue the plaintiff's execution, he would likewise have refused, because he thought it to be his duty to refuse. As a creditor preferred, and even improperly gaining a preference by the default of the officer under these circumstances, the plaintiffs have not an equity against Jones, because he has committed no wrong, and because they

have a direct and complete remedy against the officer himself. The question is not one of loss between the creditors, for neither of them can lose anything. The question is between Jones and the officer—which of them shall pay the sum to the plaintiffs, acknowledged by all to be due to them. And upon that, in the actual state of the case, I think there can be no doubt; even should the law be different had Jones been accessory to the official malfeasance.

It was slightly intimated in the argument that the action against the clerk might prove to be an inefficient remedy, because it is a question of damages, and the jury might be influenced by circumstances improperly deemed by them to be in mitigation. That would be equally an objection to every assessment of damages. But if it could in any case, it cannot have an effect here, because this is not the case of a vindictive action, but there is a fixed measure of damages, namely, the actual loss sustained by the misconduct of the clerk. Damages in such a case may be aggravated by corrupt motives, but they cannot be reduced below a real compensation for the injury in fact sustained. A ministerial officer is paid as well for his responsibility as his time and labor, and must therefore answer for all the consequences of his default to the full extent (292) of the loss sustained as between them and Jones, to be made up out of his gains. The plaintiffs have an adequate remedy against another person, for their whole loss. To meet this view of the case, the bill further charges the insolvency of Stanly. I do not pretend to say how that might operate if we could find the fact to be as alleged. But we must take it to be otherwise. The personal insolvency of the clerk does not materially impair the security of a demand founded on his official conduct. He is required to give bonds with approved sureties annually, and these are all cumulative securities up to the breach. It appears from the pleadings that Stanly has been in office many years, so that it is next to impossible that insolvency should run through his sureties, and to the present purpose their solvency is his.

It is the opinion, therefore, of the Court that the plaintiffs have adequate remedy at law against the defendant Stanly, and that the bill be dismissed, with costs.

PER CURIAM. Bill dismissed.

WILLIAM HUNT v. EDWIN BASS ET AL.

1. A deed obtained by sureties for their indemnity, under a threat of legal process in case of refusal, cannot be set aside by the bargainor for duress in its execution.
2. Property conveyed to a trustee for sale, and sold by him under an agreement with the vendee to be jointly interested in the purchase, is subject to the original trust.
3. A trustee for sale should be indifferent between the debtor and the creditor, and should not sell in disregard of the interest of the former, unless it was so agreed.
4. If the title of some of the trust property is disputed, he should not sell it until the rest is exhausted.
5. And the debtor has a right to the trust property which has been improperly sold by him, and which afterwards comes to his hands or those of his confederates, even if originally sold to one against whom he had no right to relief.

THE case made by the bill, answers, and proofs was that the plaintiff, having been appointed the administrator of Coffield Bass, a half-brother of the defendants Edwin and Gideon Bass, whose mother he had married, had given the defendant Gideon and Matthew Sykes, also a defendant, as his sureties, that he had received of the assets of his intestate about $800. Soon after his marriage he discovered that his wife had by a settlement made before it took place, but without his knowledge, conveyed three negroes to her children by her first husband, of which the intestate was one. The plaintiff filed a bill to set aside that (293) settlement, and by the advice of his counsel procured his letters of administration to be revoked and one Hammonds to be appointed administrator. The next of kin of the intestate were his brothers and sisters of the whole and half-blood, among the latter of which were the defendants Edwin and Gideon Bass. Before the letters to the plaintiff were revoked, he had made payments which reduced the amount due from him to the next of kin. At February Term, 1828, of Nash County Court the plaintiff came to the courthouse, where he got very much intoxicated, and lost a large sum of money at cards. The defendants Sykes and Gideon Bass, hearing of this, demanded counter-security, which the plaintiff gave them by conveying his land and personal property, including the three slaves in dispute between him and the next of kin of Coffield Bass, to the defendant Edwin, in trust to indemnify them. Before the plaintiff consented to do this, his sureties threatened to take instant measures to have his accounts closed and the balance collected. A sale of the property conveyed to the defendant Edwin was by him advertised for 15 March following, at the plaintiff's house, but was not known

to either the plaintiff or to Sykes until within a few days of that time. On that day the plaintiff requested that the sale might be postponed to the next court week, which being refused, he asked that his administration account might be settled in order to prevent the trustee from selling for an amount exceeding the balance; this was also refused, and the sale proceeded, when two negroes which had cost the plaintiff $800 were sold to Edmund and Isaac Bass, brothers of Edwin and Gideon, for $477. After this the plaintiff told the trustee that the amount raised was sufficient to pay the balance due by him to the next of kin of Coffield Bass and begged that any further sale might be postponed until he could settle with Hammonds, who was present; which was refused, and the negroes in dispute between the plaintiffs and the next of kin were then offered.

(294) The plaintiff earnestly requested that they might not be sold, as the doubt respecting the title to them would prevent them from bringing their value, and in lieu of selling them, he asked that other property, the title of which was clear, might be sold. But while the plaintiff and a friend were endeavoring to effect a settlement with Hammonds, these slaves were sold at about one-tenth of their value, and purchased by one Moore, with whom the Basses quarreled for bidding, and who, in the course of a few days, transferred his purchase to the defendant Edwin. All the negroes purchased were held on the joint account of the defendants Edwin and Gideon and such others of the next of kin as chose to claim an interest in them, rather than to receive their share of the surplus in money.

The bill charged that the deed of trust had been obtained by duress, and prayed to have the sale declared to be void and the defendant Edwin to be a trustee for the plaintiff, and for an account of the hires of the slaves since the sale.

Badger for plaintiff.
Dvereux for defendants.

RUFFIN, J. The allegation in the bill that the deed of trust was obtained by improper means is not supported. Sykes and G. Bass had a right to a counter-security, and the dissipation of the plaintiff about that time made it an act of but common prudence then to apply for it. The witnesses prove that although the plaintiff had been in a deep debauch, during which he had been plundered at the gaming table, he had so far recovered from it, and regained his faculties as to be capable of understanding the instrument he executed, which was read and explained to him and understood by him. Then as to the idea of coercion, and that sort of restraint on his free will which we look upon here as a

species of duress, I must say that he was asked to do nothing (295) which he ought not to have done. And it was not unfair in the sureties to inform him, as a motive for him to give the deed, that if he did not voluntarily secure them, they would use such other means as the law afforded for that purpose. They do not seem to have done this to alarm a timid man, not aware of his rights and not master of his actions, to gain from him what he would not willingly grant, or they might not rightfully ask, but to have presented the facts to his view as reasonably justifying them in their demand of a security, and as properly inducing him to give it, upon a score of convenience to himself and justice to them. In fine, the execution of the deed seems to have been voluntary on the part of the plaintiff, and the instrument must be established.

The proceedings under it are viewed by the Court very differently. It is clearly in proof that all the negroes sold have remained in the possession of Edwin Bass ever since the sale, he claiming the ownership in them for himself and others, under the purchase made at his own sale. Two of them were purchased by Isaac Bass, under an agreement before the sale, between him and the defendants Gideon and Edwin, the trustee, that a purchase should be made of all the slaves for the benefit of the three and such others of their brethren as chose to come in. This comes precisely within the common rule that such a purchase by a trustee is void. It is equally so with respect to those who join in the purchase as with respect to the trustee himself. They have united in an act of fraud and imposition, and all must fare alike. The deposition of Isaac Bass (a party to that agreement) proves that Edwin has those slaves, as well as the others mentioned in the bill, now in his possession, awaiting the determination of this suit, for a division among them. As Edwin has never conveyed, and the sale was void, they remain the property of the plaintiff, liable only as a security for the debts.

The other three slaves are differently situated, which makes it necessary to advert to other considerations. They were at that time, and when the deed was made, the subject of a suit in which Hunt (296) claimed them on one side and the Bass family on the other. It does not appear how that controversy was determined, or whether it has been determined. Hunt had made payments to some of the next of kin of his intestate, but no final settlement had taken place, nor an account current of his administration made. In a very few days after the deed was executed the trustee, at the request, as he says, of some of the next of kin, of whom he was one, advertised a sale. He gave no notice of it to Sykes or to Hunt, who heard it by accident only a day or two before the sale. On the day of sale Hunt urged that he had made payments, and

requested a postponement for a few days, when he would consent to a sale at the courthouse on a court day. That was refused. He then requested that an account might be taken, and the sum due from him ascertained. That was also refused, and the negroes first mentioned were sold and bought in by Isaac Bass, for the trustee and himself and others. The trustee was then about to offer the three negroes of which the title was in dispute, when Hunt repeated his entreaty that the calculations should be made so as to ascertain whether there was yet a balance owing by him, and, if one should be found, that it might be raised out of a tract of land or other property, to which the title was clear. The trustee did not assent to the arrangement, and while Hunt and the administrator had retired to compute the debt, those three negroes were offered as being in dispute, and sold at a great undervalue. They were not bought by either Bass, although their agreement extended to them, but were purchased, much to their displeasure, by a Mr. Moore, who in a day or two transferred his purchase to Edwin Bass, the trustee, and he now holds them, as he does the others, for the joint benefit of himself and his brothers.

A sale thus conducted cannot be supported in this Court. A trustee to sell should stand indifferent between the debtor and creditor; he is charged with the interests of both, and should take reasonable (297) care of them. Where there is no absolute necessity for an immediate sale, it is a breach of his duty to bring it on at a disadvantage, unless it was in the contemplation of all the parties to sell at all events, subject to the cloud on the title. And certainly when there is other property with a clear title, that which is in dispute ought not to be sold until the other has been exhausted, especially against the expressed will of the owner. But the circumstances in this case do not only show a total disregard on the part of the trustee of the interests of the debtor, but conclusively prove a design to oppress and ruin him, for the sake of gain to himself and his associates. The time of the sale, without an intimation of it to Hunt; the refusal to postpone it even until he could ascertain the sum to be raised; the refusal to sell the land instead of the negroes, although importunately urged to do so by Hunt and his friends; and the previous agreement to have all the negroes purchased on the joint account of himself and his brothers, and thereby extinguish the claim of Hunt, which they were then contesting at law, all mark the purpose to sacrifice the unfortunate man who had reposed a misplaced confidence in him.

Such conduct amounts to a flagrant breach of trust, and subjects the trustee to the payment of the full value of the property sold, and in that way Edwin Bass would be charged here, if necessary; and Gideon, also,

who participated throughout with him in conducting the sale and gaining an interest under it. But as the slaves have been given up by Moore, and got back to the hands that have done the wrong, the plaintiff has a right to them specifically. These parties cannot protect themselves under the purchase of Moore, even if it were consummated, which is doubtful. When the property comes back to them, they cannot say they ever parted from it, since the disposition was an act of the most aggravated wrong. As to them, the sale was absolutely void.

The plaintiff is, therefore, entitled to have an account taken of the debts secured by the deed, and a credit for the full value of the property sold other than the negroes, and also for the hire of the negroes, and to have a reconveyance, upon the payment of the balance (298) that may be found due.

PER CURIAM. Direct an account.

Cited: Denny v. Palmer, 27 N. C., 630; *Johnston v. Eason,* 38 N. C., 334; *Froneberger v. Lewis,* 79 N. C., 429; *Gibson v. Barbour,* 100 N. C., 197.

EDWARD COOPER v. ELIZABETH COOPER.

Upon a bill to set aside a deed as a forgery, the deed being in the custody of the court, and no doubt being entertained of its being forged, yet as the fact was more properly triable at law, an issue was ordered at the election of the defendant.

THIS bill was filed to set aside two deeds of gift which purported to have been executed by the plaintiff to the defendant, whereby sundry slaves were conveyed to her, with a reservation of a life estate to the donor.

The deeds were impeached as forgeries, and if in the proof of this fact the plaintiff failed, then he contended that they had been obtained by practicing upon his great age and weakness of mind.

There is no need of stating the proofs, which were very voluminous, as the case of the plaintiff was made out to the entire satisfaction of the court on both grounds; the only question being how it was proper to proceed in the cause upon the supposition that the deeds were forged.

Badger for plaintiff.
Devereux for defendant.

RUFFIN, J. Of this case, as it appears in the pleadings and proofs, in point of fact, not a doubt is entertained by any member of the Court. There is strong and convincing evidence that both the deeds set up by the defendant are forgeries; and if they be not, the circumstances, arising out of the age and infirmities of the plaintiff, his ignorance of the whole transaction, and unfeigned surprise when informed of the existence of the instruments, and the conduct of the defendant upon the interview between herself and her grandfather, when their exist-
(299) ence was communicated to him, and the power and influence she had over him, are such as show a gross fraud on him in obtaining them by the joint contrivance of the defendant and the subscribing witness. The plain ground, however, of relieving against the deeds is that they appear to be forged. And the difficulty with us has been how we shall treat such a case. No doubt, the Court can decree upon the evidence; but the question is whether it is proper to do so in the first instance, before trying an issue. It is also true that after a verdict the court is not bound to act on it, and, if it is not satisfactory, may send it back to another trial, or even decree against the verdict. Nevertheless, it seems to be more proper that it should be tried at law first. As a crime, this Court has no jurisdiction of the question of forgery. It is exclusively with a court of law. And upon the question of fact, the decision made by a jury upon the examination of the witnesses before them must be more satisfactory than drawing conclusions from their depositions, especially where much may depend on credit, as does here where two witnesses depose to the fact of execution. It seems to be the usual practice in England to direct an issue. When the defendant objects to discovery, because he may incur a penalty or subject himself to punishment for a crime, it does not preclude the relief, but the court hears the cause and orders an issue to be made and tried. That is the uniform course when there is no answer to put the matter in issue in chancery. Where there is an answer, it is also common, though not indispensable, to order a trial at law; as in the cases mentioned by *Lord Hardwicke* in *Brownsword v. Edwards,* 2 Ves., 246, and in *Bishop of Winchester v. Fournier, ib.,* 445, Sir John Strange adopted the middle course of having the bond deposited with the register, without then declaring it a forgery, but giving the defendant liberty to bring an action within a reasonable time, and if not, then to be delivered up, or canceled.

This appears to be the proper course in the case before us, which is perhaps as iniquitous a one as could well be imagined. The deeds are now filed, and are ordered to be detained by the clerk, with leave, however, to the defendant to try an action of detinue for the slaves
(300) mentioned in them, in the Superior Court of Nash County, at

next September Term, upon three months notice to the present plaintiff, who upon the trial shall not set up the objection that by one of the deeds a life estate is reserved to himself; but if the defendant should fail to give due notice of trial, further directions may be moved for by either party immediately, or if she shall give such notice, then, after the trial, or failure to try at the time mentioned. For the purposes of that trial, the deeds may be taken out of the office by the defendant's solicitor, to be by him returned after the next Nash court, and each party is at liberty to read the depositions of such of their witnesses as may then be dead.

PER CURIAM. Decree accordingly.

Cited: McGibboney v. Mills, 35 N. C., 164; *Scarborough v. Tunnell,* 41 N. C., 108.

(301)

MARY S. CLARK ET AL. v. SPENCER D. COTTON ET AL.

A legacy, where the legatee is not described so as to take, sinks into the residue; but one given by a description which applies to several, goes to the sovereign as derelict.

AFTER the decree pronounced at June Term, 1831 (*ante,* p. 51), this case came on for further directions upon the report of the master stating that by the fifteenth clause of her will, the testatrix devised as follows: "I give to Martha Barrow, daughter of Bennet Barrow, Esq., $400. By the twenty-ninth clause, she gave to Elizabeth Hunter $500. Mr. Barrow had not at the date of the will, nor ever had, before or since that time, a daughter called or known by the name of Martha. He had two daughters, named Margaret and Olivia. No evidence was before the master that either of these were intended by the testatrix to be described by the name of Martha.

Upon the other clause, the master reported that there were many persons known by the name of Elizabeth Hunter, but that it was entirely uncertain who the testatrix alluded to.

There being a deficiency of assets to pay the pecuniary legatees, Devereux, for them, moved for directions to divide the two sums mentioned in the report, between them pro rata.

HENDERSON, C. J., after stating the facts: As to the legacy to Martha Barrow, there being no testimony, if admissible to prove the identity of

the person intended, and the question being presented on the will and facts before stated, it is but common learning to pronounce the bequest to be void for uncertainty. There is no legatee designated by name or by any other description. The bequest is therefore void, and the case is to be considered as if it had never been made. It is property undisposed of, and is to be taken to pay general legacies, and if not needed for that purpose, it sinks into the residuum.

Upon the other clause of the will, it being as yet entirely un-
(302) certain who is the Elizabeth Hunter intended by the testatrix, it is unlike the case under the fifteenth clause; for here a legatee capable of taking may yet appear, the ambiguity arises from the fact that there are many answering to the description, and it may be shown by parol evidence which of them the testatrix meant. The legacy, then, is not property undisposed of, but property given to a person who does not yet appear. It must, therefore, be kept for her, and if after a reasonable time it be not claimed by the legatee, it goes to the sovereign as the trustee of all derelict property. In this State the trustees of the University have succeeded to this right of the sovereign, and at a proper time they can claim the legacy.

PER CURIAM. Direct accordingly.

JOSEPH B. LITTLEJOHN v. JESSE ISLER.

Where A. sold land to B. for $5,100, with a permission to make a payment of $1,500 by a conveyance of two tracts of land in Tennessee, which should be of the value of $3 per acre according to the locator's valuation; upon a bill by A. claiming the $1,500 in cash, *it was held* to be an executory agreement for an exchange of land, and that the default of B. in making the conveyance, and the want of a locator's valuation, were matters of compensation.

THE defendant purchased of the plaintiff a house and lot in Granville, for which he was to pay $5,100, part in cash and the residue in property, among which were two tracts of land in Tennessee, one containing 357 and the other 274 acres, which were to be of the value of $3 per acre according to the locator's valuation, and were estimated in making up the purchase money at $1,500. A memorandum of the agreement was written and delivered to a third person for safe keeping.

The plaintiff admitted that the defendant had performed all his stipu-
lation, except making him a title to the land above mentioned;
(303) that he (the defendant) had no title to one of the tracts, and that

it never had been valued by the locator. He alleged that he had from misplaced confidence, consented that the agreement should be delivered to the defendant. The bill prayed that the plaintiff might have a decree for the stipulated value of the land, or such relief as he was entitled to.

The defendant admitted that he had not, at the time of his answer, procured a grant for the tract of 357 acres, and that it never had been valued by the locator, but he insisted that it was of the stipulated value, and that it was not valued at the time of its location, by mistake.

At the hearing the defendant filed grants to himself for both the tracts, and a deed of bargain and sale from him to the plaintiff.

Gaston and Devereux for plaintiff.
Badger for defendant.

DANIEL, J., after stating the case: The defendant has now a good title to the lands. The circumstance of the locator's valuation not being endorsed on the entry of the 357-acre tract is not such a misrepresentation as will authorize the plaintiff to waive the contract which binds him to take the two tracts of land as part payment of the $5,100. As the defendant can now make an unexceptionable title to the two tracts of land, there would be no difficulty in decreeing the plaintiff to take them in payment of the $1,500, according to the agreement, if the locator's valuation of $3 per acre had been endorsed on both the entries. The plaintiff contends that the 357-acre tract is of little or no value. The defendant insists that although the locator did not endorse on the entry any valuation, yet it is land of that description that would have been valued by the locator, at the location, at $3 per acre. From the interpretation which we think should be put on the contract, and in the absence of proof of any such misrepresentation as can operate to the injury of the plaintiff, we think that the latter shall be compelled to take a conveyance of the two tracts of land, but that it shall not operate as a complete discharge of the defendant from the entire payment of the $1,500 (304) mentioned in the agreement, unless the master shall report that the 357-acre tract is of that quality and description which would at least have been valued at $3 per acre at the time of its location. We think that if the land is of a quality that would not have been valued by the locator at the time of location at the price of $3 per acre, then the defendant shall make up the difference in money. The bill will be retained, and it is ordered that the master inquire into the valuation per acre of the 357-acre tract at the time it was located.

RUFFIN, J. The construction which the bill attempts to put upon the contract is that it was a purchase by the defendants of the plaintiff's house and land at a certain price in money, to be discharged in part, on certain conditions, in lands; and the plaintiff is not now bound to take the land, but is entitled to money, because the conditions have not been strictly performed. The construction cannot be supported. It is one of those hard and rigorous interpretations which equity says it is against conscience to make. The substance of the agreement is for the land on both sides, and is the common case of an executory contract, which will be specifically decreed here. It is, however, mainly insisted that the agreement was for lands of a particular description, and that complainant is bound to receive none but such as come within it. It might be very necessary to consider the effect of this position if the covenant extended to lands generally, in which case, perhaps, the defendant must be held to have undertaken to procure such as he stipulated for, since the plaintiff had no opportunity of exercising his own judgment at all as to particular land at the time of entering into the agreement. But here it is clear that these identical lands were the subjects and exclusively the subjects to which the parties had reference. They do not say the sum of $1,500 is payable in any land to be valued to that sum, without regard to situation, quantity, or quality; but in two tracts each of a particular
(305) number of acres, and both then owned by the defendant and situate in Tennessee. These, then, were the very lands contemplated. And the question is brought down to the common one whether the vendor has described them to the vendee as having particular qualities, which were essential to the purpose of the vendee in the purchase and without which he would not have bought them at all, because they were of no value to him; or whether the difference between them as described and as they turn out in fact to be affects their value to the vendee only in such way as admits of compensation. Upon that there seems to be no reason to hesitate. They were described as having been valued by the locators at $3 per acre. They had not been so valued. But they yet may be; and they may now turn out to be of that quality which locators at the time valued at that price, or, if they should not, the difference must be made up. A variance in this respect is not a ground for rescinding the contract, but admits of compensation; and such compensation must be taken when the amount shall be ascertained by the master, to whom also either party may have a reference of the defendant's title. It is a total perversion of the contract to say it was for money, or is now for money, for aught that has been made yet to appear.

PER CURIAM. Direct a reference.

JAMES H. MARTIN v. DANIEL GOULD ET AL.

In a gift by will to a child and grandchildren, "equally to be divided," each of the latter take equally with the former, unless a different intention is inferred from other parts of the will.

THIS bill was filed by the executor of Daniel Gould, Sr., to have a construction put upon the will of his testator. The will, after giving all his estate to his wife for life, proceeded thus: "After her death it is my desire that all my estate, both real and personal, shall be sold at twelve months credit, and when the money is collected for the (306) land the average value of 100 acres to be given to my son Daniel in order to make him compensation for 100 acres of land which I gave to my son Malachi Gould. All the rest of the money that is left to be equally divided between my son Daniel and my three grandsons, to wit, etc., (naming them), to them and their heirs forever." The defendants were the testator's son Daniel and his grandsons mentioned in the will, who were the sons of Malachi. The only question was whether the residue should be divided between them equally or whether one-half should be given to Daniel and the other to the sons of Malachi.

Mendenhall for plaintiff.
No counsel for defendants.

RUFFIN, J. Probably upon the authorities the construction of the residuary clause, standing by itself, is that the grandsons do not take as a class, but each of the three named take an equal share with the uncle. But what is doubtful here is cleared up by the clause immediately preceding, which gives out of the aggregate fund before the division, when the money for the land shall be collected, the average price of 100 acres to Daniel, the son, "in order to make him compensation for 100 acres which I gave to my son Malachi." This shows that the testator meant to deal equally between his two sons, and to make the children of his deceased one stand in their father's stead, and that the grandsons take their share as grandsons. Upon the whole will, therefore, it must be declared that Daniel, the son of the testator, is entitled to one-half the residue, and the three grandsons to the other half, to be equally divided between them, as they shall come of age. And the costs of this suit must be paid out of the fund in the hands of the executor.

PER CURIAM. Decree accordingly.

Cited: Harris v. Philpot, 40 N. C., 329; *Henderson v. Womack,* 41 N. C., 440; *Bivens v. Phifer,* 47 N. C., 439; *Cheeves v. Bell,* 54 N. C., 237; *Burgin v. Patton,* 58 N. C., 427; *Lee v. Baird,* 132 N. C., 766; *Mitchell v. Parks,* 180 N. C., 636.

(307)

JOHN BULLOCK v. RICHARD BULLOCK ET AL.

1. The executor of a will which is of doubtful import has a right to apply to a court of equity to have it construed and its trusts declared.

2. A legacy to a daughter of "the negroes I placed in her possession at her marriage" passes the increase as well as the original stock.

3. A parol gift of slaves is not entirely void by the act of 1806 (Rev., ch. 701), the death of the donor, or a confirmation of it by him renders it good *ab initio*.

4. A legacy of stock in trade and all purchases made therewith gives the legatee the profits thereon.

5. A legacy to the heirs of a living person is to be construed as to his children, if it appears upon the will that he is living.

6. And in that case, after-born children take under the words "heirs proceeding from his body."

7. Accounts referred to in a will become testamentary, and may be used in explanation of the testator's intention.

WILLIAM BULLOCK, late of Granville County, duly made and published his will, whereby he devised as follows:

"I give my daughter Susan Jiggits the twelve negroes, and stock of horses and cattle, household goods, etc., put in her possession on her marriage with Dr. William Davis; also $1,000, which was appropriated to the payment of Dr. Davis's debts as executor to his estate after his death, which money was credited said estate in settlement of account.

"I give unto my grandson, William B. Inge, the fourteen negroes lent to his mother, Elizabeth Inge, with all the stock and household furniture put in her possession at her marriage with Dr. R. Inge; the negro property I have heretofore made my grandson W. B. a deed of gift for, which is in full of the legacy to my said departed daughter Elizabeth.

"I give unto my son John Bullock the $8,000 furnished in establishing him with a store in Clarksville in 1818, which has been paid over to him; also, Squire and Charles, being a part thereof; also a house, lot, furniture, etc., furnished, all of which I hereby give him and his heirs forever in like manner. I now give him $4,000, to be made out of the first money that is made after paying all the debts that may be owing by the concern of Bullock & Norwood in Warren, North Carolina.

"I give unto my son Richard $8,000 and profits proceeding therefrom, as settled by us at the dissolution of our business in 1825, which may be seen in Wm. & R. Bullock's Ledger C; also, etc., to him and his heirs forever.

"I give unto my daughter Lucy Lewis the fifteen negroes I placed in her possession at her marriage with Mr. N. M. Lewis, with, etc., to her and her heirs forever.

"I give unto my son James M. Bullock my two blacksmiths, (308) Peter and Tom, with the blacksmith's tools, and $7,000 to be made out of my estate, to be paid to him by my executor whenever my son James marries or arrives at the age of 20 years (to have interest from the time of my decease) or at a sooner period, should my executor think it would be to James' interest to have it; I also give him, etc.

"I also give unto my wife, Lucy, and son James the part of the tract of land I now live on, lying on the south side of the road leading from Captain W. Norwoods' mill to Shilo meeting-house, being part of, etc., with all the negroes thereon, except those heretofore given, etc., Gabriel, Joe, Silvey, Creatia, and boy child Mick, Bob, Jenny and son, Deler (Culbreath), the balance of negroes on said plantation, about fifty-one or two in number, with all the stock thereon not heretofore given, household and kitchen, etc., all of which is given during the natural life of my wife, Lucy, and at her death I give the land to my son James, his heirs and assigns forever. Should my son James marry, or should there become any discontent between my wife and son James, I would recommend to my executor to have a comfortable house built, but not very costly, on some part of the land for either party, as will be most advisable; and let there be a division of these fifty-two or three negroes, James to have one-third of them, my wife two-thirds.

"I give unto my sons John, Richard, and the heirs proceeding from the body of William H. Bullock, the tract of land lying on the north side of the main road leading from, etc., to them and their heirs forever.

"I give unto my son John Bullock, in trust for the benefit of the heirs of my daughter Fanny Ann Hunt, the fifteen negroes I put in her possession at her marriage with Captain J. Hunt; also, the tract of land whereon Captain Hunt now lives, containing 585 acres. I give the stock of horses, cattle, and household furniture loaned John and Frances, in the same manner to them and their heirs forever, to the heirs proceeding from the body of my daughter Fanny Ann; but be it understood, as I have advanced money and paid for this land given the heirs (309) of Fanny Hunt, there will be a drawback on those legacies which I may give to the said Fanny Ann, and it will be understood that each legatee must make up these debts and have so much discounted in their ratio at the division of my estate that each legatee may share and share alike.

"I give unto my son John Bullock, in trust, nevertheless, for the heirs of W. H. Bullock, the interest I purchased of Colonel John Baptist in Clarksville of stock in trade with said son John of about $5,400, to still

continue to manage it to the best advantage as he has done for several years past, with all purchases that he has made of said stock for the benefit of John and W. Bullock, I do hereby leave for the benefit of the heirs of W. Bullock; it is well known that the first moiety given my son William there is none remaining.

"Having about eighteen negroes at the mill plantation, in addition to them will be added Gabriel, etc., making, if no mistake in count, twenty-seven there, with all the stock of every description in said plantation except property as my son W. H. has in loan and brought with him, with all thereto pertaining, with the balance of the concern in Warren, with all the debts due me after discharging my own debts, with every other species of property I possess that does not belong to the tract of land whereon I now live, after paying James his legacy, be equally divided between my sons John, Richard, and the heirs of W. H. Bullock as one distributee, my daughter Susan Jiggits, Lucy Lewis, the heirs of Fanny Hunt as one distributee, and my son James M. Bullock, all the foregoing property, to be equally divided, share and share alike; but it will be understood that my son John Bullock and the heirs of Fanny Hunt will have a considerable drawback, as they are considerably beforehand in receiving of my estate; therefore, what they have and will receive (310) will be accounted as part of their legacy and the quota made up to them, so as all will share and share alike at the first division.

"After the death of my wife, I wish an equal division of my estate that may have been loaned to her or my son James, with every species of property not heretofore given, to be equally divided between my sons John, Richard, and the heirs of W. Bullock as one distributee, my daughter Susannah Lucy, the heirs of Fanny Hunt as one distributee, and my son J. M. Bullock, share and share alike, all the property that will be received by virtue of this my last will and testament (not adverting to that that has been heretofore given). I give it on the following conditions: if those to whom it is given die without a lawful heir, then in that case for their property to return to the surviving brothers and sisters, or to their heirs in case they should die first and leave heirs."

"A CODICIL TO THE FOREGOING WILL.

"I give unto my son Richard Bullock negro boys Anthony and Sam, now in his possession. I give unto my son John Bullock, for the benefit of the heirs of W. Bullock which may proceed from his body, Jonas, etc., with their future increase. The negroes named in the foregoing will given my son John for the benefit of the heirs of W. Bullock and

Fanny Hunt, which was named without the increase, but be it understood that I intended to convey them and their increase, and do hereby convey them and their increase."

Of this will the testator appointed his son, the plaintiff, sole executor. The bill charged that in many respects it was difficult to put a construction on the will which was satisfactory to the plaintiff or which he could safely adopt, especially as some of the legatees and devisees (those supposed to be intended by the description of the heirs of William H. Bullock and Fanny Ann Hunt, for whom the plaintiff was constituted testator, were infants of tender years. The bill then set forth the difficulties which the plaintiff experienced, in the following order: That it was uncertain whether the issue of the slaves mentioned in the first, second, and fifth clauses of the will passed to the legatees respectively named therein, or was a part of the residue and sub- (311) ject to division as provided by the residuary clause.

That as to the bequest of the plaintiff of the testator's interest in the Clarksville store, "in trust for the heirs of William H. Bullock," the plaintiff alleged that he was in that store a partner with his testator; that the testator's interest therein had been apropriated by him for many years to the maintenance and support of the family of his son William H. Bullock, who had become insolvent; that by these advances the property had been nearly exhausted; that it was the testator's habit to charge his children with all the property which he conveyed to them and credit them with that which they returned to him; at a short period before the death of the testator the plaintiff had by his directions assigned all the effects of that partnership to the heirs of William and Richard Bullock, another company in which the testator was interested; that one-half of the sum paid by the latter copartnership for this assignment was placed on the books of the testator to the credit of William H. Bullock, so that in appearance this was a debt due him, when in fact it was a legacy. The plaintiff in this respect prayed that this balance might be declared not to be a debt, and as he occupied the threefold character of surviving partner executor, and trustee, that his accounts might be settled under the direction of the court; and further, that it might be declared whether in the legacy to the plaintiff, in trust for the heirs of William H. Bullock, the testator's share of the profits passed.

The plaintiff then set forth his belief that the testator constituted him a trustee for the children of his son William and his daughter Fanny Ann Hunt, solely because of the insolvency of their respective fathers, and that he had the utmost confidence in the integrity of his son and son-in-law and would have constituted them trustees for their respective

children had he not feared that thereby the property given the latter would have been subjected to the debts of their fathers.

The plaintiff then avowed his belief in the integrity of his brother and brother-in-law, and prayed that they be constituted in his (312) stead. If the plaintiff could not succeed in this, then he prayed that it might be declared whether he was a trustee for the children of William H. Bullock and Fanny Ann Hunt born at the date of the will, or at the death of the testator, or whether the trusts extended to children subsequently born. The plaintiff further requested direction as to the course he was to pursue in making the final division; whether he was to estimate, in making up the share of each of the legatees, the balances against them on the books of his testator, and also the pecuniary and specific legacies given them by the will; and as he was interested in that division, that it might be made under an order of the court. Upon this subject the plaintiff admitted that he was to account in the division of the residue for the $4,000 given him by the fourth clause of the will, and he insisted that the testator, in speaking in the tenth clause of the drawback due by the plaintiff and the heirs of Fanny Ann Hunt, alluded to the $4,000 given the former and to the payment mentioned in the eighth clause made by him for the land devised to the heirs of the latter. And, finally, the bill stated that the plaintiff was entirely ignorant of the property which was subjected to the cross-remainders created by the last clause of the will—whether the cross-remainders attached upon all the property which passed under the will, or were confined to that disposed of by the residuary clause; whether they applied to all legacies as well pecuniary as specific, or whether they were confined to the last, and if applicable to the pecuniary legacies, the plaintiff prayed he might be protected in paying them over. All the parties interested under the will were made defendants. Of these, William B. Inge was a nonresident and did not appear and answer.

By an amendment the plaintiff stated that one of the children of Fanny Ann Hunt had died, and that he had been advised to administer upon its estate, but he averred that he was entirely ignorant whether (313) the interest of that child under the will of his testator survived to its brothers and sisters, or whether he (the plaintiff) held it in trust for the next of kin; and in this respect he prayed instructions.

By consent, the master in the court below was directed to inquire whether William H. Bullock and John Hunt were proper persons to substitute as trustees for their respective children, and whether the property of their children would be safe in their hands. It was also referred to him to state an account of the Clarksville copartnership, and of the amount which the testator had paid and the plaintiff was still liable to

pay for the land devised to the heirs of Fanny Ann Hunt, and also to state an account of the property advanced by the testator to his children, contained in the books. The master reported that W. H. Bullock and John Hunt were proper persons to appoint trustees for their children, and that the property which their children took under the will would be safe in their hands. He also stated the accounts ordered to be taken, and there were no exceptions filed to his report.

Nash for plaintiff.
Badger and Devereux for defendants.

HENDERSON, C. J. This bill is filed by John Bullock, executor of William Bullock, to have the trusts of his testator's will declared, and to have the advice of the Court on the execution of them. It is a proper case for such an application, as the will in many parts is of very doubtful meaning.

The question which presents itself is as to the increase of the slaves bequeathed to his daughters Susan Jiggits and Lucy Lewis, and to his grandson, William B. Inge. As to the latter, we decline to give an opinion, as the testator says he has made his grandson a deed of gift for the slaves. This deed must determine the question, and we have it not before us.

As to the two former, we think that the increase passed to his (314) daughters respectively, together with the original stock, as we look upon the bequests rather as confirmations of prior gifts than as legacies *de novo*. The testator, in describing the original stock, says they are the slaves which he put into their possession, upon their marriages respectively. Our act of 1806 (Rev., ch. 701) does not annul entirely gifts of slaves made by parents to children, either express or those presumed from a delivery of possession, but leaves them in the hands of the child as an advancement, if the parent does not by will or otherwise declare the contrary. And although in this case they are not advancements, so as to be brought into hotchpot, for there is no intestacy, yet they have that character so far as to form a guide in arriving at the testator's intent. There are additional reasons appearing upon other parts of the will which support this conclusion. In the clause creating cross-remainders we understand that this property is not esteemed as property received under the will, but as falling within the description of that heretofore received. The codicil affords strong proof that as to these legacies he did not deem it necessary to mention the increase in order to pass them; for he therein declared that as to the increase of the negroes bequeathed to his son John, in trust for the heirs of his son

William and of his daughter Fanny Ann, he intended it should pass, and is silent as to the increase of those bequeathed to his daughters Susan and Lucy. In the will they were bequeathed in the same way without the increase. As to those given in trust for the heirs of his son and daughter, there had been no prior gift or delivery to the trustee, or the heirs, which the will could confirm; and, therefore, the testator very probably concluded that it required express words to carry the increase. He there inserted the increase in the codicil as to them and said nothing as to the legacies in question, thinking, as we believe, that the increase passed by the confirmation of the original gift. An additional reason might be given. He made a deed of gift to his grandson, William B. Inge,
(315) for the negroes he put in the possession of his mother under the same circumstances. This deed carried the interest from its date. Why, then, it may be asked, should he make this exception against these two daughters?

We think, also, that the bequest to the plaintiff of the testator's interest in the Clarksville store, in trust for the heirs of his son William, carries with it the testator's share of the profits. This, we think, sufficiently appears on the face of the will. But taken in connection with the master's report made from the books of the concern, and from the testator's own books, to which we think the testator has given a testamentary character and which ought to be proved as parts of his will as far as they are referred to in it, there cannot be a doubt on the subject. The words of the will are: "My said son John (who became the partner of the testator after the purchase) is to continue to manage it to the best advantage, as he has done for several years past, with all the purchases he has made of (with) said stock, for the benefit of John and William Bullock, I do hereby leave for the benefit of the heirs of William H. Bullock." From the master's report, it appears that nearly the whole of the stock and profits, at least a great part thereof, had been applied to the use of William H. Bullock, with the testator's consent. I say with his consent, for he was a partner, and lived in the neighborhood, and it is presumed he knew the state of the books. And further, the sum of $1,015.10, the one-half of the amount given for the goods by William and Richard Bullock, to William and John Bullock, is carried to the testator's own books, and entered as a credit thereon to William H. Bullock. We cannot but understand from this that the appropriations made to the use of William H. Bullock by John Bullock, the active partner, were known to and approved of by the testator. And these advances made to William H. Bullock, and appearing on the testator's books as charges against him, against whom and all his other children it appears that the testator kept accounts, is conclusive evidence to show both that

the testator intended the profits to pass, and also approved of (316) the appropriation of both stock and profits by the plaintiff, the active partner, to the use of William H. Bullock. No exceptions being taken to the master's report on this subject, the same is confirmed; and the executor is directed in closing the accounts of said concern to make the said report the basis of the settlement.

The next question is as to the meaning of the words, heirs of the body, or heirs proceeding from the body; for the testator uses both expressions indiscriminately. The words import a present gift. And if there is no person to take the legacy, it is void. As to the meaning of the words heirs of the body of William H. Bullock, we are relieved from all difficulty on the subject; for the testator notices in another part of his will that his son William H. is alive. In speaking of some article, he says, "which my son William H. has now on loan." Evidently, therefore, he did not mean heirs in its technical sense, the representatives of a dead man, but heirs apparent, to wit, issue, children. And we think the same construction must be put on the words "heirs of the body of Fanny Ann Hunt." In the first place, we have a specimen of the testator's meaning of the words, and, unless controlled by other words, the same words should have the same meaning, and especially when used by the same person in the same instrument, on the same subject-matter. The words are "proceeding from the body"; which word proceeding is future, contingent, not past—which have proceeded. It looks forward to the having of other children. Another reason might be given, if necessary. The testator mentions his daughter Fanny Ann many times. He never declares whether she is living or dead. He mentions his daughter Elizabeth but once. He then calls her his "deceased daughter." I have avoided touching on the doctrine of *Stith v. Barnes,* 4 N. C., 96. We are, therefore, of opinion that in each case the words heirs of the body mean children, or rather issue. The next question is, Do these words take in after-born children, or is it confined to those born at the making of the will, or the testator's death? We think it embraces all. And we rely on the word proceeding as sufficient, independently (317) of all other reasons. We are aware that in the conveyance of a mere legal estate, the estate cannot open and shut, as it is called; for the estate must pay to the grantee at first or not at all. I speak of immediate freehold interests. It is otherwise as to a use or a trust. These may cease in one person in whole or in part and arise in another. And if it be a use, a sufficient scintilla of seisin remains in the trustee to be converted into a seisin to feed the new use. And it is the same in wills. But here there is not only a will, but a trustee also for the heirs, as well those born as those to be born. This is said as to the lands. As to the

personal estate, the inconvenience of permitting it is here avoided; for the legatees in trust are not entitled to the control of the property, or to call for an immediate conveyance on account of these ulterior trusts; so that there is no danger of its being wasted or eloigned, to defeat the ulterior *cestuis que trust*. And we can, therefore, see no reason why the personal estate, also, should not open upon the birth of a child and let it in to the benefit of the trust. And if there was no trustee appointed by the will, the court, to effectuate these intents, would declare the heir and executor trustee for that purpose.

The next question is, What property is subject to the cross-remainders? From the will we are bound to say, all the property taken under it. These are the testator's words; and there is nothing in the will to control them or vary the meaning, only the expression "not adverting to what has heretofore been given." This can control them so far only as to exclude all property which the will states, either expressly or impliedly, to have been heretofore received; for, as to that, the testator has made the will more confirmatory than legatory. But we cannot travel out of the will to ascertain what he intends to confirm as a gift or *quasi* gift, and what he intends as a legacy *de novo* entirely under the will.

[His Honor then proceeded to specify what property was subject to the cross-remainders, and came to the conclusion that all the
(318) property which had not been given by the testator to his children before the date of the will was thus subject—including in this exception property which had been given to William H. Bullock and Fanny Ann Hunt, but which was by the will devised to the plaintiff in trust for their several children.]

The executor has asked the advice and assistance of the Court in regard to the property subject to the cross-remainders. He must take bonds from the legatees with ample sureties, payable to himself, that the property shall be forthcoming in case it shall be necessary to perform the ulterior trusts of the testator's will.

Upon the subject of accountability for the receipts and advancements to equalize the distribution, upon what the testator calls the first division of his estate, we are left somewhat in the dark. But after much consideration, we think that nothing received under the will, except the $4,000 to John Bullock and a part of the legacy given to him in trust for the heirs of Fanny Ann Hunt, are to be accounted for. The testator's will, as to what is equality, is the sole law. He can by his declaration, so far as respects this question, make that equal which is in fact unequal. In giving the other legacies, he says nothing about inequality, but whenever he speaks of these two, he speaks of equality and drawbacks, and directs that they shall be accounted for upon the division.

It appears, also, that the testator had something else in view when he speaks of equalizing the other legatees. The master reports that he had kept accounts against his children. It must be that he refers to those accounts when he says these two legatees are in advance of the others. Had not the testator by referring to his books made them in some degree testamentary, we could not possibly travel out of the will to ascertain his meaning. In making the division, the executor will not consider the legacies given in the will, except as above mentioned, as creating the inequality to be made up upon the division. But he will be governed by the master's report on the subject as to the advancements made to the different children, and will make that the basis on which to found the equality directed by the testator, except as to the legacy to himself of $4,000, which he will take into the account as so much ad- (319) vanced him, together with interest thereon from the time he received it. He will also take into account the moneys paid by the testator for the land devised to him in trust for the heirs of Fanny Ann Hunt, together with all his testator's liabilities for John Hunt, deducting therefrom the bond which his testator gave to John Hunt, all which appears upon the master's report. The executor will strike a fair balance, and make what is due from John Hunt the basis of equalizing the legacy to the heirs of Fanny Ann Hunt upon the division. In striking the balance, the executor will include what he, as executor, has yet to pay on account of his testator's suretyship for John Hunt, as well as what he has paid.

The clerk and master having reported that William H. Bullock and John Hunt are prudent and discreet persons, and properly qualified to take the management of the property bequeathed to their respective families, the executor is hereby authorized, if he thinks proper, to put the trust property into their hands respectively for the support of their families and to permit them to expend the whole profits for that purpose and in the education of their children, the master having reported that they are not more than sufficient for that purpose. But the property is to be under the supervision of the executor, who may at his pleasure withdraw it, and must do so upon their mismanagement.

As to the application of the trustee to be permitted to retire from the trusts, we can see no reason why he should, and therefore refuse his application.

We are also of opinion that the heirs of William H. Bullock and the heirs of Fanny Ann Hunt form a unit each, and that upon the death of any one of them the share of the one so dying goes to its heirs and next of kin, and not to the children of the testator.

PER CURIAM. Decree accordingly.

At this term the plaintiff filed a petition, verified by affidavit in which he stated that the defendant Richard Bullock had become insol-
(320) vent, and, as far as the interest of his infant *cestuis que trustent* extended, he prayed that the legacy of the defendant Richard should not be paid over to him.

The defendants also filed a petition to rehear that part of the former decree which declared that all property which passed under the will was subject to the cross-limitations, contending that it only applied to the property to be received at the last division. A rehearing was also had of the former order, refusing to substitute William H. Bullock and John Hunt as trustees for their children instead of the plaintiff.

Gaston for defendant.

HENDERSON, C. J. We are satisfied with our former opinion as to what part of the testator's property is subject to the limitations in cross-remainder. The words of the will are too strong and point too plainly to what shall be received under the will as distinguished from that which had been heretofore received. The first, meaning that which the legatees had not possessed before, but claimed entirely under the will; the latter, that which he had before the making of his will possessed them of, and confirmed to them by the will. We went as far as we could in declaring that the property put into the hands of William H. Bullock and Fanny Ann Hunt, and by the will given to John Bullock in trust for their respective children, to be property not received under the will in the meaning of the testator; substituting the trustee to their prior possessions, and their children to them.

We think that we erred in directing the executor not to pay or deliver over the property subject to the cross-limitations in remainder; for the testator has prescribed no conditions, and we think we cannot so do unless for some cause which we think would have determined the testator himself to provide the means by which his ulterior legatees should not be disappointed. In such a case we think it would be our duty to interfere, for we should then speak what we presume the testator would himself say were he capable of speaking, or would have provided for had
(321) he foreseen the necessity. It is going very far, then, to take care of a remote contingent interest to the prejudice of the near and immediate objects of the testator's bounty, for it almost necessarily reduces the legacy to its interests or profits only. However, where there is a cause for it, as insolvency or the like, we think that we are bound to interfere, and John Bullock, the executor, as guardian and next friend to James Bullock, and trustee for the children of William H. Bullock

and Fanny Ann Hunt, having by his petition, verified by affidavit presented at this term, stated that Richard, one of the legatees, is insolvent to a very large amount, and praying that the said Richard should be restrained and enjoined from demanding any part of said legacy in cross-remainder so far as those for whom he acts are concerned, we think that, until the petition be disposed of, that the prayer of the petition should be granted and the benefit of it be extended to all; for if Richard be insolvent it should affect all those who may claim.

We therefore direct that until bond and satisfactory surety be given by Richard for the forthcoming of the property as before mentioned, or until this Court shall otherwise direct, the executor shall not pay said legacy or any part thereof to said Richard, and that the said Richard be restrained and enjoined from demanding and suing for said legacy.

In the former decree it was erroneously directed that the plaintiff should be charged with interest on the $4,000 legacy from the time he received it. The Court reverses so much of that decree, and now declares that the same is payable out of the funds of Norwood and Bullock from the first money received therefrom after the payment of the debts of the firm. The legatee is and was entitled to receive the same out of the first money collected from said firm, after paying the debts thereof, and that he is not chargeable with interest thereon, but, if the fund is sufficient, he is entitled to interest thereon from one year after the testator's death until he recover the amount.

The petition of William H. Bullock and John Hunt, praying to be substituted for John Bullock as trustee for their children re- (322) spectively, is continued for further consideration.

PER CURIAM. Decree accordingly.

Cited: Hurdle v. Elliott, 23 N. C., 176; *Stultz v. Kizer,* 37 N. C., 541; *Williams v. Cotton,* 56 N. C., 398; *Williamson v. Williamson,* 57 N. C., 285; *Faribault v. Taylor,* 58 N. C., 221; *Perkins v. Caldwell,* 77 N. C., 434; *Galloway v. Carter,* 100 N. C., 121; *Ruffin v. Ruffin,* 112 N. C., 109; *Watson v. Hinson,* 162 N. C., 80.

DECEMBER TERM, 1833

JANE McPHERSON v. THOMAS HUSSEY ET AL.

A sheriff's return and deed are *prima facie* evidence of the sale and of the identity of the land sold and that conveyed. But if the presumption exists at all in favor of deeds executed by a succeeding sheriff, under the act of 1799 (Rev., ch. 538), it fails when it appears that the successor knew nothing in the facts recited in his deed, but executed it from his confidence in the representations of the purchaser.

THIS bill was filed in 1824, and charged that a suit was instituted for alimony by his wife against the defendant Hussey, who then had a large real and personal estate, and that a decree was made in October, 1819, in favor of the wife, on which a sequestration and writ of *fi. fa.* issued to the sheriff of Guilford, under which he sold four tracts of lands, of which the plaintiff purchased two and took a deed from the sheriff. The bill further charged that Hussey, pending that suit and for the purpose of defeating a recovery therein and any sale that might be made under process upon a decree in it, conveyed or caused to be conveyed to the other defendants all his visible estate, which was without consideration and with full knowledge on their parts of his object; in particular, that one Royl had conveyed to Hussey one of the tracts claimed by the plaintiff, but that the deed had not been registered, and Royl, at the request of Hussey and the defendant Hoskins, took up and destroyed that deed and made a new one to Hoskins; and that one Bruce had sold to Hus-
(324) sey the other tract of land claimed by the plaintiff, for $1,200, and was to convey it when the purchase money should be paid; that Hussey paid $900 of it and procured Bruce to convey to Hoskins, who paid the residue of the price, but did so out of the funds of Hussey, and has since conveyed part of the land to the defendant Hunt with the privity of Hussey and without consideration. The prayer was for the conveyance of the two tracts (which are described in the bill) from such of the defendants as have the legal title, by which the plaintiff was prevented from proceeding at law, and for an account.

The answers denied the fraud and set up various defenses, and much testimony was taken to the several points; but it is unnecessary to state them or the proofs, as one of the points made in the argument of the case was thought clearly to be against the plaintiff.

The answers did not admit the plaintiff's title, but denied it in general terms and put her to the proof of it.

In proof of it, the plaintiff offered in evidence the decree in the suit of Hussey and wife and the writ of execution issued on it in October, 1819, on which the sheriff made a return to April Term, 1820, that it

was "levied on 135 acres of land in one tract, 300 in another tract, 300 acres in a third tract, and 50 acres in a fourth tract; the title being disputed, sold for $42, paid in office." Signed "A Hanner, sheriff, by J. Wheeler, deputy sheriff." She further exhibited a deed, dated 17 February, 1823, made to her by William Armfield, then the sheriff of Guilford, for the two tracts of land claimed in the bill and in the deed described by metes and bounds and stated in the deed to contain, the one 240 and the other 33 acres.

The deposition of Armfield was taken by the plaintiff to other parts of her case, and to an interrogatory from the defendants on this point he answered that the plaintiff brought the deed to him already written, and that he executed it without her showing him any document or evidence upon the subject, and without any personal knowledge of (325) his own or her rights, or of the land described in the deed.

From the record of the alimony suit, it appeared that on leave granted in October, 1825, the return on the execution was amended by Wheeler by stating, amongst other things, "that it was levied on a tract of land, of 300 acres more or less, or a part of a tract of land on Reedy Fork adjoining Charles Bruce and others, and that Jane McPherson became the purchaser of the tracts on Reedy Fork at $11, and paid the purchase money to him."

Winston for plaintiff.
Nash for defendants.

RUFFIN, C. J., after stating the pleading and proofs as above: The objection to the plaintiff's case is that the proof of her title is insufficient.

It is the general understanding and course to receive the return of the sheriff, and his deed, as *prima facie* evidence of the sale, and that the land conveyed is that sold. It is not intended to question the propriety of this practice. It rests upon the notion that the deed and acts of officers import verity, because the officer is supposed to have full means of personal knowledge, and that he does know the facts affirmed by him, and that his affirmation is true, since he is under the obligation of an oath. Whether this is to be carried to the extent that the recitals in the deed of a succeeding sheriff, of the acts of his predecessor, is evidence of those acts, this case does not call upon us to say; for, at all events, the presumption cannot stand against direct proof that the new sheriff knows not whether what he has said be true or false. Here the sheriff who made the deed himself proves that he had no knowledge of any one of the material facts constituting the plaintiff's right to call for a deed for

the land conveyed to her, and that he made the deed upon her own word only, that she purchased at all and purchased this particular land. The truth of those facts can no longer be inforred from the deed, since the whole ground of inference is destroyed by the express evidence. It (326) is then necessary that the plaintiff's purchase, and the identity of the land sold and that conveyed, should be proved by evidence independent of the sheriff's deed. The return on the execution does not establish them. As at first made, it furnishes nothing upon the subject. Admitting that five years after the return, and the expiration of the sheriff's office, and after the new sheriff had made a deed, the deputy who executed the process could amend the return, and that as amended it would be evidence between these parties, yet in this case it describes the land which the plaintiff is therein stated to have purchased in terms so extremely vague that it is impossible, by comparing that with the description in the deed, to ascertain whether the land be the same or not. It would be very unsatisfactory to decree upon such very uncertain proof. Indeed, there is nothing to which that faith can be yielded which entitles it to the name of evidence, although the fact is one which, from its nature is susceptible of clear and direct proof by the testimony of the person who attempted to amend the return, and of others.

If, however, the identity of the land were established, there is another radical defect in the plaintiff's case. This suit is not to obtain a conveyance from the sheriff. He is not a party to it. It is against other persons, to the relief against whom a valid deed from the sheriff is essential. It is her title to the property which she seeks to recover. Such a deed she alleges in the bill she has, and exhibits it. It is not from the sheriff who made the sale, but from his successor.

It is an indulgence to purchasers to allow them to get deeds from a sheriff after his office has expired, or from a succeeding sheriff. The law originally contemplated that the deed would be immediately made by the officer who made the sale, and while under the obligation of his oath of office. The act of 1767 (Rev., ch. 85) was the first departure; and from an apprehension of that danger of fraud which is apparent in this case, that act is confined to anterior purchases, as is also that of 1784 (Rev., ch. 223, sec. 10). The act of 1799 (Rev., ch. 538) is (327) the first which embraces future cases; and that is indicative of a remaining caution in the Legislature against imposition. By it the sheriff who sold, as best knowing the truth of the case, is, although out of office, to convey, if he be living and in the State. The succeeding sheriff, personally ignorant of the facts, is authorized to do so only in cases of extreme necessity, when there is no other person in being capable of conveying or compellable by our courts to convey—that is, where the

former sheriff is dead or has removed out of the State. The power to the successor is a special one and strictly limited. The policy on which it is formed, not less than the limitation itself, forbids the extension of the act by construction beyond its words.

Here, there is no evidence that at the time of making the deed Hanner had either died or removed or has yet done so. There is not even such a recital in the deed itself if that would do. The deed is therefore a nullity, and the bill must be dismissed, with costs.

Per Curiam. Declare that the plaintiff has not proven that the land described in the bill and in the deed to her in the bill mentioned, dated, etc., is the same land which it is alleged in the bill she bought at sheriff's sale; and declare further, if it be the same, that Armfield, who executed it, was not the sheriff who made the said sale, but was a successor to Hanner, who did make the said sale; and declare that the said deed is void, because the plaintiff hath not charged or proved that the said Hanner was dead, or had left the State; and therefore dismiss the bill, with costs.

Cited: Edwards v. Tipton, 77 N. C., 225, 226; *Curlee v. Smith,* 91 N. C., 178.

MEMORANDA.

At the late session of the Legislature William Gaston, Esq., of New Bern, was elected a judge of this Court, in the place of Chief Justice Henderson, whose death has been already noticed.

And at a meeting of the judges held during this term, his Honor, Judge Ruffin, was elected Chief Justice.

(329)

RICHARD BOYD v. JOHN D. HAWKINS ET AL.

1. Agreement between trustees and *cestui que trusts* are not void, but voidable, and *prima facie* require evidence of collateral facts to support them; and where a trustee had taken an assignment of a judgment which was a lien upon the trust estate, and he and the *cestui que trust* believing it could be used for his pecuniary advantage, agreed that it should be held for the benefit of the latter, and in consideration thereof, and as a compensation for his trouble, the former was allowed one-fourth of the trust estate: *it was held* that the agreement being entered into by the *cestui que trust* under a mistake of his rights, was void.

2. The case of *Boyd v. Hawkins*, *ante*, p. 195, upon a rehearing confirmed in part, and in part disapproved, and the interlocutory order made therein altered.

3. Bargains between trustee and *cestui que trust* must be such as a prudent man would make, and which the former might conscientiously advise the latter to accept from a stranger.

4. In England it is clear that the trustees who are *quasi* officers of the law as executors, etc., having no right to compensation, and by analogy the rule is extended to trustees by compact.

5. But here, by the act of 1799 (Rev., ch 536), a different rule has been introduced as to executors, etc.

6. And as equity follows the law, the rule as to trustees by compact is also altered.

7. A court of equity will not enjoin a suit at law in the court of another state; neither will it direct a particular order to be made in a chancery suit thus pending, unless it be by putting a party to his election.

AFTER the decree pronounced in this case at last December term (*ante*, 195), the defendant filed a petition for a rehearing. The matters complained of, and which were sought to be corrected, were:

1. That by the former decree the agreement of 13 September, 1824, was declared to be wholly void as a measure of compensation to the defendant Hawkins for services rendered the plaintiff. The defendant averred that the agreement was fair, the result of deliberation on the part of the plaintiff, and, further, that the property to which it applied was situated in Virginia, where the services for which it provided a compensation were to be rendered, and that by the law and usages of that state the agreement was valid, and constituted a proper measure of compensation.

2. That so much of the decree whereby it was declared to be contrary to the rule of a court of equity to allow compensation to a trustee by way of commission proceeded upon a mistake of the laws and usages of this State.

3. That the allowance of the gross sum of $1,500 as a compensation to the petitioner was inadequate, made without proper information, and should have been the subject-matter of a reference to the clerk, before whom additional testimony might have been offered.

4. The petitioner set forth several instances in which it was averred that there were mistakes and omissions in making up the balance due by him, which it is not necessary to state. (330)

5. That no provision was made to protect the petitioner from a number of suits principally pending in this State, in which his agency for the plaintiff had involved him.

6. That the decree was erroneous in directing what proceedings should be had in the court of Chancery in Virginia, and in prescribing to the petitioner the course which he should take in defending his rights there.

The rehearing having been granted, the several points above set forth were, during this term, extensively discussed.

Badger for petitioner.
Devereux for plaintiff.

RUFFIN, C. J. The importance of this suit to the parties, and the nature of some of the questions discussed in it, which were novel among us, make it gratifying to the Court that they have been brought up for a reconsideration by a petition to rehear the decree. It is especially so, as upon further reflection it is found that some general propositions were stated in the opinion given that are not entirely correct, and that on other points further information than was then laid before the Court was necessary to doing exact justice between the parties.

Upon the principal question before discussed and adjudged, the Court sees no reason to alter the decree. That was upon the validity of the deed of 13 September, 1824, as an agreement of purchase, or as an agreement for measuring the compensation of J. D. Hawkins as a trustee. No doubt, the trust was troublesome and responsible, and required Mr. Hawkins' personal attention. It is clear, too, as stated in the decree, that the defendant had with both diligence and skill discharged the trust. It is equally true that it was understood by the parties, as admitted in the bill and collected from some of the deeds of trust, that Mr. Hawkins should receive compensation; and that his care, personal labor, time, and loss of attention to his own affairs, and the advantage derived by Mr. Boyd from his services, altogether may and do constitute a (331) meritorious consideration for a proper agreement for remuneration, and for the ultimate allowance of a liberal remuneration. But upon the principle of equity which has long formed the law of this Court for the regulation of dealings between parties standing in the relations

these did at the time of entering into the articles of September, such an agreement cannot be sustained, though not obtained by actual imposition.

Without going through the case again, it will be sufficient to state that although all bargains between trustee and *cestui que trust* are not absolutely void, yet they are not favored, but are the objects of distrust. Generally, they have been regarded as mere securities, if in the event they turned out to be very gainful to the trustee and prejudicial to the other party, and unless the whole subject was clearly understood by the *cestui que trust* in its circumstances and their legal consequences. Even then, the contract has not been permitted to stand when it was not freely entered into by the party under protection, without any undue influence on the part of the trustee or any pecuniary necessity, or mental embarrassment on the other side. To gain the countenance of the Court, therefore, such agreements must, as it has been said, prove to be fair and reasonable—such as the *cestui que trust,* as a prudent man, might or would again enter into, and the trustee might, consistently with his duty, advise him to make with another person. It is impossible to define the sources of secret influence which one person may, in their relative situation, have over another, imperceptibly to the world, and almost to themselves, and when it is not sought or even desired—an influence which may not only control actions, but color the opinions and determine the judgment of the dependent party. It is wrong to engage him reluctantly in a contract known to be to his prejudice, and it is hardly less so to insist upon a contract with him, thought equal at the time, and to which he made no objection, but which in fact was to his prejudice, and which, on that ground, and upon his discovery of it, he is resultant to
(332) proceed in. One reason why the Court leans this way is that, regarding such dealings as definitive contracts, they would conclusively bind the *cestui que trust* at all events, and might do great injustice. But taking them to be voidable and *prima facie* to be supported by the aid of collateral proofs, the Court always has the power of disposing of them in a way that will secure all parties and do complete justice.

In the case before us it cannot be doubted that, certainly in Mr. Boyd's and probably in Mr. Hawkins' opinion, the latter was the owner of Brown's judgment, and could, without violating either a rule of law or morality, use it for his own benefit, by selling under it and buying in the trust property. Unquestionably that supposition entered materially and mistakenly into the agreement of September. It is recited in it and is fairly stated in the answer to have been one of the main motives. Here, then, is at once a clear mistake in the essence of the contract. If the truth had been known, Mr. Hawkins would never have advised the other

party to come, nor would he have consented that he should have come, to such an agreement with anybody else. Again, Mr. Boyd only did not know the true state and value of the property of which he was disposing, but seems to have had a different opinion upon that subject every succeeding day, and it is extremely probable that it was so uncertain that Mrs. Hawkins' own opinion frequently fluctuated; at all events, Boyd's spirits seem alternately to have been greatly elated and depressed; so that there is no likelihood that in any treaty then carried on he either reflected coolly or stipulated upon any confidence in himself. Now, although Mr. Hawkins may not have intended any advantage, and may not then have believed he was gaining any undue advantage, yet it is certain that Boyd was not in a condition to protect himself, that he did not stand on his rights, that he would have yielded more if more had been asked; and that Mr. Hawkins absolutely refused to accept all that was offered. The case really, then, is that of a bargain made all on one side; and, therefore, as a contract, it cannot be enforced, because it turns (333) out to be too much to the advantage of the one and to the prejudice of the other. It is for these reasons that contracts between trustee and *cestui que trust* can hardly be said to be binding until the relation is dissolved and a confirmation is given, as in the case of a conveyance from a ward to one who has been his guardian. But, independent of the relation of trustee and *cestui que trust,* merely as such, that which actually existed between these parties was peculiar—the trust being of the whole estate of Boyd, for sale, to pay very large debts, which gave the trustee a control over his will that could hardly be resisted. It is by no means declared that it was sought from sinister motives, or that it was exercised with any intent to oppress. But we cannot but see that it might be so exercised, and that in fact an agreement was obtained that may have been the result of it. It is the danger of such consequences that has given rise to the rule of equity, as one of legal policy in prevention of fraud, on which the Court is bound to relieve, although there be no actual fraud, but only a loss upon an improvident bargain. Such a bargain ought not to be gained nor insisted on. The Court doth, therefore, affirm so much of the decree complained of as declared that deed void for any of the purposes for which it was set up in the answer, and as sustained the first exception taken by the plaintiff to the report.

In the decree the defendant was allowed the sum of $1,500 as a compensation under all the deeds. It is now right to correct the decree in that respect; first, because the allowance was upon a wrong principle, being in a round sum as for an agency, and not as a commission, which the Court declared was against the rule of equity; and, secondly, that it was not adequate, if the principle was right.

It is not seen how the error in the mere matter of law could prejudice the defendant, since the Court made him an allowance, as being agreed for in the deeds, and submitted to in the bill, except so far as its being a proper subject of compact might tend to sustain the deed of Sep-
(334) tember. For the reasons already given, it could not have that effect, because, as a compensation it is not, in the event, fair and reasonable.

But I believe the proposition as a rule of law cannot stand. Nothing can be more certain than the opinion given by the Court was drawn from the purest and most undoubted sources of equity as established in England. There trustees are not paid in any mode. We thought it dangerous to do it, especially by the way of commission here, although it may be admissible as an allowance for time and labor, because it presents temptations, in cases where sales are not the direct and sole objects of the deed, for the trustee to make them unnecessarily, or to hurry them on, to the detriment of the debtor. In England, trustees seldom act personally, or are more than the nominal owners of the legal title. The business of the trust, as are almost all other negotiations, is conducted by solicitors and law agents, by whom the compensation is derived. For this reason probably the trustees which may be denominated public, as having the origin in the law, such as guardians, executors, and committees, are held to be honorary; and, by consequence, those which are constituted by contract are put on the same footing. This is not so much upon the idea that men are not to have reward for their labor as that these persons do not labor, but that those who are put in their place do.

The state of our country and the habits of our people are so different as to have induced the legislatures of nearly all the states, including our own, to introduce provisions by statute for competent remuneration to those to whom the law commits the charge and care of the estates of infants and deceased persons. Individually, I doubt the policy of such regulations, and my doubts are founded on the observation of much practical injustice suffered by the helpless; and I cannot but believe, if ever professional persons should become so numerous as to be readily accessible to all such trustees as convenient agents, whose services can be substituted for their own personal attentions, that those laws will
(335) be repealed, because the business can then be better done and the risk of imposition in charges better provided against. But while the present necessity exists, the rule perhaps must be retained as the means of engaging honest and competent men, in moderate circumstances, to undertake such duties.

It is natural that courts of equity, acting upon one of the most ancient and approved of their maxims, should follow the law, and adopt,

in the case of conventional trustees, the rule applied by the statutes to public ones. This has been done in almost every state in the Union, we believe; at least as far as we have had an opportunity of examining their adjudications. It is in Massachusetts, 16 Mass., 227; in Pennsylvania and New Jersey, as appears in *Manning v. Manning,* 1 John, ch. 529; in Maryland, 1 Har. and Gill. 18; in Virginia, 1 Wash., 246. 4 Hen. & Mum., 415, and in South Carolina, 4 Dess., 110. In New York, *Chancellor Kent* expressed himself strongly in favor of the English rule and refused compensation in *Green v. Winter,* 1 John, ch. 26; but he was compelled to yield, when a subsequent act of the Legislature authorized the courts to make an order in favor of public trustees. And, in answer to an inquiry, that eminent person has done the Court the honor to say, through one of its members, that he understands the old rule, denying compensation to trustees, to be pretty much abolished throughout the country, for that the statutes give it to guardians, executors, and administrators, and the courts make a reasonable allowance to receivers appointed by them, besides reimbursing their expenses, and the equity of the statutes is by construction generally extended to conventional trustees, when the agreement is silent.

To so strong a current of authority this Court does not feel at liberty to oppose the resistance of its judgment singly; but must yield (even were it with hesitation) to the extent of a reasonable allowance. We are informed, too, that it has been usual in some parts of this State for trustees to charge for services, and that the profession have no de- (336) cided opinion against it. The amount will, of course, be according to the circumstances, and not beyond that which would under the statutes be made to executors; and if fixed by the parties, it will be subject to the revision of the Court and will be reduced to what is fair, or altogether denied if the stipulation for it has been coerced by the creditor as the price of indulgence, or as a cover to illegal interest, or the conduct of the trustee has been *mala fide* and injurious to the *cestui que trust.* Whether it shall be given as a commission or not is hardly worth disputing about; that may be a convenient mode of computing in most cases; but the true object is a just allowance for time, labor, services, and expenses, under all the circumstances that may be shown before a master.

In the case before us the Court supposed that the circumstances appeared as fully as they could be at any time shown by the parties, and therefore proceeded to fix, at once, an allowance. Upon reflection, this is deemed to have been premature, as that view of the subject was not in the contemplation of the parties, or of the master, who took the accounts upon the basis that the agreement of September was binding. The decree must, therefore, be corrected in these respects; and it must now

be referred to the master to ascertain (without any reference to the agreement of 13 September, 1824 and report what is a just allowance to the defendant as before mentioned, and, taking into account the payments under the decree, if any, state the balance that may be due between the parties. In taking the account, the master will also credit the defendant with the sum of $72, received by the complainant Boyd as the rent of the blacksmith's shop in Boydton, which was overlooked in the computation on which the decree was based.

The decree will also be extended by declaring the title of the defendant to the blacksmith's shop in Boydton, and to the slave Patsy, a good one, and requiring the plaintiff to surrender the possession of, the shop and desist from any actions or suits in this State for or concerning them.

(336) Upon that part of the decree which directed the suit pending in the court of Chancery in Virginia to be dismissed, there has been some difficulty, and the Court is not unanimous. The cases cited at the bar establish that the chancellor in England does not confine himself to putting the parties to an election, but where they are within his jurisdiction, he restrains them by injunction from carrying on a suit previously commenced in Ireland or Scotland, and proceeds in the whole matter himself. This is commonly put upon the ground that the House of Lords is the common superior of all those courts. But that cannot be the true ground; for the like jurisdiction is taken where the first suit is in a foreign country, or in a colony, from which the appeal is to the King in Council. It seems to be assumed that more complete justice can be done in the English chancery. I wish it to be understood that I disavow altogether any such arrogance on the part of the Court in making the decree in this case. It primarily was not thought of, much less acted on. The sole ground with us was that of the election of the parties. It is true that the pendency of a suit in another state is not, as a plea, a bar to one here. Yet I conceive that no court will suffer one of its suitors to vex another with two suits at the same time, for the same thing, be the other pending where it may, and, upon the motion of either, will refuse to proceed in the one before it unless the other be dismissed. These parties all live within this jurisdiction, and each admitting in the pleadings that the suit was pending in Virginia, went fully into the case here, the defendant insisting in his answer on a trial here on the merits. This struck me as an election, and that as it was improper that the other suit should go on with this, or after it was decided, the Court ought, after a decision, to make it compulsory on the parties to dispose of it. This, too, was considered the most respectful course to the courts of Virginia, as it might prevent a conflict of decision, and the consequences of process of contempt to enforce opposite decrees; for it

did not appear to us that any decree had been made in Virginia. These reasons still induce me to abide by the former decree.

But my brethren think otherwise, and I cheerfully yield to (337) them, as the reasons of their judgment chiefly refer to the relation which the courts bear to each other as tribunals of sister states, and the comity which, it is supposed, should be displayed by the one towards the other. We have been able to find no precedent for the decree in the decision of any of the states; and although, in general, a court of equity having a party before it may make him do what may seem right, yet they think that he ought not to be enjoined to any act in the court of a sister state, because it must be presumed that court will, in administering its own justice, make him do the same act, and, at all events, the contrary ought not to be anticipated. The courts of the United States, for this reason, refuse to entertain a bill to enjoin a judgment in a court of law of a state. *Diggs v. Wolcott,* 4 Cranch, 179; *McKim v. Voorhies,* 7 *ib.,* 278. In *Mead v. Merritt,* 2 Paige, 403, *Chancellor Walworth* decided that he would not entertain a suit to enjoin judicial proceedings previously commenced in another state; in which I fully agree with him, upon the presumption that justice will be done there as well as it would be upon the new suit in our own courts. But he remarks further, that although the court has the physical power to act coercively upon the parties within its jurisdiction, yet he was not aware that any court of equity in the Union had deliberately decided to exercise the power by injunction on the parties to dismiss a suit in another state, for it might be retaliated, and between the courts both parties be brought into contempt. My brethren think we ought not to set the precedent, nor expose these parties to the risk of incurring the censure of the court in Virginia; for we cannot know whether that court will allow the suit to be dismissed. If it ought to be, because the matters are decided between the parties in their own state, that court will do it without our order, and of its own mere motion. They think, too, that although this Court might put the parties to an election, yet it was not done, and that the parties did not, of themselves, elect by first trying here. It is (338) possible, also, that other matters may be involved in that suit which might have prevented an order to elect, had a motion been made; for then the party making it must have shown by the proceedings that the subjects were the same. Upon this last point, I took it from the pleadings that the whole matter of that suit formed a part of the one here, and I still suppose so, because the contrary is not stated by the defendant on affidavit, nor suggested in the petition. However, without that, the majority of the Court is of opinion that the decree was erroneous, and that the parties must be left to avail themselves of the decree

here as they may be able in Virginia, where it will doubtless receive full faith and credit. That part of the decree is, therefore, reversed and the parties left at liberty to proceed in the suit in Virginia as they may be advised and allowed by the courts in that state.

Costs were given against the defendant, because the principal matter in controversy, which made a suit unavoidable by the complainants, was decided against the defendant. This seems to us still to be proper, although a small cash balance might be found due to the defendant. However, as the case is to go again before the master, that ground for the rehearing will be reserved until the coming in of the report, and a motion for directions on it.

PER CURIAM. Decree corrected accordingly.

Cited: Phelan v. Hutcheson, 62 N. C., 118; *Royster v. Johnson,* 73 N. C., 475; *Cannon v. McCape,* 114 N. C., 582; *Pass v. Brooks,* 118 N. C., 398; *Smith v. Frazier,* 119 N. C., 159; *Fry v. Graham,* 122 N. C., 774; *Whitaker v. Guano Co.,* 123 N. C., 369; *Banking Co. v. Leach,* 169 N. C., 709, 716.

MARY CRAVEN v. PETER CRAVEN, SR., ET AL.

1. A widow whose husband made a provision for her out of his personal estate is not entitled to dower unless she dissent from the will within six months.
2. The acts of 1784 and 1791 (Rev., chs. 204 and 351) construed by GASTON, J.
3. *Miller v. Chambers* (manuscript) stated by GASTON, J., to establish that a widow is entitled to dower when her husband makes no provision for her, although she may not have entered her dissent from the will.
4. A widow is entitled to a provision from both the real and personal estate of her husband, and however liberally he may have provided for her out of one, she may, by entering her dissent to his will, obtain her legal provision out of the other.

THIS bill was filed by the plaintiff for dower in the land of her deceased husband, Peter Craven, Jr., and to have a deed set up
(339) which she contended had been delivered to him by his father, the defendant Peter; and which had, upon his death, been suppressed, as she alleged, by the defendants. This was the principal controversy between the parties, but it is not necessary to state the allegations and proofs in respect to it, because it was admitted in the bill that Peter, the husband, had made a will disposing of his personal estate only out of

which he had made a provision for the plaintiff; but its nature, or the proportion it bore to his whole estate, did not appear. The plaintiff had not dissented from this will.

Winston for defendants.
Nash, contra.

GASTON, J. The first question presented in this case is whether the plaintiff has a right to dower in the land which she alleges was conveyed by the defendant Peter to his son, Peter Craven, Jr., her deceased husband. If this question shall be determined in her favor, it will be necessary to ascertain the disputed facts in relation to that conveyance; but if it be decided against her, then the bill must be dismissed, because her claim to relief is founded exclusively upon this right. Before 1784 (Rev., ch. 204) the established law of this State in relation to dower was the same, with a few exceptions, not affecting the present inquiry, which our ancestors brought with them from England. The widow was entitled to be endowed of one-third part of all the lands of inheritance whereof her husband was seized at any time during the coverture, and of which any issue which she might have had could by possibility have been heir; and her claim to dower was liable to be defeated or barred either at law or in equity by those well-known means which according to the law of England constituted either legal or equitable impediments to its assertion. Our act of 1784 made very important alterations in the (340) law relative to dower. Under this act the widow was entitled to be endowed of a third part, not of all, the lands whereof her husband was seized during the coverture, but of those only whereof he died seized. The claim to be endowed was also restricted to the widow whose husband had died intestate, and to the widow who within six months after the probate of her husband's will, "the same not having made any express provision for her by the gift or devise of such part of his real or personal estate as was fully satisfactory to her," should signify her dissent thereto in open court. The act protected the widow, whom it declared thus entitled, against conveyances made by her husband with intent to defeat her of dower, and furthermore declared her entitled, if her husband left no child or not more than two children, to one-third part of his personal estate, but if he left more than two children, to an equal share with each of the children. The act also regulated the mode of proceeding to obtain dower, and endeavored to render it easy and summary. It directed that a petition should be filed in court setting forth the lands of which her husband died seized, and demanding dower; that thereupon a writ should issue to the sheriff to summon a jury, who were

to set off to her a third part of her husband's land, and put her in possession, which possession should vest in her an estate for life therein, and who should also allot to her the part of the personal estate to which she was entitled, to enure to her forever. Time soon began to manifest those inconveniences which human sagacity seldom foresees and never adequately guards against, and which almost necessarily follow upon any sudden change in a system long incorporated into the institutions of a country. The act of 1791 (Rev., ch. 351) recites that the power given by the act of 1784 to the widow of dissenting from her husband's will "as therein regulated, deranges the whole estate, and is likely to produce the most unhappy dissensions, and expensive lawsuits," and undertakes to prescribe new regulations by which it hopes to remedy these
(341) great mischiefs. It directs that when a widow shall have signified her dissent to her husband's will by virtue of the power given to her by the former act, and a jury shall be summoned to allot her dower, they shall first inquire whether she is as conveniently and comfortably provided for as if dower were allotted, and if they be of that opinion, they shall so return to the court, and by that return she shall be precluded from any claim upon her husband's lands except those devised to her by the will. It is silent as to what shall be done in case the jury upon that inquiry should come to a different conclusion. It directs, also, that when a jury shall be summoned to set off to a widow, thus dissenting, her part of her husband's personal estate, they shall inquire whether the legacies given her be not equal to her distributive share, and if they so return, she shall be therewith content; but if they be of opinion that the provision in the will is not equal to a distributive share, they shall allot to her so much in addition as will make it equal. The act then points out the various modes of effecting this equality accordingly as there may be a residuum of specific articles "not given away in particular legacies," or as the residuum may consist of money, or as there may be no residuum, or an insufficient residuum. Several other provisions are made in this act, and in others subsequently enacted, further regulating this subject, but as they do not affect the determination of this question, it is unnecessary now to consider them.

The husband of the plaintiff made a will by which he bequeathed to her personal estate, but devised no land. This will has been proved, and she has not dissented therefrom. Assuming, then, for the present, that her husband died seized of land, has she a right of dower in that land? So far as we know or have been informed, this question is now, for the first time, presented for judicial consideration, and we have to determine it without any aid to be derived from the learning and intelligence of our predecessors. One case, indeed, has been referred to in the argu-

ment, that of *Miller v. Chambers,* decided in this Court, but of (342) which no report is to be found, in which there is no opinion filed, and of which we can learn no more than is shown by our records. In that case the former husband of Mrs. Miller had left a will in which there was no provision for her of any kind, and the Court sustained her claim to dower, although she had not entered of record her dissent to that will. I was of counsel in that case for the defendants, and have no doubt but that the ground on which the decree rested has been truly stated here in the argument. It was there contended on the part of the plaintiffs that the dissent required was not a declaration of dissatisfaction with the will, as the words of the act seem to indicate, but dissatisfaction with the insufficient provision thereby made, and that it was idle to require a solemn dissent to be recorded when there was nothing to dissent from; and it was further insisted that the act of 1784 was intended to confer on the widow the right, and impose upon her the obligation, to elect between the property given to her by the will and the provision made for her by the law, and that it could not apply but in cases where an opportunity of election was presented. One or both of these positions, we must presume, received the sanction of the Court.

The present occasion calls upon us for no opinion, nor do we mean to express any, on the point adjudged in the case referred to. We are bound to regard every adjudication of this Court as clear evidence of the law of the land until the contrary is conclusively shown. If, indeed, the revision of that determination were necessary, we should not hesitate to enter upon it, but we should do so with all the respect which is due to the high talents of those who made it, and all that solicitude for stability and certainty in judicial decisions which a deep sense of duty ought to inspire. But that judgment and the positions on which it is believed to be founded do not bear upon the question in this case. Here there was a provision by will for the plaintiff, and something, therefore, from which she could dissent, and which she might elect to take in preference to what the law would give. For ought we know, the provision was ample, and so far satisfactory that she was unwilling (343) to protest in open court against it as insufficient, or against the will as treating her with injustice. The will has not been produced, and we know nothing of it but from the plaintiff's statement in her bill. She alleges that it gave her personal property, but no land, and upon this allegation she claims dower, although she has not dissented.

On behalf of the plaintiff it is insisted that under the acts referred to the widow is recognized as having a perfect right to a certain part of the land as well as of the personal property of her husband; that these are regarded as entirely distinct funds; that whatever may be the value

of the legacies given her, and however far it may exceed that of a distributive share, she is nevertheless entitled to a full dower in the land; that she may save the unnecessary inquiry with respect to her share of the personal property when satisfied therewith, and dissent only in respect to the insufficiency of the land given her; and when personalty alone is bequeathed, her omission to dissent amounts to no more than an acknowledgment that she does not complain in that respect. This argument has been attentively considered, but it has not induced us to adopt the conclusion which it endeavors to establish. The widow is, indeed, regarded as having a right to a part of both species of property, and these are such distinct funds that she may, however, liberally provided for out of one of them, successfully assert a claim to be legally provided for out of the other. But who is the widow thus entitled, and how is she to advance this claim? The act of 1791 is entirely silent in these respects. It prescribes only the proceedings which are to take place after the judgment of the Court shall have been rendered in favor of the petitioner for dower, and after the jury is summoned in pursuance of that judgment, and by its express and unequivocal terms can apply to no case where a dissent has not been expressed. "When a widow has, by virtue of the power to her given in the said act, signified her dissent from her (344) husband's will, and the sheriff in consequence thereof, and by order of the court, has summoned a jury," etc., such words as these leave no room for construction. Recourse, therefore, must be had to the act of 1784 to answer these inquiries, and the language of this act is very explicit. It enumerates two classes of widows for whom it provides. The first comprehends the widows of those who have died intestate, in which class the plaintiff is not included; and the second, the widows of those who have left last wills and therein not made any express provision for their wives by giving and devising such part or parcel of their real or personal estate as shall be fully satisfactory. She claims to be included in this class, not because her husband has not made any provision for her in real or personal estate (he has provided for her in personal estate), but because that provision is not fully satisfactory, and she wants dower in his lands. How is this claim to be asserted? The act answers: "Such widow may signify her dissent thereto before the judges of the Superior Court, or in the court of the county where she resides, in open court within six months after the probate of the will, and then and in that case, shall she be entitled to dower in the following manner," etc. The expression of this dissent in the manner prescribed is thus made, by the plain words of the act, an indispensable prerequisite to the assertion of this her claim.

Where the language of a statute is free from ambiguity, there is much hazard of misconstruction by departing from it in search of the supposed policy of the Legislature. If, however, we are to suppose that the Legislature intended to establish a more general and precise rule of election, than that which therefore prevailed, when a demand of dower by a widow conflicted with the will of her husband, this supposition will conduct us to the same result as is indicated by the literal construction of the statute.

Every devise or bequest in a will imports a bounty, and therefore, in general, cannot be averred to be given in satisfaction for that to which the devisee or legatee is by law entitled. In consequence of this principle it was the law before our act of 1784 that a devise of lands to the wife could not be averred to be in satisfaction of dower (345) unless it was so expressed, or unless, according to the opinion of *Lord Camden* in *Villareal v. Galway,* 1 Bro., 292, note Ambler, 682, the claim of dower disappointed the will, and was inconsistent with it. Still less could a bequest of personalty where no notice was taken of dower (*Ayres v. Willis,* 1 Ves., 230) be considered as a gift in satisfaction thereof, and imposing on the widow the necessity of choosing between the gift and her legal dower. But it was clear that if the bequest was declared to be made in satisfaction of dower, or such intention could be deduced by manifest implication from the will, the widow was bound to elect, either to accept the testamentary provision, or, refusing it, to betake herself to her dower. It is needless to state the authorities for this position, but they may be found by recurring to 4 Kent Com. 56, 57. The Legislature substituted a new rule, more absolute and universal. They made every case of a testamentary disposition by a husband in favor of his wife a case of election—whether the provision in real or personal estate was made to her or to some other person for her use; whether the intent that she should take it in lieu of dower was expressed or not expressed; and whether it could be implied or could not be implied from the structure and language of the will. And to remove all dispute as to the fact of her election, they declared her to have elected to take under the will unless her refusal so to take was manifested within a prescribed time, by a solemn dissent in open court.

It is to be recollected that the act of 1784 contemplated an acceptance of the testamentary provision as "fully satisfactory," or an entire renunciation of it. All its enactments must be construed with reference to the then purposes of the Legislature. The widow could not under that act hold the personal property given to her, and get dower by law. Unless she dissented, the will regulated the extent of her claims upon the estate of her husband; and if she dissented the law prescribed what

(346) should be their extent, viz., one-third part for life of his lands, and a third or a smaller part, according to the number of children, of his personal property absolutely. The dissent entitled her to this, but to no more. The power of the widow to procure indirectly, and in consequence of dissent, a greater part of the estate than she could have claimed in case of intestacy grew out of the new regulations made by the act of 1791. Perhaps the Legislature of 1791 did not foresee this result, or, if they did, they might have regarded it as a less evil than those which occupied their minds, and which they were anxious to cure. Be this as it may, these new regulations are, as we have seen, necessarily confined to the cases where a dissent has been entered, and it cannot be inferred that such a power does exist where there is no dissent, because it may be exercised when there is a dissent. It is very true that the regulations in the act of 1791 do offer strong temptations to widows to dissent in many cases where a sense of propriety ought to forbid them from doing so. It insures to them all that is given, however greatly it may exceed in one species of property their reasonable share, and presents them a chance of getting more in the other, even to the injury of the children of their husband. But there is a check, whether sufficiently strong or not is not for us to say, upon the wanton abuse of this power. The dissent must be expressed within six months after probate of the will, while the memory of the deceased is fresh in their minds, and must be declared not in a chamber, where the influence of public sentiment may be disregarded, but in open court of their county. An interpretation upon these statutes not called for by their words, nor required by their objects, will not be recommended to our judgment because it has a tendency to remove this check upon the abuse of a power to which there is (unavoidably, perhaps), a too strong temptation.

If we yet entertained doubts upon this question, there are interests of great magnitude and of general concern the security of which demands the decision which we shall make. The widow's right to dower (347) is paramount to the claims of her husband's creditors. It attaches to the lands after they have been aliened by the heirs. There is no statute of limitations prescribing the period within which it must be asserted. Justice, which it is the first object of every well-regulated society to establish, and the repose of the community, an object second only in importance to justice, require that it should be ascertained, as speedily as convenience will permit, whether the lands of the deceased man in the hands of his heirs and devisees are or are not subject to this encumbrance. The law has defined the time and prescribed the mode when and how this fact can be certainly known. The most obvious con-

siderations of public policy forbid, without the clearest warrant, judicial exposition which will have a tendency to defeat this great purpose of the law.

It is the opinion of the Court that the plaintiff has not a right to be endowed of the land in respect to which she has instituted this action, and that her bill must therefore be dismissed. But the Court will not give the defendant costs. The question on which the cause is decided was a new one and well worthy of being tried, and the conduct of the defendants in spoliating the deed has been highly reprehensible. The parties must pay their costs respectively.

PER CURIAM. Declare that Peter Craven, Jr., duly made his will, and thereby bequeathed to the plaintiff a part of his personal estate; that the said will was duly proved, and that it doth not appear that the plaintiff dissented therefrom within, etc., and that therefore the plaintiff hath not in law a right to demand dower of the lands of the said Peter, her husband, and dismiss the bill without costs.

Cited: Redmond v. Coffin, post, 437; *Sanderlin v. Thompson, post,* 539; *Ford v. Whedbee,* 21 N. C., 21; *Brown v. Brown,* 27 N. C., 137; *Green v. Collins,* 28 N. C., 145; *Hinton v. Hinton, id.,* 278; *Elmore v. Byrd,* 180 N. C., 127.

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ISAAC FRASER v. JOSEPH M. ALEXANDER ET AL.

1. Upon the construction of a will reciting an intention to dispose "of what worldly estate," etc., and directing "that all my property, consisting of lands, stock of every kind, household and kitchen furniture, wagons, farming tools," should be sold at public sale, and disposing of the sales; and in another clause directing the sale of slaves, but making no disposition of the proceeds: *It was held* that the words "all my property" were qualified by the words "consisting of" and restrained to the enumerated subjects, and that the sales of the slaves went to the next of kin.

2. Can a mistake in drafting a will, appearing either upon proofs or the answer of the next of kin, be corrected? *Quere.*

3. A direction to sell specific property, "and the money thence arising to be disposed of" in the payment of debts and legacies, makes the latter a charge upon the sales.

THE bill stated that the plaintiff, having been requested by Sarah Carson to draft her will, complied and drew it as follows:

"In the name of God, Amen, etc., and as to what worldly estate it has pleased God to bless me with, I dispose of in the following manner:

"Item, first: It is my will that all my property, consisting of lands, stock of every kind, household and kitchen furniture, wagon and farming tools, be sold at public sale, and the money thence arising to be disposed of as follows, viz.: all my just debts to be paid and funeral expenses, then to each of my heirs at law, viz., my mother, Ann, and sister, Nancy, I give and bequeath the sum of $50 each, provided they should call for it in the space of three years from this date, and all the balance it is my will that it go to the use of the Presbyterian churches in the following manner: After paying the expenses of settling my estate, the one-third to Hopewell Church, one-third to Sugar Creek Church, and the other third to the use of Pan Creek Church. It is my will that my executor sell my negroes at private sale, giving to each one of them a choice of masters, that can make a choice. It is my will that Isaac Fraser execute this my last will and testament, and I do hereby revoke any and all former wills by me heretofore made. Witness, etc."

The plaintiff averred that the negroes were expressly included in the first clause giving the property to the three churches, and were stricken out of it solely to enable the executors to sell them at private sale, and thus permit them to select their masters; that the plaintiff and the
(349) testatrix both thought there was a clear disposition of the proceeds of the sale of the slaves, similar in all respects to that of the other parts of the estate. The trustees of the three churches and the next of kin were made defendants, and the prayer was to have the mistake corrected, or to have a declaration made of the title of the churches to the proceeds of the sale of the slaves.

The next of kin denied any mistake in the draft of the will to be within their knowledge, and insisted upon their right to the sales of the slaves.

The cause was heard upon bill and answer before SEAWELL, J., at Mecklenburg, on the last Spring Term, who ruled:

1. That the bill and answer fell short of ascertaining satisfactorily the truth of the alleged mistake.

2. Upon the construction of the will, that "although it professed to dispose of what worldly estate the testatrix possessed, which words were equivalent to all her estate, yet that the proceeds of the sale of her negroes was not disposed of; that it might be said of the testatrix, *Voluit sed non dixit.* That the legatees, if they take at all, must do so by an express bequest or by a necessary implication of one, neither of which appeared. That the next of kin are those on whom the law casts the estate in default of a different disposition." His Honor then proceeded

to ascertain the several sums due the legatees and the next of kin, and decreed accordingly, from which the trustees of the churches appealed.

No counsel for legatees.
Devereux for next of kin.

RUFFIN, C. J. The cause being set down for hearing upon the bill and answers, and the mistake in drawing the will not being admitted in the answer of the next of kin, who alone could effectually admit it, the allegations of the bill upon that subject must be declared not to be established, and the case must be decided upon the construction of the will as written. The Court, however, would not be understood as intimating an opinion that it would have been otherwise if the mistake had appeared upon evidence, or even by the answer. It is intended, (350) as the questions of the admissibility of proofs and of their effect do not arise in the case, to leave them altogether unaffected by the decision.

In the court of equity it was declared that the proceeds of the slaves of the testatrix devolve upon her next of kin, as being undisposed of by the will. From that decree the trustees of the religious societies to which the charitable bequests are made appealed; and the only question made here is whether the decree in that respect is right. I fully concur in the opinion delivered by the judge. I should think with him if the whole depended on the first clause of the will alone. It is true, the testatrix set out by declaring that she intends to dispose of "what worldly estate it had pleased God to bless her with," and next says, "It is my will that all my property, etc., shall be sold at public sale, and the money arising therefrom disposed of as follows," which is sufficient, unless qualified by something else, to carry everything. But here, after those general words, "all my property," follow "consisting of lands, stock of every kind, household and kitchen furniture, wagon and farming tools," which, I think, do qualify the force of the preceding larger terms, and confine the bequest to the subjects particularly denominated. Doubtless there may be cases in which a subsequent enumeration would not be held to be restrictive of the general words. If I give "all my property and estate, my lands, my slaves, my money on hand and due on bonds," stock in funds or in banks or money due on account might pass. The superadded particulars would be rather cumulative than restrictive, and evince that those things were known by the testator to be of the estate, and were intended to be disposed of; but it would not show that those things alone were in his contemplation. The legacy would not be confined to the particulars enumerated, because not restricted to them in terms; but the enumera-

tion would rather be considered as defective in itself, and things *ejusdem generis* might pass under the broader terms. But when the term
(351) used does not convey the idea that the testator is endeavoring to let it be understood what kind of things he intends to give, but emphatically to express what things he is giving, the general expressions must be controlled by the particulars, and the bequest confined to the very things specified. Here, "all my property" is controlled by "consisting." It is not "all the property" absolutely, but all that "consisting of," or which consist of land, stock, etc. It is not a defective enumeration of the things intended to be given, but is a precise description of the specific things given, and of all of them. Suppose there had been money or bonds in this case. Nobody would have surmised that they were intended to pass as a part of "all my property," especially when it is recollected that besides the restriction on those words, created by "consisting of" certain particulars, amongst which are not money or debts, there is a provision in the clause that the property thereby given is to be sold at public sale, which is altogether inapplicable to money, whether due or in hand. If, then, one thing, not of the articles enumerated, would not, by reason of the restriction, pass by this bequest, how can any other thing not thus specified pass? The restrictive effect of "consisting," in context with "estate," or "property," principally produced the decision in *Clark v. Hyman,* 12 N. C., 382, and in the case cited therein by TAYLOR, C. J., of *Timewell v. Perkins,* 2 Atk., 102.

But whatever doubt might rest on that clause, standing by itself, it is removed by the subsequent one, which relates to the negroes specially. From that it is clear they were not intended to pass by the first, because they are directed to be disposed of by private sale—a manner different from that of the articles enumerated in the first. This difference being in the contemplation of the testatrix, she must be considered as purposely withholding them from the former provision for the sale of the latter. Although she afterwards makes no actual disposition of the proceeds, that does not bring those proceeds again within the operation of the clause from which they had been designedly excluded.

(352) Another question is made in this court, whether the debts and funeral expenses of the testatrix, and the legacies of $50 each to her mother and sister, are to be paid out of the surplus or out of the fund in which the churches have an interest. In our opinion, the latter is the proper construction. The general rule is that the residue, even when bequeathed, is the primary fund for such purposes, although there be a charge upon another part of the estate. This, however, is not a question upon the effect of a charge, but rather what is given to each legatee, and out of what fund payable.

The penning of this will is very particular. After turning the whole estate, except the negroes, into money, by directing a sale, come these words, "the money thence arising to be disposed of as follows, to wit, all my debts and funeral expenses paid; then to each $50, and all the balance, that it go" to the churches. This is a precise division and appropriation of the whole fund, and determines the interest of the churches to be what remains of it after paying out of this very fund the preferred demands. If this fund had failed, the legacies to the mother and sister would have failed also; for they are payable out of it. "The money thence arising" is to pay them. It is true, that could not bind the creditors; but the question is as to the intention, and that is what we are to consider in determining the legacies in charity. The balance is given; of what? Of the money arising from the sale, out of which had before been given a sum to pay debts and legacies. These are first given out of this particular fund, and the balance, as the balance after answering the other purposes, is given to the churches.

The charges of administration are to be paid out of the residue; but the debts, funeral expenses, and the two legacies of $50 each, must, according to the express words of the will, be paid out of the proceeds of the sale of the other parts of the estate, as mentioned in the first clause, and the decree reformed accordingly.

PER CURIAM. Decree affirmed.

Cited: Simms v. Garrot, 21 N. C., 396; *Alexander v. Alexander,* 41 N. C., 231; *Kilpatrick v. Rogers,* 42 N. C., 46; *Champion, ex parte,* 45 N. C., 250; *Bunting v. Harris,* 62 N. C., 11.

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JOHN H. DRAKE ET AL. v. HENRY BLOUNT ET AL.

1. A *cestui que trust* has a right to relief in equity when the trustee either refuses or neglects to assert his right at law.

2. As where a partnership debt was assigned to a deceased partner, and the residence of the survivor was unknown, so that a warrant of attorney to sue at law could not be obtained: *It was held* that the executor of the deceased partner could recover the debt in equity.

THIS bill was filed by J. H. Drake and J. J. Williams, executors of Nicholas J. Drake, deceased, against Henry Blount and J. Emerson, and set forth in substance that the defendant Emerson and the deceased N. J. Drake had been concerned together in the practice of medicine as

copartners under an agreement that Emerson should receive one-fourth of the profits and his copartner the other three-fourths; that the defendant Blount became indebted to the firm; that the firm was dissolved, and that on its dissolution Emerson received his share of the profits, left this State and removed to some place which the plaintiffs cannot find out. The bill further alleged that Nicholas Drake was dead, and the plaintiffs had been duly appointed and have qualified as his executors; that among the valuable papers of their testator they found the account of Drake & Emerson against Blount, and averred their belief that this account was just, and that in the final settlement between the copartners the same had been allotted to their testator as his exclusive property. The bill also set forth that two attempts had been made by the plaintiffs to recover the amount of this account by a suit at law in the name of Emerson, the surviving partner, but that they had been nonsuited for the want of a warrant of attorney from Emerson to sue in his behalf. The plaintiffs further charged that they had offered to indemnify Blount, upon paying the account, against the claims of Emerson, which offer had been rejected, and that finding all efforts to obtain payment by amicable means unavailing, and being unable to proceed at law in the name of Emerson, they prayed the aid of the court of equity to compel a discovery from Blount, and to decree the payment of what shall be found due, and for general relief.

To this bill the defendant Blount put in a general demurrer.

STRANGE, J., at NASH, on the Spring Circuit of 1833, overruled (354) the demurrer, and upon the prayer of the defendant allowed an appeal.

Badger for defendant.
B. F. Moore for plaintiff.

GASTON, J., after stating the substance of the bill as above: Upon the facts thus set forth, which for the present must be taken to be true, there can be little or no question but the plaintiffs are entitled to some relief. They own beneficially the money due from Blount to the firm of Drake & Emerson. Emerson, the surviving partner, hath alone the legal right to collect it, and is bound to pay over the money when collected (unless there be unsatisfied creditors of the firm) to the plaintiffs. As Emerson is a naked trustee, he has no inducement of interest to take upon himself the trouble of collection, and as his residence is unknown, the plaintiffs are unable either to compel him to collect or obtain from him an authority to sue in his name. Without some aid from a court of equity the plaintiffs must lose what in justice they ought to receive, and the defendant will be permitted to keep, what in conscience he ought

not to retain. But it is objected that these facts give the plaintiffs no right to general relief, but can at best furnish but a ground for the exercise of what is termed the auxiliary jurisdiction of a court of equity, by removing out of the way the specific obstacle which prevents the prosecution of a suit of law. We think this objection not well founded. The interest of the plaintiffs is one of equitable cognizance only; they cannot assert their right but in a court of equity, and they make out a case entitling them to come into such a court for the protection of their rights. If it be the duty of their trustee to collect the money, his misconduct furnishes a sufficient cause for the interference of a court of equity. If it is not his duty to make the collection personally, his absence from the State, and the inability of the plaintiffs to procure from him the necessary authority to act in his name, make out a case of acci- (355) dent, for the relief of which such a court is the appropriate forum. And it is the general rule of a court of equity, when it has jurisdiction of the subject-matter, to do full justice to all concerned in it. When a court of equity takes cognizance of a lost bond, it exercises that jurisdiction, not by undertaking to remove the obstacle in the way of the effectual assertion of the right of the obligee in a action at law, but by decreeing what is just between the parties, compelling the one to pay and the other to indemnify. In fact, it may well be questioned whether a court of equity will ever require that to be done in a court of law which is against its established rules of proceeding to dispense with the profert of a bond or the production of a warrant of attorney. If it could do so, it ought not, because this would be to deprive the party of a legal right without providing an adequate security against a probable or possible loss by such interference with it. Here all the parties interested are properly brought before the Court, and it has in its power much more effectually to secure and protect the rights of all than could possibly be done by a court of law under any assistance which the court of equity might render.

The Court is of opinion that the demurrer was properly overruled.

PER CURIAM. Affirmed.

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ALFRED D. KERR v. JAMES COWEN AND CHARLES D. CONNER.

Between creditors, whose equities are equal, he who has the legal title prevails. But where he who has the legal title had notice, at the time he advanced his money, of an equity in the other, he is postponed. As where a note was endorsed to A. by B. as a security, and A. made subsequent advances to B., some before and some after he had notice that the maker had an equitable set-off to the note, it stands as a security to A. only for advances made before notice.

THE facts in this case were that on 22 January, 1822, the plaintiff gave to the defendant Conner two promissory notes for $1,115 each, payable on January, 1825 and 1826. That in 1823 the defendant Cowen, in Georgia, became the surety of Conner for a debt due in that State, and that the latter, on 12 January, 1824, endorsed to him the notes above mentioned to indemnify him against his responsibility. On 9 August, 1825, Cowen was compelled to pay the debt for which he had thus become Conner's surety, amounting to $1,900.44. On 26 November following, he received from Conner $900, and on 4 May, 1827, he collected from the plaintiff $1,167.68, the net amount of the first note after deducting the costs of collection. On 12 August, 1823, the plaintiff became the surety of Connor in a replevy bond in this State, and afterwards was compelled to pay a large sum of money on that account, and also other sums as the surety of Conner, amounting to more than was due on the second note. From a letter of the defendant Cowen, dated in June, 1825, which was produced by the defendant Conner, it distinctly appeared that he then had notice of these payments of the plaintiff, and of the fact that he looked to the notes which he had given Conner for reimbursement. On 12 January, 1824, Conner sold to Cowen by deed of bargain and sale, with covenants of general warranty, a tract of land in Georgia. Upon this land the taxes for the preceding year were due, amounting to $9.18, which Cowen had been compelled to pay.

(357) He had also been compelled, 4 March, 1824, to satisfy an execution against Conner, which was a lien upon the land at the time he purchased, and which amounted to $185. On 27 August, 1825, Cowen took an assignment of a note of Conner's for $200, dated 15 August, 1824, payable to Jackson Fitzpatrick or bearer, and due 25 December, 1825. He also held Conner's note for $217, payable to himself, dated 22 October, 1825, and payable 1 January, ensuing. On these two notes Cowen had obtained judgment in Alabama, where Conner had removed, executions upon which were returned *nulla bona.*

An action having been brought by Cowen on the note of the plaintiff due 1 January, 1826, this bill was filed. The plaintiff insisted that the

defendant Cowen had no right to collect that note except in satisfaction of the debt for which it was pledged, to wit, that of $1,900.44, which he alleged was paid. He prayed for an injunction, and that the money he had paid, as the surety of Conner, might be so arranged as to discharge the judgment, and for general relief.

The defendant Conner admitted all the allegations of the bill. Cowen insisted that he had a right to collect both notes and apply the money received to all claims which he had against Conner.

Badger for plaintiff.
Devereux for defendant Cowen.

GASTON, J., after stating the facts: Neither Kerr nor Cowen has a lien upon the second note by virtue of any contract. Cowen, by the terms of his contract, was to collect the money upon both notes, indemnify himself for his liability as Conner's surety, and account to him for the surplus. As against Conner he has, however, the right, upon principles of natural equity, to retain so much of this surplus as will satisfy his other just demands. And Kerr has against Conner, on the same principles, the same right to be relieved from the payment of so much of the notes as will reimburse his just claims against Conner. As the legal property in this second note has been vested in Cowen by the assignment, so far as the equities of the contending parties are equal, his legal advantage cannot be taken from him. In the opinion of the Court, his equity with respect to the claims which accrued to him before June, 1825, is equal to that of the plaintiff, and he ought to be allowed to collect so much of the second note as will satisfy these. But such is not the case with regard to the other claims founded on the notes whereon he has sued Conner and obtained judgments. When these claims originated Cowen knew of Kerr's equitable demands, and knew that his reliance for satisfaction was upon the debt which he owed to Conner. With this knowledge, Cowen could not in good faith contract with Conner, or purchase a demand against him, to the prejudice of this known equity of the plaintiff. On such sums as Cowen has advanced for Conner, and which the Court allows him to collect, and of the judgment against the plaintiff, he is entitled to interest at 8 per cent, which is the rate established by the law of Georgia. It appears from a calculation made on these principles that the balance due Cowen is $243.41.

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The Court will decree that the injunction heretofore granted shall be dissolved as to the aforesaid balance of $243.41 and interest thereon at 8 per cent from 4 May, 1827, till paid, and the costs of the suit at law, and be made perpetual as to the residue of the said judgment; and that

the plaintiff and the defendant Cowen respectively pay their own costs in this suit. And will also decree that the plaintiff may, at his option, either dismiss his bill against the other defendant, Conner, without prejudice, or have an account taken against the said defendant of what may be due from him to the plaintiff by reason of the premises, this option to be declared on or before 1 July next.

PER CURIAM. Decree accordingly.

Cited: Bank v. McNair, 116 N. C., 554.

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JOHN SELLERS v. HARRY BRYAN ET AL.

1. Mutual debts only can be set off in equity as well as at law; and where A. as administrator, had a judgment against B., who had in C.'s name recovered one against A. in his own right, and, being insolvent, had assigned it to a creditor, A. cannot have the latter judgment applied in satisfaction of the former.
2. In equity, a debt due husband and wife cannot be set-off against one due by the husband alone.
3. It is not fraudulent for a debtor to prefer one *bona fide* creditor to another.

THE pleadings in this case were very intricate and the proofs exceedingly voluminous. They all resulted in the following facts: The plaintiff as the administrator of Josiah and Esther Blackman, at November Term, 1826, of Johnston County Court, obtained a decree against the defendant Bryan, who had been guardian of his intestates, for $6,097.98. Bryan was insolvent, and the plaintiff had not been able to realize from an execution sale of his property more than half of the decree. The wife of the plaintiff was the sister of Josiah and Esther Blackman, and was, under the statute of distributions, entitled to one-fourth of the residue of their estates. Before the plaintiff had obtained his decree against Bryan the latter had, in the name of one Fellow, obtained a judgment in the county court of Sampson against the plaintiff for $900. The beneficial interest in the suit being in the defendant Bryan, during its pendency he made an assignment of it to Thomson, also a defendant, to secure antecedent debts due by him to Thomson and to the other defendants.

The plaintiff sought to extinguish the judgment against him by applying its amount to the payment, *pro tanto,* of his unsatisfied decree against Bryan.

Badger and J. H. Bryan for plaintiff.
Devereux for defendant.

GASTON, J., after stating the material facts: In support of this prayer, it is urged that as Bryan, at the time of the assignment, was insolvent, and as the assignment was made not in consideration of value, but as a mere security for preëxisting debts, the assignees have succeeded to no other rights than those which belong to Bryan, and the judgment is yet subject to every equity which attached to the claim while it (359) was his property. Admitting this argument to be correct, it becomes necessary to inquire whether the plaintiff had a right to set off the decree against this claim while it remained the property of Bryan. The Court is of opinion that by the law of a court of equity the plaintiff was not entitled to the set-off against Bryan. It is true that before any statute was ever enacted for setting off mutual debts chancellors had adopted the rue of natural justice which obtained in the civil law, under the title of "compensation," and according to which, where the same person was both the creditor and the debtor of another person, the mutual obligations to the extent of their concurrence extinguished each other. But in the civil law "compensation" did not obtain except between debtors and creditors in their own right, and a debt in one right was not permitted to be set off against a debt in another right. See *Whitaker v. Bush,* Ambler, 407, citing Digest L. 16, sec. 3, L. 23, and L. 16 Tit. 2 L. 14. See, also, 1 Pothier on Obligations, 373. Nor since the adoption of the doctrine of "compensation," or set-off, have I been able to find any case of acknowledged authority in which, except under very peculiar circumstances, the rule of mutuality has been departed from. The general principle has been repeatedly and expressly asserted that in equity, as at law, there can be no set-off where either of the debts is in *auter droit. Medlicott v. Bowes,* 1 Ves., 207; *Chapman v. Derby,* 2 Ves., 117; *Ex parte Oxenden,* 1 Atks., 237; *Bishop v. Church,* 3 Atks., 691. *Harvey v. Wood,* 5 Mad., 409; *Gale v. Luttrell,* 1 Young & Jarvis, 180. There are cases, indeed, in which the rule is departed from in appearance, but it is upheld in its spirit. Where a connection can be traced between the demands; where there is an agreement that one should liquidate the other, either expressly proved or implied from mutual credits; where the set-off has been prevented by fraud, as in *Ex parte Stephens,* 11 Vesey, 24, explained in *Ex parte Blagden,* 19 Ves., 467, these are sometimes spoken of as instances of a more extended application of the doctrine of set-off in equity than is permitted at law; but if so, such ap- (360) plication prevails because the jurisdiction of a court of equity is not so trammeled with forms as that of a court of law. These are

not cases of exception to the principle of mutuality, but of assertions of the principle, so made as to operate upon the truth of the transaction. It has been said (and how this may be is not material to the present question) that exceptions do exist in the peculiar jurisdiction which the English chancellors administer under the bankrupt laws. *Lord Rosslyn* has so decided in *Ex parte Quinten,* 3 Ves., 248, but this decision was disapproved by *Lord Eldon* in *Ex parte Twogood,* 11 Ves., 517, and in *Ex parte Flint,* 1 Swans., 33. The general law of a court of equity certainly is that the debts or credits which are the subjects of set-off must be mutual, and due to and from the same persons in the same capacity. *Dale v. Cook,* 4 Johns., ch. 17 Rep. 11. The debts here sought to be set off were not due to and between the same persons. The plaintiff owed the defendant Bryan, but the defendant did not owe the plaintiff. His debt was to the estate of Josiah Blackman and the estate of Esther Blackman, of which estates Sellers is but the legal curator or administrator. On the death of the plaintiff the interest in the decree will not pass to his representatives, but he confided to the keeping of another curator. It could not be pretended that the defendant might insist that his personal demand against the plaintiff should be applied as a set-off to the decree which the plaintiff obtained in his capacity of administrator. And there must be something very peculiar in the case which would nevertheless authorize the plaintiff to require that such a decree should be set off against such a demand.

The only circumstance relied upon to take this case out of the operation of the rule requiring mutuality as essential to the set-off is the insolvency of Bryan. I am unable to discover any satisfactory reason why this circumstance ought to produce such a result. Insolvency (361) may deprive a debtor of the right to assign or dispose of his property so as to defeat any equitable liens upon it, but insolvency does not of itself create a lien which did not before exist.

It has also been insisted that as the plaintiff's wife is entitled to a distributive share of the estates of Josiah and Esther Blackman, the plaintiff, to the extent of this share in the decree, should be regarded in equity as the creditor of the defendant Bryan, and thus there is the necessary mutuality. This position cannot be maintained. In the first place, the plaintiff's wife is not entitled to a specific part of this decree, but to a share in the net amount of personal assets to be divided among the next of kin. This cannot be ascertained without an account between the administrator and next of kin, and that account cannot be taken in a suit to which the next of kin are not parties. Nor do I apprehend the court will restrain a creditor from the collection of his debt "until all these accounts are cleared, in order to see what rights of set-off

there may be in the result." *Ex parte Twogood,* 11 Ves., 518. In the next place, the plaintiff's wife is not a party to this suit, as she necessarily must be in every case where her rights are to be asserted; and, finally, were she a party, there would be a fatal want of mutuality. The debt which Bryan owes her cannot be set off against a debt which her husband owed Bryan. This point, if any authority were needed to establish it, was expressly adjudged in *Ex parte Blagden,* 19 Ves., 465.

If these views be correct, it would seem necessarily to follow that the plaintiff cannot have the relief which he prays for unless he can set aside the assignment to Thomson and others as fraudulent and void. If it be fraudulent, then the judgment which was rendered against the plaintiff is to be regarded as a judgment obtained by Bryan, and the plaintiff's case may be brought within the operation of another principle of equity, or rather of the same principle somewhat modified in its application, which allows judgments to extinguish each other when the money to be paid by one of the parties can be reclaimed by him from the party who is to receive it. The principle has been asserted to a greater extent than that which is more generally termed set-off. (362) It was allowed in *Mitchell v. Oldfield,* 4 Term, 123, and in *Simpson v. Hart,* 14 Johns., 62, where a judgment recovered by C. against A. and B. was set off by a judgment recovered by A. against C., because, notwithstanding C.'s judgment was joint, the whole liability of it might be pressed against A. only. This deviation from a rule of strict mutuality, which ordinarily forbids joint debts to be opposed to separate debts by way of set-off, instead of inducing either courts of equity or courts of law, in the exercise of their equitable jurisdiction over their suitors, to deviate yet further, and to disregard still more the analogies furnished by the legislative rules of set-off, has lately had the effect of rendering them more observant of such analogies. It becomes unnecessary to examine, however, whether, in the case supposed, this principle of natural equity can be invoked by the plaintiff. There is no pretense for treating the assignment as fraudulent unless it be bad faith for an insolvent debtor to prefer one set of creditors to another, where the law has not attached a specific lien on the property by the conveyance of which the preference is given. The assignees here were *bona fide* assignees, and by the assignment of Bryan took his claim, such as it then was, and do not require for their protection higher rights than those which followed on an honest transfer of the debt. When the judgment was rendered against which the plaintiff asks this relief it was in law the judgment of Fellows, and, in equity, the judgment of the assignees. The money to be collected upon it is not to be received by Bryan, but by his codefendants, and their property cannot be taken for the satisfaction of his debts. No case has

been produced which will warrant a creditor in demanding that a judgment obtained against him by the assignee of his debtor shall be deducted out of his judgment against such debtor. *Doe v. Darnton,* 3 East, 149, is an authority in point that the judgment of the legal assignees of an insolvent debtor cannot be thus appropriated, and we see no
(363) reason which calls for a different rule as to the judgments of assignees in fact.

It is the opinion of the Court that the plaintiff's bill must be dismissed, with costs.

PER CURIAM. Bill dismissed.

Cited: Cotton v. Evans, 21 N. C., 306; *Elliott v. Pool,* 59 N. C., 46; *March v. Thomas,* 63 N. C., 88; *Sloan v. McDowell,* 71 N. C., 386.

THOMAS CLANCY ET AL. V. THOMAS D. CRAINE.

1. A plea of the act of 1819 (Rev., ch. 1016), avoiding parol contracts for the sale of land, is bad where the plaintiff does not pray a specific performance, but treats the contract as a nullity, and seeks other relief.
2. A demurrer is bad which does not specify the parts of the bill to which it is intended to apply. More especially is it bad when it is expressed to be "to the residue of the bill not pleaded to," when in fact the plea applies to the whole bill.
3. A contract which involves an agreement for the sale of land is within the purview of the act of 1819, and may be avoided unless signed as the act directs.
4. And where the contract comprises something else, an avoidance of a part avoids the whole.
5. A vendee who avoids a parol contract for the sale of land cannot call upon his vender for compensation.

THIS was a bill filed in the court of equity for ORANGE, by Thomas Clancy, James Child, and John W. Norwood, the material allegations of which were that Thomas Clancy and James Child, being connected together as copartners in trade, under the firm and style of Thomas Clancy & Co., agreed with Thomas D. Craine, the defendant, who at that time was the owner of certain grist and sawmills and a distillery, with land and fixtures annexed, to become his partners in the business of milling and distilling. That in order to carry the agreement into effect, it was stipulated that Clancy and Child should own each one-third part

of the lands, mills, etc., for which they were to pay a certain price, and then the business was to be conducted at their joint expense and for their joint benefit. That the contract was reduced to writing, but never signed by either of the parties. That in pursuance of the agreement, large sums of money were paid to the defendant by Clancy and Child, as well for the interest which they had purchased as for the repairs, improvements, etc., and that large profits were realized from the business, which came to the hands of the defendant alone, who had the personal management of the affairs of the concern. That in 1830 the firm of Thomas Clancy & Co., failed, and an assignment of their effects was made (364) to the plaintiff Norwood for the benefit of their creditors, and that in consequence of their failure they became unable to fulfill their contract with the defendant. The bill then prayed that an account might be taken of the partnership dealings and transactions, and the defendant compelled to refund to the plaintiffs what they had paid out and advanced in the said business, and to pay over to them a just proportion of the profits.

To this bill the defendant pleaded the act of 1819 (Rev., ch. 1016), avoiding parol contracts for the sale of lands; and as to the residue of the bill, demurred for want of equity.

DANIEL, J., on the Fall Circuit of 1833, overruled the plea and demurrer, whereupon the defendant appealed.

Badger and W. A. Graham for plaintiffs.
Winston and Waddell for defendant.

GASTON, J. The argument of this case has brought before us the merits of the bill, and has been conducted as though a general demurrer thereto had been put in by the defendant. That the parties may not be wholly disappointed as to the objects of this appeal, we shall express our opinion upon matters involved in the discussion, although a decision of them is not necessary for the judgment which we shall render. We think that the bill in its present form does not make out a case which entitles the plaintiff to relief. The agreement which it states to have been in fact made, but to which it denies legal validity, because not signed by the parties, consists indeed of many parts, but is yet essentially one.

It is an agreement of copartnership, in which provision is made for the constitution of its capital stock by a stipulation that the defendant will bring into the stock his mills and mill tract, and that the plaintiffs shall pay him an agreed sum for this advance on his part. The contract involves an agreement for the sale of lands, comes within the pur-

(365) view of the act of 1819, and may be avoided, unless signed as the act directs. But an avoidance does not affect that part only of the contract which is confined to the sale of the land, but affects the entire contract. Neither of the parties, on discovering this part to be inconvenient, can require to have the residue of the agreement executed. Unless one of the parties objects, because of the statute, the contract stands entire. If either objects, it is avoided *in toto.*

The plaintiffs, according to the frame of this bill, have elected to avoid the parol agreement, and have, as we have seen, no right to ask for its execution in part. But they ask for compensation because of their advances made and losses incurred upon the confidence that such agreement would be faithfully executed. But if, by their own act, the execution of it has been prevented—if they have voluntarily abandoned the agreement—where is their injury, and what their title to redress? In conscience, they should have proceeded to fulfill the agreement on their part as though it had been signed, so long as the defendant admitted its efficacy. The law has put it into their power to deny it efficacy at their option; but it will not make the defendant pay them for taking this advantage.

Wherever a demand is preferred in any court for remuneration, because of the avoidance of a contract under the statute of frauds, the court will not be brought into activity except at the instance of him who offers to execute the agreement, or who has been willing and ready to execute it.

But in the exercise of our limited jurisdiction upon this appeal from an interlocutory order, we apprehend that we can only revise the decision below declaring the demurrer and plea bad. The demurrer is bad because it does not specify the particular parts of the bill demurred unto. *Milfod* Pl., 173; *Chetwynd v. Lindon,* 2 Ves., Ser., 450; *Robinson v. Thompson,* 2 Ves & Bea., 118; *Weatherhead v. Blackburn, ib.,* 121. The demurrer is to those parts of the bill which are not covered by the plea. This one furnishes a sufficient reason for overruling it, (366) but it is the more vicious in this case because the plea extends to all the accounts arising out of the sale and joint ownership stated in the bill, every account asked may be considered as arising thereout, and the court cannot distinctly see what part of the bill is left uncovered by the plea, and to which the defendant demurs. The plea is entirely inapplicable, for the claim of the plaintiffs (such as it is) is actually founded upon the invalidity of the unsigned agreement.

We shall, therefore, cause our opinion to be certified to the court below that it has not erred in overruling the demurrer and plea of the

defendant; and that said court shall proceed further with said cause as it may be hereafter moved by the parties and its discretion may direct.

PER CURIAM. Decree affirmed.

Cited: McCracken v. McCracken, 88 N. C., 286.

WILLIAM KENT, ADMINISTRATOR OF SARAH A. KENT v. WILLIAM WATSON EXECUTOR OF EPHRAIM MILLER.

A legacy to a grandchild "when she comes of age," and "if she dies before she arrives of lawful age or marries," then over, is contingent, and vests only upon her arrival at full age or marriage. But the payment is postponed until she comes of age, and interest accrues only from that time.

THE defendant's testator, by his will, bequeathed as follows:

"I give and bequeath to my two granddaughters, Sally Ann and Barsheba Miller, when they arrive at age, $1,000, to be paid them out of my estate, or whenever my executors can afford to pay it out of my estate. If either of my granddaughters, Barsheba or Sally Ann Miller, should die before they arrive at lawful age or marry, I wish the survivor to heir that one's part that should so die, and in case both should die before arriving at lawful age or marrying, I wish their legacies to return to my estate."

The case made by the bill and answer was that the plaintiff married Sarah, who died before she arrived at full age, leaving Barsheba surviving her, and the only questions were whether the legacy to the plaintiff's wife was lapsed because of her death within age, (367) and, if not, when did interest upon it begin to run.

Hogg for plaintiff.

No counsel appeared for defendant.

DANIEL, J., after stating the will and facts: If a legacy is given to a person when that person arrives at the age of 21, it is a contingent legacy; and if the legatee dies before that time, the legacy is lapsed. If the question now rested on the construction of the first clause in the will, relative to the two legacies to Sally Ann and Barsheba Miller, it would be very clear that the plaintiff could not recover, as it appears that Sally Ann died before she arrived at lawful age. The testator, however, may prevent the legacy from lapsing; but to do so he must not only declare

his intention to that effect, but he must likewise mention the person who is to take it. In the second clause in the will, concerning these two legacies, the testator expressly declares that if either of his granddaughters should die before she arrived to the age of 21, or married, her legacy should go to the survivor. He further declares that the legacies shall not come to her estate, or to his residuary legatees, until both his granddaughters shall have died under age and unmarried. The arrival to lawful age or marriage of either of the two granddaughters were the contingencies upon which the legacies vested. If either of the events occurred, the legacy was no longer contingent, but then became a vested legacy. After the marriage of Sally Ann, and her death before 21, the legacy could not, by the express declaration of the testator, go to the survivor, nor could it come to the testator's estate but upon the event of both contingencies failing. Where was it then to go? The answer is plain. It became vested in Sally Ann on her marriage, and on her death it went to the plaintiff, as her administrator. Although the legacy became vested on the marriage of Sally Ann Miller, yet we think it was not payable until the time she would have arrived at the age of 21
(368) years, if she had lived; and, therefore, no interest is allowed upon it until after that time.

PER CURIAM. Decree for plaintiff.

ROBERT P. JONES v. BENJAMIN BULLOCK AND MOSES JONES.

1. Courts of equity take jurisdiction in all matters of account, and where the administrator of a principal debtor agreed with the surety to confess assets to the action of the creditor, upon condition that the surety would pay the residue of the debt, deducting the assets really applicable to it, as an account of the administration is necessary to the relief of the administrator, his bill will be sustained.
2. An answer denying the bill must be disproved by two witnesses to entitle the plaintiff to a decree.
3. A defendant against whom no decree is prayed, and who has no disqualifying interest, may be examined by the plaintiff.

THE plaintiff averred in this bill that one Radford Gooch, on whose estate he has taken out letters of administration, was, in his lifetime, guardian to the children of one Wheeler and of one Matterson, and has given bonds for the faithful discharge of the office; that the defendant Bullock was the surety to those bonds given for the benefit of the Wheelers, and the defendant Jones to those for the benefit of the Mattersons; that

process on these bonds was sued out against him and the defendants, returnable to May Term, 1824, of Granville County Court; that the defendants, being fearful of a deficiency in the assets of Gooch, applied to him, and requested him to confess judgment to those actions, so as to bind the assets, and thereby give them a priority over other debts of equal dignity; that as he had been fixed with assets in several other actions brought before that time, and was moreover entirely ignorant of the amount of assets in his hands, he refused to accede to this request, whereupon, the defendant Bullock renewed the request, and, as an inducement for him to consent, promised him that they would indemnify him from loss by reason of the confession, and would pay any deficiency in the assets which might exist after deducting them from the sums with which he (the plaintiff) was already fixed. The plaintiff then averred that in fact he had, in May, 1824, charged himself by (369) confessions of assets nearly to the full amount in his hands, leaving only $166 unadministered and applicable to the debts due the Wheelers and Mattersons; that those debts amounted to $688; that the defendant Bullock, notwithstanding his agreement, had procured himself to be appointed guardian to the Wheelers, and had caused *sci. fas.* to issue upon the judgments confessed in their favor, with the intent to charge the plaintiff *de bonis propriis* with them. The bill prayed for an injunction against these actions, an account of the assets of Gooch in the plaintiff's hands, and for general relief.

The defendant Bullock denied all the allegations of the bill. The defendant Jones never answered, and as to him the bill was taken *pro confesso*. The agreement, as set forth in the bill, was directly proved by the gentlemen of the bar who conducted the suit against the plaintiff on the guardian bonds. There had been an order in the cause for examining the defendant Jones *de bene esse;* he also distinctly proved the case made in the bill. There was no proof that the defendant Bullock had procured the appointment of guardian to the Wheelers.

Devereux and W. H. Haywood for plaintiff.
Nash for defendant Bullock.

DANIEL, J., after stating the pleadings and proofs: First, as to the agreement, it is proved as set forth in the bill by the deposition of the counsel; but the law of this Court requires two witnesses to contradict the denial of the answer. The deposition of the defendant Jones has been taken, subject to all just exceptions. Can this deposition be legally read? The plaintiff seeks no decree against Moses Jones, and it appears that the said witness has no interest of his own to be affected by any

decree that may be rendered against Bullock. The plaintiff in this case may examine as a witness any one of the defendants against whom there is no decree sought, and who is not concerned in interest. 2 Mad., ch. 416, 417-18. This witness proves that Bullock agreed, in case the
(370) plaintiff would confess the judgments, that he would not hold him liable to pay more in discharge of the said confessed judgments than the assets in his hands. This witness supports the first, and both establish the agreement as set forth in the bill.

The second objection made by the defendant Bullock is that it is a case where relief might have been had at law. The answer to this objection is that although the plaintiff might have had an action at law, he could not have had as complete relief there as in this Court. It is necessary that an account should be taken to ascertain whether the plaintiff had assets to pay all the judgments confessed, or what portion of the same. In a court of law, and especially in an action where the administration of Gooch must be plaintiff, it will scarcely be practicable to take such an account with correctness, and this Court affords peculiar facilities and possesses proper jurisdiction in matters of account.

Thirdly, the defendant alleges that the plaintiff has, or might have had, assets to pay all the judgments, if he had used ordinary diligence in collecting the same. The master has, by the consent of both parties, taken an account of the assets belonging to the estate of Gooch that came to the hands of the plaintiff, and also an account of the judgments against the said administrator, and his other liabilities. The defendant has filed several exceptions to the report. On looking into the order of reference, it appears that the master was required to take an account of the amount of assets that came to the hands of the plaintiff, and also an account of the amount of judgments which had been rendered against the administrator, their sums and dates. The master has charged the plaintiff only with such assets as actually came to his hands; he does not appear to have charged him with any sums of money that may have been lost by the mismanagement or negligence of the plaintiff; nor does he report that there has been no loss on that account. The master has reported several judgments rendered against the plaintiff, after
(371) May court, 1824, the time when the plaintiff confessed the judgments as mentioned in the bill, and has given the plaintiff credit for the same. But it appears to us that the plaintiff was not entitled to be credited for any judgments rendered against him after the date when he confessed the judgments in court. The plaintiff might have barred all claims which were brought against him after May court, 1824, by pleading the judgments which he had confessed in court against these claims. If he, through ignorance or negligence, omitted to plead the

judgments which were had against him in court, to warrants or suits that were subsequently brought against him, it shall not operate to the injury of the defendant. The report, as it stands, cannot be easily rectified, and we think it best to set it aside altogether and order another reference to the master, who will take an account of the amount of assets that actually came to the hands of the plaintiff as the administrator of Gooch, or which might have been collected by him if he had used ordinary care and diligence. The master will also take an account, and report what judgments or liens against the estate of Gooch existed prior to May court, 1824. Such judgments and liens the plaintiff will be credited with in his administration account, and no other, for after that date he had the power of barring all claims by pleading the judgments he had confessed in court; and if he did not do it, it was his own fault, and Bullock shall not be prejudiced thereby.

The report, therefore, is directed to be set aside, and the case is again referred to Thomas B. Littlejohn to take an account of the estate of Gooch that came to the plaintiff, or might have been obtained by his using ordinary diligence. The commissioner will also ascertain what judgments or legal liens existed against the plaintiff as administrator of Gooch before the date when he confessed the judgments mentioned in the bill, viz., before May court, 1824, of Granville County, and allow the plaintiff credit for such judgments and liens, and his expenses and reasonable commissions. The commissioner is also directed to report whether any payments, and, if so, what payments, have been made on the judgments confessed, and by whom made, and what is due (372) thereon to the plaintiffs respectively in the said judgments.

PER CURIAM. Direct an account.

NANCY GUILFORD BRAY v. LUKE G. LAMB, ADMINISTRATOR OF WILLIAM GUILFORD ET AL.

1. A legacy, "to be paid out of my estate," is charged by these words upon the land which passed by the will, especially where the personalty is very small, and was all given to the wife for life, and she appointed executrix.

2. Dower assigned to a widow who dissents from her husband's will is neither subject to debts nor legacies.

WILLIAM GUILFORD made his will, executed so as to pass real estate, in 1829, which he began by saying, "I dispose of my wordly goods as follows," and then thus proceeded: "I lend to my wife, Elizabeth, the use of all my lands during her life, and if at her death she should leave

an heir or heirs, lawfully begotten of her body by me, the whole of my land to descend to said heir or heirs in equal quantities; but for want of such heir or heirs, all my lands, at my wife's death, to descend to Isaac G. Bray and William G. Bray, to them and their heirs."

"I give and bequeath unto Nancy Guilford Bray $500, to be raised and paid out of my estate."

"I leave unto my wife the use of all the negroes that will fall to her by her father's will during her natural life (which negroes are not yet divided), and at her death I wish them to go to my heirs lawfully begotten of her body, if there are such; and for want of such heir of mine, my will is that they go to Isaac G. Bray and William G. Bray in equal shares." The testator appointed his wife executrix.

William Guilford died immediately after making this will,
(373) which was proved in February, 1830, when his wife renounced the executorship, and also dissented from the provision made for her, and had since had dower assigned to her. She had no issue by the testator. Administration with the will annexed was granted to the defendant Lamb.

The present suit was brought by the legatee, Nancy G. Bray, against Lamb, the administrator, Elizabeth, the widow, and the remaindermen, Isaac G. Bray and William G. Bray, who were infants; and the bill alleged that the personal estate was said by the administrator to be exhausted in the payment of debts, and prayed an account of it, and also of the real estate of which the testator died seized, and that her legacy might be raised, in case the personal estate should prove deficient, out of the lands in the hands of the widow and the other devisees.

The parties severally answered. Elizabeth, the widow, stated her dissent and the assignment of dower, and claimed to hold the same exempt from the legacy to the plaintiff. The infant defendants answered by their guardian, and insisted that the legacy was payable out of the personal estate only.

In the Superior Court a reference was made to the master to take an account of the personal estate, and of the administration of the defendant Lamb, and also to inquire what lands the testator had at his death, and their value.

He reported in October, 1831, that the personalty amounted only to $363.81, of which all had been disbursed in the payment of debts, except the sum of $52.12, and that there were then unsatisfied judgments against the administrator to a larger amount. He also reported that the testator left lands in fee to the value of $5,777.20, whereof two tracts were sold in May, 1831, on a credit of six and twelve months, by the guardian of the infant defendants, to pay judgment debts against them

as devisees of the testators; but the debts were not enumerated nor the amount stated. That the remaining lands (of the value of $4,600) were subject to the dower of the defendant Elizabeth, and also to the dower of the widow of Isaac Guilford, a former owner, and were, with the exception of these parts, in the possession of the infant, de- (374) visees of their guardian.

This report was confirmed in 1832, and the cause then removed to this Court.

Kinney for plaintiff.
No counsel for defendants.

RUFFIN, C. J., after stating the case: The only question argued in this case is whether the legacy to the plaintiff is charged on the lands, and it has been intimated from the bar that it will probably be unnecessary for the Court to proceed further than to the decision of that, as the parties will be disposed to adjust the controversy as soon as their rights in this respect are declared. We understand that the reference was made by consent to speed the cause, and without prejudice; hence, as the devisees are infants, the Court has allowed the point to be treated as open, and have considered it.

The dissent of the widow remits her to her right of dower, which is held above the will, and is liable neither to debts nor legacies, and the bill must consequently be dismissed as against her.

Upon the general question the Court has no difficulty in declaring the legacy of $500 to be well charged on the real in aid of the personal estate. It seems to us to be expressly charged. It is "to be raised out of my estate," are the words of the testator, and include everything, and show an intention that this legacy should be raised at all events. The other provisions of the will strengthen this construction. It is true, there is no residuary clause, nor are there any words annexed to the devise of the lands expressing in that part of the will that the devise was subject to this legacy. But the testator sets out with the declaration that he means to dispose of all his worldly goods, and the personalty turns out to be very inconsiderable, and, except this legacy, everything given is to the wife for life, whom he appoints executrix, with re- mainder over to the same persons, in each disposition, and upon (375) the same contingency.

It must be taken, I think, as the executrix, whose duty it is to pay the legacy, is to have the whole profits of the estate during life, that the testator could not intend that this legacy should be allowed by her to fail in case the undisposed residue proved deficient, but that the executrix should make it good out of other parts of the estate. If this be true

as against the wife, it is equally or more apparently so in respect to the remaindermen. This legacy is absolute, unconditional, and immediate, and is the only disposition of that kind which gives the idea that when it is directed to be raised out of the estate, the legatee is to be preferred before those to whom a remote and contingent interest is limited, but so limited that when it vests it carries the whole estate to the disappointment of this legatee, unless the estate vests *cum onere*. These circumstances make the intention clear, though there is no necessity of resorting to them, except as they evince that the obvious sense of the words in which the legacy is given is the true sense in which the testator used them. We consider the charge need not be implied, but it is expressed, and so the Court declares.

We do not go further at present, because the parties do not desire it. Indeed, before the Court could proceed to order the money to be raised by a sale or mortgage, a further inquiry would be requisite as to the profits or the proceeds of the former sales remaining in the guardian's hands, which may of themselves be adequate to the plaintiff's satisfaction. If the settling of the principle should not enable the parties to dispose of the controversy, either can bring any question forward upon a motion for further directions.

PER CURIAM. Decree accordingly.

Cited: Biddle v. Carraway, 59 N. C., 99, 106; *Devereux v. Devereux,* 78 N. C., 389; *Worth v. Worth,* 95 N. C., 242; *Hines v. Hines, ib.,* 484; *Hinson v. Hinson,* 176 N. C., 614.

Dist.: Lassiter v. Woods, 63 N. C., 364.

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(376)

JOHN Y. WILKINSON ET AL. v. ALLEN WILKINSON.

1. Where a father conveyed land to a son by a deed of bargain and sale, upon a bill by other children, seeking to have the land brought into hotchpot, parol evidence cannot be received to prove that it was in fact given as an advancement.
2. Parol evidence is not admissible either in equity or at law to vary the terms of a written contract.
3. But in equity, matter of fraud, accident or surprise, may be proved by parol to raise a trust *dehors* the deed, and affect the conscience of one claiming under it.

THE plaintiffs alleged that John Y. Wilkinson, the elder, the father of the plaintiffs and the defendant, died intestate, seized of land which had been sold under an order of the court of equity, for partition; that the proceeds of this sale had been equally divided between them and the defendant, and that this division was erroneous, as the defendant had

been fully advanced in the lifetime of their father; that the land advanced to the defendant had been conveyed to him by a deed of bargain and sale, but it was founded upon no valuable consideration moving from the defendant to his father, but was entirely gratuitous, and was intended by the intestate as an advancement to the defendant.

The bill prayed a discovery, and that the defendant might elect between the land charged to have been advanced to him, and an equal share of the proceeds of the land sold for partition, and, in case of his election to hold the former, that he might pay them what he had received of the latter. A copy of the deed was filed as an exhibit. It was a deed of bargain and sale in the usual form, was dated 2 August, 1819, and was proved and registered the day after. The consideration recited in it was $1,564½.

The defendant denied all the allegations of the bill most explicitly, and insisted that from July, 1813, to August, 1819, he acted as his father's overseer, and rendered him valuable service; that he also lent his father money, and that upon a settlement between them, his father fell largely in his debt, and in satisfaction of this debt agreed to make, and he agreed to receive, the conveyance mentioned in the bill. He stated that he could not produce and exhibit the vouchers upon which this settlement was made, as they had been delivered up, it being supposed to be final.

A replication was filed and many depositions taken. It is not necessary to state the proofs at length, as they are set forth in (377) the opinion of the Court.

Badger for plaintiffs.
Nash and Devereux for defendants.

GASTON, J., after stating the pleadings: A great number of witnesses have been examined on both sides, and their testimony laid before the Court. Upon this testimony a preliminary question arose, and was argued by the counsel, whether any parol evidence could be received to contradict the consideration expressed in the deed. As the parties did not demand an immediate decision upon this question, and wished at all events a final decree in the cause, the Court heard the testimony, reserving to the defendant the benefit of this objection.

The determination of this question does not depend on the doctrine of estoppels at law. It depends on the proper construction and application of a rule of evidence, founded on good sense and public policy, and recognized in all courts, as well those of equity as of law. Written instruments are to be regarded as the authentic and permanent memorials which the parties have deliberately appointed to testify to all and for-

ever, what they have done. Parol evidence is in its nature less satisfactory. It may be tainted with falsehood, perverted by ignorance, prejudice, favor or mistake, and is liable to mislead, because of the weakness of human memory. It is not to be questioned but that the general rule which declares parol evidence inadmissible to contradict or substantially to vary the terms of a written instrument obtains in a court of equity equally as in a court of law. *Brown v. Selwyn,* For., 240; *Irnham v. Child,* 1 Bro., 92; *Portmore v. Morris,* 2 Bro., 219. The consideration upon which a deed is made is an important part of the contract, and where it is distinctly declared parol evidence is not more admissible to contradict or substantially to vary that than any other term upon
(378) which the parties have thus expressed their agreement. *Peacock v. Monk,* 1 Ves., Sr., 128. Nor can we discover any reason which should exempt this case from the operation of the rule. It is true that the plaintiffs do not claim under this deed, nor directly against it, but they claim under him who made it, and in that capacity attempt to show that the deed which bound him, and which binds them as privies, is in fact different from what it purports to be, and does not bind as a sale, but binds only as a gift. By having it interpreted according to the meaning which they seek to impress upon it by parol evidence, their rights under the grantor will be extended beyond those which belong to them, if the deed be allowed exclusively to declare its own meaning.

But as the rule itself is based upon the supposition that the written instrument is the memorial which the parties have made to be the permanent repository and testimony of truth, when any instrument set up as such can be shown not entitled to be thus respected, of necessity it must not be permitted to stand in the way of the ascertainment of truth by such evidence as may be obtainable. Parol evidence is, therefore, admissible in cases of fraud, mistake, and surprise. The rule is not subverted, but confirmed, by these exceptions. The party does not undertake to vary the agreement expressed in the deed, and to show that it ought to be understood in a different sense from that which the deed declares, but to set up a matter of equity dehors the deed, by reason whereof it becomes unconscientious to insist upon the agreement as therein misstated. The plaintiffs here allege that the defendant caused this consideration of value to be untruly inserted in the deed, either without the knowledge of the grantor or by availing himself of the misconception of the grantor that it was a necessary form to give the instrument validity. The parol evidence is admissible to support this charge, for if it be made out, then the instrument must be considered as if it had truly been what the contracting parties intended it to be. But it is admissible for this purpose only.

The deed is exhibited. It is dated on 2 August, 1819, recites (379) a consideration actually paid of $1,564.50, and on the day of its date is proved in court and thereupon registered. The defendant's answer, responsive to the charges of fraud and mistake, is full, positive, and precise. Strong testimony is necessary in opposition to such a deed, and so supported, to establish the allegations of the plaintiffs. No direct proof whatever is offered to sustain them. The evidence consists principally of the recollections of witnesses of casual conversations, which they had held many years ago with one or the other of the parties, and from which they understood that the land in question was given or intended to be given to the defendant. None of these conversations are represented as having been upon the point itself—the actual contract—and nothing is more common than the misapprehensions of such general remarks, and the perversion of them to a meaning which they were not intended to express. Observations about the giving of a deed might be understood as implying a gift of the land. These witnesses also state circumstances rendering it doubtful, whether the defendant could have saved from the compensation allowed him by his father for his services (though none of them knew what was the stipulated compensation) a sum equal to that stated as the price of the land. Even this testimony, such as it is, is met by the evidence of witnesses to declarations made by some of the plaintiffs, that their brother had bought this land, and to admissions by another of the plaintiffs that he had paid a price, but one far short of that recited in the deed, and less than the value of the land. It is probable that this representation is true. In the arrangement between the parties the price might have been fixed at a sum exceeding the value of the land, and the services rated at a still more liberal estimate. But if value did indeed form a consideration for the conveyance, and the parties deliberately agreed to treat the transaction as a sale, an equality between the value of what was conveyed and what was received as its price is not essential to constitute it a sale. Were the plaintiffs fully at liberty to contradict the deed on these proofs, we should not hold ourselves justified in pronouncing that the land was (380) given, and not sold. But they are not at liberty to contradict it. They must show that by reason of some unfair practice, or through mistake, or by surprise, the deed was made to express an intention different from that which the bargainor believed that it did declare. This they have failed to do, and their bill must be dismissed, with costs.

PER CURIAM. Bill dismissed.

Cited: Harper v. Harper, 92 N. C., 303; *Gaylord v. Gaylord,* 150 N. C., 229; *Campbell v. Sigmon,* 170 N. C., 351.

Overruled: Barbee v. Barbee, 108 N. C., 583.

THOMAS B. LITTLEJOHN v. LEWIS WILLIAMS, EXECUTOR.

An equity case cannot be removed to the Supreme Court, under the act of 1818 (Rev., ch. 962) when it is only set for argument upon a plea. In such case it can come up no otherwise than by appeal.

THE bill was filed in ROWAN against Joseph Williams, the testator of the defendant, who died in 1817, when the suit abated. A bill of revivor was filed in 1829 against the present defendant, who pleaded in bar of it. This plea was set down for argument, and in this stage of the cause it was, by consent, removed to this Court.

Devereux for plaintiff.
Nash for defendant.

RUFFIN, C. J. The Court has not jurisdiction of a case in the situation of this. The act of 1818 provides for the removal of causes in equity to the Supreme Court in two cases—the one after a decision in the Superior Court, by appeal therefrom; the other, before a decision, but not until the cause should have been set down for hearing. These latter words and the context imply that no case is to be brought here until it shall have reached that stage in which it may be heard upon the bill, answer, and proofs, and finally disposed of in this Court, (381) without the necessity of sending it back to be proceeded on for any purpose in the Superior Court. Accordingly, many cases have been returned without any decree here, which came up while standing on a demurrer or plea, for upon overruling them the party is then put to answer, which cannot be done here. If the demurrer or plea be allowed in the Superior Court, and the bill thereupon dismissed, the complainant may then appeal, within the act of 1818, because the decree is final, and if reversed here, the case is sent back for further proceedings below. And under the act of 1831 there may now, by leave of the Superior Court, be an appeal from a decree overruling the demurrer or plea, which does not arrest further progress in the cause in the court below. But unless upon appeal of the one kind or the other, no case can be brought here until it shall have been set for hearing on the merits. This case must, therefore, be remanded.

PER CURIAM. Remanded.

Cited: S. c., 21 N. C., 343; *Ray v. Ray,* 41 N. C., 356.

ILAI W. NUNN AND SAMUEL H. STEWART v. HUGH MULHOLLAND AND WILLIAM MEBANE.

One who purchases at execution sale land which has been entered, but not paid for, must at his peril complete the title; and if the entry is forfeited, he has no equity to claim the land of the defendant in the execution upon a subsequent entry of it by the latter.

THE bill was filed in February, 1829, and charged that in 1826 the defendant Mulholland entered two tracts of vacant land in Orange County, the one containing 214, the other 60 acres; and that they were sold in May, 1828, under a judgment and execution against him, when the plaintiffs became the purchasers and took a sheriff's deed. That in July, 1829, Mulholland and the other defendant, Mebane, pretending that the former entries were lapsed, reëntered the same lands, and either have obtained grants or intend doing so, although they (382) had full knowledge of the complainant's purchase, and Mulholland had himself pointed out those lands to the sheriff as his, and as being subject to the execution. The bill then charged that the first entries had not lapsed, or, if so, that Mulholland had suffered them to lapse purposely to defeat his creditors; and the plaintiffs prayed a discovery whether grants had issued, and, if so, that the defendants might be decreed to convey to the complainants, or, if no grant had issued, that the defendants might be decreed to obtain them and then to convey.

Mulholland, by his answer, admitted the sale to the plaintiffs, and that he made the entry of 214 acres, and also in conjunction with one Parrish entered 120 acres, his half of which he supposed to be the other tract mentioned in the bill. He denied that the entries were made in 1826, but said the time was 11 December, 1825; he also denied that he requested the sheriff to levy on those lands, but admits that the sheriff showed him his tax list, and requested him to inform him which tracts were unencumbered by a deed of trust which Mulholland had made to other creditors, and upon that occasion he pointed out these two. He alleged that the entries lapsed in December, 1827, or January, 1828, while he was absent from the State; that he was not present at the sale, but, having understood that the plaintiffs had purchased, he soon afterwards informed them that the entries had lapsed before the sale. He admitted that afterwards, in July, 1828, he renewed the entry of 120 acres in the name of Parrish and himself, and at the request of the other defendant, Mebane, entered the 214 acres in his name, and for his exclusive benefit.

Mebane by his answer admitted the entry in his name in July, 1828, and denied any interest of Mulholland in it, and insisted upon his right to enter the land as then vacant.

Both defendants denied that grants had issued, but admitted their intention to obtain them.

Winston for plaintiffs.
Nash for defendants.

(382) RUFFIN, C. J., after stating the case: If the entries upon which the purchase money to the State is not alleged to have been paid be the subject of execution, the purchaser must yet go on to complete the title and do such acts as the laws require to prevent the land becoming vacant and again the subject of entry. There is no obligation upon the defendant in execution to pay further sums of money, or perfect the title. All his rights were transferred by the sale, and the prchaser takes the land as on entry, subject to the legislative provisions affecting such interests. It is his own fault if he forfeits it to the State, and a new enterer acquires all the rights of the State. The purchase money not having been paid, there is no equity against the State or another enterer. I should, therefore, see no equity in the bill against either of the defendants if the entries had not lapsed before the sale, but were suffered to do so before the filing of the bill; since the plaintiffs did not lose the right in the entry, the thing bought by them, by reason of a defect of title in Mulholland or by any act of his, but by their own *laches;* and when once gone from them, and vested again in the State, she could sell as well to Mulholland as to any other citizen, and her rights protect him. But the present case is still stronger against the plaintiffs, for the entries had lapsed at the time of the sale. The answers state them to have been made on 11 December, 1825, and there is no evidence upon the subject, except the deposition of the entry taker taken by the plaintiffs, which sustains the answers. By the act of 1808 (Rev., ch. 759) they lapsed on 15 December of the second year thereafter, viz., 1827, unless the purchase money was then paid, and all the subsequent acts allowing further time to perfect titles extend only to entries "upon which the purchase money has been paid in due time." The plaintiffs, then, bought nothing, and can have no relief. Whether the case is within the act of 1807 for the relief of purchasers at execution sales, who lose the estate by reason of the defendants having no title is not a question here, for the bill is not framed wtih a view to such relief, and moreover
(383) the remedy given by the act is at law, and is complete there.

I have considered the case as against Mulholland, as the stronger of the two of the plaintiffs. Against the other defendant, Mebane, there is no pretense on which, as the case is made out, a decree could rest. The bill must, therefore, be dismissed, with costs.

PER CURIAM. Bill dismissed.

Cited: Harris v. Ewing, 21 N. C., 371; *Grayson v. English,* 115 N. C., 362; *Barker v. Denton,* 150 N. C., 725.

ELIZABETH LASSITER v. JAMES DAWSON.

In this State the wife has no equity against her husband to have a provision made for her out of her *choses* accruing during the coverture, although he be insolvent, and no settlement has been made on her.

THE petitioner, while the widow of Josiah Byrd, filed her bill against the defendant, her brother, who was the executor of her father, claiming a part of his residuary estate. Pending that suit she married Craven Lassiter, her present husband, who became a party to it. A final decree was had in favor of the plaintiffs, and $484.50 was ordered to be paid into court, subject to a further order for settling it on the petitioner. The order to pay the money into court not being complied with, the wife by her next friend filed a petition, stating the above facts, and alleging that her present husband was insolvent, had made no settlement on her, and had abandoned her without leaving her any means of support; and, further, that for the purpose of defeating her of the right of having the above mentioned sum of $484.50 secured to her, under the directions of the court, had released it to the defendant. The prayer was that the money might be raised and settled to her sole and separate use. Upon this petition an order was made directing execution to issue, under which the money was made by the sheriff and paid into court. The defendant filed an affidavit in answer to the petition, in which he admitted the execution of the release, but contended that it was given in consideration of debts which Lassiter owed him, to the (384) amount of the above mentioned sum.

W. C. Stanly and Badger for petitioner.
J. H. Bryan and Mordecai, contra.

RUFFIN, C. J. We do not think it necessary to examine into the merits of the settlement between the husband and Dawson; for, how-

ever the validity of an assignment by the husband of the wife's legal or equitable chose in action might depend upon its consideration, when set up in opposition to her right by survivorship to the subject then outstanding, the husband may certainly at law release, without consideration, to the wife's debtor, and also in equity, unless she has a right in this Court to have her equitable choses set apart as a separate provision for her and her family. This case is brought to that point, on which the Court is more ready to place it, because the case of *Bryan v Bryan,* 16 N. C., 47, has been supposed in argument not to lay down the rule then adopted, as a general principle. We have considered that case, and although some exceptions are supposed by *Chief Justice Taylor, arguendo,* to be under certain circumstances admissible, yet no case can be supposed which could more emphatically call for the interposition of the court than the one then under consideration. The husband was insolvent, and had made no settlement on the wife, but had converted a larger part of the proceeds of her real estate, and she had been bred in affluence, and had brought into the family a large fortune. This was admitted by the counsel for the defendant to be an irresistible case, if the equity of the wife raised by the British courts was to be acknowledged in ours, and it seems to us that the admission was not inadvertent or beyond the truth. Yet the Court refused the relief, and that not upon the ground that the husband had released or disposed of the wife's interest by assignment, but that Sellers, who held the fund, was a creditor of the husband to a larger amount than her share. The judgment of the Court, therefore, went as far as it could do to establish the general principle; and we know that the other judges who then sat in the
(385) Court intended to adopt the rule then acted on, universally, as being appropriate to the habits of our people and the state of our society, and a necessary result from the indefeasible interest given by our law to the wife in the personal estate of the husband.

The same may be said of the case before us, that the merits of the wife are great, and the demerits of the husband glaring, and that the Court would protect her if we could in any case intercept the exercise of the marital rights of the husband. But the authority of the decision in *Bryan v. Bryan* is conclusive against it, and therefore the petition must be dismissed, and the sum raised on the execution and now in court refunded to the defendant.

PER CURIAM. Dismiss petition.

Cited: Allen v. Allen, 41 N. C., 295; *Arrington v. Yarborough,* 54 N. C., 81.

ADAM A. SPRINGS v. JOHN WILSON ET AL.

As a plaintiff may in this State dismiss his bill without prejudice, the order for the hearing will, upon his application, be set aside upon the terms of his paying all the costs, without being reimbursed them in any event.

THE plaintiff, by petition, applied to have the cause remanded to Mecklenburg, for the purpose of enabling him to have the order for the hearing set aside, so that he might take further testimony.

The facts were that the bill was filed in 1820, and alleged that in 1807 the plaintiff purchased the shares of Joseph and Jeremiah Wilson, who were defendants, in the land which descended to them and their other brothers from their father, and took deeds from them. That the defendant John, one of the brothers, after notice of the plaintiff's purchase, bought the whole land thus descended, under a fraudulent execution against the heirs of his father. That all the defendants refused to acknowledge the deeds to the plaintiff, which were then unregistered. The deeds were filed in the office for the inspection of the defendants, and to a special interrogatory as to their execution, the defendant, (386) John had answered that he knew nothing about them. His answer was filed in May, 1821. In November, 1823, the cause was set for hearing, and in November, 1828, was removed to this Court by consent. The petition was filed at this term, and it stated that the point to which further proof was wanted was the execution of the deeds to the plaintiff, which had been registered by an order of the county court, made in 1824, upon a probate taken in another state in 1807, which order and probate the plaintiff feared would not authorize the reading of them at the hearing.

Devereux for plaintiff.
Badger for defendant.

RUFFIN, C. J., after stating the facts: In considering this application, the Court assumes that the deeds cannot be read in their present state, and we confine ourselves altogether to the inquiry, whether the party ought now to have an opportunity of supplying the defects in the probate, and, if so, upon what terms.

The rule of practice in the English chancery clearly forbids the opening of the order under such circumstances. But without condemning that rule, we are obliged to see that it would work great injustice to apply it in our courts as organized. Nor, perhaps, can we lay down any precise rule of practice for ourselves, considering the difficulty that parties are under in taking their proofs and preparing a case for trial. In the present case, however, the materiality of the proof has been so dis-

tinctly known to the parties, and the fact to which it relates so fully put in issue by the pleadings, that the subsequent and great delay is without excuse, and deprives the plaintiff of all right to ask for further delay but upon the hardest terms. Our only difficulty is whether we can grant it upon any terms. But as it is taken that in such a case the plaintiff might, according to our course, dismiss his bill without preju-
(387) dice, whereby he would render himself liable to the costs, the Court will grant the prayer of the petition, upon the payment by the plaintiff of the costs of that and of all the costs of the cause, of which no part will be reimbursed to him on the hearing, whatever may be its result. This indulgence is granted, because in effect it is dismissing the bill without prejudice, with this advantage to all parties, that a final decision upon the merits will be had much sooner than if the plaintiff were put to a new bill. The plaintiff may, therefore, take this order, or have the cause now heard, at his election.

PER CURIAM. Order accordingly.

Cited: Carleton v. Byers, 71 N. C., 333.

GOODWIN JONES, ADMINISTRATOR OF JOHN SHERRAN v. DRURY JONES ET UX. ET AL.

1. The obvious meaning of words used by a testator may be controlled by a natural implication arising from the circumstances under which the will was made, or the absurdities resulting from a strict construction. As where a testator deposed of all of his estate, giving the larger portion to his wife, and a smaller portion to a daughter, then his only child, and upon the birth of a son by a codicil declared, "I revoke and make void the said legacy to my wife," and then gave one moiety of it to his son, and made no disposition of the other: *It was held* that his intention was to revoke the legacy to his wife only for one-half, so as to make her a joint tenant with the son.
2. An administrator with the will annexed becomes a trustee for any trusts declared in the will, as much as if he had been named executor.
3. A codicil by which the testator intended to revoke a former and make a new disposition of property is not effectual as a revocation unless it be effectual as to the new disposition of the same property.
4. Crops growing upon land at the death of the devisor go to the devisee.

JOHN SHERRAN, having a wife and one daughter, an only child, in September, 1831, made his will as follows: "First, I give and bequeath unto my beloved wife, Alsey Sherran, fourteen negroes, to wit, Jack,

Keziah, Jim Lewis, Alsey, Sally, George, Owen, Sally, Harriet, Gurney, Candis and Henderson; four beds and furniture, three chests and tables, with all the rest of my household and kitchen furniture, stock of horses, cattle, hogs and sheep. Further, I give unto my wife, Alsey Sherran, the tract of land whereon I live, containing 228 acres; also another tract adjoining, containing 466 acres, and lying on the (388) Cedar Prong of Little River, together with all my plantation farming utensils. Item. I give unto my executors and unto their survivors the tract of land called the river tract, containing 146 acres, also four negroes, to wit, Violet, Gill, Lesha, and Bob, one bed and furniture, three head of cattle, one loom, for the sole and separate use of my daughter, Polly Barham, without being under the control of her husband, or subject to pay his debts. If she should survive her husband, I give the property absolutely to her. If she should die during the life of her husband, my will is that the property be equally divided between all her living children, except Woody Barham.

"Lastly, my will and desire is that the honorable court of my county appoint some fit and proper person or persons to perform this my last will and testament, as I hereby revoke all former wills by me made."

Afterwards, upon the birth of a son, 15 September, 1832, he added the following codicil: "I, John Sherran, of Wake County, do made this codicil to be taken as part of my will and testament, as follows: that is to say, whereas I have by said will given to my wife, Alsey Sherran, fourteen negroes and two tracts of land, including the tracts whereon I live (i. e., my residence), now I do revoke and make void the said legacies to my wife, and I do hereby give and bequeath unto my son, Wesley, half of the said fourteen negroes and tracts of land which I have given my wife, Alsey, by my said will, including a negro girl left out of my former will, by the name of Liz, in the place of a negro man Jim, sold by me since the executing my former will; also half of the residue of my property named in said will and left to my wife. I further give, to be divided, two infant negroes, Marsy and Matsy, born since the executing of my will, between my son, Wesley, and my wife, Alsey.

The widow of the testator, after his death, married the de- (389) fendant Drury Jones. Administration with the will annexed was committed to the plaintiff. All persons interested under the will were made defendants, and the prayer of the bill was that the plaintiff might be instructed as to its proper construction; Barham and wife contending that there was an intestacy as to half of the legacy given the wife by the will. There was also a prayer for declarations whether the plaintiff by his appointment as administrator became trustee for the wife of Barham; and in what proportions the defendants were entitled to the crops made upon the land of which the testator died seized.

W. H. Haywood for Jones and wife.
Manly for other defendants.

GASTON, J. The principal question in this case is whether the testator has by the codicil to his will revoked altogether the devises and bequests which he had made to his wife, or has revoked those dispositions only as to the moiety of the property so given, and which moiety is, by the codicil, devised and bequeathed to his son, Wesley. After reciting the devises and bequests to his wife, the words of the codicil are, "Now I do revoke and make void the said legacies to my wife." These words, taken by themselves, leave no room for construction; they express an absolute and entire revocation of "the legacies" referred to, and they must be taken in their legal sense, unless by the context, considered in reference to the nature of the property and the state of the testator's family, they clearly appear to be otherwise intended. But the literal and technical force of words in a will may be counteracted by rational implication; this implication may be collected from other expressions in the will throwing light upon the intention; the state of the testator's family at the time of making the will may, when a rational doubt occurs as to its meaning, be also taken into consideration, and the absurdities, improbabilities, and inconsistencies which arise from a literal interpretation may either furnish or assist in furnishing a sufficient reason (390) to adopt another construction.

We think that in this case there are so many concurring and strong indications that the words above recited were used inaccurately as to authorize us to declare judicially what as individuals we cannot doubt, that the codicil was designed to revoke the gift of property to his wife so far, and so far only, as to make way for the disposition to his child of a part of that property. At the date of the will he had one daughter, and no other child. He makes what he considers an adequate provision for this daughter, and takes care to place this provision beyond the power of her husband, by securing it to her separate use during the coverture, and should she die before him, then to her children; and he gives the mass of his property to his wife absolutely and forever. In the course of a year thereafter a new claimant on his bounty comes into existence. He has a child for whom he had made no provision. Then is this codicil executed, and it is impossible not to see that the primary and sole direct object of the codicil is to provide adequately for this child, and that whatever else is done is incidental and subservient to this purpose. He cannot effect his object without diminishing the gifts to others, and that in favor of his wife furnishes the fund to which he would naturally resort. The mass of his property had been given to her; the being to be

provided for was her child as well as his; she had lost none of her hold on his affection because of this new link of their union; but it was fair that she should divide with her son the liberal bounty of her husband. Accordingly, he leaves the disposition made with respect to his married daughter wholly untouchd—neither increases nor diminishes its amount, nor changes the modifications for its safe enjoyment, but gives to the infant son half of the negroes and lands given to his wife by the will, and half also of all the residue of the property thereby given her, including the beds, chest and tables, cattle, hogs and sheep. The codicil is silent as to the disposition of the other moiety of this property, and if we are to understand him as revoking in toto the devises and bequests to his wife, he meant to die intestate as to this moiety. He must have known that in that event it would become distributable by law. (391) If the meaning of the codicil be ascertained, however inconsistent its provisions, they must have effect, but it is almost impossible to believe that a rational man intended this partial intestacy; that after giving a moiety in express terms to his son, he intended that this son should also take a half of the other moiety; that he intended that the husband of his daughter, whom he had excluded from the power of deriving benefit from all which he had expressly given to his daughter, should be able to possess himself of the other half of this moiety; that he intended such subdivisions to take place in negroes, tables, chests, beds, and all the et cetera of perishable articles; and that he meant, as a full and adequate provision for his widow, in lieu of dower and distributive share, when he well knew she could dissent from his will, an undivided moiety of two little negroes, the eldest not more than a year old! It may be questioned, however, whether the absurdities of this supposition would of themselves be sufficient to overrule the literal meaning of the words of revocation, inasmuch as of themselves they do not distinctly point out the true meaning of these words, nor the extent of such revocation. But the codicil itself demonstrates the testator's meaning as satisfactorily, I think, as though it had declared such meaning in appropriate terms. The testator takes notice that he had sold one of the negroes named Jim, left to his wife by the will, and that he has a negro named Liz, which he had left out of that will altogether. He therefore adds in this codicillary bequest to his son, after the gift of a half of the lands and negroes left by the will to his wife, these words, "including the negro girl Liz, in the place of the negro man Jim." The obvious inference to be drawn from these expressions is that the gift in that will was not entirely made void by the codicil, nor so regarded by the testator, but was recognized as still subsisting, and revoked so far, and so far only, as to give way to the dispositions made by the codicil. Here, too, we may remark that the

(392) testator, perceiving that he had omitted to dispose of the negro Liz by his will, undertakes to supply that omission by his codicil. It is conceivable that in performing this undertaking he should give half of this negro, intending to leave the omission unsupplied as to the other moiety? Consider the bequest to his wife revoked only so far as it conflicts with the disposition to his son, and the substitution, or, as he terms it, the "including" of Liz in the place of Jim renders the whole consistent and rational. But after all this follows another bequest which ought to remove any lingering scruple as to the testator's intention. Two children had been born of the negroes given by the will to his wife, since the date thereof, and of course would not pass by virtue of that bequest, as modified by the codicil, to his wife and the infant child along with the parent stock. To avoid this inconvenience, and to secure to her and her child this fruit of the principal donation, he adds: "I further give to be divided two infant negroes, born since the execution of my will, between my son, Wesley, and my wife, Alsey." The cases of *Edleston v. Speaks* and *Onions v. Tyrer,* Show, 89, 1 P. Wms., 343, have decided that where an express revocation is made of a previous testamentary disposition, and in the revoking instrument another disposition is made, and the court can discover that the object of the revocation is to make way for this second disposition, if this cannot take effect, there shall not be a revocation. The principle of these decisions bears us out, I think, in interpreting the express words of revocation here as extending no further in the intent of the testator than making way for the substituted disposition, in the same manner as though he had, after the revoking clause, inserted the words, "that is to say, as follows":

The crops growing upon the lands devised by the testator, according to the construction which the Court has given the will and codicil, passed with the lands to the devisees.

The defendants Drury Jones and wife, being tenants in common with the defendant Wesley Sherran, are accountable to this defendant
(393) for a moiety of the profits made by the use of the common property.

The plaintiff by accepting the appointment of administrator with the will annexed of the testator has become a trustee for the defendant Polly Barham to the same extent as if he had been nominated executor in the will, and had accepted of the appointment.

The Court has not been called on by the parties further than to declare its opinions upon these questions. This declaration will be made, and the parties may then proceed as they shall be advised.

PER CURIAM. Decree accordingly.

Cited: Creech v. Grainger, 106 N. C., 219; *Clark v. Peebles,* 120 N. C., 34.

JOHN C. GOODE v. JOHN D. HAWKINS ET AL.

1. Persons may be permitted to unite in an association by which one shall bid at a public sale for the benefit of all concerned, when the motive for such association is not dishonest, nor the object nor the effect of it to produce an improper result.
2. A wrong done by a person seeking equitable relief, to one not a party to the proceedings, furnishes no objection to such relief on the part of those against whom it is sought.
3. When an objection to equitable relief is based upon an allegation of fraud, it will not be sustained by proof of mere error.
4. No one can in equity be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition.

THE case, upon the bill, answer, and proofs, was that one William Hunt filed his bill against John D. Hawkins, Richard Boyd, Francis A. Thornton, and Henry Fitts, wherein he charged that a *fi. fa.* which had issued from the Superior Court of Granville, directed to the sheriff of Warren, against Alexander Boyd, had been levied on a certain tract of land as the land of the said Alexander; that previously to the teste of that execution the said Alexander had conveyed this land to the defendant Fitts in fee simple, upon certain trusts for the indemnity of the defendants Richard Boyd and Thornton; that doubts having arisen whether in law this conveyance had priority to the lien of the (394) execution, and it being a matter of importance not only to the creditors in the execution and to the said Alexander, but also to the defendant Richard Boyd, who was surety of the said Alexander for the debt on which the aforesaid judgment had been rendered, that all such doubts might be removed, in order that the sale might be for a full price, it was explicitly agreed and declared, on the part of the defendants Boyd, Thornton, and Fitts, that all claim under the said deed should be waived and relinquished; that upon the faith of this declaration Hunt became the purchaser of the land upon the execution sale, and paid the full price thereof; that subsequently the defendant Fitts, by the direction of the defendants Boyd and Thornton, had assigned and transferred his legal interest in the said land, under the aforesaid deed of trust, to the other defendant, Hawkins; that the said Hawkins, combining with the other defendants, was about to evict the plaintiff Hunt from the said land by virtue of the title derived under the deed of trust, notwithstanding it was perfectly known to all of them that the plaintiff had purchased at the execution sale in consequence of the explicit abandonment by the other defendants of any title under the said deed, and of their full consent that the land should be applied to the satisfaction of the judgment which was discharged by the purchase.

The plaintiff prayed for an injunction, a conveyance from the defendant Hawkins of all his estate under the said deed, and for general relief.

The material facts thus charged were admitted in the answers; but at the same time the defendants averred that the present plaintiff, John C. Goode, was the beneficial owner of the judgment against Alexander Boyd, and was jointly interested with Hunt in the purchase made at the execution sale; that the said Goode had, since the rendition of the said judgment, at sundry times oppressively and usuriously extorted from the said Alexander sums of money exceeding lawful interest, as a consideration for forbearance and indulgence thereon; and that the agreement of the defendants Richard Boyd, Thornton, and Fitts to permit the land
(395) to be sold under the execution, and to waive the title to it under the deed of trust, was obtained by gross and fraudulent misrepresentations of the said Goode, whereby they were made to believe that an original execution had issued, of a date anterior to that of the deed of trust, the lien whereof attached to this land, and that this lien had been preservedly unbroken by a series of alias executions, duly and regularly sued out thereafter.

Hunt's bill was afterwards permitted to be amended. In the amended bill he distinctly charged that the purchase made at the execution sale was made for and on account of himself and Goode jointly, on an agreement to divide the land equally between them. To this amended bill he made Goode a party defendant; and he modified his prayer for relief by asking for a conveyance from the defendant Hawkins of an undivided moiety only. The original defendants, except Hawkins, relied on the matters set forth in their former answers. Hawkins submitted to make Hunt a conveyance as to his moiety. Goode answered the amended bill, and admitted all the allegations of the plaintiff. Goode then also filed his bill in the nature of a cross-bill, in which he utterly denied all usurious and oppressive dealings towards Alexander Boyd on the judgments against him; insisted that the agreement for the waiver of title under the deed of trust as against the execution had been made upon a fair exposition of all the facts as to his judgment, and the execution thereon from time to time issued, and without any fraud, misrepresentation, or deceit on his part, and prayed that a conveyance might be made to him of the other undivided moiety of the land. To prevent delay, and save prolixity of pleadings, the parties all agreed that the answers of the defendants Boyd, Thornton, Fitts, and Hawkins to the bill of Hunt should be considered as their answers respectively to the bill of Goode, and Hunt's amended bill as his answer to Goode's cross-bill. All irregularities in the forms of proceedings were waived by general consent of all the parties. A decree had been before rendered for Hunt, so that the controversy was now between Goode and the other parties.

Devereux for plaintiff. (396)
Badger and W. H. Haywood contra.

GASTON, J., after stating the case: Three objections have been urged on the hearing against the plaintiff Goode. In the first place, it is objected that the agreement between him and Hunt, whereby they were to be equally interested in the purchase made by the latter, was one in fraud of public policy, as calculated to prevent competition at the sale and to deceive those present at the sale and ignorant of that agreement. Secondly, it is insisted that his oppressive and usurious exactions from Alexander Boyd for indulgence on the judgment for the satisfaction of which the land was sold, deprive him of all claim to the aid of a court of equity for making good his purchase at such sale. And, thirdly, it is contended that the waiver of title under the deed of trust was procured by fraud, and that he who was guilty of that fraud shall not be permitted to take the advantage of such waiver.

Not having been present at the argument of Hunt's bill, I do not know whether the objections now urged were then made, or if they were then made, what were the reasons which induced the court to overrule them. It is probable, however, from the submissions in Hawkins' answer to Hunt's amended bill, that there was no opposition to this decree. But it would seem that the objections, if valid against one of the plaintiff's, were valid against both. Whatever may be the forms of the transaction, Hunt and Goode purchased jointly by one and the same act, had one and the same title to relief; instead of being arrayed on different sides of the controversy, ought to have been joined as plaintiffs in the same bill, and are liable to have their claim repelled by one and the same defense. If the purchase were designed to stifle, or necessarily tended to stifle, fair competition; if one of the parties in the association cannot be admitted to join in insisting on the purchase; if the waiver of the outstanding title to the land were procured by the fraud of a partner in the transaction, the purchase could not stand, and ought not to be aided in a court of equity. No one can there be permitted to set (397) up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition. *Huguenin v. Basely,* 14 Ves., 238. Still less can one of two joint contractors ask to sever the contract, and let them have the benefit of half of the bargain, in order to escape the pollution with which the fraud of his companion has tainted the entire transaction.

As it is probable, however, that the objections now urged were not pressed on the hearing of Hunt's case, we have examined and considered of these objections as wholly unaffected by the adjudication then made. The first relies on the fact that Goode was concerned in the purchase

made by Hunt, and that this interest was not proclaimed at the time of the bidding. We are unaware of any judicial decision by which such a connection in a purchase at execution or other public sale is denounced as a fraud, nor do we find ourselves warranted by fair inference from any established principles in pronouncing so sweeping a denunciation. *Smith v. Greenlee,* 13 N. C., 126, referred to in this part of the argument, certainly contains no adjudication to that extent. So far from it, this Court reversed the judgment below, and ordered a new trial from an apprehension that the language of the judge's instruction might have induced the jury to think that all agreements to buy on joint concern at execution sales were unfair. Whether any question might be entertained of the correctness of the doctrine asserted in that case as applied to the trial of an ejectment in a court of law, we have none of its soundness as applicable to the controversy here, and for that purpose adopt altogether the principles which it sanctions. If an agreement for one to bid on behalf of himself and others be made to stifle, paralyze, or discourage competition, those concerned in such an association shall not be permitted to derive benefit from a sale the fairness of which has been thus violated. But persons may legitimately unite in an association by which one shall bid for the benefit of all concerned, when the motive for (398) such association is not dishonest, nor the object nor the effect of it to produce an improper result. The act does not necessarily imply a dishonest motive, an improper end, or an injurious consequence. If by reason of these the act should be repugnant to fair dealing, then he who objects to it because of such repugnancy must allege and prove the matters which render it liable to be thus impeached. It appears to us that this has not been done on the part of the defendants in the present case.

We deem it unnecessary to inquire whether the second objection has or has not been sustained by proof. If clearly established, we do not perceive how a wrong done by the plaintiff to Alexander Boyd can furnish a justification to the defendants in now setting up against the plaintiff a title to the land which at the time of the purchase they explicitly waived. Goode is asserting no equity, and asks no relief against Alexander Boyd. The latter is no party to the present proceedings. What is the true state of the moneyed transactions between Goode and Alexander Boyd, or between the former and the sureties of the latter, as such, is not here in contestation, cannot here be settled, and is in no way material to the decision of the equity which Goode sets up to have a legal title removed out of the way of his purchase at the execution sale. He claims relief against those who set up this legal title, and upon the ground of their agreement. They may rightfully insist on any opposing equity which they have against him, but they cannot insist that he shall

redress the wrongs of Alexander Boyd before he shall be heard to complain of the wrongs which they have inflicted or threaten to inflict on him.

The principal objection in the case remains to be considered. As far as we can ascertain the facts upon which this objection rests, they appear to be these: At May Term, 1822, of Granville County Court, the judgment of the executors of William Smith to the use of Goode was rendered against Alexander Boyd and Spotswood Burrell for about the sum of $9,000 on a bond in which the said Alexander was principal, and Burrell, the defendant Richard Boyd, and others were sureties. (399) The first execution on this judgment was a *fi. fa.* directed to the sheriff of Granville, tested of the first Monday of November, 1822. On this, $1,851 was paid by the defendants, and the execution stayed for the balance. Writs of *fi. fa.* directed to the sheriff of the same county were regularly made out, issued, and delivered to the said sheriff, and by him returned "Indulged," which were tested the first Mondays of February, August, and November, 1823, and of February, 1824. There was also a writ of the intermediate term, May, 1823, and tested of the first Monday of May, made out but not delivered to the said sheriff. An execution tested the first Monday of May, 1824, was then directed to the sheriff of Warren, and by him levied on certain slaves and this tract of land. After the rendition of this judgment, and after the teste of the second execution, viz., on 18 February, 1823, the deed of trust to Fitts for the security of Richard Boyd and Thornton was made. This deed was proved in April, 1823, and was afterwards registered, but the time of such registration does not appear. I presume, however, that it was registered shortly after its probate. A legal question arose, whether the land conveyed by this deed of trust was subject to be sold under the execution, and at the Warren County Court in May, 1824, Goode, Alexander Boyd, Richard Boyd, Thornton, the sheriff of Warren, and many others being present, the opinion of Robert H. Jones, Esq., a respectable lawyer of that county, was asked. Goode stated that his judgment was prior to the deed of trust; that his first execution was prior to it, and that this had been kept alive by executions regularly issued every term thereafter. This statement was not contradicted by any person, and was expressly confirmed by Alexander and Richard Boyd. Mr. Jones, thereupon, without any further inquiry, decided that the execution then in the sheriff's hands bound the land, notwithstanding the deed. Good, Richard Boyd, and Thornton then agreed, to which agreement Fitts assented, that all claim to the land under the deed would be waived as against the execution, upon Goode's consenting that the sale (400) should be made for Virginia notes at par and North Carolina notes at 6 per cent discount. Upon this agreement the sales were made.

These facts do not, in the opinion of the Court, establish the allegation of fraud and misrepresentation against the plaintiff, nor justify the defendants in now setting up title under the deed of trust to defeat his purchase at those sales. The charge of fraud rests on the falsehood of Goode's assertion that the lien of his first execution had been duly and regularly continued by those subsequently issued. This assertion, say the defendants, was false, for all the executions prior to the last having been directed to the sheriff of Granville, the execution directed to the sheriff of Warren did not relate to any of the former, so as to bind the property of Boyd in Warren County; and it was also false in this, that one of the Granville executions, that of May, 1823, was never delivered to the sheriff, but remained either in the clerk's office or in the hands of Goode. It is not pretended that the plaintiff's opinion upon any legal question was either desired or required, or relied upon by the parties. For the determination of questions of that character, Mr. Jones was appealed to. If there was any error in his decision, this error is attributable to the plaintiff so far only as he may have occasioned it by a misrepresentation or suppression of material facts. Mr. Jones did not require to be informed whether the executions preceding that then in the hands of the sheriff had been directed to the sheriff of Warren, or to the sheriff of Granville, nor whether these preceding executions had been actually placed in the hands of the sheriff to whom they were directed. It is no imputation on Mr. Jones's professional reputation that he did not make these inquiries, for unquestionably until long afterwards, till the decision of *Hardy v. Jasper,* 14 N. C., 158, many of the first men of the profession held that an alias *fi. fa.,* to whatever sheriff directed, bound all the property of the debtor against his alienations, from the test of the first *fi. fa.,* and it is not yet settled, nor are we prepared
(401) now to decide, that as against the defendant in the execution and his alienees the lien of the original *fi. fa.* is lost, because an alias properly directed was not put into the sheriff's hands. *Palmer v. Clark,* 13 N. C., 354, expressly confines the adjudication to disputes for priority between conflicting execution creditors. Had Mr. Jones deemed these inquiries material, he would have made them. Neither he nor any other witness testifies that the plaintiff stated any specific fact untruly. The defendants in their answers, charging the plaintiff with fraud and misrepresentation in the strongest terms, specify no fact which was falsely alleged by him. Richard Boyd avers that the plaintiff exhibited a statement from the clerk of Granville County Court showing what executions had been sued out, and there is no evidence to prove that such statement varied in effect from the transcript which has been exhibited to us. Alexander Boyd and Richard Boyd, says Mr. Jones, confirmed Goode's statement. Can there be a question that both these, and especially the former,

who had repeatedly obtained indulgence from the sheriff of Granville by arrangements with Goode, well knew that the former executions had been directed to that sheriff? Clanton, the sheriff of Warren, was one of the persons present, and privy to the inquiry, and he knew that the execution then in his hands was the first that had come to him. The executions had all issued from the court of the adjoining county; the clerk's office was within a day or a half day's ride; the facts were accessible to all interested in the subject, and we have no proof to induce us to believe that these parties were under the slightest mistake with respect to any of these facts. That they were in error with respect to the legal result of these facts is sufficiently shown. It is unnecessary, however, to inquire whether in any case an agreement may be set aside because founded in such error. The defense is rested on the ground of fraud, and will not be upheld by proof or error. But if it could, we deem it obvious that the agreement to waive the title under the deed of trust was not produced solely by the conviction that such title was bad as against (402) the execution. Richard Boyd was solicitous to make the arrangement, because Goode would otherwise insist on selling the negroes for specie, and being liable on Alexander Boyd's bond as one of his sureties, he was anxious that the negroes should bring full prices. It appears that Thornton was reluctant to enter into it, but he yielded, according to his onw statement, because of the double motive, that he relied on Goode's representation that the execution had a prior lien, and that as Richard Boyd had consented, he would not be obstinate. The very arrangement to waive the claim is evidence that its invalidity was not certain. The stipulation with the plaintiff in regard to the terms on which the property should be sold, if the title were waived, constituted a consideration for that waiver, assuredly of some and possibly of great weight. Richard Boyd probably, judging from the evidence, would gladly have acceded to the arrangement had Mr. Jones expressed no opinion upon the question of the title, and it has not been shown that Mr. Thornton suffered by yielding his objections to the arrangement, after learning that it was acceptable to Richard Boyd.

PER CURIAM. Decree in favor of the plaintiff, with costs against the defendants Boyd and Thornton, who must also pay the costs of the defendants Hawkins and Fitts.

Cited: Black v. Bayless, 86 N. C., 535; *Davis v. Keen,* 142 N. C., 504.

(403)

HENRY KORNEGAY AND STEPHEN BRYANT ET UX. v. SUSANNAH CARROWAY, BRYANT CARROWAY, ET AL.

1. If the specific relief prayed cannot be given, proper relief may be had under the general prayer; but this relief must be consistent with the frame of the bill; and where the plaintiff claimed slaves as absolute owner, and upon the proofs it appeared that he was entitled in remainder, after an interest for the life of the defendant, the plaintiff cannot abandon his prayer for relief as owner and obtain security as remainderman.

2. A deed to a *feme covert*, conveying slaves to her after the death of the donor, creates an interest which survives to her after the death of her husband, and she is a necessary party to a bill by him seeking relief upon her title.

THE allegations of the bill were that the plaintiff Kornegay conveyed five slaves to the defendant Susannah, his mother-in-law, upon an agreement that she should reconvey them to several members of his family. That the defendant Susannah conveyed one of them, named Lucy, to Mary, the daughter of the plaintiff Kornegay and the wife of the plaintiff Bryant. That she afterwards conveyed the remaining four to the wife of the plaintiff Kornegay; that the latter assented to these conveyances, and that the deeds were left with him for the purpose of being proved and recorded. That the defendant Susannah, before the deeds were registered, got possession of them, and through the persuasion of the other defendants, destroyed them. That the defendants then enticed the slaves from the possession of the plaintiff Kornegay, where they had always remained, and carried them away, and sold them to persons unknown to the plaintiff, and had appropriated the money for which they sold to their own use.

The bill prayed for a discovery, an account of the sums raised by the sale of the slaves, and for general relief.

The defendant Susannah admitted the conveyances as stated in the bill, but insisted that the deeds executed by her to the wife and daughter of Kornegay contained a reservation to himself of a life estate in the slaves. She admitted that she did, with the consent of the wife of Kornegay, obtain possession of the deeds, and that she destroyed them; that her reason for so doing was that Kornegay, under pretense of
(404) procuring her to execute a letter of attorney to him, had obtained a deed conveying all her estate to him, and had defrauded her out of the whole of it.

Upon replication taken to the answers, the proof was that the deeds executed by the defendant Susannah to the wife and daughter of Kornegay, were dated 10 October, 1824, and contained a reservation of the use of the slaves for the life of the donor.

KORNEGAY *v.* CARROWAY.

W. C. Stanly and Mordecai for plaintiffs.
Henry and Devereux for defendants.

DANIEL, J., after stating the pleadings and proofs: It appears that the case made by the bill is a very different one from that made by the proofs in the cause. If the case made by the bill had been supported by proofs, the plaintiffs would have been entitled to relief on the special prayer in the bill to have an account of the value of the slaves, after the defendants had spoliated the title deeds, and taken the slaves away and sold them to persons unknown. In that case there would have been no necessity to have made the wife of Henry Kornegay a party plaintiff to the bill, because an absolute deed for slaves or other personal property to a *feme covert,* and assented to by the husband, would have vested the title to him, when the slaves or other property should have been reduced into possession. 1 Thomas Coke, 132, 133. The bill states that the deeds were absolute, and that the husband had reduced the slaves into his possession. They would seem, then, to be his property, but the evidence in the case shows that the deeds were executed subsequent to the passage of the act of Assembly authorizing slaves to be limited by deed, as they might have been previous to the passage of the act, by way of executory devise in last wills and testaments; and the evidence further shows that Susannah Carroway reserved to herself a life estate in the said slaves, which reservation, with a limitation over to the wives of Stephen Bryant and Henry Kornegay after the death of the tenant for life, was good in law, both as to the life estate and also as to the limitation over.
By the case made, according to the proofs in the cause, neither (405) Henry Kornegay nor his wife had a right to the possession of the slaves until the death of Mrs. Carroway, the tenant for life. If, therefore, it becomes necessary for the parties to apply to a court of equity for relief concerning the said slaves, or any interest arising out of the sales of the same, previous to the death of the tenant for life, it would be essentially necessary that the wife should be a party to the bill, if she was alive; and if she was dead, it would be equally necessary that her administrator should be a party, because by the deed being executed to her, the limitation after the life estate enured to her, and not to the husband. The general rule of law is that choses in action which are given to the wife, either before or after her marriage, survive to her upon the death of her husband, provided he has not reduced them into possession. *Richards v. Richards,* 22 E. C. L., 119, 121. In *Garforth v. Bradley,* 2 Ves., 675, *Lord Hardwicke* says that when a chose in action comes to the wife, whether vesting before or after marriage, if the husband die in the lifetime of the wife, it will survive to the wife, with this distinction, that as to those that come during the coverture, the husband may for them

bring an action in his own name, and may disagree to the interest of the wife, and that a recovery in his own name is equal to reducing into possession. But in this case Susannah Carroway having a life estate in the slaves, by virtue of the deeds which limit the remainders to the plaintiff Henry's wife and child, it would have been impossible for him legally to have reduced the slaves into possession during the continuance of the life estate, if the slaves had not been sent away. If, therefore, during the life of Mrs. Carroway it should so happen that Henry, the husband, should die, the right to the slaves would survive to the wife. *Hynes v. Lewis,* 1 N. C., 131. So, on the other hand, if the wife should die during the life of Mrs. Carroway, and then she should die, the administrator of the wife, and not the husband, should bring the action to recover the slaves. *Whitbie v. Frazier,* 2 N. C., 275. The slaves having
(406) been turned into money by the conduct of the defendants, does not alter the rule as respects making the wife a party to a bill brought to secure the fund. In this case she is not a party, and we think the husband cannot proceed without her, if she is alive, and if she is dead, it is equally necessary that her administrator should be a party. If the want of a wife as a party was the only objection to this bill, the Court would order the case to stand over, and give leave to amend by making the necessary parties, but it appears that the case stated in the bill is quite different from the case made by the proofs, and the plaintiffs cannot proceed without additional parties, and a quite different case made in the bill, to correspond with the proofs in the cause. The present bill is framed upon a supposition that the deeds for the conveyance of the slaves had been unconditional and absolute, and that the plaintiffs were, in consequence of the destruction of their title papers and the asportation of the slaves, entitled to a decree for an immediate account of the value of the said slaves. Whereas the case made by the proofs in the cause could only entitle the plaintiff and their wives to entertain a bill for relief so far as to have a decree that the slaves and their increase be restored to the wives of Kornegay and Bryant on the death of Mrs. C., the tenant for life, or a decree for securing the fund in case the slaves could not be obtained on the determination of the life estate.

It is a rule in equity that if relief cannot be given under the prayer exactly as prayed, contained in the bill, the court will assist the particular prayer under the general prayer; but relief inconsistent with the specific relief prayed cannot be given under the general prayer, unless when a bill is filed by an infant, who may have a decree upon matter arising upon the state of his case, though he has not particularly insisted upon and prayed it by his bill. *Walpole v. Oxford,* 3 Ves., 416; *Grimes v. French,* 2 Atk., 141; 12 Ves., 48; 13 Ves., 114; *Stapleton v. Stapleton,* 1 Atk., 6; 2 Mad., ch. 171. In the case before the Court no relief

could be given under the general prayer but what would be in- (407) consistent with the particular prayer contained in the bill, viz., an immediate account; and, therefore, this Court could not help the plaintiff, under the general prayer, *if all proper* parties were before it.

We take no notice of an objection made at the hearing, that the bill was multifarious, because if this objection were well founded, it should have been made in the pleadings. The plaintiffs cannot get along without their bill being entirely remodeled, as well as the making the wife of H. Kornegay a party plaintiff.

We feel ourselves under the necessity of dismissing the bill, which is accordingly done, without prejudice to the rights of the parties, and without costs.

PER CURIAM. Bill dismissed.

Cited: Whitehurst v. Harker, 37 N. C., 293; *Johnston v. Cochrane,* 84 N. C., 448.

SAMUEL CLARKE v. JOHN CLARKE ET AL.

1. Where an executor raised money and bought the slaves of his testator at execution sale, and after repaying the purchase money, conveyed them according to the terms of the will, *it was held,* DANIEL, J., dissenting, that they are liable to the claims of other creditors.

2. *Per* RUFFIN, C. J., *arguendo:* The same objections apply to purchases made by an executor at execution sale of the assets as to those made at his own.

3. By DANIEL, J., *arguendo:* A levy vests the title to chattels in the sheriff. His sales are *prima facie* fair, and *Blount v. Davis,* 13 N. C., 19, validate purchases of assets made by the executor at his sales. According to *Blount v. Davis, supra,* executors may purchase the assets of their testator under a sheriff's sale.

THE bill was filed in 1828 and charged that Henry Selby gave his estate, by his will, to his widow, Sally, and his children, who were the defendants, and died in 1812; that his widow administered with the will annexed and conveyed all her share to the other defendants, and had since died; that there was now no administrator upon her estate or her late hsuband's; but that the defendants were in possession of the estate, both real and personal, to a considerable value, under the will; that the plaintiff became the surety for the testator in a bond on which he had been recently sued, and a recovery effected, which he had discharged, and for which he could not have remedy at law, because there is no administration as above mentioned, and because the widow died (408)

insolvent after having assented to the legacies to the children, and the latter gave no refunding bonds. The prayer was for an account of the estate and satisfaction of the debt.

On behalf of Margaret Selby, an infant defendant, and a ward of John Selby, an answer was put in by her guardian, in which she denied that she claimed or had ever received any estate under the will and in any manner from her father. It was alleged that Henry Selby died greatly indebted, and that under executions against him or his administratrix all his slaves were sold, and purchased at a full price and fair sale by William Ross, who afterwards sold part of them to reimburse himself the cost, and conveyed the residue to John Selby, as the guardian and trustee of the children and legatees of the testator, under which John Selby held them for some time, and then divided them among the children, and allotted some to her. It was insisted that the sale was a fair one, and that Ross purchased with his own money, and with a view of befriending the children, and therefore made the conveyance, and that the property was not further liable to the creditors of the testator.

This defendant, since her answer was filed, had intermarried with Thomas Hanrahan, who was made a party and took the deposition of John Selby in support of the answer formerly put in by him for Margaret, his ward.

The answers of the other children were at first drawn in conformity with the statement contained in the answer of Margaret, but were altered before being sworn to, and admitted that the negroes allotted to them in the division were received by them as legatees.

It appeared fully upon other depositions and exhibits that William Lavender was the agent of the widow to manage the estate, and finding it pressed with executions and believing that unless sacrificed it would pay all the debts and something be left for the children, did, in order to prevent a sacrifice, borrow $5,000 and place the same in the hands of Ross to purchase such of the negroes as should not go for the full
(409) value, under an agreement that Ross should hold the title as a security for the loan, and when that should be discharged by the hire and resale of a part of the slaves, and all the debts paid, that he should convey the slaves that might remain to the legatees. That Mr. Lavender reduced the debt to about $2,000, and then, by his request, Ross conveyed all the slaves to John Selby in trust to pay that balance and hold the residue for the children, between whom, after satisfying the debt by hire and sale, he divided twelve negroes in 1825, which he put in their possession respectively. When the conveyance was made to John Selby he had become the agent of the widow and received from Mr. Lavender all the accounts of the estate with full information of the return of the title, and also took from the widow an assignment of all her in-

terest for the benefit of the children. These circumstances were explicitly stated by Mr. Lavender, and as to the facts, were substantially admitted by Mr. Selby, who differed only in this, that he considered this conveyance to himself and the purchase by Mr. Ross as changing the character of the property so that it was no longer liable to the debts of the testator, but exclusively in trust for the children.

Devereux for plaintiff.
W. C. Stanly, Bryan and Winston for defendants.

RUFFIN, C. J., after stating the pleadings and proofs: The only question made in this cause arises on the answer of Mr. Hanrahan; for all the other defendants, with becoming fairness, decline any defense founded on the idea that they do not hold as legatees. They admit they do.

As far as I can understand the truth of the case, the resistance of the other defendant must be unavailing. It is not necessary to inquire even whether an executor or the agent of an executor (for they stand in the same relation to the estate and are alike affected by the rule of the policy) can purchase at a sale under execution, where it clearly appears that he purchased with his own means, for a fair price, and was purchasing for himself. Upon that proposition I have, at least, a (410) strong inclination to the negative; for the same reasons apply to a sale by execution as to one by the executor. The ground is not in either case that he cannot get a title under the sale, as he had it before. That has been sometimes said, but it is rather a quaint illustration than a satisfactory argument. The true reason is the relation of the executor to the property. He knows its qualities, the situation of the estate, and the approaching necessity for a sale, and may be tempted to make advantages by allowing an execution sale. But even at such a sale it is the duty of an executor to aid in getting the best price as if the property were his own; and it is obvious that much may depend upon full representations of the value of the several articles and upon fair efforts to gain bids. But as a purchaser, his interest is the other way and directly in conflict with his duty and with the interest of the estate. Upon principle it seems to me, therefore, that such a sale cannot stand in this Court, except at the election of all interested. But in this case the purchaser disavows in express terms all interested motives on his part, and declares that he bought to prevent a sacrifice of the estate, and took a conveyance to Mr. Ross as a trustee only as a security for the advance. He states that there was no intention to defeat creditors; but the object was to pay all the debts and then convey the residue to the children. It does not appear that there are any debts but that to the plaintiff and, that seems not

to have been known then or when the deed was afterwards made to John Selby. According to that statement, a purpose of the purchase was the benefit of creditors, and the plaintiff could then claim under an express trust for himself. But if that were not so, and the intention was to promote the advantage of the children alone it would seem to me to enure to the benefit of the creditors. The children advanced nothing. The executor or the agent, which is the same thing, bought avowedly, it may be taken, for the children or a part of them, and afterwards held the
(411) estate as a trust. It would be dangerous to say that he who is charged with protecting in equal degree the interest of all claiming the estate beneficially or having claims upon it should have the power of excluding some of the *cestuis que trustent* and conferring the benefit on a favored portion.

In this case, however, the estate paid for itself. The purchaser never was anything out of pocket, and claimed the negroes only as security, with a trust as to the surplus for those to whom the estate would go according to the will. The true construction of such a trust, unless the intent clearly and unequivocally appear, must be that it is not only for those to whom the will gives the property, but also as the will gives it, that is, subject to the claims of all persons against the legatees, as legatees. There was no intention in the administratrix or Mr. Lavender to defeat the claims of either creditors or the legatees, but, on the contrary, as he expresses it, to save the estate, which was no doubt mainly with a view to the children; but in doing that, the creditors are necessarily served incidentally. I therefore think the plaintiff is entitled to relief, and that it must be referred to the master to state the sum due to him, and to take an account of the estate of the testator in the hands of the defendants respectively, considering the slaves in question to be a part of the estate, which they are declared to be.

GASTON, J., concurred.

DANIEL, *Dissentiente:* I do not agree in the opinion expressed by a majority of the members of the Court in this case, that an executor or administrator cannot purchase at a sale made by a sheriff, who has levied an execution on the goods and chattels of the testator or intestate. I know of no authority prohibiting them from purchasing at a sheriff's sale. I do not think the case comes within the reason of the rule which prohibits executors, administrators and trustees purchasing at their own sales. By the levy, the title to property is immediately vested in the sheriff; his sales are obliged to be public, after an advertisement. I do not see what chance there can be for the executor or administrator to commit frauds in case they are allowed to purchase. This Court

has decided that they may purchase at a sheriff's sale. *Blount v.* (412) *Davis,* 13 N. C., 19. In the present case Lavender, who procured the money, was not the executor. He had acted only as the agent of the executrix. I should suppose that the purchase of the slaves by Ross, for the benefit of Lavender, was lawful, and that the title of the slaves vested in him.

PER CURIAM. Direct a reference.

WILLIAM MORRIS v. ELIZABETH FORD ET AL.

1. A purchaser at execution sale succeeds to all the rights of the defendant, and where the latter, before the test of the execution, had received a deed for land, which by the fraud of a third person had before its registration been destroyed, and the legal estate conveyed by the bargainor to that person, the purchaser is entitled to a conveyance from him.
2. *Tolar v. Tolar,* 16 N. C., 456, and *Price v. Sykes,* 8 N. C., 87, approved.
3. An unregistered deed vests in the bargainee an inchoate legal estate, which was liable to seizure under an execution before the passage of the act subjecting equitable interests to execution sales.

THE plaintiff, William Morris, filed his bill against the defendants Reuben H. Ford, John Ford, William Ford, and Elizabeth Ford, and therein charged that he and one James Morris, in 1812, purchased from the defendant Reuben the undivided moiety of a certain tract of land therein described, with the reservation of one acre thereof for Elizabeth Ford; paid the purchase money, and took from the said Reuben a bond, with Robert Catlett surety thereto, conditioned to make a title so soon as a partition could be had between him (Reuben) and William Ford, who was seized of the other moiety thereof; that the condition of the bond having been broken, William and James Morris instituted an action thereon against both the obligors, and obtained a judgment for £87 0 8; that the plaintiff caused an execution to issue on said judgment, which was levied on the said Reuben's undivided moiety in said land; that the sheriff sold the moiety so levied on, at public sale; that (413) the plaintiff purchased the same at the price of $40, and that the sheriff duly executed to him a deed therefor. The bill further charged that the tract of land aforesaid had belonged to Zebulon Ford, who devised the same to John Ford; that of this will the said John and the defendant Elizabeth were the executors; that the said Reuben and William were entitled to legacies under that will; that a dispute having arisen between the legatees and executors because of the nonpayment of their legacies, and the wasting of the assets, the controversy had been left to arbitration; that the arbitrators awarded that the said tract should be

conveyed to the said Reuben and William in satisfaction of their demands, with the exception of one acre to be reserved for the defendant Elizabeth; that in pursuance of said award, and shortly thereafter, the defendant Elizabeth and John did convey the said tract, with the reservation aforesaid, to the defendants Reuben and William, and that the said Reuben and William were seized thereof as tenants in common. The bill then charged that the defendant Reuben had caused the deed aforesaid from Elizabeth and John to be proved, but before the same was registered, and by combination with the other three defendants, had caused the deed to be returned to the defendant Elizabeth, who destroyed the same, and that then the defendants Elizabeth and John, in order to defraud the plaintiff, executed a deed to the defendant William for the whole of said tract, who knew at the time of the plaintiff's title to a moiety thereof, and who had taken possession of the whole of the said land. The bill prayed a discovery from the defendants, that William might be compelled to make a conveyance to the plaintiff of his moiety and to account for his share of the rents and profits, and that a partition might be made of the lands.

The defendant Elizabeth alone answered. In her answer she admitted that Zebulon Ford devised the land to her son John; that John con-
(414) veyed the same to her, and that in pursuance of an award she conveyed the same to Reuben and William. She alleged that, according to the award, she was to have the dwelling-house and one acre of the land during her life; that there was to be no partition of the land between her sons Reuben and William, nor was either to sell his moiety during her life; that they were to work the land jointly, and during her life pay her annually 27 bushels of corn and 8 bushels of wheat; that Reuben failed to perform his part of this award, furnished her with neither corn nor wheat, left the place, sold his part to Robert Catlett, and gave a bond to make title; that in consequence of this breach of the award on the part of Reuben, she required him to return the deed; that this was done accordingly, and the deed, with the consent of Reuben and William, was destroyed. She disclaimed all knowledge of any contract between the plaintiff and Reuben, admitted that the plaintiff did purchase under an execution a moiety of this land as the property of Reuben, but averred that at the time of such purchase he had full knowledge of the terms upon which Reuben had held the lands, and also of the destruction of the deed. She further alleged that on 18 May, 1814, after the purchase by the plaintiff at sheriff's sale, certain articles of agreement were executed by the plaintiff, herself, and the defendant John, which she sets forth in *hœc verba,* and which are, that she agrees to sell off all her lands by 25 December then next ensuing, on the plaintiff's giving up his right to the claim of Reuben Ford; that if she made sale be-

fore that time the plaintiff would give up his right to the claim of the defendant Reuben; that if she did not sell before 10 December, she should choose men to value the land or a part thereof and the plaintiff would make payment agreeably to their valuation, and that she should move off the land before 20 December and not return to the same; and that either of the parties violating these articles should forfeit $500. She then averred that in execution of this agreement she sold the land to William Ford in fee simple, who now held the same, and that she moved off before the appointed day, but afterwards she moved back to it and resided there with William until he moved away and rented it (415) to his brother John.

The other defendants have not answered, and a judgment *pro confesso* has been taken against them. The plaintiff replied generally to the answer of the defendant Elizabeth, and the cause, as between them, now comes on to be heard on the pleadings and proofs.

The proofs filed were very voluminous, and those necessary to a correct view of the case will be found stated in the opinion.

Devereux for plaintiff.
No counsel for defendants.

GASTON, J., after stating the pleadings: The plaintiff exhibits what he insists was the award, and proves its execution by Philemon Morris, one of the subscribing witnesses. It bears date 11 November, 1811, and in relation to the matters connected with this controversy, it awards that Elizabeth Ford shall make a deed to Reuben and William Ford for the land on which she lives, and that Reuben and William shall deliver to her 27 bushels of corn and 8 bushels of wheat annually, and give her the house in which she lives and one acre of land adjoining, during her life. The defendant exhibits another instrument executed many months afterwards, by three of the four arbitrators, but dated the same day, which she alleges was made on purpose to supply an omission unintentionally left in the former instrument, and which she insists contains the true award. This differs from the other solely in this, that it contains a clause in these words, "owing to the smallness of the tract of land, we do allow that no division take place between Reuben and William Ford, but each to work and to clear wherever they think proper, and that none of them sell without the approbation of the other." It is unnecessary to examine which of these contains the definitive award, as it is proved by the testimony of Dulin, and this proof is confirmed by the testimony of others, that the contract of Reuben, by which he sold his moiety to William and James Morris, was made in the pres- (416) ence and with the approbation of William Ford.

The plaintiff does not exhibit the bond which he charges to have been executed by Reuben Ford and Robert Catlett, conditioned for the making title to the plaintiff and James Morris of the said Reuben's moiety in the land, although he gives parol proof of a sale and payment of the purchase money and of the execution of a bond for the title, but he exhibits a record, from which it appears that a judgment was obtained by the said plaintiff and James Morris against the said Reuben and Robert for £87 0.8 at May Term, 1813, of Mecklenburg Superior Court, and that a *fieri facias* issued thereon, and exhibits also a sheriff's deed purporting to have been executed in consequence of a sale made upon that *fieri facias* on 2 March, 1814, and purporting to convey to the plaintiff the undivided moiety aforesaid of the said Reuben. The plaintiff further exhibits the will of Zebulon Ford, devising the whole of this tract to his son John, and devising to his wife, Eliza, both the mansion house in which she lives and her maintenance off the plantation during her life. It does not appear from the proofs whether this house and plantation were on the tract devised to Reuben or not. The plaintiff proves by Philemon Morris that a few days after the award John Ford and the defendant Elizabeth did execute a deed for the tract of land pursuant to the award, which deed was witnessed by himself and James Morris; and also proves by Daniel Fox, John Wilson, and Sugar Dulin that there was such a deed. Isaac Alexander, the clerk of the court, testifies that this deed was proved in court, and before it was registered the defendant Elizabeth applied to him for it; that he declined to deliver it to her, but that afterwards, on the application of one of her sons, with the permission of the court, he delivered the deed to the son, who made the application, and William Wilson testified that Reuben got the deed
(417) from the clerk; that William obtained it from Reuben, stating to Reuben that he had held the deed long enough; that upon the delivery Reuben charged William to take care of it, and called upon Wilson to take notice of this delivery and of the charge accompanying it. The declaration of the defendant Elizabeth produces no testimony to show how she got possession of the deed, when and by whom it was delivered to her, for what cause, under what circumstances, or by whose concurrence it was destroyed, or in any manner to explain the fact of the destruction. The exhibits filed show that on 28 January, 1814, John Ford executed a deed to her for the whole of the land, and that on 27 November, 1815, she executed a deed for the whole of it to the defendant William.

In support of the allegation in the defendant's answer of the specific agreement therein set forth to have been made between herself, John Ford, and the complainant, she offers testimony tending to show that some agreement had been made and a bond executed by the parties to

testify and secure the performance of this agreement, but no bond is produced, nor its loss accounted for, nor the terms of the agreement shown. The witnesses who speak of the agreement also represent that one of its conditions was that she should remove from the land and not return to it, and they state that she moved for a few days only and then returned to the land. The defense, therefore, so far as it rests on this allegation, is wholly unsupported.

By the admission of the defendants, then, John, Reuben, and William, and on the proof against the defendant Elizabeth, it clearly appears that a deed was executed by two of the defendants, Elizabeth and John, to the other two defendants, Reuben and William, for the tract of land whereof the plaintiff claims a moiety, which deed was effectual to convey the legal estate therein in every respect except that it wanted the formula of registration; that the plaintiff purchased at execution sale Reuben's moiety of the said tract; that after this deed was proved, but before its registration, and with a view to defeat the claim of the plaintiff under this purchase or under the judgment, it was wrongfully (418) destroyed by the defendant Elizabeth, so that the same cannot now be obtained for registration; and that the evidence of Reuben's title to the moiety, conveyed by the sheriff to the complainant, being thus put out of the way, the other defendants, John, Elizabeth, and William, have contrived by a conveyance from John to Elizabeth, and then from Elizabeth to William, to vest the legal or apparently legal title of the whole land in William.

We are of opinion that the plaintiff is entitled to be relieved against the fraudulent contrivances. Had Reuben been the individual injured by them, he would have been redressed on a bill against the other defendants. In *Tolar v. Tolar,* 16 N. C., 456, it was decided that if a voluntary deed, fairly obtained, is destroyed by the donor before registration, a court of equity will compel him to convey the same property to the donee; and certainly the same remedy would be granted against one who claims the property subsequently to this destruction, and under a *mala fide* conveyance, from the donor. The estate which Reuben held under the deed thus destroyed was duly conveyed to the plaintiff, for it was to many purposes a legal interest, although the title was not legally completed. Such an interest, it was holden in *Prince v. Sykes,* 8 N. C., 87, was liable to seizure and sale under an execution before our act of 1812, which authorized the levying of executions upon equitable estates. The bargainee after the execution of the deed, and before the registration, has not a mere equity in the land; he has an equity and an incomplete legal title. When the registration takes effect, he is then perfect owner from the time of the execution of the deed. If he dies before registration, his wife is entitled to dower as of a legal estate. If a *precipe* be brought against the

bargainee, and a recovery upon it, before enrollment, it is good, for he was tenant of the freehold. If the deed from Elizabeth and John
(419) to Reuben had been registered after the purchase by the plaintiff, at the sheriff's sale, there could be no question but the plaintiff's title to the moiety would have been complete; and the defendants cannot be permitted to set up their criminal act in preventing this registration to the prejudice or destruction of this title.

The Court does not consider it necessary to inquire whether under the award directing a conveyance to William and Reuben there was a lien on the land for the payment to the defendant Elizabeth of the annual supplies of grain, which were awarded in her favor. Certainly no express charge was created. The conveyance actually made was without condition, and the plaintiff is entitled to be placed in the same plight as if the spoliation had not been committed. If the defendant Elizabeth could set up such a lien, she should have brought it forward, either by an original or a cross bill, instead of alleging it as a pretext for her unjustifiable conduct.

The Court will declare the plaintiff to be tenant in common with the defendant William in the tract of land set forth in the bill, and decree that partition be made thereof. It will also decree that the defendant William shall convey and release to the plaintiff all his interest and estate in the portion which shall be allotted to the plaintiff in the partition; but that the plaintiff shall not during the life of the said Elizabeth, disturb her, or the defendant William, in the enjoyment of the mansion house and one acre of land, to be laid off adjoining thereto; that an account be taken of the rents and profits received from the land since the purchase of the plaintiff, at the sheriff's sale, and by whom the same were received, to a moiety whereof the plaintiff is entitled, and that the plaintiff recover his coat from the defendants, to be taxed by the clerk of the court.

PER CURIAM. Decree accordingly.

Cited: Thomas v. Thomas, 32 N. C., 125; *Tyson v. Harrington,* 41 N. C., 332; *Phifer v. Barnhardt,* 88 N. C., 338; *Austin v. King,* 91 N. C., 289; *Edwards v. Dickinson,* 102 N. C., 523; *Respass v. Jones, ib.,* 12; *Ray v. Wilcoxon,* 107 N. C., 524; *Arrington v. Arrington,* 114 N. C., 171; *Dew v. Pyke,* 145 N. C., 305.

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JOHN SMITH ET AL. v. WILLIAM BARHAM ET AL.

1. A residue which is given for life, with a remainder over, must be sold by the executor, and the interest paid to the legatee for life, and the principal to him in remainder, because this is the only mode of giving both sets of legatees the enjoyment of those chattels which are perishable.

2. Slaves are, in this State, no exception to this rule, because they are not consumed in the use, and their natural decay is supplied by their issue, which goes to those in remainder.

3. Between the heir and the executor the growing crop goes to the latter; but between the executor and the devisee the rule is different.

4. A legatee for life is bound to keep down the interest of a debt charged upon his legacy, and he may be compelled to contribute to its payment. But he is not bound to surrender the whole profits for the purpose of extinguishing it.

5. The legatee for life of a specific chattel has a right to the possession of it, and the assent of the executor to his legacy vests the title of him in remainder.

6. When a specific chattel which is consumed in the use is given for life, what interest vests in the remainderman, *quere*.

THE plaintiffs were some of the legatees in remainder of the residue bequeathed in the will of John Barham, deceased, and filed their bill against the executors, and the other residuary legatees, for an account and satisfaction. By an original and amended bill it was charged that the testators died in September, 1825, and directed his debts to be paid out of such parts of his estate as he did not specifically dispose of thereby, and "the residue, with all the lands he should die possessed of, he lent to his wife, Mary, during her life," repeating that by the term "residue" he meant that whatever should remain after the payment of debts should go to the wife for life, and that after her death the residue therein lent to his wife (the land excepted) should be divided amongst his children and grandchildren, in seven equal parts, of whom the plaintiffs were some and the defendants the others. The defendants Nicholas and William were appointed the executors, and proved the will. The bills then further charged that the testator had about twenty slaves, which formed part of the residue, and also a large crop growing and provisions on hand, a valuable stock of horses and cattle, and hogs, farming utensils, and household furniture, all of which except the slaves, it was the duty of the executors to have sold to raise a fund to pay the debts; but that instead of doing so, they either sold or suffered to be sold under an execution several of the slaves, one of which, Dave, the defendant William purchased, and left the other articles of inferior value, and most of them perishable in their nature, in the possession of the widow, who has con-

(421) sumed them or they have been otherwise converted by her or by the executors. The bill also charged that the defendant William hired out some of the slaves or made profit otherwise from them during the life of the widow, which should have been applied in discharge of the debts, instead of suffering any of the negroes to be sold for that purpose, and, therefore, that he ought to account for the value of the slaves sold, for the hire received by him, and also deliver up Dave as a part of the residue. The bills also charged that the defendant John Barham owed the testator a large debt, which the executor failed to collect, although William purchased from John his share of the negroes, and the other residue, and paid him for them with profits of the estate then in his hands, and that the executors were chargeable with that debt.

The defendant Nicholas answered and admitted that he proved the will, but stated that he resided in Virginia and had never intermeddled with the estate or received any part of it.

The answer of the defendant William admitted the will as stated, and insisted that for the purpose of raising a fund to pay the debts, a discretion is given to the executors to sell any parts of the effects composing the residue, and do justice to all the parties. That accordingly he sold nearly all the stock, farming utensils, furniture and provisions, except only such things as were indispensably necessary for the support of the widow (a very aged woman and mother of these parties), and that a sufficiency for that purpose, including the grain crop growing at the testator's death, was left unsold, and that he did not sell the crop of cotton of that year. That the widow died in September, 1830, and that thereupon the negroes remaining unsold were divided among the remaindermen, and the plaintiffs received their shares, and that this defendant then sold all the other articles which had been left unconsumed by the widow, and applied the proceeds to the discharge of a balance of the testator's debts then unpaid. He admitted that some of the negroes were sold under execution, and averred that it was unavoidable, as suits were pending against the testator, and he was unable to raise cash to
(422) discharge the judgments; and that he purchased Dave, at a full price, and borrowed the money to pay for him, but he submitted to have the purchase declared void, at the election of the plaintiffs. He further admitted that he hired out some of the negroes, but said the widow was entitled to the hire, and that he was ready to account with her representative. With respect to the debt of John Barham, the answer stated that the defendant found among the papers of the testator some evidences that he had paid money for his son John, several years before his death, and that he, the defendant, being unable to get any information upon the subject, or whether his testator had been satisfied, sued out attachments against John (who resided out of the State) and

levied them on a slave, Abel, specifically bequeathed by the testator to him, and also on his share of the residue upon which judgments were had, and a sale made, and that he, the defendant William, became the purchaser. That one reason for attaching this interest was that other creditors of John would have done so, and if the debt to the testator was really due, as it appeared to be, it would then be lost; that he made the purchase for the benefit of the estate, and was willing that it should be so considered, if it was to stand at all, or to take it himself, as the plaintiffs might elect. But that he has recently discovered that the debts were probably not due, and that the whole proceeding was founded in a mistake, upon the apprehension of which, at the time of the purchase, it was understood that if it should so turn out, the purchase should enure to the benefit of his absent brother, John; that John has since declared that nothing was due, claimed the property, and instituted proceedings to reverse the judgments, and that the persons interested in the estate, except one of the plaintiffs, Smith, had agreed to surrender the claim. He submitted to hold this part of the estate for the benefit of either of the parties in whom the right might be deemed to be.

The answer of John Barham set forth the particulars of that part of the case relative to the claim against him more at large, and alleged that he did not owe his father anything, and that the proceedings were irregular and null, and claimed his share of the property. He also (423) claimed that all the hire and profits of the negroes and other property which had accrued during the life of the mother, and also the proceeds of the crop growing at the testator's death, belonged to the tenant for life, and was to be accounted for by the defendant William to her representative.

A reference was made to the master, and he reported against the executors a balance of $1,154.29, exclusive of interest. To produce this result the master charged the defendants with the hire of certain of the slaves during the life of the widow, and also with the sales of the cotton and corn crops growing at the death of the testator, and further with the value of the hogs, sheep and wheat, and one cask of brandy, not sold, but consumed by the widow. The master made no report upon the subject of John Barham's debt, and his claim to the property sold for it, and gave as a reason that there were proceedings at law between him and the executors to vacate the judgments and to ascertain the debt, if any. The master also charged the defendant William with the price of Dave, as upon a sale to him.

To the report both parties excepted, but the exceptions of the defendant raised the only questions of importance.

Devereux for the plaintiff.
Attorney-General and W. H. Haywood for executors.

RUFFIN, C. J., after stating the pleadings and report as above: The crops growing on the land at the time of the testator's death go to the executor as against the heir; but as between the executor and the devisee, the latter is entitled to them. The devisee takes the land by the intention of the testator, with everything on it, for as the devise carries the land against the heir, so it does the crop against the executor. The rule is so strong that if the devise be for life with remainder over, and (424) the first taker die before severance of the crop growing at the death of the testator, it goes over with the land to the remainderman, in preference to the personal representative of the first taker.

Here the testator died early in September, 1825. He then left in the granary a small quantity of corn and wheat—not more than sufficient to support the stock and negroes—until the executors could, at the next court, prove the will and get authority to sell. It is in evidence that it was not sufficient; for a considerable portion of the growing crop was used for that purpose. Now, although it may be the duty of the executor upon a will like this to sell all the perishable property and invest the proceeds for the security of the fund, for the remaindermen, paying the interest, as the profits, to the legatee for life, yet some time must be allowed to make it, and in the meanwhile the stock must be supported and kept fit for sale, and the slaves fed. The executor ought not to sell until probate, to obtain which he is obliged to wait for a court. It is the interest of all concerned, that the support should be drawn from the property itself until the sale is made in reasonable time. Here it was in December, 1825, about one month after the probate of the will. The exceptions of the defendant to so much of the report as charges the executors with 30 bushels of wheat on hand is, on this ground, allowed. And the exceptions to so much of the report as charges them with the corn and cotton growing at the testator's death is also allowed. In the account a particular quantity of corn, 80 barrels, is charged as a distinct item, at $360, and also of fodder, 10 stacks, at $25, which is seen at once. But the cotton does not explicitly appear upon the report. There is a charge for one bale as an item in the account, being, as the master states, a part of the crop not sold, and put down at the price of $30. But the principal part of this charge is in the general item of "amount of sales," $1,967.93, which upon a reference to the account of the sales obtained from the county court (which was the evidence on which the master acted) (425) is found to include 9,263 pounds of cotton, disposed of at the general sale by auction, at $305.68. It appears upon the proofs that this cotton, fodder and corn was on the land when the testator died, and

was gathered by the executor and widow. To the latter they belonged, and to her the executor is accountable, and not to the residuary legatees in remainder.

The same is true also as to the charges of the hire of the slaves, which belong to the widow. When there is a devise of lands, or a specific bequest of a chattel for life, with remainder over, and the subject is charged with debts not equal to the whole value, the tenant for life may be required to keep down the interest out of the profits, or the parties are required to raise the principal by contributions in proportion to the value of their respective interests. But certainly in no case can the remainderman require the whole profits to be applied in extinguishment of the charge, for the sake of saving the subject, for that would defeat the life estate altogether. But in a residuary bequest to one for life, and then over, the whole is subject to the immediate payment of debts, and the executor may and ought to sell enough for that purpose in the first instance; for it is only what remains, after payment of debts, that is given either for life or over. So much of the capital is to be sunk at once. Here it has been done by the sale of a part of the consumable articles and a part of the slaves; and the plaintiffs say that was wrong, and so the master finds, because there were sufficient profits of the unsold slaves to answer that end. That position cannot be maintained. These profits are the use given to the tenant for life. The exception to these charges in the account must, therefore, be allowed.

The master has also charged the executor with 28 shoats, 35 fat hogs, 6 sheep, 30 gallons of brandy, and some casks and hogsheads, of the value, together, of $261. He has also charged them with the value of some household furniture, not sold either at the sales after the death of the testator or after that of the widow, to the value of $15. The executors except to these charges upon the ground that these (426) articles were necessary to the support of the widow and the family and in order to keep up the plantation. The argument on the other side is that these articles should all have been sold, and if necessary for that purpose, the proceeds applied to the payment of the debts, or if not thus needed, invested and the interest only paid to the widow for life, and therefore that the executors are chargeable with their value.

We believe the common understanding of testators in the country is with the defendants; for they can hardly be supposed to give to their widows lands and negroes for life, and to intend to strip the plantation. But we believe likewise that the law is clearly with the plaintiffs on this point.

Where there is a gift of a specific chattel for life, and then over, the executor may assent to the legacy and discharge himself from liability

to the remainderman by delivery to the tenant for life, for the assent to that legacy is an assent to the one in remainder. It was formally held, indeed, that the executor would be bound to the remaindermen, unless he took security from the tenant for life that the thing should be forthcoming at his death. But unless there be collusion, it is now held otherwise, and the tenant for life is only bound to give a receipt or sign an inventory, as it is called, unless there be reason to believe that the article will be destroyed or sent away—in which case the executor may refuse to deliver it without security, or the remainderman may after delivery file his bill for security. *Foley v. Burnell,* 1 Bro., Ch. Ca., 279. In such cases the remainderman must be content to receive the article as it ought to be left by the first taker, after using it with ordinary care and prudence. When, however, there is such a specific gift of what we commonly call, and what the master here calls, "perishable articles," or of what are embraced under the description in the books of "articles *quæ ipso usu consumuntur,*" it is difficult to say what is meant. I rather think testators seldom do mean to give such things for life only, and that (427) those words are annexed by mistake to that gift, by inadvertently inserting it in the clause giving other things of a different kind, and which are meant to be for life only. But if the testator really intends such a gift to be for life, we can hardly imagine what rights of enjoyment he meant for the objects of his bounty respectively. For to give wine, corn, sheep or cattle for life is to give the whole, if the legatee is to have any use of it, since the property, nay, the consumption, is inseparable from the use, unless the testator has this further meaning, that the tenant for life may consume and sell, as he would himself if living, and that whatever is left, both of the original stock and the increase, shall be taken as the estate of the testator, and go to the remainderman. I rather suppose that this is the meaning, for such dispositions are generally found in the provisions for wives, to whom children are to succeed, and the testator supposes that the mother would wish them to take all, whether it be his or her estate. This notion may have grown up from the rule of our law respecting increase of slaves given for life, all the articles being given together in the same clause. But to the admission of such a construction there is the insuperable objection that it is against the positive and ancient rule of the common law that the increase is the use and profit, and therefore belongs to the tenant for life in whose time it accrued; to which slaves constitute the only admitted exception. We would not feel authorized, upon bare conjecture as to the testator's intention, to carry it further. Then, what are the respective interests of the tenant for life and remaindermen in consumable chattels specifically bequeathed? From the decisions it is far from clear. We do not know

of any in our own courts upon the point. In England it is apparently unsettled. In *Foster v. Tournay,* 3 Ves., 311, *Lord Alvanley* said that some learned judges had thought the articles must be sold, and the persons entitled to the limited use have only the interest; which he thought very rigid. Yet in *Randall v. Russell,* 3 Meriv., 190, *Sir William Grant,* taking notice of that observation, says that his conception is that a gift for life, if specific, is a gift of the property in things, "*quæ* (428) *ipso usu consumuntur,*" and that it comes within the reason of the old law that there cannot be a limitation over of a chattel after a life estate. He admits it to be otherwise when such articles are included in a residuary bequest with others of a different nature, in which case the whole are to be sold by the executor and the interest received by the tenant for life. That is the case now before the Court, and, therefore, further speculation upon the effect of a specific bequest is unnecessary.

It seems clear that when a residue is given, as such, it is to be sold by the executor. The several things are not given, the testator supposing them not worth giving, as *corpora,* not knowing how much or which of them it may be absolutely necessary to sell for payment of debts and pecuniary legacies. The gift is, then, of the net balance of the proceeds after the debts are paid, which implies a sale. And if this were not the case when there is an immediate gift of the residue after the debts are paid, it must be when there is a limited use given in the surplus to one for life, and then to another; for then there is nothing to show that as to the consumable article the testator meant to give the particular legatee that use which consists in consumption, and as they are complicated in the same clause with the others of a different nature the whole must go together, and as a part must be sold, the whole must, and the first taker have the profit only. For upon the intention it is taken that the benefit is to be divided between the legatees in the whole subject, which cannot otherwise be, for if the tenant for life does not use the perishable articles, he gets no benefit, and if he does use them, the legatee over gets none. Such parts of the exceptions as relate to these articles must therefore be overruled. The executor is properly charged with the value of them in this suit, and as the widow had the benefit of them, he will be entitled, in the settlement he will make with her representative, to the value now answered for by him, as a credit against the charges against him for her cotton sold by him, for which he has by this decision (429) credit in this suit.

To the rule thus laid down slaves are an acknowledged exception, founded on the known expectations of testators and the general understanding of the country and the profession. Indeed, the reason of the rule itself constitutes them an exception. They are not wasted by use,

and if they are, that waste is supplied by their issue, which it has long been held goes with the remainder. With respect to them, service and not increase is the use of the tenant for life. When, therefore, they are included in a residue with other things, they are to be treated as they generally are when left by an intestate, not sold, as other parts of the estate, but divided amongst those entitled, unless a sale be necessary for debts or distribution.

The defendant William having submitted to have his purchase of Dave declared void at the election of the plaintiff, it would be of course. But the master has charged the price to him (which is proved to be a full one) in the account, and it has been paid in discharge of debts, and the plaintiffs have taken no exception upon that point, which is an election, and binds them.

The result of these views is that a balance is found due to the executors as far as the accounts have been stated, and the bill would be dismissed but that the plaintiffs may wish further inquiry upon the subject of John Barham's debt. For that purpose the cause will be retained; but if no motion for further directions be made by the plaintiffs on or before the calling of the case at next term, the bill will be dismissed afterwards, when moved for by the defendants.

PER CURIAM. Order accordingly.

Cited: Saunders v. Gatlin, 21 N. C., 94; *Jacocks v. Bozman, id.,* 194; *Johnson v. Corpening,* 39 N. C., 219; *Etheridge v. Bell,* 27 N. C., 88; *Jones v. Simmons,* 42 N. C., 179; *Saunders v. Houghton,* 43 N. C., 221; *Tayloe v. Bond,* 45 N. C., 25; *Williams v. Cotten,* 56 N. C., 397; *Blount v. Hawkins,* 57 N. C., 164; *Ritch v. Morris,* 78 N. C., 379; *Peacock v. Harris,* 85 N. C., 149; *Britt v. Smith,* 86 N. C., 307; *McKoy v. Guirkin,* 102 N. C., 23; *In re Knowles,* 148 N. C., 465; *Haywood v. Trust Co.,* 149 N. C., 217; *Haywood v. Wright,* 152 N. C., 432.

(430)

ABIGAIL M. RUDISELL v. ROBERT WATSON.

The words "to her and her heirs' proper use," annexed to a legacy to a married daughter, do not make it a legacy to her separate use, being probably an ineffectual attempt to secure it to her children, and not intended to defeat the right of her husband; and the fact that the testator uses different words in legacies to his sons is not sufficient to rebut this presumption and repel the claims of the husband.

ZENAS ALEXANDER by his will declared as follows:

"I will and bequeath to my beloved wife, Margaret Alexander, my dwelling-house where I now live, with all the outhouses and barns, during her life or widowhood, together with an absolute right to two beds and furniture, etc., which latter I will at her whole disposal.

"I will and bequeath to my daughter, Abigail M. Rudisell one black woman slave, Peggy, and one black girl called Retty, together with her two beds and furniture, and all the household and kitchen furniture that I gave her after she married; and also the one-half of all my land that lies on the east side of the road that leads from Charlotte to Beattie's Ford, all to be for her and her heirs' proper use, and the issue of said Peggy and Retty in the same way, the land to be equal in quality and quantity.

"I will and bequeath to my son Amyzy W. Alexander all my tract of land, containing, etc.

"I will and bequeath to my daughter Hannah G. Neil one black woman, named Sally, and one named Betsey, together with her two beds and furniture, with all the household and kitchen furniture that I gave her after she married, and also the one-half of all my land that lies on the east side of the road that leads from Charlotte to Beattie's Ford, all to be for her and her heirs' proper use, and the issue of said Sally and Betsey in the same way, together with their hires.

"I also will to my wife, during her lifetime or widowhood, all my household and kitchen furniture, with an absolute gift of the best bureau, and small falling-leaf table, to be at her disposal.

"I will to my daughter Abigail Rudisell the two lots in Charlotte whereon William Rudisell has built a tan-yard."

The will contained devises and bequests to his sons, which were (431) expressed in general terms, viz.: "I will and bequeath," etc., without any words from which an intention could be inferred either to qualify or enlarge the estate. The plaintiff by her next friend filed this bill seeking to secure to her separate use one of the slaves mentioned in the second clause above quoted. The defendant claimed under a purchase from her husband, and the only question was whether the testator by his will had secured the legacy to the plaintiff to her sole and separate use.

Devereux for plaintiff.
Badger for defendant.

RUFFIN, C. J. Upon looking through this will I am by no means certain that I can gather from it the intention of the testator upon the point involved in this suit, or that the construction I am obliged upon auhor-

ity to put upon his words be not against his intention. I believe, however, that the claim of the wife cannot be sustained upon adjudged cases or original principles.

At law a gift of chattels to the wife is a gift to the husband, and under a devise the right of the latter to be tenant by the curtesy attaches in the same manner as if the estate of the former had accrued by deed or descent. As a general principle, the rule of equity is the same. Because the reason for investing the husband with the property is as strong in equity as at law, namely, that he can manage it better than the wife, dispenses with the charges of a trustee, and ought to have it, as he is legally chargeable with the maintenance of the wife and family. But in equity certainly there may be a separate interest given to the wife which cannot be at law. The question always is whether one was intended by the testator. As I just remarked, I understand that upon this, as upon most other questions upon the rights to property, equity follows the law, and, therefore, that while a separate estate can
(432) by the law of this Court be given to the wife, yet it is not favored. The Court does not gather that intention by a measuring cost, but only sustains it when it is unequivocal and expressd in unambiguous terms. The words "separate use" are appropriate to this purpose. Any others may have the same effect standing by themselves, or in context with others, which express the whole legal idea belonging to the first—that is, not barely an interest in the wife, but the entire interest in her to the exclusion of the husband. Thus in *Ex parte Ray,* 1 Mad., 199, "sole" was said to be tantamount to "separate," but even in that case there were those other words, "such estate and effects to be and remain to the sole use, benefit, and disposition" of the feme. So in *Hartley v. Hurle,* 5 Ves., 540; *Lee v. Prieaux,* 3 Bro., Ch. 383, a trust to pay the profits "into the proper hands of the wife"; or to pay an annuity to the feme covert, the trustee not being bound to see to the application of the money, but to be discharged by her receipt, were deemed sufficient. In the last case, because as no other receipt would discharge the trustee but that of the feme, she must be entitled to receive it without or against the will of the husband. In the former, because evidence under her hand must be sufficient evidence of payment into her hand, and, therefore, as the receipt of the husband is not necessary, his interest is excluded. Here there is no trust created, but a bequest of personalty and a devise of land to the daughter, all in one clause, to which are added these words, "to be for her and her heirs' proper use." I have found no case in which these or similar words have been considered tantamount to separate use. They are the appropriate words in deeds operating under the statute of uses, which are almost the only species of conveyance used in this State, and an unskillful person (such as the draftsman of this will certainly was)

might very naturally transfer them into a will, without intending to give to them any peculiar force in this instrument, as demonstrative of any meaning of the testator, but that the devisee or legatee should have the absolute property. It is true, such words are not necessary in a will; and it is likewise true that we have no right to reject any (433) words, but must give effect to every one used. But the question is, what effect? Can we say the testator meant by these expressions to give a separate estate to the wife, instead of the absolute property, merely upon the ground that they were not necessary to the latter purpose? The words are not appropriate terms to express either intent, since a will does not raise a use and since "proper" has not the same meaning as "separate." I admit, however, that no technical terms are necessary to express either intent. But yet it is to be considered whether the intention to create a separate use can be collected here. It is argued that it is, because the words are unnecessary, and unmeaning unless they have that effect, and therefore a different inference is to be made from them than if found in a deed. This argument, if followed out, would carry us to this extent, that every personal bequest to a married woman was to her separate use, for as at law a gift to the wife is a gift to the husband. why in a will give it to the former at all, instead of the latter, unless it was intended that the former and not the latter shall have the legacy? There is a possibility, and even a probability, that such was the intention. But a possible or probable intention will not sustain the wife's claim. It must be plain and more than a conjectural exclusion of the husband. Hence, although the words might bear the construction contended for, yet if they will bear the other also, if there be an equal probability that they meant to express something else, namely, the interest devised, and not the uses to arise on that intent, the claim of the wife is repelled. It is said, however, that these words, "proper use" have received this meaning in a will; and *Hartley v. Hurle* is relied on as authority in point. I have already remarked on that case. It was a trust "to pay the profits in the proper hands" of the daughter, a feme covert. It did not turn on the word "proper," but upon the "payment into the hands" of the legatee; and was supported as a separate interest in the wife, notwithstanding the omission of the usual words, "notwithstanding her coverture," because her receipt was necessarily a sufficient discharge to the trustee, without her husband joining. So it was held in (434) *Adamson v. Armitage,* 19 Ves., 419, that a trust to pay income for "her own sole use and benefit" made a separate estate, but this was on the word "sole." A case was cited there and in *Lamb v. Milnes,* 5 Ves., 517, in which it was said to have been decided that the words "for her own use and benefit" would have been sufficient without "sole." But upon examination that case was found to be the other way, as is stated

in a note to *Lee v. Prieaux.* And there are two subsequent cases upon these very words, "own use and benefit"—*Willis v. Sayres,* 4 Mad., 409, and *Roberts v. Spicer,* 5 Mad., 491. It is true that in the former case there was a previous express legacy in trust for the separate use of the wife, and in the latter property was given in another clause to trustees for the wife, "not subject to the debts of the husband," and the Court said these express separate provisions made it clear that the others were not of that character. But it was likewise held that upon the force of the particular words "her use" or "her own use" in the clauses then under consideration no separate use could be implied; for "her use" expressed nothing that would not arise without them, and "her own use" meant no more. I think no person can find a difference between "her own" and "her proper use." Upon authority, therefore, this disposition even in England would not, as I conceive, be held to secure the property separately to the wife; much less ought it to be here, since such provisions are uncommon among us, and it may therefore be asserted that when intended the purpose will be very explicitly expressed.

Upon the words of this clause alone, therefore, my opinion is decisively against the bill.

But upon this clause, in connection with the rest of the will, I admit the question is more doubtful. The testator gives to this daughter in the beginning of his will two female slaves, some articles of furniture (which he says he gave her upon her marriage), and a tract of land, "all to be for her and her heirs' proper use, and the issue of the slaves in the (435) same way." He had another daughter, Mrs. Neil, to whom in another clause he gives similar property exactly in the same words. All his other children are sons, to whom he makes dispositions of personalty and realty without expressing what estates he gives them, or using the word "heirs." By another clause there is a devise to the plaintiff of two lots in Charlotte, on which her husband has built a tan-yard, without any other words; and for the purpose of paying his debts he directs certain land and the residue of his estate to be sold and gives the surplus, after payment of debts equally to be divided amongst all his children and his wife. By the first clause in the will the testator gives to his wife certain lands for life, and also an absolute property in some personal things, and adds, "which latter I will at her disposal," and in the eleventh clause gives to his wife during life all his household and kitchen furniture, with an absolute property in the best bureau and table, adding, "to be at her disposal."

The doubt upon this will, taken altogether, arises on the difference in the terms in which the lots in Charlotte and the property now claimed are given to the same person. That is increased when we find the provision for the only remaining daughter stated in the same words, while

nothing like it is said in the devises to the sons. This raises a strong probability that some difference was meant either in the extent or nature of the interest of the sons and daughters, and as to the property given to this daughter in the two clauses by which she is provided for. The question is whether that difference consists in raising a separate use. I am not sure that it was not the meaning of the testator. I incline to think it was. But I am not sure it was. I conjecture so; because if he did not mean an absolute gift in the ordinary way, that is the next and most natural thing we should expect him to mean. But it will not do to guess. The husband cannot be excluded without plain recorded words or a necessary implication. Here "proper use" is applied in the will as well "to her heirs" as to herself; which rebuts the idea that it (436) was intended to convey the sense of sole or separate use of the wife, in respect either of her then or any subsequent husband. The thought which dictated the sentence may, I apprehend, have been rather the interest of the children of the daughters. To the sons and the daughters he intended the whole property, and expecting the sons to be able to provide for their families, he does not fetter the gifts to them by any provision of his own. It is otherwise as to his daughters, and therefore he adds that the gifts to them shall be not only for their proper use, but also for the proper use of "their heirs" or children; which intention is the more strongly to be implied from the superaddition of the issue of the said slaves in the same way. What way? Not to the wife, as against the husband; for no such provision could be necessary for that purpose, since if the wife had the separate estate in the mothers, she would have it also in the increase. But as the words "her heirs' proper use," in the mind of the testator, appropriate only to the land, and showed only that he intended the children to take an interest in that, he feared that they might not have the increase of the slaves. He says, therefore, expressly that such shall be the case. I acknowledge that this is not clear, and it is true that if such was the intention of the testator, it cannot upon these words be effectuated; for the children cannot take under this clause, but the whole vests in the mother. But we are seeking the intention of the testator as to the creation of a separate estate, and therefore if the words, though not effectual for the purpose, were used to a different end, they cannot raise the former intention. "The issue of the slaves to go in the same way" seems to me to make it at least probable that the whole clause upon which this claim is founded was introduced to restrain alienation by the husband and wife, or by the latter alone, so that the property should go to the issue; the testator deeming it sufficient that the issue should take by succession, which would fall on them if the alienation was forbidden. This, too, is fortified by these provisions for the wife, the only other female mentioned in the will. Where the (437)

testator gives to her absolutely in terms, he further grants in each case his permission that it may be alienated by saying, "to be at her disposal."

Upon the whole, therefore, although I think it more than probable that the testator meant to exclude the husband, I am constrained to decide in favor of his right, because the conclusion is not manifest. The words in the particular clause do not themselves in their natural sense import it sufficiently. In their context they show that the testator may have meant something else besides a simple disposition in absolute property to his daughters, but are not sufficiently explicit to have the effect on the one hand of destroying the right of the husband more than, on the other, of admitting the issue as purchasers. If the testator had either or both of those intentions, he has expressed himself too defectively to enable the Court to control the operation of the general terms of disposition, and the bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

Cited: Robinson v. Lewis, 55 N. C., 25; *Bason v. Holt,* 47 N. C., 325; *Miller v. Bingham,* 36 N. C., 423; *Crawford v. Shaver,* 37 N. C., 240; *Ashcraft v. Little,* 39 N. C., 243; *Barnes v. Simms,* 40 N. C., 399.

ELIZABETH REDMOND v. BETHUEL COFFIN, EXECUTOR OF THOMAS WRIGHT, ET AL.

1. Where to a bill by the next of kin against the executors and legatees the latter relied upon a former decree, pronounced in a cause between the same plaintiff and the executors, commenced after the legal estate of the legatees was complete, but the executors did not plead it, nor in any way rely upon it, the decree was held not to be a bar.
2. A bequest of slaves for the purpose of emancipation is void, and a trust results to the next of kin.
3. An instrument in its terms a release, but not under seal, cannot be pleaded as a bar.
4. An attorney must act in the name of his principal, and a deed executed by him in his own name, and as his proper act, does not bind the principal.
5. A partial payment by a trustee to his *cestui que trust* cannot, under any circumstances, operate as a discharge of the residue.
6. Upon a bill by the next of kin, if his character does not conclusively appear, a reference as to that fact will be directed.
7. Although executors who *bona fide* pay a legacy to a charity of doubtful validity are protected, yet when slaves were bequeathed to a Quaker society

upon a trust for emancipation, and the executors confederating with the society to defeat the claim of the next of kin, delivered the slaves to the society, and otherwise acted *mala fide*. they, in default of payment by the society, were held responsible for their value and hire, and also for interest thereon.

THE plaintiff in her bill averred that she was the sole next of kin of the testator of the defendant; that he died in 1816, possessed of a number of slaves, and by his will devised as follows: "I give and bequeath them (the slaves) unto the Society of Friends of New Monthly Meeting, or their agents and their successors. I also give and bequeath all the personal property of my estate to the above named black people (438) to be sold and equally divided amongst them." The plaintiff averred that the bequest of the slaves to the New Garden Society was a bequest in trust that they might be emancipated, as religious opinions of the society forbade its members, or the society as a body, to hold slaves; that the bequest of the residue to the slaves was void, because of the incapacity of the legatees to take, and that a trust resulted to her as the next of kin, both of the slaves and of the residue. She then averred that one of the slaves named Jim had been sent out of the State to foreign parts for the purpose of being emancipated. She also averred that she had appointed one Willie Wright her attorney in fact to settle with the defendants, but that he had greatly abused her confidence, and that she had revoked his power. The prayer was for an account of the price of the slaves and of the residue, and payment of the value of Jim.

By an amendment Eliazur Hunt, Timothy Manney, Josiah Unthank, and George Swain, agents of the New Garden Meeting, were made defendants, and the plaintiff alleged that they had received the said slaves and surplus of the executors, and had hired out the former, and she prayed the same relief against them which in her original bill she had prayed against the executors.

The executors by their answer insisted that the New Garden Meeting as a body politic could take and hold slaves, and averred that believing the bequest to be valid, they had in August, 1816, delivered the slaves, and paid over the residue to the agents of that meeting. They denied notice of the plaintiffs' claim until 1818, after they had delivered the slaves. They stated that in December, 1817, Wright presented to them a duly authenticated power from the plaintiff, authorizing him or his substitute to settle and compound with them for the plaintiffs' share in the estate of their testator; that Wright appointed one Draughn his substitute, and that they came "to a full and fair settlement and compromise for all the interest of the plaintiff in the estate of their (439) testator, for the recovery of which the said Willie Wright had filed a bill of complaint in the court of equity for the county of Guil-

ford," and that Wright received the consideration stipulated to be paid by them upon the compromise. And they averred positively that this settlement and payment was made without notice of the revocation of his power.

Two papers executed by Wright, dated 12 and 14 December, 1818, were filed. The first was a release, in which it was recited that "Willie Wright of, etc., attorney and agent in fact for Betsey Redmond, of Fayette County, Kentucky, by virtue of her power, investing me with all right, etc., have remised, etc." This was signed and sealed by Wright, without the addition in any way of the name of the plaintiff. The other was without a seal, was signed by Wright alone, without reference to his principal, and acknowledged the receipt of $450 as a consideration of the compromise. The last was relied on as a bar and was filed as an exhibit to the answer. The first was proved by the deposition of an attesting witness.

The answer of the agents of the New Garden Meeting set forth at large the religious belief of the society, and insisted that as a society they could take and hold slaves. They admitted, however, that slaves held by the society were not worked for its profit, but that the money realized from their labor was deemed by the society a fund to be held in trust for the slaves, and to be used for their spiritual and temporal advancement. They charged that the planitiff "heretofore preferred in this court her bill of complaint against the executors of Thomas Wright for the same causes of complaint and relief sought in this bill, and that after full consideration of the claims of the respective parties, and for the purpose of finally disposing of and adjusting all matters in litigation and equitable consideration involved therein, the said controversy and suit was compromised by the parties at and for the sum of $450, which was paid by the said executors to the said plaintiff, by her attor-
(440) ney duly authorized and empowered, to wit, one Willie Wright, who as agent and attorney managed and conducted the said suit; and for which said sum paid as aforesaid the said W. W., attorney as aforesaid, released and conveyed to the said executors all the title, interest and claim of the said plaintiff in and to the estate of the said testator, and that in pursuance of the said compromise made as aforesaid a decree of the court of equity for the county of Guilford was duly made at, etc., in the following words, to wit: "The plaintiff, by her attorney in fact, W. W., having sold and assigned and released all her right and interest in the slaves and other property of Thomas Wright, deceased, to the defendants in consideration of $450 paid to him: bill dismissed, each party paying their own costs," and they prayed the full benefit of this decree, as if it had been specially pleaded.

The release and conveyance mentioned in the answer was that above stated, filed by the executors. These defendants exhibited a copy of the former bill and decree, which fully supported their answer and plea. Replications were taken to these answers, and the proofs filed were very voluminous. A condensation of them is unnecessary, as they are stated in the several opinions delivered in the progress of the cause. It was argued at great length at June Term, 1831.

Winston for plaintiff.
Gaston, Nash, and Mendenhall for defendants.

RUFFIN, J. The general question upon the validity of the charity created by this will was not much argued in this case. I presume the counsel considered, as the Court does, that it is not open to discussion. Qualified emancipation of the kind set up by the answer, and proved so distinctly by the member of the Society of Friends who has been examined as to it, stand upon the same ground as a bequest directly for that purpose. However praiseworthy the motive for accepting such a trust, or however benevolent the will of the donor may be, it (441) cannot be supported in a court of justice. A stern necessity arising out of the safety of the Commonwealth forbids it. *Haywood v. Craven,* 4 N. C., 360, and *Huckaby v. Jones,* 9 N. C., 120, are leading cases; the one a direct declaration of the purpose of emancipation, and the other of one collected by the Court from the terms of the will. They were followed by *Trustees v. Dickinson,* 12 N. C., 189, and *Stevens v. Ely,* 16 N. C., 493, which leaves no part of the ground unoccupied. The former was on a conveyance to the Friends for the same purpose designated in this bequest, only this is stronger, because here is a bequest to the slaves, which shows, on the will, that the testator meant emancipation. That is not an odious, but it is a dangerous and unlawful species of mortmain; and a trust results to the next of kin, where there is no residuary clause.

Several bars to an account are set up here. The first is that of a release, which is relied upon in the answers of the executors and also of the trustees. That annexed to the answer, and said to be a copy, bearing date 14 December, 1818, is not a release from anybody, not being under seal. And it might, perhaps, be proper to exclude any other, because that and that alone is relied on in the answer. But the reading of the original proved by Hubbard, and bearing date 12 December, 1818, was not objected to, and will therefore be considered by the Court.

Neither of them can avail the defendants, because neither is executed in the name of the principal. It is not material in what form the deed be signed, whether A. B. by D. C. or D. C. for A. B., provided it appear

in the deed and by the execution that it is the deed of the principal. But that must appear; and the cases cited put that beyond doubt. To them may be added *Combe's case,* 9 Rep., 75, *Frontis v. Small,* Ld. Raym., 1418, and *White v. Cuyler,* 6 Term, 176.

As a positive bar, then, these papers are nothing. They do not mention any sum of money paid. But the answers state that money
(442) was paid, namely, the sum of $450; but Hubbard, the subscribing witness examined by the defendants, says that the sum agreed on was $300, of which only part was paid, a note being given for the residue. A question has been made on this, whether the payment to Wright was good, since his power was revoked and the parties had notice of the revocation. The Court would not declare that fact, were it in the least doubtful, but leave it to arise on the master's report, upon his allowing or disallowing the sum paid to Wright as a payment to the plaintiff. But it is positively sworn by Scott that he gave notice of the new power to Swain, who made the agreement for the executors with Wright, and through whom the money was paid. He is supported by the testimony of Draughn, who says that when he came to see Wright next day at Greensboro, he heard of the revocation, and told Wright; and that he had before seen the defendant Coffin, and been told by him that he had seen John C. Redmond, the agent appointed by the second power, and had a conversation with him respecting the suit, though he did not say that he told him of the second power. From this it seems certain that the power to the son was at the place, in the possession of Scott; and no conceivable reason can be assigned why he or the son should conceal it, while the compromise was going on, and disclose it immediately afterwards. The Court must, therefore, take it that the revocation was known to Swain, who was the agent in the business, and consequently to the executors, and declare that the payment was made by the executors, or on their behalf, in their own wrong.

If this were not so, it certainly could not be set up but as a satisfaction *pro tanto.* A payment of a less sum is not a satisfaction for a greater than due, even at law. Much less does a payment by a trustee of a part of the fund belonging to a *cestui que trust* extinguish the right to the residue. Here, besides the slaves, the plaintiff was entitled to more money than was received. But it is unnecessary to pursue this point, because even the sum advanced was not a payment to the plaintiff, for want of authority in Wright then to receive it.

(443) It is, however, contended that a decree pronounced in a former cause, brought by the plaintiff against Coffin and others, the executors of Thomas Wright's will, is a bar to this suit. It is not pleaded by either of the defendants, nor is it relied on in the answer of the executors; but it is brought forward in the answer of the trustees of the

Quaker society to the bill as amended, so as to make them parties. And the transcript of the first suit has been read in evidence. From that it appears that a bill was filed in February, 1818, by this same plaintiff for an account of Thomas Wright's personal estate against his executors, who are also part of the defendants in this suit. There were no other defendants but the executors. No answer was put in, and after the compromise before spoken, viz., at April Term, 1819, the entry in question appears.

It has been objected by the plaintiff that this does not bar as a decree, because it does not profess to be the act of the court, or to be founded on the merits, but that of Willie Wright himself, after the revocation of his power, in execution of his agreement. Perhaps, if strictly construed, it might be held so, and therefore only obligatory as an agreement. But I believe the decree is clearly removed out of the case upon other and more general principles. When a former decree is pleaded and relied on as an absolute bar, *proprio vigore,* it must be a decree determining the very point in a suit between the same parties. This is the case at law, and hence a judgment against A. is not evidence in suit against A. and another. In equity there may be this difference: that as the liability of the several defendants in this Court may be several, the introduction of a new party in a second suit shall not prevent a former decree from protecting one of the defendants who is called in question a second time for the same matter; for as to that matter, the parties are the same. But a decree in favor of one cannot protect another who was not a party, unless he be a privy. And, indeed, a stranger thus introduced cannot use the decree at all, as such, because it cannot be used against him.

I will not say that the executors might not have relied on this as (444) a former decree; but the other defendants cannot set it up, because they are not bound by it, being neither party nor privy. Indeed, in this very case they have objected to the reading of a deposition taken in the former suit, upon this ground, and the objection was sustained. The reason is, if they had been defendants before, the decree might have been different, because other evidence might have been offered. 1 Phil. Ev., 250, 252, where the cases are collected. I am now speaking of the decree operating as being an adjudication, and not as founded on a compromise; in which last case it may be used by anybody as evidence of the fact of satisfaction. The privity between the executors and the society did not then exist. It never did extend to anything but the slaves, for the residue is not given to the society, but to the slaves, and the bequest is merely void. Then, as to the slaves, they were delivered over on 16 August, 1816, to the trustees of the Quakers, as alleged in both the answers in this suit. There is a privity between trustees and *cestuis que trust* as long as that relation continues; and a legatee is bound by and

can avail himself of a judgment or decree for or against the executor while the trust is open and the funds in the hands of the executor. But after the trust estate is conveyed to the *cestui que trust,* or the legacy assented to and the property delivered to the legatee, there is no further privity. The legal estate is in the legatee himself. A suit, then, against the executor, founded on his acts or breach of trust, does not affect the legatee, who claims above it and by a legal title prior to the institution of the suit. When the privity is destroyed, the consequence necessarily follows, namely, that as a stranger, he can neither be benefited nor injured by a decree in a suit against the executors; for the estoppel of *res judicata* like all others, must be mutual. Here the trustees of the society did not come to the estate since the former decree, nor *pendente lite,* but before the former suit was instituted. And as to the money aris-
(445) ing from the perishable estate, that was paid over to them without any pretence of right, and, therefore, though paid after the first suit, it must be considered as remaining, for the purposes of this suit, in the executors' hands.

The next consideration is, whether the decree protects the executors themselves—that is, conclusively. They have not relied on it. Can another set it up for them? Or, when not relied on as a positive bar in the pleadings, but offered in evidence, is it not open to an investigation of the merits of the demands determined in it? At law, a former judgment is conclusive; but to make it so it must be pleaded (if the party have an opportunity) as an estoppel. And if it be not pleaded, the matter is at large; because the party may think that he can do better than he did before. *Vooght v. Winch,* 2 Barn and Ald., 662. Here, the executors may have been conscious that the decree was obtained by collusion with Willie Wright, the removed agent (as it was certainly entered after notice of the revocation of his power), and not willing to litigate it, and to have chosen to rest their case upon its merits. It is not for another to prevent that. Again: the plaintiff might have dismissed that bill upon the discovery that the legal title of the slaves had passed by the assent to the legacy, because she did not choose to take a personal decree against the executors, who might be insolvent, or because she wished to recover the specific chattels. She may follow the property; and a bill for that purpose is not barred by a previous bill against another person through whose hands it has passed, unless the privity then existed, and unless, at any rate, it appear that in the first suit the right to the chattels be the very point decided. Both because there was no privity between these two sets of defendants at the time of the former bill, and because new matter, that is, a right to specific relief against another person, not a party before, upon a state of facts not brought forward in the first suit, that decree does not bar this suit. But if it would have that

effect, it would extend only to the persons in whose favor that decree was pronounced, if relied on by them. They have waived the bar, and have elected to have a decision upon the merits, as well they may, (446) if they wish to assume any appearance of fairness as between the other parties. They ought to desire that the right should prevail between them; and, therefore, very properly, left the case open to a decision of it. As it would be enough for them that they delivered the legacy *bona fide,* they ought not to attempt to conclude the true owner, if she be such, from recovering back that which they delivered over by mistake.

As the case stands, then, upon the pleadings, the former decree (if it be one) does not prevent this suit going on. The former defendants submit that it shall. The new defendants cannot forbid them. And the new defendants cannot avail themselves of the proceedings, as such, in a former suit to which they were not parties nor privies.

It is next objected that the plaintiff has not shown herself next of kin of the testator. It is common to direct an inquiry to ascertain who are next of kin; and the bill would not be absolutely dismissed on the hearing upon that ground, where the relation is not denied, though not admitted in the answer. But here there is *prima facie* evidence in favor of the plaintiff. The testator had no issue, nor is any parent or other brother or sister shown. The plaintiff alleges that she is sole sister, and resides in Kentucky. Her residence is proved, and there is no evidence that another of her name lived there. It is proved by a witness that the testator said he had a sister living in Kentucky, by the name of the plaintiff, and that he corresponded with her husband; and spoke of no other brother or sister. And further, in both the letters of attorney she recites her relationship, and upon the faith of that, and other information acquired by the defendants, probably from Willie Wright (who was a relative), they treat with Wright as her agent for the whole estate. After this, the defendants cannot say she is not to be presumed of kin, at all events, until upon inquiry, if the defendants ask for it, the contrary shall appear.

Another question of some difficulty was touched on at the bar, (447) which the Court will not decide without further argument. It is whether the testator's widow is entitled. Clearly, she was not against the charity, unless she dissented. Thence the argument arises that she cannot say she was not to have a part only in favor of the trustees; but that under our act of Assembly the legacy is a satisfaction of her whole claim on the estate, because the testator must be supposed to make the bequest in reference to her rights. On the other hand, this being a legacy which fails for its illegality, it may be said that intention is out of the case altogether; for if the intention prevailed, both the widow and next of kin would be equally included. It becomes a case where the

law disposes of the fund, because in the case that has happened no intention is to be collected either way; and when the law distributes, there is but one rule, which is the statute. Possibly there may be a distinction between an undisposed residue and that of a legacy failing, as this; and possibly, too, the act of 1784 may bar her right in both, as she did not dissent. The Court inclines to let in the widow; but it is too general a question to be decided without having the widow's representative before the court and without full argument. It will be left, therefore, to be considered of by the plaintiff's counsel.

A motion was made on that side to remit the cause for amendment in another particular; and if they deem it expedient, on this point, to make the widow's representative a party, the case may go back for that purpose, as we do not wish to conclude the question unless the case is put into such a shape as will allow a full hearing to the claims of the widow. But if the plaintiff chooses to bring on a final hearing here, relying upon her exclusive right, she may do so, at the risk of having her bill dismissed for want of all proper parties, in case the Court should think the widow entitled.

PER CURIAM. Declare the bequest of the slaves to the New Garden Meeting to be illegal and void, and that of the residue to the slaves to be also void, for want of capacity in the slaves to take; and that (448) a trust of the slaves and residue results for the next of kin. Declare further, that the letter of attorney made by the plaintiffs to Willie Wright was revoked on 1 October, 1818, and that the defendants had notice thereof before making the compromise with Wright, and that therefore the plaintiff is not bound by the payment alleged to be made to him.

Declare, also, that the decree relied on in the answer of the agents does not bar this suit against the executors, because they have not pleaded the same nor relied upon it in their answers as a bar; and that it does not bar this suit against the other defendants, because they were not parties to the suit in which it was pronounced, and because the executors were not at the time the said decree was made, nor thereafter, trustees for the other defendants, nor otherwise privy to them.

The minutes then directed an account, and gave the plaintiff an election to have the cause remanded to the court below, with liberty to make the wife of the testator a party.

Upon this order the plaintiff elected to have the cause sent back to Guilford, where he made the administrator of the widow a party. It appeared that she died a few days after the testator, without having entered her dissent to the will by which she took both land and slaves.

The master, during the time the cause pended in the court below, made his report, in which he charged the defendants jointly with the net residue

of the estate of the testator, $416.93, and interest thereon; with the value of four slaves, which had been carried to distant states, and interest thereon, together with the annual value of all the other slaves and interest thereon—amounting in the whole to $3,621.74.

The case was removed to this Court again, at June Term last, when the defendants excepted to the report:

1. Because the master had disallowed the payment to Wright.
2. Because he had charged them with the value of slaves which had been removed, and interest thereon.
3. Because he had charged them with interest upon the annual (449) value of the slaves.

In support of their exception, the defendants filed a petition to rehear so much of the order made at June Term, 1831, which declared that the payment to Wright had been made after notice to the defendants of the revocation of his power.

Nash and Mendenhall for defendants.
Winston for plaintiff.

RUFFIN, C. J. The master having made a report under the reference ordered at June Term, 1831, to which the defendants having excepted, the cause has been again brought on upon the report and exceptions, and on the motion of the plaintiff for further directions.

The report finds the balance of the proceeds to the personal estate, exclusive of the slaves, to be $416.93, on which interest is computed from April, 1821, that being the time when the executors stated and returned their account current. The master finds that this sum is not now in the hands of the executors, but was paid to the other defendants, the trustees of the Society of Friends, or by their order, and was in fact applied in paying the sum agreed to be given upon the compromise made with Willie Wright.

To the whole of this charge both the executors and the trustees except; the latter, because the money was never in their hands, and the former because it was paid with the privity of the trustees, and on their behalf, in good faith on the part of the executors, under the belief that it belonged to the society as owners of the slaves and that Wright was the agent of the plaintiff.

The report also finds that in 1816 the executors delivered all the slaves to the trustees, and that in 1819 one of the slaves was sent out of the State to parts unknown, or was permitted by the defendant to go, so that the plaintiff cannot now get the possession of him, and that pending this suit, viz., in 1825, three others of them were in like manner sent or permitted to go away. The master charges the defendants with the

(450) value of those slaves as of the time they were sent away, and with interest from that time. He also charges them with reasonable hires of all the slaves while in their possession, including those sent away up to the time they went, and interest on those hires as they become annually due.

To this part of the report the executors and trustees also respectively except, the former because they properly assented to the legacy to the society, and delivered the slaves to the trustees when their duty ceased, and they were no longer liable for either the slaves or their profits, since if a trust resulted to the next of kin, it arose out of the legal estate in the agents of the society; and the latter, because they have personally derived no profits from the slaves, but allowed them to enjoy the profits of their own labor, and to leave the State under the honest belief that they belonged to the society, and that such was the intention both of the society and the testator. And as to the interest, both sets of defendants except upon the common ground that it is not chargeable on rents and hires.

To the proper consideration of the exceptions, it is necessary to advert to the pleadings and to the transactions previous to this suit. Thomas Wright died in April, 1816, and by his will bequeathed his slaves to the Society of Friends of New Garden Monthly Meeting, or their agents and successors, and gave the residue of his personal property to the slaves themselves. This has been heretofore declared to be a trust for emancipation, and, as that was against the policy of the law, that it was void, and resulted to the next of kin. The executors, however, delivered the slaves to the agents in August, 1816. On 16 February, 1818, the present plaintiff, as sole next of kin of the testator, filed her bill against the executors for an account of the personal estate, and alleging that the trust of the slaves resulted to her. The plaintiff is a widow residing in Kentucky, and appointed Willie Wright, residing in Guilford, her agent to prosecute her suit in Guilford and receive the estate that might be coming to her. Wright was an incapable and distressed man, and,

(451) as the event proved, faithless as an agent. The executors put in no answer to that bill at Spring Term, 1818, but got leave to answer at the next term. At the next term they still delayed to answer. Yet Wright did not set down the bill as confessed, but enlarged the time to another term. Before that arrived he was put in prison for debt, at whose instance does not clearly appear. But there is much reason to believe that these defendants were connected with it, for no communication for a settlement seems to have been had until he was imprisoned. On 12 December, 1818, the executors engaged with one Draughn, acting on behalf of Wright, for a compromise, and then advanced $60 towards it, for the purpose of releasing him from jail which was to be valid in case Wright should accede to it, and the residue should

then be paid. The next day Wright, then in jail, assented to the arrangement, and it was concluded by the execution of two papers by him, one dated 12 December, 1818, purporting to be a general release to the executors, on the part of the plaintiff, of all demands for any part of the estate of the testator, and the other dated 14 December, 1818, in consideration of $450 then paid, to discharge the suit, and to sell and assign to the executors all the interest and claim of the plaintiff in and to the slaves and all other parts of the estate. This agreement was made by the executors personally, and by the advice and with the assistance of the defendant, George Swain, who acted on behalf of the society and their trustees, who state in their answer that they advanced part of the money. The sum paid to Wright does not precisely appear. Draughn says it was $410, including the previous $60, while Hubbard, a witness for the defendants, and a subscribing witness to one of the instruments, says it was $300 or thereabouts, for part of which a note was given. At Spring Term, 1819, the suit was dismissed under the agreement, by rule of court. This transaction has already been declared not to be a bar to the plaintiff, upon the ground that Swain and the executors then knew that the plaintiff had revoked the authority to Wright.

In July, 1824, this suit was brought, having the same objects (452) with the former, and making the agents of the society defendants, and charging that the compromise with Wright was unduly obtained, after the plaintiff had revoked his authority, and the other parties had knowledge of the fact. Both the executors and the agents by their answer insist upon the compromise and release as a bar, and also upon the title of the society to the slaves under them, and under the bequests of the will, upon the ground that the society controlled them, and does hold them as property, though they do not apply the profits to the use of the individual members or that of the society as a religious association, but as a charity for those slaves or others. The executors deny that Jim has been sent away by their privity, and say, although they are Friends and members of the same meeting, that they had no control over the slaves, but the agents only. And the agents, insisting upon a general property, say of course they had a right to send him or allow him to go away.

As a general rule, it must be admitted that executors are bound, at their peril, to pay money and deliver the property to the proper persons entitled to it, as next of kin or legatees. It may be admitted, as an exception, that executors in trust, for a charity, under a will of doubtful construction, or where the validity of the charity as a question of law is doubtful, who act honestly, though erroneously, will be protected in the application of the funds until demand from the person entitled. Upon this principle, perhaps, the executors might be excused for delivering the slaves in August, 1816, to the other defendants, though the Court

cannot recognize the purpose of emancipation, there being no evidence of meritorious services, as being in this State a moral and charitable object in a general sense, much less a charity in a legal sense, and it is hard to suppose any citizen of North Carolina, and especially of the Society of Friends, to be so little informed of the law upon this subject as not to be certain of its illegality at least. But the case does not
(453) require an opinion upon that point, nor even upon the effect of emancipation of the slaves, promised or permitted by the agents, before notice of the plaintiff's rights, either upon their own responsibility or that of the executors; for it does not appear that any of them have been emancipated at any time, and it does appear that the parties had full notice of those rights before any of the slaves were sent away. Three of them, indeed, have been put beyond the plaintiff's reach pending this suit, in which the defendants assert a right to withhold them from her, as being legally and beneficially their property. This would be a conversion at law. The fourth was sent off in 1819, in the interval between the termination of the first suit, and the bringing of this. Can that be regarded as *bona fide,* and arising from an honest mistake? I must here remark that *Haywood v. Craven,* 4 N. C., 360, was decided in this Court in July, 1816, in which the nature of such trusts was determined. Everybody deemed the question one of great importance, and perhaps no decision was ever sooner and more generally known, either as to the point of it or its principles. In possession of the knowledge of it, how stands the conduct of the defendants? They may be considered as acting upon a motive of praiseworthy benevolence in the abstract, in the endeavor to free their enslaved fellow-creatures; but in reference to the law of their country, and the duty of obedience to it, and in reference to the rights of property of the plaintiff, they cannot pretend good faith. They acted in bad faith in respect of those obligations. They endeavored to fortify their asserted rights of property by the release and assignment by the plaintiff of her right of property. They attempted to give that character to instruments obtained from one to whom she had given authority, and from whom she had withdrawn it, with their knowledge, in the hope she could not prove such knowledge on their part, and, therefore, that she would be bound notwithstanding the revocation. And if Wright had still authority, the compromise was made upon such terms and under such circumstances that it could not
(454) stand in this Court, but would be set aside as unduly obtained upon inadequate consideration and by taking advantage of if not producing the distresses of the agent. The first suit had pended nearly a year without an answer, and without any steps towards a settlement. We then find the agent in jail, and immediately the compromise is proposed, and the plaintiff's money paid for his discharge; and the whole

sum paid is less than the cash balance in the executors' hands, to which the plaintiff was entitled; in consideration of which she is made to release all claims to the residue of the estate and to convey the slaves specifically. Upon a bill filed to get rid of such a deed, upon the single point of fraud and imposition, the plaintiff must have been relieved, which is an answer to all that can be said about the good faith of the parties. If the executors had come forward as persons standing indifferent between the claimants, according to their duty, and said, "We have so much money, which we are ready to pay you; but as to the slaves, we cannot deliver them to you, because we have, as we thought we ought, already delivered them to the agents of the Society of Friends; and if there is a trust for you, apply to them, or for relief against them," it would have made a different case. But the executors and agents made a common cause, and this unfair compromise is effected, and an assignment of the slaves is actually made to the executors themselves, no doubt for the protection of the agents. Each of the parties is, in such a case, liable to the true owner for all subsequent conversions or misapplications of the property, though they may not be liable in equal degree, but the one after the other. Here all the parties are before the Court, and the plaintiff seeks the specific property. As far as it can be had, she is entitled to it; but for any parts of it that have been eloigned, she is entitled to compensation from the last holder and actual wrong-doer; and if satisfaction cannot be obtained from him, then she has a right to look to all the others by whose more remote agency the injury to her has arisen. That compensation consists in the value of the slaves withheld from her, and interest on it.

As to the sum paid to Wright, it being wrongfully paid by the (455) executors, it must be considered as between them and the plaintiff, to be still in their hands; but as between them and the other defendants, the agents, it was paid with the privity and by the request of the latter, and for the confirmation of their pretended title to the negroes, and, therefore, was a payment to their use, and the agents must be liable first for it. It is true that one of the defendants, Mr. Swain, was not appointed one of the agents of the meeting until 26 December, 1818, but he is equally liable with the others for the whole, for he was the individual who made the compromise and payment, acting on behalf of the meeting of which he was a member, and the other agents and he, as agent, subsequently ratified the whole, and all four of the slaves were sent away after he had charge of them.

As to the hires and the interest on them: Hire is the natural profit of slaves, and if not made, ought to have been made, and the owner is entitled to receive it from those who withhold the slaves themselves. It is no answer to say that the negroes worked for themselves. That was

as much against law and public economy as against the individual rights of the plaintiff. It certainly is not the general rule to charge interest on the annual profits, nor would it be allowed here if the defendants had rendered a fair account or allowed the case to be decided simply on the original rights of the parties. But the extreme injustice done to the plaintiff in the beginning, in denying her right, in taking advantage of the incapacity, the faithlessness and necessities of her agent, to extort a release and a conveyance from him, upon payment only of a very small part of what was due to the plaintiff, and after they knew that she had appointed another attorney, and the attempt to set those deeds up as a bar in this suit, and in the meanwhile to send off some other of the slaves beyond the jurisdiction of the court, all together constitute so gross a case of bad faith, and willful resistance to the cause of justice, and the claims of property as acknowledged and guaranteed by the laws, as subjects the defendants to account upon the most rigorous principles, and renders them justly chargeable with the highest hire,

(456) and interest on it. For which reasons, all the exceptions are overruled and the report confirmed, and the plaintiff must be declared entitled to all the slaves reported to be yet in this State, and to recover from all the defendants the sums of money reported to be due for the residue and for the value of the four slaves sent away, and the hires of all the others, and interest upon those several sums; for which however, the defendants, the agents of the society, are liable to her in the first place, and therefore execution will issue therefor immediately against them; and if upon return thereof it should appear that satisfaction of the whole or any part thereof cannot be had from them, that then the plaintiff shall have execution against the other defendants for the deficiency then remaining.

When this cause was before the Court, upon the hearing in 1831, a doubt was entertained upon the right of the testator's widow to a share in this property, as not being effectually disposed. The point has been since much considered, and finally decided against the right in *Craven v. Craven, ante,* 338. So that the bill, so far as it seeks to recover anything as belonging to the widow by her administrator, must be dismissed.

PER CURIAM. Bill dismissed.

Cited: Ford v. Whedbee, 21 N. C., 21; *Brown v. Brown,* 27 N. C., 137; *McCall v. Clayton,* 44 N. C., 423; *Phillips v. Hooker,* 62 N. C., 196; *Bryson v. Lucas,* 84 N. C., 687; *Cadell v. Allen,* 99 N. C., 547; *Russ v. Harper,* 158 N. C., 450; *Elmore v. Byrd,* 180 N. C., 127.

ESTHER ARMSWORTHY v. AQUILLA CHESHIRE.

1. An answer which is responsive to the bill, and contains a clear, precise, and positive denial of it, must be disproved by more evidence than the testimony of one witness, to entitle the plaintiff to a decree.

2. An issue should not be directed simply because the answer is contradicted by one witness.

3. Nor where the witness is supported by circumstances which, connected with his oath, discredit the denial of the defendant.

4. But one is proper where between the witness and the answer circumstances in evidence create an inclination in favor of the former, without estimating the interest of the defendant.

THIS bill was filed at February Term, 1817, of the Court of Equity for ROWAN by John Armsworthy and Esther his wife, against Aquilla Cheshire, Letha Call, Julia Cheshire, and Turner Jarvis, and having been dismissed as to all the defendants but the one first named, the controversy between the plaintiffs and the defendant has been narrowed down to the matter in dispute between them. In relation to this matter, the plaintiffs set forth in their bill that Burch Cheshire (457) died intestate in February, 1816, and that administration on his estate was, at August Term, 1816, of the county court, duly granted to the plaintiff Esther; that the deceased at the time of his death was upwards of 80 years of age, and for many years before his death, from age and infirmity, his mental faculties had become greatly impaired, so as to render him incapable of attending to the management of his own affairs; that the defendant Aquilla lived in the same house with the intestate, and had acquired great influence over him; that the said defendant some short time before the intestate's death did contrive to deceive the intestate into the execution of a deed for several of his slaves, by representing to the intestate that the deed presented for his signature was a conveyance for some of his stock and household furniture only; and that upon the death of the intestate, the defendant, under the fraudulent deed thus obtained, took the said negroes into his possession, and yet holds the same. Upon these allegations the plaintiff prayed that the deed might be set aside as fraudulent, and that the defendant might be compelled to surrender the negroes and to account for their hire, and for general relief. The defendant answered at April Term, 1817, and in his answer set forth that he was the grandson of the intestate; had from infancy lived in his family, and for many years before his death managed his concerns; that the deed in question, together with other deeds for other objects of the intestate's bounty, was executed in the summer of 1815; that at the time of their execution the intestate was of sound and

disposing mind, and perfectly knew their contents and their operation; that they not only were read to him, but were often read by himself; that they had been written at the intestate's request, by one Braxton Bryant, a schoolmaster of the neighborhood; that after they had been written, the execution of them was postponed by the intestate for two weeks or more, in order to have them attested by one Arthur Smith and Thomas Hainline, but that not being able to get the said Smith, (458) David Sheets and said Hainline were requested to become the witnesses; that the deeds were executed in the night, before early bedtime; that the defendant Bryant, Hainline and Sheets, were returning from a muster, and did not get to the house of the intestate until after candlelight; that soon after their arrival the intestate and Bryant were alone in a room where, as he was informed and believed, the deeds were again examined, and the intestate having determined to execute them at that time, they were executed and witnessed by the said Sheets and Hainline; and that the whole transaction was without circumvention or deceit of any kind. In answer to an interrogatory respecting the connection between him and the subscribing witnesses, he added that Sheets was the brother of his wife and that Hainline was the brother of his wife's former husband.

At October Term, 1817, the death of John Armsworthy, the husband of the plaintiff Esther, was suggested, and the suit ordered to be carried on in her name.

This answer having been replied to by the plaintiff Esther, the parties proceeded to take their proofs. The most important deposition on the part of the plaintiff was that of Braxton Bryant. This witness's deposition was taken on 17 September, 1817. In it he stated that he had been applied to by the deceased to write his will, and was furnished the proper memoranda wherewith to prepare it. That after this will was written, the intestate consulted him on the propriety of giving away a portion of his property by deeds of gift, because his son-in-law, one of the plaintiffs, threatened to sue him on account of some moneys which were alleged to belong to the estate of a deceased son of the intestate. That the witness was requested to write four deeds of gift, one to the defendant Aquilla and one to each of the other original defendants, which deeds were to comprehend respectively the same property as was bequeathed to them in the will; that the defendant, who had also requested him to write the said deeds, prevailed on the witness to prepare also a fifth deed, which should contain four negroes in addition to the property intended for him by his grandfather, and (459) promised to reward the witness's services in this respect by a gift of $100 to the witness's daughter; that accordingly, besides the four which he was instructed to prepare by the intestate, he fabri-

cated a fifth, conforming to this request of the defendant; that the old man had previously read the first four deeds, and that on the night the execution of them was about to take place, he (the witness), slipped the fifth and false one in the place of that which the intestate supposed he was to execute in favor of the defendant, and thus this deed was fraudulently executed, and, after being executed, was attested by the subscribing witnesses. He further declared that the four negroes included in this spurious deed were, by the old man's instructions, not to be inserted in any of the deeds, but to be permitted to go to his lawful children; that this imposition was practiced at the instance of the defendant, and that he believed at the time it was done he (the witness) slipped into the defendant's hands the paper which was to have been, but which was not, executed.

The subscribing wtinesses were examined on the part of the defendant. David Sheets only stated that at the request of the defendant he went with Bryan, Hainline, and others to the house of the deceased, and was requested to witness some instruments of writing which he understood to be deeds for portions of the old man's property to the defendant and others, and that these deeds were either executed or the execution of them acknowledged in his presence; that he supposed from the manner in which the transaction was done that it had been well considered of and the old man aware of what he was doing, and that the witnesses were requested by him not to say anything respecting the transaction during his life, and he was unwilling to cause an altercation in his family.

The other witness, Hainline, was more circumstantial. He stated that he was twice requested by the defendant to attend at the house of the intestate to witness a deed of gift; that he failed to attend on the first invitation, but went upon the second; that he reached the house of the old gentleman in the night, about two hours after (460) dark; that some time after his arrival, at the request of the defendant, the intestate was left alone with Baxton Bryant; that when he and Sheets went again into the room (at whose call he did not state) the old man signed in his presence, and delivered to the defendant Aquilla, the several instruments of writing which were attested by himself and Sheets; that when the old man delivered the papers he used these words, "I deliver these for the purposes therein expressed," and all appeared to be done deliberately and of his free will; that it was one or two hours after the witness arrived at the house before the business was done; that when it was done, Bryant asked the old man if he wished to have the affair kept secret, and he replied that he did.

A vast number of other depositions were filed, of which it is not necessary to take a particular notice. From these examinations it appeared

that the intestate was more than 80 years of age when he died; that he had been a man of ordinary education, able and accustomed to read and write; that at the time of the transaction in question his sense of hearing was much impaired; that he was yet able to read with the aid of glasses; that his understanding was weakened by age and infirmities, but he was yet competent for the rational disposition of his property. He had three legitimate children living, who were his next of kin, the plaintiff Esther, Elizabeth, married to Richard Williams, and Nelly, the wife of Benjamin B. Walker. The defendant Aquilla was the illegitimate son and Lethe Call the illegitimate daughter of Sarah, a deceased child. Julia Cheshire was the illegitimate child of Latty, another deceased daughter of the intestate, and Fanny Jarvis was the child of Ruth, a daughter of Elizabeth Williams, born out of wedlock. It did not appear whether any of these descendants, legitimate or illegitimate, lived in his family, except the defendant Aquilla, who had the active superintendence of his affairs, and was greatly trusted by him.

(461) GASTON, J., after stating the pleadings and proofs: Many of the depositions give the opinion of the witnesses as to the general character of Baxton Bryant for truth on oath, and are in this respect directly at points with each other. Some of the witnesses relate conversations with him apparently confidential, and soon after the transaction, concurring with the account which he afterwards gave on his examination, and others depose to conversations with the same witness in which his statements were at variance with that to which he afterwards testified. According to all of the witnesses, he appears to have been a man of talents and education, who once sustained a fair character, who afterwards became intemperate and indulged in excessive drinking, and finally fell a victim to that vice. At what step he stood in this descending scale when the transaction took place, or when his deposition was taken, it is not easy from the testimony of the witnesses to determine.

The original deed to the defendant is not upon file, but a copy is produced, accompanied with an affidavit from the defendant that the original had been placed in the hands of his counsel, Mr. Henderson, and since the death of that gentleman he has not been able to procure it. From this copy it appears to have been executed on 4 August, 1815, and to have been exhibited for probate at May Term, 1816, the term succeeding that at which administration on the estate of the intestate was granted to the plaintiff. The will mentioned as having been prepared for him by the witness Bryant is not produced, nor any account given of it. If in existence, it would have been a very important paper to confirm or counteract Bryant's statements—and if in existence, it must be presumed, from the control which the defendant had over the affairs of the intestate, to be in his possession.

After all the testimony had been taken, and these exhibits filed, the cause was set down for hearing and came on to be heard before the judge of the court of equity for the county of Rowan at April Term, 1825, of said court, when his Honor was pleased to direct an issue in the following words to be submitted to a jury: "Was the deed of gift mentioned in the plaintiff's bill from Burch Cheshire to Aquilla (462) Cheshire fairly or fraudulently obtained?" And a jury being charged with the trial of said issue, returned a verdict that the said deed was fraudulently obtained. A rule for a new trial was granted, which was held over until October Term, 1826, when it was made absolute. The cause was continued until October Term, 1828, when by consent of parties it was removed to the court of the adjoining county of Davidson. In that court at April Term, 1830, the same issue was again submitted to a jury, who also returned a verdict that the deed of gift mentioned in the plaintiff's bill, from Burch Cheshire to Aquilla Cheshire, was not fairly, but fraudulently, obtained. Thereupon the court ordered that the defendant should enter into a bond with good surety, payable to the plaintiff, in the sum of $500, for securing the payment of the hire of the negroes in contest; and that on his failing to do so, the sheriff should take the said negroes into his custody and hire them out until the next term, taking bond and surety for the forthcoming of the negroes. It does not appear that any motion was made for a new trial of the issue, or for any order of the court to set aside the verdict; but at the next term the same issue was again submitted to a jury, and they also found that the said deed of gift mentioned in the plaintiff's bill, from Burch Cheshire to Aquilla Cheshire, was not fairly, but fraudulently, obtained. Upon the trial of this issue it appears from the transcript that the judge instructed the jury that they were not at liberty to find the same against the defendant upon the testimony of a single witness, unsupported by circumstances furnished by the testimony of other witnesses; that the defendant, after the last mentioned verdict was rendered, moved to have it set aside, and to have a new trial awarded, because the said verdict was contrary to the weight of evidence; that this motion was overruled; that the defendant thereupon insisted that the plaintiff's bill ought to be dismissed because the testimony of the only witness relied upon to prove the fraud was not supported by circumstances furnished by the testimony of any other witness. (463) This objection was overruled, and thereupon the presiding judge did declare and decree that the deed made by Burch Cheshire to the defendant Aquilla, bearing date August, 1815, for the negro slaves Sam, Dennis, Rachael, and Rachael the younger, was obtained by fraud, and that the said defendant do surrender the same to the clerk of this court, to be canceled; that the defendant do deliver up to the plaintiff Dennis

and Rachael, the only survivors of these slaves, and Baal, the offspring of the other, Rachael, on the plaintiff entering into bond and surety to have them and their issue forthcoming to answer the final decree of the court, and to pay their hires to the defendant in case the final decision of the court should be in his favor; that the clerk and master should ascertain and report the value of the hire of the slaves since they had been in the defendant's possession; whether any, and, if any, which have died; whether they have had increase, and, if so, the names and ages of such increase; whether the defendant is entitled to any credits, and, if so, the amount thereof; and that the cause be held over for further proceedings. And it was further ordered that the master take an account of the value of the other property contained in the said fraudulent deed. Several other interlocutory orders, which it is not necessary particularly to recite, were subsequently passed respecting the safe custody of the property. A petition was then filed to rehear the order made at April Term, 1825, directing an issue of fact to be submitted to the jury; also to rehear the decision of the judge on the motion for a new trial of the issue at October Term, 1830, and the declaration and decree of his Honor at the said term, pronouncing the deed to be fraudulent, as hereinbefore stated. This petition was granted, and a report having been also made by the clerk, and exceptions taken thereunto, the cause has been removed into this Court for a final adjudication.

On behalf of the defendant it has been insisted, on the rehearing, that the interlocutory order for submitting an issue to a jury was
(464) contrary to the established rules of a court of equity. It is urged that, according to these rules, wherever the defendant's answer positively denies the allegations in the plaintiff's bill, and these allegations are supported only by the testimony of a single witness, the court will neither make a decree against the defendant, nor send the case to be tried at law; that in this case there was nothing more than the positive assertion of one witness and a positive denial by the defendant, and that the witness whose assertion is the sole foundation of the plaintiff's cause shows himself by his own statement wholly destitute of that integrity which should give him a claim to credit. Of the first part of this proposition we entertain no doubt. Where the denial of a defendant responsive to the plaintiff's charge is clear, precise, and positive, and it is met by the assertion of one witness only, equally clear, precise, and positive, the court will not make a decree for the plaintiff unless circumstances appear showing, not, indeed, absolutely that the truth is with the witness, but that there is a strong moral probability that his statement is true. With regard to the next part of this proposition, we find much contradiction in the books, and some difficulty in extracting from them a

distinct rule for regulating the discretion of a court in awarding an issue. On the other hand, it seems to us that the rule not to decree against the answer upon the unsupported testimony of a single witness would be broken down if whenever such a conflict existed it could be left to a jury to decide whether greater credit should be given to the witness or to the party. But, on the other hand, to order an issue only where the circumstances attaching credit to the assertion of the witness clearly overbalance the credit due to the denial of the party is calling on a jury where the chancellor needs not its assistance, but has sufficient matter whereon to found a decree. Perhaps it is impossible to lay down a rule in precise terms, and some latitude must be allowed for the exercise of a sound discretion. It may be enough to say that there ought to be some circumstances giving a preponderance to the testimony of the wit- (465) ness, independently of the suspicion against the answer arising from the interest of the party, before an issue should be awarded; but it is not necessary that these circumstances should be sufficient to produce a clear conviction on the mind of the chancellor against the answer. If his inclination upon these circumstances be in favor of the witness, but his conscience is still in doubt, he may with propriety order an issue, or tender one to the defendant, who may accept or decline at his peril. In this case there were circumstances tending strongly to confirm the testimony of the witness, fully sufficient, nay, demanding a decision in conformity to that testimony, but for the admitted participation of the witness in the base fraud charged. I shall name but a few that seem to us natural. The others, though also much insisted on in argument, were not regarded as of much weight. The hour at which the transaction took place is calculated to give support to the narrative of the witness. According to the testimony of Hainline, it must have been between 11 and 12 o'clock at night, long after the period at which it is customary for the plain farmers of our country to retire to repose, and long after old age and infirmity are wont to seek in sleep relief from weariness and care. The parties did not arrive at the house until two hours after dark, and from one to two hours elapsed afterwards before the witnesses were called in to see the execution of the instruments. The time was peculiarly fitted for playing off the infamous trick stated by Bryant upon a man of 80 years of age, of weak sight and infirm health, and no reason is given, if the purpose was an honest one, for selecting an hour so unusual for the transaction of business. This circumstance derives more weight from its being in direct contradiction to the defendant's answer, who, aware of the suspicion it ought to excite, untruly states that the deeds were executed before early bedtime. But the other circumstances stated by Hainline are far more strong. This witness and Sheets, ac-

(466) cording to the defendant's answer, were the very persons selected by the old gentleman to be the witnesses of this transaction Yet after their arrival at the house, the defendant himself, who had brought them thither, in pursuance of the intestate's request, and for the very purpose of attesting what should take place, asks them out of the room in order that the old man might be left alone with Bryant, and they do not return for an hour or two, nor until they are wanted for the purpose of seeing or hearing acknowledged the formal execution of the papers. If Bryant's statement be true, we see at once an adequate motive for these witnesses being out of the way, while he shuffled off one of the papers and substituted another in its place. If his statement be not true, and the transaction was fair, the proceeding is wholly unaccounted for and unaccountable. There is no proof that there was any other individual in the house except the old man, Bryant, the defendant, and these two witnesses; all, according to the defendant's account, intended to be fully cognizant of what should take place, and relied upon to keep it a secret so long as he should live, in order to prevent an interruption among his children. The difficulty, therefore, in ascertaining the truth of the controverted matter of fact did not arise from the want of circumstances to support the positive evidence of Bryant, but solely in deciding what degree of credit was due to the witness himself. As an acknowledged accomplice in the criminal act, he was of course obnoxious to strong suspicions. Yet he was a competent witness, and his tale rendered highly probable by corroborating facts, testified to by witnesses above suspicion. We think that the court acted right in leaving it to a jury, knowing the witness, and knowing the defendant whose answer was relied on, to pass upon the credit of which, under all circumstances, was due to the testimony of the one and the denial of the other.

We are by no means satisfied with the general terms in which this issue was expressed. When a judge wishes his conscience informed upon any matter of fact, the issue should be so framed as to present that fact precisely to the jury. Whether a deed has been fairly or fraudu-
(467) lently obtained is a general and indefinite issue, which might involve matter of law as well as of fact. But on looking into the instructions given by the judge to the jury on the last trial of the issue, and into the motion to dismiss the bill, we cannot but see that, however vague may have been the terms of the issue, it was treated by all as one specific in its nature and embracing the naked fact in dispute.

The Court, therefore, does not reverse, but, on the contrary, affirms the interlocutory order for the issue; nor does it see any reason to disapprove of the decision of the judge refusing a new trial. Three verdicts had been rendered all one way, and all founded upon sufficient proof, if Bryant was entitled to credit, and after thirty-six disinterested

freeholders, selected by the parties, had on their oath declared that they believed him, it could not have been permitted to the judge to ask more for the satisfaction of his conscience in this respect.

As to the interlocutory order which was made at October Term, 1830, so far as the same declared the deed obtained by the defendant to have been obtained by fraud, and decreed the delivery of the negroes, and directed the master to take an account, the Court doth approve thereof. (His Honor then proceeded to correct some miscalculations in the report which it is unnecessary to state.)

PER CURIAM. Affirmed.

WHITLOCK ARNOLD v. CLEMENT ARNOLD.

A contract fairly made, but under a misapprehension of its terms and of the price, will not be specifically executed unless the defendant by his subsequent act has ratified it, and thereby made it unconscientious in him to refuse its fulfilment.

THE bill was for the specific performance of a contract for the sale of certain slaves, which was stated to have been to this effect: That the defendant owned a female slave, who then had six children, and was expected shortly to have another, and agreed, if allowed to (468) select at his choice three of the children to be kept by himself, to sell the mother and the remaining four children, including the unborn one, to the plaintiff at the price of $1,000; whereof $100 was to be and was paid down, and the balance payable upon the delivery of the slave, which was to be made as soon as the mother should recover after the birth of the next child. The bill and a supplemental bill further charged that afterwards the plaintiff paid $300 more on the contract, but that the defendant refused to convey, and had sold three of the children, and another had been sold under execution against him, and insisted that by such sales the defendant had made his election of the three he had the right to choose, and that the value of the fourth should be applied towards the satisfaction of the purchase money.

The answer admitted an agreement to sell, but denied that it was at that price. The defendant stated that he understood the price to be $1,300; but discovering that the plaintiff understood or pretended it to be $1,000, in a few minutes after making the contract, he declared that he would not comply, and offered to return the sum of $100 then paid, which the plaintiff, insisting on the bargain as claimed by him, refused to receive, and he then deposited it with a third person for him. The defendant stated the value of the slaves to be $1,300, and said the subsequent pay-

ment of $300 was on other demands he had against the plaintiff, and he insisted that the contract ought not to be executed, or, if executed, that the larger price should be allowed.

The proofs sustained the statement of the bill as to the terms of the contract; but the witnesses all stated that the defendant alleged immediately after it was closed that he had misconceived it, and offered to return the money he had received, and gave the plaintiff notice that he would not stand to it. Two or three days afterwards, however, upon being assured by a person who was present that the bargain was as alleged by the plaintiff, the defendant said he would abide by it, and about a month afterwards received the further payment of $300
(469) on it, without objection or stating that he claimed a larger price than $1,000, and pending this suit he had received further payments, expressing in some of his receipts that they should be without prejudice. Several witnesses stated that the negroes were worth more than $1,000.

Mendenhall and Winston for plaintiff.
Nash for defendant.

RUFFIN, C. J., after stating the pleadings and proofs: If this case stood upon the original transaction, although the evidence establishes the contract as alleged by the plaintiff, the Court would not give the relief sought. It would be unconscientious to insist on an agreement into which the defendant had been surprised, and at a price below the value, although the inadequacy be not so unreasonable and glaring as of itself to prevent the Court from exercising this jurisdiction. But the subsequent acts of the defendant ratify the contract, as understood by the plaintiff, independent of his declaration to the witness that he would comply with it; for he knew how the plaintiff construed the bargain, and in silence received payments from him, which must be taken as giving the plaintiff to understand that he yielded his own objections. In this position of the affair the want of conscience will be on the other side, if the agreement be not performed, unless the price be altogether inadequate. Upon that point the evidence is that the price was not the full value; but no witness says that it was so unreasonably low as to bespeak imposition. Indeed, the number and ages of the negroes show that no great advantage could have been made. The plaintiff is therefore entitled to relief upon it. The defendant must elect to take those negroes which he himself sold, and as to those sold under execution, the most valuable must be allotted to him, and the other, at the true value, must be a credit to the plaintiff against the balance of the purchase
(470) money. The master must inquire what slaves have been thus sold

by the defendant, or for him, and when, and the value of those sold under execution; and also take an account of the balance due for the purchase money, computing interest from the time it was payable; and also an account of the hires and profits of the negroes while in the defendant's possession, making him just allowances for their maintenance, and after taking all the accounts, ascertain the balance that may be due on the one side or the other.

PER CURIAM. Direct an account.

Cited: S. c., 21 N. C., 111.

MARY B. GILLIS ET AL. v. JOHN B. MARTIN.

1. A memorandum given by the bargainee at the time of receiving an absolute deed, whereby he stipulated that if the land was sold within two years he would refund to the bargainor the excess received over the purchase money, and interest together with the costs of repairs, unexplained and without evidence to the contrary, makes the deed a mortgage.
2. On an appeal in equity the Supreme Court is confined to the proofs upon which the decree sought is to be reversed was founded.
3. An answer replied to is evidence for the defendant only when it is responsive to the bill.
4. An agreement at the execution of a mortgage that in default of the debtor it should become absolute is never a bar to redemption.
5. A mortgagee in possession is entitled to the costs of repairs and interest thereon.
6. But generally it is otherwise as to improvements, because by allowing for their cost, the difficulty of redemption is increased.
7. But where the mortgagor, thinking himself to be the owner, *bona fide* makes improvements which exhaust the rent, he is allowed for their costs.
8. Upon a bill for redemption, a sale is never ordered unless by consent. It is otherwise when a foreclosure is sought.

THE bill was filed by the widow and heirs at law of Malcolm Gillis for the redemption of a town lot in Lawrenceville, and a piece of land conveyed by him to the defendant, by an absolute deed, dated 21 November, 1822, which the plaintiffs alleged was intended only as a security for a debt of $169, which they said had been discharged by the profits that had come or ought to have come to the defendant's hands. The character given to the conveyance was founded on a written agreement of the defendant, of the same date, in which he stated that he had pur-

chased the premises at the price of $169, but that if sold within two years for more than that sum and the interest on it, and such necessary repairs as might be done on the house, he would pay the surplus to Gillis.

The answer admitted the agreement, but denied that it was intended to make the deed merely a security, and averred that the purchase was an absolute one. The defendant gave this account of the transaction:
(471) That Gillis was indebted to him in the sum of $69, and to secure the payment had made a deed of trust for the premises in dispute; that he was about removing to Alabama, and was unable to pay the defendant, or remove without selling the land, which he could not effect to anybody else, and that at length the defendant was prevailed on to purchase, and give $100 more than his debt, which was the full value, upon which he surrendered the deed of trust and took an absolute conveyance; that after the contract was completed and the deed executed and delivered, Gillis mentioned that his family might be dissatisfied at the price, and requested the defendant would agree to sell the premises and pay him the surplus, which he readily agreed to, as he only wanted his money and interest, and had made the purchase only to oblige the other, and that thereupon he executed the writing, that it might satisfy the family. But that it was not at all understood that the paper was to be connected with the deed, or in any event give the right of redemption, or change the purchase from an absolute one, or have any effect but to give him a claim to the surplus of the money that might be had upon a resale, after discharging the sum advanced by the defendant. The answer averred that Gillis had before applied for further advances, and to secure them by mortgage, which the defendant refused; that Gillis then, wishing to remove from the State, determined to sell, and made the sale to the defendant. The defendant further stated that he made rpeated efforts to sell, but was unable to do so at any price, up to August, 1825, at which time the houses having become ruinous and untentable, he made some repairs, and personally occupied them, and that believing the absolute property to be in himself, he had since erected several outhouses, and made such repairs and additions as were indispensable to the comfortable occupation by his family.

To the answer there was a general replication, and the cause was then set down for hearing, and was heard without proofs on either side, and a decree made by DANIEL, J., declaring that the plaintiffs
(472) had a right to redeem, and referring it to the master to take an account of the sum due on the mortgage, including necessary repairs, deducting therefrom the rents and profits.

The master reported, and submitted two views, in the first of which he gave the defendant credit for repairs made within the two years limited in the agreement, and charging him, after the subsequent improve-

ments, an improved rent, upon which he found a balance due to the defendant of $44.93. In the second, he gave him credit for all the repairs and improvements, and charged the like rent, upon which he found the balance to be $746.55. The master reported that the defendant endeavored to sell or lease the premises, but that he could get neither a purchaser nor a tenant until 1824, on account of their uncomfortable situation; that he made some repairs, and then got a rent of $6, and that soon afterwards he entered into possession himself, and made considerable repairs and improvements, so as to make the rent worth $35; that all the repairs and improvements were necessary for a convenient and comfortable residence, and were made by the defendant with that view.

The cause came on again in the Superior Court, upon a motion for further directions, when the report was confirmed *pro forma,* according to the first view submitted by the master, and a decree pronounced accordingly, from which the defendant appealed to this Court.

No counsel for plaintiff.
Mendenhall for defendant.

RUFFIN, C. J., after stating the pleadings and report as above set forth: For the defendant it is insisted that both decrees are erroneous, for that the purchase was absolute; but, if not, that the defendant had a right to make the improvements, or, at all events, is not to be charged with rents as for those improvements.

The case is not free from doubt upon the first point. The character of the conveyance is to be determined by the intention of the parties, and if that, however ascertained, was that it should operate as a security, the Court so regards it, and the debtor will be entitled (473) to redeem. The difficulty is always in ascertaining the intention. Here the instrument called by the plaintiffs a defeasance is admitted in the answer, but the defendant denies that it was given with the view of turning his purchase into a security. For the purpose of supporting that assertion he states that the price mentioned in it was a full one; that he then gave up a former and more effectual security for the debt which Gillis owed him, which he would not have done if he had considered that he was only taking a mortgage for that and the additional sum then paid, and that Gillis was about removing to distant parts, and had no expectation or wish to redeem the premises, and therefore cannot be supposed to have stipulated for it. These circumstances would be very strong to repel the inference, from the words of the agreement, if they appeared in a way for the Court to take notice of them. But they do not. It nowhere appears that the defendant ever had a deed of trust. It is true that upon the evidence before the master, upon the taking of the account,

it appears that $169 was the full value, and that Gillis was about to remove to Alabama. But the Court is confined, on an appeal, to the proofs upon which the decree impeached for error was founded. When the decree for redemption and an account was made, there were no proofs but the exhibits and the defendant's answer; and the answer, after replication, is not evidence for the defendant except as it is made so by discoveries called for in the bill, and which are responsive to direct charges or special interrogatories. Here the bill charges nothing but the execution of the agreement, which is appended to the bill, by force of which alone the right to redemption is claimed, and interrogates the defendant as to its execution. That the answer admits. The other circumstances brought forward in the answer are new matters, and must therefore be proved by the defendant before they can vary the decree.

Confining ourselves to the instrument itself, the first decree pronounced in the Superior Court seems to us to be correct. The (474) transaction cannot be regarded as a sale, accompanied by an agreement for a repurchase by the vendor, upon which he must come strictly within time; for nothing of that sort is pretended on either side. If it were so, it would be supported, though the Court watches such agreements, and construes them to be securities unless a contrary intention be manifest from the circumstances. *Poindexter v. McCannon,* 16 N. C., 373. But here no payment by Gillis is stipulated for, to be made at any time, as a price for the land. But it is contended the agreement was not for redemption, which might be had at any time, but that an eventual arrangement of property was contemplated, and that this was at least a conditional sale, to become absolute in the defendant in the event he did not sell to another within two years. It is difficult to say that, on the face of the papers. An interest is reserved to Gillis in the sum that might be got for it upon a sale to another; which is the surplus, not above a particular sum *in numero,* but above the advances then, and the disbursements on the property, and interest. The question is, Does this show that the object was primarily to secure those advances? for if it does, then redemption and all other incidents of a mortgage follow. To us the affirmative seems true. It cannot be doubted that if the defendant had sold, he would have been obliged to pay the surplus to Gillis; nor that if Gillis had within two years tendered what was due, he would have had a right to a reconveyance, and that, not upon the ground of a stipulation to that effect—for there is none such in the instrument—but upon the equity raised for him here, by seeing that since he was to have the surplus, the defendant's interest was limited to the sum due him and beyond that Gillis was the real owner. Besides, upon a settlement either before or after a sale, what is made the basis of it? The debt and interest, and the outlays for necessary repairs and interest.

The defendant, then, does not go into possession as owners generally do, and erect or pull down buildings at his pleasure, but restrains himself to necessary improvements, and as to them he is to keep accounts against either the debtor or the estate; which, we think, in the (475) absence of evidence of the value of the estate, and all other circumstances, is conclusive upon the character of the conveyance originally. If it was then a security, it remains so in the hands of the defendant, although it would be otherwise in the hands of a bona fide purchaser, even with notice, upon the score of a personal confidence in the defendant to make a sale and receive the purchase money, to the application of which the purchaser would therefore not be bound to see. But no agreement at the time of the contract that the purchase shall in default of the debtor become absolute owner even at an increased price is permitted by the Courts to bar redemption, if the subject was once redeemable. *Willet v. Winnell,* 1 Vern., 488; *Seton v. Slade,* 7 Ves., 273.

The last decree was merely formal, and seems to have been made to enable the parties to bring the other speedily under revision. We think it too rigorous towards the defendant under the circumstances of the case. Every mortgagee in possession, if not bound to repair, is at least entitled to his expenditures for that purpose, and they form part of the debt on which the interest runs. *Godfrey v. Watson,* 3 Atk., 518. And so for other outlays for the preservation of the estate. *Hardy v. Reeves,* 4 Ves., 466. As to new improvements, the general rule is otherwise, but is not unyielding. 4 *Kent's Com.* It is adopted by the Court as necessary to protect the mortgagor from imposition, and from having increased difficulties thrown in the way of redemption. The creditor is not, therefore, allowed to improve the debtor out of his estate. But where the mortgagee takes possession, not only by the consent, but, as it were, at the instance of the mortgagor, and the improvement is permanent and beneficial, and, without it, the estate would be altogether unproductive, so that the mortgagor as a prudent man would make it if he were himself in possession, and the mortgagee really made it under the belief that the estate was his own, and that he was rendering the property more valuable as for himself, and not with a view of bringing the expense into account against his debtor, there seems to be a ground for (476) repelling the application of the rule. The principle upon which it is founded does not reach such a case; which stands rather on another, that he who takes benefit by the labor or money of another person, not laid out against his will or his interest, shall make compensation. Upon this ground improvements were allowed for by this Court in *Bissell v. Bozman, ante,* 229, when last before us, because they were proper, and Bozman, at the time of making them, deemed himself the owner, and it was held to be otherwise only upon a nice legal construction. There is no

doubt, upon the evidence before the master in this case, that either the defendant's was a purchase or that he conceived it, and with much reason, to be so; and that he acted with good faith in his endeavor to sell, before he laid out more money, and also in making his expenditures. It is in proof that the sum he advanced was a full price; that the debtor was then removing and did remove to Alabama, and therefore had no actual intention to redeem, but expected at most a sale, and that he could not get a tenant at any price without improvements, and that all which the defendant made were absolutely necessary to make the place even comfortable. These circumstances seem to render the case peculiar, and to entitle the defendant to be protected in his expenditures, for as they were incurred honestly, he may claim at least to be a bailiff or steward, endeavoring to serve the owner, instead of a creditor, striving to make a pledge his own property. Moreover, the difference is not very great, for the first view taken by the master could not possibly stand, since it charges the defendant with a rent the premises ought to bring both under the repairs and improvements. The rent thus given exceeds the interest upon both the debt and the repairs and improvements, and the proof is that if repairs alone had been made, no tenant could have been had. The whole rent is therefore justly attributable to the improvements, and will nearly discharge the cost of them, so as to make the balance
(477) of the account consist almost entirely of the debt, repairs, and interest, for which the mortgaged premises are undoubtedly answerable. But we think the case upon its own circumstances forms an exception, if any can, which appeals to the sound discretion of the Court to make those allowances, upon the footing of fair dealing between these parties, and as no exception is taken to the estimates of the master, as contained in either view submitted by him, but only to the principles upon which they are respectively based, the former decree must be reversed, and the report of the master, finding the balance due to the defendant on 15 March, 1833, to be $746.55, as exhibited in the account annexed to the report, must be confirmed, and a decree made accordingly; that the plaintiff pay the same to the defendant within four months from the day of making this decree, together with the costs of his suit in the Superior Court; and upon such payment being made by the plaintiff, Mary B. Gillis, the widow, that the defendant convey the mortgaged premises to her by way of assignment of his title to the same as a mortgage; or, if the payment be made by the other plaintiffs, that the defendant do convey to the plaintiffs John E., Amanda A., and Eliza M., the children and heirs at law of the mortgagor; and in default of such payment, the bill to stand dismissed.

Upon a bill for foreclosure, the practice in this Court has been to decree a sale as being more advantageous to the debtor, and as the credi-

tor is seeking in that suit the recovery of his debt. But upon a bill to redeem, a sale cannot be ordered except upon consent, because the mortgagee ought not to be compelled to relinquish the estate upon any other terms than receiving his whole debt, which he might ultimately get by reception of the rents, and may not by a sale. *Troughton v. Binkes,* 6 Ves., 573.

PER CURIAM. Decree reversed.

Cited: Lyerly v. Wheeler, 38 N. C., 601; *Hughes v. Blackwell,* 59 N. C., 77; *Jones v. Boyd,* 80 N. C., 260; *Coates v. Wilkes,* 92 N. C., 382; *Bunn v. Braswell,* 139 N. C., 140; *Alston v. Connell,* 145 N. C., 6.

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ROBERT B. MITCHELL ET AL. v. NATHANIEL ROBARDS, EXECUTOR OF JOHN WASHINGTON.

1. No decree can be made against an executor unless assets are admitted by him or found upon a reference; and where he is made a defendant by *sci. fa.* after establishing the right of the plaintiff, the proper step is to direct an inquiry as to assets.

2. Interest is not compounded against a guardian for the time when the funds of the ward remain in his hands after the relation has ceased.

THIS was a bill originally filed against the testator of the defendant for an account of the assets of John C. Russell, who had appointed him executor of his will and guardian of the plaintiffs, his children. Pending the suit, Washington died, and the present defendant was made a party by *scire facias.*

At a former term of the court there had been a reference directed, and the master had reported. Both parties excepted to the report for matters purely of fact, and a decree was passed.

At this term the defendant filed a petition to rehear that decree, and assigned two errors as existing in it:

1. That the master had charged him with compound interest from the death of his testator up to the time of entering the decree.

2. That by the decree execution was awarded of the goods and chattels of his testator in his hands, when he never had been charged with the receipt of anything, and never had an opportunity of answering as to the receipt and disbursement of the assets by him, and when no account of his administration had been taken.

The petitioner stated that he never had notice of the objectionable parts of the decree until after the close of the term in which it was made,

as the final decree, upon the order overruling some exceptions and sustaining others, was drawn up upon a report of the master, upon directions to him to amend his first report according to the order upon the exception, and that this last report, as well as the final decree, was drawn up after his counsel had left the court to attend the circuit.

(479) *Devereux for petition.*
Badger and W. H. Haywood, contra.

RUFFIN, C. J., after stating the pleadings and report: The principal of computation acted on by the clerk is contrary to the rule laid down in *Ryan v. Blount,* 16 N. C., 382, and *Wood v. Brownrigg,* 14 N. C., 430, and the decree must be opened in this respect and the account referred again to the master to compute simple instead of compound interest from the death of Washington, the guardian.

The last point is of more consequence as a general question. The bill was filed against Washington in his lifetime, and upon his death was revived against his executor by *scire facias,* and not by bill. The *sci. fa.* does not suggest assets in the hands of the executor, nor call for an answer, nor could it. Upon the hearing, a decree was made that Washington was indebted to the plaintiffs in a certain sum, and that they might have execution therefor against the assets in the hands of the executor. Such decrees have crept into use of late unadvisedly, owing to the manner of reviving by *scire facias,* which does not admit of an answer by the executor acknowledging assets, or stating an account. But they are against principle, and will not in future be passed. The primary jurisdiction of the Court is *in personam,* and although our statutes allow executions in equity, the nature of the decree is not altered, but only that process is substituted, at the election of the party, for that of contempt. The decree is against the defendant personally, regarding him as a trustee by reason of the fund in his hands applicable to the plaintiff's satisfaction. And no decree ought ever to be given for the raising the money unless the assets be admitted by the defendant or found upon a reference. Of course, this makes a reference indispensable in every case of a revival by *scire facias,* which should make plaintiffs more particular about the mode of reviving, for it increases the expense certainly, and they may lose the important advantage of fixing the defendant with assets by confession in an early stage of the cause, and before (480) they have been applied to other creditors. Indeed, the Court has felt a difficulty in saying that there could be any account of the assets ordered upon such a revivor, as this mode seems only to be proper when the executor is a formal party, and no relief prayed against him. But it is understood that the practice has been otherwise, and

therefore a reference is allowed as incidental to the relief. Certainly an absolute decree cannot pass until assets be found; and we should not know how to treat such a decree upon an application for execution against the assets. If in analogy to the judgment at law it would be conclusive and subject the executor to payment unless he produced property. But that could not be sustained, for the rule of pleading is different. At law, a party is held to admit all he does not put in issue. In equity, it is just the contrary; and if the answer neither admit nor deny a fact charged by the plaintiff, it may be excepted to as insufficient. The object is to get the discovery. Therefore, the decree would conclude nothing but the sum declared to be due. No process ought to issue on it.

The decree must, therefore, be reformed in this respect, and a reference made to a master to take an account of the assets of the testator Washington which came to the hands of his executor, the defendant, and the disposition thereof made, and his disbursements; and if any part thereof remain in specific articles, of what the same consists, and the value thereof, and the profits made on the estate by the defendant, or any person under his authority, or that might have been made, making all just allowances, and report the same with any special matters by any of the parties required.

PER CURIAM. Order accordingly.

Cited: Sandridge v. Spurgeon, 37 N. C., 276; *Edwards v. Love,* 94 N. C., 369.

(481)

WILLIAM BUFORD v. THOMAS NEELY, ADMINISTRATOR OF WILLIS PILKINGTON, RAGLAND ROBERTS, ET AL.

1. An assignment by one of two copartners of his interest in the copartnership is a dissolution of it, because the other is not bound to receive the assignee as a partner. But where the assignment was a mere security, and it was agreed by all parties that the assignor should act in the partnership business as agent of the assignee, it does not produce this effect. And upon a bill by the assignor for an account of the partnership, the assignor and the other partner are proper parties.

2. The principal debtor is not a necessary party to a bill to settle a copartnership where the plaintiff has assigned his interest in it to indemnify the surety.

3. A sale of the joint effects in lots, made by one partner, and a purchase by him, does not divest the property of the other, and the latter is entitled to an account of the profits thereof.

THE plaintiff alleged that in September, 1815, one Hicks and Pilkington, the intestate, entered into copartnership, and did business at Lynch-

burg in Virginia; that Hicks advanced $3,000 and Pilkington $2,000, which constituted the capital; that the profits were to be divided in the proportion of three-fifths to Hicks and the residue to Pilkington, who was to be the managing partner; that the plaintiff, in March, 1816, with the consent of Pilkington, bought the interest of Hicks in the partnership; that the partnership business was transacted in Lynchburg until December, 1816, when, by consent of all parties, the goods, etc., were removed to Stokes County, in this State, where a profitable business was carried on until 1819; that in March, 1819, the plaintiff assigned his interest in the copartnership to Abraham and John Shelton (defendants), upon trust to secure Abraham and John Buford (also defendants) as his sureties in sundry debts, which were specified in the assignment; that Pilkington knew of this assignment and consented thereto, and had uniformly, after its date, until the sale hereafter mentioned, treated the plaintiff as a partner, by returning him statements of the partnership dealings, etc.; that the debts secured by this deed had been paid by the plaintiff, and the deed, as a security, abandoned by the assignees and their *cestui que* trusts. The plaintiff then charged that Pilkington, intending to defraud him, had combined with the defendant Roberts, who was a young man without capital and a clerk of the copartner-
(482) ship, and in September, 1818, had advertised the stock of goods for sale, and had, at a pretended sale, exposed them in large lots, and in conjunction with Roberts had brought them in at a nominal price, and commenced a new firm under the title of Pilkington & Roberts. The plaintiff averred that this new copartnership was conducted with the effects of the old one, and he prayed an account of the profits of both; admitting that Pilkington had paid, or was bound to pay, a part of the money due Hicks for the purchase of his interest, and submitting that he should have credit therefor, or be protected therefrom, in the final adjustment of the accounts.

The two Sheltons and the two Bufords in their answers disclaimed any interest under the assignment, and admitted that if anything was due upon a settlement of the copartnership accounts, it belonged to the plaintiff.

The defendant Pilkington, in his answer, admitted most of the allegations of the bill. He insisted that if he was liable to account at all, it was to the Sheltons under the assignment, and not the plaintiff; that his recognition of the plaintiff as a partner proceeded from the fact that he was constituted the agent of the assignees, and their *cestui que trusts*, in managing the copartnership business. He insisted that the copartnership expired on 1 September, 1818, and that not knowing where the plaintiff then resided, he did not give him notice of an intended sale, which he averred was advertised at several places, and conducted fairly,

being upon a credit of six months. But he admitted that the goods were sold in lots, and that he and Roberts had purchased nearly all of them, and that these purchases formed a part of the stock of the new copartnership of Pilkington & Roberts. He denied that profits had been made by the copartnership of which the plaintiff was a member, and insisted that the business had resulted in a heavy loss, which had absorbed the capital. He admitted that, subject to the claim of the assignees in trust, the plaintiff was entitled, and stated that prior to the assignment being executed the name of Abraham Buford had, with his consent, been inserted in the copartnership articles, instead of that of the plaintiff, for fear of embarrassment from the creditors of the latter.

The defendant Roberts joined in this answer, to which a repli- (483) cation was filed.

Pilkington filed a cross-bill, in which he insisted upon the matters set forth in his answer, praying that he might be allowed compensation for attending to the business of the copartnership and be protected from loss by reason of his suretyship for the plaintiff to Hicks, and for a decree against the plaintiff for his (the latter's) share of the loss which had taken place.

To this bill the defendant answered, and set forth an extract from the articles of copartnership, whereby Pilkington agreed to attend to the copartnership business without compensation. He denied the losses, and submitted to an account, and that Pilkington should be protected from loss as prayed by him.

Pilkington died during the pendency of the suit, and the defendant Neely was made a party to the original bill by *sci fa.* and appeared and prosecuted the cross-bill.

In the court below a reference which was to be without prejudice to the parties was directed. The master reported a balance due the plaintiff, and exceptions were taken to the report by both parties. Many of them involved simple questions of fact. Those upon which questions of law arose were the fourth of the defendant Neely because the master had rejected a claim for compensation to his intestate for managing the copartnership business.

The case was argued both upon the right of the plaintiff to an account and upon the exceptions to the report.

Badger and Devereux for plaintiff.
Nash and Winston for defendants Neely and Roberts.

DANIEL, J., after stating the material facts: The plaintiff having assigned his interest in the firm by an absolute deed, in 1816, to Abraham Buford, it is now contended by Roberts and Pilkington's administrator, two of the defendants, that the partnership was dissolved at that

(484) time by that act, and no account of the partnership transactions could be decreed after that period. It is true that a *bona fide* assignment by one partner of his share is a dissolution of the partnership, at the election of either. The remaining partners may not have confidence in the assignee, nor may the assignee choose to be concerned in trade. *Griswold v. Waddington,* 15 John, 82; *Marquand v. Manufacturing Co.,* 17 John., 535. But in this case it was expressly agreed by the parties that the partnership should continue. It was agreed by the deed of 1816 that Abraham Buford should appear as the partner, and that William Buford should act as his agent. By the deed executed in 1817 by the plaintiff to the two Sheltons in trust to secure Abraham and John Buford for their liabilities for the plaintiff, the same property is conveyed as that contained in the deed of 1816, and it is recited in the last deed that the first was considered ineffectual for the purposes intended. Abraham Buford, by agreeing that the same property should be conveyed to the Sheltons, admitted that he had no title under the first deed; or, at most, it was considered as a mortgage. It is contended that if Pilkington and Roberts are bound to account, they should do so only to Abraham Buford, or the Sheltons, who now are the owners of the share which formerly belonged to the plaintiff.

On this point the defendant's counsel has cited several authorities. When examined, they prove nothing more, where there is no collusion, than this: A creditor shall not be permitted in equity to file a bill for relief against the executor and a debtor of the testator, or against an assignee in bankruptcy and a debtor to the bankrupt, or against a trustee and a debtor of the assignor, where all the assignor's effects and debts are transferred for the benefit of all his creditors. Where there is no fraud, the creditor's remedy is against him who has the legal title. If this was not the rule, every debtor to such estates might be harassed with a bill in equity. The plaintiff does not claim as a creditor, nor is he seeking a surplus under a resulting trust arising from the deed to the Sheltons. Ever since the date of that deed Abraham Buford has
(485) not pretended to be considered as a partner in the concern, but William has always claimed to be and has been so acknowledged by Pilkington himself. It is a general rule that where a bill is brought for relief, all persons materially interested in the subject of the suit should be parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete decree between all parties having material interests. 2 Mad. C., 179. If the assignees in this case had brought a bill for an account and relief, the assignor must have been made a party to show his interest if he had any, for how would the defendant be protected against the assignor if it should turn out that the assignment was not valid. *Cathcart v. Lewis,* 1 Ves., Jr.,

463; *Ray v. Fenwick,* 3 Bro. Ch., 35. In this case all the parties have been brought before the court, and those persons who the defendant says have the absolute interest which formerly belonged to the plaintiff disclaim any interest, and expressly state that it all belongs to the plaintiff. The defendant Pilkington admits in his answer that the plaintiff had an ultimate interest, after Abraham and John Buford should be satisfied. The defendant Pilkington also admits sufficiently in his answer for us to see that he always treated the plaintiff as a partner; he made monthly returns to him of the sales, kept up a correspondence with him upon the subject of the concern, and agreed to come to a settlement with him. And we think there is nothing to prevent the defendants now accounting with him.

It is said that although Abraham and John Buford and the Sheltons now disclaim any interest, yet the Court should not let the plaintiff have the fund unless it should appear that all the creditors of William Buford, mentioned in the deed of trust of 1817, have been satisfied. The answer is that the deed of trust was to secure Abraham and John Buford for their liabilities to those creditors mentioned in the deed of trust. The trustees and Abraham and John Buford, admitting that they are satisfied, is presumptive evidence that all those creditors have been paid; it does not appear that they had not been paid. And if it should appear that they have not, I am not prepared to say (486) that would prevent the relief he is seeking.

We are of opinion that the defendant Pilkington's administrator is liable to account to the plaintiff William Buford as a partner of all the firms mentioned in the bill, and that Robert's and Pilkington's administrators are liable to account to William Buford for his part of the capital and the profits that were made on the same after the time when by the original articles the partnership expired. We consider the sale of the stock of goods made by Pilkington, and purchased by him and Roberts, a fraudulent transaction. William Buford was not divested by the sale of his interest in the stock in trade, and as the defendants Pilkington and Roberts traded upon that stock and capital, if any profits were made, three-fifths of the same belonged to William Buford.

A report having been made in these cases, subject to the opinion of the Court whether Pilkington and Roberts were bound to account, and the Court being of opinion that they are, exceptions have been filed by both parties to the said report, and the exceptions now come to be decided. His Honor here considered several of the exceptions which involved questions of fact.

The defendant's exceptions will now be considered. The first, second, and third exceptions are overruled. His Honor here stated the reasons shortly.

The fourth exception is overruled. Pilkington was bound by articles of copartnership to attend personally to the business; he did not stipulate for compensation. He is not entitled to receive remuneration for doing that which he agreed to perform, and which it was his duty as partner to transact. It has been held that a surviving partner, when there is not an express stipulation to that effect, is not entitled to charge in account a sum of money as a compensation to himself for his management of the trade, and for his time and labor; he cannot, in the absence of a positive agreement, claim an allowance for carrying on the trade. *Burden v. Burden,* 1 Ves. and Bea., 170; Gow., 380, 381. The fifth exception is overruled, as to all but the sum of $60, with interest (487) from 1 October, 1824, which is allowed for Pilkington's services and expenses in attending to the suit brought by Hicks against him as the surety of the plaintiff.

PER CURIAM. Decree accordingly.

Cited: Anderson v. Taylor, 37 N. C., 421; *Butner v. Lemly,* 58 N. C., 148, 149.

JUNE TERM, 1834

WILLIE PERRY, EXECUTOR OF STEPHEN OUTERBRIDGE v. MARY MAXWELL, EXECUTRIX OF JAMES MAXWELL ET AL.

1. A bequest of "all the notes of hand that will be remaining after paying off all the legacies hereinbefore given, which I suppose will be from twenty to thirty thousand dollars," is specific, and the legacy is to be applied to the payment of the general legacies only in the event of the undisposed of residue being insufficient for their discharge.

2. Dividends upon stock due at the death of the testator do not pass by a bequest of the stock itself.

3. In a will, the words "all my notes" include bonds as well as notes, but not judgments upon either.

4. A legacy by a debtor to his creditor of the same nature with the debt, and of an equal or greater value, is *prima facie* a payment of it.

5. But the adoption of this rule has been regretted, and there are many circumstances which repel the presumption.

6. As a general direction for the payment of debts, or if the legacy be contingent, or payable after the debt, or be specific or uncertain, or given after the debt is contracted.

7. Especially it is repelled where the debt is contingent.

8. And where at the date of his will the testator was an administrator, and upon his death without settling his administration bound to account with an administrator *de bonis non*, legacies given by him to the next of kin of his intestate are not payments of their distributive shares.

9. A legacy "in notes to be taken out of my notes and handed over," etc., is not merely a charge for its amount upon the notes of which the testator may be possessed, but is a specific legacy of securities hereafter to be ascertained.

10. But one to be paid as soon as its amount can be collected, or if the "legatee is willing to receive that in good notes he can do so," is a general legacy.

11. So also is a legacy "in notes to be paid as soon after my death," etc., there being nothing to denote that any particular notes were intended.

12. And a subsequent bequest of "all the notes that will be remaining after paying off the legacies hereinbefore given," will not make them specific, because the remainder, being uncertain in amount, indicates that the charge upon them, and not a fractional part of them, was intended.

13. Executors charged with the management of legacies to infants are entitled to commissions upon the profits; but they take them *as executors*, to be divided according to their several degrees of labor; and upon the death of one who had possession of the fund, the survivor is not entitled to another commission.

14. A gift by will of a note carries with it the interest due on it.

STEPHEN OUTERBRIDGE died in 1824, having made and published his will, which was proved by the plaintiff and by the testator of the defendant Mary, the executors therein appointed. This will was as follows:

"First of all, it is my will and desire that all my just debts be paid. Secondly, I do hereby give and bequeath to my granddaughter, Joseph Ann S. Johnson, formerly Joseph Ann S. Outerbridge, a small tract of land lying, etc.; and I do hereby give and bequeath unto my said granddaughter, Joseph Ann S., $3,917 in *notes to be taken out of my notes* by my executors hereafter named, and paid over to my said granddaughter, Joseph Ann, *as soon* after my death as it can conveniently be done. I do further give and bequeath unto my said granddaughter, Joseph Ann S. Johnson, formerly Joseph Ann S. Outerbridge, unto her and her heirs forever, all the furniture, with the clock that was in my house at the time of the death of my wife, to be delivered shortly after my
(489) death. I do hereby give and bequeath to my nephew, Stephen Outerbridge, $1,500, to him and his heirs forever, to be paid to him by my executors as soon after my death as they can collect it; but in case my said nephew is willing to receive that amount in good notes, he can do so. If my sister-in-law, Drucilla Outerbridge, formerly wife of my brother Ben, should not get married before my death, I do by these presents give unto her and her heirs forever $350, to assist her in supporting her children, etc.; but if she should get married, as aforesaid, this gift to be void. I do give and bequeath unto my niece Nancy Wherton, formerly Nancy Ballard, $250, to her and her heirs forever. I do give and bequeath unto my niece, Polly Ballard, wife of Silas, $250, to her and her heirs forever; all of which it is my will and desire that my executors shall pay over to my said sister-in-law and my two nieces as soon after my death as they can collect the money.

"Whereas, I have 50 shares in the State Bank of North Carolina, 19 shares in the Bank of Cape Fear, and 7 shares in the New Bern Bank, making 76 shares in all: It is therefore my will and desire that my daughter, Sally M. Fenner, shall have the profits arising therefrom during her natural life or until the charters of said banks may expire. I do therefore by these presents leave the said 76 shares on trust with my executors, or either of them, and I do hereby authorize and empower them or either of them to take charge of said bank stock and to draw the dividends as they shall become due and payable; and the said dividends when drawn by my said executors or either of them shall be paid over to my said daughter, Sally M. Fenner, for her own use and comfort. Whenever the charters of the said banks shall expire (if they should not be again renewed), I do then give and bequeath the said 76 shares of bank stock, which cost me $7,600, to my said daughter,

Sally M. Fenner, to her and her heirs forever. I do further (490) give and bequeath unto my said daughter, Sally M. Fenner, $12,400 *in notes, to be paid to her by my executors as soon after my death as it can be conveniently done;* that, with the bank stock, will make the sum of $20,000. I further give and bequeath unto my daughter, Sally M. Fenner, to her and her heirs forever, the following negro slaves, viz., Charles, etc. I do further give unto my said daughter, Sally M. Fenner, and to her and her heirs forever, the tract of land and the improvement and appurtenances whereon I now live. I do further give unto my said daughter, Sally M. Fenner, to her and her heirs forever, all my stock of horses, cattle, sheep and hogs, my carriages and harness, saddles and bridles, with all the furniture that was in the house where Dr. Richard H. Fenner, deceased, formerly lived, with the piano and clock, except one bed and a few other articles that did belong to said Fenner, and has been sold as his property; all of which I do give and bequeath to my said daughter, Sally M. Fenner, to her and her heirs forever. And I do also give and bequeath to my said daughter, Sally M. Fenner, my wagon and ox-cart or carts, with all my plantation utensils, blacksmith's tools, all my kitchen furniture, and also all the corn, fodder, wheat, oats, rye, cotton, etc., that may be on hand at the time of my death; and should there be a crop pitched or growing at the time of my death, it is my will and desire that the people should carry it on in the same manner as they did before my death, and all that is made I do give to my said daughter, to her and her heirs forever.

"I do now give and bequeath to my four grandchildren, who are the children of my said daughter, Sally M. Fenner, namely, Eugenia Ann, Richard Joseph, Catherine Reavil, and Stephen Outerbridge, to them and their heirs forever, all the notes on hand that will be remaining after paying off all the legacies hereinbefore given and bequeathed, which I suppose will be about from $20,000 to $30,000 worth; (491) all of which notes so remaining I do fully and freely give and bequeath to my said grandchildren, to them and their heirs forever. It is my will and desire that my said executors take into their possession the said notes left as aforesaid for the use of said children, and keep them at an interest all together, that is, not to have them divided, until the oldest child becomes of lawful age or marries; then, whatever loss may be on said notes, each of the children will have to bear their equal part. If my executors should at any time think any of the children's notes to be doubtful, I hope they will bing suit on such, and if negro property has to be sold in any case to make payment, I do hereby authorize and empower my said executors to purchase young negroes, at a price that they think will answer, and then hire out what negroes they

may purchase. I do hereby further give and bequeath unto my said grandchildren, Eugenia Ann, Richard Joseph, Catharine Reavil, and Stephen Outerbridge, to them and their heirs forever, the following negroes, viz., Eady, Nott, etc.

"In witness whereof I have hereunto set my hand and seal this 2 October, 1824."

The plaintiff in his bill stated that the whole trust had, during the life of his coexecutor Maxwell, been managed by the latter; that he had recently died, having appointed his widow, the defendant Mary, his executrix. That upon an attempt to settle the accounts of the trust fund with the defendant Mary, the plaintiff had met with difficulties which rendered it prudent that the settlement should take place under an order of the court of equity.

In specifying these difficulties, the plaintiff stated that at the death of the testator there was to his credit on the books of the State Bank $1,354.55, which consisted of dividends upon his stock, which had been received by him and transferred to his individual account. Besides which there was standing on the dividend book of the same bank (492) the sum of $800, dividends upon the same stock, which he had never given a receipt for, and transferred to his individual account; that the dividends upon the stock held by him in the banks of New Bern and Cape Fear were in the same situation, in the former to the amount of $228, and in the latter to that of $56; that these several sums, being the dividends upon the stock bequeathed to Sally Fenner, the daughter of the testator, his coexecutor, thinking her to be entitled to them as incidents to the principal legacy, had paid them to her, and the defendant Mary claimed them as credits to her testator, which the plaintiff was advised it would be improper for him to allow.

The plaintiff then charged that at the death of the testator he had recovered a judgment against one Benjamin F. Hawkins and others, upon a note for $2,600, which was collected by his coexecutor; that it was contended by the next of kin of the testator (Johnson and wife, and Jasper, who had married Sally Fenner, the daughter of the testator, and who were parties) that there being no general residuary clause, this sum constituted a part of the undisposed of residue, and was to be distributed according to the statute. But that it was claimed by the infant grandchildren of the testator as being included in the legacy to them; and if not, then that it formed a proper fund for the payment, in the first instance, of several of the smaller legacies given to the collateral relations of the testator; while, on the other hand, the next of kin contended that these legacies were a charge upon the notes of the testator bequeathed to his grandchildren. The same question also existed as to the disposition to be made of the general residue of the estate.

Another difficulty arose from the fact that the testator, a short time before his death, had taken out letters of administration upon the estate of Richard Fenner, the husband of his daughter Sally, and the father of the four infant legatees, and at the September County Court of Franklin, before the date of his will, had returned an account of sales whereby he charged himself with $1,404, which had been paid by Maxwell to the next of kin of the intestate as a debt due them (493) by the testator. But the next of kin of the latter disputed this payment, alleging that it was a debt due by the testator to his daughter and her children, and was discharged by the large legacy left them.

The plaintiff then charged that Maxwell had at March Term, 1827, returned an account of his administration to the County Court of Franklin, in which, after paying sundry debts and legacies, and retaining the sum of $968.76 for his commissions, he had charged himself with $54,785.74, being the residue of the testator's notes, of which $8,155 was interest. And that at March Term, 1830, of the same court he had returned another account in which, after crediting himself with sundry other debts paid, and retaining $495.74 for his commissions, he has charged himself in favor of the infant legatees with $62,264.46, of which $7,478 was interest which had accrued since the return of the first amount. The plaintiff stated that Maxwell had in the management of the fund in his hands performed the duties of guardian to the grandchildren of the testator, and that the above charges of commissions included his compensation for those services; and the plaintiff prayed the court to declare whether Maxwell and himself were testamentary guardians of those children, and whether the above-mentioned charges of commissions were correct. Connected with this subject, the plaintiff averred that Maxwell had, upon the idea of his being the guardian of the infant legatees, dealt with the notes and bonds bequeathed them as guardians, renewing them and compounding the interest so as to affect them with usury, as the plaintiff feared, in case it should turn out that he was not clothed with the powers of a guardian; and that the defendant Mary insisted upon her right to discharge the above-mentioned balance of $62,264.46 by surrendering to the plaintiff the specific bonds or notes, which the latter admitted he was willing to receive, if they had not been affected with usury by the acts of her testator; and upon this point the opinion of the Court was prayed.

Several minor points were made in the bill and at the bar. (494) The facts upon which they arose need not be particularly stated, as they appear upon the opinion of the Court.

While the cause pended in the court below, Mrs. Maxwell procured an order to be made whereby the notes and bonds in her hands were

placed in the master's office, and he was appointed a receiver to collect such of them as the plaintiff might direct. There was no dispute upon the facts, the answers being drafted merely to raise the questions upon which the parties differed.

Badger for plaintiff.
Winston for the grandchildren.
W. H. Haywood for the executrix of Maxwell and for the next of kin.

RUFFIN, C. J. The bill is filed by the surviving executor of the will of S. Outerbridge, against the next of kin and some of the legatees of the testator and against the executrix of J. Maxwell, deceased, who was also one of the executors of Outerbridge. The object of it is to have the construction of the will in several particulars settled and also to be directed as to the principles upon which the complainant shall settle with the representatives of his former coexecutor, who in his lifetime transacted most of the business of the estate, and at the time of his death had in his hands upwards of $60,000 belonging to it. It is a proper bill, as the points are all of them of some consequence to those interested, and some of them of sufficient difficulty to authorize the plaintiff to ask the advice of the Court.

The will is exhibited and has no general residuary clause. The testator, nevertheless, left a considerable undisposed residue, as some of the parties contend, to be divided amongst his next of kin, and, as others contend, to be applied in satisfaction of pecuniary legacies, while questions are also made whether certain parts of the property are specifically disposed of, or fall into the residue.

(495) The testator by his will gave to his daughter, Sarah M. Fenner, 50 shares of stock in the State Bank, 19 in the Bank of Cape Fear, and 7 in the Bank of New Bern, all of which he owned at the date of his will and of his death, on which he directs his executors to receive the dividends during the continuance of the charter and pay them to his daughter, and if the charters should not be renewed, then to transfer the shares to her. At his death dividends had been declared on the Cape Fear Bank stock to the amount of $228, which had not been paid to him, but stood to his credit in the dividend book of the bank; this was also the case in the Bank of New Bern, to the amount of $56, and in the State Bank to the amount of $800. Besides that sum thus declared, in the State Bank, and standing on the dividend book, the sum of $1,354.55, which had been before declared as dividends of that stock, had been transferred by the testator to his personal credit on the individual ledger as a deposit. Those sums were received by Mr. Maxwell, and under the idea that they passed with the stock bequeathed to Mrs. Fenner, he paid

the same (in the whole, $2,438.55) to her. One of the questions between the parties is, whether these sums did so pass, or are undisposed of.

It is very clear that the stock did not carry any part of the dividends in either bank. As to the sum of $1,354.55, that was no longer a dividend. It had been received and deposited again as cash, subject to the testator's check in the common course of business. The remaining sums were not precisely in that state, but they had been severed from the stock by being declared. They were not profits accruing, but had accrued, and no more would pass then as a part of the stock than a crop made on land and gathered would by a devise of the land. Upon a transfer of the stock to a purchaser, dividends declared do not follow, unless bargained for, and then the purchaser gets them in the name of his vendor. But the particular words of this will positively exclude the idea, for the executors are directed to receive the dividends as they shall become due, and payable for Mrs. F. These sums were therefore improperly paid to her under a mistake, and she must account for them; (496) and, in the event of her inability to do so, Mr. Maxwell's estate will be obliged to make them good to the persons entitled to the benefit of the residue in the settlement of the estate.

At the death of the testator, he had obtained judgment on a bond given to him by B. T. Hawkins, which remained unpaid, and was inventoried by the executors, for the sum of $2,504.12, due at July, 1820. It was received by Mr. Maxwell, and retained by him as part of the legacy to the testator's four grandchildren, Eugenia, Richard, Calhoun, Stephen, to whom he bequeathed "all his notes of hand." The claim to it is now made for the grandchildren, while the next of kin insist that it is not included in their legacy, but is undisposed of. Of this latter opinion is the Court. *Notes of hand* may well include promissory notes, properly speaking, single bills and bonds. It is a name given generally by the unlearned, in common, to all those evidences of debts which are verified under the hand of the debtor, and which the creditor keeps. It is not an apt legal term to describe a debt by judgment; nor is it ever used in that sense as its popular one. This debt, therefore, falls into the residuum, and is to be accounted for as such.

The questions of the most importance to the parties, and of the greatest legal difficulty, relate to the disposition to be made of this residue. The testator's next of kin are Mrs. Fenner and Mrs. Johnston. To the latter he gives a legacy of $3,917, "in notes, to be taken out of my notes by my executors and paid over to her as soon after my death as it can conveniently be done." To a nephew, Stephen Outerbridge, he bequeathed $1,500 "to be paid as soon as the executors could collect it, but if he should choose to receive the amount in good notes, he can do so." Then follow a conditional legacy of $350 to his brother's widow, Drucilla,

and a legacy of $250 to his niece Polly, which he directs the executors to pay to them as soon as they can collect the money. The next legacy is to the daughter, Mrs. Fenner, of the bank stock, which, he remarks, cost him $7,600. He adds, "I do further give to my said daughter
(497) $12,400 in notes, to be paid to her by my executors as soon after my death as it can be conveniently done; that with the bank stock will make the sum of $20,000." In the same clause he proceeds to devise to her lands and bequeaths a number of slaves by name. He adds, "I further give to my said daughter all my stock of horses, cattle, sheep, hogs, with all the furniture at a particular house, and also my wagons, carts, with all my plantation tools, all my kitchen furniture, and the crops of corn," etc.

The next clause contains the disposition to the children of his daughter, Mrs. Fenner. It is: "I do give and bequeath to my four grandchildren, namely, E., R., C., and S., all the notes of hand that will be remaining after paying off all the legacies hereinbefore given, which I suppose will be about from twenty to thirty thousand dollars worth; all of which notes so remaining I do fully and freely give to my said grandchildren. And I desire my executors to take into their possession said notes, left for the use of my grandchildren, and keep them on interest all together, that is, not to have them divided until the oldest child becomes of age or marries; that whatever loss may be on said notes may fall equally on all." He then gives authority to the executors to take negroes for such of those debts as they might deem it necessary to call in, and hire them out for the children; to whom he adds a legacy of a number of slaves by name.

A short time before the making of the testator's will he administered on the estate of Richard Fenner, the late husband of his daughter and the father of the four grandchildren to whom the foregoing legacies are given, and was indebted to them for their distributive shares in a sum which amounted to $1,404.22, in 1828, when it was paid. It is contended for the next of kin that those debts were satisfied by the legacies, and are not payable out of the residue. That all the legacies of the will are specific or expressly charged on the notes after the payment *thereout* of all the previous legacies, and, by consequence, that the residue is only chargeable with the other debts of his testator, and after satisfying them is to be distributed by law among the next of kin.

(498) It is extremely probable from the large sum due to the testator, upon bonds and notes, and his habits, as to be collected from his language throughout the will, of keeping his moneys at interest, that he contemplated on having very little of his substance in cash, and that he expected all his legacies to be paid either in securities or in money to be collected on them, after his death. If this be true, he meant the disposition in favor of his grandchildren as it has been understood by the

executors, as a residuary clause. That is, he thought it would in fact pass all that such a clause would in law pass. But he has not so framed his will as to allow the Court latitude to adopt that construction.

The several questions made are therefore to be decided upon the particular terms of the several bequests.

It is true that if one be indebted and give to the creditor a legacy of the same nature with the debt of a greater or equal value, it is, under circumstances, taken to be a satisfaction. The rule is an old one, and cannot now be denied. It was adopted on the idea that it was the intention of the testator to pay the debt by the legacy; for certainly, like all other questions upon wills, the construction must be according to the intention. Hence many of the chancellors have regretted the decision, and denied that it accorded with the intention, because there is no reason why a testator may not mean to give a bounty to one whom he owes, and also pay a debt to one for whom he feels kindness enough to make him a legatee. None have, however, ventured to decide against the rule, when the case fell clearly within it; as if the debt be for a certain sum of money, and the legacy, if an equal or larger sum of money, *simpliciter,* that is, payable unconditionally and immediately, or when the debt would be due. But regarding the intention to which the rule was formed as being but equivocal, any, the least circumstance, indicative of a contrary intention, or not consistent in point of justice with an intention of satisfaction, has been laid hold of to take a case out of the rule.

The exceptions are now as well established as the original princi- (499)
ple; so that that principle itself cannot be as properly stated in any way as by modifying it at once by the enumerations of the circumstances which control it; and numerous authorities were cited at the bar on each side, which it is unnecessary to notice particularly. They are collected and collated by Mr. Roper (2 *leg.* 38 *et seg.)* where the several distinctions are clearly explained, and the whole doctrine is very fully stated in *Strong v. Williams,* 12 Mass., 391. It is now understood that express direction in the will for the payment of debts requires the debt as well as the legacy to be paid, because the testator says that it is his intention. Both are also to be paid when either is contingent and the other not; when they are payable at different times, the legacy, though larger, being at the later day; when the debt and legacy are of different natures, as if the former be for a sum of money, and the latter be of specific things which may be destroyed, and thus the legacy lost; when the debt is contracted subsequently to the making of the will; or when the amount of the legacy is uncertain, and given as being uncertain. The rule itself ought to be now laid in these restricted terms. It may be said that a legacy is intended as a satisfaction of a debt in some cases, but in those above-mentioned it is not so intended.

To apply these principles to the question whether the testator intended that the distributive shares of his daughter and grandchildren should not be paid to them. In relation to the grandchildren, the point is clear, upon many grounds. In the first place, the legacy throughout to them is specific, consisting of slaves *nominatim,* and all *the notes of hand* that will be remaining, etc. If the testator had called in all his debts on bond and note it would have been an adoption of the legacy. The question is not what he might possibly have intended, if he had known the case that happened to exist at his death; but what is to be inferred from the will was his intention when he made it. It was alto-
(500) gether uncertain what notes he would then have, and the legacy, being specific, depended for its value and effect on that circumstance. So of the gift of a residue, because a residue is necessarily contingent, and may be altogether exhausted. This legacy is not only specific, but is residuary. It is not, it is held, the gift of a general residue, but the *remaining* part of the notes after the payment of other legacies. Confining it to the notes makes it specific, that is, a gift of the *corpus,* and the words following, "that may be remaining," constitute it a gift of them as a special residue. This also renders it uncertain, not because it might, as a general residue, be diminished by debts, but because the whole amount of notes specifically on hand might not be more than adequate to the payment of the legacies before charged on them. The testator says the amount was problematical, and might be $10,000, more or less. His estimate turned out to be nearly $30,000 too little, but it might have been as much too high. Again this legacy is not payable until twenty-one, or marriage, and the children were young; whereas the debt, if anything was due, immediately, or would be so in two years. For these reasons the Court entertains the opinion that the grandchildren were entitled to their legacy and also to their distributive shares.

There are other reasons sufficient to authorize the same conclusions, which are equally applicable to the case of the grandchildren and that of their mother, supposing her legacy of $12,400 to be a general pecuniary one. The testator, in the beginning of his will, expressly directs "all his just *debts* to be paid." Such a direction has been relied on as decisive that there was no intention that what was called by the testator himself a gift should be a payment. In some of the cases the direction has been for payment of debts and legacies; but the *debts* is the material word, because giving the legacies imports that they are to be paid without a further special order, and in a late case, *Adams v. Lavender,* 1 M'Clel & Y. Exch., 41, the direction was confined, as here, to the debts, and held not a satisfaction. There is another circumstance which is very
(501) strong with me. The testator returned his account of sales of

Fenner's estate to September county court, and made his will the second day of October following. The debt due to the distributees must have been altogether contingent in his mind; for there must be strong reasons to expect that every dead man is indebted more or less, and it was probable his intestate might owe the whole value of the small part of his estate which he sold. Besides, the testator could not contemplate these shares as debts due from him when he made the will. He had not settled the estate or rendered any account to the next of kin. Upon his death, before any account thus ascertaining the estate, debts or distributive shares, he must have known that he would be accountable to the administrator *de bonis non* of his intestate, and not to his next of kin. Not only was the amount of the debt contingent, but its existence as one owing by the testator to these legatees was also contingent. In the event on which the legacy could alone operate a satisfaction, namely, the testator's death, he must know that in case he had not accounted the legatees would have no demand which they could enforce without a new administration. And there is no just ground for supposing that it was meant by the testator that the gifts of this will should be taken in discharge of what might turn out on a remote settlement with an administrator *de bonis non* to be the respective interests of the legatees in that fund. Unless the will contain something to show the contrary, it is not to be presumed that the testator considered himself *debtor* to the next of kin for that estate at all, but only accountable for it to such persons, including them, as might have demands against it while unsettled, or in it when closed.

The opinion of the Court is therefore declared to be that the legacies to Mrs. Fenner and to the children are not to be taken to be in satisfaction of any moneys which it happened, at the death of the testator or afterwards, they had a right to demand in respect of their distributive shares of the estate of Richard Fenner, deceased, but (502) that the said legatees have a right to the said legacies and also to retain the money received by them on account of those distributive shares.

The next questions are upon the nature of the legacies to the other persons, besides the grandchildren, upon which depends the fund out of which they are payable, that is, whether out of the residue generally or out of the notes as specifically given.

It is our opinion that the legacy to Mrs. Johnston is specific. The gift is, indeed, not of a particular thing set apart as one individual *corpus* by the testator, but it is of that nature. It is not absolutely a general legacy, so as to abate with mere pecuniary legacies, payable out of the residue. It is charged on a particular part of the estate, and therefore is not to fail while that fund is sufficient to satisfy it. It is by

the words not merely charged on that fund, but is to be paid, not in money to be raised from the fund, but in the securities themselves which the testator might leave in specie at his death; and, if no such securities had been left, it must have failed. It is a legacy to a certain value "in notes, to be taken out of my notes as soon after my death as it can be done"—thus marking the very thing given. It is not marked so that but one single thing of that kind owned by the testator would be within the description. But it is so marked that nothing of the same kind, not owned in specie by the testator at his death, would satisfy it—nothing but "my notes." By which he denotes the whole of the very things, and then gives part of those particular and additional things to the legatee.

Upon this difference between the terms in which this legacy is given and in which the others are expressed arises the material dispute between the parties; for, if the other legacies are general legacies, they are payable out of the residue, and will exhaust it and thereby leave a larger amount of notes for the grandchildren; but if specific, then they must be paid from and in the notes, and the residue will belong to the next of kin.

The leaning of the courts is against construing doubtful terms into a specific gift, because the gift is lost upon the failure of the fund from any cause, and also because it is not subject to the equitable (503) principle of equality by abatement. It must be clear, therefore, upon the will, that nothing is meant but a particular thing, or a part of a particular thing, existing in specie at the making of the will, or when it is to take effect. If the words will be satisfied by anything of the same kind not owned by the testator, the legacy is general. The difference may be illustrated by the common case of a contract to sell and deliver goods of a common kind, say one hundred barrels of corn, upon which the remedy is by action for damages for not delivering, and a contract to sell a certain hundred barrels, as a distinct parcel in a crib, which vests the property and gives trover or detinue upon refusal to deliver.

The legacies to the brother's widow and the niece are purely pecuniary, and without reference to any funds, but are payable as soon as money from any source can be collected.

That to the nephew, Stephen, is given in the same way, except that the testator adds, "that if he is willing to receive that *amount* in good notes, he can do so." It is to be recollected that the rule is that it must be manifest upon the whole will that nothing but a gift in specie was intended. I have no doubt in my own mind that this testator expected his nephew to receive either a part of the very securities left by him or that the $1,500 would be raised out of those very securities. But he has not

given the legacy in that way, or tied it up by his words to any such contingency. It is left with the nephew to take the money, and, therefore, upon the failure of notes he would yet be entitled to the legacy. Moreover, although he certainly anticipated that if paid in notes they would be selected out of those left by him, yet he has not said so, and therefore the legatee would not be confined to them. *Sibley v. Perry,* 7 Ves., 523, is a forcible illustration of the principle which governs the construction of this clause. That was a direction to the executor, within three months after the testator's death, to transfer £1,000 stock, in the funds styled the three per cents consolidated annuities, to (504) several persons. The testator then had the funds of that kind, from which and the particular words *transfer* and *in the,* the inference to the apprehension of every individual understanding is that he had in his mind that very stock. Yet *Lord Eldon* held that upon the general rule it was a general legacy, because the testator had not in the will appropriated the particular stock, as his stock, or by other means which would show that no other stock held by him would do.

This reasoning goes also to the same conclusion as to the nature of the legacy of $42,400 to Mrs. Fenner. There is no election, indeed, given to her to take money or notes to the value, but she is to be paid in notes at all events. But the testator does not say in *his* notes. It may be admitted that he expected her to be so paid; that the executors would offer them, and that she would accept them, and that he was morally certain of leaving such. But she is not restricted to them; and if there had not been notes, there can be but little doubt, if the testator had admitted the thought of that event, he would not have considered, that thereby his daughter should lose her legacy. The words are, "in notes, to be paid by my executors as soon after my decease as it can conveniently be done"—which falls almost literally within *Sibley v. Perry.* This is the stronger here, because the testator had just before given a similar general legacy to his nephew, accompanied by other words, which clearly decide that he did not, in that instance, intend to give by those a specific legacy; and because in the legacy to Mrs. Johnston, and in that of the money, furniture, stock, wagons, etc., to Mrs. Fenner, he evinces a knowledge of the proper methods of making a specific legacy where he meant one, by the use of the possessive pronoun, *my,* to identify the fund. Upon the words of the bequest to these several persons, therefore, it seems, upon authority, the legacies are general, and not specific.

It is, however, argued that the doubts upon those clauses as expressed are removed by the manner in which the gift to the grandchildren is made. That is clearly specific, and is of the notes "that will be remaining after paying off all the legacies hereinbefore given, which I suppose will be from $20,000 to $30,000." The words, (505)

"remaining after paying off all the legacies," are considered as referring the previous legacies so directly to the particular fund of which the remnant is thus specifically given as to make those previous legacies consist of specific portions of the fund itself. Certainly, different fractions of the same *corpus* all will be specific. It is also true that the general terms used in the prior gifts may be controlled and rendered specific in the disposition of each part by such a reference in the gift of every one of the parts as will show an intention that each legacy was so much of the identical thing. As in *Sleigh v. Thorington,* 2 Ves., 561, where the testatrix gave £2,413 of South Sea stock, or annuities in different proportions to several persons, and then gave to A. "the remaining £13.13 South Sea stock," and it was held that the legacies were specific by force of the words in the last gift, and that the deficiency could not be made up out of the general assets. The last words referred plainly to stock *then* standing in her name, that is, at the making of the will, as was evident from the exact balance, £13.13, being computed. That computation was incorrect; nevertheless, the making a computation so as to exhibit a balance, true or false, showed that she was only giving away that which then existed, or which she thought then existed; and as the last was of that character, the previous dispositions of parts of the stock meant parts of that identical stock. The whole force of the argument in that case rested upon the residue being stated as the exact residue of certain stock then held by her. It can have no application to a case where the residue given is of the things of that sort which the testator might have in specie at his death, which must be altogether uncertain; nor to one in which the testator shows in the will that he had made no computation, and that the residue given specifically may be more or less, according as it may be necessary to resort to it for the satisfaction of the prior claims of the legatees. Here the
(506) remainder is not given as a certain one, but expressly as being altogether uncertain. Besides the specific legacy of $3,917, part of the notes, the other money legacies before that to the grandchildren amounted to $14,500. The giving over the residue of the notes, as being uncertain in amount, is demonstrative that the testator could not have considered that he had given away absolutely and definitely, as parts of the notes then held by him, that sum of $14,500, because in that case the residue must have been certain, and could not have varied from twenty to thirty thousand. That variation could only arise by the general assets failing to a greater or less extent to meet those bequests, and thereby throwing them on the other fund for the various differences.

The true sense, we think, is that the prior legacies are not of fractional parts of the things of which the residue is given to the grandchildren, but is a charge on the fund. The reasons which lead to this

conclusion produce the further one, that the charge is not specific and primary on that fund, but only that they are to be made good at all events. For the reason why that fund was uncertain was that these legacies, certain in their amounts, might require portions of it, larger or smaller, as the other parts of the estate primarily applicable to them should prove sufficient or insufficient.

We therefore declare it as our opinion that the debt of Hawkins and the dividends and moneys in the bank constitute the undisposed residuum; that all the legacies, except those to Mrs. Johnston and the grandchildren, are general pecuniary legacies, to be paid out of the residuum in the first instance, and, that proving inadequate, then out of the legacies to the grandchildren. Consequently, as Mr. Maxwell has applied notes to the value of $2,438.55, belonging to the children, to pay the legacy of Mrs. Fenner, for which he had that sum in hand, of the residue, in the moneys received from the banks, his estate must make that sum good to them, unless it can be collected again from Mrs. Fenner.

As to compensation to the executors, and the principle on which it must be allowed, we are of opinion that they are to receive it as executors. It is not necessarily incidental to the office of an executor to take the management of legacies to infants, but it is incidental (507) to the office to have such duties assigned. It is the common case of a trust to the executors of a fund to accumulate. They take *virtute officii,* and hence by renouncing the office the trusts will be executed by others, without an assignment from the executors. The executors jointly fill the office, and the duty survives to the complainant.

Both are, therefore, together entitled to the commission given by law. Upon such an estate to be thus managed through a course of years the highest commission is not more than an adequate remuneration for the labor and responsibility, if the trust be faithfully executed. Thus far there has certainly been perfect good faith, and the executors are entitled to claim at once a reasonable proportion of the commissions. In what proportions it shall be divided, as between the executors themselves, it is impossible for the Court to say without directing an inquiry as to the actual past labor and risk performed by each, and that which will probably be incumbent, for the future, on the survivor. If the parties should be unable to settle it to their own satisfaction, such an inquiry will be directed at the instance of either. But the Court cannot allow full and double commissions in a case of this sort, when the executors as coexecutors took, and upon the death of one, the other, by his old office, acts exclusively. He gets no power by the other's death, but only loses his aid.

Certain other points are raised in the answers of some of the defendants. One is, whether the interest accrued on the debts due on bonds

and notes in the lifetime of the testator passed to the grandchildren? On this we have no doubt. The interest had not been severed, as the dividends on the stock had. The *corpora,* the notes themselves, are given, and all passes that would pass by an endorsement, and there can be no question that the assignee of a note past due is entitled to the interest as well as the principal due at the time of the endorsement.

Another is, whether Mr. Maxwell's estate is responsible for the (508) debt of Robert H. Jones, who has become insolvent. The debt was contracted with the testator himself, when the debtor was in fact greatly embarrassed and probably insolvent; but, notwithstanding, in such good credit that no security was required but his own bond. His credit continued good up until the time of his declared bankruptcy, and in the meantime he renewed the bond and paid the interest punctually. It is to be recollected that one part of the trust was to keep the fund at interest. There are, therefore, no losses in not collecting. The only ground on which it can be imputed is in not increasing the security. Good faith is required from the executor and circumstances to prove that he acted in good faith. This case is fully established by the debtor's conduct and character, and the course of dealing with him by the testator himself, and by the discretion given by the will to the executors, as to calling in moneys from those who were debtors at the testator's death. We declare, therefore, that the complainant must receive the bond of Jones as part of the funds of the children.

An opinion upon the effect of compounding interest and including it in bonds taken to renew others is rendered unnecessary, as we are given to understand that, pending this suit, all the debts upon which any difficulty would probably be made on that ground have been paid into the hands of Mr. Johnson, the receiver. We barely intimate that although more troublesome, it would be safest to require payment of the interest annually and to reinvest it; and that the executor should also clothe himself formally with the office of guardian.

All the parties must pay their own costs, except the complainant, whose costs must be paid out of the fund, and the defendant Mary Maxwell, whose costs, up to this time, must also be paid out of the fund in Court.

PER CURIAM. Order accordingly.

Cited: Johnson v. Johnson, 38 N. C., 428; *Stultz v. Kizer,* 37 N. C., 540; *Stocks v. Cannon,* 139 N. C., 64; *Battle v. Lewis,* 148 N. C., 151; *Pigford v. Grady,* 152 N. C., 181.

(509)

LEVI WARD v. LARKIN STOW ET AL.

A testator having directed that "the residue of my estate, real and personal, be divided amongst the heirs of my brother I., the heirs of my sister N., and the heirs of my sister S. and nephew L.," *it was held*, the testator having recognized I. as being alive, that the word "heirs" was used as a description of legatees only, and not in its appropriate technical sense, as denoting the succession, and that the individuals of the several classes of children were entitled equally *per capita*.

NATHAN FORD, by his will, devised and bequeathed as follows:

"I give and bequeath to my brother, John Ford, 200 acres of land, including where the said John now lives, during his natural life, and at his death the said land to fall to his heirs, the said John Ford's children.

"I give and bequeath to my nephew, Levi Ward, my sorrel horse called Merlin, and my negro boy named Dick, to him and his heirs forever.

"It is my will, and I do allow, that all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother, John Ford, the heirs of my sister Nancy Stow, the heirs of my sister Sally Ward, and my nephew, Levi Ward."

At the death of the testator, his brother John and his sister Nancy were living—the former having four and the latter nine children. Sally Ward was dead at the date of the will, having left two children, both of whom survived the testator, and of whom Levi Ward, the plaintiff and legatee, was one.

A petition for the partition of the land of which the testator died seized was filed in Lincoln, and a final judgment was entered thereon, whereby one-fourth thereof was assigned to each of the families, to be divided among them, excluding Levi Ward from any share of the fourth assigned to the family of his mother, and giving him the remaining fourth. Upon an appeal to the Supreme Court, this judgment was reversed, and a division *per capita* directed (*Stow v. Ward*, 10 N. C., 604). Instead of remanding the cause and awarding a *pro-* (510) *cedendo* to the court below, a writ of partition was issued from this Court, and upon its return the order reversing the judgment below was set aside and another writ of partition issued, directing the division to be *per stirpes*, including Levi Ward and giving him in addition thereto one clear fourth. *Stow v. Ward*, 12 N. C., 67. And on the return of this writ, judgment of confirmation was entered. After the first division above mentioned, the legatees, supposing it conclusively to settle their rights under the will, made a voluntary division of the negroes and other personal property according to the principle which was thereby established. When the last division was set aside and one *per stirpes* directed, the

plaintiff filed this bill, in which he averred that the voluntary division of the personal property was made under a mistake, and prayed to have it set aside and another division made according to the last adjudication.

The case was frequently argued and held under advisement for several terms.

Winston for plaintiff.
Badger and Devereux for defendants.

GASTON, J. The inquiries which this case presents are exceedingly unpleasant, but so far as the purposes of justice require, they must be prosecuted to their legitimate result. The first of these inquiries is, whether the division complained of and sought to be reformed be erroneous or correct. On the part of the complainant it is insisted that the last adjudication of the Court must be regarded as conclusively settling the construction of the will with respect to the real estate, and, by necessary inference, fixing its construction also as to the personal property. It is also insisted that if the interpretation of the will can be considered as *open* to discussion, the reasons on which that adjudication is founded completely sustain it. Upon this point the argument is briefly this: that where persons come to an estate as *heirs,* whether by descent or by purchase, under that description, they take *per stirpes* and (511) not *per capita,* in a *representative* character and not as *individuals,* and to others must be always considered as an unit, however they may subdivide and parcel out the property among themselves. That if A. dies intestate, seized of lands of inheritance, leaving a daughter and two daughters of a deceased daughter, his lands descend one-half to his daughter and the other half to his granddaughters, and that if a devise should be made to them simply as the heirs of A., they must take the estate in the same proportions; that in the first case the canons of descent ascertain the heirs and direct the disposition of the land, and that in the latter case the will gives to those whom the canons ascertain to be the heirs, and in such proportions as the canons direct. It is thus concluded from the force of the word *heirs* that the persons indicated in the will as the heirs of John, Nancy, and Sally are to be regarded as the representatives of, and substitutes for, John, Nancy, and Sally, respectively, and taking the same shares as if the land had been given to *these* persons, and then transmitted to them as the successors of these ancestors; and that a similar result must take place with respect to the personal property, first, because it was obviously the intent of the testator to give both species of property to the *same* persons, in the *same* way, and, secondly, because the word heirs as applied to personal property means heirs *quoad* that property, that is to say,

those whom the statute of distributions directs to succeed to the personal estate of an intestate.

None can be more deeply convinced than we are of the necessity of a steady adherence to the decisions of our predecessors. Carelessness in this respect can scarcely fail to involve us in error and throw the law into confusion. So far as the decisions of these eminent judges concur with each other, they form a law for this Court, which nothing short of what we may reasonably hope cannot happen—a manifest breach of the law of the land—can warrant us to disregard. Where they are found to conflict, which from the imperfections of all human institutions must sometimes be the case, the latest will of course be presumed right, yet not so conclusively right as to forbid examination. In the present singular case, however, it is somewhat difficult to say (512) which of the two opposing decisions has the better claims to be regarded as the precedent; for while the one is the more recent, the other has the advantage of having been unanimous; of having been decided upon argument, and of being a judgment in a case regularly and properly before the Court. Convinced that we ought not to rely authoritatively and exclusively on the last adjudication, we have deemed it an imperious duty deliberately to investigate the argument by which it is supposed to be established.

The whole of the reasoning is founded on the effect which the word *heirs* is supposed to produce in the devising and bequeathing clause. *An heir* is he who succeeds by descent to the inheritance of an ancestor, and in this, its appropriate sense, the word comprehends all heirs, and the heir of heirs *ad infinitum,* as they are called by law, to the inheritance. This succession is regulated by the canons of descent. According to one of these, the lineal descendants of any person deceased represent their ancestor, or stand in the place in which such ancestor would have stood if living at the time of the descent cast, and it is this taking by a right of representation which is termed a succession *per stirpes* or by stocks, the branches taking the same share which their stock would have taken. From this definition it would seem to follow that in strictness none can come to an estate *as heirs* otherwise than by descent. Thus *Lord Thurlow* says in *Jones v. Morgan,* 1 Brown, 209: "All heirs taking *as heirs* must take by descent." Upon this ground he holds the rule inflexible which requires that when a freehold is given to one and a remainder is so limited as to go in succession to the heirs of the first taker, these shall take by descent, because "taking in the *character* of heirs, they must take with the quality of heirs"—that is to say, must take by descent and not by purchase. But an inheritance may be limited in remainder to the heirs of him to whom a precedent freehold is not given, or it may be originally limited to the heirs of a deceased person. Here the

(513) donees do not take by descent, for their ancestor has no estate which the word "heirs" can expand into an estate of inheritance. They do not, therefore, take as heirs, but take simply as *purchasers*.

But it is insisted for the plaintiff that, nevertheless, they are *described* as "heirs"; that the law of descents is necessarily referred to for the understanding of that term, and the ascertainment of the persons thereby intended; and, therefore, this law is to regulate also the shares in which the thing given is to be enjoyed by those on whom it is bestowed.

With the highest respect for those who have drawn this inference, we are compelled to say that we do not feel its force. Every voluntary disposition of property takes effect according to the agreement of the contracting parties. Their intentions, properly expressed, give the mode and the form that constitute the *law* of the conveyance. The regulations of the State for the transmission of inheritances left vacant by death do not, *proprio vigore,* operate on the subject-matter of such conveyances, and can apply to them only so far as the parties have adopted them and directed them to be so applied. When a technical phrase is deliberately used, it is reasonable to suppose that it is employed in the sense appropriated to it in the science or art from which it has been taken, and that science or art is very properly consulted for its interpretation. "Heirs" is a well-known term in the law of descents, and when donees or devisees are not otherwise described than as heirs, the law is impliedly referred to for the meaning of the term. But whether these donees or devisees are to take much or little, for a long or a short time, all together or by moities in equal or unequal portions, the law of descents can give no information; for it has made no provision in relation to these matters, but has left all these to be regulated by the law which the parties may have themselves made in their conveyance. Is it, then, a reasonable inference that the conveyance refers to the law of descents *for any such purposes?* If there be, indeed, a settled rule of construction to this effect, it will most cheerfully be followed; but after diligent inquiry, I have been unable to find any traces of its existence. There are, indeed, some anomalous cases in which the words "heirs male (514) of the body," and the like, although operating to a *certain* extent as words of pure description or purchase, have also been allowed to operate as if they were words of limitation and according to the canons of descent. Thus it has been said that where a limitation is made to *the heirs male of the body* of B., where no estate is in or is given to B. himself, though the limitation originally attaches in his heir male under that special description, yet on failure of his issue male it will go in succession to the other heirs male of the body of B. as if the estate had descended from B. himself. Here the word heirs has a double meaning and a

mixed effect. The individuals who first take under this term, take as purchasers, designated by the relation which they bear to a deceased ancestor; but they take an estate which, *by the form of the donation,* is to pursue the same course of succession to the same extent of duration, and through the same persons, as if it had attached to and descended from such ancestor. Such a limitation is of an intermediate description betwixt a descent and a purchase, in point of acquisition having the quality of the latter, as not being derived from or through the ancestor, but in regard to its devolution referable to the former. This and such like cases are considered as *quasi* entails, in regard to which the law is settled, but the principles on which it is settled are not easily discoverable. (See Butler's Ed. of Fearne, 80 to 84.) How far the position may be true that persons called to *such an estate as heirs* take in a representative character with the shares or the portions which the canons of descent point out may be a very curious subject of inquiry; but it can throw little light upon the investigation in which we are now engaged. The term "heirs" has here but a single meaning, and can produce, as we think, but a single effect. It is not pretended nor assumed to be a word of limitation. It directs nothing as to the devolution or succession of the estate after it is vested in the original devisees or first takers, and its sole purpose seems to be to point them out. An estate not of inheritance, an estate for life, or a term of years, or a chattel, may be limited to persons not otherwise described than as the (515) heirs, or the heirs of the body of a deceased person, and so an intestate of inheritance may be limited to persons thus designated, without any attempt to direct its transmission, as in a course of descent from that ancestor. In the first class of cases the word heirs is *necessarily,* and in the last case is *obviously,* one simply of description, whereby the donor or testator declares under a general term, instead of mentioning by their names the persons whom he contemplates as donees or devisees of his property. It is a collective term so far only as is every term which may comprehend within it more individuals than one; but it is not collective as calling in the whole *succession* of heirs to the deceased person. Whenever a descriptive phrase is used in any conveyance instead of an actual nomination, the import of the phrase must be attended to in order to find out the persons meant by it. If it be seen that by the term "heirs" those are intended who, at the time referred to, where or might be the *"heirs"* at law of a deceased ancestor, of course the law must be consulted to enable the inquirer to determine who answer to this description, and who, therefore, are these first takers. *Foster v. Sierra,* 4 Ves., 768. But this determined, the sole purpose of the reference is over; and the persons thus ascertained take simply and purely

by virtue of the conveyance in their own persons, not as the representatives of others, precisely as though they had been individually named, or had been described by any other phrase sufficiently explicit to point them out. Thus in *Mounsey v. Blamire,* 4 Russell, 384, the testatrix by her will *inter alia* devised her real estate to a person whom she described as her kinsman, and who was not her heir at law, and directed him to assume her name and arms. By a codicil she gave several pecuniary legacies, and amongst others "to my heir," £4,000. At her death this legacy was claimed by three persons who were her coheirs, by her next of kin, and by the devisee of her real estate as the *hæres factus.* The claim of the devisee was at once rejected by the master of the
(516) rolls. In deciding between the next of kin and the coheirs, he remarked that where the word heir is used to denote succession, it may be understood to mean such person or persons as would legally succeed to the property according to its nature and quality; but where it is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, it must be taken in its ordinary sense. The coheirs, therefore, took the property, and there being no words of severance in the will, they took it as joint tenants. So if a man makes a gift of gavelkind lands to J. S. and the heirs of his body, and he hath four sons, all these sons shall inherit; but if he make a lease for life to one, remainder to the right heirs of J. S., and J. S. dies, leaving issue four sons, in this case the eldest only shall have the remainder. *Shelby's case,* 1 Co., 103, Co. Lit., 10, Hob., 31; *Dyer,* 179 pl., 45. In the first instance, the word heirs of his body are words of limitation and call in all who by law can succeed to an estate tail in those lands; but in the last the words right heirs of J. S. are words of purchase, are *descriptive* merely, and refer to the law no further than is necessary to explain the description. If the donor, however, had added to these words "in gavelkind—or according to custom," or such like, then all the four sons would have taken, because all would have been included in the description. (Hargrave's Note to Co. Lit., 10 *Newcomen v. Barker,* 2 Ves., 732.) So if one seized of lands in Borough English devise to his "heir," the eldest son and not the youngest would take; but if he devise to his heir in Borough English, the lands will descend to such youngest son. (14 *Viner's Ab.,* 528, 529; *Heir C.* 5 pl., 1, 8.)

I am forced to conclude, therefore, that when the term "heirs" is altogether a word of purchase, and simply descriptive of the first takers; where it is not used to denote *succession,* but to designate *persons,* those who come under that description take as individuals, and not in a representative character, and of course take *per capita,* unless there be an intent to the contrary apparent on or to be collected from the
(517) instrument itself.

But it is manifest in this case not only that the word "heirs" does not denote *succession,* but that it is not used to designate those whom the law calls "heirs at law."

The testator makes a devise of land to his brother John, and thereby recognizes that John was alive at the date of the will. By the phrase "heirs of his brother John" he must, then, contemplate persons other than those who are in law his heirs, and to give effect to this disposition we are obliged to understand the word heirs in some sense different from its ordinary and legal meaning. It may mean heirs apparent or heirs presumptive. But in the same sentence we meet with the expression "heirs of my sister Sally, deceased"; and here it may mean heirs at law, but cannot mean heirs presumptive or heirs apparent. We find the same term used in the same sentence to designate persons standing in a certain relation to living persons, and also to dead persons. It cannot be interpreted in what is called its technical sense to mean those who *have succeeded* by law to the inheritance of their ancestor, because so interpreted it would exclude the heirs of his brother John and sister Nancy. *Nemo est hæres viventis.* It cannot be interpreted in the sense sanctioned by custom, of heirs apparent or heirs presumptive; that is to say, of those who *will probably* inherit from a *living ancestor,* for then it would not embrace the heirs of his sister Sally. Besides, the term is used in reference to the gift of personal as well as of real property. Heirs, heirs apparent, heirs presumptive, ordinarily indicate those who have or expect a claim on the *lands* of another by reason of their connection with him; but those who acquire personal property on the death of its possessor, or look forward to its acquisition upon his death, are generally termed his relations or his next of kin. The word is used in some sense sufficiently comprehensive to take in all the objects of his bounty, and employed in relation to *both* species of property. Individually, I am quite satisfied that the testator means by it "children," and I think we have this exposition given by himself in the preceding sentence, where he directs the land devised to his brother John for life, to (518) go upon his death "to his brother John's children." But the Court does not decide this to be its meaning. We decide only that it does not mean *heirs,* properly speaking, nor *heirs* apparent, nor *heirs* presumptive. It is unnecessary to determine whether it means children or issue, for upon either interpretation the same result will follow. There is no reference expressly or impliedly to the canons of descent, to the statute of distributions, not even for the purpose of ascertaining the first takers of the property, and still less for fixing the proportions in which they shall take it.

An improper term has been used by the testator, and in order to effectuate his intention we are bound to give the will the same construc-

tion as though he had used the appropriate expression. If by "heirs" he meant children or issue, we are to read the will as if it were written children or issue.

It may not be amiss to quote a strong case in illustration of this doctrine, although it seems reasonable enough to stand without authority. In *Hallen v. Ironmonger,* 3 East, 533, lands were devised to a trustee to receive and pay the rents for the maintenance of Sarah Hallen, a *feme covert,* and the issue of her body, during her life, and after her decease, for the use of the heirs of her body, and their heirs and assigns forever, without regard to seniority of age or priority of birth, and in default of such, to the right heirs of the testatrix. Sarah Hallen enjoyed the premises during life, and had issue one son and two daughters. The son died before the mother, leaving the lessor of the plaintiff his son and heir at law, and also four other children. On her death this ejectment was brought against her surviving daughters, and the question was whether the plaintiff was entitled to recover any, and if any, what part of the premises. It was admitted that no estate of inheritance passed to Sarah Hallen, for that the legal estate during her life was in the trustees; but it was insisted, first, that a legal contingent remainder was limited to such person or persons as should be the heir or heirs of her body at the time of her death, under which description the eldest son was (519) entitled to the whole; and, secondly, if the Court thought that heirs of the body meant children, then such children would take as tenants in common, and the lessor of the plaintiff was entitled to a third. It was urged, upon the last point, that the qualifying expressions, "without regard to seniority of age, or priority of birth," meant only that all the children should take equal portions; those who came in *esse* last as well as first; that the word "heirs" was sufficient to *sever the estate;* and that it was plain that all were meant to take alike, which could not be without taking as tenants in common. But the Court, stopping the counsel for the defendants, held that the phrase, "without respect to seniority of age, or priority of birth," annexed to the words heirs of the body, conclusively indicated that these were words of purchase, and *meant* children; and, secondly, that as there were no words of severance used, they took as joint tenants, and the father of the lessor of the plaintiff having died before severance, the whole vested in the surviving children, the defendants.

We are brought, then, irresistibly to the conclusion that the word "heirs" as used in this will has not the peculiar operation which has been attributed to it, and that the persons whom the testator designated by this expression must take the shares, whatever they may be, which the will assigns to them, in the same manner as if they had been pointed out by any other and more appropriate terms. The will declares that the

property given to these persons *shall be equally divided,* and the only question that remains is, Between whom is this equality directed? Is it between the *classes,* or is it between the *individuals* of which the classes are composed? Adopting the language of *Chief Justice Taylor* upon the first adjudication *(Ward v. Stow,* 10 N. C., 606), we think that "There has been a settled construction upon all devises and bequests of this description, recorded in a series of decisions to be traced back for more than a century," which leaves us no liberty to speculate on this question. It can scarcely be necessary to swell the list of authorities to which he has appealed, and which clearly sustains his position. We will add only the following cases to the very strong ones which he has (520) enumerated. In *Davenport v. Hanbury,* 3 Vesey, 257, a legacy was given to A. or her issue. A. died before the testator, leaving a son and *two* grandchildren, the children of a deceased daughter. It was held that the word issue included grandchildren, and that the son and grandchildren all took as joint tenants; but that had the word "equally" or the words "equally to be divided," been inserted, they would all have then taken *per capita.* "As there are no words of severance, nor anything to show that they were intended to take, not in their own rights, but as representing others, the son and the children of the deceased daughter must be considered as *personæ dignatæ,* and will take as joint tenants." In *Barnes v. Patch,* 8 Ves., 604, there was a devise of real and personal estate to be equally divided "between my brother Lancelot's and sister Esther's families," It was held that the children of Lancelot and Esther took exclusively of their parents, and all took equally *per capita.* In *Lincoln v. Pelham,* 10 Ves., 166, the testatrix bequeathed one-fourth of her personal estate to the younger children of a daughter A., a fourth to the younger children of a daughter B., a fourth to the child or children of a daughter C. (upon and after the death of said C.), and the remaining fourth to the child or children of a daughter D., upon and after her death; and directed that if either of the last mentioned daughters should have no child living at her death, the part allotted to *her* child or children should go to the child or children of the *other,* and if both of them should die and leave no child as aforesaid, then these two fourths should be equally divided amongst the younger children of her daughter A. and the younger children of her daughter B. The daughters C. and D. both died unmarried, and it was held that these two last mentioned fourths were to be distributed among the younger children of A. and B. *per capita.*

The result of our inquiries is a full conviction that the last adjudication of the Court upon this will *(Stow v. Ward,* 12 N. C., 57) was wrong, and that the first was right; and as there is no doubt but that the personal and real estate are given to the same persons and in the (521)

same shares, the error which the plaintiff complains of in the division of the personalty and which it is the purpose of this bill to reform and correct, does not exist. We are, therefore, all of opinion that the plaintiff's bill must be dismissed, but for obvious reasons it is to be dismissed without costs.

PER CURIAM. Order accordingly.

Cited: Brant v. Scott, 21 N. C., 156; *Hobbs v. Craige,* 23 N. C., 338; *Hill v. Spruill,* 39 N. C., 246; *Harris v. Philpot,* 40 N. C., 329; *Bivens v. Phifer,* 47 N. C., 438; *Am. Bible Soc. v. Hollister,* 54 N. C., 14; *Lee v. Foard, id.,* 126; *Cheeves v. Bell, id.,* 237; *Clement v. Cauble,* 55 N. C., 103; *Roper v. Roper,* 58 N. C., 17; *Burgin v. Patton,* 58 N. C., 427; *In re Walton,* 60 N. C., 360; *Grandy v. Sawyer,* 62 N. C., 10; *Tuttle v. Puitt,* 68 N. C., 545; *Tyson v. Tyson,* 100 N. C., 367; *Culp v. Lee,* 109 N. C., 677; *Starnes v. Hill,* 112 N. C., 25; *Johnston v. Knight,* 117 N. C., 124; *Lee v. Baird,* 132 N. C., 766; *Miller v. Harding,* 167 N. C., 54.

EDWARD S. GILES v. ELIJAH FRANKS, EXECUTOR.

A legacy to A. *when* he shall attain 21 does not vest before that time, and a payment to his guardian during infancy does not protect the executor.

THIS was a petition originally filed in the County Court of ONSLOW, to recover a legacy left by Edward Franks, the testator of the defendant, to the plaintiff. The will at length was not certified with the record, but was, as stated in the petition, and admitted in the answer to be, as follows:

"I give to Edward S. Giles one horse, saddle and bridle, worth $80, when he arrives at the age of 21."

It was admitted that the defendant had paid the legacy to the father of the plaintiff, who had been duly constituted his guardian, and that this delivery was made before he arrived at his full age. The only question was whether this delivery protected the defendant, the father having become insolvent, but the surety to the guardian bond being still able to pay the amount.

His Honor, Judge Donnell, on the last circuit, dismissed the petition, thinking the plaintiff had his remedy against the surety to the guardian bond, and the latter appealed.

J. H. Bryan for plaintiff.
No counsel for defendant.

RUFFIN, C. J. There is no dispute in this case upon the facts, (522) the parties having agreed on them in the pleadings, or by admissions in court, as set forth in the decree of the Superior Court. The bequest is in these words: "I give to Edward S. Giles one horse, saddle and bridle, worth $80, when he shall arrive at the age of 21 years." The will is not exhibited, and no other parts of it set forth in the record, so that the case turns upon the words of this disposition alone. Upon them, it is within the rule which annexes the time to the substance of the legacy, and makes the right dependent upon the arrival of the legatee to the age prescribed. Although this rule was adopted by the courts of equity less upon principle than from the necessity to make their decisions, in a matter in which the two tribunals exercised a concurrent jurisdiction, conform to the prior ones of the ecclesiastical courts, yet it is now an old rule of equity itself, which must be adhered to. It is found in all the text-writers and is acknowledged and acted on by the courts in modern time. (1 Eq. Ca. Ab., 295, p. 6; *Hanson v. Graham,* 6 *ib.,* 239.) It has also been adopted in this State in *Perry v. Rhodes,* 6 N. C., 140, and in other cases. The *gift* is *when* the legatee shall attain 21. Until that event the legacy is contingent and could not be demanded. The utmost relief that could have been granted in the respect of it would be to secure it; and upon the death of the legatee before its vesting, it would have lapsed.

The question is whether in the event which has happened, namely, that the legatee has attained his age, a prior payment during his minority, to his guardian, be a due payment, so as to discharge the executor.

An executor is a trustee for the legatees, and is bound to preserve the legacies for them, so that they shall have the benefit intended for them at the periods designated. If he or any other trustee, with even the best intentions, place the fund in other hands, without the directions of a competent court or other legal authority, he does it at his peril, and must answer it to the person entitled. There are many cases in the books where the executor has been charged a second time (523) under circumstances of great hardship. It is upon the principle that he cannot, for his own ease, make another person the debtor or trustee for the legatee, when he was not compelled or compellable to it. Such is the case here. The payment was made to the guardian, who had not then, and never could have, authority to receive it. His office would necessarily expire before the legacy could arise, which could only be when the legatee would have capacity to receive it himself and give an acquittance for it. That the payment to the guardian, under these circumstances, is not conclusive on the legatee seems to follow from this, that it is not a payment to the legatee either in fact or in law, on which

he would be chargeable to all purposes with the sum, as having been received by him. Suppose the petitioner had died after the payment, and before 21—the legacy, as having lapsed, would be redemandable by the executor or a remainderman, if limited over. From whom could it be required? Certainly not from the administrator of this legatee; because he had never a right to receive it, nor ever in fact received it. The resort must have been to the guardian by whose hands it was received and is held, and to those who have bound themselves for him, if there be such. If the general estate of the legatee would not be liable to refund it, the consequence seems a necessary one that until the value came in fact to his hands his legacy is not satisfied. This seems to have been in effect admitted by his Honor, as the decree rests principally upon the ability of the petitioner to obtain satisfaction from the sureties of his guardian. If that could operate at all against the petitioner, it would only be as a temporary restraint until he had made the effort, and tested its success; which could authorize a decree dismissing the petition, and thereby establishing it now as a perpetual and conclusive bar. But it seems to us that it does not affect the petitioner more in the one way than in the other.

(524) It is very true that the petitioner would have a remedy against the guardian personally, upon his actual receipt of the money, and so with the defendant, upon his having to pay it a second time. But it is admitted that the guardian died insolvent, so that the right of recourse to him is a vain one. It is, however, stated that his sureties are of ability and responsible. It is a question whether they would be liable, since the money, at no time during the guardian's life, was the property of the ward. But admitting that a recovery could be made from them, because their principal received the sum under color of his office, and converted it, yet the defendant is also the trustee of the petitioner, and committed a breach of trust in paying over the legacy which he ought to have held in his own hands. A *cestui que trust* may follow the fund; but he is not bound to do so. He may, if he choose, take his recourse immediately against his trustee, and leave the latter to reimburse himself out of the fund, or from the party in whose hands he placed it, or those who are answerable for him. The responsibility of a trustee is not subsidiary, but primary, and the person entitled is not obliged to look further than to him. If the guardian or his sureties (supposing them bound) were before the Court, it would be just that the decree should, in the first instance, call the money from these who will be ultimately liable for it; but the plaintiff is under no necessity to make them parties, as he has a distinct and complete case against the defendant and may at his election take his relief against him exclusively. For

these reasons, the Court deems the decree erroneous, and reverses it, and thinks the plaintiff entitled to a decree for the value of his legacy, with interest from the filing of this petition, with costs.

PER CURIAM. Decree reversed.

Cited: Guyther v. Taylor, 38 N. C., 326; *Sutton v. West,* 77 N. C., 431; *Ellwood v. Plummer,* 78 N. C., 395; *Hooker v. Bryan,* 140 N. C., 404.

(525)

PROBATE COLLIER v. THE BANK OF NEW BERN, JAMES RHODES, AND CHARLES HOPTON.

1. Defendants need not answer immaterial allegations. Therefore, where a plaintiff alleged that an execution in favor of the defendants, being in the hands of the sheriff, he had in satisfaction thereof discounted with the sheriff a judgment which he, the plaintiff, had against him and others, an execution for which was then in the hands of the coroner, and that mutual receipts had passed between him and sheriff; and further, that the sheriff not paying over the money to the defendants, they had obtained a judgment therefor upon the official bond of the sheriff: *it was held*, that without the assent of the defendants to the settlement between the plaintiff and sheriff, these facts constitute no defense against the judgment in favor of the defendant, against the plaintiff; and that the defendants need not answer whether the sheriff and others against whom he had the judgment were good and able to pay the same, nor whether an execution on said judgment was in the hands of the coroner, nor whether the plaintiff gave the sheriff a receipt for the judgment, nor whether the sheriff and his sureties were able to pay the judgment obtained on his official bond.

2. Nothing but cash received by the sheriff from the defendant in an execution, or a levy upon his property, and taking it out of his possession, can discharge the debt due the plaintiff.

The plaintiff alleged that, being indebted to the defendants, the president and directors of the Bank of New Bern, a suit was instituted and judgment obtained against him at February Term of the County Court of WAYNE, 1828, for $1,040.88; that an execution issued thereon, and came to the hands of Calvin R. Blackman, then sheriff of Wayne County, who received satisfaction therefor from him, the plaintiff, and gave him acknowledgment for $1,055.13, which was in full thereof, except the costs; that the whole amount of the execution was not paid in money, but a part thereof was satisfied in the following manner: One John Snead had, before that time, obtained a judgment against Blackman, Stephen Smith, and others, for $1,627.70; that the plaintiff received an assignment of part of said judgment, an execution on which

was then in the hands of the coroner of the county of Wayne. That when the execution against the plaintiff in favor of the Bank of New Bern came to the hands of Blackman, the plaintiff, believing the
(526) judgment against Blackman, Smith, and others to be perfectly good, and that he might legally discount with Blackman the amount of his part of Snead's judgment in satisfaction of the execution in favor of the Bank of New Bern, did in good faith make that arrangement with Blackman, and after paying the balance of the execution in money, received from him the receipt above mentioned, and then gave a receipt on the execution against Blackman for the amount thus discounted.

The plaintiff alleged further that some time after this settlement was made the defendant, the Bank of New Bern, instituted a suit by *scire facias* to revive the judgment against him, the plaintiff, and at Spring Term, 1833, of the Superior Court obtained a judgment for $915.04, it being the balance due after allowing certain payments made on account thereof by Blackman; that whilst the suit by *scire facias* was pending, the president and directors commenced suit on the official bond of Blackman against him and his sureties, the defendants Rhodes and Hopton, and obtained a judgment against them for the debt due said president and directors from the plaintiff. But the plaintiff alleged that the president and directors of said bank colluding, with the other defendants, Rhodes and Hopton, forbore to collect the money from them, they being perfectly able and sufficient to pay the same, but was pressing the plaintiff therefor.

The prayer of the bill was for an injunction to restrain the defendants, the president and directors of the Bank of New Bern, from enforcing the collection of the judgment on the *scire facias* against the plaintiff until they had first endeavored to obtain satisfaction from Blackman and the other defendants on the judgments against them; or that, upon receiving satisfaction from the plaintiff, they might be compelled to assign to him the last-mentioned judgment.

The defendants, the president and directors of the Bank of New Bern, admitted that the plaintiff was indebted to them, and that they had instituted suit and obtained judgment for the amount due as stated.

They also admitted the assignment by Snead to the plaintiff
(527) of a part of a judgment which he had previously obtained against Blackman, Smith, and others. They admitted further that they had understood and believed it to be true that the plaintiff had made some arrangement with Blackman by which Blackman was to take upon himself the payment to the defendants of their judgment against the plaintiff, and that Blackman executed a receipt to the plaintiff for the amount of their judgment as if it had been paid to him as

sheriff. But they did not admit that the plaintiff in making this arrangement with Blackman acted fairly and in good faith, under the belief that he had a right so to do; on the contrary, they stated it as their belief that it was a cunning and dishonest contrivance between the plaintiff and Blackman to relieve the latter from the pressure of Snead's execution, and also to pay the debt of the plaintiff to the defendants, by throwing it upon Blackman and his sureties. The defendants further stated that they did not know whether the plaintiff did or did not give any receipt on account of Snead's judgment, in return for the receipt given by Blackman for the judgment against the plaintiff in favor of the defendants; but if such were the case, they submitted that this interchange of receipts could not affect them, they not being cognizant of nor assenting to it. The defendants further admitted that they had instituted a suit by *scire facias* to revive the judgment against the plaintiff, and had obtained a judgment in the Superior Court, on the trial of which suit it had been shown that at the time when Blackman executed the receipt to the plaintiff he had not in his hands any writ of execution authorizing him to collect the money. They also admitted that pending that suit they had obtained a judgment against Blackman and the defendants Rhodes and Hopton, his sureties on his official bond, for the amount of the same judgment. They denied all collusion with the other defendants, or that any agreement, expressed or implied, existed between them, further than that they had directed their attorney to collect the money from the plaintiff before resorting to the other defendants. They stated that this was done under a conscientious belief on their part that Rhodes and Hopton ought not to be pressed, if the money could be got out of the plaintiff; that in point of (528) interest it was immaterial to them from whom the money was received; and they submitted, upon the receipt of the amount due them, to assign either of their judgments as the Court might direct.

The answer of the other defendants, Rhodes and Hopton, corresponded in all material respects with that of the president and directors of the Bank of New Bern, only they stated further that at the time when the judgment was obtained on the official bond of Blackman they were ignorant of the fact that when Blackman gave the receipt to the plaintiff he had no execution in his hands authorizing him to receive the amount of the judgment in favor of the other defendants against the plaintiff.

To these answers the plaintiff excepted: (1) Because the defendants had not answered and set forth whether Blackman, Smith, and others, against whom Snead had obtained judgment, and which judgment was in part assigned to the plaintiff, were perfectly solvent and good and able to pay that judgment.

2. Because they had not answered and set forth whether Rhodes and Hopton, the sureties of Blackman, against whom the president and directors of the Bank of New Bern had obtained judgment, were perfectly solvent and able to pay the judgment so recovered against them.

3. Because they had not answered and set forth whether an execution was in the hands of the coroner of Wayne County against Blackman, Smith, and others on the judgment obtained by Snead, and which had been assigned to the plaintiff.

4. Because they have not answered and set forth whether the plaintiff gave his receipt on the execution against Blackman, Smith, and others, issued on the judgment in favor of Snead, and which was assigned to the plaintiff as before mentioned.

DONNELL, J., at Wayne, on the last Spring Circuit, *pro forma* (529) allowed the exceptions, and the defendants appealed.

Mordecai for plaintiff.
J. H. Bryan, contra.

DANIEL, J. The first exception to the sufficiency of the defendant's answers must be overruled, because, whether Blackman, Smith, and others were good and able to pay the judgment which Snead had obtained them (a part of which belonged to the plaintiff) was a matter quite immaterial in this case, as it is not alleged by the plaintiff in his bill that the bank assented to any arrangement by which the judgment against the plaintiff should be satisfied out of any portion of Snead's judgment against those persons; and the sheriff had no execution in his hands at the suit of the bank against the plaintiff.

The second exception must be overruled, because, although Blackman, Rhodes, and Hopton may be able to pay the judgment which the bank obtained against them, still as no payment or satisfaction has actually been made on this judgment, the circumstance of the judgment having been obtained by the bank against the sheriff and his sureties is not, in law or equity, a satisfaction or discharge of the judgment which the bank had before obtained against the plaintiff, although the two judgments were in fact for one and the same demand. The bank had its election to make the money either out of them or the plaintiff; and the election the bank proposes to make is obviously the just and equitable one, because the sheriff's sureties were not properly chargeable.

The third exception must be overruled, for if the fact was that the coroner had an execution in his hands at the instance of Snead against Blackman, Smith and others, and if at that time the plaintiff thought proper to give Blackman a receipt for his (the plaintiff's) part of Snead's judgment, under an agreement with Blackman that he would

pay the bank that sum, on its execution against the plaintiff, if (530) it had been then in his hands as sheriff, still, as no cash was paid, such an arrangement made by the plaintiff and the sheriff, without the assent of the bank, could in no wise operate as a discharge of the plaintiff from his liability to the bank. The agreement of the sheriff could not bind the bank. Nothing but the receipt of the cash, or a levy by the sheriff, and taking property sufficient to discharge the execution out of the possession of the present plaintiff, could discharge his liability.

The fourth exception must be overruled, because the bill does not pretend to state that the bank assented to the transaction. Therefore, whether the plaintiff gave his receipt to Blackman for his part of Snead's judgment against Blackman, Smith, and others, was a thing quite immaterial to the bank. It was neither payment nor satisfaction of the execution which the bank then had against the plaintiff. But the defendants in their answer do state that they do not know whether the plaintiff gave Blackman any receipt for his part of Snead's judgment. Their omitting to say whether they were informed or believed that the plaintiff had given such a receipt, in this case, would have been useless, for the reasons before mentioned. The answers state that it was proved on the trial that Blackman did not have the execution for the bank in his hands at the time he and the plaintiff made the agreement.

We think that the order made in the Superior Court, allowing the exceptions to the sufficiency of the answer, must be reversed, and that all the exceptions must be overruled.

PER CURIAM. Decree below reversed.

Cited: S. c., 21 N. C., 328; *Parker v. Jones,* 58 N. C., 279.

(531)

WILLIAM A. GREEN v. JONES COOK ET AL., EXECUTORS OF WILLIAM HARRISON.

Upon a bequest to children, as tenants in common, with a postponement of the division, in the absence of any direction to the contrary, the expenses of each is a separate charge upon his share of the profits.

WILLLIAM GREEN, the father of the plaintiff, by his will, among other things, provided as follows:

"The balance of my estate, both real and personal, I absolutely order that it shall be kept together on my lands, under the directions of my executors that I shall hereafter name, and also that it be equally

divided between my children, Harriet, Bryan, and William A. Green; this estate to be divided between my three children named, when my daughter Harriet arrives to the age of 21 years or marries; the balance of my estate to be given up to my sons at the age of 21 years."

This will was not executed so as to pass the land of which the testator died seized.

The testator of the defendants was appointed guardian to the infant legatees, and kept the negroes together on their land, and made the expenses for their nurture and education a joint charge upon the profits as a common fund.

This bill was filed by the plaintiff for an account of his estate in the hands of the guardian, and, upon the usual reference, the master charged the plaintiff with one-third of the whole expenses. He excepted to this charge, and insisted that his undivided third of the profits should be charged with the expenses of his nurture and education only.

Other exceptions were taken, but the above presented the sole question in the cause.

W. H. Haywood for the exceptant.
Badger, contra.

(532) GASTON, J. Several exceptions have been taken by the plaintiff to the report of the commissioner, but the Court understands from the counsel on both sides that it is not required to pass upon any but a part of the seventh exception, because if that be not sustained, the plaintiff cannot bring the defendant in debt; and if it be sustained, the parties will either settle all the other matters embodied in the exceptions or take an account *de novo*. The defendant's testator had been the guardian of the three children of William Green, deceased, and their whole property was derived from their father. By a will, not executed, however, with the formalities necessary in a devise of lands, the testator, after making a provision for his wife, proceeded as follows: [His Honor here repeated the terms of the will as above set forth.] The guardian, who had the care of all these infants, made the expenses of their support and education a joint charge upon this property as a common fund, and the master has followed the same principle in taking the account. The plaintiff in his seventh exception objects to this as erroneous, and insists that his undivided third part of this fund ought to have been charged with the separate expenses of his support and education.

If we are at liberty to indulge in conjecture as to the intention of the testator, we should perhaps sanction the interpretation of the will which was adopted by the master. The infants were to be supported and schooled by the income of this property, and the property itself was

afterwards to be divided between them. It is not an unreasonable supposition that the father intended, if sickness, accident, or difference in their capacities for receiving such instructions as would qualify them for the business and duties of life, should render a larger expenditure necessary upon one than the others, that their portions, when entering on life, should be nevertheless equal. It is usual for parents who live to settle their children to make such allotment, and it is natural to look for such provision in the will of him who is taken from them before such duty is performed. But we are not permitted to indulge in conjecture. If his intention can be collected from the will, we are to follow it out; but if that gives no rule to guide us in this respect, we must follow the rules of law. Although the will could not be (533) operative to pass lands, if it had attempted to devise them, it manifests a clear purpose that the personal shall accompany the real property. Had it been operative as to lands, the real estate, as it is not devised away from his children, would have descended, as it has descended to them, on his death, as tenants in common. There can be no question but that under the will the personal property became vested in them in like manner; that the division only was postponed, and that on the death of one before a division, his interest would have been transmissible to his representatives. If each of the children take an undivided third part, both of the real and personal property, the profits of each share follow upon the share itself, as its fruits, unless some other disposition is made of them. And if no means were provided for the necessary support of the children, the income of each became applicable to the support of each. The will is utterly silent as to the profits of the property in which they respectively obtain these undivided shares, and as to the charges to be imposed on them. No intent, therefore, to make the profits of the whole property a joint fund for the support of all the tenants in common is expressed. In strong terms the division of the property is prohibited until the eldest, by marriage or arrival at the age of 21, shall have occasion for the allotment of her part in severalty. If from this direction it could be *inferred,* as if the testator had so declared, that until this division, the profits should be joint and the charges on them joint, then we should be justified in giving effect to his direction thus satisfactorily ascertained. But we cannot draw this inference. He might for many obvious reasons, besides this conjectured purpose, have wished a division to be postponed until absolutely necessary. He might, from the nature of the property, have deemed it more for the interest of each that the whole property should be kept together and worked together, believing that thus the whole receipts would be greater, the entire expenditures less, and the net income of each be thereby enlarged. We must follow, then, the general rules of (534)

law by which the profits attend on the shares and the charges attach to the profits. And we do this with the more confidence, as in all the cases we have met with where maintenance is decreed to children who take an undivided property by will, we find that the maintenance of each child is deducted out of the profits of his share.

The Court feels itself bound to declare so much of the seventh exception as objects to that parts of the report which credits the guardian in account with the plaintiff with a third part of the expenses of the support and maintenance of the three wards must be allowed, and that the guardian, instead thereof, is to be credited with the separate expenses for the support and education of the plaintiff. The parties will proceed to settle the account on this principle, or have a new account, at the option of either. And for this purpose, and in pursuance of the agreement of the parties, the Court doth set aside all the residue of said report, without an expression of opinion on the matters therein embraced.

PER CURIAM. Exception sustained.

Cited: Branch v. Branch, 58 N. C., 271.

(535)

SAMUEL S. DOWNEY AND ANN A. SMITH v. JAMES W. SMITH, MAURICE SMITH, SAMUEL H. SMITH ET AL.

1. A gift, unaccompanied with delivery, and by an instrument not sealed, is not valid; and where a testator bequeathed a slave to his widow for life, and afterwards to all his children, and while the slave was in the possession of the widow some of the children relinquished, without consideration, and by a writing not under seal, their interest in the slave to one of their brothers, it was held that the instrument passed nothing.

2. An executor will not be charged interest on a small sum, too inconsiderable for distribution, which he *bona fide* keeps in hand for a general settlement. Nor will he be charged interest on a large sum received after the filing of a bill for an account, when he makes no opposition to the account, and retains the money to answer the decree. But if an order is made in the cause, authorizing him to pay the money into court, and he neglects to do so, he will be charged with interest upon it from the time the order was made.

THIS bill was filed in the Court of Equity for GRANVILLE, for an account and distribution of the estate of Samuel Smith, the elder, which he had bequeathed to his widow during her life, and afterwards to be divided among all his children. Samuel Smith, the elder, died in 1800, leaving ten children, all of whom, or their representatives, were either

parties plaintiffs or defendants. The defendants James W. Smith and Maurice Smith, two of the sons of the testator, were his surviving executors. The widow died in 1828. Among the slaves bequeathed to the widow was a woman named Amey. Soon after the death of their father and during the life of his widow, several of the children executed to their brother Samuel, the younger, a writing which recited that it was the intention of their father to give that slave to his son Samuel, and for the purpose of fulfilling that intention they thereby "relinquish to said Samuel, the younger, all their claim and title to said slave Amey." The writing was not under seal. The slave was then in the possession of the widow, and so remained until her death, and in the meantime had four children. Upon the death of the widow, the defendant Maurice, as executor of his father, sold these negroes as part of (536) his estate, and in his answer stated that he did so because he was advised that the writing was not effectual; but he, and his coexecutor, James W. Smith, averred that they did not mean to claim their shares of the proceeds of the sales of that family of negroes.

Upon the death of the widow, in 1828, the estate to be divided was of the value of nearly $8,000, and the executor immediately distributed the slaves of which the title was undisputed, to the value of $4,184.81; and at that time Maurice received from his coexecutor, who resided in Tennessee, $290.89 which he had in his hands by the permission of his mother, of the principal money collected on debts due the testator. The residue of the moneys collected on those debts bequeathed to the widow for life had been used by her, and was to be accounted for by her administrator, with whom no settlement was made, nor could be made, in consequence of the death of the executor of the widow, and a litigation about the probate of his will. At the first term after the filing of this bill, which was in August, 1831, the defendants James W. Smith and Maurice Smith, executors of Samuel Smith, the elder, answered and submitted to an account. Soon afterwards the defendant Maurice made a settlement with his mother's administrator, and received the sum of $1,528.94. The plaintiffs replied to the answer, but took no testimony. Upon a reference to the master, accounts were taken upon the answers and interrogatories to the parties. In the report the slave Amey and her increase were estimated as part of the estate to be divided among all the children, and in the account the defendant Maurice Smith was charged with interest on the sums of money which came into his hands from the time he received them, though it did not appear that he had used the money or made any profit on it up to that time. Upon the coming in of the report, an order was made that the defendants might pay into court such moneys as they might admit to be due the estate, without prejudice to the rights of any of the parties.

(537) The defendant Samuel H. Smith, executor of Samuel Smith, the younger, excepted to the report because by it the proceeds of the sale of Amey and her children were stated to be a part of the estate to be divided among all the children of Samuel Smith, the elder, and no notice taken of nor any effect given (as to any of the parties) to the agreement or relinquishment made to his testator.

The defendant Maurice Smith excepted to the charges of interest against him.

Devereux for plaintiff.
Nash for Maurice Smith.
W. H. Haywood for Samuel H. Smith.

RUFFIN, C. J., after stating the case: The exception of the defendant Samuel H. Smith, executor of Samuel Smith, the younger, which raises the question whether the gift of the negro woman Amey is valid or not, must be wholly overruled. The writing is not under seal, and the possession did not accompany it. The slave was then and for many years afterwards held by the widow, and could not be delivered. A gift is not effectual unless it be made by deed or delivery. As to the voluntary confirmation of the release on their part by the defendants Maurice and James W., they will doubtless act on it between themselves and their brother's family. But it is not the subject of judicial cognizance in the distribution of the estate by decree. The money is still, in law, the property of those to whom the testator gave it.

To the charges of interest in the account reported by the master, the defendant Maurice has put in an exception which we think must be allowed. It could not have been the expectation or wish of any of the parties that the small sum of $290.89 should be distributed amongst ten legatees before a general settlement; and the executor might, therefore, very properly not offer it. As to the larger sum received from the mother's administrator, it stands upon a different ground. It came to the defendant's hands pending this suit for it, and it was reason-
(538) able that the executor should keep it to answer the decree. He made no resistance to the account and has excepted to no part of the report but the charges of interest. He ought not to be charged interest on the money which he ought to have kept, and as far as appears did keep, until the rights of the parties could be ascertained. It does not appear upon what ground the charge of $11.96 for interest on a debt of William Smith, is made by the master against Maurice Smith. There is no evidence relative to it, and therefore the account must also be corrected in that respect.

After allowing the exception of the defendant Maurice, and reforming the report accordingly, the report and account must in all other respects stand confirmed.

There arises, however, upon the making of the decree, another question upon the subject of interest which in our opinion is against the executor Maurice. Upon the coming in of the report at September Term, 1832, an order was made that the defendants might pay into court such money as they might admit to be due the estate, and without prejudice to the rights of any of the parties as to their shares. This defendant had then an opportunity of discharging himself from further responsibility, and upon the paying in of the money the court might have ordered at least a partial distribution. He has not availed himself of the leave granted to him, and we must presume that he has retained the money either for his own use or *male fide* for the purpose of depriving the owners of the use of it, and in either case it is just that he should pay interest since that time. The decree will accordingly be that the shares of each shall carry interest from September, 1832, until paid. The costs had nearly all accrued before that order; and as no default in the executor prior to that time appears, it is proper that the fund should answer the costs; and, therefore, they must be paid equally by all the parties out of their shares.

PER CURIAM. Overrule the exception of the defendant Samuel H. Smith, and sustain that of the defendant Maurice Smith, and decree according to the report of the master thus corrected, allowing interest on each of the shares from September Term, 1832, of (539) the Superior Court for Granville, till paid; all the costs of plaintiffs and defendants to be paid equally by the parties interested in the estate.

Cited: Munds v. Cassidy, 98 N. C., 565.

JESSE SANDERLIN ET UX. V. DANIEL THOMPSON ET AL.

1. Where a testator directed his land to be sold and the proceeds divided among his children, the power being apparently executed, and the purchase money paid to the children, they will not be permitted to recover in ejectment, because the will was not proved so as to pass the land.

2. But if the purchaser, after filing this bill for relief, procures the will to be proved, and charges this fact by a supplemental bill, he thereby overrules his original equity; because, having established a legal title in himself, he defeats the jurisdiction of the court.

3. There is no equity in favor of the grantee of a power, nor of a purchaser under him, against the heir, to supply a defect in the creation of the power. But it is otherwise as to the purchaser, upon a defective execution of it.

4. One who has the legal title cannot maintain a bill to have an equitable claim upon his estate declared unfounded.

THE bill, which was filed in the Court of Equity for ONSLOW in 1827, charged that John Thompson, the first husband of the *feme* plaintiff, died in 1800, having by his will, which was admitted to probate upon the oath of Nathan Askew, the only subscribing witness thereto, devised and bequeathed as follows: "*Item:* I lend to my wife, Sarah Thompson, all the property that I possess, during her life or widowhood; and if she should marry, the property shall be sold and divided betwixt my children and the child that she is big with now, and herself," etc., and appointed his widow and William Pollock executors, who duly proved the will; that the widow remained in possession of the land whereon the devisor lived at the time of his death, that being the only land he then owned; that in 1805 she intermarried with the plaintiff Jesse, whereby the latter, in right of his wife, became the sole executor of the will, Pollock having died before the marriage; that the plaintiff, being desirous of faithfully discharging the trust devolved upon him, under the advice of learned counsel, and under an order of the county court, sold, on 3 December, 1805, at public auction, the property which remained in the widow's possession, including the tract of land; that the sale had been duly advertised for more than forty days, and when
(540) the land was set up several persons bid for it, until it was finally struck off to Jacob Williams, he being the last and highest bidder, at the price of £392 17 6, which was at that time a fair and full price for it; that the sale was in all respects conducted fairly; that J. Williams owned the adjoining land, and was desirous of annexing this to his other possessions, and purchased for his own and sole use; but that after much importunity from the *feme* plaintiff, he agreed to let the plaintiff Jesse have the land at the same price he was to give, and his name was substituted in the account of sales for that of Williams, which was erased; that no deeds of conveyance were executed between the parties, as it was believed that the will and account of sales would be a sufficient title for the land; that on 27 September, 1808, the plaintiff Jesse settled with two of the defendants, Charles Cox and Kader Cox, who had intermarried with two of the daughters of John Thompson, and paid over to them and took receipts for the respective shares of their wives in the estate of their father, including the proceeds of the tract of land; that on 27 July, 1815, he made a similar settlement with the descendant Daniel Thompson, who had then arrived at full age, and in

like manner paid him, and took his receipt in full; that these settlements were full and fair, and were considered by the parties as such, and the receipts were regarded by them as discharges for their interest in the estate, both real and personal, of the testator, and were acquiesced in as such for many years, the defendants having had full knowledge of their rights when the settlements were made and the receipts given; that believing himself to be undoubted owner of the land, the plaintiff Jesse had laid out and expended large sums of money in improving it, all which was done with the knowledge and acquiescence of the defendants, who lived in the neighborhood and had never set up any claim to it for the space of twenty years; that, notwithstanding all this, the defendants had at September Term, 1826, of Onslow Superior Court of law, brought an ejectment for the land, and at September Term, 1827, recovered a verdict, and had judgment thereon; that on the trial the (541) plaintiff Jesse offered in evidence the will of John Thompson as a part of his title, but it was rejected as inoperative to convey real estate, because there was but one subscribing witness thereto, whereby he was remediless at law. The prayer of the bill was for an injunction to restrain the defendants from enforcing their judgment at law, and for securing and quieting the possession and title of the plaintiff; or, if the title to the land had not passed in equity to the plaintiff under the will, that her dower in said land might be decreed to the plaintiff Sarah, and that the defendants might account with the plaintiff for the moneys laid out and expended in improving the land, also for the sums paid them as parts of the proceeds of the land, and for such other relief as the case might require.

The answers of the defendants admitted the death of their father, John Thompson, the devise in his will, the marriage of his widow with the plaintiff Jesse, and the assumption of the executorship by him in right of his wife. They also admitted the sale of the land at the time mentioned, but denied that it was made in pursuance of learned legal advice, or in a regular and fair manner, and for a full price, and insisted that Williams did not purchase for his own use, but as the agent of and for the benefit of the plaintiff Jesse. They also denied that their settlements with the plaintiff Jesse were fair and *bona fide,* and made with a full knowledge of their rights, but averred that the plaintiff Jesse had taken advantage of their youth and ignorance of the provisions of their father's will, and had imposed such terms as he pleased upon them; that soon after ascertaining that they had not been fairly dealt by, they had applied to counsel, who had informed them of their rights, and they then commenced the action of ejectment mentioned in the bill. They denied the right of the plaintiff Sarah to her dower in the land, because she had not dissented from the will of her deceased husband.

(542) After the filing of the answer, the case was continued for several terms, when in 1831 the plaintiffs by leave of the court filed an amended and supplemental bill, in which they stated by way of amendment to their original bill that on 29 March, 1826, they had, as executor and executrix of John Thompson, executed a deed of conveyance to Ann Graham, wife of Stephen Graham, and sole heir to Jacob Williams, for the land purchased by said Williams, on 3 December, 1805, and that on 30 March, 1826, Stephen Graham and his wife, Ann, conveyed the same in fee to the plaintiff Jesse. The plaintiffs also stated that since the filing of the original bill they had instituted proceedings in the county court of Onslow to have the will of John Thompson established as a will to convey real estate, and after obtaining a verdict in their favor in the county court, the issues had been carried by appeal to the Superior Court, where, at March Term, 1831, the said will was established as a will to convey real estate, and the proceeding therein being certified to the county court, the will was duly recorded, and thereupon the plaintiff Sarah, who was then the sole surviving executrix to said will, qualified thereto, and letters testamentary issued to her. The plaintiffs alleged further that by the probate of the will as a will devising real estate, and by the qualification of said Sarah as executrix thereto, her acts under the same were validated, the probate having relation to the death of the testator, and thereby ratifying and confirming her prior acts.

Answers were put in to the amended and supplemental bill, but it is unnecessary to state their contents or to detail the testimony taken in the cause, as the judgment of the Court proceeded upon the facts disclosed in the pleadings above stated.

Devereux and J. H. Bryan for plaintiff.
Badger, contra.

RUFFIN, C. J. As the plaintiff's case was at the filing of the original bill, or rather as it is therein stated, and in the subsequent additions as to facts existing at the commencement of the suit (which are properly amendments), there was doubtless a ground for relief in this (543) Court. That case was, that the will was inefficacious to pass the land, and that the parties had dealt with each other under a contrary belief; that the plaintiffs had made a deed to the heir of Williams, who had reconveyed to Sanderlin, and the latter had accounted with the defendants and the other children for their respective shares of the price of the land, as well as for the other parts of the estate, and had been in possession of the land and improved it, believing he had a good title, in which the defendants acquiesced.

The relief sought is, primarily, to be confirmed in the legal title by a conveyance from those to whom payment had been thus made, and to be quieted in the possession by an injunction against execution on the judgment at law; or if that cannot be, that dower may be assigned to the wife, the real estate being undisposed of; and that an account may be taken of the improvements and of the whole estate, and a decree that the defendants shall refund whatever it may be found they have been overpaid in respect of the land, to be raised out of the land, and for an injunction in the meantime.

The claim for dower, it is true, is not sustainable; and it is now settled, in *Craven v. Craven,* 17 N. C., 338, that a widow for whom any provision is made in the will is not dowable unless she dissent.

But certainly there ought in such a case, supposing it true, to be a decree for a conveyance from the heirs, they having received the price of the land. It would amount to a sale by them, and ought to be specifically executed. But it would be open to all the equity upon which defendants may resist that relief; as that the price was inadequate, or that they were mistaken in their rights. But in this case even a wider field of objection would be open to them, as no express sale, that is, by a particular contract with that view, is alleged; but only one implied from the payments. As to that, the case is that all the parties had the idea that the sale already made was valid. This would impose on the plaintiffs the burden of proving, at least, that it was a fair sale for an adequate price; that Williams was a real purchaser, and himself substituted in his place by a subsequent and independent agreement, or (544) that the children were fully informed of the real facts, and with that knowledge received the money upon a settlement, in which the land was included. Upon these points there is evidence, which it is not necessary to investigate minutely, as the decree will not turn on it. Upon its examination it is indeed far from satisfactory. It does not appear that any account in detail was rendered or settled; but round sums were paid to the children, as they respectively came to age, and receipts taken, in which there is no notice of the lands specifically; and there is no other direct proof that it was included. The probability, also, that Williams purchased upon a previous agreement that the plaintiff should have the land is so strong as to amount almost to a certainty. There is no evidence that the plaintiff communicated that fact to the defendants, or that they knew it. Indeed, the bill affirms the contrary to be true, and that Williams did not buy for the plaintiff, but for himself. But as the decree will not declare these facts to be either way, as we do not proceed on them, and do not wish to conclude the parties upon them in any future litigation which may involve them, the examination of the evidence will not be further prosecuted.

It is plain that the material equity of this case arises upon the facts that the will did not confer a power to sell, and that the parties labored under a mistake upon that point—they thinking that it did, and treating the plaintiff as the owner. This equity would entitle the plaintiff to original relief, as an intrinsic equity of the case, independent of any proceedings at law. It rests upon the inability of a court of law to do him right, because his title is not a legal one. The judgment at law, and its mere legal injustice, does not create the equity of the case. Relief against the judgment is therefore merely collateral to the general relief to which the plaintiff is otherwise entitled, and is founded upon its being against conscience in the persons who have received the price of the land, as being effectually sold under the power, to take advantage of the want of it, and to insist on the legal title which they have, be-
(545) cause they happen also to be the heirs of the testator, and so to insist in a court of law, where the present plaintiffs could make no resistance.

It seems to the Court, for these reasons, that the new matter charged in the supplemental bill overrules the whole of this equity. It charges that pending the suit the will has been proved as a will to pass real estate, and that the power created therein is valid, and infers that the probate relates back, and that the former sale is confirmed thereby, and that Sanderlin has now the legal title. Supposing that sale a fair one to Williams, we see no reason to question the correctness of those positions, either as the rules of equity or law. But admitting that the sale to Williams was only colorable, and therefore that the persons to take benefit under the power might impeach it in this Court, there is nevertheless no jurisdiction here to entertain a bill of the present plaintiffs in respect of it, in which they allege that the power has been duly executed, and that under it one of them has the legal title. For the present, the case is considered upon its intrinsic equity, unaffected by the judgment at law, which, in the sequel, will not be forgotten.

It is true that notwithstanding the power, the descent was not broken, and the legal title was in the heirs. But a power is not an equity arising out of the estate of the heir, but is itself a legal authority over that estate, whereby, when executed, it may be divested and vested in another to hold as under the instrument which created the power. There is no equity, therefore, between the grantee of a power or the person in whose favor it has been executed (supposing it not to be defectively executed) and the heir. The grantee of the power has, to the extent of it, an absolute control over the estate at law, without the aid of this Court, and therefore cannot ask such aid. He may, as between himself and those for whose benefit it was created, in a case of doubtful construction, apply for directions; but against the heir by himself, and as such, there

is no relief to be given. There cannot be a bill by the grantee, (546) where the power is clear in its terms, merely for a decree to sell, and to bind the heir beforehand, except so far as it may be necessary to establish the will which contains the power; which is not one of the objects here. The will and powers being established, the heirs do not join in the sale. Nor after a sale and conveyance can there be a bill to confirm the sale and declare the conveyance valid. The plaintiff cannot state a case, involving those facts, which can have equity; for they turn every question and right as against the heir into a legal one. There are cases in which it is laid down that there is a jurisdiction in equity, upon the bill of the owner of a legal estate in possession, to decree a deed, made or kept on foot by fraud, and under which another claims the legal title, to be delivered up to be canceled. *Lord Thurlow,* indeed, thought that all that could be done was to perpetuate the testimony. But *Lord Eldon* ventured to say that he would give relief upon the principle of *quia timet* because the deed was apparently a legal title, by which the possessor might be harassed at law, and by the death of witnesses his title be defeated, though in truth the better one. But this can never be applied to a claim as heir, for there cannot be a fraud in the fact that he is heir.

As little ground for relief is there against the defendants, regarding them as the persons beneficially interested under the power as well as being the heirs. There is no case in which it has been decided or said that one having or claiming to have the legal title can come here to have it declared that another, who unjustly claims an equity arising out of that estate, has not such an equity. What comes nighest to it is a bill to foreclose. But that is essentially different. The mortgagee admits the equity of redemption to be a just right of the mortgagor, and submits that he may have the benefit of it: only he insists that he should not always have it, and prays that he should exercise it in a reasonable time, or thereafter lose it. But although, after twenty years, a mortgagee may rely upon the time as a bar to the mortgagor's own bill for redemption, there is no precedent of a bill by the mortgagor himself to have that time declared a bar. The bar to an equity is a defense to a bill to enforce it, but can never make a case for a decree merely (547) to restrain the future assertion of it.

The question upon the fairness of the transactions, upon which depends the validity of the plaintiff's title in equity, supposing it valid at law, can therefore only be investigated when it shall be impeached in equity by the persons interested under the power. The persons having the legal title cannot repel that right to impeach it by establishing its fairness now, while the other party does not allege its fairness in this Court, but is asserting, at law, its legal invalidity.

Nor can the questions upon the validity of the legal title be drawn into this Court upon any idea that anything will be deemed an execution of it here which is not so at law, or that the facts necessary to its validity can be better established here than at law. It may be doubted, indeed, whether a court of law would not be obliged to regard that as a good execution which this Court would not. For instance, if it be the fact that Williams purchased for the plaintiff, undoubtedly this Court would set the whole aside, unless the acts or acquiescence of the parties have since confirmed it. But it is by no means certain that at law they could look beyond the deeds; for the question is upon their effect upon the legal title of the heir, and it does not follow that he could take advantage of a fraud on the parties for whose benefit the power was conferred. *Lord Coke* says, indeed, that if a power to sell be given to two executors, and one renounce, he cannot buy from his companion, but the deed is void. This is upon the apparent fraud, or danger of fraud, and the whole appears on the face of the title. Whether the inquiry could be carried further may be questioned. But if it could, it must depend, at law, upon precisely the same facts on which its validity, as a legal execution of the power, would be decided here as against the heir. There is, therefore, nothing in the case to call this Court into action, unless it be the judgment at law and the state of the evidence on which the (548) verdict was rendered; for the conveyances do apparently duly execute the power, which is a clear and explicit one to the executors, to sell upon the marriage of the widow; and the plaintiff has, upon the showing of his supplemental bill, the legal title.

What effect can the judgment, and the circumstances under which the verdict was obtained, have? For the plaintiff it is contended that at the trial he had not the legal title, though it turns out that he was then entitled to it, and that he has since got it; each of which circumstances gives him an equity, because the first made it unconscientious in the other party to sue at law, and, at all events, the last makes it so to take out execution on the judgment, since the title on which it was given is now divested.

It has already been remarked that the primary object of the first bill was to obtain the legal title, upon the supposition that the will gave no means of getting it; and that, if obtained, was the sole object of that bill, except for an injunction as consequential to the principal relief. All the other relief sought is only in the alternative of not obtaining that. The case now is, that the plaintiff has that title, and that the mistake consisted in supposing that the power was not well raised. If he was entitled to it from the plaintiffs at law, or if they could have prevented him, and did prevent him from getting it, and by those means

excluded him from his defense, then they did act against conscience, and the plaintiff ought to be relieved. Such the argument assumes to be the case. But the assumption is against the truth. The plaintiff had no right to call on the present defendants for the legal title. He had it potentially in himself, and culpably or ignorantly neglected to execute it. It has been shown that before being sued at law, he could not have framed a bill stating himself to have a valid power, or an executed title under such a power, on which any relief could be decreed against the heir, because the plaintiff could relieve himself. By the same means he could have effectually defended himself against the suit of the heir. It is his own folly that he did not. It is not against conscience (549) in the heir to enter and take the profits until a sale, as they are his right at law; and here the same persons were entitled both as heirs and as those among whom the proceeds of a sale were to be divided. It would only be iniquitous in them if they had received those proceeds and intercepted the legal title, which, in the actually existing case, they did not and could not do. The only thing which could affect the conscience of the plaintiffs at law would be that they were seeking to recover against one to whom they ought to convey the legal title, and who could not get it but from them. If he had it, there is no equity to prevent one legal claimant contesting the like claim of another, nor, after a trial at law, to enable the latter to reëxamine the case. If he had it not, but had a right to claim it from a third person, the same principle applies. There can be no equity between persons between whom there is no privity.

It is not conceded that the present plaintiffs had not the legal title at the trial of the ejectment. It is supposed they had not, because the will had not then been proved as a will of lands, and *prima facie* it was not, as it had but one witness. This takes for granted that it could not have been proved on the ejectment. This proposition is not admitted, though it is not needful in this case to dispute or to determine it. If it might have been then proved, it was entirely the fault of the party not to offer the proof, or the mere error in law of the court to reject it; and in neither case can this Court help the party. But admitting that it was not evidence at law in that state, the subsequent probate establishes, against the present plaintiffs, that it was a good will, and the power over the real estate valid. These facts then existed, and there is no allegation in the bill that the parties were then ignorant either of the facts or the evidence of them. Can this Court, in such case, grant a new trial here, either upon the ground that the plaintiffs at law ought not to have got their verdict or that they ought not now to proceed on it, as their title is now gone? In the last point of view the verdict is regarded as being rightful at the time. If the title is since divested, and (550)

vested in the present plaintiffs, their remedy is in a new action at law upon their title. In the former we think the rule is settled that this Court does not interfere with a verdict in any action and again hear the matter upon its merits, or order a new action or issue to be tried at law unless the matter which the party now shows was not a defense at law, or unless he was prevented from showing it by the fraud of the opposite party on the trial or by mistake or accident amounting to surprise. Whenever a legal title will be relieved against in equity, upon one of its own peculiar principles, of course an injunction will be granted to stop proceedings at law upon such title. But when the relief is sought upon the ground merely that the party has lost his defense at law by any of the above means, it is granted solely because the court of law would, according to its forms of proceeding, be unable to redress the injury, and thus be made the instrument of doing injustice. In ordinary actions this is the consequence of their conclusiveness at law. Whether the principle extends to the action of ejectment may therefore be questioned, because that is not conclusive, and the applicant here can, by completing his evidence, do himself justice at law. Besides, it is probable that the only decree would be to stay execution until another ejectment could be tried; for a court of equity has no right to draw to itself the determination of pure questions of law, which can be tried in the appropriate tribunals. If that be so, the only operation of the injunction would be as to the costs of the first trial, for which alone a bill will not, I believe, lie in any case, and especially to charge heirs who have not been personally in fault. But however these points may be, there would be no ground for this injunction were the action one in which the judgment is conclusive; because it was in the power of the parties claiming under the power either to prove the will on the trial or, at all events, before it. They had the means of making it evidence, and they must abide the consequence of neglecting to do it.

(551) The bill and supplemental bill must, therefore, we think, be dismissed, with costs.

PER CURIAM. Decree accordingly.

Cited: Norwood v. Lassiter, 132 N. C., 58; *Elmore v. Byrd,* 180 N. C., 127.

ROBERT MARSH, EXECUTOR OF MILES SCARBORO, v. NANCY SCARBORO ET AL.

An executor who pays legacies voluntarily, without taking a refunding bond, has no equity against the legatees to compel them to refund, unless the debts for which the assets are deficient are such as the executor had no notice of when he paid the legacies, or unless some casualty has destroyed or impaired the value of the assets retained to pay them.

THE plaintiff alleged that soon after he proved the will of his testator he understood and believed that the debts due from the estate were few and of small amount, and that the assets not bequeathed in specific legacies were amply sufficient for their discharge; that under this impression he delivered over to the legatees their respective legacies without taking any refunding bonds from them; that he afterwards proceeded in administering the residue of the estate, and that debts to an amount larger than the assets in his hands had been presented, and in paying them he had been compelled to advance his own funds. For the amount thus advanced he prayed to be reimbursed by the defendants, who were the specific legatees.

The defendants denied that the plaintiff had exhausted the assets in his hands, objected that he had not pursued the directions of the acts of the General Assembly in relation to executors and administrators, insisted that he should be held to strict proof of the allegations of his bill, and claimed the benefit of every legal objection to his recovery.

The plaintiff filed with his bill a copy of the inventory and account of sales of the estate of his testator, which he had returned to the county court, and also a schedule of the debts paid by him in the course of administration. No testimony was taken by either party, and the cause was heard upon the bill, answers, and (552) exhibits.

Nash for plaintiff.
W. H. Haywood and Waddell for defendants.

GASTON, J. The plaintiff has not made out a case which, according to the rules of this Court, entitles him to relief. When an executor has voluntarily paid legacies, he is not in general permitted to institute proceedings against the legatees to refund. As it is his folly to make such payments before the amount of the estate can be ascertained, or his negligence in not acquainting himself with its amount, when that information may be obtained, neither of these grounds will entitle him to the interference of this Court, and for that purpose subject the legatees to the inconvenience of an account of the administration of the assets.

There are certainly, however, excepted cases in which the executor can demand this relief. If debts be afterwards made to appear of which debts there was no notice when the legacies were paid, or if any casualty which could not have been reasonably anticipated has, without fault or negligence in the executor, destroyed what was kept for the payment of the debts—these matters, arising subsequently to his settlement with the legatees, may give him an equity to call on them to refund what he needs for the satisfaction of creditors. But then the matters constituting this equity must be distinctly set forth in his bill, for obvious reasons. One is to show the right of the plaintiff to have what he asks of the court, and another is to enable the defendants to put in issue the matters upon which that right depends. The bill in that case is wholly insufficient. It sets forth *no accident* which has destroyed the estate or impaired the value of the assets, and it does not charge *what* debts, if any, have been demanded since the payment of the legacies, of which the executor then had no notice. Had the bill, however, been sufficient, no relief could be given unless its material allegations were either admitted or
(553) proved. Here the statement in the bill, vague as it is, that the amount of debts exceeded the assets retained by the executor, is wholly denied; the presumption of the law is against it; and there is *no* evidence of any sort to support the allegation or to contradict the presumption.

The bill must be dismissed, and at the costs of the plaintiff. As it is possible, however, that the plaintiff may have rights which can be shown on a proper bill, this dismission is directed to be made without prejudice.

PER CURIAM. Bill dismissed.

Cited: Alexander v. Fox, 55 N. C., 108; *Stack v. Williams,* 56 N. C., 15; *Donnell v. Cooke,* 63 N. C., 229; *Bumpass v. Chambers,* 77 N. C., 359; *Lyle v. Siler,* 103 N. C., 266.

MARY WARD v. SETH WARD ET AL.

In a suit by a married woman, a *prochien amy* is necessary not only to secure the costs, but, when her husband is a defendant, to interpose a suitable adviser; and this rule is not dispensed with, even where the wife sues in *forma pauperis.*

THE plaintiff, being entitled to a separate estate under a marriage settlement, filed her bill, by permission of the court, in *forma pauperis* against her husband, Seth Ward, Henry G. Montford, the trustee, and Edward Williams, which last named defendant was charged with having

in his possession, claiming as his own, some of the property belonging to the plaintiff under the marriage settlement, he having notice of the plaintiff's title at the time he purchased it.

The prayer of the bill was to have an account taken of the estate under the settlement, and that the present trustee might be removed and another appointed, and that the trust fund be secured. The defendant Williams demurred, and for cause of demurrer, among others, especially assigned this, that the plaintiff is a *feme covert,* and has no right to sue alone.

On the last circuit, at Onslow, DONNELL, J., overruled the demurrer, and the plaintiff, under leave of the court, appealed.

Bryan for plaintiff. (554)
Devereux for defendants.

DANIEL, J., after stating the material facts: A *feme covert* having a separate estate, may, in a court of equity, be sued as a *feme sole,* and be proceeded against without her husband, for in respect of her separate estate she is looked upon as a *feme sole.* In *Dubois v. Hole,* 2 Ver., 614, Mr. Raithby, the annotator, has collected and digested all the authorities on this question. In a court of equity *baron* and *feme* are considered as two distinct persons, and, therefore, a wife, by her *prochein amy,* may sue her own husband.

The question to be settled on this demurrer is, Can she sue alone, in *forma pauperis?* The courts of equity, as well as the courts of law, permit persons to sue in *forma pauperis* when proper affidavits are made. 2 Mad. Ch., 256. But I can find no case where a wife has been permitted to sue her husband in that character. I cannot find any case where the wife has been permitted to sue alone in a court of equity. Where the husband is made a party defendant, the invariable practice is for the *feme covert* to sue by her *prochein amy.* The rule is established, I expect, not only to secure costs, but to have a responsible person who would be liable if the process of the court should be abused, and also that a proper and fit adviser might interpose to prevent domestic feuds, and at the same time protect the *feme* from the frauds and power of the husband. 3 P. Wms., 39.

The plaintiff asks leave to amend her bill by adding a *prochein amy.* This is an appeal under the late act of Assembly, from an interlocutory decree. This Court has no power to make any order or decree in the cause except on the point appealed from. We are of opinion that the court below erred in overruling the demurrer. It should have been sustained.

PER CURIAM. Decree overruled.

(555)

TULLY JACKSON v. JOHN H. BLOUNT ET AL.

1. A mortgagee who purchases the mortgaged premises at sheriff's sale, upon a parol agreement to hold them as a security, is, in equity, a mere encumbrancer, and parol evidence of the agreement may be received, notwithstanding the sheriff's deed be absolute.

2. Facts and circumstances *dehors* an absolute deed may, in equity, be proved to show it was executed merely as a security.

UPON the pleadings and proofs in this case it appeared that on 18 April, 1827, the plaintiff, by an absolute deed of bargain and sale, in which the sum of $196 was recited as a consideration paid to him by James Stanton, conveyed to the said Stanton in fee the tract of land on which he resided, and that at the same time Stanton executed to the plaintiff a written declaration setting forth that the object of the conveyance was to secure the repayment of that sum, with interest, and promising on the part of Stanton to reconvey the land whenever such repayment should take place. The deed was shortly thereafter registered, but the defeasant had never been registered. The tract of land was proved to have been worth about $600, and the plaintiff retained the possession of the whole of it until 1830, and of a part of it until this time. On or about 10 July, 1829, a sale was made of this land by the sheriff, upon an execution against the plaintiff, at the instance of a creditor; and at that sale Stanton became the purchaser at the price of $75, gave his note to the creditor in discharge of the judgment, and took a deed for the land from the sheriff, in which it is described as the same land heretofore conveyed by Jackson to Stanton. It was in proof, also, that on the day of the sheriff's sale Stanton informed the execution creditor that he had a lien on the land, but had no objection to a sale, provided that he could become the purchaser and hold his title under such sale, as he did that under his deed, as a security for his advances; that thereupon they proceeded together to the place of sale, where Stanton bought, the plaintiff not being present; and that on the land being bid off, he quieted the plaintiff's wife, who seemed uneasy, by declaring that all he wanted was to secure the repayment of what he had ad-
(556) vanced, or might advance. There was satisfactory proof also, that after this sale Stanton and Jackson recognized each other as still standing in the relation of creditor and debtor, and the sheriff's conveyance, and Jackson's conveyance as securities for the payment of the debt. Messages were sent to Jackson to liquidate and pay off the debt. An arrangement was made by him for letting out the land to take up the notes given by Stanton at the sheriff's sale, and on Stanton being apprised of it, he told the plaintiff that he could afford to pay as good a rent for the land as anybody; that he would be satisfied with an arrange-

ment which would pay off all his demands, but he did not approve of one which was to discharge his last lien only, for he looked upon that as his best title. In the next year (1830) Stanton occupied accordingly a part of the land, Jackson retaining possession of the residence. Before the close of that year Stanton died. The guardian of his infant heirs at law then instituted an ejectment in their names, and prosecuted it to judgment against Jackson, who filed this bill to enjoin their further proceedings and to redeem the mortgaged premises.

Kinney for plaintiff.
Mendenhall for defendants.

GASTON, J., after stating the facts: Upon these facts it is manifest that the relation of mortgagor and mortgagee did originally exist between the plaintiff and the intestate, the ancestor of the defendants. It is almost equally plain that whatever might be the form of the proceedings at the sheriff's sale, or the legal effect of the sheriff's deed, the mortgagor and mortgagee intended by this latter transaction but the removal of an encumbrance which for some cause or other was supposed to affect, and which by reason of the nonregistration of the defeasance, did affect the mortgaged property; and it would follow from the acknowledged principles of a court of equity, as well as from the plain intent of the parties, that the relation of mortgagor and mortgagee continued after the sale, and that the sheriff's deed was but a further security to (557) cover the further advances made. Objections, however, have been made to the receiving of the proofs. It was insisted that as the sheriff's deed was absolute, the admission of these proofs would be not only a violation of the rule which forbids a written instrument to be contradicted, varied, or explained by parol, but is an attempt to set up a parol contract in relation to lands in contradiction to the act of 1819, entitled "An act to make void parol contracts respecting lands and slaves." Neither of these objections appear to us well founded. With respect to the former, it may be remarked in the first place, that the testimony is not offered to explain or vary the contract between the sheriff and the purchaser at execution sale, who alone are the parties to the conveyance of the sheriff, and, secondly, that it has been long since settled (see *Streator v. Jones,* 10 N. C., 423) that in equity facts and circumstances *dehors* an absolute deed—such as inadequacy of the alleged price, possession remaining with the supposed vendor, and the supposed vendee claiming still to continue a creditor for the money advanced—may be received in evidence to show that the purpose of the conveyance was to give a pledge or security for the repayment of the money. Nor is it apprehended that this rule of equity is at all affected by the act of 1819. But at all events,

in this case, the original right of the plaintiff to redeem is evidenced by the written agreement of Stanton, and the facts connected with the sheriff's sale are properly examinable in order to ascertain whether, in that transaction, Stanton acted in his individual or in his fiduciary character. If in the latter, neither he nor his heirs can set it up to the injury of the plaintiff.

The Court is of opinion that the plaintiff is entitled to redeem, and therefore doth direct the usual accounts to be taken.

PER CURIAM. Direct an account.

(558)

FREDERICK KIMBOROUGH ET AL. v. NICHOLAS SMITH.

1. An absolute deed declared to be subject to a *proviso* for redemption, upon proof that the vendor was an ignorant and impoverished man, was the father-in-law of the vendee, had been upon a treaty with the latter to raise money upon loan, that the purchase was an unequal one, and was the balance which the vendor owed for the same land, together with the fact that he occupied the land for twenty-four years without paying rent, and other attendant circumstances.

2. Absolute deeds taken from embarrassed men after a treaty for a loan are viewed with distrust by courts of equity.

THE material allegations contained in the bill and supplemental bill of the original plaintiff, Frederick Kimborough, were that on or about 1 January, 1803, being greatly pressed to raise $300, which he owed in part of the price of the tract of land upon which he resided, he applied to the defendant, his son-in-law, to assist him in this difficulty; that the defendant agreed to advance this sum, and to take for security a bond from the plaintiff to convey the land in case of failure to repay the money lent; that accordingly the money was advanced, and an instrument prepared, by the direction of the defendant, which the plaintiff, who was wholly illiterate, understood and believed to be such as had been agreed upon, and under such understanding and belief executed; that the land very greatly exceeded in value the sum advanced; that from this period up to the filing of the original bill (September, 1827) the plaintiff had continually resided on the land as his own, paying the taxes, but neither paying nor called upon to pay any rent; that the defendant, during this period, had repeatedly admitted the plaintiff's right to redeem, and declared that he had no other claim on the land than as a security of the money; that the poverty of the plaintiff had rendered him unable until then to make this redemption, but now, by the assistance of his friends, he was empowered and desired to do so, and had tendered the sum lent and its interest; but that the defendant most unconscientiously refused

to permit him to redeem, rejected the tender, and claimed the land as absolutely his own under the instrument aforesaid, which purports to be an unqualified conveyance in fee simple. The plaintiff averred that he never did sell nor agree to sell the land to the defendant; (559) that the distinct agreement between himself and the defendant was for a loan of money and a pledge of the land, under a bond to make title as security for its repayment; that he executed the deed under a full belief that it was but such a security, and under an entire misconception of its contents and legal operation. The prayer of the original bill was to be permitted to redeem, and for the defendant to reconvey. The supplemental bill, which was filed in 1829, brought forward the fact that the defendant had since commenced an action of ejectment against him and prosecuted it to judgment, and prayed that the execution on this judgment might be enjoined.

The defendant, in his answer to each of the bills, admitted that the plaintiff applied to him for money to pay for what was due for the land, but denied any agreement on his part to lend or to take any security or lien on the land for the repayment of the money; insisted that he purchased the land absolutely at and for the price of $300, which was represented to him as the amount of the plaintiff's debt; that in execution of this contract of sale he paid the $300 to the plaintiff, and received from him an unconditional deed in fee simple, which the plaintiff executed after hearing the same distinctly read over, and approving of it; that after this he went with the plaintiff to the agent of the plaintiff's creditors, and there found that besides the $300, there was $50 due for interest, which additional sum the defendant then paid, and the plaintiff's bonds were then taken up; that the defendant gave a fair price for the land, or that if it was rather low, the plaintiff could not complain, as the defendant, from motives of affection, permitted him for more than twenty years to live upon it and receive its profits rent free; denied that the defendant ever admitted the plaintiff's right to redeem, or that defendant's only claim on the land was as security for repayment of the money advanced by him, and denied any tender, unless it be that George Kimborough, a son of the plaintiff, had a few weeks before asked him if he would receive the money, to which question the defendant (560) answered by asking him if he had it; that these mutual questions were asked twice, but nothing further said or done in relation to a tender.

It appeared that the injunction granted on filing the supplemental bill was, on coming in of defendant's answer thereto, dissolved with costs; that a general replication was entered to the answers; that the original plaintiff died, and his heirs at law were made parties plaintiffs in his stead; and the parties having taken their respective proofs, the cause was set down for hearing and then removed into this Court.

Many depositions were read at the hearing, which it is unnecessary to state.

W. A. Graham for plaintiffs.
Nash and Winston for defendant.

GASTON, J., after stating the pleadings: There is much difficulty in ascertaining, at this day, the truth in regard to this remote transaction, when many of those who were best able to throw light upon it have been removed by death. Neither Wiers, who it appears wrote the deed, nor Jacob Smith or James Wells (which two last were subscribing witnesses to it) have been examined on the part of the plaintiffs or defendant. We can account for this omission on both sides only by the presumption that the testimony of none of these can now be had. There are, however, some facts about which little or no doubt can be entertained. At the time of the transaction the plaintiff was indebted $300 on account of the purchase of this land, which he was anxious and pressed and unprepared to pay. This was known to the defendant, who expressed a disposition to assist the plaintiff, and to take a security upon the land for repayment of the money. The plaintiff levied upon the land, which was then worth from $860 (the lowest) to $1,200 (the highest estimate), and owned scarcely any property beside. The whole of the money paid by the defendant was precisely that needed for the creditor, and (561) was paid over to him. Both the parties are represented as Germans, with very little knowledge of the English language, and the plaintiff is illiterate, and can neither read nor write. A deed absolute in its terms was executed when the money was advanced, and for twenty-four years afterwards the plaintiff enjoyed the land, paid the taxes for it, but paid no rent. And the defendant was the plaintiff's son-in-law. Besides these, which we regard as ascertained facts, many witnesses testified to declarations of the defendant that all he wanted was his money and interest; that the old man might redeem, no one else should, and that the whole must be paid in a lump. There is also evidence of declarations of the old man, who seems to have been never able to redeem by his own means, that the land was Smith's, that his creditors could not touch it, and, at one time, that he would no longer pay taxes for it. As we are disposed to rely very little on the testimony as to the declarations of either party, by witnesses who probably imperfectly understood and have partially forgotten what they have heard, and do not very intelligibly relate what they remember, it is sufficient to say that the general effect of this testimony is to confirm the opinion which we have formed upon the facts that we consider as without doubt. There is no evidence of a tender.

It is a rule with all courts to consider the solemn deed of a party as containing the deliberate and well-weighed terms of his contract, and not to permit these terms to be enlarged or restrained, explained or contradicted, by parol evidence. But upon a proper suggestion that through fraud, imposition, oppression, accident, surprise, or mistake, such deed was not made conformably to the terms upon which the parties had agreed, and which deed was to have expressed, a court of equity will examine into the verity of this suggestion, and, upon that being established, will grant relief against the deed, because it is unconscientious that the party should be bound thereby. In receiving such suggestions, and in weighing the proofs by which it is attempted to support them, the Court usually acts with great caution. But it would (562) be unsuited to the exigencies of human society if, while it uniformly adhered to the same *principles,* it should require in all cases the same amount of *testimony* to satisfy its judgment. The nature of the transaction to be investigated, the relative situation of contracting parties, the usages of business, and the ordinary motives of human conduct, may render the inference of an equity *dehors* the deed scarcely possible in one case and quite probable in another; may require for it so complete a demonstration in the former as is seldom to be attained, and permit to be drawn in the latter from comparatively slender evidence. In *all,* the allegation of surprise or fraud must be established before the Court will act; but different degrees of proof are required according to the probability or improbability of the charge.

Courts of equity view with much jealousy absolute conveyances taken from embarrassed men, after a negotiation for a loan of money. They regard such persons as in a state approaching to moral *duress,* likely to be goaded on by distress into submission to whatever terms may be exacted; heedless of the forms and inattentive to the words with which the transaction may be veiled; and thus peculiarly exposed to mistake and surprise, as well as to imposition and oppression. Where the written contract clearly conforms to that on which the parties had agreed, equity will often relieve, because its terms are hard and grinding; and it readily receives evidence of the surrounding circumstances of the transaction to show that the written instrument does not in truth conform to the terms on which the parties had agreed. We hold it to be clearly settled that if *these circumstances* do establish that the parties really contracted as borrower and lender, and that what purports to be a sale and purchase covers a loan of money and security for its repayment—unless there be some explanation why the written instrument does not correspond with the precedent agreement—it will treat the instrument not as an absolute conveyance, but as security for the repayment of money lent; will hold the lender entitled, not to the thing pledged,

(563) but to his money for which it was pledged; and will permit the borrower, on repaying what is justly due, to redeem what was pledged for its repayment. It arrives at this conclusion principally from a consideration of these extraneous facts, and regards as of comparatively little consequence the loose conversations of the parties. Among the circumstances which it deems of high moment when engaged in this inquiry, are a striking disporportion between the sum advanced and that for which the property might have been sold; the apparent vendor retaining possession, as if no deed had been made; the vendee receiving no rents, or only rents to the amount or in lieu of interest. We have seen that in the present case there is this disproportion, the money being only about one-third of what such land then sold for in the neighborhood. The man who appears to have made the absolute deed retains the possession, and enjoys the profits for twenty-four years afterwards, and pays no rent. But there are very strong additional circumstances. A loan and a pledge of the land were at one time *intended,* and except from the deed there is no evidence of a change of intention. The sole object for which the money was wanted, and was known to be wanted, was to enable the applicant to hold this land, the home of himself and his family. The sum advanced was precisely that needed and known to be needed for this purpose, and was all paid over to him whose claim it was necessary to remove. No benefit could result, but a certain and vast injury did result to him who sought the favor, unless this advance was in the nature of a *loan.* And if it were a loan, the *only* security which could be given must have been upon this land. Add that the plaintiff was illiterate and almost wholly ignorant of the language in which the deed was written, that the relation between the parties was such as to inspire confidence and occasion carelessness, and that unquestionably the defendant has often expressed a willingness for a redemption, and we think we cannot err in pronouncing that the deed was not designed to make an absolute conveyance of the property. Its

(564) original purpose was a security for money, and it was drawn in its present form either by imposition on the grantor or, as we rather believe, from the mistake of the parties, and was afterwards unconscientiously set up by the defendant as an absolute conveyance. We hold, therefore, that the plaintiffs are entitled to redeem, and that for this purpose an account must be taken of whatever advances the defendant has made upon the faith of this security, and of the rents which he has received since he has gained possession.

PER CURIAM. Direct an account.

Cited: McLaurin v. Wright, 37 N. C., 97; *Blackwell v. Overby,* 41 N. C., 45; *Shields v. Whitaker,* 82 N. C., 521.

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