NORTH CAROLINA REPORTS
VOL. 21

CASES IN EQUITY

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1834, TO DECEMBER TERM, 1837,
BOTH INCLUSIVE

BY
THOMAS P. DEVEREUX AND WILLIAM H. BATTLE
(VOL. I)

ANNOTATED BY
WALTER CLARK

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¶Elected 1836 vice Strange elected United States Senator.
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CASES REPORTED

A

	PAGE
Alexander v. Burton	469
Allen v. Bank	3
Allison v. Davison	46
Allison v. Campbell	152
Andres v. Lee	318
Armfield, Wadsworth v.	323
Arnold v. Arnold	111
Arny, Wilson v.	376
Attorney-General v. Bank	216
Attorney-General v. Bank	227
Attorney-General v. Bank	545

B

Bailey v. Wilson	182
Baird v. Baird	524
Baker v. Carson	381
Bank, Allen v.	3
Bank, Attorney-General v.	216
Bank, Attorney-General v.	227
Bank, Attorney-General v.	545
Bank v. Collier	328
Bank, *ex parte*	75
Bank v. Knox	50
Banner, Clarke v.	608
Battle, Harrison v.	213
Bethell v. Wilson	610
Billups, Felton v.	584
Birchett, Falls v.	449
Bird v. Chaffin	55
Bird v. Graham	168
Black v. Ray	443
Blewit, Love v.	108
Blount, Pendleton v.	491
Blue v. Patterson	457
Bozman, Jacocks v.	192
Bright, Sorry v.	113
Briley v. Sugg	366
Bryan v. Read	78
Bryan, Koonce v.	227
Bryant v. Scott	155
Buie, Gilchrist v.	346
Burger, Melchor v.	634
Burton, Alexander v.	469
Bustin, Grant v.	77

C

Caldwell, Gaither v.	504
Campbell, Allison v.	152
Carpenter, Falls v.	237
Carr v. Holliday	344
Carson, Baker v.	381
Casey, Harrison v.	322
Cawthorn, Johnson v.	32
Chaffin, Bird v.	55
Child v. Dwight	171
Clapp v. Coble	177
Clapp v. Fogleman	466
Clarke v. Banner	608
Coble, Clapp v.	177
Cole, Dudley v.	429
Collier v. Bank	328
Cotton v. Evans	284

D

Darden, Gatlin v.	72
Davison, Allison v.	46
Davis v. Howcott	460
Dick v. Pitchford	480
Dix, Oliver v.	158
Dix, Oliver v.	605
Dozier v. Dozier	96
Dudley v. Cole	429
Dunn, Scott v.	425
Dwight, Child v.	171

E

Edwards v. University	325
Elliott v. Elliott	57
Etheridge, Lindsay v.	36
Evans, Cotton v.	284
Ewing, Harris v.	369

F

Falls v. Carpenter	237
Falls v. Birchett	449
Felton v. Billups	584
Fleming v. Sitton	621
Fogleman, Clapp v.	466
Ford v. Whedbee	16
Fowler, Strickland v.	629
Freeman v. Hill	389

G

Gaither v. Caldwell	504
Garrot, Simms v.	393

	PAGE
Gatlin v. Darden	72
Gatlin, Saunders v.	86
Geddy v. Stainback	475
Geddy, Stainback v.	479
Gilchrist v. Buie	346
Gilchrist v. Gilchrist	362
Gill v. Weaver	41
Graham, Bird v.	168
Grant v. Bustin	77
Goodman, Hite v.	364
H	
Ham v. Ham	598
Harper v. Williams	379
Harrison v. Battle	213
Harrison v. Casey	322
Harrison v. Wood	437
Harris v. Ewing	369
Harris v. Horner	455
Hawkins, Hodge v.	564
Henderson v. Hoke	119
Hiatt v. Twomey	315
Hill, Freeman v.	389
Hinton v. Hinton	587
Hite v. Goodman	364
Hodge v. Hawkins	564
Hoke, Henderson v.	119
Holliday, Carr v.	344
Horner, Harris v.	455
Howcott, Davis v.	460
I	
Irby v. Wilson	568
J	
Jacobs v. Bozman	192
Johnson v. Cawthorn	32
K	
Knox, Bank v.	50
Koonce v. Bryan	227
L	
Lanier v. Ross	39
Ledbetter, Ward v.	496
Lee, Andres v.	318
Lindsay v. Etheridge	36
Littlejohn v. Williams	343
Love v. Blewit	108
M	
McAden, Worth v.	199
McConnell v. Peobles	601
McGahee v. Sneed	333
McKay v. Williams	398
McKinnie v. Rutherford	14
McLin v. McNamara	407
McNamara, McLin v.	407
Melchor v. Burger	634
Mitchell, Waugh v.	510
Morris, Tyrrell v.	559
Myers, Powell v.	502
N	
Neely v. Torian	410
Newby v. Skinner	488
O	
Ochiltree v. Wright	336
Oliver v. Dix	158
Oliver v. Dix	605
P	
Patterson, Blue v.	457
Pender, Toler v.	445
Pendleton v. Blount	491
Peobles, McConnell v.	601
Perry v. Terrell	441
Pitchford, Dick v.	480
Powell v. Powell	379
Powell v. Myers	502
Pratt, Trice v.	626
R	
Ray, Black v.	443
Read, Bryan v.	78
Rice v. Satterwhite	69
Ricks, Thorpe v.	613
Ross, Lanier v.	39
Rutherford, McKinnie v.	14
S	
Satterwhite, Rice v.	69
Saunders v. Gatlin	86
Scott v. Bryant	155
Scott v. Dunn	425
Shine v. Wilcox	631
Simms v. Garrot	393
Sitton, Fleming v.	621
Skinner, Newby v.	488
Smith, Woodfin v.	451

PAGE

Sneed, McGahee v. 333
Sorrey v. Bright 113
Stainback, Geddy v. 475
Stainback v. Geddy 479
Strickland v. Fowler 629
Sugg, Briley v. 366

T

Tate v. Tate 22
Terrell, Perry v. 441
Thompson, White v. 493
Thorpe v. Ricks 613
Toler v. Pender 455
Torian, Neely v. 410
Trice v. Pratt 626
Twomey, Hiatt v. 315
Tyrrell v. Morris 559

U

University, Edwards v. 325

V

PAGE

Vanhook v. Vanhook 589

W

Wadsworth v. Armfield 323
Ward v. Ledbetter 496
Waugh v. Mitchell 510
Weaver, Gill v. 41
Whedbee, Ford v. 16
White v. Thompson 493
Wilcox, Shine v. 631
Williams, Littlejohn v. 343
Williams, Harper v. 379
Williams, McKay v. 398
Wilson, Bailey v. 182
Wilson v. Arny 376
Wilson, Irby v. 568
Wilson, Bethell v. 610
Wood, Harrison v. 437
Woodfin v. Smith 451
Worth v. McAden 199
Wright, Ochiltree v. 336

CASES CITED

A

Alston v. Foster ..... 16 N. C., 337 94
Alston, Wynn v. ..... 16 N. C., 163 33
Armstrong, Hodges v. ..... 14 N. C., 253 368
Arrington, Branch v. ..... 4 N. C., 230 566

B

Bailey v. Davis ..... 9 N. C., 108 71
Bank, Donaldson v. ..... 16 N. C., 107 613
Barham, Smith v. ..... 17 N. C., 420 ..... 94, 195
Battle, Harrison v. ..... 16 N. C., 537 406
Branch v. Arrington ..... 4 N. C., 230 566
Bright, Sorry v. ..... 21 N. C., 113 492
Brown v. Graves ..... 11 N. C., 342 406
Bruce v. Child ..... 11 N. C., 372 409
Bryant v. Deberry ..... 3 N. C., 356 71
Burgess v. Wilson ..... 13 N. C., 306 359
Burnett v. Roberts ..... 15 N. C., 87 94
Burton v. Murphey ..... 4 N. C., 684 538

C

Carrington, Dunwoodie v. ..... 4 N. C., 355 94
Cawthorn, Delins v. ..... 13 N. C., 90 365
Cawthorn, Johnson v. ..... 21 N. C., 32 ..... 335, 379
Child, Bruce v. ..... 11 N. C., 372 409
Child, Hill v. ..... 14 N. C., 265 175
Clark v. Cotton ..... 17 N. C., 51 342
Clark v. Shields ..... 10 N. C., 461 368
Coffin, Redmond v. ..... 17 N. C., 431 21
Collier, Sherwood v. ..... 14 N. C., 380 368
Cotton, Clark v. ..... 17 N. C., 51 342
Cox, Williamson v. ..... 3 N. C., 4 440
Craven v. Craven ..... 17 N. C., 344 21

D

Daniel, Matthews v. ..... 5 N. C., 42 71
Davis, Bailey v. ..... 9 N. C., 108 71
Deberry, Bryant v. ..... 3 N. C., 356 71
Delins v. Cawthorn ..... 13 N. C., 90 365
Donaldson v. Bank ..... 16 N. C., 107 613
Dowell v. Wadsworth ..... 13 N. C., 103 380
Dunwoodie v. Carrington ..... 4 N. C., 355 94

E

Ely, Stephens v. ..... 16 N. C., 493 114
Erwin v. Kilpatrick ..... 10 N. C., 456 195
Erwin, Roberts v. ..... 9 N. C., 48 375

F

Foster, Alston v. ..... 16 N. C., 337 94
Freeman v. Hill ..... 21 N. C., 389 436

G

Garvan, Thomas v. ..... 15 N. C., 223 538
Gatlin, Saunders v. ..... 21 N. C., 86 536
Gatling, Speight v. ..... 17 N. C., 5 91
Gillis v. Martin ..... 17 N. C., 470 623
Gillis v. McKay ..... 15 N. C., 172 406
Graves, Brown v. ..... 11 N. C., 342 406

H

Harrison v. Battle ..... 16 N. C., 537 406
Hightower, Wilson v. ..... 10 N. C., 76 21
Hill v. Child ..... 14 N. C., 265 175
Hill, Freeman v. ..... 21 N. C., 389 436
Hill v. Hughes ..... 18 N. C., 336 380
Hill v. Jones ..... 5 N. C., 211 330
Hill, Jones v. ..... 6 N. C., 131 329
Hill v. Moore ..... 5 N. C., 233 78
Hodges v. Armstrong ..... 14 N. C., 253 368
Hooks, Howell v. ..... 17 N. C., 258 479
Howell v. Hooks ..... 17 N. C., 258 479
Huckaby v. Jones ..... 9 N. C., 120 114
Hughes, Hill v. ..... 18 N. C., 336 380

I

Ingram v. Terry ..... 9 N. C., 122 94

J

Johnson v. Cawthorn ..... 21 N. C., 32 ..... 335, 379
Jones, Hill v. ..... 5 N. C., 211 330
Jones v. Hill ..... 6 N. C., 131 329
Jones, Huckaby v. ..... 9 N. C., 120 114
Jones v. Speight ..... 4 N. C., 157 468
Jones v. Zollicoffer ..... 4 N. C., 645 94

K

Kilpatrick, Erwin v. ..... 10 N. C., 456 195
Knight v. Wall ..... 19 N. C., 125 590

M

McKay, Gillis v. ..... 15 N. C., 172 406
Martin, Gillis v. ..... 17 N. C., 470 623
Matthews v. Daniel ..... 5 N. C., 42 71
Moore, Hill v. ..... 5 N. C., 233 78
Mulholland, Nunn v. ..... 17 N. C., 381 370
Murphey, Burton v. ..... 4 N. C., 684 538

N

Nunn v. Mulholland..... 17 N. C., 381..... 370

R

Redmond v. Coffin..... 17 N. C., 431..... 21
Roberts, Burnett v..... 15 N. C., 87..... 94
Roberts v. Erwin..... 9 N. C., 48..... 375
Rogers, Van Hook v..... 7 N. C., 178..... 590, 597

S

Saunders v. Gatlin..... 21 N. C., 86..... 536
Saunders v. Saunders..... 17 N. C., 262..... 427
Shepard v. Shepard..... 3 N. C., 382..... 632
Sherwood v. Collier..... 14 N. C., 380..... 368
Shields, Clark v..... 10 N. C., 461..... 368
Smith v. Barham..... 17 N. C., 420..... 94, 195
Sorry v. Bright..... 21 N. C., 113..... 492
Speight v. Gatling..... 17 N. C., 5..... 91
Speight, Jones v..... 4 N. C., 157..... 468
Stallings v. Stallings..... 16 N. C., 298..... 588
Stephens v. Ely..... 16 N. C., 493..... 114
Stowe, Ward v..... 17 N. C., 509..... 156

T

Terry, Ingram v..... 9 N. C., 122..... 94
Thomas v. Garvan..... 15 N. C., 223..... 538
Toler v. Toler..... 16 N. C., 456..... 23

V

Van Hook v. Rogers..... 7 N. C., 178..... 590, 597

W

Wadsworth, Dowell v..... 13 N. C., 103..... 380
Wall, Knight v..... 19 N. C., 125..... 590
Ward v. Stowe..... 17 N. C., 509..... 156
Williams v. Williams..... 17 N. C., 69..... 427
Williamson v. Cox..... 3 N. C., 4..... 440
Wilson, Burgess v..... 13 N. C., 306..... 359
Wilson v. Hightower..... 10 N. C., 76..... 21
Wynn v. Alston..... 16 N. C., 163..... 33

Z

Zollicoffer, Jones v..... 4 N. C., 645..... 94

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1834

GEORGE N. ALLEN AND ROLEPH J. WYCOFF v. THE STATE BANK OF NORTH CAROLINA.

1. The owners of lost bank notes may in equity recover the amount upon offering bond and security to save the bank harmless from all claims for or on account of such notes.
2. Whether a recovery upon lost notes can be effected at law. *Quere?*
3. The cutting a bank note in two, for transmission by mail, is not a *voluntary* destruction of it; and if, in the course of transmission, one of the halves be lost, the owner upon producing the other half, and offering an indemnity, may recover the amount of the whole note.

THIS bill was filed in the court of Equity for the county of WAKE and removed to this Court for a final hearing.

The plaintiffs charged that they were copartners in trade; that in the collection of debts due them in this State the plaintiff Wycoff had received certain notes issued by the defendants, payable to bearer on demand at the bank, amounting in the whole to the sum of five hundred dollars, of which notes they set forth a description list; that on 8 February, 1831, the said Wycoff, for the purpose of securing the safe transmission of the said notes, and according to the usage of merchants on such occasions, cut each of the notes into two parts, and on that day enclosed the first halves thereof in a letter addressed to the plaintiff Allen at New York, and on the same day forwarded the (4) letter by the public mail; that on the 10th of the same month he transmitted in like manner, by mail, the other halves; that the first parcel duly came to hand, but that the second had not been received, but was lost; that as soon as this loss was ascertained the plaintiffs sent an account of the numbers, letters, and the places where the bills

were payable to the principal bank of the defendants, to all their branches, and to the different banks in this State and in Virginia; that they presented to the defendants the halves received, offered an indemnity against any loss which the defendants might sustain by reason of the missing halves, and required payment of the whole amount due upon the notes; that the defendants paid the plaintiffs one-half of this sum, but utterly refused to pay more. The bill prayed that the defendants might answer to the matters charged, and upon having a proper indemnity executed, might be compelled to pay the residue of the money due upon the notes, with the interest which has accrued thereon since the payment was demanded and refused. To this bill, which was verified by the affidavits of the plaintiffs taken before a Master in Chancery in New York, the defendants put in an answer under the seal of the corporation, in which they denied the partnership of the plaintiffs, their possession and ownership of the bank notes referred to, the cutting and transmission of them, and the loss of the second halves thereof as charged. In this answer they insisted that if the facts alleged were true the plaintiffs, by the voluntary cutting of the notes for their own convenience, took upon themselves the risk of loss, and could not require payment without presentation of the entire notes. They further alleged that it had been their custom to pay the holder of a half note on presentation at their counter one-half of the amount of the note, which custom was known to their dealers, and particularly to the plaintiffs; that this custom was adopted from regard to public convenience and not upon the supposition of their liability; for they contended that at law no recovery could ever be enforced, but on presentation of the entire note; and that a court of Equity would
(5) give no relief where the loss has been occasioned by the voluntary act of the holder in dividing a note. The defendants further answered that in May, 1831, one P. Lemesurier sent to their cashier in a letter, a copy whereof was annexed, the halves of bank notes, amounting to five hundred dollars, in behalf of a friend, and requiring payment of the whole sum, and in this letter there were others referring to the plaintiffs as the owners, and they stated that in answer to this the cashier wrote to Lemesurier, stating the usages of the bank; transmitting a draft on the United States Bank in New York in payment of two hundred and fifty dollars; returning the letters enclosed in Lemesurier's communication, and requiring of him if this arrangement were not satisfactory to return the draft, whereupon the cashier promised to return the half notes received; that receiving no reply, and hearing no complaint from Lemesurier, they some time afterwards destroyed these halves as useless; that in about a fortnight or three weeks after this transaction with Lemesurier the plaintiff Allen called on the cashier

and inquired respecting the half notes, and the cashier informed him of the payment made by draft, and that he expressed no dissatisfaction further than saying "that he thought the bank ought to pay the whole." The defendants denied that any indemnity was ever offered or demand made in any other way before suit brought; denied also that a description list of the notes was sent to their principal bank or its branches; insisted that if the plaintiffs were entitled to the payment of the notes they were bound, when payment of half was made, to notify the defendants that they refused the same as a discharge of their demand, but claimed to hold it as a partial payment; that they were bound also to furnish the defendants with a particular description of the lost notes; to make a distinct demand of payment of the whole amount, and to tender to them an additional indemnity, especially as they allege that, being about to close their business, they have burned and destroyed a large amount of their notes, half, as well as whole notes, and it was impossible for them to ascertain whether they may not have paid off the other halves of these notes received in pursuance of their usage, and destroyed them as useless; and they objected, finally, (6) that having delayed to bring their bill more than two years after the transaction between the defendants and their agent Lemesurier, the plaintiffs came too late to ask the aid of a court of Equity. To this answer there was a general replication, and the only proof taken on either side is to be found in the deposition of Benjamin J. Spruill, a witness examined by the plaintiffs. This witness fully proved that the plaintiff Wycoff, on 8 February, 1831, had the possession of the notes set forth in the list attached to the bill; that he cut the notes in two; that on that day he forwarded by mail the first halves, in a letter directed to the plaintiff Allen at New York, and that on the 10th of the same month he forwarded the other halves by mail, in the same way.

Devereux for plaintiffs.
Badger for defendants.

GASTON, J., after stating the case as above, proceeded: These are the allegations and this the testimony on which the cause is brought to a hearing. It is to be regretted that the proofs have not been more full, as it is quite probable that by reason of this defect we are not possessed of that accurate knowledge of the facts which would enable us to do precise justice between the parties. Upon that testimony, however, as connected with the pleadings, it is our duty to pronounce the facts such as they appear to us either by direct proof or by fair inference. It may not be amiss here to notice an objection that has been taken to the affidavit annexed to the bill of the plaintiffs. It is said to be irregular,

because sworn to, not before any commissioner appointed under the authority of this State, but before a Master in Chancery in New York, and that were it regular in point of form, it is not evidence on the hearing. If the objection to the irregularity of the affidavit, merely as an affidavit, were well founded, it should have been availed of by the defendants before answering the bill, and comes too late afterwards.

But considered as an affidavit, it is sufficiently regular according
(7) to established chancery usage. *Braham v. Bowes,* 1 Jacob & Wal., 296. We do not regard it as evidence upon the hearing. When a bill is brought, not for discovery merely, but also for relief, the practice of the Court generally requires that an affidavit of the loss of the written instrument should be annexed; because it is this loss which constitutes the reason for changing the forum and transferring to a court of Equity an ordinary case for relief in the courts of law. The want of such an affidavit would be a good ground of demurrer. But when matters of fact are charged and denied by the pleadings of the parties, and the court is to ascertain the truth of the matters thus put in issue, the *proof* must come from competent witnesses; and as a general rule a man is not more competent to prove his own case in a court of Equity than in a court of law.

The Court is satisfied that the plaintiffs were the lawful holders of these notes. There is no question but that one of them had the *bona fide* possession of the notes, cut them in two, and transmitted to the other plaintiff the respective halves by mail on different days, viz., on 8 and 10 February, 1831. The next information which we have about them is on 18 May, following, when the first set of half notes was sent to the bank at Raleigh by Lemesurier, claiming them as the agent of the plaintiffs, and requiring payment of the whole amount in their behalf, or if this was refused, to return the half notes. There is no *proof* of what was done upon this demand, but it is alleged by the plaintiffs that they received a partial payment of one-half of the amount, and the defendants allege that they paid one-half to Lemesurier in discharge of the entire demand. The *fact* of an actual receipt of one-half by the plaintiffs from the defendants on account of these notes is therefore not disputed, although the character of this payment is very differently represented by the parties. In defect of any other explanatory or contradictory evidence, the necessary inference from these facts is that the notes belonged to the plaintiffs. The proof of *loss* has been objected

to as defective and insufficient. If the case were one of the
(8) *loss* of an *entire* note, the possession whereof might expose the bank to a rightful demand of payment from a subsequent *bona fide* holder, where there might be an obvious motive and a strong temptation for pretending a loss which had never happened, we should prob-

ably require more full proof. This we suppose might be obtained through the postoffice establishment at New York, which could show whether the parcel mailed at Scotland Neck on 10 February reached New York; and if it did, whether the letters enclosed corresponded to those set forth in the way-bill. The division of the notes—their being sent by *different* mails—the production of and *delivery to the defendants* of the first set of half notes by the plaintiffs, the lapse of time without any presentation of or demand by anybody on account of the other set, and the want of any rational motive for keeping back the letter, if it had come to the hands of the plaintiffs, constitute a mass of evidence which induces us to pronounce this allegation fully proved. It is in truth rather a case of *destruction* than of *loss* of the notes. There is no proof on the part of the plaintiffs of a descriptive list having been forwarded to the bank and to its branches, or of an indemnity being offered previously to suit; and none on the part of the defendants of the usage of the bank to pay on half notes half the sum for which the notes were given, nor, if such usage existed, that it was known to the plaintiffs; nor of the halves received having been burned by the bank, nor of any circumstances rendering it probable that the other halves may have been received and destroyed also. The Court, therefore, must regard all these alleged facts, if they be material, as not existing in the case.

The defendants have not in their answer, nor upon the hearing, objected to the jurisdiction of a court of Equity, because that the plaintiffs, if entitled to relief, had remedy at law. On the contrary they insist that there is no remedy *at law* for the holder of a note who, by any mischance, is unable to present the note itself for payment, and that whenever he is entitled to redress he can obtain it only through the intervention of that court whose peculiar province it is to relieve against accident. There are few subjects on which there (9) have been such inconsistent decisions, and on which such marked changes of judicial opinion have occurred, as the competency of courts of law to give relief in cases of lost instruments, and the right of a court of Equity to take jurisdiction of such claims. Up to the period of our separation from the mother country it was considered as beyond question that no action would lie at law upon a lost *bond* because of the indispensable necessity in every such action to make a profert of the instrument declared on; and it was the invariable usage to seek relief in equity which, in a proper case, never refused to give it. Within the last fifty years courts of law in England have allowed such actions to be maintained, holding it sufficient to dispense with the necessity of a profert, to state that the obligation has been lost by time and accident, or destroyed by other casualty. Notwithstanding this assumption

of jurisdiction by courts of law, the courts of Equity have continued to hold cognizance of such demands, because they once had acknowledged jurisdiction of them; because of the ability of these courts, where there are more persons than one liable to the same debt with mutual remedies against each other, to make a complete and effectual adjustment among all the parties liable; and because of the difficulty at law of securing an adequate indemnity. With regard to bills of exchange and other negotiable instruments, there were many inconsistent adjudications in both courts. In the case of *Tenesy v. Gory,* decided in the reign of Charles II, and quoted with approbation by *Lord Hardwicke* in *Walmsley v. Child,* 1 Ves. Sen., 345, a bill of exchange was drawn on the defendant and endorsed to the plaintiff, by whom it was lost or mislaid, as appeared by the affidavit annexed, and the bill prayed that the defendant might be decreed to pay the plaintiff the money, the plaintiff first giving the defendant security to save him harmless, which was so decreed, but without damages or costs. In 1749, in the case of *Walmsley v. Child,* above mentioned, *Lord Hardwicke* entertained no doubt but that an action at law would lie on lost bank notes, but thought that the plaintiff might also sustain a bill in equity for relief, upon
(10) annexing an affidavit of the loss and submitting to give security.

In *Glynn v. Bank of England,* 2 Ves. Sen., 38, he stated that upon a lost note there was a clear relief at law, and that a man is not entitled to bring a bill in equity *in general* on a lost note, but that he might do so under special circumstances. What these are he does not state, but he seems disposed to exercise jurisdiction in the case before him, which was that of a bill brought by the representatives of a dead man touching several bank notes alleged to be lost, praying a decree for the payment of them, upon offering to give security to refund and indemnify the defendants in case any other claim should be made upon them. In 1810, in *Mossof v. Eadon,* 16 Ves. Jun., 430, where a note before it became due was cut in two and one of the halves lost, *Sir William Grant* refused to give relief, notwithstanding a full conviction that the merits were with the plaintiff, because there was clear relief at law, and that he was fearful to break down the barriers which separated the jurisdiction of courts of law and courts of Equity. In 1817, in *Davies v. Dodd,* 4 Price, 176, *Chief Baron Richards* gave a decree in favor of an endorsee against an acceptor of a lost bill of exchange, stating that it did not become him to say whether the plaintiff had or had not a remedy at law, for if he had, he has also a remedy in equity; and if he had commenced an action at law, the defendant might have restrained him by injunction from proceeding, because a court of law could not compel him to give security which a court of Equity would hold that he was entitled to. He added: "There are

many cases of this nature, particularly where bonds have been lost, where the parties have come into equity on that very ground, and the case of *a negotiable bill is yet stronger.*"

There were many adjudications at law in which plaintiffs recovered upon lost bills and notes, and among the latest, one before *Lord Tenterden* (then *Chief Justice Abbott*) in 1826. *Glover v. Thompson,* Ryan & Moody, 403 (and 21 Eng. C. L. Rep., 472). But in 1827, in the case of *Hansard v. Robinson,* 7 Bar. & Cres., 90 (and 14 Eng. C. L. Rep., 20), the Court of King's Bench, through *Lord Tenter-* (11) *den,* pronounced their unanimous judgment that an endorsee could not recover at law against an acceptor on a bill lost, after it became due, and after the plaintiff had required payment and offered an indemnity. The Court declare that it was impossible to reconcile the decisions, and therefore recourse must be had to principle; that according to the custom of merchants, the holder of the bill was to present the instrument at its maturity to the acceptor; demand payment of its amount, and upon receipt of the money deliver up the bill; that the acceptor paying the bill had a right to the possession of the instrument for his own security, and as his discharge and voucher *pro tanto* in his account with the drawer; that he who has lost the bill and cannot give the possession thereof to the acceptor, has not a *legal* right to require its payment; and that his remedy must be to tender a sufficient indemnity to the acceptor, and if it be refused, then enforce payment in a court of Equity. Since this adjudication the courts of Equity in England have had no scruples in exercising jurisdiction in cases of lost bills and notes, giving adequate relief thereon. See *Macartney v. Graham,* 2 Sim., 285. It is not surprising that during the clashing of judicial decisions in England similar differences and repugnances should have occurred in this country. In many, we believe in most of the States of the Union, suits on lost bills and notes are brought at law—in some they are brought in equity; but we are not aware of any adjudication in any State having distinct courts of law and equity that such claims are not within the jurisdiction of a court of Equity.

We do not decide whether an action on a lost bill or note can or cannot be brought at law. When it is considered that all written engagements for the payment of money, whether with or without seal, whether payable to order or not payable to order, are by our laws negotiable; that many of these, and among them the bank notes which constitute the currency of the State, are for sums too small to render them fit subjects of a controversy in a court of Equity; that there may be a difference between the *loss* properly so called and the *destruction* of the negotiable instrument — nay, between a demand against one who is ultimately chargeable thereon and him who on pay- (12)

ment thereof has a right to charge it in account against another—we should weigh well all the bearings and consequences of the adjudication of such a question and make it, when it becomes *necessary* and is the direct point involved in the controversy, and not before. But however this may be, we have no difficulty in sustaining the jurisdiction of a court of Equity. Accident is one of the peculiar and proper grounds upon which its aid may be rightfully invoked. It can give redress better suited to the nature of the controversy, more safe for all the parties concerned, and rendering unnecessary an application to it from any of them for relief against a harsh judgment at law. If therefore the claim might have been prosecuted at law, it is nevertheless a proper subject of equitable cognizance. If it could not be sued on at law, it may be prosecuted in equity for that very reason.

The plaintiffs, having been the lawful owners and possessors of these notes, if the same have been lost or destroyed without their fault, have a right to recover what is justly due upon them. In the case of *Walmsley v. Child* an objection was raised because of the import of the contract, the notes being payable to *bearer,* and transferable without assignment; but, observed the great Judge who decided that case, this "is carrying it too far to say in any case, for undoubtedly one having lost his note or security is no reason why he should lose his debt; but a note lost in that manner is a strong reason why the defendant should hold his hand and receive the fullest satisfaction that it would never be demanded of him." But it is objected in the present case that the loss or destruction was occasioned by the *voluntary act* of the plaintiffs, and therefore they cannot any more in equity than at law entitle themselves to demand payment thereof without the presentation of the entire notes at the places where the same were payable. We think this objection unfounded. The cutting of a note into two parts, unless done with the intent to destroy the note, is not *of itself* a destruction of it. While the two parts exist, and are retained by the lawful holder, the
(13) rights and liabilities of the parties remain precisely the same as before the division. If one of the parts be afterwards lost or destroyed, the right of the former holder of the note and the obligation of the maker are the same as though the whole note had been destroyed. Had the notes in this case been put into the mail in their original state, and then the loss occurred, it might with equal plausibility have been urged that the plaintiffs for their own convenience took upon themselves the risk of loss, and can therefore demand payment only according to the letter of the engagement. If the law warranted such an usage as that alleged by the defendants, of paying upon a half note, by whomsoever presented, half the amount of the note, the

risk of injury to one or the other of the parties would be the same in the transmission by mail of a divided as of a whole note. In the former case there would be indeed a double chance of casualties, but only the danger of half of a loss upon each casualty. Such an usage however is wholly unsupported by law. The holder of a half note, as such, has no right to any part of the money. Such an usage has a pernicious tendency to facilitate the receipt of money by the dishonest holders of half notes, and thereby creates or multiplies temptations to dishonesty. The transmission of divided notes by several mails diminishes the danger of injury as to one of the parties, and does not increase it as to the other; is for the benefit of commerce; affords additional security against dishonesty by lessening the inducement to commit it, and ought in no manner to affect the rights of the lawful owners of the notes.

In England and in the States of this Union the propriety of this course of remittance has been again and again recognized, and we cannot therefore admit that the plaintiffs have lost the notes through their fault.

It has been seen that the parties differ materially as to the circumstances under which payment of part of the money was made, and that we are without the means of ascertaining to whose representations greater faith is due. Had the answer been on oath, it might have been evidence for the defendants. But it is not on oath, and therefore can be viewed only as a denial of the allegation of the (14) plaintiffs and as an allegation of facts on their side. It would seem, however, from the letters of Lemesurier, distinctly requesting if the bank should not comply with the requisition made for a *full* payment to return the half notes, that the first irregularity was on the part of the defendants in keeping *these* and sending half the amount claimed. If a binding agreement could have been made (which we greatly doubt) to receive this sum in discharge of the whole claim, such an agreement is not proved. The time which elapsed before the filing of this bill is clearly not such as to affect the plaintiffs with laches, or to afford any valid objection to relief.

The defendants had certainly a right to ask a satisfactory indemnity, and also *prima facie* evidence of the loss of the other half notes before the plaintiffs could in conscience insist on payment. No such evidence appears to have been given, and no such indemnity offered, before the filing of this bill. This omission does not destroy the right of the plaintiffs, but it affects their claim to damages and costs. Following the example in the old case of *Tenesy v. Gory,* we shall decree for them the unpaid part of the principal of the notes *only,* and the parties must respectively defray their own costs. The sum decreed to be paid, when bond shall be given in the penal sum of five hundred dollars, with such

sureties as shall be approved by the clerk of this Court, with condition to save the defendants harmless from all claims for or on account of the notes set forth in the list annexed to the bill.

PER CURIAM. Decree for the plaintiffs.

Cited: Carter v. Jones, 40 N. C., 199; *Fisher v. Carroll,* 41 N. C., 485; *Streator v. Bank,* 55 N. C., 32; *Barringer v. Andrews,* 58 N. C., 350; *Fisher v. Webb,* 84 N. C., 46.

WILLIAM McKINNIE v. WALTER B. RUTHERFORD.

1. A defense which is good in equity against the assignor of a note or judgment is available against his equitable assignee.
2. To a bill brought by the assignee of a judgment the assignor is a necessary party.

THE CASE made by the bill, answer and proofs was that one Sackett sold a tract of land to the defendant Rutherford. The land was
(15) under mortgage, of which Rutherford was ignorant at the time of the purchase. To secure the purchase-money Rutherford gave four several promissory notes payable to Sackett or bearer, which the latter afterwards pledged to the plaintiff for money borrowed of him. After the notes became due, suit was brought on them in the name of Sackett, and judgment obtained, Rutherford knowing at that time that McKinnie had an interest in them. After the judgments were obtained, Rutherford, discovering for the first time that the lands which Sackett had conveyed to him were under mortgage, filed his bill against Sackett alone, praying an injunction, which at the hearing was perpetuated. The plaintiff then filed this bill against Rutherford, omitting to make Sackett a party, claiming to be the equitable assignee of the notes, and to be entitled to the beneficial interest in the judgments, and seeking to be made a party defendant with Sackett to the former suit.

No counsel appeared for either party.

DANIEL, J., after stating the case as above, proceeded: If the plaintiff had had the legal interest in the notes, as he pretends, he should have brought suit at law in his own name as bearer, and then Rutherford could not have proceeded in his bill without making him, as well as Sackett, defendant. But he did not sue at law in his own name, but in

that of Sackett, which is strong proof that he had not the legal title in the notes, but was only a pledgee. The judgments have merged the simple contracts on the notes, and the plaintiff's interest, if any, is purely equitable. The plaintiff contends that Rutherford had notice of the mortgage at the time of the sale of the land, but there is no proof of that; and if he had notice afterwards, he could not have set it up as a defense at law in the actions brought on the notes; therefore, his suffering judgments to be taken upon them operates nothing against him in equity. If Rutherford had an equity against the notes, or the judgments on them, as to Sackett, he must, as it seems to us, have the same equity against the plaintiff, the equitable assignee. Again, it is (16) a rule in equity that where a bill is brought by the assignee of a judgment, the assignor is a necessary party. *Cuthcart v. Lewis,* 1 Ves. Jun., 463; 2 Mad. C. P., 148. But in such case the bill is not ordinarily dismissed, but the case will be ordered to stand over with liberty for the plaintiff to amend by adding parties upon paying the cost of the day (2 Mad. C. P., 142). But, because of the defects of the bill, and the great irregularity of the proceedings in this cause, we deem it idle to retain the bill, and therefore direct that it be dismissed with costs, but without prejudice to the plaintiff to bring a new bill if he thinks proper.

PER CURIAM. Bill dismissed.

CHARLES M. FORD v. JAMES P. WHEDBEE ET AL.

A legacy to the wife of the testator, payable two years and three months after his death, during which time land for a residence was devised to her, and the executor was directed to sell other land, so as to have the money ready to pay her at the expiration of that time, and which was expressed to be in lieu of her dower, upon her death before the time of payment, survives to her representative.

THE plaintiff set forth the will of James Whedbee, of which the following parts only need be stated: "I give unto my beloved wife, Jane J. Whedbee, all the property that came to me by her in marriage—that is to say, all the household and kitchen furniture, etc. (repeating the particulars at length).

"I give unto my beloved wife, for her year's support, one hundred and fifty barrels of corn, etc. (repeating a variety of articles of ordinary household consumption). I leave her the plantation and buildings, either where I live or where my son, Lemuel Whedbee, lived and deceased, for the full space of two years and three months, at the expiration of which time my administrator is herein directed to pay out of

my estate one thousand dollars, the one half cash, the other half in good and safe obligations then due, and no other. To raise that sum of money, he shall be at liberty to sell all the land which, etc. (describing it), which he may sell as soon after his qualification as time
(17) will admit, upon the longest credit that can be given, so as to have the money ready for her use immediately after two years and three months is expired. Which said thousand dollars is to be to her a full satisfaction for, and in lieu of, her taking thirds out of my land." The testator then gave to his son, James P. Whedbee, property which he particularly described, and estimated to be worth nine thousand dollars, and proceeded as follows: "all of which will include all and every part of my estate intended, meant, and allotted to him as the whole of his portion thereof."

After making a provision for his grandson, James N. Whedbee, the testator proceeded: "all of which is to complete his share of my estate, unless the death of some one or more of his connections should entitle him to heir from them."

The bill, after setting forth these parts of the will, charged that, there being no person appointed executor, administration with the will annexed had been committed to the plaintiff; that the plaintiff, in the execution of his office, had experienced great difficulty, and he prayed that his administration might be conducted under an order of the court.

In explanation of the difficulties he had encountered, the plaintiff stated that Jane J. Whedbee, the widow of the testator, died before the expiration of two years and three months after his death. That her administrator (who was a defendant) claimed the legacy of one thousand dollars, but that the next of kin of the testator insisted that the legacy was contingent, and had failed in consequence of her death before it fell due. Upon this subject the plaintiff prayed a declaration of the opinion of the Court.

Another question which arose was, how the surplus should be divided, there being no residuary clause in the will. The widow claimed to be entitled to a share of it, but her claim was denied by the next of kin, who insisted she was only entitled to that provision which the testator had made for her, as she had not dissented from the will. Among the next of kin a question also occurred, there being six of them; four contended that it should be divided between them, as the testator had
(18) expressly excluded James P. and James N. Whedbee, while the latter, the two Whedbees, contended that, as the testator had not disposed of the residue, it was to be distributed by law, and that a distribution by law included them. The plaintiff also stated that he had been appointed guardian to Joseph Nauby, who had been the ward of

the testator, and that difficulties had arisen in stating the account between the infant and the testator, and he prayed that it might be settled under a reference made by the court.

The several answers admitted the allegations of the bill to be true.

Badger for plaintiff.
Iredell and Devereux for the administrator of the widow.
Kinney for James P. and James N. Whedbee.

GASTON, J. This bill is filed by the administrator with the will annexed of James Whedbee, to obtain the advice of the Court on several questions arising under the will of his testator, which are likely to produce controversies and delay a settlement of the estate. The first of these is whether the bequest of one thousand dollars to the testator's wife be a *vested* or *contingent* legacy. Questions of this kind are frequently very perplexing, and, with a view to the determination of them with uniformity, the courts have established rules involving refined and almost verbal distinctions, but all designed to eviscerate and to execute the intention of the testator. If it be his purpose to pass an immediate *interest* to the legatee, postponing only the time of *enjoyment,* then is the legacy vested. But if it be to render the *title* to the legacy dependent on the *event* of the legatee being in a condition to receive it when due, the legacy is contingent. The will which we are called upon to expound is exceedingly inartificial and untechnical in its language, and calls for the indulgence of a liberal criticism. The intention of the testator in any particular disposition is frequently not to be collected but by a careful examination of the entire clause containing it, and sometimes, indeed, not without a comparison of different clauses. It commences with making a suitable provision for his wife, and it is apparent that the testator had in view the provision which (19) the law would make in case he died intestate, and substitutes for it that which his sense of propriety and the convenience of his estate recommends. In the event of intestacy the claims of the widow would be of three kinds—first, a year's allowance out of his crop, stock, and provisions; secondly, dower in his real estate; and thirdly, a distributive share in his personal property; the two first claims to be urged immediately on his decease; the last, a claim which could not be pressed before the time which the law allows for settling the estate. With much distinctness of purpose he first makes the year's allowance, following the several subdivisions of crop, stock, and provisions; then he allots dower, or gives a substitute for it; and lastly, he sets apart to her specifically a share of his personal estate. It is perfectly clear that the year's allowance was to be delivered over *immediately* upon his death; it is made

by him as a year's allowance in lieu of that made by the law. It is natural to expect that what is given as dower, or in lieu of dower, should be also given immediately; and upon examining the details of the provision for that purpose, we find much to justify that expectation. The gift in lieu of dower consists of two parts. He first lends to her the use of either of two plantations for the term of two years and three months after his decease, and then directs that at the expiration of this term there shall be paid (the will is silent as to whom) the sum of one thousand dollars, half in cash and half in good obligations then due. The limitation of the term for two years and three months is a very unusual one, and prompts the inquiry, what could have suggested it? The motive seems to be developed in what follows. In order to raise the thousand dollars, the administrator is authorized, as soon after his qualification as time will permit, to sell certain lands which the testator designates, and upon the longest credit that can be given, so as to have the money ready for her use at the expiration of the term so limited. The administrator cannot qualify but in the County Court, and as its terms are quarterly, three months might elapse after the death of
(20) the testator before qualification, while two years is a reasonable period of credit to enable lands to be sold at a full price and the vendor to collect half of the purchase money. The duration of the term is then with a view to the ulterior disposition, and is accommodated to the arrangements provided for effectuating that disposition. The term is but a temporary provision, while the receipt or enjoyment of the main gift is deferred. It is in the nature of interest for delay in the payment of principal. The payment of the money given is to take place at the moment when compensation for its detention is to cease. This is not like the cases in which the postponement of payment is because of the age, or person, or character of the legatee; her fitness to enjoy, her capacity to dispose of, and her right to expect a suitable provision did in no manner depend upon the contingency of her surviving her husband for two years and three months. The postponement manifestly is for the convenience of the testator's estate, and on account of the circumstances of the property to be sold for raising the money. The testator imposes it as a duty on the administrator to sell the lands *immediately* upon his decease, in order to have the money *ready* for her when the day of payment shall come, but makes no disposition of the money in case she dies before pay-day. The language, "to have the money *ready* for her use *immediately* upon the expiration of the two years and three months," is *that* of one making arrangements for discharging with punctuality a debt certain, then existing, though *solvendum in futuro.* The omission of an ulterior disposition in the event of her dying before the time of payment tends to show that the *title* to the money was not

made dependent on that event. The testator closes the clause with this declaration, "which thousand dollars *is to be* to her a full satisfaction for and in lieu of her taking thirds out of my lands after the abovementioned two years and three months." What thousand dollars does he allude to? The thousand dollars directed to be raised immediately upon his death by a sale of specific property, charged also as a debt upon his whole estate, and to be ready for her at the moment when the use of the thirds loaned shall cease. When is it to be a satisfaction? Dower is an immediate right, and in cases of *testacy* must be (21) immediately demanded. The widow is to choose between that given by will and that which she can demand by law within six months after probate. Not only then, from the words used, but from the purpose in contemplation the inference is strong that he intended that she should elect at his death between his gift and a legal provision. It is in satisfaction of thirds after the term of two years and three months, for during that term "thirds" (as he terms dower) is absolutely provided, and should she dissent, it can only be because a satisfactory provision is not made thereafter, and she could only demand so much, in addition to what is unconditionally given, as will make up the full value of legal dower. We are satisfied, from these considerations, that by the will an immediate gift was made of the legacy, although its payment was postponed, and declare the legacy vested and not contingent.

The advice of the Court is also prayed in relation to the distribution which ought to be made of the *residuum* of the personal estate not disposed of by the will. The cases of *Craven v. Craven,* 2 Dev. Eq. Cas., 344, and *Redmond v. Coffin, ib.,* 437, must be considered as conclusively establishing that, in consequence of the peculiar enactments of our acts of Assembly, a widow for whom her husband's will makes a provision in real or personal estate must dissent therefrom, or she foregoes and relinquishes all further claims upon his property as widow. The administrator of the widow is therefore not entitled to a share of this undisposed *residuum.* It must be distributed amongst the next of kin, including James P. Whedbee and James N. Whedbee. They cannot be excluded, however strongly the testator has expressed his determination to give them no further part of his estate. Their claim to that with respect to which he died intestate is wholly independent of his intention, and is founded on the statute of distributions. What the testator has left undisposed of, the law must dispose of for him. It is hardly necessary to add that the legacies given to any of the next of kin are not to be regarded as advancements. *Wilson v. Hightower,* 3 Hawks, 76.

The administrator also prays that it may be ascertained, under (22) the sanction of the Court, what is justly due from the estate of his testator to Joseph Newby, an infant, to whom the plaintiff is

guardian, and accounts have been taken for the purpose of enabling the Court to ascertain the amount due. The Court, however, must decline to make any declaration with respect to the subject-matter of this prayer. It is against the course of the proceedings to pass judicially upon an account involving adversary interests, where the same person represents both parties, and of course manages both sides of the account. The defendants, James P. Whedbee and James N. Whedbee, have asked for the opinion of the Court upon certain matters not set forth in the bill, and in regard to which, therefore, the Court is advised of the allegations of the respective parties to this suit. The Court declines to make any declaration thereon.

The case appears to be one in which the administrator had a right to bring the parties before the Court in order to determine the questions which embarrassed the settlement of the estate, and therefore the Court declares his costs to be a charge on the assets of that estate.

PER CURIAM. Decree accordingly.

Cited: Brown v. Brown, 27 N. C., 137; *Redmond v. Van Hook,* 38 N. C., 587.

JAMES H. TATE ET AL. v. DAVID TATE ET AL.

An advancement to the children of a first marriage, made before a second was contemplated, is not a fraud upon the second wife's right to dower, and this as well where she knew of the deed before her marriage, as where she was ignorant of it.

THE plaintiffs alleged that David Tate, the elder, on 16 August, 1814, executed a deed of bargain and sale, by which he conveyed to his children all his land in fee; that the bargainees being infants, the deed was delivered to Hugh Tate, their uncle, to keep for them; that it remained in the custody of Hugh until his death, which happened in the year 1816, when the bargainor, having after its execution intermarried with Christian Tate, a defendant, went to the widow of Hugh and
(23) obtained the deed before it was registered, and canceled it, by tearing off his signature and that of the witnesses; that, afterwards, David, the elder, made a voluntary conveyance of a part of the same land to his son, the defendant, David, and one of the bargainees in this first deed; that he made similar settlements upon Samuel W. Tate, also a defendant, and to Rebecca Woodward, a plaintiff, who were his children and bargainees in the canceled deed.

The canceled deed was filed as an exhibit, having been found among the papers of David, the elder, after his death. The plaintiffs were the children of David Tate, the elder, by his first wife; the defendants were his widow and a child born of her, and those of the issue of his first wife, who have received other deeds for part of the land included in the first. The prayer was to have the deed set up, to enjoin the suit of the widow for an assignment of dower, for an account of the rents and profits, and for a partition.

The answers and the proofs are so fully stated in the opinion of the *Chief Justice* as to render any abstract of them useless.

Badger for plaintiffs.
Pearson for defendants.

RUFFIN, C. J., after stating the substance of the bill as above, proceeded: That such a conveyance will be established against the donor himself if it was completed as a deed, was the point of the decision in *Tolar v. Tolar,* 1 Dev. Eq. Rep., 456, and upon principles that are clear beyond doubt. The equity is not in the nature of the right, but to have the benefit of a legal title, of which the evidence has been lost by spoliation. The relief is a reconveyance with covenants against intermediate encumbrances, or acts of parties making it.

The first question is whether the instrument ever was a deed. The answer of the youngest child disclaims, of course, all knowledge on her part, and against her the plaintiffs must prove their case strictly. Enough remains on the paper to satisfy us, upon inspection, that it was once executed. A part of the signature of one of the subscribing witnesses is still to be seen; and the widow of Hugh Tate proves (24) that her husband had it in his possession for safe-keeping in the form of a deed, and that upon his death the donor applied for it and took it away. These circumstances are not necessary in the case, except as confirmations of the positive testimony of Ezra M. Tate to this point. That witness is one of the donees, and assigned his share to the others to render him competent.

He proves that the deed was drawn by the late Judge Paxton, then at the bar; was executed by his father in compliance with a dying request of his mother; was attested by John Paxton and Hugh Tate, the brother of the donor; and was then delivered to Hugh Tate for the benefit of the children mentioned in it, and to be kept for them. The witness states that he was the eldest of those children, and was then about eighteen years old, and that the youngest was about the age of three years; that his father was not embarrassed, though somewhat indebted, and that he retained other property amply sufficient to pay his debts.

This evidence is precise and full, to the execution of the deed by signing, sealing, and actual delivery. When supported by the existence of the paper itself, by the appearances on it indicating execution, and by the testimony of Mrs. Tate that her husband had it in his custody as a deed, it seems to be entitled to full credence, notwithstanding the relation the witness bore to the instrument and bears to the parties. But whatever doubt might be raised, from those circumstances, of the credit to which this witness is entitled, it is dissolved by the answers of the defendants. That of Mrs. Tate states that at the date of the deed her husband, as he told her after her marriage, was indebted, and, for the purpose of securing his property to his children, that he executed the deed; but as he had extricated himself, that he should tear, or had torn, off his name, for the consideration had failed, and "therefore the deed ceased to have any legal or binding effect upon him." She adds, indeed, that she did not understand that the deed was delivered for the benefit of the bargainees; and that she is convinced "if it was delivered, as stated by the plaintiffs, it was conditionally to be redelivered to
(25) the donor if he should be able to discharge himself from his debts." The opinion of this defendant, as expressed in the latter extract from the answer, is of little avail, as it is inconsistent with the words she gives as those of her husband, and with his professed object. If the deed ever had any "legal or binding effect," it could not "cease" to have it for any of the reasons or by any of the acts mentioned by him; and if the design really was to defraud creditors, the only opinion that can be entertained is that the parties would at least give to the transaction all the forms of a perfect and executed conveyance. The answers of the other defendants admit, almost by necessary implication, a delivery to Hugh Tate for the donees. They do, in express terms, admit the formal execution, attestation, and delivery to Hugh Tate. They do not expressly say that it was delivered to him *for the donees,* but that is almost a necessary inference from other parts of the answer. For the point insisted on is the insufficiency of such a delivery, in point of law, to give effect to the end. They say "that as all the children were under age, and some of them of very tender years, the deed was handed to Hugh Tate, to be kept by him until the said children should arrive at age and be capable of receiving said deed; and they insist that the donor had a right to cancel the paper, as it had never become his deed, by delivery to the bargainees themselves, or by their assenting to the delivery to Hugh Tate." In a subsequent part of the answer these defendants state more explicitly "that they are advised that as all the children were under age at the time the conveyance was made, the handing the deed to H. Tate did not amount to a legal delivery, but required the assent of the children to *such delivery* after their arrival at age, and

that before such assent, the father had a right to cancel the instrument." We are obliged to read this answer as putting the defense upon the legal points that, to the validity of a delivery, it is essential that it should be made to the party himself, or, if to a third person, that the party should expressly assent to it, and that no such assent was given here, or could be given, because the donees were infants. It does not deny that there was a delivery by the donor of the instrument as his deed privately, nor that the delivery to Hugh Tate was for the donees, (26) and that he might keep the deed on their behalf; but, on the contrary, the affirmative upon those points is taken to be admitted, not simply as being tacitly yielded, but as necessarily implied from the manner of stating the facts in the answer. But, whether the answer be viewed as barely not denying those facts, or as impliedly admitting them, is but of little consequence in this case. The case is not heard on the answers, but the facts are established by proof of witnesses. The answers are resorted to as tests of the witnesses' credit, and to that purpose they are equally effectual, whether they admit or evade the charges in the bill.

Upon the testimony of the witness, an absolute delivery for the benefit of the children is clearly established. That was intended to be a delivery to the children, one of whom, the witness Ezra, was present and assenting. The points made in the answer upon the legal effect of such a delivery do not admit of discussion. When the maker of a deed parts from the possession of it to anybody, there is a presumption that it was delivered as a deed for the benefit of the grantee; and it is for the maker to show that it was on condition, as an *escrow*. Such a delivery to a third person is good, and the deed presently operates, and infants may assent to such a deed to themselves, and their assent is presumed until the contrary appears. Here one assented at the time; the plaintiffs have since assented, and no express dissent by any one of them appears. The defendants have taken several conveyances for parcels of the land, but this is not a dissent to the instrument as a whole. Even if it were, it is not seen how their refusal to accept the estate conveyed to them could defeat the deed as to the other grantees. The doctrine is found in the old cases. *Jaw v. Bury,* 2 Dy., 167; *Alford and Lea's Case,* 2 Leon, 110; *Butler's and Boker's Case,* 3 Rep., 26; *Whispdale's Case,* 5 Rep., 119. And the learning upon the point is all collected in the modern cases of *Souverbye v. Arden,* 1 John. C. C., 240, and *Doe v. Knight,* 5 Bar. & Cres., 671 (12 Eng. Com. Law Rep., 351). The plaintiffs are therefore entitled to the relief they ask for, unless precluded by the other matters brought forward in the answers. In the opinion of the Court, none of the objections are sufficient for (27) that purpose.

The first to be considered is that of the widow, that there was much disparity in the ages and health of the grantor and herself, and that she had no knowledge of the deed at the time of the marriage, but supposed the property to be in the donor from his retaining the possession; and therefore that the deed will, if set up, be a fraud on her. This position is founded on the act of 1784, which provides that conveyances made fraudulently to children, or otherwise, with the intention to defeat the widow of dower, shall be void as against her. The statute embodies the spirit of the decisions upon the customs of York and London upon this subject. It is not certain that it embraces the case of any conveyance made even during the marriage, whereby the donor actually divests himself of all property in the land conveyed, and intended primarily on advancement made to a child, although it may have the effect of defeating the widow. But if this case depended on this view of the question, we should consider more particularly the effect of the donor's remaining in possession, and the secrecy of the transaction as evidence that the purpose of advancing the children was merely colorable as against the wife. It is a further question whether any deed is within the act but one made during the marriage. It may be that the right of the widow must be inchoate at least before the deed can be construed to be intended to defeat her dower. I incline to say for myself that a deed made in contemplation of marriage is within the statute. It is, indeed, in England, the rule of equity as well as at law, that the widow is barred of dower if the husband puts his estate into trust immediately before the marriage, and expressly with a view to defeat her. But that rule has been disapproved of in point of justice, and it rests upon the ground that conveyancers had so long acted on that mode of barring dower, when there was a settlement, that it would be dangerous to overturn it. There, settlements are almost universal, and the wife and her friends look to one as a provision. But it has been more than once
(28) doubted whether the same effect would be given to any transaction not technically within the rule, and whether a long legal term upon a nominal rent, likely to last beyond the life of the wife, created just before marriage, and for the sole purpose of defeating her, would be sustained in that country. 2 Powell Mort., 486 (Coventry's edition). With us there is no habit of marriage contracts, and a woman has a right to expect to enjoy the marital rights promised by the law to a wife, as much as the husband to look to those given to him. The statute ought to receive a liberal construction in suppression of the fraud forbidden by it, and be made commensurate with the principle of equity, which protects the husband from her covenous practises, at least as far as the conveyance of the husband is for his own benefit, or expressly to defeat the wife, and not truly for the advancement of chil-

dren. But were these parties reversed, and the wife had made this deed, the husband could not be relieved against it. There was no intention to defraud the wife, nor any other woman. The witness proves a different purpose in the party's mind—that of advancing the children by a former wife, by whose labor the estate had chiefly been accumulated. There is no evidence that the donor then had a second marriage in view with any woman; much less the one afterwards consummated, which did not take place until the expiration of two years. The Court cannot say that a deed, upon a meritorious consideration, in favor of children, is void as against every woman whom the donor may happen to marry at any distance of time, to whom notice of it cannot be brought. She takes her husband in his actual circumstances as they are while addressing her, and must by reasonable inquiries satisfy herself beforehand of the prudence of her choice. She may be deluded by appearances, it is true, but the deed cannot be said to have been intended to defeat her, unless it can in some way be connected, by the time of its execution, or otherwise, with the purpose of marrying some woman, and perhaps the one actually married. *Cotton v. King,* 2 P. Wms., 357, 674; *Strathmore v. Bowes,* 2 Cox's Ca., 28, and *Goddard v. Snow,* (29) 1 Russ. Ch. R., 485.

The widow and her daughter likewise insist that the deed was in fraud of creditors, and that it is iniquitous in the plaintiffs to set it up against them. How far an unlawful interest, which does not take effect on the original objects of it, can be alleged to vitiate the act into which it enters, in respect to third persons whose rights are incidentally affected by it, we need not here inquire. There is a clear answer to the objection upon the facts of this case, whatever may be the law. The only evidence of the donor's indebtedness is in the deposition of his son, and he states that his father reserved an ample fund for that purpose, and there is no proof that a single creditor then existing remains unsatisfied.

It is stated in some of the answers that the father became insane in 1830, and then the two sons, who are defendants, were appointed his guardians, and leased to one of the plaintiffs a house and lot in Morganton, which is part of the estate conveyed; and this is relied on in the argument as acquiescence in the destruction of the deed, especially when coupled with the delay in bringing this suit.

The first circumstance is disposed of by saying that there is no evidence of the lease. There is no charge in the bill respecting it, to which the answer is responsive. The answer in this respect is not therefore evidence, but merely pleading, and the defendants must support it by proof. The averments by the defendant David of the consideration on which the subsequent deed to himself was given, is subject to the same

remark. He admits that the land was conveyed to him partly as a gift, but he says it was partly for the price of five hundred dollars paid by him for his father. On this statement he claims to be a purchaser, and that under statute 27 Eliz., the deed of 1814 is void as to the lands conveyed to him. A colorable consideration will certainly not make a purchaser under the statute. Whether an inadequate one, known and understood to be so at the time, will suffice to convert a transaction meant mainly to be a gift into a purchase for any purpose, may also be at least doubted. But one who claims as a purchaser must at all events
(30) prove that he paid the money, and does not establish it by his deed or by his own answer.

Then, as to the length of time as evidence of acquiescence, to give it that effect there must appear to have been a knowledge by the parties of their rights, and no incapacity to sue, nor any circumstance to account for the delay upon any other ground but the presumption of a satisfaction or renunciation of the right. The deed was canceled in 1816 or 1817, and the bill was filed in 1832, and during the greater part of the intervening sixteen years the plaintiffs were either *femes covert* or infants. It is not surprising that as they came of age they should not assert their title against their father, and especially during his unhappy and helpless state for several of the last years of his life. The time itself is not long enough to bar the plaintiffs, against whom can only be presumed a willingness that the father should enjoy during his life, and whose possession as their natural guardian they regarded as their own.

The lapse of time can have no other effect; for the statute of limitations is not pleaded, nor relied on in the answer. If it were, it could not, as urged in the argument, avail the defendants, David and Samuel, under the deeds to themselves, because there is no evidence of the length of their possession under those deeds.

The last point taken is, that the defendants, David and Samuel, are creditors of their father to a large amount. They state that they were his guardians during his lunacy, and administered upon his estate after his death, and in those capacities have made advances to creditors under the belief that the lands now in dispute were his and had descended. Upon this point also there is a total defect of proof. But if the fact had been established, it would not bar nor delay the relief of the plaintiffs. If those defendants be creditors, they cannot object to the relief for an indefinite period. They must be active in the assertion of their claim, by their own bill, to which the decree in this cause will be no obstacle. They cannot use the fact by way of defense here. Indeed, it appears there is other estate, and that may be sufficient without resorting to the settled lands, and is liable before them. The claim for those
(31) debts arises upon an independent equity, and would not, we

suppose, be barred by this decree. But for greater safety, the defendants may insert in it a clause that it shall be without prejudice to them in that respect.

The execution and delivery of the deed of 1814 must be declared to be established, and that it vested the title of the lands in all the donees therein named, as mentioned in the bill. The decree will be that the widow be perpetually enjoined from proceeding at law for dower in any of those lands; that the defendant Mary A. E. Tate, upon coming of full age, release, under direction of the master, all the said lands to the donees in the deed of 1814 or their heirs, with liberty to her to show cause against the decree within six months after full age; that partition be made between the plaintiffs and the defendants of all the said lands included in the deed of 1814, according to their several shares under the same, and that in such partition the tract of land conveyed to Baker Woodward be allotted to the plaintiff Nancy H. Woodward as for or in part of her share, according to its actual valuation at the period of partition, and that a commission issue for that purpose. The decree will not direct conveyances for the present, as they can be more conveniently executed as mutual releases upon the return of the partition. There must also be an account of the rents and profits since the death of the donor, David Tate, deceased, received by any of the parties; and the annual value of the land conveyed to Woodward must, for the same period, be treated as profits received by Mrs. Woodward under her submission in the bill.

The infant heir, Mary A. E. Tate, must have her costs, to be paid by the plaintiffs and the defendants David and Samuel equally; and as between the other parties no costs are given.

PER CURIAM. Decree accordingly.

Cited: Littleton v. Littleton, 18 N. C., 329; *Morrow v. Alexander,* 24 N. C., 392; *Thomas v. Thomas,* 32 N. C., 125; *Gaskill v. King,* 34 N. C., 216; *Crump v. Black,* 41 N. C., 323; *Tyson v. Harrington, id.,* 331; *Phillips v. Houston,* 50 N. C., 303; *Robbins v. Roscoe,* 120 N. C., 81.

Dist.: Barnes v. Roper, 90 N. C., 191.

(32)

JANE JOHNSON v. GORDON CAWTHORN.

Whether the vendor of the land has a lien upon it for the purchase-money, and if any, its nature and extent, are unsettled questions in this State. But it is clear that if the lien does exist against volunteers and purchasers with notice, it does not against a creditor of the vendee, enforcing the collection of his debt, or a purchaser clothed with the rights of such a creditor.

THE case made by the bill, answer and proofs was that in February, 1826, the plaintiff sold a tract of land in Warren to Robert R. Johnson for fifteen hundred dollars, and took from him three bonds, payable at intervals of one year each, for the security of the purchase-money; that Johnson died before the first bond became due; that his administrators paid that bond, but his estate being exhausted, the plaintiff had never received anything upon the others; that before the second bond fell due the guardian of the infant children of Johnson procured an order of the County Court of Warren for the sale of the land of which he died seized; that under this order a sale was made of the land formerly belonging to the plaintiff, when it was purchased by the defendant, who had notice of the fact, that one thousand dollars of the purchase-money was unpaid, and also that the plaintiff looked to the land as a security for it, and intended to enforce her lien if she had one. The prayer of the bill was that the land might be subjected to the satisfaction of the two bonds of Johnson, held by the plaintiff. On the Fall Circuit of 1830 an interlocutory decree was pronounced by Swain, J., establishing the right of the plaintiff and directing an account of her debt and a sale of the land. At the ensuing term, a final decree having been entered according to the principle settled by the interlocutory order, the defendant appealed.

The Attorney-General for defendant.
Badger for plaintiff.

GASTON, J. We have delayed the decision of this cause in the hope of being able, with satisfaction to ourselves, to settle questions of great public interest involved in it, viz.: the existence in this State,
(33) and if it exist, the extent of the rule that the vendor of land has a lien thereon for the unpaid purchase-money. The case of *Wynn v. Alston*, 1 Dev. Eq. Ca., 163, has been generally considered as establishing that the vendor here has a lien against the vendee, and against volunteers and purchasers under him with notice, and that it was so established by the adjudication of *Judge Hall* and *Judge Henderson* against the dissenting opinion of *Chief Justice Taylor*. From

the published report it appears that *Judge Hall* and the *Chief Justice,* respectively, filed opinions, and as none was filed by *Judge Henderson,* and as it was known that the decree for the plaintiff could not have been rendered without his sanction, it was a natural inference that he concurred for the reasons stated by *Judge Hall.* It was known, however, to some of the individuals who now constitute the Court that there is reason to doubt whether this inference be correct. Some years after the decision of *Wynn v. Alston* there came on for hearing the case of *Kelly v. Perry* in which the plaintiff set up the lien, and founded upon it her claim to relief. In the argument the defendant's counsel admitted the general doctrine of the vendor's lien as supposed to be established in *Wynn v. Alston,* but contended that it did not apply to the case then under consideration. *Judge Henderson* remarked from the bench that the rule was not established in that case, as supposed, for that, although he concurred with the decision, his judgment had rested upon other grounds than those taken by *Judge Hall.* The bill in *Kelly v. Perry* was dismissed, and the judgment of the Court, as delivered by *Judge Hall,* seems to admit that the rule was not yet settled. "How far (I take the words from the opinion) the vendor of land has a lien on the purchase-money in the hands of the purchaser from the vendee with notice *need not be the subject of examination in this case,* because it does not appear that anything was due from Taylor (the vendee) to the plaintiff as part of the purchase-money." * Under these circumstances we were solicitous to examine the record in *Wynn's case,* to see the allegations, the proofs and the (34) decree, and thus satisfy ourselves what were the points authoritatively decided by it. But with every exertion on our part, and on the part of the officers of the Court, we have been unable to do so. In the conflagration of the State-house the books and papers of the clerk's office were saved as they could be—in much hurry and confusion; and although it is believed that none were actually destroyed, yet they were so scattered that one book of our records and the original papers in some of the suits are yet missing. A hope is indulged that these will yet be obtained, but we do not think ourselves justified in postponing any longer on that account the decision which the parties to this controversy have a right to require.

On the general question, whether this doctrine of lien ought to be considered as a part of the equity jurisprudence of North Carolina, we all of us feel the force of the argument in the dissenting opinion

*The reporters have reëxamined the opinion of *Judge Hall* in *Kelly v. Perry* and believe, with the exception of the above quotation, he confines himself to the question of fact, whether Taylor, the vendee of the plaintiff, owed any part of the purchase-money.

of *Chief Justice Taylor.* It is difficult to resist it, especially when we see the "inconvenient state," to adopt the language of *Lord Eldon,* in *Mackwreth v. Simmons,* 15 Vesey, 350, in which this doctrine, after all the corrections and improvements it has received in England, has ultimately placed the titles to lands in that country. Whether there be or be not a lien, whether the purchaser from the vendor be or be not liable for the original purchase-money, is not there a "dry question" depending upon the existence or nonexistence of any fact, but depends upon the peculiar circumstances of *each case,* accordingly as these circumstances may induce the Court to *infer,* either that the lien was intended to be reserved to the vendor, or that credit was given, and exclusively given, to the vendee. A doctrine leading to such results ought to be well considered before it is adopted, or if already adopted should, if possible, be well guarded lest it should be followed by the same consequences. But upon this question the rules by which it is our duty to be guided are exceedingly different, accordingly as the doctrine may or may not have been sanctioned by our predecessors. An adjudication by them is a precedent which we are bound to
(35) regard as evidence of the law, unless it can be conclusively shown to be erroneous, and by which we must be guided even when so shown, if a departure from it occasions greater public inconvenience than the error itself. Where there is no such precedent, we then ascertain the true rule by the deductions of reason from settled principles. After several conferences we are unable to agree upon this general question, and as a determination of it is unnecessary in the present case, we must leave it, reluctantly leave it, in the state in which we find it.

If we should attempt to decide this case (supposing the doctrine of lien to exist here) by *Lord Eldon's* rule—drawing from the peculiar circumstances of the transaction an *inference* that the lien was intended to be reserved to the vendor, or the opposite inference, that credit was intended to be given exclusively to the vendee—it is *questionable,* at least, whether there would be more harmony in opinion than there is on the general question.

There is, however, one point in the case upon which there is no difference of sentiment among the members of the Court. Whatever may be the lien as between vendor and vendee, or between vendor and volunteers or purchasers with notice under the vendee, we deny its existence against *creditors* enforcing the collection of debts by legal process. If a vendor claiming such a lien will not reduce it to a legal form, and give it the notoriety of registration, which our laws require for the validity of legal liens, it cannot prevail against creditors. Purchasers under execution sales represent creditors, and buy all that the

creditor has a right to sell. The purchaser in this case is to be considered as a purchaser under a sale by execution. The sale was made by order of the Court, under the fifth section of the act of 1789, for the satisfaction of creditors, and the proceeds thereof are assets in the guardian's hands for the benefit of creditors, and the purchaser at such a sale necessarily represents these creditors.

The plaintiff is evidently not pursuing these assets, as she has not filed her bill against the vendee's heirs for any surplus after paying debts, but against the purchaser at the judicial sale. She asks that the sale so made in order to satisfy creditors should be (36) declared null, so far as it affects her equitable lien upon the thing sold. This would be in effect to set up such a lien against creditors.

The decree below is to be reversed and the plaintiff's bill dismissed with costs in both courts.

PER CURIAM. Decree below reversed.

Cited: Harper v. Cawthorn, post, 379; *Womble v. Battle,* 38 N. C., 184.

DANIEL LINDSAY ET AL. V. ELIZABETH ETHERIDGE ET AL.

Where, upon the bill and answer, it appears the defendant can claim under the wills of two testators, and no election nor any fact which puts him to one is charged, none will be decreed.

THE plaintiffs in their bill alleged that Sampson Etheridge, their father, by his will gave all his property to the defendant Elizabeth, his wife, for life, with remainder to them; that he died in 1822, and that the defendant Elizabeth, being appointed executrix, proved the will, and had sold a slave, late the property of the testator, to Nathan Etheridge, also a defendant, who had removed him out of this State, and that she threatened, upon a claim of absolute property, to make a similar disposition of others. The plaintiffs averred that the sale was not necessary to pay the debts of the testator, and prayed that the defendant Nathan might be enjoined from paying the purchase-money for the slave to the defendant Elizabeth, and that she might be enjoined from selling other slaves, and that those in remainder might have the usual security for the forthcoming of the property, to which they were entitled upon her death.

The answer of the defendants admitted the death of the testator and the provisions of his will, as set forth in the bill. But the defendant

Elizabeth stated that the slaves in question never belonged to her late husband but were the property of her father, Jonathan Dough, by whom they were lent to her husband, upon the expectation of a future gift. That her father survived her husband, and by his will, dated in 1824, gave them to her. That being advised that the slaves
(37) belonged to her, she had sold one of them. She denied any intention of selling the others out of the State.

Upon the coming in of the answers his Honor, Judge Seawell, at Currituck, on the Fall Circuit of 1833, dissolved an injunction which had been granted at the filing of the bill, and the plaintiffs appealed.

Kinney for plaintiffs.
Iredell for defendants.

GASTON, J. Under the act of 1831 the judges of the Superior Courts may permit an appeal to this Court from an interlocutory judgment or decree, and an appeal so allowed does not remove the record of the cause into this Court, but brings before it so much only of the matter in controversy as shall be certified by the court below, as necessary for the consideration of the question on the appeal. It is under this act that the plaintiffs bring up this appeal from a decretal order of the Court of Equity for the county of Currituck, dissolving an injunction.

The *gravamen* upon which the injunction issued is set forth in the bill of the plaintiffs, as follows: Sampson Etheridge died in 1822, having duly made his last will and testament, and therein appointed the defendant Elizabeth executrix, who proved the will, and took upon herself the duty of executing it. By this will the testator bequeathed to her all his estate, real and personal, during her natural life, and, subject to this disposition, gave certain negro slaves to his children, the plaintiffs. The bill charges that the defendant Elizabeth, holding the negroes under this bequest, has nevertheless sold one of them as her absolute property, to her codefendant, Jonathan Lindsay, and is threatening to sell the others out of the State, and that the plaintiffs fear that should this be done they will suffer irretrievable loss. Upon this statement of facts the defendant Lindsay was enjoined from paying over to the defendant Elizabeth the price of the negro sold, and she was enjoined from selling the other negroes.

The defendant Elizabeth, in her answer, denies that her husband owned the negroes in question; says they belonged to her father,
(38) Jonathan Dough, and by his permission, and under the expectation of a future gift from the said Jonathan, her husband had the use of them at his death and when he made his will; that her father died in 1824, and by his will bequeathed these negroes absolutely to her; that, being advised they were thus her undisputed property,

she sold one of them to meet a demand which she had for money, but that she has no intention to sell the others out of the State. Upon the coming in of this answer the injunction was dissolved.

It is a general rule that where a defendant's answer denies all the equity of the plaintiff's bill the injunction ought to be dissolved, but where, admitting the equity therein charged, it brings forward a new fact in avoidance of it, the injunction shall be continued until the hearing. It is insisted here, on the part of the plaintiffs, that the answer in this case is of the latter description; that the whole matter which it alleges in relation to the negroes having been the property of the defendant's father, and becoming her's under a testamentary disposition from him, is new matter set up to avoid the equity on the part of the plaintiffs. Certainly the answer does bring forward new matter, but does it admit the equity charged? The bill is not very precise in its language, but we must understand it, not as setting forth *evidence* but as charging *facts,* otherwise it would be radically defective. It charges, then, that the negroes in question were the property of the defendant's husband, bequeathed to her for life, and in remainder to his children, and it seeks for the relief which a court of Equity gives to those having a residuary interest in personals, against the immediate holders, who are making away with the property to their injury. The answer denies that the negroes were the property of her husband, and of course denies that she is tenant for life, and that the plaintiffs have any residuary estate in the negroes. This is a denial of the very ground on which the bill rests. But it is urged by the counsel for the plaintiffs that notwithstanding this denial still there is an equity undisputed, for that the defendant has taken under the will of her husband, and shall not be allowed to disappoint its provisions, or that she should now be compelled to *elect* whether to take the property (39) bequeathed by her husband or that derived under her father's will. We forbear from expressing an opinion—for it would be premature—whether the plaintiffs can make out a case, either by way of amended or supplemental bill, disclosing such an equity. If they can, they will not be precluded from doing so, or from then obtaining appropriate relief. But this bill does not present such a case. It contains no allegation that the defendant has made an election, and charges no matters upon which an election is prayed, or can be decreed. Were the cause brought to a final hearing upon the present allegations of the parties, no relief could be given to the plaintiffs unless the negroes in question were part of the personal estate of the defendant's husband, and passed by his will, as charged in the bill. Relief must be not according to the proofs merely, but according to the allegations as sustained by the proofs.

The Court directs that it shall be certified to the court below that the interlocutory decree appealed from is correct, and that said court be instructed to proceed thereon according to the usages in equity and the rights of the parties.

PER CURIAM. Decree affirmed.

Cited: Hewett v. Outland, 37 N. C., 441; *Kerns v. Chambers,* 38 N. C., 579; *Strong v. Menzies,* 41 N. C., 546.

MARY LANIER v. GREEN ROSS.

As all the acquisitions of a *feme covert* made by her own act during the coverture inure to her husband, a bill seeking to enforce the execution of an agreement for the purchase of property, and a conveyance of it to the sole and separate use of a married woman, her husband not joining in it, will be dismissed.

THE case made by the bill was that Thomas Lanier, the husband of the plaintiff, having become insolvent and his property being about to be sold under execution, the defendant agreed with the plaintiff to purchase a certain share for her separate use, and upon being secured in the purchase-money to convey it to a trustee for such use. That the purchase was made according to the agreement, and that
(40) the defendant, upon being tendered the amount of his purchase and requested to convey according to his agreement, had refused to do so.

The bill was filed during the life of Lanier, the husband of the plaintiff, she suing by her next friend, and sought to enforce the agreement, but the husband was not a party. The defendant denied the agreement charged, and relied on the coverture of the plaintiff as a defense.

Upon the proofs, the agreement stated in the bill was fully made out. It appeared also that a brother of the plaintiff's at the sale of her husband's slaves had purchased a number of them, and left them with her for her use.

Devereux for plaintiff.
Badger and W. H. Haywood for defendant.

RUFFIN, C. J., after stating the substance of the bill as above, proceeded as follows: The Court is of opinion that such a bill cannot be

sustained. The contracts of a wife during coverture are void as to herself, and inure to the benefit of the husband. She cannot acquire property by her own earnings or upon her own engagement as a purchaser distinct from her husband. This is the general rule in equity as well as at law. But it is said that in equity she may have a separate estate, and that in respect to that she is regarded as a *feme sole*. Where she gets an estate to her separate use by devise or donation, in which cases the owner may give to any purposes and upon any conditions that to him may seem meet, she is as to such estate thus vested a *feme sole*. But by a bargain of her own, and especially by a mere executory contract, she cannot constitute herself a *feme sole*. If she could, the marital rights of the husband would virtually cease to exist in equity. It is said in this case that she had other separate estate which was purchased by a brother to her separate use; and that in respect of that, and on the credit of it, she might make the contract that is the subject of this suit. After the creation of a separate estate the wife may bind it, and herself in respect of it, by a contract touching or encumbering it. But such an estate does not give her the power of contracting generally any more than she had before; that is to say, upon (41) any subject but the separate estate. There is no proof, however, that even the articles purchased by the brother are in a situation to be viewed as the wife's separate property. The brother seems to have purchased and merely allowed the use to his sister of his property, as his, by way of charity. But if there be actually a conveyance it can make no difference, because this contract had no connection with that estate, and was not entered into upon the faith of it, and, moreover, because the bill does not allege any such separate estate. The bill is founded solely upon the idea that this slave is her separate property, and that she is constituted a *feme sole* as to it, by force of the contract with the defendant above. If it were the law, then every contract of the wife would be valid in equity, both as against the person with whom she contracts and against her husband, which cannot be pretended. She cannot make an executory agreement, and thereby constitute herself a *feme sole*. The interest is in the husband and not in her.

The bill must therefore be dismissed, but without costs. The evidence satisfies us that the defendant has deceived the plaintiff and her friends. He did agree to purchase for her, and under the general belief of that fact the creditors of the husband allowed him to purchase at or under value, and he now appropriates the profit to himself. He has therefore no merits which entitle him to recover costs.

PER CURIAM. Bill dismissed.

ALLEN GILL ET AL. v. AMOS WEAVER ET AL.

A legacy to a wife "until my youngest living child becomes of age," and "if she dies before my youngest living child," etc., then "to be equally divided among my living children," but if she lives until my youngest child, etc., "she shall have an equal share of my estate as is mentioned," does not vest in the children until the youngest arrives at full age, or until the death of the wife.

WILLIAM GILL died in the year 1797, having first duly made and published his will, in which, after providing for the payment
(42) of his debts, he proceeded as follows: "I bequeath to my wife all my personal and real estate, to have the sole use of until my youngest living child comes of age as is prescribed by law, provided she (my wife) lives. If she dies before my youngest living child comes of age, then all my property, both real and personal, shall be equally divided among my living children, male and female, except Judith Donaldson, my eldest child; I have already given her a full share. It is my desire that if my wife does live until my youngest living child comes of age she shall have an equal share of my estate as is mentioned."

The widow of the testator lived until the youngest child who survived him attained full age. But one of his daughters, Susannah Tomlinson, died before that time, leaving issue. The object of the bill was to obtain the opinion of the Court whether the share of Mrs. Tomlinson survived to her personal representative.

Nash and Pearson for the administration of Mrs. Tomlinson.
Devereux contra.

RUFFIN, C. J. The inclination of the courts is to construe legacies, and especially provisions for children, to be vested and transmissible if the words will possibly admit of it; and they are most reluctantly held to be contingent. Hence the general rule is that if a legacy be given to two or more, or the survivors or survivor, equally to be divided between them, the period to which the words are referred is the death of the testator. If the gift be immediate, that is to say, without any previous interest in the subject to another person, there is nothing to denote any other period but that at which the will first speaks. At that time the legacy vests, and the division is made or ought to be made, and the persons then answering to the description must take their shares absolutely, or there would be survivorships indefinitely until all comes to the last survivor, which is inadmissible without the

most unequivocal words. But if a previous life estate be given, (43) the period of division is the death of the tenant for life; and the survivors at that time take the whole, either as not having vested before or if vested at the death of the testator, as being divested by the death of one of the legatees, and surviving to the others. Upon this last point, however, the cases are not all reconcilable. It is not surprising that they should not be. The question does not turn on words having a technical and precise legal meaning, like *heirs* or the like; but the Court is to determine upon the apparent intention, to be collected both from the particular disposition and the other parts of the will, and the context varies with almost every will. Hence there are numerous cases in which the survivorship is sometimes referred to the death of the testator, notwithstanding a previous interest to another, and sometimes to the period of distribution. It is not proposed to enumerate or to classify those cases, because it is thought upon the whole of them the principle is indisputably established that if, upon the whole will, the certainty of the shares in their amount, or rather the proportion of the estate to which each legatee should be entitled, could not be conclusively determined upon the death of the testator, then the will must be construed as referring the survivorship to the event on which the legacy is to vest in possession.

By this will the estate is to be divided upon the death of the wife, or the arrival at age of the youngest living child, which shall soonest happen. In the former case the estate is to go to all the "living children" except Mrs. Donaldson. In the latter, it is to be divided between the wife and "all my children, as is mentioned," that is, all the living children, except Mrs. Donaldson.

If this had been an absolute disposition to the wife for life, and then to be equally divided between surviving children, the question would be open to discussion upon the conflicting cases alluded to. It may be, also, that there is no difference between the words "to my children or the survivors of them" and the expression here used, "to my living children," if standing by themselves, though the latter seems more emphatically to say *then* living. But there are other circumstances here affixing a future meaning to the word, which (44) seem to be uncontrollable.

The testator applies the term "living" four times to his children, in some of which he most certainly refers to events succeeding his death; and it is not easy to see how it can be said he used the word in a different sense in the other instances, although it might be doubtful what his meaning was in these latter dispositions, if they stood by themselves. The will begins with a bequest to the wife of the whole estate, "until my youngest living child comes of age, provided my wife lives"; and

afterwards says, "if my wife do live until my youngest living child comes of age, she shall have an equal share of my estate with my living children." What child is the "youngest living child," upon whose arrival at age the wife's estate in the whole was to cease and a share vest in her? It cannot be the one who happened to be the youngest at the making of the will or the death of the testator, for then the provision would be for a division at a certain period at all events, namely, when that child came of age; or in case of its death, when it would have come of age. But that is clearly not the intention, for the gift of the whole to the wife is obviously to keep the estate together for the support of the family and the education of the younger children, as long as there was a living infant child and no longer. The whole is given to the mother, *because* there is a child *living* who is not of full age. Whenever that should not be the case, he meant that the property should not be kept together but be divided. The sense of "my youngest living child," as here used, is the same as if the words had been transposed and the expression was "my youngest child living," that is, *then* living or alive. The period of division is contingent, depending, first, upon the life of the wife, and next, upon the living of the children until all come of age, or the dying of the younger ones, until none were left but those of full age. If "living" has that meaning in the clauses quoted, how can it receive a different one when used as descriptive of the persons to take? If "youngest living child" denotes the event on which the estate is to vest in possession to be *when* there is no infant child *alive,* it would seem that the "living
(45) children" amongst whom the division is to be made must be those then alive.

But this is the stronger from the express contingency on which the wife's share depends and the particular words in which it is expressed. They are, "if she dies before my youngest living child comes of age, then all my property shall be divided between my living children"; "but if she lives until my youngest living child comes of age, she shall have an equal share with my children, as is mentioned"; before this it was altogether uncertain what share each child should have until either the wife's death or the arrival at full age of all the children, or of the last one that was living. If the wife died before the latter events, she took nothing, by force of the word *die* applied to *her;* but if *she lives* until the youngest *living child* attains full age, then she and all the *living children* take equally. "Living," in reference to the children, as strictly ties up the disposition to those living at the period of division as "if she live" does, when applied to the wife. Doubtless there would have been a difference in the mind of the testator between a provision for the issue of his children and the future issue of his

wife, if the case had occurred to him. But it did not, and he has forgotten to provide for the death of a child leaving issue, and has put the wife and children upon the same footing, and nearly in the same words, by giving an equal share to each, if living at the period of distribution, and nothing if not so living. Any other reading would strike the word "living" out of the will altogether. As Mrs. Tomlinson died before her mother and before the full age of all the children, she was not entitled under the will.

PER CURIAM. Decree accordingly.

Cited: Sanderlin v. Deford, 47 N. C., 78.

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(46)

ANDREW ALLISON v. GEORGE L. DAVIDSON ET AL.

Serving an executor with process for the plaintiff's own demand does not, in equity, restrain his power of preferring other debts of equal dignity, But the rule is different when the object of the bill is to have an account of debts and assets, and for all the creditors to come in under the decree.

AFTER the decree made in this case at June Term, 1831, against the defendant Davidson (*vide* 2 Dev. Eq. Ca., 79), the question between the plaintiff and the executors of Simonton and of Worke were subsequently moved.

The master, in his report upon the administration of Simonton's assets, had allowed his executors for payments to the amount of ten thousand eight hundred and forty-three dollars and twenty-five cents, made just before taking the account, upon sundry judgments *quando,* which were entered up against them at February Term, 1827, of Iredell County Court, upon process sued out in August and November previous. These payments were partial, and the master returned a separate report upon those judgments, from which it appeared that there was still a balance of fifteen thousand two hundred and sixteen dollars and twenty-one cents due upon them.

The executors of Simonton and Worke were made parties to this suit *sci. fa.,* which was served in November, 1826.

The master in his report allowed the executors of Simonton three thousand three hundred and fifty-seven dollars and fifty-four cents, which the plaintiff contended was for payments upon simple contract debts made after they were served with process in this suit.

There were to this report many exceptions taken by the plaintiff, but the seventh and eighth referred to the two allowances above men-

tioned, and it was admitted that if these two were against the plaintiff, or if the judgments *quando* had a preference over his claim, it was useless to consider the others, as the judgments would absorb everything with which he could by them, if they were sustained, charge the executors.

Similar questions arose upon the report concerning the admin-
(47) istration of Worke's assets, which need not be stated. But on this part of the report a question was made by an exception of the plaintiff, founded on the fact that the executors of Worke, after his death, received from the executors of Simonton his full share of the profits of the partnership, amounting to three thousand six hundred dollars. The plaintiff contended that the sum was not of the assets of Worke, but was partnership effects with which his executors were liable, as they came to their hands specifically.

The questions made by these exceptions were argued several times by

Badger and Devereux for plaintiff, and by
Gaston and Winston for the executors.

RUFFIN, C. J., after stating the facts as above, proceeded: The two exceptions may be considered together, so far as they involve the effect of payments actually made by the executors. The Court believes from a cursory examination that the last is not founded in fact, where it treats the debts as being due on simple contracts. But the case is not decided on that question of fact because, deeming it immaterial, the inquiry has not been thoroughly pursued. Assuming them to be on simple contracts, their grade is the same with the demand of the plaintiff, which is but a simple contract, being the claim of a partner without articles. The argument of the plaintiff is that filing the bill or serving process upon the executors is a restraint upon their power to give preference to other creditors in like degree. We do not think that is the rule in a court of equity. It is so at law after a plea, and in some instances after a process served. In equity, also, when a creditor sues on behalf of himself and the other creditors, a decree to account ties up the hands of the executors from giving or allowing preferences. The creditors must come in under the decree, which all can do according to their legal priorities, but if the executor voluntarily pays a creditor, he will not be allowed it in his account. *Perry v. Philips,* 1 Ves. Jun.,
251; 10 *ib.,* 34; *Paxton v. Douglas,* 8 *ib.,* 521. But a mere
(48) decree, much less the filing of a bill for an account of the plaintiff's own demand, or for an account of the assets to satisfy the single debt of the plaintiff, is not an obstacle to the payment of judgments by the executor, nor, it seems, other demands of equal dignity

with the plaintiff's; but the plaintiff's decree must, to that purpose, be final. Thus *Sir John Leach* lays it down in *Maltby v. Russell,* 2 Sim. & Stu., 227, upon the authority of the House of Lords, reversing the decree in *Davison v. Lord Oxford,* Pr. Chanc., 188, and the Vice-Chancellor allowed the executor in account the payments made by him to other creditors, after the bill filed, with the view of giving them the preference. This the creditor may prevent by filing his bill on behalf of all the creditors, which perhaps, in fairness, he ought; and if he will not do so, equity will not help him to a preference upon any less ground than his getting a final decree, which is in the nature of a judgment. For this reason the second, seventh, and eighth exceptions of the plaintiff must be overruled.

But the seventh exception could not be supported for another reason. The accounts have not been taken with a view to ascertain the state of assets at the time the *quando* judgments were taken, and it does not appear with precision. But an examination of the account satisfies the Court that the executors were largely in advance for the estate at that time, and that assets to a much larger amount than all those judgments have come to the executors' hands since the judgments were rendered, which have been applied partly to the previous absolute judgments, partly to the *quando* judgments, and partly remain to be applied to the same judgments. When applied, more than fifteen thousand dollars will remain unsatisfied of principal and interest. At law, the defendants would be fixed with those assets when the plaintiffs shall sue out *scire facias,* and of course they would be made to pay them twice, if decreed against them here. It is a mistake to suppose that assets to a much larger amount than all the *quando* judgments have not been received since they were entered up. The payments on them were therefore proper, and the balance in the executors' hands must yet be paid to those now unsatisfied; and so the decree (49) will declare.

The decision of these points render it useless to go through the plaintiffs' other exceptions, since if they were all allowed the sums excepted against would not form a fund equal to the balance due on the preferable and unsatisfied judgments, and the Court is unwilling unnecessarily to conclude any person in respect to the other matters of the account.

It was formerly ordered in this cause that the estate of Robert Worke must account with the plaintiff for the sums received as his part of the profits of the partnership from Simonton's executors. That money was received by the defendants, Worke's executors, after his death, and pending this suit. A question presents itself whether, as the character of the fund was not changed in respect to the plaintiff, those defendants

are personally bound to answer to him upon their own receipt of the money. The Court has formed no conclusive opinion on the point as, whatever may be the rights of the parties, the plaintiff, we think, cannot in the present proceedings treat that sum otherwise than as assets of the testator, Worke, and must abide in this suit by their administration as such. The defendants are brought in by *scire facias* as executors merely, and are not charged by any supplemental bill upon their own acts. Taking it to be assets, it has been duly administered. Whether the defendants can be made personally liable in equity in another proceeding we give no opinion on, nor have we formed one.

We suppose the points ruled to be decisive against the relief of the plaintiff against either set of executors, and therefore, without passing upon any of the other exceptions of either party, direct the bill to be dismissed as against the executors of Simonton and of Worke, without costs to either side.

PER CURIAM. Decree accordingly.

Cited: Sandridge v. Spurgeon, 37 N. C., 277; *Wadsworth v. Davis,* 63 N. C., 253; *Wilson v. Bynum,* 92 N. C., 724; *S. v. Georgia Co.,* 112 N. C., 43.

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(50)

STATE BANK OF NORTH CAROLINA v. AMBROSE KNOX ET AL.

A court of Equity never assists a creditor who has been guilty of usury, and where, according to the bill, usurious interest was incorporated in a note by the fraudulent contrivance of the debtor, for the purpose of taking advantage of it, and avoiding the debt, relief was refused.

ASA ROGERSON owed the plaintiffs six thousand dollars, which was secured by a promissory note signed by him as the principal debtor, and the defendants Knox and McMorine as sureties. Rogerson also owed the plaintiffs another debt for about one thousand dollars, for which they had no security except his personal responsibility. Rogerson became embarrassed, and conveyed his estate to Knox and McMorine to secure them against loss by reason of the above-mentioned debt, and also two other small notes for which they were his sureties.

The note for six thousand dollars being unpaid, suit was instituted, judgment recovered for the amount, and execution pressed against the sureties. They, through their attorney, applied to the attorney of the plaintiffs for indulgence to enable them to realize the value of Roger-

son's property conveyed for their indemnity; but this was refused unless they consented to make a new note for the amount of both the debts due the plaintiffs by Rogerson. The attorney of Knox and McMorine asked if this incorporation of the debt to which they were not sureties, with that for which they were bound, would not render the new note usurious, and was answered that it would not, as Rogerson would sign the renewal note as the principal debtor. After some difficulties, made by the defendants, this arrangement was completed. But Rogerson having in the meantime absconded, the new note was signed by Knox and McMorine as the principal debtors. An action was subsequently commenced on this note, which was defeated upon the plea of usury.

The plaintiffs by this bill sought, first, to have the debt established against Knox and McMorine, alleging that the usury was consented to by them with the intention of subsequently avoiding the security, and was therefore a fraud upon them. Second, they insisted that the property of Rogerson having been conveyed to Knox and (51) McMorine, to secure the debt of six thousand dollars, they had a right in equity to follow it and procure from it satisfaction of that debt. It was stated in the bill, and admitted by the defendants, that Rogerson died in a distant State, insolvent, intestate, and that no one had sued out administration upon his effects. The attorney of Knox and McMorine was made a defendant.

Badger for plaintiffs.
Iredell and Devereux for defendants.

GASTON, J. We see no ground on which this bill can be supported. The plaintiffs allege that the defendants, Knox and McMorine, became indebted to them by reason of their having executed a note for six thousand dollars with one Asa Rogerson, and as his sureties; that to enable the said defendants to renew this note and discharge also a demand which the plaintiffs had against Rogerson alone, the plaintiffs discounted a new note of Knox and McMorine for an amount sufficient to cover both claims, and thereupon surrendered the note for six thousand dollars; that the plaintiffs afterwards brought an action upon the new note, but were defeated of a recovery upon the plea of usury. They further charge that this usury consisted in their requiring of Knox and McMorine, as a condition of indulgence upon the debt for which they were responsible, to make themselves liable also for that on which they were not responsible; that the plaintiffs, at the time of proposing and making this arrangement, believed that it would not be liable to the imputation of usury, and that they were entrapped into

this arrangement by a disingenuous artifice of the attorney of Knox and McMorine, whom they have also made a defendant, and who, as the plaintiffs say, discovering their opinion and believing it erroneous for the purpose of confirming them in error, declared that his clients would and ought to assent to it. The bill also charges that Rogerson had, before this arrangement, by a deed of trust made between himself and the said defendants Knox and McMorine, conveyed a large amount of real and personal estate in trust, to be sold, and to apply the
(52) proceeds to the securing of Knox and McMorine against their responsibility on the note of six thousand dollars and on two other notes on which they were his sureties. The bill states that Rogerson is dead, and has died insolvent, and insisting that the debt of six thousand dollars still remains due, for that the note was surrendered on the supposition that the new note was valid; prays for an account of the trust funds, which ought to be applied to the satisfaction of this debt, and secondly, a personal decree for the money truly due thereon against Knox and McMorine, because of the alleged fraud in drawing them into an usurious contract and then setting up the objection of usury.

The original liability of Knox and McMorine, which this bill seeks to enforce against them, is founded solely on their having executed a note as the sureties of Rogerson, and to us it seems clear, upon the showing of the plaintiffs, that this liability has been extinguished. The plaintiffs discounted their note for the purpose of enabling them to pay off this demand and one other, on which Rogerson alone was indebted. The money raised by this discount was the money of Knox and McMorine, and as such was applied in payment of the note then held by the bank and on which they were debtors. That note was then extinguished at law, and if so, it cannot be set up in equity. The lender has no claims upon a court of Equity to relieve him from the legal consequences of usury. A contract tainted with usury is denounced by statute as corrupt and utterly void, and every court must treat it as holding the character which the Legislature has stamped upon it. An usurious contract is also regarded by the settled law of every court as an oppression, practiced or attempted by the lender upon the borrower. A court of Equity cannot, therefore, be invoked to aid such a contract, in whole or in part, or to redress the oppressor, because the meditated injury has, by the artifice of the intended victim, been made to recoil upon himself. Oppression cannot demand help, even against fraud. The Court is not at liberty to array its imagined wisdom against the legislative will, or to defeat public policy,
(53) by a recourse to the code of honor or morality.

But it is insisted that if the bill cannot be sustained so far as it asks a personal decree against Knox and McMorine, it may be upheld in its demand of an account of the funds of Rogerson assigned for their security, and an application of these funds to the reimbursement of the plaintiffs. It is argued that the demand of the plaintiffs against Rogerson is founded upon the original dealings by which he became their debtor, and this demand yet subsists against him because it has never been satisfied. If this proposition could be maintained, which we are not prepared to concede, this bill nevertheless cannot be sustained. The funds cannot be pursued as the funds of Rogerson until a debt against Rogerson has been established. A court of Equity is not the proper forum for establishing such a debt. If it were a fit forum, a debt cannot be established in any proceeding to which the debtor is not a party.

The bill must be dismissed, and although the plaintiffs appear to have been heavy sufferers in the transaction of which they complain, yet as that loss is but the penalty which the law inflicts, and their claim for relief is, upon their own showing, unfounded, it must be dismissed with costs.

PER CURIAM. Bill dismissed.

Cited: Hines v. Spruill, 22 N. C., 99; *Ballinger v. Edwards,* 39 N. C., 453; *Moore v. Beaman,* 112 N. C., 565.

MEMORANDUM.

At the last session of the General Assembly JOHN J. R. DANIEL, Esq., of Halifax, was elected Attorney-General, *vice* R. M. SAUNDERS, Esq., who resigned.

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1835

WILLIAM C. BIRD v. NATHAN CHAFFIN.

A creditor who, by a misrepresentation, induces another person to execute a bond as surety for his debt, will not be permitted, in equity, to subject the latter to its payment.

THE facts were that one John A. Chaffin, being indebted to the defendant in the sum of two hundred and twenty-five dollars, the latter called upon him to execute a bond, with surety, for the amount. John A. Chaffin executed the bond, and asked the defendant if the plaintiff would be a satisfactory surety, to which the latter replied in the affirmative, and supposing himself authorized by this conversation to apply to the plaintiff to execute the bond, he did so, telling the plaintiff that it was in consequence of the directions of John A. Chaffin. The plaintiff executed the bond, and upon mentioning the fact to John A. Chaffin, the latter disavowed the authority to the defendant.

The defendant having obtained a judgment at law, the plaintiff filed this bill praying for an injunction.

His Honor, Judge Seawell, on the last circuit at Rowan, perpetuated the injunction, and the defendant appealed.

Badger for defendant. (56)
Nash for plaintiff.

GASTON, J. This case comes before us on appeal from a decree rendered in the court of Equity in the county of Rowan, upon bill and answer, by which decree the defendant is perpetually enjoined from collecting a judgment, which he had recovered against the plaintiff as the surety of one John A. Chaffin, on a bond executed by the said John

and the plaintiff to the defendant. The *gravamen* of the bill is that the plaintiff had been induced to execute the bond by a misrepresentation of the defendant, that John A. Chaffin had authorized him to request the plaintiff to become the said John's surety. The answer admits that such a representation was made by the defendant to the plaintiff. It denies, indeed, that this was done with a fraudulent intent, and sets forth all that passed between the said John and the defendant, from which the defendant inferred that an authority to make such request had been given. This inference was not communicated to the plaintiff as an inference, but stated as a fact. It appears to us that this inference was unfounded; that such an authority was not given, and that the representation therefore was not true. If the plaintiff should be compelled to pay this bond, he could have no redress against the principal, because he did not execute the bond at the instance or request of the principal. It is against conscience that the defendant should enforce a recovery upon an engagement which the plaintiff would not have contracted but upon the belief that he was entitled to an indemnity from his principal; which belief was a clear mistake, and which mistake was occasioned by an incorrect representation of the defendant himself.

The decree below is to be affirmed with costs.

PER CURIAM. Decree affirmed.

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(57)

ELIZABETH ELLIOTT v. JAMES T. ELLIOTT, ADMINISTRATOR OF MARTIN ELLIOTT ET AL.

A deed whereby a husband conveyed to his wife several slaves, without the intervention of a trustee, will not be set up in equity where the parties lived unhappily, where there is no evidence of a delivery, except the production of the deed by the wife after the death of her husband, and where she had never claimed the slaves during the husband's life, but had permitted them to be sold by his administrator, and had purchased some of them.

THE bill charged that a marriage had taken place between the plaintiff and the defendant's intestate; that it was very unequal, the plaintiff being a young woman and her husband a very infirm old man; that for the plaintiff's kindness and attention to him, the defendant's intestate frequently promised to make provision for her over and above that allowed by law; that, in execution of this promise, he, on 10 April, 1827, in the presence of two witnesses, executed a deed whereby he conveyed directly to the plaintiff five negroes; that on 20 November, 1828, he executed another deed whereby he conveyed all

his land, and all his personal estate mentioned in a schedule thereto, to the defendant James, upon trust for the intestate during his life, and then for the plaintiff's dower, and by an interlineation in the schedule directed several negroes, among whom were those which he had by the deed of 10 April, 1827, conveyed directly to the plaintiff, to be held for her use. The bill then set forth the death of the husband in March, 1831; the administration upon his estate by the defendant James, and averred that he had sold all the slaves intended for the plaintiff.

The heirs and next of kin of the intestate were made defendants; and the prayer was that the deed of April, 1827, might be set up, and that the defendant might have her dower assigned; and for an account of the personal estate, and distribution thereof.

The deeds mentioned in the bill were filed as exhibits. That of April, 1827, was a deed by Martin Elliott to the plaintiff, whereby, "in consideration of the love and natural affection I had for my beloved wife, Elizabeth Elliott, I have given, granted, and delivered the following negro slaves," etc. It was attested by Samuel S. Gedney (58) and John McIntire, and was registered in July, 1832.

The deed of 20 November, 1827, was in the usual form; the use, after payment of debts, declared to be to "the said Martin Elliott during his natural life, then equally to be divided among the lawful distributees of said Martin." Endorsed on this was the following, bearing the same date, and signed by the defendant's intestate: "An inventory or schedule of the negroes, stock, etc., referred to in the annexed deed, viz., Jim, Kate," etc. After mentioning several, among them those included in the deed of April, 1827, the following words were interlined: "all to be to my wife, Elizabeth, and their increase."

By another endorsement, dated 20 April, 1828, after mentioning other articles of property, it proceeded: "and now my will and desire is that all the above-named property, and the balance of my estate, shall be sold by James T. Elliott, and equally divided between my lawful distributees."

The defendants submitted to have the plaintiff's dower assigned, and also to an account and distribution of the personal estate, but they severally objected the following facts as a defense to her claim to have the deed of April, 1827, established: That the marriage between the plaintiff and the intestate was very unequal, and probably very interested, she being seventeen years of age, and her husband upwards of eighty, she being very poor, and he possessed of considerable estate; that the match was an unhappy one, the plaintiff being an undutiful wife; that she had been in the habit of despoiling his house of furniture, and had been accused by him of breaking open his desk and stealing his money and

notes; that they had frequently quarreled and parted, and that two months after the date of the deed of April, 1827, he had advertised her as having left his house, and cautioned all persons from harboring her or contracting debts with her; and it was insisted that the intestate's rea-
son was impaired by age, and either that the deed never had been
(59) delivered, or was unfairly obtained. In support of this defense, it was stated that, after the death of the husband, the plaintiff attended a public sale of the slaves of the intestate, made by the defendant James, at which the negroes included in the deed of April, 1827, were sold, when she made no claim to them, but, on the contrary, actually purchased two of them. All the facts above mentioned were established by proof.

Samuel S. Gedney proved the signature of the deed of April, 1827, by the intestate. He stated that it was signed at the house of the intestate, and that he, the witness, attested it at his, the intestate's, request; no other person being present, and nothing being said of its contents, and that after the attestation the intestate took it into his possession. The other attesting witness, McIntire, swore that the intestate came into his store, about twenty miles from his, the intestate's, residence, alone, with the deed in his possession, and requested him, the witness, to attest it; that he did so, and handed it back to the intestate, who requested that the matter might not be mentioned, saying that he always intended to do something for his wife, but did not wish his family to know it until after his death.

The attesting witness to the deed of November, 1827, proved that the intestate signed and sealed it in his presence, and directed him to retain it in his custody; that upon two different occasions he called for it, and at the first made the interlineation, and at the second executed the last endorsement.

(60) *Devereux for defendant.*
Badger, with whom was Iredell, for plaintiff.

(61) RUFFIN, C. J. The plaintiff seeks to set up the deed of 10
April, 1827, and also to have her dower in the real estate of her husband, and her distributive share in his personal estate, according to the trusts of the deeds of 20 November, 1828. The defendants resist the first claim, upon the grounds stated in the answers. But they submit to the second, and state that they have always been willing to account with the plaintiff upon the footing of the latter deed as it was originally drawn, or as it was modified and left by the husband at the time of his death. Accordingly, dower has been allotted to the plaintiff by an interlocutory decree in this cause, without resistance on the part

of the defendants. The only dispute, therefore, really existing between the parties is upon the validity of the deed of 10 April, 1827.

That is a deed purporting to convey several slaves presently (62) from her husband to the plaintiff absolutely. It is insisted that such a deed is valid in this Court as a complete disposition, not subject to the husband's revocation; and the Court is bound to protect the separate interests of the wife under it, as absolute rights, in the same manner and upon the same principle that the rights of any other *cestui que trust* are enforced against a trustee.

The Court does not entertain that opinion. In England it has been certainly held that a gift from the husband to the wife, without the intervention of a trustee, may be made under such circumstances as to render it valid in equity and induce that court to constitute the husband himself the trustee. No case of that sort has occurred in this State; and perhaps the Court might not feel the obligation to encourage the obtaining such donations, or the creation of separate interests in the wife, subject to her immediate and absolute control during the marriage, by an act between the husband and wife themselves, which is inoperative at law. But it is not necessary, nor do we mean to deny the proposition in this case. If the Court would in any case support such a transaction, we think the circumstances before us are insufficient to raise any equity for the plaintiff.

As the contract is void at law, the case in this Court must always be that of an application to aid a defective conveyance. The wife cannot have that assistance unless she shows herself to be meritorious, and shows further a clear intention that what was done should have the effect of divesting the interest of the husband and of creating a separate estate for her, which she should have the immediate power to dispose of as she chose, and that the estate thus intended for her was but a reasonable provision. Hence, although the doctrine that equity will recognize such transactions, under circumstances, is laid down in the books, there are very few cases, indeed, in which a gift by the wife to her husband of her separate estate, once well constituted, or a gift by the husband to the wife, have been made effectual. They almost all fail, either from the extravagance of the gift or the insufficiency of the evidence to establish the intent of an actual gift by what was done. It (63) is plain that a court of equity cannot, by way of aiding a defective conveyance, carry it further than the parties intended it should operate, although its terms may be broader. In *Walter v. Hodge,* 2 Swans., 97, the wife set up a parol gift of six hundred pounds in bank notes by her husband in his last illness, accompanied with actual delivery. It was insisted that it was good, either as a *donatio causa mortis,* or to her separate use. The case failed in the first aspect. As to the other,

Sir Thomas Plumer said there was great difficulty in establishing such a transaction, whereby the husband parts from his property in his lifetime and puts it under the immediate control and to the separate use of the wife. He calls it a suspicious case, and says the Court requires satisfactory evidence of an act constituting a transfer of the property and a sufficient transmutation of the possession. There was none such there, because the possession of the wife was that of her husband. He ruled against the wife, because her answer stated the gift to be absolute and immediate, and her only witness proved it to be conditional and postponed to the husband's death. In *McLean v. Longlands,* 5 Ves., 1, *Lord Alvanly* said that nothing less would do than some clear and distinct act of the husband, by which he divests himself of his property and engages to hold as trustee for the separate use of the wife. Declarations of an intention or of a disposition of property to the use of his family, if admitted, would be a sort of evidence, and upon a principle that would have a most extensive effect. Suppose, said the Court, that the husband had given to Callender (who had the funds in his hands) distinct directions to pay to her and her separate use, does that vest it in her? Could she in this Court compel execution of such a trust? The Court refused an issue to try the fact of the gift. In such cases as the gifts of trinkets, or the borrowing by the husband of the wife's savings of her pin money, the transactions are supported on the manifest intent. So, in what *Sir Thomas Plumer* calls "the single case" of an actual transfer in the stock books of one thousand pounds South Sea annuities by the hus-
(64) band to the wife, and in her name, the Court thought that so decisive an act as amounted to an agreement by the husband that the property should become hers. It could not be mistaken. It was a clear and distinct act which, he thought, operated immediately, which he plainly intended should so operate and divest him of the property. The two first cases, it is true, were transactions by parol, and in that respect differ from that before the Court. But they are cited for the reasoning, and to show how reluctant the Court is to extend this extraordinary assistance to any cases where there is the shadow of a doubt of the intention, or where it cannot be seen that the parties had done all that was intended to be done, and that they believed that sufficient had been done to effectuate their purpose to change the character of the husband's interest immediately. Such dealings are suspicious. It is not easy to admit into the mind the belief of such an intention on the part of the husband freely, actually and immediately to part from the property and to vest it in the wife, she living with him and comfortably provided for by him, and both contemplating that will continue to be the case. Why should he thus convey slaves to her under those circumstances? It cannot be supposed in this case that it was with a view of

separating them from his own and letting the profits accumulate for her. Nothing of the sort was in fact done. No such intention is stated in the bill, nor any reason given for everything's remaining after the deed as it was before. It is not pretended that the plaintiff set up any right to the slaves in her husband's lifetime, nor, indeed, until long after his death, when the trustee had sold them for the purposes of division. The deed has this effect: it proves what was then in the husband's mind—that is, that he thought of providing for his wife, and how far he would go if he did it at all. If there had been a change of the possession of the slaves, if the plaintiff had exercised or asserted any dominion over them, if the husband had even acknowledged her authority to do so, there might be something to show that he intended to divest himself of the property, and thought he had done so. If even there were clear evidence of the delivery of the deed to the plaintiff, or any (65) person for her, there might be room for a presumption that the husband was parting from the property, though the possession and perception of the profits continued as before. It is said that the execution of the deed, and the subsequent production of it by the wife, is sufficient evidence of its having been perfected by delivery. And that, even if the maker of a deed retain the possession until his death, after a formal execution, which was intended as a delivery, that will make it effectual. The cases on that subject relate to deeds effectual at law. If a father make a deed to advance an infant child, and formally execute it, and put it away in his desk for safe-keeping, that will be his deed. It can operate at law between the parties, and there is a presumption from the nature of the transaction that it was intended it should. But the rule is otherwise between husband and wife. The deed from one to the other cannot operate, and there is no presumption that he means to give her a separate estate during his life. A father may wish to advance a child before marriage, but a husband seldom wishes to put his wife on an independent footing; he may perhaps do so, but it requires clear proof. The bare and formal signing and sealing a deed to her and having it attested cannot in such a case be taken for a delivery or as having been intended for one. There must be proof of some further act—delivery, in fact, or the production of a deed by the wife, with evidence at least of such acts on her part in relation to the property, in his lifetime, as would induce the belief that she had the deed in his lifetime and by his consent. This is the more necessary, as the intimate relation between the parties, and her means of access to his papers, afford opportunities to her to possess herself of the instrument without his consent or knowledge. The ordinary presumptions, therefore, do not reach such a case. But here the circumstances are very strong to rebut them, if they did. The deed was executed in April, 1827, and witnessed by Gedney, without

anything passing between the parties but the bare signature and attestation. The plaintiff was not present, and the husband did not state the nature of the paper, but kept it himself. The bill charges that
(66) he had frequently declared his intention to make such a deed, and that he executed it in the presence of two witnesses. The bill states the case as if the deed had been attested by both witnesses at once and immediately delivered to the plaintiff. The latter fact is not directly averred; nor, indeed, is any delivery charged, except as implied in stating the execution of the deed. The bill is silent upon the delivery and possession of the deed or slaves. Some time afterwards, the husband, at some distance from home, produced the deed and requested Mr. McIntire to attest it, and he did so. He stated to the witness that he always intended to do something for his wife, but did not wish his family to know it until after his death, and therefore desired him to keep it secret. The husband took the deed again. Nothing more is heard of it until July, 1832, when it was proved and registered, though the husband died in March, 1831, and the defendant James T. Elliott, as his administrator and trustee, soon afterwards sold the estate, including the negroes conveyed in this deed, and the plaintiff was present at the sale and made no objection, but purchased two of them. It might be possible that she thought the deed ineffectual, and therefore did not assert a right under it. But why should she think so? Would she not have taken advice on it? Nothing of that sort is proved, nor does any witness prove its intermediate existence.

It is clear, however, from Mr. McIntire's testimony, that the husband did not intend the deed to operate immediately. He did not intend the possession to change, but did intend everything to remain as it was until his death. Upon the deposition of this witness of the plaintiff, an immediate delivery of the instrument, which upon its face is to have an immediate operation, cannot be presumed, but such a presumption is disproved. That there was an actual delivery, the plaintiff ought to furnish clear evidence. She does not; but her depositions and the circumstances show that a delivery was not intended when the husband last spoke of the instrument, and that it was not made. Besides those already adduced, it is clear that the parties united themselves,
(67) unfortunately, from motives of the most interested kind on her part, and that they lived unhappily together. Just two months after the deed is dated, and probably a few days after McIntire's attestation, the plaintiff left, and her husband advertised her. If she had then been in possession of the deed, is it not probable she would have shown it to some person? After that period there seems to have been little probability of his executing any kind intentions to her. On the contrary she frequently left him after violent altercations, and carried

off bed linen and other movables; and, as charged by him, opened his desk and plundered him of money. In November, 1828, he executed the deed of trust by which he conveyed all his estate, including the slaves mentioned in the deed to the wife, and making therein for her just the provision to which she was legally entitled. It is said, however, that the interlineation subsequently made, whereby those slaves and two others were assigned to the wife as her share, shows that the donor either considered or meant the deed of April, 1826, to be obligatory. That does not seem to be a just inference. All that can be inferred is that he wished her share to consist of those particular slaves, for certainly he did not intend that she should hold them under the one deed and to take one equal share with his children of his other property under the other. But it is certain that the provisions of the last deed are altogether inconsistent with the first, as now set up. Under the deed of April the wife takes an immediate separate estate. That of November subjects those negroes, in common with the other estate, to the payment of the debts; and the use for life in the whole is reserved to the husband. These provisions show that whatever else he may have intended by the interlineation he could not intend thereby to confirm the first deed which conveys an immediate estate.

In a case, therefore, where the Court expects satisfactory and clear evidence that the deed was delivered, and that her husband meant to make thereby such a separate provision for her as the deed purports to create, that is immediate, and to make himself her trustee, instead of being the beneficial owner, the plaintiff has not only not supplied the proof, but the evidence tends the other way to (68) establish that he did not intend to part from the property; that the paper was merely deliberative, and that it never was delivered, but obtained at some time surreptitiously by the plaintiff and kept concealed by her.

If the plaintiff had proved such a case as has been supposed, other difficulties of a very serious kind would be presented to her relief. A wife must have merits to make the Court active in her behalf. She is not like a purchaser for value. She must yield to creditors, and only stands before other volunteers, and not before them, unless her conduct entitles her to the bounty of her husband. The aid of the Court is discretionary under all the circumstances. In *Stoit v. Ayloff,* 1 Ch. Rep., 60, the plaintiff filed her bill on a promise of the husband to settle one hundred pounds on her, but she had separated from her husband and the bill was brought sixteen years after the promise, and was dismissed. In *Beard v. Beard,* 3 Atk., 72, the husband gave *by deed* all his substance to his wife; *Lord Hardwicke* refused relief because the law will not permit a man to convey to his wife, and equity will

not suffer the wife to have the husband's estate while he is living because it is not in the nature of a provision, which is all she is entitled to. In England the wife is dependent upon the husband's good will for a *provision,* unless secured by contract. Here the law secures it to her, against his will.

But the clear ground is that there is a defect of evidence of the actual intent, in respect of the deed and of its delivery by the husband. For that reason the bill must be dismissed, as far as it seeks relief upon the footing of the deed of 10 April, 1826.

The plaintiff is entitled to an account under the deed of 20 November, 1828, and the subsequent memorandum dated 20 April, 1829. It might be a question, were it not for the latter memorandum, whether the interlineation of the words "all to be to my wife," in the schedule, after the execution of the deed, could control the provisions of the deed itself. Being a voluntary conveyance and settlement on the
(69) family of the donor, and kept for the donor by his friend, subject to his order, and never delivered to the trustee until all the alterations had been made, perhaps it might be considered unfinished until then. But it is unnecessary to discuss the question because, if the donor was at liberty to make the first alteration, he could also make the second, and the last reinstates the provisions of the body of the instrument, adding only other property.

PER CURIAM. Decree accordingly.

Cited: Steel v. Steel, 36 N. C., 456; *Paschall v. Hall,* 58 N. C., 109; *Collins v. Collins,* 62 N. C., 157; *Warlick v. White,* 86 N. C., 141; *Taylor v. Eatman,* 92 N. C., 605; *Walton v. Parish,* 95 N. C., 262.

ZADOCK RICE, ADMINISTRATOR OF JOHN G. RICE, v. SOLOMON SATTERWHITE ET AL., EXECUTORS OF JAMES SATTERWHITE.

In a bequest of a slave to A., the words "but should he die without an heir the aforesaid slave to return to my family, and be equally divided amongst the rest of my children," refer to an indefinite failure of issue, and consequently the limitation is too remote.

THE bill charged that James Satterwhite, by his will, among other things, bequeathed as follows: "I give and bequeath to my beloved grandson, John Green Rice, one negro girl, Liney, and one hundred dollars, one folding table and one feather bed and furniture, after the death of my beloved wife, Frankey Satterwhite; to remain in the hands

of my executors until he become of age, without any expense or charge to the aforesaid John Green Rice; but should he die without an heir, the aforesaid Liney and her increase to return to my family, and be equally divided among the rest of my children"; that by a subsequent clause he gave to his wife the use of all his property during her life, and at her death directed the same to be equally divided among his children; that the defendants were appointed executors, and had proved the will; that the legatee, John G. Rice, had died without issue and under age, and that the plaintiff was his next of kin and had taken out letters of administration upon his estate, and that the defendants denied the plaintiff's right to the negro Liney and the other property above mentioned. The prayer was that the plaintiff's title might be established and be in some way secured in the succession, upon the death of the widow of the testator. (70)

The defendants in their answers admitted the allegation of the bill, and the only question between the parties was upon the construction of the will.

Devereux for plaintiff.
Nash for defendants.

GASTON, J., after stating the facts as above set forth, proceeded as follows: It is proper to remark that the will of the elder Satterwhite was made and proved before our act of 1827 (ch. 7) on the subject of contingent limitations went into operation.*

No question has been made here upon the seeming repugnance between the particular disposition made by the testator of the negro Liney, in the clause above recited, and the universal disposition of his property after the death of his wife to all his children. None such could with propriety have been taken, for as it is the duty of the court to reconcile the various dispositions in a will, wherever it can be done, the latter and general bequest must be understood as impliedly subject to the former and special bequest of this property.

It is apparent that but for the words limiting the negro Liney, in the event of John Green Rice dying "without an heir," his estate must be regarded as an absolute one. The gift of a chattel by will is the

*By this act, all contingent limitations made to depend upon the dying of any person "without heirs, or heirs of the body, or without issue, or issue of the body, etc., shall be held and interpreted to be a limitation to take effect when such person shall die not having such heir, etc., living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it."

gift of the testator's entire interest therein, unless a different intent is expressed or can be implied from the will. The question presents itself whether this limitation over has the effect of making the gift a defeasible or modified gift. It is clear that John Green Rice could not die "without an heir," in the legal sense of that word, while
(71) his uncles and aunts or any of their descendants remained in being. The word "heir" must then be understood in some other than its legal sense, and the most obvious one is issue. It is a question of construction, whether this dying without issue imports a failure of issue at any determinate time, or a failure of issue at any time. If the latter be the true construction, the limitation over is too remote and therefore void. If the former, then the limitation may be good, provided that the contingency be such as, if it happen at all, must occur within a life or lives in being, and twenty-one years and a few months thereafter. Now it has been settled by innumerable cases, which cannot be departed from without doing violence to the law, that expressions referring to a dying without issue, unless explained by the context, do import a general indefinite failure of issue, that is, a failure of issue at any period. We can discover nothing in the context to change the legal meaning of these expressions. There is no room for supposing that the contingency contemplated was the legatee's *dying under twenty-one years of age,* for it qualifies the gift to him, and not its retention in the hands of the executors, during his minority. It has been insisted that the context shows that the testator meant to tie up the failure of issue to the moment of the legatee's death, and that the legatee shall keep the negro if he has *issue surviving him,* and not otherwise. We must have something in the will sufficiently explicit to warrant the interpretation or we dare not make it. To die "without an heir" is equivalent to dying without heirs. In *Matthews v. Daniel,* 1 Mur., 42, the phrase, "if she shall depart this life without heir lawfully begotten of her body," and in *Bryant v. Deberry,* 2 Hay., 356, the phrase, "if no heir," and in *Bailey v. Davis,* 2 Hawks, 108, the phrase, "shall die without lawful heir," were all construed to import an indefinite failure of issue. The expressions, to "return to my family, and to be equally divided amongst the rest of my children," leave the *time* when Liney and her issue are thus to return and to be divided as indefinite as the dying without issue. This is to be done whenever that failure shall occur, whether at the death of the legatee or at any subsequent
(72) period. In the case of *Reily v. Fowler,* 3 Bro. P. Ca., 299, it is supposed to have been decided that words importing that on the death without issue the property was to *return to the executors, to be by them distributed,* tied up the contingency to the lives of the executors, because they implied a personal trust, to be executed by the execu-

tors. This case and the ground to which it was referred have met the decided disapprobation of a great chancellor. See *Bigge v. Bensley,* 1 Bro. Ch. Ca., 187. But however that may be, the decision cannot affect the question here. In the case under consideration there is no personal trust. The property is limited over to the testator's family, which he explains to be his children, and if the limitation were good, the interest is a transmissible one, and would pass to and vest in the representatives of these children whenever the contingency should happen.

The plaintiff is entitled to the declaration which he prays for, and a decree should be made accordingly.

PER CURIAM. Decree accordingly.

REDDICK GATLIN, ADMINISTRATOR JAMES GATLIN, v. WILLIAM DARDEN ET AL.

Where an administrator made a mistaken distribution of slaves, and afterwards a decree was pronounced against him in favor of those really entitled, correcting the mistake, his bill, filed more than three years after its discovery, seeking to recover the slaves from those to whom he had improperly assigned them, is barred by the statute of limitations.

JOSEPH SPEIGHT died in the year 1792, possessed of certain slaves, which he bequeathed by will (the construction whereof has been settled in this Court, *vide* 2 Dev. Eq. Ca., 5) to his widow, Ann, for life; remainder to his sons Francis and Henry forever. The widow received the slaves from the executors, and enjoyed them until her death in 1819; the two legatees in remainder died before. The plaintiff's intestate, James Gatlin, was the administrator of one of these legatees, Henry, and upon the death of the widow took out letters of administration upon her estate, and became administrator *de* (73) *bonis non,* with the will annexed, of Joseph Speight. He applied for advice to a professional gentleman in relation to the title and disposition of these negroes, who was of opinion that the residuary interest, after the estate for life to the widow, was undisposed of by the will, and that they were distributable as a part of the said Joseph's property, with respect to which he had died intestate. Confiding in the correctness of this opinion, the plaintiff's intestate immediately caused the negroes to be valued, and a division thereof to be made into four equal shares. One he retained for the next of kin of his intestate, Henry; one he delivered over to the representatives of the other legatee, Francis; another he delivered to the representatives of Catharine Dunn, a deceased daughter of Joseph Speight; and the remaining fourth,

consisting of two negroes, Stephen and Elijah, was set apart for the defendants, then and still infants, who were the grandchildren of Susanna Darden, another daughter of the said Joseph. These two negroes were received into possession by Jethro Warren, since deceased, but then guardian of the defendants. The plaintiff's intestate having died, a bill in equity was brought by the next of kin of Henry against the plaintiff in 1824 which, after much delay, was finally heard in 1831 (*vide* 2 Dev. Eq. Ca., 5), and a decree rendered for the plaintiffs therein, correcting that erroneous division. The true construction of the will was definitely settled, and the plaintiff, as administrator of James Gatlin, was decreed to account for the residue of the share of Henry Speight, which had not been retained and accounted for by his intestate. The plaintiff thereupon filed this bill, seeking an account of the negroes improperly received by the defendants, and of their hires, which he alleged on account of the mistake should be considered as having been held in trust for the plaintiff's intestate. Besides the two negroes, an account was demanded of a sum of money alleged to have been paid over under the same circumstances, but the proofs showed that this was paid and received as part of Ann Speight's personal estate, and it did not appear that it was improperly paid
(74) as such.

Winston for plaintiff.
No counsel appeared for defendants.

GASTON, J. Several defenses have been set up to this bill, and among others the ordinary statute of limitations.

The legal interest in the negroes, subject to the life estate, had vested in Francis and Henry Speight. After the mistaken division, there was no impediment to an action of detinue by the administrators of those estates to recover the possession of them. The statute makes three years a bar to that action, and it is an established rule of equity that wherever a legal claim is there presented, as it may be in some cases, it must be presented within the time prescribed as a bar to the analogous legal action. If the mistake can furnish an equitable ground for suspending the operation of the statute (of which we say nothing), bringing of the suit by the next of kin of Henry was distinct and express notice and warning to the plaintiff's intestate that such mistake had been committed. After this, he cannot be permitted to allege ignorance of the mistake or ask of the court to remove out of his way a statutory bar, arising from his own subsequent neglect.

From the proofs it appears that one of the negroes, Elijah, died in the hands of the former guardian, and before any profits were or could

be received. As to the other negro, it would seem from the testimony that he had been left by the former guardian, after the bill brought by Henry Speight's next of kin, in the plaintiff's possession to await the decision that might be made in that suit. If the present bill had been framed with reference to that state of things, and the representatives of the deceased guardian been parties thereto, a decree might probably have been had declaring the property in that negro. But in the present state of the bill we cannot do so. Our decision in this case, however, will not prevent the plaintiff, should the defendants attempt to recover possession of that negro, from showing the truth of the case and setting up such defense and obtaining (75) such protection against that claim as may be just.

It is the opinion of the Court that the bill must be dismissed.

PER CURIAM. Bill dismissed.

STATE BANK, EX PARTE.

Upon a sale of land under order of the court of Equity, the clerk and master has no power to execute a deed, except under the acts of 1812 and 1818 (Rev., chs. 847, 982), where the land is condemned for public purposes or where the sale is for partition.

THE petitioners stated that in a case removed into this Court from Wake, between A. S. H. Burgess and Thomas Henderson, plaintiffs, and John Stewart and others, defendants, for the redemption of a lot of ground in Raleigh, which had been conveyed in mortgage to Stewart, an order was made for the sale by the clerk of the mortgaged premises; that at the sale they purchased two subdivisions thereof; had paid the purchase-money, and the sale had been confirmed, and that they never had received a deed for their purchases, and the prayer was that the clerk might be directed to convey to them.

Upon a reference as to the facts, the clerk reported that they were truly set forth in the petition.

Badger for petitioners.

DANIEL, J. Where directions for the sale of real estate are made by the English Court of Chancery, the decree usually runs in the following form: "It is ordered that the said estate, or a sufficient part thereof, be sold with the approbation of the master, to the best purchaser or purchasers that can be got for the same, to be allowed of by the master,

wherein all proper parties are to join as the said master shall direct. And in order to such sale, the parties are to produce before the said master, upon oath, all deeds and writings in their custody or (76) power relating to the said estates." Seaton's Forms, 25. If the defendants or any of them are infants, and not acting as trustees, the decree runs thus: "And the defendants are to join in the conveyance of the said estate to any purchaser or purchasers thereof, when they shall attain their respective ages of twenty-one years, unless they, being served with a subpœna to show cause against the same, shall, within six months after he shall attain his age of twenty-one years, show unto the court good cause to the contrary. And in the meantime it is further ordered that any purchaser of the said estate, or any part thereof, do hold and enjoy the same against the said defendants till they shall respectively come of age." Seaton, 271. If any loose practice in this State has been indulged in of permitting the clerk and master to execute deeds of conveyance to purchasers of estates, when ordered to be sold by the court of Equity, in any other cases than those expressly directed by the Legislature, we must say such practice is not warranted by law. The legal title which the purchaser wishes to obtain is not, by such a conveyance, divested from the former owner. By the act of 1818 (Rev. Ch., 982) it is enacted that whenever any joint tenants or tenants in common, or the guardians of such, shall on oath or affirmation, and by petition or bill, state to a court of Equity that the lands thus held are required for public purposes, it shall be lawful for the said court to order a sale of all such parts of the land as it may judge necessary. The second section authorizes the clerk and master to make conveyances to purchasers in all cases accruing under this act or which have arisen or shall arise under the act passed in the year 1812 (Rev. Ch., 847), entitled an act relative to the power of courts of Equity in cases of partition. These are a set of particular and enumerated cases, where the Legislature has altered the law and course of the court of Equity in making conveyances of title to purchasers of lands ordered to be sold by that court. The case before us is not within that class of cases, and therefore must be governed by the common law of the court. The petition must be dismissed.

PER CURIAM. Petition dismissed.

(77)

JAMES GRANT, ADMINISTRATOR PATIENCE PITTS, v. THOMAS BUSTIN, ADMINISTRATOR BENJAMIN BUSTIN.

Next of kin, born before the time when distribution is to be made, are not entitled under the statute unless they were in *ventre sa mere* at the death of the intestate.

THIS was a case for the distribution of the property of the plaintiff's intestate, originally commenced in Halifax Court of Equity. In the progress of the cause a question occurred whether the intestate of the defendant, viz., Benjamin Bustin, was entitled to any part of the assets in the hands of the plaintiff, it being admitted that he was the half-brother of intestate, Patience, born ten months and a half after her death. His Honor, Judge Martin, on the Fall Circuit of 1833, thinking that the defendant was not entitled, made an interlocutory order, directing the clerk and master to exclude him from the distribution, and upon the prayer of the defendant an appeal was allowed, and the above facts certified.

Badger for defendant.
No counsel appeared for plaintiff.

GASTON, J. The only question presented by this appeal is whether Benjamin Bustin, the half-brother of the intestate, Patience Pitts, born ten months and a half after her decease, is entitled under the statutes of distribution to a share of her personal estate, in common with her brothers and sisters living at her death. This statute is in the nature of a will framed by the Legislature for all such persons as die without making one for themselves, and directing the disposition to be made of the property upon the death of its owners. After payment of debts the administrator is ordered to distribute the surplus among the lawful friends of the deceased. In England he is prohibited from making the distribution until a year after the death of his intestate; and in this State he cannot be compelled to make distribution until two years after his appointment. But the rule, nevertheless, is that the *right* to the distributive share vests at the death of the intestate. *Edwards v. Freeman,* 2 P. Wms., 442-446. It is said the rule is liable to an exception in the case of a child in *ventre sa mere.* (78) In truth, however, a child in *ventre sa mere* is held capable of taking a distributive share, because for all beneficial purposes it is in *rerum natura,* is regarded as actually *in esse. Wallis v. Hodson,* 2 Atk., 115; *Burnett v. Mann,* 1 Ves. Sr., 156; *Hill v. Moore,* 1 Murph., 233. The very reason on which these adjudications are founded shows that one not in being, and not considered as in being at the death of an

intestate, can, under the statute of distributions, prefer no claim to a share of that intestate's estate. It is not stated in this case, nor can we infer from the facts set forth, that Benjamin Bustin was in *ventre sa mere* at the death of Patience Pitts, and we therefore hold that he was not entitled to the distributive share claimed for him in her personal estate.

The decree below is affirmed, with costs.

PER CURIAM. Decree affirmed.

JOSEPH H. BRYAN v. MARTIN READ ET AL.

If, upon an agreement for the sale of land, the vendee has a right to the possession, both as vendee and lessee, and on the expiration of his term refuses to complete his purchase, but tenders the rent, the vendor, by accepting it, waives the contract and forfeits his right to a specific performance.

THE plaintiff, on 24 January, 1832, filed his original bill against the defendant Martin Read, and therein charged that, being the proprietor in fee of a certain lot in the town of Halifax, subject to an estate for life in one undivided moiety thereof in Mrs. Mary Rhodes, he on 31 December, 1829, entered into a written agreement under seal with the said defendant for the sale of the said lot; that by the said contract it was stipulated and agreed that, in consideration of the following payments to be made by the said defendant, that is to say, five hundred dollars in ninety days, for which a negotiable note payable at bank was to be immediately executed, and five hundred dollars payable 31 December, 1831, and five hundred dollars payable 30 December, 1832, for which the defendant was to execute his notes, and further to secure the payment thereof by a deed of trust on the premises; the plaintiff thereby bargained and sold the said lot and improvements unto the said defendant, including Mrs. Rhodes' interest therein; that a deed from Mrs. Rhodes and the plaintiff was to be executed in sixty days thereafter, or as much sooner as was convenient, and that the defendant was to take immediate possession and to execute the two last-mentioned notes and the deed of trust when the conveyance should be executed. The bill further charged that the defendant, under and by virtue of this agreement, took possession of this lot and occupied it for about a year; that the plaintiff, having purchased the consent of Mrs. Rhodes to the contract, caused a deed executed by her and the plaintiff to be tendered to the defendant, but that the defendant refused to receive the same or to execute what remained unfulfilled of

(79)

the contract, alleging that he was not bound to proceed therewith because the deed was not tendered within the sixty days after the execution of the articles, and pretending that he had not taken the possession under the contract but as a tenant under lease from Mrs. Rhodes. The plaintiff further charged that if the deed was not tendered within the stipulated time, which he did not admit, the defendant sustained no loss or inconvenience from the delay, and that a strict compliance with the time was not material in the estimation of a court of Equity, and peremptorily denied the assertion that defendant had entered as tenant under Mrs. Rhodes, and not as purchaser under the contract. The prayer of the bill was for a specific execution of the contract.

The defendant in his original answer admitted the execution of the written agreement as set forth and a tender of a deed executed by the plaintiff and Mrs. Rhodes in the month of May, 1830, and a refusal on his part to receive the conveyance or to go on with the execution of the agreement. The defendant further alleged that before the agreement he had leased this lot from Mrs. Rhodes for the year 1830 at the rent of one hundred dollars; that after the execution of the agreement he took possession to hold as purchaser, if the plain- (80) tiff caused the proper conveyance to be made within the stipulated time, and as the tenant of Mrs. Rhodes, if the plaintiff should fail to do so; that in consequence of the failure of the plaintiff to deliver the deed at the appointed time, the defendant occupied under his lease, and communicated this his purpose to the plaintiff, and make known to the common agent of the plaintiff and Mrs. Rhodes his intent to pay the rent of one hundred dollars on the first of January, 1831; that the agent communicated this notification to the plaintiff, and asked his instructions; that the plaintiff instructed the agent to receive the rent; that the defendant paid the sum accordingly, relinquished the possession to the agent, and considered the agreement as entirely waived and abandoned until he was served with a copy of the plaintiff's bill.

The defendant having upon affidavit obtained leave from the court, put in an additional answer in which he averred that when he entered into the agreement with the plaintiff for the purchase of the lot in question he had no knowledge or information of certain matters which he was advised put it out of the power of the plaintiff to make a good title to the lot; that he had been informed, and believed, and so stated, that the plaintiff claimed title to an undivided moiety of the lot by a purchase at sheriff's sale, under an execution against the infant daughter and only heir at law of Edward O. Rhodes, deceased, from whom the said lot had descended; that the plaintiff, upon the death of the

said Rhodes, administered upon his estate, and by improper management in purchasing the personal property of his intestate at reduced prices, had caused an apparent exhaustion of personal assets to pay creditors; that in consequence of this pretended administration of the personal assets the real estate descended to the infant heir had been subjected to execution; that the plaintiff promised the relatives of the infant that he would purchase this undivided half lot for her; that he averred at the sale that he was purchasing for her; that in consequence of this avowel other persons refused to bid, and that the
(81) plaintiff thereupon effected the purchase at the price of one hundred dollars. And the defendant insisted by reason of these matters, which he offered to prove, the said infant daughter of the plaintiff's intestate had a good estate in equity to an undivided moiety of the said lot.

The plaintiff, having obtained leave, then filed his amended bill, in which he admitted that he administered on the estate of Edward Rhodes, but averred that, upon a full and fair administration of all the personal assets of the intestate, the same fell short of satisfying his debts; that it became therefore necessary to sell the real estate descended to the heir; that after a *scire facias* duly issued, the same had been ordered to be sold, and that at this sale the plaintiff purchased the undivided moiety of the lot in question which had descended to the infant heir. The plaintiff admitted that at this sale he stated to the sheriff that if he could purchase the half lot so low as to make a profit of four hundred dollars he would give the same to the infant heir of his intestate; and the plaintiff declared that, although this declaration was purely gratuitous on his part, and in no way binding, it was his purpose, should he succeed in enforcing the execution of this contract against Read, to let the said heir have the benefit of the profit by continuing to furnish her with board, clothing and education. The plaintiff denied that the defendant Read was entitled to an account of his administration of the assets of his intestate, but professed himself willing to come to such an account if the court thought proper to gratify the wish of said defendant; and for the purpose of binding the rights of the infant heir of Edward Rhodes (Ann Rebecca Rhodes), if any she had, which the plaintiff did not admit, prayed the said infant might also be made a party defendant to his bill of complaint.

To this amended bill the defendant Read answered, and denied that the purchase of the infant's interest in the lot was made as charged by the plaintiff; and distinctly insisted that at the time the lot was cried the plaintiff announced to the bidders and the persons present that he was buying not for himself, but for the intestate's infant
(82) daughter; that thereupon the persons present desisted from bid-

ding at the sale; that it was purchased by the plaintiff at a price far below its value, and that but for this declaration of the plaintiff the same would have sold for a much larger price. The infant heir answered by her guardian *ad litem,* denying all knowledge of the allegations of the plaintiff, praying that he might be put to the proof thereof, and that her interests might be protected.

The plaintiff replied to the answers of the defendants, and the parties proceeded to proofs. Those were neither numerous nor complicated. It appeared that some short time before the agreement entered into between the plaintiff and the defendant Read that Mr. Jesse H. Simmons, as the agent of Mrs. Rhodes, leased the lot to Read for the year 1830, at the rent of one hundred dollars, and delivered to him the keys of the buildings thereon. The bargain for the purchase was made on the day before the year's letting was to commence, and on the day of the bargain Read executed his note for five hundred dollars, payable at ninety days and negotiable at the bank. It did not appear what delayed the tender of the conveyance, but it did appear that it was not made until about two months after the expiration of the time set forth in the agreement; that Read, because of the delay in making the title, refused to take up the note in bank, rejected the tender of the deed, and claimed to be released from the contract of purchase. Jesse H. Simmons, who had made the lease, was also the subscribing witness to the agreement and the depository thereof, and kept the same as the agent of both parties thereto. Being apprised by Read that he claimed to hold the lot under the lease and not under the contract of purchase, and that when the rent became due he purposed to pay the same, Simmons wrote to the plaintiff and asked his advice what to do, to which he received the following answer:

"OXFORD, 23 December, 1830.

"DEAR SIR:—I received yours by the last mail, and note its contents. If Doctor Read should offer you the one hundred dollars, receive it; and if he will give you one hundred dollars rent for another (83) year, I will cancel the contract with him. You may state this to him. I would never have refused to let the doctor off the contract if he had desired me to do it as a matter of favor. It has been his purpose (that I believe) to be off, whether I would or not, hence I had come to the determination to force it; but the one hundred dollars he owes, with the rent of another year, at the same price, and the rent of the store, which I will get from the present occupant, will be better for me than a sale."

The contents of this letter were communicated by Simmons to Read, who remarked that if he had earlier known the plaintiff's wishes he

would have rented the lot for the ensuing year at the proposed rent, but that he had then provided himself with another place, and declined therefore to take it. After this, and on 1 January, 1831, he paid the one hundred dollars to Simmons, and delivered up to him the possession of the lot; and Simmons thereupon executed, as the agent of the plaintiff, a receipt in full to the defendant for the year's rent, and immediately thereafter wrote to the plaintiff, communicating the fact of the receipt of the rent, and stating that he was ready to pay over the same, after deducting the amount of an account which he had against the plaintiff. To this he received no answer, and he had no further communication with the plaintiff until after this bill was filed, when the plaintiff informed him of the suit, and declined receiving the money.

It was further in proof, by the testimony of William M. Deford, that before the sale of Ann Rebecca Rhodes' undivided moiety of the lot in question the plaintiff declared to him his, the plaintiff's, purpose to buy it for her benefit, and after the sale informed him that he, the plaintiff, had declared that purpose at the sale, and thereupon those who were bidding declined to bid further, and the property was struck off to the plaintiff.

The case was submitted without argument by

Devereux for plaintiff.
S. H. Mangum for defendant Read.

(84) GASTON, J. Upon these pleadings and proofs three questions are presented. The first is whether the plaintiff can demand a specific execution of the contract, inasmuch as he did not make or tender a title within the prescribed time. Second. Has the plaintiff waived his right to the specific execution of the contract? Third. Can the plaintiff now make such a title as the court will compel the defendant Read to receive.

The first question opens an inquiry upon a subject where we find much less precision of doctrine than ought to prevail. Equity will in certain cases enforce the execution of an agreement, notwithstanding there has been delay in the performance of what was stipulated on the part of the plaintiff, if such delay has not been unreasonable; if it has been attended with no practical inconvenience to the opposite party, and if the time were not made an essential part of the contract. The older cases have been far less strict in exacting attention to the time fixed on for the completion of a contract than the more recent ones, and perhaps there is cause to regret that equity ever assumed the power of dispensing with the performance of any condition in a con-

tract of this kind. No explanation has been given of the causes of the delay in this case, nor has it been alleged or shown that such delay produced serious inconvenience to the defendant. It was, very probably, important to him to be assured of the conveyance before his note became due in bank; and although the failure to make the title before the expiration of the sixty days might have been of no moment, we should feel hesitation in deciding that the delay beyond the ninety days was immaterial. As the decision of the cause will not rest upon this point, we forbear from any further examination of it.

On the second point we are of opinion that the plaintiff has waived his right to compel the execution of this agreement. It was known to him that the defendant Read had claimed to be "off" from the contract, and to occupy as lessee for the year under the lease made by the plaintiff's cotenant. Having purchased in her right, he became the sole proprietor of the lot. If the contract were binding, the entire estate in equity passed to the defendant, and no rent was (85) due. If the contract were broken off, then the whole rent became due to *him*. With a perfect knowledge of the facts, he writes to Simmons the letter which has been recited and which, though not free from ambiguity, Simmons interpreted, and, as we think, rightfully interpreted, as authorizing and directing him to receive the one hundred dollars, whether Read would or would not agree to rent the lot for another year.

"If Doctor Read should offer you the hundred dollars, receive it." So far nothing can be plainer. It was known that if offered it would be as rent. If the bargain were relinquished it would be due as rent, and it depended upon *him* whether it should or should not be relinquished. He goes on to add, indeed, "and if he will give you one hundred dollars rent for another year I will cancel the contract." These expressions seem to indicate that he did not *believe* that the effect of receiving the rent would be to cancel the contract, but they in no manner qualify the instruction to Simmons to receive the rent if it should be offered. Matters had arrived at that state in which it was incumbent upon the plaintiff to act decisively in one or the other character, either as landlord or as vendor; and he cannot be permitted, consistently with the rights of the other party, to act as landlord, with a reservation to himself of the privilege of thereafter claiming not to have been landlord but vendor. Should the construction put upon this letter be not entirely free from doubt, it is the misfortune or the fault of the plaintiff who, at such a time, ought to have distinctly declared his purpose. The payment of rent to Simmons must be regarded as a payment then made to the plaintiff, and the more especially as the plaintiff, after being informed of the payment of the rent, the abandonment of the

possession by Read, and the taking of possession by Simmons, did not, for more than one year thereafter, express any dissatisfaction at what had taken place.

We are also of opinion with the defendant Read upon the third point. It is clear that the court will not compel the purchaser of an entire tract or lot of ground to take an undivided part of the
(86) estate contracted for. It is also clear that if, after the contract of sale, it be discovered that the vendor cannot make a good title to the thing sold, or that his title thereto be doubtful the court will not enforce the specific execution against the purchaser. See cases cited Sugden on Vendors (5 ed.), 243. The objection which has been set up against the plaintiff's title to an undivided moiety of the lot upon the proofs now submitted is a serious one. We cannot decree for the plaintiff upon these proofs that the infant defendant has no estate in that moiety. If such a decree were made, the infant must have a day to show cause against it after arrival at full age. We cannot now decree that the purchaser, instead of a complete title, shall receive an imperfect one and an indemnity against the title of the infant defendant. We cannot decree that a part of the purchase-money, in consequence of the consent of the plaintiff, shall be secured to the infant in lieu and satisfaction of her interest in the land. As, to say the least, we doubt of the ability of the plaintiff to make a complete title, we shall, on this ground, also refuse the relief which has been prayed for.

The bill must be dismissed, and with costs.

PER CURIAM. Bill dismissed.

THOMAS SAUNDERS, ADMINISTRATOR FRANCIS SPEIGHT, v. REDDICK GATLIN, ADMINISTRATOR JAMES GATLIN.

Where two decedents were joint owners of slaves, and the administrator of one, having obtained possession, distributed them improperly, he is liable to account for their value to the next of kin of his intestate, but not to those of the other.

JOSEPH SPEIGHT died in the year 1792, having duly made his last will, and thereby bequeathed to his wife for the term of her life five negroes and other personal property; and after various other bequests, by the last clause in his will, he declared it to be his desire that all the remainder of his estate, of every nature and kind whatsoever, should be sold on a credit of nine months, and the money arising therefrom to go to pay his just debts and funeral charges; and if there
(87) should be any remainder, for it to be equally divided between

his two sons, Francis and Henry Speight, and their heirs forever. The slaves and other personal property bequeathed were delivered to the widow by the executors of the testator, his two sons and residuary legatees above named, and were enjoyed by her until her death, which took place in the latter part of the year 1818 or the beginning of the year 1819. Francis and Henry Speight both died several years after the testator, but before the widow. Upon her death James Gatlin, who was the administrator of Henry Speight, became also her administrator, and administrator *de bonis non,* with the will annexed of the testator, Joseph Speight. Having taken the advice of counsel, and being informed that the remainder in the negroes and other personal property bequeathed to the widow for life was not included in the residuary clause of Joseph Speight's will, and that, as to this remainder, Joseph died intestate, he applied to the county court and obtained an order appointing commissioners for the division of this property, and on 16 August, 1819, the division was made accordingly. One-fourth part was allotted to and received by the next of kin of Francis Speight, to whose estate there was no administrator; another fourth was delivered over to the next of kin of Henry Speight, of whose estate the said Gatlin was then the representative, and the other two-fourths allotted to the representatives and next of kin of two deceased daughters of Joseph Speight—Susanna Darden and Catharine Dunn—who had survived their father. The next of kin of Henry, who were present at this division, declared to Gatlin their dissatisfaction thereat, and that they would hold him accountable for what they alleged was yet due to them. One only of the next of kin of Francis Speight was present at the division; he was dissatisfied, but did not communicate that dissatisfaction to Gatlin, nor did it appear that the others of the next of kin of Francis raised any objection to what had occurred when they received their part of the share allotted to Francis Speight's estate. In April, 1822, a suit by petition was brought by the next of kin of Henry Speight, deceased, against Gatlin, to which Henry Speight, the (88) younger, who in November, 1822, administered on the estate of Francis, was afterwards made a party defendant, which suit was discontinued in 1823, without any determination on its merits. James Gatlin died shortly afterwards, and in November, 1823, Reddick Gatlin and Charles Sumner administered upon his estate. John Speight, having taken out letters of administration *de bonis non* on the estate of Henry Speight, the elder (one of the residuary legatees of Joseph, the testator), together with William K. and Joseph Speight, who, with the said John, were next of kin to Henry, in 1824 filed their bill against the administrators of James Gatlin, praying an account of the personal property of the said Henry, which came to the hands of said James,

as his administrator, on the death of the widow of Joseph, and for a delivery over of such part thereof as had not yet been received by the distributees of the said Henry. To this bill Henry, the administrator of Francis, was made a party defendant, but no decree was asked against him, nor did he make any answer to the bill. Upon the death of Henry in 1828 the present plaintiff was appointed administrator *de bonis non* of Francis Speight, and the death of Henry being suggested, the present plaintiff was made a party defendant to that suit by *scire facias*. Charles Sumner died pending the said bill, and his death having been suggested, the bill was prosecuted against Reddick Gatlin, the surviving administrator of James Gatlin, and in June, 1831, the plaintiffs in that suit had a decree for the value of the fourth part of the negroes and personal property so erroneously disposed of, and the interest thereon.

On 30 November, 1834, Thomas Saunders, administrator of Francis Speight, filed this bill against Reddick Gatlin, the surviving administrator of James Gatlin, and therein claimed that the said James was well entitled upon the death of the widow of Joseph Speight to the possession of the slaves and personal property bequeathed to her for life, as the administrator of Henry Speight, one of the two residuary legatees, the other residuary legatee, Francis, being dead, and having then no personal representative; that he held the possession
(89) thereof as trustee in respect to one moiety for the next of kin of Henry, his intestate, and as to the other moiety, for such administrator as might be appointed on the estate of Francis, or for the next of kin of the said Francis; that in delivering over to the representatives of Susanna Darden and Catharine Dunn a moiety of that property, he violated at once the trust under which he held the same for the next of kin of Henry, and that under which he held for the administrator to be appointed, or for the next of kin of Francis; that there being no creditors of Francis, and the plaintiff acting in behalf of the next of kin of the said Francis, he, the plaintiff, admitted, as part satisfaction of his demand against the said James, the receipt by the said next of kin of a half of the share to which the estate of the said Francis was entitled in the property so held and erroneously divided by the said James; that Henry, the former administrator of Francis, and the present plaintiff, having been defendants to the suit of John Speight and others against the administrators of James Gatlin, and being advised that whenever that suit was decided, if the division should be pronounced erroneous, a decree would be rendered also in favor of the representatives of Francis Speight, neither the said former administrators nor the present plaintiff had been guilty of laches in omitting to bring a suit as plaintiff until after the determination of the former

suit; that the defendant, the administrator of James Gatlin, who had received assets of his intestate, was bound to pay over to the plaintiff the unsatisfied part of the legacy of the plaintiff's intestate; that the plaintiff was not bound to seek satisfaction thereof from the representatives of Susanna Darden and Catharine Dunn, more especially as they had gone to parts unknown, and, as he believed, had become insolvent, and prayed an account and decree accordingly against the defendant.

Controverting the right of the plaintiff to any relief, the defendant specially insisted by his answer that neither the former administrator of Henry Speight nor the present plaintiff ever advanced any claim for or on account of the matters set forth in the bill until the institution of this suit; that each of them had refused to be a party plaintiff in the former suit, and when compelled to come in as (90) party defendant had then preferred no claim; that on the expiration of two years after the qualification of the administrators of James Gatlin on the estate of their intestate they had settled the estate with and paid over the same to the next of kin of their intestate, and they prayed specially the benefit of the ordinary act of limitations (Rev., ch. 2), also of the provision in the act of 1715 (Rev., ch. 10, sec. 7) barring all suits of creditors against the estates of deceased persons, if not preferred within seven years after their death, and also of the act of 1789 (Rev., ch. 308), entitled an act concerning proving of wills and granting letters of administration, and to prevent fraud in the management of intestate's estates.

Badger and Winston for plaintiffs.
Iredell for defendant.

GASTON, J., after stating the case as above set forth, proceeded: Upon the argument it was urged by the counsel for the plaintiff that his right to recover, unless prevented by some of the bars set (91) up because of lapse of time, was established by the decision made in the suit referred to in the pleading (*vide Speight v. Gatlin,* 2 Dev. Eq. Cas., 5). That decision is regarded by us as conclusively settling the construction of Joseph Speight's will. He did not die intestate, with respect to the remainder or residuary interest in the property bequeathed to his widow for life, and that property upon the death of the widow was divisible between the representatives of Francis and Henry Speight, the two residuary legatees, only, and not between them and also the representatives of their deceased sisters, Susanna Darden and Catharine Dunn.

As James Gatlin was the administrator of Henry Speight, and stood in the express and direct relation of trustee to the next of kin of Henry

Speight, they had a right to call upon him and his representatives for a distribution of the funds of Henry Speight which had come, or ought to have come, into his hands as their trustee, more especially as, at the very time when he parted with a portion of these funds improperly, they had remonstrated against the act which he was committing, and cautioned him against its consequences. But the defendant's intestate was not administrator of Francis Speight, and therefore did not stand in the same relation to his next of kin which he occupied with respect to the next of kin of Henry Speight. On what ground, then, is it that he became personally responsible to the administrator *de bonis non* of Francis Speight for the share in this property which had vested in the said Francis? The bill claims that, being tenant in common with the administrator thereafter to be appointed of Francis Speight, or with the next of kin of the said Francis, and having the whole of the common fund in his hands, or at all events in his power, he was trustee for such administrator or next of kin as to his or their share of it, and responsible as for a violation of trust in having neglected to preserve it. We do not assent to these positions. The possession of one tenant in common as such is, so long as it continues, the possession of all the tenants in common, because tenants in common, although they have a
(92) distinct interest, have but one possession. The possession of a trustee is said to be the possession of the *cestui que trust,* because it is the duty of the trustee to take care of the thing of which he is the legal owner for the benefit of his *cestui que trust,* and the possession, while it remains with the legal owner, will not be presumed inconsistent either with his obligations or with the rights of his *cestui que trusts.* But a tenant in common, as such, is not a trustee for his companion. He is under no obligation to his companion to take or to keep possession of the undivided property; he is not charged with the duty of protecting the common property; while he holds it he is liable for the profits derived from his companion's share or for an actual injury done to it; when he parts with the undivided property to another, as there is an end to his possession, there is an end also, with him, to the liabilities arising from that possession. Constructive or implied trusts between tenants in common may be raised by courts of Equity because of the relation caused by a community of possession, just as similar trusts are raised between persons whom any other cause brings together into a relation inferring confidence. If one of several tenants in common should buy in an outstanding title affecting the common property, equity will declare him to have purchased for the benefit of the others. So if one of several cosureties procures an indemnity from the principal, it shall inure to the protection of all. And so, if a particular tenant renews a renewable lease in his own name, the renewal

shall operate for the benefit of those in remainder. And so if a fraud in any matter of contract be committed by one party upon another, equity considers him who has obtained the unfair advantage as bound in conscience not to avail himself of it, and to that extent treats him as a trustee for the other. If any improper advantage had been taken by Gatlin, by reason of his possession of the common fund, or if the abandonment of it in whole or part had been made with a fraudulent intent, there might be room for then converting him into a trustee, as to those injured or attempted to be injured by his unfair practices. But he was not the legal owner, curator, protector of the share of the plaintiff or of those whom the plaintiff represents, and is (93) not, therefore, responsible to the plaintiff as his trustee. The division made of the common fund was erroneous, and it was just as competent for the administrator of Francis, as for the administrator of Henry Speight, to take the proper steps to correct the error. Regularly, they should have acted in concurrence with each other. Neither has taken any measures for that purpose. The proceeding here is not to correct the mistake, not to have a new division of the fund, but to throw the whole loss upon one of the tenants in common for the relief of the other. It is possible that the property may now be removed to parts unknown, or that the possessors of it may be insolvent, or that it may be too late for those injured to obtain any redress; and if so, where there is no fraud and no breach of any peculiar obligation imposed upon one of the parties, equality is equity.

Although the bill places the claim to relief upon the ground which has been stated and considered, we have deemed it incumbent on us to examine whether the facts charged and ascertained presented any other ground upon which the plaintiff is entitled to relief. The property had been bequeathed for life to the widow of Joseph Speight, and the ulterior interest therein passed under the residuary clause to the two sons, the executors. Had the will been silent, the law constituted the residuum of the testator's estate the primary fund for paying debts and funeral charges, and this ulterior interest was a part of that residue. The testator, however, expressly charged the residue of his estate with this burden, and directed it to be sold for that purpose. It was competent then for the executors, had other persons been the residuary legatees, when assenting to the specific bequest for life, to have restricted their assent to that only. If there were debts remaining undischarged which rendered the aid of this ulterior interest necessary for their satisfaction, I am not convinced that an unexplained assent to the bequest for life would have been in such a case construed into an assent also to the ulterior disposition. But where no debts appear, where there is no purpose for which the executors could rightfully

(94) ask for the possession of the property after the death of the legatee for life, such an assent would, I think, pass the estate in the property wholly away from the executors, and vest it in those in remainder, as well as in the tenant for life. The case is quite as strong, or perhaps stronger, when the executors are themselves the ulterior legatees. The property being in equity theirs, charged only with the obligation of paying the debts of their testator, it will readily be presumed, when no debts appear, that they assent to the bequest and make it legally theirs. We think, therefore, the plaintiff was right when he charged by his bill that the defendant's intestate took possession, not as administrator *de bonis non* of Joseph Speight, the original testator, but as the administrator of Henry Speight, one of the legatees, to whom it had been bequeathed, subject to the life estate of the widow. The case does not come, we think, within the principles of *Dunwoodie v. Carrington,* 2 Law Rep., 469, where the executor has a trust to perform *out of the thing bequeathed,* and after the death of the first taker. The payment of the funeral charges and debts of the testator was not to await here until after the death of the widow, and then to be made out of the things bequeathed; but the ulterior interest in these things, such as it was at the testator's death, was chargeable with these expenses and debts, and they were payable immediately. We are obliged to infer, from all the facts charged, that this ulterior interest was not needed for any such purpose, and that when the delivery was made to the widow it operated to vest the complete legal interest in the things bequeathed. The case comes within the principles of *Jones v. Zollicoffer,* N. C. Term Rep., 214; *Ingram v. Terry,* 2 Hawks, 122; *Alston v. Foster,* 1 Dev. Eq. Cases, 337, and *Burnett v. Roberts,* 4 Dev. Rep., 87. We regard it as settled in this country that when slaves are given, or an interest in slaves bequeathed as a residue, or part of a residue, a sale is not to be had unless it be necessary for the payment of debts or for accomplishing the purposes of the testator. *Smith and Wife v. Barham,* 2 Dev. Eq. Cases, 420.

If these views be correct, it is unnecessary to examine the bars (95) set up against the present claim because of the lapse of time. Should it be possible, however, for the plaintiff to substantiate a claim against the intestate of the defendant analogous to that which a tenant in common can prefer against his companion for a destruction of the thing, we see no reason wherefore it must not be brought within the time limited for such actions. Fifteen years elapsed in this case since the wrong complained of, and twelve years since the first administration taken out on Francis Speight's estate, before any demand shown or suit brought, and three years with us is a bar to an action of trover. If James Gatlin did not stand in the relation of trustee to the plaintiff

or those whom he represents, but his error gives the plaintiff, nevertheless, a claim to compensation, makes him either a legal or equitable creditor of the deceased, I can see no reason why the bar of the act of 1715 does not apply. It is not confined to any particular suits, or to suits in any court. But it operates in all where the claimant comes as a creditor, and such claim and creditor existed at the death of the person whose estate is pursued. If the plaintiff labored under the notion that being a defendant to the former bill was a suing within the ordinary act of limitations, or a making of claim within the meaning of the act of 1715, it was unquestionably a mistake, and it would be too unreasonable to allow him to derive benefit from his mistakes, however innocent, while he seeks to render others liable to him for mistakes equally honest.

It is the opinion of the Court that the bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

Cited: Baird v. Baird, post, 536; *Hyman v. Williams,* 34 N. C., 94; *Lowe v. Carter,* 55 N. C., 386; *McKoy v. Guirkin,* 102 N. C., 23.

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(96)

JOSEPH DOZIER v. PHILIP DOZIER.

Upon a bill seeking satisfaction of an equitable demand against a deceased debtor from property in the hands of his donee, it was *held,* that the administrator of the debtor was a necessary party, and that a decree against him in a former suit establishing the debt, and ascertaining that he had fully administered, was not admissible to prove the case of the plaintiff.

THIS case came before the Court upon an appeal of the defendant from the decree of the Court of Equity of CAMDEN County.

The transcript showed the case made by the pleadings to be as follows: The plaintiff, as surviving executor of Willoughby Dozier, Jr., filed his bill in October, 1828, against the defendant, Philip Dozier, and against W. D. Barnard, and charged that said Willoughby, Jr., made his will and appointed the plaintiff and one Dennis Dozier the executors, who proved the same after the death of the testator; that said Dennis took into his possession nearly all the assets, which he wasted, and that, without accounting for them, he died in 1826 intestate and insolvent, and the said Barnard obtained administration of his estate; that the plaintiff, as surviving executor, had filed his bill in the Court of Equity against Barnard, and thereupon, in March, 1828, obtained a decree

declaring that said Dennis was indebted to him in the sum of eighteen hundred and eight dollars and ninety-nine cents; but that Barnard had no assets of said Dennis, and had fully administered all that had come to his hands. The bill further charged that there were other debts or judgments at law to more than the value of the real estate of said Dennis in the hands of his heirs, and that the plaintiff could not get satisfaction of his said decree. It then charged that the defendant, Philip, married the daughter of said Dennis, and that upon the marriage he received by way of loan or parol gift several slaves from said Dennis, which he retained, and which were of value sufficient to answer the said decree; that Dennis was greatly indebted at the time of the loan or gift, and that the same was fraudulent against his creditors; but that the
(97) defendant, Philip, insisted on his title, and refused to surrender the slaves that they might be sold for the plaintiff's debt. And the bill prayed a discovery and account and satisfaction out of the negroes, and to that end that process might issue against Barnard and the said Philip.

On this bill, process was not issued against Barnard, but against Philip Dozier only, who appeared and put in an answer.

It admitted that the plaintiff and the said Dennis were joint executors, as charged in the bill, and the death of the latter, and the administration of Barnard, and the suit against him, and the decree; but it denied all knowledge of the assets received by Dennis or of his administration of them, or that he wasted any of them or was indebted to the plaintiff as surviving executor, or otherwise, and required the plaintiff to prove those allegations. It also denied any knowledge of the assets of Dennis which Barnard received, or whether the plaintiff's recovery was just, or whether Barnard had fully administered, or not. It stated that Dennis was indebted to the defendant, and also to his wife, as their former guardian, and that in part payment thereof the defendant purchased one of the slaves mentioned in the bill; and that in 1818 the said Dennis gave by parol to the defendant, by way of advancement to his wife, a daughter of said Dennis, certain other slaves, which he took into his immediate possession, and has retained them ever since, claiming them as his own, and adversely to all other persons; and that at that time the said Dennis was not insolvent nor embarrassed with debt. The answer set forth the names of the slaves and their increase, and, as if the same were pleaded, relied on the statute of limitations.

Upon a replication to the answer, the parties took proofs as to the circumstances of Dennis Dozier at the time of the defendant's marriage, and other matters not material to state.

The court directed a reference to the master to take an account of the slaves, their number, value, and profits; and subsequently to take an

account of the profits received by the defendant in the lifetime (98) of Dennis, of certain real estate of the intestate which he permitted the defendant to occupy, and to take an account of the debts due from said Dennis to the defendant and his wife.

The master reported the present value of the slaves to be two thousand six hundred and seventy-five dollars; their net profits, seven hundred and fifty-nine dollars; profits of land, one thousand and eighty dollars; making, together, four thousand five hundred and fourteen dollars; that Dennis owed the defendant and wife five hundred and ninety-two dollars and ninety cents; and that after deducting the same, the defendant had funds to the value of three thousand nine hundred and twenty-one dollars and ten cents.

The defendant excepted to the report, because the master charged him with the present value of the negroes instead of that at the time he received them, and because he was charged with the profits thereof, and because he was charged with the rents of the land, and because he was charged with the hires of the negro sold to him by the intestate.

The last exception his Honor, *Judge Strange,* on the last Fall Circuit, allowed, and overruled the others, and confirmed the report in all other respects, and thereupon decreed that the defendant should pay to the plaintiff the sum of two thousand two hundred and eighty-five dollars and eighty-five cents, being the principal and interest found due him in the decree mentioned in the bill, and also the costs of this suit. From that decree the defendant appealed to this Court.

There was no evidence in the record that any debt was owing from Dennis Dozier to the plaintiff, except the transcript of the former suit between the plaintiff and Barnard as administrator, and the decree therein made, as mentioned in the pleadings in this suit. In the former suit a reference was made by consent at the first term to the master to take the accounts. He reported to the next term the sum due to the plaintiff from the intestate, Dennis, to be $1,808.99. No account was taken of his assets in the hands of Barnard, his administrator, who had answered that he had none, but had fully administered. (99) The cause was set for hearing on bill and answer, and the report confirmed by consent, the plaintiff admitting expressly that Barnard had fully administered. Thereupon a decree was made by consent, as expressed, that the plaintiff recover the said sum of $1,808.99, to be levied of the assets of Dennis Dozier, deceased, if any there be, and that the plaintiff should pay the costs.

Devereux and Bailey for plaintiff. (101)
Kinney (with whom was Iredell) for defendant.

(103) RUFFIN, C. J., after stating the case as above, proceeded as follows: The counsel for the defendant, without entering into the details of the proceedings in the Court of Equity, has insisted here that the decree is erroneous, upon two general grounds—the one, that the former decree is not evidence against the defendant; and the other, that Barnard is not a party to this suit, and that he ought to be a party. Upon both the Court is of opinion with the defendant.

At law, a fraudulent donee of goods is, after the death of the donor, liable to creditors for the value. He may be sued as executor *de son tort,* and, from the necessity of the case, he may be thus sued, where there is a rightful executor or administrator, because no act of the latter can render the goods assets in his hands. It may be yielded, also, that a parol gift of slaves to a child, which, in case of the donor's intestacy, is made by the act of 1806, an advancement, is fraudulent and void against the donor's creditors if he die without leaving other property sufficient to discharge his debts, and that, in respect of them, the donee would be deemed, at law, executor in his own wrong. There seems to be no reason to doubt that a fraudulent donee is responsible in equity to an equitable creditor of the donor, who cannot otherwise obtain satisfaction, for this Court must support rights, which are the peculiar creatures or subjects of the jurisdiction of equity. But it does so according to its own course. At law, an executor, in his own wrong, is sued as if he were executor, and may, therefore, be sued separately or jointly with the rightful executor. But he cannot be sued jointly with an administrator, because the law knows not of an administrator by wrong, nor of any mode of showing an administration but by the grant of letters by the proper legal authority. So, in equity, an administration can be shown only in the same way, and a liability as executor can be created only by charging a will and the appointment of the executor, and his undertaking the burden of executing the will. In the case of
(104) such fraudulent gift, therefore, the rightful representative must be before the court, upon the general principle that all persons concerned in interest must be parties in this Court, and the donee may also be made a party, and is chargeable as having a fund which ought, in equity, to pay the debt, and is followed by equity in his hands. This Court does not know of an executor *de son tort* for the purpose of a remedy against him as such. But if it did, neither at law nor in equity, can the debt of the deceased debtor be proved against him by a judgment against the rightful representative merely. There is no privity between them. At law, where the suit is against the executor *de son tort,* he is supposed to be the executor, and it is incongruous to charge him upon the acknowledgment of, or proceeding against, another as being the person invested with the character given in the record to the defendant.

It is equally so in this Court. The demand is presented here against the executor, and he is liable in the first instance if he have assets. The donee may be made a party for the purpose of making him liable in succession. But each of those parties has a right and, in such a proceeding, the opportunity of contesting the debt, and it is manifestly just that each of them should have both the right and the opportunity. There is no precedent of such a decree as that framed by the parties for themselves in this case. The jurisdiction here is primarily *in personam,* and if an executor hath not assets, the Court does not decree for the creditor, but dismisses the bill. If the executor have assets, the decree is, in respect of the possession of them, that he personally pay the debt in the first instance. But if he have not assets, he is in no degree liable to the plaintiff, is not his debtor, and the bill must be dismissed. If the plaintiff's demand arise upon an account or trust between him and the testator, that account may be taken, and the report upon it confirmed; but if the plaintiff will not proceed to take the account of the executor's administration, so as to fix him with assets, or if he proceed to take the account, and it is found thereon that he has no assets, the plaintiff cannot stand in the court, but the defendant is entitled to a decree dismissing the bill. It is argued that the statutes giving the (105) remedies at law against heirs, and on refunding bonds, have created a new rule at law, which equity will follow. By no means. Equity, before, gave relief against legatees in case of the insolvency of the executor, or against heirs, upon a failure of the personal estate, on such debts as the heir was liable for; and that relief was adequate upon a bill against all those parties. The statutes may have the effect of rendering the legatees liable in equity, upon the ground of the refunding bonds, and the duty of the executor to deliver over the estate, without an insolvency of the executor, and as if he were insolvent. But, as to the mode of proceeding, or the frame of the decree, the rule at law, introduced by the statute, ought not and cannot affect the rule of this Court. Doubtless, upon discovering the insolvency of the executor, or that there are no personal assets, the plaintiff, in a suit against the executor alone, may, by an amendment to his bill, or by supplemental bill, bring in the legatees or the heir; but when they come in, the plaintiff's demand is open to be contested by them, and must be proved as *ab origine* against them. But if the plaintiff will bring on his bill to a hearing against the executor, and have it dismissed as against him, although it be dismissed upon the ground that he has no personal assets, he can never afterwards found upon that decree against himself a proceeding to charge other persons separately, and by a distinct suit, with a demand claimed in the former suit. The decree in the case before us was, no doubt, drawn up in reference to the proceedings at law, and the

parties hoped to sustain it by an analogy to the legal liabilities. But, even at law, the executor, as a necessary party, is kept in court until the heir or legatee discharge him by a plea which admits his insolvency or full administration. Here no process was sued against Barnard in this bill, which cannot be connected with the former one, as the *scire facias* is with the judgment *on which* it is issued. But the decisive thing here is that the decree in the suit against Barnard is, in effect, and substantially, notwithstanding its formal phraseology, a decree to dismiss, and dismissing that bill at the plaintiff's cost. Besides, there is a
(106) marked difference between the case of an heir or legatee and that of a donee. The two former receive their estates after the death of the debtor and as a part of his estate. They are liable to creditors, although the executor receive sufficient assets, provided he is insolvent, or the creditor should otherwise be prevented from getting satisfaction from him. But a donee does not claim the goods as a part of the deceased debtor's effects. He is liable in respect of the fraud only; and if the donor left sufficient estate, either real or personal, to pay all his debts, there was no fraud, but the goods passed to the donee, not only against the donor and his heir or executor, but also against the donor's creditors. The donee, therefore, must have the right of contesting the debt, and is not confined to the allegation that the judgment or decree was *per fraudem,* and also the right of showing assets descended to the heir or come to the executor. Until they are exhausted, the donee is not chargeable, and those persons are necessary parties to an account of those assets. Besides, the executor may get assets in future, out of which the donee should be made whole for what he would have now to pay, and that he may have direct relief therefor the executor should be a party to, and concluded by, the decree against the donee.

It is said that the bill is sustainable upon the common equity on which the court assists judgment creditors against funds of the debtor in the hands of another. But this plaintiff has been already shown not to be a judgment creditor or, what is equivalent thereto, a creditor by decree of this Court. The decree gave him no relief. It professed to declare one fact in his favor—that he was a creditor of the intestate, but, upon his own admission, states on the face of it that the only defendant to his suit was not liable to pay that debt. The bill was dismissed against that defendant, and the plaintiff allowed to have satisfaction out of the assets of the intestate, *if there be any;* that is, that the plaintiff might sue anybody else and get his money, if he could. But, in cases to which the principle of equity alluded to applies, the debtor must be a party, as well as the possessor of the fund. In such cases, too, the justice of the debt is not an inquiry for such possessor; the fund is not his,
(107) but the debtor's, and he has no interest in the question. If the

possessor claim the effects under a conveyance alleged to be fraudulent, then the existence of the debt is to be proved, as in other cases in which the question of fraud arises. The plaintiff must show himself a creditor by judgment or decree, entitled to take advantage of the statute, 13 Eliz., but is not bound to reprove the debt as to its origin or amount, unless the possessor allege and show *prima facie* that the judgment itself was a fraudulent contrivance to defeat a previous gift. But, as in the case before us, there was no decree which could even affect an heir or legatee, and if there had been, as this defendant does not stand in privity with the party to that suit, what was done in that suit does not prove the debt against any person (unless possibly Barnard himself) and is not evidence to any purpose against this defendant.

The plaintiff might have moved before the hearing to bring in Barnard, and thereupon to take an account of the assets; and it is not usual to dismiss a bill for the want of parties in the first instance. If that were the sole ground for reversing the decree, the cause would, upon the reversal, be ordered back, with liberty for the plaintiff to move such proceedings. But the plaintiff brought his cause to hearing, without any proof whatever of his demand as against this defendant, and without any allegation in his bill on which he could have offered such proof, the bill relying specifically on the decree as conclusive. He has, therefore, failed to establish any debt of the intestate, Dennis Dozier, and for that reason the bill ought to have been dismissed on the hearing. For the same reason, the decree must be reversed; and this Court, proceeding to give such decree as the Court of Equity ought to have made, must dismiss the bill, with costs in both courts to be paid by the plaintiff.

PER CURIAM. Decree reversed.

Cited: Bryant v. Green, 38 N. C., 170; *Bridgers v. Moye,* 45 N. C., 173; *Brittain v. Quiett,* 54 N. C., 330.

(108)

ERASMUS LOVE v. THOMAS BLEWITT, EXECUTOR WILLIAM LOVE.

Whether the Supreme Court can entertain jurisdiction of bills to review its own decrees on account of newly discovered testimony, *quere?* But if it can, leave will not be granted for that purpose without notice to the other party to show cause against the application.

AT THE last term of the Court a cause was heard between the parties, in which the principal question involved was one of fact, viz., whether a

certain female slave, called Anaka, was born before or after the death of William Love, it being admitted that if it was born before, the slave was the property of the plaintiff; if afterwards, that she belonged to the widow of the testator, the mother of the plaintiff, in whose possession she remained up to the commencement of the suit. The final decree declared that the slave was born after the death of William Love, and the bill was dismissed.

At this term the plaintiff filed a petition, in which he stated that, since the rendition of the decree, he had been informed by one Jesse Williams that the defendant had admitted the right of the plaintiff to the slave during the pendency of the suit; and also by one Nancy Covington, that she knew that the birth of the slave took place before the death of the testator. The petition was verified by the oath of the plaintiff, and he swore that the testimony was unknown to him when the cause was set for hearing, and that during the pendency of the suit he had been informed by his counsel that he had sufficiently proved the time of the slave's birth by the deposition of his mother, Mary Love.

The prayer was for liberty to file a bill of review for newly discovered testimony. The affidavits of Williams and of Mrs. Covington were filed with the petition. Williams swore that, in a conversation with Blewitt, the latter, speaking of the suit then pending and about to be heard, said that it was exceedingly hard for him to have to pay for the slave, and that it was his expectation that he would have to do so; that he
(109) knew the negro was the petitioner's, and expected to have to pay for her.

Mrs. Covington stated in her affidavits that she was intimate in the family of the testator during his lifetime, being the sister of his wife, and that the slave in question was born before his death. Both the affiants were uneducated persons, and made their marks instead of fixing their signatures to their respective affidavits.

Winston for petitioner.
Badger contra.

GASTON, J., after stating the substance of the petition and affidavits as above set forth, proceeded as follows: It is a question of no little difficulty whether, on account of the peculiar constitution of this Court, any decree here rendered can be reëxamined by bill of review because of new matter or evidence, discovered since the rendition of the decree. This question is not intended now to be decided, and it is mentioned lest an inference should be hastily drawn that the Court has either overlooked the difficulty or has overruled it. If a sufficient *prima facie* ground had been laid in these affidavits for granting the prayer of the petitioner,

we should forbear to act upon the subject-matter of it until notice of the petition had been given to the defendant and an opportunity afforded him of being heard against the application. Such a petition is addressed to the sound discretion of the Court, and for the proper exercise of that discretion it is essential that the parties interested should have an opportunity afforded of bringing forward what they may respectively be advised to be material.

But there is not a sufficient *prima facie* ground laid. It is impossible to infer more from the conversation which Williams declares himself to have had with Blewitt than the latter then supposed that Love had proved the fact of Anaka's birth at the alleged time, and that the consequence of this proof would be a recovery against him, hard and oppressive as such a recovery would be. In Blewitt's answer he declares that, when he administered, in 1793, on William Love's estate, (110) he believed Anaka born after his death; that she was taken possession of by the widow, Mary Love, and continually kept by her upon that ground, and that he never heard any intimation to the contrary until the year 1818, many years after he had closed his administration (when he was so informed by the plaintiff, the present petitioner), and that he did not then, nor at the time of putting in his answer (1823), believe the plaintiff's allegation to be true. Since that answer, and before the alleged conversation, the deposition of the petitioner's mother was taken and publication passed, in which deposition, without referring to any dates or giving any explanation, after having taken and kept the negro, upon the ground of its being born since the death of her husband, she simply swore that it was born before his death and after the making of his will. We must, therefore, understand this saying of the defendant, as indicating the apprehension which this deposition had excited, that the fact would be considered as established by proof, and would be decisive of the plaintiff's right to recover. It would be worse than idle to regard it as overruling and contradicting the statement made by him on oath, as to his belief when he entered upon, and while he was engaged in, the management of his testator's estate.

The only evidence set forth in support of this application which can be deemed material is that of the affiant Nancy Covington; and if the petition is to be granted, it must be for the purpose of affording to the plaintiff an opportunity on a bill of review to have the testimony of this witness taken to corroborate the deposition of Mary Love.

We deem it unnecessary to say more than that, according to the well-established rules of equity, we do not feel ourselves justified in granting the application on this ground. The new witness sought to be introduced is the sister of the petitioner's mother, and there is no allegation that her testimony might not easily and readily have been obtained

(111) before the former hearing. That the plaintiff or his counsel thought it safe to risk that hearing and the decision of the cause altogether upon the vague, unsatisfactory testimony of the plaintiff's mother—testimony the object of which was to render the defendant liable to the plaintiff for his negro, which she held, and for which, therefore, in conscience, she, and not the defendant, should have been accountable—is the fault or misfortune of the plaintiff or of his counsel. This is not newly discovered evidence; and if it were, it is only cumulative evidence to a litigated fact. These considerations, without going further, appear to us decisive against the application. See *Young v. Keigley,* 16 Ves., 348; *Norris v. Le Neve,* 3 Atk., 37; *Taylor v. Sharp,* 3 P. Wms., 371; *Livingston v. Hubbs,* 3 Johns. Ch. Reps., 126.

The prayer of the petition is denied.

PER CURIAM. Petition dismissed.

Cited: Matthews v. Joyce, 85 N. C., 268; *Wilkie v. R. R.,* 127 N. C., 213.

WHITLOCK ARNOLD v. CLEMENT ARNOLD.

When a slave dies in the custody of an officer of the court, during a litigation concerning it, the loss is to be borne by the party to whom the title is ultimately adjudged, especially when he had no right to the possession.

AFTER the decree for a specific execution of the contract for the sale of the slaves, made at December Term, 1833 (Rule 2, Dev. Eq. Cas., 467), by an order in the cause the sheriff of Guilford was directed to take into his possession the slaves remaining in the hands of the defendant and hire them out, and account with the master for the hires received by him. The master, in his report, stated that the sheriff had accounted with him for the hires, and had delivered to him all the slaves, excepting a female who had been sold to the plaintiff and who had died during the year for which she was hired.

The master also reported that a balance of $983.96 was due the defendant from the plaintiff, and that the latter having failed to pay it, he had, according to the decree, sold slaves to that amount, and (112) had the funds in his hands; that he had received notice from a judgment creditor of the defendant not to pay $333 of that money to him, the defendant, as the claim had by the latter been assigned, when he had taken the benefit of the act for the relief of insolvent debtors, for the use of his creditors; and on this subject the commissioner prayed the instructions of the Court.

Mendenhall and Winston for plaintiff.
Nash for defendant.

RUFFIN, C. J., after stating the facts as above set forth, proceeded as follows: Upon no principle can the motion be sustained. The plaintiff was not entitled to the possession, for the master has reported a balance of $938.96 to be due from him for the purchase money, for which the defendant had a right to retain the negroes as a security.

But the defendant did not have the possession. He surrendered it to the court, and the slave was in the custody of the law, and the defendant is not chargeable for the value in the case which has occurred, more than he would have been if one of the slaves had died while held by the master for sale. The plaintiff has not sought a decree for compensation for a breach of trust, but specific execution of his contract. That relief he had in the decree which treated the negro as his, and gave him the hires while in the sheriff's hands. Of course, he must so treat her throughout. She died the property of the plaintiff, and he must bear the loss.

The master reports that a judgment creditor of the defendant has given him notice to retain out of the moneys in his hands belonging to the defendant under the former decree the sum of $333, the amount of the judgment, upon the ground that the defendant (113) had included the debt due on this decree in a schedule made by him as an insolvent debtor in execution upon that judgment, and the master prays the advice of the Court.

The money is not in the hands of the master as a private debtor, but it is in the custody of the law and held by him as the officer of the court. He must, therefore, pay it according to the terms of the decree, and cannot take notice of the rights of any person in or to it. The decree is his justification, and he is bound to comply with it according to its tenor. If another person has an interest in the fund, or requires an interest of the decree, the master is not to be charged upon his peril with deciding on it. Such a claimant must not apply to the master, but the court, either by petition in the cause or by bill in due time, according to the circumstances. The master must not, in this case, therefore, suffer any notice from any quarter to interrupt the execution of the decree.

PER CURIAM. Decree accordingly.

DENNIS SORREY ET AL. V. JOHN R. BRIGHT, EXECUTOR DIANA SORREY ET AL.

A bequest of slaves, with a request that the legatee will permit "said negroes to have the result of their own labor," is a bequest for emancipation, and a trust in them results for the residuary legatee or the next of kin.

THE bill stated that the testatrix of the defendant Bright, a resident of Currituck County, by her will, bequeathed as follows: "I give to John C. Simmons (a defendant) the following negroes, viz., Daniel, etc., but it is my request and desire that the said John C. Simmons will admit said negroes to have the result of their own labor, but ever to be under his care and protection, and his heirs and assigns forever. I give and bequeath to my brother-in-law, Dennis Sorrey, one-fourth of the money arising from my estate, after paying all just debts and legacies."

"To Mariah Gisborne, three-fourths of the net proceeds of my (114) estate, after paying all just debts and legacies, to her and her heirs forever." That the executor had assented to the legacy to Simmons, and that the latter had possession of the slaves and had made profit from their labor. The residuary legatees and the next of kin of the testatrix joined in the bill as plaintiffs; they insisted that the legacy to Simmons was void and that a trust resulted for them, but whether for the next of kin or for the residuary legatees they were ignorant. The prayer was that the legacy might be declared to be void and that Simmons might account for the hires of the slaves, and that by the final decree the respective rights of the plaintiffs might be established. The defendants, the executor and Simmons, in their answers, admitted the allegations of the bill, but averred the distinct fact that Simmons was, at the death of the testatrix, and at the time of filing the answers, a resident of the State of Virginia, and that by the law of that State bequests for the purpose of emancipation were valid.

The cause was heard upon bill and answer.

Kinney for plaintiffs.
Bailey for defendants.

RUFFIN, C. J. It is apparent, both from the terms of the will and from the answers, that it was the purpose of the testator that the legatee, Simmons, should not hold the negroes beneficially as property. The bounty intended was to the slaves themselves, and not to the nominal donee. The negroes are to have the profits of their own labor. Simmons is made the legal owner, not that he should be master, but that the negroes might have a protector. The case is not, therefore, to be distinguished from those of *Huckaby v. Jones,* 2 Hawks, 120, and *Ste-*

vens v. Ely, 1 Dev. Eq. Ca., 493, and others upon this subject, unless the application of the rule be prevented by the residence of the legatee in Virginia and the law of that State.

Upon the pleadings the disposition must be deemed to be good in that law, as it is so stated in the answers; and the cause is set for hearing on the bill and answers. But we think clearly that cannot affect the construction of a disposition of personalty in a will made here (115) by a person residing here. The capacity to make the will is derived from our law, and the validity of its provisions is to be ascertained from the same source. By it every trust for emancipation, and every direction in a will to that end, whether the emancipation is to be absolute or qualified, is illegal and void, and the trust results in equity to those who would be entitled if no such disposition had been attempted. The defendants must, therefore, surrender the slaves and account for the profits.

The next of kin of the testatrix and her residuary legatees are all plaintiffs, and submit the question of their respective rights to these slaves to the Court. That mode of bringing forward conflicting claims is not approved of, and in doubtful cases would not be allowed, as there might be much difficulty as to the mode of reconsidering the decree as between different plaintiffs. But as no objection is made by the other parties in this case, and as we deem the law to be clear, the Court will proceed to decide between those two classes of claimants. The Court is of opinion that the next of kin are not, but that the residuary legatees are entitled to the slaves. The bequest to Sorrey is of "one-fourth of the money arising from my estate after paying debts and legacies"; and that to Maria Gisborne is of the other "three-fourths of the net proceeds of my estate after paying all just debts and legacies." Of an express general gift of the residue the rule is well settled that it comprehends all the personalty which is not otherwise effectually disposed of by the will, whether it be acquired after making of the will or whether it fall in by the lapse of a legacy or by the particular gift of the thing being illegal and void. *Durour v. Motteux,* 1 Ves. Sr., 321; *Cambridge v. Rous,* 8 Ves., 14; *Dawson v. Clarke,* 15 Ves., 410; *Bland v. Lamb,* 2 Jac. & Walk., 399. In the last case *Lord Eldon* says that to take a case out of this general rule very special words are necessary, showing the intent to be clear, that particular parts of the estate should not pass under the residuary clause. The rule itself is not founded upon the actual intention of the testator to include everything; for often, nay generally, there is probably a contrary intention, as every man must be supposed to consider each particular disposition of his (116) will valid, and to expect it to take effect. But the rule is an inference from the presumed general intention not to die intestate as to

anything when there is a gift of the general residue. Doubtless it may be restricted by the special wording of the will. If the residue given is partial, that is, of a particular fund, the rule has no application. So where it is clear from the residuary clause itself or other parts of the will that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away, or which the will professed to give away, should not fall into the residue.

We think, however, that effect cannot be given to the words here used, "after debts and legacies paid," notwithstanding the previous attempt to give away the slaves specifically. Those words in truth express nothing more than is implied in the term "residue," by itself, which imports what is remaining after paying debts and taking out legacies antecedently given. If these words would exclude everything from the residue which the will professes to give particularly, the same might be contended and would be true in every case, and the general rule would cease to exist. *Sir William Grant,* in *Cambridge v. Rous,* after laying down the will in the form in which it is now generally approved and quoted, says that there can be no distinction nor inference against its application founded on such words as "then" or "after legacies before given," for they mean nothing more than "residue" does.

For these reasons the Court deems the point so clear that little would have been said on it were it not for an expression reported of *Lord Camden* upon this subject, which has been adopted and made a ground of distinction in cases of this sort by respectable text-writers. Mr. Roper, in his Treatise on Legacies, II Vol., 457, states that when it appears the testator intended the residuary legatee should have only what remained *after payment of legacies,* he will not be entitled to any benefit from lapse; and he cites and states the cases of (117) *Davers v. Dewes,* 3 P. Wms., 40, and *Attorney-General v. Johnston,* Ambl., 577, as the authorities for that position. We think he states his principles too loosely, and that the cases do not support him to the full extent. It is true *Lord Camden* uses the expression imputed to him, but not in the sense supposed.

In the first case, *Davers v. Dewes,* the testator, after disposing specifically of parts of his real and personal estate, declared an intention to dispose thereafter by codicil of certain plate and furniture, and then gave away the residue of his personal estate not disposed of or reserved to be disposed of. He died without making any further disposition of the plate and furniture, although he made codicils. Upon a question as to those articles between the residuary legatee and next of kin, it was decreed for the latter. The express reservation in the will of those goods for future disposition prevented that will from operating on them at all. It was a plain declaration that they should

not thereby pass to anybody, and amounted to taking them out of the residue therein bequeathed. Upon the authority of that case *Lord Camden* decided *Attorney-General v. Johnstone,* upon the peculiar phraseology of the will and the evident intent. The testator, after many legacies (including one of twenty thousand pounds to a charity, which was void by the statutes of mortmain), gave to a "hospital in Hamburg one hundred pounds, that is, if there remain enough of my personal estate to satisfy it, *but if not, or in case there remain but little,* then the one hundred pounds to the hospital shall not be paid, and the small remainder of my personal estate shall be left to my executor to dispose of in favor of charity schools in Hamburg as he thinks proper. So it is likewise my will that if my personal estate shall sufficiently reach towards satisfying all the legacies by me bequeathed and above mentioned, my executor shall also dispose of the remainder in favor of charity schools in Hamburg, in manner before expressed." Upon these last general words it was contended for the schools that they were entitled to the twenty thousand pounds which remained in the event undisposed of. But *Lord Camden* decreed for the (118) next of kin, upon the ground that upon the whole will the residue was intended not to be a general one but a particular small one. He says, indeed, that "the intention appears strong in the case to confine the residue to what should remain of his money *after the other legacies paid.*" But it is plain the Chancellor did not mean to lay down any new rule, nor did he found the decree barely upon the words "towards satisfying all the legacies by me bequeathed," for he treats it as within the case of *Davers v. Dewes,* in which he considered the testator had said that none of the legacies should fall into the residue; and he remarks minutely upon all the other provisions of the will before him, to show what particular residue the testator intended for the charity schools. Those provisions were sufficient of themselves to exclude the schools without the words about satisfying other legacies. The legacy to them was contingent and uncertain in amount, but to be small, at all events. In the first place, schools were to be substituted for the hospital, if the small sum of one hundred pounds could not be raised out of the remainder of the personal estate. If it could be raised, then the small remainder, whatever it might be, was to go to the schools. It was therefore doubtful in the testator's mind, and contemplated by him as being doubtful, and so expressed by him, whether the residue which he intended to give would amount to one hundred pounds. It might, and a remainder be over, but if there should be, although the exact amount was uncertain, it was certainly to be *"the small remainder."* Hence *Lord Camden* decided for the next of kin, because he considered, from all these provisions, that a specific and not a gen-

eral residue was given to the schools. When he uses the words "after the other legacies paid," it is not in their strict technical sense, and with the intention to give to those words generally a meaning which will control and limit a residuary bequest; but his meaning is to be understood that, in that case and upon the whole will, the residue given is that residue which remains after all the sums of money bequeathed particularly should first and at all events have been raised, and (119) that the testator strongly expresses the intention that it should not be more. The terms "legacies paid" are used somewhat inaccurately for the sums mentioned in the will as the amounts of the legacies, for there can be no payment of a legacy, as such, when it has lapsed. But where the residue is given as that which shall remain after so much money shall have been first taken out of the whole estate, that residue is a particular one, and will not by any subsequent events embrace more than that which was originally residue at the making of the will and upon its face.

The Court cannot, therefore, upon the words "after payment of legacies," unaided by any restrictive context, say that the residuary claims do not include the slaves which the testatrix attempted ineffectually to emancipate, and must decree, accordingly, against the next of kin.

PER CURIAM. Direct an account.

Cited: Pendleton v. Blount, post, 492; *White v. Green,* 36 N. C., 49; *Davie v. King,* 37 N. C., 205; *Thompson v. Newlin,* 38 N. C., 340; *Johnson v. Johnson, id.,* 429; *Lemmond v. Peoples,* 41 N. C., 140; *Hudson v. Pierce,* 43 N. C., 128; *Green v. Lane,* 45 N. C., 114; *Lea v. Brown,* 56 N. C., 147; *Allison v. Allison,* 56 N. C., 237; *Dunlap v. Ingram,* 57 N. C., 183; *Clark v. Bell,* 59 N. C., 274; *Mabry v. Stafford,* 88 N. C., 604.

LAWSON HENDERSON v. JOHN D. HOKE.

Where A. purchases the land of B. at execution sale, and assigns his bid to C., and it is again sold under an execution against C. and bought by D., and A., conferring with C. to defeat D.'s title, takes a deed from the sheriff, a court of Equity will compel him to convey to D.

THE original bill charged that in April, 1826, one Joseph Wier entered into recognizance to the State in a large sum in the Superior Court of Lincoln, which he forfeited in October, 1826; that such proceedings

were thereon had that judgment was rendered in favor of the State, on which execution was sued out and a sale made by the sheriff of Lincoln on 22 October, 1827, of the lands in controversy in this suit, when the plaintiff became the purchaser, and afterwards took the sheriff's deed, dated 26 November, 1827. The title of Joseph Wier to the lands purchased by the plaintiff, which were distinguished in the pleadings and depositions by the designation of the Home Place, is stated in the bill to the following effect: That of a tract containing two hundred and thirty-three acres, part thereof, Joseph (120) Wier was the grantee of the State by patent dated 30 November, 1812; that of nine hundred acres, the residue thereof, Robert Wier was seized in fee, and by deed dated 6 March, 1809 (which was exhibited), conveyed the same to Joseph in consideration, as expressed in the deed, of one thousand dollars; that Joseph was the son of Robert, and that the plaintiff was unable to ascertain whether any part of the consideration was paid or not, and that the father and son resided together on the land until 1826 or thereabouts; but that the defendant and one John Wier, hereafter mentioned, alleged that no part of the consideration was paid, and that the deed was voluntary and fraudulent against the creditors of Robert, and was particularly designed to defeat one Robertson, who was then prosecuting a suit against the father, in which he recovered a large sum. This recovery the bill stated to have been satisfied without a sale, leaving Robert still in possession of a valuable property. It was not stated clearly in the bill whether the plaintiff insisted upon the foregoing conveyance as a valid title in Joseph or not, as against the creditors of the father, and it was rather to be inferred from the whole bill that he did not. The answer, however, affirmed directly that it was expressly fraudulent; and the proof by the witnesses was clear that the payment of the consideration was merely fictitious, being made in the depreciated Continental money of the Revolution. On the argument the counsel on both sides admitted that deed to be void, and so treated it as between the parties to this suit. As a further title in Joseph, which was insisted on as a valid and subsisting one, the bill stated that John Wier obtained a judgment against the said Robert and sued execution, on which the sheriff, on 21 October, 1822, sold the land which had been conveyed by Robert to Joseph, when the defendant became the purchaser at the price of twenty dollars. That this purchase was made in trust and for the use and benefit of Joseph Wier, who paid to the defendant the money advanced by him, or that within a few days after the sale Joseph Wier purchased those lands from the defendant, and being in posses- (121) sion, claiming under his father's deed to him, took a deed of release for the land from the defendant, with a transfer of his bid and

an order to the sheriff (Coulter) to make a deed to Joseph Wier instead of the defendant; and that Joseph Wier then paid or secured the price to the defendant, and afterwards satisfied it, in particular, by the sale of a slave called Anthony to the defendant. The bill further charged that this arrangement was communicated to Coulter, the sheriff, who was directed by the defendant to convey to Joseph, and that the latter applied to him for that purpose, but that he did not execute the deed because the parties had not furnished him with the boundaries of the land so that he could describe it; that Joseph Wier in 1825 committed a capital felony, and that being in prison in the latter part of the year 1826 on that charge, with a view of defeating his creditors, and particularly the State, of the benefit of his forfeited recognizance, he came to some secret agreement with the defendant whereby, without adequate consideration, he abandoned all claim to the said land, and allowed the defendant to take the sheriff's deed to himself; or that the defendant, having or pretending some other claim to the said land under some other purchase at sheriff's sale then recently made, applied to Joseph Wier, then in prison, for the inspection of his title papers, that he might ascertain the parcels of which the whole tract consisted and have it surveyed for the purpose of taking deeds under such last pretended purchases or claims; that said Joseph Wier delivered to the defendant or his surveyor some of his title papers for the purpose aforesaid, and gave him a letter or sent him a message to his, Wier's, wife (who was residing on the land) to put into the defendant's hands his other title papers, which were at home, or give him free access to them for his inspection and information, and that he did have such access to the papers and took them into possession, when about Christmas, 1826, he went upon the land to survey it; that among the deeds and papers which thus came to the hands of the defendant by
(122) the delivery of Joseph Wier or his wife was the release or transfer made by the defendant himself to the said Joseph as aforesaid, which either upon the fraudulent agreement between the defendant and the said Joseph before alleged was canceled without having been proved or registered, or was, without the privity or consent of the said Joseph, spoliated and suppressed by the defendant; that the said Joseph was convicted and executed for the crime with which he stood charged, without having received a deed from the sheriff, and that soon afterwards the defendant procured the sheriff (Coulter) to execute to the defendant a deed bearing date 26 April, 1827, under his purchase of 21 October, 1822, in which was included much more land than the defendant actually purchased, and particularly the tract of two hundred and twenty-three acres before mentioned, which was granted to Joseph Wier himself, and had never belonged to Robert Wier. The

bill further stated that the defendant, until within a very short time before he obtained the deed from the sheriff, did not claim the land under his purchase of October, 1822; that he did not list it for taxation as his property, nor pay the taxes, nor receive rent therefor from Joseph Wier, who occupied it as owner; that after his purchase the plaintiff entered into possession and now occupies the land.

The prayer was for a discovery of the agreements between the defendant and Joseph Wier; for the discovery and production of the release or deed of assignment by the defendant to said Joseph, that it may be proved and registered; and for a conveyance from the defendant to the plaintiff, and for general relief.

The answer admitted the title of the plaintiff under the execution in favor of the State against Joseph Wier, as stated in the bill; also the deed from Robert to Joseph of 6 March, 1809, and affirmed to be fraudulent against creditors. It also admitted the judgment and execution in favor of John Wier against Robert, and insisted that the land was subject thereto. It admitted the defendant's purchase at the sale under that execution in October, 1822, and that he took the deed from the sheriff on 26 April, 1827. It admitted that the tract of two hundred and thirty-three acres never belonged to Robert, (123) but was granted to Joseph; but stated that the defendant was ignorant of that fact when he took his deed. In relation to this subject, the answer stated that he was ignorant of the boundaries of the land, and for the purpose of procuring this deed from Mr. Coulter he employed Mr. Cansler, then the sheriff of the county, to make a survey. That Mr. Cansler had procured from Joseph Wier, while in his custody, his title papers, and that from them and the information derived by Cansler from Joseph Wier he made the survey and ascertained the boundaries and drew a plat, which by mistake included the two hundred and thirty-three acres, according to which Mr. Coulter conveyed; but that as soon as the defendant discovered the error he disclaimed the title to that part of the land of which the plaintiff had notice. The answer further stated that the defendant entered into the lands in the spring of 1827, and was peaceably possessed until, during his absence from the county in the succeeding autumn, the plaintiff, by threats or promises to his tenants, obtained possession, and compelled the defendant to sue at law to recover it.

The answer denied positively the contract or agreement between the defendant and Joseph Wier, as alleged in the bill, and stated that the allegation "that at the time the defendant purchased from Coulter, or at any time afterwards, he transferred his bid or right to said Joseph is entirely untrue." The answer set forth the transactions in which such a transfer was made, but affirmed that there was none of

the Home Place. It stated that in March, 1821, a tract of land containing six hundred and forty acres, situated on Muddy Fork, and belonging to Robert Wier, was sold at the suit of one Magness and purchased by the defendant at sixty-three dollars, and that at a sale under the execution of John Wier against Robert Wier in July, 1822, the defendant purchased another tract containing three hundred and thirty-three acres, situated on Suck Fork, at one hundred and fifty-three dollars; that these last were distinct parcels from the Home Place, situated several miles distant from it, and that they were (124) worth about fifteen hundred and fifty dollars; that he did transfer to Joseph the parcel of three hundred and thirty-three acres, and at the same time held his bond for three hundred and twenty-one dollars and thirty-seven and a half cents, on which subsequent payments were made, to the amount of one hundred and forty-five dollars; that the defendant called on Joseph Wier to repay him the sums he had advanced when he bid off said lands and to discharge the balance due on said bond, and that thereupon it was agreed that the defendant should take the slave Anthony into possession as a security for the debt, and that his hire should discharge the accruing interest; that about a year afterwards, finding that Joseph Wier would probably become insolvent, he purchased the slave absolutely and took a bill of sale from Joseph in discharge of the debts for which he was mortgaged, as aforesaid; that said slave was really the property of Robert Wier, and that afterwards he also conveyed him to the defendant. The defendant exhibited with his answer and as a part of it the bills of sale: that by Joseph, bearing date 21 March, 1825, and expressed to be in consideration of three hundred and twenty-one dollars and thirty-seven and a half cents then paid; that by Robert, bearing date 12 March, 1827, recited that Robert had sued the said Joseph in equity for said slave (amongst others), but that the defendant had purchased him from Joseph for a fair consideration expressed in his bill of sale; and then, in consideration of the sum thus paid to Joseph, conveyed all the right and title of Robert, either at law or in equity, of and in said Anthony, to the defendant. The defendant also exhibited, as parts of his answer, two receipts of the sheriff for the sums of sixty-three dollars and one hundred and fifty-three dollars for the purchase-money of the Muddy Fork and Suck Fork tracts, dated as stated in the answer; and on the latter there was an endorsement by the defendant bearing date 24 July, 1823, that he had "received full satisfaction from Joseph Wier for his claim of the within." The answer then denied positively that the price of the slave went towards paying for the Home Place, or that the defendant ever received from

Joseph Wier or any person for him one cent on that account, (125) or that the defendant ever informed the sheriff, Coulter, or any other person, that he had released the Home Place or his bid to the Home Place, now in controversy, to said Joseph; but admitted it to be probable that he told Coulter that he had released or intended to release the other two tracts. The answer further admitted that it was true that he also intended that Joseph or his father might redeem the land in controversy upon the payment of the purchase-money with a reasonable compensation; and that for that reason they were permitted to remain in possession without rent, the defendant expecting that they would pay the taxes out of the profits. The answer denied, therefore, having made any written transfer of the Home Place to Joseph Wier, and also the suppression of any such. It stated that Mr. Cansler had Joseph Wier's papers in possession for a considerable time, and after examining them and ascertaining the location of the land in dispute, he delivered them to the defendant as the evidence of defendant's title; that among them there was but one release from the defendant, and that it did not relate to the Home Place but to the tract of three hundred and thirty-three acres before mentioned.

The answer then stated that the defendant had another and further title to the Home Place, which he insisted on as a bar to the relief of the plaintiff, at all events. It set forth that Joseph Wilson, Esq., obtained a judgment against Robert Wier, and upon execution thereon had the Home Place sold, and became himself the purchaser on 23 October, 1826, and in consideration of one hundred and three dollars sold it to the defendant on 19 January, 1827, and directed the sheriff to convey to the defendant, which was accordingly done, 21 January, 1828. The defendant exhibited as part of his answer the sheriff's deed last mentioned, which described the land by the same metes and bounds with those set forth in the subsequent deed of Coulter of 26 April, 1827; and he also exhibited two written instruments executed by Mr. Wilson, 19 January, 1827, by one of which, after reciting (126) his judgment and execution against Robert Wier, and his purchase of two tracts of land under them, of which one was that on which Robert Wier lived and claimed by Joseph Wier, Wilson, in consideration of one hundred and three dollars, transferred to the defendant the balance due on the judgment, and all the interest acquired by his purchase of that tract, and agreed to refund the price if the defendant should lose the land, and by the other he directed the sheriff to convey to the defendant the land purchased by him, Wilson, "where Robert Wier now lives, and where Jo. Wier did live, meaning the eight-hundred-acre tract on Buffaloe, which Colonel Hoke now claims on a purchase

as the property of Joseph Wier in October, last, on a sale made by you as sheriff." The judgment of Wilson was rendered by a justice of the peace, 18 July, 1826, and there was an order of sale in the county court in the same month.

The plaintiff thereupon filed an amended bill, which charged that the purchase of Wilson and the sheriff's deed thereon to the defendant did not pass any title to the defendant for the several reasons following: that Robert Wier had no title to the lands, because whatever interest he had was sold at the execution sale in October, 1822, and purchased by the defendant and transferred to Joseph Wier; that, at all events, Wilson's purchase was void from the manner in which it had been conducted and the circumstances under which it took place, and that Robert Wier, if he had any interest in the land, had only a mere equity, which could not be sold, especially at the instance of Wilson. In support of these propositions the amended bill charged that Robert Wier exhibited his bill in the court of Equity against Joseph Wier in February, 1826, in which he alleged that the deed of 1809 made by him to his son was voluntary, except that Joseph engaged, in consideration thereof and of a conveyance of a number of slaves made at the same time, to maintain Robert and his wife comfortably during their lives; that Joseph became dissipated, so that it was probable he would be unable to do so, and that the father and mother would be left destitute, and that in consequence thereof they came to (127) a new agreement in 1818 or 1819, whereby the negroes, about twenty in number, were to be equally divided between them, as well as the crops of that year, and Robert should have the Home Place and the Muddy Fork tract, and that Joseph should convey those lands to his father, and also one-half of the negroes at the end of the year, and have the other half of the slaves and the other lands for himself; that no such conveyances were made, but that Joseph had sold twelve of the slaves (which are named, and of which one was Anthony aforesaid), and the remainder (ten in number) were in the possession of Robert, except two, which had lately been seduced from him and held by other defendants for the benefit of Joseph; and that the said Robert prayed thereupon that an actual division of the slaves might be made, and those sold by said Joseph should be allotted as his share, and the remaining ten, not being more than one-half in value, allotted to said Robert; and that said Joseph should convey to him the said two tracts of land and such of the slaves as should fall to the part of said Robert in such division; that Joseph Wier did not answer the said bill, but that it was taken *pro confesso* against him; and that upon the hearing of the cause in April, 1827, a decree was made in favor of the plaintiff Robert, and that Joseph should convey to him the said

two tracts of land, and also the ten slaves mentioned, among whom Anthony was not included.

The amended bill then charged that this decree was never performed so far as respected the actual execution of conveyances; that Mr. Wilson was the solicitor and counsel of Robert Wier, who filed and prosecuted the said suit; and that pending the same, and before the hearing, he instituted his action against Robert Wier, and upon his execution sold the said two tracts of land, and purchased the same at the price of twenty-seven dollars, although they were worth five or six thousand dollars. The amended bill further charged that those tracts of land were situated several miles apart but yet the sheriff put them up together, and said Wilson purchased them as one lot; that Wilson took, on 21 April, 1827, a sheriff's deed to himself for the tract (128) on Muddy Fork, expressed to be in consideration of twenty-seven dollars paid for that, which amounted to an abandonment of the other, of all of which the defendant had notice. The amended bill then interrogated the defendant as to the date of the bond for three hundred and twenty-one dollars and thirty-seven and a half cents and its consideration, and who attested it, and whether Joseph Wier gave defendant any other bonds since October, 1822; for what amount and by what persons witnessed, and whether he did not come to some agreement, and what, with Joseph Wier, touching the Home Place; and the prayer was that the defendant might be restrained from setting up his sheriff's deed under Wilson's judgment and execution as a title at law, and might be compelled to convey to the plaintiff.

Accompanying the bill were exhibits of the sheriff's deed to Wilson for the Muddy Fork tract, as stated in the bill, and a transcript of the suit of Robert Wier against Joseph, and the decree therein, of the tenor and effect charged by the plaintiff.

The answer to the amended bill admitted the suit between Robert and Joseph as charged, but did not admit the allegations of Robert in his bill to be true, and left the plaintiff to his proof, and insisted that if they were true, yet Robert Wier had an interest legally subject to sale and execution, being the whole trust of the land; and that if the defendant did not by the sheriff's deed obtain a legal title under the sale the same could not prejudice the plaintiff, who is the defendant at law, and therefore the plaintiff is not entitled to any relief here. The answer denied that Wilson purchased both tracts together, and averred they were sold separately, though the defendant was unable to set out the price of each, and insisted that the mistake in stating the consideration in the sheriff's deed to Wilson, or the act of the sheriff and Wilson on 21 April, 1827, could not affect the defendant's

(129) purchase from Wilson made on 19 January, 1827, but that he had a right thereunder to take a deed for the Home Place.

The answer then denied that the defendant did agree to convey to Joseph in fee, at any time after Coulter or Cansler had conveyed to him, and stated that "as far as he ever did agree with Joseph (and that was before the execution of the deed to him by either sheriff) was that he would release, as stated in his original answer, but that he never did release his interest in the Home Place, though he always intended to do so, provided his money advanced in the purchase of those lands should be paid back to him, with a reasonable profit upon it." The answer then stated that the defendant was a merchant, and as such dealt largely with the Wiers, father and son, and had many notes of theirs, but that he is unable to specify them except that for three hundred and twenty-one dollars and thirty-seven and a half cents; and as to that one, he is unable to state the consideration, the date, or whether it was attested.

Upon the hearing all the exhibits annexed to the pleadings were read, and also another exhibit filed by the plaintiff, namely, the copy of a deed for the same lands, bearing date 10 March, 1827, made by Mr. Cansler, the sheriff, to the defendant, purporting to be under a purchase made by the defendant on 23 October, 1826, under sundry executions against the estate of Joseph Wier, at the instance of Fullenwider and others.

Numerous and voluminous depositions were also read on the hearing, many of which it is not necessary to set out at large.

It was clearly proved and admitted on both sides that the conveyances of the lands and slaves from Robert to Joseph in 1809 were fraudulent as against John Wier and his other creditors at that time.

John Coulter stated that he was the sheriff of Lincoln in 1822, and that the executions of John Wier against Robert came to his hands, and that under them the tract of three hundred and thirty-three acres was purchased by the defendant in July; and that at October (130) court following, the home tract, on which Robert and Joseph lived, supposed to contain about one thousand acres, was bid off by the defendant; that either at the time of the last sale, or when the deponent went to receive the money on it that week, and certainly not later than January court, 1823, the defendant directed him to make the deed to Joseph Wier, saying either that he had purchased for Joseph or that he had transferred his purchase to Joseph Wier, but which was the particular expression the witness did not recollect positively. The witness was positive, however, that for the one reason or the other the defendant then directed him to convey the Home Place to Joseph Wier; that said Joseph often called on him for a deed, which he could

not make for want of information as to the boundaries; and that while in prison for the felony, some time in 1826, said Joseph sent for him and again requested him to execute the deed, which the witness declined for his former reason; and that thereupon said Joseph said that he would get his title papers from home and make out the description, and witness promised that when that should be done he would make him a deed. The witness further stated that at April Superior Court, 1827, at which time the judgment was taken for the State upon the forfeited recognizance entered into by Joseph Wier in April, 1826, the defendant applied to him for the first time to execute a deed for the Home Place to him, the defendant; that witness declined doing so, replying that the defendant had never claimed the land, and had directed him to convey to said Joseph, whereupon the defendant said that said Joseph had nothing to do with the land, and insisted on having a deed; and that then the witness went himself to see Wier in the jail, and inquired what he must do, and was told by him to make the deed to the defendant, and that he, Wier, had nothing to do with the land; and that accordingly he immediately made to the defendant the deed of 26 April, 1827; that witness did not know the particular land, but objected at first that, according to the boundaries, much more than one thousand acres would be conveyed, to which defendant replied that it made no difference, as the boundaries (131) included the land he did buy.

Michael Goodson stated that he witnessed a written instrument of release or transfer made by the defendant to Joseph Wier of the Home Place on Buffalo Creek, where Joseph Wier then lived; that it was read to Wier and the witness by the defendant, and executed in the defendant's own store in the year 1822, as well as he can recollect, and was for the land sold by Coulter, late sheriff, to defendant, under John Wier's execution against Robert.

The defendant did not cross-examine the last witness, but for the purpose of discrediting him examined six persons to his character, all of whom spoke more or less to the impeachment of his moral character, and some of them explicitly stated that he ought not to be believed on oath, according to their knowledge of his general reputation, unless supported by corroborating circumstances.

In answer to that testimony the plaintiff read the testimony of Joseph Green and Samuel Green. The former stated that in 1827, several weeks before the sale for the forfeited recognizance, Goodson requested this witness to purchase a part of the land for him, as he said that he was not then able to do so himself, and that the witness Green expressed a doubt of the title; that Goodson then stated that Joseph Wier had managed so as to get all the titles into his own name;

that John Wier had judgment against the old man and had the land sold, and John Hoke purchased it; that he, Goodson, was at the court-house during a court, and Joseph Wier requested him to go with him to Hoke's, saying that Colonel Hoke had purchased his father's land and was about to make a deed or relinquishment to him (Joseph) for the same, and he wanted Goodson to attest it; that he went and became a witness to an instrument of writing by which Hoke transferred his title in that land to Joseph Wier.

Samuel Green stated that when the plaintiff made his purchase the defendant made known his claim to the land, and that shortly afterwards, being in company with Goodson, this witness (Green) asked him which of them he thought would hold the land, and Good-
(132) son replied that he expected Henderson would; that he, Green, then mentioned that he understood that Hoke had two claims to it—one under Wilson's purchase and the other under a purchase made by Hoke himself, several years before; but Goodson replied that Hoke had not that claim but had given it up to Joseph Wier, for that at a time when he was in Lincolnton Joseph Wier told him he was going to Hoke's house to lift a claim Hoke had on the land, and requested him to go and witness it; that they went together, and Hoke and Joseph had a settlement, and Mr. Hoke assigned his claim to Joseph Wier, and he, Goodson, became the witness to it.

Henry Coulter, the sheriff of Lincoln in 1826, 1827, and 1828, mentioned in the pleadings, stated that about 1826 he surveyed the lands for the defendant and in company with him, and that he embraced in the survey about two thousand two hundred and fifty acres, consisting of thirteen or fourteen tracts, including a tract of two hundred and thirty-three acres that was granted to Joseph Wier; that this last-mentioned tract was not included by mistake, for that all the lands were surveyed as those of Joseph Wier, which Hoke had purchased from the witness at sheriff's sale in October, 1826, under the executions of Fullenwider and others against Joseph Wier, and to enable the defendant to get a deed from the witness under that sale, and not to enable him to get a deed from Coulter under any former sale; that they were several days engaged in the survey, and that Hoke spent one of the nights at the house of Joseph Gladden; that they first went to the house of Joseph Wier for the purpose of examining his title deeds to ascertain his titles and the boundaries, and that Wier's wife produced her husband's papers for their inspection, but he did not recollect them nor whether Hoke took away any of them, or which. This witness then stated positively that the defendant did not set up any title to any of these lands under Robert Wier except as derived through Joseph Wier, and that his only claim at that time was under the sale of the

land as Joseph's under Fullenwider's execution; and that he (133) repeatedly said, expressly, that the title was not in Robert, but in Joseph alone; particularly, that at one time John Wier insisted to him that he would not get a good title under the execution against Joseph because Robert, the father, had filed a bill in the court of Equity against Joseph for a conveyance, to which the defendant replied that his title could not be affected by that, for that he, Hoke, had before purchased Robert's title at sheriff's sale and transferred it to Joseph Wier, and that now his purchase under Joseph must make his title a good one. The witness further stated that, accordingly, he executed the deed to the defendant, dated 10 March, 1827, in conformity with the survey and the sale under the executions against Joseph.

The defendant examined the above-mentioned John Wier to prove the deed from Robert to Joseph to be fraudulent; but neither party interrogated him to the conversation stated by Mr. Cansler. Upon his cross-examination by the plaintiff he stated that he came to Lincolnton after the sale in 1822, either at the same or next court, and there saw Joseph Wier, and in a short time went to the house of the defendant; that he seemed to be in a passion with Joseph and abused him, and regretted that the witness had not come a little sooner; that he might have let him have the land instead of Joseph. The witness said that Hoke then told him that he had just relinquished to Joseph the old place or Home Place, calling it sometimes by the one name and sometimes by the other, and also that Joseph had paid or satisfied him for it, as he understood him.

The defendant also examined Joseph Gladden, who was the witness to the deed of 1809 from Robert to Joseph Wier, to establish the fraudulent intent of it. On his cross-examination in that deposition, and on his original examination in another deposition taken by the plaintiff, he stated that while Cansler was surveying in December, 1826, the defendant went home with the witness and stayed all night, and that during the evening he, Hoke, took out a number of title deeds which he said he had received from Joseph Wier's wife, and examined and read them, and interrogated the witness respecting the lines, with the view of obtaining a knowledge of the boundaries of (134) the tract commonly called Wier's Home Place; that in looking through the deeds the defendant Hoke took up a paper, and upon opening it said immediately "that he knew that paper, for it was in his own handwriting and was a release which he had given to Joseph Wier for the Home Place, which he, Hoke, had purchased several years before under an execution against Robert Wier." The witness further stated that he and the defendant had just previously been conversing

about the suit in equity instituted by Robert Wier against his son Joseph, and that when Colonel Hoke stated the nature of the instrument he had given Joseph and which he, Hoke, then said he had in his hands, the witness remarked to him that Joseph could have defended himself on that title at any rate, for he expected there was no fraud in that, and Hoke replied that there was no fraud in that title, and fully sanctioned the witness' inference. The witness further stated that he was confident that the conversation and release spoken of related to the Home Place, and that the defendant expressly mentioned it as having been bought by him under John Wier's execution and transferred to Joseph by the deed or release several years before; and that he then claimed Joseph's title to the land derived through that release by virtue of the purchase under the execution against Joseph shortly before. To interrogatories on the part of the defendant, the witness stated that he did not recollect that he knew at that time that the defendant had purchased the two tracts on Muddy Fork and Suck Fork; but that, although he did not read the deed himself, he could not be mistaken in supposing it to relate to the Home Place, and not to these two tracts, because they only talked about the Home Place and no other.

Mrs. Wier, the widow of Joseph, stated that about Christmas, 1826, the defendant came to her house, in company with Mr. Cansler, and informed her that he was about to survey the land, which he had purchased as her husband's lands a little while before, in order to get the sheriff's deed; that he said if he thought her husband would (135) get clear of the prosecution he would let him have the land again, as he had once done, but that he was then about to take possession of the land, though he would not hold it for what he had paid for it, but would satisfy her and her children for it; that he then told her her husband directed him to call on her for his title papers that were in a certain drawer, and she accordingly delivered to him several bundles, some of which he took away, but which in particular she did not state, as she was illiterate. To an interrogatory by the defendant whether she did not know that he had bought the Suck Fork and Muddy Fork tracts, and released them to Joseph Wier for the negro boy Anthony, she replied that she did not know of any sale of those two tracts, but that her husband had told her that the negro was mortgaged for the Home Place, which was sold to Hoke under John Wier's execution against Robert; and to another interrogatory by defendant, whether he did not tell her when he was surveying the land that he had first bought Robert's title, and then Joseph's and that under both he must hold it, she replied that she did not recollect such

conversation; she then stated that Hoke then told her that Robert Wier's title (then set up by him in his bill against her husband) was of no account, and that he, Hoke, would hold the land under Joseph's title, for that he had before bid off the land (when sold as Robert's) for Joseph, and had made Joseph a title to it, or that he had bid off the land and let Joseph have it; the exact expression the witness could not positively state, though she thought the latter were the defendant's words.

Robert Williamson stated that he had two conversations with the defendant. In the first the defendant, after remarking that he never made anything by buying at sheriff's sales, because he gave up his purchases, said that he had bought Wier's land, but had given it up again, and witness understood the defendant to mean all the Wier lands which he had purchased; that this conversation certainly occurred after 1822, but in what particular year he could not state. In a second interview (which took place after the defendant took the slave Anthony into possession) the witness applied to the defendant (136) to release to him two tracts of land which Joseph Wier had sold to the witness, and that Colonel Hoke informed him that he had not bought those lands in any of his purchases, but he professed a willingness to release, if witness wished for greater security, and at the same time said that Joseph Wier had satisfied him, or he was satisfied, for all the land he had bought, by a negro sold or mortgaged to him by Joseph.

William J. Wilson stated that after the year 1822 and, as he thinks, in 1825 or 1826, the defendant informed him that he had given up to Joseph Wier the purchases he had made at sheriff's sale of the lands of his father, Robert. The defendant regretted having done so as they were so dishonest and troublesome; that if it were to do again he would not give it up unless the family would leave the State. The defendant referred to the Home Place, as the witness clearly understood him. He could not say that he then knew that the defendant had purchased the two other tracts; but if he did, and if they were alluded to at all, the Home Place was also mentioned, and the one particularly meant by the defendant and understood by the witness as having been given up to Joseph Wier for Robert Wier, and Joseph or his family were then living on that place; and the defendant said that he once had it in his power to remove the Wiers, but could not do so now because he had given up the land, as before stated. To an interrogatory by the defendant whether he then knew that the defendant had given Joseph Wier a release for the other two tracts, he replied that at the time of the conversation he did not, as he thought, know it, but at the time of

giving his deposition (29 November, 1832) he did know it, and that it was produced on a trial at law between these parties for the land now in dispute.

Benjamin S. Johnston stated that he was the deputy sheriff who sold to Wilson under his own execution; that the two tracts are distinct and several miles apart; that he had no recollection whether they were sold separately or together, but that it was his practice to sell each
(137) tract by itself unless there were particular circumstances or directions to the contrary, and he did not remember any such; that he made a return of the sale of both for one sum, and thought that if they had not been sold together he would have set out the price of each, but he could not say how the fact was.

Badger for plaintiff.
Devereux for defendant.

RUFFIN, C. J., after stating the pleadings and proofs as above set forth, proceeded as follows: The object of the original bill is to set up the contract between the defendant and Joseph Wier, and on the footing of it to have a decree for a conveyance from the defendant of the title derived by the defendant under the deed made by Coulter. The equity is founded on the existence and validity of the alleged contract, and the destruction or suppression of it by the defendant, with or without the privity of Joseph Wier, with the intent to defeat the claim of the State on the forfeited recognizance, and to the prejudice of the plaintiff's rights as a purchaser under the State's execution.

In the case supposed by the bill there can be little hesitation in pronouncing the equity asserted by it to be sound.

The answer admits the facts, upon which the plaintiff's title rests, respecting the recognizance and the proceedings upon it, to be true as stated in the bill, although the answer does not raise the question, nor was it brought forward in the argument, yet the Court does not think it proper to overlook the doubt that might be stated, whether Joseph Wier had such an interest as could be affected by the lien and be sold under the execution. The Court is of opinion that he had.

We think it clear that the interest of a purchaser at sheriff's sale who has paid his money but not taken a deed, is a trust estate within the act of 1812. The whole equitable interest is in him, and
(138) he has a right to call for a conveyance to himself at any moment. Such an estate it is the policy of that statute to make available to the owner's creditors. The purview of the act is to treat the keeping of the legal estate by a debtor out of himself and in a trustee for him, and for him alone, as a fraud upon his creditors. It is therefore to

receive a construction, liberal and beneficial to creditors, by extending it to every case in which the legal estate is a naked one, and the whole beneficial interest is in the party or parties against whom execution is sued. As there is no third party in interest, there is no possibility of injury to any one. Although a purchaser at sheriff's sale of the estate of a former purchaser at a like sale gets, by force of the act, a legal title by the deed simply of his immediate vendor, without any deed from the sheriff who first sold, yet that is the effect of the express words of the statute, and is a consequence which furnishes no just argument for a construction which would take a case out of it that falls both within its words and policy. Probably the cases immediately in the contemplation of the Legislature were trusts, honest in their creation, and plainly expressed in the deed by which the trustee gained his estate. In that case the rights of the *cestui que trust* and trustee both appearing on the same instrument, the latter could not assert his title without showing that of the former. As that would be the whole beneficial interest, and be at all times obviously seen, the sale of it might well be treated as the sale of the land itself as against the trustee. But the act is not confined to such express trusts in its words. The phraseology extends it to all cases in which any other person is in any manner or wise seized in trust for him or them against whom execution is sued, and thus includes the cases of a declaration of trust by a separate and subsequent instrument, of a sale by articles where the vendee has paid the purchase money and done all the acts on his part to be performed, and of resulting trusts where the purchase money is paid by one person and the deed executed to another, and the like. These cases are within the mischief against which the act provides, as well as within the letter of the law; and an execution runs against the estate of the (139) owner of the entire valuable interest, without injury to others, and with as little prejudice to his own as in the case of express trusts. They may, indeed, present difficulties to the purchaser in respect of getting evidence at law to establish the trust, and also in showing it to be of that clear and explicit kind on which alone, perhaps, a court of law would be inclined to act, without resorting to the implication of it, from refined equities. But those difficulties do not prevent the estate of such a *cestui que trust* from being seized and sold on execution, though they may render it necessary that the purchaser should come into a court of Equity for the discovery, declaration, and establishment of the trust, and of a permanent evidence of it, on which his legal title depends. To that end, there would seem to be a jurisdiction here to decree a conveyance from the trustee, where the trust is not express, as the most simple, durable, and permanent muniment of title—one which the trustee, after the establishment of the trust and the purchaser's ownership

of it, could not, in good conscience, refuse to give. We need not embarrass this inquiry with the difficulty of a technical kind, whether the sheriff who sold under the first execution, or the defendant in that execution, be the trustee. The legal estate is in neither, after a sale of the land for the debt of the *cestui que trust*. The object is not to get the legal estate, but to get legal and accessible evidence of it. If the deed of Coulter, therefore, be not indispensable to the legal estate, it is convenient, necessary and proper, and, indeed, the only means known to the law to establish conclusively at law, in respect of land, that the first sale was in fact made and the purchase money paid. Had not Coulter made a deed to the defendant, and would not make one to a second purchaser, qualified to demand it, by having a deed from the sheriff, who was his immediate vendor, it seems to us that the purchaser would be entitled to a decree for such a conveyance as a link in a clear paper title. Here he has made a deed to the defendant which was executed before the plaintiff purchased, and, therefore, apparently, at least, vests the legal
(140) title in the defendant. Whether there is a jurisdiction in the Court of Equity to decree a conveyance by a purchaser at sheriff's sale, who gets his deed from the sheriff after the land so purchased by him had been sold under an execution against himself, it is unnecessary to say. It is not easy, in ordinary cases, to see the utility of a deed from the first to the second purchaser under such circumstances.

But in the present case the jurisdiction rests on other grounds. The defendant has the apparent legal title, and the plaintiff is in possession. The plaintiff does not claim under an execution against this defendant, but against another person, to whom, it is alleged, the defendant sold the land. That contract of sale is disputed, and the defendant is charged with its spoliation or suppression. The plaintiff comes to establish those facts and bring in possession, supposing it to be on a legal title—to be protected against a deed taken by the defendant in fraud of the contract made by him with Joseph Wier, and of the title now vested in the plaintiff, under which he may be harassed at law from time to time. In such a case the jurisdiction to give relief by calling in the deed or decreeing a conveyance is as clear, we think, as that for establishing the contract of sale to Joseph Wier.

If a purchaser of the defendant's interest, under execution, could have called on Coulter, in equity, for a deed, so may a purchaser of the land at execution sale, as the property of the defendant's assignee. If the defendant assigned his interest absolutely to Joseph Wier, and received the consideration money, so that, as between themselves, the defendant had no valuable interest in the land, it was liable to Wier's creditors, upon the same principles upon which, before the assignment, it would have been liable to the defendants. Wier was then the sole *cestui que*

trust; and the Court cannot, in executing a statute for the benefit of creditors, stop at the first use, as was done with respect to the statute, 27 Hen., VIII, and thus put it in the power of debtors to render ineffectual a remedial law and elude their creditors.

The decision, then, must depend upon the merits of the case as (141) shown by the proofs, whether there was a contract between the defendant and Joseph Wier whereby the equitable title of the lands became vested in the latter, and so continued, in respect of his creditors, up to the day on which he acknowledged his debt to the State.

In considering the case, the Court is relieved from any difficulty that might be raised, on the statute of frauds, either as invalidating a parol contract between the defendant and Joseph Wier, or in precluding the defendant from insisting on the statute at the hearing, because it is not relied on in the pleadings. The bill is understood as charging the specific agreement, on which the relief is sought, as a written agreement, although it also charges many parol declarations. Those declarations are charged to be of such a nature as presupposes a written contract, or are consistent with the existence of such an one. The defendant could not, therefore, have availed himself of the statute; and the Court, upon these pleadings, can only regard the evidence of such declarations as refer to a written instrument as being proof of its existence, and must treat the rest as merely tending to sustain the credit of the witnesses who depose to such an instrument.

The answer denies, directly and peremptorily, more than once, the agreement charged in the bill. It is a part of the law of evidence in this Court that such a denial is a bar to relief unless disproved by two witnesses, or by one and such collateral circumstances in corroboration, as show that the single witness is credible, and has in fact deposed to the truth in the particular case before the Court. But if there be two witnesses, or only one, and he sustained by incidental circumstances, clearly established, which leave no fair doubt in the judge's mind that the witness has in fact told the truth, then there is evidence which preponderates; and the most positive and unequivocal statement of the answer—coming, as it does, from an interested person—must yield to the opposing depositions of the disinterested witnesses or witness. The Court is then bound to determine according to the actual convictions produced by all the testimony and circumstances, taken together.

Of the existence of a written instrument in this case, whereby (142) the defendant sold and conveyed the land in dispute, or assigned his interest in it, in 1822, to Joseph Wier, there is direct evidence given by Michael Goodson, who deposes that he heard the defendant read it to Wier, and that he attested its execution. He does not profess to give its contents but in those general terms, nor does he state whether it was

in form a deed, or not, nor the consideration expressed in it, nor that upon which it was in fact founded. This is a single witness to the fact of its execution, and the only one, also, who speaks of its contents, from personal knowledge.

If the effect to be given to the testimony of this witness depended entirely upon his credit, estimated by the evidence to character, on the one hand, and on the other by that of his consistent declarations to the two Greens, it might not be deemed safe by any tribunal to found an adjudication on it. Those declarations raise a presumption that he may have spoken the truth in his deposition. But that, at most, only rebuts the contrary inference from bad character. Something more is necessary—something in the admissions of the defendant, of his veracity, in this particular instance, or of such other acts of the defendant as are consistent with the narrative of the witness and inconsistent with its falsehood. If other witnesses had seen the deed, for instance, or if the defendant were to declare expressly that he made such a deed, and such declarations were clearly proved, such evidence would satisfy the rule of this Court, and ought to satisfy every court, because no better proof of a lost or suppressed writing can be made.

Here, looking at the proofs judicially, and without any knowledge of the parties or witnesses, the Court cannot but say that the requisite additional evidence abounds.

To the witness Gladden the defendant made such declarations, under circumstances that rendered them peculiarly impressive on the witness, and gave them great weight with the Court. With the paper in his hand, he declared it to be a release from himself to Joseph Wier for the home place, which he had then lately bought as the property of Joseph
(143) Wier. The witness did not read the instrument, nor does he say that the defendant read it to him. But he states what is tantamount. The defendant professed to know the paper perfectly, as soon as he saw it, saying that he had himself written it. He had it then before him, and claimed title under it, as by it those lands became vested in Joseph Wier. This witness is unimpeached, and is, indeed, the defendant's own witness. His testimony establishes the written contract charged in the bill, independent of Goodson's evidence, and consequently sustains the credit and veracity of that witness. He also proves that the defendant had the paper in his custody in December, 1826, and then set up title under it. The defendant suggests that the paper of which he spoke was a release for the other two tracts, and that, as Gladden did not see it, he might be mistaken as to its nature. But the witness is positive as to the defendant's words—that it was a release for the Home Place. Besides that, he says that, from the colloquium, that tract must have been referred to, and no other. Under the paper then spoken of,

the witness, according to his understanding of its contents, as represented by the defendant, inferred that Joseph Wier could have successfully defended the suit brought by his father against him for the land which the defendant had bought as Joseph's, and that inference was expressly sanctioned by the defendant. Now, although Robert Wier claimed in his bill both the home tract and that on Muddy Fork, yet the defendant had not purchased the latter tract as Joseph's; he then set up no claim to that tract, and it is not embraced in his deed from the sheriff. That deed conveys only the home place, or what the defendant claimed as the home place. The release must, therefore, have extended to that, and to that only. Indeed, the only claim then asserted by the defendant to the home place was by virtue of the purchase of it as Joseph's, and for that reason it then concerned the defendant to establish Joseph's title to it to be good. The Home Place was sold under the execution of Fullenwider and others, but not the other tracts. The defendant does not rely on nor state that title in his answer—probably, because he has discovered that those judgments were (144) posterior to the recognizance. But during the survey, he claimed only under the execution sale of Joseph, which explains why the tract of 233 acres which had been granted to Joseph was included in that survey and in the deed which Cansler made on 10 March, 1827; that the defendant then asserted that claim only is sworn to by Gladden, by Mrs. Wier, and strongly by Cansler, and is to be inferred from a document exhibited by the defendant, which is more to be relied on than the recollection of all the witnesses. The defendant purchased the land as Joseph's on 23 October, 1826—on the same day Wilson purchased the same land as Robert's. After the survey, and so immediately after it that everything must have been fresh in memory, the defendant purchased from Wilson, and took the instruments of 19 January, 1827, in which Wilson transfers to the defendant his right to "the 800-acre tract on Buffalo, where Robert Wier now lives, and where Joseph Wier did live, which Colonel Hoke *now* claims as the property of *Joseph* Wier, under a purchase made in October last at sheriff's sale." It is not easy, with this document before us, and with the concurring testimony of so many witnesses, to admit a possible doubt that the defendant's only claim to the home place was then under Joseph, and that the release to Joseph, which he then had in his hands, was not for the home place, and no other. Mr. Cansler states that, during the survey, the defendant, in reference to the same suit between Robert and Joseph, insisted that the title of the latter was good, by means of the defendant's own transfer to him of his father's right, and that, consequently, the defendant's title to the same lands, under Joseph, must also be good. He traced his title to each witness in the same way, and the only difference between his

statements to them, respectively, is that he left the one to infer, naturally, that his transfer was in writing, and to the other he expressly stated that fact, and actually showed him the paper, which he said was the deed. The defendant insists that there was no release, because
(145) it was not seen by Cansler, through whom, the answer states, the defendant derived the possession of Joseph Wier's papers. But that fact, from which the inference is deduced, is contradicted by the witnesses. Cansler and Mrs. Wier prove that she delivered the deeds to the defendant himself when they began the survey; and Gladden proves that the defendant had them, during the survey, at his house, in the absence of Cansler. No doubt, Cansler used such deeds as were useful for the purposes of discovering the lines, and afterwards returned those to the defendant. It is not probable that the defendant would deliver to him any deed or paper that was not necessary for that purpose. Hence, Cansler does not seem to have seen any release whatever, though the defendant admits that one for the Suck Fork land was among the papers.

If to this direct evidence of the existence of the instrument be added the general conversations with Mr. Williamson and Mr. Wilson, to the latter of whom the defendant pointed particularly to the residence of the Wiers; the testimony of John Wier, that in a short time after the defendant purchased, he told the witness that on that very day he had transferred this land to his brother; the testimony of Coulter to repeated declarations to that effect, both by the defendant and Joseph Wier; and, superadded, the admitted fact that, although the defendant took his deed from Cansler under the sale of October, 1826, on 10 March, 1827, he yet took the deed from Coulter under his purchase of October, 1822, on 26 April, 1827, and never applied for it until that day, when the State was taking judgment against Joseph Wier, under which the land of Joseph Wier might be sold. The direct testimony is so entirely corroborated as to establish conclusions not to be refuted by the denials or explanations of the answer, upon any just principle for weighing evidence by a judicial or other mind.

Upon it the Court must declare that the written agreement between the defendant and Joseph Wier for the Home Place purchased by the defendant in October, 1822, must be established, as the same is charged in the bill, and that it afterwards came into the hands of the
(146) defendant himself. It follows, as the defendant refuses to produce it, and denies that it ever existed, that the defendant must be held to have suppressed or destroyed it.

It is probable that Joseph Wier voluntarily surrendered the instrument and concurred in the purpose of suppressing it. The motive of each of those persons for the act is obvious enough. Until the State was about to take judgment on the recognizance, in April, 1827, the

defendant was not aware that his title under Joseph could be invalid, and therefore asserted that, and that alone, to be his title. But when the lien of the recognizance was discovered, it then became important that the defendant should make out a title without deducing it through Joseph. To the latter it was immaterial, as he was to lose the land, at all events, whether the defendant or the State held it. But his wife proves a circumstance calculated to produce in his mind a strong bias towards the defendant. She says the defendant informed her that if her husband should get clear, he would let him have the land again, as he had once before done, and, at all events, if he held the land, he would not do so at the price he had given, but would make satisfaction to herself and the children. In this state of affairs the defendant applied to Coulter for the deed, and Joseph Wier consented to the execution of it, although he had, but a short time before, asked the sheriff to make the deed to himself. The rescinding the contract (if it can be called rescinding) without consideration, and under such circumstances, would be manifestly in fraud of the State, and would in this case be altogether inoperative, as the recognizance constituted a lien which would render a *bona fide* sale by Wier void. Whether the defendant has destroyed or withholds the contract, with or without the privity of Wier, is not therefore material. It is sufficient if it be suppressed, without regard to the intent of that act.

It is insisted, however, that there is no proof, more than an executory agreement, which is not binding, unless there was a valuable consideration, of which there is no sufficient evidence.

If this were an ordinary bill for specific performance, and (147) depended solely upon the sufficiency of the consideration to make the agreement effectual against the defendant as the contracting party merely, and without reference to his claim under Wilson, we think the evidence fully sufficient. It is unquestionable that the defendant, about the period of the transaction, received the slave, Anthony, from Joseph Wier. The defendant admits that he first took him in pledge for some debt, and afterwards, in March, 1825, took an absolute bill of sale in satisfaction of the same debt. The debt is stated in the answers to have been for the prices of the two other tracts of land, and the balance due on a bond for $321.37½, on which $145 had been paid—that is, $392.37½, without any previous interest. But the bill of sale states the consideration to be the precise sum of $321.37½, the amount of the bond without deduction, though $145 had been paid on it. The account of the defendant of the manner of paying for the slave is, therefore, altogether unsatisfactory. But that bond cannot be taken for granted without some proof, and there is no proof of its existence, nor of any debt from Joseph Wier to the defendant, nor of any dealings

between them, except for the lands; and the balance due for all the lands, after a payment of $145, would be $282, which, with the accruing interest, may have constituted the debt of $321.37½. This is consistent with the testimony of the witnesses. Mrs. Wier says that the negro was a payment for the Home Place; Mr. Williamson, that he understood him to be a payment or security for the money due for all the land; and John Wier, that at the day of the contract he understood from the defendant that his brother had *settled* for the home place. This is affirmative evidence of some satisfactory price in general terms, though as to the particulars it is not precise. But the want of precision (148) is fully supplied by another fact already found upon the evidence.

The defendant stands before the Court upon this part of the case as a spoliator, against whom everything that may be presumed is to be presumed. Although the consideration need not be expressed in the agreement, it is generally expressed, and must be supposed to have been in this. The contrary not being shown by the defendant, it is a presumption of fact from the course of business between man and man, and from the admitted dealings between the parties, that Joseph Wier reimbursed or secured the money advanced by the defendant; otherwise, the defendant would neither have released nor authorized the sheriff to convey immediately to Joseph Wier, but would have retained the title as a security.

But it is urged in argument that if the slave was the price of the land, he was not the property of Joseph, but of Robert Wier, and that the defendant derived a good title to him under the latter.

That, if true, could not affect the contract, for the defendant paid nothing to Robert, who, as between them, may have voluntarily made good his son's contract. The defendant has not been disturbed in his enjoyment.

It is said, however, that in law the purchase of the land inured to Robert, whose slave went to pay for it—at least, in respect of Robert's creditors. And it is contended that the land was consequently liable to Wilson's execution.

It might be questioned whether the defendant can be allowed that argument. It is inconsistent with his own answer, in which he affirms that the slave was not the price of this land, but the payment for other debts.

But, yielding the position that the negro was the price, it is not perceived how it can help the defendant. It is admitted that the deed of 1809 was fraudulent, and that the land was liable to Robert Wier's creditors. But it was once sold for his debt, in October, 1822, and bought by the defendant. It could not be sold again by another credi-

tor unless Robert reacquired it. That the defendant's counsel insists he did, because the slave belonged to him.

If one person buys an estate for another, and with his money, (149) the trust certainly results to him who advances the price. But this is not a case of that sort. There is no evidence that Joseph bought for his father. It is not even alleged in the father's bill against the son, which sets up a different title to the land; and all the witnesses prove that this defendant stated Joseph, and not Robert, to be the person to whom and for whose benefit he transferred the land.

But what is the proof that the slave belonged to Robert, and not to Joseph? The allegations of the father's bill, and the proceedings on it, are not evidence against the parties to this suit, unless the defendant has made them so, as against himself, by taking a subsequent release of the slave from Robert. But if they were, that bill states Anthony to have been a part of the joint property of Robert and Joseph and that the latter had sold him; and the bill claims that he shall be considered a part of the son's share, and thus affirms the sale.

If the negro is to be regarded simply as a part of the property fraudulently conveyed in 1809, then he was not the property of the father, in the sense now insisted on. As between the father and son, he belonged to the son. As against the father's creditors, he remained the father's. The donor's creditors can resort to the property fraudulently conveyed. That, and not what he got in exchange for it, by the donee, is the fund for the satisfaction of the creditor. If a debtor conveys property upon a secret trust for himself, and to the intent that the donee shall change its character and invest it in other property, doubtless the fund, of whatever it may consist, may be reached in equity, for the donee is but the donor's agent and trustee, and the purchase is made for the donor. But when the conveyance is made to the intent that the donee shall have the estate, and he asserts his title, both against the donor and his creditors, and deals with the property as his own, and with a part of it buys an estate, the creditor cannot take that estate at law, for that would be to give the creditor both the thing fraudulently conveyed and that exchanged for it. If Joseph's title to the negro was not (150) good under the deed of 1809, Wilson's remedy was, in this aspect of the case, against the negro, and not against the land. Joseph's title to the land was derived from this defendant; and as against Robert Wier and his creditors, the defendant's transfer was equally good, with or without a consideration moving from Joseph.

There was therefore no trust for Robert Wier in this land, which rendered it subject to Wilson's execution, and no estate was acquired under his sale, even if he, a creditor in 1826, could impeach the deed of 1809.

It may be said that the question upon that title is a legal question, and ought not to be decided here. That would be true if the object of the bill was to try that question. But it is not. The plaintiff seeks a discovery and declaration of a trust attached to the title derived under Coulter's deed, which is apparently the legal title. It is the defendant who brings forward the deed from Cansler as a bar to the relief by a decree for a conveyance. To every bill to enforce a trust the owner of the legal title must be a party; and so far the court of Equity must judge of it and determine in whom it is. If the plaintiff relies on his title as a legal title, then his relief is at law; but if he establishes a trust, and attaches it to a particular estate, apparently vested in the defendant under a conveyance which purports to convey a legal title, it will be different. The subject is, then, one of equitable jurisdiction, and the Court must see which is the legal title in order to determine whether the trust can be supported as arising out of it, or must fail, as arising out of a defective legal title. This case furnishes an example of both sorts. The defendant included in this deed from Coulter two hundred and thirty-three acres of land which never had belonged to Robert Wier, but belonged to Joseph, under whom the plaintiff purchased and took a deed. Again, the plaintiff alleges that Wilson bought both tracts at once, and therefore that the sheriff's deed is void. Now these are questions purely at law, and do not fall within the cognizance of this Court. The plaintiff does not seek relief in respect of the two hundred and thirty-three acres, because he has a trust, and the defendant the legal title; but he seeks to set aside that deed because it did not convey the legal title. But in respect of the Home Place,
(151) the relief sought by the plaintiff is upon equitable grounds, which entitle him to a conveyance from the defendant, if the estate on which his equity attaches be that on which the defendant would hold the land in the judgment of a court of law. If that were the only estate claimed by the defendant, the relief would be undoubted. We think he cannot defeat it by merely taking another deed from a stranger. He may bring forward another title, and if it be the true and better title, the relief may be defeated, because the alleged trust did not arise out of it, and it may be cannot be made to attach to it through the fiduciary character of the defendant. But if a party defendant does bring forward such a title for this purpose, he must not expect it to be a bar to an equity unless it be truly a distinct, good, legal title. That point must be determined in the cause before the plaintiff can be turned out of court. In England, it is probable that it would be sent to law upon an issue or a case, but that would be by an order in the cause, and because the Chancellor does not choose to encumber himself with a question on which he can get advice from

those within whose province it more particularly falls. In this State that practice has never prevailed, and would be ridiculous, as the same persons are the judges in both courts. As it is clear, therefore, upon the pleadings and evidence that the sale under Wilson's execution passed nothing, the title set up by the defendant under it cannot stand in the way of the plaintiff's relief.

There must be a decree for the plaintiff that the defendant convey to him in fee, with special warranty against himself and those claiming by, through or under him, by deed to be approved by the master, all the lands (except the tract of two hundred and thirty-three acres, mentioned in the pleadings as having been granted to Joseph Wier) which were conveyed by the sheriff, Coulter, to the defendant, and which were also conveyed to the plaintiff by the sheriff, Cansler, as in the pleadings mentioned, and stated in the deeds of Coulter and Cansler, which are exhibited, and that the defendant pay the costs.

Cited: Morisey v. Hill, 31 N. C., 68; *Patterson v. Bodenhammer, id.,* 98; *Rutherford v. Green,* 37 N. C., 126; *Hall v. Harris,* 38 N. C., 298; *Justice v. Scott,* 39 N. C., 116; *Frost v. Reynolds, id.,* 497; *Thigpen v. Pitt,* 54 N. C., 64; *Clement v. Clement, id.,* 185; *Ferguson v. Haas,* 64 N. C., 778.

(152)

ANDREW ALLISON ET AL., EXECUTORS OF RICHARD ALLISON, v. MILTON CAMPBELL, ADMINISTRATOR OF WILLIAM ALLISON, ET AL.

The jurisdiction in lunacy is strictly territorial; and a court of Equity in this State can neither charge his land in another, nor its proceeds in the hands of his heir *here,* for his support.

THE case made upon the pleadings and proofs was that the testator of the plaintiffs had been appointed by the County Court of Iredell, committee of the intestate William Allison, who was a lunatic; that he expended under the orders of the county court a large sum in support of the lunatic, whose only property consisted of a tract of land in Tennessee; that after the death of the lunatic his heirs, the defendants, sold this land and received the purchase-money. The bill prayed that the defendants might be compelled to pay the amount due to the plaintiff.

The case was argued at the last term, and by directions of the Court again at the present by

Badger for plaintiff.
Nash for defendant.

RUFFIN, C. J. Upon the second argument, all the points to which the counsel were desired to speak have been fully discussed, but the Court does not think it necessary to deliver an opinion upon more than the last, because upon that we are compelled to dismiss the bill.

The jurisdiction in lunacy cannot extend to lands out of the State. The courts of our country cannot order lands in another to be sold, nor effectually charge them. The application must be made to the tribunals where the estate is situate. This is admitted by the plaintiff's counsel, and shown by adjudged cases. *In re Duchess of Chandos,* 1 Sch. & Lef., 301; *Matter of Daniel Perkins,* 2 John. C. C., 124. But it was insisted that an order of the court having the jurisdiction over the lunatic's person, providing for his comfortable maintenance, would be respected and enforced by the courts of all other countries. It seems not, for (153) the cases cited lay it down that an inquisition of lunacy in another country is not recognized as an authority for disposing of his estate, and that, to that end, there must be proceedings in the country where the land is situate. What they shall be must depend upon the particular laws of each country. It may be that in Tennessee lands cannot be sold by the order of any court, for even the support of the unfortunate owner. At all events, no order of the Court here could reach them. It is, however, said that every disbursement here, made according to our laws for the benefit of the lunatic, while his person is within our jurisdiction, forms a just debt against his estate wherever it may be situate; and that, although there may be an impediment to enforcing it against the estate abroad, yet the courts of this State may and will give a remedy, whenever the estate be brought here or is under the control of one who is within our jurisdiction, in the same manner as if the estate had been always here. That may be true of personalty, and especially if it be brought here in the lifetime of the lunatic; for then it comes and is held as his estate, subject to the disposition of our courts. But even that would be by force of an order made in the matter of the lunatic. The Court could not entertain a bill for such a demand against the personal representative of the lunatic after his death. No such case is found. There is no debt of the lunatic, for he could not make a contract; neither is there a debt of the estate as a thing of strict right. We do not know of such a thing in the law. The Court, out of any property within the jurisdiction, will reimburse any expenditure made under its authority; but no order in lunacy creates a debt either against the executor or the heir. Upon the idea of a debt this bill is brought, and upon that alone could it be sustained. Suppose the defendants had not sold the land or after the sale had not come within our jurisdiction, the plaintiff could not have enforced the debt, as it is called, either here or in Tennessee. That shows that he has no

right, strictly speaking, for rights can never be lost by the residences of the parties, though remedies may thereby be affected. To sustain the bill, the plaintiff must make himself the creditor of (154) the lunatic and of the defendants as his heirs, or show a valid charge on the fund in the defendants' hands. No order of the Court could create such a charge; and there is no pretense for saying that the lunatic did or could contract personally, or that the law could raise such a contract by implication, either without or with the order of the county court. It is to be regretted that the plaintiff should not be compensated for his services and expenditures; but the Court does not see a ground on which he can have relief, and the bill must be dismissed.

PER CURIAM. Bill dismissed.

Cited: Dowell v. Jacks, 58 N. C., 420.

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1835

BENJAMIN BRYANT, ADMINISTRATOR OF JAMES BRITT, SR., v. JAMES SCOTT ET AL.

In a bequest of a residue of personalty, "to be equally divided" among the following persons, viz.: "E. B., M. P., J. V., and the children which my daughter T. had by J. S., and the children of my deceased son J., and the children of my son W." who, it appeared from the will, was then alive, *it was held*, that the division among the legatees must be *per capita*, and not *per stirpes*. (*Ward v. Stone*, 17 N. C., 509, approved.)

THIS was a bill filed by the administrator *cum testamento annexo* of James Britt, Sr., to obtain the advice of the court of Equity as to the mode of distributing the residue of the estate of his testator under the 14th clause of his will, which was as follows, to wit: "Item 14th. It is my will, after all debts against my estate are paid, that the residue of my estate not herein disposed of shall be sold by my executors, at public sale, to the highest bidder, upon a credit of six months, and the proceeds to be equally divided among the persons hereafter named, viz.: Edith Bryant, Margaret Parker, Julia Valentine, and the children my daughter Temperance had by John Scott, and the children of my deceased son James, and the children of my son William D. Britt, to them and their heirs forever." This residue consisted entirely of personal estate, the lands having been devised in a previous (156) clause to William D. Britt, his son, whom he also appointed one of his executors. Some of the legatees above named claimed a division *per stirpes*, whilst the others insisted upon one *per capita*. Upon the hearing at Hertford, on the Spring Circuit of 1833, his Honor, *Judge Norwood*, made an interlocutory order directing a division *per capita*, from which there was an appeal taken to the Supreme Court.

No counsel appeared for either party in this Court.

RUFFIN, C. J. The question made in this case has not been argued, but we do not postpone the decision on that account, as we think no argument could raise a doubt upon it. All the cases upon the subject were looked into and much considered by the Court in the recent case of *Ward v. Stowe,* 2 Dev. Eq. Ca., 509, and they clearly establish the correctness of the decree made by his Honor. The only difficulty in that case arose out of the word *heirs,* there used as the description of the donees of a residue, in which real and personal estates were complicated. We were finally of opinion that in that will *children* or, at any rate, *issue* were meant by it; and it then followed, of course, upon the authorities, as we thought, that the different families of children did not take collectively or by representation, but severally, and as individuals who came within the general description. Several Chancellors have, in cases like this of gifts to the testator's children and to the children of deceased children, expressed the apprehension that, in distributing *per capita,* they did not follow the intention; but they have never been able to find a ground for holding otherwise, and have thought themselves bound to that construction, although it might not be according to the intention, rather than adopt the opposite one, which obviously does violence to the words of the testator. The intention that the grandchildren should take *per stirpes* is conjectured from the reasonableness of it, as applied to the state of most families. But when the gift is made under circumstances which exclude all reference (157) to the statute of distribution, that conjecture must be given up; and when to that is added a direction for an *equal division* among all the donees, no court could feel safe in making an unequal division.

The present case has both of these distinguishing circumstances. One set of the grandchildren are the children of a son of the testator, who was then living, and, indeed, was the executor of the will. That brings it to the very point on which the leading case on this subject, *Blackler v. Webb,* 2 Pr. Wms., 383, was decided. That was a bequest of a personal residue equally to several of the testator's children by name, and to the children of a deceased child, and the children of a living child, without any words of division. At first, *Lord King* inclined that the grandchildren took *per stirpes;* but at length he was obliged to decree otherwise because the mother of some of the children was living, which showed that the testator could not have looked to a legal distribution in which grandchildren represent their deceased parents. That case is mentioned in all the subsequent ones, and has never been questioned. The rule, indeed, is not confined to cases in which a parent of one set of the donees is alive, but extends to legacies to "the children" of de-

ceased parents, as to A. and B., and the "children" of C., deceased, and the "children" of D., deceased, "equally to be divided between them." *Northey v. Strange,* 1 Pr. Wms., 340; *Butter v. Stratton,* 3 Bro. Ch. Ca., 367; *Lady Lincoln v. Pelham,* 10 Ves., 166; *Davenport v. Hanbury,* 3 Ves., 257. The difficulty, in cases of this kind, has always arisen on the description being by some term as "heirs" or "representatives," or "next of kin" or the like, which was thought to denote that the legatee was to make claim by representation, in which case his share ought to be that of a representative. We had a case somewhat of that nature before us at the present term in *Elliott v. Elliott,* on the word "distributee" in a family settlement. But a tenancy in common between "children" and "grandchildren," who are to take *equally,* is necessarily a gift to each individual, as such, and the distribution must be *per capita.* Whatever may be the wish of testators in particular cases, the judicial construction of such bequests is so thoroughly (158) settled that it cannot be disregarded.

The interlocutory decree was therefore proper, and it must be so certified to the Court of Equity of Hertford.

PER CURIAM. Judgment affirmed.

Cited: Hobbs v. Craige, 23 N. C., 338; *Hill v. Spruill,* 39 N. C., 246; *Roper v. Roper,* 58 N. C., 17; *Burgin v. Patton, id.,* 427; *Chambers v. Reid,* 59 N. C., 305; *Howell v. Tyler,* 91 N. C., 213; *Culp v. Lee,* 109 N. C., 677.

JOHN J. OLIVER v. THOMAS DIX.

A bill, either to rescind or to enforce the specific execution of a contract for the sale of land, cannot be sustained against one who had guaranteed the contract, without making the principal vendor or his representative a party.

THIS case came before the Court by way of appeal from the Court of Equity for Caswell County. The bill was filed on 13 March, 1834, and stated that the plaintiff was in possession of a part of lot No. 12 in the town of Milton and improving it, in the year 1818, under a purchase from some person not mentioned in the bill, and that one James Dix then, through the defendant Thomas Dix, as his agent, set up a claim to the same; that the plaintiff became satisfied that said James was the owner, and thereupon agreed for the purchase of his title at the price of ten hundred and fifty dollars, one-half payable in

ten days and the other half in three years; that this agreement was made on 9 October, 1818, with Thomas, as the agent of the owner James, and that the plaintiff then gave his two bonds, each for five hundred and twenty-five dollars, for the purchase-money, payable to James Dix as aforesaid. The bill further stated that the plaintiff was informed during the treaty that the lot was under an encumbrance of a deed of trust made by the said James to one Dabney to secure the payment of a debt to one Colquhoun of Virginia; and that it was a part of the agreement that the said encumbrance should be discharged by the vendor, and a reconveyance obtained from the trustee, and that a title should then be made to the plaintiff, by James Dix, within six months from the day of sale.

(159) The bill then charged that on the same day the agent Thomas (who is the defendant in this suit) gave to the plaintiff his bond, in which he obliged himself to cause the said encumbrance to be removed and the title made agreeably to those terms. The bond was exhibited with the bill, and was an obligation from the defendant to the plaintiff in the sum of five thousand dollars, with a condition (after reciting the contract, as above stated, as being made with James Dix, by his agent Thomas) that unless the obligor "shall cause to be released the premises from the said encumbrance, and shall cause my brother, James Dix, to make to him, the said Oliver, on or before the expiration of six months, such title as he, the said James, may have to the said premises, the said obligation shall be in full force"; which is under seal, and signed *"Thomas Dix, acting for James Dix."* The bill further stated that the plaintiff, in confidence of getting a good title, made expensive improvements, and paid to the defendant the bond for the first installment of the purchase-money some time after it became due, without objecting that the title had not been made; but that, not having received a deed, and finding that the defendant would not or could not procure one to be made to him, and that he had taken an assignment to himself from the said James of the other bond, he gave him notice that he would not pay the bond unless the encumbrance was discharged and a proper deed made to him, but that he was ready to make payment when that was done. The bill further charged that in consequence of not having a perfect title, the plaintiff had been unable to sell the lot, and that then it had so depreciated in value that, notwithstanding he had expended several thousand dollars in buildings, it could not be sold for a sum equal to the first installment already paid, and the interest on it. The bill stated also that the heirs of one George Samuel had set up title to the lot, which was unknown to the plaintiff until recently. That in fact the deed of Thomas Dix would not give the plaintiff a good title, and that after the delay of fifteen years the de-

fendant ought not to insist on the contract nor compel the payment of the last installment; but that the defendant had put the bond in suit, and in January, 1834, obtained judgment for the balance of the purchase-money and the interest thereon. The prayer was (160) for an injunction and for general relief.

The answer stated that the defendant paid large sums of money for his brother, James Dix, as his security, and was bound for the debt to Colquhoun, to secure which the deed of trust was made; that to enable him to provide a fund to meet those debts, the said James executed to the defendant a letter of attorney, which was exhibited, and bore date of 4 August, 1818, authorizing him to sell and convey absolutely several parcels of land, including the premises purchased by the plaintiff; that he accordingly made, on behalf of his principal, the contract with the plaintiff as stated in the bill, and gave, for the fulfillment of it, his bond as exhibited; that he, in a short time, paid the debt to Colquhoun, four hundred and sixty-four pounds fourteen shillings, Virginia currency, and took an order to the trustee to reconvey; and that accordingly Dabney did reconvey to James Dix, by deed bearing date 10 March, 1819; that on 27 March, 1819, he, the defendant, under the said power of attorney, executed a deed to the plaintiff, and offered to deliver it if the plaintiff would pay the first installment and secure the other; but learning that the plaintiff was much embarrassed, and fearing if he delivered the deed to him that the premises would be sold for other debts, he declined delivering it without such payment and security, but agreed that he would deliver it whenever he should be paid or secured, to which the plaintiff made no objection; that the first bond was sued on, in the name of James Dix, and judgment recovered; but the defendant received the money and applied it, with his brother's approbation, in part discharge of the debt for his said advances, and took an assignment of the other bond in further discharge thereof; that the plaintiff had been in peaceable possession ever since the contract, and made no objection to a want of title when he paid the judgment for the first installment, nor since, until the filing of the bill, but had repeatedly requested further time to make payment of the money then due; that he had deposited the deed to the plaintiff in court, to be taken out by him when the payment should have been made; (161) that the possession of James Dix, and of the plaintiff under him, was a perfect bar to the pretended title of the heirs of Samuel, and that in fact they never had title.

The defendant exhibited the acquittance of Colquhoun for his debt as having been paid by the defendant, and also the deed from Dabney to James Dix, both as stated in the answer. He also exhibited the deed to the plaintiff of 27 March, 1819, which ran throughout in the name

of "Thomas Dix, attorney in fact for James Dix," and was sealed and signed by Thomas in the same way. The defendant also exhibited an original deed from James Dix to himself, bearing date 2 April, 1819, for ground adjoining that sold to the plaintiff and part of the same lot No. 12, in which he called for the lines and corners of those premises as belonging to the plaintiff.

Upon the coming in of the answer there was a motion to dissolve the injunction which had been granted on the filing of the bill, which was refused, and the injunction continued to the hearing. The cause was then set down for hearing upon the bill and answer. At different days afterwards it was, under several orders, referred to the master to inquire whether the premises were discharged, and when, from the encumbrance of the deed of trust to Dabney, and whether James Dix had at that time the same title and interest in the lot that he had on 9 October, 1818, and what conveyance the defendant should offer or be able to make for the premises, and report any special matter touching the subject of the reference which the parties might require. It was further referred to the master to inquire what sum was paid by the plaintiff on the judgment for the first installment, and when; and to compute the interest thereon from the time of payment, and to inquire whether the same was received by the defendant, as the agent of James Dix, or in trust for his creditors, or in the defendant's own right, and for his individual benefit.

The master made report that in July, 1820, the plaintiff paid the sheriff on execution, for the principal, interest, and costs due upon the judgment the sum of $600.13, and that the interest thereon up
(162) to the making of the report in November, 1835, was $552, making together the sum of $1,152.13; that the defendant received the sum of $577 for the debt and interest to the time of payment for his own benefit, and appropriated it to his own use, giving the said James credit on his debt therefor. The master also reported that the encumbrance of Colquhoun was released, and that Dabney did reconvey to James Dix, as stated in the answer; that James Dix died in 1822, having made his will, whereby he devised all his estate, after payment of his debts, to William Dix; that said William had since died intestate, and this land, sold to the plaintiff, descended to the heirs of said William, only one of whom had attended the master, and that he refused to convey, and that the defendant had not offered to make any conveyance before the master. The defendant excepted to the report because it did not state that the heirs of Samuel had no title, and because it did not state that the title of the plaintiff would be good under the deed tendered to him and exhibited with the answer bearing date 27 March, 1819.

The case then came on upon the bill and answer, the report and exceptions, and a motion for further directions; and the court confirmed the reports and decreed "that the injunction before granted be made perpetual"; and, after declaring "that the defendant had received the money collected on the first judgment for his own proper use, and that he could not rightfully retain the same because it had been paid without consideration," decreed further "that the defendant should pay to the plaintiff the said sum of $1,152.13, with interest, and also the costs of this suit." From the decree the defendant appealed.

Nash for defendant.
W. A. Graham and J. W. Norwood for plaintiff.

RUFFIN, C. J., having stated the case as above, proceeded: It is clear that the deed offered to the plaintiff is altogether insufficient. No doubt the defendant intended to comply with the contract, and both he and the plaintiff thought he was doing so. But the deed does not purport to be the deed of James Dix, the owner, but of Thomas (163) as the attorney. Allusion is not had to the method of signing only. It may not be material whether it be signed J. D., by T. D., or T. D., for J. D. But the instrument must profess in its terms to be the act of the principal. Besides, if it had been in that respect good, it would not be effectual for the want of delivery. The defendant says, in the answer, that he did not deliver it because he thought it necessary to retain the title as security. It is now too late to deliver it, had it been a proper deed, as the death of his principal revoked the power.

Upon this ground alone the decree seems to have been based. It is not supposed that any other difficulty mentioned in the bill had any influence upon the court. There is no defect of the title of James Dix stated in the decree or found by the master. The plaintiff's possession constitutes a title against the Samuels *prima facie,* and upon those pleadings does so conclusively, for the cause is set for hearing on bill and answer, and the answer is precise in the denial of their title. Besides, the title is immaterial. The contract is only for such title as James Dix had after getting a reconveyance from Dabney, which has been done. The sole foundation of the decree, therefore, is that James Dix has not conveyed to the plaintiff, and therefore that the plaintiff is entitled to recover back that part of the purchase-money which he has paid, and interest on it, and be discharged from any further payment.

To sustain the decree it is necessary to regard the contract in this case as one between the parties to this suit exclusively, independent

of any authority from James Dix, and supposing him not to be bound by it. Even in that point of view, the plaintiff would have many difficulties to contend with. If two persons contract that one shall convey to the other the land of a third person, or that he will cause the owner to convey it, is it certain that equity will entertain a bill for specific performance, or to rescind the contract? Will not the parties be left to law in so obvious a case of speculation? But if a court of Equity can interfere at all, will more be done than to stop such part of the purchase-money as may remain unpaid, until the vendee can
(164) ascertain his damages at law for the breach of covenant by the other party? If he gets into possession by virtue of the contract, is he to retain it and not account for rents and profits, and yet recover back the whole purchase-money and interest, although the estate may have fallen one-half in price since the contract? If it had risen, and the vendee had recovered the increased value in damages, the vendor could not be relieved, for he could not make a title, and therefore could not have a decree for specific execution; and, on the other hand, would have no equity to compel the other to accept a return of the purchase-money merely because he could not fulfill his stipulations, though that inability was known when he entered into them. The like reasons seem to apply to one who buys from a person who he knows cannot make a title and is undertaking to sell that which belongs to another. It is a wager on the rise and fall of the property. The Court might restrain the collection of the present judgment, upon the ground of the defendant's nonperformance of his contract, for a reasonable time. But it is not seen how the plaintiff could have a decree for the sum formerly paid, for the bill is not for specific performance, but in respect of that sum is for a mere money demand, arising simply from nonperformance. It is a substitute for the action of covenant.

But the contract here is not of that character. It has been argued that it is, because James Dix is not bound by or in the instrument of 9 October, 1818, but the defendant only. That is true, if it be inquired whose deed that obligation is. It is, unquestionably, the bond of Thomas and not of James. The former seals it, and he speaks in it throughout, and the latter not at all. But it states that Thomas was, in fact, the attorney of James, and that as such he had made a contract for his brother to sell and convey the land to the plaintiff. He was in truth the agent of James, constituted by a sufficient letter of attorney, not only to contract but to convey. The instrument is evidence of the conract against James, and makes it binding on him. The transaction was prior to the statute of frauds, and a contract of James, by
(165) parol, made by his agent, was good. But it would be equally

so now, for the statute requires a writing to be signed by the party to be charged therewith, or some other person thereto by him lawfully authorized. Within the statute, the signature need not be that of the principal nor in his name, but that of the agent is sufficient. Besides, the contract was recognized and ratified by James himself. Over and above the answer, there is complete proof of that. James accepted the bonds, sued on one and recovered judgment, and endorsed the other. He conveyed other parts of the lot, and in the deed calls this portion of it the property of the plaintiff. But the answer, which is admitted by the plaintiff to be true, puts it beyond a cavil.

The case then is that the plaintiff contracted with James Dix, the owner, for the purchase; and that, as he was embarrassed and had encumbered the estate, he required a guarantee against the encumbrance, who would stipulate for its extinguishment within a reasonable period, and a conveyance of the title of the vendor, and that the vendor has died without conveying. As a mere personal covenant this Court has nothing to do with it were it not that the defendant has become the owner of the plaintiff's debt, which the Court will not suffer him to collect if the vendor will not make the conveyance which he contracted to make. But the defendant stands upon that instrument as the surety of his brother; and the plaintiff can have no relief on it against the surety without having the principal before the Court. The relief which the plaintiff seeks cannot be obtained but as a consequence of having the agreement rescinded. The Court cannot decree it to be rescinded without having the devisee of the vendor or his heirs before the Court. Justice to the defendant makes that indispensable. How would it look if, after making this decree, the vendor should still insist on the agreement, and file his bill to compel this plaintiff to accept the title, and what would there be to prevent it? It may be said that it is the business of the defendant to procure the conveyance, and that perhaps the heirs will not convey, even after decree, and the plaintiff ought not to be obliged to pay the money until the deed be approved and delivered. The neglect of the defendant may ulti- (166) mately affect the costs, but it cannot make him answerable to the plaintiff in the first instance, at least not in this Court. Disobedience to the decree is not to be anticipated. But if it were to occur, the Court would enforce obedience. If the case rested between the plaintiff and the heirs, they would be at liberty to modify, perform or cancel the contract. But the defendant has an equity as surety, that no collusion between the plaintiff and those succeeding to the vendor can overcome; and he has a right to insist that the plaintiff shall require the heirs to convey, or that he shall be discharged. He has also an

equity as assignee, not only that the plaintiff shall require the conveyance, but upon the heirs that they shall make it. Those persons could not by agreement rescind the contract so as to defeat the defendant's right, as assignee, to receive the money due on the bond. Much less would the Court allow the heirs to hold out against a decree, so as to throw the burden or the loss on the defendant. If the vendor would not convey, and the plaintiff elected not to pay upon a decree alone, without a deed actually made, the Court might then rescind the contract at his instance. But what then? Why it would stand rescinded for the benefit of the surety, as well as the other parties. Upon what terms? That the vendor, and not the surety, in case the former was able, should repay the purchase-money to the plaintiff, and then so much of it would be applied to the discharge of the defendant's judgment as would satisfy it. Moreover, the plaintiff would then be required to surrender the possession and account for the rents and profits; and if the surety were held liable at all upon his contract, he would have the advantage of that deduction. In what situation does the decree pronounced leave these parties? The plaintiff does not even offer to surrender the possession to anybody after seventeen years enjoyment without rent, is allowed still to keep possession and get back from the surety the whole purchase-money, with interest on it; and this not in a case where the vendor cannot make title, but only will not. If it be said that he is accountable to the owner for rent, and may have
(167) to pay him, so much the worse. Then that money will be taken out of the surety's pocket, to be put into his principal's; and the plaintiff wishes to carry on his suit in that way which will enable him or his vendor to do such palpable injustice.

It cannot be said that the contract has been abandoned by the delay. The plaintiff has been in possession under it all the time. It is nearly certain that each party thought it had been executed. At any rate the plaintiff waived the delay; he sought indulgence himself, and raised no objection to the title until he made it in this suit. But be that as it may, the principal contracting party must be before the Court, as well in a suit to have a contract declared null, upon the ground of laches and abandonment, as when it is sought to have it rescinded because it was improperly obtained, or cannot be performed. Any other course would sacrifice the rights of the defendant to enable the plaintiff to get rid of a losing bargain, or open the door to collusion against the defendant between the plaintiff and his vendor.

The injunction is merely incidental to the principal relief, and cannot be sustained unless those persons are parties against whom the principal relief is to be decreed. The bill, for these reasons, might have been dismissed on the hearing, or the court might have allowed it to stand

over for an amendment to bring in those parties, as to which last, however, its being an injunction cause might be a material consideration as to the terms. But without those parties the plaintiff could not have a decree, much less such a decree as this, which must have been greatly modified upon the merits, if those persons had been parties, whether by the decree the contract had been enforced or rescinded.

The opinion of this Court is that there is error in the decrees of the Superior Court of Equity in perpetuating the injunction and in ordering the payment by the defendant, to the plaintiff, of the sum of eleven hundred and fifty-two dollars and thirteen cents, with interest, or any part thereof, and in directing the defendant to pay the costs of this suit; and therefore that it be wholly reversed and the costs decreed against him; if already paid by the defendant, be restored to (168) him.

The Court does not dismiss the bill, inasmuch as it does not appear that any objection was made at the hearing of want of parties, and it is not raised in the answer. But the cause will be remitted to the court of Caswell, to be proceeded in further, according to right, and then the necessary amendments may be asked for. Doubtless that court will make it the interest of the plaintiff to speed the cause to a hearing against the parties he may bring in, and to prosecute it faithfully, by the control it has over the injunction, which is now continued till the further order of that court, as is also the question of costs.

PER CURIAM. Judgment reversed and the cause remanded.

Cited: Washburn v. Washburn, 39 N. C., 311; *Love v. Camp,* 41 N. C., 212; *McCall v. Clayton,* 44 N. C., 423; *Phillips v. Hooker,* 62 N. C., 196; *Bryson v. Lucas,* 84 N. C., 687; *Neaves v. Mining Co.,* 90 N. C., 414; *Cadell v. Allen,* 99 N. C., 546; *Hargrove v. Adcock,* 111 N. C., 171.

JOHN BIRD, ADMINISTRATOR, ETC., v. MARGARET GRAHAM ET AL.

1. A receipt from one of the next of kin, expressed to be for his part of the *personal estate,* but following a statement in which he is credited for his share of the *"perishable estate"* of the intestate, is not a receipt in full of the personal estate, so as to exclude him from claiming an interest in a negro belonging to the estate; particularly when it appeared that the sum for which he was credited was the same that each of the other next of kin received for their respective shares of the *perishable* estate, independent of their interest in the negro.

2. Where a negro remains in the possession of the administratrix, who is also the widow of the intestate, for twelve or fifteen years, no presumption of satisfaction will arise from the delay against one of the next of kin to prevent his claiming his interest in the negro, especially if it appears that he was under the belief that his infant child, and not himself, was entitled to the interest in the said negro.

THE plaintiff charged that his deceased wife, Charlotte, of whose estate he had been duly appointed administrator, was entitled, as one of the next of kin of Robert Graham, to a sixth part of the said Robert's personal estate; that after his intermarriage with her, and some time in the year 1812, the plaintiff received from the administrator of Robert Graham the sum of twenty-eight dollars, her share of that part of the said personal estate which had been sold by the said administrators, and gave his receipt therefor; that his said wife was more-
(169) over entitled to a sixth part of a negro woman, Oney, which had not been sold, and for which nothing had ever been received by himself or his said wife; and the plaintiff claimed that the defendant should account to him as her administrator for the sixth part of the said negro and her issue since born, and their hire and profits. The defendants alleged in their answers that Margaret Graham, one of the administrators of Robert Graham, had demands against the plaintiff to an amount exceeding the value of the one-sixth part of the negro woman Oney; that by an arrangement between the plaintiff and the said Margaret it was agreed that the plaintiff should allow these demands as a payment and satisfaction for and on account of the sixth part to which his wife was entitled of the said negro; and the plaintiff, in pursuance of said agreement, and having received actual payment of his wife's part of the residue of the personal property, did thereupon, in the year 1812, execute a receipt in full of all claims which he and his wife had upon the estate of Robert Graham. In the answer of the defendant Margaret Graham she declared that she had this receipt ready to be produced. By an agreement of the counsel of the parties filed in the cause it was declared that objections were waived to the testimony taken because of the nonproduction of the receipt. The court having examined that testimony thus rendered competent, and feeling not a little doubt in determining the disputed fact whether the receipt referred to by the parties, plaintiff and defendants, were a receipt in part only or a receipt in full, and deeming that to be a fact of much importance in the controversy, directed a special reference for the purpose of ascertaining the true nature of the receipt, and reserved the further consideration of the cause until the report should come in. The commissioner made his report, to which he annexed the original receipt itself, which was at the foot of an account in which

the administrators had charged the plaintiff with certain items, and given him credit by his share of "the perishable estate" of their intestate; and the receipt then followed in these words: "Received the above sum of eleven dollars and seventy-six cents, the balance of twenty-eight dollars and thirty-four cents, the amount due me (170) from the administrators of Robert Graham, Jr., deceased, for my share of the personal estate of said Robert Graham, Jr., deceased, as guardian for Robert Bird, one of the legatees of said estate." (Signed) "John Bird." It appeared that twenty-eight dollars and thirty-four cents was the sum received by each of the other next of kin, independent of Oney. It further appeared that the said negro woman remained in the possession of the defendant Margaret Graham, who was the widow of Robert Graham, Jr., until 1825, within four years after which time the present bill was filed.

Mendenhall for plaintiff.
Winston for defendant.

GASTON, J. The inquiry which the Court directed has been made. To the commissioner's report is annexed the receipt, the character of which we wished to ascertain, and that manifestly does not comprehend the plaintiff's or the plaintiff's wife's undivided interest in Oney. It follows upon a statement in which the plaintiff is credited solely for his share of the *perishable* estate of Robert Graham. There is no room to doubt that the term *perishable* was intended to exclude this interest, for we find the amount of twenty-eight dollars and thirty-four cents, at which the share of the perishable estate is stated to be, the same received by the other children who have retained Oney and her increase. There is then no proof that any payment or satisfaction was made to the plaintiff on account of the subject-matter of this suit, unless we are to presume satisfaction merely because of the delay in instituting it. Now it appears that Oney remained in the possession of Mrs. Graham, the widow and administratrix, until 1825, and no presumption during that time arises against any of the persons entitled to distributive shares. The benefit from her labor was a slender compensation for rearing her children, and this bill was filed in less than four years thereafter. Besides, it would seem from the terms of the receipt, which is given by the plaintiff as father and guardian of "Robert Bird," that the plaintiff supposed the right to be, not in himself, but in his child, and if so, he had no reason to fear (171) that the child's claim could be prejudiced during his minority. The lapse of time under these circumstances is insufficient to warrant the presumption of satisfaction, and the Court therefore declares that

the plaintiff, as administrator of his deceased wife, is entitled to an undivided sixth part of Oney and her increase. This declaration is made because the parties before the Court have expressly waived all objections because of the want of other proper parties. But a final decree cannot be rendered unless those who hold Oney and her increase are before the Court. To enable the plaintiff to have this done, the cause is ordered to be remanded to the Court of Equity for the county of Montgomery.

PER CURIAM. Cause remanded accordingly.

Cited: Bird v. Graham, 36 N. C., 197; *Peacock v. Harris,* 85 N. C., 151.

SAMUEL CHILD v. JAMES DWIGHT & COMPANY ET AL.

Neither the plaintiff nor defendant can direct the application of money received by the sheriff on an execution. The powers and duties of the sheriff in that respect are beyond the control of either party, as the law itself applies the money raised on an execution.

THE bill was filed 20 August, 1830, and stated that the defendants, Thomas Clancy and James Child, were partners and merchants in Hillsboro, trading under the name of Thomas Clancy & Co., and became largely indebted to sundry persons, and amongst them to the defendants, Dwight & Co., of Petersburg, in Virginia, by bond in the sum of eleven hundred and ninety-eight dollars and ninety-seven cents; and to the defendants, Bowers & Co., of Petersburg, by bond in the sum of eight hundred and forty-one dollars and fifty-five cents; that these creditors placed their bonds in the hands of the defendant Scott, as their attorney, to be put in suit, which was done accordingly, and judgments taken at August Term, 1828, of Orange County Court, from which appeals were taken to the Superior Court, and thereon final judgments apparently rendered for the whole principal and interest by confession at September Term, 1828; that no executions issued (172) thereon from that term, but that writs of *fi. fa.* issued from March to September, 1829, which Scott, the attorney, directed the sheriff not to proceed on, and that they were by his consent returned "nothing found"; that before any judgment, and pending the appeal, and after final judgment, Clancy & Co. made payments to Scott, on account of those debts, to the amount of more than one thousand dollars; that Scott was also indebted upon account to Clancy & Co., and to another firm in which they were interested, to the amount of seven

hundred dollars or thereabouts, subject to some credits by account, which might reduce the same to between four and five hundred dollars, and came to an agreement with Clancy & Co. to accept his own said debts in part payment of those of which he had the collection; that in fact the said pretended judgments were not rendered by the court, nor confessed in court, but the entries thereof were made privately on the record by the parties and clerk in the clerk's office.

The bill further stated that Thomas Clancy & Co. were indebted to the defendants Hill & Nalle, likewise of Petersburg, in a large sum, namely, five thousand two hundred and forty-three dollars and twenty-eight cents, by bond, in which the plaintiff was bound as their surety, and also nine hundred and seventy-nine dollars and seventy cents upon the note of Thomas Clancy & Co. themselves; that suits were instituted in Orange County Court on each of those debts, which were put to issue at May Term, 1829; that the plaintiff, being only a surety, left the defense to his principals, who withdrew the pleas at August Term, 1829, when judgments were rendered in both cases; and that in each a *cessat executio* was entered "until ordered by the plaintiffs," without the consent or knowledge of the present plaintiff; that writs of *fi. fa.* issued thereon from that term to the next on both judgments, which were levied on all the estate, real and personal, of Thomas Clancy & Co., and thereon writs of *venditioni exponas* issued from term to term until the filing of the bill, at which time the sheriff had them.

The bill further stated that execution was issued on each of (173) the pretended judgments of Dwight & Co. and Bowers & Co. from September, 1829, which was also levied on the whole of the property of Clancy & Co., and that another was issued from March, 1830, and was then in the sheriff's hands; that under three various executions of Hill & Nalle, and the other creditors, the sheriff had made sundry sales, and paid out of the proceeds different sums to the attorney Scott, amounting to as much as would be due to his clients if the said payment to him by Clancy & Co. and his debts to them were deducted; but that the said Scott refused to make any such deductions, and that he and Dwight & Co. and Bowers & Co. claimed out of the moneys that would be raised by a sale of the residue of the property of Clancy & Co. (which was to be made in a few days) a sufficiency to satisfy those executions, without allowing any of those credits, upon the ground that they were older and to be preferred to those of Hill & Nalle; that if those credits were not allowed, the plaintiff would be greatly injured, inasmuch as Clancy & Co. were insolvent, and the whole of their estate would be much less than sufficient to satisfy all the debts, and the deficiency on the judgment of Hill & Nalle against Clancy & Co. and the plaintiff would be levied from the plaintiff's estate. The bill

further stated that Hill & Nalle had directed the sheriff to apply the moneys raised by him to their execution against Clancy & Co. for the debt for which there was no surety, so as to throw the entire loss on the plaintiff, whose estate the sheriff was about to seize on the other execution, notwithstanding Clancy & Co. had instructed the sheriff, in writing, to apply the money raised on both the executions of Hill & Nalle, in the first place, to the execution against them and the plaintiff.

The bill then charged that the plaintiff was discharged from all liability on the judgment, by which he had been bound by the stay of execution, granted without his consent, and by the voluntary delay of the plaintiffs therein to issue it, and that the order of Clancy & Co. to the sheriff, as to the application of the money, was obligatory on him and the plaintiffs in the executions.

The prayer was for a discovery of the manner of taking the
(174) judgments of Dwight & Co. and Bowers & Co., and of the payments made to Scott of the sums due from him to Clancy & Co., and of the agreements relative to discounting them in part of those judgments; and in the meantime that those creditors and Hill & Nalle should be enjoined from suing the sheriff for or receiving from him any of the moneys then in the sheriff's hands, or that might be raised by the approaching sales, unless there should be enough to satisfy all the said debts or, at any rate, unless the judgment to which the plaintiff is a party should be first satisfied or be discharged from it.

The answer of Scott denied that the judgments of Dwight & Co. and Bowers & Co. were entered in the office, and stated that they were taken in term time, and in open court. It also denied that he received any payments on or had agreed to make any deduction of any debt of his own from those judgments. He admitted that certain payments had been made to him on other debts to the same creditors, which were placed in his hands for collection, and on which he had not brought suit on account of those payments and the promises of the debtors to discharge the balances thereon without suit, and that he had agreed that any debt of his own to Clancy & Co. should be received in the liquidation of these last-mentioned demands; that there is still a balance due on those debts, after making every deduction; that upon a statement of the mutual accounts between him and Clancy & Co. there is a balance in his favor of forty-four dollars and sixty-five cents, but that they are entitled to a further sum from him for a debt to Crane & Co. (in which they were partners) of two hundred and twenty dollars and sixty-two cents; yet that the said balance ought not to affect these transactions because, upon the failure of Clancy & Co., he had paid as their surety a much larger sum, and was still bound in like manner for heavy debts, which he would be obliged to pay.

The answers of Dwight & Co. and Bowers & Co. merely stated their ignorance of the actual transactions between their attorney and their debtors; denied any authority to the former to discount any debt of his own or any other person, and also denied the payment to them of anything on any one of their debts of which they had (175) confided the collection to him, as set forth in Scott's answer; and they insisted on their right to raise the whole amount of their judgments by reason of the priority of their liens.

The plaintiff obtained injunctions as prayed for by him, by an order of a judge out of court, which was dissolved as to Hill & Nalle, upon their answer at the first term. The bill was then continued as an original bill, replications taken to the answers, and the cause set for hearing, without testimony being taken by either party, and transferred to this Court for hearing.

Winston for plaintiff.
J. W. Norwood for defendants.

RUFFIN, C. J., after stating the case as above, proceeded: There is no equity upon the face of the bill against Hill & Nalle. If an agreement to stay the executions on the judgment, to which the plaintiff was a party, could have the effect of discharging him after he was fixed with the debt, there is yet no such agreement charged, nor anything from which it could be inferred. There is no particular time given to the debtors, no negotiation, no stipulation for delay set forth, but a mere memorandum by the plaintiff's attorney to the clerk not to issue the execution of his own accord, nor until it should be ordered. Besides, there was, in fact, no delay, for the plaintiffs did sue out execution from the very first term.

Then, as to the application of the money as between the two executions of Hill & Nalle, the question is one merely at law, where the present plaintiff could get all the relief he was entitled to by a motion upon the return of the executions. Indeed he did, in a few days after the filing of this bill, get in that way the benefit he seeks here, for the case at law between these same parties came to this Court, 3 Dev. Rep., 265, and was decided in favor of the present plaintiff, to the full extent of his rights. That case is, however, mentioned not for the purpose of showing that the plaintiff has availed himself of his remedy, but that he had another available and more obvious remedy. (176)

The directions of the principal debtors as to the application of the money raised from the sales of their property are perfectly ineffectual. The duties and powers of the sheriff in that respect were beyond the control of the plaintiff in the process, after delivering both,

and much more beyond that of the defendants therein. The law applies the money raised on an execution.

The case against the other defendants is equally weak. If an attorney could set off his own debts, instead of receiving money, and thereby bind his client, although he failed to pay him—for which proposition we know of no authority or reason—the agreement for such a set-off, much more a settlement upon that basis, is pointedly denied by Mr. Scott's answer, as is also the receipt of any payment whatever from Clancy & Co. on the judgments enjoined, and there is no proof to the contrary on either point. It is hardly necessary to remark that the objection to the method of entering these judgments is subject to the same observations. If the objection were valid in law or were open to the complainant, the existence of the facts on which it rests is denied and not proved.

The bill must therefore be dismissed, and with costs to each of the defendants, except Thomas Clancy & Co.

PER CURIAM. Bill dismissed.

Cited: Fox v. Kline, 85 N. C., 176.

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(177)

DANIEL CLAPP ET AL. v. SAMUEL COBLE.

1. A tenant, against whose landlord a judgment in ejectment had been recovered, may, after such judgment and before eviction, purchase in the title of the real owner, and hold the possession of the land as his own, under his newly acquired title.
2. *It seems* that although before eviction, after a judgment in ejectment, the covenant for quiet enjoyment is not broken, yet if the tenant of the vendee acquires a new title, after such judgment and before his eviction, it will amount to a breach of that covenant, so as to entitle the vendee to his action.
3. An administrator who *bona fide* carries on a suit commenced by his intestate, will be allowed the expenses of such suit as a proper disbursement, although it may be unsuccessful.

THE plaintiffs and the defendant were the next of kin and the heirs at law of David Coble, deceased. This bill was originally filed for two purposes: the one to call the defendant, who was also administrator of the said David, to account with the plaintiffs for their distributive shares of the personal estate of the deceased, and the other for the partition of three tracts of land, whereof it was averred that the deceased

died seized in fee simple. The first part of the case was disposed of, except in relation to a single item claimed by the defendant as a disbursement, it being the amount of costs and charges paid by him in the unsuccessful prosecution of a suit instituted by the deceased, and carried on by the defendant after his death and as his administrator. If this were allowed to the defendant as a proper disbursement, the plaintiff had no further claim as next of kin; if it were not, then they would be entitled to an additional sum to that already decreed to them. With respect to two of the tracts of land there was no controversy. The defendant admitted the common seizin of the plaintiff and himself therein, and assented to the partition prayed for. But, with respect to the tract called the Welbourn tract, the defendant insisted that he was the sole proprietor of it, and that the plaintiff had no right to ask for a partition thereof. The facts in relation to the title to this disputed tract, upon the pleadings and proofs, appeared to be these: Jane McGee was seized thereof in fee simple. She married John Welbourn, who executed a deed of bargain and sale unto one William Bell, whereby he purported to convey the said tract to the said Wil- (178) liam in fee simple; and on 27 October, 1799, the said William, by deed of bargain and sale, conveyed the same in fee simple to the deceased David Coble. Jane Welbourn was not a party to the deed of her husband, but subscribed her name to an endorsement upon the deed of William Bell, or to a certificate annexed thereto, declaring that she assigned all her right in the said land for a valuable consideration to the said David Coble. Under this claim of title David Coble remained in possession of the tract during the life of John Welbourn. *He* died after the month of May, 1823, and before 29 September, 1825, when his widow instituted an action of ejectment against Samuel Coble and Daniel Coble, sons of David, and tenants in possession under him. By an order made in the cause David, as the landlord of the said Samuel and Daniel, was made a party defendant in their stead, and in November, 1826, a verdict was had and a judgment rendered for the plaintiff in ejectment. Immediately after this judgment was rendered, and before any eviction of possession, an action was brought by David Coble against the representatives of his bargainor, William Bell, for a supposed breach of the covenants contained in the deed aforesaid of the said William. The plaintiff in this action having died, the present defendant, as his administrator, revived and prosecuted the said action, which was finally decided against him because the covenant sued on was a covenant for quiet enjoyment, and a breach of that covenant had not taken place when the suit was instituted. On the day succeeding that upon which the last-mentioned suit was commenced the defendant, who was yet on the land, obtained a conveyance therefor from William

Welbourn, who claimed under a conveyance with covenants of general warranty from John Welbourn and his wife Jane, dated 14 May, 1823. The defendant paid a full and fair consideration for the land to William Welbourn, and under this conveyance hath continually since enjoyed the land as his own.

Nash for plaintiffs.
W. A. Graham for defendant.

(179) GASTON, J., having stated the case as above, proceeded as follows: It is obvious upon this statement that the rightful estate which the deceased, David Coble, acquired by his conveyance from William Bell terminated by the death of John Welbourn. The fee simple was in John Welbourn's wife, and could not be rightfully transferred except under the solemnities required by law in relation to the deeds of *femes covert;* but *his* estate passed by his deed to Bell, and by Bell's deed to Coble. Jane Welbourn had no right of entry until after the death of her husband, and if this right had not been asserted within seven years, the then adverse possession of Coble would have ripened his defeasible into a perfect title. But it was asserted effectually to a judgment, which put it into her power to take possession of the land. It is an established rule of law that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or in a third person, while such tenancy continues. It would encourage bad faith and violate public policy to allow the tenant to hold in defiance of his landlord who, reposing upon the faith of the relation existing between them, has regarded the possession of the tenant as *his* possession, held under *his* title, and ready to be surrendered to *him* when the time to require such surrender shall arrive. There can be no question, however, but that after the dissolution of the tenancy, as where the tenant has been evicted on an adversary claim, the tenant is free to purchase in the title or to enter into a new relation with others, and to defend the possession, under that title or that relation, against his former landlord. Here, indeed, there was not an actual eviction of Samuel Coble, but his possession had been unsuccessfully attempted to be defended by David Coble. It had been judicially ascertained that, as the tenant of his father, he had no right to the possession; that the interest in the land, and of course the rights to its rents and profits, was in another; and it seems to us that he was well warranted in treating the relation of tenancy between him and his father as terminated, and in regarding himself at liberty to give a new and rightful character to his possession.

See *Baker v. Mellish,* 10 Ves., 544. We also think, although it (180) is not necessary to give a judicial opinion on the question, that

if David Coble had deferred bringing his action of covenant until after the conveyance to Samuel, he might have successfully maintained his action. The possession of Samuel being no longer his, the covenant for quiet enjoyment would have been broken. But it is objected that the defendant purchased and took a conveyance not from Jane, but William Welbourn, who set up title to the land under an alleged deed from Jane Welbourn, and that *this* deed passed nothing, because at the time it was made the land was in the adverse possession of David Coble. In law, however, this possession was not *then* adverse to Jane Welbourn. David Cole was seized of a rightful estate during the joint lives of John Welbourn and his wife, and the reversion in fee remained in her. And if the possession had been adverse, we understand the law to be that, although the deed did not operate directly to transfer the title, which yet remained in the grantor, so that the grantor might maintain an ejectment against persons not privy to the deed, it might between the parties thereto operate as an estoppel. But there is a stronger objection to the deed. The acknowledgment of Jane Welbourn to this deed was defectively and irregularly taken, and this may have been the reason, for it would have been a sufficient reason why, in the action of ejectment, the deed was not set up by David Coble to defeat the plaintiff's recovery. But, notwithstanding all or either of these objections to the efficacy of that deed, we are still of opinion that the taking of the conveyance from William Welbourn changed the character of the defendant's possession. The true question is whether David Coble died seized of the tract in dispute. His estate ceased on the death of John Welbourn, and there is no pretense for the allegation that he died seized, unless the possession of the defendant continued to be *his* possession and in affirmance of his title up to his death. But the possession of the defendant, after taking the conveyance from William Welbourn, was adverse to the title of his father. William Welbourn claimed under Jane Welbourn, by a colorable though defective conveyance. The possession by his assignee was a possession under her title, which none but herself could disturb, which she has not disturbed, and which now she cannot disturb. It must be re- (181) garded as having been held by and with her concurrence.

The plaintiffs also allege that David Coble was a lunatic, and the fact being denied by the defendant, much and contradictory evidence has been taken upon it. We do not see any necessity for deciding this fact. However it may be, the judgment in ejectment cannot on that account be rendered inoperative. If the defendant's right to purchase from William Welbourn depended on his father's assent to such purchase, the inquiry might be a material one. But it is wholly independent of that assent, and results simply from the determination of

his tenancy. Upon the whole, we are of opinion that the plaintiffs and the defendant are not tenants in common of the Welbourn tract, but that the defendant is sole seized thereof.

We are also of opinion that the defendant is entitled to the disbursement which he claims for the expenses of the suit upon the unfortunate action of covenant. It was brought by his father upon the advice of respectable counsel, and was prosecuted by him in good faith for the benefit of the estate, with the care of which he was charged.

The partition, as prayed for and assented to by the defendant in the other two tracts, must be made, and the costs attending such partition are to be charged upon all the parties, in the proportion of their respective interests. As to the other matters, the bill is to be dismissed, and with full costs to the defendant.

PER CURIAM. Decree accordingly.

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(182)

WILLIAM BAILEY, JR., ET AL. v. GEORGE WILSON ET AL.

If, to prevent a contest about the probate of their father's will, certain brothers executed articles of agreement among themselves, providing for a more equal distribution of their father's estate than that contained in his will, such agreement will not be considered as voluntary and without consideration, but will be enforced in equity as a fair family arrangement, independent of its being a compromise of doubtful rights.

THIS bill was filed at the Fall Term, 1826, of the Court of Equity for the county of Anson, by William Bailey, Jr., William Covington and Elijah Covington, plaintiffs, against William Bailey, the elder, Jacob Bailey, George Wilson, and Dempsey Fielding and Fanny, his wife; and was subsequently amended by making John Bailey and Charles Gettings and Clara, his wife, also defendants thereto.

The plaintiffs therein charged that Thomas Bailey died in the year 1800, seized of real and possessed of personal property, after having made and published his last will and testament, which, at the October Term, 1802, of Anson County Court, was duly admitted to probate; that the testator by his said will devised and bequeathed, among other things, as follows; that is to say, he devised to his son John two hundred acres of land whereon the said John then lived, being the half of a four-hundred-acre tract, and to his son Jacob the other half of the said tract; and also bequeathed to the said Jacob a negro boy named Jim; he devised to his son William three hundred and forty acres whereon the said William then lived, the half of a tract of six hundred and eighty acres, on which the testator resided; and to his son James

the other half of the above six hundred and eighty acres, being the part on which the testator lived; but the last devise was upon condition that the said James should not take possession thereof until the decease of his mother; he devised to his wife, Jenny Bailey, the last-mentioned piece for her life, and bequeathed to her three negroes—Wall, Kiz, and Silvy—also for life; he bequeathed the said Silvy and her increase to the said James; Wall to the said John, and Kiz and her increase (with the exception of the child wherewith she was then pregnant) to the said William. The plaintiffs further charge that the said John and Jacob were dissatisfied with the dispositions (183) in their testator's will, and were about to oppose the probate thereof; and a controversy being then likely to arise between the brothers in relation thereto, they, the said brothers, entered into an arrangement for preventing such controversy, and making a more equal distribution of the property so devised and bequeathed, which arrangement was testified by two written instruments executed at the same time, and which were made exhibits in the cause. These instruments bore date in April, 1802; one of them was in the form of articles of agreement signed and sealed by all the brothers whereby, after reciting the bequests aforesaid, it was declared that it was nevertheless agreed upon between them that Wall, Kiz, and Silvy should remain in the possession of Jenny Bailey, their mother, for her life; that the hire or labor of Jim should be equally divided among all the brothers, and that after their mother's death all the said slaves should be equally divided, or be sold, and their proceeds equally divided between the four brothers. The other instrument was in the form of a penal bond, in the sum of one thousand pounds, executed by William and James to John and Jacob, with condition annexed which, after reciting the devises of the six-hundred and eighty-acre tract to the obligors, stipulated that after deducting two hundred acres thereof to each of the obligors the residue (two hundred and eighty acres) should be divided into four equal shares; that one of these shares at the lower end of the old survey, from a creek up the little branch, should be conveyed by sufficient conveyance to John, and one other share joining James and William's land on the north side of the creek should be conveyed in like manner to Jacob. The bill further charged that their mother, the widow of the testator, had died about twelve months before the filing of the bill, possessed of all the said slaves and their increase, except a negro girl named Rachel and her increase (at that time two children, whose names were unknown), in the possession of Jacob Bailey in Tennessee; that William Bailey had in his possession Wall, Kiz, Winny, Nathan, and little Wall and the children of Winny; that James Bailey had died, and George Wilson, his administrator, had in possession as such, (184)

Silvy and her increase—Fanny, Hamilton, Isabella, and Jim; that the said Wilson, with a full knowledge of the claim respecting these negroes, and for the purpose of defrauding those thereunder entitled, had obtained an order of court for the sale of the negroes in his possession, and had procured one Vincent Parsons to bid them all off at a pretended sale under such order; that they were put up together and bid off at a gross sum; and that, in furtherance of the fraudulent scheme aforesaid, a pretended conveyance was made by Wilson, as administrator, to Parsons, who in a few days thereafter reconveyed them all to the said Wilson, in his individual capacity. The plaintiffs set forth that the heirs at law of James Bailey were Sherwood Bailey, who was then dead; Clara, the wife of Charles Gettings, and Fanny, the wife of Dempsey Fielding, one of the defendants to the bill; and that the said Sherwood Bailey and Charles Gettings and wife had conveyed their whole interest in the before-mentioned land to William Bailey, one of the defendants, who then occupied the entire tract of six hundred and eighty acres; that the plaintiffs had purchased and obtained conveyances from John Bailey for all his interest in the said negroes and land; that Dempsey Fielding and Anne, his wife, resided in Tennessee; that the negroes then in possession of Jacob Bailey, who also resided in Tennessee, were equal in value to the fourth part to which he was entitled under the aforesaid agreement, and that the plaintiffs had not one of the negroes; that they had applied to Wilson and William Bailey (the defendants) for their share thereof, and to the said William Bailey to convey to them the one-fourth part to which they were entitled of the land, but that these defendants utterly refused to comply with their request. The bill prayed for process against all the defendants, that the plaintiff's might have their fourth part of the slaves allotted and delivered to them or the value thereof, and have possession decreed and proper conveyances made of their share in the land, and for an account of the profits since the death of the widow of Thomas, the testator, and for general relief. John Bailey,

by his answer, admitted that he had sold and conveyed all his (185) interest in the property to the plaintiffs as charged. Gettings

and wife admitted by their answer that they had conveyed all their interest in the lands and other real estate of James Bailey to the defendant William. Publication was made agreeably to the act of Assembly as to the nonresident defendants, Jacob Bailey and Dempsey Fielding and wife, and the bill taken *pro confesso* against them. William Covington, one of the plaintiffs, had died since the filing of the bill, and his executor and heirs had been made parties plaintiffs. William Bailey, Sr., and George Wilson put in several answers to the bill. The former admitted the death of Thomas Bailey, the execution of his

last will, containing the devises and bequests stated in the bill, a dispute between the brothers in relation to the will, and the execution of the articles and bond exhibited; but declared that he acceded to the arrangement under "an expectation and belief that it would put an entire end to the controversy"; but that the probate of the will was caveated by James Plunkett, one of the next of kin, and on an issue made, the will was established at the October Term, 1802, of Anson County Court. The defendant further stated that Jenny Bailey, who by the terms of the will was entitled to the negroes bequeathed her for life, removed to Tennessee to reside with her son Jacob, and carried with her the negro Rachel; that she afterwards returned to this State without bringing back Rachel, whom Jacob insisted on keeping, and that he had been informed that Rachel had since had issue; admitted that he had the negroes charged by the bill to be in his possession, but had believed that John Bailey, knowing that the articles were executed without consideration, had abandoned all expectation of benefit from them; and insisted that the court would not now permit him to enforce the execution of the said articles after such long delay and acquiescence. This defendant also admitted the death of Jenny Bailey, as charged, and the purchase and conveyance from Sherwood Bailey and Charles Gettings and wife of their shares of the land willed by Thomas Bailey to his son James. George Wilson, in his answer, admitted the death of Thomas Bailey, the devises and bequests as set forth, and the probate of his will; the death of Jenny Bailey, the widow; the (186) death of James Bailey; his administration on the estate of said James, and the taking into his possession of the negroes mentioned in the bill as the property of his intestate; but declared that he had sold these negroes in pursuance of an order of court; that Vincent Parsons became the purchaser fairly, as the highest bidder, on a credit of twelve months; that the negroes, being a mother and four children, were sold together on a principle of humanity; denied that there was any agreement entered into between him and Parsons for the purchase of the slaves before the sale took place; and averred that about ten days afterwards he repurchased the whole of them back from Parsons. This defendant, in relation to the agreement of compromise charged in the bill, said merely that he was ignorant of the execution of the writings, and required that the plaintiffs might make strict proof thereof; and insisted that if the execution should be proved, the court ought not to enforce the specific performance thereof; but, inasmuch as the same was without any consideration, leave the plaintiffs to their remedy at law. To the answers of the defendants William Bailey and George Wilson the plaintiffs replied generally, and thereupon proofs were taken. The court of Anson passed an interlocutory order at March

Term, 1827, directing an account of the hire of the negroes mentioned in the bill from the death of Jenny Bailey, which account appeared to have been taken accordingly, but not to have been otherwise acted upon, and the cause was afterwards set down for hearing, and then transferred to the Supreme Court for hearing.

Winston for plaintiffs.
Badger for defendants.

GASTON, J., after stating the case as above set forth, proceeded: The interlocutory order for an account having never been reheard, nor prayed to be reheard, ought to be viewed as a declaration that the plaintiffs are entitled to the account prayed for, and of course to the share of the negroes, in relation to which the account was asked. But as this point has not been pressed here in argument, and as it (187) is not improbable that the order may have been made merely to speed the final decision, we have examined into the merits of the case upon the allegations and proofs.

The execution of the articles and bond exhibited with the bill is *barely* not admitted by the defendant Wilson. This vague manner of denial is always received by the Court unfavorably. A defendant is not at liberty thus to put in issue allegations which he may fully believe to be true, and thereby take the chances of the plaintiff's being unable to establish them by strict proof. He is bound to answer, not only as to his knowledge, but as to his information and belief. But the execution is fully proved by William Wood, who drew up the writings at the request of all the parties, and who saw them executed, and attested the execution as a subscribing witness.

An allegation is faintly intimated in the answer of William Bailey, Sr., that the compromise testified by these writings was made upon condition that the same should not be operative if opposition were made on the part of any of the next of kin to the probate of Thomas Bailey's will. If such a defense were intended, it was incumbent on the party to bring it forward distinctly. It is inconsistent with that reverence for truth which is required from those who answer upon oath, as well as with the rules of pleading, for a defendant to express himself obscurely in his answer, and leave to the Court the task of divining his meaning. Whenever this course is pursued, the Court adopts that construction of the language which is strongest against him. The defendant says that he acceded to the arrangement, under the belief and expectation that it would put an entire end to the controversy. What *controversy* does he refer to? The only one mentioned in the previous part of the answer is "a dispute between the brothers"

in relation to the will. The answer further states that James Plunkett, one of the next of kin, caveated the will; that an issue was thereupon made up, and the will established at October Term, 1802, of Anson court. The *whole* truth in relation to this caveat is not set forth. An exhibit is produced, showing that at the term aforesaid a caveat was entered by James Plunkett; an issue made up; the issue found against the caveator; a *new trial* of the issue awarded by the (188) court, and then a withdrawal of the caveat by the caveator.

The Court does not consider this defense open to the defendant, if it could be proved, because it is not *taken* in his answer. Proofs must be confined to the allegations of the parties. But it is unsustained by the proofs. The only testimony tending to establish it is that of Catharine Bailey who, in answer to an interrogatory whether she "understood that the bonds were to *stand in full force,* if no other heir came forward to break the will," answers that she heard them, the four brothers, say so. It would be a *violent* inference from this that they had agreed that it should be utterly null if any one set up an ineffectual opposition. But this witness does not represent herself as being present at the agreement of compromise, or actually knowing the full intent of the parties; nor does she state when she heard this declaration; but says further that *she* also took a *bond* at same time for some of the movable property of her father (the testator); that she has not, indeed, got the property, but that she put the bond into the hands of a legal gentleman for the purpose of being enforced, and does not know whether any or, if any, what steps have been taken upon it. Her acts seem to show that she did not regard her bond as avoided by Plunkett's caveat. William Wood, however, who drew up both the writings, under the directions of the parties, has been examined upon this point by the defendants, and he states that the agreement was, indeed, entered into to prevent a controversy respecting their father's will, but that he did not understand that the agreement should not be binding in case the probate should be opposed by others. It is probable that no opposition was apprehended except from the dissatisfied brothers, and also very probable that the ineffectual opposition set up was withdrawn because of the compromise between the brothers.

It is objected that the agreement of compromise was wholly voluntary, and that a court of Equity will not enforce its specific execution. Where there is a fair doubt as to the rights of parties, an agreement entered into without fraud, for the compromise of those rights, is not a voluntary agreement, and is a fit subject for the juris- (189) diction of a court of Equity. We should, however, have great difficulty in enforcing this agreement merely as a compromise of *doubtful rights,* for the bill sets forth *no rights* as claimed by the plaintiffs

in opposition to those derived under the will. There is no averment of any matter which should render the validity of the will doubtful, but only of an intention on the part of the dissatisfied brothers to contest its probate. It seems to us that in order to make out a case of a compromise of doubtful rights it was necessary to state what were the alleged rights in regard to which the doubts existed. But it is not exclusively on this ground that the claim of the plaintiffs rests. The agreement was confessedly entered into for the purpose of quieting disputes between the children of the same father, in relation to the disposition of his property; it is apparently equal; it is not denied to be fair; and was deliberately assented to as a proper and just family arrangement. Such arrangements are upheld by considerations, affecting the interests of all the parties, often far more weighty than any considerations simply pecuniary. *Stapilton v. Stapilton,* 1 Atk., 10; *Cary v. Cary,* 1 Ves., 19; *Pullen v. Ready,* 2 Atk., 292.

The defendant William Bailey sets up, by way of defense, that he believed that John Bailey, knowing that the articles had been executed without consideration, had abandoned all expectation of benefit from them, and objects to him or his assignees now enforcing them after such delay and acquiescence. No particular facts of acquiescence are stated, nor is there any averment that the parties to the arrangement had waived it or agreed that it should be inoperative. Unless then an abandonment of the agreement is to be presumed according to the rules of the Court, this objection is unavailing. Under the circumstances of the case we cannot infer such an abandonment. There was no time appointed for the execution of the agreement, but the most material parts of the agreement could not be executed until the death of the testator's widow, and the bill was brought promptly after her death. No inconvenience is shown to have been sustained by
(190) the defendant because of a bill not having been brought in the lifetime of the widow to have the agreement established, and such parts of it as were then in a state to be performed, carried into execution. The plaintiffs complain of no wrong, and ask for no account before the death of the widow; and there is nothing shown from which we can infer that either they or John Bailey, to whom they succeeded, anticipated any resistance to the claim until the moment when they sought the practical benefit of it.

The defendant Wilson insists that the negroes which came to his possession as administrator of James Bailey, and therefore subject to the trust which the plaintiffs charge, are now *his* property, freed and discharged from the trust. The Court thinks this defense not sustained. It appears from the report of the commissioner in the court below that these negroes came to the possession of Wilson on 17 October, 1825.

He is expressly charged in the bill with notice of John Bailey's claim, and in his answer does not deny, but impliedly admits it, and sets forth a *fact* which is *prima facie* evidence of it. He denies that he *knew* of the execution of the writings, and prays that strict proof may be required thereof, but states that he got the negroes from the *possession of John Bailey*. The transactions on which he relies as operating a transfer to him of the property in the slaves took place some time between October, 1825, and the Fall Term of 1826 of Anson Superior Court. If these were in truth what they purport to be, the trust would still attach to the negroes in his hands, because he *had notice* of the trust. But we have no difficulty in pronouncing them merely colorable. He denies that there was "any agreement entered into between him and Parsons for the purchase of the slaves before the sale"; but, considering the general evasive character of the answer and the circumstances of the case, we are constrained to believe that he attempts to shelter his conscience behind the *literal* sense of these words. He sets forth no reason for making the sale; shows no note taken from Parsons on *his* pretended purchase; avers no change of possession, and states neither the price nor terms of his alleged repurchase. He has (191) taken Parson's deposition, which is *very* unsatisfactory. This witness states that he bought the negroes at a price exceeding their value by forty-five dollars, and that Wilson did not *apply* to him to bid them off. This is the whole explanation given on the subject. Why he bid them off at forty-five dollars more than he thought they were worth; whether he purchased in truth for himself, and intending to hold them as his own; whether he gave any note or took the possession; whether he resold them to Wilson, and if so, when and for what price? On all these very natural subjects of inquiry he is wholly silent. We believe that there was in truth no sale, no repurchase; that the whole was a trick executed, not perhaps by means of a direct agreement between the defendant and Parsons, but of a well understood arrangement effected through the medium of some third person.

Upon the whole matter the Court is of opinion that the plaintiffs are entitled to a decree establishing the agreement evidenced by the articles and bond of 1802 as a fair family arrangement, which is proper for the execution of this Court, and which has never been abandoned; to an account of the negroes, the subject of that arrangement, and to an account of the profits of the said negroes and of the share of the plaintiffs in the land, also the subject of that arrangement, since 5 January, 1826, when the defendant John Bailey conveyed his interest therein to the plaintiff, as appears from his deeds exhibited in the cause and duly proved.

PER CURIAM. Decree accordingly.

(192)

CHARLES W. JACOCKS, ADMINISTRATOR, ETC., ET AL. v. JUDITH BOZMAN, ADMINISTRATOR, ETC., ET AL.

1. Where a residuary bequest, consisting in part of slaves, was given by a testator to his widow for life, and after her death to others, and to pay a balance of debt the executor was permitted by the widow to retain the slaves till out of their hire he had discharged it, *it was held* that the debt was a charge upon both the life estate and the remainder in the slaves, in proportion to the respective values of those estates; and that consequently the widow, or, as she had died after payment of the debt, her representative, was entitled to the sum which it had been agreed the remaindermen should pay, if they were liable to pay any portion of the debt.
2. Whether in such case, independent of any agreement, the rule of apportionment would be to require the life-owner to keep down the interest, leaving the principal to be paid by the remaindermen, or to require the principal to be paid at once by each in proportion to the value of their respective estates, *quere?*

THIS case came before the Court upon an appeal from part of a decree pronounced in the Court of Equity for Bertie.

From the transcript of the record, the following appear to have been the facts: John Rhodes died in 1826, having made his will, in which he appointed William S. Rhodes executor, and gave his whole estate, subject to the payment of his debts, to his wife for life; and after her death, to the said William S., and other persons in certain proportions. The personalty consisted of crop, stock, provisions, farming utensils and furniture, and seven negro men. The testator was indebted to a larger amount than the value of the whole, excepting the slaves. The executor proved the will, but died soon thereafter, without having made any progress in the administration. At the request of the widow, P. O. Picot administered with the will annexed, and sold all the effects except the negroes, and applied the proceeds to the payment of debts; but a balance of four hundred and thirteen dollars and sixty-four cents of the debts remained undischarged. The administrator retained the possession of the slaves, by the consent of Mrs. Rhodes, and hired them out until her death, which happened in April, 1829, and out of those hires he paid, also by her consent, that balance of the testator's debts.

The bill was brought by those entitled in remainder, against
(193) Picot, the administrator, and against the administratrix of Mrs. Rhodes, and prayed an account of the estate, the division and delivery of the slaves, and payment of the profits since the death of the tenant for life. The plaintiffs insisted therein that, as the negroes were not sold in the lifetime of Mrs. Rhodes but the debts were paid out of

the profits by her consent, the administrator could not then sell or retain for any part of the debts out of the profits arising since Mrs. Rhodes' death.

The answers admitted all the facts charged in the bill, and submitted to the relief prayed, except that they insisted the plaintiffs ought to bear a fair proportion of the debts which the other parts of the estate were insufficient to satisfy.

The parties themselves ascertained the values of the life estate and that in remainder, and agreed that, according to those values, the relative proportion of the debts to fall on the remainder was three hundred and twenty-five dollars and four cents, with interest from 20 March, 1832; and agreed further that the remainder should pay the same, provided it were liable at all. The parties also agreed that the payments by the administrator were made by the consent of the widow, and that there was then in his hands more than three hundred and twenty-five dollars and four cents, and the interest aforesaid, of the profits of the slaves since her death.

Upon the hearing the court was of opinion that the plaintiffs were not bound to contribute to the balance of the testator's debts, and decreed, amongst other things, that the whole sum found in the hands of the administrator should be paid to the plaintiffs. From so much of the decree as concerns the said sum of three hundred and twenty-five dollars and four cents, and the interest thereon, the defendants appealed.

Iredell for defendants.
Badger for plaintiffs.

RUFFIN, C. J., having stated the case as above, proceeded: Independent of any agreement, the case is the ordinary one of a bequest of slaves, as parts of a general residue, to one for life, and then (194) over, in which it becomes necessary, after applying all the rest of the estate, to raise money from the slaves to satisfy a part of the debts. The question is, in what proportion the different interests are to contribute and how these proportions are to be raised.

The general rule is, necessarily, that the executor must sell the residue and pay the debts out of the proceeds. That sinks so much of the capital, and does equal justice to each class of the legatees. Only what remains after payment of debts is given away, and that surplus is invested so as to yield a profit, which is the legacy to the tenant for life, and the principal is secured to those entitled in remainder.

But in *Smith v. Borham,* 2 Dev. Eq. Ca., 420, it was determined that in reference to the right of such legatees, as between themselves, slaves form an exception to that rule. The executor is not obliged nor gen-

erally permitted to sell them. He is not, merely for the sake of the convenience or interest or security of the first or last takers. Slaves have always been considered "unperishable goods" within the acts of 1715 and 1723, and when forming a part of the estate of an intestate, are not sold, but divided specifically amongst the next of kin, unless a sale be necessary to the payment of debts, or an equal division. They have been viewed in the same light when they form a part of a general residue bequeathed, whether the bequest was immediate or for a particular time, to one and then to another. The legatee of the particular estate is not merely to have the interest upon the value, but is entitled to the possession of the slaves; and where the interest upon the value would be more than the profit from the possession—as it may be if the slaves be mostly females, having children—the first taker cannot require a sale because the remainderman is likewise entitled to the slaves themselves in his turn. From an early period the reduction in the value of the original stock has in this State been compensated to the remainderman by giving him the increase. That is settled doctrine. *Erwin v. Kilpatrick,* 3 Hawks, 456. Indeed, the principle was (195) incorporated into our law by statute. The act of 1784 (Rev., ch. 225) gave that part of the distributive share of a widow, which consists of slaves, for life only; and required her to give bond for the return, upon her death, of the slaves and their increase to the administrator of her husband.

Yet there is no doubt that an executor may sell slaves thus bequeathed for the payment of debts, and generally he ought to do so. Then each interest certainly bears a due share of the common burden. But if he does not sell, he cannot keep them and pay the debts out of the first profits. That would throw the whole burden on the first taker. Nor does it seem just where, the gift not being specific, the subject yields large immediate profits but is wearing out daily, to give all these profits to the tenant for life, and only require that person to keep down the interest on the debts, or ultimately to pay the principal, with the remainderman, in proportion to the original values of their interests, estimated as of the time they vested. That might throw on the remainderman the larger part of the debts, although his legacy were the less valuable when it fell into possession. Hence the rule in England seems to be, as to a leasehold given in a residue, that the tenant for life is not entitled to the annual produce, but only to interest on the estimated value at the death of the testator, for the term is expiring while it is producing. *Fearns v. Young,* 9 Ves., 552. Families of slaves, however, differ from leaseholds in this respect, as before mentioned. Their value does not ordinarily diminish, but increases. The tenant for life is bound to provide for and preserve the issue, and

therefore is allowed to have possession, and consequently the whole profit during the life estate. In effect, then, slaves given in a residue and unsold stand, as between the legatees, upon the footing of a specific gift. When given in either way, the executor may sell for debts, the difference as to his duties and powers being that in the latter case he ought to apply to the respective legatees for contribution before a sale, and in the former he need not, because the gift is only of so many of the slaves as may remain in clear surplus. But if the executor do not sell, that cannot affect the rights of the legatees as be- (196) tween themselves, nor render the executor liable, unless his neglect has produced loss to all or some of the legatees. Where no sale has been made, each legatee is entitled to the profits during his time, and must pay what would have been taken out of his share by a sale as nearly as it can be computed. That result would be reached by requiring the tenant for life to keep down the interest, or by charging each with the principal in proportion to the value of the particular and general estates. Which of those rules would be the proper one it is unnecessary in this case to say, because the parties have adopted the latter for themselves by agreement, in case the remaindermen are liable to contribute at all, and the case is therefore not open to inquiries which might be deemed by the Court material to the judicial determination of the question.

As the profits during Mrs. Rhodes' life belonged, in the opinion of the Court, entirely to her, no reason is perceived why the plaintiffs should get the negroes exempt altogether from charge. Although the executor did not sell, as he might have done, yet he never delivered over the slaves but kept them, as executor, for the purpose of paying the debts. The executor is accountable to the administratrix of the tenant for life for those profits, and must pay such part of them as is over and above her just proportion of the debts. No injury is done to the plaintiffs by allowing him to reimburse himself out of their share, to the extent of their proportion of the debts. Possibly they might have been injured by the conduct of the executor, but if so, it does not appear. These slaves are all males. They might have died or become old and of little value. But that cannot be taken for granted. They might also have been young and growing, or the price may have become better. At any rate, the shortness of the period between the deaths of the testator and his widow renders it probable that no material change of value took place and that no actual injury arose to these parties. The bill is framed on the idea of the risks the plaintiffs were made to run and not on that of loss. Because the executor did not sell during the life of the widow, they say he cannot do so now nor keep any part of the subsequent profits, since by death the (197)

plaintiffs might have lost the subject altogether. That would be strange, for even against creditors the property is changed and becomes that of the executor by payment of debts to the value. If a negro had died, or a loss had occurred by other accidents, it might have been debated whether the executor had not made the property his own by not selling after a known necessity, so as to throw the loss on him. But this case presents no such question. There is no effort to impose on the remainder any other burden than that with which it was originally chargeable. The plaintiffs say it is discharged. But they show no reason for it unless it be found in the consent of the widow, as stated in the case.

That consent seems to avail nothing to that purpose, under the circumstances. If she had intended a gift of her profits, and that were clearly proved, or if she had agreed with the executor on behalf of the remaindermen to apply her profits to the debts and had accepted the slaves without an account, and without taking an assignment of the securities; or even if there had been long delay and her life had exhausted the value of the property, there might have been some ground to insist on the exoneration of the plaintiffs. But what actually took place amounts to no more than simply not insisting on an immediate assent of the executors and delivery of the slaves to her. She preferred that her share of the debts should be paid out of her profits rather than have a sale. To effect that she allowed the executor to retain them until he had received enough to pay all the debts, and did pay them. But that, without other evidence of the intent, does not constitute a gift of her profits, beyond her share of the charge, to those who were to take after her. It is true, she might have been under a difficulty in getting the negroes without payment by herself or the remaindermen of the whole sum, because the executor was not bound to part from the property until he had been fully indemnified. But she might
(198) expect the remaindermen to pay their shares also without a sale, or she might intend to take an assignment of the debts or of the executor's claim. She had not accepted the slaves with such a renunciation of her rights. There has been no settlement and no delivery of the slaves. The executor still retained them in that character, with full authority to make each share liable for its proper original burden. There is therefore no ground of presumption that the widow or executor regarded the remainder as discharged, much less that the former had agreed that her money should discharge it, considering the debts as her own.

The Court is therefore of opinion that so much of the decree as is appealed from is erroneous and must be reversed with costs in this Court, and that it should be declared that the plaintiffs have no right

to the sum of three hundred and twenty-five dollars and four cents, with interest from 20 March, 1832, part of the moneys found to be in the hands of the defendant Picot, and that said defendant ought to retain the same for the benefit of the other defendant, the administratrix of the legatee for life.

PER CURIAM. Decree reversed.

Cited: Blount v. Hawkins, 57 N. C., 164.

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(199)

JONATHAN WORTH ET UXOR, ET AL. v. JOHN MCADEN ET AL.

1. The probate of a will, and qualifying as executor thereto, is an acceptance of a trust of *personalty* declared therein, and the executor cannot afterwards refuse to perform the trust.
2. Whether an executor can, at the time of qualifying, by some solemn and authentic act renounce the office of trustee for a trust of personalty declared in the will, *quere? It seems* that he cannot.
3. Whether the acceptance of the office of executor necessarily carries with it the acceptance of trusts in relation to *realty*, which the testator authorized and directed his executors to perform, *quere?*
4. A joint trustee is to be charged with the funds belonging to his *cestui que trust* which ought to have come to his hands, or which did come to his hands, or which passed through them, or which have been wasted or misapplied by his cotrustee by and with his concurrence. But *mere* passiveness in not withdrawing money out of the hands of his cotrustee, which had never been in his own, is not such a concurrence as to make him chargeable.
5. Where a testator devised lands to two of his sons, and the survivor of them, in trust to be sold, and by a subsequent clause appointed them executors, and provided that in case both his said sons should die before a sale and conveyance of the lands, another person should sell and convey and execute all the trusts of the will, and by a codicil appointed that other also executor, *it was held* that neither the substitution in the will nor the appointment as executor in the codicil authorized the other person to interfere in the sale of the land during the life of the sons, or of either of them.

ARCHIBALD MURPHY, on 8 March, 1816, duly made and published his last will and testament, and thereby, after making provision for his wife, devised all the rest and residue of his lands, wherever situated (including the remainder in a tract given to his wife for life), unto his sons, Alexander Murphy and Archibald D. Murphy, and to the survivor of them, in trust, to sell the same upon such credit as they or

the survivor of them, should deem best. After some special legacies, which it is unnecessary to state, he directed by his said will that after his wife's share (previously declared to be an eighth) should be taken from the personal estate, and all costs and charges of administration and expenses of surveying and identifying his western lands deducted, the residue of his personal estate, and all the moneys arising from the sales of his western lands, should be divided into seven equal
(200) parts; the children of his son Alexander to have one part; the children of his daughter, Polly Harralson, one; those of his daughter, Betsy McAden, one; those of his son, Archibald D., one; those of his son, John G., one; those of his daughter, Nancy Debou, one, and those of his daughter, Lucy Daniel, one; that his sons, Archibald D., Alexander, and John G., should respectively receive the shares so given to their children respectively, as trustees for the said children; that John McAden, the defendant, Herudon Harralson, and John Daniel should receive and hold as trustees the shares so given to their children respectively. The will contained a provision that before *paying over* such respective shares his executors should take bonds, with good security, from the fathers, for paying over to their children the shares to which they were entitled, which bonds should be filed with the clerk of Caswell County Court for the benefit of the children. The executors were also directed to hold the share of the children of Nancy Debou for their use. The testator further directed that his respective grandchildren should receive their parts as they came to the age of twenty-one years, or marry; and if any of them should die under twenty-one without issue, his or her part should be equally divided between his or her surviving brothers or sisters. After these directions the will proceeded: "I appoint my sons Alexander Murphy and Archibald D. Murphy executors of this my last will and testament, and do authorize and empower them, or the survivor of them, to execute deeds for all my lands, which I have directed them to sell; and if both of my executors should die before such sale and conveyance be made, I authorize and empower John McAden and Herudon Harralson, or the survivor of them, to make such sale and conveyance, and to execute all the trusts of my will then remaining to be executed."

On 20 October, 1817, the testator added a codicil to this will, whereby, after reciting that his daughter, Lucy Daniel, had died, he annulled that part of his will whereby John Daniel was authorized to receive the share of his property bequeathed to the children of the said Lucy,
(201) and appointed his sons, Alexander and Archibald D. Murphy, and his son-in-law, John McAden, the defendant, in his stead and in that behalf; and directed that they, or the survivor of them, should hold the same, as trustees for the aforesaid children, under the

same rules and regulations as the aforesaid devises are made in his said will. By the codicil, the testator also devised to his son John G. a tract of land on Bradley's Lick Creek, of Stone's River, in trust for his, the said John's, children, to be valued by three commissioners, to be appointed by the County Court; and the amount of the valuation to be deemed a part of their distributive share. The codicil concluded, "Lastly, *in addition* to the executors named in my last will, I hereby nominate my said son-in-law, Dr. John McAden, one of my executors, to coöperate with my sons, Alexander and Archibald D., in executing the same."

Shortly after, the testator died, and the aforesaid will and codicil were duly proved by Alexander and Archibald D. Murphy and John McAden, who qualified as executors thereto. The present bill was filed by Jonathan Worth and Matilda, his wife, and Lucy Ann Daniel, an infant, suing by her next friend, against the said John McAden, and John M. Daniel and James M. Daniel. Lucy Ann Daniel afterwards intermarried with Harvey J. Baldwin, and he and his said wife were made parties complainants. The bill charged that Lucy Daniel left five children; that is to say, the plaintiff Matilda, who had, since the death of her mother, intermarried with the plaintiff Jonathan Worth; the plaintiff Lucy Ann; the defendants John M. Daniel and James M. Daniel, and Archibald A. Daniel, who had died under the age of twenty-one years without issue; that the executors took into their possession and sold the personal property of their testator to the amount of $16,959.24, and sold lands to a very large amount; that Alexander and Archibald D. Murphy were both dead, and were insolvent long before their deaths; and that the defendant Dr. McAden was the surviving executor and trustee; and that they had required from him an account and the payment or securing of the payment of their portions of the share given by the will to the children of Lucy Daniel. The bill set (202) forth that this account had been refused upon several pretenses, which the plaintiffs alleged to be untrue and insufficient; that it was pretended that he, the defendant John McAden, received no money as the proceeds of his testator's effects, except the share of his own children; whereas the plaintiffs charged that he received a much larger amount, and particularly that he bought, himself, to a large amount, at the sales of his testator's estate; that he received $800 from William Oliver on account of a negro man purchased at the sales aforesaid; and that Mrs. Jane Murphy, the widow, purchased to a considerable amount at the said sales; that she died indebted on account of these purchases; that he administered on her estate, received assets abundantly sufficient to discharge the debt, and actually paid over the amount of the debt to his coexecutor, Archibald D. Murphy. They also charged that he exer-

cised dominion over the whole estate, and was actively engaged in the sales thereof; that the said sales of the personal estate were made without an order of court authorizing the same, and, therefore, all and every of the executors joining therein were and was responsible for any loss, of whatever kind, thereby occasioned; that at the said sales, each of the executors, Archibald D. and Alexander Murphy, was allowed to purchase to a great amount, and gave no security; and that these sums had either been paid to him or had been lost, because of his neglect and misconduct; that of the sales of the real estate, $6,385 were for a tract purchased by Archibald D. Murphy from the defendant and his coexecutor, Alexander Murphy, for which no security was given, and that this sum had either been collected by him or had been lost through his negligence. They also charged that large sales had been made of the western lands, the proceeds of which had either been collected by him or lost through his negligence; and that considerable portions yet remained unsold, and that he refused to make sale thereof; and they insisted that the defendant was a trustee, under the will, for the making sale of
(203) these lands. They further charged that Archibald D. Murphy became insolvent in the year 1820; that the defendant knew this fact, and the danger of permitting him to keep the funds of the testator in his hands; but not only made no effort to withdraw them out of his hands, or to secure them, but permitted him to go on and receive moneys upon them, and in 1827 paid over to him the debt due from Mrs. Jane Murphy's estate; that if proper efforts had been made by him, the amount to which the children of Lucy Daniel were entitled might have been secured, notwithstanding such insolvency; for in the year 1827 he received from the said Archibald $2,584, which he claimed unjustly to retain wholly as trustee for his own children. The bill further charged that the land on Bradley's Lick Creek, given by the codicil to the children of John G. Murphy, had been valued pursuant to its directions, and insisted that the amount of that valuation should be added to the fund, out of which the plaintiffs were to take their parts. The plaintiffs prayed that the defendant might be directed to account for the administration of the assets of his testator and for the performance of the trusts confided to him, to pay unto the plaintiffs Worth and wife, and to secure to the plaintiff Lucy what might be found due to them, and for general relief.

All the defendants answered the bill. The defendants John M. Daniel and James M. Daniel, by their answers, admitted all the matters therein charged, and prayed not only that their interests might be protected, but that they might have a decree for what was due them. The defendant John McAden insisted that, under his appointment as executor, with Alexander and Archibald D. Murphy, he had no authority whatever over

the freehold estate of the testator during their lives or that of Archibald, the survivor; and denied that he ever, in any manner, interfered therewith; admitted that he had been informed that several tracts of land had been sold in Tennessee, and that all the lands in this State had been sold; declared that he was ignorant whether any lands in Tennessee remained undisposed of; and stated that, never intending to accept the trust delegated to him and Harrelson on the death of the original executors, he had made no inquiries respecting them. He denied (204) that he ever undertook the office of trustee for Lucy Daniel's children, to which he was appointed conjointly with the said Alexander and Archibald, or that he assumed or exercised dominion over the personal estate of his testator generally, or that he interfered in the administration thereof, except to the very limited extent which he afterwards set forth. The defendant knew that the confidence of the testator was principally reposed in the two original executors, one of whom was the clerk of the County Court of Caswell, and the other an eminent lawyer, conversant with matters of account, and both of them men of great skill and experience in business; and understood that he had been added to the number of executors at the solicitation of the testator's wife because of his residing more immediately in the neighborhood. He denied that he joined in the inventory, but admitted that he joined in the first sale, which occurred almost immediately after the death of the testator, on 13 November, 1817, and which amounted to the sum of $1,189. He admitted that he was present at the two subsequent sales, but declared that he took no part therein, and that they were managed wholly by his coexecutors, whom he knew to be capable, and believed to be honest; that at these sales he purchased some trifling articles, to the amount of $5.25; that Alexander Murphy purchased to the amount of $3,000, and Archibald D. Murphy to the amount of $4,823; and that neither the said Alexander nor Archibald gave security for his purchases; declared that he did not know that such purchases were illegal, but, having been advised that they were, insisted that the property so sold continued to be the property of the testator in the hands of his coexecutors, respectively; that he had no power to wrest it from them, and that he was not responsible therefor. The answer stated that he found himself charged in the account of sales with the purchase of a slave by the name of Milly, but declared that he did not buy (205) the said slave thereat, but that he bought her a few days afterwards from Archibald D. Murphy, who had purchased her at one of the sales of the testator's estate. It also admitted that the defendant had not been able to find any order of court for the sales, but declared that, at the time, he was not only ignorant whether an order had been made, but whether an order was necessary; and said that at all

events a sale was necessary, because otherwise a division among the grandchildren of the testator was impracticable. The answer further stated that, after the last sale, he received from his coexecutors bonds and notes of the purchases for collection, amounting to $2,900, or thereabouts; that they were placed in his hands simply for the convenience of collection, because he lived in the neighborhood of the obligors, and his coexecutors at a distance; that the amount of these, added to a hundred dollars in cash previously received by him, the trifling amount bought by him at the sales, and $521, at which price he obtained Milly by assignment from Archibald D. Murphy, made up the aggregate sum of $3,476.14½, which, he averred, comprehended the whole of the personal assets of his testator, which came to his hands previously to the death of Mrs. Murphy, in 1827, on which aggregate he charged commissions at 3 per cent in his settlement with Archibald D. Murphy. He claimed to have paid debts and legacies previously to 1 January, 1819, and to have incurred charges which, added to his commissions, amounted to $1,153.45, which left a balance of assets of $2,322.69½. The defendant charged that he accepted the appointment of trustee for his own children under the will; and that, upon balancing his accounts concerning the estate with his coexecutors, and substracting the sum which he was entitled to hold as such trustee, there was due from him to the estate of his testator on 1 January, 1819, but the sum of $521.92½, for the explanation whereof he referred to the set-

(206) tlement so made. The defendant, denying peremptorily that he ever claimed or exercised authority in selling the lands of his testator, said that, in the year 1827, having learned from Archibald D. Murphy, the surviving trustee, that sales had been made thereof to the amount of $16,200.40, to one-seventh part whereof his children, for whom he was trustee, were entitled, viz., to $2,314.34, and there being a balance due from his intestate, Mrs. Murphy, to the estate of his testator, of $2,900, or thereabouts, and a balance due from himself to the estate of $521.92½, as above stated, he, on 12 May, 1827, came to a full settlement with his said coexecutor and surviving trustee, a copy whereof was annexed to the answer, whereby the said trustee and coexecutor was credited for the sum of $2,584.19½ as so much paid the defendant on account of his children, and the defendant's receipt given therefor; and this defendant was credited for the sum of $2,900 as paid by him on account of Mrs. Murphy, and the same was receipted by the said trustee and coexecutor; but declared that, in truth, the respective payments aforesaid were made simply by opposing or setting off the claims against each other; and all that was actually paid was the balance of $345.80½ found due upon the whole account, and which balance was then paid by him to his coexecutor. The defendant denied that this settlement or

payment was made with a design to avoid responsibility, but because his said coexecutor had been almost the sole manager of the estate and was recognized by all interested as such; had made settlements or advancements, in full or in part, with or to nearly all the legatees; that during the life of the said Archibald no discontent, to the defendant's knowledge, was expressed or existed in relation to his management; that he was at that time not only the acting executor and sole trustee of the testator, but trustee for his own children, for the children (207) of Lucy Daniel, and for the children of Nancy Debou; was executor of Alexander Murphy, and lawfully authorized agent of John G. Murphy and Herudon Harralson, the trustees of their respective children; and he submitted whether, under these circumstances, the said settlement with, and the payment of, said balance to the said Archibald were not correct and sanctioned by the rules of the Court. The defendant also admitted the receipt from the said Archibald, since the said settlement, of two sums, amounting to $221.42, in behalf of his children, because of their share of the purchase money and rent of a tract afterwards sold; and denied that he ever received any other of the assets that were of his testator; that he ever received any money on account of Alexander Murphy's purchases, or that the price thereof was lost through his negligence or default. The defendant further stated that in 1821 Archibald D. Murphy, from a state of unexampled credit and high reputation for capacity in the management and increase of his estate, suddenly became bankrupt; and Alexander Murphy became also insolvent, and died at the same time; that the defendant had not the power to take to himself, and was not under any obligation in consequence of these unfortunate results, to require to be surrendered to him the management of the testator's estate; that, having always declined to act as trustee for the children of Lucy Daniel, he did not seek to get into his hands any part of their portion, but that he occasionally received small sums of money wherewith to buy clothes and a few other necessaries for the complainant, Lucy Ann, who lived in his family for many years, for which he never received any compensation. He charged that this insolvency of the acting executor was perfectly known to the plaintiffs, and especially to the plaintiff Jonathan, who had read law in Mr. Murphy's office, practiced in the same courts with him, was one of his most intimate and confidential friends, became connected with him afterwards in certain mining speculations, and who, although he had been married to the plaintiff Matilda for eight or ten years before Mr. Murphy's death, never expressed any dissatisfaction at his conduct or took any steps to get the property from his control. (208) The defendant averred that Archibald D. Murphy treated the children of Lucy Daniel with great personal kindness, and made divers

expenditures for their education and maintenance, an account of which he had seen among the papers of the deceased; that in one of the books of Mr. Murphy there was a statement of the account between him as trustee and coexecutor of his testator and the plaintiff Jonathan, and therein there was an entry in his handwriting as follows: "By settlement with Mr. Worth in full. He has this settlement, and the payments since are credited thereon"; and the defendant charged that there had been a final settlement between the plaintiff Jonathan Worth, acting for himself, and the plaintiff Matilda, and the said Archibald D. Murphy.

The plaintiffs replied to these answers and proofs were taken by the parties, but it is unnecessary to state them, as the pleadings present all the facts necessary to a proper understanding of the case.

Winston for plaintiffs.
Nash and W. A. Graham for defendants.

GASTON, J., after having stated the pleadings as above, proceeded: The first question which presents itself for our consideration is whether the defendant Dr. McAden, notwithstanding his having forborne *to act* as a trustee for Lucy Daniel's children, had that office imposed upon him.

If he had, it follows that an account must be taken between him and his *cestui que trusts,* in relation to the administration of the subject-matter of that trust. It is not alleged that he ever executed a formal renunciation or disclaimer of this trust, but it is insisted that it could not be imposed without his assent, and that he has done no act declaring that assent, or warranting any inference of such assent. We are of opinion that his probate of the will as executor was an acceptance
(209) of this trust. An executor is he to whom the execution of a last will and testament of personal estate is, by the testator's appointment, confided. How far the acceptance of the office of executor may *necessarily* carry with it the acceptance of trusts in relation to real property, which the testator has authorized and directed his executors to perform, it is not now necessary to determine. By this will, lands were devised to be sold, and a personal fund, consisting partly of the proceeds of these sales and partly of the personal estate of the testator, was directed to be kept for the infant children of Lucy Daniel by certain persons as trustees for those children, which same persons were by the will constituted executors. Of these, the defendant was one. Nor is it necessary to decide whether he might not, at the time of proving the will, by some solemn and authentic act, have *declined* the office of trustee for the children, although the *inclination* of our minds is

that this would not have been admissible. We think that as the same persons who are charged with the office of executors are also instructed by the will to act as trustees of a fund bequeathed by that will, this latter duty is imposed upon them as executors, and the acceptance of the office of executor cannot be qualified by a refusal to perform any duty which the testator has annexed to it. *Mucklow v. Fuller,* Jacob, 198 (4 Con. Ch. Rep., 93). But if he could have been permitted *thus* to have declined, we hold that an unqualified engagement to execute the will bound him to execute it fully and in every particular, as he was directed to execute it, to the extent of the powers which he derived under it. Where one who is sole executor of another dies after making a will and appointing executors, those so appointed may accept the office of executor to their immediate testator, and renounce the office of executor to *his* testator; but if they prove the will of their immediate testator generally, without such a renunciation, they become executors also of the first testator.

The taking of the account between the defendant as surviving trustee of Lucy Daniel's children and his *cestui que trusts,* under the unfortunate circumstances of this case, will be a task full of difficulties, and we cannot undertake by precise instructions to anticipate (210) and provide for all of these which may and probably will arise. Upon the account itself many subjects may be presented with more distinctness and particularity than they are now seen, and our judgments can then be formed upon them with more accuracy than at present. Such directions only will be given as we deem necessary for fixing the attention of the commissioner and the parties, upon the general principles by which the account is to be regulated and indicating the inquiries which it will be essential to make.

The defendant on the account is to be charged with the funds belonging to his *cestui que trusts* which ought to have come to his hands, or which did come to his hands, or which passed through them, or which had been wasted or misapplied by his cotrustees, or either of them, by and with his concurrence. *Mere* passiveness in not withdrawing funds out of their hands, which never had been in his, is not such a concurrence as to render him chargeable. The Court collects from the settlement between the defendant and Archibald D. Murphy, a copy whereof is annexed to the answer, that previously to the date of that settlement (12 May, 1827) there had been no *definite appropriation* of the balance in the defendant's hands of the assets of his testator (thereby stated to be two thousand three hundred and twenty-two dollars and sixty-nine and a half cents), nor of the debt due from the estate of Mrs. Murphy to the executors of his testator (which is represented as two thousand nine hundred and thirty dollars) to the children of the

defendant. At that time it is not to be questioned but that the situation of Mr. Murphy was desperate, and that the defendant knew that the payment of these sums to him must be attended with imminent danger to those interested in their preservation. He was the *only responsible* trustee for the children of Lucy Daniel, as well as sole trustee for his own children. We are of opinion that he owed the same duty of protection to each set of his *cestui que trusts;* that he should have held on those funds for the benefit of all his *cestui que trusts,* and that he had not then a right, by a mere arrangement with the insol-
(211) vent trustee to appropriate them solely to the use of his own children. If the defendant can, he may exhibit evidence to show more fully the time and nature of this appropriation, but *prima facie* he is to account with the children of Lucy Daniel for their rateable share in these funds.

To ascertain the amount to which the children of Mrs. Daniel are entitled out of the personal estate of the testator, and what the defendant's liability is by reason of his and his coexecutor's administration of that estate, an account of that administration becomes necessary. In taking that account, the defendant is not to be charged because of funds which never came to nor passed through his hands, and which have been lost by the *devastavit* of either of his coexecutors, unless such *devastavit* was by and with his concurrence. The sale of the negroes belonging to the estate, without a previous order of court, was irregular; and the losses sustained by reason of negroes bought and not paid for are *prima facie* chargeable on all who concurred in making such sales. But if the sales ought to have been made, the mere neglect to procure an order of court does not impose this liability. The commissioners will therefore inquire whether these sales were necessary; if not, wherefore they were made, and whether the defendant concurred in making them.

The Court is of opinion that during the life of Archibald D. Murphy the defendant had no authority to interfere with the sale of the lands of his testator. These lands are by the will devised *to* Alexander and Archibald D. Murphy and to the survivor of them, expressly in trust to be sold. *They* are also by the will appointed executors, and in the same clause in which they are so appointed the testator authorizes and empowers them, or the survivor of them, to execute deeds for the lands which may be so sold. But in the event that both should die before such sale and conveyance, *then* a power is conferred upon the defendant and Herudon Harralson, or the survivor of them, to make such sales and conveyances, and "to execute all the trusts of the will." As this substitution is to take place *only* in the event that the trusts in regard to the sale and conveyance of the lands should not have been fulfilled

in the lifetime of either of the original trustees, the Court under- (212)
stands this substitution to extend to all those trusts only which relate to the subject-matter, the trusts declared in relation to the lands, and that the latter are not substituted as executors in lieu of the former. When, by the codicil, the testator appoints the defendant, in addition to his two sons, and of the executors to coöperate with them in executing his will, he thereby bestows on him no other authority than that which is attached to the office of executor, and does not make him a *devisee* with his two sons in trust, nor confer upon him any authority concurrently with them in the disposition of the lands.

The Court is satisfied that whatever liabilities may attach to the defendant because of the mismanagement of his coexecutors and cotrustees, and of his implicit confidence in them, no imputation of *fraud* rests upon him. In taking each of the accounts, therefore, the commissioner is to exact no further evidence of credits for disbursements or advancements made by either of his associates than can reasonably be required of one who was not personally cognizant of them, and cannot be supposed to possess regular vouchers therefor.

An interesting question will probably arise between the plaintiffs, Jonathan Worth and wife, and the defendant, founded on the alleged settlement between Mr. Worth and the late Mr. Murphy and the transactions consequent on it. That settlement, if in existence, must be exhibited, and the commissioner will not only report it, but all the transactions connected with it, to enable the Court to pronounce whether Mr. Worth has not, according to the rules of equity, made Mr. Murphy his personal debtor, and released the defendant from the claim now sought to be enforced. The consideration of this question is distinctly reserved until the coming in of the report.

The commissioner will also inquire and report who are the persons entitled to the benefit of the bequest made to Lucy Daniel's children and which of them have attained the age of twenty-one years, and also whether any lands of the testator remained undisposed of at the death of the late Archibald D. Murphy. If any so remained, it will then be our duty to inquire what relief, if any, it may be in our power to give in relation to the sale of these lands. (213)

The defendants John M. Daniel and James M. Daniel being parties to these proceedings, are consequently interested in the accounts that may be taken; but if anything should be found due to the children of Lucy Daniel they cannot have a decree for their part of it in a case where they are merely defendants.

PER CURIAM. Direct an account.

Cited: Thompson v. Newlin, 43 N. C., 43.

NATHANIEL HARRISON v. LAWRENCE BATTLE, ADMINISTRATOR OF FRANCES COOPER, AND JOSEPH ARRINGTON, ADMINISTRATOR OF JOHN D. COOPER.

1. Where a slave was conveyed by deed to a trustee for a married woman for life, with the power of appointing to whom the remainder in the slave should belong after her death, and she died without making or attempting to make any appointment, *it was held* that neither the husband's representative, he having died before his wife, nor the representative of the wife could claim the slave; but that the trust in the remainder of the slave resulted to the donor or his representatives.
2. The plaintiff in a bill of interpleader is entitled to his costs out of the fund when the bill is filed properly; otherwise not.

EDWARD COOPER by deed conveyed a certain slave and her increase to Nathaniel Harrison, in trust, for the use and benefit of Frances Cooper (who was the wife of John D. Cooper) during her natural life, and at her death the said Harrison was to convey the said slave, with her increase, to any person or persons that the said Frances might direct. Frances Cooper, after surviving her said husband, died without making any appointment under the power given in the deed of trust. After her death, Lawrence Battle, her administrator, set up a claim to the slave, as did also Joseph Arrington, the administrator of John D. Cooper (the husband), whereupon the trustee filed this bill of interpleader against them both, calling upon them to litigate and establish any right that either of them might have in the said slave and her increase.

(214) *No counsel appeared for plaintiff.*
Badger for defendant Battle.
Devereux for the other defendant.

DANIEL, J., after stating the case, proceeded: The Court is of the opinion that neither of the defendants have any interest in the trust fund mentioned in the deed, but that on the death of Frances Cooper (who only had a life interest in the trust), without executing or attempting to execute the power of appointment, the remainder of the trust resulted to the donor, Edward Cooper, or his personal representatives. When a particular estate is limited in a will by way of trust, followed by a declaration that the particular legatee may dispose of the fund, he will not take a beneficial interest in the capital. He will have a mere power to dispose of it, and no more, because when a limited interest is expressly given, its enlargement by implication will not be

permitted. If then, by will, the interest of one thousand pounds be given to A. for life, with a declaration that he may dispose of the principal at his death, the prior limitation will not merge in the general power of disposition, so that A. will take a vested interest for life, with a power to appoint the capital. 1 Roper on Legacies, 430. In *Nannock v. Horton,* 7 Ves., 392, 394, 398, Mr. Norman bequeathed to trustees eight thousand pounds, three *per cent* consols, to pay the dividends to his son Robert for life, and after his death to pay and transfer six thousand pounds, part of the capital, to such persons as Robert should appoint by deed or will. The testator, by codicil, directed that Robert should be paid the dividends for life, of six thousand pounds, part of the eight thousand pounds, three *per cent* consols, and at his death he should be allowed to dispose of four thousand pounds, part of the six thousand pounds, three *per cent* consols, instead of the whole of the latter sum. The question was whether under the will and codicil of the father, Robert took a vested absolute interest in the four thousand pounds stock or merely an estate for life, with a power of appointing the capital. *Lord Eldon* determined that under the will and codicil Robert was entitled for life only, with a power to appoint the four thousand pounds stocks. The simple power which Frances (215) Cooper had was no estate in the trust. A power unexecuted is not assets to pay debts, 7 Ves., 499; if an appointment be made, the Court will arrest the fund *in transitu* for the benefit of the creditors. *Harrington v. Hart,* 1 Cox, 131. So the Court will supply the defective execution of a power in some cases, as when it was made to a purchaser for creditors or for a wife and children; but the nonexecution of a power cannot be supplied. *Holmes v. Coghill,* 7 Ves., 499; *Brown v. Higgs,* 8 Ves., 570; *Shannon v. Brodstreet,* 1 Scho. & L., 63. In limitations of trusts, either of real or personal estate, the construction ought to be made according to the construction of limitations of a legal estate, unless there is a plain intent to the contrary. In *Garth v. Baldwin,* 2 Ves. Sen., 646, 655, *Lord Hardwicke* said: "The principle I go upon is what I went upon in *Bagshaw v. Spencer,* 1 Ves. Sen., 142. It is this principle, and not departed from before or since, that in limitations of a trust, either of *personal* or real estate, to be determined in this Court, the construction ought to be made according to the construction of limitations of a legal estate, with this distinction, unless the intent of the testator or author of the trust plainly appears to the contrary; but if the intent does not plainly appear to contradict and overrule the legal construction of the limitation, it never was laid down that the legal construction should be overruled by anything but the plain intent." See, also, 2 Thomas' Coke, 699. Whether trust estates arise

under a will or deed, the same rule applies as to the construction of the limitation of the trust estate. *Dix v. Lambert,* 4 Ves., 725. But a conveyance to a trustee in trust for another for life does not carry the whole estate to the *cestui que trust,* because the intent is plain that the parties did not so mean. On failure of appointment under a power to the *cestui que trust* the trust, after the determination of the life estate in it, results to the donor. The bill must be dismissed, but without costs on either side. If a bill of interpleader is properly filed, the plaintiff is entitled to costs out of the fund, *Campbell v. Sola-*
(216) *mans,* 1 Sim. & Stu., 462; but we cannot allow it in this case.

PER CURIAM. Bill dismissed.

THE ATTORNEY-GENERAL v. THE PRESIDENT AND DIRECTORS OF THE BANK OF NEW BERN.

1. By a clause in the charter of the New Bern Bank (act of 1814, Rev., 870, sec. 11) it is enacted "that a tax of one per cent per annum shall be levied on all stock holden in said bank, except on the stock holden by the State, which shall be paid to the Treasurer of the State, by the president or cashier of said bank, on or before the first day of October in each and every year." For eighteen years after the passage of this act the officers of the bank paid the tax specified, but charged it against the whole corporation instead of the private stockholders, whereby the stock, holden by the State, was made to pay a part of said tax; whereupon an information was filed against the bank to recover the amount of the taxes which had thus been borne by the State stock, and to have the same deducted out of or charged upon the stock of private holders; when it was held by the Court, *Daniel, J.,* dissenting, that by a proper construction of the above recited clause, taken in connection with other parts of the charter, the tax was not payable out of the profits, as such, declared to each individual; that it was not payable out of the other separate estate of the holder; that it was not payable out of the separate capital of each stockholder, because that could not be reached by the collecting officers, and because, if reached through the corporation, it would render the shares of unequal value, diminish the capital, and *be a fraud on purchasers;* that it was payable, at all events, every year; and that therefore, for all these reasons, it was payable out of the common funds in the hands of the officers, as such, whether those funds consisted of capital or profit. And it was further *held,* by the whole Court, that as the stock in the bank was transferable and daily changing owners, a court of Equity would not charge the present stockholders, they not being in many cases the persons who had been profited by the alleged erroneous mode of payment.

2. Per DANIEL, J. The meaning of the Legislature in the above-recited clause was that the stock of each individual stockholder should be annually charged with a tax of one per cent. And in making up the accounts, for a dividend of profits, the State should have first received the dividends on her stock out of the whole amount of net profits, exclusive of tax, and then the tax should have been taken from the remaining profits before its division among the private stockholders.

THIS was an information filed by the Attorney-General in the Court of Equity for Wake County, on behalf of the State, against the president and directors of the Bank of New Bern, to recover from the individual stockholders of the said bank a certain amount (217) of taxes which it was alleged were due from the said stockholders to the State. The information charged that by the 11th section of the act of 1814 (Rev., ch. 870) entitled, "An act to continue in force certain acts concerning the banks of Cape Fear and New Bern, and for other purposes concerning the said banks," it was provided "that a tax of one per cent per annum should be levied on all stock holden in each of the banks of Cape Fear and New Bern, except on the stock holden by this State, which shall be paid to the Treasurer of this State, by the presidents or cashiers of said banks, on or before 1 October in each and every year." This tax, the information stated, had been duly paid by the proper officers of the bank to the public treasurer from the year 1816 to the filing of the information, but in the accounts kept by the officers of the bank with the State, it was charged, not against the individual stockholders, in respect of their stock, but against the whole corporation, in which the State was a stockholder to a large amount, whereby, in the dividends of profits, the State, in respect of its stock, was made to bear its proportion of the tax. The information contended that this construction was erroneous, and sought to correct the accounts made out according to it by requiring the president and directors of the bank to pay to the State the whole amount of the loss, which had been charged to the shares of the State in the bank, and charge the payment so made to the stock of the individual stockholders in equal proportions to each share, or by requiring them to credit the State by the amount of the error so made against it, and apportion the amount among the other stock and charging it to be retained out of the next dividend. To this information the defendants filed a demurrer, which his Honor, *Judge Donnell,* at Wake, on the Fall Circuit of 1834, *pro forma,* overruled and ordered the defendants to answer, from which judgment they appealed.

Devereux and Badger for defendants.
W. H. Haywood for the information.

(218) The Judges not agreeing upon all the points involved in the cause, delivered separate opinions, as follows:

RUFFIN, C. J. The tax imposed on stock in the Bank of New Bern has been paid, from the year 1816 to the present time, out of the corporate funds. The information seeks to keep the sums paid to the State, and alleging that the tax was payable exclusively out of the separate interest of the private stockholders, seeks to correct the supposed error by charging to them, in the division of the capital, and giving credit to the State for, the proportion of those sums raised out of her stock.

The tax is due under a provision of the new charter of 1814 (Rev., ch. 870), by the 11th section of which it is enacted "that a tax of one per cent per annum shall be levied on all stock holden in the bank except the stock holden by the State, which shall be paid to the Treasurer by the president or cashier of said bank on 1 October in each and every year." It may here be mentioned that the printed statute book is inaccurate in substituting the word "stockholders" for the two words, "stock holden," which appear in the original roll.

The doubt is whether, on the wording of the charter, the tax is payable by the corporation out of the common fund, the number of private shares being the measure of the tax, or whether it is payable out of those private shares only, so as to make each stockholder severally contribute annually to the public treasury one dollar for each share.

I own that the language of the statute is not so clear to the contrary that I could confidently say, were the construction now to be placed on it for the first time that the one contended for on behalf of the State was not according to the intention of the Legislature. It is possible that such was the meaning. But I do not think that a strained construction is allowable of an act which levies money from the citizen. The amount of the levy, the subject of it, and the method of raising it ought to be so plainly pointed out as to avoid all danger of oppression by an erroneous interpretation, and where there is a fair (219) doubt the citizen should have the advantage of it.

Here the difficulty arises from the silence of the act as to the fund out of which the tax shall be paid. The natural construction of a charter creating a corporation, a new artificial being, is that all the privileges conferred, all the duties declared, and all the burdens imposed, relate to that being as a whole, and not to the individuals composing it. The contrary may be enacted it is true, but it ought to be clearly enacted before the corporators, as natural persons, can be affected. Here it is insisted that, as the tax is to be "levied on" the private stock, it is necessarily to be "raised on or out of" that stock. The argument is so plausible as at the first view to have much weight,

and would be satisfactory were it not for other provisions in that section and others of the charter. The payment into the Treasury is to be made by the president or cashier in their official characters. Those terms of description are naturally to be referred to the official character, and not to the persons in their natural capacity who happened to hold those places. But what renders the meaning clear is that there is no clause of distress on any property of the several stockholders, nor any means provided of raising the tax except from funds that would be under the control of those persons as officers, and not otherwise. What fund belonging to the stockholders, as the separate property of each, is within the reach of the cashier and president? The profits annually declared and passed to the credit of the stockholder, and those only. The stock itself and all the surplus undivided is a common joint stock under the exclusive direction and power of the board of directors, and the interest of each stockholder in that fund is ideal and intangible, not accessible to the officers or to any fiscal agent of the State, except through the intervention of the corporation itself. When a dividend of profit is declared that becomes separate property, and might be appropriated under the authority of law to the satisfaction of any demand upon the owner. If the charter had said the tax of one per cent on each share should be paid out of the profit on each share declared to the stockholders, it would have been clear, and the fund thus rendered liable would have been a proper one and within (220) the reach of the officers charged to collect and account for it.

It is possible, but hardly probable, that the Legislature, without closely considering the subject, might have expected a continued and certain profit and its periodical division, and therefore have intended that the tax should attach to it as soon as it was declared. But the consequence of that construction would be that unless there was a profit there would be no tax, for it could not be raised unless the fund existed out of which it was, according to the meaning of the act, to be satisfied. Perhaps that might have been the proper interpretation at first of this ambiguous statute, for it seems to be consonant to natural justice. But the contrary has been practically insisted on by the State, and is now insisted on in argument. The tax has been paid every year, whether profit were made or not; indeed it has been paid when, so far from making a profit, a large part of the capital had been sunk, as we know from the statements of the fiscal officers of the State and the proceedings of the Legislature. Besides, the words of this section of the act are that the tax "*shall* be paid in each and *every* year," which seems to overrule the implied meaning that it is payable out of the profits alone, and to require positively that the sum due for the tax, according to the measure prescribed in the act, shall be paid at all events.

If that be admitted, then the question arises, how it is to be paid when there is no profit. I do not state the question in that shape for the purpose of determining how the money is to be raised in the two cases, when there are profits and when there are none, as if it was to be raised differently in the one or the other, but as the criterion of the proper construction as to the proper fund for raising it in every case. It has already been shown that it is payable, whether there be profits or not; and, therefore, the construction must be that it is not payable out of the profits as profits, and does not attach to them. If not attached to them after they are declared, nor to any other property of the individual stockholder, it seems to follow, as a necessary consequence, (221) that the tax is to be paid out of the corporate property, whether capital or profit, while it is a joint fund; for to that fund alone can the president and cashier have access. They are to pay the tax. Whence is it to arise? It has been shown that it is not out of the separate property assigned to each shareholder. It is impossible that it can be out of the capital share itself, because that is not tangible by those persons, either in their official or natural capacities. It must then be out of the funds in their hands, and as they are in their hands—that is, the corporate property. With respect to that fund, it is immaterial whether it consists of principal and profit, or of principal alone; for the whole effects of the corporation must answer all burdens on the corporation. When there are two funds out of which the tax might have been raised, or may be supposed to have been intended by the Legislature to be raised, and it is doubtful, upon the words, which is meant, it seems to be a just rule of construction, when the act commands particular official persons to pay the tax, that the fund within the power of those officers is the proper fund—is the one meant, and the one not within their power as officers was not meant. But it is said those officers are spoken of as representing the corporation, and that in fact the corporation itself is responsible for the tax and for the payment out of the proper fund. That may be admitted. It may be true that if the officers made default in paying the tax, the bank would have to make it up. But it would recur out of what fund? Plainly, out of that which was chargeable from the first with it. Then, what remedy would there be against the corporation? When a corporation, as such, is liable for money, it must answer out of the corporate funds, and the process is to distrain or sell the common property, which, in this case, would result precisely in accordance with what has been done. Doubtless, also, a *mandamus* would lie to compel the corporation in a general meeting of the stockholders, and, through their ordinary organs, the board of directors, to make such orders upon their officers as would set apart a sufficient sum out of the proper fund to satisfy the demand of the State,

whether it be for the tax or her share of the profits; and that sum thus set apart could be reached without further process against the corporation directly. But the question would still be the (222) same, Which is the proper fund? Proceeding against the corporation to compel its creation, or its being set apart, would not change the source from which it is to spring. Such a proceeding would be only to enforce the corporators not to withdraw from the officers the means they were expected to have and would have of answering the tax, and not to make the tax payable out of a fund which never was accessible to those persons in their designated official characters. But further, the argument for the State would necessarily lead to this—that the shares of stock would be unequal. For if it be true that by *mandamus* or by proceedings in equity the corporators may be compelled to order their officers to pay the tax out of the separate shares of the stockholders, then, when there is no profit declared and none in fact, the payments must be out of the capital of the share itself. This is so obviously inconvenient and impolitic, and so clearly against the general scope of the charter, as to condemn the construction. The shares are made one hundred dollars each, and the profits are to be equally divided. The diminution of some of the shares would discredit the bank and render the security of noteholders and other creditors precarious, or throw the burden of them on the State, and would make it almost impracticable to keep the accounts with simplicity and correctness amongst such a number of unequal proprietors. Besides, the stock itself is made transferable, and passes in the course of business almost like money; and as it could not be seen from the certificate how far the capital had been reduced, all assignments would be at an end or purchasers exposed to great frauds. It is no answer to say that purchasers must take *cum onere*. That is true with respect to liabilities of the corporation. But it is not true within the contemplation of the charter, in respect to the liability of each corporator. The bank itself and the State cannot, against the express terms of the certificate, say that the share of stock is not one hundred dollars, as between the shareholders themselves. They cannot say that the former proprietor has withdrawn a part of his capital, but that, notwithstanding, the bank was compelled by law to certify to him falsely that (223) his payment had been full and yet remained full. The Legislature could not intend to authorize a fraud so palpable and base.

I conclude, therefore, from a consideration of the whole act—as the tax is not payable out of the profits as such declared to each individual; as it is not payable out of the other separate estate of the holder; as it is not payable out of the separate capital of each stockholder, because that cannot be reached by the collecting officers, and

because, if reached through the corporators, it would render the shares of unequal value, diminish the capital, and be *a fraud on purchasers;* as it is payable at all events every year—that for all these reasons it is payable out of the common funds in the hands of the officers as such, whether those funds consist of capital or of profit. There is no other plausible or admissible construction but the one, that the divided profits is the proper fund and that the Legislature deemed them certain, and therefore considered that each stockholder would permanently have a separate property from which one dollar on his share could be raised annually. Such an expectation on the part of the General Assembly cannot be supposed without imputing the grossest ignorance to that body, for all know that banking is not only a hazardous business, but that in this State large portions of the capitals have actually been lost. But if the supposition were true, it would only prove by inference that the construction of the act is that the tax is payable out of such profits, which is rebutted by the express provision for a payment every year at all events. Besides, the information does not proceed at all upon the idea that profits have been annually declared out of which the tax might have been paid, and seek to recover out of them; but it seeks to have a larger share of the capital than the other stockholders in the division now making, upon the notion that the tax has been paid, and was, if necessary, payable out of the capital, and that a portion of her capital as composing a part of the joint stock has been improperly thus applied. The incorrectness of that view has already been shown.

Besides the reasons for our opinion drawn from the provisions
(224) of the act itself, a most forcible one arises out of the contemporaneous construction put on the act by the stockholders, the fiscal agents of the State, and the Legislature. The State is the largest shareholder in the bank, represented in general meeting, and entitled through her officers to quarterly statements of the affairs of the corporation, and to inspect all general accounts on the books. The mode of payment therefore must have been known. The default of her officers and of the Legislature itself would not bar the State of a clear right, but such default is not to be presumed. Their acts cotemporaneously, and continued consistently through a period of eighteen years, are such strong proof of the sense in which the act was understood by those who passed it as to make their construction almost as authoritative as if the words admitted of no other.

Having arrived at this conclusion as to the meaning of the charter, it is unnecessary to consider what relief could be had were the act to be otherwise interpreted against the present proprietors, in respect of the taxes of former years, and of bygone profits received by former proprietors. It would be difficult to strike out of the case one spark

of equity against the present holders under that aspect of the case. But I do not think it necessary to go into that question, especially as the information is filed against the corporation and not against the individual corporators. The decree must be reversed and the demurrer sustained.

GASTON, J., concurred with the Chief Justice.

DANIEL, J. By the 11th section of the act of 1814, extending the charters of the banks of New Bern and Cape Fear, it is enacted that a tax of one per centum per annum shall be levied on all stock holden in each of the said banks, except on the stock holden by the State, which shall be paid to the Treasurer of the State, by the presidents or cashiers of said banks, on or before 1 October in each and every year. The meaning of the Legislature was that the *stock* of each individual stockholder should be annually charged with a tax of one per cent. In making up the accounts of the bank for the purpose of declaring dividends of profits among all the stock, the direc- (225) tors took the tax, which was due only from individual stockholders, out of the aggregate amount of net profits which the bank had made, and then divided the remaining mass equally among all who held stock, as well the State as individuals. By this method of taking the accounts and dividing profits the State, on a *share* of her stock, received exactly the same amount of dividends as an individual stockholder received on a *share* of his stock. Whereas, if the intention of the Legislature had been regarded, the amount of dividend on a *share* of stock held by an individual would have been *minus* the amount of dividend on a *share* of State's stock to the difference of the tax which should have been taken out of the individual's dividend. At dividend day the accounts should have shown the net aggregate amount of the profits of the bank, exclusive of the individual stockholders' taxes; then the *stock* of the *State* should have had declared and set apart to it its dividend out of the aggregate mass. The remainder of the mass should then have had subtracted the tax on the stock due from all the individual stockholders, then the balance of that remainder should have been equally divided among the shares of stock of individual holders. I will simplify it, by supposing that A. and B. enter into copartnership, each putting in a capital stock of one hundred dollars, the profits to be divided every year. The stock of A. is subject to a tax of one per cent per annum; at the end of the year they have made net profits twenty dollars. The division of the aggregate profits would give B. ten dollars and A. ten dollars, out of which A. would pay his tax and leave him but nine dollars profit. But if the tax which

A. only owed was to be taken from the aggregate of profits, B. then would only receive nine dollars and fifty cents and A. would receive the same amount. By this mode of settling the accounts, B., whose stock was not subject to tax, would pay one-half of the tax which A. only owed. This mode of taking the accounts would certainly not be correct. The State and the private stockholders in this bank are partners in the institution upon the very same principles as the
(226) case which I have supposed, with the difference only that the profits are declared semiannually instead of annually. Part of the profits of the stock of the State has been annually taken to aid in paying the tax due only from the individual stockholders. The annual dividends of the State's stock has been, in consequence thereof, less than it legally should have been. This information is filed to correct the mistakes thus made in the accounts, and surcharge the bank with the difference, which should be coming to the State, if the accounts at bank had been taken according to law.

The information states that the dividends have been declared from time to time, since the year 1814 up to the filing of the same, upon this erroneous principle; and that the individual stockholders have been paid more than their proper shares of dividends of the moneys which rightly belonged to the State. The information then proposes to obtain repayment by directing the bank to stop so much of the future dividends of profits of the individual stockholders, or to distrain the stock of individuals for that purpose.

If the stock had not been assignable, and the present individual holders were the same persons who had improperly received the money which rightfully belonged to the State, then the plan proposed would be right and just, as the persons who had improperly received would be before the Court. But the stock is assignable and changing owners daily, and there is no lien on the individual stock for this debt. Can it be right that the State, which is only a partner in this institution, should compel the present individual stockholders (new partners as it were) to pay the amount of the errors in account of antecedent profits, which had been paid by the agents of the bank and received by their assignors or the assignors of their assignors? It seems to me that the plan of redress proposed by the information is not agreeable to equity. If the stockholders who have received an excess of dividends at the expense of the dividends due on the State stock were before the Court, I would decree against them, and perhaps the agents of the bank (the directors) who committed the breach of trust in the illegal dis-
(227) tribution of the revenues of the institution, might be liable. However, on this I give no opinion as they are not before the Court. But it seems to me that the corporation, the interest in which

is jointly owned by the present individual holders of stock and the State, cannot be decreed to make good the loss, as stated in the information. Whether a court of Equity would enjoin the agents of the bank from making erroneous dividends, or whether a court of law would interfere by *mandamus,* the case now before the Court calls for no opinion. But as the case presents itself by the pleadings, I am of opinion that the demurrer ought to have been sustained.

PER CURIAM. Decree reversed, demurrer sustained, and the information dismissed.

Cited: Attorney-General v. Bank, 40 N. C., 73; *Attorney-General v. Bank,* 57 N. C., 290.

THE ATTORNEY-GENERAL v. THE PRESIDENT, DIRECTORS AND COMPANY OF BANK OF CAPE FEAR.

This case was similar in every respect to the last and received the same determination.

TOBIAS KOONCE ET AL. v. HARDY BRYAN ET AL.

A post-nuptial settlement made in favor of a wife by a husband, in pursuance of an agreement before marriage, will, if variant from such agreement, be reformed in a court of Equity; and consequently if, by accident or misapprehension of its legal import, the husband makes such settlement in accordance with the ante-nuptial agreement, when he designed, after marriage, to vary it, even with the consent of his wife, he cannot be relieved.

IN 1817 the plaintiff Koonce, by way of provision for his then wife, Holland, executed to the defendant Bryan a settlement of four slaves, named Violet, and her three children, Norris, Betty, and Sukey, upon the following trusts: for the husband during his life, and if his wife should survive him, in trust for her and her executors absolutely; with power to the wife, at any time during her cover- (228) ture, notwithstanding the same, to appoint, by any writing under her hand, the said slaves, or any of them, to any person or persons she might choose to have them, after the death of her husband; and in case she should make such appointments, then in trust for such appointees. The deed then provided that if the wife should survive

her husband and set up any claim to dower or a distributive share of his personal estate, other than he might give her by will, all the said trusts should cease and the slaves belong to the estate of the husband. In the beginning of the deed it was recited that the four slaves had belonged to the wife, and that it had been agreed before the marriage that they should be so settled on her, that if she should survive her husband she should be put to her election, to relinquish them altogether or to accept them as a provision in lieu of dower and her distributive share. The description of the slaves in the deed, as first written, appeared to have been as follows: "Violet and her increase, Norris, Betty, and Sukey, and *their increase, present and future,*" which is altered so as to read, "Violet and her increase, to wit, Norris, Betty, and Sukey, *only.*" Violet had another child, called John, who was born after the intermarriage and, as alleged by the plaintiffs, in March, 1817, and before the execution of the settlement. On 3 February, 1822, Mrs. Koonce, by two deeds, appointed and conveyed to her niece, Mary Gunter, the slaves Norris, Betty, and John; and to her niece, Eliza Wright, the other two slaves, Violet and Sukey, to be conveyed to them by the trustee, after the deaths of her husband and herself; and she soon after died, leaving her husband surviving and having all the slaves in his possession. The slave Sukey afterwards had issue, Chelcy and Charles, and on 10 January, 1830, the plaintiff Koonce gave the three, by deed, to his daughter, the plaintiff Mary, and they were taken into possession by her husband, the plaintiff John Pollok. The slave Betty also had issue, Henry and Isaac, and the plaintiff Koonce, on the same day, gave those three, in like manner, to another daughter, Matilda, whose husband, Benjamin Huggins,
(229) one of the plaintiffs, took them into his possession. Violet and John were then in the possession of Koonce himself. Since the deeds of gift of 10 January, 1830, each of the women, Sukey and Betty, had had other issue, which were in the possession of and claimed by Pollok and Huggins respectively. The defendants, the donees of the wife, claimed the ultimate remainder in all the original four slaves, after the death of Koonce, and also in all their increase, including the said John.

The bill was filed in 1832 by Koonce and his two sons-in-law, Pollok and Huggins, and their wives, and stated that the settlement was made in pursuance of "an agreement and understanding" between Koonce and his wife, before their marriage, that her negroes should be settled to the use set forth in the deed of 1817, except that it was a part of "the understanding" that the four she then had, and *those only,* should be so settled; and that their issue, born in the lifetime of said Koonce should not

be subject to the disposition of the wife, nor be held in trust for her, but should belong absolutely to the husband; that the deed was not drawn before the marriage, but that Koonce was willing, after marriage, fully to comply with the previous agreement; and that, accordingly, he and his wife both applied to the defendant Bryan to act as trustee, and communicated to him fully and expressly the nature of the ante-nuptial agreement, whereby the issue that might be born, prior to the death of Koonce, should be reserved to and belong to him; and requested him, Bryan, to have a settlement prepared accordingly, which he undertook to do; that in some short time afterwards Bryan presented to Koonce the settlement already mentioned, which he represented that he had caused to be prepared by counsel, in execution of and in conformity to the agreement and directions before stated; and that Koonce and Bryan, both believing that the deed did conform to the directions and intention of the parties, they each executed it in September or October, 1817. The bill then stated that in the year 1832 the donees of Mrs. Koonce made known their claim to the negroes born since the marriage, and that the plaintiffs then applied to Mr. Bryan to peruse the deed, and discovered that it was so framed that it was doubtful, as they were advised by counsel, whether, (230) according to its provisions, the said issue, born since the deed was made, did not belong to the defendants. The bill then charged that if such were the construction of the deed it was erroneous in fact, and was executed by the parties under a clear mistake of the contents and meaning of the instrument, it having been the intention of the parties, and the explicit instructions given to Bryan, and by him to the solicitor who drew it, that such issue should be excepted out of its operation, and that such intentions and instructions were necessarily inferable upon the face of the deed from the erasures and interlineations, which show its readings as first drawn and finally settled, as before mentioned; that Mr. Bryan then admitted the error in the deed, and the mistake under which it was executed, and was willing to correct it, but did not feel at liberty to do so without the directions of the court. The bill further stated that the slave John did not pass under the settlement, as he was born before it was made; and that the plaintiffs could then prove that he was born in March, 1817, but that it would probably be impracticable to do so after the death of the plaintiff Koonce. The prayer was that the appointment of John might be declared invalid; that the proper construction of the deed as to the other issue might be declared; and if the said issue were thereby subject to the appointment of Mrs. Koonce, that the mistake under which the settlement was executed in that form might be declared and the

settlement reformed accordingly; and that the trustee and the other defendants might be decreed to execute proper releases to the plaintiffs respectively.

One of the donees was an infant, who, answered by her guardian, and denied all knowledge of the matters charged in the bill.

The other denied all knowledge or information of the mistake alleged, and said that her aunt always claimed the issue and the power of disposing of them, as well as their mothers, and that she supposed it was so intended in the agreement before the marriage; that she did not know when John was born, but that he was claimed and con-
(231) veyed by Mrs. Koonce as hers after the death of her husband.

Mr. Bryan put in an answer, and his deposition was taken by the plaintiffs, and in each he stated that Mrs. Koonce owned the four slaves, Violet, Norris, Betty and Sukey; and informed him of the proposed marriage and requested him to have a marriage settlement drawn between Koonce and herself whereby she should have the exclusive right to her own slaves, and the power of disposing of them by will or writing during the marriage, reserving therein the use for his life to Koonce, and that he would act as her trustee; to which he assented, if it were agreeable to the proposed husband, and that in a few days Koonce himself made the like communication and request. He had no further recollection of the nature or terms of the contract as then, or at any time before the marriage, related to him. Some time after the marriage, but how long he could not say, the husband saw him on his way to New Bern, and said he was willing to settle his wife's negroes on her as he had promised, and requested Bryan to have a deed prepared, as he would then have an opportunity of seeing counsel, then saying and giving particular charge to him to have it so drawn as to give to his wife no power or control over the increase of the negroes born or to be born during his life, as he could not nor would not raise young negroes for any person but himself. Mr. Bryan gave the instructions to counsel as directed, who prepared the draught and read it to him; that upon hearing it read he perceived that in respect of the increase it did not conform to the orders of Koonce, and he required the draftsman to correct it, which he did by running a pen through the words "increase present and future" and inserting "to wit" and "only," so as to make the deed read as before mentioned. The attorney then said that thus altered it did express the agreement according to his instructions; and so believing, he took the deed home and read it over and explained it to both Koonce and his wife as leaving the issue of the four slaves to Koonce; and under that belief,
(232) entertained by all three, it was executed by Koonce and Bryan.

Badger for plaintiffs.
J. H. Bryan and W. C. Stanly for defendants.

RUFFIN, C. J., having stated the case as above set forth, proceeded as follows: The legal operation of the deed admits of no dispute as to the issue of Betty and Sukey. Their issue follows themselves, of course. A question might be made upon the subsequent issue of Violet, upon the ground of the particular restriction to the three children she then had, and to them *only*. But the Court does not deem it material to determine it, as it could not, if in favor of the plaintiffs, afford a foundation for any relief to the plaintiffs upon these proceedings. The equity of the plaintiffs obviously depends upon the terms of the agreement itself between the parties to the proposed marriage and the departure or conformity of the settlement founded on it.

It could scarcely be doubted by any person that the deed, as drawn, varies from the intentions of the husband and trustee existing at the time of its execution, and from the instructions given to the draftsman. The testimony of Mr. Bryan is precise, positive and clear to that point. His credit is not questioned by the defendants, and indeed stands apparent upon the fair and candid manner in which he speaks in both his answer and deposition. He does not therefore need the support, in respect of his credit, of the testimony of the solicitor who wrote the deed. Nor is the case open to the objection made at the bar, that the deed ought not to be altered upon parol testimony merely, especially that of one witness. The instrument itself bears upon its face unequivocal evidence that the instructions given were not understood or not regarded, and denotes that some such alteration as the witness speaks of was aimed at by the writer when he made the erasures and interlineations which altered the reading of the instrument, the whole being still legible. This part of the case does not therefore rest on parol testimony merely, but is fortified by the writing itself, and that in a stronger manner than if there had been separate (233) written articles or memorandums, because these last might possibly have been departed from by a new agreement before the deed was settled. The Court therefore is obliged to perceive that the deed is not conformable to the instructions, and was executed by the husband under a mistake as to its contents and legal operation.

But assuming these facts, it is, nevertheless, our opinion that the plaintiffs cannot have a decree. It seems to us that the instrument has, by accident—supposing it to be in all respects as contended by the defendants—been framed exactly as it ought to have been, according to the original agreement between the parties. This is a post-nuptial settlement, professing to be executed according to an agreement before

marriage, and must of necessity be subject to the control of the agreement, as the execution of the deed is then the act of the husband alone, and the wife is in his power. If the agreement had been by written articles, there could be no doubt upon the subject, for in some cases, even where the settlement had been executed before marriage, it had been reformed according to the articles, when it was apparent that the departure did not arise from a change as to the terms of the agreement, but that it was intended to pursue the articles, and they had been mistaken. The Court has always modeled articles so as to effectuate the intention of the parties; and when, by following the words of the articles, a settlement drawn under them, even before marriage, would give the husband an estate tail, or would give the estate to the issue of the husband by another marriage, the settlement has been dealt with so as to make it conform to the articles according to their true construction, and not their strictly verbal sense. *Seymore v. Boreman,* cited 2 Meriv., 347; *Randall v. Willis,* 5 Ves., 575; *Wert v. Errisey,* 2 Pr. Wms., 355. Much more clearly will the Court hold the husband to the articles when the whole rests in executory contracts until after the marriage, for then the husband has everything in his own hands, and the wife cannot vary her agreement.

(234) The question therefore is, What was the original agreement in this case? Unfortunately it rested in parol, and no person pretends to state its precise terms, so that the Court is obliged to collect it from the circumstances, and therefore some uncertainty must be felt as to the absolute correctness of our conclusions. Perhaps, however, as little exists here as could be expected in any case. The bill charges that it was distinctly agreed before the marriage that the husband should have all the issue of the slaves that might be born in his lifetime, and that the power and beneficial interest of the wife should extend only to the original stock; all which was communicated to Mr. Bryan, the trustee, by both the parties before marriage. That is a most material allegation to the plaintiff's equity. But it is not sustained by proof. As the agreement was by parol, and Bryan does not profess to recollect all that the parties told him before the marriage as to the nature of their respective interests, it has been argued that the terms of the agreement in this respect may be collected from the concurrence of the views of all the parties respecting the settlement, as the same was understood by Bryan, and explained by him to the others when it was executed. It is said that this was not a new provision introduced first into the settlement, but that its existence there, without objection, proves that it entered into the original agreement. The Court does not inquire whether such an inference is just

or legitimate in transactions between husband and wife, for it seems to us that the inference itself cannot with truth be made.

In the first place, neither the husband nor the trustee alleges any other departure in the deed from the instructions or from the agreement, but the one respecting the slaves that might be born. Mr. Bryan says he cannot recollect any part of the agreement as communicated to him before the marriage except that the wife was to have all her slaves secured to herself exclusively, subject to the life estate of the husband, with power to her to dispose of them after his death. No doubt there were other stipulations. What were they? Was the absolute gift of the issue to the husband one of them? We deem it nearly certain that it was not. There is not a defect of evidence as to the other parts of the agreement, although Mr. Bryan or any other witness does not speak to them. The deed fully supplies all (235) necessary light on this subject. It shows that the wife was to renounce all her marital rights in the husband's estate, real and personal. Being prepared after marriage, upon an agreement by parol, the deed puts her in this respect to an election. But that the deed speaks the substance of the agreement upon this subject is not at all controverted. If that be so, it is scarcely possible that it could ever have been proposed by the intended husband, or assented to by the wife, that she should be put off with the inadequate provision of her own four original slaves in her old age, when those slaves might be also aged or have died; that the husband should keep all his own estate, be entitled by the law to all that should fall to her during the coverture, and also, under the settlement, to all the profits and issue of her negroes then in possession. It appears that both the parties were advanced in life at the time of marriage, and the husband had a family of children; and it is not uncommon under such circumstances that, expecting no issue of the marriage, each keeps his or her own estate and renounces that of the other. The husband, of course, takes the profits during the coverture, when he supports the wife, and she might be willing to bestow her slaves on him during his own life in preference to her own relations. But it cannot be supposed that she could possibly agree to do so and strip herself, so as to be destitute in her widowhood and old age.

Then, according to the agreement as stated to Mr. Bryan before the marriage, the issue followed their mothers and belonged to the wife, that being the legal effect of it. He can state nothing to the contrary. The other provisions of the deed, which relate to such parts of the contract as the witness has forgotten, strongly sustains her claim as having been then expressly recognized. It can, moreover, scarcely be supposed that Mr. Bryan could have forgotten this particular part of

the agreement, now alleged by the plaintiff, if it had been mentioned to him before the marriage, more than he has the subsequent instructions. If nothing was said about the issue before marriage, the (236) effect is the same as if they were expressly reserved to the wife.

From all which the Court deems it clear that the stipulation that the issue should belong to the husband was a new one, first suggested to his mind after the marriage, and probably after Violet had another child, and was improperly designed by him to be interpolated into the settlement. If the attempt had been successful, the Court upon this evidence would have been constrained to modify the settlement so as to secure the issue to the wife, and consequently cannot, in the case which has happened, alter it so as to take the issue from her.

This conclusion renders it unnecessary to make any declaration as to the period of the birth of the boy John, upon which point, however, the plaintiff has not offered any proof. For if he was born before the execution of the deed, and therefore did not pass by it, still, as a part of the issue embraced in the original agreement, he belongs in equity, as between these parties, to the donee of the wife. But these proceedings do not authorize any relief to either party in relation to that slave; not to the plaintiff, for want of proof and for want of equitable right; and not to the defendants, because if John was born before, and did not pass by the deed, the donee of the wife must file her own bill to get a title, if the other party should still hold out. But the present plaintiffs have no title, and their bill must be dismissed, with costs to the defendant Bryan and the defendants Bryan Jones and wife.

PER CURIAM. Bill dismissed.

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(237)

ANDREW FALLS ET AL. v. FREDERIC CARPENTER, THEODORIC F. BIRCHETT ET AL.

THEODORIC F. BIRCHETT ET AL. v. ANDREW FALLS ET AL.

FREDERIC CARPENTER'S HEIRS v. ANDREW FALLS, THEODORIC F. BIRCHETT ET AL.

1. Where a vendee contracted for the purchase of land and took possession, but neglected to pay the purchase-money for nine months after it fell due, during all which time the vendor held the bonds for the purchase-money, and did not offer to surrender them, but recognized the contract as still subsisting, *it was held* that, having allowed the contract to subsist after the default, the vendor could not put an end to it without a previous formal and reasonable notice to the purchaser to come forward

and fulfill it, or he would not hold himself bound. And *it was held* further, that upon such purchaser's paying the money he could demand a specific performance from the vendor or call for the legal title from a person who had purchased with full notice of the contract.

2. If a vendor, after a default by the vendee, is still willing to complete the contract, and a third person interposes and, by misrepresenting the willingness of the vendee to fulfill the contract on his part, procures a conveyance to himself, *it seems* that the first vendee will have an equity against the second, independent of any he might have against the common vendor. Insolvency, whether existing at the time of the contract or occurring subsequently does not of itself dissolve the contract; but if continuing so as to disable the purchaser from fulfilling his part of it, may authorize the other party, after request and default, to renounce it, and after reasonable notice may discharge him; or it may be evidence, with other things, of abandonment by the purchaser, but in that case liable to be repelled by other evidence.

3. The increase of value is not such a change in the subject-matter of a contract as is, of itself, a ground for rescinding or not enforcing articles. But if one of the parties refuse to perform, and then comes a change of circumstances, upon the strength of which he is desirous to go on with the bargain, and insists on it, he may be properly repelled, although he was not watching for that change.

4. A defendant against whom the plaintiff must have a decree, if he gets one at all, cannot, by giving a release of his interest to his codefendants *pendente lite*, become a competent witness for them. His liability for the costs, if nothing else, would exclude him.

THE original plaintiff, Falls, purchased in February, 1823, from the defendant Frederick Carpenter, the elder, two adjoining tracts of land in the pleadings described and executed his bonds for the purchase-money, and took a covenant for a conveyance upon the payment of the price. He took possession, but failed to make the payments, and there was on 6 November, 1826, the sum of eighty-three dollars (238) and forty-three and three-quarter cents due for interest in arrears. He then applied to Carpenter to modify the contract by giving further time and by agreeing to accept payment in grain or country produce, in lieu of money, if he should be unable to raise the money, to which the other acceded. On this day accordingly that covenant and the bonds were destroyed, and Falls gave three new bonds: two for three hundred and seventy-five dollars each, payable at one and two years, with interest from the date, for the purchase-money; and the third, for the balance of interest, eighty-three dollars and forty-three and three-quarter cents, due on the old contract; which last instrument provided that it might be paid in grain at specified prices, and that any excess of the grain delivered, after discharging that bond, should be applied to the other two. At the same time Carpenter entered into a bond, in the penalty of fifteen hundred dollars, to Falls, with condi-

tion to be void if Carpenter should "at the payment of the two notes for three hundred and seventy-five dollars each, with the interest thereon, convey to said Falls the said two tracts of land" in fee simple, with general warranty as to one and special warranty as to the other.

The original bill, filed 11 September, 1829, by Falls, charged the contract of November, 1826, and that he was in possession under it, and made payments which satisfied the small bond, and left the sum of one hundred and thirty-one dollars, besides interest, applicable to one of the bonds for three hundred and seventy-five dollars; and that in August, 1829, while the contract was in full force, a valuable gold mine was discovered on the land, which he and other persons under him began to work; that the defendants, Birchett and Ormond were on the land, and saw the plaintiff and his tenants collecting gold, and knew that he had purchased the land, and then claimed it, and was in actual possession; and that with knowledge of these facts they, on 22 August, 1829, without informing Falls of their purpose, went to Carpenter (who resided seventeen or eighteen miles off), and proposed to purchase the same lands for themselves; that Carpenter refused to sell to them unless with
(239) Falls' consent, or unless he could get up his bond to Falls, upon which they represented to him that the bond was not obligatory, because the purchase-money had not been punctually paid, and also that Falls was yet unable to pay it, and wished to rescind his contract, and pretended that they wished to purchase that the one might build a mill and the other set up a store, which he wished to do immediately, as his goods were already purchased; that Carpenter did not wish to keep the land himself but to sell it; and believing those false representations, agreed to sell to them at the price of seven hundred and fifty dollars, which was immediately executed by their giving their bonds for that sum and taking a deed from Carpenter in fee; that during the treaty they concealed from Carpenter the fact that gold had been found on the land, and in answer to an inquiry by him on that point, denied it. The bill further charged that Birchett and Ormond entered into a part of the land and collected some gold, of which an account was prayed, and threatened to bring an action of ejectment or otherwise expel Falls from the land which he had under cultivation or was working for gold. It also charged that between 22 August and the filing of the bill the plaintiff had come to a settlement with Carpenter, and ascertained the balance due on his bonds, and that he had fully paid the same and taken up the bonds. The prayer was for a conveyance by Carpenter, Birchett and Ormond, or those of them in whom the legal title was, and for an injunction and general relief.

Carpenter died intestate, after service of the bill and before answer; and by a bill of revivor and supplemental and amended bill the suit

was revived against his administrators, widow and heirs. And it was further charged that the defendants Birchett and Ormond had sold and conveyed shares of the land to certain other persons who had notice of the plaintiff's rights, and were made defendants; and that Falls, before the filing of the original bill, had also assigned undivided shares to certain persons who were made plaintiffs with him.

The administrators were P. Manney and Frederick Carpen- (240) ter, the younger, who was a son and one of the heirs of F. Carpenter, deceased. They answered, and admitted the contract of November, 1826; the possession of Falls under it; the payment of grain to the quantity and value charged in the bill; the sale and conveyance to Ormond and Birchett, and the subsequent payment by Falls of the balance due on his bonds, all as charged in the bill; that thereupon the intestate informed Falls that Birchett and Ormond had obtained a conveyance from him by inducing him to believe that Falls was unable to pay for the land, and that the contract with him was void; and offered then to make Falls a deed, which Falls declined accepting unless that to Birchett and Ormond were first surrendered and canceled; that the intestate then sent the bond of Birchett and Ormond to them by one Adderholt as his agent, with instructions to tender it to them and demand the deed, which was done, but they refused. These defendants then submitted to any decree between the other parties, and to repay the plaintiff his money, or to surrender to Birchett and Ormond their bond, as the court might decree the land to belong to the one or to the other.

By an amended answer, the administrators said that they had no personal knowledge of the transaction, and had before answered upon information which they have since discovered to be untrue, and to have been imposed on them by the plaintiff and those interested with him; and they and the other heirs and the widow of Carpenter then stated the contract of February, 1823, and that of November, 1826, and that although some grain was delivered they did not know how much, and believed not more than discharged the note for eighty-three dollars and forty-three and three-quarter cents, or certainly that and the interest on the other bonds, so that the whole principal purchase-money remained due in November, 1828, when the last bond became payable; and that no payment was made thereafter until the last of August, 1829, when Carpenter had sold to Birchett and Ormond. They stated that through the winter of 1828 and in the spring of 1829 Carpenter applied to Falls for payments, and insisted on them; and *that Falls was unable, or alleged that he was unable, to make any, and proposed to Car-* (241) *penter to rescind the contract, which was then agreed to by Car-penter, and the contract considered to be rescinded;* that it was thereupon understood between these parties that Carpenter should make

sale of the land for his own benefit, but that he should keep the notes of Falls, and the latter keep possession of the land until a new sale; and when such should take place, that a settlement should be made and the notes and possession mutually surrendered; that, accordingly, Carpenter made several efforts, with the knowledge of Falls, to sell, and could not until August, 1829; that on the 22d of that month Birchett and Ormond and one Robert Dixon, having ascertained that a very valuable gold mine (which has since turned out to be worth, probably, one million of dollars) had been just before discovered on the land, formed the design to purchase it on speculation, and applied to him for that purpose; that Carpenter wished time to consider of it; and that he was an old, weak and intemperate man, at no time well able to attend to business, and then sick in bed; that they represented to him that they were anxious to get the land for the purpose of building a mill and a store, and if they could not get it immediately they would not purchase at all, and both concealed and denied that gold had been found on the place; that thereupon Carpenter contracted with them and conveyed the land to Birchett and Ormond, as charged in the bill; that he was induced to make the contract by the urgency of those persons, in the belief that they really wanted the land for the purposes mentioned by them, and that they hurried him into the completion of it then, before a rumor of the existence of the gold mine could reach his ears or he might have any other reason to suspect their motives.

The answer then stated that, a few days thereafter, Falls and the plaintiff Wilson (who, with others, had formed an association to get a title and work the mines) offered to pay off the notes of Falls, and demanded a deed; that he was confounded at discovering the fraud that had been practiced on him by Birchett and Ormond, and also at the demand of Falls and Wilson, and disclosed to the latter his true situation and embarrassment, and asked Wilson's advice what he
(242) should do; that they insisted on Falls' claim, and repeated the tender of the money, and advised him to take it, as that could not make the matter worse for him, and that, intimidated by their menaces and at their suggestion, Carpenter appointed Adderholt, his agent, to take advice and act for him, who attempted to get the contract with Birchett and Ormond rescinded, but failed, and thereupon received from Falls and Wilson, in cash, a part of the sum due on Falls' bond, and took the bond of Wilson for what they admitted to be the residue, but that Carpenter refused to accept from Adderholt either the money or Wilson's bond, or to make a deed to Falls, and, overwhelmed with the perplexities of his condition, soon after died, before he could answer the bill.

The defendants, Birchett, Ormond, and Dixon, answered, and admitted the purchase and conveyance from Carpenter, for which they gave their bonds for $750. They stated that, two or three days before, they had seen persons digging and washing for gold on a piece of land which they were informed and believed was vacant; that Dixon, who lived on an adjoining tract, so believed; that it was, on 22 August, 1829, agreed between the three that they would enter the land they supposed vacant, and as they expected the vein of ore to run also into the Carpenter land, the line of which, as they believed, ran very near the spot at which the gold was found, it was further agreed by them to buy that land also; that Dixon went to the entry-takers to make an entry, in his own name, on the joint account, and Birchett and Ormond proceeded to Carpenter's to make the purchase from him, and did so, taking the deed in their names, also on the joint account. They stated that they knew Falls had agreed for the land, but had understood and believed that he was unable to pay for it, and had before abandoned it, which belief was founded upon the facts that Falls was notoriously an imprudent and insolvent man; that Carpenter had repeatedly offered the land for sale to Ormond and others, from the autumn of 1828 up to that time, declaring that he was absolved from the contract with Falls by his non-compliance, and that, although this was generally known, they (243) never had heard that Falls forbade Carpenter to sell; that they did not use any persuasion to induce Carpenter to sell to them; that they considered him to be the absolute owner, and knew that he was desirous to sell to raise money, and that as soon as they made known their wish Carpenter agreed to make the sale; that the remarks about Falls' claim came from Carpenter, who mentioned that he had a long time before agreed to sell to Falls, but he was no longer bound, and "his bond was dead," because Falls had made no payment and never would be able, and because he (Carpenter) had sent to him, the spring before, to come and settle with him, as he was about to sell the land to other persons, and Falls neither paid anything nor came to see him. They admitted that Birchett and Ormond did not mention to Carpenter that gold had been found, and said that the reason was that they were not then certain that it was on his land, although they expected that it would extend into it. They denied that they made any false representations touching the gold, and stated that Carpenter made no inquiries, but voluntarily said, during the treaty, that he hoped they might find gold in abundance; that Dixon also came to Carpenter's in the evening, when they were writing the deed, and upon being informed by Carpenter of the contract, remarked to him "that he had better take care what he was about—perhaps there's gold on your land"; to which the other replied "that he wished they might find the best mine in the country;

he did not want gold mines, as he was too old to work them, and wanted nothing but the value of his land or the money for his land." The answers then stated that these defendants entered into the lands immediately and began to work the mines, but were in a few days evicted, under color of a summary process, for a forcible entry and detainer, by means of which Falls, Wilson and the other plaintiffs got into exclusive possession; and, further, that on 4 September, 1829, the defendant Ormond had sold and conveyed to the other defendant, Dixon, his third, and that

Birchett and Dixon had since associated with themselves the
(244) other persons named, who were made defendants by the supplemental bill, who also put in answers, in which nothing material was set forth.

By a subsequent answer, Robert Dixon disclaimed, and the defendants, Birchett & Co., exhibited a deed from him to themselves, dated 3 May, 1832, with special warranty for all his share and interest.

Birchett and Ormond instituted an action of ejectment against Falls and others to recover the possession which was thus lost by them, and, the trial of the same being delayed, Birchett and the assignees in May, 1832, filed their cross-bill against Falls and his partners, in which they charged the two contracts between Falls and Carpenter, and that the latter was merely an extension of the time by reason of his inability to pay the purchase money, and sought a discovery as to that fact and as to the particulars of those contracts. The bill also charged that Birchett and Ormond had heard various reports, which were in common circulation, that Falls had wholly failed to comply with his contract and had abandoned it, and that they then became desirous of purchasing from Carpenter, as was generally known, and particularly by Falls; that on 22 August, 1829, or the day before, Birchett and Falls were on the land together, and that the latter, then knowing of the intention of the former to purchase, made no sort of objection thereto, but expressed his satisfaction therewith; that, in fact, Falls had told Carpenter that he could not pay for the land, and directed him to sell to any other person who could pay for it, to whom he (Falls) would surrender all claim, and that Carpenter so declared to them, Birchett and Ormond, at the time that he sold to them. The bill further charged that no person was in actual possession of any portion of the land, but one Arrowood, who attorned to the plaintiffs, and that they entered into the peaceable possession and continued it for a few days, until turned out in the manner stated in their former answer, and that Falls and the other defendants got into possession and were making great profits and committing irreparable waste. The prayer was for a discovery of all the matters

charged, for an account of the gold already made, and for an
(245) injunction against further waste or working.

All the defendants put in answers, but that of Falls was the only material one in the present state of the case, and none of the others were contradictory of it. That admitted the two contracts of 1823 and 1826, and that the last was substituted for the former at his instance, because it was more convenient to pay in grain than money. He denied that he was unable to pay for the land, and said he could always have done so, if pressed, but that Carpenter promised not to press him; that in the winter of 1826-27 he paid 200 bushels of corn, and in 1828 more corn and rye, amounting, altogether, to $240, and in the spring of 1829 Carpenter applied to him for $25, which he had not by him, and he requested Carpenter to borrow, and he would take up his note, and that he did pay Carpenter's note to John Falls for about $26, which was satisfactory to Carpenter. The answer denied positively any agreement with Carpenter to rescind the contract or any abandonment or any act or omission from which it could be inferred, or that he ever agreed that Carpenter should sell to any other person, and, on the contrary, stated that he was in actual possession of the land, claiming it under his purchase, cultivating and improving it, and digging for gold, both he and his hirelings and tenants, and that Arrowood was one of his tenants and had continued to work under him ever since; that it is true that on 21 August, 1829, both Birchett and Ormond (the former of whom was a stranger to this defendant) were on the premises and saw Falls and his hands collecting ore, and became fully aware of its richness and the great probable value of the mine, and, no doubt, formed the design then of purchasing from Carpenter, and may have thought they would hold the land if they could get his deed, notwithstanding the contract with Falls, as they, after getting the deed, insisted on it as a good title, because it was the first and a warranty deed, and said that Carpenter and Falls might settle the dispute upon their contract between themselves. But the answer denied positively that this defendant assented to or had the least knowledge of their intention to pur- (246) chase, or even suspected it, until he heard, in the evening of the next day, the 22d, that they had gone to Carpenter's for that purpose. The answer stated that both Birchett and Ormond conversed with this defendant, and neither of them intimated such an intention, but that, on the contrary, Birchett applied to him for a lease, and denied that he subsequently expressed his satisfaction at their purchase, but, so far from it, that upon hearing that such was their business he set off early on Sunday morning, 23 August, to Carpenter's, to put him on his guard and prevent him from making a contract; that upon getting there, he heard for the first time that they had obtained a deed, and was also told by Carpenter of the misrepresentations (as charged in Falls' original bill) made to him by those persons as to gold being on the land, and also

that this defendant was willing to give up his contract and would have come with them and brought up the bond had he not been confined at home by sickness, and that, upon Carpenter's expressing a desire to postpone a contract until he could consult this defendant, who was, as he considered, entitled, Birchett and Ormond assured him that he (Falls) had agreed with them to give up the land and all claim on Carpenter for his improvements, all which representations the answer affirmed to have been false. The answer then stated that, upon hearing the truth from this defendant, Carpenter declared that he had been imposed upon, and that he would never receive the money from Birchett and Ormond, and in a few days sent their bonds to them by his agent, Adderholt, and demanded his deed; that he (Falls) returned to the land and went the next day to work the mine, when he was prevented by Dixon, who claimed it under Carpenter's deed, and that thereupon he associated himself with Wilson and the other defendants, as a copartnership, to receive the title and work the mines; that on the last day of August, Falls and Wilson offered to settle with and pay Carpenter, who expressed a perfect conviction that he had been imposed on respecting Falls' giving up or abandoning the contract, and a readiness on his part to comply with it, but desired time to send to Birchett and
(247) Ormond for his deed, which he wished to get up, and that on their refusal he said that he would accept the payment from Falls, and did so, as stated in the bill, on 2 September, 1829, it being then understood that Falls, Wilson and others would file a bill against Carpenter, Birchett, and Ormond to have their deed surrendered or obtain a conveyance. The answer then asserted that Falls was never out of possession of the land, but admitted that Ormond, Birchett, and Dixon were in possession of a part of the gold mine for a few days, until they were evicted, as alleged in the bill. The answer then set forth a statement of the number of hands engaged in the service of the defendants in working the mines, the gold collected, and the mode of working it.

At Fall Term, 1832, the heirs of Carpenter also filed their cross-bill against Falls and those claiming with him, and against Birchett and those claiming with him, to rescind the contract with Falls, and also for a reconveyance from Birchett and Ormond and others, upon the ground, as to the first, that it had been abandoned by Falls not making the payments stipulated, and by reason of his insolvency, being unable to make them, except from the great and sudden increase in the value of the land, and that it had been rescinded by express verbal agreement, and that Carpenter had been surprised into receiving the payment on 2 September, 1829, he being incapable of business, from age, infirmity, ignorance and weakness, and that, at any rate, as he had not made a

deed to Falls, he ought not to be held obliged to do so, since the value of the lands had accidentally increased so immensely, and as to the latter, for the causes of fraudulent concealment and misrepresentations and hurrying into the bargain and conveyance before set forth in the bill of Falls and others and in the answers of the Carpenters thereto.

To this bill Falls put in an answer substantially the same with that to the cross-bill filed by Birchett and others against him, adding that when he went to Carpenter's in August, 1829, he carried and showed to him one of the best specimens of ore found in the mine, and made a full disclosure of its extent and richness, as far as then (248) discovered, and that Carpenter was dissatisfied only with Birchett and Ormond for their deception practiced on him, but was perfectly satisfied with his conduct, and expressed his willingness to make him the title as far as he could, and that he received the payment on 2 September without the least influence or menace from any person, and voluntarily, because he thought it right that the deed to Birchett and Ormond should be canceled and a conveyance made to Falls, and that he was then in the full enjoyment of his faculties; that the value of the mines was greatly overrated, for that shares of one-tenth part sold several months afterwards at $300, and it was a subsequent discovery that enhanced the value to a large but uncertain amount; that when his bonds fell due, he owned unencumbered land in the county, besides that purchased of Carpenter, worth $2,000, which was known to Carpenter, who neither wished to rescind the contract nor abandon it, nor would have let Falls do so.

Birchett and Ormond also answered this bill to the same effect with their answer to the original bill of Falls and others, admitting, further, that their principal object in buying the land was the prospect of gold, and that the spot where the gold was then found (which they then thought was vacant) was included within the lines of the Carpenter land, which had been sold to him by the party, Robert Dixon, and stating also that that vein turned out to be of little value, but that several months afterwards another of great value was discovered in another part of the land; that Carpenter expressly declared that he and Falls had rescinded their agreement, and that he readily contracted with them and sent for Adderholt, his friend and neighbor and ordinary adviser, to draw the writings, who came and did so, and that before he executed them Dixon arrived and informed him that there was probably gold, to which he replied "he did not care, and hoped there might be; that if there was he did not want it, but wanted money to pay his debts and put his mind at rest"; that he was perfectly competent to do business, and had the assistance of his confidential adviser, (249) Adderholt.

To the answers in each of the causes, replications were entered, and a large mass of testimony taken by all the parties. The most important were the depositions of Adderholt, the person mentioned in the pleadings, which were taken several times by the parties respectively.

That witness stated that he was the friend and near neighbor of Carpenter, with whom he generally advised upon matters of business, and on whom he called to do his writing; that he drew the contracts between Carpenter and Falls, and that he knew that Falls paid corn and rye in 1827 and 1828, though he could not state the precise amount of his own knowledge, and that he also paid a note of Carpenter's to John Falls for twenty-six dollars; that it was agreed the small bond should be first paid, and any surplus should be applied to those given upon the last bargain for the price of the land. He further stated that on 22 August, 1829, Ormond came to his house and stated that he and Birchett had bargained for the land, and that Carpenter had sent for him to draw the bonds and deeds; that he went, and on the way asked Ormond if Falls was there, and he said not; that he then asked if they had the bond to Falls, to which he also replied no, and that they had been to see him, but that he was intoxicated continually. The witness then remarked to him that Falls or the bond ought to be there, and Ormond stated that Birchett was with him the day before but that he was so stupidly drunk they could do nothing with him. The witness asked if they had found gold on the land, and Ormond said not as he knew, and that he and Birchett wanted to set up a mill and store on the land. Upon their arrival at Carpenter's the terms of the bargain seemed to have been settled, but Carpenter asked him what *he* thought of the trade, and upon his saying that he thought Falls or the bond ought to be there, Carpenter observed that he thought so too. Birchett or Ormond then said there was no danger, for as Falls had not paid his bonds, Carpenter's bond was void. When the deeds were drawn, Carpenter hesitated to sign them, and said he did not like to do so without
(250) Falls or the bond; when Dixon, who had then arrived, said that the bond was void and there was no danger. It was understood by all parties that Falls was then in possession, and the witness then heard of no other person who was. After Dixon's remark, Carpenter executed the deeds, and in a little time Birchett or Ormond asked how they were to get possession, to which Carpenter replied, "You must see to that yourselves." Both Birchett and Ormond denied at that time that they knew of any gold on the land; and on that occasion Carpenter said he had no persons to work gold mines, and did not care for them, but he wished they might find one; that what he wanted was his money for the land, which he believed he could never get Falls to pay him; and Birchett or Ormond then said there was no doubt Falls would give

up the land and come to a settlement. The witness stated that Carpenter was a weak man, and not very competent to business from age and intemperance, and was not entirely sober on that day; and upon being asked why, as his friend, he did not postpone the business until the next day, he replied that he had great confidence in Ormond's integrity, and thought everything fair; and he himself became their surety in the bonds to Carpenter for the purchase-money. The witness further stated that he had considered Carpenter's "bond dead" because Falls had not paid, and that he had several times told Carpenter so, but always advised him not to sell to any other person before he took it in; that this opinion was founded on the belief that the bond provided on its face that if Falls did not pay his bond when due, Carpenter should be discharged; but that, upon seeing the bond, he found that he was mistaken. Two or three days afterwards Falls and Wilson came down to pay Carpenter, who again sent for the witness to make a settlement for him. Carpenter complained of being deceived by Birchett and Ormond, and was unwilling to receive the money from Falls until he could get up his deed. They, however, made a statement of the payments before made, which discharged the small bond and a hundred and thirty-one dollars of the purchase money, besides nine or ten dollars allowed as interest for the payments in advance. Car- (251) penter asked Falls to wait until he could send to Birchett and Ormond, which was acceded to; and the witness went with their bond and requested them to give up the deeds, as Carpenter alleged that he had been imposed on and wished to have no difficulty with Falls and Wilson. Ormond was then willing to surrender the deed, but Birchett and Dixon refused. That he returned, and on 2 September the settlement with Falls was completed, and Wilson paid six hundred and thirty-five dollars and sixty-two and a half cents in cash, and offered to pay the residue, but Carpenter requested him to keep it, and give his bond, as he wished to keep that at interest. Carpenter delivered the money to the witness for safe-keeping, but in a few days took two hundred dollars, and afterwards lent the witness on his bond three hundred dollars more, and the residue the witness paid to the administrators after his death. The witness stated that when he went to get the deed from Birchett and Ormond, the latter admitted that the conversations with Carpenter, before Adderholt was sent for, "were or might be sufficient" to make him think they would have brought Falls or the bond, if he had not been too drunk; and Ormond afterwards acknowledged that they told Carpenter that they, Birchett and Ormond, would run all risks about the bond to Falls. Birchett also admitted to him that before he bargained with Carpenter he had tried to get a lease from

Falls, and could not; but Dixon said it was not from Falls but from one Crane who then had a lease from Falls.

It clearly appeared upon other proofs that Falls had been in possession from 1823 up to August, 1829, and that he or his tenants lived on the land and had parts of it in cultivation; and particularly, that some weeks before Birchett and Ormond's purchase he had applied to R. M. Crane (a witness for Birchett and Ormond) to borrow five hundred dollars to pay to Carpenter, saying then that he had paid about one hundred dollars towards the land, and if he could raise five hundred dollars more Carpenter would wait with him; and to induce Crane to make the loan, he offered to lease to him the land in dispute, and (252) to mortgage other land, worth twelve hundred dollars, and also this as a security; and did make a lease of part of the land to Crane; and also that on 18 August, 1829, he leased four acres to Riley Arrowood, to be worked for gold, on which the lessee proceeded to work, and the ore was found which Birchett and Ormond saw.

Thomas Dixon, a son of Robert Dixon, who was a party, stated that he heard Falls say, in the spring of 1829, that "he expected to give back the Carpenter land"; and also heard F. Carpenter, Jr., say that in the spring of 1829 "his father had sent him to Falls to see if he would pay or give up the land, and that he got no money," but he did not state that Falls agreed to relinquish the land.

Hugh Patterson stated that in the spring of 1829 F. Carpenter, Jr., brought a message to Falls, and witness saw them conversing, but did not hear the particulars, and that next morning Falls said that "he must go up in a few days and settle with Mr. Carpenter"; but whether he meant to settle for the corn or pay for the land the witness could not state. A few days afterwards Falls was very drunk, and was complaining of Dixon having gained an expensive lawsuit for land against his father, and said that he must give up the Carpenter land and try Dixon himself.

Jacob Starnes stated that several days before Birchett and Ormond purchased, Falls had made leases to Arrowood and others, and they proceeded immediately to work, and that those leases were publicly known; that on the day Birchett and Ormond purchased, Falls mentioned to the witness that "they had gone to purchase the land and gold mine in dispute."

John Hullett stated that in the fall of 1828, as he thought, though it might be in 1827, Falls delivered one load of corn to Carpenter, when the latter remarked, "You have come nearer paying the interest than I thought you had," and the balance of interest was then stated to be between five and ten dollars; Falls said it was less than he had expected, but that he should never be able to pay for the land, and that Carpenter

must sell it if he could, and pay himself; that no person was (253) present but the witness and Carpenter and Falls, and this was the only payment he knew of.

Two other witnesses proved that in October, 1828, F. Carpenter, Sr., offered to sell the land to Ormond, and said that Falls would not even pay the interest; and that in the spring of 1829 Carpenter again sent word to Ormond to come and buy the land, as he could get nothing from Falls; and F. Carpenter, the son, said that Falls would give up, and had told him to sell the land. Falls was not present at nor informed of either of those conversations.

To the discredit of John Hullett, many witnesses were examined who said that he was not credible; and other witnesses proved that the last payment was not made by Andrew Falls, the party, but by John Falls, who delivered four loads of corn in 1828, while Andrew was in South Carolina, and that the delivery of the corn by Andrew himself was in 1827.

Benjamin S. Johnson stated that a short time after the sale to Birchett and Ormond, Carpenter informed him that when they proposed to purchase, they stated to him that Falls had consented that they should, as they intended to establish a mill and store which would be convenient to him, residing on his own land, which adjoined; and that he, Carpenter, told them that he did not think it right to sell to any person after having agreed to convey to Falls; but that, upon receiving the assurance before mentioned, and believing Ormond to be a very honest man, he thought he might do so; and that he would not have conveyed to Birchett and Ormond if he had not believed it was approved by Falls.

Richard McKee, a nephew of Carpenter, stated that two or three weeks before Carpenter died, and when he was "fully at himself," he stated to the witness that he told Birchett and Ormond that he had sold to Falls, who held his bond, and that Ormond replied they had seen Falls, and he did not want the land, and had told them to go and purchase; that he, Carpenter, would still do nothing until Adderholt was sent for, who said, when he came, he thought the bond for (254) title was out of date; that, putting confidence in Ormond and thinking the bond void, he made them a deed; but that he soon learned from Falls that he had not given his consent to Birchett and Ormond, and therefore he received payment from him, and was willing to make the title to him.

Robert Dixon was, after his release and disclaimer, examined by Birchett and his associates under an order, subject to all just exceptions. He stated that those persons did not know that the gold found was on the Carpenter land, but they believed it extended to it; and that he told Carpenter before he signed the deed that he, the witness, ex-

pected there was gold on the land as some had been found on the piece he had that day entered, on the branch just below. He also stated that in the winter before, at which time gold had not been found, Falls told him that he could not pay for the Carpenter land without selling a tract devised to him by his father, and that he would rather give it up than to sell his father's old place. In a few weeks afterwards Carpenter told him that Falls had given him up the land, to make his own out of it, and desired him to let Ormond know it, and request him to come up and buy. Upon being asked whether Falls did not tell him that he had actually given up the land, the witness replied that he did not, but only that he would have to do so.

There was also much testimony as to Falls' circumstances, in which the witnesses expressed opinions somewhat at variance. Upon the whole of it there was no doubt of his solvency. When he made the contract he had but little property, and was a young man living with his father, who was a farmer in easy circumstances; and Falls could himself get credit, from the general confidence in his honesty. He added somewhat to his property, and contracted debts; and in the early part of the year 1828 his father died and left him lands and a slave, worth about two thousand dollars, but somewhat encumbered; so that Falls' clear estate, after discharging his father's debts and his own (exclusive of the lands then in dispute and the price to be paid for them) was, in 1828
(255) and 1829, of the value probably of twelve or fifteen hundred dollars.

These cases were brought on and argued together at very great length by Badger for Falls and others; Thompson (of South Carolina), Devereux and Iredell for Birchett and others, and by Pearson and Winston for Carpenter's heirs.

Badger for Falls and others.
Thompson, Devereux and Iredell for Birchett and others.
Pearson and Winston for Carpenter's heirs.

RUFFIN, C. J., having stated the pleadings and proofs as above, proceeded: These three causes have been properly brought on and argued together; for nearly the same questions arise in each, and all those that are important to the rights of the parties appear upon the pleadings in the original suit.

The cross-bill of Birchett and Ormond is chiefly for discovering from Falls as to matters set up by those plaintiffs in their answer as defendants to his bill. It charges only one new fact, or rather puts that fact more distinctly and in a stronger light than their answer did. That is,

that Falls was on the land with Birchett, and knew of his intention to purchase, and made no objection, but expressed his satisfaction. But the allegation is positively denied by Falls, and there is no evidence to sustain it. It would require very strong evidence to do so, for Birchett, within whose knowledge, as well as that of Falls, it must, if true, have been, does not venture to state it in that way in his answer, but only in general terms, that they inferred he had abandoned, because Carpenter had offered to sell the land for several months, and they (267) had not understood that Falls had forbidden him. The plaintiffs have examined but a single witness with a view to this point (Starns), and he says only that, on 22 August, Falls mentioned that those persons had gone to buy the land. But that does not tend to show his assent to the purchase, and is entirely consistent with his answer that he himself heard of their intention only on that day, and after they had gone. It reached him as a piece of common information, and in the same way he may have mentioned it. His conduct, immediately before and subsequent, renders the assertion of the bill incredible. All the other parts of this cause which can oppose the relief to Falls are involved in the original one, and may therefore be disposed of with that.

The cross-bill of Carpenter's heirs was probably filed principally to enable the plaintiffs therein to impeach the deed to Birchett and Ormond upon their alleged fraud, in case a decree should be refused to Falls in the original suit, and therefore Falls was made a party, that it might appear that his interest had been put out of the plaintiff's way. It brings forward no new matter against Falls; and if the matters charged, and admitted or proved, be insufficient to bar Falls from specific execution, still less will they authorize a decree that he shall give up the agreement. Equity may refuse to help either party, and leave both to law; but there is no ground in this Court to cancel a contract, fair in its origin, upon the score merely of default or abandonment. There cannot be a case of that sort, upon which that relief could be asked in equity, in which the facts, on which it was asked, would not defeat an action at law on the contract. As a bill of discovery simply, it has entirely failed with respect to Falls, who denies that he had either rescinded or abandoned the contract. The plaintiffs can have no relief, therefore, upon it, if Falls should be found entitled to a decree in his suit; for if Birchett and Ormond practiced the grossest fraud in obtaining the deed—although it may affect the costs—it becomes immaterial to these plaintiffs as soon as their interest in the subject (268) ceases and it is shown to belong, in the view of this Court, to the other party, Falls. It may be remarked, however, that the case is much stronger for Falls in the suit by the Carpenters than upon his own bill, because there is important evidence competent in the former

which he cannot read against Birchett and Ormond in his suit, which is the testimony of Johnston and McKee as to the declarations of Carpenter, the father, after he made the deeds. Falls had a right to use those declarations as against Carpenter, both to repel the imputation of abandonment on his part and the charge of surprise on Carpenter, which, the bill of his heirs says, ought to prevent the acceptance of the money by him from being considered as a confirmation. We think, indeed, that there is no ground for the allegation of surprise; for it is clear to our minds, from the testimony of those witnesses and that of Adderholt, and from many other concurring circumstances, that Carpenter never considered the contract abrogated or that he could honestly sell against the consent of Falls, and that he would not have sold without his consent or supposed consent. He may not have known, and probably did not know, what remedy a court of Equity would give on the contract; and may have thought that all Falls could have done at any time was to sue for the penalty, and that even that was then out of his power. But he had no idea that he had let Falls off, or that Falls wished to be off. He constantly meant to convey to Falls if he could pay the money. He probably believed that Falls would not, after all his indulgence, stand in the way of a sale to another if it became necessary for Carpenter to have money and Falls could not raise it. But that was all. He had in his own mind gone no further, if even that far. That was the reason why he spoke of "the bond being dead," and at the same time inquired whether Falls was willing to give it up. Whether Falls could sue him, or not, he had always a regard to the interest and wishes of Falls; and however deficient his knowledge of artificial equity, or whatever the grade of his intellectual capacity at the time may have been, he seems to have retained to the last that best kind of sense,
(269) which prompted him to be an honest man and observe his contracts in good faith, according to their substantial meaning, as understood by the parties. As against his heirs, therefore, the inference from these facts is strong that the contract was considered by the parties to be a subsisting one, and it is rendered conclusive by the subsequent declarations, which are express to that purpose. That Carpenter was deficient in understanding to make a contract or transact ordinary business there is no evidence that will bear stating; much less that he was incompetent to acts proper to the performance of a previous fair contract. The argument that he was ignorant that the contract was not binding, and therefore his acts and declarations, under the belief that it was binding, ought not to be deemed a confirmation, is altogether fallacious. It is founded upon the cases of conveyances obtained by trustees, tutors or guardians. They are voidable and cannot be confirmed by a second deed unless the first deed was known to be not binding, and

the second was intended simply to make it so. The meaning is, that the last shall not cure the *vice* of the first, unless it was intended to have that very effect, which cannot be, if the maker thought himself obliged by the one to make the other. But that has no application to the case of a contract which has no vice, but was fair, in respect of which the only question is whether it continued to be a contract between the parties. Acts done under it establishes its subsistence. They do not constitute a case of confirmation, but of performance. There could not be a doubt, therefore, that in the actual state of the case as against Carpenter the plaintiff, Falls, would be entitled to specific performance if the legal title were now in his heirs. Their cross-bill must consequently be dismissed as against Falls and those claiming under him, and with costs. That brings us to the inquiry, what relief he is entitled to as against Birchett and Ormond in the original suit.

That question was made in the argument to depend mainly upon the right of Falls to have called for a deed from Carpenter, upon the facts existing before, and on 22 August, 1829, as those facts (270) appear upon the proofs, exclusive of the subsequent declarations and acceptance of the purchase money by Carpenter. Birchett and Ormond are purchasers who have not paid any money, and consequently stand in Carpenter's shoes in respect to the equity of Falls, but that equity must be established against them by evidence that is competent against them. The Court will consider the case in that light, and throw out of view the testimony of Johnston and McKee and the payment of the balance of the price.

The deposition of Robert Dixon must, for a like reason, be rejected upon this part of the case. Having released to his companions before Carpenter filed his bill, he was not made a party defendant to it, and his deposition was therefore competent for Birchett and Ormond against Carpenter. But it cannot be read against Falls, as to whom the release *pendente lite* is a nullity, and who must have a decree against the witness, if he gets one at all. Indeed, his liability for the costs, although in discretion, would be a sufficient objection, according to *Barrett v. Gore*, 3 Atk., 401. That case has been questioned in some of the courts of this country. Nevertheless, we approve of it, because it is a safe rule that a witness should be entirely disinterested, and in a case of this kind the Court must, upon its settled principles, decree costs against Dixon, if any decree be made against him.

In the point of view in which the case is now to be regarded, the offers of Carpenter to sell to others, and the declarations of him and his son that Falls had agreed that he might do so, must also be put aside, because the knowledge of those circumstances is not brought home to the plaintiff.

It may be remarked here, however, that upon one ground Falls might be found upon investigation to have a substantive equity against those purchasers distinct from that he might have had against their common vendor. Supposing that the contract had not been expressly rescinded, but that Carpenter thought that it had been abandoned by Falls, and, under that impression, sold to another, who contributed to pro-
(271) duce or confirm that impression, and represented that Falls had abandoned expressly in favor of the person seeking the second purchase—it would seem to constitute a case of deliberate deception by active means for the sake of gain, which ought to deprive the purchaser of all the advantage of his deed, and make it subservient to the interest of the party, whose conduct and wishes had been misunderstood by him who made the deed, and misrepresented by him who took it. In this aspect of the case, Carpenter's own interest is to be considered as gone, at all events, either upon his contract with Falls or his deed to the others; and the question is, to which of them ought it to go? Carpenter honestly disabled himself from conveying to Falls. He knew he had made default, and from that he may possibly have inferred that the contract was abandoned by Falls. He was ignorant that, in fact, it was not abandoned. But Birchett and Ormond knew, and fully knew, better. Their answer, indeed, states that Carpenter told them that the bond was void, and that Falls had abandoned—intending to imply a negative pregnant to the proposition that such remark fell from them. But they do not say that affirmatively, and, the answer being silent as to that charge of the bill, the unequivocal testimony of the witness (Adderholt) proves it; and also that Carpenter deemed it a most material circumstance that Falls was willing the other should buy. Admit that Carpenter might have insisted on the default as a forfeiture, yet, if he did not, and would then have conveyed to Falls, upon the footing of their former contract, in preference to conveying to Birchett and Ormond upon a new contract, against the wishes of Falls, ought not the last bargain—the price being the same in each—to be looked upon as having been made, substantially, in compliance with the first contract, as it was, expressly, upon the supposed wishes of the party to that contract? Carpenter is put out of the way because he would not rely on Falls' default against him. Are the others in a posture to raise the objection simply because he might have done it, though he did not? Notice subjects them to all the equities against Carpenter, but their conduct may prevent them from being entitled to all his defenses against Falls. Now,
(272) whether Carpenter told them that the contract with Falls was not binding, or they told him so, it is certain that Carpenter would not have made them a deed, as the contract had not been actually canceled, if he had not believed that Falls fully assented to it. This

they knew perfectly was not a fact, though they represented it to be the fact. They assign certain reasons why the opinion they attribute to Carpenter—that "the bond was void" and that Falls had abandoned—might have been deemed correct by them. But they could not deny a knowledge of other facts, notorious to them, that proved conclusively that he had not in truth abandoned, though his claim might not have been valid in law. They knew that he was in possession; that he was cultivating a part of the land; that he had discovered gold and was engaged in collecting it; that he had given leases to others for the same purpose; and, above all, that he had refused a lease for a part to the very person who pretended that Falls was willing that he might take an absolute conveyance for the whole. They knew that he was not only able but in a very short time would be ready to pay the purchase-money, and that if he did, Carpenter felt himself bound (whether he was or not in law) to make the deed to Falls. Yet they hold out that he could not pay and did not wish to have the land, studiously producing or confirming that belief. They got, then, the title from the person in whom it was vested, because that person was governed by the wishes of Falls, as having a prior claim—a claim which he was willing might be renounced, but also ready to recognize as the right, if asserted. It would have been as beneficial to the claimant, and it was as effectually used by the other parties as the most perfect right could have been. After pretending to be substituted to it, and thereby gaining the legal title, can they supersede the thus acknowledged right by the objection that it was not legally valid? It should rather seem that whatever it was before, it was thereby made valid as against them. But as little was said in the argument upon this view of the subject, the Court has considered the case upon the points on which the counsel placed it, and on which it will be decided.

The first objection on the part of the defendants would be (273) fatal if founded in fact. It is that the contract was expressly rescinded by a subsequent parol agreement. But to this allegation there is no evidence, while it requires that which is clear, positive, and above suspicion. Hullett's testimony comes the nearest to it. He states a proposition by Falls, but no assent on the part of Carpenter. Besides the witness is mistaken as to the time, for more than a year after the one load of corn, which Hullett saw Andrew Falls deliver, four other loads were delivered for him (1828) by John Falls. The parties, therefore, acted on the contract after the time Hullett speaks of, which proves that it was not then rescinded. As late as the spring of 1829, Carpenter sent for further payments, and the defendants have themselves examined witnesses who can go no further towards establishing even abandonment than to state Falls' declarations about this last period, that "he would

have to give up the land" or that he "must give it up because he could not pay for it." The Court must therefore declare that the contract was not rescinded by agreement between the parties, and that it was not expressly renounced or abandoned by the plaintiff Falls. Those declarations are only indicative of his fears as to what necessity or convenience might require him to do, and not of a past or immediate refusal to proceed on the contract, for he still continued to act as owner and to strive to raise the purchase-money by a mortgage of his other property. He is therefore entitled to the common decree unless other reasons render it unfit that he should have it.

The substance of the objections consists in the failure of Falls to pay the purchase-money punctually, and in his insolvency, which rendered him unable to perform his agreement until the land rose in value, and then only out of the land itself, and in the great increase of value immediately before he offered to comply. The argument for the defendants did not distinctly proceed upon those grounds severally, as if any single one of them constituted a bar to the relief, though the principal proposition taken was the general one, that time is material in equity, and is deemed of the essence of the contract, and therefore the relief (274) must be refused; and the other circumstances were invoked to sustain that doctrine by showing its reasonableness in its application to this cause. It struck us that it required the whole to make the argument plausible, and that if any one of the positions be false in fact or immaterial to the conclusion the whole proposition must fall.

The allegation of insolvency is unfounded. There was no change in the circumstances of the plaintiff except for the better, and he was fully able to pay the debt. Had he been insolvent, it would be a question how far one who contracts with a person known by him to be in that situation could, after an increase in the value of the estate, allege, for the first time, *that* as a reason for annulling the contract, or why a court of equity should not give full effect to it. It might form a proper motive for inserting in the contract a clause that default should avoid it, and be a reason with the Court for holding in such case that the provision was not formal but substantial. But when the vendor retains the title as a security, and also takes bonds of the vendees as a separate and absolute obligation, binding on the person, and recoverable without showing performance on the part of the vendor, and likewise deals with an insolvent person as if he were solvent, by leaving him in the articles at large as to time, it is not seen how the court can put a construction on the instrument, founded on the circumstance of insolvency, as indicative of the intention of the parties. Insolvency, whether existing at the time of the contract or occurring subsequently, if continuing, so as to disable the purchaser from fulfilling his contract, may authorize the

other party, after request and default, to renounce the contract, and after reasonable notice may discharge him, or it may be evidence with other things of abandonment by the purchaser. But in that case it may also be repelled by other evidence that there was no abandonment in fact. Insolvency by itself does not dissolve the agreement, nor put it in the power of either party to treat it as dissoluble at his will merely. But it is useless to speculate upon the consequences of that circumstance, if it existed; it is not the fact, and therefore cannot (275) be brought to bear on the argument.

It is otherwise with respect to the increase in the value of the land, which, at any rate, will bring a great deal more in the market than the contract price. It might be well, however, to ask, who now urges this fact, and whether that party can avail himself of it? Carpenter's interest in the subject in litigation is excluded, as already stated; and the decree, as one for specific performance, if made, must be against Birchett and Ormond, who have the legal title. They are alone interested, and they bought after they knew of the increased value; Falls, before it was discovered. It is not a case of turpitude, in which equity will not interfere, but leaves the possessor to his advantage, because the other has no merit on which it can be taken away; it is simply an objection that equity ought not to transfer so valuable an estate for so little money. Does that lie in their mouth, when they were to give precisely the same sum, and had notice of the other's purchase? But not to speak of that, it is certain that the increase of value is not such a change in the subject-matter of a contract as is, of itself, a ground for rescinding or not enforcing articles. The thing contracted for is, in equity, considered the purchaser's from the time of the contract, and stands as a security only to the seller. Ordinarily, therefore, advantages or disadvantages, arising subsequently, either from unforeseen accidents or from contingencies, on which the value was known at the time to be dependent, cannot be a cause for refusing to enforce an executory agreement more than for annulling an executed conveyance. *Paine v. Meller,* 6 Ves., 352; *Pritchard v. Ovey,* 1 Jac. & Walk., 403; *Revel v. Hussey,* 2 B. & Beat., 287. What happens to the property while the contract is in full force cannot alter the respective rights. If one of the parties refuse to perform, and there comes a change of circumstances, upon the strength of which he is desirous to go on with the bargain, and insists on it, he may properly be repelled, although he was not watching for that change, because a favorable chance ought not to profit him who would not run the risk of an unfavorable one. In like manner, if a loss arises by a fall in value of things of fluctuating price (276) and subjects of traffic, and the vendor could not or would not make a title, according to his contract, in which case the purchaser

might have avoided the loss, the former, having caused the loss, ought to bear it, and cannot compel the other to take the property. This brings us to the consideration of the grounds of decreeing specific performance, and of what is deemed a *fault* of the party, which shall defeat this relief.

It has been contended that the nonpayment of the purchase-money at the day or, at any rate, that circumstance, with any other slight one of inconvenience or loss to the seller, is a sufficient reason for refusing it, and that here, the delay and the change in value discharge the vendor. The jurisdiction was traced to its origin, and it was said that its principle was to execute specifically a contract legally valid, and therefore that time must be essential in equity, because it is at law; and many cases were cited and minutely criticized. Certainly the cases show that, under a great variety of circumstances, the court has refused the relief when the party applying was in default in respect to the thing to be done by him, or in respect to the time in which the thing was to be done, and circumstances had then so changed that performance by him would not put the other party in the same situation as if it had been done in due time. On the other hand, the cases are as numerous in which the relief has been given, where there was default in those respects, and a change in the title or value of the property, upon the ground of the conduct of the parties, before or after the alleged default occurred. We do not think it necessary to examine all the cases, nor to dwell much on the elementary principle, for we think the facts of this case are such that the decree we feel obliged to make will not be in conflict with a principle established or a precedent furnished by any one of the cases in the books.

What the Court deems the material circumstances of the case may be, in a great degree, gathered from what has been already said. But it may be well to group them together. The plaintiff agreed to give seven hundred and fifty dollars for the land, and executed two (277) bonds for the price, payable, with interest, at one and two years, the last of which fell due in November, 1828, and took a bond from his vendor to convey "at the payment of the purchase-money." He went into immediate possession or, rather, continued that derived under a former contract, and acted in all respects as owner, without any objection on the part of the vendor, up to the moment of the sale made by him to the other defendants, which occurred between nine and ten months after the last payment fell due. In the meantime he repeatedly made payments, altogether to the amount of two hundred and forty dollars, of which he agreed that a part should be applied to another debt, and about the sum of one hundred and forty dollars, including interest, remained applicable to the debt for the land; and also, in the

meantime, he discovered a gold mine on the land, of parts of which he gave leases, and was exerting himself to raise money to discharge the balance on his bonds. The vendor did not wish him to give up, but wished him to complete the purchase. He had never renounced the contract, but had expressed, not to the vendor but to others, the fear that he would have to do so as he did not expect he could make the payments as soon as they might be wanting. We think these facts constitute the case of a contract partly performed and in the course of execution, and continuing, clearly, by the consent of both parties. And we are of opinion that relief could not be denied in such a case even if there has been a default, after it has been thus acquiesced in. There is no case to give countenance to a decree for the defendants.

It is not denied that time is material in equity. It is always respected here. Nor is it denied that time may be of the essence of a contract. Exact punctuality may be of great importance to the interests of a contracting party in many situations. In some, it is obvious from the state of the property and other circumstances. In others, we do not doubt that the instrument may be so framed as to show what is true, namely, that it is a substantial part of the contract. In those cases a court can no more dispense with that than any other vital provision. But the parties themselves can dispense with it, and the inquiry, where it has once existed, is whether they have dispensed (278) with it. It is in that sense true that time is not essential, but immaterial in equity, when comparing its effects here with that at law. It never was, and cannot be regarded in both courts in the same light. It is true, a maxim is found that equity does not decree performance of an agreement, upon which an action would not lie at law for damages, and anciently it was the usage to send the party to law. But that was to determine whether the agreement was so constituted as to have become binding at any time, whether it ever was a legal contract, and not whether the party had lost his legal remedy by accident or the non-observance of a provision, deemed in equity merely formal. But the jurisdiction is established now, upon the view of the court of Equity, as to what forms a sufficient contract, and it is beyond a doubt that some are so considered which could not be stated to a court of law, as, for example, the cases of parol contracts with part performance, under the statutes of fraud. And in respect to time, so far from equity being governed by it as a conclusive bar, it was one of the earliest jurisdictions to relieve against it, as in the case of penalties. Suppose a day to be fixed for Carpenter to make a deed and that he made after the day, at law the penalty of his bond might be recovered. Ought equity to allow that? Certainly not, and would not. It could not be tolerated, that with the deed in his pocket Falls should say, "I stand upon the

bond, and that every provision in it, time included, is of the essence." If he could not say that, how can the other party? Time, with the conduct of the parties, is material here, while the conduct of the parties is nothing at law. The law is necessarily confined to the time specified in the deed, because the declaration is on the deed *in his verbis*, not to be varied by another agreement or mode filed by acts *en pais*. But here the contract is for the thing which thereby becomes the property, and at the risk of him who contracts to get or take it, and the other party ought not to insist on its forfeiture for a slip, but only on compensation for the loss thereby arising to him. Interest on the purchase-
(279) money generally places him in as good a situation as if there had been no default. It is therefore the general doctrine in equity that time is not of the essence of the contract. In cases in which it is seen really to be essential, that is, where it must have been understood by the parties at the time of the contract that events would probably happen, in which interest would not be a compensation, because the title to the property or its value might be greatly affected by those events, and one of them holds back until the contemplated contingency happens, that person cannot apply to enforce the contract which he has violated, and violated in bad faith, and as to a main ingredient of the bargain. Upon this principle rests the cases upon sales of reversions, stock, and other uncertain interests or titles. To decree a specific performance in those cases to the defaulter would be to make a wager binding in favor of him who refused to put up his stake, because if he had put it up the event proves he would have won.

Default in respect of the time is not therefore a bar of itself, except in peculiar cases, but is only evidence, with other things, of abandonment, and of course may be rebutted. It may in all cases be made essential, but where it is, it does not follow that it is necessarily conclusive in equity as it is at law. It cannot be made thus conclusive here, that is to say, so as to preclude a party from showing that it ceased to be essential, as is the case at law from the form of pleading and the mode of proof. But it is never to be forgotten that in equity a party may waive, and it may be shown that he did waive, a stipulation introduced into a contract for his benefit, whatever may be the subject or the terms of the stipulation. It was said, indeed, by the counsel for the plaintiff that both parties must be active, and that, even if articles expressly state that the agreement shall not be binding unless performed at the time, a party cannot avail himself of it unless, before the first default, he give notice that he will take advantage of it. That would be going very far towards saying that time could not be made essential, for, if the contract be not notice enough to the parties, it would be difficult for the Court to perceive upon the same instrument that it was essen-

tial. But a failure to avail himself of it at the first fit occasion, (280) and before or when the other begins after default to act again on the agreement, may produce a very different result. He gives up thereby that part of the contract as much as the other, by his default, if insisted on, relinquishes the other parts of it. Thus far we think it correct to say that both parties must be active. A small matter may amount to such waiver—anything that draws on the other party to execute the agreement afterwards or that shows it is deemed a subsisting agreement after the essential default. In *Seton v. Slade,* 7 Ves., 264, the purchaser's taking the abstract, although not bound to do so, and stating objections to the title, overruled his defense. In *Hudson v. Bartram,* 3 Mad. Rep., 440, *Lord Eldon* admitted the time to be of the essence of that contract, and it was expressed. Yet he held the vendor to be bound, because, when the vendee excused his default by letter, he did not reply to it, and afterwards referred a person entitled to a charge on the premises to the vendee, and avoided the vendee when he subsequently sought him according to the engagements of his letter. The vendee could not assert the inconsistent rights of owner and vendor at the same time, and therefore the purchaser had a decree. If the party has been guilty of any unfairness, or his delay was with the view to test the value of the bargain before he acted on it, or there is satisfactory evidence, from circumstances, that he once abandoned, or he has wholly failed to perform any part, and a loss has thereby ensued to the other party, in those cases the justice and the law are both manifestly against him that is in fault. Of one or the other of those descriptions are all the strongest cases cited for the defendants. In *Lloyd v. Collet,* 4 Bro. C. C., 469, the vendor wilfully delayed to furnish the abstract, though repeatedly requested, for six months after the vendee had sued for his deposit, and the subject was one of fluctuating price and an object of speculation, and had fallen. In that case it was said that a party's own neglect was a singular head of equity. Certainly it would be, where, as in that case, nothing had been done. Hence, *Lord Loughborough* (4 Ves., 690, note) asks the plaintiff for a case to (281) prove that, where nothing had been done, the time was not essential. But nothing done on one side, and advantage properly and in due time taken of that on the other, is very different from part performance, without any attempt to put an end to the contract by the other party, by notice of any sort. To make that case in point here, "not everything" and "nothing" must have one meaning. In *Brashier v. Gratz,* 6 Wheat., 528, the purchaser had done nothing. He could not take possession, for the property was in litigation, which he was to manage, and for which he had received compensation. He was to have a special warranty, and in case the land should be lost, half the price was to be returned to him.

He became insolvent subsequently, and failed to pay any part of the price, and likewise failed to attend to the suit at all, and at the same time refused the vendor's offer to rescind. The vendor was then obliged to prosecute the suit, or lose the whole price. When gained, the land rose suddenly, and Brashier raised his purchase money on the credit of it, and claimed a conveyance. A decisive objection was that he bought the title as a doubtful one, but would not take it as such, nor as long as the price he agreed to give was fairly the value, but claimed it when the title ceased to be doubtful and the value increased greatly. It was a case, within the principles of those of reversions, where *nothing* has been done until the life falls in. In *Allye v. Deschamps,* 13 Ves., 224, there was a sudden, unforeseen rise, but that did not govern the judgment; it only proved the dishonesty of the plaintiff's motives. *Lord Erskine* plainly went on the abandonment of the assignees. The purchaser took possession and became bankrupt, after paying a less sum than the rent during the time he occupied. Bankruptcy is stronger than insolvency, because it is an absolute discharge, and it was once supposed to dissolve the contract, though it is now held otherwise. *Brooke v. Hewitt,* 3 Ves., 255. But, although the assignees might have claimed the benefit of the contract, they did not. They never entered into possession, and therefore were not liable for the purchase money, unless the vendor chose to come in under the commissions, which they (282) knew, of course, that he would not do. As soon as the value rose, and the assignees could certainly pay the purchase money out of the estate on which it was a lien, they wished to make themselves liable for it and take the estate. No, said the chancellor; you must not "lie by *with a view to see* whether the contract will prove a gaining or losing bargain, and, according to the event, either to abandon or, considering the lapse of time as nothing, to claim a specific performance." The decision is nothing more than that a party cannot elect to abandon, or not, as it may appear hereafter to be his interest. He must decide at the proper time, and the decision, once made, is conclusive. The bankruptcy alone did not discharge the contract, nor was the relief refused because the value had increased. But it was because the whole price remained unpaid, and *nothing* had been done *after* the bankruptcy, which was an abandonment.

The present is not like the case *Hatch v. Cobb,* 4 John's C. C., 559, which was much pressed at the bar. There was no acquiescence, but express notice that the vendor must sell again, and the purchaser had covered all his property by a recent judgment, and there was no separate security. All the vendor could do was to get his land again, and he gave the other the opportunity of paying for it and keeping it. But this question could not arise in that case, because the second purchaser was

not a party to the suit, and the bill could not, at any rate, lie for damages alone. In *Benedict v. Lynch,* 1 Johns. C. C., 371, the purchaser was let into possession, it is true. But the contract for purchase was expressly rescinded and a new one made for a lease for one year, under which the plaintiff enjoyed the term, and, moreover, he told the second purchaser, who inquired with a view to making a contract, that he held only for the year and had given up his purchase. In *Harrington v. Wheeler,* 4 Ves., 686, the sale was of a reversion, and the vendee did not take possession nor do anything until he filed his bill, six years after the contract and one year after the death of the tenant for life. This case is taken notice of in *Alley v. Deschamps* as one in which money was paid, but it hardly deserves that character. The vendee (283) advanced £104 at the contract, but he took a mortgage on the estate for that and, just before suit, demanded it as a debt from the second purchaser. Besides, the object of the sale was to pay off a heavy mortgage which the plaintiff agreed to discharge; and the second purchaser, who was originally joint owner with the plaintiff's vendor, was, to save his own share from being foreclosed, compelled to buy the other shares and discharge the mortgage himself. That case was, therefore, one both of bad faith and of unequivocal abandonment.

The present case, on the contrary, stands on the common equity of a contract for an estate in possession. The purchaser is in arrear for a large part of the purchase money for nine months, but is fully able to pay it, and the vendor acquiesces in the default during the whole time; and then, without any notice whatever, makes a second sale to a person, with full notice, not only had before, but repeated to him at the time by the vendor himself. Having allowed it to subsist after the default, he cannot put an end to it by an act which, supposing it to subsist, is in violation of it; but to that end there must be a previous, formal and reasonable notice that if the purchaser does not fulfill it, the other party will not hold himself bound. This would be the law if the purchase money was only secured by the articles, and the time specifically made essential therein. It is much clearer when the vendor holds the bonds of the other party and does not offer to surrender them. Upon this agreement the time also seems to be as much at large as it could be, unless it had expressed that it should not be material, and left the money to be paid during the purchaser's lifetime, unless hastened by request.

An objection was made to the assignment by Falls, upon the ground of maintenance or champerty. But a *cestui que trust* may surely assign when he or his trustee is in possession, which has been the case at every moment since his purchase. He has never been out of possession, and contracted on the land. The occupation of a small part by the

(284) others, for a short time, cannot affect his conveyances, even if that could be regarded as tortious as against him, upon the ground that they are only constructively trustees.

We think, therefore, that the plaintiffs in the original bill are entitled to the usual decree for specific performance, and to be quieted in the possession by injunction; and that Birchett and Ormond, and those defendants who claim under them, must pay the costs, and that the cross-bill of Birchett and Ormond must be dismissed, with costs. Those decrees extinguish all claim of the Carpenters to the land, and consequently their cross-bill must also stand dismissed as against Birchett and Ormond, and without the necessity of determining the question of fraud from their imputed concealment or representations touching the discovery of gold, but without costs to those defendants.

PER CURIAM. Decree accordingly.

Cited: Barnes v. Strong, 54 N. C., 107; *Scarlet v. Hunter,* 56 N. C., 86; *Taylor v. Kelly, ib.,* 244; *White v. Butcher,* 59 N. C., 233; *Allen v. Pearce, ib.,* 311; *Reynolds v. McKenzie,* 62 N. C., 56; *Faw v. Whittington,* 72 N. C., 323; *Herren v. Rich,* 95 N. C., 503; *Holden v. Purefoy,* 108 N. C., 167, 170; *Boone v. Drake,* 109 N. C., 82; *Taylor v. Taylor,* 112 N. C., 31; *Gorrell v. Alspaugh,* 120 N. C., 368.

SPENCER D. COTTON ET AL., ASSIGNEES OF VAN BOKKELIN & WHITE, v. PETER EVANS, WILLIAM J. ANDREWS, BENJAMIN RUNYON, WILLIAM ELLISON ET AL.

1. A mercantile instrument given in the partnership name binds all the partners, unless the person who took it knew, or had reason to believe, that the partner who made it was improperly using his authority for his own benefit, to the prejudice, or in a way that might be to the prejudice of his associates.

2. But, per DANIEL, J., dissenting: A person who takes a mercantile instrument, in the partnership name, for the separate debt of one of the partners, cannot recover of the others, unless he can show that they had notice of and sanctioned it, whatever may have been his impressions as to the partner's being authorized to give such instrument.

3. The extent of the power and authority of each partner to bind the firm stated and discussed by RUFFIN, C. J., and DANIEL, J.

THE pleadings, exhibits and proofs in this cause, which were very voluminous, presented substantially the following case: In the month of June, 1826, the defendants, Evans, Andrews, Runyon, and William

Ellison, associated themselves together as merchants and partners in trade, to commence business on the first of the ensuing month. The firm had two branches — one at Washington, in Beaufort, the books of which were kept in the name and style of Runyon, (285) Ellison & Co., and of which William Ellison was the acting partner, assisted occasionally by Runyon. The other branch was established at Sparta, in Edgecombe County, the books of which were in the name and style of Evans, Andrews & Co., and was managed by Evans and Andrews. Previous to the formation of this company, Evans and Andrews had been engaged in business at both those places in connection with Runyon and one Godwin Cotton, from which the two latter wished to retire. As a house at the shipping port of Tar River was necessary to the house above, it became an object to establish a new one at Washington. For some years previous, James and William Ellison had carried on an extensive business there, and were in good credit; and it appeared that both Mr. Evans and Mr. James Ellison had large separate properties and were esteemed rich. A. H. Van Bokkelin, one of the assignors of the plaintiffs, was the personal friend of all those parties, and had long been the factor and general agent of all their mercantile establishments, in New York, at which place, chiefly, they purchased merchandise, and to which they made shipments of produce. An agreement was made, early in 1826, between Evans and Andrews and the two Ellisons, that a connection should be formed between the house in Edgecombe and the house of the Ellisons in Washington, but upon what particular terms did not appear. Just before that time, Van Bokkelin, to whom James and William Ellison owed a considerable debt, had failed, and made an assignment for the benefit of his creditors. He was succeeded in business by R. M. White, the other assignor of the present plaintiffs, who had been his clerk, and to whom those North Carolina houses transferred their correspondence. This change in the business of Van Bokkelin was only nominal, for he continued to be substantially at its head, and some time after obtained a reassignment, and openly reassumed it in connection with White, under the name of Van Bokkelin & White. In a letter, dated 6 April, 1826, addressed to Mr. White, Mr. Evens informed him of the proposed retirement of the persons who were then his partners in Washington, and desired him (286) "to let Mr. Bokkelin know that we have taken the two Mr. Ellisons into company. *We shall join stocks in July.*" It appeared that, after this, James Ellison preferred retiring, and Runyon agreed to purchase his interest in "J. and W. Ellison's" goods, debts and responsibilities altogether; and he went, instead of James Ellison, into the new firm first above mentioned, which commenced business on the first of July, and, as before stated, was conducted at Washington by Runyon

and William Ellison, though chiefly by the latter. The same two persons were to collect and pay the debts of James and William Ellison, that duty having devolved upon Runyon in connection with William Ellison in consequence of his purchase from James, and his covenant to indemnify him against the debts due from the said firm, the assets of which were about $24,000 and supposed to exceed its liabilities by $8,000 or $10,000. Immediately after this, William Ellison, in letters in his own name and that of Runyon, Ellison & Co., assured White and Van Bokkelin that the change of the firm would not delay, but would expedite the payment of the old debts, and that remittances should be forwarded as soon as collections could be made, and he joined James Ellison in a request that he, James, should be discharged by the creditors, as Runyon, Ellison & Co. had assumed the debts; but Van Bokkelin declined acceding to the request, because his assignees objected to parting from a responsible name. In July, and the subsequent months of that year, and for the next two years, produce to a large amount was shipped to New York in the name of Runyon, Ellison & Co. Upon the first shipment received, Van Bokkelin requested, in a letter to Runyon, Ellison & Co., to be advised whether the shipments in their name were to be passed to the credit of James and William Ellison. On 29 September, 1826, he again wrote to Runyon, Ellison & Co., enclosing accounts of other creditors in New York of J. and W. Ellison, which had been left with him as their general agents, and said, "If you wish us to pay, return them with your directions." To these two letters it did (287) not appear that any specific answers were returned. All the proceeds of the shipments were, therefore, passed to the credit of Runyon, Ellison & Co.; but during the autumn and winter Runyon, Ellison & Co. paid debts at home of J. and W. Ellison to a considerable amount, and drew successive bills on White in favor of the New York creditors of J. and W. Ellison, to the amount of $4,493.95, which White accepted and paid. In all the dealings of these houses, those in North Carolina made no cash payments, but all the remittances were in produce, of the proceeds of which the appropriation was made by bills. Every draft in favor of the creditors of J. and W. Ellison in New York, and every payment to the creditors at home were *regularly entered to the debit of J. and W. Ellison in the books of Runyon, Ellison & Co.,* and the bills were duly charged in the accounts current, which were rendered every three or four months by White to Runyon, Ellison & Co. Things were in this state when, in April, 1827, William Ellison remitted to Van Bokkelin the bill of Runyon, Ellison & Co. on White for $5,000 in part payment of the debt of J. and W. Ellison to Van Bokkelin, and at the same time drew another bill on White for $492.30 in favor of

another creditor of J. and W. Ellison, which was paid. Both of the last bills were also charged in the books of Runyon, Ellison & Co.; and in September, 1827, when Mr. Andrews and Mr. Runyon were in New York together, the accounts current of the houses under their several charge were delivered to them, respectively; and in those of James and William Ellison with Van Bokkelin, and Runyon, Ellison & Co. with R. M. White (which were delivered to Mr. Runyon), the bills of April, with others, appeared; and that for $5,000 was stated therein to be "on account of balance due A. H. Van Bokkelin by J. and W. Ellison." From that period, accounts current were rendered quarterly until the copartnership terminated, in the latter part of 1828 or beginning of 1829, and no intimation of any objection to these transactions reached the creditors from any quarter. There was no original (288) distinct agreement that Runyon, Ellison & Co. should assume the debts of J. and W. Ellison, nor was there any evidence to show that Evans and Andrews knew of the bills being drawn on White in the name of Runyon, Ellison & Co. in favor of the creditors of J. and W. Ellison, or that they in any manner sanctioned it, except what was inferable from the facts detailed above, and from proof that on one occasion Evans was seen at Washington, looking into the books of Runyon, Ellison & Co. The bill was filed by the plaintiffs as assignees of Van Bokkelin and White, under their joint and several assignment, against the persons composing the firm of Runyon, Ellison & Co., and against James Ellison, A. H. Van Bokkelin, and R. M. White, to charge, first, Runyon, Ellison & Co. with all the debts of J. and W. Ellison, upon the ground that they had been expressly assumed; second, to recover the debts owing to Runyon, Ellison & Co. to the assignors of the plaintiffs, upon the ground that the assignees could not sue at law. The first part of the case was disposed of by an agreement pending the suit, by which James Ellison undertook to pay all the debts of J. and W. Ellison due to Van Bokkelin and to White, except the sum of $5,000, the amount of the bill of exchange of April, 1827. This bill of exchange was charged by White to the debt of Runyon, Ellison & Co., and was one of the debts professed to be assigned by him to the plaintiffs. Upon the second part of the case the court directed an account to be taken, and the commissioner made a report, in which he allowed the $5,000 as a debt due to White, and the defendants Evans, Andrews, and Runyon excepted to that item, upon the ground that the bill was drawn without their authority, and not for the benefit of Runyon, Ellison & Co., and, therefore, did not bind them. They also excepted to the report because the commissioner had not allowed them as credits certain amounts due from Van Bokkelin and White to Evans, and also to Runyon, individually; and they excepted, thirdly, because they had been debited with the

sum of $555 paid to William Ellison for Van Bokkelin and White under their directions to pay it to Runyon, Ellison & Co. after White (289) had notice of the dissolution of that firm.

The case was argued at a former term by *Devereux* and *J. H. Bryan* for the plaintiffs, and by *Badger* and *Winston* for the defendants; but the judges, being unable to agree, held it under advisement until the present term, when, being still unable to agree, they delivered their opinions, *seriatim,* as follows:

RUFFIN, C. J. The principal question between these parties turns upon the true nature and extent of the authority of one partner to bind another. The bill is drawn *diverso intuitu:* to charge, first, Runyon, Ellison & Co. with all the debts of James and William Ellison, upon the ground that they had been expressly assumed by the first-mentioned house generally. That part of the case has been disposed of by an agreement, pending the suit, by which James Ellison has undertaken to pay all the debts to Van Bokkelin and R. M. White (who were the creditors of J. and W. Ellison), except the sum covered by the bill of exchange for $5,000 drawn by William Ellison in the name of Runyon, Ellison & Co. on White in favor of Van Bokkelin in part of the sum due to him from J. and W. Ellison. The other aspect of the bill is to recover the debts owing by Runyon, Ellison & Co. to the assignors of the plaintiffs, upon the ground that the assignees cannot sue at law. This bill of exchange is charged by White in account with the drawers, and consequently forms an item of the debt he professed to transfer to the plaintiffs, who are the assignees for the benefit of his creditors. The master has allowed it in his report; and if it stand, the defendants Runyon, Ellison & Co. are found to be indebted to the plaintiffs in the sum of $4,481.34, including interest; but if otherwise, the balance due to that house would be $2,668.86. The propriety of the charge is the dispute, and it is brought before the Court upon the exception of Evans, (290) Andrews, and Runyon, three of the partners of Runyon, Ellison & Co., who say that the bill was drawn without their authority, and not for the benefit of Runyon, Ellison & Co., and does not bind them.

The authority of each partner has been admitted to be a general one in respect of transactions which appear to be and are for and on account of the partnership. But it has been contended for the defendants who have excepted that, in respect of matters which are not in fact on the joint account, it is special; and, consequently, that he, who claims upon an engagement in the names of the firm, must, when it is shown that the firm did not get the benefit, establish the special authority to the

partner who gave the security, either by proving a previous express delegation of it, or by inferring that, from the subsequent knowledge and acquiescence of the other partners.

The position, taken fairly, presents the point on which the cause, as it seems to me, ought to be determined; and if it be correct, the plaintiffs cannot sustain their bill, because that knowledge is denied and is not affirmatively proved. But I think it is not correct, and that the true principle is that a mercantile instrument given in the partnership name does bind all the partners unless the person who took it knew or had reason to believe that the partner who made it was improperly using his authority for his own benefit, to the prejudice or in a way that might be to the prejudice of his associates. In other words, the question is not one of power simply, but of a known abuse of power; the inquiry being whether the security was *obtained* in good or bad faith.

No authority can be more general than that of partners. It does not depend upon the terms in which the copartnership is contracted; for it is implied by the law and needs no stipulation of the parties. The conduct and success of the trade demand it, as between the partners themselves, to the most unlimited extent; and the interest of each is promoted by it as long as it is honestly exercised—that is, for the purposes of the trade. But, besides that, the security of third persons forbids any restriction of it by agreement among the partners; and, therefore, let the articles be as explicit as they may that one of the partners shall not make contracts or give securities in the joint name, yet (291) if he is held out to the world and does act as a partner, and in that character gives a security for a joint transaction, it must be valid. Third persons can only know him as a partner generally, and he who made him a partner must bear the consequences of his unfaithfulness to their private engagements. Even a factor is deemed, in respect of the purchaser, the owner of goods which he sells without disclosing his principal, and the purchaser may, before notice from the principal, set off a debt to him from the factor, especially when the principal lives abroad, because he is then deemed to be ignorant of the party with whom the factor deals, and the whole credit is considered as subsisting between the actual parties to the transaction. 1 Atk., 248; 7 T. R., 359. That is upon the ground that the principal puts it in the power of the factor to represent himself to be the owner, and, therefore, when he does so represent himself, though falsely, the world may treat him as being really so. Much more is he, who is actually one of the joint owners of stock, to be taken *prima facie* as having in himself the entire power of all the partners, and as acting on the joint account in all cases in which he acts in the joint name. He has authority to give securities of a mercantile character in the name and upon the credit of the firm. When

he does so, there is a presumption that it is rightful—that the partnership security was given for a partnership debt, or that the partnership is in some way to get the benefit of it; and, secondly, if that should turn out not to be the fact, that the person to whom the security was given had a right to consider and did consider it in that light from the very form of the transaction. But as the objects of the law in implying this very extensive authority are the benefit of trade and the indemnity of those who think they are dealing with the firm, and only getting an effectual security for what the firm ought to pay, it is plain that a partner who perverts his power by using it for his several advantage acts in bad faith; and equally plain that he who is cognizant of such bad faith participates in it, and ought not to claim from those against whom it was directed. But if he be not cognizant of it, he ought not to (292) suffer, for that would be to make him the victim of a fraud which the members of the firm put it in the power of one of themselves to practice on him by the use of their name. The implied authority, then, cannot in its terms be limited to the joint concerns. If it were, the plaintiff in every suit on an instrument in the partnership name must prove, in the first instance, that the transaction related to the common business. If it be not thus limited, it follows that the bad faith, singly, of the offending partner will not impair the extent of his power, except as between himself and his copartners; and hence the misapplication of the funds by one of the partners cannot destroy the remedy of the person from whom they were obtained on the partnership security given for them. In such case there is a loss to fall on one of two innocent persons; and the question is, which of them ought to bear it? Manifestly, he who entrusted the power. It was susceptible of abuse, and that he knew when he conferred it. It is not, in point of form, exceeded; and if it has been employed for a different purpose than that for which it was created, that is a risk that must have been seen and undertaken from the beginning. The act done is not void as being without authority. There is always at least an apparent authority, and that is real authority as to all those who had not reason to think otherwise.

These general observations are useful to a correct exposition of the general principle upon which the liabilities of partners depend, and conduce to a proper understanding of expressions which have dropped from the courts in cases of this sort. It seems to me clearly that the exoneration of the members of a firm, whose name has been pledged for the separate debt of one of the partners, does not arise from that act being without authority or exceeding the authority, but from the privity of the other party to the abuse of an ample authority, and its perversion to a purpose for which it was not originally intended. If so, all instru-

ments in the partnership name bind all the parties, unless the party who obtains them be guilty of a fraud. The difference is important, because it changes the *onus* and enables the creditor to recover, not because no fraud has been practiced, but because he is inno- (293) cent of it.

The inquiry into the purposes for which the partnership has been pledged, with a view to the validity of the instrument, is but of recent origin—at least, in a court of law, where alone the notice of a want of authority, strictly speaking, is of any moment. The first case we find is *Fordyce's,* stated under the name of *Hope v. Cust,* in *Shirreff v. Wilkes,* 1 East, 48. Before that, it would seem as if parties were bound at law by whatever was done in their name by one of them; at least, there is no case upon the point. That went from the Court of Chancery, for what reason we do not know, unless it may have been that the creditor was the plaintiff in that court, and was therefore bound to establish a valid legal demand. But certainly that case does not put the liability or exoneration of partners upon any other ground than the one I have stated, which must always have been a clear ground of relief in equity to the injured partner, whatever may have been the legal obligation of the contract. *Lord Mansfield* left it to the jury explicitly upon the point of fraud, saying, indeed, that gross negligence amounted to fraud, to which all may agree, although there might be a difference of opinion, whether or not it appeared there. Fordyce owed Hope & Co., of Amsterdam, a debt of his own, and sent them the guaranty of a house in London, of which he was a member, of which the other partners had no notice, and in which, consequently, they did not acquiesce. If it had been a question of *power merely,* it would have been settled by those facts in themselves, without any inference from them. But it was not. *Lord Mansfield* took the pains to show the jury why the ignorance of the other partners, and the fact that they derived no benefit did not excuse them, by stating the case of an accommodation guaranty or endorsement given by one partner for anybody's debt but his own, and said that clearly bound all. He therefore told them they must inquire whether there had been covin, which he defined to be a contrivance by two to cheat a third. "If the fact be clear that Hope & Co. knew that this was done to cheat Fordyce's partners, there is no question in the cause. But it is manifest that they trusted to it as binding (294) on the partnership. Therefore, this brings it to the question whether it be not *gross negligence,* as they knew at the time that Fordyce was acting in his separate capacity, and this security was intended to indemnify them against his separate debt." In his report he said "he left it to the jury whether, under these circumstances, the taking of the guaranty was, in respect of the partners, a *fair* transaction, or covenous,

with sufficient notice to the plaintiff of the injustice and breach of trust Fordyce was guilty of in giving it." The principle adopted by me is here distinctly stated. The guaranty was not made without power, but the exercise of that power for that purpose was a *breach of trust;* and if the creditor had *sufficient notice* of *that,* his conduct was not fair, but covenous. Those are the naked points of law laid down; and the jury were to decide whether there was in fact sufficient notice. They did so, although there was no evidence of an actual design on the part of Hope & Co. to charge the other partners with what they knew they were unwilling to be bound for, which must have been upon the ground that, being á separate debt, they ought in that case to have presumed their unwillingness, and, therefore, ought not to have relied on it without inquiry from the other partners. That it should have been left to the jury to make that inference from those facts is the subject of *Lord Eldon's* animadversions, when he said, in *Ex parte Bonbonus,* 8 Ves., 540, it was doubted whether *Hope & Cust* was not carried too far. But he admits that the law had then taken this course; that if, under the circumstances, the party taking the paper can be considered as advertised in the nature of the transaction, that it was *not intended* to be a partnership proceeding (as if it were for an antecedent debt), *prima facie* it will not bind; and he expressed his agreement in the opinion of *Lord Kenyon,* in *Shirreff v. Wilkes,* that as partners do not act in good faith when pledging the partnership property for the debt of the individual, *so it is a fraud* in the person taking that pledge. I yield a full assent to the conclusion drawn by *Lord Eldon,* as thus stated (295) by him. Nor do I doubt the propriety of its application to both the cases of *Hope v. Cust* and *Shirreff v. Wilkes.* In the latter there was simply the acceptance of a bill of exchange drawn by the creditor, knowing that Robson had no concern in the matter, and no assent of his found, and nothing, as *Lord Kenyon* remarked, to show that he had any knowledge of the transaction. There was no evidence of any previous or subsequent dealings of the firm with this creditor or any others who had been creditors of Wilkes and Bishop. It was an isolated transaction, and derived no support from any collateral circumstances—not even that an entry of that bill had been made in the books of the firm. Hope's case was still worse, if possible, for he did not even take an instrument which, in the ordinary course of business, would be entered in mercantile books, but a collateral guaranty, which could not, or at least was not, likely to come to the knowledge of the other partners, unless communicated directly by the holder. It was a fraud in those creditors to make men liable for money they did not owe, without their privity and under circumstances which denied them the opportunity of becoming privy to, or cognizant of, the transaction; for the

creditors had not the least reason to believe that they had concurred or would concur with their partner in making his debts their debts.

I admit, therefore, that the cases cited, and numerous others, establish that, if a separate creditor take from his debtor a partnership security for his debt, that fact alone is conclusive evidence of fraud, and vitiates the security. I use the term fraud because I consider it as embracing not only actual collusion, but what has been called gross negligence, in reference to this subject; though it seems to me that the fault of the creditor is not so much one of laches as of positive wrong in gaining a security which he must know his debtor ought not to give, nor, consequently, he to take. That is certainly of itself a fraud. But the rule is like that of *Edwards v. Hosben,* 2 T. R., 587, respecting the possession of the vendor of chattels being *per se* fraudulent. It is only so where there are not circumstances to explain and justify the possession. Since this is the nature of the objection to the con- (296) duct of the creditor, it fails when, from other circumstances, it is seen that he did not know that his debtor ought not to give the security, but has reasonable ground to think, and did think, that he ought, or that in giving it he was acting with the privity of his partners, and not against their interest. It was said at the bar that nothing short of consultation with the other partners, or bringing home to them actual notice of the particular transaction, without objection from them, can repel the argument of fraud. That is but another form of putting the first objection, of the defect of authority, since it requires evidence of specific approbation as a new and distinct authority in itself. I do not think that necessary. A fair ground for a rational opinion of the creditor that the other partners did approve is necessary, and it is also sufficient. *Lord Eldon,* in *Ex parte Bonbonus,* uses, indeed, the language, "that it will bind if you can show a previous authority or subsequent approbation; a strong case of subsequent approbation raising an inference of previous positive authority." Yet it is manifest that he does not there speak of authority in the sense that the general power of a partner is a naked legal power to deal on matters relating to the partnership, and on those only; nor of the indispensable necessity, for the purpose of enlarging it, of a communication between the separate creditors and all the partners, or between the partners themselves; for he immediately states a case where the liability of the other partners is placed by him, not on communication, but on its omission on their part. He says that other transactions are to be looked to, as well as that, at the time; for if the partners will permit the other *to go on dealing in this way,* without giving notice, it is approbation, and they would not be entitled to the benefit of the principle which is established for the safety of partners, thus repelling what otherwise might be *crassa negli-*

gentia of the separate creditor by what is certainly neglect, equally gross, on the part of the other partners. Hence, in *Ex parte Peele,* 6 Ves., 602, much importance was attached to the length of the partnership and to the general transactions. The agreement had only
(297) existed four months before a bankruptcy was declared, and, indeed, had never been confirmed by articles, and the incoming partner was plainly trepanned into an insolvent concern. Kirk had entered his separate debt in the books as a partnership debt, but Ford swore that he had no knowledge of it. *Lord Eldon* said, if the man had been a partner, upon a long-existing partnership, with a regular series of transactions, books, etc., a knowledge of what his partner had been doing might be inferred against him—that which in common prudence he ought to have known. But that was not the case. It was a treaty, and difficult to say that he knew of the entry, in which case he would be bound. But that fact had not been sufficiently inquired into; and even under those circumstances an inquiry was directed, whether *any* debts due from Kirk on account of his stock in trade were assumed, and *any* debts due to him carried into the partnership with the knowledge and consent of Ford.

It is clear, therefore, that *Lord Eldon* does not mean a specific assent to the particular transaction when he speaks of authority to make it, but that, under circumstances, it may be as binding as if the partners had, as between themselves, given the most express assent. The same observation applies to the terms in which *Sir John Leach* and *Lord Lyndhurst* are stated to have expressed themselves in *Ex parte Goulding.* True, the responsibility lies on the separate creditor to ascertain the fact whether the other partner knows of the pledging of the partnership name; and if the creditor knows that his debtor's partner is ignorant of such pledges of his credit, there is an end of the question. But the point to be sought by us is, what is a sufficient ascertaining of the fact of ignorance or knowledge—does it require direct and express consultation, or may the creditor safely act upon appearances which would satisfy any disinterested mind? The latter is my opinion, and, if true, it turns the question into one of fraud on the part of the creditor. We fortunately have *Sir John Leach's* own authority for saying that such is also his opinion, and for the true exposition of the language in *Ex parte Goulding.* It is not uncommon for courts, in laying
(298) down new principles, to use the language of illustration instead of definition, and that it should afterwards be discovered that there was an inadvertent looseness of expression which might mislead. The latest case on this subject is that of *Frankland v. McGusty,* reported in Kapp's Priv. C. C., 274, a book not within our reach here. It is also found stated in the last edition of Comyn on Contracts, printed the

present year. In that case the Vice Chancellor himself stated to the Privy Council "that, although it lies upon a separate creditor who takes a partnership security for his separate debt, if it be taken *simpliciter,* and there is nothing more in the case to prove that it was given with the consent of the other partners, yet, if there be circumstances to show a *reasonable belief* that it was given with the consent of the partnership, it lies upon the partners to prove the fraud." What is the fraud to be proved in such a case? Plainly, that the creditor knew that it was not given with the consent of the others, notwithstanding appearances to the contrary. This corresponds with the doctrine and decision in *Ridley v. Taylor,* 13 East, 179, where Ewbank had in fact drawn and endorsed a bill in the name of the partnership, and passed it, after it had been accepted eighteen days, to his separate creditor. The Court held that the creditor could not be deemed to know, from the circumstances, that Ewbank was committing a fraud, and, therefore, that they must give effect to the transfer, and say that the defendant, who relied upon covin as a defense, had not satisfactorily established it. This seems to me to be an intelligible principle, supported by just reasoning, and applicable to the ordinary transactions of life. It is the case of every day that a partner takes his market money or pays his tradesman's bill out of the shop till; and nobody ever thinks of going to the other partner, although in the same village, to ask whether he allows it. It is known that the partners must live, and it is in every such case expected that each partner will look into the conduct of the business sufficiently to satisfy himself whether the other honestly enters his expenditures or indulges in such as he cannot afford. But while the partnership continues, and a partner is seen daily to live out of its means, there is no (299) idea of fraud in one who takes the money from him for things towards his living; for the imputation of fraud may always be repelled by the fact of honest intention, with the further fact that the particular act which raises the presumption of fraud was done under such circumstances as might create in any man of common prudence and ordinary capacity, with honest purposes, the belief that he was not doing a dishonest thing—that which is to the prejudice of another and against his will. That can never be said by him who takes the effects or the security of the firm for the separate debt of one of the partners, and shows nothing else; nor can it be said of him who thus acts, under any circumstances which, as known or understood by him, do not raise a strong probability that his debtor was not violating the confidence of his partners. It may be assimilated to probable cause in actions for malicious prosecution. Circumstances may appear which in themselves might raise a strong suspicion; but if the person who prefers the prosecution

knows any material circumstance not to be as it appears, his suspicion was pretended, and there was, as to him, no probable cause. So a separate creditor must show, in the circumstances of the transaction or the general dealings, grounds for a rational opinion that the act of his debtor was not against the consent of the other joint owners, and that he acted on that opinion in the particular instance. I admit, it will not do for him to say simply that he thought so. There must be something that would make other sound minds, unbiased by interest, concur with him; and even then it is open to the other party to show that in reality he did not think so. A separate creditor must, therefore, in all cases, make out a strong case of honest intentions, resting upon just reasons, for the act is *prima facie* fraudulent.

The circumstances of the present case seem to me to constitute a strong case, such as was entirely sufficient to induce, and did induce, a belief in Van Bokkelin and White that the bill was drawn in good faith, with the knowledge and acquiescence of the other partners, either prior or subsequent, and probably because the drawers had in their (300) hands the effects of the original debtors. I admit, the evidence does not establish an original distinct agreement that Runyon, Ellison & Co. should assume the debts of J. and W. Ellison. James Ellison says, indeed, that he and Runyon so understood it, and that it was so understood at the time of taking the inventory, in June, 1826, at which Mr. Andrews was present, assisting. But that is denied by Andrews; and the instruments which passed between James Ellison and Mr. Runyon show that, whatever course those persons might suppose the business would practically take, it did not then, in point of form, purport to be an engagement of the new firm, as such, to collect and pay the debts of the former firm. But it is equally clear that those duties remained with William Ellison, and devolved upon Runyon, as assignee and successor of James Ellison, and they were the same persons that were to be the active partners of the new house of *Runyon, Ellison & Co.*

Although *Runyon, Ellison & Co.* did not assume the debts, Van Bokkelin, though erroneously, certainly thought they had. Both W. Ellison and James Ellison repeatedly stated it to be the fact in their letters of June, July, and August, 1826, at the very beginning of the new business. It is said that he ought not to have trusted to them, but applied to the other partners. True, that would have been more business-like, and if there were nothing more in the case I should deem the most unequivocal representations of the separate debtors inadequate to justify the creditor in taking the security of the firm, for the very act itself is, in every case, to some extent, an affirmation of the offending partner,

that he is at liberty so to deal. But those representations were, here, sustained by collateral incidents, some of which were immediately connected with the other partners, which were sufficient to render them to the apprehension of a suspicious, not to say cautious, mind in the highest degree probable and credible.

Previous to the year 1826, Evans and Andrews, who did business in Edgecombe, had been connected in a house at Washington with Runyon, from which the latter wished to retire. As a house from the shipping port of Tar River was necessary to the house above, it became an object to establish a new one there. For some years previous, (301) James and William Ellison had carried on an extensive business there, and were in good credit; and it appears that both Mr. Evans and Mr. James Ellison had large separate properties, and each of them was esteemed rich. Van Bokkelin was the personal friend of all those parties, and had long been the factor and general agent of all their mercantile establishments in New York, at which place, chiefly, they purchased merchandise, and to which they made shipments of produce. An agreement was made early in 1826, between Evans and Andrews and the two Ellisons, that a connection should be formed between the house in Edgecombe and the house of the Ellisons in Washington, but upon what particular terms does not appear. Just before this time Van Bokkelin, to whom James and William Ellison owed a considerable debt, had failed, and made an assignment for the benefit of his creditors. He was nominally succeeded in his business by Mr. White, who had been his clerk, and to whom those North Carolina houses transferred their correspondence. It may be mentioned here that I allow no advantage to the plaintiffs from the change of names under which the New York houses were conducted, for I consider them all as substantially "A. H. Van Bokkelin." In a letter dated 6 April, and addressed to Mr. White, Mr. Evans informed him of the proposed retirement of the persons who were then his partners in Washington, and desired him "to let Mr. Van Bokkelin know that we have taken the two Mr. Ellisons into company: *we shall join stocks in July.*" It appears that after this, James Ellison preferred retiring, and Runyon agreed to purchase his interest in "James and William Ellison's" goods on hand, debts and responsibilities altogether; and he went, instead of James Ellison, into the new business which began in June following, and was conducted at Washington by Runyon and William Ellison, though chiefly by the latter. The same two persons were collecting, and to pay the debts of James and William Ellison; the assets of that firm being about twenty-four thousand dollars, and supposed to exceed their engagements eight or ten thousand dollars. Immediately afterwards, William (302)

Ellison, in letters in his own name and that of *Runyon, Ellison & Co.,* assured White and Van Bokkelin that the change of the firm would not delay but would expedite the payment of the old debts, and that remittances should be forwarded as soon as collections could be made; and he joined James Ellison in a request that he, James, should be discharged by the creditors, as *Runyon, Ellison & Co.* had assumed the debts; and in July and the subsequent months of that year, and for the two next years, produce to a large amount was shipped to New York in the name of *Runyon, Ellison & Co.* Van Bokkelin declined acceding to the request that J. Ellison should be released, not because he doubted the credit of *Runyon, Ellison & Co.,* or that they had assumed the debt, but because his assignees in trust did not think it proper to part from a responsible name. Still he appears to have intended to have conducted the business upon principles that should appear to be strictly proper, by keeping the transactions in the name of each house separate and distinct; for, upon the first shipments received, he requested in a letter to Runyon, Ellison & Co. to be advised whether the shipments in their name were to be passed to the credit of James and William Ellison. On 29 September, 1826, he again wrote to Runyon, Ellison & Co. enclosing accounts of other creditors in New York of J. and W. Ellison, which had been left with him as their general agent, and says, "If you wish us to pay, return them with your directions." To these two letters it does not appear that any specific answers were returned. Accordingly all the proceeds of the shipments were passed to the credit of *Runyon, Ellison & Co.;* but during the autumn and winter *Runyon, Ellison & Co.* paid debts at home of J. and W. Ellisons' to a considerable amount, and drew successive bills on White in favor of the New York creditors of *J. and W. Ellison,* to the amount of four thousand four hundred and ninety-three dollars and ninety-five cents, which White accepted and paid.

In all the dealings of these houses, those in North Carolina made no cash payments, but all the remittances were in produce, of the (303) proceeds of which the appropriation was made by bills. Could Van Bokkelin doubt, when he saw those funds applied for six or eight months to the debts of J. and W. Ellison, that the produce, though shipped in the name of Runyon, Ellison & Co., was the proceeds of the debts owing to J. and W. Ellison? He must have thought so, otherwise he would not have accepted the bills in favor of other creditors, on which he had to pay out cash. If he had not been convinced that William Ellison was not committing a breach of trust, it is most improbable that he would have concurred in the act for the benefit of others, and without applying anything to his own debt. The first step in unfair

dealing of this sort would have been to pay himself. But he acted otherwise, and was the last of J. and W. Ellison's creditors to get anything. He had no motive to act dishonestly for he was under no necessity, for the purpose of security, to get the responsibility of Runyon, Ellison & Co. James Ellison was fully able himself to pay, and the debt of J. and W. Ellison was always deemed secure. His interest was against any undue preference of James Ellison, to the prejudice of the other persons, for the former had retired from business, and the latter were his active and profitable customers. But it is said that Evans and Andrews knew nothing of those transactions. How was Van Bokkelin to suppose that? He could not suppose that proper entries had not been made in the books, and that they would not be looked at by all concerned. The series of shipments, and the succession of bills, all in the same direction, was evidence to him of the highest character, for transactions to such an amount could not be concealed from the least vigilant through so long a period. He was in New York and the other partners near the scene of business, and from the very beginning Mr. Evans had used language calculated to produce the impression on his mind that William Ellison and James Ellison had told him the truth, and that the business was carried on as it was only because it was in conformity to the arrangements of the parties. What is to be understood by the correspondent of two mercantile houses when they tell him *"that they have joined stocks?"* Of itself, the expression denotes an entire union of all their common means and engagements. But when that is followed (304) up by actual transactions for two years, accordant with such an understanding of those terms, is not the conviction irresistible? In fact, however, they were not concealed from Evans and Andrews. Every draft in favor of the creditors of J. and W. Ellison in New York, and every payment to the creditors at home, were *regularly entered to the debit of J. and W. Ellison in the books of Runyon, Ellison & Co.;* and the bills were duly charged in the accounts current, which were rendered every three or four months by White to Runyon, Ellison & Co. Things were in this state when in April, 1827, William Ellison remitted to Van Bokkelin the bill of Runyon, Ellison & Co. on White for five thousand dollars, in part payment of the debt of J. and W. Ellison to Van Bokkelin, and at the same time drew another bill on White for four hundred and ninety-two dollars and thirty cents in favor of another creditor of J. and W. Ellison, which was paid. Both of these last bills were also charged in the books of *Runyon, Ellison & Co.;* and in September, 1827, when Mr. Andrews and Mr. Runyon were in New York together, the accounts current of the houses under their several charges were delivered to them respectively; and in those of James and

William Ellison with Van Bokkelin, and of Runyon, Ellison & Co. with R. M. White (which were delivered to Mr. Runyon), the bills of April, with others, appear; and that for five thousand dollars is stated therein to be "on account of balance due A. H. Van Bokkelin by J. and W. Ellison." From that period accounts current were rendered quarterly until the copartnership terminated in the latter part of 1828 or beginning of 1829, and no intimation of any objection to these transactions reached the creditors from any quarter. Now it is true that it turns out that William Ellison has most unfaithfully managed the business under his charge, and wasted or concealed the effects of *Runyon, Ellison & Co.* and of James and William Ellison to a heavy amount; and it is likewise true that Evans and Andrews say that they did not examine the books and had no knowledge of these transactions. (305) Suppose that to be so, must it not be inferred against them, upon every principle on which vigilance is deemed a duty, and on which third persons are allowed to act safely upon the faith of the conduct of others? As *Lord Eldon* laid it down, it must be inferred as that which in common prudence they *ought* to have known. Here was not a business just begun, but one which continued for a period of at least two years and a half, having large transactions, with explicit entries of all those now impeached. More, if their partner had omitted the entries, the creditor took the usual means to convey information from himself by rendering accounts containing all the items to one of the managing partners of one house, in the presence of a managing partner of the other. To whom else should he have handed those accounts? Could he have expected less than that each of those partners should have asked of the others to see how their respective branches stood with their general agent and factor? and that upon refusal, application would be made to the factor himself? I am now considering what Van Bokkelin had reason to think, not what he did think. Upon this last point there is no room for a cavil. The very bill itself excludes every suspicion of an actual dishonest purpose. The first thing in an attempt at dishonest conversion is to cover over the transaction so that the owner can never trace his property. But here, the bill upon its face tells that it was not drawn for the debt, properly speaking, of the drawers, but for that of James and William Ellison. It is most improbable that Van Bokkelin would have taken the security in that form if he had not deemed it fair, and believed that Runyon, Ellison & Co. had undertaken to pay, at least, that sum for their predecessors. But I have already said that I do not think that alone sufficient to sustain the security. There is a further inquiry, whether Van Bokkelin in the state of his information ought to have thought as he did? Now, from

the previous payments to other creditors of J. and W. Ellison out of the shipments to him he saw a course of dealing which must, without notice to the contrary, have raised a strong belief that it met the approbation of the other partners. The Court would now infer that, if Mr. Evans and Mr. Andrews did not positively deny it. If (306) we should be obliged to make that inference, there must have been enough to make Van Bokkelin fall honestly into the same error, when he had not their denial to help his judgment. The truth is, those persons reposed an unreasonable and blind confidence in William Ellison and would not look into their affairs. Van Bokkelin could not anticipate such remissness in men of business, and such a neglect of their interests, when the evidence was spread so plainly before them in their own books and in his accounts. Supposing them to have looked into those documents, they must have seen everything, and, seeing it, their silence under such a train of transactions he had a right to deem acquiescence. He could not have entertained any other opinion or belief. The law regarded their safety, and has established a principle for their protection. But if they will not put themselves in a situation in which they can claim the benefit of it, if they will shut their eyes to what everybody else must have seen, and be guilty on their part of the gross negligence of making no examination of the letters of correspondents, the accounts rendered by factors, the books kept by their partners—will make no inquiry of any fact or from anybody, they cannot complain that other people, who had no design to cheat, have not taken care of them. They have not taken care of themselves. My opinion is, therefore, that their first exception be overruled.

So, we think, must the second. The debts are not mutual. Not being legal set-offs, the insolvency of the plaintiff's assignor does not impugn the assignment in favor of other *bona fide* creditors. *Sellers v. Bryan,* 2 Dev. Eq. Ca., 358. We do not regard the name in which the debt is contracted, but look to the real ownership. The master has properly credited the account of Runyon, Ellison & Co. with a balance of six hundred and seventy-eight dollars and three cents due from Van Bokkelin and White to Evans, Andrews & Co., for the two houses were composed of the same persons, with the same interest in each. But the other credits, as claimed in this exception, are for sums due to some of the partners individually, and had no connection with the (307) joint dealings.

Their third exception is allowed. James Ellison collected the sum of five hundred and fifty-five dollars for Van Bokkelin and White, with directions to deposit it with *Runyon, Ellison & Co.,* to be remitted. He paid it on 11 May, 1829, into the hands of William Ellison, who gave

a receipt in the name of Runyon, Ellison & Co. That does not bind the other partners, for the plaintiffs admit in their bill that White had notice in March, 1829, that at that time there had been a dissolution.

GASTON, J. I was originally concerned in this cause for the plaintiffs, and feel the delicacy of the situation in which I am placed, in consequence of the disagreement between my brethren on the main subject of controversy between the parties. In the act of 1818 (Rev., ch. 963, sec. 8), supplementary to the act establishing this Court, there was a provision authorizing, in a case similarly circumstanced, one of the judges of the Superior Courts to occupy temporarily the place of the Judge who might deem himself incompetent to take a part in the decision.

But the repeal of this provision has been regarded as a legislative declaration, that no supposed bias of feeling or opinion should excuse a member of this Court from acting judicially upon any cause, when his aid is necessary to its determination. Thus circumstanced, I shall content myself simply with stating that, on deliberate and, as I trust, impartial examination of the case, I *entirely* concur with my brother *Ruffin* in the opinion which he has delivered.

DANIEL, J., *dissentiente.* Evans, Andrews, Runyon, and William Ellison associated themselves together as merchants and partners in trade. The firm had two branches: one at Washington, the books of which were kept in the style and name of *"Runyon, Ellison & Co.,"* and William Ellison was the acting partner. The other branch was established at Sparta in Edgecombe County, the books of which were in the style and name of "Evans, Andrews & Co.," and was managed by Evans and Andrews. The firm shipped large quantities of produce to
(308) the care and management of *Van Bokkelin and White,* commission merchants of New York. William Ellison and James Ellison were largely indebted to Van Bokkelin. Runyon had undertaken, with James Ellison, to pay his part of the debt. William Ellison (for the purpose of discharging this separate debt, which was due only from himself and Runyon) drew a bill of exchange in the name of the firm, on *Van Bokkelin and White,* in favor of *Van Bokkelin.* The bill was accepted by the drawees, and the avails passed to *Van Bokkelin,* in discharge of the separate debt.

In taking the accounts between the firm in North Carolina, composed of the four members first named, and the firm of *Van Bokkelin and White,* the question is whether *Van Bokkelin and White* are entitled to a credit for the amount of this bill of exchange? Much testimony has been offered by the plaintiffs for the purpose of proving that *Evans* and

Andrews knew of the bill being drawn in the name of the firm, and to be applied as it was applied, or that the debts of William and James Ellison were assumed by the new firm on its first formation. But there is nothing that satisfies my mind that those debts were assumed by the new firm, or that *Evans* and *Andrews* knew of or authorized or at any time assented to the transaction. The letter of Evans to Van Bokkelin, that *"they had joined stocks with William Ellison,"* furnishes no proof that the new firm were to be responsible for the separate debts of William and James Ellison, or for the price of stock brought by the separate partners into the firm, Gow., 168; and Van Bokkelin did not so understand the letter. He refused to discharge James Ellison from liability until after much persuasion by James Ellison and after a long time had elapsed. The proof that Evans once went to Washington, and was seen looking into the books at that place of *Runyon, Ellison & Co.*, wherein William Ellison had charged himself to the firm with several small bills, drawn in the name of the firm on Van Bokkelin and White, to pay his separate debts in New York, is not sufficient to fix Evans with notice. (William Ellison had also charged himself and Runyon with this bill on the day book of the firm at Washington.) There is no evidence that these entries in the books at Washington ever (309) caught the eye of Evans. If Evans had been an acting partner at Washington, a presumption would arise from the entry in the books that he had notice of them, and his silence would have been evidence of acquiescence in the transaction. But the position of Evans, although a partner, repels the presumption of notice to him by the entries being in the books at Washington. Out of the mass of evidence there is not a tittle that goes to prove that Evans knew of or sanctioned the transaction. The letter in which he says that *"they had joined stocks,"* and the entry of the bill in the books of *"Runyon, Ellison & Co."* does not in my mind, fix Evans with liability. The case then comes to this, in taking the accounts can *Van Bokkelin and White* have a credit for this bill of exchange? Is not the burden of proof upon them to show to the court that Evans and Andrews had notice, and sanctioned or authorized William Ellison to draw the bill for the payment of his separate debt? The power of one partner to bind the firm as to all the partnership concerns has never been disputed. It is in the scope of a trading partner's general authority so to act, without the creditors inquiring whether the particular partner had such an authority expressly delegated to him. Gow., 54. But for one partner to draw bills, etc., in the name of the firm to pay his separate debt is beyond his implied authority. A series of decisions have shown that if a separate creditor of a partner take a partnership security towards the discharge of his separate debt,

that fact alone, unless explained by particular circumstances, is conclusive evidence to charge the creditor with fraud, or with gross negligence amounting to fraud, and consequently that the firm is not bound by such transaction. Collyer on Partnership, 280. This author has arranged the authorities which were cited by counsel in the argument of the case now under consideration. In *Hope v. Cust,* 1 East, 53, where a partner had given the guaranty of the firm as a security for his separate debt, *Lord Mansfield* directed the jury to inquire, *first,* whether there was not positive fraud, or, *secondly,* whether there was not gross negligence amounting to fraud on the part of the creditor, and (310) in either case to find a verdict against him. The facts were these: Fordyce, who traded very largely in his separate capacity with *Hope & Co.* in Holland, did, for and in the name of himself and partners, give them a general guaranty for the money due from him in his separate capacity. Fordyce became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the Court of Chancery by *Hope & Co.,* in order to have the benefit of this guaranty; the court directed an issue to try the validity of it. There was strong presumptive proof that the partners of Fordyce had no privity in the transaction. *Lord Mansfield,* in summing up the evidence to the jury, said: "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. But there is no general rule which may not be infected by covin or such gross negligence as may amount to or be equivalent to covin; therefore, the whole will turn on this, whether the taking the guaranty from Fordyce himself, in his own handwriting, without consulting the other partners or having their privity, is not such gross negligence in the *Hopes* as will amount to a fraud or covin. Fordyce was acting in two several capacities, having transactions in his own name only, for his own separate benefit; and in the names of the partnership, for his own benefit. It is manifest that *Hope & Co.* trusted to it as binding on the partnership. Therefore, this brings it to the question whether it be not a gross negligence, especially as they knew at the time that Fordyce was acting in his separate capacity, and this security was intended to indemnify them against his separate debts." The jury found a verdict for the defendant. *Lord Mansfield,* in his report to the Court of Chancery, on a motion for a new trial, said: "That three things were established to the satisfaction of himself and the jury—first, that the transactions between Hope & Co. and Fordyce were wholly on Fordyce's account; secondly, that the partners of Fordyce derived no profit or benefit whatever from them; thirdly, that they had no notice of the guaranty, and consequently did (311) not acquiesce in it. He said he left it to the jury whether, under

these circumstances, the taking of the guaranty was, in respect to the partners, a fair transaction or covinous." The case of *Shirreff v. Wilkes,* 1 East, 48, was decided upon the same principles. "This is an action," said *Lord Kenyon,* "brought against three persons—Wilkes, Bishop, and Robson—as acceptors of a bill of exchange. It appears that the acceptance was, in fact, made by Bishop alone, in the name of the firm. The consideration of this bill was some porter which had been sold by the plaintiff to Wilkes and Bishop only, at a time when Robson had no concern with the house. Then the plaintiff, knowing this, drew the bill upon all the three partners, and knowingly took an acceptance from one of them to bind the other two, one of whom, Robson, had no concern with the matter and was no debtor of theirs, no assent of his being found, and nothing stated to show that he had any knowledge of the transaction. It would be carrying the liability of partners for each other's acts to a most unjust extent if we suffered a new partner to be bound in this manner for an old debt, incurred by other persons." The doctrine contained in these cases has, if possible, been carried still further in more modern decisions. Thus, in the case of *Green v. Deakin,* 2 Stark. Rep., 347, A. advanced to B. £500 to enable him to enter into partnership with C. B. repaid to A. part of the sum advanced, but, being pressed to pay the remainder, he drew a bill in the partnership name, payable to A., and endorsed to A., without informing him that it was done without the concurrence of his partner, C. In an action on the bill by A. against B. and C., B. having pleaded his bankruptcy, C. insisted that he was not bound by the transaction between A. and B., which he alleged to be a fraud. *Lord Ellenborough* was of that opinion, and nonsuited the plaintiff. Again, *Ex parte Goulding,* 2 Glyn & Jameson, 118; Collyer, 283. O'Niel and Martin were partners. Goulding sold and delivered to O'Niel on his separate account a cargo of timber. The agent of O'Niel, to whom the timber was delivered, drew a bill of exchange on O'Niel & Co., payable to the order of the drawer four months after date, and it was indorsed by the drawer to Gould- (312) ing in payment of the separate debt. Goulding left the bill, on the day he received it, at the counting-house of O'Niel & Co.; some hours afterwards he called and received the bill, accepted in the name of the firm. Goulding admitted the acceptance was in the handwriting of O'Niel, but he denied that there was any previous agreement that it should be accepted by O'Niel or that there was any collusion with O'Niel in the matter. Upon this evidence, *Sir John Leach* dismissed the petition of Goulding to be admitted as a joint creditor against the estate of O'Niel & Co.; and upon appeal the decision was affirmed by *Lord Lyndhurst,* who said: "If the fact of Martin's ignorance was known by Goulding, he can have no claim on the joint estate. *The responsibility*

of ascertaining that fact rested on Goulding." In *Ex parte Bonbonus,* 8 Ves., 540, *Lord Eldon* remarked upon the necessity of the allegation in the petition that the several transactions relative to the debt took place without the privity or knowledge of Parnell. He said that he agreed with *Lord Kenyon* that, as partners do not act with good faith when pledging the partnership property for the debt of the individual, so it is a *fraud* in the person taking that pledge for his separate debt. I think it is clearly to be seen and collected from the above British authorities that Van Bokkelin cannot exonerate himself from the charge of gross negligence, which in law is tantamount to being covinous, if Evans and Andrews were ignorant of the transaction of Ellison's drawing the bill in the name of the firm. As *Lord Lyndhurst* said, in *Ex parte Goulding,* the responsibility of ascertaining that fact rested on Van Bokkelin. This is agreeable to principle. By entering into partnership each party reposes confidence in the other, and constitutes him his general agent as to all partnership concerns, but in nothing else. Therefore, if he acts beyond the scope of his general authority and attempts to bind the firm in matters not relating to the partnership, he who wishes to take advantage of such transaction must show a new and extraordinary authority—an authority separate and distinct from his general authority as partner—or the firm will not be bound. (313) Such new authority is implied if the other partners have notice and are silent on the subject. The rule laid down in the American decisions is very explicit. In *Chazournees v. Edwards,* 2 Pick. Rep., 5 (a case well argued), *Parker, C. J.,* said the principle has been very distinctly settled in many cases in the English and New York reports that a note or other security given in the name of a mercantile firm by one of the house to pay or secure a private debt of his own, without the knowledge or consent of his partners, cannot be recovered against the house. It is so laid down in Bailey on Bills (4 ed.), 47, and the cases cited in support of the position are numerous and decisive. The rule is summed up in these words, and repeated in every case: "Where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note unless they have been previously consulted and consent to the transaction." The same doctrine is laid down in *Doe v. Halsey,* 16 John. Rep., 34; *Foot v. Sabin,* 19 John. Rep., 154; *Brown v. Duncannon,* 4 Har. & McHenry, 350; *Livingston v. Hastie,* 2 Cains' Rep., 246, and *vide Jones v. Yates,* 9 Barn. & Cres., 532; *Heath v. Sanson,* 2 B. & Ald., 291. It seems to me that the law is decidedly against the plaintiffs' claim upon this bill, so far as to charge the firm of Evans & Andrews with the amount of it. Nothing can authorize Van Bokkelin or his assignees to

recover the amount of this bill against the firm unless he or they show to the Court that Evans & Andrews had notice that Ellison had drawn. The *onus* lies on the plaintiff to make the proof, or they cannot recover, in my opinion, let the impressions on Van Bokkelin's mind be what they may.

PER CURIAM. Decree accordingly.

Cited: Weed v. Richardson, 19 N. C., 536; *Miller v. Richardson,* 24 N. C., 252; *Norment v. Johnson,* 32 N. C., 91; *Street v. Meadows,* 33 N. C., 131; *Abpt v. Miller,* 50 N. C., 34; *Carter v. Beaman,* 51 N. C., 45; *Hartness v. Wallace,* 106 N. C., 431.

Dist.: Long v. Carter, 25 N. C., 241.

(314)

MEMORANDUM.

At the last session of the General Assembly, *John M. Dick, Esq.,* of Guilford County, and *Romulus M. Saunders, Esq.,* of the city of Raleigh, were elected judges of the Superior Courts of Law and Equity for this State; the former in the place of *Judge Seawell,* deceased, and the latter in the place of *Judge Martin,* resigned.

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1836

ISAAC HIATT ET AL. v. WILLIAM TWOMEY AND GEORGE W. MONTGOMERY.

No warranty is implied in the sale of a patent right, and therefore the purchaser of such a right cannot, in the absence of fraud, and without an express promise, recover of his vendor the price paid for it, upon its turning out to be invalid.

THE BILL charged that the President of the United States, on 18 January, 1826, issued letters patent to one Thomas Key upon the allegation that he was the inventor of a new and useful improvement in the mode of letting water on water-wheels. In the schedule or specification annexed to the letters patent, and forming a part thereof, and which was set out in the bill, a description and drawing of the said improvement was given. The bill also charged that Key conveyed his right in the letters patent for the State of North Carolina to Hiram H. Tusk, who assigned it to the defendants, and that on 2 December, 1826, the plaintiffs purchased, and the defendants conveyed to them, the exclusive right of constructing, using and vending, forever, the (316) said improvements, in the counties of Stokes and Orange, at and for the price of $200. The plaintiffs then stated that, since the purchase, they had discovered that Key was not the inventor of the said improvement; that the pretended improvement was a plan which had been discovered by one Jones, and had been in use twenty years ago, at divers sawmills in this State; that they were ignorant of this when they made the purchase, and charged, first, fraud on the part of the defendants; secondly, a mistake as to a fact upon which the validity of the patent rested. They insisted that the contract had not been, nor could it be, of any value to them, and prayed to have it rescinded and to be repaid their purchase money.

The bill was taken *pro confesso* against the defendant Montgomery, as to whom publication had been made, he being an inhabitant of another State. The defendant Twomey answered and admitted that he and Montgomery contracted with the plaintiffs as mentioned in the bill, and for the price there stated; but he insisted that they had no notice that the invention was in use anywhere before Key discovered the improvement and obtained his patent; that the improvements mentioned in the bill to have been so long in use in this State were different from the specification annexed to the patent; that Key assigned the patent right for North Carolina to Tusk, and that the defendants were his agents, and that they conveyed to the plaintiffs in that character, and that the contract and sale on their part was *bona fide* and not fraudulent. The plaintiffs replied to the answer, and proofs were taken, the general result of which will be found in the opinion of the Court.

No counsel for plaintiff.
Nash for defendants.

DANIEL, J., after stating the pleadings, as above, proceeded: The Constitution of the United States gives to Congress the power to pass laws securing to *inventors* the exclusive right to their respective (317) *discoveries,* for a limited time. Const. U. S., Act 1, sec. 8, clause 8. Under this authority Congress has passed laws upon this subject. Under the sixth section of the Patent Law (Act 1793, ch. 55), it is enacted that, if the thing secured by patent had been in use, or had been described in a public work, anterior to the supposed discovery, the patent is void, whether the patentee had or had not a knowledge of this previous use or description. *Evans v. Eaton,* 3 Wheat., 454; 1 Mason, 302. The same is the rule in England, under the statute of 21 of James I, ch. 3. 5 Bac. Abr. Wilson's edition, Prerogative, pp. 591, 592, 593. The evidence in this case satisfies the Court that there was no fraud committed by the defendants, and that the contract was made by them in good faith. But the proofs established that the improvements described in the specification annexed to Key's patent were known and used in this State before the date of the patent, though there is no evidence that the defendants had notice of that fact. According to the above authorities, the patent is void, and the defendants had no title, in law or equity, to convey. If a sale be made of a chattel, there is an implied warranty that the vendor in possession has title; and if the vendee be evicted by a better title, he can at law maintain an action of *assumpsit* on the implied warranty. 1 Chit. Plead, 92, 93. In the sale of lands the rule is different. The possession of lands is no criterion of title, and no person in his senses would take an offer for a

purchase from one merely because he stood upon the ground. The purchaser must look to his title, and if he does not, it is *crassa negligentia.* If there be no fraud, and no covenants taken to secure the title, the purchaser has no remedy for his money on a failure of title. This is a settled rule of law. *Frost v. Raymond,* 2 Cain's Rep., 188. And the same rule prevails in equity. *Abbott v. Allen,* 2 Johns. Ch. Rep., 523. The vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of his covenants. *Bree v. Holbeck,* Doug. Rep., 654; *Johnston v. Johnston,* 3 Bos. & Pul. Rep., 162; *Governeur v. Elmendorf,* 5 Johns. Ch. Rep., 84. The plaintiffs do not exhibit their conveyance, nor have they alleged that it contains any (318) express stipulations for the validity of the patent, nor anything from which a stipulation to that effect can be inferred. But they claim simply the restoration of their money because their patent turns out to be invalid. The subject-matter is not relative to any corporeal thing, either real or personal, but to something intangible and incorporeal, resting wholly in grant. In contracts for the assignment of such interests, if there be no fraud, the purchaser must depend, in case they prove of no value, wholly upon his covenants. Both parties are equally innocent, there is no necessary warranty of title, and the loss must fall wherever the bargain leaves it. *Taylor v. Hare,* 4 Bos. & Pul. Rep., 260.

The bill must be dismissed, but, as the proofs are very satisfactory that the defendants were not merely the agents of Tusk, but had purchased from him the interest in the patent for this State, and sold it in their own right to the plaintiffs, we think, from the unfairness of the answer, that they are not entitled to costs.

PER CURIAM. Bill dismissed.

Cited: Cansler v. Eaton, 55 N. C., 501.

TIMOTHY ANDRES v. BRYAN LEE ET AL.

1. The purchaser of chattels under an executed contract can claim redress against his vendor for a defect of title only where there is an express or implied warranty, or a deceit. And, ordinarily, the affirmation of title by the vendor, at the time of the sale, is equivalent to a warranty; but not where the vendor is out of possession, and there is an adverse claim to the chattel, made known at the time to the vendee; and especially where the vendor, notwithstanding his affirmation of title, says expressly that he sells only such as he may have.

2. Where a bill is filed upon a claim against two defendants jointly, and one suffers the bill to be taken *pro confesso*, and the other sets up a defense, which defeats the claim altogether, the bill must be dismissed as to both, though without cost to him who made default.

THE BILL was filed against several defendants, only two of whom answered, and it was taken *pro confesso* as against the others, who were nonresidents. The case made by the pleadings and proofs was,
(319) that a certain negro was supposed to belong to the estate of Solomon Lee, after whose death an order was obtained by his administrator for the sale of the negroes of the deceased for the purposes of distribution. At the time of the sale the negro in question was actually held and claimed by Baillie Sutton and Thomas Lee as their property, and the sale thereof was forbidden by them, and the administrator suspended the sale. Some of the next of kin who were present insisted that the sale should proceed, for that the title of the intestate was clearly good. The negro was thereupon offered for sale again, the administrator declaring repeatedly that he sold only "the right of the heirs of Solomon Lee." The plaintiff became the purchaser, at the sum of $300, at a credit of six months, which was from 25 to 40 per cent less than the full value of the negro. The plaintiff asked if he ought not to have a bill of sale, but, on being told by a bystander that the sale itself was a sufficient transfer, without waiting for or receiving a delivery of the slave, gave his bond to the defendants, the next of kin, for the purchase money. The plaintiff contrived to get possession of the slave afterwards, but it was reacquired immediately by Baillie Sutton and Thomas Lee. The plaintiff thereupon brought suit against them, but failed, because Solomon Lee's title was defective. The prayer of the bill was for an injunction against execution on a judgment which had been obtained upon the bond, and for general relief.

Upon the hearing at Bladen, on the Spring Circuit of 1835, before his Honor, *Judge Seawell,* the plaintiff obtained a decree; and the defendants, John Smith and wife, who alone had answered, appealed.

Badger for plaintiff.
No counsel for defendants.

GASTON, J. The purchaser of chattels under an executed contract can claim redress against his vendor for a defect of title, only where the vendor has undertaken to assure the title, or has deceived the
(320) purchaser, in relation to it. In this case the plaintiff does not impute any fraud to the defendants. His title to redress must be founded, then, upon their warranty, either express or implied. We do not think that a warranty can be implied from the circumstances of

the case, or is established by the proofs. Upon these the case is as follows. (Here his Honor stated the facts of the case, as above, and proceeded.)

The *only* fact tending to establish a warranty of the title is the assertion by some of the defendants that the title was good. There is, indeed, one witness who states in his deposition that "he heard James Lee say that the right was good, or he would make it good." It may be that the witness means to represent that James Lee declared that the title was good, and, further, that if it proved otherwise, he would make it good. But we feel ourselves bound to understand him as representing that he used one or the other of the phrases—either that the title *was* good, or that he would *make* the title good—and that the witness is not confident which of these was the phrase employed. We adopt this construction of the deposition, for several reasons—first, the plaintiff, in his bill, does not charge any engagement to make the title good, but only that some of the heirs gave assurances that it was good; secondly, all the other witnesses who speak of James Lee's declarations represent him as simply affirming the goodness of the title; and, finally, the testimony of the plaintiff's witness should not be strained against the defendants.

We assent to the argument which insists that this assertion of James Lee's is to be regarded as the assertion of the other defendants present at the sale and not dissenting therefrom; and we admit also that an affirmation of title by the vendor at the time of sale is ordinarily equivalent to a warranty of title. But in this case we are clearly satisfied that it amounted to no more, and was understood by the plaintiff to amount to no more than a confident expression of honest belief.

The adverse possession and claim put the purchaser upon his guard, and called for some explicit stipulation as to title, if any were required. Instead of such a stipulation, he was left to decide between conflicting assertions, and expressly apprised that no more was (321) offered for sale than the right of Solomon Lee's next of kin. The price shows that the purchase was a speculation; and the giving of a note for the purchase money, without delivery of the property, or covenants from the vendors as to title, leaves scarcely room to doubt but that he bought at his own hazard.

Upon the pleadings and proofs the Court is therefore satisfied that the decree below is erroneous. But no defense has been made to the bill, except by the defendants, Smith and wife. As against the other defendants, who are nonresidents, the bill has been taken *pro confesso*. This state of things presents a question which, as far as we are informed, has never been decided in the courts of this State. Where a claim is against two jointly, and one suffers the bill to be taken *pro confesso*, and the other sets up a defense, which defeats the claim alto-

gether, what disposition of the cause is to be made as against him who makes no resistance? We believe that from analogy to the doctrine which prevails at law in similar cases, from the probable mischiefs that would result from an extension of the rigorous rule against nonresident defendants, and because of the obvious equity of such a course, we are bound to hold that the defense must inure to the benefit of all the defendants having a joint interest in the subject-matter.

The decree below is to be reversed, with costs to the appellants in this Court. The bill of the plaintiff must be dismissed, and the defendants Smith and wife recover their costs in the court below. No costs are given to the other defendants there because they made default.

PER CURIAM. Decree reversed and bill dismissed.

Cited: Attorney-General v. Carver, 34 N. C., 235; *Roberts v. Welch,* 43 N. C., 294; *Sparks v. Messick,* 65 N. C., 442.

(322)

JAMES HARRISON v. WILLIAM CASEY AND DANIEL CASEY.

Upon the partial dissolution of an injunction the defendant in equity may have an execution there for the sum as to which the injunction is dissolved; but if, instead of that, he sues at law upon the injunction bond, he cannot afterwards, upon the total dissolution of the injunction, have an execution from the court of equity, his only remedy being upon his judgment at law.

IN this case the plaintiff had obtained an injunction against a judgment which the defendant William had against him at law. Upon the coming in of the answers, the injunction was dissolved as to three hundred dollars, part of the judgment enjoined, and the defendant William obtained the leave of the court to put the injunction bond in suit at law; he did so, and recovered judgment for the penalty, to be discharged by the payment of three hundred dollars and the costs. The bill was retained as an original, and was afterwards dismissed at the hearing, on the merits. The counsel for the defendant William now moved for judgment on the injunction bond, which was resisted by the other side.

Winston for plaintiff.
Pearson for defendant.

RUFFIN, C. J. The court refuses the motion. No reason is perceived why the defendant, in this Court, might not have obtained execution

here against the plaintiff and his sureties for the sum for which the injunction was dissolved. The bond is an agreement to perform the orders and decrees of the court, made in the cause from time to time, and may be regarded to be in the nature of a rule to that effect. But if the defendant did not choose that method, but preferred that of an action at law—which was in his own election—this Court can no longer give a remedy on the bond. It is not here, and indeed is merged in the judgment at law; and all further proceedings must be had on that judgment. That can be enforced only in the court which rendered it.

PER CURIAM. Motion refused.

(323)

WILLIAM WADSWORTH ET AL. v. DAVID ARMFIELD ET UXOR.

A testator bequeathed a negro woman, together with several other articles of property, to his wife for life, and after her death he gave all the property, except the negro, to be equally divided among five daughters. The negro woman he bequeathed after his wife's death to his daughter B., adding, "after said negro is appraised by two freeholders; and B. shall pay unto each of her four sisters above mentioned one-fifth part of the said appraisement": *It was held*, that after the death of the widow the four sisters were entitled each to one-fifth of the value of the increase which the negro woman had borne during the life of the widow, as well as of the value of the negro woman herself.

JOSIAH TROTTER, in the year 1792, made his will, and bequeathed as follows: "First, all my debts to be paid. Secondly, I give and bequeath to Jane, my wife, during her widowhood, the plantation whereon I now live, with three hundred acres of land, together with all my household goods, debts and movable effects, as horses, cows, hogs and sheep, and one negro woman named *Beck*, one negro girl named *Ailse*. Thirdly, I give and bequeath, at my wife Jane's decease, either of life or widowhood, all my household goods, debts and movable effects, as horses, cows, hogs and sheep, unto my five daughters, Nancy, Rachel, Jane, Betsey and Mary. Fourthly, I give and bequeath unto my daughter Betsey, at my wife Jane's decease, either of life or widowhood, the negro woman *Beck*, after the said negro is appraised by two freeholders; and Betsey shall pay unto each of her four sisters above mentioned one-fifth part of the said appraisement, but shall have ten years to raise the money in, and the negro shall be hers." To his five daughters above mentioned the testator gave no other property by his will than that above set forth. The negro *Ailse* he gave, after the death of his wife, to a sixth daughter, named Hannah. All the lands which he owned he gave to his sons.

After the death of the testator, and during the life of his widow, the slave *Beck* had issue five children and grand-children. Betsey intermarried with the defendant Armfield who, after the death of the widow, Jane Trotter, in right of his wife, took possession of *Beck* and
(324) her increase, and contended that he was only bound to account with the other four sisters of his wife for four-fifths of the value of *Beck only;* and that he was by law entitled to hold her increase as his absolute property, without any contribution. The plaintiffs, who were the other four sisters or their assignees, contended that by a proper construction of the will of Josiah Trotter they were entitled to four-fifths of the slaves, or four-fifths of the value of *Beck* and her issue born at the death of the widow; and they prayed a division of the slaves or an account of their value, and that the same might be secured to them.

Nash and J. M. Morehead for plaintiff.
Mendenhall for defendant.

DANIEL, J., after stating the case as above, proceeded: The argument on the part of the defendants is, that under the will a vested interest in *Beck* passed to the testator's daughter Betsey; and that the issue of *Beck,* born since the vesting of that interest, accrued to the said daughter by operation of law. That the legacies charged upon that bequest are pecuniary legacies, the amount whereof is to be ascertained when Betsey takes *Beck* into possession, and that amount is also made dependent on the value at which *Beck* shall then be appraised; and that, without inserting words in the will which it does not contain, the appraisement must be confined to *Beck* alone. We do not yield to the force of this argument. The court cannot, indeed, under the pretense of construction, alter a will. They must find enough in it to manifest the intention which they attribute to the testator, but it is not necessary that this intention should be expressed with critical precision. On the will, it is apparent that the testator designed that his five daughters should share equally of his bounty. He makes no mention of the increase of *Beck,* either in the bequest of her to Betsey or in the appraisement which he directs of her value for the benefit of Betsey's sisters. The appraisement is to be made when Betsey is entitled to the possession of *Beck;* and what Betsey then obtains by means of this bequest is to be valued so as to give her sisters an equal share thereof.
(325) Under the name *Beck,* she received not *Beck* alone, but *Beck* with her fruits or increase. In the valuation for the purpose of an equal division, not *Beck* alone, but *Beck* with her attendant fruits or increase is to be comprehended. It is not the legacy as vested, but as enjoyed, which the testator directed to be appraised. Had *Beck* died

without increase during the existence of the particular estate, Betsey could not have been called upon for contribution, although her interest in remainder had completely vested, because the charge was upon her legacy after it should come into possession. It should, therefore, be valued such as it then was. Any other construction would do violence to the plan of the testator.

PER CURIAM. Decree for the plaintiffs.

SAMUEL EDWARDS ET AL. v. THE TRUSTEES OF THE UNIVERSITY.

1. The possession of a trustee, so constituted by act of the parties, is the possession of his *cestui que trust;* and no length of possession as such will bar; but if a party is sought to be constituted a trustee by the decree of a court of Equity, founded on fraud or the like, his possession is then considered adverse, and the statute of limitations will be a bar.
2. Where a plaintiff alleges a disability which is to exempt him from the operation of the statute of limitations, it is incumbent on him to prove that it was a *continuing* disability from the time the cause of action accrued.

THE plaintiffs were the children and heirs at law of one John Edwards, who died in the year 1817, intestate. John Edwards was a noncommissioned officer in the Continental service during the Revolutionary War, belonging to the North Carolina line, and had been regularly discharged. He being entitled by the laws of the State to one thousand acres of military bounty land, the defendants suggested that he had died leaving no heirs, and obtained a warrant for the land, as having escheated to them. The bill prayed that the defendants might be declared to be trustees for the plaintiffs, and decreed to convey the land to them, and also for general relief. The defendants, in their answer, denied that they held the land, or had ever obtained a grant for the same. They admitted that a land warrant for one thousand (326) acres issued for their benefit, it being for the services of John Edwards, a corporal in the Continental line of this State; but they alleged that they had assigned it to one Thomas Henderson, on 11 October, 1821, for his own use and benefit, and without any notice of the claim of the plaintiffs; that they had not then, nor at any time since the assignment, any interest in the warrant or grant of land obtained upon the same; and they relied upon the statute of limitations.

From the proofs taken in the cause, it satisfactorily appeared that the plaintiffs were the heirs at law of John Edwards, who had been a noncommissioned officer in the North Carolina line; that he was entitled

to one thousand acres of land, and that he died in 1817 without ever having obtained his warrant; therefore that the defendants did suggest that he had died without heirs, and obtained the warrant for their own benefit on 5 September, 1821, and assigned the same, without notice of the plaintiff's claim, to Thomas Henderson on 11 October of the same year. The bill was filed in March, 1831. Two of the plaintiffs were stated and proved to be *femes covert;* but at what time they married or whether, at the date of the warrant or of the assignment thereof, they were *covert,* and had so continued, was neither stated in the pleadings nor shown by the proofs.

Pearson for plaintiff.
Badger contra.

DANIEL, J., having stated the case as above, proceeded: The plaintiffs seek to make the defendants their trustees by operation of law and by a decree of this Court. The defendants rely upon the statute of limitations, nearly ten years having elapsed since they obtained the warrant and assigned it to the time of filing the bill. As respects *trusts,* the distinction in equity is, that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust,* and no length of possession as such will bar; but if a party is to be constituted a trustee by the decree of a court of Equity, founded on (327) fraud or the like, his possession is then considered adverse, and the statute of limitations will run and be a bar. *Hovenden v. Lord Annesley,* 2 Sch. & Lef., 633; *Cholmondely v. Clinton,* 1 Tur. & Russ. Rep., 118, 119; 1 Chit. Prac., 759. As to the plaintiffs who were *femes covert* at the filing of the bill, but who are not shown to have been *covert* when the defendants obtained the warrant and made the assignment, the rule is, that when issue is taken on the plea of the statute of limitations, that the cause of action did accrue within a certain time, the burden of proof lies on the plaintiff, and he must prove a cause of action within the limit. *Hurst v. Parker,* 1 Bar. & Ald. 92; 2 Stark. Ev., 888. When it is incumbent on a plaintiff to prove that he labored under a disability, which exempts him from the operation of the statute of limitations, he must show that it was a *continuing* disability from the first, for it seems to be a general rule that where such a statute has once began to run, no subsequent disability will restrain its progress. 2 Stark. Ev., 901; 4 Term Rep., 309; 1 Stra., 566. The cause of action in this case arose in the year 1821; the bill was filed ten years after, viz., in the year 1831, at which latter period two of the plaintiffs were *femes covert;* but that they were so in the year 1821 there

is no proof produced by the plaintiffs, on whom the *onus* lies; the statute of limitations therefore bars the claims of each and all the plaintiffs and the bill must be dismissed, but without costs.

PER CURIAM. Bill dismissed.

Cited: Christmas v. Mitchell, 38 N. C., 548; *Thompson v. Thompson,* 46 N. C., 434; *Taylor v. Dawson,* 56 N. C., 91; *Barnett v. Woods,* 58 N. C., 433; *McKethan v. Murchison,* 73 N. C., 435; *Peacock v. Harris,* 85 N. C., 151; *Hodges v. Council,* 86 N. C., 183; *Comrs. v. Lash,* 89 N. C., 168; *University v. Bank,* 96 N. C., 287; *Holden v. Purefoy,* 108 N. C., 168.

(328)

PROBERT COLLIER v. THE BANK OF NEW BERN ET AL.

1. A court of Equity may, at any time during the second term after the death of the plaintiff in a suit, on motion, declare the suit to be abated, though if the representative of the plaintiff were afterwards to apply within that term, the order would be set aside, and the suit be revived, unless such representative had before contumaciously refused to come in and make himself a party.
2. The abatement of a suit in equity for an injunction is not of itself a dissolution of the injunction. It requires an order of the court for that purpose, which order it is competent for the court to make, after an abatement by death.
3. Upon the abatement of an injunction suit in equity, the defendant, on motion, may have an order for the dissolution of the injunction, and thereupon a judgment upon the injunction bond against the sureties thereto.
4. If the motion for the dissolution should be made at the second term, no notice thereof need be given to the plaintiff's representative; but if the defendant neglect to move at that term, it may be necessary that he should give notice of his motion or that the order should be prospective, and be served on the plaintiff's representative.

(The case of *Jones v. Hill,* 6 N. C., 130, and *Hill v. Jones,* 5 N. C., 211, approved.)

AFTER this cause was remanded, at June Term, 1834 (see 2 Dev. Eq. Rep., 525), to the Court of Equity for Wayne County, it was continued in that court until the Spring Term of 1835, when the death of the plaintiff was suggested. At the ensuing Fall term it was ordered that the injunction, which had been granted upon the failing of the bill, should stand dissolved unless the administrators came in as parties at that term; whereupon the following decree was made, viz.: "In this

cause the complainant having died before the last term, and his death having been at said term suggested, and the representatives of the complainant failing to make themselves parties at this term, and the court being just about to adjourn, the cause is declared to be abated and the injunction dissolved. Whereupon, on motion, judgment is rendered against John J. Collier, security to the injunction bond, for," etc. From this decree declaring the cause abated, and also from the judg-
(329) ment on the injunction bond, John J. Collier appealed.

W. C. Stanley and Devereux for plaintiff.
Henry and J. H. Bryan for defendants.

RUFFIN, C. J. The question in this case is rather one of practice than of principle. The case of *Jones v. Hill,* 2 Murph., 131, decided that the sureties in an injunction bond are liable under the act of 1800 (Rev., ch. 551) upon a dissolution of the injunction, decreed for the want of prosecution, caused either by the negligence or death of the plaintiff, as well as when the decree is founded on the merits. The objection here is to the time and manner of proceeding against the surety. The act of 1810 (Rev., ch. 794) provides that when an injunction is dissolved the bond may be proceeded on in the same manner and under the same rules that bonds are proceeded on in cases of appeal, under which it has been the constant practice in the courts of Equity to give a summary judgment or decree for the debt and costs, or such part as the court thought it right to decree against the plaintiff.

It has been contended for the surety in this case that by the abatement of the suit it was out of court, and therefore that no order could be made in the cause to dissolve the injunction, nor for judgment against the surety who is living. On the other hand, the counsel for the defendant has insisted upon the authority of the case of *Jones v. Hill,* before mentioned, that the abatement itself wrought a dissolution of the injunction, and that the liability of the surety on his bond survived, and *might* be enforced in equity in a summary way, as well as by suit at law.

The Court is of opinion that the death of the plaintiff and the failure of his representative to prosecute the suit so that it abates do not of themselves dissolve the injunction. An order of the court is necessary to do that. It is not stated in *Jones v. Hill* that such an order had been made in equity before the bond was put in suit. But it is not stated, on the other hand, that such an order had not been made, or that it was deemed unnecessary. The point does not seem to have been raised.

There can, however, be no doubt on it. The death of a party
(330) to a suit in equity does not vacate nor render inoperative the

orders made in the cause, while the parties were regularly before the court. When revived, it stands upon those orders in the plight in which the death of the party left it. It is true, no order upon the merits can be made after the death, and before a revivor. It was for that reason that in the original case out of which that of *Jones v. Hill* arose, the motion of the defendant to dissolve the injunction, upon the reading of his answer after the plaintiff's death, was refused. *Hill v. Jones,* 1 Murph., 211. But although the Court refuses to decree upon the merits, or to take any step whatever in that direction while the cause is in that state, yet it would be manifestly unjust and oppressive to keep the defendant in equity, in peril of the pains of a contempt of the court by an effort to enforce his recovery at law. That would, in effect, make the injunction perpetual, for the defendant cannot compel the executor to make himself a party; or, indeed, there may be no representative; or the defendant may have died, and the plaintiff may decline to bring in his executor. In all such cases, therefore, the course is for the party against whom the injunction issued, or his representative, to apply for an order requiring the complainant or his representative to revive, within a limited time, or that, in case of failure, the injunction shall, for that reason, be dissolved. *Hill v. Hoare,* 2 Cox's Cases, 50; *Hawley v. Bennett,* 4 Paige's Rep., 163. The object of such a motion is to clear the defendant, or the person representing him, of a contempt in proceeding at law; and the effect is that simply, without entering at all into the merits. It is right that the court should withdraw its mandate against proceeding at law, if the person to be affected by such a proceeding will not prosecute his equitable complaint against it; and the death of one of the parties furnishes no reason why the plaintiff at law should be deprived for an unreasonable time of his legal and only remedy, or be put in contempt for resorting to it after a reasonable time. An order of that sort is, therefore, competent and proper for the court to make after an abatement by death. In England, it would be doubtless necessary that a copy of the order should be served. That is the (331) common practice as to all the orders of the court, and would be the more necessary in a case of this kind, because there is no statute or general rule of the court which keeps the cause in court for any period after the death of the party. But the Court thinks the rule should be otherwise with us. As our terms are at certain and short periods, parties are charged with the knowledge of all the orders made in the cause, without service of a copy, unless specially directed; and the act of 1801 (Rev., ch. 574) keeps the cause in court, for the purpose of being revived without bill, upon application of the plaintiff's representative, for two terms. At the second term the defendant may have the injunction dissolved upon motion, if it shall not be revived during that term. If the

defendant or his representative neglect to move it at that term, it may then be necessary that he should give notice of his motion, or that the order for the dissolution should be prospective, and served on the plaintiff or his representative, if there be one. The idea was mentioned at the bar, that although the cause was kept in court for two terms, yet when it did abate it was as of the death of the party; and that it was thence to be inferred that the order at the second term against the surety was not made in the cause, and was therefore erroneous. The Court does not deem it material to inquire to what event or period, the abatement relates. The order that the injunction shall stand dissolved if the suit be not revived, has been already shown to be proper and valid, although made after the abatement; for the abatement is in truth the very cause and foundation of it. But the abatement does not put any person but the deceased party out of court until the end of the second term. The rule has been constantly expressed in those terms, both in suits between parties and in the *regula generalis,* adopted in the courts on the act of 1786 (Rev., ch. 253, sec. 1), and was applied equally to cases in equity and at law. 1 Hay., 163-455; 2 Hay., 66; Tayl. Rep., 134. The surety was therefore before the court during the second term, without further notice; and as the injunction was then dissolved for want of prosecution, the bond was forfeited and the obligor became liable
(332) on it. The only inquiry that remained was as to the proper remedy. The court might have sent the defendant to law, and would have done so if for any reason as complete justice could not have been done in this mode, as by allowing a full defense at law; as if, for example, the defendant had asked judgment against the executor, which would raise the question of assets. But there was no reason for refusing the judgment in this case after the surety became fixed with the debt by the dissolution of the injunction. On the contrary the defendant in equity was entitled to the speediest remedy for raising the money, after his demand had thus been judicially ascertained, and it would be equally against good morals and the sound policy of the act of 1810 (Rev., ch. 794) to put it in the power of the surety to involve him again in an expensive and tedious litigation. The interval necessary to the proofs and investigation of rights in controversy, and the ascertaining of them is that of salutary delay. But all beyond that is unjust; and there can be no greater reproach to a system of jurisprudence than that it is feeble or dilatory in enforcing rights already established by its tribunals in due course of law.

Something was said of the executor of the deceased plaintiff having the whole of the second term to become a party, which precluded the court from making any order within that term, founded on his not having at that moment come in. But the Court thinks there is nothing

in that. The words are, "at or before"; but if they had been "within the second term," the meaning of them would be, when required by the court, at that term. There is no doubt, however, that the court would have received him and rescinded the orders had he applied at any time after they were made, unless obviously he had contumaciously before refused. But the representative did not at any time apply, and therefore, whether the order be considered as made at the first or the last moment of the term, it proved, in the event, to have been properly made, and it must be affirmed with costs in this Court.

PER CURIAM. Decree and judgment affirmed.

Cited: Stone v. Latham, 68 N. C., 422; *University v. Lassiter,* 83 N. C., 41; *Marion v. Tilley,* 119 N. C., 474.

(333)

JOSEPH McGAHEE v. WILLIAM SNEED ET AL.

When a purchaser seeks relief from a court of Equity, because he has purchased without notice, he must deny notice. So when he sets up by plea or answer a purchase without notice as a bar to discovery or relief to which a plaintiff is entitled, he must be equally explicit in denying it. But where a plaintiff would convert a purchaser into a trustee, and seeks to *charge* him because he bought with notice, if the allegation of notice is not admitted the plaintiff is bound to prove it.

THE bill charged that the plaintiff, on 9 June, 1818, conveyed to Charles Simms (one of the defendants) one-third part of the lot No. 18 in the town of Milton, for the price of five thousand dollars, and took from the said Simms therefor three several bonds, one for one thousand dollars, payable 25 December ensuing; the second, for two thousand dollars, payable 25 December, 1819; and the third, for two thousand dollars, payable on 25 December, 1820; that the first of said bonds was duly paid; that upon the second becoming due, and remaining unpaid, the plaintiff commenced a suit at law, and obtained a judgment thereupon; that Simms obtained an injunction against this judgment, upon an allegation of defect of title in the plaintiff to the lot in question; that the defendant Sneed and Howell L. Ridley, the testator and ancestor of the defendants, Robards, Lewis and John Ridley, became sureties to the injunction bond, and as an indemnity against their suretyship Simms conveyed to one John Smith the lot in question, in trust, for the benefit of Sneed and Ridley; that the injunction was afterwards dissolved, and the plaintiff obtained satisfaction of his

judgment from Sneed and Ridley, Simms being then considered insolvent; that Sneed and Ridley and their trustee afterwards sold the said lot to David Kyle, another defendant; that at the time when the deed in trust was executed for the benefit of Sneed and Ridley, they and their trustee had notice that the judgment against which the injunction was obtained was in part for the purchase-money of the lot, and also that the plaintiff held the other bond for the remaining part
(334) of the purchase-money, and that he had no other security therefor; that when Kyle purchased he had like notice that the last bond for the purchase-money remained due and unpaid. The bill then charged that the plaintiff had obtained a judgment against Simms upon the last bond, but that he had not obtained satisfaction thereof, Simms being insolvent. The prayer of the bill was for the payment of the balance of the purchase-money by the defendants, or some of them, or that the lot in question might be sold for that purpose, so as to enforce the lien on it which the plaintiff contended that he had in equity. The defendants put in separate answers, admitting all the material allegations of the bill, except the purchases with notice as therein charged. As to that, the representatives of Ridley, who had died, declared their ignorance of the matters charged in the bill, and therefore did not admit them, but insisted that the plaintiff might be held to strict proof of them. Sneed answered that at the time when he signed the injunction bond as surety for Simms, and took the deed of trust aforementioned, he knew that the judgment enjoined was in part for the purchase-money of the lot, but whether it was on the second or the third bond he had no means of ascertaining; that at that time it was not understood, or believed generally, that a vendor of land had a lien for his purchase-money, and that not deeming the fact of notice material, he might have then had notice without being able afterwards to recollect it; that he did not, in fact, have any recollection of such notice, and that he was unprepared either positively to deny or to admit it. Kyle expressly denied notice. No replication to these answers was filed by the plaintiff, and the case was heard upon the bill and answers.

Badger and Norwood for plaintiff.
Devereux and W. A. Graham for defendants.

GASTON, J. The plaintiff claims in this case to have an equitable lien for the unpaid part of the price of the land sold by him to Simms, and afterwards purchased by Sneed and Ridley. Waiving, for the reasons stated in the case of *Johnson v. Cawthorn* (*ante,* 32), the inquiry whether such a lien exists in our State, and if so, to what extent,
(335) it unquestionably does not exist against a *bona fide* purchaser

from the vendee, without notice that the purchase-money on the original sale remains unpaid. The plaintiff shows in his bill that Sneed and Ridley are purchasers, but avers that they bought with this notice. On the part of the representatives of Ridley, this allegation is as explicitly denied as it can be by those who have no personal knowledge of the transaction. On the part of Sneed, it is not expressly denied, but it certainly is not admitted. He declares in his answer that he has no recollection whatever of such notice, and therefore does not admit it; but as it is possible that the fact may have occurred, and deeming it an unimportant circumstance, he may have forgotten it; that he cannot *positively* deny it. We take the rule to be that when a purchaser *seeks* relief from a court of equity because he has purchased without notice, he must positively deny notice. So when he sets up by plea or answer a purchase without notice as a bar to discovery or relief to which a plaintiff is entitled, he must be equally explicit in denying notice. A want of notice is an essential part of his equity in the one case, and of his defense in the other; and it is a general rule in pleading that whatever is essential to the right of the party must be averred by him. But where a plaintiff would convert a purchaser into a trustee, and seeks to *charge* him, because he bought with notice, and therefore *mala fide,* if the allegation of notice is not admitted, the plaintiff is bound to prove it. Should the answer be silent, or not sufficiently explicit in this respect, the plaintiff may except to the answer and require one more full and perfect. But if he does not except, and cannot prove the notice, he must fail because a material part of his equity is not established. *Eyre v. Dolphin,* 2 Ball & Beat., 303; *Harris v. Ingledew,* 3 P. Wms., 91; *Jerrard v. Saunders,* 2 Ves. Jun., 454; *Walleryn v. Lee,* 9 Ves. Jun., 32. As the plaintiff has not replied to these answers, the court cannot declare that Sneed and Ridley bought with notice. The bill, therefore, must be dismissed as to Sneed and the representatives of Ridley, with costs.

Kyle is brought in merely as a stakeholder, and as the bill is not (336) sustained against his vendors, it must be dismissed as to him also.

Against Simms, the plaintiff has a judgment at law, and neither asks nor needs any aid in equity. The bill must be dismissed also as to Simms. As to the two latter, however, it is dismissed without costs.

PER CURIAM. Bill dismissed.

Cited: Saunders v. Lee, 101 N. C., 7.

WILLIAM B. OCHILTREE v. THOMAS WRIGHT AND ALFRED BECK.

1. Where one of two coexecutors took possession of the effects of the testator, sold them, and received and kept the bonds taken for the same, and the other executor did not interfere in the management of the business further than to assent to the sales and join in signing the inventory and account of sales, *it was held* that the latter, not having done anything more than the law required of him, was not responsible to the legatees for the *devastavit* of the former.

2. When coexecutors are appointed curators or trustees of a fund bequeathed by their testator each is responsible only for what was in his hands or under his control; and as neither has any authority to take from the possession of another the property of their *cestui que trust*, he cannot, therefore, be made answerable for the default of that other.

WILLIAM BECK made his will, which was proved by the defendants. The testator gave to his wife several slaves, and other personal property, for and during her life; and, on her death, then he bequeathed one-fifth part thereof to the plaintiff, provided he should attain to the age of twenty-one years. The testator, after a bequest of one-fifth part of all the remaining portion of his property to the plaintiff, provided he should arrive to the age of twenty-one years, and the other four-fifths to his, the testator's children, directed as follows: "It is my will and desire that my executors retain in their hands the whole of the property herein given to him (the plaintiff) until he shall arrive at the age of twenty-one, should he live to that age, and apply the annual profits of the same property towards his education, so far as it is necessary, and the balance, if any, to be paid to him when he arrives at the age of twenty-one years; but should he die before that age, then the remaining profits, together with the property, immediately to be divided (337) and paid to my children." Upon the death of the testator, the widow took possession of her legacy; and on her death the defendant Beck, who was the devisee in remainder of the plantation where she resided, and also one of the executors, immediately moved to that plantation, and took possession of all the property in which the widow had an estate for life. The executors had power by the will to divide the property among the legatees, either by lot or sale; and for the purpose of a division among the five claimants, to wit, the plaintiff and the four children of the testator, the property was advertised and sold at the late residence of the widow, and then the residence of the defendant Beck. The other defendant, Wright, who had married one of the testator's daughters, and was therefore entitled to a share of the property, was at the sale and assented to it. Both of the executors signed an inventory of this property, and also an account of the sales, and returned

them to the county court. On the day of the sale, after the property was all cried off, Wright returned home, leaving everything in the hands of Beck, who delivered the articles to the purchasers, and took their bonds therefor. Except what is above stated, Wright took no part in the management of the business, leaving the whole to Beck, who settled with four of the legatees for their shares. One of the bonds taken by Beck for articles sold was executed by David Ochiltree and C. Shaw as his surety, which bond was for an amount equal to one-fifth part of the whole sale, and was at the time perfectly good. Beck kept this bond as the share of the plaintiff, then an infant; and on one occasion he solicited a gentleman to become his guardian and to take the bond as payment of his share, but this was declined. Beck then continued to keep the bond, and negligently omitted to collect it, or make any effort to collect it, until one of the obligor's became insolvent and the other died, and the demand against his estate was barred by the statute of limitations. The plaintiff, having arrived to the age of twenty-one years, brought this bill against both the executors, in which he prayed for an account of his one-fifth part of the property, which had been left to the wife for life and then over, as before mentioned. The bill was taken *pro confesso* as against Beck, who was a nonresi- (338) dent. Wright answered, and contended that he was not liable to the demand; and as far as he was concerned, and for the purpose of deciding on his liability, the facts were admitted by the counsel to be as above stated. There was no allegation or pretense that the defendant Beck was insolvent.

W. C. Stanly for plaintiff.
Badger and Henry for defendant.

DANIEL, J., after stating the case as above, proceeded: It is (339) contended on behalf of the plaintiff that he is entitled to relief against Wright as well as against Beck, notwithstanding the whole of the assets came to the hands of Beck, and were disposed of by him, because Wright signed the inventory and account of sales, and assented to the sale; for that so far he was active in enabling his coexecutor to dispose of the assets, and that he ought therefore in this Court to be held liable for the *devastavit* of his coexecutor.

The *devastavit* by one of two executors or administrators shall not charge his companion, provided he has not, intentionally or otherwise, contributed to it, for the testator's having misplaced his confidence in one, shall not operate to the prejudice of the other. *Hargthorpe v. Milford,* Cro. Eliz., 318, 319. An executor shall not, under ordinary circumstances, be responsible for the assets come to the hands of his co-

executor. *Littlehales v. Gascoyne,* 3 Bro. Ch. Rep., 73; 2 Will. Exrs., 1118. This, then, being the rule, Wright could not be held responsible for the assets which his coexecutor took into his sole possession immediately after the death of the tenant for life. Wright being passive, and not obstructing his coexecutor from getting the assets into his possession, is not as to that responsible. *Langford v. Gascoyne,* 11 Ves., 333.

The foregoing remarks bring us to the inquiry whether, under (340) the circumstances of this case, Wright, by his assent to the sale and signing the inventory and account of sales, has made himself liable for that *devastavit.* The signing the inventory could not have that effect, because executors are bound to render an inventory of all the assets which came to their possession or knowledge, because each has authority by the will to take possession of the property, and because Beck had already exercised that authority before the inventory was signed. It was but a formal proceeding, and by no means subjects Wright to the *devastavit* of his coexecutor. Is there any additional responsibility thrown on Wright by his assent to the sale by his coexecutor and signing the account of sales with him to be returned to the county court? It is contended for the plaintiff that the case is within the principle of the rule that when two executors sign a receipt, and one alone receives the money, both are equally liable for that money. At one period a well-recognized distinction existed between trustees and executors. This distinction was founded on the difference between the power and authority of a cotrustee and that of a joint executor, viz., that trustees cannot act separately, as executors may, but must join both in conveyances and receipts; and therefore it may be taken that a cotrustee joins only for conformity. But a coexecutor, as it is not necessary for him to join, interferes unnecessarily; he was therefore to be considered as assuming a power over the fund, and consequently to be answerable for its application as far as it was connected with the particular trust action in which he joined. Therefore the rule was that when the executors joined in a receipt, both having the whole power over the whole fund, both were chargeable; but when trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was chargeable. 2 Will. Exrs., 1125. One executor in trust is not answerable for the receipt of the other merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer. Joining in a receipt, though not absolutely necessary, is not *conclusive* against an executor any (341) more than against a trustee, to charge him with the receipt of his coexecutor. *Hovey v. Blakeman,* 4 Ves., 596-605. Again, in *Scurfield v. Howes,* 3 Bro. Ch. Rep., 90, *Sir Richard Pepper Arden* said he dissented from the rule as broadly stated, that if one executor receives

the money and two sign the receipt both are chargeable, if it appear that the second joined for conformity only. And *Lord Redesdale,* in *Joy v. Campbell,* 1 Sch. & Lef., 341, took the distinction to be that if a receipt be given for the mere purpose of form, then the signing will not charge the person not receiving the money. And the true question in all these cases seems to have been whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor, who did not actually receive it, amounted to a direction to pay to his coexecutor, and he became responsible for the application, just as if he had received it himself. Again, in *Doyle v. Blake,* 2 Sch. & Lef., 242, it is said, the true consideration in a question of this kind is whether the executor who merely joins in the receipt had a control, and his joining in the receipt is evidence of that control, although the money was actually received by the other. The joining in a receipt shall not have the conclusive effect of charging both. *Westley v. Clarke,* 1 Eden, 357. The relaxation of the rule in favor of executors has been lamented by *Lord Eldon,* but his lordship, in *Walker v. Symonds,* 3 Swan., 64, alludes to its alteration as having been completely effected, and it seems to us reasonable and equitable. In the case now before the Court, it appears that Beck took possession of the property and alone managed the sale; the law required an account of sales to be returned to the court; the signing that account of sale was, we think, merely for conformity; a control over the property is rebutted by the facts of the case, and, according to the before mentioned decisions, does not subject him on that ground to the demand of the plaintiff.

The last position taken by the plaintiff is that, by the will of the testator, the two executors were appointed curators of the estate, which was contingently bequeathed to him; that the bond of Ochiltree and Shaw composed a part of that estate; that it was the duty of (342) Wright, as well as of Beck, to see to the collection of that bond; that Wright has been remiss in this part of his duty; that he has been vigilant in getting his own part of the estate and permitting the other shares belonging to the children of the testator (including that of his coexecutor) to be paid, and has wholly disregarded the interest of the plaintiff, who was then an infant, and should have been protected by him, as well as by Beck; that although Beck is not insolvent, yet that he is entitled to a decree against both defendants, and that Wright should run the risk of any loss by the possibility of Beck's becoming insolvent, and not let that risk fall on him. The true answer to this position may be given almost in the words in which the opinion of this Court was heretofore expressed in the case of *Clark et al. v. Cotton et al.,*

2 Dev. Eq. Rep., 51. Wright was indeed a curator or trustee for the plaintiff, but only for what was in his hands, or had been in his hands, or was under his power and control. Beck was a curator or trustee with precisely the same powers. If a misplaced confidence was reposed in the latter, it was not the confidence of Wright, but the confidence of the testator. Wright did no act by which an abuse of that confidence was facilitated. He had no authority to take out of Beck's hands the property of the *cestui que trust,* which was rightfully there; he never guaranteed the diligence, fidelity or solvency of his cotrustee; and there is no ground in conscience to render him answerable when he has committed no fault and broken no engagement.

The bill must be dismissed as against Wright, with costs to be paid by Beck; and the plaintiff is declared entitled to an account against Beck.

PER CURIAM. Decree accordingly.

Cited: Williams v. Maitland, 36 N. C., 106; *Kerr v. Kirkpatrick,* 43 N. C., 140.

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(343)

THOMAS B. LITTLEJOHN ET AL. v. LEWIS WILLIAMS ET AL., EXECUTORS.

A plea to a bill of revivor that the cause of action arose more than twenty years before the filing of the original bill, and that after the abatement of the original bill the bill of revivor was not filed within the proper time, and that the same was therefore barred by the statute of limitations, and the length of time between the abatement of the original suit and the filing of the bill of revivor is double, and therefore bad.

AFTER the cause was remanded to the Court of Equity for Rowan, at December Term, 1833 (see 2 Dev. Eq. Rep., 380), it was continued there until October Term, 1835, when the plaintiffs set the plea down for argument. His Honor, Judge Norwood, *pro forma,* sustained the plea, whereupon the plaintiffs appealed. The plea was that the cause of action arose more than twenty years before the filing of the original bill, and that after the abatement of the original bill, the bill of revivor was not filed within the proper time, and that the same was therefore barred by the statute of limitations and the length of time between the abatement and the original suit and the filing of the bill of revivor.

Nash for plaintiffs.
Pearson for defendants.

PER CURIAM. The plea in this case is double, and must be overruled. The defense proper for a plea must be such as reduces the case to a particular point which will bar the plaintiff's demand. It is then of use, because, by having the judgment of the court upon that point, the parties are saved the expense of the examination. A plea does not deny the equity, but brings forward a fact or a series of circumstances, forming in their combined result some *one fact,* which displaces the equity. If there be two defenses offered by a plea, they cannot be separated and one only allowed.

The decree below allowing the plea and dismissing the bill is overruled with costs, and it is ordered that the suit and the proceedings therein do stand revived against Lewis Williams and Joseph Williams, executors of Joseph Williams, the original defendant, and be and stand in the same plight and condition as they were in when the said suit abated. And the cause is remanded to the Court of Equity (344) for the county of Rowan for further proceedings.

PER CURIAM. Judgment reversed.

SARAH CARR, ADMINISTRATRIX OF ROBERT CARR, v. TILMAN HOLLIDAY.

If a person contracts with a lunatic, in good faith, without taking advantage of his situation, and without knowledge of the lunacy, a court of Equity, although the contract is legally void, will not interfere to deprive such person of the advantages he has obtained, without restoring to him whatever benefit the estate of the lunatic has received by the contract.

ROBERT CARR came of age on 10 January, 1829, and on 8 April, following, was, by an inquisition legally taken, found to be a lunatic, and that he had been such since the month of November, 1827. Sarah Carr was appointed by the court his committee. Between the time of his arrival at age and the finding of the inquisition the defendant entered into several pretended contracts with him, and obtained from him, by way of exchange or purchase, several slaves, one-third part of a tract of land called Haw Landing, and some bonds for money which have been paid. On 12 May, 1830, Sarah Carr, as the committee of Robert, and on his behalf, filed the present bill for the purpose of having the aforesaid pretended contracts set aside and the property restored, and for general relief. After the filing of the bill Robert Carr died, and Sarah Carr administered upon his estate and was made a party plaintiff. The defendant answered the bill, and admitted that he made several contracts with the said Robert at the times mentioned in the bill, but denied that

Robert was a lunatic at any of those times. He alleged that all the contracts were *bona fide,* and that Robert received from him a full and adequate consideration for the slaves, land and bonds.

A replication to the answer was filed by the plaintiff, and
(345) proofs taken, the result of which will be found in the opinion of the Court.

Devereux for plaintiff.
W. C. Stanly for defendant.

DANIEL, J., having stated briefly the pleadings, proceeded: The inquisition was *prima facie* evidence that Robert Carr was a lunatic, and had been and continued so from the month of November, 1827. The contracts mentioned in the pleadings would be declared void, if resting upon that evidence alone. To repel the force of the inquisition, and in support of his answer, the defendant has taken the depositions of many persons. The plaintiff, to sustain the allegations in the bill, and support the inquisition, has also taken many depositions. From the conflict of the testimony given, either of the parties might have had an issue if it had been asked for. But as it has not been asked for, we have ourselves examined the depositions and proofs in the cause, and are satisfied upon the weight of the evidence, and so find and declare, that Robert Carr was and continued to be a lunatic, as mentioned in the inquisition; and that he was a lunatic or of unsound mind at the several times when the supposed contracts mentioned in the pleadings were entered into. A lunatic has no legal capacity to contract, yet a court of Equity will not interfere where the lunatic has actually had the benefit of the property of the defendant, if the contract was made in good faith, without knowledge of the lunacy or incapacity, and where no advantage has been taken of the situation of the party. If the transactions were *bona fide* on the part of the defendant, the court will not deprive him of the advantages he has obtained without restoring to him whatever benefit the estate of the lunatic has received in consequence of the contracts. The
(346) cases cited by the defendant's counsel support the above-mentioned positions. *Loomis v. Spencer,* 2 Paige's Ch. Rep., 153; *Neil v. Morley,* 9 Ves. Jun., 477. The Court therefore directs a reference to the master, and an inquiry to be made, whether the estate of the lunatic has received benefit by the sales and transactions mentioned in the pleadings, and to what extent. And the master will report *specially* upon each of the contracts, what was the true value of each of the things sold by the defendant and received by the lunatic, and whether the plaintiff can make restoration to the defendant of all or any of the articles so pur-

chased. The report may, and probably will, contain matter material to the inquiry into the good or bad faith with which the defendant contracted, and therefore the Court reserves that point for the present.

PER CURIAM. Direct a reference.

Cited: Carr v. Holliday, 40 N. C., 167; *Riggan v. Green,* 80 N. C., 239; *Creekmore v. Baxter,* 121 N. C., 33.

GILBERT GILCHRIST v. FLORA BUIE ET AL.

In a contract of sale, by which the vendors stipulated "to make a sufficient title, as far as their claim extends in said land," the words "a sufficient title" were held, upon the whole instrument, to mean "a sufficient deed" to assure the estate, if they had one, notwithstanding "a quit-claim deed" was, by the articles, agreed to be given for other lands.

THE plaintiff, by an original bill, filed 21 June, 1827, against Flora Buie and Archibald Gilchrist and his wife, charged that he purchased, in April, 1823, from Daniel Buie (then the husband of the defendant Flora) and his wife, Flora, and from the defendants, Archibald Gilchrist and his wife, Mary, certain lands, at the price of $1,500, and that he executed to Daniel Buie two bonds for $375 each, and to Archibald Gilchrist two other bonds for the like sums; that the lands so sold were claimed in fee, in right of the said *femes covert,* as having descended to them and others, as tenants in common of three tracts, of which one contained 450 acres, in which their shares, as claimed, were 225 acres; another contained.....acres, in which their shares, as claimed, (347) were 186½ acres; and the third contained 100 acres, in which their shares were 32 acres; that the said vendors and their wives intended to execute a bond to convey the title, but, through ignorance of the necessity of a seal, did execute to him only a writing in a penalty of $4,000, to be void "if they should make a sufficient title to a certain parcel of land belonging to the old plantation as far as their claim extends on said lands, and likewise a quitclaim deed to that part coming to them of the land belonging to the estate of Collin McPherson, deceased; and likewise their claim to 100 acres of land, called Goodson's lands, including Goodson's fields; and when sufficient titles shall be made to said lands, these presents to be null and void, but otherwise to remain in full force."

That, soon afterwards, Daniel Buie died, and his widow filed her bill in the Court of Equity against the present plaintiff and the administra-

tor of her late husband, and therein charged that the said lands so agreed to be sold came to her by hereditary descent, and that she was willing to affirm the sale if she should receive the price and cost; otherwise, she prayed that she might be declared to be entitled to the said two bonds that were made payable to her said husband; and it was decreed thereupon that the said administrator should assign the same to her, which was accordingly done; and she instituted actions at law and recovered judgments thereon. The bill then charged that the plaintiff had been advised that the vendors had no title, either legal or equitable, to any but a very small part of the land; that the 100 acres called Goodson's land did not in any part belong to them, but was entirely covered by adverse and paramount title; that the defendants together claimed one-half of the 450 acres as heirs of their brothers, Archibald and Neil McPherson, who died intestate and without issue; but that, in fact, the said intestate, Neil, left four sisters and three brothers, some one or all of whom was or were born before the year 1795, before which
(348) time the said Neil died. The bill further charged that the alleged title of said Archibald and Neil is derived from their grandfather, John McPherson, who devised different parts of the same to them severally, but that in respect of the part given to Archibald nothing passed, because the said Archibald died in 1790, and the said testator died in 1791, whereupon the same descended to his two sons, Daniel and Alexander. The bill further charged that, at the time of the purchase, no deficiency of title or quantity was made known to the plaintiff, and that he had no knowledge that there was any defect or difficulty in the title, but believed that the defendants had a good title to the respective shares aforesaid, amounting to the quantities aforesaid. The bill further charged that the said Daniel McPherson (one of the sons of the testator, John, and the father of the said Archibald and Neil) entered into said lands, and, after residing on them for many years peaceably, died intestate and in possession, leaving three sons and four daughters, of whom the defendants Flora and Mary are two; and that, soon afterwards, upon a petition in the County Court to have the real and personal estate of said intestate, Daniel, divided, the whole of said lands was, as the estate of the said Daniel, the father, allotted to the said three sons as their shares, and they were ordered to pay a sum of money to each of their four sisters for equality of division, and that such payments had been made and accounted by the defendants many years before they sold to the plaintiff. The bill further charged that the intention of the parties was that the defendant should convey one undivided half part of the "old plantation," containing 450 acres, with general warranty, and the residue with special warranty; and that such is the meaning of the terms "a sufficient title" in the agreement in refer-

ence to the first-mentioned parcel, and that the plaintiff has requested the defendants to execute to him such conveyances, but that they have refused, under the pretense that they were to make only a quitclaim deed for the whole. The prayer is for specific performance by conveyances from the defendants, respectively, with covenants of general and special warranty, as aforesaid, the plaintiff submitting to (349) pay the purchase money; and if the defendants have not title and "cannot make a good and sufficient title according to the contract," that the agreement be rescinded; and in the meantime for an injunction against proceeding therefor at law.

Upon the bill an injunction was granted by a judge at chambers. The answer stated that Daniel McPherson, the father of the defendants Flora and Mary, and also of Nancy, the wife of complainant, died seized of the *Goodson* place, and leaving four daughters and three sons, of whom Colin McPherson was one, and he died intestate and without issue, by means whereof each of the defendants became entitled to, or claimed, one-*sixth* part of that tract; that said Colin was also seized or claimed another tract (which is mentioned in the agreement as claimed under him), and upon his death each of his brothers and sisters acquired the like share of one-*sixth* thereof; that upon the death of their grandfather, John McPherson, in 1791, their brother Neil claimed the tract of 450 acres, called the Old Plantation, under his will, and entered into the same, and that said Neil died also in the year 1791, leaving no brother surviving him, but the three sisters beforementioned, and a fourth, named Catharine, who is now living; and that the said four sisters were his heirs at law and infants, and that their father, the said Daniel, and their uncle, Alexander, did not claim any of the said lands devised by the testator, John, to their brothers, Archibald and Neil, but that the said Daniel, upon the death of the said Neil, did, on the behalf of his said four daughters, enter into all the said land, claiming the same for them, and for them alone, as the sisters and coheirs of the said Neil, and continued to so hold for many years; that after the death of the said Neil, their father had three other children, sons, by the names of Hugh, Alexander, and the said Colin, but that they are unable to state when they were born; that in 1801 the said Daniel required his daughters to execute to him an instrument, intended by him to be a "release to him and his heirs of all the estate, real and personal, of said Neil," their brother, which they did, under constraint and without consideration, and that the same is for that reason ineffectual, (350) and also because it is informal in its terms and is not under seal; that, notwithstanding the said instrument, the daughters claimed the said land, and, after the death of the father, in 1804, and intestate, they entered into it as their own by descent from their said brother, Neil;

that the administrators of their father's estate procured, upon motion, commissioners to be appointed by the County Court, to divide the negroes and personal estate of their intestate amongst his children, and that in such division they understood that the lands were allowed to the sons, and money directed to be paid to the daughters, but the same was void, as none of the children were parties thereto, and it was never in any respect acted on, and the sons have not set up any claim to the land under the same, or otherwise; but the daughters have claimed and enjoy the land exclusively; that the plaintiff intermarried with Nancy, one of the daughters, shortly after the death of Daniel, the father, and also assisted his wife's claim to some undivided fourth part of the old place; and that in the year 1820, knowing the title and claim by descent, he took actual and exclusive possession thereof on behalf of himself and wife and her three sisters, and has lived on it ever since, undisturbed; that in April, 1823, the parties met on the premises to make actual partition thereof between the four sisters; but that the plaintiff, being of opinion that it would be injurious to their interest to divide it, and wishing to keep the whole tract for his own residence, proposed to purchase the two shares of the defendants, and thereupon the contract was made, as set forth in the bill. They allege positively that the plaintiff was not ignorant of the state of the title or the manner in which it had been derived and was claimed by the daughters, but knew the same perfectly, and had consulted counsel on it; that the true intent of the agreement was for a sale of their shares as claimed as aforesaid, and that they should execute a deed for their *claim* in the said land, or as far as their claim extends, and that they should not be answerable for the title or covenant against the claim of others. The defendant

(351) Flora insisted that the decree in the former suit between her and the administrator of her husband and the present plaintiff, as a defendant therein, whereby the administrator was ordered to transfer the bonds to her, and she to make a conveyance to the plaintiff, is conclusive between the parties thereto, and relies on the same as a bar; and she answers that, in obedience to that decree, she did execute and tender to the plaintiff a deed for her share in all the said tracts, with special warranty, which he refused to accept because it did not contain a covenant of general warranty, and not because of any defect of title, which he did in no wise there pretend. The defendants, Gilchrist and wife, answered that they were not bound, as they were advised, to enter into any covenant for the title, except against their own acts, yet that, believing the title to be indefeasible, and wishing to remove every obstacle to an amicable adjustment of the business, and to satisfy the plaintiff entirely, they did execute their joint deed to him in fee for one undivided fourth part of the old plantation, and for one undivided sixth

part of the other parcels, with full covenants of general warranty and for quiet possession as to those shares; and the said Nancy acknowledged the same before a judge upon privy examination, and thereupon it was tendered to the plaintiff, and refused by him. They also answered that the plaintiff had paid to the defendant Gilchrist $100 in part of one of the bonds to him; and all the defendants answered that the plaintiff, knowing the title, did, upon the purchase, take the exclusive possession of the same of the whole tract as his own, and has ever since occupied it without paying any rent, and is still in possession, claiming it as his own, in right of his wife, and by virtue of the purchase from the other sisters. They answered further that Alexander McPherson, the uncle, lived in the neighborhood for upwards of thirty years; and also that the youngest of their own brothers had been of full age for many years, and that no claim had been set up by either to any part of the old place, or to the shares claimed by the defendant in the other lands.

The defendants exhibited with their answers the deed mentioned in their answers. That made by Mrs. Buie is dated 20 September, 1825, and is of the tenor stated in her answers; that made by Gilchrist and wife is dated 4 October, 1825, and is of the tenor stated in (352) their answer, and was acknowledged by her on the same day before a judge, who certified that, "being privily examined by him as to her voluntary assent to the said deed, she replied that she executed the same without any constraint or compulsion whatever on the part of her husband or any other person"; but the deed attested has never been proved as to the husband or acknowledged by him.

Before the coming in of the answers, the injunction was dissolved and replication entered, and testimony afterwards taken, and the cause brought on to a hearing in October, 1832, and a decree made; in it the court declared that the plaintiff was, at the time of executing the contract, in possession of the land mentioned in it as tenant in common, in his right of his wife, with the defendant, and since the agreement, had remained in the sole possession thereof, without eviction or disturbance by any person; that at the time of the contract, the complainant had as full, if not more full, knowledge than the defendants of the nature and extent of their respective titles, and claimed in right of his wife in all respects similar; that the defendants had respectively executed the deeds to the plaintiff which they had exhibited, and tendered the same before suit, and that the plaintiff had refused the same; and that they had been deposited in court by the defendants, to be delivered over to the plaintiff if the court deemed them sufficient when the same should be ordered; that the court approved of the said deeds as being sufficient,

according to the terms of the agreement, and that the court did not think fit, therefore, to inquire whether the quantity of land was equal to that alleged by the plaintiff to have been sold; and, therefore, it was decreed that the clerk and master should deliver the said deeds to the plaintiff upon his application, and that the instrument or agreement made by the defendants to the plaintiff should be delivered up to be canceled, and that the plaintiff pay all costs of the suit. From
(353) this decree the plaintiff prayed an appeal, but did not prosecute the same.

On 20 May, 1834, the plaintiff filed his bill to renew this decree, and therein alleged that he had fully performed the same by paying the sums due on the judgment at law, and by doing all other acts on his part to be performed. The errors assigned are, first, that by the proper construction of the agreement the plaintiff was entitled to conveyances, with covenants of general warranty, and for quiet enjoyment, and so the decree ought to have declared, whereas the deeds tendered have not any such covenants and were declared sufficient and proper without them; secondly, that the defendants were bound by the contract also to make to the plaintiff a good title, as well as to enter into covenants for it, and the court ought so to have declared, and that the knowledge by the plaintiff of the state of the title was in no way material to the case; thirdly, that the agreement ought not, upon the fact declared, to have been ordered to be delivered up; fourthly, that the declaration of the plaintiff's knowledge of the title was made without any sufficient relevant or competent evidence; fifthly, that the decree ought to have ascertained whether the plaintiff would by the said deeds get a good title, and, if not, to have restored to him the purchase money paid by him, and otherwise relieved him; and, lastly, the general errors.

The defendants put in a demurrer, and for causes assign, first, that the plaintiff cannot have a bill of revivor after having his appeal allowed, and failing to prosecute it; and, second, that the bill is signed by one counsel only, when, by the course of the court, two counsel ought to sign it and certify that in their opinion there is sufficient ground for the same.

On the argument of the demurrer, his Honor, *Judge Strange,* at Robeson, on the last Fall Circuit, sustained the same, and dismissed the bill, with costs; and the plaintiff appealed to this Court.

Badger for plaintiff.
Devereux for defendants.

(354) RUFFIN, C. J., after stating the pleadings as above, proceeded as follows: The decree on the bill of review does not state the grounds of it, whether they were those stated specially in the demurrer,

or that the original decree was not erroneous in any of the respects stated in the bill.

The Court is of opinion that neither of the special reasons bars the plaintiff's bill. It is a matter of practice in England to require the signatures of two counsel of character to a petition for rehearing or for appeal to the House of Lords, in order to avoid delays and prevent frivolous appeals. But we do not find such a rule laid down with respect to the bills of review, and it would seem to be altogether inapplicable. Such bills, upon newly discovered evidence, can only be filed by leave of the Court, and the Chancellor grants that leave upon his own judgment, and not on the certificate of counsel. When they are brought for errors in law, apparent upon the decree, they are regularly entertained, as a matter of course, as much so as a writ of error is at law. That is strictly a writ of right. And a bill of review is of that nature, according to the course of the Court of Equity; the only restriction imposed is to require previous obedience to the decree, and a deposit to answer the costs, or, here, as at law, to give security for the costs. It is sufficient, therefore, that the bills be signed by one counsel.

The power to have a cause reëxamined, upon appeal, does not preclude a reëxamination of it before the same court in which it was first tried. We think the allowance of the appeal, and the failure to prosecute it, does not make it a decree by consent, nor ought to be attended by the consequences of such a decree in this respect. It is a principle with the chancellor, as well for his own protection from error as for the purposes of justice and the satisfaction of suitors, never to conclude any question by a single hearing. Until a second hearing be had in some one of the regular modes, any one of them which in the state of the case has not been specifically lost or abandoned, is open to the party. After appealing and not acting on it, the same party cannot appeal a (355) second time to a higher tribunal. But the first decree does not thereby stand as if it had been affirmed, especially in this State, when the appellee could have brought up the transcript and asked upon it that the former decree should be affirmed. The opposite party cannot be injured by having the cause reconsidered upon a bill of review, for he can still appeal from the decree on it. Unless it would produce some prejudice to him, the Court cannot but cheerfully entertain the right to revise its own acts at least once. Indeed, it is more respectful that the judge who pronounced the decree should have an opportunity of correcting his own errors in the first instance. The question between the parties, therefore, depends upon the propriety of the decree in the original cause.

It has been contended for the plaintiff, first, that the contract ought to have been rescinded, because the defendants could not make him a good title; and, secondly, that if the contract ought to be specifically executed without regard to the actual state of the title, the defendants ought to have been decreed to make conveyances with covenants of general warranty and for quiet possession; and, therefore, that he ought not to have been compelled to accept the deed of Mrs. Buie, which has no such covenants, but only against her own acts, and those claiming under her, nor to accept that of Gilchrist and wife, because it has not been executed so as to pass even her estate, whatever it may be; and, thirdly, that the decree was erroneous in ordering the agreement to be delivered up.

The merits of the cause depend upon the two first positions, and they again upon the proper circumstances of the contract. It is clear that the plaintiff cannot, upon the words of the agreement or the understanding of the parties, claim in respect of the Goodson tract and those called "Colin McPherson's estate" more than a conveyance for such title as the vendors had: that is a deed with special warranty. There is no allegation of fraud, but the relief is put on the ground of the stipulations of the parties. The bill does not plainly charge ignorance (356) and a mistake on the part of the plaintiff as to the state of the title, and we suppose it was partly in reference to that charge that his knowledge of the title was declared in the decree; it seems to us to be altogether immaterial in every point of view, so far as regards those parcels, because he took them at his own risk expressly; and even if mistake would help him, he does not state it so that the Court can see in what it consisted, nor how it misled him. But the fact was found against him, and the declaration of it in the decree unnecessarily will not hurt.

The Court probably conceived, also, that the plaintiff's knowledge of the title, and his taking possession under it in right of his wife and her sisters, and the taking exclusive possession under the purchase of the sisters' shares, were material to the relief which the plaintiff could have in that state of the case in respect of the "old plantation," although he might, under the contract itself, if matters had remained as they then were, have been entitled to demand a perfect title to that tract. Then, certainly, on circumstances under which a vendee will be held to have waived all objections to the title and to have so acted as to have it in his power to ask for nothing more than the conveyances of his vendor, what in such a case are proper covenants to be inserted in the conveyance would still have to be determined. In England, although a vendor must show a good title before the vendee shall be compelled to accept it,

yet it seems settled that the vendor is not obliged to covenant for the title thus apparently good, beyond his own acts and those claiming under him. But we believe that is not so considered in this country; at least, it is not so settled; and in practice the vendee seldom submits the title to counsel or examines it himself, and therefore requires general covenants, which it is the constant course to give. If his Honor, therefore, thought that the plaintiff was ever entitled to a reference of the title in this case, he must deem the rule of England to be that of this State, and that the purchaser cannot ask for general covenants, for the deed of Mrs. Buie has none such to be appended to it as being proper in the case declared in the decree. That position has never yet been laid down by us or our predecessors, and would require very (357) deliberate consideration before the adoption or positive repudiation of it. The task of that examination is not imposed on us in this case, for the question does not arise if the contract between these parties was written for a title, nor for covenants for a title. Such, we think, is its character, and therefore all the inquiry into the knowledge or conduct of the plaintiff was superfluous.

The doubt can extend only to the first tract mentioned—the old plantation—to which the vendors are to "make a sufficient title as far as their claim extends on said lands." It is argued for the plaintiff that those terms in themselves embrace a good title, or at least covenants for it, and must have that meaning when contrasted with the phrase, "quitclaim deed," which immediately follows, and is applied particularly to the other tracts. "Sufficient title," in its proper and obvious sense, refers to the interest or estate in the land, and requires it to be indefeasible, and it may be also stipulated for the usual covenants for the title and enjoyment. But those words may be used in a different sense, and the question is whether there is enough here to show that they were. We think there is. They are not contrasted in the agreement with the other words for the purpose of obliging the vendors to show a good title to one parcel and dispensing with it as to the others, nor to make a deed with general covenants as to the former, which might be omitted as to the latter. The term *title* is evidently used for *deed.* That is the vulgar sense in which it is often used, and that was the meaning of these parties. *Deed* or *conveyance* must be substituted or interpolated to make it mean anything; for that the vendors should be able to make out a sufficient title would not serve the plaintiff any purpose unless they were required to convey it to him. *To make* a title, therefore, did not mean to make out one, but to make a deed, and a sufficient one, at least in point of form, and to pass the title. We will not say that if the agreement had stopped there, the vendors might be

deemed to have performed the agreement by a conveyance, good in point of form only, and might not have been bound to make one which (358) was in fact operative and would carry a good title. But it does not stop with those words. To what are they to make a sufficient deed? Not to any particular undivided share or determinate quantity of land, but to a certain tract of land, *as far as their claim extends on said lands.* Now, whatever the former expression may mean, if standing alone, these last words qualify it and confine it to their claim, such as it is. A purchaser under a notice of a sale of an estate, "as A. B. held it," cannot insist upon any title but such as A. B. had (*Freire v. Wright,* 4 Mad. Rep., 193), even when the sale professed to be of the whole in severalty. To what could a general warranty be answered in this case? The agreement does not specify what their claim was—what shares or proportions they had, or pretended to have. If the deed, therefore, followed the agreement and conveyed their "shares," or claim, the warranty would be futile; for, as far as their shares extended, the title would be good and the covenant unnecessary, and beyond that the deed would not purport to convey, and there would be nothing for the covenant to operate on. It is said, however, that the vendors claimed each an undivided fourth part, and that establishes what was meant by their claim. But there is nothing in the agreement to that effect, nor, if we can go out of it, is there anything to show that such was the meaning of the parties. The defendants deny that charge in the bill, and say that they were only to convey the title they had. Suppose it had turned out that the defendants owned the whole tract, could the Court say they had not contracted to sell the whole, when the agreement is for their claim in the tract, without specifying what part? It may be further argued that the insertion of a general warranty in the deed of Gilchrist and wife proves the intention. It would certainly be some evidence of it if they had not explained their reason and denied that inference, and their explanation is supported by the circumstance that the covenant embraces all the different tracts, while they certainly were not bound to warrant all. But what puts the meaning beyond doubt is that the very same words, "sufficient title," are used in the close (359) of the instrument in the sense of "deed" only. It provides that when "sufficient titles shall be made to said lands," the bond shall be void. What bonds? All that were sold, to parts of which the instrument is express that the sufficient titles shall consist of a "quitclaim deed." We conceive, upon the whole, that the sense of the parties was that the defendants sold their interest, whatever it might be, and agreed to convey it by the description of their claim or shares therein. His Honor was therefore right in refusing to inquire into their title, either

as to its validity or the quantity to which it extended. But we do not concur in that part of the decree which declares the deeds tendered by the defendants to be proper and sufficient, according to the tenor and effect of the agreement. That of Mrs. Buie, we think, was, for the reasons already given. If each vendor was bound for the performance of the others upon the agreement, she was not, because she was a married woman when it was made, and subsequently undertook to carry only her own interest, as her husband had contracted she should, and her deed is effectual to that purpose. But that of Gilchrist and wife is not effectual, according to several decisions of this Court, for the want of probate or acknowledgment as to the husband, before which the wife cannot be privily examined. *Burgess v. Wilson,* 2 Dev., 306. The decree ought, therefore, to have relieved the plaintiff, either by rescinding the agreement as to that share, unless the husband, in a reasonable time, executed and procured his wife to execute a conveyance duly acknowledged; and we suppose that would have been the decree had the objection been made or the acknowledgment read at the hearing. It is highly probable that it was not, for it is not even stated as one of the grounds of the bill of review, but is made in argument in this Court for the first time. For that reason we cannot correct the decree, although we think it erroneous in this respect.

The rule is well established that a bill of review must recite the former bill and the proceedings which were had on it, so as to hear what matters were in issue; and the former decree, so as to hear how those matters were disposed of; and then the points in which that decree is conceived to be erroneous, so as to show what the party (360) complains of, and how he is injured thereby. It is not enough that there is error, but it must be to the prejudice of the plaintiff; and, therefore, the other side may look into every part of the decree and insist that, upon the whole of it, right has been done. Nor will any error, by itself, do, unless complained of in the bill, because the plaintiff may have had an interest, at the time, in submitting to that part of the decree which is erroneous, and ought not to retract when he finds his interest the other way; or the defendants might have withheld this demurrer and consented to the correction of the decree if the bill had stated this objection. It is plain that this plaintiff had an interest when the decree was pronounced, supposing it to be correct, in either respect, to state the deed as it is; for, as the deed of the husband alone, with covenants binding on him, it is better than the deed of both without covenants, and will coerce the husband to have a deed by himself and his wife properly executed, in order to pass his title and prevent that, at least, from being used so as to be a breach of his present cove-

nants. However that may be, a bill of review does certainly bring up the whole decree, but the court looks, at the instance of the plaintiff, only as to those parts of the decree which he particularly complains of and states in the bill as the grounds of it. Cooper's Eq. Pl., 95. We would not construe the terms in which the errors are alleged, with rigor, so as to exclude from reëxamination anything that counsel could be supposed to have expected to insist on. But, after the most liberal exposition of this bill, we cannot think that this point entered into the imagination of the draftsman. The whole scope of the bill is to have the construction of the contract corrected and to have it declared that the plaintiff ought to have a good title, or covenant for such a title; and the only objection to the deed is that they did not convey such a title nor contain such covenants. Not a word is said about the insufficiency of the deeds for want of such execution. Now, the Court is of opinion that the plaintiff was not entitled to those covenants, and the fact is that they are in the deed from Gilchrist and wife. But, the deed (361) not being good as to her, and that being apparent, as it is said, justice ought to be done to the plaintiff. That is the difficulty; it is not apparent and cannot be made to appear in this suit, since the bill has no obligation which will enable the Court to look for the fact in the decree.

It has been urged, indeed, that it is covered by the assignment of error in that part of the decree which orders the agreement to be delivered up, which was done, upon the idea that it had been performed before the original bill was filed. It struck us, at first, that there was an informality in directing that, upon the plaintiff's bill, instead of putting the vendors to their bill after performance. But it is clearly otherwise. If the plaintiff's bill had been dismissed, it would have been informal to cancel the agreement in the suit. But the bill was not dismissed, and the plaintiff got all he was entitled to, though not all he claimed. He got specific performance, according to the tenor and meaning of the articles; for a tender of a deed is not performance of an agreement to convey in this Court, as at law. It only affects costs here, and the vendee may still file his bill to get the deed. Here that was done, and obtained, by the decree. Of course, when the agreement was fully performed under the direction of the court, it was proper the court should see that the party performing should be safe from further vexation on it. If the plaintiff were to proceed on it at law, the court would be bound to restrain him by injunction, and, therefore, might at once detain the instrument or order it to be delivered over. This part of the decree was therefore right in itself, supposing the construction of the instrument to be right, and we do not perceive how the allegation of

error in it can reach the defect in Mrs. Gilchrist's deed. The cancellation followed as a consequence of performance by the execution of that deed, and consequently the error in the order was the result of the defect in the deed. But that defect itself is not complained of in the bill, and, therefore, the Court can no more declare that there was error in canceling the agreement than we can declare it erroneous to have held the deed to be duly executed.

Upon the whole, therefore, the Court does not perceive any error in the decree, as complained of in the bill. Though not formally expressed, it is substantially right; and the decree of the Court of Equity, whereby the plaintiff's bill of review was ordered to stand dis- (362) missed, with costs, and the decree in the said bill of review complained of, was ordered to be affirmed, is by this Court affirmed, with costs.

PER CURIAM. Decree affirmed.

Cited: Am. Bible Soc. v. Hollister, 54 N. C., 14.

GILBERT GILCHRIST v. DANIEL GILCHRIST ET AL.

One against whom a decree has passed cannot sustain a bill praying relief inconsistent with that decree, by making another party and charging a subsequent interest in him. The proper course is to file a bill of review as to the original parties, charging supplementally the interest of the new defendant.

THIS was an original bill, filed 28 June, 1834, against Flora Buie, Archibald Gilchrist and his wife, Mary, against Duncan Buie and Malcolm Buie, administrators of Daniel Buie, deceased, and against Daniel Gilchrist, and charges the same matter which is charged in the original bill filed by the same complainant on 21 June, 1827, against Flora Buie and A. Gilchrist and wife on the decree in which he brought his bill of review on 20 May, 1834, which has been decided at the present term. The only differences between the bills are, that the present seeks no relief in respect of the plaintiff's bonds that were made payable to Daniel Buie, and by his administrators assigned to his widow, Flora, and makes those administrators parties; and charges, further, that the bonds which were made payable to Archibald Gilchrist have been assigned to the defendant Daniel Gilchrist, deceased; that he has recovered judgments on them; and the prayer is, as before, for conveyances

with general warranty for one-half of the 450 acres, the old plantation, or that the contract may be rescinded for want of title in the vendors, and in the meantime for injunctions against the judgments obtained by Daniel, the assignee.

The defendants, by plea or answers, severally rely on the decree in the former suit, which was made in October, 1832, as a bar, and the bill was thereupon dismissed in the court below by *Strange, J.*, at (363) Roberson, on the last Fall Circuit, and the plaintiff appealed to this Court.

Badger for plaintiff.
Devereux contra.

RUFFIN, C. J., after stating the case as above, proceeded: The introduction of the new matter does not set the party at large from the former decree, which is a bar in respect of all parties to it, and those claiming under them. No relief can be given to the plaintiff in this suit, which would not be inconsistent with the decree of 1832, and, therefore, while that remains in force, the plaintiff cannot proceed at all. The proper method of bringing in a person who was not a party to the original suit, and has become interested in the subject, is to file a bill in review, or one in the nature of a bill in review, against the original parties, and charge therein, by way of supplement, any event which has since occurred or which created the interest of the new party, and to pray that the former decree may be reversed, and that the cause may be heard with respect to the new matter and parties, made by the supplemental part of the bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief on the supplemental case as it may entitle him to. *Lord Redesdale* thus lays it down in his treatise, 89-92; and in *Perry v. Philips,* 17 Ves., 173, *Lord Eldon* recognizes and approves of that passage as at once providing a method for correcting decrees and adjusting all rights of other persons in the subject, without the necessity of making one decree in conflict with another. The matter in this bill might have been inserted in the bill of review which was filed in May, 1834, but an attempt to set aside a decree collaterally by an original bill which does not mention the first suit, but seeks a decree inconsistent with the former, cannot be suffered. *Wirtley v. Biskhead,* 3 Atk., 811; *Ogilvie v. Herne,* 13 Ves., 564.

The decree of the Court of Equity is therefore affirmed, with costs in this Court.

PER CURIAM. Decree affirmed.

(364)

ZACHARIAH HITE ET AL. v. CALVIN GOODMAN ET AL.

1. Where the justices of a county meet out of court, and in their public character offer a reward for the apprehension of outlawed slaves, they are not personally bound, although the county is not responsible upon their engagement.

2. One who, without fraud, contracts in the name of another, but without his authority, is not personally liable upon the contract unless he renders himself so by express stipulation, or by the receipt of the consideration.

CERTAIN runaway slaves having committed great outrages in the county of Gates, several magistrates of that county assembled at the courthouse to deliberate upon the propriety of calling upon the colonel of the county to order out the militia for the purpose of apprehending them. This meeting was held during the recess between the regular terms of the County Court, and at it the following order was made: "Ordered, that a reward of $1,600 be given for the apprehension of negroes, Jim, etc. (four in number), or $400 for each." The plaintiffs alleged that three of the slaves were taken by them and one Collins; that they were without redress at law, because Collins, after having assigned to one of them his interest in the claim for a reward, had fraudulently dismissed a suit brought to recover it. The prayer of the bill was for payment of the sum of $1,200, being that portion of the reward to which they were entitled for taking three of the outlaws.

The claim was resisted upon several grounds, which it is not necessary to state.

Kinney for plaintiffs.
Iredell contra.

GASTON, J., after stating the facts as above, proceeded: It has not been, and will not be pretended, that in its terms this order is a personal undertaking on the part of these individuals to pay the reward. It purports to be a command, issued by the embodied magistracy of the county, to that county and its fiscal officers. If it can be regarded in the nature of an engagement, it must be viewed as professing and as credited by the plaintiffs to be, not the engagement of the (365) defendants, but the engagement of the county of Gates. But it is admitted on all hands that the order for the reward did not bind the county, for that the justices had no authority to disburse or direct the application of the county moneys, except when holding the regular County Court. And it is insisted by the plaintiffs that whenever a contract is entered into in behalf of others without authority, it becomes the personal contract of the pretended agents. To this proposition, in

its broad terms, we do not assent. Every man who is guilty of a fraud in *pretending* an authority to bind another, and who by means of that fraud does an injury to a third person, is undoubtedly responsible to the extent of such injury. He who stipulates in the name of another without fraud, but without authority, and receives the consideration of that stipulation, may be liable on the promise which the law implies from the receipt of the consideration. *Delins v. Cawthorn,* 2 Dev., 90. But where there is no concealment or misrepresentation in him who promises in the name of another, and no consideration or benefit moves personally to him, where there is a simple misapprehension on both sides that he for whom and as whose the engagement is made, will be bound to perform it, I am not aware of the principle of law or equity that raises a personal promise in opposition to the unquestioned truth of the case. But however this may be as to engagements professing to be made under authority from individuals, we consider it settled that an action will not lie against a public agent for any contract entered into by him in his public character, although alleged to be in the particular instance a breach of his employment, unless he explicitly undertakes to be personally responsible. *Gidley v. Palmerston,* 2 Bro. & Bing., 275; *Unwin v. Wolseley,* 1 Terms, 674; *Macbeath v. Heldermand, id.,* 172; *Hodgson v. Dexter,* 1 Cranch, 345. The defendants, therefore, are not liable as charged. The mere fact that the order exceeded their authority does not support the allegation of a personal promise.

Without examination into the other grounds of defense which have been taken, we feel ourselves bound to dismiss the bill, with costs (366) to these defendants.

If the plaintiffs have a well-founded claim against the county, it ought not to be doubted but that, on proper application, they will obtain full justice.

PER CURIAM. Bill dismissed.

Cited: Dameron v. Irwin, 30 N. C., 424; *Brown v. Hatton,* 31 N. C., 326; *Tucker v. Iredell,* 35 N. C., 435; *Fowle v. Kerchner,* 87 N. C., 62.

BENJAMIN BRILEY v. GEORGE A. SUGG AND ROBERT WILLIAMS.

A surety, against whom and the principal debtor a judgment has been obtained, by paying the debt and taking an assignment of the judgment to himself satisfies it, and reduces his claim to a simple contract debt, and can, on the footing of the judgment, have no relief in a court of Equity. The proper course is to have an assignment of it made to a person not a party to the record.

BRILEY *v.* SUGG.

THE plaintiff was surety to one Richard H. Hines in a bond payable to one James S. Clark. Clark transferred this bond to one Anderson, who brought a suit on it in the name of Clark, to his (Anderson's) use, and his beneficial interest appeared on the face of the original writ and on the proceeding throughout the whole process of the suit. At August Term, 1831, of the County Court of Pitt (the term commencing the first Monday on that month) judgment in this action was entered up against both Hines and the plaintiff for $735 and costs. The plaintiff paid the amount of this judgment to Anderson, who assigned it to him. By the payment to Anderson, the plaintiff did not intend to satisfy the judgment, but wished to get the control of it, so as to avail himself of any lien which might exist under it upon the property of Hines. Execution issued, tested the first Monday of August, 1831, to the sheriff of Edgecombe, and was by him levied, on the first of November ensuing, upon the land of Hines, subject, however, to a deed of trust to the defendant Williams to secure a debt due by Hines to one Foreman. The defendant Sugg obtained a judgment at August Term, 1831, of the County Court of Edgecombe (which began on the 4th of that month), (367) for $890. Execution issued from the same term, which also came into the hands of the sheriff of Edgecombe, and was by him levied on the land above mentioned. No sale of the land was made, and that fact was returned upon both executions, and writs of *venditioni exponas* issued upon both judgments, returnable to the February Term, 1832, of the respective courts; that in favor of the defendant Sugg came to the hands of the sheriff; that in favor of Clark, to the use of Atkinson, for the plaintiff's benefit, miscarried. In January, 1832, the defendant Williams sold the land, and after discharging the debt to Foreman, there remained in his hands $715, which he, being indemnified by the defendant Sugg, paid in part satisfaction of the execution in his favor.

Hines was also a defendant, and the prayer of the bill was to have the judgment in favor of Clark, which, the plaintiff contended, had a priority, satisfied out of the surplus in the hands of the defendant Williams.

The case was argued at June Term, 1836, by *Devereux* for the plaintiff, and by *Iredell* and *Badger* for the defendant.

DANIEL, J., after stating the case as above, proceeded as follows: We are of the opinion that the plaintiff has no right to have priority in satisfaction of his debt out of the balance of the purchase money which remained in Williams' hands after satisfying Foreman's deed in trust. It is true that Clark's judgment against Hines and Briley, and the execution issued on the same, were prior in point of time to that of the defendant Sugg. But the plaintiff, who was jointly bound with

Hines in the judgment, paid the same to Anderson, who was Clark's agent upon record and authorized to receive the debt. The writ against Hines being in the name of Clark, *"to the use of Anderson,"* and all the proceedings in the cause so entitled, it was notice to the world of such agency, and Clark was bound by the act of Anderson within the
(368) authority given him. *Clark v. Shields,* 3 Hawks, 461. Notwithstanding the plaintiff did not intend to extinguish the judgment by paying Anderson the amount, yet in a court of law and in a court of equity it would have that effect. We have determined it would be so at law in the case of *Sherwood v. Collier,* 3 Dev., 380. Is payment simply of a judgment of record such an extinguishment of it as to deprive a subsequent *bona fide* assignee of any remedy in a court of equity against the judgment debtor? To an action on a record, a plea of payment was not good at common law. But if a judgment of record had been paid, the defendant had a right to demand a warrant to some attorney of the court authorizing him to enter up satisfaction on the roll. 1 Archb. Prac., 325; 2 Saund. Pr. C., 713. But by the statute of 4 Ann., ch. 16, sec. 12, payment may be pleaded to an action on a judgment if the whole judgment be satisfied. 1 Chitty's Pl., 426. In analogy to the case of a bond in England it seems to us that the assignee would have no remedy against the judgment debtor. If one have a bond in England, where bonds are not negotiable, and receives the money due upon it, and afterwards assign it for valuable consideration, as unsatisfied, to another, who has no notice of the payment, yet the purchaser can have no avail of this bond. *Turton v. Benson,* 1 P. Wms., 497; *S. c.,* 2 Vern., 764; 1 Stra., 240. If the plaintiff (a surety) had taken an assignment of the judgment against his principal and himself to a stranger, and did not intend satisfaction, then the judgment would not have been extinguished; and as execution had been issued on the same, it would have held its rank in the scale of priorities. *Hodges v. Armstrong,* 3 Dev., 253. But that has not been the case here. The plaintiff has paid the debt to the judgment creditor, by which payment he has reduced himself to the situation of a simple contract creditor of Hines. The general rule is, that if one of two joint obligors, being a surety, pays off the debt, he is at law merely a simple contract creditor of the principal; if the principal dies, equity will not convert him into a specialty creditor. *Copes v. Middleton,* 1 Turn., 231; *Worffington v. Sparks,* 2 Ves., 569 (as to administration of deceaseds' estates, the act of Assembly makes the surety who has paid a bond, etc., a
(369) specialty creditor). In *Jones v. David,* 4 Russel, 277 (3 Cond. Ch. Rep., 665), the plaintiff joined the testator as surety in a bond which he paid after the death of the testator, taking an assignment of the bond; he was still only a simple contract creditor to the testator.

The assignment was but an idle formality. The assignment of an instrument which had ceased to have any legal force could not confer any legal rights. The plaintiff, as a creditor of Hines, cannot in this Court follow the assets in the hands of Williams, a third person, without first obtaining a judgment upon his simple contract debt against Hines and failing to get satisfaction by execution at law.

The bill must be dismissed, but without costs, as the defendant did not demur. *Jones v. David, ubi supra.*

PER CURIAM. Bill dismissed.

Cited: Peoples v. Tatum, 36 N. C., 415; *Hanner v. Douglass,* 57 N. C., 266; *Tiddy v. Harris,* 101 N. C., 593; *Liles v. Rogers,* 113 N. C., 200; *Burnett v. Sledge,* 129 N. C., 120.

HOWELL HARRIS v. JOHN EWING.

The act of 1783 (Rev., ch. 185, sec. 11), requiring entries of land to set forth the nearest water courses, mountains, etc., is merely directory, and does not avoid entries because they are not as special as they might be made. If, from the want of distinguishing marks to identify the land, a second enterer has been misled, the first is void as to him; but if he had notice of the first before he paid his purchase-money, it is valid as to him, notwithstanding the defective description.

THIS case came before the Court by appeal from the final decree of *Strange, J.,* pronounced in the Court of Equity for MONTGOMERY County, on the last Fall Circuit, by which the bill was dismissed. The bill stated that the plaintiff made an entry on 1 October, 1822, of "fifty acres of vacant land situate in that county, adjoining the lands of Daniel Chisholm"; that he obtained a warrant and had his survey made on 16 January, 1824, and paid the purchase money into the treasury and obtained a grant on 24 September, 1824. The bill then set forth the description of the land as contained in the certificate of survey and grant, as follows: "lying on the waters of Chuk's Creek, and beginning at a pine standing at the intersection of his own line and Daniel Chisholm's line, and running thence north 38° east 138 poles to his own corner," and so on, calling for courses, distances and par- (370) ticular corners, to the beginning. It then charged that the defendant, with full knowledge of the plaintiff's entry and survey, and that he claimed the particular land under them, made an entry for him-

self on 1 March, 1824, and subsequently surveyed it, and took out a grant on 20 September, 1824, covering 41 acres of the plaintiff's survey, and that he recovered that part in ejectment, and evicted the plaintiff therefrom. The prayer was, that the defendant might be declared a trustee for the plaintiff and decreed to convey to him and restore the possession, and for an account of the profits and of the costs of the suit at law.

The allegations of the bill were admitted in the answer. But, in avoidance of them, the defendant set up several matters which, he insisted, were destructive of the plaintiff's right—first, that the plaintiff did not pay his purchase money within the time prescribed by law, and, therefore, that his entry lapsed; secondly, that his entry was defective in not calling for Chuk's Creek, which runs through the land, nor for any other remarkable place within or near the land, and was altogether vague and indefinite; and, thirdly, that the entry did not cover the land in dispute, because it does not in fact adjoin any land of Daniel Chisholm, who owned none within less than two miles of it. The answer first insisted on a distinct title under one McCaskell for eight acres of the land sued for and recovered at law.

Mendenhall for plaintiff.
No counsel for defendant.

RUFFIN, C. J., after stating the facts as above, proceeded: As the decree does not declare the matter of law upon which it is based, it becomes necessary here to examine each of the several points raised in the pleadings.

There is no proof in support of the last position in the answer. The demised premises are described in the declaration in ejectment by the very abuttals contained in the grant to the present defendant, and he has put in no other conveyances to himself but that grant.

The act of 1808 (Rev., ch. 759) enacts, "As the standing law in future, that entries made in the course of any one year shall be paid for on or before 15 December in the same year thereafter." (371) Upon these words the period is not to be computed from the day of the entry, so as to make the price payable in the second December that may succeed the making of the entry. If that had been meant, it would have been easy to express it much more explicitly than it is. We think the year of the entry, and not the day, is the epoch from which the computation of the act begins. The 15th of December of the second year after the expiration of the year of entry is the time, as seems almost necessarily inferable from the words, *"made in the course of any one year,"* which make *"thereafter"* referable to that whole year,

and not the particular day of that year. This construction is nearly so obvious that its correctness was taken for granted by this Court in *Nunn v. Mulholland,* 2 Dev. Eq. Rep., 381. If it were doubtful, the Court would not be at liberty now to depart from it, as we learn upon inquiry at the executive offices that a similar one was adopted there upon the passage of the act of 1804, ch. 653, and has been acted on ever since. A very clear wording could alone authorize a construction in opposition to one so long settled by the officers to whom the execution of the act is immediately confided, and under the annual practical sanction of the members of the Legislature, through whose hands, it is well known, their constituents remit a large portion of the purchase money due on entries. Our opinion, therefore, is that the plaintiff's payment was made in due time.

Another objection is, that if the entry be in itself sufficient, the plaintiff cannot claim this land under it, because in his survey he has departed from the entry and taken up land that does not adjoin the lands of Daniel Chisholm. We think this position cannot be sustained. The land claimed by the plaintiff is situate between another tract owned by him and one on which the defendant resides and which he now claims. In whom the title actually is, does not appear—the plaintiff's grant calling for it as Chisholm's land, and the defendant's grant as his own. The witnesses on both sides speak of it as having formerly belonged to one McCaskell, and it is probable (though not shown) (372) that he conveyed it to the defendant. But it is distinctly established by several witnesses that the contract of purchase was made between McCaskell and Chisholm, the father-in-law of the defendant, and that Chisholm intended it chiefly as an advancement to his daughter. Being more in value than he then chose to give, it was not conveyed immediately to the defendant, but Chisholm himself took the profits for some time. Afterwards, upon Chisholm's receiving from him a part of the purchase money, he gave up the whole tract to the defendant. It does not appear at what time that occurred, but it is plain from these facts that Chisholm was at least the equitable owner for a considerable period, and it is stated by the witnesses that he was reputed in the neighborhood to be the owner, and that about the period when the plaintiff's entry was made, the land was called Chisholm's or Harris', indifferently.

Every instrument must sufficiently describe the subject of the contract, and if there be but one description, that must of necessity be adhered to. The object of the description is to identify the thing for which the contract is made, and whatever means will effect that end must be all-sufficient. Judges are at liberty—nay, are bound—to under-

stand the terms of a description in the sense in which the rest of the world and in which they as men would understand them. It would be mischievous to apply a rule merely artificial to terms not in themselves technical. To enable a person in the neighborhood to point out a particular spot to another, the notorious reputation of ownership is a more satisfactory guide than a reference to the strict legal title. It answers the same purpose as the description in a deed, for the particular line called for must in each case be shown *dehors* the deed, whether it be a line understood to be that of another or to be proved by his title paper to be his line. In truth, however, the actual title is seldom thought of, and would generally mislead if the parties were confined to it. It is called for as it is known—that is, according to the knowledge of the public generally, or common opinion—not according to the proper title.

Thus viewing the subject, the Court is of opinion that the line
(373) called for in the entry as Chisholm's line is sufficiently established to be his for the purposes of identity, and that in his survey the plaintiff did not depart from his entry.

The remaining point is one on which there have been few adjudications in this State, and none reported. The Court thus not being familiar with the doctrine, has not adopted their conclusion without hesitation. But, from the best consideration we have been enabled to bestow on it, our opinion upon that is also adverse to the defendant.

The plaintiff's entry is extremely vague. It is contended to be so much so as to be radically defective and void. Such must be the consequence if the directions of the act of 1783 (Rev., ch. 185, sec. 11) be peremptory as to the means by which an enterer must in his entry ascertain the land intended to be embraced in it. But we think that is not the proper construction of the statute, but that it is directory; that an entry is not absolutely void, in any case, merely because it is not as special as the party could have made it by the use of all the *indicia,* internal and external, supplied by the act as evidences of identity; but that it ought to be valid or invalid in respect of a subsequent entry according to the fact, that the second enterer may or may not have sustained loss by the want of particularity in it. Without going minutely through all the reasons, some may be mentioned which have been sufficient to satisfy our minds that the act is directory in its character. It is plain that it was not intended that the entry should be so specific as entirely within itself to identify the land by its boundaries, because the same statute commands a survey to follow the entry at a short interval, and in the seventeenth section points out the means of identity to be set out in the certificate of survey. It is obvious to the most cursory observer that the requisitions of the act are less strict in reference to the objects discovered by the survey than in respect to those which the entry

must specify, if the statute is to be literally taken. By the eleventh section, not only "remarkable places" within the entry, but also "water-courses, mountains and remarkable places, nearest to," but without the land, are to be stated in the entry, while the other section (374) omits the whole of them. To insist that the former section is peremptory would be to make the entry supersede the use of the survey altogether. Besides, we know that the State wished to have all her vacant lands appropriated as speedily as possible, and that at that period the purchase money was paid to the entry taker, so as immediately to constitute the enterer an equitable purchaser. The Legislature cannot be supposed to have intended those provisions as a trap to catch the money of the citizens for public uses, and at the same time avoid the claim for the land by reason of some trivial oversight of one of the many objects, internal and external, specified in the act. The truth is, that the interest of the State, as vendor, was not at all concerned in the entry's being more or less special. The quantity was alone important to her, because that regulated the price. Again, the entry has never been considered in this State as a constituent part of the legal title, and for that reason such precision in its terms is not necessary as will upon their face connect and identify the land granted with that entered.

It appears to the Court, therefore, that a vague entry is not void as against the State, but gives the enterer an equity to call for the completion of his title by the public officers. If it be not void against the State, it is a necessary consequence, as we think, that it is likewise not so as against a subsequent purchaser from the State with notice.

The act, although directory, is to be so construed as will insure protection to other and innocent persons desirous of taking up land. That, we think, was the purpose of the Legislature, and, therefore, we hold that to be the meaning of the law. The entry, therefore, ought, *prima facie,* to be so explicit in its calls as to give reasonable notice to a second enterer of the first appropriation. If it do not, and the same land be entered again, the last purchaser has conscience on his side, while the fault is on the other. What calls will suffice to this end may much depend upon the state of the country and the opportunities and dangers of exploring and gaining an exact knowledge of it. Circumstances may justify a legislature or a court in requiring a call (375) for something *notorious,* by which a second enterer could *easily* identify the particular land, while in other cases identity alone might be deemed sufficient for all purposes in an entry, as it is in common deeds of conveyances between man and man. We are not aware that more than terms of identity were ever supposed indispensable in this State. If they were, they cannot now be, because such alone are at present useful. But the discussion need not be pursued on this subject, for it may

be admitted, and such is our opinion, that the entry must import to describe the land, so that another person may identify it thereby; and, therefore, that one who makes a second entry might have done it before he laid out his money. If, then, the plaintiff's claim had rested on his entry, merely, at the time the defendant entered, we should have no difficulty in pronouncing it defective. It calls for nothing but the line of Chisholm's, without saying which line or on what side of the line the land was situate. But that was not the state of the case. The plaintiff had taken further steps to set apart the land from all other. He surveyed it and completely identified it, and of that the defendant had full knowledge before the inception of his title. This he confesses in his answer, and is fully proved by his surveyor, who had also made the survey for the plaintiff. We have before stated that the only purpose on which a special entry is preferred to a general and vague one is to give notice to a second enterer. If that be correct, the specific notice established in this case must supply the original defect in the entry. It is a defect which does not avoid it altogether, but only displaces it when otherwise it would prejudice the ignorant and the innocent. But, like an unregistered deed, it gives a complete equity against one who does know of its existence and of the particular land surveyed under it, provided he come to that knowledge before he parts with his money or, as our law now stands, makes his entry. The case is within the principle of *Roberts v. Erwin,* 2 Hawks, 48, in which it was held, at law, that distinct personal notice to a creditor supplies the want of an adver-
(376) tisement, required by the act of 1796, of the intention of a debtor to remove.

We think it makes no difference that the plaintiff had not paid his purchase money at the time the defendant entered. The act of 1808 altered that of 1783 and extended the credit, it is true. But the entry gave the plaintiff the right of preëmption, of which the defendant could not rightfully deprive him having the knowledge he had.

The Court, therefore, deems the decree heretofore pronounced erroneous, and reverses it, with costs in both courts, and declares the plaintiff entitled to have a conveyance of the land covered by both grants to be restored to the possession and quieted therein. The Court would order a reference for an account of the profits if it had not been declined by the plaintiff.

It has been in several cases held that the plaintiff cannot recover his own costs at law when he has defended them upon a title merely equitable; but the defendant is bound to repay the costs recovered by him at law; and it is referred to the master of Montgomery to ascertain and report them.

PER CURIAM. Decree below reversed.

Cited: Plemmons v. Fore, 37 N. C., 314; *Johnston v. Shelton,* 39 N. C., 91; *Monroe v. McCormick,* 41 N. C., 88; *Krous v. Long, ib.,* 263; *Fuller v. Williams,* 45 N. C., 164; *Horton v. Cook,* 54 N. C., 273; *Currie v. Gibson,* 57 N. C., 26; *McDiarmid v. McMillan,* 58 N. C., 30; *Gilchrist v. Middleton,* 108 N. C., 707; *Wool v. Saunders, ib.,* 739; *Kimsey v. Munday,* 112 N. C., 832; *Grayson v. English,* 115 N. C., 362; *Carr v. Coke,* 116 N. C., 252.

MATHEW WILSON, EXECUTOR OF CHRISTY ARNY, SR., v. CHRISTY ARNY, JR.

Whenever a devisor gives away by will the property of a devisee, so that the claim of the devisee to the latter defeats the will, a case of election arises, upon the presumed intention of the devisor, but the implication of this intention must be plain, as it is not readily to be supposed that one gives away the estate of another.

THE testator of the plaintiff duly made and published his will, whereby he devised as follows:

"I give and bequeath to my son, Christy Arny, $350 in money. I also give and devise to him, his heirs and assigns, forever, the plantation whereon I now reside; but if he should make choice of the lot in Lincolnton, on which the smith shop stands, with an out lot (377) adjoining the same, in preference to my home plantation, my will is that he shall have the same in fee simple. In that case I will and direct my executor, hereafter named and appointed, to sell my said plantation, and the money arising to go in discharge of the foregoing money legacies, and should any remain of the same, after the payment of said legacies, the balance shall be equally divided between my children. But if my son, Christy, should elect to keep my home plantation, then and in that case the said lots shall be sold by my said executors, and the money arising therefrom, after the said money legacies are discharged, shall be equally divided between my aforementioned children."

The bill stated that the defendant, the devisee, had taken possession of both the plantation and lots, and prayed that he might be decreed to make his election between them, and that the one which he did not take might be sold for the purposes of the will and the defendant directed to join in the sale.

The defendant, in his answer, insisted that he had title to the lots, and denied that the will put him to his election.

D. F. Caldwell for plaintiff.
Pearson for defendant.

RUFFIN, C. J. We are of opinion that this case is clearly with the plaintiff. The doctrine of election is based upon the principle that one who takes a bounty under an instrument is under an obligation to give effect to the whole instrument, or rather that the donor intended that he should not enjoy that bounty if he disappointed that bestowed in the same instrument to another. The question commonly arises upon a disposition by a testator, simply as a gift to one, of the estate of another, to whom he also gives *simpliciter,* an estate of the testator, or some pecuniary benefit. To put the legatee to his election, it is necessary that the instrument should clearly ascertain the property given, and that the gifts themselves should be in such terms as are incon-
(378) sistent with the notion that the donee can keep his own estate and also take, under the will, without defeating the intention of the testator. It is, in other words, in the nature of a condition, and, generally speaking, that condition is implied from the nature of the several dispositions; and where the implication is not plain therefrom, and almost necessary, such a condition cannot be implied, because no one in a doubtful case is to be taken as intending to give away what belongs to another.

But in the case before us there is no necessity nor opening for presumption or implication. The condition is expressed in so many words in the will itself. It is not a case for election by construction of the court, but created expressly by the testator himself. The plantation is given to the defendant, and it is then added, "but if he should make *choice* of the lot in Lincolnton, on which the smith shop stands, with an out lot adjoining the same, *in preference* to my plantation, he shall have the lots, and the plantation be sold" by the executors, and the proceeds applied to the payment of pecuniary legacies, and the surplus given to particular persons. That would seem to make the meaning precise enough; but the testator immediately repeats the condition in these words, "but if my said son shall *elect* to keep my home plantation, *then and in that case* the said lots shall be sold" and the proceeds applied as before. There cannot be a plainer express condition than that here declared; and, accordingly, the defendant must renounce the plantation devised to him, unless within a reasonable time he declares his election before the master to keep it, and in that case join in the sale and conveyance of the lots for the purposes of the will. As it appears that the defendant has been in possession, both of the plantation and lots, since the death of the testator, he must account for the rents and profits, since

that period, of the parcel he may surrender, which account the master will take as soon as the defendant shall have declared his election. The defendant must also now pay the costs up to this time.

PER CURIAM. Decree accordingly.

Cited: McQueen v. McQueen, 55 N. C., 19; *Robbins v. Windly,* 56 N. C., 288.

(379)

FRANCIS HARPER v. DAVID M. WILLIAMS ET AL.

A vendor has no equitable lien for the purchase-money against a creditor of the vendee, who claims under an execution sale.

The case of *Johnson v. Cawthorn* (*ante,* page 32) approved.

THIS was a bill, filed by a vendor, to subject the land sold to the payment of the purchase money. Many facts and circumstances were stated to strengthen the plaintiff's claim, which were strongly contested by the defendant, but which it is wholly unnecessary to state, as it was conceded that the defendant claimed under a sale made upon executions against the vendee.

The case was submitted, without argument, by *Mordecai* for the plaintiff and *W. C. Stanly* for the defendant.

RUFFIN, C. J. We do not advert to the particular circumstances stated in the answer, on which it is insisted that the plaintiff gave credit exclusively to his vendee, personally, and that he then, or subsequently, renounced his lien, because the case must be decided against the plaintiff upon the general principle agreed on in *Johnson v. Cawthorn, ante,* 32. The vendor has no equitable lien as against the vendee's creditor, who proceeds to a sale by execution.

PER CURIAM. Bill dismissed.

JOSEPH M. D. POWELL v. JESSE POWELL, EXECUTOR OF DEMPSEY POWELL.

When slaves were given by parol, and upon the death of the donee, intestate, were assigned to one of his next of kin, a possession of them by the latter for more than three years gives him a perfect title.

THE defendant's testator, in the year 1822, made a parol gift of slaves to his nephew, the father of the plaintiff. Possession was held under

(380) this gift by the donee until his death, in 1824, when they came to the hands of his administrator, who soon after delivered them over, in a course of distribution, to the defendant as the guardian of the plaintiff. Possession of the slaves was continued by the defendant as guardian of the plaintiff, until the year 1831, when Dempsey Powell died, having made his will, whereof he appointed the defendant executor. The defendant, being advised that he held the slaves as executor of Dempsey Powell, and not as guardian of the plaintiff, immediately resigned the latter trust; and the object of the present bill was to determine whether the plaintiff had the title to the slaves, or whether the defendant should hold them as executor.

Manly for plaintiff.
W. H. Haywood for defendant.

GASTON, J., after stating the facts, proceeded: The possession of the plaintiff's father was under a general bailment, determinable at the will of either party, and no length of possession under that bailment could avail to give him a title. *Hill v. Hughes,* 1 Dev. & Bat., 336. But upon his death the bailment necessarily terminated. Whether the possession then taken by his administrator was adverse to the title of the defendant's testator, it is unnecessary for us to determine. Perhaps it might depend upon the fact whether the possession was taken as of the effects of his intestate under his authority as administrator, or as of the effects of the bailor *found* among those of his intestate. But after they were delivered over unto the plaintiff upon a claim of right, as his, the plaintiff's own property, a possession of them by the plaintiff's guardian, as such, was wholly inconsistent with and repugnant to the admission of a title in the original bailor. *Dowell v. Wadsworth,* 2 Dev., 103. An action of detinue or trover might then have been brought by him against the possessor. By our statute of limitations, such actions are barred if not instituted within three years after the cause of action accrued; and under our act of 1820 (Rev., ch. 1055) a possession of a slave, continued until it is protected by the statute of limitations, confers a com-
(381) plete title against the person thereby barred of his action. This last act contains, indeed, a proviso that it shall not affect the law requiring gifts of slaves to be made by written transfer, but the proviso is satisfied, and completely satisfied, by holding that a *parol* gift is, in law, a bailment, and that no length of possession under the bailment shall cause it to operate as a gift.

It is the opinion of the Court that the plaintiff is entitled to a decree for the negroes, and an account of the hire and profits.

PER CURIAM. Decree accordingly.

Cited: Martin v. Harbin, 19 N. C., 505; *Green v. Harris,* 25 N. C., 220; *Bennett v. Williamson,* 30 N. C., 125; *Call v. Ellis,* 32 N. C., 254; *Love v. Love,* 38 N. C., 111; *Richardson v. Pridgen,* 43 N. C., 155; *Koonce v. Perry,* 53 N. C., 61; *Woods v. Woods,* 55 N. C., 428; *Freeman v. Sprague,* 82 N. C., 369.

JOHN B. BAKER ET UX. v. REBECCA CARSON.

Where one having a remainder in fee in land went into possession and made permanent improvement at the request of the tenant for life, *it was held,* DANIEL, J., dissenting, that a court of Equity would restrain the tenant for life from resuming the possession until he had paid for the betterments, although there was no note or memorandum in writing made of the transaction.

THE case made by the pleadings and proofs was, that the late husband of the defendant, the father of the *feme* plaintiff, had by his will given the estate to his wife for life, with a remainder to his children; that after his death the plaintiff intermarried; that the plaintiff, John, was, at his marriage, settled upon land situate several miles from the defendant, and continued to reside there until the month of January following his marriage; that the defendant, being anxious to have her daughter, the wife of the plaintiff, near her, stated to him that the land devised to her for life, and in which his wife had a remainder in fee, in common with her sister, was in a great measure uncleared, and she proposed that a division of it should take place between the tenants in common in remainder, and that the plaintiff should take possession of such part of it as might be assigned to his wife, and there make a settlement. The defendant offered, in case this was done, to release to the plaintiff her life estate in the land. This plan was, at the earnest entreaty (382) of the defendant, carried into execution, and the premises were greatly improved by the plaintiff, who resided on them for several years, but, having neglected to take a conveyance of the defendant's life estate, she had, upon some disagreement with him, commenced an action of ejectment to turn him out of possession.

The bill prayed for a conveyance of the defendant's life estate, or for an injunction to restrain the defendant from prosecuting her action unless she would pay the plaintiff for the improvements made by him upon the land. The defendant, by plea, relied upon the act of 1819 (Rev., ch. 1016), avoiding parol contracts for the sale of land and slaves.

The case was argued several terms ago by

Devereux for the plaintiff, and
Mordecai for the defendant; and continued under advisement until this term.

RUFFIN, C. J. The plaintiff, Lisitta Baker, is the owner in fee of the tract of land described in the bill, subject to the life estate of the defendant, and one object of the bill is to enforce the execution of an agreement, on the part of the defendant, to convey this life estate to the said plaintiff. So far as the bill seeks this relief, it must be dismissed. The alleged agreement is by parol, and the defendant insists on the act of 1819, which declares all such parol agreements void, in law and equity. But the bill asks for relief of a different kind. It prays that the defendant may be enjoined from turning the plaintiff, John, out of possession unless she will make him a reasonable allowance for the valuable improvements he has put upon the land. This claim to relief is not founded upon the supposed existence of *any contract* of which it seeks execution, or for the breach of which it asks compensation, or damages. It is an appeal to the Court to *prevent fraud.* The case made is, that the plaintiff entered upon this land by the license of the defendant, and, therefore, was not a wrongdoer; that the land was then in woods, wholly useless and unproductive; that he reclaimed the land, made it fit (383) for cultivation, built his dwelling and put other valuable and lasting improvements upon it; and all this was done, not only under the eye of the defendant, but upon her assurances that he should not be turned out of his home nor deprived of the fruits of his labor; that she has thought proper to revoke this license, is about to eject him at law and thus appropriate wholly to herself the improvements, which, by these misrepresentations, she has procured to be made.

It is difficult to explain the grounds on which this relief is asked for, more distinctly than appears from a statement of the case. It is a misrepresentation, I think, to suppose that the plaintiff asks *damages.* He prays that the defendant may be restrained from the exercise of her legal power to turn him out of house and home unless she will *consent* to do what conscience requires—make him an equivalent for the worth of his labor, dishonestly taken to herself. The bill does not ask compensation for work and labor done at the request of the defendant, for it was not for the defendant's benefit, but for his *own,* and on an assurance, which she cannot in conscience violate, that *he should have the benefit thereof.*

It is needless to determine whether any action could lie at law to get compensation for the labor if she should be permitted to wrest the fruits of it from him; for if it could, it must be on the principle that to pre-

vent so flagrant an injustice the law would, on a principle of equity, imply a promise to pay against the fact. A court of equity does not entertain less abhorrence for fraud than a court of law, and, when it can exercise jurisdiction, will go as far to redress or prevent it. It seems to me it has here a plain jurisdiction by *enjoining* the defendant until *she will do justice.*

But I think there could be no adequate and perhaps no remedy at law. An action for work and labor done or money expended will not lie, except it be done for the use and at the request of the defendant. When it has been done for his use, without a previous request, a *subsequent* acceptance may supply the want of that request. But where it was not done originally *for his use,* but he gets the benefit of it (384) because *in law it was his,* as an appurtenance of the property to which it is affixed, it is inconceivable to me how *in law* he can be made to pay for it. Can a man be made to pay where he gets nothing but his own?

To hold that there is *no* relief, either in law or equity—that a man may be stripped of the entire fruits of his toil for years by any one who can cajole him into the weakness of expending them on his land by assurances for a future title—is a doctrine which seems to be subversive of first principles.

This, I think, is a question altogether of a different nature from that in *Denton v. Stewart,* 1 Cox, 258; *Todd v. Gee,* 17 Ves., 273, and the other cases cited in the argument. It is not a case of damages for the nonperformance of a contract, valid in law, which the defendant has disabled herself from performing, or is unable to perform, for the want of a title, or for compensation for a partial defect of title, or for a difference in the estate from the description in the contract. Though equity, in cases of the latter kind, makes compensation out of the purchase money, it very properly, in the former, refuses to give damages or entertain a bill in the alternative for a conveyance or for the damages or compensation. That is plainly a question of legal damages, which ought, therefore, to be left at law. The vendor gets no benefit by the labor of the plaintiff in such a case, for the very cause of the damage is that the vendor is not the owner of the estate. If he were, the Court would compel a specific performanee. As that cannot be, a decree for compensation is, in effect, a decree for the damages arising on the breach of the agreement. This case, on the contrary, is founded on the equity of the plaintiff against the defendant as the owner of the estate, who takes it away, with its improvements, made by the plaintiff. The relief goes upon her unconscientious gains. True, the plaintiff sets forth the contract and asks for its performance. But that is not an alternative, in the sense before spoken of. It was necessary for him to do so,

that he might offer an acceptance on his part, without which he would have no equity, for he would have no right to compensation if the defendant were willing to let him enjoy the fruit of his labor. He must, therefore, give her the election. Having elected to take the land, (385) the defendant ought to pay the plaintiff, not for the land, nor damages for a breach of the agreement, but for his labor, of which she fraudulently sweeps the profits.

As the case is supported by the proofs, I would not permit the defendant to eject the plaintiff until she make a fair allowance for the value to her of the improvements which he has made on the land. It may be that this has fully been made through his use of the land since the delivery of it was demanded. To enable us to ascertain what is just between the parties, let the clerk and master of Pitt inquire and report the additional value conferred on the defendant's life estate in this land by means of the plaintiff's labor and expenditures thereon, and also the reasonable value of the use of the land since 1 January, 1831, when possession was required to be surrendered.

GASTON, J., concurred with the *Chief Justice.*

DANIEL, J., *dissentiente:* This is not such an agreement as a court of equity would have caused to have been specifically executed, previous to the passage of the act of 1819, requiring all contracts for the sale of lands to be in writing, the consideration not being of such a nature as to induce the Court to decree for the plaintiff. But the agreement being since the passage of the act, and being by parol, and the act relied on by the defendant, as to so much of the bill as seeks a conveyance, the plea must, of course, as to that, be sustained. The bill then rests simply on a demand for damages, or compensation for work and labor done by the plaintiff for the benefit of the defendant. I am of the opinion that a court of equity cannot aid the plaintiff on this part of his case. Courts of equity (except in a few instances) never decree *damages or compensation* singly, without other relief. And the granting compensation to purchasers is only a peculiar exception, incidental and ancillary to that jurisdiction, which the court possesses in giving relief, by enforcing a specific performance of contracts in matters of freehold. 2 Chitty's Gen. Practice, 404. The cases of *Denton v. Stewart,* 1 Cox, 258, (386) and *Rex v. Butterton,* 6 Term, 554, have been cited as authorities in favor of the demand of the plaintiff. *Denton v. Stewart* has been impugned by other cases; and the rule is now established that a bill cannot be sustained having for its sole object an integral demand of compensation, unmixed with any circumstances showing that a plaintiff was driven to a court of equity for relief. *Gwillim v. Stone,* 3

Meriv., 237; *Blow v. Sutton,* 14 Ves., 128; *Greneway v. Adams,* 12 Ves., 309. In the case of *Todd v. Gee,* 17 Ves., 273, the chancellor (*Lord Eldon*) declares his inclination to support the course of previous authorities against that of *Denton v. Stewart,* observing that the power of a court of equity to give relief, in the shape of damages, is confined to cases where it has an opportunity of ordering compensation out of the purchase money. In the case of *Newham v. May,* 13 Price, 749, *coram Alexander,* Lord Chief Baron, the bill was by a purchaser of freehold houses, praying that the vendor might be decreed to refund and pay him a fair and reasonable compensation for the difference in the actual value of the property sold, and the stated value, as by reference to the rental, which, though in fact only £89 per annum, had been represented by a broker, the defendant's agent, to be £110, on the faith of that representation the plaintiff had purchased at the sum of £1,225. The *Chief Baron,* in giving his opinion, said it is not in every case of fraud that relief is to be administered in a court of equity. In the case, for instance, of fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity. The cases of compensation in equity I consider to have grown out of the jurisdiction of the courts of equity as exercised in respect of contracts for the purchase of real property, where it is often ancillary or incidentally necessary to effectuate decrees of specific performance. This, however, appears to me to be no more than a common case of fraud by means of misrepresentation, raising a dry question of damages—in effect, a mere money demand. Compensation will not be granted in equity for any loss sustained by the bargain in consequence of the vendor not being able to perfect his title; the (387) remedy, if any, being at law. 1 Mad. C. P., 440; 1 Chitty's Gen. Prac., 868. If the plaintiff should be dispossessed of the land by the defendant, then, whether he can recover damages at law, either in a general action on the case or on an implied *assumpsit* for work and labor done, will be determined when the case occurs. I think the plea must be sustained and the bill dismissed. If the plaintiff be dispossessed by the defendant, I think the law would raise an implied *assumpsit* for work and labor done on the land for the benefit of the owner.

PER CURIAM. Decree accordingly.

Cited: Albea v. Griffin, 22 N. C., 10; *Dunn v. Moore,* 38 N. C., 367; *Love v. Neilson,* 54 N. C., 341; *Daniel v. Crumpler,* 75 N. C., 186; *McCracken v. McCracken,* 88 N. C., 281; *Hedgepeth v. Rose,* 95 N. C., 45; *Pitt v. Moore,* 99 N. C., 90; *Tucker v. Markland,* 101 N. C., 426; *Vann v. Newsom,* 110 N. C., 125; *Rumbough v. Young,* 119 N. C., 569; *Love v. Atkinson,* 131 N. C., 548.

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1836

HARRIET FREEMAN ET AL. v. DANIEL S. HILL, EXECUTOR OF CHARLES A. HILL, ET AL.

An ante-nuptial settlement in articles is in equity, if registered, valid as a lien upon the property agreed to be settled, against the general creditors of the settler, and of course is valid against one claiming in place of a creditor. Therefore a purchaser at execution sale of the property included in the settlement is bound to execute it, although he may not have had notice of it at the time of his purchase.

ON 11 January, 1819, William D. Freeman, in contemplation of a marriage which had been agreed on between himself and Harriet Guin, executed a bond to the defendants, Marmaduke N. Jeffreys and Jones Cook, in the penal sum of £10,000, with condition to be void if within six months after the marriage he should, by such deed as the obligees might approve, convey the whole of the property of his then intended wife unto the said obligees, upon trust, to permit the said Freeman to have the use and profits thereof during his life, and after his death, to the use of the said Harriet, and of such child or children of the said Harriet as might be then living, as tenants in common, and their heirs forever; and if she should have no children living at his death, then to the use of the said Harriet and her heirs forever. The (390) marriage was shortly afterwards solemnized, and the bond, within six months thereafter, proved and registered. Freeman, by virtue of the marriage, became possessed of several slaves, to which his wife was previously entitled, and in the month of February, 1828, died insolvent, without ever having executed the conveyance mentioned in the condition of the bond. His wife survived him, and had then living three infant children, who, with her, were the plaintiffs in this cause. On 6 October,

1820, the defendant Charles A. Hill purchased one of these negroes—a man called Gray—at an execution sale on a judgment against Freeman. Shortly after the death of Freeman, this bill was filed, praying that the said bond might be established as a marriage settlement, and specifically executed, with respect to the said negro, for an account of his hire and profits since the death of Freeman, and for general relief. These facts were clearly established, either by the admissions of the defendant or by proof. The bill also charged that the defendant Hill had express knowledge of the bond before his purchase. This allegation was not admitted on his part, and was the only matter of fact disputed in the case.

The case was argued several terms ago by *W. H. Haywood* for the plaintiff, *Badger* for the defendant, *Hill* and *Devereux* for the trustees.

GASTON, J. Were it necessary to decide on the fact of notice, we should probably have little difficulty in determining it against the defendant. While he denies, by his answer, knowledge of the bond, he states several circumstances, tending to show information respecting the claim of the plaintiff, as should have put him upon his guard; and, according to the law of a court of equity, is equivalent to notice. But, as in our view of the case the fact of notice is an immaterial one, we forbear from determining it.

By the marriage, Freeman acquired a legal title to the slave in question. This legal title was, by virtue of the bond, charged spe-
(391) cifically with the trusts therein declared. An agreement for a mortgage is, in equity, a mortgage, and a lien upon the land agreed to be mortgaged, against the creditors of the mortgagor. *Burn v. Burn,* 3 Vesey, 573. An equitable mortgagee has a specific lien, even against the prerogative of the Crown, in respect of a debt accruing to the king subsequently. *Casberd v. Ward,* 6 Price, 411; *Picton v. Philpot,* 12 Price, 197. One covenants before marriage to settle certain lands on his wife for life, and afterwards devises these lands for the payment of his debts; this covenant is a specific lien on those lands against the creditors. But if he had covenanted to settle land of a certain value, without mentioning any in certain, then there would have been no specific lien, and the wife must have come in as a creditor in general. *Frenault v. Dedin,* 1 P. Wms., 429. This specific lien was good against the creditors of Freeman. There is no allegation or pretense that the equitable settlement was not *bona fide.* It was a provision made for the intended wife and her children, only to the extent of her then property. Our act of 1785 (Rev., ch. 238, sec. 2) permits a marriage settlement, or other marriage contract to avail against creditors, when a greater value is not secured to the wife, than the portion re-

ceived with her, and the net estate of the husband at the time of his marriage, exclusive of his debts.

The bond was registered within the time prescribed by the first section of this act for the registration of marriage settlements and other marriage contracts binding the estates of husbands. This was a necessary ceremony to give validity to this equitable settlement against the creditors of Freeman.

From the preamble of the act, and from the language of its several enactments, it is obvious that it is the creditors of the husband whom it designs to protect against deception and injury.

This equitable settlement, being unimpeached for fraud, not exceeding the amount permitted to be thus settled, and having the notoriety prescribed by law, and being therefore good and valid against the husband's creditors, with or without actual notice, must be good and valid against those who succeed simply to the rights of those (392) creditors, with or without notice. A sale under a *fieri facias* is the prescribed mode in which the law carries into effect its seizure of the property of a debtor, for the satisfaction of the demand of his creditors. The mandate gives no authority to the officer to seize any other estate than the estate of the debtor, and the vendee under the execution acquires no other estate than the law directed to be seized for this purpose. The vendee represents the judgment creditor, but is not regarded a purchaser from the proprietor. The well-known doctrine of equity, which refuses to enforce a trust against a purchaser for valuable consideration, and without notice, applies only in cases of sales *between parties,* not to vendees under executions. If the bond in this case had not been registered, as no notice would have made it binding upon the creditor, none would have given it validity against the vendee at the sale under the creditor's execution. Registered or not registered, it would have been enforced against a purchaser (from the husband) with notice of the lien. It would be absurd if all could be prohibited from buying at an execution sale what a creditor had a right by execution to seize and sell; and scarcely less so if what could not be rightfully seized by execution might nevertheless be rightfully bought at a sale under it. Cases may occur in which a vendee at an execution sale may be protected or relieved against valid liens upon the property because of fraud in the encumbrancer concealing his demand. But these belong to a different head of equity and have no application to the subject now under consideration.

It is the opinion of the court that the plaintiffs are entitled to a decree for the negro, and for his hire and profits since the death of Freeman, and to costs against the defendant Hill. Under the circumstances of this case the trustees must pay their own costs.

Cited: Dudley v. Cole, post, 436; *Polk v. Gallant,* 22 N. C., 397; *Rutherford v. Green,* 37 N. C., 127; *Tomlinson v. Blackburn, ibid.,* 511; *Irwin v. Davidson,* 38 N. C., 320; *Croom v. Wright,* 39 N. C., 250; *Spencer v. Hawkins, ibid.,* 292; *Vannoy v. Martin,* 41 N. C., 172; *Smith v. Smith,* 57 N. C., 306; *Carr v. Fearington,* 63 N. C., 563; *Walke v. Moody,* 65 N. C., 602; *Hicks v. Skinner,* 71 N. C., 540.

(393)

KIMBOROUGH J. SIMMS ET AL. v. ISHAM GARROT AND BERRY D. SIMMS.

1. A legacy to the lawful heirs of A., when it appears in the will that he is living, is equivalent, as a description, to a legacy to his next of kin, or to his children.
2. A legacy to the children of A. is to be divided among those born at the death of the testator.
3. A lapsed legacy does not fall into a residue which is only partial in its nature, though it requires very special words to deprive a residue of its general character. Where a residue consisting of crop, stock and furniture was given, *it was held* that a lapsed legacy of a slave did not fall into it, but was subject to distribution under the statute.
4. A bequest of a slave to A. for life, with remainder to the lawful heirs of B., who it appears from the will was alive, is tantamount to a bequest to the children of B., and is to be divided among those who shall be *in esse* at the death of the first taker, and is not confined to those born at the death of the testator.

REDDING SIMMS in the year 1823, by his will, among other things, bequeathed as follows: "I leave to my beloved mother, Martha Simms, one negro woman, during her natural life, by the name of Sally, and at her death I give her to Joel Simms's lawful heirs.

"I loan to my brother Joel Simms, during his natural life, four negroes, viz., etc.; also one tract of land, etc.; and at his death, etc., I give to my brother John Simms two negroes, etc.; also two hundred and fifty dollars in cash.

"The balance of my property, consisting of stock, of horses, cattle, hogs and sheep, with my household and kitchen furniture, plantation utensils, with my crop of corn, fodder, wheat and cotton, I leave with my executors, out of which my just debts are to be paid; and the residue, if any, I give to Joel Simms's lawful heirs; one mule excepted, which I give to Berry D. Simms."

Of this will he appointed the defendants executors who, after his death, proved the same. John Simms died before the testator. The

plaintiffs are Joel Simms's children, who survived the testator. Martha Simms, the mother of the testator, survived him; and upon her death the negro woman, Sally, was sold by the executors. The plaintiff, Berry Simms the younger, is a son of Joel, born after the (394) death of the testator but before that of his mother.

The bill prayed an account of the assets of Redding Simms, and at the hearing the following questions arose:

1. Whether the plaintiffs were sufficiently described so as to enable them to take under the will?

2. If they were, did the plaintiff, Berry Simms the younger, take under the residuary clause?

3. Whether the legacy to John Simms, which lapsed by his death, passed under the residuary clause?

4. Whether the plaintiffs, and especially the plaintiff Berry Simms the younger, took the money for which the slave Sally was sold?

W. H. Haywood for plaintiffs.
Badger for defendant.

DANIEL, J. In this case there are several questions submitted for the decision of this Court, arising upon the construction of the last will of Redding Simms. First. Does the residuum, after paying debts, belong to the plaintiffs, who were the only children and next of kin to Joel Simms at the death of the testator? The residuary clause is in these words: "The balance of my property, consisting of stock, of horses, cattle, hogs, and sheep, with all my household and kitchen furniture, plantation utensils, with my crop of corn, fodder, wheat and cotton, I leave with my executors, out of which my just debts are to be paid; and the residue, if any, I give to Joel Simms's lawful heirs; one mule excepted, which I give to Berry D. Simms." The testator takes notice that Joel Simms was alive at the making of the will: he devises and bequeaths to him lands and slaves. There can be no doubt that the testator did not intend that the words "lawful heirs" should be taken in their technical meaning, but he meant to designate a class of persons who should take immediately on his death. That class of persons must be either the next of kin of Joel Simms or the children of Joel Simms; and in this case it is not material which, since the next of kin to Joel Simms were his children—the plaintiffs. It is always a question of intention as to the meaning of a testator in the (395) use of the word "heirs," if it appear that the intent was for the heir properly and technically such, to take the personal estate, there can be no objection to his title. 1 Roper on Leg., 88; *Gwynne v. Maddock,* 14 Ves. Jun., 488; *Britton v. Twining,* 3 Mer., 176; *Mounsey v.*

Blamire, 4 Russell, 384. But the intention here is plainly that Joel Simms' next of kin, or children, at the death of the testator, should take this partial residue, if any, and so we determine. Secondly, Berry Simms, Jr., the son of Joel Simms, born after the death of the testator and after the time when this fund (the partial residue) was in law to be divided, is not entitled to a share of this fund. The rights of legatees are finally settled and determined at testator's death when the legacy is due. 1 Roper on Leg., 48, 49, and the authorities there cited.

Third question. Testator bequeathed a legacy in money and slaves to his brother, John Simms. John Simms died in the lifetime of the testator, and the legacy lapsed. The plaintiffs claim this fund as residuary legatees. Are they entitled to it? It does not appear from anything said in the will that the testator contemplated the possibility of any of the legatees dying in his lifetime. If the plaintiffs were general residuary legatees, they would be entitled not only to what remains after payment of debts and legacies, but also to whatever may by lapse, invalid disposition, or other casualty, fall into the residue after the date and making of the will. *Bird v. Le Fevre,* 15 Ves. Jun., 589; *Roberts v. Cooke,* 16 Ves. Jun., 451; *Smith v. Fitzgerald,* 3 Ves. & Beames, 3; *Leak v. Robertson,* 2 Mer., 392; 5 Mad., 412; 2 Roper on Leg., 453.

But when the legatee is not generally but only partially residuary legatee, he will not, in that character, be entitled to any benefit from lapses, though very special words are required to take a bequest of the residue out of the general rule. 2 Jac. & Wal., 406, per *Lord Eldon.* 2 Roper on Leg., 457. It sometimes happens that a testator appoints a residuary legatee of a partial residue, and not of the general undisposed of surplus of his personal estate, in which case of course
(396) the residuary legatee of such partial residue will not be entitled to lapsed interests, as where a testator directs a certain leasehold house, and the furniture and effects thereto belonging, to be sold, and out of the produce certain legacies to be paid, adding words to this effect: "if anything remains" or "what is left to B."; in such case B. will only be entitled as residuary legatee of the fund specified, and not of the general residue. 2 Roper on Leg., 558. So here the testator bequeaths "the balance of my property, consisting of stock, of horses," etc., enumerating the particular articles, which particular property he charges with his debts, and then in and at the foot of the same clause he goes on to say, "and the residue, if any, I give to Joel Simms's lawful heirs." The words "residue, if any," must of necessity be understood to refer to the particular fund made from the particular articles just above enumerated. So that it seems to us that the plaintiffs are residuary legatees of a partial residue, and not of the whole undisposed of

surplus of testator's personal estate. *Frazer v. Alexander,* 2 Dev. Eq. Rep., 348. We are therefore of the opinion that the plaintiffs are not entitled in their character of residuary legatees to the fund which fell in by the legacy of John Simms lapsing; but the same is undisposed of and belongs to the next of kin of the testator, and goes according to the statute of distributions.

Fourth question. Testator, by a clause in his will, bequeaths as follows: "I leave to my beloved mother, Martha Simms, one negro woman, during her natural life, by the name of Sally, and at her death I give her to Joel Simms's lawful heirs." Martha Simms is dead, and the slave Sally has been sold by the executors, and the money is now in court. Are the plaintiffs entitled to this fund? or are they entitled to it with their brother, Berry Simms, who was born during the life of Martha Simms, the tenant for life? or is the fund undisposed of by the will, and to be distributed as in a case of intestacy? It has been before remarked that the testator knew that Joel Simms was alive, for he bequeathed him a legacy, and therefore did not mean to be (397) understood by the words "lawful heirs," when used in his residuary bequest (which bequest was to take effect at his death) as intending heirs of Joel Simms, according to the technical meaning of that word; and although the inference is less strong upon this clause of the will than in the other that the testator, by using those words, intended that the next of kin, or children of Joel Simms, should take in remainder, yet in our opinion the inference of intention is sufficiently strong to induce us so to construe the words, for he has used the same words in the same way in different parts of his will. We therefore must understand that he intended that they should convey the same meaning when used in one and every clause of his will. We think that the children of Joel Simms (being his next of kin) will take this fund as legatees in remainder; and we are of the opinion that Berry Simms, Jr., is entitled to a share of the money produced by the sale of the slave Sally, he being *in esse* at the time the law required the fund to be divided. If the words, "Joel Simms's lawful heirs," could be made to mean Joel Simms's children, then there would be no doubt but that Berry (born during the life of the tenant for life) would take. *Knight v. Wall,* determined at this term. But take the words "lawful heirs" to mean next of kin of Joel Simms, then the words in the clause in question, "and at her death (viz., Martha's death) I give her (slave Sally) to," etc., show an intention in the testator that the next of kin of Joel Simms living at the death of Martha, the tenant for life, should take the fund in remainder. As in the case of *Long v. Blackall,* 3 Ves., 484, where testator gave leasehold property upon the death of his last surviving son, without leaving issue male, etc. (to whom he had limited the estate)

"to such persons as should then be his (the testator's) legal representatives." The event happened upon which its last limitation was to take place; and it was determined that the testator's next of kin living at the death of the survivor of the sons were entitled. Vide; also 1 Roper on Leg., 124. We are of the opinion that the fund by the sale (398) of the slave Sally belongs to the plaintiffs and their brother, Berry Simms, Jr.

PER CURIAM. Decree accordingly.

Cited: Dicken v. Cotten, 22 N. C., 274; *Johnson v. Johnson,* 38 N. C., 429; *Mebane v. Womack,* 55 N. C., 301; *Hayley v. Hayley,* 62 N. C., 187; *Irvin v. Clark,* 98 N. C., 445.

ALEXANDER McKAY v. HARRY S. WILLIAMS ET AL.

1. Slaves held in trust to be divided among A.'s children "who may be now living and those who represent a deceased child, in proportion and after the same manner as if they were claiming them as next of kin of their father," are not liable to an execution at law. And in equity, a creditor under an assignment subsequent in date to the execution, but prior to the bill of the plaintiff in such execution, to subject the fund, is preferred.

2. A creditor whose execution has no lien upon a trust estate can subject it in equity only upon the ground that he cannot otherwise procure satisfaction. The jurisdiction is original; and as priority of time is regarded in equity, any other person having *bona fide* a specific lien prior to the filing of his bill is preferred to him.

3. But where the execution has a lien at law the jurisdiction becomes ancillary, and the legal priority is not lost by seeking that relief.

PHEREBEE WILLIAMS, on 20 November, 1827, conveyed to Joel Williams fifty-nine slaves in trust, to be divided into three equal parts, of which one-third part to be divided among the children of donor's brother Samuel, deceased, who may now be living, and those who represent any deceased child or children, in the proportion and after the same manner as if they were claiming the said slaves as next of kin, or distributees, under the statute of intestacy, of their father's estate. One other third part is given in the same words to the family of her brother Isaac, also deceased, and the remaining third in the same words to the family of her brother Joel, deceased. Then is added the following clause: "And also upon the further trust to appropriate the hire and profits derived from the said slaves, to and among the children aforesaid, and grand-

children, in the same proportion that they share in the slaves, after deducting the reasonable charges and disbursements for managing this trust." The trustee, Joel Williams, took possession of the slaves, and hired them out in the years 1828 and 1829. Samuel Wil- (399) liams, the brother of the donor, left living at his death, and at the date of the above-mentioned deed, four children, of whom Harry S. Williams is one and the wife of the present plaintiff is another. The families of the other two brothers of the donor, Isaac and Joel, were very numerous; several of the creditors of the said Harry S. and of the plaintiff, respectively (who had removed from this State), levied attachments on the slaves in the hands of the trustee as garnishee, and the several children and grandchildren set up claims to shares of the slaves in conflict with each other. In February, 1829, Joel Williams, the trustee, filed his bill in the Court of Equity for Cumberland County against all his *cestui que trusts,* and their attaching creditors, submitting to carry into execution the trusts, and alleging his inability to do so by reason of the impossibility of determining what share each claimant was entitled to, and of the impediment to a division, by means of those attachments, and praying that the accounts and divisions might, for his protection, be taken under the direction of the court.

In that cause it was, on 22 November, 1830, ordered that a division of the slaves into three equal parts should be made by the clerk and master; the part that might be allotted to the children of Isaac Williams to be again divided into nine equal shares—one for each of his children or those representing them—and the same with respect to the share of Joel Williams' (deceased's) children; that the negroes allotted for those two classes of claimants should be delivered to the individual claimants, respectively, upon their giving bonds, respectively, for the forthcoming of the slaves to answer the further order or orders in the course, but that the third part allotted to the children of Samuel Williams, deceased, should remain in the hands of the trustee, Joel, without further division amongst these children, severally, and be hired out by the said trustee, subject to the further order of the court touching their final disposition, and it was referred to a master to state an account of the trustee with the trust fund for the hires and expenses of the slaves, and (400) to report a just allowance to the trustee for his trouble and services and all his cost at law, and these orders were declared to be made by consent and without prejudice to the rights and ultimate liability of any of the parties.

On 12 February, 1831, the master made the divisions as directed; and as to the share allotted to Samuel Williams' children, he reported "that it remains undivided, to await the decree that may be made touching the same." The master also reported on the accounts of the trustee.

At the next term, May, 1831, the report as to the division of the slaves was confirmed, but the parties had leave to except to so much of it as related to the accounts.

The present plaintiff was a creditor by judgment in the court of Cumberland of the defendant Harry S. Williams, one of the four children of Samuel Williams, deceased; and in December, 1830, sued out a *fieri facias* thereon, on which the sheriff returned to March court, 1831, "that he had, on 16 February, 1831, levied the same on the defendant's interest in the part allotted to the children of Samuel Williams of the negroes belonging to the estate of Pherebee Williams, deceased." On this return the plaintiff has regularly issued writs of *venditioni exponas* from that time up to the filing of this bill, but nothing has been done on them, nor did the sheriff at any time interfere with the possession of the slaves by the trustee, Joel Williams.

At the next term of the Court of Equity, 22 November, 1831, it was further ordered that the clerk and master should sell the slaves allotted to Samuel Williams' children, on a credit of six months, and bring the proceeds of the sale into court for the further direction of the court; and that the creditors, by judgment or attachment of Harry S. Williams, should not sell any of the said slaves on execution, but might apply in that court for satisfaction out of the proceeds of the sale then ordered.

The master sold the negroes accordingly, on 2 January, 1832, for $6,278, and made a report thereof, which was confirmed on 16 May,
1832, and the master was ordered to collect the money when the
(401) bonds should fall due; and the same was ordered to be divided into four equal parts, whereof Harry S. Williams was declared to be entitled to receive one-fourth part. The trustee, Joel Williams, was also ordered to pay and deliver to the master a balance then found to be in his hands, in cash and bonds, for the hires of the slaves, after making him all just allowances; and the master was directed also to collect those debts. On 18 October, 1832, Harry S. Williams, then and for some years before, residing out of the State, assigned all his interest in the said slaves so allotted to him or for his use, and in the proceeds of the sale thereof, and the funds to him in any wise belonging, under the said deed of his aunt, Pherebee Williams, and the decrees of the court in the said suit for or on account of the said slaves or their hires or profits to the defendant McNeill, in trust, to secure the payment of certain debts in the deed mentioned, amounting to the sum of $1,909, whereof the sum of $259 was due to certain creditors by judgment in Cumberland, rendered on attachments served on these slaves; and the residue, $1,650, was due to certain other creditors in Tennessee; and if the fund should be more than sufficient to discharge those debts, then in

trust to pay a debt of said Harry S. to one S. Sonter upon judgment in Cumberland; and the residue, if any, to pay to maker of the deed.

On 14 May, 1833, it was, upon the petition in the cause presented by H. S. Williams and McNeill, ordered by the court that the master pay out of the share of H. S. Williams, of the fund in court, the sums due to the said attaching creditors, who are also provided for in the assignment to McNeill, and that he pay the residue of the said H. S. Williams' share of said fund, consisting of one-fourth of the proceeds of the sale of one-third part of all the said negroes, and a like proportion of the proceeds of the hires to the said McNeill, he being entitled thereto under and by virtue of the said assignment. The present bill was then brought on 1 June, 1833, by the plaintiff, Alexander McKay, against H. S. Williams, McNeill, Sonter, and the creditors in Tennessee, in which the foregoing matters were charged; and also that McNeill had received, or was about to receive from the clerk and master, (402) the sum so decreed to be paid to him, to apply it in payment of the debts, as by the assignment directed. The bill submitted to payment being made to the creditors by attachment in North Carolina, as they had acquired a specific lien on the property independent of and long before the assignment; but in respect of the other debts thereby secured, the bill insisted that the plaintiff, by force of his writ of *fieri facias,* and by keeping up writs of *venditioni exponas,* had a preferable legal right to satisfaction out of the said slaves, and then had it out of their proceeds; and that the said H. S. Williams could not assign the same, so as to defeat him, and that such assignment was void as against him. The bill further charged that the assignment was made by Williams, and accepted by McNeill, with a full knowledge of the plaintiff's judgment and executions, and with the view to defeat his right to priority of satisfaction, before the creditors secured or intended to be secured, by the said deed: and that said McNeill intended to send the fund to the creditors out of the State, towards the satisfaction of their debts, in manifest fraud of the plaintiff's rights, although the plaintiff had given him notice not to do so. The prayer was that McNeill might be enjoined from thus paying over the money, or any part of the trust funds, and might come to an account thereof with the plaintiff, and first satisfy the debts to the plaintiff.

An injunction issued accordingly.

The defendants McNeill and H. S. Williams answered, and denied any actual intention to defeat the plaintiff's debt; and stated that the debts secured or intended to be secured by the assignment were true and just debts, and that the deed was executed solely for the purpose of securing and satisfying them; and insisted that it was effectual in law for that purpose, notwithstanding the judgment and executions of the

plaintiff, of which McNeill denied any knowledge at the time of the assignment. By the death of F. Williams, the principal creditor in Tennessee, the suit abated as to her, and the bill was taken *pro*
(403) *confesso,* after advertisement as to the other creditors there resident. The cause being set down for hearing, was transferred to this Court.

Badger for plaintiff.
Devereux for defendants.

RUFFIN, C. J. The bill does not impeach the assignment as being fraudulent within the act of 1715, for want of a consideration, on account of the debts mentioned in it not being due. On the contrary, it assumes all of them to be just, and submits to payment of those upon judgments in this State, because they have a legal preference by reason of the prior lien of the attachments. In the ground of that submission, we think the pleader who drew the bill was mistaken, because, in our opinion, this interest of H. S. Williams was not subject to attachment. But for the same reason on which that preference is yielded, the bill insists that the plaintiff acquired a lien by his execution, which arrested the power of the debtor to assign this fund. Upon the correctness of this position the rights of these parties depend.

There is no doubt that this Court, considering an equitable right as a part of the property of a debtor, will make it effectual to the satisfaction of a creditor who has established his debt by judgment, and is unable to obtain satisfaction by execution at law; but this is not on the ground of any lien created by the execution on the equitable property of the debtor. On the contrary, it is upon the ground that there is no such lien; and that in consequence thereof, unless equity will decree a satisfaction, the creditor can have no other remedy. Since there is no lien, the debtor may assign for value, unless the object of the assignment be in reality and primarily to defeat the creditor, as if the purchaser have notice of the judgment debt, knows of the insolvency of the debtor, and that his object is to put the money in his pocket and defy the creditor. *Edgill v. Haywood,* 3 Atk., 356. But that is an intent that cannot be implied; nay, is repelled, when the assignment is to satisfy or secure another *bona fide* debt; because, until a specific lien be in some way created, a debtor has a right to prefer which creditor
(404) he pleases. This is so even at law, and much more in equity, which regards all debts as alike in conscience. If therefore, from the nature of the property, the process of execution does not create a lien at law, the creditor must file his bill against the debtor and his trustee, to change the particular equitable property in this Court, which

constitutes a *lis pendens,* as to the thing, and consequently restrains the debtor's alienation or, rather, keeps the property still liable in the hands of the assignee. *Edgill v. Haywood; Hendricks v. Robinson,* 2 John. C. C., 306. Until bill filed, any honest disposition by the debtor of his equitable property is sustained, and that for the payment of a just debt is apparently honest.

It is, however, otherwise when the property is subject to be sold under the execution at law, for the jurisdiction here then becomes ancillary to the law. The legal lien is not lost by the creditor being under the necessity of coming into this Court to clear the title of doubts or ascertain the precise extent and value of the debtor's interest; equity neither sets up nor destroys such a lien.

As the assignment in question here was made before the bill filed, and is not impeached for fraud, it must prevail, unless the plaintiff could have sold the negroes in question under his execution. The case may be confined to the view arising on that state of facts. Although it might be a material question whether the plaintiff did not lose the lien, as against these parties, by what afterwards happened; that is to say, by his not selling and suffering the negroes to be turned into money under the decree of the Court of Equity. But supposing his rights against this fund to be the same as against the negroes themselves, he cannot be preferred to the assignee, unless at law the negroes were subject to sale by the sheriff.

It is insisted that they were, first, because the legal title vested in H. S. Williams and his brethren, as tenants in common, of their share, upon the division made in February, 1831, under the order of November, 1830; but the contrary is quite clear. No conveyance by the trustee was made or directed, and when that general division was confirmed, the share allotted to this particular family was undivided between them, and was directed to be still held by the trustee, ex- (405) pressly upon the old trusts, for them.

It is further insisted, secondly, upon the ground that after that decision the trust estate was within the act of 1812, and subject to be sold under execution against H. S. Williams, one of the *cestui que trust.* It is to be remarked here that all the rights of the plaintiff depend in this suit upon the soundness of this rule, as applied to the property in the State it was during the operation of his *fieri facias,* sued out from December, 1830, and returnable to March Court, 1831. All the executions since issued are writs of *venditioni exponas,* upon the levy of that *fieri facias;* and therefore the whole rests upon the effect that had at the time. We think it clear that the property was not then in a condition to be seized and sold at law. It was then subject to all the complicated trusts that ever existed under the deed of Pherebee Williams.

Even the general division was not then reported, much less confirmed. The whole was liable then to be set aside, and the negroes allotted to this family, given to others of the *cestui que trusts.* Indeed, that division seems to have been made more for the convenience of the parties, and to relieve the trustee as to the possession of some of the slaves, than to conclude the rights, or for any other purpose, for to all the parties it was without prejudice; and the respective claimants had still to show, among themselves in families, what advancement from their several fathers they had received; and the shares of all were subject to the demands of the trustee for his services and disbursements on the trust property, according to the terms of the deed. But this was more particularly the case with respect to the allotment of slaves, in which H. S. Williams was concerned, for they were to be held by the trustee himself as such, subject to the original order of the court as to their distribution, none whatever having been then or previously made touching that share.

Those slaves were then plainly not held upon that simple, pure and clear trust, by which it was the duty of the trustee to admit the *cestui que trust* into the immediate enjoyment and possession of the (406) property, and convey the legal estate upon his demand, which, according to the rule of *Brown v. Graves,* 4 Hawks, 342, and *Harrison v. Battle,* 1 Dev. Equity, 537, approved in *Gillis v. McKay,* 4 Dev., 172, is necessary to bring the case within the act of 1812. This last case, indeed, arose upon the very deed now before us, and it obliges us to treat all interest of the *cestui que trust* under the deed as merely equitable rights, until the property came to those persons, divested altogether of the trust; or, at least, until those trusts be altered and reduced by a decree of the court, or the acts of the parties, to a state of purity and simplicity, in which the trustee holds only for one *cestui que trust,* or for one set of *cestui que trusts,* all claiming an equal and ascertained interest.

The case, therefore, is against the plaintiff upon its particular circumstances at the time he sued the execution by which he supposes himself to have acquired a lien.

This cause, it is thus seen, may be decided without discussing the more general question whether, upon a trust for two or more, as immediate, equitable, joint-tenant or tenants in common, the interest of one of them can be sold under execution against him alone. The Court, therefore, deems it proper to leave that important point still open.

It appears by the pleadings and exhibits that the debts secured by the assignment amount to nineteen hundred and nine dollars, exclusive of that to Sonter, of which the particular amount does not appear. The sum to which McNeill is entitled, as the share of H. S. Williams of the

proceeds of the sale of the slaves, is only fifteen hundred and sixty-nine dollars and fifty cents; a balance, therefore, will be still due on those debts. If this were the whole case, the bill ought at once to be dismissed; but the deed of H. S. Williams, which is exhibited, also conveys two tracts of land upon the same trusts, with directions to sell them; and McNeill has also received, or is entitled to receive, further sums as his assignor's share of the hires of the negroes. It does not appear what sums will come to the trustee from those sources, and it may be that, after satisfying the debts mentioned in the deed, there will be a surplus applicable to the plaintiff's demand in (407) this Court. Liberty is therefore given to the plaintiff to have an account stated of those debts upon the foot of the assignment, and also of the trust fund in the hands of the trustee, in order to ascertain whether there will be anything over and above those debts, as described in the deed. But if such a reference be not asked at or before the calling of the cause at the next term, the bill will then stand dismissed, with costs. In the meantime the injunction heretofore granted must be dissolved, so far as respects the sum of fifteen hundred and sixty-nine dollars and fifty cents, before mentioned.

PER CURIAM. Decree accordingly.

Cited: Burgin v. Burgin, 23 N. C., 163; *McGee v. Hussey,* 27 N. C., 258; *Brown v. Long,* 36 N. C., 193; *Canady v. Nutall,* 37 N. C., 268; *Frost v. Reynolds,* 39 N. C., 500; *Presnell v. Landers,* 40 N. C., 254; *Bridges v. Mayo,* 45 N. C., 173; *Dixon v. Dixon,* 81 N. C., 327; *Love v. Smathers,* 82 N. C., 372.

THOMAS McLIN v. ROBERT McNAMARA, ADMINISTRATOR OF S. FERRAND.

1. If a defense, which may be pleaded, is relied upon in the answer, its validity can only be determined at the hearing. That part of the answer cannot be set down for argument as a plea.
2. The rules of practice as settled in *Bruce v. Child,* 11 N. C., 372, approved.

THIS bill was filed against the defendant, as administrator of S. L. Ferrand, for an account of certain dealings between the plaintiff and the intestate, including some articles of merchandise which had been consigned to Ferrand for sale, on the plaintiff's account. The defendant put in an answer, to which he did not annex any account, and in which he denied all accountability, so far as the facts are known to him; but if it should be established by proofs, the answer then insists

on the statute of limitations, and also on the act of 1789, for the protection of administrators, and prays the same benefit thereof as if the same had been pleaded.

The plaintiff replied to the answer, and the cause stood several terms upon orders for taking testimony. At the last term, without any
(408) order, publication, and without setting the cause down for hearing "the pleas were set down for argument"; and the counsel for the plaintiff further moved the court "that it be referred to the master, without prejudice, to take an account, with power to examine the parties on oath, and to compel them to produce such papers as they may respectively have in their possession as are requisite for taking such account." The court refused the motion, but allowed an appeal by the plaintiff to this Court.

W. C. Stanly for plaintiff.
J. H. Bryan for defendant.

RUFFIN, C. J., after stating the record as above, proceeded: The question brought up by the appeal is necessarily confined to the order denying the motion made on behalf of the plaintiff. But we cannot forbear remarking upon the unusual and incorrect manner in which the parties treat the defense set up under the statute of limitations. That defense, it is true, is proper for a plea, the office of which is to render an answer unnecessary. If the defendant does not, indeed, choose to bring it forward, by way of plea, he may insist on it in an answer. But if he does, the whole case made by the bill and answer is open for consideration; and the party cannot claim to have that part of his answer, as constituting a distinct and substantive bar, disposed of before the cause is ready for hearing on all the pleadings and proofs. It is doubtless competent for the court, upon the hearing, to decline entering into other parts of a cause, if there be one decisively against the plaintiff. But that is only to save time and unnecessary labor, and is a decision of the court in the cause, when the whole of it is open to discussion upon the hearing, and is very different from setting the case down to be heard upon the bill, one particular part of the answer, and the replication to it. There is, in fact, no plea to be argued. There is an answer, and the cause now stands on a general replication to it, and therefore the equity cannot be denied until the case shall come on regularly to a hearing.

(409) A similar reason sustains the particular order complained against. It is contrary to the course of the court to order a reference for taking accounts, on motion. It involves the whole merits of the cause, since such a reference can never be made until the defend-

ant is found by the court to be bound to account; and that is the question to be decided at the hearing. Inquiries as to particular facts may, indeed, be ordered upon the hearing, in aid of the Chancellor, upon matters reserved for further directions; but a reference to take an account upon a bill, whose sole object is to get such an account, is a peremptory adjudication of the defendant's liabilities, according to the result as it may be found by the master, and overrules all the bars set up in the answer, so far at least as to prevent the bill from being afterwards dismissed. If it be said that the reference asked was to be without prejudice, the reply is obvious that, as an order of the court *in invitum,* such an order is incongruous and absurd, since it professes to reserve that for future adjudication, which, by the import of the same order, has been already determined. The parties may consent to such a proceeding for the purpose of speeding the cause, and the court may require in a proper case such consent from a party as a condition on which a favor may be granted to him. But without consent, the court can never make such an order. Attempts have been made, upon the pretext of a loose practice in our courts, to escape from the consequences of a reference by treating the case as still open to the equity of the defendant; but such attempts have not been sanctioned by this Court. *Bruce v. Child,* 4 Hawks, 372. It is deemed safe and proper to adhere to the established rules and practice of courts of Equity. It must, therefore, be certified to the court of Craven that, in the opinion of this Court, there is no error in the order of that court, from which the plaintiff appealed, and the appellant must pay the costs of the appeal.

PER CURIAM. Decree below confirmed.

Cited: McDonald v. McLeod, 36 N. C., 224; *McCaskill v. McBryde,* 37 N. C., 53.

(410)

GARNETT NEELY v. NATHANIEL TORIAN.

Where a man in embarrassed circumstances, whose property was advertised for sale under a deed of trust, was induced to permit a tract of land, which he would not have had sold if the trust could have been otherwise satisfied, to be exposed to sale, by the promise of one who wished to buy it, that he should have time to redeem it; and the effect of this promise was to stifle competition and enable the person making it to purchase at an under-value, a court of Equity will compel such purchaser to submit to a redemption, and the act of 1819 (Rev., ch. 1016) will be no bar to such relief.

THE bill of the plaintiff charged that the plaintiff became indebted to the State Bank in the sum of eight hundred dollars, or thereabouts, and that Samuel Mitchell and James Currie were bound as his sureties therefor; that to indemnify his sureties the plaintiff conveyed in trust to one John B. McMullin two tracts of land, two negro slaves, his stock of horses, cattle and hogs, and all his other property; that a suit was brought by the bank against the plaintiff and his sureties, and a judgment obtained therein at the January Term, 1832, of Caswell County Court; that execution issued upon this judgment, returnable to the April Term following of said court, and that the trustee advertised a sale of the property so conveyed, in order to raise the amount so recovered, to take place at the plaintiff's house on 3 April, 1832. The bill further charged that a large number of persons attended at the time and place appointed; that one of the negroes was sold at the price of four hundred dollars, and that then the defendant, professing a desire to serve the plaintiff, agreed with the plaintiff to bid off the plantation on which he resided, and whereon there was a valuable mill, to advance the residue of the money wanted to satisfy the execution, and to permit the plaintiff to redeem the same on repaying within a reasonable time the sum so advanced, and interest; that Samuel Mitchell was called as a witness to this agreement; that thereupon the said plantation was next set up for sale by the direction of the plaintiff, and bid off by the defendant at the price of six hundred and eleven dollars.

(411) The bill charged that the plantation was worth two thousand dollars; that it would have commanded at that sale at least one thousand dollars, but that the persons present were the neighbors of the plaintiff, commisserated his situation, and were aware of the agreement which had been made between him and the defendant, and understood that the purpose of the defendant in bidding was to befriend the plaintiff. The bill further charged that on the second day after the sale the defendant paid to the trustee the sum of five hundred and twenty-one dollars and sixty-eight cents, being the amount which was required in addition to the money raised by the sale of the slave before mentioned, to discharge the execution, but had never paid nor offered to pay the residue of the price of the land; that on 14 August, 1832, the plaintiff, having raised the money which had been paid by the defendant, tendered the same to him with interest; when the defendant refused to receive it under pretense that the plaintiff had suffered the time to elapse within which the defendant would have allowed him to redeem; and the defendant insisted that the sale had then become absolute. The plaintiff averred that he was still ready to pay, and by his bill proffered to pay the sum advanced by the defendant, with interest thereon, but charged that the defendant had taken absolute conveyances

from the trustee, and instituted an action of ejectment to turn the plaintiff out of possession. The plaintiff prayed a writ of injunction to restrain the defendant from further prosecution of the action of ejectment; that the defendant might be decreed to convey the land to the plaintiff on payment of the sum advanced and interest thereon, and for further relief. Upon the filing of this bill, a writ of injunction issued to restrain the defendant from prosecuting the action of ejectment further than to judgment. The defendant put in his answer to this bill, whereby, admitting his purchase at the sale by the trustee of the land mentioned in the plaintiff's bill, at the price therein stated, and that he had taken a conveyance from the trustee for the said land. He explicitly denied having entered into the agreement charged, or having said or done anything for the purpose of preventing competition at the sale, or his knowing or believing at the time of the sale that the bystanders were under any impression that he was (412) bidding to befriend the plaintiff, or under any agreement with the plaintiff. The defendant, in and by his said answer, set forth that, understanding that the sale was to take place, he attended thereat, with the view of making some purchases, by means whereof he might save some small debts therein particularly stated, due to him from the plaintiff; that applications were made to him by the plaintiff to advance the money required and take a deed of trust on the land for security, which he rejected; that just as the sale was about to commence the plaintiff requested him, if he became the purchaser, to give to the plaintiff a chance of redeeming the land, declaring that he, the plaintiff, could in three days get the money to pay off the bank debt from William McKissack; that thereupon, without apprising the plaintiff of what he meant to do, the plaintiff called on Col. Samuel Mitchell, one of the sureties for whose indemnity the sale was to be made, and inquired whether the price was required to be paid down; that Colonel Mitchell replied that if the money were paid by the Wednesday of the next Caswell County Court it would do; that he (Col. Mitchell) had offered the same terms to the plaintiff, and would do so to the defendant, and that the defendant then remarked that the plaintiff had stated that he could get the money in three days, and that if the defendant bought the land and the plaintiff raised the money in three days he (the defendant) would give up the land.

The defendant denied that any contract, agreement or understanding, further than as above stated, existed between him and the plaintiff upon the subject. The defendant further denied that he made known the agreement, such as it was, to the company assembled, or any one of them; or in any manner intimated that any understanding existed on the subject, or that he had either knowledge or suspicion that the

company believed that any understanding for redemption did exist; and declared that he had determined not to bid for the land more than seven hundred dollars; and that he had been informed by most of the moneyed men in the neighborhood that it brought about its (413) value. The answer further stated that the defendant, finding that the plaintiff did not or could not get the money according to his expectations, on 6 April paid McMullin, the trustee, five hundred dollars and sixty-eight cents; that the plaintiff was present thereat and consented to the residue of the purchase money remaining in the defendant's hands until a settlement should be made with respect to the defendant's claims before referred to, amounting in the whole to about seventy-seven dollars. The defendant admitted that on 14 August, 1832, the plaintiff came to him with witnesses and offered to repay the purchase money, which the defendant refused to receive; but the defendant offered to pay the plaintiff the residue of his bid, after deduction of the claims aforesaid; which offer the defendant rejected. The defendant further prayed by his answer to have the benefit of the act of 1819, avoiding parol contracts respecting the sale of lands and slaves, as fully as if he had especially pleaded the same; averring that neither the said pretended agreement, nor any part thereof, nor any memorandum thereof, was ever reduced to writing. Upon the coming in of this answer, a motion was made to dissolve the injunction, and thereupon the court ordered that the same should be dissolved unless the plaintiff should, by a given day, deposit with the clerk and master the sum paid by the defendant, and interest thereon. The money was paid into the office accordingly. The plaintiff filed a general replication to the answer. The parties proceeded to their proofs; and these being completed, the cause was set down for hearing and removed to this Court.

W. A. Graham for plaintiff.
J. W. Norwood for defendant.

GASTON, J. The plaintiff founds his claim to relief not on the ground of the specific execution of a contract respecting the sale of a tract of land, but on the ground that the defendant has taken an unconscientious advantage of the plaintiff in getting his land at a price below its value, and below what it would have commanded had not competition at (414) the sale been prevented by the defendant's unfair practices. We have diligently examined the proofs to ascertain whether they make out this claim to relief. If they do, the act of 1819 is certainly not in his way. How it might be, if the bill were brought simply to execute the agreement between the parties, it is not necessary to determine. Whatever difficulty there may be in ascertaining the truth

of this transaction in other respects, it is certain that an almost universal belief prevailed among those present at the sale that the defendant was purchasing or bidding as a friend of the plaintiff, and under some agreement for the benefit of the plaintiff. Fourteen persons who were present at the sale have been examined, and eleven of these, and among them the trustee and the crier who conducted the sale, state explicitly that such was their impression; and several of them testify that such was, as far as they had means of knowing, the belief of all the bystanders. One of the remaining three, Col. Mitchell, states what took place, and says nothing as to what was his impression. The other two testify only that they heard nothing said and saw nothing done by the defendant to excite this belief; but even one of these (Russel), it is shown by other testimony, when called on to bid at the sale, declined to do so, and gave as a reason that he could not get the property, as the plaintiff had a bidder there to befriend him. It is also satisfactorily shown that the effect of this general impression and belief was to put down competition, and to enable the plaintiff to get the land at a price, not only below its value, but less than that which it would otherwise have commanded. It could scarcely have been otherwise. After a price had been offered sufficient to indemnify the sureties, not only the ordinary inducements for competition would be removed by the belief of such friendly arrangement between the debtor and one of the bidders, but a further interference with the bidding would have been deemed an odious act. That the land was sold below its real value is not to be doubted. The defendant admits that he had intended to bid as far as $700, and seems to have expected to secure thereby a debt of upwards of $70 which the plaintiff owed him. The persevering (415) efforts of the plaintiff to redeem, and the strenuous resistance on the part of the defendant to redemption, furnish full evidence that the purchase, if an absolute one, was *"a bargain."* But the effect of this impression, to put down competition, is expressly proved. Douglass, the crier, in his first deposition, testifies that William McMurray arrived after the land was set up for sale, and, seemingly in haste, bid for the land several times; that suddenly he stopped bidding, requested the crier not to be in haste, and went off, saying that he would return presently, and then say whether he should bid again or not; that after some time he returned and said to the crier (but the witness does not know or believe that this was heard by the defendant) that he had come for no other purpose than to befriend Neely by buying the land and giving him an opportunity to redeem, but as Neely had got Torian to befriend him, he should not bid *against Torian;* and, thereupon, in the words of the witness, "I continued to cry the property, and made every exertion I could to get a *higher bid,* but found it in vain. The trust was satisfied.

I was told Mr. Torian was to befriend Neely by giving him time to redeem the land and mill, and *so* Mr. Torian was the last and highest bidder." McMurray testifies that he did not bid for the land, and should have bid more, but that Green W. Brown informed him that there was an understanding between the plaintiff and defendant which stopped him; that the witness then apologized to Neely for having bid, and that Torian was not far off when he made the apology; and that in the evening after the sale the witness said something to the defendant, but he does not distinctly recollect what, about the redemption, when the defendant replied, "If Neely will do right, I will." What was the precise agreement between the plaintiff, if any, in relation to the defendant's purchase, and whence arose the general belief that the defendant's purchase was not to be an absolute one, are inquiries involved in more doubt. The first material circumstance bearing upon these questions appears from the testimony of Enos Ross. A short time before (416) the day of sale, the witness was at the mill of the defendant, and inquired of him whether the plaintiff's mill would be sold, when defendant said that he expected not, for that the plaintiff could get $400 for his negro boy from Brooks, and the suit which the plaintiff had against Roan would enable him to do without selling the mill, as he could raise the balance upon the strength (meaning, no doubt, the *security*) of his mill.

The information respecting the sale of the boy to Brooks was correct, for we learn from *his* testimony that although he bid off the boy at the trustee's sale, it was in formal completion of a prior contract between himself and the plaintiff to purchase the boy at the stipulated price of $400. Green W. Brown arrived at the place of sale at an early hour, and was applied to by the plaintiff to purchase the land and hold it as a security until the plaintiff could redeem it. Brown declined acceding to the proposition, and then learned from the plaintiff his determination to have every other thing in the trust deed sold rather than the land, unless he could get some one to befriend him. About this time, but before any sale had begun, it appears from the testimony of Thompson Neely, the defendant came into the mill, examined her, and asked whether the plaintiff (witness' father) had made any arrangements to save the mill, when witness informed him that his father and Brown were at the house, together, and, as witness expected, engaged upon that business. The plaintiff and Brown returned, and then the plaintiff applied to the defendant to befriend him, buy in the mill, and wait until he could raise the money. The defendant, according to the testimony of this witness, at first declined, stating as a reason that he should be obliged to borrow the money, or a part of it at least, if the plaintiff did not have it ready by the Wednesday or Thursday week, the return term

of the execution. The plaintiff expressed his confidence that he could get the money by that time, through Maurice Smith, of Granville, to whom William McKissack, of Person, had promised to recommend him, and added that if he should fail to get the money in time he would pay the defendant *any interest* defendant *might require,* observing at the same time that he had money due to him. The defendant (417) asked what, if the plaintiff should not get the money by the time, was the defendant to do, and what security would he have? And the plaintiff answered, "Hold on the land; it is good for the money any time." And the defendant replied that he believed it was. The witness further states that the defendant said he must walk out, but would see the plaintiff again; that some time afterwards he saw the parties and Colonel Mitchell together in conversation, and when they separated he walked to Colonel Mitchell and asked him what they were going to do, when the colonel said they were going to sell the *boy* first, and then the defendant was to buy in the land for his father and give him a reasonable time to pay it. The next testimony in point of time, and very important testimony it is, is that of Col. Samuel Mitchell. As one of the sureties for whose indemnity the property had been conveyed, he attended at the sale. He declares that he was called to the parties, plaintiff and defendant, by one or the other, but is not positive which; that the defendant said that he had an idea of bidding for the land and mill, but that he had not the money in hand; that the witness observed that if the money was paid by the Wednesday of the following week (the week of Caswell County Court) it would be as good as at the present moment; that the plaintiff stated that by that day he thought he could pay the money himself, for that he had a prospect of getting it from William McKissack, and should go in a day or two and get it and pay it to the trustee; that the defendant replied, "If you can do so, you can still retain your land and mill"; that plaintiff inquired, if he should fail to get it in time, but should get it in a few days, or otherwise in some short and reasonable time afterwards, whether it would not answer the purpose, and the defendant replied that he did not know that it would make any difference. Witness added, "With interest?" and defendant said *that* was understood. The witness adds that he did not understand that the defendant had determined to bid off the land *at any rate,* and that he does not recollect, nor does he think that he told young Neely, that the defendant was to bid off the land and allow his father to redeem it, or words to that import. It then (418) appears that, immediately after this conversation between the parties and Colonel Mitchell, the negro boy, which Brooks had contracted with the plaintiff to buy at $400, was set up and bid off by him, and then the land was set up; that the defendant took his seat, had no

conversation with any one in relation to his purposes, and, after some bids by Colonel Mitchell, McMurray and others, became the highest bidder, as stated by Douglass.

Before passing upon the effect of this evidence, it is proper to consider of some remarks which have been made upon the testimony of young Neely. The young man represents the defendant as stating, before the conversation with Mitchell, that he might be obliged to borrow the money if it was not ready by the Wednesday or Thursday of the next County Court; and it is asked, "How could he know, as the sale was advertised to be for cash, that the parties interested would wait for the money until that time?" It does not seem to us that this supposed incongruity subjects his testimony to suspicion. It was known that the sole object of the sale was to have the money in time to satisfy the execution, and it could scarcely be doubted but that the persons interested would not object to an indulgence which was consistent with this object. The defendant's answer informs us that when he was distinctly assured by Colonel Mitchell that the indulgence would be granted to him if he bought, Colonel Mitchell said that the plaintiff had been previously informed that *he* should have this indulgence; and it is exceedingly probable that the defendant was apprised by the plaintiff of this previous assurance. It was natural, however, for the defendant, notwithstanding such his belief, and such information from the plaintiff, to get a distinct and direct assurance from Colonel Mitchell before he ventured to act upon the faith of this supposed indulgence. So far as there may be a discrepancy between the testimony of Colonel Mitchell and that of Thompson Neely, we have no hesitation in placing superior confidence in the accuracy of the former. We believe, therefore, that

(419) he did not tell Thompson Neely that the defendant was to bid off the land, particularly as Colonel Mitchell did not understand that the defendant had bound himself to bid it off at any rate; but we have little doubt that, in answer to young Neely's inquiries, he stated what had taken place; and it was very natural for the latter, after what had occurred in the mill, to understand the communication as he represented it.

From this testimony we infer that the defendant knew that the plaintiff was anxious to prevent the sale of this tract of land, and believed that the plaintiff might save himself from this evil by procuring money upon the security of this land to pay the balance of what was required to be raised; that with this knowledge of the plaintiff's necessities and wishes, and this belief of his ability to save the land, he encouraged the plaintiff to believe that his object would be effected through the means of a formal sale to the defendant, who would not take a title if the plaintiff should be able to raise the sum demanded by the Wednesday

of the succeeding week, and would permit the plaintiff, if disappointed in then raising the money, and the defendant should be obliged to advance it, to redeem the land by repayment of the sum advanced and interest (possibly more than ordinary interest) within a reasonable time; that the plaintiff caught eagerly at the expectations thereby excited, and, in full confidence that they were well founded, not only declined further efforts to save this land, the home of himself and his family, and the property which he was most reluctant to part with, either by a sale of the other articles comprehended in the deed of trust, or by arrangements to obtain aid from his friends on the faith thereof; that the defendant could not but see that he had raised these expectations, excited this confidence, and thereby induced the plaintiff to direct the land to be set up for sale; that the defendant also foresaw that, upon a sale so directed, he was likely to purchase the land without full competition, and that he has thus obtained it at a price much below its actual value and less than it would have brought had a fair competition taken place. But these inferences of unfairness on the part of the defendant are supposed to be repelled by the testimony of Dr. McMullin. He states that on Friday, 6 April, he applied to the (420) plaintiff, in order to get the courses of the land, by which to make out the deed from himself, as trustee, to the defendant, as purchaser; and that the plaintiff produced the original title-deed from which he extracted them; that the plaintiff inquired of him whether he intended to charge commissions, and upon being answered in the affirmative, declared that he would not allow them, as they were already charged by the sheriff; that the plaintiff went with the witness to the defendant to forbid the defendant from paying commissions to the trustee; that he heard nothing said against the deed, nor did the plaintiff, on that occasion, allege that any understanding existed between him and the defendant; that as the plaintiff and witness were walking on, the plaintiff complained that his property had sold far below its value; that the witness remarked that it was very possible that the land would have sold for a higher price if an impression had not existed among some of the persons present that the defendant was purchasing or bidding as the plaintiff's friend and was to give him the privilege of redemption, when the plaintiff disavowed the alleged understanding with indignation and as though he was offended that such an impression should have existed. The witness does not testify as to what occurred after he and the plaintiff reached the defendant's house, further than that, in answer to an interrogatory of the defendant, he stated that there was a balance left in defendant's hands after satisfying what the trustee wanted; that no objections were made thereto by the plaintiff, and he was under an *impression* that there was to be a *settlement* between the

parties; that he *"had* heard" (but does not state when) the defendant say that the plaintiff owed him about $70. On the same day the witness took a receipt from the plaintiff for the whole amount of defendant's bid, in order to close the trust; and on 20 April, afterwards, he returned to the plaintiff $21.95 commissions, which, until then, he had retained on the amount of the sales made by him under the deed of trust.

It is not so much what appears upon this deposition as what does not appear, and might reasonably have been expected to appear, had it occurred, that renders it difficult to reconcile this deposition with (421) the testimony already examined. It is not so strange that the plaintiff should have *said nothing* to the witness against making the deed, or in relation to the understanding between the plaintiff and the defendant, for the witness came in character of trustee, and no understanding between the plaintiff and defendant could discharge the trustee from the obligation to make the deed when the defendant was ready to pay the money. The trustee had no concern whatever with that understanding. But it is strange if we are to collect from this deposition that such was the case, that nothing was said about the defendant paying the money so much in advance of the day when the sureties for whom the trustee acted required it to be paid. The deposition, however, does not negative the fact of any remark being made on that subject; and as it is expressly stated in Thompson Neely's deposition, and as from the manner in which testimony is taken in our courts of Equity, the contents of that deposition were known to the defendant, and he has not, by a reëxamination of Dr. McMullin, as he might have done, contradicted Neely; in this respect we must conclude that Dr. McMullin is not to be understood as intending to negative the fact. The witness Neely states that on the second day after the sale (we presume it was on the third, for the doctor had probably, by means of his memoranda, the means of affixing the day with most precision) the trustee came to his father's house and requested his father to aid him in making out the deed for the land, and the plaintiff inquired why he wanted to prepare the deed, when the trustee observed that he was going to draw the money, and the defendant required to have a deed before he paid it; and that the plaintiff did remark that this was contrary to their understanding, for that the money was not to be drawn from defendant until the Wednesday or Thursday of next week; that the plaintiff asked how much of the money he meant to draw, and McMullin said the whole amount bid; when the plaintiff forbade him taking more than was required to satisfy the trust; (422) that the plaintiff also objected to paying the trustee any commissions because a commission had been allowed to the sheriff; and adds that McMullin assigned as a reason for not waiting for the

money that he was responsible for it as trustee—had no security for it—and therefore would have the money. This testimony is not in conflict with that of the other witnesses. The understanding referred to is not the understanding between plaintiff and defendant, to which Dr. McMullin declares no allusion was made, but the understanding between Col. Mitchell on the one side and the plaintiff and defendant on the other. The reason assigned for requiring such immediate payment is at least plausible, and the *only* circumstance to be found in the case tending to explain the unexpected haste with which the trust was closed. The understanding that the money was not to be demanded until the Wednesday of the court is admitted by the answer, is proved by Col. Mitchell, and can scarce be believed to have been unknown to the trustee. It is difficult to understand how the plaintiff could have disavowed any understanding with the defendant with regard to the sale not being purely absolute, unless it be an understanding which he supposed could be *enforced.* As to the fact of some understanding to that effect there is no doubt. The defendant admits in the answer that the sale was not to be absolute if the money were raised in three days. Col. Mitchell declares that it was certainly not to be absolute if the money were raised by the Wednesday of court, nor if paid with interest in a short time thereafter. The defendant admitted to William McMurray that there was some understanding, and that if the plaintiff did what was right, *he* should; and Enos Rogers states that two weeks after the sale he observed to the defendant that the defendant had got the land very low, but supposed that Neely had the chance of redeeming it; when defendant answered that "he had had the chance, but that defendant did not know how it was then." The indignation which the plaintiff manifested was indeed natural if it were excited by the *effect* on the sale of his land, consequent upon the belief that the defendant was acting as his friend, or at the discovery that this belief was (423) about to prove unfounded, or if directed against the defendant, or the trustee for the harshness of the course apparently about to be pursued against him, but is inconceivable unless the witness misapprehended either its cause or its object.

This deposition is silent with regard to a very important part of this case, of which some explanation ought to be given by the defendant—and of which, if any satisfactory one could be given, this witness had the peculiar means to know it—why was it that the defendant paid the purchase money before the day when, according to his own statement, *he* was to be permitted to retain it, and according to Col. Mitchell's testimony *the plaintiff* was to be allowed to raise it? Had the plaintiff declared his inability to procure the money? Had he waived the in-

dulgence so anxiously stipulated for? Was it because of the importunities of the trustee upon the defendant to close the trust and to be freed from responsibility? Did the defendant remind the trustee that the delay was for the plaintiff's accommodation rather than for the defendant's? Or, rather, was the defendant himself prompt and eager to pay the money and get a title as soon as a deed could be prepared? Even the three days of grace, which he concedes in his answer were to be allowed, had not elapsed before he foreclosed the plaintiff; and not a fact is shown to account for this manifest departure from the understanding of all parties in relation to the sale; a departure which had certainly a tendency to discourage the plaintiff from making efforts to raise the money, and which it is very difficult to reconcile to fair dealing.

Our conclusion upon the whole testimony is that the defendant has deceived an embarrassed man into an assent to the sale of his land to the defendant, through the trustee, by taking advantage of his distress and exciting false hopes that the sale should not be treated as absolute, but that the land might be redeemed within a reasonable time. That thereby the defendant has obtained the land at an inadequate price, and at a price less than the plaintiff, but for this deception, would have procured; and that, in conscience, the defendant cannot retain
(424) the unfair gains thus acquired, but can avail himself of his legal title only, as a security for what has been advanced on the faith of it.

Connecting the circumstances mentioned, as before stated in the deposition of Dr. McMullin, relative to a settlement between the parties, with the fact stated in John McMurray's deposition, that when the plaintiff tendered to the defendant the price he had paid for the land he also offered to pay the defendant's shop account, we feel ourselves warranted in holding that the demands which the defendant had against the plaintiff when the sale took place were intended by both parties to be secured thereby, and ought therefore to be regarded as advances. If these have not been satisfied, the defendant may have their amount ascertained by a reference.

The purchase money is already in court, and the defendant is permitted to receive it whenever he may make demand therefor. If the account should not be taken before 20 July next, the defendant must be understood to waive it.

The plaintiff is declared entitled, on payment of any balance of account that may be found due, to have a decree for a perpetual injunction against disturbing his possession of the land in question; for the payment by the defendant of all the costs in the action of ejectment

heretofore brought; for a conveyance, by the defendant to the plaintiff, of the said lands, with covenants against the acts and encumbrances of the defendant; and for the costs of the plaintiff in this suit, to be taxed by the clerk thereof.

PER CURIAM. Decree accordingly.

Cited: Rich v. Marsh, 39 N. C., 398; *McLeod v. Bullard,* 84 N. C., 528; *Cheek v. Watson,* 85 N. C., 198.

(425)

JOHN SCOTT ET AL. v. JOHN DUNN ET AL.

Where an executor sold lands and applied the proceeds to the payment of debts, under a mistake of his power, and the purchaser is evicted by the devisee, the land in equity will be subjected to indemnify the purchaser, to the extent to which his money was applied to the debts, over and above the personal estate.

THE bill charged that William Kooling, the elder, by his last will and testament, whereof he appointed the defendant Dunn and others his executors, after directing all his just debts to be paid, devised a certain tract of land, in distinct parcels, to his two sons and five grandsons, the other defendants to the bill. That after the death of the testator, the defendant Dunn alone proved the will, and finding that there was an insufficiency of personal assets to satisfy the debts of the testator, and believing that by the will the land devised was so charged with the payment thereof as to authorize him to sell it, advertised the same for sale at public auction; that the plaintiffs became the purchasers at said auction, at the price of two hundred and forty-two dollars and fifty cents; have paid the whole purchase money to the executor Dunn, and received from him a conveyance in fee, accordingly. The bill further charged that the title to the land being contested by the defendants, the devisees, the plaintiffs instituted an action of ejectment to establish it, and to recover possession thereof; but failed in said action because, in law, the executor had no authority to make the sale aforesaid. It also charged that of the purchase money so paid by the plaintiffs all but the sum of one hundred and one dollars and seventy-eight cents was applied by the executor to the payment of the debts of his testator, and that this sum yet remained in his hands; and it prayed that the defendant Dunn might be decreed to refund to the plaintiffs the part of the purchase money remaining in his hands; and as to the residue, that the necessary accounts might be taken to ascertain whether the whole per-

sonal estate was not administered in the payment of debts, without fully paying the same (should the matter be denied by the de-
(426) fendants), and that the plaintiffs might stand in the place of the creditors who have been thus satisfied, and who might have enforced these demands against the land; and that the land might be decreed to be sold for the payment thereof. The answer of the executor admitted all the substantial allegations in the bill except that it averred that he received from the plaintiffs but the sum of one hundred and eighty dollars in payment for the land, and that the whole of this was applied to the payment of the testator's debts, except the sum of ninety-five dollars and eighty-six cents, which is admitted to be yet in his hands, and which sum he was willing to pay over as the court might direct. To this answer was annexed an account of his administration of the assets of his testator, which showed a result corresponding with that above mentioned. The other defendants, the devisees, admitted the execution and probate of the will and the sale of the land, as charged, but insisted that the personal estate was fully sufficient for the satisfaction of all the debts of the testator; and denied the right of the plaintiffs, if the personal estate had been insufficient, to be subrogated to the rights of the creditors of the testator, because the law had pointed out the course to be pursued in subjecting the real estate of deceased debtors to the satisfaction of their debts, after the personalty has been exhausted, because they, the devisees, had in no way contributed to the blunders of the executor in transcending his authority, or to inducing the plaintiffs to purchase at his unauthorized sale; because if the plaintiffs had any relief it should be sought against the defendant Dunn alone, and in a court of common law: because the plaintiffs had knowledge of the will and that it gave the executor no power to sell; because the land was purchased at an under value by reason of misrepresentation of the plaintiffs that they were purchasing for the benefit of the devisees, and because, although they purchased at the price of two hundred and forty-two dollars, and gave bond for the payment of that sum, on a credit of nine months, they, on the day after the sale, obtained from the defendant Dunn a surrender of the land by paying to him in cash the sum of one hundred and eighty dollars only.

(427) The cause was set down for hearing upon bill and answer.

Badger for plaintiffs.
W. A. Graham and Norwood for defendants.

GASTON, J. There is no contest between the plaintiffs and the defendant Dunn as to the money of the plaintiffs not paid over, and for this sum they will of course have a decree against him.

The claim of the plaintiffs to be substituted to the creditors, whose demands they have satisfied, is supported, we think, by well-settled principles. By the laws of this State, real as well as personal property is liable for debts of every description, but personal property is the primary fund for their satisfaction. It is alleged that the personal assets were insufficient for the discharge of all the debts. Whether this be the fact or not can only be ascertained by taking an account of the assets and of the administration of them. If in taking the accounts the fact should be established as alleged, then it follows from the doctrine sanctioned in the cases of *Williams v. Williams,* 2 Dev. Eq. Reps., 69, and *Saunders v. Saunders, ibid.,* 262, that the defendant Dunn would have a right in a Court of Equity to be subrogated to those creditors who have been paid by his advances. As between Dunn and the plaintiffs, if their money were yet in his hands he could not retain it with a safe conscience, and would be obliged to refund it. And it seems to us clear that if he could rightfully reclaim it from his codefendants he might be compelled to assert this right or permit the plaintiffs to assert it in his name, in order that it might be refunded. The court would do this upon the same principle by which the surety on making satisfaction to the creditor becomes entitled to demand every means of enforcing payment which the creditor himself had against the principal debtor; a principle which, when traced to its origin, is founded on the plain obligations of humanity, which bind every one to furnish to another those aids to escape from loss which he can part with without injury to himself (Home's Princl. of Equity, 84). As (428) all the parties are before the court, complete justice may be done by deciding direct relief to the plaintiffs. The objections urged in this case are not, in our opinion, sufficient to repel the claim here advanced. There can be no relief at law as to the money paid over, either against Dunn or the devisees. Not against him, for it has been applied in conformity to his agreement with the plaintiffs; not against the devisees, for between the plaintiffs and them there has been no contract. The doctrine of substitution which prevails in equity is not founded on contract, but, as we have seen, on the principles of natural justice. Unquestionably the devisees are not to be injured by the mistake of the executor as to the extent of his power over their land, but that mistake should not give them unfair gains. The executor was not an officious intermeddler in paying off the debts of his testator; and his erroneous belief that he could indemnify himself in a particular way should not bar him from obtaining indemnity by legitimate means. It is not a question here whether a mistake of law shall confer any rights, but whether such mistake shall be visited with a forfeiture of rights, wholly independent of that mistake.

It is immaterial to the devisees whether the price at which the land was sold was a fair and full price or not, for that sale is not sought to be established. It is also unimportant for any purposes now under consideration to inquire wherefore the land was surrendered on payment of a sum less than its amount; for certainly no relief will be granted except in respect to the sum actually paid. When the disposition of the costs shall come before the Court then this circumstance, and others of a like kind, will receive the consideration to which they may be entitled. The Court therefore declares that the plaintiffs may have the accounts taken as prayed for, and reserves the further consideration of the case until the coming in of the commissioners' report.

PER CURIAM. Decree accordingly.

Cited: Laws v. Thompson, 49 N. C., 107; *Springs v. Harven,* 56 N. C., 99; *Holt v. Bason,* 72 N. C., 310; *Wall v. Fairly,* 77 N. C., 108; *Perry v. Adams,* 98 N. C., 173.

(429)

DAVID W. DUDLEY v. JAMES C. COLE.

1. Where the plaintiff in an execution obtained his judgment by fraud—there being no debt due him—and fraudulently prevented the defendant having it reversed, in equity he shall have no benefit from a sale under it.
2. Whether the purchaser of a stranger to the judgment would be protected? *Quere.*

ON 1 June, 1824, William Orme, in the name of John Simmons, to the use of Orme, sued out a warrant against Morris Ward for the sum of one hundred dollars, due by note, on which judgment was rendered by Daniel Smith, a justice of the peace, on the 5th day of that month for the sum demanded, and costs. On 28 March, 1825, Orme sued out a *fieri facias* thereon from another justice of the peace, and caused it to be levied on 1 June on a tract of land belonging to Ward, and returned to Jones County Court, and there obtained an order of sale; and on 12 September following, the sheriff exposed the land for sale, and Orme became the purchaser at one hundred dollars and took the sheriff's deed. Afterwards William Orme died intestate, leaving one Robert Orme his heir at law, against whom judgments were rendered and executions issued in 1830, under which the defendant Cole purchased the same land, as the property of Robert Orme, and took the sheriff's deed. Cole thereupon brought an ejectment against Ward, who still continued in possession.

The original bill was brought in 1833 by Ward, *in forma pauperis,* and alleged that the judgment against him was fraudulently obtained, and the sale under it fraudulently made; and specially charged the following matters as constituting such fraud:

That the plaintiff did not owe Orme or Simmons any sum secured by note, nor any sum of money whatever, but that Simmons had been indebted to Ward by sundry bonds, of which one was for the sum of one hundred dollars, which had been placed in the hands of one Franks for collection; that Ward and Simmons came to a settlement, on which the former gave to the latter an acquittance against the bond held by Franks, and therein engaged to surrender or cancel it; (430) and that accordingly, by the consent of Ward and the directions of Simmons, Franks destroyed the bond before the year 1824; that Orme afterwards came into possession of the plaintiff's receipt to Simmons, and issued the before-mentioned warrant on it, which was served on 1 June, 1824, by one Lee, a constable, who summoned Ward to trial on the 5th of the same month at Trent Bridge, the usual place of trial in that district, and the place of Orme's residence; that Ward accordingly attended by the usual hour of trial, namely, the middle of the day, and requested Lee to return the warrant before a justice of the peace, who was then sitting to try all the other warrants, returnable there on that day; that Lee then informed him, and such was the fact, that in the early part of the day Mr. Smith had been passing by on his way to New Bern, and had been requested by Orme to stop and try that warrant, and that he did so, and gave judgment by default, without any evidence but the production of the receipt itself, and left all the papers with Orme, and immediately proceeded on his journey. The bill further charged that Ward immediately applied to Orme himself to produce the warrant for the purpose of a second trial before a magistrate then sitting on other warrants, which he refused; that in consequence thereof, as soon as Mr. Smith returned home Ward stated to him, on oath, his defense, and the advantage that had been taken to deprive him of it; whereupon Smith granted a new trial, and on 14 June, 1824, issued and delivered a written notice thereof to Lee, requiring him to have the parties and papers before a justice of the peace for such second trial, but that Orme refused to deliver or produce the papers; that Ward believed the judgment to be then superseded and no longer binding, and consequently that no steps could be taken against him in the matter until he should be again sued; that he knew and suspected nothing to the contrary until September of the succeeding year when, being at the courthouse, he heard the sheriff set up his land, under an order of sale, and upon inquiring discovered that in March, 1825, Orme had obtained from another justice of the (431)

peace living in a remote part of the county an execution on the judgment, and had caused it to be levied on his land by one McDaniel, a constable, also residing in another and remote district, and returned to court, and had obtained the order of sale—all without notice to Ward: that Ward then applied to the sheriff to know what process was in hands against the land, and was told by him that, besides Orme's, he had an order of sale at the suit of one Bryant, and that if he would pay the debt to Bryant the sale should then be solely at the instance of Orme; and that Ward immediately paid Bryant and took his receipt for the debt, in the presence of the sheriff, to whom he was also ready, and offered to pay the costs; that the sheriff then proceeded in the sale as upon Orme's execution only, when Ward gave public notice of his intention to resist the sale and seek relief against it; but that Orme, notwithstanding, purchased as before mentioned and took a deed from the sheriff in which it was recited that the sale was made under both writs; that the application of any part of the price to the costs in Bryant's suit was unknown to Ward, who had been assured publicly that the sale was under Orme's execution only. The bill then stated that Ward refused to give up the possession, but continued to claim and reside on the land up to the time of the sheriff's sale to Cole under the execution against Robert Orme, and at that sale gave open notice of his right to all bidders, and particularly to a Mr. Roe, who bought the land as the agent of Cole, the defendant.

The prayer of the bill was for a reconveyance of the land; that the defendant might be enjoined from proceeding further in his action at law, and that the plaintiff might be quieted in his possession.

The answer denied all personal knowledge or information on the part of the defendant of any of the circumstances stated in the bill, touching the nature of William Orme's demand against the plaintiff or his method of proceeding thereon; and insisted that, as the same appeared of record to be regular, neither they nor the sale under them could be impeached for fraud as against him, because he was not a party (432) nor in anywise privy thereto, and was ignorant thereof when he paid his purchase money and took his deed from the sheriff. The answer admitted that the plaintiff continued in possession when the defendant purchased, and that he gave notice of his claim to the agent Roe, who made the purchase for Cole. The answer further stated that the sale in September, 1825, was under Bryant's execution for the costs due thereon, as well as under Orme's for the debt and costs, and that both are recited in the sheriff's deed to Orme; and insisted that at all events the title passed by virtue of the former.

By an interlocutory order the plaintiff was required to suffer judgment to be entered against him in the action of ejectment, and the de-

fendant was enjoined from proceeding thereon, or otherwise disturbing the plaintiff until the hearing.

After replication and taking depositions, Ward died, having first devised the land in dispute to David W. Dudley, the present plaintiff, who revived the suit by a supplemental bill and bill of revivor; and the cause being ready for hearing, was transferred to this Court.

The defendant exhibited transcripts of the records of the county court, and also the deed made by the sheriff, from which it appears that the judgment and execution against Ward were for the sums and of the dates before mentioned, and that the sheriff satisfied the costs due to Bryant out of the sum bid by Orme, and applied the residue thereof to Orme's execution. By the transcript it also appeared that no note or other paper on which the judgment in the name of Simmons was rendered was returned to the county court.

The depositions of the magistrate Smith and of the constable Lee were filed, and fully sustained the allegations of the bill as to the nature of Orme's demand; the service and return of the warrant, and the trial and judgment thereon before the arrival of Ward, his dissatisfaction and application for a new trial, and the order therefor. Lee further stated that when he gave notice to Orme and demanded the paper, Orme replied that he could not deliver them as he had sold the debt and transferred the papers to another person, but would not dis- (433) close to whom.

Other witnesses distinctly proved that the bond of Simmons, against which Ward gave a receipt, was, with the knowledge and at the request of Simmons, canceled by Franks soon after the date of the receipt.

Mr. Huggins, the sheriff, who made all the sales, stated that, in answer to Ward's inquiry, he informed him that he held the two executions and no others, and that if he would pay Bryant's debt the sale should proceed upon Orme's only; and that he did pay Bryant, and immediately gave notice that he would attempt to set aside a sale upon the other as fraudulent; but that, nevertheless, he put up the land by Orme's directions, and Orme bought it at one hundred dollars. He says that he would not have sold under the other writ for the costs, viz., four dollars and ninety-two cents, but that after Orme's purchase he applied as much of the price as discharged those costs.

Devereux for plaintiff.
J. H. Bryan for defendant.

RUFFIN, C. J., after stating the case as above, proceeded as follows: It may be remarked in the outset that this case is clear of everything that could be said in favor of a third person who might have become

the purchaser under the execution, in the name of Simmons, against Orme, who instituted that suit, and claimed the benefit of the judgment, and was himself the purchaser. The relief we think is clear, the only doubt being whether it ought not to be by an immediate reconveyance, notwithstanding the small sum applied to the costs of the other case. That the sale under Orme's own process cannot be sustained, while the essential principles of justice and fairness constitute any part of the system of equity, as administered in judicial tribunals, no mind we think can doubt. With the objections which might be taken at law to those proceedings on the grounds of the order for a new trial, the withholding from the county court the paper on which the judgment
(434) was rendered, or any matter of the like kind, this Court does not deal. We assume that the judgment is right, so far as respects the action of the legal tribunals themselves; and if that were not so, this Court will not undertake to revise them for the purpose of correcting either mistakes of facts or errors in law. But when the party practices a deception upon the court of law, and thereby precludes the opposite party from all defense; when by means thereof he gets a judgment for a sum of money of which no part is due; and then further, by concealment and falsehood, defeats every fair effort made by the ordinary legal means for reëxamining his judgment, a Court of Equity will restrain such a party from the unconscientious use of a legal advantage thus fraudulently obtained and thus fraudulently kept up. It is clear, in the first place, that there was no debt in this case, and that Orme was quite sensible of it. This would not be material, merely as it would show the judgment to be wrong, in a case in which the party sued had made defense, or had the opportunity of making it; but it becomes a most material inquiry when there has, in fact, been no defense, but it has been lost, apparently, by the contrivances of the plaintiff, as evidence of the motive of those contrivances. Besides the direct testimony of the witnesses as to the nature of the demand and of its being entirely unfounded, it is also strongly to be inferred from the circumstance that Orme took possession of the written instrument on which he got the judgment and did not have it returned to court with the judgment, but has suppressed it altogether; from the mode in which he took the judgment, just before Ward might be expected at the place of trial, according to the summons, and just before he did arrive; from his subsequent refusal to come to another trial, and the steps taken to enforce the judgment after he knew that it had been superseded, or at least that Ward thought it had, without the least intimation to Ward of his intentions, the Court cannot but find that Orme designed deliberately to deprive the other party of all opportunity of defense, in the first instance, and subsequently of all the ordinary legal means

of redress, either on the merits or the matter of law. The mark (435) seems to have been this land for, from the levy, we must take it that Ward had no personal property, nor it seems much of anything, for in this suit he appears as a pauper. It would be bad enough, by contrivance, to put such a man under the necessity of giving security for the debt to obtain a trial *de novo;* but it was yet worse to bring his land to sale under circumstances in their nature calculated to diminish the price, and then, after buying it, to tell him to reverse the judgment at law and get restitution, not of the land, but of the money it brought. Throughout the proceedings we are obliged to perceive the anxious purpose, by means of circumvention and contrivance, to defeat this poor man of the semblance of a trial, and to take from him his land, for a claim having no existence. The title derived under such proceedings, by the author of them, must be null.

But reliance is placed by the defendant on Bryant's judgment and execution to render the title indefeasible. We think it cannot have that effect, although that is admitted to be fair. If a sale under that execution had been rendered necessary, in order to secure those costs, by Orme's pressing a sale under his own, whereby the lien of the first would be lost, it perhaps would not be a hard measure of justice to hold that the whole sale was so far imbued with oppression and undue advantage that the contriver should not profit by it, to any purpose; but the Court cannot declare that the sale was, in fact, made for the costs on Bryant's execution, but rather the contrary. Such was the declaration of the sheriff to Ward, who was clearly under that impression. The recital in the sheriff's deed is not positively inconsistent with that supposition. After the sale the sheriff may have satisfied those costs out of the purchase money, because that was the only fund out of which he could then make them, and may have thought it proper, for that reason, to recite that execution in his deed. The circumstance may be accounted for in that way, and is in itself probable, rather than the supposition that the sheriff combined with Orme to have the sale under both writs, notwithstanding his assurance to the contrary, especially when there is no evidence from a bystander that the (436) sheriff did thus sell, in violation of his first declaration. Taking this to be the truth of the case, we must regard the sum of four dollars and ninety-two cents of Orme's money as having been applied by the sheriff to Ward's use, and to that extent the sheriff's deed must stand as a security, but no further.

The present defendant is in no better situation than Orme, in whose shoes he stands. The denial of personal notice cannot avail him. The possession of Ward and the express notice to his agent affect him. Be-

sides being a purchaser at sheriff's sale, his case is governed by the principle of *Freeman v. Hill,* lately in this Court, and he can only get the title of the defendant in the execution.

The decree must therefore be that the deed to Orme is good only as a security for the sum of four dollars and ninety-two cents, and that upon the payment thereof by the plaintiff to the defendant the latter shall convey the land in the pleadings and exhibits mentioned to the plaintiff, the devisee of the original plaintiff, free from any encumbrance by the defendant created, by a deed to be approved by the master, and the injunction be perpetuated. The defendant must pay all the costs at law and in equity.

PER CURIAM. Decree accordingly.

Cited: Rutherford v. Green, 37 N. C., 127; *Tomlinson v. Blackburn, id.,* 511; *Sutton v. Schonwald,* 86 N. C., 202; *Grantham v. Kennedy,* 91 N. C., 154.

(437)

JAMES HARRISON v. HANNAH WOOD.

To a bill enjoining the heir from ejecting the plaintiff from land which descended upon the former, upon the ground that the latter had purchased under the erroneous idea that the heir was barred, and had paid the debts of the ancestor to value of the land, the deficiency of the personal estate is all that gives an equity to the plaintiff; and to ascertain that, the personal representative of the ancestor is an indispensable party.

THE plaintiff alleged that in March, 1818, he purchased of one Oliver a tract of land lying in Jones County; that he paid the purchase money (eleven hundred dollars) and took possession in January, 1819, and continued that possession until recently, when the defendant brought an ejectment for it and recovered judgment at the Fall Circuit of 1835 (1 Dev. & Bat. Rep., 356); that one John Philyan had died seized of the land; that judgments had been rendered against him in his lifetime, and for his debts after his death, against his widow and administratrix; that under these judgments the land was sold by the sheriff and purchased by one Giles, who before that had bought the widow's dower, and who had sold to Oliver; that the plaintiff failed in his defense to the ejectment because the defendant was heir at law of Philyan, and had not been served with process to subject the land to those judgments; that Philyan died, indebted greatly beyond the value of his personal estate, and that the land in question was all of which he died seized; that it

was liable to the satisfaction of those judgments, and that the plaintiff, having purchased from the assignee of Giles, whose money went to discharge them, had in this Court a right to be substituted to the creditors and be protected in his possession of the land. The bill then alleged the insolvency of the defendant, and her avowed intention of selling the land and removing from the State, and prayed that she might be enjoined from suing out a writ of possession upon her judgment. The defendant answered at some length. It is sufficient to state that she denied the insolvency of Philyan; on the contrary she averred that his personal estate was amply sufficient to discharge all the claims upon it. She also denied any intention to sell the land and (438) remove from the State.

Upon the answer, his Honor, *Judge Donnell,* at Jones, on the last circuit, dissolved the injunction, and the plaintiff appealed.

J. H. Bryan for plaintiff.
Devereux for defendant.

RUFFIN, C. J. The Court does not perceive a ground for a decree in favor of the plaintiff upon his bill, much less for continuing the preliminary injunction granted to him. Upon the face of the bill there is an admission that the legal estate which descended to the defendant was not divested by the sheriff's sale, because the defendant had not been made a party to the proceedings at law commenced against her ancestor. If, then, it be yielded that a creditor can file against the heir a bill in the courts of equity of this State, either on behalf of himself and the other creditors or of himself alone, for an account of the real estate, and for satisfaction out of it, yet it is clear there can be no relief against the heir without first taking an account of the personal estate. To such a bill, therefore, the personal representative is an indispensable party. The heir has a right to assistance from that quarter to contest the debt, to establish a payment of it, and finally to have it satisfied out of the personal estate as the primary fund, if there be any. Here the administratrix is not made a party, but the plaintiff contents himself with alleging that the intestate was indebted beyond the value of his personal assets, without even stating that those assets were inadequate to pay the judgment creditors under whom he claims. The bill, when it comes to be heard, must, therefore, be dismissed, unless it should be altered by substantial amendments. At present, our view is limited to the order dissolving the injunction, from which the appeal was taken. The equity of the plaintiff, which is essential to every step he can take against the heir, depends upon the deficiency of the personal assets. That is to be established either by the admissions of the heir or by an (439)

account taken in the cause. Under this bill, it cannot be in the latter mode, because the personal representative is not before the Court. The plaintiff has chosen to rely upon the answer of the defendant upon that point. But the answer does not admit that the assets which came to the hands of the administratrix were insufficient to pay the debts, and, on the contrary, insists that they were fully sufficient. Upon a motion to dissolve the injunction, at least that precise denial in the answer is conclusive.

But if the administratrix were a party, and everything else were right, so that upon the hearing it would be clear that the plaintiff was entitled to satisfaction out of the real estate, his Honor's decree would still be proper. Until a decree, the plaintiff has no right to the possession of the land, but the right to the estate, and the possession is perfect in the heir. A creditor cannot enter upon the lands of a deceased debtor and keep out the heir upon any principle recognized by this Court, more than he can by any rule of law. The heir is, at law, entitled to the issue and profits, and also to the lands, until a judgment against him and a sale under it; and likewise in equity, until his liability has been ascertained by a decree. As the sale, upon execution under which the plaintiff claims, was altogether inoperative, he can have no higher equity than the general one belonging to the creditors, to whom he seeks to be substituted; and, of course, he cannot intrude, as yet, between the defendant and her inheritance. The special matter charged in the bill, that the defendant is insolvent and intends to sell the land, which is insisted on in argument, as a peculiar equity in this case, does not, in our opinion, vary the rights of the parties. It could, at most, only be a ground for restraining the defendant from selling, and for a motion for the appointment of a receiver; it is none for prohibiting her from entering, or for protecting the plaintiff's unlawful possession. The motion for a receiver the plaintiff has not made; possi-

(440) bly, among other reasons, because one of the first duties of that officer would be to collect from the plaintiff the mesne profits received by him and bring them into court in the cause. There is also no necessity for an injunction against a sale; for, while process sued annuls at law the voluntary alienation of the heir, there is no doubt that a purchaser *pendente lite* is treated in the same manner in this Court.

It was further contended at the bar that there ought to be relief, and an injunction in the meantime, in respect of the dower; but upon that point, also, we think the plaintiff must fail. The bill, in the first place, does not state that the widow is yet living, so as to show that her claim to dower is a subsisting one. If that defect were supplied, there are other objections equally valid. It is not stated that dower was ever

assigned to the widow, nor afterwards conveyed to Giles, and no assignment or deed from her has been exhibited or read. If such documents exist, they constitute a legal title *"pro tanto,"* and there is no ground for the interposition of this Court. It is probable, however, that when Giles, after contracting for the dower, purchased, as he supposed, the reversion, he deemed it useless to have the dower allotted, and that, in fact, it never was assigned. If that be the case, the plaintiff cannot have a decree upon this bill. Dower, until assignment, is not an estate in the land of the deceased husband, but a mere right. *Tompkins v. Fonda,* 4 Paige's Reps., 448. The widow cannot defend herself against the suit of the heir for any part of the land. *Williamson v. Cox,* 2 Hay., 4. It may, no doubt, be released to the heir or his alienee, but it cannot be conveyed to a stranger. The sale of the widow could, therefore, amount but to an equitable assignment of her right, which might sustain a bill against her and the heir to have the contract established and specifically executed by a decree for an assignment of dower and for a conveyance to the vendee; but this bill has no such aspect. The widow is not a party, nor the contract with her set forth with any precision, nor is there even a prayer for an assignment of dower.

Upon no ground, therefore, ought the injunction to have been continued, but was properly dissolved, with costs, which must be certified accordingly to the court of equity. The appellant must (441) also pay the costs in this Court.

PER CURIAM. Decree affirmed.

Cited: Moore v. Shields, 68 N. C., 331; *S. v. Thompson,* 130 N. C., 681.

GUSTON PERRY, EXECUTOR OF JAMES MAXWELL, v. TOLLIER TERREL, EXECUTOR OF MARY MAXWELL.

A devisee for life is entitled to the crop growing at his death, as is a legatee for life to the increase of cattle and the interest of money.

JAMES MAXWELL made his will, and therein appointed his wife executrix, and gave to her his whole estate, real and personal, during her life, with a discretionary authority to sell such parts of the personal estate as she might choose, with remainder at her death, as to one-third, to such of her relations as she might appoint; and as to the other two-thirds, to certain other persons mentioned in the will. Mrs. Maxwell, upon the death of her husband, in 1831, proved the will and took the

estate into her possession. The testator left debts due to him at his death, and the executrix also sold a part of the estate, namely, a negro, some merchandise, and part of the cattle, and other perishable things; and all those moneys she kept out at interest. Some of the slaves, likewise parts of the horses, cattle, and other stock, she did not sell, but retained them for her use, on her husband's plantation, where she still resided; and while she held them they increased. At her death, on 5 November, 1834, she left a crop on the land, made that year and then ungathered.

The bill was filed by the representative of the husband against the representative of the wife, and stated that upon the death of Mrs. Maxwell the defendant came to a settlement with the plaintiff, and accounted with him for the money due to the husband as principal or interest at the time of his death, and also for the prices of such parts of the estate as she had sold; and also had delivered to the plaintiff the negroes (442) and all their increase, and the original stocks of horses, cattle, sheep and hogs, or such parts as were then alive; but that the defendant refused to account for the interest that had accrued upon any of the moneys during the life of Mrs. Maxwell, and to deliver to him any of the increase of the stocks during the same period, and also to surrender to him the crops that were made, but not gathered, at the death of Mrs. Maxwell; and the bill sought relief specially in respect of such interest, increase, and crops, and nothing else. To the bill the defendant put in a general demurrer, which was allowed by his Honor, *Judge Settle,* in the Superior Court of Franklin, on the last spring circuit, and the bill dismissed, from which the plaintiff appealed.

W. H. Haywood for plaintiff.
Badger contra.

RUFFIN, C. J. From the very special framing of the bill, it is obvious that the parties did not propose entering into a general account of the estate, but intended to confine the controversy to the three points on which particular relief is prayed. We need not, therefore, say anything upon the general duty of an executor to sell all personal things, except slaves given as a residue for life and then over, nor inquire whether this will discharged Mrs. Maxwell, as executrix, from that duty, by the discretion given to her for her convenience as a legatee. We understand, from the bill, that for all the specific articles originally composing the residue of the estate the parties have satisfactorily accounted.

Upon the questions distinctly submitted by the bill there can be no doubt. A tenant for life is unquestionably entitled to the emblements on the land devised, at the period of her death, and as certainly to the increase of animals during her time. Where money is bequeathed for

life, the very thing given is the interest, and that only. The remainderman can no more claim the interest accrued in the time of the particular legatee than the latter can claim a part of the principal.

The decree is, therefore, affirmed, with costs, to be paid by the (443) plaintiff in both courts.

PER CURIAM. Decree affirmed.

JOHN BLACK, ADMINISTRATOR OF HUGH BLACK, v. DAVID RAY.

1. When one having an interest for life in slaves, with a view of defeating those in remainder, sold them, and with the proceeds purchased others, the remainderman may affirm the sale, and subject those slaves to his claims; but he cannot recover specifically the slaves so purchased.
2. To a bill affirming the sale, and seeking to charge the slaves for the purchase-money, the personal representatives of the first taker are necessary parties.

IN THE progress of this suit many changes had been made in its parties and in its character. It was at the hearing considered as one instituted by the administrator, with the will annexed, of Hugh Black against David Ray, seeking relief upon the following case: Hugh Black died in the year 1807, having by his will bequeathed certain slaves to his widow, Effie Black, for life, and without making any ulterior disposition of them. The widow received the slaves so bequeathed, and, with intent to defraud those who might be entitled to them after her death, sold some of them absolutely, and with a part of the proceeds of these sales purchased a negro girl, named Edy. The defendant was charged with having been an agent of the widow in making these sales and this purchase, and to have had full notice of the nature of Effie Black's estate, of her purpose in selling, and of this application of the proceeds of the sales. Effie Black was dead; but, before her death, made a gift of the girl, Edy, to the defendant, who had her and her issue, since born, in his possession. The bill insisted that the plaintiff was, in equity, entitled to Edy and her issue, and prayed that the defendant might be decreed to deliver them.

Mendenhall for plaintiff.
W. H. Haywood for defendant.

GASTON, J., after stating the case as above, proceeded as follows: The case, as charged, is not admitted by the defendant's answer, and proofs have been taken to support it. But to us it seems unnecessary to

(444) examine these proofs, for that the bill cannot be supported. It is argued for the plaintiff that the tenant for life ought to be regarded as a trustee for him in remainder, and that, the trust fund having been converted into other property, he can, by the rules of this Court, pursue the property so substituted. If we concede to the plaintiff the position that the widow was *quasi* a trustee for him (a point on which we do not express an opinion), we are yet unable to see upon what principles of a court of equity the property now claimed became *his*. The sales may be either repudiated or ratified. If repudiated, the slaves sold belong to the plaintiff, and he has a legal interest in them; he may claim them wherever found. If the sales be adopted, he may be entitled to *their price,* and to hold the trustee responsible for it. There are cases, too, in which a *cestui que trust,* or one standing in a situation analogous to that of a *cestui que trust,* may pursue property acquired by a misapplication of the trust funds, whether in the hands of the trustee, or of one who has obtained that property gratuitously, or with notice, in order to have satisfaction of his claim for compensation. *Ryall v. Ryall,* 1 Atk., 59. But this bill does not seek to *charge* the negroes in question with the payment of the money due him as the price of those sold; it demands them as *his property.* We are not aware that the doctrine of *substitution* has ever been carried to this extent. Besides, to a bill which should seek thus to charge property in the hands of an alienee of the wrongdoer, it is essential that such wrongdoer or his representative should be a party, in order that the amount of the injury, the amount of the compensation, and the question whether compensation has been made, or not, may be properly tried, and that satisfaction may be had, if it can be, out of the property of the wrongdoer. If the bill were framed with a view to compensation, we might not, perhaps (though there could be but a very feeble claim to indulgence, (445) after the repeated amendments allowed), dismiss the bill because the widow's representatives are not before the Court, but afford the plaintiff an opportunity to bring them in. We do not say that plaintiff can have such relief, however his bill may be modified, but it is certain he cannot ask it under its present frame.

We must dismiss the bill; but, lest we may throw any embarrassment in the way of the plaintiff, should he be advised to seek relief on a bill framed with a different aspect, we shall, out of abundant caution, dismiss it without prejudice to such a bill.

PER CURIAM. Bill dismissed.

Cited: White v. White, 36 N. C., 444; *McKinley v. Scott,* 49 N. C., 198; *Bateman v. Latham,* 56 N. C., 38; *Whitley v. Foy,* 59 N. C., 37.

BARDEN TOLER v. JOHN C. PENDER ET AL.

A conveyance in the form of a mortgage, securing a specific debt, but admitted by the defendants to be intended as an indemnity against the costs of a lawsuit, cannot be supported upon the ground that it is held as a means of enforcing the execution of an agreement for giving the defendant a part of the property recovered in that lawsuit.

THE plaintiff, Barden Toler, filed his bill against Stephen Boyd, John C. Pender, and Blany Coor, and therein charged that one Nehemiah Toler had obtained judgment against him in the County Court of Wayne, in an action of *detinue,* for several slaves; that he applied to the defendants to become his sureties for a *certiorari* or appeal upon this judgment to the Superior Court of Wayne; that they consented, upon the condition of being indemnified against loss; that it was thereupon agreed that he should execute unto them a mortgage of certain lands and negroes for the purpose of saving them harmless from said suretyship; that one Calvin Coor, the brother of the defendant Blany Coor, was employed by the defendants to draft the said mortgage; that two deeds were prepared by the said Calvin, under the direction of the defendants, and were executed by him upon the representation (446) that they were proper to carry into effect this contract of indemnity. Copies of these deeds were appended to the bill, from which it appeared that the plaintiff was a marksman and could not write. One of them was a deed of bargain and sale, whereby, in consideration of the sum of $2,600, thereby acknowledged to be received, the plaintiff bargained and sold to the defendants several negroes and other personal property, with condition to be void upon the repayment of the said sum to the defendants, with interest; and the other was also a deed of bargain and sale, whereby the plaintiff, in consideration of the sum of $600 acknowledged to be received, bargained and sold certain tracts of land to the defendants, to hold for the term of three years, upon condition that the same should be void on repayment of the said $600, with interest. The bill expressly charged that these deeds were executed upon no other consideration and for no other purpose than to indemnify the defendants against their liability as his sureties; that this liability had entirely ceased, for that the plaintiff had finally succeeded in the Superior Court in reversing the judgment of the County Court, and had fully paid off all the costs for which he was answerable in that suit, but that the defendants had caused an action of *detinue* to be brought against him for the negroes named in one of the deeds, and were setting up a title to the land comprehended in the other; and also charged that, pending the suit between him and Nehemiah Toler, the defendants

Blany Coor and John C. Pender had held possession, respectively, of some of the mortgaged negroes, and had received and retained the profits thereof, and the plaintiff prayed for a perpetual injunction of the suit at law; that the said deeds might be surrendered and canceled; that the defendants Coor and Pender should account for the profits of the negroes while in their possession, and for general relief.

To this bill the defendants put in several answers.

The defendant Boyd admitted by his answer that, so far as he was concerned, the deeds were made to indemnify him against his liability for becoming a surety to the *certiorari* bond, but averred that the (447) plaintiff at the same time promised to pay him $25, should the plaintiff fail in the suit, and $100 dollars, should he succeed, for his services in writing notices, for taking depositions, and in attending to the taking of depositions in said suit; and he admitted that, since the determination of that suit, the plaintiff had paid him the $100, according to promise. The defendants Coor and Pender set forth in their answers that the plaintiff had repeatedly solicited them to become his sureties on the bond for a *certiorari;* that they at length yielded to his importunities, upon the express agreement that the plaintiff should execute to them conveyances for two of the negroes in dispute, free from all conditions and encumbrances, except the title of Nehemiah Toler; that, relying on this engagement, they executed the bond as his sureties, but that the plaintiff did not make the conveyance stipulated; that afterwards the deeds in question were executed by the plaintiff, not as a substitute for the former agreement, nor for the purpose of releasing the same, but "for the purpose of giving to them an additional security against loss by reason of their said suretyship," and they admitted that neither of them had sustained any injury thereby, but they insisted that, after the termination of the suit of Nehemiah Toler in favor of the plaintiff, he had refused to execute a conveyance for the two slaves, agreeably to his promise, and they declared that they had brought the action of *detinue,* complained of, as the means of coercing him to render them justice in that respect.

They both professed a willingness to forego any legal advantage which they might have under the said deeds if the plaintiff would convey to them the two negroes, which they were to have absolutely, but prayed, if the plaintiff would not execute this engagement, that he should be held to the literal terms of the deeds, and not be permitted to vary the same by parol evidence, which said deeds they averred were not obtained from him by any misrepresentation or fraud, but were drawn up at his own suggestion by Calvin Coor, who had been employed by him to prepare them. The answer of the defendant Coor admitted that he (448) had held possession of some of the mortgaged negroes during a

part of the time the suit of Nehemiah Toler was pending, but insisted that he held them by a contract of hiring, made with the plaintiff, and had paid up such hire in full. The other defendant, John C. Pender, by his answer, denied that he had at any time held possession of any of them.

To these answers the plaintiff replied generally, and a great mass of testimony was taken on both sides.

Devereux and J. H. Bryan for plaintiff.
W. C. Stanly for defendants.

GASTON, J., after stating the facts as above, proceeded as follows: We deem it unnecessary to comment upon the proofs, for upon the pleadings it appears to us clear that the plaintiff is entitled to relief. There is no allegation in the bill upon which we can examine the right of the defendant Boyd to retain the reward of one hundred dollars received for his alleged services. We cannot, as this bill is framed, compel him to refund it; and whether he has obtained this rightfully or wrongfully, it is all which he claims of the spoils. After the distinct admission by the defendants that the deeds in question were executed and intended simply and solely as an indemnity to save them harmless against their liability as the surety of the plaintiff, this Court must act upon the deeds as though they had been drawn up in proper terms to express that intent. It would be monstrous if the incapacity or ignorance or fraud of the draughtsman should, in a court of conscience, give operation to an instrument inconsistent with the acknowledged intention of all the parties thereto. Nor will this Court permit the defendants Coor and Pender to avail themselves of these deeds as a security for enforcing the performance of the agreement, which they set up by their answer, even if such agreement were proved beyond dispute. It is an agreement abhorrent to morals, as having been extorted from a distressed man; contrary to public policy, as creating interests unfavorable to the impartial administration of justice; against the principles of the common law, and interdicted by positive statutes. It is founded in *champerty,* the most odious species of (449) maintenance, and far from vesting rights worthy of the jurisdiction of a court of equity, makes out a case perhaps better fitted for the animadversion of a criminal court.

The plaintiff is entitled to the perpetual injunction which he prays for, to have the deeds surrendered and canceled, and to have a conveyance from the defendants of every right which they or any of them can set up under them. We do not examine into the evidence of the matters of account between the plaintiff and the defendants Coor and

Pender. As to them, the plaintiff may have a reference if he requires it. All the costs, both at law and equity, up to the taking of the account, must be paid by the defendants. They are each and all of them liable therefor, having joined in the action which gave occasion for this bill.

PER CURIAM. Decree accordingly.

ANDREW FALLS ET AL. v. THEODORICK F. BIRCHETT ET AL.

Two sets of solicitors' fees are not taxed in a cause removed to the Supreme Court, viz.: one in that Court and one in the court below; and execution for such costs can only issue from the Supreme Court.

SUITS in equity between these parties were, upon being set for hearing in the Court of Equity for Lincoln, transferred to this Court to be heard. Upon the hearing in this Court there was the usual decree for costs, including solicitors' fees; and the clerk sent down to the clerk and master of Lincoln a certificate, according to the act of 1825 (Taylor's Rev., c. 1282). Thereupon execution was issued from the Court of Equity for the costs due to the clerk and master, the sheriff, and also for the fees of the solicitors employed in the Court of Equity at Lincolnton, by the parties who prevailed in this Court. At the last term

(450) the opposite parties moved to set aside the execution and retax the costs, so as to exclude the fees of the solicitors, which was ordered accordingly by his Honor, *Judge Dick,* and an appeal taken to this Court.

Badger for plaintiffs.
Devereux for defendants.

RUFFIN, C. J., after stating the facts as above set forth, proceeded: We think the decision of his Honor correct: the statute authorizes executions to be issued from the Superior Courts or the Courts of Equity, upon the certificate of the judgment or decree of the Supreme Court, only for the costs incurred in said cases in the court from which the cause was sent. This means clearly the costs taxed in the court below, and absolutely payable by one of the parties to the suit, at all events. In cases of appeals from either court, it doubtless includes the fees to solicitors and attorneys, taxed or taxable in the court below, according to the final decision here; but when an equity suit is removed for original hearing here, there is no solicitor's fee *incurred* on either side in the

Court of Equity; that is, there is no liability on one side to pay the fee of the other party to his solicitor; that arises for the first time upon the decree of this Court; and consequently the execution for it must issue from this Court. It is indeed only a question of practice, for the decision of it affects no rights, since the same person is entitled to the same sum of money, let the execution issue from which court it may. The decree is that the costs, etc., be paid to the *party,* and not to a particular solicitor, or set of solicitors, engaged either in one court or the other. With their rights, as against each other or their clients, the Court, as far as this question goes, has nothing to do. The decree did not give solicitors' fees in both courts, and could not do so, except upon an appeal; and the sole question is, from what court the execution for the single set is to go? We think from this Court. The officers' fees stand on a different footing, because they are taxed to the several parties as the service is rendered, and it would be impossible to retax the bill upon a motion here for that purpose, with any certainty of doing justice, without putting the parties to almost as much expense (451) as would cover the costs of an ordinary suit.

The order is therefore affirmed, with costs in this Court, against the appellants.

PER CURIAM. Decree affirmed.

JOHN WOODFIN v. WILLIAM D. SMITH ET AL.

A court of equity will not enjoin an execution, because the defendant at law has paid it, when he might have proved that fact on the trial, and was not by fraud or surprise prevented from so doing.

THIS bill was originally filed as an injunction bill. The injunction was dissolved on the coming in of the answers of the defendants, and the bill was then continued over as an original. The gravamen of the bill is that two judgments were rendered against the plaintiff, before a justice, in favor of John W. Statton, which was satisfied by the plaintiff through the agency of Hiram Whitehead; that upon the death of the said Whitehead, the satisfied judgments being found without any endorsement of satisfaction among his papers were put into the hands of an officer, who served a notice on the plaintiff to show cause why executions should not issue thereon; that the plaintiff being obliged to attend a court at the distance of sixty miles as a witness under *subpœna,* on the second day after that on which he was cited to appear informed the officer of the payments made and of his inability to attend on the

appointed day to prove it, requested a postponement of the trial, and expected confidently that the trial would be postponed accordingly; that the notice, nevertheless, was returned; and no defense being made, the executions were ordered, and came to the hands of the defendant Fortune, a deputy sheriff of the county; that an execution upon a judgment obtained against the plaintiff in the county court, by one Moses L. Hodges, also came to the hands of the said deputy sheriff; that
(452) the defendant Smith had purchased from the agent of the representative of Hiram Whitehead the two judgments in the name of Statton, with notice of plaintiff's payment thereof, and was also the equitable proprietor of the judgment of Hodges; that the plaintiff made payments to Fortune of sundry sums of money, expressly to be applied to the judgment of Hodges, informing him that the other judgments had been satisfied, and that he would not pay them again, but that Fortune, combining with Smith to prevent the plaintiff from setting up his defense against these judgments, had applied the sums so received in the first place to the satisfaction of the executions upon them, and the balance in part payment of the judgment of Hodges, and was proceeding to enforce the collection of the residue of that judgment.

The defendant Fortune explicitly denied in his answer that the payments received by him from the plaintiff were received on account of, or directed to be applied by, the plaintiff to the discharge of the court execution, but declared that they were applied, in the first place, to the satisfaction of the justice's judgments, simply because the payments were sufficient to extinguish them, and averred that this application was made with the knowledge and approbation of the plaintiff.

He distinctly denied all knowledge in relation to the alleged matters of defense set up by the plaintiff against those judgments in the name of Statton, and all concert and combination with his codefendant, Smith. The defendant Smith answered that he had been informed and believed that Whitehead purchased the judgments of Statton at the request of the plaintiff, and that after the death of Whitehead, the executions having remained dormant more than a year and a day, the administrator of Whitehead caused them to be revived by citation; that the defendant took those judgments from the administrator after they were so revived, and at their full amount, in satisfaction of a debt due him; that before he traded for them he had repeated conversations with the plaintiff, in which the plaintiff stated that a settlement ought to have taken place between him and Whitehead, and that he believed he had claims
(453) against Whitehead to the full amount of the judgments, but as Whitehead had died before any settlement, he would be obliged to pay them; that in consequence of these conversations he consented to take the judgments as a payment of the debt which the administrator

of Whitehead was liable for. He denied all combination or collusion with his codefendant, insisted that he was in conscience entitled to retain the money received upon those judgments, and, further, that if, in truth, the plaintiff had paid them off to Whitehead, or to Statton through Whitehead, the plaintiff ought to have made that defense before the magistrate when cited to show cause why execution should not issue; or, if prevented from obtaining justice there, he should have sought the ordinary and legal remedies by application to the courts which review the proceedings before magistrates.

No counsel appeared for either party.

GASTON, J., having stated the case as above, proceeded: No evidence of any kind is offered on the part of the plaintiff to support his allegation of his having directed an application of his payments. There is no ground on which he can have relief against Fortune, and the bill must be dismissed as to him, with costs.

If we were satisfied of our right to grant relief against the other defendant, we might hold that the plaintiff's allegation of having paid the judgments of Statton to or through Whitehead is true, for Statton testifies that he sold the judgments to Whitehead, and that thereupon the latter remarked that the plaintiff had already paid him the amount of them.

There is no evidence to support the allegation of the defendant that he bought these judgments in consequence of the plaintiff's admission that he was bound to pay them; and there is evidence which renders it at least probable that he was aware of the plaintiff's claim that the original judgments had been paid off in Whitehead's lifetime. At all events, as the judgments were not assignable at law, the defendant, by his purchase, took the judgments, liable to any equities subsisting against them.

But we are unable to perceive any satisfactory ground on which a court of equity ought in this case to interpose for the relief of the plaintiff. The alleged payment should have been pleaded when the plaintiff was cited to show cause why executions should not issue. (454) The payment, if made, was sufficient cause against the ordering of the executions, and he had notice and opportunity to show it. He has not proved that he requested a postponement of the trial, or received any assurance, direct or indirect, that it would be postponed. Reese, the officer examined for that purpose, testifies that he "cited the plaintiff to attend at the widow Whitehead's, but that he failed to attend, alleging that he had to attend Haywood Court, and saying also that he had paid the claims." It does not appear that the plaintiff was deceived by any

promise to postpone the trial on the citation, and he has not proved his inability to attend. The question of payment must be considered as having been regularly passed upon by the judgment rendered on the citation. Besides, he has alleged no excuse for not endeavoring to have a new trial, or appeal, or remedy by *recordari;* has alleged no efforts on his part to ascertain what had been done on the citation, and no steps taken to correct the injustice of this adjudication for many months after it was rendered.

We feel ourselves constrained to hold that, under these circumstances, he is not entitled to the extraordinary aid which he asks for. The bill must, therefore, be dismissed as to Smith, also; but in this respect it is dismissed without costs.

PER CURIAM. Bill dismissed.

Cited: Grantham v. Kennedy, 91 N. C., 153.

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(455)

ROBERT HARRIS v. WILLIAM HORNER ET AL.

One who takes an assignment of property to secure a debt, and neither advances money nor releases his debt, is not a purchaser within the rule of equity which protects purchasers without notice.

THE plaintiff obtained a judgment before a justice on an attachment against Stephen Clements for $100, with interest from 21 December, 1826, to the rendition of the judgment, on 29 January, 1829. Two dollars were paid on the same. Clements was in the State of Tennessee. The judgment was left in the hands of John J. Carrington (the plaintiff alleges, as his agent), to have it sent to Tennessee and collected. John J. Carrington sent James Carrington to Tennessee, as his agent, to collect this judgment, and other claims which he had against other persons in that State. James Carrington, on his arrival in Tennessee, took the notes of one Terry and James and Stephen Clements for the amount of the claims that were due John J. Carrington, including the judgment in favor of the plaintiff. John J. Carrington became insolvent, and on 27 September, 1827, in consideration of a large debt due from him to Horner, and his (Horner's) liabilities for him, executed to Horner, by way of security, a deed of assignment of all debts due to him by all persons whatever. The deed mentions "and the debts committed to James Carrington for collection, and all property which the said James may take in satisfaction of said debts." John J. Carrington gave an order

on James Carrington to deliver to the defendant the notes and evidences of debt and what property he held of his, which was accordingly done, and among which were the notes of Terry and James and Stephen Clements.

The plaintiff filed this bill to compel the defendant Horner to account to him for the amount of the aforesaid judgment (J. J. Carrington being insolvent), alleging the same belonged to him, the plaintiff. The defendant admitted that at the date of the deed of assignment he knew the said judgment had been sent by J. J. Carrington to (456) Tennessee for collection, and was one of the evidences of debt in the hands of James Carrington. He says that John J. Carrington, both before and after that time, told him—and he believed the statement—that he purchased for a valuable consideration the said judgment of the plaintiff. The defendant averred that he honestly believed that the judgment was passed to him by the deed of assignment executed by J. J. Carrington. He admitted that he had received evidences of debt which included that judgment, but he denied that the judgment was the property of the plaintiffs at the date of the deed of assignment. He insisted that he was a *bona fide* purchaser of it, without notice of the plaintiff's claim thereto.

W. A. Graham and Waddell for plaintiff.
P. H. Mangum and Norwood for defendants.

DANIEL, J., after stating the facts as above set forth, proceeded: There has been a great deal of testimony taken in this cause. We have examined it, and are satisfied that the judgment in favor of the plaintiff against Stephen Clements, as mentioned in the bill, was truly the property of the plaintiff, and that it had been placed in the hands of John J. Carrington, as agent of the plaintiff, to be sent to the State of Tennessee for collection. The defendant, by his admissions, had sufficient evidence before him to put him upon inquiry, if he had in fact advanced or paid at the time a valuable consideration for the judgment. But we are of the opinion that he does not come within the principles of the rule, as he in fact was nothing out of pocket by the assignment, so far as relates to this judgment. The inducement for the assignment was old debts due by Carrington to him, and already incurred liabilities, but no acquittance was given for the same to Carrington. There was no present loss to the defendant in consequence of the assignment. The defendant admits that he received the judgment or notes which were given for it. The evidence proves that he was compelled to receive this debt and others in horses, and as a just loss on the claims. We are of the opinion (as Carrington is insolvent) that the plaintiff is entitled

(457) to a decree for an account of so much of the judgment as the defendant has actually received. It is, therefore, referred to the master of the Court of Equity for the county of Orange, as a commissioner, to state and report what sum in cash value the defendant Horner has received on the said judgment, allowing him reasonable commissions for his trouble in collecting that sum.

PER CURIAM. Decree accordingly.

Cited: Holderby v. Blum, 22 N. C., 52; *Potts v. Blackwell,* 56 N. C., 454; *Brooks v. Sullivan,* 129 N. C., 190.

ARCHIBALD BLUE, ADMINISTRATOR OF JOHN PATTERSON, SR., v. DANIEL PATTERSON, ADMINISTRATOR OF JOHN PATTERSON, JR.

A defendant claiming a slave by reason of his having, under a mistake, paid for him to A., supposing him to be entitled, must, in a suit by the executor of B., under whose will A. is clearly entitled, make the administrator of the latter a party by cross-bill before he can avail himself of that defense.

JOHN PATTERSON, the younger, the son of John Patterson, the elder, died in the year 1794, possessed of a slave, named James. He made no will and left no children. His father and several brothers and sisters survived him. In the year 1820 the defendant took out letters of administration upon the estate, received the slave into his possession, and returned an inventory of him. In the same year the plaintiff took out letters of administration, with the will of John Patterson, the elder, annexed, who died in the year 1813. In the year 1827 the plaintiff filed this bill, seeking distribution of the estate of John, the younger, and praying that the slave, James, might be surrendered to him. The defendant, in his answer, set up several defenses, which are all stated in the opinion of the Court.

Badger and W. H. Haywood for plaintiff.
Winston for defendant.

(458) DANIEL, J., after stating the facts as above set forth, proceeded: The defendant has made several objections to the plaintiff's claim. We will notice them in their order.

First. That the will of John Patterson, Sr., under which the plaintiff claims, was obtained by fraud, although he admits it has been admitted to probate by the county court.

Answer: A will cannot be set aside, in equity, for fraud or imposition; for if it be of personal estate, in England, the ecclesiastical court has jurisdiction; and if of real estate, a court of law, by issue *devisavit vel non.* 1 Chitty's E. Dig., 596, 597. A court of equity has no jurisdiction to declare what is, or is not, a man's last will. *Pemberton v. Pemberton,* 13 Ves., 297. Therefore, this objection is answerable.

Second objection. The plaintiff brought suit at law for the slave, James, and there was a verdict and judgment for the defendant.

Answer: The defendant held the slave, as administrator of J. Patterson, Jr., in trust for the plaintiff; and a court of law has no jurisdiction of trusts. The plaintiff's remedy was only in a court of equity. The judgment at law is no bar here, as the court of law had no jurisdiction of the subject-matter. Therefore, this objection is overruled.

Third objection. The slave belonged to the brothers and sisters of John Patterson, Jr., as his next of kin.

Answer: The slave belonged, on the death of John Patterson, Jr., to his father, John Patterson, Sr., as his next of kin.

Fourth objection. Under the will of John Patterson, Sr., the slave, James, is bequeathed to Duncan Patterson, who was the *cestui que trust* of the plaintiff. That Duncan Patterson, pretending to be the administrator of John Patterson, Jr. (though in fact he was not), sold the slave, James, with a view of making a distribution of the money among the brothers and sisters of John, the younger, who, as he and the defendant then thought, were his next of kin; that the defendant purchased the slave at the sale, at a full and fair price, and has paid, by the consent and order of Duncan Patterson, to each of the brothers (459) and sisters, their shares of the purchase money, except the share of Duncan Patterson, who proposed that payment of that should be delayed until a future final settlement of all their business should take place. It would (he says) be against conscience now to compel him to account for the slave for the use of Duncan Patterson's estate.

Answer: First. The defendant has made no proof that he has paid the purchase money. Secondly. Duncan Patterson being dead and his administrators not being before the Court, the defendant not having filed a cross-bill for that purpose, we cannot, under the present state of the pleadings, take any notice of this part of the defense, for the want of proper parties to contest it.

But the decree in this suit cannot preclude the defendant from availing himself of the same matter in a bill against the present plaintiff and the representative of Duncan.

Fifth objection. The defendant says that he took possession of the slave as his own property soon after the death of his father, in 1813, and

has held him as such ever since. He contends that lapse of time should restrain the Court from giving the plaintiff any relief.

Answer: Before the year 1820 there was no person authorized to bring suit. Administration on the estate of J. Patterson, Sr., was granted to the plaintiff in that year, and in that year the defendant administered on the estate of John Patterson, Jr., and returned an inventory, including the slave, James, as the property of his intestate. The bill was filed in 1827. There had but seven years elapsed, after a proper person was authorized to sue, before filing of the bill. This length of time never could be considered, in this Court, as an objection to a defendant's executing an express trust. We think this objection must be overruled; and, upon the whole case, we are of the opinion that the defendant must be decreed to deliver up to the plaintiff the slave, James, and account for his hires and profits.

PER CURIAM. Decree accordingly.

(460)

WILLIAM H. DAVIS v. CHARLES R. HOWCOTT ET UXOR, ET AL.

Where a testator devises as follows: "I devise to my wife the use of the lands and buildings whereon I now live, for and during the term of her natural life; and after her death it is my will and desire that the said land, etc., shall be sold by my executors, and at their discretion, and the proceeds thereof be equally divided between my four children, or the survivors of them"; and before the death of the widow, she and the executors, upon petition, procured the land to be sold by the clerk and master, under an order of the court of Equity, and the purchase-money was paid to him, and never came to the use of the children, *it was held* that the latter were not barred of their legal title to the land.

ANDREW KNOX, by his last will and testament, duly executed, to pass lands, devised as follows: "I give, devise and bequeath unto my beloved wife, Sarah Penelope Knox, the use of the land and buildings whereon I now live, for and during the term of her natural life, and after her death it is my will and desire that the said land and buildings shall be sold by my executors and at their discretion, and the proceeds thereof to be equally divided between my four children, or the survivors of them, say Lavinia Matilda, Andrew, Nathaniel B., and Louisa Matilda Knox, and their heirs forever." Of this will he appointed his wife, Sarah, Nathaniel Bond, and Ambrose Knox executors, the two latter of whom, after the death of the testator, proved the will; but the widow neither qualified nor acted as executrix. At the April Term, 1830, of the Court of Equity for the county of Chowan, the widow and the executors

filed a petition, *ex parte,* in which they set forth these facts, and further represented that the land attached to the dwelling-house consisted of ten acres only; that the petitioner, Sarah (the widow), did not intend to reside there; that the rent of the premises would not equal the interest on the sum for which they might be sold, and that the premises, if rented out, would unavoidably be much injured; that the petitioners were desirous that the premises should be sold before the expiration of the life estate of the petitioner, Sarah; that the purchase money might be put at interest, to be paid to her during life, and the principal thereof secured, to be paid to the other petitioners, for the benefit (461) of the children, at the expiration of the life estate, but that, as the rights of infants were concerned, they were unwilling to make the sale without the aid of the court, and thereupon they prayed that a sale of the premises might be made and the purchase money so secured that the interest thereof might be paid to the widow during her life, and the principal, at her death, to the other petitioners, for the benefit of the children, the devisees named in the will. From the defective memoranda of the proceedings of the court, it was to be collected that *some* order for a sale was made in pursuance of this petition; that the sale was conducted by the clerk and master; that he reported to the court, at a subsequent term, that a sale had been made to Hugh B. Knox, at the price of $2,500, on a credit of six, twelve, and eighteen months, and the sale, so reported, was confirmed by the court. No directions were given how the amount of the purchase money should be secured, nor to whom it should be paid. No order was made for collecting the purchase money.

No further proceedings were ever had by the court, nor by the executors, in relation to the subject-matter. The proofs and admissions of the parties also showed that Hugh B. Knox, the purchaser, when he bid off the property, gave his promissory notes to the clerk and master for the price, and took from him a paper-writing certifying that he, Knox, had become the purchaser at the sale, had given notes for the purchase money, and that he, the clerk, would make a title at any time. It also appeared that Knox paid off these notes to the clerk, who has since died, and died insolvent. Two of the children of Andrew Knox, the testator, had also died; and in April, 1825, Sarah Penelope Knox was appointed guardian to Andrew Knox and Louisa Matilda, the surviving children. In April, 1826, the sheriff of Chowan County, having an execution against Sarah Penelope Knox, by her directions and in her name, applied to the son of the late clerk and master, who was also his executor and successor in office, and obtained from him $1,253.42, part of the money so paid by Hugh Knox, which was appropriated (462)

to the discharge of the execution. This payment to her order was made under a declaration that in strictness she was not entitled to the money, but that the risk of making it would be guarded against by an indemnity. Sarah Penelope Knox had died also insolvent. Hugh Knox also died without having obtained a deed for the land, and at an execution sale against his heirs at law the plaintiff purchased his estate in the said land and received a conveyance therefor from the sheriff. Andrew Knox and Louisa Matilda Knox, who has intermarried with Charles Howcott, afterwards instituted an action of ejectment against the plaintiff to recover the land. In the course of the suit the plaintiff obtained a release and conveyance from Andrew Knox of his undivided share in the premises, but, being unable to make an effectual defense against Howcott and wife, a judgment was rendered against him as to their moiety. The plaintiff then filed this bill against them and the executors of Andrew Knox, the testator, and the administrator of Sarah Penelope Knox, praying that the executors might be decreed to make him a title, and for an injunction against Howcott and wife, and for general relief. The injunction was granted on filing the bill, and had been continued until the hearing of the cause.

Kinney for plaintiff.
Devereux for Howcott and wife.

GASTON, J., after stating the case as above, proceeded as follows: The ground on which the plaintiff rests his claim to the aid of the Court is, that by his purchase at the execution sale he acquired the estate of the late Hugh B. Knox, who, by virtue of his purchase at the sale of the clerk and master, and of the payment of the purchase money, was, in equity, the owner of the land in dispute. If both these positions can be sustained, it is not easy to see why the plaintiff did not resist the recovery of Howcott and wife, at law. The sale to him, if valid, is made so by our act of 1812, which passes to the purchaser not only the equitable interest of the *cestui que trust,* but the entire legal (463) estate of the trustee. But, as this objection has not been raised on the pleadings, and even had it been raised, the plaintiff might yet have been justified in asking for assistance in having his title established and cleared from doubt; and as the injunction might be sustained as incidental to the main relief, we have not permitted ourselves to be arrested by it in the consideration of the case. Many objections were taken in argument to the regularity of the proceedings under which the plaintiff purchased at the execution sale, some of which objections it would be difficult to get over, but we forbear from examining them,

because, assuming that they are all unfounded and that the plaintiff by that purchase acquired the estate of Hugh B. Knox, we are unable to see that Hugh B. Knox had any estate or any right in equity to demand that conveyance or appointment from the executors of Andrew Knox, which the plaintiff seeks as his assignee.

The will of Andrew Knox contained no devise of the legal estate of the land in question, except to his wife for the term of her life. A naked power, wholly without an interest, was thereby granted to his executors, and the land descended to his children and heirs at law, subject to the estate for life, and liable to be divested when the power so given should be validly executed. An appointment by the executors, pursuant to the power, would operate as the designation of a person to take under the will, and the ulterior legal estate would then pass to the appointee as the devisee of the testator. It is perfectly clear that the executors cannot be compelled to do any act which is not warranted by the scope of the power confided to them. Their sole authority is derived from the testator. What he has empowered them to do, they may do; if they refuse, they may be compelled; if they have done it, but unconscientiously withhold the formal evidence of the act, it may be extorted from them. The question presents itself, have the executors sold the tract in question to Hugh B. Knox conformably to the trust reposed in them? If they have, he and those who may represent him have a right to demand such a deed as shall authenticate the sale and complete the title to the land.

It is a doubtful point, upon the authorities, when there is a devise to one for life, and that after his decease the land shall be sold, whether a sale can be made until after the decease of the tenant for life. However this may be, when an intent may be collected that the (464) testator did not mean by the words, after the decease of the tenant for life, to limit and postpone the time of the sale, but only to mark the determination of his estate (see Hargrave's note to Co. Lit., 113, and *Vredale v. Vredale,* 3 Atk., 117), we think that in this case such an intent is repelled by the direction given with respect to the application of the proceeds of the sale. The testator, after the devise for life, expresses his wish that the land should be sold and the proceeds divided among his four children or the survivors of them. It is admitted by the counsel on both sides, and the pleadings proceed upon the understanding, that such is the legal interpretation of the will (therefore, it is that the representatives of the deceased children are not brought before the court), that by survivors are meant those living at the death of the tenant for life. The sale directed is for the purpose of dividing among these children the *value* of that which is itself unsusceptible of

partition. If all these children had died before their mother, he unquestionably did not direct that a sale should then be made. The power was a trust, to be called into action only for the benefit of the *cestui que trusts*. If but one child had survived the tenant for life, the executors might well have hesitated in undertaking to make a sale. The late case in the Court of Exchequer, in England, referred to by Mr. Sugden, in his Treatise on Powers (first American, from the 3d London edition, 273), is a direct authority in point.

If this difficulty could be removed, another presents itself, which, in our opinion, is conclusive—the executors did not sell to Hugh B. Knox. We do not rely now on the forms with which the pretended sale was conducted, irregular and extraordinary as they were, but upon the fact that the alleged price was never paid to the executors or to any person authorized to receive it. Whatever a court of equity, by virtue (465) of its controlling and conservative power over the interests of infants, may order in regard to the disposal or change of their property, it acted in no such character here. The infants were in no way before the court. Their rights were not represented; no decree was rendered, or could have been rendered, changing those rights; the petition was wholly an *ex parte* one by the widow, who held the life estate, and the executors, who had a power of sale under the will. The court could not enlarge, change or modify that power in any respect. The sale, whether made with or without the sanction of the court, could be rightfully made only by the executors. If they employed the clerk and master to set up the property at auction, the bidding might be regarded as one at their auction. If he received the money as their agent, for that purpose appointed, it would have been a receipt by them. But the whole character of the transaction shows that this was a pretended sale by the clerk as a judicial sale, and that the receipt of the money by him was by color of his authority as clerk. The certificate given to Knox is signed by him as clerk and master, recites a sale made by him under a decree, and obliges him to make a deed whenever demanded. A report of the sale is made by him in his official character, and by an order of court he is compensated for his services in conducting the sale, as such. Had the sale been valid as a judicial sale, the clerk and master would not then have been authorized to receive the money without an order of the court to collect it; and the purchaser, wishing to pay, in such a case, before an order to collect, can only save himself from hazard by obtaining permission to pay it into court. No title can be made until the court authorizes it; and the court will not direct a conveyance before it ascertains that the money is effectually secured for all those who may thereafter become entitled to it. If the master, *as master*, could sell,

the payment of the price to him, under these circumstances, unless the money afterwards reached the hands of those to whom it belonged, would not pass the equitable estate in the subject-matter of the purchase. Still less could it have that effect when the master had no authority even to make the sale.

The case may be a hard one upon Hugh B. Knox or on the plaintiff, who claims to have succeeded to his rights. Nothing appears to raise a suspicion that he did not act in good faith. But we cannot make a decree to divest the heirs of Andrew Knox of the inheritance (466) which descended to them from their father, unless the sale has been made, which he authorized by his will. In equity there is no sale without payment of the purchase money. By the misplaced confidence of the alleged purchaser, instead of this money having been paid to those who were interested to receive it, and secured to the intended objects of the testator's bounty, one-half of it has been pocketed by the insolvent clerk and the other half appropriated to the personal necessities of the insolvent widow. The injunction must be dissolved and the bill dismissed, with costs, as to the defendants, Howcott and wife; as to the other defendants, the bill is to be dismissed, but without costs. The executors have come before the Court under very unfavorable circumstances. The misconduct of the widow deprives her estate of a right to remuneration for the expenses of this litigation; and an administrator who relies upon the insolvency of his intestate, and where that insolvency is not contested, is not on that account entitled to costs, in equity. *Adair v. Shaw,* 1 Sch. & Lef., 280; *Vredale v. Vredale,* 3 Atk., 119; *Humphrey v. Morse,* 2 Atk., 408.

PER CURIAM. Bill dismissed.

CHRISTIAN CLAPP ET AL. v. JOHN FOGLEMAN.

In England a limitation over upon a bequest of personalty, in case the first legatee "shall die without leaving any issue," is good. The same words in a devise either reduces an estate in fee to one for life or enlarges an estate for life to an estate tail. In this State, since our act of 1784, abolishing entails, the same construction is put upon the words in both cases. The words, without having issue or *children,* clearly confine the time to the death of the legatee.

JACOB CLAPP died in the year 1826, having made and published his will, by which he devised his land to his two sons, and bequeathed pecuniary legacies to his two daughters. To all these provisions he added the following limitation: "It is my will that if any of (467)

my children die without leaving issue or children, that what I have given them shall return, or its value, and be equally divided among all my children."

The defendant married one of the daughters, and received her legacy. She died without leaving children surviving her. The plaintiffs were the other children of the testator, and the bill set forth the above facts, and prayed an account and payment of the legacy.

The defendant, in his answer, insisted, first, that the legacy belonged absolutely to his wife, the limitation over being too remote; secondly, that if in this he was mistaken, that the plaintiffs had a plain remedy at law, and ought not to have filed this bill. His Honor, *Judge Settle,* at Guilford, on the last circuit, pronounced a decree according to the prayer of the bill, and the defendant appealed.

No counsel appeared for plaintiffs.
Iredell for defendant.

DANIEL, J., having stated the facts as above, proceeded: In the first place, the will, having been made before our act of Assembly of 1827 (ch. 7) was passed, is not to be construed by it, but is to be construed by those rules of law relative to the subject-matter as they existed before the passage of that act. The subject of the suit being personal property, the limitation over to the plaintiff would be good as an executory devise, by force of the words, "if any of my children shall die without leaving issue," if the additional words, *"or children,"* had not been inserted; for these words shall be, as to personal estate, construed to mean a dying without leaving issue at the death of such child. The reason of which difference, in case of personal property, is in order to support the devise over, which otherwise would be too remote. The reason, wherefore, in England, in the case of a devise of lands to one, and if he die without issue or without leaving issue, shall reduce or enlarge his estate (468) to an estate tail, is because they are supposed to be inserted in favor of the issue, that they may have it, and the intent of the testator may take place by creating an estate tail. Thus we see the reason why a different construction is then put upon the same words in a will, where they relate to different species of property. *Forth v. Chapman,* 1 P. Wms., 663; *Dansey v. Griffith,* 4 Maule & Selw., 62; *Crooke v. De Vandes,* 9 Ves., 197, 203; 2 Thomas' Coke, 762. In this State, since the act of 1784, there cannot be an estate tail; the same construction is put on words like these in devises of real property as, in England, obtains on bequests of personalty. *Jones and Wife v. Spaight,* 1 Car. Law Rep., 544. As to the second objection, without stopping to inquire whether the plaintiff could recover in *assumpsit* at law, this

Court has always held the first taker, in a case like this, to be a trustee for the executory devisees when the contingency happened which caused these legacies to vest; and a court of equity, once having the jurisdiction, does not lose it by its being also assumed by a court of law. We are of the opinion that the decree in the Superior Court of Equity was correct and the same must be affirmed, with the cost of this Court.

PER CURIAM. Decree affirmed.

Cited: Ward v. Jones, 40 N. C., 406; *Camp v. Smith,* 68 N. C., 540.

MEMORANDUM.

At the late session of the General Assembly, FREDERICK NASH, ESQ., of the county of Orange; JOHN D. TOOMER, ESQ., of the county of Cumberland; JOHN L. BAYLEY, ESQ., of the county of Pasquotank, and RICHMOND M. PEARSON, ESQ., of the county of Davie, were elected judges of the Superior Courts of Law and Equity for this State; the three first in the places of judges NORWOOD, STRANGE, and DONNELL, resigned; and the last to supply the office rendered necessary by the creation of an additional judicial circuit.

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1837

JOSEPH McK. ALEXANDER, EXECUTOR OF WILLIAM J. WILSON,
v. ROBERT H. BURTON ET AL., EXECUTORS OF JAMES CONNER.

The courts of this State have no power to make submissions to arbitration rules of Court, excepting when the subject-matter of the submission is a suit pending in them; and the Superior Court has no power to make an order appointing commissioners to audit and settle the accounts of an executor. An order of that court appointing commissioners is only obligatory so far as it sets forth a contract between the parties to it; and one made upon the joint petition of the executors and creditors, directing commissioners "to adjust and finally settle" the accounts of the former, in the absence of proof to the contrary, is taken as only authorizing them to make a statement of his receipts and expenditures, and to allow his commissions; and does not confer the right to disturb the priorities of the creditors, or in any way to interfere with the legal course of administration.

THE bill charged, in substance, that the plaintiff, being the sole acting executor of William J. Wilson, and having, shortly after the death of his testator, and in pursuance of the directions of his will, made sale of all his estate, real and personal, and having discovered that it was uncertain whether the assets would be sufficient to discharge the debts due by bond and otherwise liquidated, for the purpose of removing all difficulties that might arise between himself and the creditors having these demands, agreed to refer "the settlement of the estate and (470) the question as to whom and in what manner the assets were to be disbursed" to the arbitrament of Pearsall Thompson, the clerk of the Superior Court of Law for the county of Mecklenburg, and William J. Alexander and Washington Morrison, Esqs., and that the same might be rendered more solemn and permanent, it was agreed that a petition

should be drawn up and signed by the parties, praying the judge of the Superior Court of said county to appoint the said Thompson, Alexander, and Morrison to adjust and finally settle said estate and to place the same on the records of the court. The bill further charged that, in pursuance of the said agreement, a petition was drawn up and signed by the parties, or their duly authorized agents; that the judge ordered the matters contained in the said petition to be referred as prayed for; that the referees thereupon made an award, which was filed among the records of the court; that by said award they adjudged that certain debts should be paid off in full, and that certain other debts claimed by the creditors signing the petition, and amongst them the debt due to the testator of defendants, should be paid out of the residue of the assets *pro rata*—that is to say, at the rate of 53 cents upon the dollar; that the plaintiff had applied the assets as directed by the said award, had paid to the testator of the defendants in his lifetime a part of the sum awarded to him, and since his death had paid the residue thereof to his widow, who, he charged, was authorized to receive the same. The plaintiff then complained that, notwithstanding he had furnished the defendant with a copy of the award, he had instituted a suit at law to recover the whole amount of the bonds. To the bill was appended as an exhibit a copy of the petition, order of court, and award referred to.

The defendans, by their answers, denied that their testator ever did agree to submit his claim against the plaintiff as executor of Wilson to the arbitrament of any persons whatever; declared that they were informed and believed the fact to be that there was no communica-
(471) tion with him on the subject of a reference, either with respect to the validity of his claim or the amount to be paid him thereon, but that the paper-writing, called a submission (the petition), was handed to him when very ill, and that he directed James Wilson, the son of complainant's testator, to sign it, under the belief that it was simply an application for the appointment of a committee to settle the plaintiff's accounts as executor, and probably to fix the rate of his commissions; and they insisted that, upon the petition and the order of the court thereupon, it is apparent that there was no submission to an award, nor any such submission contemplated by the parties. They admitted that a sum of money was paid by the plaintiff to their testator, which was duly endorsed on one of the bonds, and that, after his death and before the probate of his will, a further sum was paid to his widow; but they peremptorily denied that either of these sums was received on account of the award, and stated that, with regard to the latter sum, it was paid to the widow wholly without any authority on her part to receive it; but the defendant Burton, after his qualification

as executor, having received from the widow the bonds, which until then had remained in her possession, and learning that so much money had been received by her on account thereof, caused the same to be endorsed as a further payment. The defendants admitted that they had brought suit on the bonds to recover the residue unpaid thereof; aver that the sum claimed is justly due; charged the plaintiff with fraud in the administration of the estate, and contended that he had assets sufficient to satisfy their demands.

Upon these answers, his Honor, *Judge Saunders,* continued until the hearing the injunction which had issued upon the filing of the bill to restrain the defendants from proceeding in their action upon the bond of the plaintiff's testator to the testator of the defendants; and, the defendants being dissatisfied therewith, his Honor was, upon their prayer, pleased to allow an appeal to this Court.

A. M. Burton for defendants.
D. F. Caldwell contra.

GASTON, J., after stating the case as above, proceeded as follows: We deem it unnecessary to enter upon the inquiry whether, if there has been the submission charged in the bill, the award thereupon does not furnish a legal defense against the action enjoined. Nor shall (472) we examine whether it may not be open for the plaintiff to show by *extrinsic* evidence that in truth such a submission was made; or for the defendants, on the other hand, to prove that their testator signed the petition under a misconception of its import. In the present state of the conflicting allegations of the parties, and for the purpose of deciding on the question before us, we have confined our attention to the construction of the written documents exhibited. The petition is addressed to the judge of the Superior Court of Law and Equity for the county of Mecklenburg. It states that the executor of William J. Wilson and the creditors petition his Honor to appoint the clerk of the court, together with William J. Alexander and Washington Morrison, Esquires, to adjust and finally settle with J. McKnitt Alexander, the executor, the estate of William J. Wilson, and place the same on the records of the court; and it purports to be signed by the executor, and by several persons as creditors, among whom is the testator of the defendants. The order thereupon is that Pearsall Thompson, William J. Alexander, and Washington Morrison, Esquires, be appointed a committee to adjust and finally settle the estate of William J. Wilson, deceased, with J. McKnitt Alexander, the executor. The petition is dated July, 1834, and the order is made at August Term, 1834. The award bears date 17 February, 1835. It prefixes a statement of the unsatisfied

demands against the estate, which is headed "Report of the estate of William J. Wilson by the executor"; two lists of debts paid by the executor, and a statement showing "amount of William J. Wilson's estate"; and then proceeds to declare that the said Alexander, Morrison and Thompson, being appointed by the Superior Court of law, by and with the advice and consent of the executor of William J. Wilson, on the one part, and of the creditors set forth in the preceding statement, on the other, to settle the estate of said Wilson and "decide to (473) whom and in what manner the assets of said estate should be paid," do award that the executor, having paid the amount of debts as set forth in the two lists above mentioned, do pay those contained in the first statement *pro rata* out of the assets, there being a deficiency to pay all the bond debts and others of equal dignity; that the executor be allowed four per cent commissions, and that Margaret Wilson (one of the petitioning creditors paid in full) pay the executor one hundred dollars in addition to the commissions above allowed. There is then subjoined or endorsed a general statement representing the amount of the estate, the balance after deduction of commissions and debts subject to no deduction; the amount of debts subject to deduction, and the excess of these above the balance of assets, showing that the executor will be enabled to pay fifty-three cents in the dollar. It does not appear when the proceedings of the committee or arbitrators were returned to court, but that they were returned would appear from the copy thereof certified by the clerk of the court. There was no action thereon by the court. The testator of the defendants died 11 April, 1835.

Executors and administrators are required by law to make a settlement of their estates with the county court, which is authorized to make to them an allowance by way of commissions on the amount of receipts and expenditures that shall appear to be fairly made in the management of the estates. It is the universal usage to make this settlement through the agency of a committee appointed by the county court, which committee also reports to the court a reasonable rate of commissions. Such settlements, however, are regarded as *ex parte* settlements, and in no respect binding the creditors, legatees or next of kin, except as to the allowance of commissions when sanctioned by the court. The Superior Courts have no original jurisdiction over these settlements or the allowance of commissions; nor have any of our courts authority to direct a submission to arbitration to be made a rule of court, unless when the parties agree to a reference of some subject of litigation actually pending before them. To a proceeding so anomalous as that which (474) we are examining it is difficult to assign a precise character. It

has no *force* as a judicial proceeding — and is binding on the parties only to the extent to which the parties have declared their will to be thereby bound. From the concurrency of the creditors with the executors in the appointment of the persons to superintend or make the settlement between him and the estate, it may be inferred that the parties intended to impart to such a settlement a character above that of the mere *ex parte* settlements usually made by executors and administrators. This inference is strengthened by the introduction of the unusual expression, "finally," in the application for the appointment— "to adjust and *finally* settle." But whatever was to be the *character* of the settlement, whether conclusive, *ex parte,* or intermediate between these extremes, the main inquiry is, what was the subject-matter of it? The petition and the order thereon show that this was "the estate of the deceased with the executor"; and such a settlement involves directly no more than an inquiry into his receipts and disbursements and the reasonable rate of commissions to be thereon allowed. Before we can hold that the rights of the creditors as against the executor, or as to priority as between themselves, were conclusively adjudicated by an award, it must clearly appear that the creditors submitted these subjects to adjudication. Had a submission of these rights been intended, we cannot but think that the language of the petition and order would have been more explicit. The persons nominated to act would have been characterized not as a *committee,* but as referees or arbitrators; the subject-matter of the reference would have embraced, in terms, not merely a settlement of the estate with the executor, but in the language of the bill and the award, have set forth the questions arising between the creditors, "to whom and in what manner the assets of said estate should be paid"; and the result of the reference has been designated, not as a settlement of the estate to be returned to court, but by its well-known name of an award to be binding upon the parties. It would be dangerous to imply a delegation of authority not resulting from obvious intendment to a tribunal raised by the parties, so as to deprive them of the power of resorting to the tribunals con- (475) stituted by the law for the ascertainment of rights and the decision of controversies. Upon this view of the case we are of opinion that for the present, and upon the face of the exhibits, the award, as it has been termed, cannot be considered as binding the defendants to forego their claim to the unpaid residue of the bonds, for which they have brought suit.

On the trial of the suit, what effect shall be given as evidence to the accounts accompanying the report of the committee is a question on which it were improper now to express any opinion.

The Court directs that this, their opinion, shall be certified to the Court of Equity for the county of Mecklenburg, with instructions to reverse the order appealed from, and to order that the injunction heretofore granted in this case be dissolved with costs. The plaintiff must pay the costs of this Court.

PER CURIAM. Order reversed.

Cited: Lusk v. Clayton, 70 N. C., 188.

ELIZABETH GEDDY v. LITTLEBERRY E. STAINBACK ET AL.

1. In the absence of fraud, mistake or surprise, parol evidence cannot be received to prove that a bond, payable immediately, was not to be demanded until after the obligor's death.
2. A bond given for the amount of an account is not rendered voluntary by the fact that the obligor had a set-off of equal amount which was waived.

THE allegations of the bill were that William Gilmore, a nephew of the plaintiff, having been unfortunate in business, and having lost his wife, who left a family of infant daughters, brought them to the house of the plaintiff, his maternal aunt; that at that time no agreement was made for their board, but that Gilmore informed her that he was about to commence business in Petersburg as a grocer, and that he would supply her with such articles in his line as she required; that (476) the children resided with her eight years, and that during that period their father did supply her as he had promised; that on 1 September, 1827, he visited his children, and while at the house of the plaintiff produced an account for the various articles which he had furnished her with, and asked her to execute a bond to him for the amount; that this was promptly refused by her, she stating to him that he owed her a sum at least equal to the amount of his account; that this was admitted by Gilmore, who told her that his children were as nearly related to her as any other person; that as she was a single woman, advanced in life, her property would upon her death be distributed among her relations, and he asked the bond only as a means of enabling his children to receive a portion of it; and that he then promised her that if she would execute the bond she should never be called on for payment of it, but that he would wait until her death, and then receive it only in the event of her leaving property to pay it; that, moved by these considerations, she executed the bond before a respectable witness, to whom the above statement was made; that Gilmore had

died insolvent, having before his death pledged it to John V. Wilcox (a defendant) upon a loan of four hundred dollars; that the bond had been, by Wilcox, handed to the defendant Stainback, the partner of Gilmore, who had brought suit on it; that Gilmore had promised her that he would charge its amount to himself and take it from the partnership effects and put it among his private papers; that upon his death-bed he had communicated the above-mentioned facts to Stainback, and besought him not to press the plaintiff for the amount during her life; that he, Stainback, instead of so doing, had brought suit on the bond; that the plaintiff had succeeded in setting off against it the sum due for the board of the children of Gilmore, subsequent to its date; that of a large sum due her before its execution she had been defeated by the presumption of a settlement which the bond raised, and by the statute of limitations; and that judgment for the balance of the bond had been entered against her. The plaintiff insisted that the bond was testamentary in its character, and if in this she was mistaken, then that she was entitled to have the payment of it stayed until her death; and she prayed either a perpetual injunction or one dur- (477) ing her life.

The defense and testimony is stated fully by the *Chief Justice* in giving judgment.

Badger and Devereux for plaintiff.
W. H. Haywood for defendants.

RUFFIN, C. J. The instrument is in no sense testamentary. It was never intended to be revokable according to the statement of the bill. The form of the instrument shows this. It is a bond, and the plaintiff admits that it was meant to bind her to the absolute payment of the money, if not immediately, at her death. If it be meant that it is testamentary, because it is a voluntary provision for a relation, to arise after the party's death; it is not even that, if that would do. This is not a voluntary bond. The bill admits that the plaintiff had merchandise to the value of the sum for which the bond was given. It is therefore founded on an adequate and full consideration. The plaintiff says, indeed, that she might have made a counter-demand, of equal or larger amount, but that she would not nor did not. If the board of the children was not meant from the beginning to be gratuitous, a point on which the parties had probably no definite purposes, much less distinct communication, yet the abandonment of a claim for it, by the person who might set up such an one, will not make the bond of that person for a just debt due to another voluntary; more especially when it was not expressly abandoned, as was the case here, for the

plaintiff actually had the benefit of the subsequent board, by way of set-off, in the action on this bond; and she attributes the loss of the residue to the operation of the statute of limitations. The plaintiff is certainly, therefore, not entitled to a perpetual injunction.

If the alleged agreement for the delay were established, relief might be granted to the extent of stopping the payment during the plaintiff's life. But the only evidence of the agreement is the testimony of the subscribing witness. The plaintiff has failed in her attempt to (478) draw it from the defendants upon her interrogatories. Stainback answers distinctly that the goods for which the small bond was given were furnished by W. Gilmore & Co., but that those which formed the consideration of the large bond were not, but must have been purchased by Gilmore for the plaintiff, for that the firm of W. Gilmore & Co. was not formed until the year 1828, which was after the date of this bond. He states that no entry was made of it on the books of that concern, and tenders the inspection of them to any agent of the plaintiff; and he denies that Gilmore ever made any communication whatever to him, or to any person to his knowledge, upon the subject of the bond, or of any condition on which it was given; and, moreover, denies that he knew of the existence of the bond, or of the debt on which it was founded, until after the death of Gilmore. The plaintiff's case, therefore, rests entirely upon the testimony of the witness.

He states that he also resided with the plaintiff during the whole period that Mr. Gilmore's children did; that he was present and witnessed the bond for one thousand dollars; that at that time or any other he never heard compensation for the board of the children spoken of, but that when the bond was given it was distinctly agreed that it was not to be presented for payment until after the death of the plaintiff, but upon that event, if she left property, the money was to be recoverable.

Upon this evidence it is not competent to the Court to vary the written contract. Neither the bill nor the deposition intimate that the bond is not in its form what the parties thought and intended it to be at the time. There is no allegation of fraud, mistake, or what is technically called surprise in this Court. The bond was not given for more than was intended or than was due, upon the principle on which the parties settled, nor payable at a different day from that on which it was understood to purport to be payable. The allegation and evidence is merely of a distinct collateral agreement, entered into at the time, which is insisted on as controlling the written agreement. It ought to have been inserted in the instrument or set forth in a separate one, in the (479) nature of a defeasance or condition. It has been so often said

by the Court that parol evidence is inadmissible for that purpose as to render it almost a legal adage, not needing the support of an authority. There are, however, many adjudications, and among them is the case of *Howell v. Hooks,* 2 Dev. Eq., 258, directly in point.

PER CURIAM. Bill dismissed with costs.

LITTLEBERRY E. STAINBACK v. ELIZABETH GEDDY ET AL.

Matters of equitable defense against a judgment at law cannot be set up to prevent the removal of an encumbrance, operating as an impediment to the satisfaction of it, but must be urged by a bill seeking relief against it.

THIS suit, which was pending at the same time with the preceding one of *Geddy v. Stainback et al.,* was brought for the purpose of having a sale of certain mortgaged premises belonging to the plaintiff in that suit, to satisfy the judgment he had obtained upon the bond mentioned in that suit. The matters set forth in the bill in the preceding suit were relied upon in the answer in this as a bar to the relief sought. The allegations and proofs were exactly the same in both suits, the preceding one being, in fact, a cross-bill to the present.

W. H. Haywood for plaintiff.
Badger and Devereux for defendants.

RUFFIN, C. J. The relief sought is of course to every judgment creditor, as such, in the way of whose satisfaction at law an encumbrance stands. He has a right to redeem or to have the encumbrance satisfied out of the property; and it is no favor to him, but mere justice, to decree it for him in this Court. It is not to be considered, therefore, that objections to the relief can be made upon the ground of an equity against the judgment, by way of defenses. The proper mode of taking benefit of such an equity seems to be by a bill of the (480) defendant at law. But in this case, as the opinion of the Court is clear, and has been already expressed upon the merits in the other cause, it is enough to say that, for the reasons before given, the contracts, as written, are obligatory in this Court as they are at law, and therefore that the plaintiff is entitled to have satisfaction of his judgment. There must be a reference to the master to ascertain the sum due to the plaintiff for principal, interest, and costs, upon the foot of his judgment; the sums due the creditors mentioned in the deeds of trust, and the present state of the trust fund; of what it consists, etc.

PER CURIAM. Decree accordingly.

JOHN M. DICK ET AL. V. ALLEN PITCHFORD ET AL.

1. A deed for land and slaves upon trust, to apply annually the rents and profits to the use and benefit of the *cestui que trust*, for his life, "so that they shall not be sold or disposed of or anticipated by him," without giving the estate over in case of an attempted sale or anticipation, does not prevent an assignment of his interest by the *cestui que trust;* and the assignee has a right to an account of the rents and profits from the time of the assignment; but in such case, if there be ulterior contingent trusts, he has no right to call upon the trustee for the surrender of the possession of the trust property.

2. A deed by a trustee, relinquishing his legal estate, but without conveying it to any person, is inoperative, and leaves the estate in him subject to all the trusts declared in the deed creating it.

THIS bill was filed by John M. Dick, Daniel B. Pitchford, and Miles Pitchford, against Allen Pitchford, Hezekiah Pitchford, and Branch Pitchford; and its prayer was, the said Allen and Hezekiah might be decreed to surrender unto the complainant, John M. Dick, the possession of the negro slaves, Harriet, Solomon, Elvira, Sally and Frances, and to account with him for the profits of said slaves, and for general relief. All the allegations of the bill were admitted by the defendant, Branch Pitchford, in his answer to be true; the bill was taken *pro confesso* against the defendant Hezekiah, and the sole contro-
(481) versy was with the defendant Allen Pitchford. On the pleadings and proofs the case appeared to be that, on 23 February, 1818, Daniel Pitchford, the elder, of the county of Warren, by a deed of bargain and sale, in consideration of the sum of ten dollars, acknowledged to be paid by Thomas Pitchford, also of said county, conveyed unto the said Thomas, his heirs, executors, administrators and assigns, a tract of land in Guilford County and five negro slaves, Russel, Sylvia, Nancy, Salisbury, and Harriett, upon the following trust, that is to say, upon trust "annually to apply the rents and hire of the said land and negroes, or their issue, or other profits thereof to the use and benefit of Hezekiah Pitchford" (son of the bargainor), "during the life of the said Hezekiah and no longer; so that they be not subject to be sold or disposed of by the said Hezekiah, or the rents and profits anticipated by him, or be in any manner subject to his debts or contracts; and after the death of the said Hezekiah, in trust for the three sons of the said Hezekiah, to wit, Branch, Daniel, and Miles Pitchford, or such of them as may be living at the death of the said Hezekiah; but should the said sons, or either or any of them, die before their said father, leaving issue then alive, such issue shall stand in the place of his father, and have that part or parts which his or their parent or parents would have

taken had he or they been alive at the time of said Hezekiah's death, to them, the said three sons, Branch, Daniel and Miles, in manner aforesaid, their heirs and assigns forever." Hezekiah Pitchford removed to the county of Guilford with his three sons; there became embarrassed with debt, and was hard pressed by his creditors. To enable him and his sons, by a disposition of part of this property, to remove these embarrassments and relieve this pressure, Thomas Pitchford, the trustee, on 22 December, 1830, executed an instrument under his hand and seal whereby, after reciting the deed of trust, it is declared as follows: "Now be it known that I, Thomas Pitchford, trustee as aforesaid, for divers good causes me thereunto moving, and being further desirous of giving up and relinquishing the said trust reposed in me by said deed, I hereby, for myself, my heirs, executors, administrators and (482) assigns, now and forever relinquish and abstain from all law, authority, or any other interference in any of the premises aforesaid, by reason of the said trust deed or otherwise." This instrument was, on 13 February, 1831, transmitted to James Cole, of Guilford County, enclosed in a letter written in the name of and subscribed by the said Thomas, and addressed to the said Cole. The letter also covered a bond of indemnity, to be executed by the said Hezekiah and his sons, and requested the said Cole to have the said bond executed and the instruments delivered to the proper parties, so that the said Thomas might be discharged from his trust and the said Hezekiah relieved from his debts; with a further request that "the boys would come down and take their property and make the other arrangements." At the date of these transactions the said Thomas had sufficient capacity to enable him in law to perform valid acts, but his mind, from habitual drunkenness, was in such a state of imbecility as rendered the aid of friends necessary for the explanation of any business not of ordinary occurrence. The nature of the instrument and the purport of the letter were explained to and understood by him. From the evidence it is to be inferred that the indemnifying bond enclosed in the letter was executed. It does not appear, nor can it be inferred, that the sons of Hezekiah took the property or made the other arrangements alluded to therein, but it is to be collected; that Salisbury, one of the trust negroes, was, shortly after the receipt of the letter, sold by Hezekiah and his sons and the proceeds, or a part of them, applied to the relief of the said Hezekiah. In the meantime Sylvia, one of these negroes, had borne issue—Evan, Solomon, Elvira, Sally and Peggy, and on 19 January, 1832, Hezekiah and his sons came to an agreement for the final disposition of the trust slaves and the increase thereof between themselves; and in pursuance of said agreement, and on that day, the sons conveyed to their father the negroes Russel, Sylvia, and Robert; the father and

(483) his sons, Branch and Daniel, conveyed unto the complainant, Miles Pitchford, Solomon and Elvira; the father and his sons, Branch and Miles, conveyed unto the complainant, Daniel Pitchford, Harriet and Sally; and the father and his sons, Miles and Daniel, conveyed the others to the defendant Branch. Thomas Pitchford died in January, 1833, having all these negroes in his possession; and upon his death they came to the possession of the defendant, Allen Pitchford, his administrator, and so continued up to the institution of this suit. On 26 July, 1833, the complainant Miles conveyed to the complainant, John M. Dick, Solomon and Elvira; and on 9 August, 1833, the complainant Daniel also conveyed to him Harriet, Sally, and Frances, an infant child of Sally. After these conveyances the complainant Dick demanded from the said Allen the negroes so purchased by him, which demand was refused, he, the said Allen, alleging that he was advised he could not rightfully surrender the possession of them during the life of the said Hezekiah. Upon this demand and refusal, the present bill was brought in December, 1833.

Badger for plaintiffs.
Mendenhall for defendant Allen Pitchford.

GASTON, J., after stating the case as above, proceeded as follows: Upon this case it is necessary, in the first place, to ascertain the effect of the qualifications and restrictions imposed by the deed of settlement upon the use or beneficial interest thereby secured to Hezekiah Pitchford. The deed provides that the trustee shall, annually, during the life of the said Hezekiah, apply all the rents and profits to his use and benefit. The trustee has no *discretion* over these proceeds, and they belong wholly to the said Hezekiah. The deed does not provide that in the event of the said Hezekiah attempting to sell or dispose of the same, or otherwise to anticipate the receipt thereof, that they shall then go over and be paid to some other person; it secures to him, at all events, the enjoyment of the property for life, but prohibits him from transferring it or anticipating its profits. Now, the general right of the giver of property to prescribe the modifications of his gift is (484) subject to the condition that these modifications be not contrary to law nor repugnant to the nature of the conveyance, nor incompatible with the legal incidents belonging to the disposition he has made. The power of alienation is a legal incident of ownership. It is familiar doctrine that if a feoffment, grant, release, confirmation, or devise be made upon condition not to alien the estate, or if a term for years or chattel personal be granted upon condition not to assign, such conditions are altogether nugatory. The doctrine obtains not less in courts of

equity, acting upon those interests which are the proper subject-matter of their jurisdiction, than in courts of law adjudicating upon legal interests. A departure from it would introduce endless confusion and innumerable mischiefs. The capricious regulations which individuals would fain impose on the enjoyment and disposal of property must yield to the fixed rules which have been prescribed by the supreme power as essential to the useful existence of property. If under the settlement a legal estate had been limited to Hezekiah Pitchford for life, he would have taken that estate as one in its nature alienable, and the prohibition against alienation would have been absolutely void. The exclusive right, enforced through the trust imposed on the legal proprietor, to receive the profits of the property thereby conveyed, is, in equity, the estate in that property; and equity must hold a prohibition to dispose of what is *his* as wholly inoperative.

No doubt, the peculiar provisions in this deed have been borrowed from those restraints upon alienation, and upon anticipation of profits, which, in England, and in comparatively modern times, have been introduced into settlements for the separate use of married women, in order to protect them against the undue influence of their husbands. By the common law, upon marriage the personal property of the wife becomes the property of the husband, and he is entitled to all the rents and profits of her real estate. But in equity a separate and exclusive property may be secured to her in personal estate and in the rents and profits of real estate. Equity, for these purposes, confers upon her a capacity which she has not at law, and regards her as a *feme* (485) *sole,* so far forth as the settlement makes her the owner of the property. It has been held by great judges that this capacity, being the creature of equity, may be so moulded by equity as not to permit it to be abused to purposes for which it was not bestowed. Upon this reasoning, these restraints upon married women have been upheld. Other eminent judges have disapproved of this reasoning and insisted that if equity allows a wife to hold property as though she were a *feme sole,* the property so held should be subject to all the incidents which belong to the like property in the hands of a *feme sole.* Whichever party may have had the advantage in the argument, authority has settled the controversy in that country. The first instance of express and effectual provisions against anticipation of profits is said to have occurred in the settlement of Miss Watson's property under the sanction of *Lord Thurlow,* soon after his judgment in *Pybus v. Smith* (reported 1 Ves. Jun., 189, and 3 Brown's Ch. C., 340), rendered in 1791. Many cases have since come under the consideration of the English courts in which the validity of such restraints in settlements for the use of married women has been conclusively established. In this State no case of the kind has

been judicially considered, and how it would here be determined, it is unnecessary now to say. In the excepted case, where such restraints are allowed, there has been a diversity of opinion and a conflict of decisions as to the extent to which they may be carried. An eminent judge—the late Master of the Rolls, *Sir John Leach*—held that, in order to afford adequate and complete protection to these favored interests, the power of anticipation may be controlled, even while the *feme* is single, so as to secure for her a separate estate in the event of a future marriage; but, upon appeal to the then *Lord Chancellor Brougham,* he reversed the decrees of the Master of the Rolls and held that a clause against anticipation annexed to a life estate in a trust fund settled to the separate and exclusive use of a woman does not prevent her, at any time before marriage, from making an effectual assignment. *Wood-*
(486) *meston v. Walker,* 2 Russ. & Mylne, 197; *Brown v. Pocock, ibid.,* 210; and Cooper's Sel. Ca., 70. But in these cases, and in many others, where the point has been considered, it is admitted as indisputable that such restraints imposed on persons having *legal* capacity to dispose of property are wholly inept and null. *Brandon v. Robinson,* 18 Ves. Jun., 429; *Barton v. Briscoe,* 1 Jacobs, 603; *Newton v. Reid,* 4 Sim., 141; *Jackson v. Hobhouse,* 2 Meriv., 482. The Court is, therefore, of opinion that the defendant Hezekiah could rightfully transfer his interest in the trust property, and declares that this interest, as to the slaves claimed by the complainant, John M. Dick, has been transferred to him, and that he is entitled to an account of the profits thereof, since the interest of the said Hezekiah in the same was transferred to him.

But the said complainant, by his counsel, insists that he is entitled to the immediate possession of the slaves, and either to a conveyance from the defendant Allen of the legal estate therein, or to an injunction restraining the said defendant from asserting said title. This Court does not think so. If the instrument of 22 December, 1830, had not been executed, and the defendant Hezekiah still retained the interest in the slaves given him by his father's deed, it is very clear that he would not have been entitled to demand a surrender of the possession from the trustee. He could have claimed no more than what that deed secured to him—the annual profits of the slaves during his life. If the sons had concurred with the father in demanding a surrender of the possession, it ought not to have been decreed. Under the deed of Daniel Pitchford, the elder, valuable contingent interests have been limited to the children of the said Hezekiah's sons, and the legal title was conveyed to the trustee in order to secure these contingent interests, as well as those of the father and his sons. The instrument of 22 December, 1830, neither enlarged *these* interests nor destroyed the contingent interests, nor

changed the duty of the trustee to any of his *cestui que trusts.* Unquestionably, that instrument was intended to operate as a relinquishment of the legal estate, but it cannot, in law, have this operation unless it availed to *pass the title,* and this it did not pass, nor (487) purport to pass, to any person whatever. If, indeed, it had transferred the title, there would have been no pretext for asking the aid of a court of equity. The very ground on which this bill seeks relief against the administrator of the trustee is that the legal title to the slaves is in him. The instrument not operating at law as a relinquishment, we do not see why equity should decree to it this operation. It is the duty of him who holds the legal estate to perform, and it is the duty of this Court to protect, all the trusts of the original gift which are not incompatible with law, and to deliver over the possession to those who have an interest to defeat, and might be tempted to defeat, the contingent trusts would, in him and in the Court, be a breach of duty. The arrangements made between the defendant Hezekiah and his sons, and between them and the complainant, John M. Dick, since the execution of the instrument of 22 December, 1830, do not, we think, furnish a sufficient reason for the interference asked for. It is not charged that *they,* or any of them, have been circumvented or surprised into these arrangements by the fraud or misrepresentations of the trustee—if such a charge can be considered as intimated in the bill, it is not proved—if distinctly alleged and proved, whatever other redress it might call for, it presents no equity for obtaining what the trustee's administrator cannot rightfully yield, and what *they* are not in conscience entitled to demand. Each and every of them should be secured in the enjoyment of the rights, such as they are, which have passed under those arrangements; but a misapprehension as to the extent or value of these rights furnishes no adequate reason for asking more.

A decretal order will be drawn up for taking an account embodying the declarations of the Court as to the rights of the parties litigant; and the further consideration of the cause will be reserved until the coming in of the report, or until the Court shall be called on for further directions.

Cited: Battle v. Petway, 27 N. C., 576; *Miller v. Bingham,* 36 N. C., 425; *Mebane v. Mebane,* 39 N. C., 132; *Harris v. Harris,* 42 N. C., 115; *Forbes v. Smith,* 43 N. C., 31; *Turnage v. Green,* 55 N. C., 66; *McKnight v. Wilson, id.,* 494; *Pace v. Pace,* 73 N. C., 125; *Ricks v. Pope,* 129 N. C., 55.

(488)

THOMAS NEWBY, EXECUTOR OF WILLIAM LAYDEN, v. EDMUND B. SKINNER ET UXOR, ET AL.

Where a testator directs land to be sold and the proceeds divided, it is not a conversion of the land into personalty out and out, but merely the appointment of a mode of division; and those entitled to the purchase-money take as devisees; and the money is not subject to the payment of debts until the personal estate is exhausted.

WILLIAM LAYDEN died in December, 1834, having duly made his last will and testament, whereof he constituted his daughter, Eliza Curtis, and his friend, Thomas Newby, executors; the last of whom alone proved the will and performed the functions of executor. By the will the testator devised to his wife for life his Sound plantation, and bequeathed to her sundry negroes and other specific chattels; devised to his son, Joseph, in fee, the tract of land called the Clayton tract, and bequeathed to him several negroes specifically; directed that three negro slaves, designated by name, and a tract called the Thomas Barclift tract, should be sold for the payment of his debts; bequeathed certain negroes specifically to each of his two daughters, Mary Jane and Eliza Curtis (wife of the defendant Skinner), and then devised, bequeathed and declared as follows: "It is my wish that the lands called the Dempsey Barclift tract, or say the Broad Neck tract, should be rented out for the benefit of my estate for the term of two years; and also my negro men, Will and Stephen" (the former of whom he had bequeathed to his daughter, Eliza Curtis, and the latter to his son, Joseph), "to be hired out for the term of two years for the benefit of my estate. Item. It is my wish that, after two years, the Broad Neck tract, or say the Dempsey Barclift land, should be sold at six and twelve months credit, by those who purchase the land to give good security, and the moneys to be equally divided between Mary Jane and Eliza Curtis, both my daughters; and, also, if there should be any moneys left after paying my just debts, should be equally divided between my two daughters as above." Thomas Newby, the executor, has filed his bill against the

(489) devisees and legatees, setting forth that he has applied the residuary part of the testator's personal estate and all the funds arising from the sales of the negroes and tract of land specifically charged with the payment of testator's debts, and the rents of the Broad Neck tract, and the hires of the negroes, Will and Stephen, for two years; and has sold some of the negroes specifically bequeathed, and applied their proceeds also to the satisfaction of those debts; that he has sold the Broad Neck tract and applied a part of the proceeds of that sale to the satisfaction of debts; and that he has now a balance in

his hands which he knows not to whom to pay, because of a controversy between the widow and the son of the deceased on the one hand, and the daughters on the other; the former contending that the proceeds of the sale of the Broad Neck tract ought to be regarded as in the nature of a pecuniary legacy, and therefore liable to abatement before their legacies, which are specific; and the latter insisting that the said proceeds are in the nature of land specifically devised and not liable for debts, except upon a deficiency of the whole personal estate. The defendants have answered. The daughters set up the claim to receive the proceeds of the Broad Neck tract undiminished because of the testator's debts; the widow joins with them in the assertion of this claim; and the son, who is a minor, submits his rights to the protection of the Court.

Kinney for Joseph Layden, the infant legatee.
Devereux for Skinner and wife and Mary J. Layden.

GASTON, J., having stated the case as above, proceeded: In our opinion, the daughters have clearly the right in this controversy. The general rule is indisputable that the personal estate is the first and natural fund for the payment of debts, and the real estate is not to be made liable thereto, except to supply the deficiency of the personal. It is sought, in this case, to subject the proceeds of the land devised to the daughters, because, by the direction of the testator to sell the land, he turned it, in the contemplation of a court of equity, into personalty, and made it a part of his general personal estate. This (490) position, to the extent to which it is pressed, is untenable. The real estate directed to be sold was, at the time of the testator's death, land. By the will it was to remain land until sold, and it was directed to be sold only for the convenience of division between the devisees. It was impressed with the character of personalty so far as was necessary to effectuate the testator's purpose, but no further. Every person taking an interest under a will, in the produce of land directed to be sold, is in truth a devisee, and not a legatee. As he takes from the bounty of the devisor, he must receive what is given, in the quality which the devisor has impressed upon it. The devisor has given, not the land, but the price of the land; and although the trustee is not bound to sell if the *cestui que trust* will take the land itself, yet the land in the hand of the *cestui que trust* is, in equity, regarded as personalty; and if he die without any act to change its quality, it is personalty as between his heir and executor. The devisor might, if he pleased (see *Kidney v. Consmaker,* 1 Ves. Jr., 436, and 2d *ib.,* 267) have converted the land into money, out and out, and then, from the whole context of the will, it would have been open for consideration, whether it was made an

auxiliary fund for the payment of debts or was thrown into the ordinary fund as a part thereof, or constituted the primary fund in exoneration of the personal estate. But even in these cases the executors take as devisees; it is not strictly a part of the testator's general personal estate, but real assets, applicable in their hands to the payment of debts, because devised to them in trust, to be so applied. And in England, however it may be with us, the proceeds of land so converted are held to be equitable and not *legal* assets. *Barker v. May,* 9 Barn. and Cress., 489 (17 Eng. Com. Law Reps., 426). But a conversion of land into money, directed for the benefit of the devisees, creates no charge upon the land for the payment of debts, and does not make the proceeds either legal or equitable assets in the hands of an executor. He holds these (491) proceeds simply as a trustee for the devisees. *Gibbs v. Angier,* 12 Ves., 413; and see *Smith v. Claxton,* 4 Mad., 484.

The bill submits to the Court also the *quantum* of commissions to which the executor is entitled. The ordinary tribunal for deciding on such a question is the County Court; and although when a court of equity is resorted to for the settlement of an estate, it may, as incidental to the exercise of this jurisdiction, determine that question also, it ought to have the materials before it, as far as practicable, to enable it to form an advised judgment. We should require for that purpose an examination, by a commissioner, of the nature and quality of the services rendered by the executor, and a report from him, before we acted upon the subject. This has not been moved for, and we should not direct it without a motion. It will produce costs which neither party may be willing to incur.

It is highly probable that the declaration of our opinion on the main question in controversy will enable the parties to come to a complete settlement. If it should not, either party may hereafter move in the cause as he may be advised.

PER CURIAM. Declare accordingly.

Cited: McBee, ex parte, 63 N. C., 335.

SARAH PENDLETON ET AL. v. JOHN C. BLOUNT ET AL.

A testatrix, after a bequest of slaves, which was void, being for their emancipation, directed the balance of her estate to be sold, and after paying all her just debts the surplus, if any, to be retained in the hands of her executor, and two-thirds of it to be laid out by him for the clothing and

support of her brother's children, and the other third to be for the use of the slaves: *It was held* that the children of the testatrix's brother were only partial residuary legatees, and that she died intestate as to the slaves and one-third of the residue besides them.

ELIZABETH BRASIER, by her will, gave all her negroes to her "executor, hereinafter named, to be by him hired out annually to such person or persons as he may think proper, and the hire of the said negroes I leave as a fund for their support when they are too old or (492) unable to support themselves"; and after sundry particular instructions for their comfort and for removing them to another State or to Africa, and giving several small specific legacies, she proceeded as follows: "It is my wish and desire that all the balance of my property be sold, and after paying all my just debts, the surplus, if any, be retained in the hands of my executor, and two-thirds of it be laid out by him, at his discretion, for the clothing and support of my brother's (Thaddeus Pendleton's) two smallest children; and the other third to be kept for the benefit of my negroes when he may think they need it."

The plaintiffs were the two residuary legatees, the children of the testatrix's brother. The defendants were the executor and next of kin; and the bill charged that the bequest of the slaves, being for emancipation, was void, and that the slaves fell into the residue and passed, two-thirds of them, to the plaintiffs. The bill admitted a right in the next of kin to distribution as to one-third of the slaves and of the residue as created by the will, and prayed for an account and division accordingly. The defendants claimed that the testatrix died intestate as to her slaves.

Devereux for plaintiffs.
Kinney for the next of kin.

DANIEL, J. It is very clear that the bequests of the slaves in the manner stated, and the one-third of the fund produced by the sale of the balance of the property and directed to be kept for testatrix's negroes, are illegal and void. *Sorrey v. Bright, ante,* p. 113. The question then arises, does a trust result for the plaintiffs of two-thirds of the slaves and the fund contemplated by the will to be for their benefit, or does the whole of the slaves and the said fund go to the next of kin, as in a case of intestacy? Had the plaintiffs been expressly named general residuary legatees, their claim would be well founded. But it seems to us that the plaintiffs are only partially residuary legatees, and that of a particular fund. Out of "the balance" of her property her debts were to be paid, and then the "surplus," if any, "to be held by the executor, two-thirds of it (viz., the surplus, if any) for the (493)

clothing and support of the plaintiffs; "the other third to be kept for the benefit of my negroes." The intention of the testatrix is very clear that the plaintiffs were to be excluded in any event from taking, as residuary legatees, the one-third of the fund set apart for the negroes. And her intention is equally clear that her slaves were not to compose a part of the residue, since one-third of that very residue is given to the slaves themselves. Her intention was to confine the legacy of the plaintiffs to the two-thirds of a surplus arising out of a particular fund when her debts charged on that fund should be paid. This being the intention, as is plainly to be gathered from reading the will, the plaintiffs' claims cannot be allowed to the extent set up. The bequests relative to the slaves, or the fund mentioned in the will for the slaves, are illegal and void bequests. The slaves and said fund belong to the next of kin and must be divided among the plaintiffs and the defendants as they each may be respectively entitled under the statute of distributions.

PER CURIAM. Decree accordingly.

Cited: White v. Green, 36 N. C., 49; *Thompson v. Newlin,* 43 N. C., 46; *Green v. Lane, id.,* 79; *Hudson v. Pierce, id.,* 128; *Green v. Lane,* 45 N. C., 114.

ROBERT WHITE v. HENRY W. THOMPSON ET UXOR, ET AL.

Defective conveyances to children are aided in equity. Mere inadequacy of price, in the absence of fraud or surprise, is no defense against a decree for a specific performance, especially when, in addition to the price, affection for a child entered into the consideration.

GEORGE WHITE, the father of the plaintiff, purchased a tract of land of one Johnson, for which he paid $1,500. He took a deed in his own name, but told the plaintiff that he had purchased it for him, and that he, the plaintiff, must aid in paying for it. The plaintiff paid one-third of the purchase money; and upon consultation with a neighbor as to the best means of securing the title, it was concluded that the (494) father should endorse his deed from Johnson to the plaintiff.

This was done, and the following memorandum was written on the deed: "I endorse the within deed to Robert White, 9 May, 1829. Given under my hand and seal." This was signed by the father, in the presence of two witnesses, who attested it. The plaintiff went into possession, and the father died soon after, leaving seven children. Two of

these children, who are defendants, brought an ejectment to recover their two-seventh parts of the land. The bill prayed an injunction and that the defect in the plaintiff's title might be amended by the defendants conveying to him the legal estate which had descended to them from George White.

The defendants, in their answer, put the plaintiff to the proof of his case, and, as a distinct defense, alleged that their father was old and infirm, and had been induced by the contrivance of the plaintiff to make the endorsement on the deed. They also insisted that the part of the purchase money paid by the plaintiff had been obtained from their father, who had already advanced the plaintiff greatly, to the injury of his other children.

J. H. Bryan for plaintiff.
The defendants were not represented in this Court.

DANIEL, J., after stating the case as above, proceeded: The evidence in the cause proves to our satisfaction that the money advanced by the plaintiff was his own money. There is no proof to support the allegation in the answer that the father was imposed on, but there is abundant proof that he intended to do what he did, and that he acted knowingly and understandingly on the subject. The price advanced by the plaintiff, to be sure, was only one-third of the value of the land; but the father meant to make a further provision and advancement to his son; and the evidence shows that he executed the agreement on the back of the deed in consideration of the money advanced, and also in consideration of the natural love and affection for his son. To induce a court of equity to decree the specific performance of an agreement, it must be supported by a valuable or meritorious consideration. Mere inadequacy of price is no ground for refusing a specific per- (495) formance, when the party is under no incapacity or deficiency of judgment, or led by accident or design into a misapprehension of the value. *Western v. Russell,* 3 Ves. & Bea., 188. In the case before us, the father knew the value; he was under no incapacity; and to the money advanced, his love and affection was an additional consideration, which will be considered by the Court. Whether the provision was greater than it ought to be, the Court will not take upon itself to examine; the father, as *Lord Hardwicke* said in *Goring v. Nash,* 3 Atk., 185, being considered the judge of the quantum of the provision. The defendants say that this is a parol agreement, and ought not, on that account, to be enforced. It is an agreement in writing, signed by the vendor; and if the statute of fraud had been relied on in the answer (but it is not) parol evidence might have been given to prove the con-

sideration. We are compelled to say that the injunction must be made perpetual, and the defendants must be decreed to convey to the plaintiff what title they have in the land. The defendants are two of the heirs at law who have been seeking their rights; the plaintiff, therefore, will not recover costs against them.

PER CURIAM. Decree accordingly.

(496)

JESSE WARD v. JONATHAN LEDBETTER ET AL.

1. Upon an executory agreement for the purchase of land, the payment of the purchase-money constitutes the vendee, in equity, the owner; and he has a right to a conveyance from every person having the legal title, with notice of his claim. Thus, where A. purchased land of B., and took a bond to secure his title, and subsequently sold to C., who paid the purchase-money which came to the hands of B., and took a bond for title from A.; and the latter, to defeat the claim of C., surrendered to B. his bond; B., having notice of C.'s equity, is bound to convey to him. And if C. has received any part of the consideration for the surrender of the bond by A. to B., that is no defense to C.'s bill, but must be brought forward as the foundation of a distinct suit.

2. Parol evidence, although it may be inadmissible to reform a written contract, yet is received to repel a specific execution of it; but in the latter case it cannot be received to show that the written contract was not the one made, but to prove fraud, accident or surprise, raising an equity to rebut the claim to specific execution.

IN the month of April, 1830, Jonathan Ledbetter sold to Jonathan Elms a tract of land lying in the county of Rutherford at the price of six hundred dollars; received Elms's notes to secure the payment of the purchase money, and delivered to him a bond in the penal sum of twelve hundred dollars, conditioned to make a warranty title thereto upon the payment of said notes. Elms finding it impracticable to raise the money to make the payment, and having offered to Ledbetter fifty dollars to be freed from the contract, which offer was refused on 5 March, 1831, sold all his interest in the said land to Jesse Ward, at the price of five hundred and fifty dollars; and, to secure a title to the said Ward, executed a bond with Jones Bradley as his surety, with condition to be void on the said Elms executing a good title to said Ward, after a reasonable time allowed for procuring a title to himself from Ledbetter. Ward paid the purchase money to Elms, who paid it over immediately to Ledbetter, and therewith, and by fifty dollars which he advanced, discharged in full his notes to Ledbetter. Elms thereupon required of Ledbetter to execute a conveyance, according to the stipulations of his bond; and Ledbetter refusing to make a conveyance, except with

a reservation or exception of an estate for life to his, the said (497) Ledbetter's, father therein, Elms instituted a suit in equity against him to compel a conveyance. Pending this suit, Ledbetter had full notice of Elms's sale to Ward, and of Ward's payment of the purchase money, and made several attempts to repurchase the land from Ward; but failing in these, he entered into an agreement with Elms, who was about leaving the State in order to escape from his creditors, whereby, in consideration of certain property and money, either advanced or secured to be paid unto said Elms, amounting in the whole to five hundred and fifty dollars, Elms dismissed the suit in equity at his proper costs, and bound himself to surrender to Ledbetter the bond which the latter had given to make a title. This compromise was made 24 November, 1832. Elms immediately thereafter absconded; and at the next term of the Court of Equity for the county of Rutherford Ward filed this bill against the said Ledbetter, Elms, and Bradley, charging these matters, and praying for a proper conveyance of title, and for general relief.

D. F. Caldwell for plaintiff.
A. M. Burton and Badger for defendant.

It is unnecessary to state the defenses set up by the defendant Ledbetter nor the testimony filed, as they are set forth in the opinion of GASTON, J., who, after stating the substance of the bill, as above, proceeded as follows: The defendant Ledbetter resists this claim on three grounds: first, he alleges that the contract between himself and Elms was not for an absolute sale of the land in dispute, but for a sale with an exception of an estate for life therein to his, the defendant Ledbetter's, father; secondly, for that the plaintiff relied on the bond of Elms and Bradley for the performance of Elms's stipulation, and not upon any equitable relief which he might have against the said defendant; took no assignment of said defendant's bond to Elms, but left it with Elms, who was permitted to prosecute the suit for a title in his own name; and thirdly, that some of the said defendant's notes which he executed to Elms upon the compromise have come to the (498) plaintiff's hands with full knowledge of the consideration on which they were given. Testimony was offered in support of the first ground of defense; and it was read, subject to an objection on the part of the plaintiff, that parol evidence could not be admitted to contradict or explain a written instrument, except in the exercise of a jurisdiction to reform that instrument because of fraud, accident, or mistake; and that there was no allegation on the part of the defendant in this case of any facts showing either fraud, accident, or mistake in the drafting

of the instrument in question. On the part of the defendant it was admitted that *relief* is not granted in Courts of Equity against written instruments, except in the exercise of the jurisdiction above referred to; but it was urged that the *execution* of written agreements may always be resisted on the ground that they do not conform to the actual agreement of the parties. It is proper to remark that in the case before us it is not pretended that the written agreement between the parties had been waived and a new agreement entered into, or that the agreement, after being reduced to writing, had been altered by parol, but simply that the written is not the true agreement, without the averment of any matter wherefore the written agreement did not conform to the intention of the parties. Unquestionably, parol evidence may be received to repel a demand for specific performance of an agreement where it would be inadmissible to vary the written agreement in order to have it executed in its new form. The latter cannot be permitted without a violation of the statute of frauds, which denies efficacy to agreements not reduced to writing. But it does not follow, because parol evidence offered to repel or rebut an equity is not against the *statute of frauds,* and is therefore, often for that purpose, admissible, when it could not be received to make out an agreement sought to be enforced, and which the statute requires to be in writing; that, therefore, the rule of law which, independently of any statute, forbids a written contract to be contradicted, explained or varied by extrinsic testimony, does not prevail in equity equally as in law, and (499) against defendants resisting specific execution, as well as against defendants resisting specific execution, as well as against all other parties to such instruments. The reverse is stated in one of the cases referred to by the defendant's counsel (*Clowes v. Higgenson,* 1 Ves. & Bea., 524), with a precision and accuracy that render any addition or explanation unnecessary. A bill had been formerly brought by Higginson against Clowes, 15 Ves. Jun., 516, to compel the execution of an agreement for the *purchase* of an estate, consisting of seven distinct lots; and it was insisted by the plaintiff in that action that it was part of the agreement that the trees on *all* these lots were to be taken at a valuation. The defendant resisted the execution because, as he insisted, the agreement bound him to pay only for the trees on *two* of the lots. Parol evidence was offered on the part of the then plaintiff of the declarations made by the auctioneer at the time of the auction, which evidence the Master of the Rolls (*Sir William Grant*) refused to receive, holding that sales at auction were within the statute of frauds, and that the whole of the agreement was by that statute required to be in writing. The vendor's bill being dismissed, Clowes, the vendee, then brought his bill against Higginson to have the agreement of *sale* exe-

cuted according to *his* construction of the contract, when the vendor offered this parol evidence to *repel* the execution of the agreement as demanded; but the Vice-Chancellor (*Sir Thomas Plumer*) rejected it because of the general rule of law, which he declared to be also the rule in equity, that parol evidence could not be received to explain or contradict a written agreement, whether offered by a plaintiff seeking specific performance or by a defendant resisting it. He declared that the rule admitting the evidence in the latter case was intelligible and clear; that it never was admitted to show that the writing purporting to be the contract is not the contract; not to vary the agreement as it is expressed, open to no objection, and therefore upon the face binding; but to show circumstances of fraud, or making out a *clear* case of *mistake* or *surprise,* and thus rendering a specific performance unjust. With respect to the latter head, of mistake or surprise, he was emphatic in stating that great caution was required in the appli- (500) cation of the evidence lest, under the pretense of proving mistake or surprise, the rule should be relaxed by letting in evidence to explain, alter, or contradict, and thus in effect to get rid of a written agreement. In our opinion the rule is properly laid down by the Vice-Chancellor, and the objection made to the parol evidence in this case is well founded.

It may, however, afford satisfaction to the parties to be informed that upon the parol evidence this Court entertains a clear opinion against the defendant. The explicit testimony of Dr. McIntyre, who was selected by the parties to draft the instrument, to whom they made known the bargain, who wrote the instrument conformably to their instructions, and who read it over to them previously to its execution, and then learned that it expressed their agreement, very far outweighs the *"understanding"* (as the deponent describes his belief) of the subscribing witness that Elms was not to take possession until after the old man's death, and loose observations of Elms, testified to by two other witnesses, as declaratory of that purpose.

The other objections made by the defendant Ledbetter furnish no defense against the relief sought by the plaintiff. The answer distinctly admits, and if it did not, the proofs unequivocally establish, that after Elms had purchased the land in controversy from Ledbetter he sold the same land to the plaintiff; that the plaintiff paid the price stipulated for in his purchase from Elms, and that the defendant had full knowledge of all these facts before he entered into the contrivance with Elms to defeat the plaintiff's purchase. In equity, the contract and payment of the purchase money constituted the plaintiff complete owner of the estate, and as such he became entitled, and is yet entitled, to demand a conveyance of the legal title. The bond which the plaintiff took from Elms was but a *security* for procuring that title, and for pro-

curing it at Elms's cost. The suit brought by Elms was a step taken in order to get the title for the plaintiff; and the arrangement
(501) made between Ledbetter and Elms was a gross fraud upon the rights of the plaintiff. It is not pretended by the defendant that this arrangement was made with the knowledge or privity of the plaintiff, or that it afterwards in any way received his sanction. If the defendant has any equity to be relieved from the payment of the notes which he passed to Elms under this arrangement, and these notes or any of them have come into the hands of the plaintiff, this equity must be asserted in an appropriate way, but furnishes no defense in this action.

Elms has answered the plaintiff's bill—sets up no defense against it, but offers in excuse for his scandalous breach of honesty the temptations of Ledbetter, and his sore distress.

The Court is therefore of opinion that, as against these defendants, the plaintiff is entitled to a decree for a conveyance of the legal title in the land mentioned in the bill, and to an account for the profits made, or which might have been made by either of them thereon, from the time when full payment was made to the defendant Ledbetter, and also to his costs.

The plaintiff has not prayed us for any decree against the defendant Bradley; nor, as at present advised, do we think that a decree can be had against him. But as the cause has not been heard between the plaintiff and the defendant Bradley, that part of it, and all other matters, will be reserved until the coming in of the report, or until the Court shall be further moved thereon.

PER CURIAM. Decree accordingly.

Cited: Rutherford v. Green, 37 N. C., 127; *Wilcoxon v. Galloway,* 67 N. C., 465.

(502)

JACOB POWELL ET UXOR, ET AL. v. ABSALOM MYERS ET AL., EXECUTORS OF JOSEPH PICKETT.

1. A judgment confessed by an administrator is *prima facie* fair, and in the absence of all proof that it is otherwise is to be allowed in settling the accounts of the administrator.

2. Mere technical informality in the entry of a judgment is not cause for rejecting it as a credit in an administrator's account.

THIS was a petition for an account of the administration of the estate of John Wright, filed by the plaintiffs against the defendants, the execu-

tors of Joseph Pickett, who was administrator with the will annexed of John Wright. There had been a reference of the accounts directed, and the commissioner had rejected certain judgments confessed by Pickett as administrator because of some informality in them. If these judgments were allowed as charges against the plaintiffs, then Pickett had paid out everything which came to his hands. There was no allegation of fraud in the administrator, and no proof that the judgments were not for honest debts, or that they had not been paid, the only objection stated to their allowance being the technical informality above alluded to. The defendants excepted to the report because of the disallowance of the sum paid in satisfaction of these judgments.
His Honor, Judge Settle, at Anson, on the last circuit, allowed the exception and dismissed the petition, and the plaintiffs appealed.

Winston for plaintiffs.
Devereux for defendants.

GASTON, J. The subject-matter of this controversy is an account between the plaintiffs as legatees of John Wright, deceased, and the defendants, executors of Joseph Pickett deceased, who was the administrator with the will annexed of the said John Wright, of the administration by the said Pickett, of the assets of his testator. An account was taken by the commissioner, who reported a balance against the testator of the defendants. The balance so reported arose *entirely* from the commissioner having rejected as a credit the amount (503) of four judgments rendered against the intestate by *nil dicit* on suits instituted against him by alleged creditors of his testator, and which judgments were paid off to the creditors. The defendants excepted to so much of the commissioner's report as rejected this credit. The court sustained the exception and declared the defendants entitled to the credit claimed; and it therefore appearing that nothing was due to the plaintiffs, dismissed the petition.

It appears to us that there is no error in the decree below. The only grounds taken for disallowing these judgments are technical irregularities in the proceedings upon which they were founded. It is not objected that the debts were not *bona fide* due, or that the administrator permitted judgments to be rendered for more than was due, or that he did not honestly pay off all that was recovered. Unless some such objections were made and sustained, objections showing that, in *conscience,* the administrator was liable to his *cestui que trusts* for assets misapplied, they cannot have a decree against his representatives. The first duty of the administrator was to pay off the debts due from his testa-

tor, and all that he has honestly paid off must be allowed him by those whose claim is posterior to that of the creditors.

It was competent for the plaintiffs to impeach the judgments for fraud, and as they were rendered by confession, slighter evidence might be sufficient to show fraud than if they had been rendered after contestation. But they must be presumed to be honest until they are impeached; and objections for informality merely are decisive indications that substantial objections could not have been successfully urged.

The decree is affirmed with costs.

PER CURIAM. Decree below affirmed.

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(504)

WILLIE GAITHER v. PINCKNEY CALDWELL.

A partner who claims the benefit in equity of a debt due the partnership as a set-off or satisfaction of his individual note must make his copartner a party to his bill.

THE plaintiff filed his bill in the Court of Equity for the county of Iredell on 29 September, 1827, against P. C. Caldwell, who alone was made defendant thereto, and therein charged that he had executed a bond to a certain John A. Chaffin for the sum of six hundred dollars, due to the said John on the settlement of the accounts of a copartnership theretofore existing between them; that at the time of executing the bond the plaintiff was in copartnership with one Newton Crawford, trading under the firm of Crawford & Gaither; that shortly afterwards Chaffin commenced dealing with the firm, under an express agreement that whatever debt he might contract therewith should be passed to the plaintiff's credit on his bond; that by arrangements made between the plaintiff and his partner, Crawford, the plaintiff was authorized to apply the debt of Chaffin to the firm in this way; that afterwards, in the month of May, 1827, a settlement was made between the plaintiff and Chaffin in relation to his dealings with the firm, whereby the balance due from Chaffin thereon was ascertained to amount to one hundred and twenty-five dollars and seventy and three-fourth cents; and Chaffin executed his bond for that sum, payable to the firm, and renewed his promise to credit the plaintiff's bond to him for that amount; that about or before the time of this settlement Chaffin assigned the said bond of the plaintiff to the defendant, with distinct notice, and an express agreement, that the same should be subject to a deduction of the amount due from Chaffin to Crawford and Gaither; that the defendant had induced the plaintiff in May, 1827, to accept

service of a writ returnable to the next County Court of Iredell, upon an express promise that the cause "should stand" until the November term following; that, regardless of his promise, the defendant had caused a judgment to be taken by default for the whole amount of the bond, and was proceeding to collect the same by execu- (505) tion, and that Chaffin had become insolvent, and had left the State. The prayer of the bill was that the defendant should be enjoined as to the said sum of one hundred and twenty-five dollars and seventy and three-fourth cents, and the interest thereon since the execution of Chaffin's bond to Crawford and Gaither.

The defendant filed his answer to the bill, and therein set forth that in the spring of 1825 he sold out to the plaintiff and the said John A. Chaffin his stock of goods in trade, at an advance of twelve and a half per centum on the cost; that a computation was made by the plaintiff whereby the price of the goods appeared to be between twenty-one and twenty-two hundred dollars; that it was agreed if any errors appeared in this computation these should be thereafter rectified; that in the winter of 1826-27, and in payment of the debt thus contracted, Chaffin delivered to the defendant his own note, with Abram Jones surety thereto, for the sum of fifteen hundred dollars, and transferred two bonds of the plaintiff, one for five hundred and fifty-three dollars and the other for six hundred dollars; that the only agreement entered into between Chaffin and the defendant at the time of the transfer was that if, upon a final settlement of the valuation of the goods sold by the defendant, there should be found anything due from the defendant the same should be credited on the bonds of the plaintiff so transferred; and if, on the other hand, a balance should be found due by the plaintiff, the same should be paid by the said Gaither; that an adjustment was afterwards made by certain persons, to whom the same was submitted, and thereupon a balance was found due to the defendant from the plaintiff, greatly exceeding one hundred and fifty dollars, which the plaintiff admitted to be correct. The defendant denied the promise alleged to have been made to the plaintiff when the service of the defendant's writ was acknowledged, but admitted that he promised not to force the collection of the money sooner than it could be compelled by the regular course of legal proceedings; and set forth that the writ was returned to the May term of Iredell County Court; (506) that judgment at said term was rendered by default; that, although execution was issued from said term, returnable to the August term following, and was levied on the plaintiff's property, the defendant forebore to enforce a sale thereon, and caused the execution to be returned; and that it was not until the execution issued from the August term, returnable to November, that the defendant endeavored to press

the collection of the judgment, when he would have been enabled to do so had the defendant pleaded to the action. The defendant denied that he ever had any notice previous to the transfer of the plaintiff's bonds of the alleged agreement between the plaintiff and the said John A. Chaffin, or of any other agreement whereby the bonds might be diminished or made liable to credits, other than the agreement before stated in his answer, and insisted that the bond in question became due on 4 May, 1827, and was assigned to him before the day of payment for a valuable and *bona fide* consideration.

Upon the coming in of this answer the injunction, which was granted on the issuing of the bill, was dissolved with costs; and, on motion of the plaintiff, the bill was held over as an original bill. Replication was made to the answer, the parties proceeded to their proofs, and the cause being set down for final hearing was, by consent of the parties, transmitted to this Court to be heard.

The proofs on the part of the plaintiffs consist of two depositions. Abram R. Jones, the surety to the note of fifteen hundred dollars, given by Chaffin to the defendant, testifies that he was present about 1 February, 1827, when this note was delivered to the defendant, and that at the same time two notes of the plaintiff, payable to Chaffin, and amounting to about the sum of eleven hundred and fifty dollars, were also delivered to the defendant; and that at the same time Chaffin stated that Crawford and Gaither had an account against him which he supposed to be between fifty and a hundred dollars, and which was to be a credit on one of the notes. He further testifies that Caldwell's claim against Chaffin did not exceed twenty-three hundred dollars, and (507) that his impression and understanding at the time was that the *difference* was to be credited on the note or notes Chaffin gave Caldwell, and that *no* credit because of that difference was ever given to the note whereon he was surety. Judge Pearson testifies that in May, 1827, when he was engaged in the practice of the law, he made a settlement at the request of the plaintiff and John A. Chaffin of their respective demands against each other; that the principal charge of the plaintiff was an account of Crawford and Gaither against Chaffin; that after allowing to Chaffin as set-offs against this account all his claims against Gaither individually, there yet remained a balance against Chaffin of one hundred and twenty-five dollars and seventy and three-fourth cents; that Gaither said that Crawford had transferred to him (his) Crawford's interest in this account of the firm, but as he exhibited no evidence of the transfer, the deponent drew the note for this balance, payable to Crawford and Gaither, which note Chaffin executed in his presence. This note is appended to the deposition and bears date 19 May, 1827. On the part of the defendant, the persons to

whom, according to his answer, the computation made at the sale of the goods was referred for correction, have been examined. Their testimony has been taken so vaguely that it is difficult to infer anything from it with certainty except an error of addition in the inventory of the goods sold by defendant to Chaffin and the plaintiff, to the injury of the defendant. They do not state whether Chaffin was before them, nor the time at which they revised the computation. They refer to their corrections made at the foot of the inventory, which was returned to the defendant, and is not produced. John A. Chaffin has also been examined, and nothing is to be collected from his testimony but that a mistake against the defendant was made in the inventory of the goods sold by the defendant to Chaffin and Gaither, which he thinks was discovered and rectified at the time he transferred the notes of the plaintiff to the defendant; he is not examined by either party touching the alleged agreement to credit these notes, with the amount of his debt, to Crawford and Gaither; and in answer to a question from the defendant, whether he does not remember that the amount of (508) all the notes delivered to the defendant fell short of the sum truly due from Chaffin and Gaither for the purchase of the goods; and whether he did not confess a judgment to the defendant for the balance of about one hundred and ninety dollars, answers that his recollection is too indistinct to enable him to render a definite answer.

No counsel appeared in this Court.

GASTON, J., after stating the pleadings and proofs as above set forth, proceeded: The frame of the plaintiff's bill is so defective as not to warrant a decree in his favor, however clear his proofs might be. He claims to credit against the bond in the hands of the defendant a debt due from Chaffin, not to himself individually, but to himself and Crawford jointly, and this because of arrangements made with Crawford by which the plaintiff is individually to have the benefit of this copartnership demand, and because he is, therefore, *in equity,* the assignee thereof. Now, in all such cases the assignor must be a party, because his legal interest has not been transferred, and he would not otherwise be bound by the decree. It is not of course, however, to dismiss a bill on account of a defect of parties discovered at the hearing, but rather to let the cause stand over with liberty for the plaintiff to amend by adding parties. But we ought not to delay the cause for this purpose, because, upon the proofs and independently of this objection, we cannot decree for the plaintiff.

The charge of notice to the defendant of an agreement between the plaintiff and Chaffin, that Chaffin's debt to Crawford and Gaither should

be applied as a payment on the bonds of the plaintiff assigned to the defendant, is most explicitly denied in the answer. The only proof to establish it comes from one witness. We can find no corroborative circumstance attaching more credit to the evidence of the witness and overbalancing the credit due to the defendant's positive denial. It is *possible,* indeed, that the witness may have misunderstood the arrangement about which he has testified. It may have referred to a
(509) credit which might become due because of mistakes in the inventory and valuation of the goods sold, and not as he supposed to a credit for Chaffin's debt to Crawford and Gaither. But the defendant could not be mistaken. If his answer be untrue, it is wilfully untrue; and we cannot declare it so upon the unsupported testimony of a single witness. The plaintiff, indeed, made affidavit to the truth of his bill on his application for an injunction, but we are hearing the cause as though it had been instituted by original bill, and we are not now at liberty to consider that affidavit. If the agreement of Chaffin and notice of it to the defendant at the time of assignment had been proved, there is no evidence *against the defendant* of the amount due from Chaffin to Crawford and Gaither. The settlement made between the plaintiff and Chaffin after the assignment of the bonds is, as to him, *res inter alios acta.* It binds the parties and those claiming under them subsequently, but it binds no others.

There is an entire defect of proof that the plaintiff is the sole equitable owner of the demand of Crawford and Gaither against Chaffin. The alleged fraud in getting a judgment at law by default is denied, and there is no proof to sustain the charge. The Court, therefore, must declare that the allegations in the plaintiff's bill are not proved, and the same must be dismissed, with costs.

PER CURIAM. Bill dismissed.

Cited: McNair v. Pope, 100 N. C., 408.

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(510)

WILLIAM P. WAUGH ET AL. v. ANDERSON MITCHELL ET AL.

Upon a bill to review a decree founded upon an award, the original is not, if erroneous, to be revived, but only to be corrected in those particulars in which it is wrong, and made to be what it originally ought to have been.

THIS was a bill to review a decree made in a cause in which Mitchell and Martin, as the administrators of Ambrose Parks, deceased, were

plaintiffs, and William P. Waugh, John Finly, and Benjamin J. Parks (the present complainants) were defendants.

The original bill charged that in 1822 (immediately after the death of one George Parks) Ambrose Parks, of the first part, the defendants William P. Waugh and John Finly, under the firm of Waugh & Finly, of the second part, and the said Waugh and the other defendant, Benjamin J. Parks, under the firm of Waugh & Parks, of the third part, entered into an agreement of copartnership, to carry on the mercantile business together, at Wilkesboro and at Ashe Court House; the latter under the direction of the said Ambrose, and the former under the joint direction of said Waugh and Benjamin J. Parks; that the parties did so until February, 1826, at which time the said Ambrose died, after large profits were made, having large stocks of merchandise on hand, and debts due to the firms, all of which came to the hands of the original defendants as surviving partners. The bill sets forth the terms of copartnership and the interest of the respective partners in the manner following: That in July, 1820, it had been agreed by and between the said Waugh and Finly, of one part, the said Ambrose, of the second part, and one George Parks, of the third part, that these four persons should be copartners, to carry on the trade of merchandise in Wilkesboro and Ashe, aforesaid, upon a capital stock of $13,000, whereof Waugh and Finly were to advance the sum of $10,000, and each of the said partners, Ambrose and George, the sum of $1,500; that Ambrose was to conduct the business at Ashe by himself and by (511) clerks employed and paid by him, under the firm of Ambrose Parks & Co.; and that George was in like manner to conduct that at Wilkes by himself and by clerks paid by him, under the firm of George Parks & Co.; that at the expiration or dissolution of the business, the capital of the respective partners, with interest thereon, should, in the first place, be paid, and the surplus or profits should be divided—one-half to Waugh and Finly, and one-fourth to each of the other partners; that the partnership should continue for five years, notwithstanding the deaths of the said Waugh and the said Finly; but that upon the death of either of the Parks the concern should be closed, or continued, at the election of Waugh and Finly. The bill then charges that the business began and proceeded, according to the articles, until the autumn of 1822, when George Parks died; that thereupon the business was not continued for the benefit of the estate of George Parks upon the footing of the articles; neither was it closed by a settlement with the representatives of the said George. But it was then agreed by all the partners that Waugh and Benjamin J. Parks should represent said George in the firm by assuming to those beneficially entitled to his share the responsibility therefor, and by taking on themselves, as between them

and the other partners, all the duties and rights of the said George under the said original agreement; that accordingly the business proceeded at Ashe under the charge of said Ambrose, and at Wilkes under that of Waugh and Benjamin J. Parks, for the whole term limited in the articles, and afterwards, by mutual consent, until the death of Ambrose, in 1826, as aforesaid; that administration of his effects was granted to the plaintiffs, Mitchell and Mastin, and they had repeatedly applied for an account and to be paid the share of their intestate, but that the defendants Waugh and Benjamin J. Parks, who were the active managers and represented George Parks under the new agreement, failed and refused to render such account, which the bill prayed for in the broadest terms; and that the partnership accounts
(512) and transactions might be finally settled, under the directions of the Court.

The answer of Waugh and Finly admitted substantially the several allegations of the bill, except that it was stated that the first agreement of partnership was made between Waugh and Finly, of the one part, and George Parks, of the other, in which the former were to advance $5,000 and the latter $1,500, and that it was reduced to writing and contained the stipulations touching the duties and rights of the parties thereto, as set forth in the bill respecting the store at Wilkesboro; that afterwards a similar agreement was entered into with Ambrose Parks as to a store at Ashe, under his management; that it was not reduced to writing, but was to be governed by the other, and that Ambrose Parks and George were to be partners in each house, so as to make both firms really one, though in different names. The answer thereupon insists that, upon the death of George Parks, Ambrose was bound to perform his duties, and that as they were performed by Waugh and Benjamin J. Parks, those persons are entitled to an allowance from the plaintiffs therefor; that upon the death of Ambrose Parks, the defendant Waugh employed the plaintiff Mastin and other clerks to close the business, and that the plaintiff Mastin had the actual custody of the books, notes and other effects of the concern; that the plaintiffs and the defendants came, on 1 March, 1828, to an agreement for a partial settlement, in which the terms thereof were fixed and then reduced to writing, whereby the sum of $4,000 was set apart to cover balances of debts for goods then outstanding, and securities allotted to Waugh and Finly for their capital and interest, and to the plaintiffs for that of their intestate, and the residue of the effects were to be divided, one-half to Waugh and Finly, and the other half to Waugh and Benjamin J. Parks and the administrators of Ambrose, and that said Waugh and Parks and said administrators should bear in equal shares the expenses for clerk hire from November, 1825, until the business should be closed.

The answer further states that the settlement was not con- (513) cluded, because the parties differed as to the persons who should bear the charges of clerk hire before November, 1825, and also upon the charges brought forward by said Waugh for his expenses in purchasing goods for the Wilkesboro store, and giving his general superintendence to the business there, and closing both concerns upon the dissolution; and it is insisted that Waugh was entitled to such allowances and was not liable for any part of the clerk hire. The answer then stated that the defendants were advised that there ought to be other parties; but they submit to a settlement and division if it can be ordered with safety to them; insisting, however, upon the demands of Waugh, before mentioned.

The defendant Benjamin J. Parks did not answer, and the bill was taken *pro confesso* as to him.

The bill was filed in March, 1829; and after several orders, the parties, at September Term, 1833, referred it, by rule of court, to James R. Dodge, Esq., to make his award upon the matters in controversy in the suit.

The arbitrator made his award thereupon, and returned the same to March Term, 1834, and therein found that Ambrose and George Parks did not stipulate for each other in the original agreement, but that each of them was to manage the store under his particular care, at his own expense, and that Waugh and Benjamin J. Parks took the place, in this respect, of George, upon his death, and must therefore exclusively bear the clerk hire of that store; and between them, therefore, they had one-fourth of the profits, especially as they had in 1827 settled with the representatives of George Parks and been allowed therein by his representatives for the hire of the clerks in his time as a charge against George's share in the concerns. Further, that Benjamin J. Parks had left this State before the death of Ambrose, and that upon the latter event all the effects of both stores came to the hands of the defendant Waugh; that Waugh and Finly had received their capital and interest, and the plaintiffs had received that of their intestate and interest; that payment had been fully made to the representatives of George Parks for all his capital, interest and profits up to the time of his death, by the surviving partners in 1827; that Ben- (514) jamin J. Parks was indebted to the concern more than his share of the profits, and that he was insolvent. He charges to the plaintiffs all the clerks' hire at the store in Ashe in conducting and closing it, and to Waugh and B. J. Parks all that in Wilkes from the beginning of the business by George Parks & Co., but he limits the period to eighteen months from the death of Ambrose as a reasonable one, when Waugh ought to have closed the business, and therefore does not allow the pay-

ments made by him for clerks after that time. He refused to make any allowance to Waugh, personally, for closing the concerns, because Waugh was bound by contract to settle the concerns of the store in Wilkes, as George Parks would have done, and because those of the store in Ashe had been settled by clerks employed by Waugh, whose wages the arbitrators made the plaintiffs pay. The award then proceeded to find that the debts which either of the stores had contracted had all been paid, except the sum of $87.36, with interest from 23 March, 1828, which was still owing to the plaintiff Mastin in his own right. It finds the whole personal assets of the firms, including the accounts of the respective partners, to be $15,458.61, whereof the plaintiffs were entitled to one-fourth, or the sum of $3,864.65¼; that B. J. Parks' account exceeded his share by the sum of $403, of which one-fourth, or $134.33⅓ was to be borne by the plaintiffs, and being deducted from their share, left to their credit the sum of $3,730.32; but the account of Ambrose Parks and the debts of clerk hire to be paid by him amounted to $3,073.10, which left a balance really due to the plaintiffs of $657.23, with interest from the first of March, 1828. The arbitrator then states the accounts of each of the other partners with the companies, and finds the (515) balance due to Mr. Waugh and to Mr. Finly; and awards that Waugh, in whose hands are all the funds, shall pay to Finly the sum of $577.57, with interest, and to the plaintiff the said sum of $657.23 and interest, as before mentioned; and likewise shall pay into the office the sum of $87.36 and interest, to satisfy the debt of Mastin; that B. J. Parks shall pay to Waugh, Finly and the plaintiffs each the sum of $134.33⅓. The arbitrator then finds that the defendant Waugh has securities for debts due from insolvent debtors to the firms to the amount of $4,963.19, which he divides between the parties by schedules, and awards that the division shall be final and that each party may use the names of the others to collect his share, but at his own expense and without any claim for contribution in case the debts shall prove absolutely bad. He then proceeds to find that George Parks & Co. had purchased four tracts of land in Wilkes with the partnership funds and in the course of their joint dealing; that the value of them had been accounted for with George Parks' representatives by the surviving partners, and that the land now formed part of the effects of the firms he was then settling, in addition to the effects before mentioned, and must be sold before a final settlement could be made; that the arbitrator doubted his authority to award such sale, but if under the facts found by him he had such power (which he refers to the Court), he did then award that those four tracts (which he described), and any other lands belonging to the said firms, should be sold under the direction of the Court, and the money arising therefrom be divided between the parties:

that is to say, one-eighth to B. J. Parks, two-eighths to the plaintiff, two-eighths to Finly, and the remaining three-eighths to Waugh; that the share thereof which might belong to B. J. Parks should be applicable, first, to that part of the costs of the suit which he was awarded to pay; and, secondly, to the payment pro rata of the sums awarded to be paid by him to the other parties, respectively; (516) but the same should be considered as a collateral security only for those sums, and that the said parties might proceed otherwise to collect the said moneys from said B. J. Parks. The award concludes by directing B. J. Parks to pay his own costs, and Waugh to pay the residue of the costs.

To the award the defendant Waugh alone objected. He moved to set it aside, on several exceptions—first, that the arbitrator rejected legal evidence of payments made by him on account of the concerns; secondly, that he erred in awarding upon matters not submitted to him; thirdly, that he erred in not awarding on all the matters submitted; fourthly, that the award is not final, as it leaves the parties exposed to further litigation as regards the subject-matter submitted. There were other exceptions, but they related exclusively to the conduct of the arbitrator in deciding certain questions of fact upon certain evidence given, and were not supported by any affidavits or evidence in this cause.

Upon the hearing, upon the pleadings and award and exceptions, the court denied the motion of the defendant Waugh, and proceeded to decree according to the award—that the defendant Waugh should pay into the master's office the sum of $87.36, with interest thereon for the use of the plaintiff Mastin in discharge of the debt owing to him by the said A. Parks & Co.; that he should pay the parties, Finly and the plaintiffs, as administrators, the sums due to them which the decree specified as in the award; that the debts reported as being insolvent should, as directed in the award, belong to the several parties, who should be at liberty to collect them, if they could, at their own expense and use, and for their several use; that B. J. Parks should pay to each of the other parties the sum of $134.33, and that executions might issue therefor; but as the said Benjamin J. was found to be insolvent, it was declared that the said sums and the costs decreed against him should be a charge against his one-eighth part of the proceeds of the land mentioned in the award and directed therein and in the decree to (517) be sold unless the said B. J. Parks should otherwise pay the same. The court further decreed that the four tracts of land mentioned in the award and particularly described should be sold by the clerk and master, and that the money arising therefrom should be divided as follows: to wit, one-eighth to Benjamin J. Parks; two-eights to the plaintiff; two-eighths to Finly, and the remaining three-eighths to Waugh; all

which is in full satisfaction of the respective claims of the said parties litigant against each other. The decree then ordered B. J. Parks to pay his own costs, and the defendant Waugh to pay the other costs.

To review the foregoing decree, the defendants in that suit, William P. Waugh, John Finly, and Benjamin J. Parks, have now jointly brought their bill, alleging the following errors: First. That the decree does not pursue the award. Second. That the award and decree was erroneous, in ordering the sum of eighty-seven dollars and thirty-six cents, with interest, to be paid to the plaintiff Mastin, as he was a party only as administrator of Ambrose Parks, and the said sum is recovered by him in his individual capacity. Third. That in ordering the payment of said sum, and in ordering the sale of the land, the arbitrator exceeded his authority, as those matters were not in issue or controversy in the suit, and so were not submitted. Fourth. That the court ought not to have decreed the sale of the land, because the heirs of Ambrose Parks and George Parks were not before the court, and that the court ought not to have made any decree in the cause, because neither the award nor decree could be final, inasmuch as neither the heirs nor personal representatives of George Parks were parties, and they may yet call for an account from these parties, and draw them into litigation again for the same matters. Fifth. That the court improperly overruled the exceptions, without declaring any reason therefor, and made the decree without declaring any facts as the grounds therefor. To this bill the defendants put in a demurrer, which was removed (518) to this Court for argument.

Devereux for defendants.
Caldwell and Badger for plaintiffs.

RUFFIN, C. J., after stating the pleadings and proceedings in the former suit as above, proceeded: The plaintiffs are of course confined to the errors pointed out in the bill, and unless some of them go to the whole ground of the decree, it is not to be absolutely annulled, but reversed, as far as it is erroneous, and corrected by making it what it ought to have been. Supposing the award, therefore, to stand, any departure from it in the decree would simply call for its modification so as to make it conformable to the award, in the particulars in which they do not agree, provided such correction be asked by a person prejudiced by the decree as pronounced. The only difference brought to our notice, between the decree and the award on which the decree professes to be founded, is that the latter directs the share of B. J. Parks, of the proceeds of the land, after payment of his costs, to be applied to the satisfaction of his debts to the other parties, and the former, it is

said, orders it to be paid to Parks himself. There are several answers to that position. In the first place, Parks is one of the plaintiffs in the bill of review; then surely he cannot complain of the direction in the decree, that he should receive that money; and supposing that the other plaintiffs by themselves might, yet as they have thought proper to connect themselves with him, they must abide his fate. But secondly, the Court apprehends that the supposed discrepancy does not exist. The award and decree are substantially the same, as far as they could be, upon this subject. The arbitrator awarded that the land should be sold, and appropriated the proceeds, first, by declaring the shares of the respective parties in it, and secondly, by subjecting the share of Parks to the satisfaction of his awarded debt to the others, unless otherwise paid. The arbitrator could not himself sell the land and divide the proceeds. He could award that the parties should sell, or that the sale should be made under the directions of the Court; and the latter was the better method as the award was made under a rule of court, in a cause then pending, in which all necessary orders might be made (519) to render the award directly effectual. The court ordered the sale to be made by its officer, and expressly declares the same charges on the proceeds that appear in the award.

It does not direct the money to be paid to Parks, but only declares his share. In such a case the sale is not made until confirmed by the court. Consequently the money could not be paid by the master until a further order, but it was his duty to bring the sum into court, and it would there be subject to the applications directed in the award and decree.

We likewise think the objections to the award upon the score of the sum of eighty-seven dollars and thirty-six cents, to be paid to Mastin, and of the sale of the lands which had been purchased by George Parks & Co. untenable. It is an error to say that those were points not within the submission, and involved subjects and interests which the arbitrator or court could not bind.

The submission included all matters in controversy in that suit. The suit was for the settlement of partnerships between the parties; the bill covers the whole partnership dealing and effects. The object and effect of every such bill is to bring all the effects, of whatever consisting, into court for division, and to inquire into all demands against the firm, and cause them to be settled. For only the net balance belongs to the parties, and it cannot be told what the assets will be until they have been turned into money, and all claims of third persons cleared off. This is particularly beneficial to the partner who has the effects in hand, for if they were taken from him he would be left liable to pay a creditor of the company out of his own pocket. In this case the original defendants

were the surviving partners, and therefore alone liable at law to the creditor. If the creditor had been a third person, altogether unconnected with the cause, the court would probably have directed the payment by interlocutory order before making the final decree, because nothing short of actual payment would bind the creditor or secure the partners. But there was no impropriety in making the decree for payment in
(520) this case, as the creditor was in one capacity a party to the suit, and did not object to it. The funds were not taken from him; and it was for the protection of Waugh and Finly that the debts should be satisfied out of the funds in the hands of Waugh before a distribution. It is not a decree of recovery simply, but it is a step taken to reduce the assets to their true amount.

So, also, with respect to the land. If it belonged to the company, a sale was necessary. There could be no final adjustment without it. It might have been directed to precede a division, so as to bring the proceeds into account in making the division. But the award as drawn is not the less final, for all the other assets are ascertained and divided, and these directed to be ascertained in an infallible mode, namely, by sale, and then divided in the same proportions.

But it is said that these lands did not belong to the firm, but had been purchased by George Parks & Co. in the lifetime of George Parks, and therefore that the arbitrator could not determine the rights of George Parks, nor the decree bind him. It is admitted that nothing done in this suit can affect George Parks's representatives. But the question between these parties is wholly unconnected with that subject. Whatever interest the firm or company had in the land, as a firm or company, might properly be ordered to be sold, although that might not be an absolute or exclusive interest, either at law or in equity. Between these parties, indeed, the land was to be deemed the property of the new company, formed after the death of George, into which B. J. Parks was admitted. He and Waugh undertook, with the others, that they would represent George in every respect. To the other members the property was to be made good as if Waugh and B. J. Parks had been partners from the beginning, and George had never been a partner. They contracted to satisfy George Parks, and to put him out of the concern, as respected the other members. If, therefore, George Parks's heirs could claim this land, or a part of it, and could bring these parties into litigation, it would be solely because the present plaintiffs have not fulfilled their agreement with the present defendants. The orig-
(521) inal bill was not to settle the firm of George Parks & Co., as such, but to settle that of which B. J. Parks was a member; and the firm of George Parks & Co. is only mentioned by way of reference to show the terms upon which the new partnership was formed and of

what a part of its effects consisted. If these lands belonged to George Parks & Co., Waugh and B. J. Parks stipulated that they would make them assets of the new company, and they ought not to raise an objection that they are not so. The arbitrator properly treated them as assets of the partnership he was adjusting, and directed a sale. The award was final between these parties, although some of them might be responsible to others on another contract, in respect of an interest in the land. The award would not have been final if it had not directed a sale or some disposition of this land, because, unquestionably, this company had some interest in it; and when the award directed the sale of the land, it means the sale of the interest of the firm therein. It may be prudent and advantageous, with a view to the settlement of a partnership, to sell an uncertain and disputed claim in the state it is in, and not wait to have the title cleared; and there could have been no settlement in this case without it.

But it is again said that the award was not final because it did not positively direct the sale. It finds the facts conclusively, and does expressly direct the sale, if in law it be competent for an arbitrator to do so. That is the common mode in which a question of law is raised upon an award, upon a reference to counsel, upon the recommendation of the court. It is simply saying such and such are the facts upon which arises a point which I mean to decide according to the rule of law. If the law be one way on it, I award in that way; but if the law be otherwise, I award the other way. This leaves the only question in dispute—that of the law on a precise point—to the most competent tribunal, the Court.

But it is further contended that if the arbitrator was authorized to award that the interest of the new firm should be sold, the court ought to have confined the decree to such interest, and not directed a sale of the land, as if it had belonged wholly to these parties, (522) since they could not make a good title and might be answerable to George Parks, or to the purchaser, if they entered into general covenants. The answer is, that Waugh and B. J. Parks cannot, against their contract, make this objection, were it in itself valid. But it does not seem to the Court to have much difficulty in itself. It is assumed in the objection that the land belonged to the partnership of George Parks & Co. and was acquired in the course of their dealings for the purposes of partnership. Upon the death of George Parks, then, we suppose that at law it vested in the survivors, to be disposed of and accounted for by them to the representatives of the deceased partner, as money, according to the act of 1784. A good title could in that case have been made by these parties to the purchaser. But whether it could, or not, that was a question for the purchaser, upon a motion for confirmation of the sale,

and for the parties when the covenants to be contained in their conveyances came to be settled. The difficulty in making a title might prevent the best sale from being effected, but it furnishes no reason why such a sale as could be made of such interest as this firm had in the land should not be made. It might aid the discretion of the court in fixing the time of the sale if either of the parties could show that the title could be made clearer within a reasonable period, and that it would make a real difference in the price. Nothing of that sort occurred here. It was not suggested that any loss would actually arise from an immediate sale. On the contrary, it was found by the arbitrator that these very plaintiffs had, in a settlement with George Parks' personal and real representatives, treated this land as part of the personal effects of the firm of which he was a member, and accounted for and paid his share, so as to vest in them the equitable as well as the legal title. Time, therefore, could not have improved the price nor the title. The objection, indeed, is not addressed to the merits as arising from a probable injury or loss by the State, but it is the power of the arbitrator and the court for the want of parties. The arbitrator does not pretend to bind George (523) Parks' representatives. It was his business to find in what the assets of this partnership consisted; and he states that this land is a constituent part, and why it is. This is the same as if he had found a tract of land to belong to the firm which A. B. conveyed to it. It is a mode of describing the subject and also of showing how their claim was acquired. It does not profess to bind A. B. as if he were a party to the submission. This award does not profess to bind the representatives of George Parks, but it finds that they are bound by their own acts and the law arising on them, and that by those means the land in question became exclusively vested in the parties to this suit. It being thus found and undisputed, the Court might very properly not only order an immediate sale, but a sale upon which the parties, Waugh and B. J. Parks, should be compelled to covenant against the claim of all persons under George Parks. It is not perceived how any of the present plaintiffs could be injured thereby.

This Court is therefore of opinion that it was competent for the arbitrators to direct the sale of the lands in the award as part of the assets of the copartnership in the pleadings mentioned; that the award would, indeed, have been defective if it had not provided for some disposition of them; and that in the case found by the award they belonged at law to Messrs. Waugh and Finly, but, in equity, to this partnership, as such.

It is most proper that the pleadings and proofs upon which a decree is founded should be shortly recited in it. But it is not the practice in this State to do so, except by a general reference to them. In this case the award is confirmed, and the decree is given upon the bill, answer,

former order, and award. We must understand a decree which professes to be made upon an award to imply thereby that the matters decreed are thus decreed, because in the award they are thus awarded. Upon the whole, the Court does not decree the decree erroneous in any of the matters alleged; and, therefore, the bill of review must be dismissed, with costs, and the decree in the original cause stand affirmed.

PER CURIAM. Bill dismissed.

Cited: Governor v. Carter, 25 N. C., 337; *Am. Bible Soc.,* 54 N. C., 14; *McCaskill v. Lancashire,* 83 N. C., 400.

(524)

BEDEN BAIRD v. ZEBULON BAIRD'S HEIRS ET AL.

1. One tenant in common may purchase the interest of his cotenant, under an execution in favor of a third person, or of himself, against the other, for the sole debt of the latter, or under an execution in favor of a stranger against both for their joint debt. And such purchase, if fairly made, will be good in equity, as well as at law.

2. An actual ouster or disseizin in fact is not necessary to make the possession of one tenant in common adverse; and although the silent sole perception of the profits will not constitute an adverse possession, yet if continued without claim for a long time every presumption necessary to support it will arise. But where one, who has in fact but an undivided share, is exclusively in possession, under a conveyance for the whole, notoriously claiming to hold in severalty, the possession can no longer be regarded as common, more especially if the possession be taken under color of a conveyance for a share of one of the cotenants, though the conveyance may somewhat be ineffectual.

3. Lands purchased with partnership funds are not held by the owners as tenants in common, but as joint tenants, as copartners; and a bill for the partition of such lands, upon the ground of their being held in common, or joint tenancy simply, cannot be sustained, as there can be no division of partnership property until all the accounts of the partnership have been taken, and the clear interest of each partner ascertained.

4. One partner cannot demand an account in respect of particular items and a division of particular parts of the property, but the account must necessarily embrace everything.

5. Where the right to call for an account of a partnership is lost by lapse of time, and there are lands belonging to the partners, they may be taken as a clear surplus remaining, and equally divisible between the partners as joint tenants, provided it appear that the parties were equally interested; and provided further, that the lands continued to be treated by the parties as joint property.

THE bill was filed in September, 1827, and stated that "the plaintiff and Zebulon Baird were brothers, and, having mutual confidence and regard for each other's interest, became and were united in the joint and equal portions of sundry tracts of land in Buncombe County, and acquired titles in their joint names for the same by means of their joint funds; that Zebulon was the active manager of said joint lands, and made sales of sundry parts thereof to certain persons mentioned in the bill, to the value of $1,470, and that he received the same and converted it to his separate use, one-half of which was justly the plaintiff's
(525) and to be accounted for"; "that Zebulon and the plaintiff owned some cattle in partnership, which they sold to Parton & Stevely, from whom Zebulon received the price, $551, and appropriated the plaintiff's half to his own use"; "that while those sums of money were in the hands of Zebulon and unaccounted for, Zebulon became indebted to one Andrew Baird in the sum of $400, on which he was sued and judgment taken; that the plaintiff became his surety for said debt, under the act to suspend executions; that afterwards an execution issued against Zebulon and the plaintiff thereupon, and said Zebulon directed the sheriff to sell three tracts of land, in which Zebulon and the plaintiff had each a moiety, and at the sale they were purchased by Z. Candler and conveyed by the sheriff to him; that in making the purchase Candler was the agent of Zebulon, who paid the money to the sheriff immediately and took a conveyance from Candler to himself, without any other consideration." Therefore, the bill charged "that the said sale to Candler, and through him to the said Zebulon, was, so far as respects the plaintiff's moiety of the land, unjust, iniquitous and fraudulent, the said debt being originally one contracted by Zebulon alone, and the plaintiffs having become liable only by being surety, as aforesaid."

"That said Zebulon, in his lifetime, held the said lands as the joint estate of himself and the plaintiff, but pretended that the plaintiff was greatly indebted to him, and said that he would convey to the plaintiff when he should settle and pay him up; whereas the plaintiff, as he believes, was not indebted to the said Zebulon in any sum, but upon a fair account of all the partnership moneys received, as aforesaid, and on other accounts not now known or remembered, the said Zebulon would be found largely indebted to the plaintiff."

It then charged that Zebulon Baird died, in March, 1824, intestate, leaving several children his heirs at law, who claim to hold the land in severalty as their own estate, in exclusion of the plaintiff, and have brought actions of trespass against the plaintiff's servants for cutting wood on the land by his direction; and that he also left a widow, and that David S. Swain administered on his personal estate;
(526) all of which persons are made defendants. The prayer was "that

the defendants should answer all the allegations and charges of the bill, and set forth their titles, aforesaid, in such manner that the Court may see and examine the same; and that they account for such money as their intestate received, in which the plaintiff was a partner, and be decreed to pay the same and to give up said deeds to be canceled, or that they convey to the plaintiff as may seem just and equitable, and do whatever else is right in the premises.

The defendants put in answers, in which they stated that, in respect to many of the matters involved in the controversy, they had no personal knowledge, as they had occurred before they were born. It was admitted that a mercantile copartnership once existed between the three brothers—Andrew, Zebulon, and Beden Baird—from which, after some years, Andrew retired, and then the other two carried on the business jointly; that when Andrew retired the firm was indebted to him, and, after making him various payments, a balance was found due to him of $400 on 26 April, 1799, for which a bond was given, which was exhibited, and appeared to have been signed and sealed by Zebulon alone, for "self and Beden Baird," and that on this bond the judgment was had, which the plaintiff stayed, under the suspension law, and under which the sale by the sheriff took place, which was mentioned in the bill. The answer admitted that Zebulon and Beden Baird purchased lands with their joint funds, and took conveyances to them jointly, but denied that such purchases were independent transactions, distinct from the general mercantile copartnership, but stated that they were made in the course of the mercantile business for the purpose of promoting the same, and the price paid out of the funds of the firm. The answers further stated that the firm ceased to do business about the year 1800 or 1801, but that no settlement was made between the partners, as far as the defendants knew or believed; that each of the brothers, about that time, married and settled on farms or land which had been jointly purchased, which they had occupied and claimed in severalty ever since; but it was admitted that those tracts of land afterwards (527) sold by the sheriff were not divided, but remained the joint property of the two. The defendants alleged that when the business ceased the firm was indebted to Zebulon Baird in the sum of £341 12*s.* 1d., according to a statement drawn up by Zebulon and found in his books after his death, to which were entered as credits the price received for such parts of the lands as had been sold before the purchase at sheriff's sale, leaving a balance of £287 12s. 1d.; that the plaintiff was also indebted to Zebulon in other sums, amounting to $793.57, according to the accounts of the latter; that Zebulon frequently applied to the plaintiff for a settlement of both accounts and to close their transactions, but that the plaintiff refused or declined coming to a settlement; that in

consequence thereof Zebulon determined that he would not discharge the debt due on the judgment recovered on the old debt of the partnership to Andrew Baird, but suffer the joint lands of the partners to be sold for it; that he was driven to this by the refusal of the plaintiff to pay it or any part of it, or to come to a settlement, because there was no other alternative but that or the payment by Zebulon himself, who was already in advance, both for the firm and to the plaintiff, as aforesaid; and that, under those circumstances, he suffered the land to be sold, and requested Candler to become the purchaser, who did so, and made payment with money furnished by Zebulon exclusively out of his own resources, and took a deed from the sheriff on 7 October, 1815, and conveyed to Zebulon on the 20th day of the same month.

The answers of the widow and heirs then insisted that Zebulon, immediately thereafter, entered into the whole of the land thus conveyed, claiming the whole in severalty as his own, and denying any right in the plaintiff; cleared parts of each tract, and built houses and made other improvements thereon; and sold parcels to sundry persons; and that he, and those claiming under him, held the exclusive posses-
(528) sion adversely during his lifetime and ever since, being more than seven years; and thereupon they relied on the act of 1715 for quieting old titles to land and for limitations of actions, and prayed the benefit thereof. The answers admitted the sales of land stated in the bill, but insisted that most of them were made after Zebulon's purchase and exclusive ownership; and that, of those made before, the price was either entered in the partnership books, or one moiety received by the plaintiff.

The defendants denied that they had any information of a sale of cattle to Paxton and Stevely, or of the receipt of any money thereon by Zebulon. They thought it probable that the firm did sell cattle, and that the sum of £76 9s. was received by him therefor, because, in the account of Z. and B. Baird with Zebulon Baird, left by the latter and already mentioned, he had credited the firm with that sum as received in "a county claim from John Paxton."

The defendants all stated that the plaintiff and Zebulon resided near each other throughout the whole period from the formation of their original copartnership up to the death of the latter, and that the plaintiff never set up any claim to the land after Zebulon's purchase, nor to the price of such parts as he sold, nor to any balance due from Zebulon to him on the partnership dealings, or on their private account; and thereupon the heirs insisted that the plaintiff was barred by his laches and lapse of time, especially as, since Zebulon's death, no person had the competent information to make a proper settlement; and the administrator insisted on the statute of limitations and also on the lapse of

time. The answer of the administrator admitted that, a short time before the death of Zebulon, he advised with him as a friend upon his title to the land in question, and, after showing him the deeds and stating his title as herein set forth, and being informed by the administrator (who was a gentleman of the bar) that, in his opinion, the title was good, Zebulon said, "if it was in his power to obtain a fair settlement he would greatly prefer it, because he did not believe the land would make him whole"; and he then showed him a statement, in writing (which the administrator annexed to his answer), purport- (529) ing to have been made in 1819, with a view to ascertain what sum the plaintiff's half of the land would stand him in, provided a settlement ever took place. In it the plaintiff's half of the judgment debt to A. Baird, with interest up to 1819, was stated at $735, his private debt on book account, $793.57, and interest thereon $786, amounting in the whole to $2,296.57; to which was appended a statement of the account of Z. and B. Baird with Zebulon, showing the balance, as before mentioned, due Zebulon, of £287 12s. 1d., as of November, 1809, without interest. The answer of the administrator also stated that he had advertised for creditors to bring forward their demands, according to the statute, and that he had fully administered by paying debts and delivering this surplus to the next of kin and taking refunding bonds; and prayed the benefit of the act of 1789. To the answers the plaintiff put in replications. The evidence established clearly, in the opinion of this Court, the mercantile partnership alleged in the answer, and that in the prosecution of it, various tracts of land were entered or purchased for the partnership, and conveyances taken in the joint names of Zebulon Baird and Beden Baird, among which were the lands sold by the sheriff and now in dispute; that the firm had no transactions of business after 1801 or 1802, but was never formally dissolved; and there was no evidence of a settlement between the partners, but, on the contrary, that Zebulon frequently expressed himself desirous of coming to a settlement, and claimed balances due to him up to the time of the sheriff's sale, and that the plaintiff declined it, but insisted that Zebulon had joint funds in his hands sufficient to discharge the debt of the firm to Andrew Baird, and for that reason forbid the sheriff's sale, at which he was present. There was also clear proof of the actual and exclusive possession of all the lands in dispute, by Zebulon and those claiming under him, from the year 1817 to the filing of the bill in 1827, claiming to hold the same in severalty, and during the whole (530) time under the title derived from the sheriff's sale, and adversely to the plaintiff and all other persons; and that during that period the plaintiff set up no title nor exercised any acts of ownership, except those mentioned in the decree of his Honor, hereinafter set forth; and also

that the plaintiff had resided in the same neighborhood, with his brother, was not on good terms with him, and was in easy circumstances from 1802 until the death of Zebulon, and has since continued to reside at the same place. One witness stated that the firm sold cattle to Paxton and Stevely, and that Zebulon, in 1803, had their note for the price, and took for it Buncombe County claims, but he was unable to state the amount. In other respects the evidence went only to the other facts declared in his Honor's decree, and, therefore, need not be stated further than to say that the parties exhibited and gave in evidence a patent from the State to Zebulon and Beden Baird for 400 acres of land, dated 6 December, 1799, and founded upon an entry made 19 March, 1794, and the sheriff's deed to Candler, and the deed from Candler to Zebulon Baird, of the dates mentioned in the answers; by the two latter of which two tracts of land were conveyed, of which one was part of the tract covered by the said patent.

At the opening of the cause on the hearing at Buncombe, on the last Spring Circuit, before his Honor, *Judge Pearson,* the counsel for the defendants stated that, from the nature of the issues between the parties, it was proper that they should be tried by a jury, and made that motion accordingly. But the court, thinking the intervention of a jury unnecessary, as no doubt was entertained upon the facts, refused the motion, and desired the counsel to confine their attention to the single question of law, "whether a tenant in common could, under any circumstances, acquire the title of his cotenant by execution sale?" The counsel for the defendants then proposed to examine the facts, with a view to insisting on the title of Zebulon Baird as being well constituted by the deed made to him by Candler, and the possession under it. But the
(531) court declined hearing any argument, except on the above point of law, in the case.

Thereupon the court proceeded to declare that Zebulon Baird and Beden Baird were jointly indebted to Andrew Baird in the sum of $400, for which Zebulon executed his own bond, Beden refusing to join in the same, and alleging as the reason that Zebulon was in possession of funds with which he ought to pay the debt to said Andrew; that Andrew Baird assigned said debt to one Murphey, who recovered judgment thereon against said Zebulon for £241 3s. and costs, which was stayed by Beden Baird and another person becoming sureties for the suspension of the execution under the provisions of an act of Assembly then in force; that execution issued thereon against those three persons for £260 8s. 7d. and costs, and came to the hands of the sheriff of Buncombe County; and that he, at the instance and request of Zebulon Baird, and against the will of Beden Baird sold the land mentioned in the pleadings under the said execution, on 27 March, 1815, and the

same was bought by Zebulon Baird, through his agent, Z. Candler, at a sum sufficient to pay said debt, and the money was paid by said Zebulon, who afterwards procured the sheriff's deed to be made to said Candler on 7 October, 1815, who conveyed to said Zebulon on 25 October, 1815; and that at the time of the sale Zebulon and Beden Baird had each personal property sufficient to satisfy the execution, and that fact was known as well by the sheriff as by said Zebulon; that whether said Zebulon had funds with which the said debt ought to have been paid by him, as alleged in the bill, or whether the said Beden was then in arrears to Zebulon, as alleged in the answers, was not proved, and, therefore, the court declared that said Zebulon did not have such funds in his hands.

The court further declared that, after the execution of said deeds, the said lands remained unoccupied until the year 1817, and that then the said Zebulon made a lease to one John Palmer, who occupied a portion of each of the several tracts by cultivating the same, and (532) paid the rents to said Zebulon until the expiration of his lease, and thereupon another tenant occupied under Zebulon in the same way and paying him the rent; and therefore the court declared that the land was occupied by Zebulon, by means of tenants, from 1817, inclusive, to his death in 1824, and afterwards by the defendants, his heirs, up to the filing of the bill, during which time they received the rents. And the court declared further that during all the said time the said Beden made no call upon said Zebulon for any portion of the rents, and exercised no acts of ownership over the land, except that in 1820 he did forbid one Peter Stradley from cutting timber upon it; and that in the year 1826 he, the said Beden, cut wood on the land, for which he was sued in an action of trespass by the said heirs. The court further declared that, between the years 1817 and 1824, the said Zebulon sold and conveyed several parcels of said land and received the price as his own; and thereupon his Honor declared his opinion that there had not been an actual ouster of said Beden out of said lands by said Zebulon; and also that the defense relied on in the answers arising from the conveyances to Candler, and from him to said Zebulon, and the possession under them, was not valid, because that possession was not, in law, adverse; and, therefore, that the said sheriff's sale, and the deeds under it (if they have any effect at all) do, at most, only operate to transfer the right of said Beden, as a tenant in common, to said Zebulon in trust to secure the said Beden's part of the said debt for which the said land was sold; and that, with and subject to this encumbrance, the said Beden is entitled to have, hold and enjoy the said land, mentioned in the pleadings, as a tenant in common with the heirs at law of said Zebulon. And thereupon it was decreed that the plaintiff have, hold and enjoy the land mentioned in the pleadings, as a tenant in common

with the said defendants, the heirs at law of the said Zebulon; and that they, the said heirs at law, are liable to account with and pay over to the plaintiff the one-half of the rents, issues and profits received by (533) the said Zebulon or by themselves, and also one-half of all sums received by their said ancestor for the sales made by him; and that the plaintiff execute deeds of release to the several purchasers from the said Zebulon; and that partition of the said lands be made between the said tenants in common, whereby the plaintiff shall have one-half of the said lands in severalty, and that the plaintiff recover his costs from the said heirs at law, who are defendants; and that it be referred to the master to take the accounts and report how the balance stands, charging the said heirs at law as aforesaid, and crediting them with such part of said debt to A. Baird as the plaintiff ought to have paid, and interest thereon, and with the value of the timber cut by the plaintiff, and with the value of such permanent improvements as were made upon the land before the filing of the bill, and to state separately the value of such improvements as had been made since the filing of the bill.

The court further declared that the defendant David L. Swain, the administrator, had fully administered all the assets of his intestate, and also that the plaintiff's bill, as to him, was barred by the statute of limitations and length of time; wherefore, and because the plaintiff prayed no decree against him, the bill was dismissed as against said Swain, but without costs.

From this decree the other defendants were allowed to appeal to this Court.

Burton and Devereux for plaintiff.
Badger for defendants.

RUFFIN, C. J., having stated the case as above, proceeded as follows: The pleadings do not appear to be so framed as to raise the questions which were considered in the court below to be involved, and on which his Honor declared his opinion. Yet, as this Court does not concur in the principles declared in the decree, and especially in their application to this case, it would be improper to dispose of the cause without some notice of them.

The case is treated in the decree as a partition cause, merely, by one tenant in common against another, in which the defendants set (534) up a sole seizin, first, by virtue of a conveyance of the title of the plaintiff by a sheriff's sale and deed, and, secondly, by virtue of a continued adverse possession of more than seven years under the color of a conveyance from Candler to their ancestor. The answer admits that Candler purchased at the sheriff's sale, as the agent of

Zebulon Baird, who was then cotenant with the plaintiff and took the conveyance as his trustee. His Honor was of opinion that one tenant in common could not purchase the share of his cotenant at execution sale, under any circumstances; and, therefore, that this purchase in the name of the trustee was a nullity and did not extinguish the tenancy in common at law, and certainly not in equity. It followed from that position that partition ought to be decreed, as if no such sale and conveyance had been made. We do not concur in those premises, nor in the conclusion. The Court is not aware of any decision that a tenant in common cannot, nor of any reason why he may not, purchase the interest of his fellow. Their estates are legal and several, the only union between them being that of possession. They do not hold in trust for each other. The rule is only that the possession of one *eo nomine* is the possession of the other, and that such a possession will, therefore, never bar his companion. But the relation between them is not such as to forbid one from purchasing from the other, upon the principle on which a court of equity regards with jealousy the dealings between persons who stand toward each other in a fiduciary capacity. These estates are so completely severed that, at common law, that of the one could not be passed to the other by release, but required a feoffment and livery of seizin. Why, then, should not one purchase the several estate of the other upon execution? There is nothing in the policy of the law against it. There might be a disadvantage to the debtor by judgment if the law excluded his companion from bidding, as he would probably give more than any other person. There may, indeed, be dealings between the parties themselves, upon which an accountability had arisen, as upon the receipt of too much of the profits by one, or outlays in common improvements, or the like, which would render it wrong, as (535) an undue advantage in one, to bring the share of the other to sale, upon which the court might hold the sheriff's deed to be only a security for the true balance that might be found upon a general account. But there is no principle of law which is violated by such a purchase; nor any principle of equity, either, in the case declared, and upon the evidence, properly declared, in the decree; that is to say, that the defendant's ancestor had no funds of the plaintiff in his hands, applicable to the debt, of which the plaintiff owed one-half; and that the purchase was made with the party's own money. If a third person have a judgment and execution against one of two tenants in common, his interest may unquestionably be sold, and the sale is valid against him, both in law and equity. His share is the subject of execution. And we cannot imagine a reason why his companion may not fairly, in such a case, be a bidder. So, if one tenant in common have a judgment against another, he may sell the share of the debtor. If he may not,

while others may, it will amount to the loss of his debt; for the judgment of the companion is not a specific encumbrance, or an equitable lien, which would follow the land in the hands of a purchaser under another execution, as a claim for outlays in improvements might. This case is somewhat different from either of those supposed, inasmuch as the execution was against both the tenants in common for a joint debt. But we cannot conceive that it calls for a different principle. Although the debt was joint, so that each was bound for the whole, yet, as between the parties, half the debt was the separate debt of each, regarding them merely as tenants in common. Suppose a judgment against heirs for the debt of the ancestor, can it be argued that one heir, in order to save his own estate, is bound to pay the whole debt and then wait to sue his coheir for contribution, and to have partition also made before he could have satisfaction? We think he could pay his own proportion of the debt, and then that the proportion of the other heir might be raised by the sale of his share *eo nomine,* at which the heir who had paid (536) his part might be a bidder. If so, his purchase of the whole undivided land must also be good; for, in effect, it is the same as paying his part of the debt first, and then buying his companion's share for his default. It is a very common case that one brother buys at sheriff's sale the undivided estate of another brother in descended lands, either for the debt of the ancestor or that of the brother himself, contracted after the father's death; and we believe the legality of such a purchase has never been questioned. It is a legal, several interest, and, as such, subject to execution; and the policy of the law is to invite bidders and exclude none but those whose *duty* it is, in a legal sense, to make the thing exposed to sale bring the best price. They are excluded because the interest of a purchaser is to get the thing at the least price, and is therefore directly opposed to this duty. But it is not the duty of one heir, or of one tenant in common, as such, to pay the debts of another heir or tenant in common, nor to aid in the sale of his estate by getting the best price for it, nor to refrain from buying it, to his own disadvantage, more than it is the duty of any other person wholly unconnected with them. *Saunders v. Gatlin, ante,* vol. 1, p. 86. For the only connection consists in the *possession;* and the *estates* are entirely disjoined. The Court, therefore, does not accede to the proposition laid down as a general one, and is of opinion that one tenant in common may fairly buy his companion's share at execution sale. The particular case now before us is precisely parallel to that of the two heirs. Supposing the transaction is a fair one, then the sale and conveyance were effectual to pass the plaintiff's title. No unfairness is imputed to it in the decree, and we find no evidence of it in the pleadings or depositions. The debt was originally equally due from both the

parties, legally and equitably. The brother, now deceased, gave a security for it, which, from its form, bound him only; but if he had paid it, the plaintiff would have been his debtor for one-half. Indeed, the debt of the plaintiff was not merged in the others' bond; but, being joint and several, the original creditor might still have sued him alone for the whole debt at law. When he made himself legally liable for the judgment, he did nothing more than he ought to have (537) done, equitably, and might, by another mode, have been forced to do in a court of law. Then, the evidence is clear that he refused to pay any part of the debt upon the false allegation that the debt was owing wholly by Zebulon Baird; and he even repeats that in his bill as the main and, as we think, sole ingredient of his claim to relief; and, indeed, it is one which could not have been resisted if it had been in fact true. Why was it said to be the debt of Zebulon alone? We find no reason given for it in the bill, except that Zebulon was indebted to Andrew Baird and gave him his bond. The case is then stated as the ordinary transaction between single persons who are debtor and creditor to each other. With that representation of it, the bill adds that the plaintiff became the surety of that debtor, and alleges that he "became liable only as surety." But upon the answers and depositions it is found that the plaintiff's allegation out of doors was altogether different; and that, admitting the debt to have been originally contracted by him and his brother as partners, he contended that the brother ought to pay it because he had partnership effects sufficient. In that sense only, according to the proofs, did the plaintiff denominate the debt as Zebulon's alone. But in that point the plaintiff has not offered any proof tending to sustain his position. Indeed, upon these pleadings, as will be mentioned more particularly hereafter, he could offer no such proof. Everything that appears on that point, however, indicates that the truth of the case is on the other side. If, then, the plaintiff in reality owed this debt jointly with his brother, and positively refused to pay any part of it, the creditor might have sold the plaintiff's share of the land if his codefendant had paid his proportion of the debt; or the sheriff might, justly, at the request of Zebulon, have raised the plaintiff's part of the debt out of his estate; and in either case, upon the principles we have mentioned, Zebulon Baird might have purchased. Such was virtually this transaction. Consequently, the tenancy in common was extinguished, as the plaintiff's estate passed by the sale and sheriff's deed.

Such being the effect of the sale, it becomes unnecessary to consider the character of the subsequent possession. The Court, however, does not entertain the opinion that an actual ouster, or disseizin in fact, is necessary to be shown in order to make the possession (538)

of one tenant in common adverse to another. It is true that possession, merely, or the silent sole perception of the profits, will not constitute adverse possession. But even that, continued without claim for a long time, will raise every presumption necessary for its sanction. *Thomas v. Garvan,* 4 Dev. Rep., 223. And we think that where one who has in fact but an undivided share is exclusively in possession under conveyances for the whole, and notoriously claiming the whole in severalty, the possession can no longer be regarded as the common possession, but must be deemed adverse. *Burton v. Murphey,* N. C. Term Rep., 259; *Clapp v. Brougham,* 9 Cowan, 530. More especially must this be true if the possession should be taken under color of a conveyance for the share of one of the cotenants, as such, though the conveyance might turn out to be ineffectual. Here the entry in 1817 by Zebulon was under the deed for the land sold as his own and as the plaintiff's. That possession could not be the common possession, for he claimed the plaintiff's share against him, and sold parts as sole owner; consequently the possession must be adverse. If the sale were irregular, or the execution defective, yet the deed was a good color of title, under which the possession for seven years ripened into an indefeasible title by the destruction of the plaintiff's right of entry.

In truth, however, these parties were not mere tenants in common. The answers state, and the evidence proves, that they were general mercantile partners, and that these lands were part of the partnership effects. Tate, the principal witness of the plaintiff, says that both the parties so informed him repeatedly. They were, therefore, joint tenants, as copartners. That fact, thus put in issue by the answers and replication, ought to have been declared in the decree. If it had been declared, it must have put an end to the supposed tenancy in common, and the right supposed to be asserted to partition of these particular lands as being held in common or in joint tenancy simply. There (539) can be no division of partnership property until all the accounts of the partnership have been taken and the clear interest of each partner ascertained. Partners do not necessarily hold equally. They hold according to the sums they are respectively entitled to receive from the common stock. The usual decree is to sell everything and turn all into money for a division. But if the partners are made equal out of other effects, and then land remains, they may, no doubt, be specifically divided. That, however, cannot be known until the partnership accounts have been settled between the parties or taken under the order of the court. The bill in this case does not allege a settlement, nor as much as allude to the partnership itself, but seems purposely to evade it. The accounts of the partnership, therefore, could not be taken under it. If they were taken, and Zebulon found to be a creditor of the firm, as

alleged by him, the lands would undoubtedly be liable for the general balance due to him, and not merely for half the sum advanced by him on the sheriff's sale. Consequently it was indispensable to take the accounts to do justice between the parties. As that could not be done upon these pleadings, it was a complete answer to the bill when it appeared that the land in question and the debt for the cattle were items, merely, in the assets of the mercantile concern. A partner cannot demand an account in respect of particular items, and a division of particular parts of the property; but the account must necessarily embrace everything, for the reasons just mentioned. It may be said that, after such a length of time, a bill for an account of the partnership would be barred and a settlement or satisfaction presumed, and, therefore, that these lands may be taken as a clear surplus remaining and divisible equally between the parties as joint tenants simply. That may be admitted, for we think it correct, provided it appear that the partners were equally interested; and provided further that the lands continued to be treated by the parties as joint property, in which each was equally concerned. But that is not our case. The ancestor of the defendants and the plaintiff each denied an equal interest in the other. The plaintiff alleged that his brother had other funds of the firm in his hands, which rendered him a debtor to the plaintiff, while (540) Zebulon insisted that both the firm and the plaintiff were indebted to him, and for each balance looked to these lands as a security. It may be true that Zebulon could not enforce his claim by a bill for an account at so late a day as 1827, when this bill was filed. But if the plaintiff would lie by until his copartner could not have the accounts between them taken, by reason of the staleness of the demand, surely it must, for the same reason, be too late for the plaintiff to claim a division of the specific lands, in character of joint tenant simply, and without taking the accounts and avoid these conveyances by which while they stand, the joint tenancy is extinguished, and the land become vested in severalty in the other party. From the time the parties ceased to treat this land as common property, it could no longer be looked on in a court as mere real estate belonging to them equally, for the purpose of partition, in the light now spoken of. It may be, indeed, that the plaintiff, after such unreasonable laches, and upon a suit brought after the death of his partner, who alone could adjust the accounts with an accuracy at all satisfactory, ought not to have a decree upon any other principle than allowing the accounts as stated and left by his deceased partner. But whether that be so or not, the delay will not, in the case which has happened, exempt him from the necessity of the account and authorize partition without taking it; for this land was not regarded by either party as common property, but it was claimed, possessed and disposed

of as the sole property of one of them for such a length of time and under such circumstances as in a case of a tenancy in common, would be evidence of an ouster and make a title under the statute of limitations; and, perhaps, also, for like reasons, would terminate the trust between the parties as partners, and, in this Court, in analogy to the rule at law, put the statute of limitations in motion on behalf of the possessor. At all events, the plaintiff cannot rely on his own laches to excuse him from the account of the partnership and authorize
(541) him to call for a division of these estates as remaining specifically of the assets of the partnership.

But in reality the pleadings present neither of the questions that have been discussed, and no relief can be granted but upon the facts alleged in the bill and such as is consistent with those allegations and the prayer founded on them. This bill is as meager in its allegations as can well be imagined, and as limited in the prayer as possible. It sets forth no general partnership, and of course asks for no account of it. "The partnership moneys" mentioned in it are necessarily confined to the sums of $551 and $1,470, previously spoken of, as the prices of a lot of cattle sold by the two, and of parts of the land jointly owned, which were sold by Zebulon. Those transactions are set forth as merely isolated transactions of limited joint dealings and in no way connected with a general partnership. The draftsman of the bill did not mean that his client should submit to a general account in order to get a moiety of the lands, but the intention was to get it without the account. The partnership was, therefore, purposely kept out of sight. Upon those transactions, as stated, the plaintiff had no claim upon the heirs of Zebulon, but only against the personal estate into which the money had gone; and from the payment of it, as money had and received, the administrator was properly held to be protected by the statute of limitations. It is not seen why that matter was put into the bill, which was to pray the relief sought in respect of the land, but as a pretense under which evidence might be given to establish that the debt to Andrew Baird ought to have been paid by Zebulon, although it was originally against both. But it cannot have the effect of admitting proof with that view, since the charges of the bill on that point are precise, that the debt was *never* that of the plaintiff, except *as surety only* for Zebulon.

Then the case stated with respect to the land is nothing more than that those parties purchased lands jointly and held them jointly, and that Zebulon became indebted and the plaintiff became his surety,
(542) and that, upon a joint judgment gainst them therefor, Zebulon procured the land of the plaintiff to be sold, and indirectly purchased it himself. The bill further alleges, indeed, that Zebulon set up,

as a very insufficient pretense for such manifest bad faith and wrong, that the plaintiff was indebted to him, which pretense, the bill states, was altogether unfounded, for, "upon an account of all the partnership moneys received as aforesaid," the balance was the other way. This shows what partnership was in the mind of the pleader; *"as aforesaid"* referring particularly to the two sums before mentioned as the prices of cattle and land sold. As for the other words in this part of the bill, respecting moneys received "on other accounts not now known or remembered," they must be admitted to be too vague for any purpose. The charge respecting those moneys, so far as it is connected with relief in respect of the title of the land, is introduced merely to repel the pretense of Zebulon of the plaintiff's indebtedness to him on other accounts. It is true that, for the reasons before given, neither party has proved, nor could prove, in this cause, on which side the indebtedness was, since it arose on general partnership dealings, which cannot here be inquired into. It may be taken, however, either way, and it will not affect the rights of the parties in respect of the land upon the questions made here; for whatever sum the plaintiff might have owed to Zebulon, it would be a plain and gross fraud in the latter to sell, or procure to be sold, the plaintiff's land for a debt of Zebulon, for which the other was bound merely as surety, and to become the purchaser himself. Such a case could not receive the least countenance in a court of justice; but the plaintiff would be entitled to relief against such abuse of his confidence, and of the process of the law, without any regard to the land being before held in severalty by him, or jointly by Zebulon and himself. The slightest inspection of the bill shows that such is the gravamen, and solely the gravamen, of the plaintiff's case, as stated in it. It is true, there are general words of the sale of the plaintiff's moiety being "unjust, iniquitous, and fraudulent." But epithets of that sort are unmeaning and impertinent in pleading, unless they be used in reference to facts stated, which render, (543) and whereby it may appear that the act complained of is legally fraudulent. In other words, the facts constituting the fraud must be alleged before proof of them can be received or the court act on the general allegation. Here the only facts stated are those mentioned, namely, that the principal debtor contrived to have the land of the surety sold under the execution, and purchased it himself. That turns out to be untrue, for the debt was originally a joint one, and there is nothing appearing, or can appear, in this suit to show that the joint property of the debtors ought not to have been sold to satisfy it, or that the several property of the plaintiff ought not to have paid one-half of it. That being established, the plaintiff's case, as made in his bill, was answered, and the bill should have been dismissed. Here may be noticed

that part of the decree which declares that each of the parties had personal property sufficient to satisfy the execution, as was known to the sheriff and Zebulon Baird. That would be material evidence of one species of fraud. But it would be one entirely different from that brought forward by the plaintiff, and is not suggested in the bill. The Court could not, therefore, act on it. The fraud here complained of consists of one man's selling the property of another for a debt which the former alone owed, and his buying it and holding it from his surety. That the view of the bill here taken is correct is confirmed by a recurrence to the relief prayed in respect of the land. It is not for a sale as partnership property, nor for a division as of lands held jointly or in common. Partition was not in the contemplation of the writer, for the bill does not even describe or identify the lands. He conceived that the joint estate was extinguished by the sale and deeds; and his object, so far from being a partition, was to restore the original character of the estate as it was before the sale, and that was his sole object. The prayer is for a discovery of the titles set up by the defendants for the lands which the sheriff had sold, that the Court may see whether they correspond with those stated by the bill; and if so, that the defend-
(544) ants may be decreed "to give up the sheriff's and Candler's deeds to be canceled, or may convey to the plaintiff." Here is not a glance of thought towards a partition. The sole relief sought is that the deeds may be declared void, as being fraudulent, upon the single ground mentioned in the charging part of the bill, and that thereupon they may be put out of the plaintiff's way, either by cancellation or a reconveyance, the effect of which would be to let him, unless otherwise barred, get into possession again, or to consider the possession held by the other as a common possession. It seems to the Court, therefore, that all that was done in the court below was out of the case, and that the proper decree in respect of the land would have been to declare that the debt on which it was sold was not the several debt of Zebulon Baird, but the joint debt of him and the plaintiff, and, therefore, that the plaintiff had not proved *the* fraud alleged by him, and upon which he claimed to have the deeds declared void, and thereupon to have dismissed the bill with costs. The money received for land sold by Zebulon since the purchase at sheriff's sale stands on the same ground with the land itself, and therefore the bill ought to be dismissed as to that also. The other moneys—that is to say, those received for land previously sold, and for the cattle—have already been disposed of, upon the ground that they are general partnership assets, or that the administrator was alone liable for them, and is protected by the statute of limitations. As the decree pronounced was not final, and the cause remains in the Court of Equity, this Court cannot reverse it and pronounce such decree

here as ought to have been made; but this opinion must be certified to the Court of Buncombe, that the former decree may be there reversed and one entered in conformity to the directions now given. The plaintiff must also pay the costs in this Court.

PER CURIAM. Direct accordingly.

Cited: Wells v. Mitchell, 23 N. C., 489; *Price v. Hunt,* 33 N. C., 43; *Ward v. Turner,* 42 N. C., 76; *Flanner v. Moore,* 47 N. C., 123; *King v. Galloway,* 58 N. C., 123; *Ross v. Henderson,* 77 N. C., 173; *Mendenhall v. Benbow,* 84 N. C., 650; *Williams v. Clouse,* 91 N. C., 327; *Page v. Branch,* 97 N. C., 102.

(545)

THE ATTORNEY-GENERAL v. THE PRESIDENT AND DIRECTORS OF THE STATE BANK.

1. Where a bank charter reserved to the State the privilege of subscribing for shares, upon a part of which it was to be at liberty to defer payment upon allowing the bank to retain interest, at the rate of four per cent therefor, out of the dividends of profits of all the stock held by the State until "such time or times as it might be convenient for the State to pay for the same"; and the Legislature, by a subsequent act, authorized the bank to make a partial dividend of its capital before the expiration of its charter, *it was held,* that the Legislature was the sole judge of the conveniency of the time when the payment should be made; that though courts of justice may ascertain whether an individual, under the pretense of convenience, is influenced by caprice or dishonesty, yet they could not judge of the public convenience, which involved the consideration of numerous questions of policy, upon which none can pass but the Legislature; and that therefore the State might defer the payment for its unpaid stock until the expiration of the charter. *It was further held* that a partial dividend of capital would not authorize the bank to retain the whole amount for the unpaid stock of the State, even viewing the State as an ordinary debtor to the corporation, because the debt *was not due* until the State should deem it convenient to pay it; but that in truth the debt of the State was not to be regarded as a debt of the corporation, *independent* of its stock in the corporation, and either originally contracted upon an engagement distinct from its contribution to the capital stock or accepted in lieu of such contribution; that so far as profits were concerned, it was the stock of the State in the bank, but in a division of capital it must be considered as a part of the capital of the bank in the hands of the State; and that such division of capital would operate upon this debt for unpaid stock a total or partial extinction, according as a total or partial division was made.

2. Where the capital stock of a bank has been impaired, a division of its funds amongst the stockholders, although called a division of profits, is in fact a dividend of capital; and if the State has engaged, upon unpaid

stock, to allow the bank to retain interest out of the dividends of profits upon all its stock, such interest cannot be taken by the bank, while the dividends are really dividends of capital and not of profits.

THIS was an information, filed in the Court of Equity for Wake County by the Attorney-General, on behalf of the State, against the president and directors of the State Bank of North Carolina, for the purpose of effecting a settlement of certain matters of account between the State and the bank. All the facts necessary to a proper understanding of the case will be found stated in the opinion of the Court as delivered by his Honor, *Judge Gaston.*

(546) *The Attorney-General and W. H. Haywood for the information. Badger for defendants.*

GASTON, J. The pleadings upon this information present two questions, on which the judgment of the Court is required, for the purpose of effecting a settlement of certain matters of account between the State and the bank. To understand these questions it is necessary to examine briefly the provisions of the several acts of Assembly bearing upon the matters in controversy, and the proceedings on the part of the officers of the bank which are complained of in the information. The bank was created by an act of Assembly, passed in the year 1810, entitled "An act to redeem the paper currency now in circulation, and to establish a bank by the name and title of The State Bank of North Carolina." It was thereby enacted that a bank should be established with a capital of $1,600,000; that it should be lawful for the Treasurer of the State to cause to be subscribed, for and in behalf of the State, the sum of $250,000, which sum should be reserved for the use of the State, to be paid for in stock of the United States, and "the residue in gold or silver, at such time or times as it might be convenient for the State to pay the same"; that books should be opened to receive the subscriptions of individuals for shares of $100 a share in the capital stock of the bank, which shares were to be paid for, one-fourth to the commissioners at the time of subscription, one-fourth within sixty days after the bank should go into operation, one fourth within 120 days, and one-fourth within twelve months, to the directors of the bank; and that the subscribers to the bank, their successors and assigns, should be a corporation, and so continue until 1 January, 1830. The subscription in behalf of the State was made accordingly by the Public Treasurer, and the stock of the United States belonging to the State was transferred to the corporation in part payment. In 1811 another act was passed, modifying in several respects the provisions of the original char-

ter. This act is entitled "An act in addition to the act entitled (547) 'An act to redeem the paper currency now in circulation, and to establish a bank by the name and title of The State Bank of North Carolina,' passed in the year 1810." It contains this provision: "The president and directors of the bank shall not be bound to pay to the State full dividends upon the whole sum of $250,000 of the stock of the said bank reserved by the above-recited act to the use of the State, and upon which, by the said act, the State is entitled to full dividends; but it is hereby declared lawful for the said president and directors, out of the full dividends to be declared on the said sum of $250,000 held by the State in their stock, to retain at the end of each year, for the general benefit of the stockholders, including the State, a sum equal to four per centum upon such part of the said stock as shall not have been actually paid for by the State, on the day when the dividend is declared, out of which the retainer is to be made." By this amendatory act, which was accepted by the stockholders as a modification of their charter, the term of the corporation was extended to 1 January, 1835. Payments were afterwards made by the State on account of the stock so reserved for its use and subscribed for by the Treasurer, but not in full therefor; and the bank received every year from the State, by retainer, out of the dividends of profits declared upon this stock, an interest of four per cent on the balance remaining unpaid. In the Session of 1829 an act was passed, entitled "An act to enable the State Bank to wind up, gradually, and to fix a uniform rate of collection." This act, under certain limitations and restrictions, continued the corporate powers of the institution until 1 January, 1838; prohibited the making of new loans, except in renewal or substitution for a subsisting debt after 31 December, 1834; prohibited the making of accommodation loans after 1 September, 1830, on more indulgent terms than the payment of three equal installments every ninety days; prohibited the issuing of notes under $5 after 31 December, 1832, and the issuing of any notes after 31 December, 1834; required of the president and directors so to regulate (548) the collection of debts already due as to permit them to be paid by installments of a twentieth every ninety days; authorized the president and directors to receive shares of stock in the bank in payment of debts at a reasonable value, to be fixed on by the stockholders and to be approved of by the Public Treasurer; authorized the stockholders, after 1 January, 1833, to declare dividends of the capital as the same should accumulate, provided that the amount of capital should not be reduced to less than the amount of debts due from the bank; and made other provisions for the convenience of the institution and the community which were called for by the approaching expiration of the charter.

This act was accepted by the stockholders, in general meeting, on 12 January, 1830; and on the succeeding day the stockholders passed a resolution authorizing the president and directors to receive shares of the stock of the bank in payment of debts at $75 per share, which resolution was approved by the Treasurer of the State. In December, 1830, 1831, and 1832, the president and directors declared dividends of profits upon the capital of the bank of four per cent, and passed the same to the credit of the State on account of her stock, which then greatly exceeded the $250,000 originally subscribed for, but retained out of the dividends so declared four per cent on the unpaid part of the stock so subscribed for. On 14 January, 1833, the stockholders, in general meeting, declared a dividend of capital of fifty per cent to be paid to the respective stockholders after 1 February then next ensuing. When the Treasurer claimed the dividend of capital on the stock of the State, the officers of the bank claimed as of right to deduct therefrom the sum of $83,906.11, the whole sum remaining unpaid of the State's original subscription, and refused to pay more than the balance after
(549) making this deduction. In December, 1833, the president and directors declared a further dividend of profits of two per centum.

The first question raised is as to the right of the bank to apply this sum of $83,906.11 to the entire extinguishment of the debt of the State. The information insists that, by the original act of incorporation, the State was to pay "the residue of its subscription at such time or times as to the State might be convenient," and that of this convenience the State was the exclusive judge; that under the amendatory act of 1811 a compact was entered into between the State and the bank, by which the former had an option to pay the balance which it owed for its subscription and take full dividend of profits on all its stock, or to leave the balance unpaid until the end of the charter, paying an interest of four per cent out of the annual dividends; that under the act of 1829 the State claimed, and had to claim, one-half of the said sum of $83,906.11, to be applied to the extinguishment of the stock debt of the State, and no more than one-half, and to receive the residue of its dividend of fifty per cent on its capital stock. On the part of the bank, it is contended that the State was bound in good faith to pay "this residue of its subscription" so soon as it could be done without interfering with the discharge of other engagements or the necessary and proper expenses of government, and that this payment might have been thus conveniently made when the bank so applied the money of the State in its hands; that this original obligation was in no way impaired by the amendatory act of 1811, and that at all events when, under the act of 1829, the business was to be finally closed and the joint stock paid out to the holders, the bank, by a most evident equity, was entitled to retain and

apply the dividends on the stock of the State, as a corporator, to the payment of a debt from the State to the corporation. The Court entertains no doubt but that, under the act of 1810, the State had the exclusive right to decide when the public convenience would permit of the payment for stock at any time or times before the expiration of the charter. The argument of the defendants on this point is, that if an individual promise to pay money or to do any other act when (550) it may be convenient to him, he is bound to perform it when he can do so without difficulty, and whether he can or not is a question to be adjudged by the courts, and not to be decided by himself; and that, although the State cannot be sued and thereby compelled to perform an engagement to which it has been inattentive, yet the rules of justice are the same with respect to States as to individuals, and demands of the State may be met and repelled by just counterclaims against the State. It *may be* that, if an engagement should be made by an individual to do an act or to pay money at a convenient season, and it cannot be collected, from the nature of the contract, that there is any period within which it must, convenient or inconvenient, be complied with, the courts might from necessity construe convenience to mean ability or reasonable time, because otherwise the engagement would be nugatory. All deliberate engagements are presumed to mean something, and intended to confer rights upon those with whom they are made; and, therefore, a construction must be put upon them, if it may be, which will prevent them from being turned into a mockery. But where an engagement to do an act, from the terms of the contract, fixes a time *within* which it must be performed, but allows a latitude for its performance within that period, according to the convenience of the party who is to do the act, it would seem that the individual himself must be the judge of what his own convenience prescribes. There is a period limited by the act of incorporation within which the stock must be fully paid for. The payment is to be made to the corporation, and the life of the corporation is defined in the act. Such, we think, would be the construction of this contract if made by an individual; but, however this might be, any other construction of it as a contract on the part of the State is inadmissible. Courts of justice may ascertain whether an individual, under the pretense of convenience, is guided by caprice or influenced by dishonesty. But how can *they* judge of the public convenience? *That* involves the consideration of numerous questions of policy, conflicting claims between the different interests, wound up in (551) the public welfare; the various demands upon the State for justice, protection, relief and improvement, compared with the resources which can be commanded to meet them—upon all which, by the fundamental institutions of the State, none can pass but the Legislature.

Public convenience is not a subject of judicial inquiry. To pay at such time or times during the continuance of the charter as may be convenient to the State is equivalent to paying at such time or times during the continuance of the charter as the State shall determine. This, no doubt, was the construction put upon these terms in the original act, and furnished one of the reasons for the modifications of the charter to be found in the amendatory act. It was uncertain when the public convenience would admit of payment, and it was thought hard that the State should receive full dividends on stock for which it had not paid and for which it might not pay until the end of the charter. The act of 1811 asserted that the right of the State to full dividends on the unpaid stock, in direct terms, left the State still free to pay at any time short of the expiration of the charter, and secured to the bank, if its affairs were properly managed, an interest of four per centum until payment should be made. It cannot be, if the contract were understood otherwise and the State were supposed to be deferring payment, to the injury of the institution, but that some remonstrance or memorial to the Legislature invoking its justice, or some request for payment would have been made by the bank before the year 1833. The information is explicit in charging that there was none such. The answer pretends not to aver that there was, but *argues* that on the face of the information such a demand appears. We presume that reference is here made to that part of the information where it is charged that the act of 1816, under which an issue of small treasury notes was made, to the amount of $80,000, and under which these were paid into the bank, on account of the debt of the State, was enacted *at the request* of the bank. The answer is not on oath; it does not set up a demand otherwise (552) than as inference from the matters charged, and the inference is not conclusive. It by no means follows, if the word "request" be taken in its strongest sense, that it was a request for *payment*. There were many considerations of *supposed expediency* on the part of the bank, as well as of the State, for the making of this *paper change*, which may have prompted the measure. But, in truth, what is called "request" is nothing more than assent. The preamble to the act of 1816 declares that the stockholders in general meeting had given their assent to the measure; and upon looking into the resolution of the stockholders we find it declared that "the proposition," to which their assent is given, comes from "a committee of the Legislature." The Court is, therefore, of opinion that there was a well-understood arrangement between the State and the bank, by which the former had an option to defer payment of the debt due upon its subscription for stock, on allowing the bank to deduct an interest thereon of four per cent out of the dividends upon the whole amount of the stock taken by the State in

that subscription, or to hasten the payment thereof, and demand full dividends on all its stock.

It is insisted, however, that as by the act of 1829 a division of part of the capital was authorized, and in pursuance of that act an actual division of one-half was ordered by the stockholders, then the corporation had an equity to require that the debt of the State should be paid before the State should receive its dividends. It is to be regretted that the act of 1829 made no explicit provisions upon what should be the effect on the debt of a partial division of capital, and that we have to find out, as well as we can, what in justice ought to be its operation. If the debt be regarded *simply* as one due to the corporation from one of its corporators, then the equity insisted on must be that applicable to all partnerships, whereby the debts of the partners are to be paid up or taken into account when the partnership is dissolved. No individual member of the firm is entitled as such to a portion of its *funds,* but only to his share of what belongs to the company after the settlement of its accounts. Upon a dissolution, this settlement becomes indispensable, and it must include all debts due to the company, (553) whether from its members or others, and all debts due from the company, either to the partners or strangers. Until this adjustment, it cannot be seen what is to be distributed—whether the capital has been swollen by profits or diminished by losses, or whether there be any capital to be distributed. But on a partial division of capital, such a settlement is not indispensable. The parties, on ascertaining to their satisfaction that one-half of the capital is as much as is needed for the satisfaction of all demands against the company, and for the further prosecution of their business, may agree to return to each the half of what he has put into the common stock. Whether, upon an agreement for such a division, anyone can be required to take his own debt in payment of his part of the capital, must depend, we think, upon the fact whether the debt be then demandable. If it be, this may be insisted on; but if it be not, it is difficult to see why the agreed division of capital should *per se* change the character of the debt. No doubt several of the debtors of the bank were to be found among its stockholders. Were not these entitled to renewals upon the payment of installments, under the act of 1829? Could the bank have sequestrated their dividends of stock in order to force *immediate* payment of any debts which, either by the terms of their engagement or by the construction of law, were not then absolutely demandable? The equity set up is not sustained, we think, upon the ground that all the debts of the partners must be settled before a final dissolution of the partnership.

But it is not correct to regard the debt of the State as a debt due from one of the corporators, *independent* of its stock in the corporation,

and either originally contracted upon an engagement distinct from its contribution to the capital stock, or accepted in lieu of such a contribution. This debt is uniformly spoken of as due because of "a part of the stock not paid for, but to be paid for." It is a part of the State's contribution to the capital stock kept back upon an agreement that the State may receive a share of profits thereon as though it had been advanced, subject to certain stipulations as to interest, but which (554) part the State is bound to put into the capital before the expiration of the charter. So far as profits are concerned, it is the stock of the State in the bank, but in a division of capital it must be considered as a part of the capital of the bank in the hands of the State. Upon a division of capital it cannot be claimed; for such a division is but a restitution to the associates of what they have advanced as capital. Upon a final settlement, if the capital be unimpaired, the debt is extinguished, because it were idle to pay it in and then demand its immediate return. If the capital be impaired, the State is bound to pay so much thereof as is in proportion to the loss sustained on the capital. When, instead of an entire, a partial division of capital takes place, the State can claim no *restitution* because of this portion of the capital in its hands, nor is it bound to pay for this part of the capital sooner than it had contracted to pay. The State is entitled to receive, on a partial division, an aliquot part of what it would have been entitled to receive on a complete division. As a complete division operates an entire extinguishment of a debt because of unpaid capital, it seems to follow that a partial division operates an extinction of it *pro tanto*. On a final division, should it be ascertained that the capital is impaired, the State's obligation to pay its proportional loss on this part of its stock remains in full force. We have had some difficulty upon this point, because of the pledge of the dividends of the whole original stock of the State as a fund for the payment of four per cent on this part of it. This pledge could not be taken away without the consent of the institution. But the division of capital is by consent.

The compact is to be found in the act of 1829, ratified by the stockholders. There is no objection made because of a weakening of the pledge; any objection on that account would have been unreasonable and captions. The division of capital is in anticipation of a final dissolution. There could be little expectation of many dividends of profits thereafter; and if any such should occur, a pledge of dividends on half the stock would furnish as ample a fund for the payment of interest on half the debt as of dividends on the whole stock for the payment (555) of the interest upon the whole debt. Upon the best consideration which the Court has been able to take of this question, it is of opinion, and so declares, that the bank, under the resolution for the

division of fifty per cent on the capital stock, ought to have retained out of the State's dividend but the sum of $41,953.05½, to have applied the same to the extinguishment of the debt of the State *pro tanto* on the unpaid part of its stock, and to have paid over to the State a full dividend of fifty per cent upon the residue of its stock; and it further declares that if it shall appear, upon the expiration of the charter, that the bank has not assets wherewith to restore to the stockholders, including all dividends of capital theretofore made, the amount of capital stock respectively advanced, the State will be chargeable in account with the bank for so much of this debt as will make the loss of the State upon each share of its stock the same with that borne by the other shares.

The second question raised by the information and the answer is in respect to the dividends of profits made by the president and directors in 1830, 1831, 1832, and 1833. The information charges that, before any of these dividends were declared, it had been ascertained that the capital of the bank was impaired; that there could be no profits to be divided until the capital was restored; that these declarations were illegally made; that by means of such illegal declarations the bank charged the State with four per cent as interest on its unpaid stock, and unjustly withheld that amount; and that these illegal declarations were made with the view that, by means and under color thereof, the bank should exact interest to which it was not entitled. The answer denies peremptorily the *motive* assigned in the information for declaring these dividends; denies the fact that, when they were declared, the capital had been impaired; insists on the difficulty that must always exist in estimating with precision the state of a bank, and contends that when profits are declared *bona fide* upon an estimate founded on probable data, such division ought not to be held illegal if the estimate prove to be erroneous. The Court is of opinion that the inquiry (556) as to the alleged motive for making the dividends is immaterial; for if the dividends were made as of profits after it was ascertained, as far as such a fact could reasonably be ascertained, that the capital was broken in upon, whatever might be the motive for declaring the dividend, it was in truth a dividend of capital, not of profits; and the bank had not a right, under the compact in the amendatory act, to charge the State with interest. The Court recognizes the difficulty, set up in the answer, of distinguishing between apparent and real profits, and holds that a division made of apparent profits is not to be deemed irregular until there is sufficient reason to know or to believe that the apparent are not real profits. Upon the question of fact, whether the dividends so declared, and if so, which of them, were in effect dividends of capital, under the name of profits, the Court will not now decide. There is, indeed, a very strong *prima facie* case made in respect to this contro-

verted fact on the part of the State. It appears, from a statement made of the affairs of the institution, at a general meeting of the stockholders, 1 June, 1829, that the capital of the bank is then represented as impaired to the amount of $152,878.17. To lessen this loss on the capital, there is mentioned the contingent gain to be derived from lost notes. But this contingent gain cannot legitimately form an item in the estimate of the condition of the bank. The institution must be regarded as actually owing the whole amount of its unredeemed issues, and no notice can be taken of any profits derived from the loss of these evidences of debt until the institution is at an end, when they may fall into the general fund of bank assets as unclaimed debts. About seven months after this estimate of loss was spread before the stockholders, they proceeded, by a committee, to ascertain the value of stock, and to consider and determine the proper price upon which stock might be taken in payment of debts. This committee reported that they had been unable to ascertain to their satisfaction the value of the stock,
(557) but that there was a continuing depreciation in the value of the real estate of the bank; that heavy losses had been sustained and heavy losses were anticipated on probable grounds; that under these circumstances they believed it their duty to fix a price on the stock which would not endanger the interests of the stockholders not indebted to the institution, and which it would be at the option of the indebted stockholders to avail themselves of, or not, by paying in stock or money. Upon this report, the stockholders fixed the price at which stock might be received in payment of debts at $75 per share. It is apparent that in fixing this price the stockholders acted upon the principle of an estimation which should not transcend the value, and not of an estimation of actual value. But there is no indication whatever then exhibited of a better state of things than had been presented in the preceding meeting of June; and it must be believed that, however cautious they may, as they ought to, have been not to fix too high a value on the stock, they did, in the true spirit of the act of 1829, declare what they considered a *reasonable* value. But an inquiry is indispensable to ascertain if the capital of the bank were impaired when the first dividend of profits is alleged to have been illegally declared, what was its condition when the subsequent dividends were declared; and the Court prefers that the inquiry shall be open as to the state of the bank even at the time of the first dividend. An interesting question may arise upon the coming in of the report, upon which no opinion is expressed, because it is not certain that it will arise, and it is mentioned now in order that either party may have the inquiry so conducted as to present it distinctly upon the report. That question is, if dividends of capital have been paid over to the State as dividends of profits, whether an equity

does not arise against the State to allow the interest of four per cent on its unpaid stock from the time when dividends of profits might legitimately have been declared if the dividends of capital had not been withdrawn.

The Court declares that the State was not liable for the payment of interest on its unpaid stock, except out of dividends of profits to be declared by the bank on the original stock subscribed for the State; that dividends made as of profits, when the capital stock (558) of the bank was impaired, are not dividends of profits, but of capital; that the rightfulness of such dividends of profits depends upon the state of the bank at the time of the declarations, respectively, according to the knowledge and means of information then possessed by the directors of the bank, and directs an inquiry to be made by Edmund B. Freeman, a commissioner for that purpose appointed, into the state of the bank at the times, respectively, when the dividends complained of in the information were declared.

The Court directs that the commissioner shall be armed with full powers to examine all persons whom either party may desire to be examined, and to require from the officers of the State and of the bank access to and inspection of all books, documents and papers required for the purposes of this inquiry.

The Court authorizes the inquiry by the commissioner to embrace any special matter which either party may deem material as tending to facilitate the settlement of the matters of account between the parties. And it reserves the case for further consideration upon the coming in of the report of the commissioner.

PER CURIAM. Decree accordingly.

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(559)

JOEL L. TYRRELL ET AL. v. JAMES MORRIS ET AL.

1. A sale by an executor of the chattels belonging to his testator is good, and the purchaser is not obliged to see to the application of the purchase-money; and this, although the testator has created a particular fund for the payment of his debts, of which the property sold does not form a part, and the purchaser has notice of the will. But if the sale be collusive, or in a way to enable the executor to commit a *devastavit*, in equity the purchaser will be liable.

2. The same rule applies to a pledge by the executor, also to an agreement turning a pledge into an absolute sale.

THE plaintiffs were the children of Joel Tyrrell, deceased, and, with their mother, who was one of the defendants, were the legatees of all

his personal estate; and they brought this bill against their said mother, the executrix, and James L. Tyrrell, the executor of their father, and against James Morris, John Rowland, and Robert G. Twitty, to impeach the sales of certain negroes belonging to the estate of the deceased, made by his executors to Morris, and by him, as was alleged, to the other defendants. Joel Tyrrell, by his will, directed that his negroes should be kept for the support of his wife and children—a part to be employed in cultivating a farm, and the residue hired out as his executors should deem most advisable. He further directed that his lands and stock of every kind should be sold *or retained* at the discretion of his executors, and the product, together with the hire of his negroes, should go to the payment of his debts, and the surplus to be laid out in lands, at the discretion of his executors, as a residence for his wife and children. Upon his death, which took place in 1819, James L. Tyrrell and the widow qualified as executors to the will. There was no sale made of any of the property, nor were the negroes hired out, but the widow continued on the farm with all the children, retained the possession of all the property, supported herself and the children out of the produce of the farm and the labor of the negroes. The testator died considerably indebted, and the creditors, seeing no arrangements made for discharging their demands, brought suits, obtained judgments, and took
(560) out executions against the estate. The executors, from time to time, as they were pressed by the creditors, disposed of the negroes, and, amongst others, in the years 1822 and 1824, disposed of five, viz., Reuben, Patrick, Katy and her two children, to the defendant Morris, who afterwards sold some of them to the defendant Rowland, and he was alleged in the bill to have sold to the defendant Twitty. The plaintiffs contended, in the first place, that the sales of these negroes by the executors should be set aside and declared to be void, because made in violation of the injunctions of the testator; because made at private sale and without any order of court; because, although ostensibly made for the relief of the estate, the purchase money was in fact advanced to the executors, or one of them, for private and personal uses, or was applied to such uses, or otherwise wasted; of all which matters the purchaser was charged to have had notice; and, secondly, that the conveyances by the executors should be declared to be but securities for refunding certain sums of money *loaned* to the executors, and that the plaintiffs be allowed to redeem the negroes thus conveyed.

W. A. Graham for plaintiffs.
Badger and J. W. Norwood for defendants.

GASTON, J., after stating the case as above, proceeded: The cause has been brought to a hearing only as against the defendant Morris and the alleged purchaser under him. Whether the plaintiffs will ask for any relief against the executors we know not. Our decision on the case as heard will not prejudice such an application if they should hereafter make it.

The bill must be dismissed, and dismissed with costs against the defendant Twitty. He has denied by his answer that any of the negroes were conveyed to or holden by him, and there is no proof that they were.

The first ground on which the plaintiffs rest their claim against the defendants Morris and Rowland will not avail unless they can make out a case of fraud in the defendant Morris. However inattentive the executors may have been to the injunctions of their testator, or however remiss in the performance of their duties, the debts of (561) the testator were, nevertheless, to be paid by them, and their power to dispose of the estate of their testator for the purpose of meeting these demands was complete. It is the general rule of equity, as well as of law, that an executor has the absolute power of disposal over the whole personal effects of his testator, and that it is not incumbent on the purchaser of the assets to see the money raised by the disposition of the assets properly applied. In the language of *Lord Thurlow* (*Scott v. Tyler,* 2 Dick., 725), "His title is complete by sale and delivery, and what becomes of the price is of no concern to him." Fraud, however, will vitiate every transaction; and, therefore, in the language of the same eminent judge, "If one *concerts* with an executor by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in any other manner contrary to the duty of the office of executor, *such concerts* will involve the seeming purchaser or pawnee and make him liable to the full value." This *concert* or collusion between the executors and Morris to enable the former to commit a *devastavit* of the assets, the plaintiffs have utterly failed to establish. Morris was, indeed, aware of the dispositions contained in the will of their testator, but *these* did not contain a peremptory injunction to sell the land, and, if they had, did not take away the power of the executors to sell the personal property for the payment of debts. The will, indeed, directed that the negroes should be kept together or hired out, and that the hire should be applied to the discharge of his debts. But the time had come when these debts must be paid off, although no such funds had been prepared for discharging them as the testator contemplated, and when there was no other means of meeting the exigency than by a sale of part of the estate. There is no evidence of any contract or agency of Morris in bringing about this state of

things. A sale was then necessary, and it must be made, either under execution or by the executors. The latter had a right to sell, and those who dealt with them in the exercise of that right, unless dealing (562) collusively, are not liable to be called to account for the past misconduct of the executors, which induced the necessity of a sale. There is no allegation in the bill that the negroes were obtained by Morris at a fraudulent undervalue. If there had been, it would have been disposed of by the testimony which establishes that they were sold at fair prices, and probably for more than could have been obtained at public auction. It cannot be pretended that a sale by an executor is invalid, either in law or equity, because not made at public auction nor under an order of court specially granted for that purpose. The most that can be required from the purchaser under such circumstances is to repel the presumption that he may have bought at an undervalue. The charge that the sales were made for the private benefit of the executors, or of either of them, and not with a view or for a purpose connected with the administration of the assets, is not proved. All the evidence tends to establish that it was *professedly* made to raise money to pay off the debts of the estate. A considerable portion of it was unquestionably applied directly to that purpose, and there is no evidence to show that any part of it was misapplied to other purposes. Under these circumstances, more especially as it is apparent that the purchases were made by Morris with the knowledge of the family, one of whom, the complainant, Evalina, was then of full age and the others nearly of age, and as no attempt was made to impeach these purchases until nine years after the last took place, we have no hesitation in saying that the first ground on which the claim to our interposition rests is wholly unsupported.

The plaintiffs further allege that in truth the conveyances made by the executors were intended but as securities for refunding moneys loaned by the defendant Morris. There is little or no doubt in regard to the facts in relation to this charge. In 1822 the negro, Reuben, was conveyed to the defendant Morris by an instrument which, however unskillfully written, did amount but to a security for the repayment of $326 then advanced to the executors. In April, 1824, a similar conveyance was made of the negro Patrick for the repayment of (563) $900 then advanced. On 12 July, 1834, Katy, the wife of Patrick, and her two infant children, were sold absolutely, at the price of $500; a further sum of $80 was advanced to make up the price of Reuben, $400, and a formal release was executed by the executors of the equity of redemption, with respect to Reuben and Patrick, so as to convert the *pledge* of them into an absolute transfer. The same principles which hold in the sale of assets by an executor apply to a pledge

of them. *Mead v. Orrery,* 3 Atk., 239; *Scott v. Tyler,* 2 Dickens, 725; *McLeod v. Drummond,* 17 Ves. Jun., 154. He has the power to pledge or sell, and the pawnee or vendee is not responsible beyond the terms of his contract, except by reason of covin and improper concert with the executor. The change of the pledge into a sale must be tested by the same principle. The pawnee has a right, by enforcing his pledge, to compel the payment of his debt; and if, by agreement with the executor, the thing pledged be taken in absolute property in payment of the debt, the validity of that transaction must depend on the good or bad faith in which it was done. We see no indications of collusion in the transaction; and, therefore, from the date of it, the property was not holden as a security for a debt, but the debt was paid off by a sale of the property.

It is, therefore, the opinion of the Court that the bill must be dismissed against the defendants, Morris and Rowland, and with costs. It will be retained a reasonable time to see whether the plaintiffs will move against the other defendants. If they do not in the course of the next term, the bill will stand dismissed altogether, but as to the latter defendants, without costs.

PER CURIAM. Decree accordingly.

Cited: Gray v. Armistead, 41 N. C., 77; *Bradshaw v. Simpson, id.,* 246; *Wilson v. Doster,* 42 N. C., 233; *Wooten v. R. R.,* 128 N. C., 124.

(564)

FRANCIS HODGE v. JOHN D. HAWKINS AND RICHARD BULLOCK.

1. Where a testator leaves the same person executor of his will and guardian of his children, he is chargeable with simple interest only for the time he was acting as executor; but from the time when the administration of the estate was or might have been concluded, he is to be charged with compound interest, unless he can show special equitable circumstances to discharge him of such accountability.

2. Where one or two joint executors and testamentary guardians settled with his ward, and was allowed commissions, that allowance is no criterion for estimating the commissions to the other. The compensation to the latter must depend on the time he employed, the labor he performed, the services he rendered, and the responsibility he encountered in the performance of his duties.

THIS cause was heard on exceptions to the commissioner's report. By a former order the commissioner was directed to take an account of the

receipts and disbursements of the defendant John D. Hawkins as one of the executors of James Boyd, deceased, and testamentary guardian of his children, and to report the nature of the services rendered by said defendant, and what amount of commissions should be allowed him therefor. The report of the commissioner set forth an account of the receipts and disbursements, in which the said defendant was charged with the sum of $902, and credited by the sum of $291.89 for interest. The report also found he was entitled to a commission of 2½ per cent on $37,179, being the amount of receipts and disbursements of James Boyd's estate as audited and returned to the August Term, 1816, of Granville County Court; also upon $3,263.03, amount of money paid Thomas Brown, a creditor of the estate; also upon the sum of $680.32 recovered from Thomas Boyd, and on the sum of $400 recovered
(565) from Spain's heirs, amounting to $1,038.19. To this report the plaintiffs excepted—first, for that in the account of receipts and disbursements the commissioner ought to have charged compound and not simple interest on the balance in his hands; and, secondly, for that the defendant was not entitled to any commissions on the sums whereupon the commissioner allowed him commissions, because a full commission of five per cent had already been received by his coexecutor and joint guardian, and also for that the commissions so allowed by the commissioner were unreasonable and excessive.

Upon the pleadings and proofs it appeared that the testator appointed Richard Bullock and John D. Hawkins joint executors of his will, and guardians to his two infant children, and that upon the death of one of them under age the whole beneficial interest in the testator's estate, according to the limitations of his will, accrued to the survivor, the present plaintiff. Both these gentlemen qualified and joined in returning the inventory, and both of them acted, more or less, in the management of the trusts confided to them. Shortly after the marriage of the plaintiff with William S. Hodge (who died after the institution of this suit), a settlement was made between the plaintiff's husband and Bullock, who had been the principal acting executor, and had the great bulk of the estate in his hands, to which settlement the defendant Hawkins was not a party when Bullock made a statement of his accounts as executor and guardian (containing the items, the commissions on which were excepted to), and charging therein a commission of five per centum on all his receipts and disbursements, amounting to the sum of $4,703.88. It appeared that a proposition was then made to the said Hodge, which he accepted, to deliver over to him the whole estate, including the bonds and other effects in the hands of Bullock, and pass receipts. The present bill was afterwards instituted to call the defendant Hawkins to account because of his receipts on account of the estate which were not

included in the settlement with Bullock, and in the adjustment of these matters the order for ascertaining the commissions, now the subject of dispute, was made. (566)

Devereux for plaintiff.
Badger and W. H. Haywood for defendant.

GASTON, J., after stating the case, as above, proceeded: With respect to the matter of the first exception, the Court understands the law to be that, as executor, the defendant is chargeable with simple interest only, but that as guardian he is accountable for the annual interest on the balance of principal and interest in his hands, unless he can show special equitable circumstances to acquit him for such accountability. *Branch v. Arrington,* 2 Car. Law Repos., 252. In this case it does not appear what portion of the moneys charged was held by the defendant as executor, and what as guardian. This part of the report, therefore, must be recommitted to the commissioner, with instructions to make this discrimination, and to regard all balances due from the defendant because of receipts as executor to be held by him as guardian from the time when the administration of the estate as executor was or might reasonably have been concluded.

With respect to the matter of the second exception, it appears to the Court that the commissioner has proceeded upon an erroneous principle, and hath not so found the matters as to enable the Court to decide thereon. After setting forth the mutual allegations of the parties, the report finds that it appears "that in the settlement made by Richard Bullock with the plaintiff he had charged five per cent commissions on the whole amount of receipts and disbursements, which sum ought to be a sufficient charge for settling the whole estate; but if the plaintiff was willing to make that compensation to one of the executors, the master, notwithstanding, is of the opinion, under all the circumstances of the case, that the defendant ought to have a commission of 2½ per cent on such part of the estate as he had a joint agency in settling." If the master had concluded that the allowance of five per centum by the plaintiff to the defendant's coexecutor, although quite enough to satisfy the claims of both, ought not, under the circumstances (567) of the *ex-parte* settlement, to preclude the defendant from receiving a fair remuneration for his time, trouble, risk, and services, such conclusion would have received our sanction. But we understand him as taking this rate of commission as that *settled* to be the fair amount of compensation, and giving one-half of the commissions allowed on all property which had been under the agency of the joint executors. Now, we hold it to be clear that the settlement in question was one solely

between the plaintiff and Mr. Bullock; and whether there was any commission allowed to this gentleman, and, if so, what was the amount thereof, is a matter wholly immaterial between the parties now litigant. We hold that the commission found by the master to have been allowed is no criterion for estimating the value of the entire services rendered by both executors, and that the circumstances of Mr. Hawkins having a *joint* agency in the matters which were the subject-matter of that settlement does not, therefore, give him a right to one-half of the value of the entire services.

This part of the report must also be recommitted. The master, in revising it, will direct his attention to the inquiry, what is the reasonable amount of compensation for the time he, the defendant, employed; the labor he performed, the services be rendered, and the responsibility he encountered in the performance of his duties? And report such a commission, not exceeding five per cent, as will amount to this compensation. It cannot be expected, and ought not to be demanded, of the defendant to make proof in detail as of items in an account; but the commissioner can satisfy himself by general evidence of the commission proper on an entire settlement of such an estate, and of the proportion of this sum which the exertions of the defendant Hawkins entitle him to.

PER CURIAM. Direct accordingly.

(568)

WILLIAM IRBY ET AL. v. WILLIAM J. WILSON ET AL.

Where a marriage was solemnized in South Carolina between persons resident there, and the parties afterwards removed to and acquired a domicil in Tennessee, from whence the wife removed to this State, *it was held* that a decree dissolving the marriage made by a court in Tennessee upon the petition of the husband, exhibited six years after the removal of the wife to this State, and without personal service upon her, was a nullity, and that a marriage contracted by the wife before the death of the husband was void.

THE bill was filed on 14 May, 1831, by William Irby, Andrew B. Cox, and William Nolin, and stated that one Joshua Irby died intestate in the year 1828, leaving a personal estate consisting of certain negro slaves, designated by name, moneys on hand, debts due on bonds, notes and accounts, and also specific articles of furniture, stock, and other things, and that the same came to the hands of William J. Wilson, who duly obtained letters of administration and undertook the burden thereof; that the said intestate left no child him surviving, but left his

father, John Irby, and a widow, Mary H. Irby, who were entitled to have the clear personal estate, after the payment of the intestate's debts, and the charges of administration, divided between them; that John Irby, by way of advancing the plaintiffs, who were his son and sons-in-law, on 25 April, 1831, assigned and conveyed to them all his share and interest in the said estate, and that they had applied to the said Wilson and to Mary H. Irby to come to an account thereof and divide the same, and pay to the plaintiffs their just proportions; that they refused so to do, under the pretense that the said negroes had been conveyed to trustees, upon a former marriage of the said Mary H. with one Alexander Jones, in trust, for the sole and separate use of the said Mary H., whereby she was exclusively entitled to the same, and no interest vested in the said Joshua; whereas the bill charged that, by the provisions of the said deed, the said negroes were, upon the death of either the said Alexander or Mary H. without issue of the marriage, to vest in the survivor absolutely; and that the said Alexander Jones did (569) die without leaving or having any issue of the marriage in the lifetime of both the said Mary H. and the said Joshua, and thereupon the said slaves became the property of the said Mary H. and vested in the said Joshua by force of his marital rights. The bill further stated that the said parties refused to account, upon the further pretense that the said Mary H. had intermarried with said Jones, and that he was living at the time of the intermarriage of the said Joshua with the said Mary H., and that so the said marriage last aforesaid was illegal and null, and the property of the said Mary H. did not belong to the said Joshua by virtue of the said intermarriage; whereas the bill charged the truth to be that, although the said Alexander Jones and Mary H. might have intermarried as aforesaid, and the said Jones might have been or was alive at the time of the said last intermarriage of the said Mary H. with the said Joshua, yet the same was a valid and legal marriage, because, before the same was had and solemnized, the said Alexander Jones and Mary H., his then wife, had been and were duly divorced from the bonds of matrimony by a proper and competent tribunal in the State of Tennessee. The bill had the usual prayer for process and for an account and distribution of the estate. The bill was afterwards amended by making John Irby a party defendant, in order to establish his assignment to the plaintiffs.

The answers of the defendants Wilson and Mary H. Irby admitted the death of the intestate, Joshua, in 1828, and the administration of Wilson. Mary H. stated that the negroes mentioned in the bill, except one named Cato, were the same, and their increase, which were conveyed to trustees upon her first marriage with Jones, which took place

in South Carolina, and, by force of the trust therein declared, she insisted, were held by the trustees to her sole use, as she survived the said Alexander Jones.

The answer of the said Mary H. further stated that, some time after the said marriage, her said first husband and herself removed to the State of Tennessee, where they lived unhappily together — so (570) much so that she returned to her relations in North Carolina and settled on a tract of land in Lincoln County, in this State. The answer proceeded: "This defendant has understood that, after she left Tennessee, and whilst an inhabitant of this State, her said husband instituted proceedings in Tennessee to obtain a divorce, and that a decree to that effect was made by some court in that State, but whether it was regular, or not, she was ignorant; but she is advised that she was disabled from entering into the contract of marriage even if said decree was regular, and therefore insisted that, the said Jones being alive, her marriage with the said Irby was null and void, and none of the said negroes nor any part of her property ever vested in him." And she claimed the stock on her said plantation at the death of Irby. As to the negro, Cato, and a sulky, chaise and harness and the sum of $200, she stated that they were received by said Irby in 1827 from certain friends of hers, to be held at their pleasure, for her sole and separate use; and as to a further sum of $200, that he received that from another relation, also for her sole use; and that he put out both of the said sums on loan and took a bond for the same in his own name, which came to the hands of Wilson, the administrator, but that the same was not a part of Irby's estate and justly belonged to her.

The answer of Wilson, the administrator, set forth an account of the estate in his hands. He admitted having received a bond of one Fullenwider, payable to his intestate, for $414, at six months after date, which was given for the sum of $400 loaned, and that such moneys had been received by his intestate from the relations of his then supposed wife to and for her separate and sole use, and no interest was claimed therein by the intestate, but he admitted that the same was subject to her sole disposition and control. This defendant further said that on said bond the sum of $332.39 was due when it came to his hand, which he had received, and submitted to pay to the person that might be found (571) entitled. This defendant then set forth the slaves found by him, which had been in the possession of his intestate; also other effects which were claimed by the defendant Mary H. or by her trustees, and stated that he did not sell or take into his possession the said slaves because his intestate had never claimed them as his own, and the administrator supposed them not to belong to him; that he supposed all the other property, including articles to the value of $258.22 which

were claimed in like manner by the said Mary H. and her trustees, upon an agreement with her that if they were not really of the estate of his intestate, the proceeds should be paid to her. Whether the said slaves and the several sums of $332.39 and $258.22 were, or were not, of the proper goods of his intestate, or of the said Mary H., he prayed the court to have litigated, for his protection, between her and the plaintiffs, and submitted that either might have the same in whom the right might be found. And, for the nature of her claim, reference was made to her answer.

John Irby, the father, answered and insisted that the defendant Mary H. was the lawful wife of his late son, Joshua, and denied that the assignment by him to the plaintiffs was effectual, as it was obtained by fraud and misrepresentations.

The plaintiffs replied to the answers, and the parties proceeded to proofs.

Winston for plaintiffs.
D. F. Caldwell and Devereux for defendants.

RUFFIN, C. J., after stating the pleadings, as above, proceeded as follows: For the purpose of obtaining the opinion of the Court upon the principal points in controversy, the counsel, upon the supposition of the validity of the assignment under which the plaintiffs claim, have brought the cause on for hearing. The principal question and, indeed, almost the only one upon the matter of law, is upon the validity of the supposed marriage between the intestate, Joshua Irby, (572) and the defendant Mary H., mentioned in the pleadings. In reference to that, the Court finds upon the proofs that Alexander Jones and the defendant Mary H., then Mary H. Smith, both being inhabitants of South Carolina and having their permanent domicile in that State, duly intermarried in South Carolina according to the laws of that State, in the year 1804; that no divorce from the bonds of matrimony has ever been granted, declared or pronounced by any judicial sentence or legislative enactment in South Carolina, and that by the laws of that State the contract of marriage is indissoluble, except by death; that Alexander Jones removed himself and his said wife from South Carolina, in the year 1809, to the State of Tennessee, and there they became *bona fide* and permanently domiciled; that the said Alexander continued to have his domicile and inhabitancy in Tennessee up to the time of his death, which happened in the year 1827; but that the said Mary H., in the year 1810, separated from her said husband, Alexander Jones, and removed to the county of Lincoln, in the State of North Carolina, and that her residence, inhabitancy and actual domi-

cile has, ever since her said last removal up to this time, been in the said county of Lincoln; that there is probable reason to believe that the said separation between the said Alexander and his said wife was voluntary on the part of both, and that she removed to North Carolina by his consent, but the evidence of such consent on his part is not so clear that the Court can declare that fact conclusively. The Court further finds that the said intestate, Joshua Irby, and the said Mary H. intermarried with each other in Lincoln County, aforesaid, on the 5th of July in the year 1821, while the said Alexander Jones was in full life.

Upon these facts the law of this State is, that the second marriage of the defendant Mary H. was illegal and null, unless at the celebration thereof the marriage before had between her and Alexander Jones had been legally and effectually dissolved and annulled. As that is not admitted in the answers, the plaintiffs have insisted that it was (573) so dissolved by a judgment and sentence of a court of the State of Tennessee, pronounced in a cause there duly constituted between the said Alexander as plaintiff and his wife, the said Mary H., as defendant, and in proof thereof have read in evidence a duly certified copy of a statute of Tennessee, passed in the year 1799, entitled "An act concerning divorces"; and also a duly certified transcript of a record of the Circuit Court for the county of Giles, in Tennessee, wherein, upon the petition of said Alexander Jones against the said Mary H. Jones, that court, on 11 April, 1816, decreed and ordered "that the bonds of matrimony existing between the said Alexander Jones and the said Mary H. Jones be entirely dissolved and made void."

By the act of the Legislature of Tennessee exhibited, it is enacted, amongst other things, that "If either the husband or the wife shall be guilty of acts inconsistent with the matrimonial vow, by adultery or willful or malicious desertion, or absence without a reasonable cause for the space of two years, it shall be lawful for the innocent and injured party to obtain a divorce from the bonds of matrimony, by filing his or her petition against the other for that purpose in a Superior Court." The act further prescribes as the method of proceeding therein "that process of subpœna shall issue and be served, either personally on the party defendant or, if not to be found, by leaving a copy thereof at his or her usual place of abode; and if he or she neglect to appear, then an *alias* subpœna shall issue and be served as aforesaid; but if he or she cannot be found, then proclamation shall be made publicly by the sheriff on three several days at the courthouse, during term-time, for the party to appear and answer as commanded by the subpœna, and notice also be given in some newspaper in the State for four successive weeks previous to the return day of said process; and in the meantime the court shall make preparatory orders in the cause, that the same may

be brought to a hearing at the second term, when the court may determine the same *ex parte* if necessary."

The transcript of the record of the divorce suit purports to be on the petition of the husband, Alexander Jones, filed on 18 September, 1815, and setting forth the marriage of the parties in South (574) Carolina, and that they soon lived unhappily; that the temper of the wife was turbulent beyond description, and her habits, both before and after marriage, were base and libidinous; that the petitioner continued to live with his wife five or six years, under the vain hope of reclaiming her; that about five years previous to filing the petition he became convinced of her continued lewd practices, and undertook to remonstrate with her, whereupon she declared that she would act as she pleased; and shortly afterwards—that is to say, five years before the suit—she left the bed and board of the petitioner without any just cause or provocation for so doing, and had not since returned, but, on the contrary, is living in the State of North Carolina, in a state of concubinage. The prayer is for process of subpœna, and for such further order as may seem meet and proper.

On the subpœna which then issued, the sheriff returned "not found"; and from the best information the defendant Mary H. Jones is not an inhabitant of this State. Thereupon, the record sets forth that the petitioner appeared, by his attorney, at October Term, in 1815, and a proclamation was made on three several days of the same term for the said Mary H. Jones to appear, but that she, although solemnly called, came not; whereupon the court ordered notice to be given for four successive weeks in a newspaper that she should appear at the next term of the court and answer the petition; otherwise the court would proceed to a hearing of the petition *ex parte;* and the same was accordingly so set for hearing at the next term, after ordering an *alias* subpœna, returnable to that term. At April Term, 1816, the *alias* subpœna was returned, "Not found; from information, the said Mary H. Jones is an inhabitant of another State." Thereupon the cause was heard *ex parte* and without any appearance of Mary H. Jones, the defendant; and the decree before mentioned was pronounced.

In the argument at the bar, which was ably conducted, many interesting questions were discussed upon the comity of nations and the conflict of laws. On the one side it was insisted that the marriage between Jones and his wife could not be dissolved in Tennessee, if (575) both of the parties had been domiciled there, upon the principles of *lex loci contractus,* because it was indissoluble in South Carolina; that although the courts of Tennessee might, under her law, be obliged to pronounce the decree and afterwards give effect to it, yet that in South Carolina no effect could be given to it, both because it was against

her policy and because the law of Tennessee and the adjudication under it impaired the obligation of, and violated, the contract which was validly made in South Carolina; that this State, being a third party, must, upon this last principle at least, refuse to execute the adjudication. To this it was replied on the other side that the courts of this State could not look at the original nature of the contract after the question of its absolute and permanent obligation, or of its being dissoluble, had passed into *res judicata* before a tribunal of the country to which the parties were amenable at the time of the adjudication, and especially under our law, when the adjudication was in a sister State.

For the defendants it was again urged that the courts of North Carolina ought not to enforce this sentence, because it was in conflict with our own law upon the subject of divorce, and especially because it was granted against an inhabitant of North Carolina, for a cause on which divorce cannot be founded in this State, and contrary to sound policy, good morals, and the divine law. While on the other side it is said that the wife was not legally an inhabitant or citizen of this State, but was of Tennessee by virtue of her residence there when the offense was committed, and that being her husband's permanent domicile; that our law allows, like that of Tennessee, proceedings in many instances against persons not brought before the court by process and not appearing, and particularly in our statute on this very subject of divorces, and that the wife, having been once a resident of Tennessee, was amenable to the law of that State for the offense there committed, and could not
(576) evade that law by changing, not her domicile and home, but her abode; and that at all events all inquiry upon these and similar heads is excluded by the adjudication in Tennessee, which, under the fifth section of the fourth article of the Constitution of the United States, and the act of Congress of 26 May, 1790, is conclusive here, because it is conclusive in Tennessee. The defendants, on the contrary, contend that the record is not evidence at all, because the wife was not before the court in Tennessee and was not amenable to her laws, process and tribunals, being an inhabitant and citizen of this State.

Upon several of the questions discussed, the Court would not be unwilling to express the opinions to which our researches and reflection, aided by the argument, have led our minds; but we deem it neither needful nor proper, because upon most of them contrariant opinions have been delivered by eminent jurists in different countries, and also opposing adjudications made; and this cause, we think, may be disposed of entirely upon a single one of the points made. The Court is of opinion that the decree of the court of Tennessee is altogether inoperative and null, because it was not an adjudication *between any parties*, since the wife did not appear in the suit, nor was served with process,

and was not a subject of Tennessee, but was a citizen and inhabitant of this State, and therefore not subject to the jurisdiction of Tennessee nor amenable to her tribunals.

It lies at the foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact and upon the matter of law; and no sentence of any court is entitled, intrinsically, to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defense. Generally, when the judgment is to be personal, the person is made a party by the service of process of summons; but in some countries even that is insufficient; and the Court will not proceed to an adjudication until appearance in court and entered of record has been compelled by other process. But different countries have different regulations on this subject.

If both the parties be subjects of the country of the forum, other (577) countries have no right to complain of the municipal regulations by which judgment may be rendered for one of them against the other without defense, and perhaps ought therefore not only to sustain in their courts, when brought into litigation, what was done under the judgment in the country in which it was rendered, but also to aid in its execution, by considering it evidence of property, or of debt, or of right, when made the direct subject of an action or of defense in the courts of the other country. Upon that point, however, and upon the extent of the obligation of such a judgment of a foreign forum, there is much diversity of opinion. Admitting, nevertheless, in this country such a judgment in one State between the citizens of that State to be conclusive in all others, it will not yet follow that the same effect is to be allowed to a judgment in like circumstances pronounced by a court in favor of one of its own citizens against an absent citizen of another State who did not appear, was not served with process nor had any notice of the proceeding. The utmost extent to which the courts of one country can be expected to go in execution of the judicial sentences of another country in such a case is when both persons are the citizens of the State of the forum. When the party to be charged belongs to a different State, and especially to that from which the execution of the sentence is asked, the answer must be given, "We cannot aid in such palpable disregard of right and violation of justice." One State cannot send process into another; and it is a settled principle in most civilized nations not to proceed in a cause in which the process by summons, even, has been made in another jurisdiction. If a person has been brought by force from one jurisdiction into another to be served in the latter with process, nations having regard to their own character, discharge the person and refuse to proceed in the cause originated by such

service of process. Much more, then, ought a court to refrain from adjudicating against a person belonging to another government, actually resident therein, and to whom no notice appears to have been given.

But it is said that notice was, in the contemplation of the law of (578) Tennessee, given by proclamation, suing out process, and advertisement in a newspaper. The regularity of the judicial proceedings in those respects is not questioned here. They cannot be; for it is supposed that every interlocutory adjudication stands on the same ground with the final one, and proves itself to be right. It is assumed, therefore, that the wife had the notice, as prescribed in the law of Tennessee, and that the court of Giles was the proper court, in reference to the jurisdiction of this subject, as between it and the other courts of Tennessee, under her law. But the notice there deemed legal is not, in fact, notice, and the courts of this State are not bound by the fiction imposed by Tennessee on her own courts. The reason is, not that fault is to be found with the courts of Tennessee, but with the law of Tennessee. That State has no power to enact laws to operate upon things or persons not within her territory; and if she does, although her domestic tribunals may be bound by them, those of other countries are not obliged to observe them, and are not at liberty to enforce them. The laws of one country have no direct extra-territorial efficacy. The wife, Mary H. Jones, was not bound to appear in a court in Tennessee, nor is she concluded by the sentence in a cause to which she was not a party. That is the principle which controls the opinion of this Court. There can be no valid adjudication unless there be a thing or persons before the Court. Without that, what purports to be an adjudication is a perfect nullity and binds one person no more than it does another. If a person be named in the proceedings as the person who is to be made a party, but in fact is not made a party, and the record itself shows that it is the same thing as if he were not named; for the law regards substance, not shadows, and has respect to realities and not the mere names of things or persons.

In the opinion of the Court, the Constitution of the United States and the act of Congress do not make it more imperative on the courts of one State, than it was before, to recognize and enforce the judicial sentences of another State against persons who were not parties (579) to the proceedings and before the court. Those provisions were made, as we think, for other purposes, and not with the view of enlarging the jurisdiction of the several States, either in regard to persons or things out of them. At the time of the American Revolution it was the doctrine of the English courts of common law that foreign judgments, however, regular, and although rendered between persons within the jurisdiction, and after full defense, were, if sued on in England,

reëxaminable upon the merits, both as to the fact and the law. That doctrine was deduced from the technical reason that a foreign judgment was not a record, and therefore was not conclusive as record evidence. It was very important in this country that such a principle should not be incorporated into our law, as the connection between the colonies, though strictly speaking, foreign to each other, was very intimate by commercial intercourse, and migration from one State to another, under a common sovereign, was lawful and frequent. The evil would be great if, after a course of litigation in one colony, the aggrieved party should be compelled to go through the whole again simply by the removal of the other into an adjacent territory. It was to meet that grievance that the very salutary provision was inserted in the Constitution, as it seems to us; for it is well known that the decisions of the English courts were at that time not only received, as at this day, with great respect in this country, but were cited and relied on as authoritative on the courts of America. The purpose was to make what was then deemed presumptive or *prima facie* evidence of right, that might be reëxamined, conclusive record evidence, and nothing more. The words do, indeed, take in all judicial proceedings in other States. But constitutions are necessarily expressed in short sentences and comprehensive terms, and, like other works of man, must, from the acknowledged difficulty of attaining perfect precision of language, be construed according to the nature of the subject and the indispensable necessity of exceptions by implication. Take for example that provision of the Constitution which forbids a State to pass any law impairing the obligation of contracts. It is, of necessity, construed to mean impairing a contract once (580) valid, according to the law of the State which dissolves or impairs its obligation. It is seen at once that it did not, according to its words, mean that everything in the form or garb of a contract should be enforced, notwithstanding the State denied the parties to it the capacity to make a contract, or enacted that, if made, it should be void, because it was, from its consideration or object, against good morals or public policy. The very divorce in question can be deemed effectual only by a liberal relaxation of the words of that clause. The article under consideration is subject, we think, to the like restriction. It was intended to restrain one State from disregarding the judicial sentences rendered in another *between parties* or *on things* within it. It is not an enabling provision, under which one State might pass laws directly embracing persons or things throughout the Union. Congress alone can do that, upon the matters committed to the general government. If the State cannot, by law, directly reach persons or things out of her territory, she cannot do so through the intervention of her courts; for the power

of the court is derived from the law of the State, and cannot extend to places, persons or things not under the control or power of the law-maker. Such an extension of the power of a State, or a State court, was not in the contemplation of the convention. It is unnecessary, unjust, and dangerous, and cannot be admitted, when it is so obvious that the general words were used *diverso intuitu.*

It has been, however, observed, in the course of the argument, that the courts of North Carolina cannot object to this jurisdiction; for our own laws assume it in cases of attachment, nonresident defendants in equity and in divorce suits, and other cases. To some extent it is justifiable, as it is in the nature of merely dispensing with a party because he is out of the jurisdiction, and giving relief against those who are within it. For, although a decree is pronounced against the absent person, yet the statute allows him time to show cause against it, and upon his motion it opens the decree. But it is acknowledged that, in (581) so far as the judgment in attachment against foreigners is personal, that it goes beyond the thing attached; and in divorce cases, where the defendant is out of the State, our laws are obnoxious to the same criticism and objection which is made to that of Tennessee. But that is no reason why we should be insensible to the injustice that may be done under either code, or why this Court should not act under what is deemed to be the true construction of the Federal Constitution. Although we may be obliged, as a domestic tribunal, to give personal judgment in attachment, or respect that given by other courts of this State, we are not, for the like, or for any reason, to enforce against a person here a judgment of another State, to which that person was no party. Nor can we expect the courts of our sister States to act with more comity to us.

There remains to be disposed of the position of the counsel for the plaintiffs that Mrs. Jones' domicile was in Tennessee, and that therefore she was amenable to the law of that State. The Court entertains a different opinion. There is nothing in the doctrine of allegience to prevent her domicile being in this State. We suppose every citizen of the United States free to remove from or into any and each of the States. If not, in this case the allegiance of both parties was due to South Carolina, where they were born, and not to Tennessee. Admitting, then, that the parties acquired a domicile and citizenship in Tennessee by remaining and settling there; by the same means she gained a domicile, home and citizenship in this State by removing and living within the State continually, and in a state of separation from her husband for nearly six years prior to the institution of these proceedings in Tennessee. She was effectually severed from Tennessee thereby,

as we think. It may be true that for some purposes the matrimonial domicile of this female would be deemed Tennessee—as, for instance, to determine her distributive share of his personal estate in case of his intestacy. But, for the purposes of jurisdiction over her person, and especially in a suit between her husband and herself, she was not domiciled in Tennessee. The aphorism that the husband and wife are but one person has been alluded to as founding the argument (582) that his domicile is necessarily hers. That is merely a positive institution of the common law of England, and may not be the law of Tennessee, upon which we have no evidence. But it is a mere fiction, which is never allowed, even in the common law, to obscure, much less defeat, justice. They are two persons to make a marriage contract. They must also, necessarily, be two persons to litigate between themselves upon any subject, and, above all, upon the obligation, continuance or dissolution of that contract. They are not, therefore, so identified that they cannot have opposing interests, that they cannot have separate existences and separate residences and homes. If the argument of the counsel were well founded, it would prove that the husband might sue his wife for a divorce, enter her appearance, and in her name confess his own allegations. One ground for a divorce in the law of Tennessee is *absence* of the wife *for two years*—a length of time showing the change of home; and the gravamen of the petition—it may be called so, because it is the only specific allegation of any *fact* against her—is, that the wife "left the bed and board of the plaintiff five or six years before, and had not since returned, but was *living* in North Carolina." In the opinion of the Court, the domicile of the wife was separate from that of her husband, and was permanently fixed in North Carolina, as her home.

Such being the state of facts the Court entertains no doubt that the sentence of divorce rendered in Tennessee is a mere nullity; because Mary H. Jones, the person against whom the sentence was pronounced, was not a party to the proceeding in which the sentence was given and, no suit was properly thereby constituted; and if, as a citizen and inhabitant of Tennessee, she would have been bound by that judgment or decree, yet that she is not so bound, because at the time of making the decree and of instituting the petition by Alexander Jones, and for more than five years previous, she was not within the jurisdiction of Tennessee, but was an inhabitant and citizen of North Carolina.

The effect of this opinion in the cause is, that the marriage of (583) Joshua Irby with Mary H. Jones was void; and that he, therefore, did not acquire thereby any property that was hers.

PER CURIAM. Decree accordingly.

Cited: *Burke v. Elliott,* 26 N. C., 358; *Gathings v. Williams,* 27 N. C., 494; *Davidson v. Sharpe,* 28 N. C., 16; *Yarborough v. Arrington,* 40 N. C., 294; *Battle v. Jones,* 41 N. C., 572; *Barwick v. Wood,* 48 N. C., 311; *Calloway v. Bryan,* 51 N. C., 571; *Charleton v. Sloan,* 64 N. C., 704; *Arrington v. Arrington,* 102 N. C., 512; *Harris v. Harris,* 115 N. C., 588.

Dist.: *S. v. Slachter,* 61 N. C., 522.

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1837

KEDAR FELTON ET UXOR v. JOSEPH R. BILLUPS.

A testator bequeathed as follows: "I lend unto my grandson O. R. three negroes, etc. Now if, in case that the said O. R. should live to arrive to manhood and beget heirs lawfully, the above property to him and his heirs forever; if not, I give and bequeath the above-mentioned property unto my son J. R., to him and his heirs forever." The grandson, O. R., was an infant at the date of the will, but attained the age of twenty-one, and then died without ever having been married. *It was held*, from the use of the word "*lend*," that the testator intended to give a life estate to his grandson, to be enlarged into an absolute one upon his marrying and having children; that the word "manhood" could not be construed to mean "twenty-one years of age"; and that there was nothing to authorize the change of "*and*" into "*or*"; and that, consequently, the grandson, although attaining twenty-one years of age, having died without having been married, the ulterior limitation took effect.

JOSIAH ROGERSON, in the year 1806, made his will, which contained the following clause: "I lend unto my grandson, Obadiah Rogerson, a tract of land; three negroes, Dick, Rose, and Viney. Now, if in case that the said Obadiah Rogerson should live to arrive to manhood, and beget heirs lawfully, the above property to him and his heirs forever; if not, I give and bequeath the above-mentioned property, unto my son, Jeremiah Rogerson, to him and his heirs forever." What was the age of Obadiah at the date of the will was not stated, but it was stated and admitted that he was then an infant and an idiot; (585) and he died in the year 1836 of mature age having never been married. The defendant Billups was his administrator and in that character had possession of the slaves. Jeremiah Rogerson died in the year 1835, and the plaintiffs were his administrators and next of kin. The plaintiffs contended that they were entitled to the slaves inasmuch as

Obadiah died and never "begot heirs lawfully." The defendants contended that as Obadiah arrived to "manhood," which must mean the age of twenty-one years, the title of the slaves vested absolutely in him. They also contended that the word *"and,"* should be construed *"or,"* so that if either of the alternatives happened, viz.: Obadiah's living to arrive to "manhood," to wit, twenty-one years *or* begetting lawful issue, the property in the slaves vested absolutely in him; that the construction should be, that the limitation over to Jeremiah should fail, unless Obadiah had died under twenty-one years of age, *and* also, without begetting issue.

Devereux for plaintiffs.
Kinney for defendants.

DANIEL, J. After stating the case as above, proceeded as follows: In construing wills, the leading rule is that the intention of the testator should be observed; and that no parts of a will to which a meaning or operation can be given, shall be rejected. It sometimes happens that a whole sentence in a will is rendered uncertain or unintelligible, from the circumstance of the testator's having used the disjunctive *"or"* when the copulative *"and,"* should have been inserted; *et sic e converso, "and,"* for *"or."* In order to effectuate the intention of the testator and give validity to the bequest, the courts have corrected the mistake. Each case, of course, being governed by its peculiar circumstances, no general rule can be laid down upon the subject. 2 Roper on Leg., 290. The Court construes those words so as to (586) effectuate the general intention. It follows, therefore, that it will not consider itself warranted in making the alteration, unless it be clearly authorized by the meaning of the testator, as collected from the whole will. 2 Roper on Legacies, 294. In the case before us, it seems that the testator meant, by using the word *"lend,"* to give the property to his grandson for life, at all events, as a provision and maintenance; and if Providence permitted him to become the father of a family, then his life-estate was intended to be enlarged into a fee; and on that event the ulterior limitation to Jeremiah should fail. We do not consider that the testator, by using the very indefinite sentence "should he" (Obadiah) "live to arrive at manhood," intended to fix a period when the life-estate should be at all enlarged, without the main thing also happening, viz.: his, Obadiah's "begetting lawful heirs." The testator did not intend that his son Jeremiah should lose his bounty, unless in the event of his grandson Obadiah having issue; and in that event he designed that the issue should, through their father, have this property, or at least a chance for it. The property

was intended for the benefit of Obadiah and his issue, if he should have any; if not, then for the benefit of his son, Jeremiah. We cannot, therefore, in this case, construe "manhood," to mean "twenty-one years of age"; and there is no necessity to change the word *"and,"* into the word *"or,"* as the testator did not intend to enlarge the life-estate, but in one event, viz.: Obadiah's having lawful issue. That event did not take place and the plaintiffs are entitled to the slaves and personal property, and to a decree for an account of the same.

PER CURIAM. Decree for plaintiffs.

(587)

JOHN L. HINTON, BY HIS GUARDIAN, v. LEWIS HINTON.

Slaves advanced by parol to a daughter by her father upon her marriage, and remaining in the possession of her husband until the death of the father intestate, are, under the act of 1806 (1 Rev. Stat., ch. 37, sec. 17), an advancement at the time of the marriage; and if the daughter die before her father her husband, and not her children, are entitled to them.

In the year 1821, Hollowell Old put into the possession of the defendant, who had then recently intermarried with his daughter, several negroes that have ever since remained in his hands. The defendant's wife died in January, 1825, and her father died in the month of May following, intestate. Two children were the issue of the marriage, viz.: the plaintiff and a brother who died an infant of tender years in September, 1825. The defendant was appointed guardian to the plaintiff and acted as such until a short time before the filing of this bill, when Thomas Hinton was duly appointed in his stead. This bill was filed to call the defendant to an account of his guardianship; and among other matters, claimed that the defendant should surrender these negroes as the property of the plaintiff. The defendant submitted to an account, but insisted upon these facts charged in the bill and admitted in the answer, that the plaintiff had no interest in the negroes, but that they belonged wholly to him. It was agreed between the parties as a fact, that the administrator of Hollowell Old set up no claim to the negroes; and they prayed the court to declare whether the advancement by Old, enured to the defendant or to the issue of his wife.

No counsel appeared for plaintiff in this Court.
Devereux for defendant.

GASTON, J., having stated the case as above, proceeded: If, under the circumstances stated, the negroes became the property of the children

living at the death of their grandfather, the representative of the deceased child ought to be brought before the Court; and then as the father would be the sole next of kin of the deceased child, the plaintiff could claim no part of his share. But as there is no difficulty
(588) in the question on which our opinion is asked, we shall not defer it, because of any formal defects in the proceedings.

The act of 1806 (1 *Rev. Stat.* c. 37, sec. 17) in general terms makes void all parol gifts of slaves; and then excepts the case where a parent shall have put a slave in the possession of a child and shall afterwards die intestate without having resumed such possession. In this case the act declares that the slave shall be considered an advancement made by the parent to his child. In the construction of this act, a question occurred, at *what time,* was the advancement made? Was it when the possession was given, or at the moment of the parent's death? It was solemnly decided that the advancement was made when the slave was placed with the child—that this act was either a gift subject to revocation by the parent, or a gift inchoate and imperfect, but afterwards consummated by the parent dying intestate without having disturbed the possession—and that in either point of view, when rendered irrevocable or when consummated, it became in law an absolute gift from the commencement. *Stallings v. Stallings,* 1 Dev. Eq. Rep., 298. This decision, which has never been controverted, determines the question submitted to us. The advancement was a gift of the slaves now claimed by the plaintiff to his mother while she was the wife of the defendant, and therefore, in law a gift to the defendant.

This declaration will be made and the account asked and submitted to is to be taken before a commissioner to be agreed on by the parties.

PER CURIAM. Decree accordingly.

Cited: Meadows v. Meadows, 33 N. C., 150; *Harrington v. Moore,* 48 N. C., 57.

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(589)

JOHN VANHOOK ET AL. v. AUGUSTINE VANHOOK ET AL.

In a will, under the words, "I lend to my son L. the use of my negroes," etc., with a direction that the executors should hire out the negroes yearly and apply the hires to the support of L. for life, "and all the overplus to be applied yearly to the support of my son B.'s family; and after the death of my son L. that my negroes, with their increase, be equally divided between my son B.'s children as they come of age"; *it was held* that the children of B., born during the life of L., took vested interests. (*Vanhook v. Rogers,* 7 N. C., 178, and *Knight v. Wall,* 19 N. C., approved.)

THE questions in this case depended upon the construction of the will of John Rogers, who died in the year 1797. The testator, after cutting off his son Bird with five shillings, and giving to others of his children and grandchildren, certain negroes which had been theretofore placed in their possession and that of their parents, expressed himself thus: "I lend my son Littleton one feather bed, and furniture, two cows and calves, and their increase, together with the use of my negroes Esther, Ned, and Lett; and that my executors hire out the said negroes for the best price that may be got yearly; and such hire to be applied by my executors towards the support of my son Littleton in his boarding, clothing, washing, mending, making, during his natural life; and all the overplus, if any there be, to be applied by my executors, yearly, towards the support of my son Bird's family; and after the death of my son Littleton, that my negroes with their increase, be equally divided between my son Bird's children, as they come to full age, and their heirs; and that my son Bird is not suffered or permitted to move (or) concern with any part of the property lent to my son Littleton, as aforesaid, without first giving bond with sufficient security for his punctual performance of this my will; which said bond is to be given to my executors." The will contains also the following residuary bequest: "My will and pleasure is, that all the remainder of my estate be sold by my executors, to the highest bidder; and after paying my just debts, I give unto my grandson Anthony Bird Rogers, twenty pounds current money of Virginia; and all the remainder to be equally divided between my son Bird's children as aforesaid, including (590) my grandson Anthony." At the death of the testator, there were living three children of Bird Rogers; and afterwards, and during the life of Littleton Rogers, the said Bird had five other children, two of whom, Richard and Randolph, died before the said Littleton, who departed this life in 1836. The bill was filed to settle the rights of the children of Bird Rogers, and of their representatives and assignees in the negroes and their increase, limited to these children as aforesaid.

J. T. Morehead for plaintiffs.
W. A. Graham for defendants.

GASTON, J., after stating the facts as above, proceeded as follows: The first question presented upon the pleadings is, whether under this bequest, the five children born after the death of the testator, and before the death of Littleton, be entitled to shares of the slaves bequeathed; and if so, the second question is, whether these children took, before the death of Littleton, vested interests which were capable of assignment, or which were transmissible to their representatives. The

first of these questions has been definitely determined in *Vanhook v. Rogers,* 3 Murph., 178; and both of them, we think, were in effect determined in *Knight v. Wall,* 2 Dev. & Bat. Rep., 125. In the latter case it is recognized as a general rule that when a legacy or fund is given to a class of persons, by a general description, all those who can entitle themselves under that description, at or before the time when the will directs the payment of the legacy or division of the funds to be made, are entitled to a share thereof; and further, that when the property in a fund or chattels, is bequeathed in fractional interests *in succession,* as to one for life, and after his death to others, the interest of the ulterior legatees vest, at the death of the testator, or as they come into being, if before the period fixed for enjoyment.

It is insisted, however, by the counsel for the defendants, that *this* case is distinguishable from that of *Knight v. Wall,* and that the (591) legacy to the children of Bird Rogers did not vest before the death of Littleton; inasmuch as *here* the testator did not bequeath a fractional interest in *the negroes* during the life of Littleton, but only of the *hire and use* thereof, and made no disposition of the *corpus* or property, distinct from the direction for its division at the death of Littleton. To establish this distinction, and the conclusion drawn from it, reference has been made to elementary treatises of great respectability, Roper on Legacies, and Williams on Executors, and also to a number of adjudged cases in English Courts of Chancery. We have examined these treatises, and the adjudged cases referred to, and although they recognize the distinction pointed out, as worthy of attention, they do not, in our judgment, justify the conclusion drawn from it.

When a legacy is payable at a future time, and there is doubt whether it be vested or contingent, the inquiry is whether the postponement is directed because of a character required in those who are to take, which character cannot be ascertained before the prescribed period, or because of the nature of the fund, and the convenient application of it to the purposes of the will. Where the final bequest is subject to, or following after, temporary interests, in the property beneficially bequeathed to others, it is presumed, that those to whom the absolute property is given, are intended to *take* at all events, although the enjoyment is deferred, because, and to the extent, of those intermediate interests. But this, like every other rule with respect to the vesting or not vesting of legacies, is not an arbitrary and inflexible rule, but one of construction, adopted to ascertain the intention of the testator, and therefore yields to an opposite intent, whenever it is manifested. This intent may be indicated by the terms used, either in the temporary disposition, or in the final gift of the property. When a testator appears to have drawn a precise distinction between the *interest* and the *principal* of

a sum of *money,* or between *dividends* of stock, and the *capital* stock itself, and to have bequeathed *these* as though they were distinct independent subjects, although in truth the former are but the fruits or produce of the latter; the presumption in favor of vesting the ulterior legacy is weakened, and readily yields to any further (592) indications that the gift was designed to be conditional, depending on the character of the legatees, and not postponed merely because of previous arrangements with respect to the subject of the gift. We are not aware that a similar distinction has been taken in the bequest of chattels *other* than money or stock, contradistinguishing the use or profits from the temporary ownership of the chattels, and we think that it would not be taken unless the terms of the will showed that such distinction was *clearly* contemplated by the testator; since undoubtedly, in ordinary discourse, as well as in legal construction, the use or profits of a chattel for life, and the loan of the chattel itself for life, are of equivalent meaning and operation. This seems to us the fair result, as applicable to the argument before us, to be collected from the adjudged cases as well as the elementary treatises referred to. Mr. Roper in his valuable work, discussing the inquiry "when legacies will vest, notwithstanding they be given in words purporting to constitute the gifts and times of payment *one* and the *same,*" lays it down, (Roper on Legacies, chap. 10, sec. iii, par. 2, vol. 1, page 392, Amer. ed.) that when the intermediate interest is bequeathed beneficially as *to, or in trust for one* for life, and there is a *direction to transfer the fund* after his death to another absolutely, and "the person to whom the absolute property is limited, will take an immediate vested interest in the subject, since such bequests are in the nature of remainders, the rule as to which is, that the interest of the first and subsequent takers vest together." In the third or succeeding paragraph of the same section, page 396, he proceeds to notice the distinction which we are considering. "It has been settled," he observes, "by a variety of cases, that if only the *interest* or *dividends* of property be bequeathed for life, and the context of the will shows that no interest in the *principal* was intended to pass until after the determination of the life estate, the remainder will not vest during the continuance of the particular estate, because there is no disposition of the *capital* distinct from the period appointed for the payment or distribution of it; but to prevent the vesting of the remainder, the contents of the will must clearly show (593) such to be the testator's intention, for we have seen, that whether the *interest* or the *fund* itself be given to A. for life, with remainder to B., absolutely, the remainder will vest in B. at the death of the testator, the intent being that B. should have the *capital,* at all events, at the demise of A., on whose account alone the enjoyment of it by B. was

postponed." The observance of Mr. Williams, as applicable to this inquiry, are less full and explicit than those of Mr. Roper, but evidently refer to, and substantially adopt them.

The cases cited by the counsel for the defendants, will warrant no other inference than that hereinbefore stated. In *Billingsley v. Wells,* 3 Atk. 219, there was indeed a devise of the *interest* of one thousand five hundred pounds to Capel Billingsley, the testator's brother, for life, and after his decease, of the *principal sum,* to the younger sons and daughters of his brother Capel, and it was held that the ulterior legacy was contingent during the life of the first legatee. But besides the distinction taken between the interest and the principal sum, there were unequivocal *indicia* in the will, that the gift was confined to the younger sons and daughters which his brother should leave living at his death. Among other expressions in the will were these, "but my express will and meaning is, that no older son in case there shall be more than one son, nor any elder daughter, if there be *only* daughters of my brother *living at his decease,* shall have any part, share, or interest in the one thousand five hundred pounds."

At the date of the will, and at the time of the testator's death there were living one son and two daughters. The words therefore "but in case he should have *only* daughters," necessarily referred to a future state of things; excludes the *son* in case he died before that state arrived, and had the *effect,* in *Lord Hardwicke's* opinion, to *describe further* the persons who were to take the benefit of the legacy: and "what," (said *Lord Hardwicke,*) do the words, living at his decease refer to? undoubtedly to both members of the sentence, and is a further description, *videlicit,* that should there be such sons or such daughters,

be they one or be they many who should be living at the time of
(594) their father, Capel Billingsley's decease. These words are not only descriptive of the child excluded, but likewise of the children which are to take." *Ford v. Rawlins,* 1 Sim. & Stu., 328 (1 Cond. Eng. Ch. Rep., 167); was not decided upon the distinction which we are now examining. In that the testator left to the use of his wife, furniture, plate, books and jewels, which he desired might be distributed among their children when the youngest attained twenty-one, at her and his executor's discretion; and it was held that there was no direct gift to the children, but only a power to the widow and executors to distribute amongst the children, *at their discretion,* certain specific articles, when the youngest came of age: that this discretion was meant to be applied to the circumstances of the children as they came of age, and could have no application to the children who had died in their infancy. Nor was the decision in *Haughton v. Whitgreave,* 1 Jac. & Wal., 146; founded upon this distinction. The testator there gave not

the *use,* but left the *property* itself to his widow for life, and after her death gave it to trustees in trust to sell and pay the money arising from the sale to certain persons and the survivors and survivor of them. It was held, that there was not only no bequest to those persons before the death of the widow, but that the subject matter did not exist till then in the form in which it was given; and that the words "survivors or survivor of them," in the clause containing the gift referred to the death of his wife, as the period when it was to operate; and that the testator must therefore be understood to mean such as survived at the death of his wife. In *Pope v. Whitcombe,* 3 Russ. 124 (3 Cond. Eng. Chan. Rep., 323), after a bequest to her brother for life of the interest in a fund directed to be vested by his executors, the testatrix, from and after her brother's death, gave the fund to her executors in trust for certain persons named, "and the survivors and survivor of them, share and share alike, to be paid or assigned to them respectively, as they should attain the age of twenty-one years, with interest in the meantime, and until they should be *entitled* unto and receive their shares respectively of the trust fund"; and it was held (595) upon the ground not only of the distinction drawn by the testatrix between the interest and the fund, but because of the special terms of the limitation of the trust in the fund, that she meant survivors or survivor at the death of his brother. In *Batsford v. Kebbell,* 3 Ves. Jr., 363, there was not a disposition of a fractional interest to one person, and a gift of the ulterior interest to another. All the dispositions were to and for the benefit of one and the same person. The testator gave to Robert Endley the *dividends* that should become due upon certain stock *until* he should arrive at the age of thirty-two years, and Endley died before he attained the age of thirty-two; and the question was, whether the stock should be transferred to his executor, or to the residuary legatee of the testator. The Chancellor *Lord Rosslyn* notices then the executors should transfer to him the stock itself. Robert the precise distinction taken by the testator between the *dividends* and the *capital stock,* which are usually recognized as distinct subjects of bequest, and of the case therein differing from those where the thing is given, and the profit of the thing is given, which are considered but as dispositions of different interests in the same thing, remarks, that the gift here was in the direction for payment, which attached to the legatee only upon his arriving at the age of thirty-two; that were it to be construed an absolute gift, and not conditional upon the legatees reaching that age, he must in effect strike out the suspension of the fund until that age; for the legatee being entitled to the fund as well as to the dividends, he would then be the uncontrolled owner; and therefore declared that in the event which had happened the stock was not

taken out of the residue, and should be transferred to the testator's residuary legatee. The other case relied upon in the argument (*Thicknesse v. Liege,* 3 Bro. Par. Cas., 365; *Reeves Brymer,* 4 Ves., 692; *Bennett v. Seymour,* Ambler, 521; *Smith v. Vaughan,* Vin. Abr. title Devise, 381, pl. 32, and *Spencer v. Bullock,* 2 Ves. Jr., 687), have been critically examined by Mr. Roper in the concluding part of the section already referred to, and the peculiar features in them manifesting (596) a plain intent to restrict the absolute bequest to those who should be in existence at a particular period, and making the circumstances of being *then* alive a condition precedent to their taking, have been clearly and accurately pointed out. *All* the cases are consistent with and justify the general doctrine which we have quoted from him. None of them show that where a testator, after the disposition of a partial beneficial interest, gives the *thing* itself to others, the principal legacy is to be deemed contingent on the event of the legatee's living to the period of distribution, merely because in terms the use or profit of the subject of the gift, and not the subject itself, was disposed of partially in the first instance. *Devisme v. Mello,* 1 Bro. Ch. Ca., appendix, 537; *Taylor v. Langford,* 3 Ves. Jr., 119; *Monkhouse v. Holmes,* 1 Bro. Ch. Ca., 298; *Benyan v. Madison,* 2 *ibid.,* 75; *Wadley v. North,* 3 Ves., 364; *Middleton v. Madison,* 2 *ibid.,* 140; *Walker v. Shore,* 15 *ibid.,* 124, are decisive to show, that whether the thing or the use of it be given in the first instance, the ulterior and final bequest is a vested legacy, unless a contrary intent be manifest upon the will.

The law leans in favor of the vesting of legacies, because the convenience of the legatees and the interests of society are opposed to the tying up of property and keeping it out of the commerce of life. It favors the vesting of legacies, more especially when given to children or those standing in a like relation to the testator, because it presumes that testators naturally desire, that the families of legatees, who die before the time for actual receipt of the legacy shall succeed to the provision made for their parents. And it also favors the vesting of legacies because it will not *intend* that the testator meant to die partially intestate. All these reasons operate in the present case. It is apparent from the nature of the provision made for Littleton, a mere provision for *feeding, clothing* and *keeping* him decently until his death, that he was incompetent, or at least considered by the testator incompetent, for the business of life, and as requiring only sustentation while he lived. The testator left no portion to his son Bird, and cautiously guarded against *his* interference with the portion left to *his* children— (597) and left to them simply as *his* children—charged with the maintenance of their unfortunate uncle. Can it be supposed, that the testator did not intend that his son Bird's children should at all events,

subject only to the charge, have the benefit of this portion? Is it to be inferred, that if these children should, before their uncle's death, arrive at an age to form matrimonial engagements and enter upon the duties of active life, they should not have the power of making such dispositions of their interest in this portion, as prudence might suggest, or their necessities require; or that if they should all die before their uncle leaving families, *these* should succeed to no part of it? Such however, would be the consequences of construing the bequest to be contingent, for it is certain that the concluding words of the bequest "and to their heirs" are words of limitation, and that the children of these legatees, could take only through succession to their parents, and not by way of substitution. Moreover, if this bequest be held to be contingent, then notwithstanding the clause immediately following, and purporting to be a disposition of the residue of the testator's estate, he nevertheless died partially intestate; for it has been already decided in the case of *Vanhook v. Rogers,* before referred to, that by force of the words "to be divided among my son Bird's children as aforesaid" (see 3 Mur., 178), there is such a reference in the residuary clause to that immediately preceding it, that the property given as a residue is bequeathed to the *same persons* and *in the same manner,* as the negroes now in controversy. If the bequest of the negroes be contingent upon some one of these persons surviving their uncle, and attaining the age of twenty-one, so must be the other, and then no disposition has been made of the property in the event that such contingency should not happen.

It is the opinion of the Court, and must be so declared, that all the children of Bird Rogers, who were born before the period of distribution, which according to the facts admitted, was in September, 1836, when Littleton Rogers died, took vested interests in the negroes in dispute, which interests were assignable, and upon the death of any of the legatees without assignment, were transmitted to their executors and administrators.

There must be a reference to take the accounts prayed for, (598) and to make a division. The consideration of the costs and of all other matters involved in the cause, is reserved until the coming in of the report, or until further directions shall be required by any of the parties.

PER CURIAM. Decree accordingly.

Cited: Wallace v. Cowell, 25 N. C., 325; *Sanderlin v. Deford,* 47 N. C., 76, 77.

JANET HAM ET AL. v. CAREN HAM.

A bequest of chattels is within the rule in *Shelley's case;* and the words, "I lend my daughter C. my negroes, etc., during her lifetime or widowhood, and then I give them to her lawful heirs, for them and their heirs forever," pass the absolute interest in the slaves to the daughter.

WILLIAM SMITH in the year 1832 made his will and among other similar provisions for his other children, provided as follows: "I give unto my daughter Caren Ham, a certain tract of piney woods land that I bought of Timothy Mooring; also I lend unto her my negro girl, Mary, and my negro man, Hopton, during her lifetime or widowhood; and then I give them to her lawful heirs for them and their heirs forever." The plaintiffs were the children of the defendant Caren Ham, and in their bill they stated that she had sold the negro girl, Mary, and they feared that she would also sell the man, Hopton. They insisted that they had an interest in remainder in the two negroes, and they prayed that this interest might be protected by compelling the defendant to give security that the negro Hopton should not be carried out of the State.

The defendant answered and insisted that by the terms of the will the absolute interest in the slaves vested in her; and this was the only question in the cause.

Devereux, for the plaintiffs, argued that the rule in *Shelley's case* did not apply to slaves and he cited the case of *Gettings v. McDermott,*
7 Cond. Ch. Rep., 263, as an authority to prove that no decided
(599) case had ever included mere chattels within that rule. He also contended that the words *"lend"* and *"widowhood,"* would prevent the subsequent bequest to the "lawful heirs" of the legatee from enlarging her interest into an absolute one.

The cause was submitted without argument by

Henry for defendant.

DANIEL, J., after stating the case, proceeded as follows: The land mentioned in the recited clause of the will, we think, is clearly and absolutely given in fée to Mrs. Ham. And if the subsequent words in the clause which relate to the slaves, had related to the land, then there would be no doubt but Mrs. Ham would be entitled to the whole fee, by force of the rule in *Shelley's case,* 1 Coke Rep., 92. That rule is that when in any instrument an estate of freehold is given to the ancestor and afterwards by the same instrument the inheritance is limited either mediately or immediately to his *heirs* or *heirs of his body,*

as a class to take in succession as heirs to him, the word *"heirs"* is a word of limitation, and not of purchase, and the ancestor takes the whole estate. The possibility that the estate of freehold may determine in the lifetime of the ancestor does not prevent the subsequent limitation to his *"heirs"* from attaching in himself as a vested interest. Fearn Cont. Rem., 33-37. *Merrel v. Ramsey,* T. Raym., 126. *Curtis v. Price,* 12 Ves. Jun. Rep., 89. When to the word *"heirs,"* are superadded the words of limitation *"for them and their heirs,"* the limitation will still be construed within the rule in *Shelley's case. Goodright v. Pullyn,* 2 Lord Ray., 14-37. 2 Strange, 729. *Legate v. Sewell,* 1 Peere Wms., 87. *Morris v. Ward,* cited in 8 Term Rep., 518, 2 Bur. Rep., 1102. *Webb v. Puckey,* 5 Term Rep., 299. *Formerly,* the rule was not applied in cases of assignments of terms for years. Fearn on Dev., 6 ed., 490; *Peacock v. Spooner,* 2 Vern. Rep., 43, 195; 2 Freeman, Rep., 114; 1 Peere Wms., 133; 2 Atk. Rep., 73. *Dafforn v. Goodman,* 2 Vern Rep., 362; *Ward v. Bradley,* 2 Vern., 23. But it is *now* adopted as to terms for years, and the words "heirs of the body," are held to be words of limitation. *Webb v. Webb,* 1 Peere Wms., 132; *Thulridge v.* (600) *Kilburn,* 2 Ves. Rep., 233; 4 Cruise Dig., 2 ed., 400; *Horn v. Lyeth,* 4 Har. & John. Rep., 431; 4 Kent's Com., 222; unless there be some clause or restriction added, whereby it plainly appears that the words "heirs of the body," are intended as words of purchase. See *Hodgeson v. Bussey,* 2 Atk. Rep., 89; *Withers v. Algood,* 1 Ves., 150; *Price v. Price,* 2 Ves., 234, 652; *Doe v. Lyde,* 1 Term Rep., 593, 596; *Knight v. Ellis,* 2 Bro. Ch. Cas., 570. Does the rule in *Shelley's case* extend to chattels personal? On this point, authorities are not so plenty as they are in the case of terms for years, yet we think, they are not wanting. As it is well established, that the rule extends to terms for years, which, on the death of the termor, go to the executor, and not to the heir; we cannot see, why the rule should not extend to chattels personal, when there is nothing in the will which shows that the testator meant by the word "heirs," children, next of kin, or any other class of persons. *Chancellor Kent,* it would seem, is of the opinion that the rule does extend to chattels generally. He says that in the bequest of chattels a gift to A. for life with remainder to his "heirs," or to the "heirs of his body," would carry the entire interest. 4 Kent's Com., 223. *Gettings v. McDermott,* 7 Cond. Eng. Ch. Rep., 268; was the case of a bequest of stocks in the funds, and money. *Chancellor Brougham* said, "if it be to the legatees for life, and after their decease to their heirs, it carries the whole interest to the legatees, and makes a lapse on their predecease." He said that such would be the construction, he could have but little doubt though he was not aware of any decision exactly in point. In *Britton v. Twinning,* 3 Mer. Rep., 176,

Sir William Grant held, that when there was nothing to qualify the words "heirs of the body," those words must be taken to have been used in their strict technical sense; and when words were so used as to give an estate tail in land, they would pass an absolute interest in personal estate. The plaintiff's counsel has contended that as the testator has devised and bequethed in his will to several of his children, lands
(601) and slaves in the same manner as the bequest to Mrs. Ham, viz.: to them for life or to them for life or widowhood, and then to their *"heirs,"* the Court ought, from the so writing of these many clauses in the same way, to understand that the testator intended the *"next of kin"* by the use which he has made of the word *"heirs"* in the will; and that the *next of kin* should take as purchasers. We have looked through the whole will, and are unable to find any word or clause or restriction added whereby it appeared that the word *"heirs"* was intended or understood by the testator to mean *"next of kin."* The repetition of similar clauses is not sufficient of itself, to make the change of construction. We are of the opinion that the law gave the absolute interest in the slaves to Mrs. Ham and that the bill must be dismissed.

PER CURIAM. Bill dismissed.

Cited: Floyd v. Thompson, 20 N. C., 617; *Swain v. Rascoe,* 25 N. C., 203; *Bradley v. Jones,* 37 N. C., 247; *Donnell v. Mateer,* 40 N. C., 9; *Sanderlin v. Deford,* 47 N. C., 76; *Worrell v. Vinson,* 50 N. C., 94; *Hodges v. Little,* 52 N. C., 146; *Leathers v. Gray,* 101 N. C., 164; *Hooker v. Montague,* 123 N. C., 157, 161.

WASHINGTON McCONNELL ET AL. V. ALLEN PEOBLES ET AL.

Where a father, since 1806, made parol gifts of slaves to his children, and afterwards by his will directed all his slaves to be equally divided between his six children, *it was held* that the slaves given to the children, and in their possession at the death of the testator, were to be included in the division. But *it was also held* that no account was to be taken of slaves so given which the children had sold during the testator's lifetime; neither was a slave purchased by a child and paid for by the father to be estimated as one of the father's in making the division.

THE bill stated that Lewis Peobles died in the year 1834, having made his will, whereof he appointed the defendant, Allen, executor, and thereby, among other things, bequeathed as follows: "My will is, that all

my negro slaves be laid off into six lots, made equal in value, and then drawn for by my six children, namely, Betsey, etc., and the heirs of Patsey McConnell, deceased." The plaintiffs were the children of Mrs. McConnell, and the defendants the other legatees. The plaintiffs alleged that the several defendants had, in the lifetime of the testator, received several slaves from him under parol gifts since 1806, (602) and had sold some of them. The prayer was for a discovery of the negroes sold, and an account thereof; and that the prices of the negroes so sold, as well as the negroes in the possession of the defendant, Allen, as executor, and those held by all the defendants under the parol gifts, might be divided into six equal parts, and one part assigned to the plaintiffs.

The defendants in their answers insisted, that the provision above set forth in the will of the testator applied only to the negroes in his possession at the time of his death. They admitted that they had received negroes from the testator as gifts by parol; and that in many cases they had, with his knowledge, and without any opposition from him, sold or exchanged those slaves; and they resisted all claim to an account of the money received for the slaves so sold or exchanged, or a division of those not sold or received in exchange. The defendants, Thomas Smith and wife, alleged, that at the time of their marriage, the testator desired to give them a negro girl, but it not being convenient to do so out of those in his own family, he told these defendants to purchase one, and he would pay for her; and that accordingly they selected a girl named Hannah, and bargained for her with a dealer in slaves; and the next day the testator came to their house and paid for the girl; when the dealer executed a bill of sale for her, and delivered her to Mrs. Smith; and that the girl had ever since remained in their possession.

Winston for plaintiffs.
J. T. Morehead and W. A. Graham for defendants.

Daniel, J., after stating the facts, proceeded as follows:

Allen Peobles will of course account for all the slaves and their increase which came to his possession as executor of Lewis Peobles. It is also the opinion of the Court, that the said Allen, and all the other defendants must account to the plaintiffs, for the purpose of division, for all the slaves and their increase, which had before belonged to the testator, and had been placed in possession of the defend- (603) ants by the testator in his lifetime, and which were alive at the death of the testator, and had not been *then sold* by any of the de-

fendants. The act of 1806 (see 1 *Rev. Stat.*, ch. 37, sec. 17), declares that all gifts of slaves shall be void, that are not made in writing, and authenticated as there prescribed. The gifts of the slaves by parol, which the defendants set up under their father, are therefore void. It has been frequently decided in this Court that slaves held by children under parol gifts from their parents were considered in law only as *bailments.* If the parent had died *intestate,* such parol gifts to children would be *advancements.* But in this case, as the father did not die *intestate,* but *testate* as to his whole personal estate, the slaves thus bailed to his children (the defendants), and which were in their power or possession at the death of the testator, must be accounted for. We are, however, of the opinion that the plaintiffs have no right under the will to call for an account of the money for which any of the slaves were *sold,* and where the slaves were actually *sold* before the death of the testator. The clause in the will is, that "all my *negro slaves* be laid off into six lots." His slaves here meant were those left at his death in possession of his executor, and those slaves that were then in possession of the defendants as his bailees. The money which the defendants held, and which was the price of the bailed slaves by them sold, cannot by any fair construction of the will be made to mean *"negro slaves."* It is his *"negro slaves"* which belong to him (the testator) at his death that are directed by the will to be laid off into six lots, and not any other part or portion of his personal estate or *choses in action.*

The Court is of opinion that the slave, Hannah, and her issue, mentioned in the answer of the defendants Smith and wife, are not to be brought into account for the purpose of making a division of the testator's negro slaves. The plaintiffs have not shown by any means to the satisfaction of this Court that the slave, Hannah, ever belonged to the testator. We are unable to learn from the answer of Smith and wife (the only evidence on this point in the cause) that the tes-
(604) tator contracted with the slave trader for the girl, Hannah. But, on the other hand, a very strong inference arises from what is stated on this subject in the answer (which has been made use of as evidence by the plaintiffs) that not only the selection of Hannah by Mrs. Smith was made at the slave station of the trader, but that she and her husband stipulated with the trader as to the amount of the price and contracted for the purchase. The father, on the next day, advanced the money to the trader. But did he contract with and purchase of the trader, or only give the money? The trader delivered the slave, not to the father, but to Mrs. Smith, who took her home from the

station, and she and her husband have kept the girl and her issue as their own undisputed property ever since. Under these circumstances, this Court is unable to say that the slave, Hannah, ever was the property of the testator. It is a point which it behooves the plaintiffs to establish—that the slave, Hannah, once belonged to the testator. They have not done so; therefore, we declare that the slave, Hannah, and her increase, are not to be taken into the account in ascertaining what slaves belonged to the testator at his death that were subject to division among his legatees. The decree will be in conformity to the principles declared in this opinion.

PER CURIAM. Decree accordingly.

Cited: Davie v. King, 37 N. C., 205.

(605)

JOHN J. OLIVER v. THOMAS DIX ET AL.

Although at law the covenants of the vendor and vendee may be independent, yet in equity, upon a bill for specific execution of a contract for the purchase of land, a conveyance is never ordered until the purchase-money is paid.

THIS was the same cause which was before the Court at December Term, 1835, against Thomas Dix, as sole defendant. (See *ante,* p. 158.) Upon its being remanded, the plaintiff, by leave of the Court of Equity, amended his bill by charging that James Dix, after entering into the contract with the plaintiff, died, having first devised all his estate, including the purchased premises, to William Dix in fee, and that William subsequently died, having also devised the same in fee to his widow and children, who were named as defendants in the amended bill, and against whom it prayed a decree for a specific performance and a conveyance. A subpœna and copy of the bill were served on Thomas Dix, the younger, the only child of William who was resident in this State, and advertisement according to the statute was made as to the others. None of those persons put in answers or appeared, and thereupon the bill was taken *pro confesso* and set for hearing *ex parte* as against them, and the cause again transferred to this Court for hearing.

W. A. Graham for plaintiff.
J. T. Morehead for defendants.

RUFFIN, C. J., having stated the case as above, proceeded as follows: This case presents a very different aspect from that which it wore when it was formerly before the Court. The plaintiff, after a long enjoyment of the estate contracted for by him, and while remaining in possession, then sought to enjoin the then defendant from enforcing, as assignee, the payment of a bond for one-half the purchase money, and to recover back from him the other half which had been paid, upon the
(606) sole ground that the defendant had obliged himself by a collateral covenant that the vendee, James Dix, should extinguish an encumbrance on the premises and should then convey within a limited period, and that such conveyance had not been made. That is said to be the sole ground, because it appeared by the master's report that James Dix did discharge the encumbrance and obtained a reconveyance of the legal title, and by the terms of the contract the plaintiff was then to take the title of James Dix, such as it was. For the reasons then given, the court refused the relief asked. The vendor, we thought, had a right to insist on the contract, and the plaintiff, under the circumstances, was obliged to accept a conveyance if offered to him by those to whom the legal title came from the vendor; and those persons, we also thought, were compellable, at the instance of the plaintiff or of the original defendant, whether regarded as a surety for the vendor or as assignee of the securities for the purchase money, to make such a conveyance upon a bill properly framed.

As the bill has been amended, the object is to obtain a conveyance, and it is now, therefore, the common case of a vendor seeking a specific performance, to which the plaintiff here is clearly entitled upon the performance by himself of the contract on his part. One-half of the purchase money—the sum of $525—fell due on 9 October, 1821, and, with the interest subsequently accrued, remains unpaid and resting in the judgment which was enjoined in this suit. The payment of that sum, and the interest, is necessarily preliminary to the relief asked. There cannot be a decree for a conveyance of the land unless the plaintiff has paid the purchase money due at the time, or offers to pay it, and brings it into court. Although the defendants may be in default, so also is the plaintiff, in the present state of the case; and the Court cannot move at the instance of either party until that party shall have exculpated himself. At law, the respective engagements of these parties may be independent, but in this Court the estate is always regarded, until an actual conveyance, as a security for the purchase money, or such part of it as has fallen due. This must be especially true in our law, since the vendor, after conveying, has no lien against
(607) other creditors of the vendee. The defendants are therefore

entitled to more than a dissolution of the injunction before executing a deed or before a decree against them to convey. The means possessed by this Court of securing the vendor in the price are more effectual by requiring the payment prior to or at the hearing. Upon payment, the plaintiff purges his default and is in a condition to claim the relief. In strictness, the bill might now be dismissed for the want of payment, or an offer of it. But, owing to the peculiar circumstances under which the case has assumed its present shape, and seeing that the defendants have not moved to dismiss, but that one of them, who is chiefly interested, is desirous that the litigation should be terminated upon this proceeding, the Court declines dismissing the bill for the present, and instead thereof orders the plaintiff to pay into court within the first eight days of the next term the half of the purchase money remaining unpaid, with interest thereon, as above mentioned, to the day of payment, and the costs of the suit at law, mentioned in the pleadings. Upon the payment being made, either party may then move for further directions, and it will be, of course, to decree the specific performance asked by the plaintiff and wished by the original defendant. The money also may be detained in court until the actual execution of the deeds, if necessary, under the circumstances to be shown, as a guarantee that the conveyances decreed shall in fact be executed, or an inducement to diligence on the part of the defendants, or either of them, in procuring their execution. But in the event of a continuing default in this respect on the part of the plaintiff, the Court can do nothing less at that time than dismiss his bill. That will leave the other party to enforce the judgment at law or file their bill to raise the residue of the purchase money by a sale of the estate itself; and in case of the judgment being satisfied without a sale of the estate, the plaintiff will then be put to a new bill, having the same object with the present, but presenting the new fact of the payment of the whole purchase money. It is with the view of avoiding such injurious delay and litigation that the present course is adopted, of requiring the plaintiff to (608) bring in the unpaid residue of the purchase money within a reasonable time, as before mentioned, which is ordered accordingly.

PER CURIAM. Decree accordingly.

Cited: Winborn v. Gorrell, 38 N. C., 121; *Burgin v. Burgin,* 82 N. C., 200; *Johnston v. Cochrane,* 84 N. C., 449.

SAMUEL CLARK v. CHARLES BANNER ET AL.

1. A plaintiff who seeks the aid of a court of equity to obtain satisfaction of his judgment at law ought not only to establish his debt there, but sue out execution.

2. Whether a return of *nulla bona* on such execution be necessary, *quere?*

The bill charged that the plaintiff, as the surety of the defendant, Charles, in his official bond as sheriff of Stokes County, had been compelled to pay large sums of money for the default of his principal: that he had obtained a judgment against his principal for the sum of two hundred and thirteen dollars and twenty-seven cents, part of such payments; and that a large balance still remained due him on account thereof, for which he had obtained no judgment; that the defendant, Charles, to defeat the plaintiff in obtaining satisfaction of his debt, had conveyed to his sons, Constantine and John, also defendants, all his property, except one mare, which he had conveyed to the plaintiff; and that the defendant, Constantine had brought an action at law against the plaintiff for the value of this mare. The plaintiff insisted that all the conveyances by the defendant, Charles, to his sons were fraudulent; and prayed a discovery and account of the property of Charles in the hands of the other defendants; and for satisfaction of his debt out of the property or money.

The defendants answered and denied all the allegations of the bill. Proofs were taken and the cause transferred to the Supreme Court for hearing.

Waddell for plaintiff.

(609) *J. T. Morehead and Boyden for defendants.*

DANIEL, J., after stating the case proceeded: The defendants might and ought to have demurred to the bill. The plaintiff, although he obtained a judgment at law for part only of his demand against Charles Banner, never, as we can discover, took out any execution to obtain satisfaction at law, even for that portion of it which he had reduced to a judgment. The plaintiff should have obtained a judgment at law for his entire demand, and then issued an execution on the same. Because, until execution, the plaintiff has no *lien* on the property as to which he asks the aid of this Court for a discovery and satisfaction. In *Angel v. Draper,* 1 Vern., 399, the defendant had come to the possession of the goods of the debtor in a fraudulent manner, but notwithstanding, upon the defendant's demurring because the plaintiff (a judgment creditor) had not alleged that he had taken out execution, the

court allowed the demurrer, and said that the plaintiff ought actually to have sued out execution before he brought his bill. To the same point is *Shirley v. Watts,* 3 Atk., 200. The plaintiff should show that he had sued out the writ, the execution of which is sought to be avoided, or the defendant may demur. 1 Mad. Ch. Prac., 205. Whether it is necessary to show a return of *nulla bona,* it is not now necessary to inquire, as no writ of execution ever issued on the plaintiff's judgment.*

The defendants did not demur. They have answered and denied the allegations in the bill, and the parties have gone to proofs. We have examined the testimony and the plaintiff has, in our opinion, failed in proving that the two sons of Charles Banner have any money or property of their father, which ought to be subjected to the satisfaction of his demand. We think the bill must be dismissed; but the defendants are entitled to recover costs only as in case of a demurrer sustained, viz.: one attorney's fee.

There is another matter controverted between the parties in relation to which the Court makes no decree. The bill alleges that the defendant, Constantine, has brought an action at law to recover (610) from the plaintiff the value of a mare, which the plaintiff claims by conveyance from the defendant, Charles. The Court leaves that matter to be settled between the parties in the suit at law, if the same be yet pending.

PER CURIAM. Bill dismissed.

Cited: Bethell v. Wilson, post, 613; *Bank v. Harris,* 84 N. C., 209; *Frank v. Robinson,* 96 N. C., 33.

WILLIAM BETHELL'S EXECUTRIX ET AL. v. JOHN P. WILSON ET AL.

1. All the residuary legatees are necessary parties to a bill seeking to subject the share of one of them to a debt, especially when the interest of each legatee is uncertain, depending upon the amount of advancements made them in the lifetime of the testator.

2. A creditor cannot obtain the aid of a court of equity to procure satisfaction of his debt under any circumstances until he has established his claim at law and issued an execution therefor.

**Vide Harrison v. Battle,* 1 Dev. Eq. Rep., 537. (Reporters.)

BETHELL *v.* WILSON.

WILLIAM BETHELL and Absalom Watt filed their bill against John P. Wilson, and also against Sarah and Covington Wilson, executrix and executor of John Wilson, deceased, and thereby charged that the plaintiffs and the defendant, John P., in the year 1826, entered into a copartnership for the purpose of buying and selling slaves: that the defendant, John P., was the acting partner of the concern, received the capital paid in, purchased a parcel of slaves, carried them to the south and sold them, partly for cash and partly on credit: that the said defendant paid to the plaintiffs a part of the moneys he had received and subsequently wrote to the plaintiff, Bethell, informing him that there yet remained to be collected for the concern, the sum of three hundred and seventy-five dollars, which when collected and expenses paid, were to be divided among the partners as profits, according to the contract: that soon afterwards, the said defendant did collect the said debt, and others due to the concern, and in the year 1827 or 1828, made a settlement with the plaintiff, Watt, at which he admitted himself indebted to the (611) plaintiffs, as partners, in the sum of two hundred and fifty dollars or thereabouts, and stated and signed an account to that effect, which has been lost or mislaid. The plaintiffs further charged that the said defendant originally resided in the county of Rockingham, in this State, but after his return from the South, removed over the State line into Virginia: that he occasionally came into this State: that process was sued out here against him, but the plaintiffs were unable to get it executed, and that soon thereafter he moved off, as they had been informed, to the State of Alabama. The bill then proceeded to state that the said defendant had left no property in this State, liable to an attachment, except an interest in remainder in an undivided tenth part of a tract of land, and certain slaves and personal property, which the father of the said defendant had devised and bequeathed to the defendant, Sarah (his widow), during her life or widowhood; and then to be equally divided between his ten children: that the said Sarah was an aged woman, and the plaintiffs were apprehensive that the defendant, John P., would assign his interest in the said legacy without returning to this State. The bill prayed that the defendant, John P., might set forth on oath the amount due to the plaintiffs: that the defendants, Sarah and Covington might set forth on oath what property of their testator would belong to the said John P. after the death of the said Sarah: that the interest of the said John P. in this property might be sold to satisfy the debt due to the plaintiffs: that the said John P. might be in the meantime restrained from demanding or receiving or assigning his interest in the said legacy; and that the said Sarah and Covington from delivering over the same to him, or to any other person, and also for general relief. Upon affidavit that the defendant, John P.,

resided out of the State, publication was ordered and made against him to appear and answer to the bill, or that the same would be taken *pro confesso* against him. He did not appear and the bill was accordingly against him taken *pro confesso* and set down to be heard *ex parte.*

The defendants, Sarah and Covington Wilson, answered, but it is not thought material to state more of their answer than that they alleged, that by the will of their testator it was expressly declared, with regard to the division between the children of the testator (612) of the property devised and bequeathed to the said Sarah for life or widowhood, "that from first to last, together with what they have received, and may hereafter receive, each child shall receive the same amount;" and that they were utterly unable to ascertain what portion of the said property under the said limitation the said John P. would be entitled to receive.

W. A. Graham for the plaintiffs.
Winston for the defendants.

GASTON, J., after stating the case as above proceeded as follows: Upon these pleadings, it is evident, we think, that no decree could be made subjecting any specific part of the residuary interest in the property in question to be made liable for the debts of the defendant John P., until it was ascertained what was the said John P.'s interest therein; and that *this* could not be ascertained, without bringing before the Court all those interested in the bequest so that an account might be taken of their respective advancements.

But the Court will not retain the cause for the purpose of having these parties made as it is satisfied that the plaintiffs cannot have the relief which this bill asks, or any relief of the same kind.

The bill does not seek for a settlement of the accounts of the partnership, but for satisfaction of a debt alleged to be absolutely due from the defendant, John P., to the plaintiffs by virtue of an *account stated;* and recites the partnership and other matters therewith connected as inducement to said settlement.

But the plaintiffs as *creditors* cannot ask the aid of a Court of Equity to have a sale of the property of their debtor, because they have not obtained any judgment for their debt, nor sued out an execution by which a lien has been created on that property. In the language of this Court on former occasions, "Nothing is clearer, than that a mere creditor cannot, in equity, pursue his debtor's property in the hands of a third person." *Donaldson v. Bank of Cape Fear,* 1 Dev. Eq. Rep., 107. *Clark v. Banner,* decided at this term. The (613)

remedy by attachment given by our acts of assembly must be sought in the courts which are authorized to administer it. If that remedy be not sufficiently extensive to reach the property which the plaintiffs would fain make liable for their debt, a Court of Equity has no right to enlarge the remedy by supplemental legislation. In some states, we understand the attachment laws have been so modified as to authorize their Courts of Chancery to help creditors before execution or judgment, to reach moneys due to, or property held for nonresident debtors. Our State has not thought proper, and probably never will think proper, to confer this large and dangerous jurisdiction.

The bill must be dismissed, and as against the representatives of John Wilson, deceased, with costs.

PER CURIAM. Bill dismissed.

Cited: Bank v. Harris, 84 N. C., 209; *Frank v. Robinson,* 96 N. C., 33.

JOHN THORPE v. JOHN RICKS.

Where A. contracted for land and placed one-third of the purchase-money in the hands of B., who completed the purchase, and then leased the land to A., reserving rent, at the rate of twelve and a half per cent upon the sum advanced by him, and gave a bond to A. to convey to him, at the expiration of the term, upon the payment of the advance and rent, with interest on the latter, and A. was embarrassed and made permanent improvements, *it was held* that the arrangement was a mortgage to secure an usurious loan, and that a purchaser of A.'s interest at execution sale had a right to redeem.

THE bill was originally instituted by the plaintiff against John Ricks and Hardy W. Hatton. The latter died pending the suit and it was supposed to abate as to him, and was brought to a hearing against Ricks only. Upon the pleadings and proofs the facts were, that a short time before the 20th of May, 1833, Hatton contracted with Mrs. Temperance Alston to purchase an improved lot in the town of Nashville (614) at the price of four hundred and fifty dollars, to be paid in cash. Not being able to raise more than one hundred and fifty dollars of the price, the defendant Ricks advanced the residue, three hundred dollars, and paid the whole to Mrs. Alston, and by an arrangement between him and Hatton, took a deed for the lot to himself. On the same day Hatton executed his single bill to Ricks, securing to the latter the sum of one hundred and twelve dollars and fifty cents, in three annual installments of thirty-seven dollars and fifty cents each,

for the rent of the lot for three years; and Ricks executed a bond to Hatton, wherein it was recited, that Ricks had bought the lot, and leased it for three years to Hatton, at the annual rent of thirty-seven dollars and fifty cents; and that the lot was bound for the payment of the rent, and was not to be liable for the payment of any other debts; and it was thereupon declared, that if Hatton should pay the rent as it fell due, and also the further sum of three hundred dollars, then Ricks was to convey the lot to Hatton. The instrument also provided that Hatton was to take the lot under all incumbrances: that Ricks was not bound to put him in possession, but that he, Hatton, was to obtain possession in a peaceable way, or in any other way the law permitted. At the time of this transaction, Hatton was deeply indebted, and continued so until August, 1826, when he died insolvent. Among other creditors at that time was Henry Blount, who, in August, 1833, came to a settlement with Hatton, took a note for one hundred and seventy-three dollars, fifty-two cents, and in November following obtained a judgment for the amount. An execution issued upon this judgment which was levied upon Hatton's interest in the lot, and in February, 1835, the sheriff sold that interest, whatever it might be, and subject to the claim of Ricks; when the plaintiff purchased it, and took a deed purporting to convey the estate of Hatton therein. At the time of the purchase from Mrs. Alston, the lot, independently of the buildings on it, was worth three hundred dollars. Hatton took possession immediately upon this purchase and put additional improvements on it worth one hundred and fifty dollars; and continued in possession up to the day of the sale to the plaintiff, when the lot with all its improvements was worth eight hundred dollars. The plaintiff after his purchase, as the assignee of Hatton, claimed of the defendant to redeem the lot upon the payment of three hundred dollars and (615) interest; the defendant refused to allow such redemption, but offered to convey to the plaintiff, on his paying the sums of three hundred dollars and one hundred and twelve dollars and fifty cents for the rents, with interest on the latter from the times when the several installments became due, or to refund to the plaintiff the one hundred and fifty dollars advanced by Hatton, if the plaintiff would convey the lot to him.

The plaintiff prayed that upon his paying to Ricks the sum of three hundred dollars and interest thereon, he, Ricks, might be decreed to convey the lot to him.

The case was argued by:

Devereux for plaintiff.
Badger for defendant.

GASTON, J., after stating the facts as above proceeded: It is insisted that the plaintiff is not entitled to the decree for which he prays. The first objection made is that Hatton never had any estate (other than a term for years) in the lot: that the same was purchased by Ricks, and leased to Hatton for a fair rent; and that the agreement of Ricks only gave Hatton a right to purchase from Ricks, upon the conditions and terms therein stated. The Court is entirely satisfied that this objection is unfounded. Whatever may be the forms with which the transaction was invested, it is manifest that, in truth, the purchase was made by Hatton, who actually paid one-third of the purchase-money: that Ricks advanced to Hatton the sum necessary to make up the residue of the price: that the conveyance was made to Ricks as a security for this advance: that the contract of lease was a mere contrivance to obtain twelve and a half instead of six per cent interest upon the money so advanced; and that Hatton had a clear right in equity to redeem the lot on payment of what was *bona fide* due. The contract with Mrs. Alston was made by Hatton in his own name, and exclusively for his own benefit. Ricks was never known in the transaction until the
(616) moment when the contract was to be executed. It is admitted by Ricks that one-third of the price paid for the lot was Hatton's own money and it is not pretended that Ricks acknowledged himself *Hatton's debtor* therefor. No notice whatever is taken of this payment by Hatton in any of the writings. The defendant admits that Hatton applied to him for a loan of three hundred dollars to complete the purchase; says that he refused to lend; but being pressed by Hatton, he at length concluded, as *an accommodation* to Hatton, to buy the lot himself upon Hatton's advancing what money he could (the one hundred and fifty dollars), and afterwards to let Hatton have the title upon the terms mentioned. Independently of these circumstances, the written agreement manifests that the parties regarded the purchase as Hatton's. Why the stipulations that Hatton is to take the lot under its present incumbrances and to get the possession as he can? In the view we take of the transaction, these are reasonable stipulations; but if the purchase were solely on Ricks' account, and Hatton's occupation were as *his* tenant, it is exceedingly difficult, if not impossible, to account for them. The subsequent conduct of the parties is explanatory of the transaction. Hatton continues to occupy the lot, increases its value by permanent improvements, and not a cent of rent is paid or demanded during the occupation. When it is recollected that nothing is more usual than for oppressive money lenders to avail themselves of the necessities of a needy borrower, to obtain for themselves collateral advantages over and above the interest of the money they advance, and to clog the redemption of the pledge put into their hands or power by agreement—all

manner of extortion and usury would be let in, if the *forms* here used, were held sufficient to constitute Ricks the whole and absolute owner of the property.

But it is objected that if Hatton had a redeemable interest in this property it was not such an interest as our act of 1812 subjects to sale at execution. The first section of that act embraces all lands and goods whereof any one may be seized or possessed in trust for the defendant in execution, and is unquestionably restrained in its operation, to cases of mere naked trusts solely for the defendant. Clearly (617) the estate of Hatton was not liable to execution under this section. The second enacts that the "equity of redemption in all lands, tenements, rents and hereditaments which are now or hereafter shall be pledged or mortgaged shall, in like manner be liable to any execution or executions hereafter sued out on any judgment against the mortgagor or mortgagors." For the defendant it is contended that this section embraces no equity of redemption except such as arises upon formal mortgages where a conveyance of lands has been made by a debtor to his creditor with an express proviso or defeasance that the same shall be void on payment of money at a certain day. It is worthy of observation that the reason which has compelled the courts to place the most rigorous construction on the section of the act respecting sales of trust estates does not apply in the construction of the section now under examination. A sale by execution of a trust estate entirely destroys the estate of the trustee and transfers the land or chattel itself to the purchaser. We were bound, therefore, to hold that no sale of a trust interest was contemplated by the statute except where the trustee held simply for the benefit of the *cestui que trust,* as it would be indecent to suppose that the Legislature intended by a sale of the debtor's interest to disturb the interest of any other person. But a sale, under the act, of an equity of redemption, transfers to the purchaser simply the right of him entitled to redeem, and does not displace, or in any manner disturb the right of the mortgagee. Moreover, whatever may be our opinion of the policy of the enactment, even should we suppose that it were better that the equity of redemption should be subjected to a creditor who had issued out execution by a bill to redeem instead of being set up to sale under execution, we are bound to regard the policy approved by the Legislature as that best for the community, and therefore to affix to their enactment such a reasonable construction as will advance that policy. Now it is obvious that the great purpose of this enactment was to furnish an easy and expeditious remedy to creditors against debtors, who held redeemable interests, actually of value, but not acknowledged at law, because the whole legal estate was outstanding in another, and it is equally obvious, that if we adopt (618)

the narrow construction contended for, every debtor, by a slight change of *form,* may secure to himself such valuable interests, and place them beyond the operation of the statute. The very case before us is an apt illustration of this position. An embarrassed man obtains a loan upon a pledge of property, purchased by himself and in order to effect that purchase; but instead of taking the legal title to himself, and giving a formal mortgage to the lender, he has the legal title made directly from the vendor to the lender, taking from the latter an instrument which manifests that such title was made but as a security for the loan, and then the judgment of his creditor cannot reach it. We are aware of the inconveniences which may result from the sale of interests as equities of redemption, where the right of redemption may not be express—may indeed be doubtful—but we feel ourselves bound to hold, that whatever a court of equity—the appropriate tribunal for passing upon such inquiries—holds to be an equity of redemption in lands, is by force of express legislation, liable to sale under execution.

It is further objected that the sheriff's deed in this case, if the sale were valid, is insufficient, because it does not follow the directions of the act; which makes it "the duty of the sheriff, when he sells an equity of redemption, to set forth in his deed, that the said lands, tenements and hereditaments were under mortgage at the time." If we regarded this objection as well founded, we should not dismiss the bill therefor; but afford the plaintiff an opportunity to have a deed made in better form. The objection is purely formal; as unquestionably in the present case the levy was made upon this equity, the sale was made subject to Ricks' legal title or mortgage, it would be the duty of the sheriff to execute a deed in approved *form;* and the deed, when so executed, would relate back to, and have effect from the time of sale. But we do not deem it necessary to defer the decree for this reason. It seems to us that the clause is simply directory to the sheriff.

It is advisable, for *many* reasons, that this direction should be
(619) observed; and sheriffs ought to take care not to disregard it. But we do not feel ourselves justified in declaring that the deed does not convey what it purports to convey, and what was actually purchased—the interest of Hatton in the lot.

Finally it is objected that the plaintiff is not entitled to a decree until he shall make the personal and real representatives of Hatton parties to this action. The question, what parties are necessary or proper to be made, is felt by all conversant with the proceedings of courts of equity, to be sometimes the most perplexing which can be presented. The general rule is, that all persons having an interest in the object of the suit, ought to be made parties, and the general rule is thus established for two purposes; the one, that no man's right shall be

decided without affording him an opportunity to be heard; and the other, that when a decision is made, it shall provide for the rights of all whose interests are immediately connected with the decision. But even this general rule is subject to so many exceptions, and is in some cases so difficult of application, that a mere recurrence to it will not readily settle the question of proper parties. Hatton's representatives are not wanted here because of any decision asked against them. If they ought to be here, it must be that provision may be made to prevent the defendant from being hereafter harassed by them. The *possibility* that they may institute a suit against Ricks does not, in the opinion of the Court, furnish a sufficient reason for requiring that they should be parties to this bill. The elementary books and the adjudged cases lay it down very clearly that a bankrupt is not a necessary party to a bill brought by his assignees, yet we suppose it cannot be controverted that if a decree should be rendered upon such a bill it would be competent for the alleged bankrupt to bring his own bill or action, denying the bankruptcy and the validity of the assignment. So it is laid down that where a mortgagor or mortgagee makes an assignment of all his interest, the assignee may institute his bill without making the assignor a party. But certainly the assignor will not be precluded by the decree rendered from asserting his right, afterwards denying the fact of, or the operation of, the assignment. The reason given in all these cases (620) is, that upon the matters charged in the bill the assignor is seen to have no interest, and therefore the bill cannot be demurred to for want of parties. If the assignment charged be admitted by the answer, then upon that admission the assignor has no interest. If the assignment be denied, the plaintiff is bound to prove it upon the hearing, and, it being established, the Court judicially finds the fact that the assignor has no interest. If a defendant, when a claim is advanced against him, apprehends injury because of a conflicting claim asserted by another, he can take the proper measures to make the parties asserting such claims interplead with each other, so that the Court may adjudge to which of them the disputed right belongs, and he may be completely indemnified. But it is enough for any plaintiff asking relief to bring before the Court *all* who, according to his allegations, supposing them true, have any interest to be affected by the relief asked. The Court does not see any substantial distinction in this respect between an assignment alleged to have been made by act of the party and one made by act of law, provided that the assignment in each case be *complete*. In either case, where the assignment passes the entire interest, and the plaintiff simply claims to have that interest against one denying it, the assignor seems not to be a necessary party. In both, where the assignment is partial or leaves an interest, either legal or equitable, in the

assignor, the latter is a necessary party. The present case, according to the pleadings, is one in which there would have been less ground for requiring the assignor to be a party than usual. The dispute here is not so much about the facts as upon the law of the Court arising upon the facts; and it must be presumed that whatever is now declared to be the law of the Court will be held so, whoever may hereafter attempt to impeach it.

It is the opinion of the Court that the plaintiff is entitled to a decree that upon his paying to the defendant, on or before 15 June, next, the sum of $300, with interest from 20 May, 1833, Ricks shall make a conveyance, to be approved by the clerk of this Court, of the lot in
(621) question, with covenants against his own acts and encumbrances; shall surrender up to this Court, to be canceled, the single bill of Hatton hereinbefore mentioned; and as the right of the plaintiff to redeem has been unconscientiously resisted, the plaintiff is entitled to recover costs.

PER CURIAM. Decree accordingly.

Cited: Polk v. Gallant, 22 N. C., 398; *Davis v. Evans,* 27 N. C., 534; *Doak v. Bank,* 28 N. C., 330; *Patterson v. Bodenhamer,* 31 N. C., 98; *Davis v. Cunningham,* 32 N. C., 161; *Medley v. Mask,* 39 N. C., 343; *Frost v. Reynolds, ibid.,* 498; *Mullin v. McCanless,* 57 N. C., 428; *Gorrell v. Alspaugh,* 122 N. C., 562.

THOMAS FLEMING ET AL. v. WILLIAM SITTON.

A deed of bargain and sale, with a proviso avoiding it, upon repayment by the vendor of the purchase money, is *prima facie* for a conditional sale, and shall not, in the absence of all fraud on the part of the vendor, be turned into a mortgage securing the purchase money as a debt.

THE allegations of the bill were that the defendant purchased goods of the plaintiffs, residents of Charleston, to the amount of $1,502.84, and on 19 May, 1832, gave a note, at six months, for the amount; that the defendant neglected to take it up, and the plaintffs, becoming doubtful of his solvency, went to the residence of the defendant, at Waynesville, in Haywood County, and requested further security; that the defendant then confessed his inability to give any additional security, unless it was a mortgage upon an improved lot in Waynesville, which he represented as being worth $3,000; that, confiding in this representation of the value, the offer was accepted, and the plaintiffs agreed

to suspend the collection of their debt until 11 January, 1834; that on 14 September, 1832, the defendant executed a mortgage of the lot to secure the payment of the debt due them in Charleston; that after its execution the defendant insisted upon the cancellation of the note for $1,502.84, assigning as a reason for so doing that it was customary to surrender the note when a mortgage was given to secure it, and insisting that unless this was done he might be called upon to (622) pay the debt twice; that the plaintiff, being ignorant of such things, and supposing that the mortgage deed would be sufficient evidence of the debt, consented to this arrangement.

The plaintiffs then alleged that the defendant had not paid the mortgage debt, and, when being called on, had denied that he owed them anything, insisting that he had sold the lot and improvements to them, absolutely, for the debt of $1,502.84; that the value of the property was but $600 or $800, and their debt, with interest, $1,800. They averred that the whole plan originated in a fraudulent design to cheat them.

The prayer was that the lot might be sold and the proceeds applied to the payment of the debt due the plaintiffs, and that they might have execution for the residue of it.

A copy of the mortgage was filed as an exhibit; it was in form a deed of bargain and sale for the lots with a covenant of quiet enjoyment, executed by the defendant to the plaintiffs, in the consideration of the sum of $1,502.84, with a proviso that if the said William Sitton, his heirs, etc., "doth or shall well and truly pay to, etc., the assumed sum of $1,502.84, in the city of Charleston, on or before, etc., then the above indenture to be void, or otherwise to be and remain in full force and value, in both law and equity."

The defendant, in his answer, denied that it was his intention, or that of the plaintiffs, to take a mortgage of the lot, but that both parties had a conditional sale in view, and that the condition was inserted for his benefit, as he then believed the property worth more than the debt; that it had cost him more, and that one of the plaintiffs was on the premises and examined it. He denied all fraudulent misrepresentation of the value, and admitted that it was doubtful whether the lot would now sell for the amount of the purchase money and interest.

The depositions of the attesting witnesses were filed, and the substance of them is stated in the opinion of the Court.

His Honor, *Judge Pearson,* at Haywood, on the last Spring (623) Circuit, by his decree, declared that the debt due by the defendant to the plaintiffs still existed, and that the indenture was a mortgage, and ordered a sale of the lots, and, in case the sale did not realize a sum equal to the debt, that execution should issue for the residue.

From this order the defendant appealed.

Badger for defendant.
No counsel appeared for plaintiffs.

RUFFIN, C. J. The Court is of opinion that so much of the decree as requires the defendant personally to pay to the plaintiffs the mortgage debt and interest, and awards execution for the same, or any part of it, is erroneous.

The jurisdiction of equity in mortgages is simply to decree redemption or foreclosure. To that end, the Court directs accounts to be taken of the sum due, in order that it may be known how much the mortgagor must pay to entitle him to a reconveyance, or to prevent his equity of redemption being foreclosed. Of late years, a beneficial practice has gained favor, until it may be considered established in this country, not absolutely to foreclose in any case, but to sell the mortgaged premises and apply the proceeds in satisfaction of the debt; if the former exceed the latter, the excess is paid to the mortgagor; if it fall short, the creditor then proceeds at law on his bond or other legal security to recover the balance of the debt. *Gillis v. Martin,* 2 Dev. Eq., 470. In *Lansing v. Goelet,* 9 Cowen, 346, *Chancellor Jones* treats the subject much at large and with great learning.

But the debt is never recovered in the Court of Equity on a bill for foreclosure. Debt or no debt is purely a legal question, and the parties must try it at law. The Court of Equity acts only upon the equitable security, not upon the debt. It makes the pledge absolute, but it cannot decree the independent payment of the money due, over, beyond
(624) the value of the pledge. His Honor, therefore, erred in the decree as pronounced, because he therein merely declares that the defendant owed the plaintiffs a certain sum at the date of the mortgage, and that the same, with interest, is wholly unpaid, and therefore decrees that the defendant pay to the plaintiffs their said debt and interest, and, to that end, that a sale of the premises be made, and, after applying the proceeds, that execution go against the estate or person of the defendant for the residue. Upon the facts upon the face of the decree, therefore, it cannot stand.

Nor do we think that the allegations of the bill and the proofs will enable this Court to supply the defect in the decree by declaring the facts necessary to support it. There are cases in which this Court will decree the payment of a legal money demand. If the bond or other security be lost, by time or accident, the jurisdiction is established; *a fortiori,* it exists when the creditor has been deprived of them by the fraud of the other party. The object of the bill was to charge that case. The mortgage contains no acknowledgment of debt or covenant to pay money. It purports to be a bargain and sale for two lots of land in

fee simple, in consideration of the sum of $1,502.84 paid by the plaintiffs to the defendant, on the day of the date, 19 March, 1832, with covenants of general warranty, with a proviso, to be void upon payment of the same sum in Charleston, South Carolina, by the defendant, on 11 January, 1834. On its face, therefore, it would not appear to be connected with a personal debt of the defendant. The bill charges, however, that it was; that in truth he owed the plaintiffs that sum for merchandise before sold, and for which they held his note; that, doubting his solvency, they wished further security, and that the defendant proposed to give a mortgage on this property by way of additional security, which they agreed to accept, it being represented to them that the property was of value to answer the debt. The bill then states that when the defendant was about to execute the deed, he claimed to have his note surrendered and canceled, which they acceded to, upon the belief that the defendant was better acquainted with business (625) than they were, and that the deed would be sufficient evidence of the debt, and also the lots a sufficient security; and the bill thereupon charges that in truth the lots will not pay more than half the debt, and that the defendant knew it at the time, and designed by his assertions to the contrary to obtain the surrender of his note upon a false pretense and to cheat them out of the money.

It is manifest that the whole fraud consists in the alleged false representations as to the value of the property. It is not a fraud to obtain a personal discharge from a debt by substituting a real security. It is often a better security and to the advantage of the creditor to get it. The circumstances of the defendant were doubted by the plaintiffs, as the bill admits; and it is not improbable that the creditors should prefer the mortgage, without any security against the original debtor, to his note or bond without the mortgage. The question is, did they or had they reason to expect both or only one? The presumption is the latter only, because they say they consented to give up the note. But they complain that they were entrapped into that. The answer is positive and precise to the contrary, and states that it was distinctly understood that the lots were to be the only security, and that the reason why he insisted on the clause for redemption was that the defendant really thought them worth more and hoped to redeem them. He admits that in that he has been disappointed, and the lots, like most property at county courthouses in the back country, have fallen. In these statements the answer is supported by the subscribing witnesses to the deed. They prove that at the execution of the mortgage the value of the lots was from $1,200 to $1,500; and that upon one of them advising the defendant not to redeem them, but let them go at the price, the defendant said they had cost him more and were worth more, and that he

would redeem them if he could. The other witness says he thinks the lots are now worth the whole debt. Consequently the foundation
(626) laid in the bill for a personal decree against the defendant sinks under the proofs.

As, however, the plaintiffs may possibly recover at law on the original sale and delivery of the goods, or in some other way, the Court will not simply foreclose the mortgage, but so much of the decree as directs a sale of the premises may be affirmed. The residue of the decree must be reversed, with costs in this Court, without cost to either party in the court below.

PER CURIAM. Decree reversed.

Cited: Green v. Crockett, 22 N. C., 393; *Waddell v. Hewitt,* 37 N. C., 253; *Hyman v. Devereux,* 63 N. C., 628.

JAMES TRICE v. WILLIAM PRATT ET AL.

Where several persons agree to purchase land at a sale by the clerk and master, and one of them bids it off, the act of 1819 (1 Rev. Stat., ch. 50, sec. 8), avoiding parol agreements for the sale of land, does not bar the claim of his associates; neither is it a defense to a bill by them that they had a remedy by petition.

THE allegations of this bill were that under an order of the Court of Equity for the county of Orange, upon the petition of the heirs of William Dilliard, the clerk and master (a defendant) was directed to sell a tract of land, described in the bill; that the plaintiff and defendant, with William E. Anderson (also a defendant), became the purchasers thereof as tenants in common, the defendant Pratt bidding for and in behalf of them all, in pursuance of a previous agreement for that purpose; that the plaintiff and the defendants Pratt and Anderson gave joint bonds for the purchase money to the clerk and master; that Anderson afterwards transferred his interest in the purchase to the plaintiff; that the purchase money had been wholly paid, viz., two-thirds by the plaintiff and one-third by the defendant Pratt; that the plaintiff had required a deed for his undivided two-thirds from the clerk and master, but had been refused, because the defendant Pratt had forbidden its execution and had demanded a conveyance of the whole to him as the sole purchaser thereof. The prayer was for a conveyance and
(627) for general relief.

The clerk and master permitted the bill to be taken *pro confesso* against him, and the defendant Anderson in his answer admitted its allegations to be true. Pratt in his answer admitted that he had demanded from the clerk and master a conveyance of the whole land, and had forbidden him to execute a deed for any part of it to the plaintiff, and insisted that he had a right to do so, because he did not make the purchase in pursuance of the agreement charged in the bill, but in his own name and on his own account, because he never agreed to let the plaintiff and Anderson have any share in the land—and if he did, such agreement was by parol, and therefore void, under the act of 1819, avoiding parol contracts for the sale of land and slaves; because, although the plaintiff had paid two-thirds of the purchase money, it was done without his (Pratt's) consent, who could not prevent such payment, as the plaintiff and Anderson were his sureties to the bond for the purchase money; because the plaintiff, if entitled to the relief sought by his bill, might have obtained it by a motion or petition to the court; and, further, that he *had understood* that the payment made by the plaintiff was not in cash, but by receipting to the clerk and master for so much money on account of the shares of the land belonging to the wife of the plaintiff, who was an heir of William Dilliard and to other heirs of said Dilliard to whom the plaintiff was guardian; and, therefore, that he (Pratt) was apprehensive that, those shares being thus received without being duly secured and settled, the purchase money might in equity be held not to have been fully paid, and that he might be made liable for some part thereof.

W. A. Graham for plaintiff.
W. H. Haywood for defendant Pratt.

GASTON, J., after stating the case, as above, proceeded: All these objections are unfounded. The proof is satisfactory that the purchase was made by Pratt, Trice, and Anderson in pursuance of a previous agreement, through Pratt, who was appointed to bid for that purpose.
The act of 1819 has no bearing on the transaction, for it is not a (628) parol contract for a sale of land from Pratt to his copurchasers, but a contract for a sale, and a *judicial sale,* which may be by parol between the clerk and master on the one hand, and the joint purchasers on the other. If the parol evidence of the joint purchase needed any confirmation, it put beyond all doubt by a petition for partition filed by the defendant Pratt against the plaintiff, in which the plaintiff is stated to be the owner of two undivided two-third parts of the land, and the petitioner of the other third, and by a written agreement between the said defendant and the plaintiff, and an award thereupon by persons

chosen for that purpose, providing for the temporary occupation of the land until a final partition should be made.

Whether a summary remedy might have been had by motion or petition, it is needless to inquire. Certainly the court might and, in case of serious controversy, probably would have declined acting in a summary way and required a formal bill to be filed. But it cannot be an objection to the formal and solemn mode of proceeding that it is formal and solemn and affords to the defendant the most ample opportunity of vindicating his supposed rights.

The defendant has offered no evidence to support the truth of what he has "understood" respecting the *mode* of payment which was pursued by the plaintiff, and therefore we cannot find the allegation true. The payment of the whole purchase money is expressly proved by the deposition of the clerk and master, which has been taken by order of the court, and no interrogatory has been put to him on the part of the defendant as to the mode of payment. Upon the admitted ground that the whole purchase money has been duly paid, the defendant has required a conveyance of the entire trust to himself, and the plaintiff asks for a conveyance of two-thirds to him, and the clerk and master stands ready to convey as soon as it shall be judicially ascertained whether the purchase was made solely by Pratt, or jointly by him and his alleged associates in the transaction.

The plaintiff is entitled, we think, to the decree he asks for;
(629) and the costs of the suit must be wholly paid by the defendant Pratt.

PER CURIAM. Decree accordingly.

Cited: Rogers v. Holt, 62 N. C., 111; *Hudson v. Coble,* 97 N. C., 263.

WILLIAM G. STRICKLAND v. JOSEPH FOWLER, ADMINISTRATOR, ET AL.

Gross *laches* is a defense to a bill for specific execution of a contract; but what will amount to it depends upon the circumstances of each case. A delay for nine years will bar a bill seeking the performance of an agreement to sell the life interest of an old person in a lot of slaves, and an account of their hire; for, during the time delayed, the defendant has taken the risk of the life estate.

THE facts of this case, as found by the court, were as follows:

John P. Strickland, the father of the plaintiff, was entitled to nine slaves for the life of his wife, with remainder to her children. An execution issued against him, and his interest in these was sold to one

Newton Wood in the year 1827. At the sale Wood agreed to buy the negroes and permit the plaintiff to redeem them upon paying a debt due him by J. P. Strickland, together with the sum he might bid for them. This agreement never was executed; and in the year 1829 the plaintiff and his brothers and sisters filed their bill against Wood, praying for security of their rights as remaindermen. In his answer to that bill Wood submitted to deliver up the negroes upon being satisfied for his debt and advance. This bill was filed in the year 1836; it set forth the death of Wood; that the defendant Fowler had proved his will, and that either he or the other defendants, the children of Wood, held the negroes; that Mrs. Strickland, the mother of the plaintiff, was still alive; and it prayed an account of the hires of the negroes, and tendered to pay the balance of Wood's claim, if any should exist; and for a specific execution of the contract.

The defendant Fowler, in his answer, stated that he had settled (630) the estate of Wood as early as the year 1833, and delivered the negroes to the other defendants and all the defendants relied upon the act of limitations, and the act of 1819, avoiding parol agreements for the sale of land and slaves, and insisted upon the *laches* of the plaintiff in not sooner bringing forward this claim.

Badger for plaintiff.
W. H. Haywood for defendant.

DANIEL, J., after stating the facts, as above, proceeded: There is no evidence in the cause excusing the plaintiff's *laches*. In decreeing or not decreeing specific performance of an unobjectionable contract, the court, it is said, has a discretion, and so it has, but it is a regulated and judicial discretion, governed by established rules of equity. 1 Mad. C. P., 362. One of these rules is, that if there has been *gross laches* in a plaintiff, a specific performance of an agreement for the purchase of an estate will not be decreed. 1 Mod. C. P., 415.

What shall be deemed *laches* so as to prevent the court decreeing specifically will very much depend upon the circumstances attending each particular case and also whether the plaintiff is in or out of the possession of the estate (*vide* the cases cited in 1 Mad. C. P., 417, 418). The purchase here was, at the first, but for the life of an old lady. The plaintiff has lain by until perhaps the hires of the slaves may pay the debt. The risk of the life of Mrs. Strickland, and of the lives of the slaves, and the risk of the loss of evidence as to the terms of the contract, have been all the time at the expense of the defendants.

A lot of slaves in this country will almost necessarily materially change their value in seven or eight years. Shall the plaintiff, after

such a lapse of time, and after filing his bill for a *ne exeat,* be now permitted to have the amount of the hires carried to the credit of Wood's debt and to call for a specific performance? It would certainly be very much in the teeth of what was said by *Lord Alvanley,* that a party cannot call upon a Court of Equity for a specific perform-
(631) ance unless he has shown himself "ready, desirous, prompt and eager." 5 Ves. Rep., 720, note. We are of opinion that the *laches* of the plaintiff, taken in connection with the other circumstances in the case precludes us from giving him a decree, and on this point the bill must be dismissed. We give no opinion as to the effect of the act of 1819 on the agreement.

PER CURIAM. Decree accordingly.

MARY SHINE v. LITTLEBURY WILCOX.

A tenant for life may in this country clear land for cultivation, if necessary to his enjoyment of the estate, and if done with a due regard to the relative proportion of wood and cleared land which should be preserved upon it.

THOMAS HUDSON devised the tract of land whereon he resided to his wife for and during her natural life, and after the death of his wife to the plaintiff.

The defendant married the widow of the testator, and the plaintiff filed this bill against him for and on account of the value of waste alleged to have been committed by him. The waste was denied by the answer.

The testimony established that there was cleared ground upon the tract sufficient for the employment and, in the opinion of several of the witnesses, for the profitable employment of the slaves which belonged to Mr. Wilcox at the time of the intermarriage; that the land was thin and much worn by previous cultivation; that the defendant occasionally let out parcels of this land; that since February, 1828, the defendant had cleared between fifty and seventy acres of the woodland; that this was done gradually by cutting down for fuel and the uses of the plantation the wood growing thereon, which had been much injured before he came into possession, and never had been plentiful; and that he had turned out a part of the exhausted land and suffered it to grow up
(632) with the ordinary second growth of the country. There was no evidence, unless the fact was to be inferred from this testimony, that any permanent injury has been done to the inheritance, and the only witnesses examined to that point declared that in their judgment it had not been deteriorated in value.

Badger for plaintiff.
The Attorney-General for defendant.

GASTON, J., after stating the case, as above, proceeded as follows: It is insisted on the part of the plaintiff that the clearing of woodland is in itself waste, and that the only exception to this general law is when such clearing is *necessary* for the useful enjoyment of the land by the tenant for life. We are of opinion that this position is laid down too broadly. According to the adjudications in this State, and in most of the States of the Union, the cutting down of timber is not waste unless it does a lasting damage to the inheritance and deteriorates its value, and not then if no more was cut down than was necessary for the ordinary enjoyment of the land by the tenant for life. *Shepard v. Shepard,* 2 Hay., 382; *Ballentine v. Payner, ibid.,* 111; *Jackson v. Brownson,* 7 Johnson's Rep., 227; *Owen v. Hyde,* 6 Yerger's Tenn. Rep., 334. While our ancestors brought over to this country the principles of the common law, these were nevertheless necessarily accommodated to their new condition. It would have been absurd to hold that the clearing of the forest so as to fit it for the habitation and use of man was waste. And, at this day, when a large proportion of our lands is yet wild, the reduction of part of a tract to an arable state may be highly beneficial to the owner. Whether it has been beneficial or injurious to him is a question of fact, which must depend on the relative proportion of the cleared to the wood land, on the comparative value or worthlessness of the trees destroyed, and on the ordinary use made of the trees in the part of the country where the land is situated.

It is not shown in this case that the trees cut down by the defendant were valuable, for sale or for any other purposes than for the support of the plantation, nor that a deficiency was thereby caused of timber sufficient for its permanent support after it should come (633) into the possession of the plaintiff. The exception to the general law of waste, as above laid down, owes its origin also to the usages of the country and to the necessities of widows—the most frequent tenants for life that we have amongst us. The provision for life was regarded as designed for their support, and such an use of the land was necessary for that support, and as prudent proprietors were accustomed to make of their own, was deemed to have been intended in the provision, although the value of the estate might be somewhat impaired thereby.

We hold also that the turning out of exhausted lands is not waste. An improved system of agriculture has commenced with us which, we hope, will in time supersede the present slovenly and, as it respects the country at large, injurious course of husbandry. But as yet the usage is almost universal of cultivating the cleared land until it is worn out,

permitting it to rest and grow up with pines and scrubby oaks in order to shield it from the sun, and return by their straw and leaves a portion of the fertility it once possessed, and clearing new ground to supply the place of that given back to nature. While the tenant for life observes the usual course of husbandry of the country, and does no permanent injury to the estate of him in remainder, such tenant ought not to be deemed guilty of legal waste.

The bill is dismissed, but the Court does not consider this a case in which to decree costs to the defendant.

PER CURIAM. Decree accordingly.

Cited: Crawley v. Timberlake, 37 N. C., 464; *Lambeth v. Warner,* 55 N. C., 167; *King v. Miller,* 99 N. C., 595; *Dorsey v. Moore,* 100 N. C., 44; *Sherrill v. Connor,* 107 N. C., 633; *Emry v. R. R.,* 109 N. C., 611.

(634)

CHRISTOPHER MELCHOR ET AL. V. CHRISTIAN BURGER.

The heir is not put to his election when he claims personal property under a will, and land against it, the will not being executed so as to pass land, unless an express condition is annexed to the gift of personalty that he shall not claim the land.

GEORGE MILLER, by his will, duly executed to pass personal property, but not sufficiently attested to pass land, bequeathed certain negroes to the defendant, the daughter of his deceased child, Esther Burger. The will then proceeded as follows:

"It is further my will that all the balance of my property, both real and personal, after my death, shall be divided and distributed according to the laws of North Carolina relating to the estates of intestates, with this exception alone: my said granddaughter, Christian, shall not be entitled to receive any part of my estate as heir at law of Esther Burger, deceased, other than that bequeathed to her in this will."

The plaintiffs, who, with the defendant, as the child of Esther Burger, are the heirs at law of the testator, filed this bill against the defendant, in which they prayed that she should be compelled, if she elected to take the legacy bequeathed to her, to forego her right in the real estate which descended to the heirs of the testator, or, if she insisted upon her right to the land, that she should give up the negroes to them.

To this bill the defendant demurred, and the demurrer was sustained by his Honor, Judge Toomer, at Mecklenburg, on the last circuit, and the plaintiffs appealed.

No counsel for plaintiffs.
Caldwell for defendant.

GASTON, J., after stating the case, as above, proceeded: Ever since the case of *Noyes v. Mordaunt,* which was decided in 1706 (2 Ves., 581), it has been holden for an established principle of equity that where a testator by his will confers a bounty on one person and makes a disposition in favor of another, *prejudicial* to the former, the person thus prejudiced shall not insist upon his old right and at the same (635) time enjoy the bounty conferred by the will. The intention of the testator is apparent that both dispositions shall take effect, and the conscience of the donee is affected by the condition thus *implied,* that he shall not defraud the design of the donor by accepting the benefit and disclaiming the burden, giving effect to the disposition in his favor and defeating that to his prejudice. The donee is therefore put to his election either to take the thing given and confirm the will, or, retaining what is his independently of the will, to surrender to the disappointed devisees or legatees so much of what the testator has given him as will compensate them for the disappointment. It has, however, been settled in England, at least as early as 1749, that a devise of freehold by one not having legal capacity to devise lands, or not executed according to the solemnities required by law in devises of lands, contained in a will valid as one of personalty, did not impose on the heir disputing its validity an obligation to elect between his rights as heir and the personal benefits bequeathed by the will. *Hearle v. Greenbank,* 1 Ves. Sen., 306; 3 Atk., 695; *Carey v. Askew,* 8 Ves., 492; 1 Cox, 241; *Goodrich v. Sheddon,* 8 Ves., 481; *Thellusson v. Woodford,* 13 Ves., 209. This modification of the general doctrine is founded upon the principle that the attempted devise affords no legal evidence of an *intention* in the testator to devise; or, in the language of *Lord Erskine,* "A devise of real estate was considered a matter of so much solemnity and importance that the law would accept no proof of the act, except what is required for the validity of the act." 13 Ves. Jun., 223. The intention not being before the court, the estate did not appear to have been devised away from the heir, and the will must be read by the Court as if such devise was not in it. Eminent judges have, indeed, expressed dissatisfaction with this reasoning, and have thought that, however ineffectual the attempt to devise, the Court might regard the attempt as indicating an intention to devise, which had failed to have legal effect, as clearly as in the case where the devisor attempts through mistake to devise an estate which belongs to another person. However this may be, the rule is there settled as a rule of property; and if no more appears than a devise from the heir, and a bequest of personalty (636)

to him, in a will sufficiently executed to pass personal, but not sufficiently executed to pass real estate, it is a good will of the personalty; it is no will as to the lands; there is no implied condition of election, and the heir may keep the lands descended, and also take his legacy.

We are not aware of any express adjudication in our State in which this doctrine has been declared with respect to devises under our statute; but we know that it has been regarded by the profession as existing here in full force; and we know of several cases, and some of them involving property to a large amount, in which an election might have been implied but for this supposed rule, and in which it was not attempted to be raised because of the conviction that it was a rule of property not to be controverted. We feel ourselves, therefore, bound so to consider it.

But as a testator may qualify a bounty which he confers by any condition not contrary to law, and as a legatee in such case must take the bounty, if he take it at all, subject to the condition which the testator has annexed to the bequest, it was thought that if in a will sufficient to pass the personal, but not to pass the real, estate, the testator annexes as a condition to a legacy given to his heir at law that the legatees shall permit the persons named in the will to take the lands of the testator, the condition annexed would be effectual, although the devise was void, and the heir must surrender the lands if he insist on the legacy. This was held in the case of *Boughton v. Boughton,* in 1750, by the same eminent lawyer, *Lord Hardwicke,* who decided the case of *Hearle v. Greenbank,* but the year before. In that case, by a will not executed according to the statute of frauds, real estate was given to A., and a legacy to the testator's heir at law, his granddaughter, and in the will was an express clause that if any of his children, or any who might receive benefit by his will, should controvert any part thereof, and not comply with the whole, both as to real and personal estate, they should severally forfeit every claim under his will, and what was given to them should go to his residuary legatee. The chancellor determined that this express clause constituted the distinction between this and the
(637) other cases; that in the other cases, where there was no condition expressed in the will, but the court was to imply a condition on the dispositions in the will, it could notice no dispositions but those which were declared with the formalities prescribed by law; but where a condition was annexed to a personal legacy, the court must examine every part of that conditional bequest, let it *relate* to what it might—to personal or to real estate, or to any other matter whatever. See *Boughton v. Boughton,* 2 Ves. Sr., 11. This distinction between an express and implied condition is perhaps a subtle one. *Sir William Grant,* indeed, has observed that he did not understand why a will, though not executed so as to pass real estate, should not be read for the purpose of

discovering in it an implied condition concerning real estate annexed to a gift of personal property, as it is admitted that it must be read when such condition is expressly annexed to the gift; for that if by a sound construction such condition is rightly inferred from the whole instrument, the effect would seem to be the same as if it were expressed in words. *Bradie v. Barry,* 2 Ves. & Beame, 130. It was also regarded by *Lord Kenyon* as an unsatisfactory distinction. *Carey v. Askew,* 1 Cox, 241. And *Lord Eldon* has said of it that it was "such as the mind could not well fasten upon." *Sheddon v. Goodrich,* 8 Ves., 197. Yet it has been uniformly held to be well established, and is recognized as a fixed rule of property in the case of *Ker v. Wanehope,* 1 Bligh., 23-25.

In the case before us, if we are at liberty *judicially* to notice all the dispositions made or attempted in the will, there can be no doubt but that it was the testator's intention that the defendant should not have any part of his estate, real or personal, except that specifically bequeathed to her. There were two modes by which this intention might have been carried into execution. He might in terms have annexed as a condition of the bequest that she should relinquish and forego in favor of his other heirs and next of kin all her claim to the residue of his estate, real and personal. Or he might have made a disposition of this residue to these, his other heirs and next of kin. We are obliged to say that he has not adopted the former mode, but has attempted to pursue the latter. The words, "My granddaughter shall not be (638) entitled to receive any part of my estate as heir at law of Esther Burger, deceased, other than that bequeathed to her by this will," are not subjoined by way of condition to the bequest in favor of his granddaughter, nor do they contain in terms a forfeiture of the bequest in case she should insist on this claim. They are but a qualification of the clause in which he undertakes to dispose of this residue and except her out of the number of those to whom the residue is given. "It is further my will that all the balance of my property, both real and personal, shall be divided and distributed according to the laws of North Carolina relating to the estates of intestates, with this exception alone, that my granddaughter shall not be entitled to receive any part," etc., etc. It is a devise and bequest of the residue to certain persons, described by a general designation which would embrace the defendant were she not excluded, and from which, therefore, she is excluded. It must have the same operation as if the devisees and legatees had been named instead of being described as a class, with an exception out of that class. Unfortunately for the plaintiffs, this disposition must be read by the Court as though it were a disposition of the testator's personal estate only, and therefore the condition of election which the law of this Court implies is between the specific bequest to the defendant and the bequest of the

residue of the *personal* estate. The defendant, as one of the testator's heirs at law, may therefore insist on her right to a share of the lands descended, without being compelled to make good the devise of these lands, inasmuch as the will contains *no devise* of them which she would disappoint.

The case is felt to be a hard one. We see that, although the demurrer was sustained below, no costs were given to the defendant. This, we think, was perfectly correct; but as there has been an appeal from the decree of the Superior Court, and this Court approves of that decree *in toto,* the defendant is entitled to costs in this Court.

Cited: Tucker v. Tucker, 40 N. C., 84.

INDEX

ABANDONMENT. See Presumption.

ABATEMENT.

1. A Court of Equity may at any time during the second term after the death of the plaintiff in a suit, on motion, declare the suit to be abated, though if the representative of the plaintiff were afterwards to apply within that term, the order would be set aside and the suit be revived, unless such representative had before contumaciously refused to come in and make himself a party. *Collier v. Bank*, 328.

2. The death of a party to a suit in equity does not vacate nor render inoperative the orders made in the cause while the parties were regularly before the court. When revived, it stands upon those orders in the plight in which the death of the party left it. *Ibid.*, 330.

3. No order upon the merits can be made after the death of a party and before revivor. *Ibid.*, 330.

See Injunction, 3, 4, 5.

ACCOUNT.

When an interlocutory order for an account is not reheard nor prayed to be reheard, it ought to be taken as a declaration that plaintiff is entitled to the account prayed for. *Bailey v. Wilson*, 187.

See Executors and Administrators, 1, 10, 16, 17; Partnership, 8, 9, 10; Practice, 3.

ACTS OF ASSEMBLY.

Per RUFFIN, C. J. An act which levies money from the citizen should not receive a strained construction against him. If there be a fair doubt, he should have the advantage of it. *Attorney-General v. Bank*, 218.

2. The default of her officers, and even of the Legislature itself, will not bar the State of a clear right. But their acts under a law which it is contended has given the State a right, commencing with the time of its passage and continued for many years thereafter, afford strong proof of the sense in which the law was understood by those who passed it. *Ibid.*, 224.

ADMINISTRATORS. See Executors and Administrators.

ADVANCEMENT.

Slaves advanced by parol to a daughter by her father upon her marriage, and remaining in the possession of her husband until the death of the father intestate, are, under the act of 1806 (1 Rev. Stat., ch. 37, sec. 17), an advancement at the time of the marriage; and if the daughter die before her father, her husband, and not her children, is entitled to them. *Hinton v. Hinton*, 587.

AFFIDAVIT. See Practice, 1, 2.

AGENT. See Principal and Agent; Principal and Attorney.

ALIENATION. See Assignment, 3, 4.

ANSWER.

1. A vague manner of denial is looked upon unfavorably in equity. *Bailey v. Wilson*, 187.

2. A defendant is bound to answer, not only as to his knowledge, but as to his information and belief. *Ibid.*, 187.

3. Every defense which is intended to be relied upon ought to be brought forward distinctly in the answer; and if not taken in the answer, it cannot be urged on the hearing. *Ibid.*, 187, 188.

ARBITRATION. See Award; Executors and Administrators, 14.

ASSIGNMENT.

1. A defense which is good in equity against the assignor of a note or judgment is available against his equitable assignee. *McKennie v. Rutherford*, 14.

2. To a bill brought by the assignee of a judgment the assignor is a necessary party. *Ibid.*, 14.

3. A deed for land and slaves, upon trust, to apply annually the rents and profits to the use and benefit of the *cestui que trust* for his life, "so that they shall not be sold or disposed of or anticipated by him" without giving the estate over in case of an attempted sale or anticipation, does not prevent an assignment of his interest by the *cestui que trust;* and the assignee has a right to an account of the rents and profits from the time of the assignment; but in such case, if there be ulterior contingent trusts, he has no right to call upon the trustee for the surrender of the possession of the trust property. *Dick v. Pitchford*, 480.

4. The power of alienation is annexed to the ownership of property, and every restraint upon such power is void, as well when the estate is equitable as when it is legal. *Ibid.*, 484.

ATTORNEY.

It seems that an attorney cannot set off his own debt instead of receiving money upon claims put into his hands for collection, so as to bind his client. *Child v. Dwight*, 176.

See Principal and Attorney.

AWARD.

1. An award which directs the share of a partner in specific partnership property to be applied in payment of his debts to his copartners is not inconsistent with a decree which directs it to be paid to the partner himself; and if it were, it is not erroneous. That partner being himself a plaintiff in a bill to review the decree, he cannot object to it for directing money to be paid to him; and what is binding upon him is so upon his coplaintiff. *Waugh v. Mitchell*, 518.

2. Upon a submission of all matters in dispute between copartners, the surviving or settling partner cannot complain of the award because it directs him to pay an outstanding debt of a partnership. *Ibid.*, 519.

3. Where a copartnership owned land, and, upon the death of one of the firm, another covenants to stand in his place as to the survivors, he

AWARD—*Continued.*

cannot object to an award and decree declaring a sale of that land, that the representatives of the deceased partner were not parties to the bill. *Ibid.*, 220.

4. An award under a rule of court which finds facts and submits the law arising from them to the judgment of the court is final. *Ibid.*, 521.

See Bill of Review, 6.

BANK OF NEW BERN, No. 1.

By a clause in the charter of the New Bern Bank (act of 1814, Rev., ch. 870, sec. 11) it is enacted "That a tax of one per cent per annum shall be levied on all stock holden in said bank, except on the stock holden by the State, which shall be paid to the Treasurer of the State by the president or cashier of said bank, on or before the first day of October in each and every year." For eighteen years after the passage of this act the officers of the bank paid the tax specified, but charged it against the whole corporation instead of the private stockholders, whereby the stock holden by the State was made to pay a part of said tax; whereupon an information was filed against the bank to recover the amount of the taxes which had thus been borne by the State stock, and to have the same deducted out of, or charged upon, the stock of private holders; where it was held by the Court, DANIEL, J., dissenting, that by a proper construction of the above-recited clause, taken in connection with other parts of the charter, the tax was not payable out of the profits, as such, declared to each individual; that it was not payable out of the other separate estate of the holders; that it was not payable out of the separate capital of each stockholder, because that could not be reached by the collecting officers, and because, if reached through the corporation, it would render the shares of unequal value, diminish the capital, and be *a fraud on purchasers;* that it was payable, at all events, every year; and that, therefore, for all these reasons, it was payable out of the common funds in the hands of the officers, as such, whether those funds consisted of capital or profit. And it was further held, by the whole Court, that as the stock in the bank was transferable and daily changing owners, a court of equity would not charge the present stockholders, they not being, in many cases, the persons who had been profited by the alleged erroneous mode of payment. *Attorney-General v. Bank*, 216.

Per DANIEL, J. The meaning of the Legislature in the above-recited cause was, that the stock of each individual stockholder should be annually charged with a tax of one per cent. And in making up the accounts for a dividend of profits, the State should have first received the dividends on her stock out of the whole amount of net profits, exclusive of the tax, and then the tax should have been taken from the remaining profits before its division among the private stockholders. *Ibid.*, 216.

BANK, No. 1.

Where a bank charter reserved to the State the privilege of subscribing for shares, upon a part of which it was to be at liberty to defer payment upon allowing the bank to retain interest at the rate of four per cent therefor, out of the dividends of profits of all of the stock

BANK, No. 1—*Continued.*

held by the State, until "such time or times as it might be convenient for the State to pay for the same," and the Legislature by a subsequent act authorized the bank to make a partial dividend of its capital before the expiration of its charter, *it was held* that the Legislature was the sole judge of the conveniency of the time when the payment should be made; that though courts of justice may ascertain whether an individual, under the pretense of convenience, is influenced by caprice or dishonesty, yet they could not judge of the public convenience which involved the consideration of numerous questions of policy, upon which none can pass but the Legislature, and that therefore the State might defer the payment for its unpaid stock until the expiration of the charter. *It was further held,* that a partial dividend of capital would not authorize the bank to retain the whole amount for the unpaid stock of the State, even viewing the State as an ordinary debtor to the corporation, because the debt *was not due* until the State should deem it convenient to pay it, but that in truth the debt of the State was not to be regarded as a debt of the corporation, *independent* of its stock in the corporation, and either ordinarily contracted upon an engagement distinct from its contribution to the capital stock or accepted in lieu of such contribution; that so far as profits were concerned, it was the stock of the State in the bank, but in a division of capital it must be considered as a part of the capital of the bank in the hands of the State, and that such division of capital would operate upon this debt for unpaid stock a total or partial extinction, according as a total or partial division was made. *Attorney-General v. Bank,* 545.

Where the capital stock of a bank has been impaired, a division of its funds amongst the stockholders, although called a division of profits, is in fact a dividend of capital; and if the State has engaged, upon unpaid stock, to allow the bank to retain interest out of the dividends of profits upon all its stock, such interest cannot be taken by the bank while the dividends are really dividends of capital and not of profits. *Ibid.,* 545.

BANK NOTES. See Last Notes.

BEQUEST, No. 1.

1. In a bequest of a slave to A., the words, "but should he die without an heir, the aforesaid slave to return to my family and be equally divided amongst the rest of my children," refer to an indefinite failure of issue, and consequently the limitation is too remote. *Rice v. Satterwhite,* 69.

2. A general disposition of a testator's whole estate, made after several particular legacies, is to be taken as being subject to them. *Ibid.,* 70.

3. A bequest of slaves, with a request that the legatee will permit "said negroes to have the result of their own labor," is a bequest for emancipation, and a trust in them results for the residuary legatee or next of kin. *Sorrey v. Bright,* 113.

4. In a bequest of a residue of personalty, "to be equally divided" among the following persons, viz., "E. B., M. P., J. V., and the children which my daughter T. had by J. S., and the children of my deceased son J.,

BEQUEST, No. 1—*Continued.*

and the children of my son W.," who, it appeared, was then alive, *it was held* that the division among the legatees must be *per capita* and not *per stirpes*. *Bryant v. Scott*, 155.

5. A testator bequeathed a negro woman, together with several other articles of property, to his wife for life, and after her death he gave all the property, except the negro, to be equally divided among five daughters. The negro woman he bequeathed after his wife's death to his daughter B., adding, "After the said negro is appraised by two freeholders, and B. shall pay unto each of her four sisters, above mentioned, one-fifth part of the said appraisement." *It was held*, that after the death of the widow the four sisters were entitled each to one-fifth of the value of the increase which the negro woman had borne during the life of the widow, as well as of the value of the negro woman herself. *Wadsworth v. Armfield*, 323.

6. A bequest to the lawful heirs of A., when it appears in the will that he is living, is equivalent as a description to a bequest to his next of kin or to his children. *Simms v. Garrett*, 393.

7. A bequest to the children of A. is to be divided among those born at the death of the testator. *Ibid.*, 393.

8. A bequest of a slave to A. for life, with remainder to the lawful heirs of B., who, it appears from the will, was alive, is tantamount to a bequest to the children of B., and is to be divided among those who shall be *in esse* at the death of the first taker, and is not confined to those born at the death of the testator. *Ibid.*, 393.

9. A testator bequeathed as follows: "I lend unto my grandson, O. R., three negroes, etc. Now, if in case that the said O. R. should live to arrive to manhood and beget heirs lawfully, the above property to him and his heirs forever; if not, I give and bequeath the above-mentioned property unto my son J. R., to him and his heirs forever." The grandson, O. R., was an infant at the date of the will, but attained the age of twenty-one, and then died without ever having been married. *It was held*, from the use of the word "lend," "that the testator intended to give a life estate to his grandson, to be enlarged into an absolute one upon his marrying and having children; that the word 'manhood' could not be construed to mean 'twenty-one years of age,' and that there was nothing to authorize the change of 'and' into 'or,' and that consequently the grandson, although attaining twenty-one years of age, having died without having been married, the ulterior limitation took effect." *Felton v. Billups*, 484.

10. In a will under the words, "I lend to my son L. the use of my negroes," etc., with a direction that the executors should hire out the negroes yearly and apply the hires to the support of L. for life, "and all the overplus to be applied yearly to the support of my son B.'s family, and after the death of my son L. that my negroes, with their increase, be equally divided between my son B.'s children as they come of age": *It was held*, that the children of B., born during the life of L., took vested interests. *Vanhook v. Vanhook*, 589.

11. A bequest of chattels is within the rule in *Shelly's case;* and the words, "I lend my daughter C. my negroes, etc., during her lifetime or

BEQUEST, No. 1—*Continued.*

widowhood, and then I give them to her lawful heirs, for them and their heirs forever," pass the absolute interest in the slaves to the daughter. *Ham v. Ham*, 598.

12. The repetition of similar clauses in a will do not vary the construction which one of itself would receive. *Ibid.*, 601.

See Executory Devise; Gift; Legacy.

BILL ON INTERPLEADER.

The plaintiff in a bill of interpleader is entitled to his costs out of the fund, when the bill is filed properly; otherwise not. *Harrison v. Battle*, 213.

BILL OF REVIEW.

1. Whether the Supreme Court can entertain jurisdiction of bills to review its own decrees on account of newly discovered testimony, *quere?* But if it can, leave will not be granted for that purpose without notice to the other party to show cause against the application. *Love v. Blewitt*, 108.

2. Leave to file a bill of review for newly discovered testimony will not be granted to enable a party to adduce additional testimony to a point at issue, nor where the evidence might with ordinary diligence have been had at the hearing. *Ibid.*, 110.

3. The signature of one counsel is sufficient to bills of review, for if filed upon newly discovered evidence, they are allowed by the Court; if for error in law, they are a matter of right. *Gilchrist v. Buie*, 354.

4. After an appeal prayed and allowed, and a failure to prosecute it, the appellant may still file a bill of review. *Ibid.*, 354.

5. Upon a bill of review for errors in law, only those can be reëxamined which are pointed out; and where the error assigned was that general covenants were not directed to be inserted in a deed, the plaintiff cannot, at the hearing, object that the deed was improperly executed. *Ibid.*, 359.

6. Upon a bill to review a decree founded upon an award, the original is not, if erroneous, to be revised, but only to be corrected in those particulars in which it is wrong, and made to be what it originally ought to have been. *Waugh v. Mitchell*, 510.

See Decree, 1.

BILLS, BONDS AND PROMISSORY NOTES. See Assignment, 1; Lost Notes, 2.

BOND.

A bond given for the amount of an account is not rendered voluntary by the fact that the obligor had a set-off of equal amount which was waived. *Geddy v. Stainback*, 475.

CHAMPERTY.

The assignment of a *cestui que trust*, if he or his trustee be in possession, is not champerty or maintenance, although another may have intruded into part of the land. *Falls v. Carpenter*, 283.

CLERK AND MASTER.

Upon a sale of land under order of the Court of Equity, the clerk and master has no power to execute a deed, except under the Acts of 1812 and 1818 (Rev., chs. 847 and 982), where the land is condemned for public purposes, or where the sale is for partition. *Bank ex parte*, 75.

COMMISSIONS.

Where one of two joint executors and testamentary guardians settled with his ward, and was allowed commissions, that allowance is no criterion for estimating the commissions to the other. The compensation to the latter must depend on the time he employed, the labor he performed, the services he rendered, and the responsibility he encountered in the performance of his duties. *Hodge v. Hawkins*, 564.

See Executors and Administrators, 15.

CONTRACT.

1. Equity will not cancel a contract, fair in its origin, upon the score merely of default or abandonment. *Falls v. Carpenter*, 267.

2. There cannot be a case of that sort, upon which that relief could be asked in equity, in which the facts on which it was asked would not defeat an action at law on the contract. *Ibid.*, 267.

3. The rule that a deed obtained from one who had executed a former voidable instrument is not binding, unless he knew that the first was not obligatory, and gave the second expressly to cure the *vice* of the first; does not apply to a contract which has no *vice*, but is fair, and in respect to which the only question is whether it continues to be the contract between the parties. Acts done under such a contract establish its subsistence, and they do not constitute a case of confirmation, but of part performance. *Ibid.*, 269.

4. Evidence to prove the rescinding of a written contract by a subsequent parol agreement must be clear, positive and above suspicion. *Ibid.*, 273.

See Idiots and Lunatics, 3.

CORPORATION.

Per RUFFIN, C. J. The natural construction of a charter creating a corporation is that all the privileges conferred, all the duties declared, and all the burdens imposed relate to it as a whole, and not to the individuals composing it. And although the contrary may be enacted, it ought to be clearly done before the corporators, as natural persons, can be affected. *Attorney-General v. Bank*, 219.

COSTS.

1. Two sets of solicitor's fees are not taxed in a cause removed to the Supreme Court, viz., one in that Court and one in the court below; and execution for such costs can only issue from the Supreme Court. *Falls v. Birchett*, 449.

2. The uncontested insolvency of an intestate does not entitle his administrator to costs. *Davis v. Howcott*, 466.

See Bill of Interpleader.

COVENANT.

It seems, that although before eviction, after a judgment in ejectment, the covenant for quiet enjoyment is not broken, yet if the tenant of the vendee requires a new title after such judgment and before his eviction, it will amount to a breach of that covenant, so as to entitle the vendee to his action. *Clapp v. Coble*, 177.

CREDITOR.

1. A donee cannot resist a bill to set up a prior voluntary deed of the donor's upon the ground that he is a creditor of the donor, but must assert his right as creditor in a suit at his instance. *Tate v. Tate*, 30.
2. A court of equity never assists a creditor who has been guilty of usury; and where, according to the bill, usurious interest was incorporated in a note by the fraudulent contrivance of the debtor, for the purpose of taking advantage of it and avoiding the debt, relief was refused. *Bank v. Knox*, 50.
3. In equity, satisfaction of a debt is never enforced until it has been established at law. *Ibid.*, 53.
4. A creditor who, by a misrepresentation, induces another person to execute a bond as surety for his debt, will not be permitted in equity to subject the latter to its payment. *Bird v. Chaffin*, 55.
5. A plaintiff who seeks the aid of a court of equity to obtain satisfaction of his judgment at law ought not only to establish his debt there, but sue out execution. *Clark v. Banner*, 608.
6. Whether a return of *nulla bona* on such execution be necessary, *quere? Ibid.*, 608.
7. A creditor cannot obtain the aid of a court of equity to procure satisfaction of his debt, under any circumstances, until he has established his claim at law and issued an execution therefor. *Bethell v. Wilson*, 610.
8. The question of debt, or no debt, cannot be tried by a court of equity unless there is no remedy at law, as in cases of lost bonds and the like. *Fleming v. Sitton*, 623.

DECREE.

1. One against whom a decree has passed cannot sustain a bill praying relief inconsistent with that decree, by making another party and charging a subsequent interest in him. The proper course is to file a bill of review as to the original parties, charging supplementally the interest of the new defendant. *Gilchrist v. Gilchrist*, 362.
2. A decree cannot be had upon the testimony of one witness unsupported by circumstances against the plain and direct denial of the defendant in his answer, although the plaintiff swear to his bill upon obtaining an injunction. *Gaither v. Caldwell*, 508.

DEED.

1. A delivery of a deed to a third person for the benefit of the bargainee renders it effectual until the latter dissents. *Tate v. Tate*, 26.
2. An infant bargainee may assent to such a delivery, and his assent is presumed until the contrary appears. *Ibid.*, 26.

DEED—*Continued.*

3. The presumption of a delivery which arises from the execution and attestation of a deed valid at law does not take place as to one by a husband to his wife. There must be proof of a delivery in fact, or of acts or declarations of the parties, from which it may be inferred. *Elliott v. Elliott*, 65.

See Husband and Wife, 2, 3, 4.

DEVISE.

1. Where a testator devised lands to two of his sons, and the survivor of them, in trust, to be sold, and by a subsequent clause appointed them executors, and provided that in case both his said sons should die before a sale and conveyance of the lands, another person should sell and convey, and execute all the trusts of the will, and by a codicil appointed that other also executor, *it was held* that neither the substitution in the will nor the appointment as executor in the codicil authorized the other person to interfere in the sale of the land during the life of the sons, or either of them. *Worth v. McAden*, 199.

2. Where a testator devises as follows, "I devise to my wife the use of the lands and buildings whereon I now live, for and during the term of her natural life, and after her death it is my will and desire that the said land, etc., shall be sold by my executors and at their discretion, and the proceeds thereof be equally divided between my four children or the survivors of them," and, before the death of the widow, she and the executors, upon petition, procured the land to be sold by the clerk and master, under an order of the Court of Equity, and the purchase money was paid to him and never came to the use of the children, *it was held* that the latter were not barred of their legal title to the land. *Davis v. Howcott*, 460.

See Bequest; Executory Devise; Lands; Tenant for Life, 1.

DISTRIBUTION.

Next of kin, born before the time when distribution is to be made, are not entitled, under the statute, unless they were *in ventre sa mere* at the death of the intestate. *Grant v. Bustin*, 77.

DIVORCE.

Where a marriage was solemnized in South Carolina between persons resident there, and the parties afterwards removed to, and acquired a domicile in, Tennessee, from whence the wife removed to this State, *it was held* that a decree dissolving the marriage made by a court in Tennessee, upon the petition of the husband, exhibited six years after the removal of the wife to this State, and without personal service upon her, was a nullity, and that a marriage contracted by the wife before the death of her husband was void. *Irby v. Wilson*, 568.

See Jurisdiction, 2.

DOMICILE. See Husband and Wife, 5.

DOWER. See Frauds and Fraudulent Conveyances, 1, 2; Heirs, 3.

EJECTMENT. See Covenant; Landlord and Tenant.

ELECTION.

1. Where, upon the bill and answer, it appears the defendant can claim under the wills of two testators, and no election, nor any fact which puts him to one is charged, none will be decreed. *Lindsey v. Etheridge*, 36.
2. Whenever a devisor gives away by will the property of a devisee, so that the claim of the devisee to the latter defeats the will, a case of election arises upon the presumed intention of the devisor, but the implication of this intention must be plain, as it is not readily to be supposed that one gives away the estate of another. *Arny v. Arny*, 376.
3. The heir is not put to his election when he claims personal property under a will, and land against it, the will not being executed so as to pass land, unless an express condition is annexed to the gift of personalty that he shall not claim the land. *Melchor v. Burger*, 634.

EMBLEMENTS. See Tenant for Life.

ENTRY.

1. The act of 1783 (Rev., ch. 185, sec. 11), requiring entries of land to set forth the nearest watercourses, mountains, etc., is merely directory and does not avoid entries, because they are not as special as they might be made. If, from the want of distinguishing marks to identify the land, a second enterer has been misled, the first is void as to him; but if he had notice of the first before he paid his purchase money, it is valid as to him, notwithstanding the defective description. *Harris v. Ewing*, 369.
2. The time fixed by the act of 1808 (Rev., ch. 759) for the payment of the purchase money for entries of land is the 15th day of December in the second year after the entry, not the second 15th of December after its date. *Ibid.*, 371.
3. If land be described in an entry as adjoining land of D. C., the fact that D. C. did not own any land adjoining does not in itself vitiate the entry, especially where the adjoining land was reputed to belong to D. C., although he never had title to it. *Ibid.*, 371.

EQUITY OF REDEMPTION. See Execution and Execution Sale, 14, 15; Mortgage, 3.

EVIDENCE.

1. Upon a bill seeking satisfaction of an equitable demand against a deceased debtor from property in the hands of his donee, *it was held* that a decree against the administrator of the donor in a former suit, establishing the debt and ascertaining that he had fully administered, was not admissible to prove the case of the plaintiff. *Dozier v. Dozier*, 96.
2. A defendant, against whom the plaintiff must have a decree, if he gets one at all, cannot, by giving a release of his interest to his codefendant *pendente lite*, become a competent witness for them. His liability for costs, if nothing else, would exclude him. *Falls v. Carpenter*, 237.
3. In the absence of fraud, mistake or surprise, parol evidence cannot be received to prove that a bond, payable immediately, was not to be demanded until after the obligor's death. *Geddy v. Stainback*, 475.

EVIDENCE—*Continued.*

4. Parol evidence, although it may be inadmissible to reform a written contract, yet is received to repel a specific execution of it; but in the latter case it cannot be received to show that the written contract was not the one made, but to prove fraud, accident or surprise, raising an equity to rebut the claim to specific execution. *Ward v. Ledbetter*, 496.

EXECUTION AND EXECUTION SALE, No. 1.

1. Where A. purchases the land of B. at execution sale, and assigns his bid to C., and it is again sold under an execution against C. and bought by D., and A., conferring with C. to defeat D.'s title, takes a deed from the sheriff, a court of equity will compel him to convey to D. *Henderson v. Hoke*, 119.

2. The interest of a purchaser at sheriff's sale, who has paid the purchase money, but has not received a deed, is subject to execution, under the act of 1812 (Rev., ch. 836). *Ibid.*, 137.

3. That act extends to all cases where the whole beneficial interest is in the defendant in the execution, as well when it is created by deed as where it results from operation of law. *Ibid.*, 138.

4. And when the trust is constructive, a court of equity will aid the purchaser by directing the trustee to convey to him. *Ibid.*, 139.

5. And if the sheriff neglects to make a deed to the purchaser, one who buys the latter's interest under another execution can in equity call upon the sheriff to perfect the evidence of his title by executing a deed to the first vendee. *Ibid.*, 139.

6. Neither the plaintiff nor defendant can direct the application of money received by the sheriff on an execution. The powers and duties of the sheriff in that respect are beyond the control of either party, as the law itself applies the money raised on an execution. *Child v. Dwight*, 171.

7. The application of money raised on execution, at law, furnishes no ground for relief in equity, as a more obvious and available remedy may be had by motion in the court of law upon the return of the execution. *Ibid.*, 175.

8. Slaves held in trust, to be divided among A.'s children "who may be now living, and those who represent a deceased child, in proportion, and after the same manner as if they were claiming them as next of kin of their father," are not liable to an execution at law. And in equity a creditor under an assignment, subsequent in date to the execution, but prior to the bill of the plaintiff, in such execution to subject the fund, is preferred. *McKay v. Williams*, 398.

9. A creditor whose execution has no lien upon a trust estate can subject it in equity only upon the ground that he cannot otherwise procure satisfaction. The jurisdiction is original; and as priority of time is regarded in equity, any other person having *bona fide* a specific lien prior to the filing of his bill is preferred to him. *Ibid.*, 398.

10. But where the execution has a lien at law, the jurisdiction becomes ancillary, and the legal priority is not lost by seeking that relief. *Ibid.*, 398.

EXECUTION AND EXECUTION SALE, No. 1—*Continued.*

11. A trust estate is not liable to execution at law unless it be a pure and simple one, in which nothing is to be done by the trustee. *Ibid*, 405.

12. Whether the interest of one tenant in common of a trust estate can be sold at law under execution, *quere? Ibid.*, 406.

13. A court of equity will not enjoin an execution because the defendant at law has paid it, when he might have proved that fact on the trial, and was not by fraud or surprise prevented from so doing. *Woodfin v. Smith*, 451.

14. The act of 1812 (1 Rev. Stat., ch. 45, sec. 5), subjecting equities of redemption to execution, extends to those subjected to redemption by construction of a court of equity, as well as those expressly made so by the terms of the mortgage. *Thorpe v. Ricks*, 616.

15. A sheriff's deed for an equity of redemption is effectual, although it does not describe the land as under mortgage, the act of 1812 being in this respect merely directory. *Ibid.*, 618.

See Injunction, 2.

EXECUTOR DE SON TORT.

1. A parol gift of slaves is void as to creditors of the donor if he died without leaving other property sufficient to pay *all* his debts, and the donee may be subjected at law as an executor *de son tort*. *Dozier v. Dozier*, 103.

2. A court of equity does not charge a person as executor *de son tort*, but only in respect of his possession of the fund. *Ibid.*, 104.

EXECUTORS AND ADMINISTRATORS, No. 1.

1. Serving an executor with process for the plaintiff's own demand does not in equity restrain his power of preferring other debts of equal dignity. But the rule is different when the object of the bill is to have an account of debts and assets and for all the creditors to come in under the decree. *Allison v. Davidson*, 46.

2. In equity, upon a bill against an executor to enforce the payment of a debt, nothing but a final decree restrains voluntary payments of other debts of like degree by the defendant. *Ibid.*, 48.

3. Where the executors of a partner are made defendants by a *sci. fa.* to a bill against him for an account of the partnership, they cannot be charged with partnership effects which came to their hands since his death. *Ibid.*, 49.

4. The jurisdiction of a court of equity being primarily *in personam*, if an executor has assets the court establishes the debt and decrees payment by him; but if he has fully administered, the bill is dismissed; and a decree ascertaining the debt and establishing that the executor has fully administered is in substance one of dismission. *Dozier v. Dozier*, 104.

5. An administrator who *bona fide* carries on a suit commenced by his intestate will be allowed the expenses of such suit as a proper disbursement. *Clapp v. Cobbe*, 177.

EXECUTORS AND ADMINISTRATORS—*Continued.*

6. The probate of a will and qualifying as executor thereto is an acceptance of a trust of *personalty* declared therein, and the executor cannot afterwards refuse to perform the trust. *Worth v. McAden*, 199.

7. Whether an executor can, at the time of qualifying, by some solemn and authentic act, renounce the office of trustee for a trust of personalty declared in the will, *quere? It seems* that he cannot. *Ibid.*, 199.

8. Whether the acceptance of the office of executor necessarily carries with it the acceptance of trusts in relation to *realty* which the testator authorized and directed his executors to perform, *quere? Ibid.*, 199.

9. The sale of negroes belonging to an estate without a previous order of court is irregular, and any losses occurring under such sale are *prima facie* chargeable on all the executors who concurred in making it. But if the sales ought to have been made, the mere neglect to procure order of court does not impose this liability. *Ibid.*, 211.

10. In taking an account against an executor who, without any *actual fraud* on his part, is chargeable because of the *devastavit* of his coexecutors, no further evidence of credits for disbursements or advancements made by such coexecutor is to be required than can reasonably be demanded of one who was not personally cognizant of them, and cannot be supposed to possess regular vouchers therefor. *Ibid.*, 212.

11. Where one of two coexecutors took possession of the effects of the testator, sold them, and received and kept the bonds taken for the same, and the other executor did not interfere in the management of the business further than to assent to the sales and join in signing the inventory and account of sales, *it was held* that the latter, not having done anything more than the law required of him, was not responsible to the legatees for the *devastavit* of the former. *Ochilltree v. Wright*, 336.

12. When coexecutors are appointed curators or trustees of a fund bequeathed by their testator, each is responsible only for what was in his hands or under his control; and as neither has any authority to take from the possession of another the property of their *cestui que trust*, he cannot therefore be made answerable for the default of that other. *Ibid.*, 336.

13. Formerly there was a distinction between coexecutors and cotrustees joining in a receipt for money. In the former case both were held responsible; in the latter, only he who actually received the money. Now the rule in regard to coexecutors is, that the joining in a receipt, though not absolutely necessary, is not *conclusive* against an executor any more than against a trustee. The true inquiry in these cases is whether the money received was under the control of both executors; and the joining in the receipt is evidence of that control, though it is not conclusive. *Ibid.*, 340, 341.

14. The courts of this State have no power to make submissions to arbitration rules of court, excepting when the subject-matter of the submission is a suit pending in them; and the Superior Court has no power to make an order appointing commissioners to audit and settle

EXECUTORS AND ADMINISTRATORS—*Continued.*

the accounts of an executor. An order of that court appointing commissioners is only obligatory so far as it sets forth a contract between the parties to it; and one made upon the joint petition of the executors and creditors, directing commissioners "to adjust and finally settle" the accounts of the former, in the absence of proof to the contrary, is taken as only authorizing them to make a statement of his receipts and disbursements, and to allow his commissions, and does not confer the right to disturb the priorities of the creditors or in any way to interfere with the legal course of administration. *Alexander v. Burton*, 469.

15. Although a court of equity may, when it is applied to for the settlement of an estate, determine the question of the commissions to be allowed the executor as incidental to the main question, yet it will never do so without a reference. *Newby v. Skinner*, 491.

16. A judgment confessed by an administrator is *prima facie* fair, and in the absence of all proof that it is otherwise is to be allowed in settling the accounts of the administrator. *Powell v. Myers*, 502.

17. Mere technical informality in the entry of a judgment is not cause for rejecting it as a credit in an administrator's account. *Ibid.*, 502.

18. A sale by an executor of the chattels belonging to his testator is good, and the purchaser is not obliged to see to the application of the purchase money; and this although the testator has created a particular fund for the payment of his debts, of which the property sold does not form a part, and the purchaser has notice of the will. But if the sale be collusive or in a way to enable the executor to commit a *devastavit*, in equity the purchaser will be liable. *Tyrrell v. Morris*, 559.

19. The same rule applies to a pledge by the executor; also to an agreement turning a pledge into an absolute sale. *Ibid.*, 559.

20. A private sale, made by an executor, of the chattels of his testator, without an order of the County Court, is valid unless impeached for fraud. *Ibid.*, 562.

21. Where a testator leaves the same person executor of his will and guardian of his children, he is chargeable with simple interest only for the time he was acting as executor; but from the time when the administration of the estate was or might have been concluded he is to be charged with compound interest unless he can show special equitable circumstances to discharge him of such accountability. *Hodge v. Hawkins*, 564.

See Commissions; Costs, 2; Remainder, 1.

EXECUTORY DEVISE.

1. In England a limitation over upon a bequest of personalty, in case of the first legatee "shall die without leaving any issue," is good. The same words in a devise either reduces an estate in fee to one for life, or enlarges an estate for life to an estate-tail. In this State, since our act of 1784, abolishing entails, the same construction is put upon the words in both cases. The words, "without leaving issue or children," clearly confine the time to the death of the legatee. *Clapp v. Fogleman*, 466.

EXECUTORY DEVISE—*Continued.*

2. The first taker has always been held to be a trustee for the executory devisees. *Ibid.*, 468.

FAMILY ARRANGEMENT.

If, to prevent a contest about the probate of their father's will, certain brothers executed articles of agreement among themselves, providing for a more equal distribution of their father's estate than that contained in his will, such agreement will not be considered as voluntary and without consideration, but will be enforced in equity as a fair family arrangement, independent of its being a compromise of doubtful rights. *Bailey v. Wilson*, 182.

FRAUDS AND FRAUDULENT CONVEYANCE, No. 1.

1. An advancement to the children of a first marriage, made before a second was contemplated, is not a fraud upon the second wife's right to dower, and this as well as where she knew of the deed before her marriage, as where she was ignorant of it. *Tate v. Tate*, 22.

2. It seems that conveyances in contemplation of marriage, made to defeat the future wife's dower, are within the equity of the act of 1784 (Rev., ch. 204, sec. 8).

3. Within the statute of frauds the signature to a contract for the land need not be that of the principal nor in his name; that of the agent is sufficient. *Oliver v. Dix*, 165.

4. Where a man in embarrassed circumstances, whose property was advertised for sale under a deed of trust, was induced to permit a tract of land which he would not have had sold if the trust could have been otherwise satisfied to be exposed to sale by the promise of one who wished to buy that he should have time to redeem it, and the effect of this promise was to stifle competition and enable the person making it to purchase at an under value, a court of equity will compel such purchaser to submit to a redemption; and the act of 1819 (Rev., ch. 1016) will be no bar to such relief. *Neely v. Torian*, 410.

5. Where the plaintiff in an execution obtained his judgment by fraud—there being no debt due him—and fraudulently prevented the defendant having it reversed, in equity he shall have no benefit under it. *Dudley v. Cole*, 429.

6. Whether the purchase of a stranger to the judgment would be protected, *quere? Ibid.*, 429.

7. Where land is sold under two judgments, one fair and the other fraudulent, and is purchased by the plaintiff in the latter, whose money is paid to both, the deed of the sheriff shall stand only as a security for the sum paid to the former; and, *it seems*, he shall not have this protection if the sale under both is procured by his fraudulent management. *Ibid.*, 435.

8. Where several persons agreed to purchase land at a sale by the clerk and master, and one of them bids it off, the act of 1819 (1 Rev. Stat., ch. 50, sec. 8), avoiding parol agreements for the sale of land, does not bar the claim of his associates; neither is it a defense to a bill by them that they had a remedy by petition. *Trice v. Pratt*, 626.

See Creditor, 4.

GIFT.

Where a father, since 1806, made parol gifts of slaves to his children, and afterwards by his will directed all his slaves to be equally divided between his six children, *it was held* that the slaves given to the children, and in their possession at the death of the testator, were to be included in the division. But *it was also held* that no account was to be taken of slaves so given, which the children had sold during the testator's lifetime; neither was a slave purchased by a child and paid for by the father to be estimated as one of the father's in making the division. *McCannell v. Peoples*, 601.

See Advancement; Executor de son Tort, 1.

HEIRS.

1. To a bill enjoining the heir from ejecting the plaintiff from land which descended upon the former, upon the ground that the latter had purchased under the erroneous idea that the heir was barred, and had paid the debts of the ancestor to the value of land, the deficiency of the personal estate is all that gives an equity to the plaintiff, and to ascertain that the personal representative of the ancestor is an indispensable party. *Harrison v. Wood*, 437.

2. At law, the heir is entitled to possession until a judgment against him; and so in equity, as against a creditor not having a specific lien, he is entitled until a decree. *Ibid.*, 439.

3. A right to have dower assigned, without an actual assignment of it, does not, either at law or in equity, repel the heir's right to the possession. *Ibid.*, 440.

HUSBAND AND WIFE.

1. As all the acquisitions of a *feme covert* made by her own act, during the coverture, inure to her husband, a bill seeking to enforce the execution of an agreement for the purchase of property, and a conveyance of it to the sole and separate use of a married woman, her husband not joining in it, will be dismissed. *Lanier v. Ross*, 39.

2. A deed whereby a husband conveyed to his wife several slaves, without the intervention of a trustee, will not be set up in equity, where the parties lived unhappily, where there was no evidence of a delivery, except the production of the deed by the wife after the death of her husband, and where she had never claimed the slaves during the husband's life, but had permitted them to be sold by his administrator and had purchased some of them. *Elliott v. Elliott*, 57.

3. Whether a defective gift from a husband to his wife will be aided in this State, *quere?* But certainly it will not be unless she shows merits, and a clear intention by the husband to divest his title and hold for her benefit. *Ibid.*, 62.

4. The deed of husband and wife, where the privy examination of the latter is taken before the acknowledgment of both, is void. *Gilchrist v. Buie*, 359.

5. The domicile of the husband is that of the wife, for some purposes, as for regulating her claim to distribution of his estate in case of intes-

HUSBAND AND WIFE—*Continued.*

tacy. But where husband and wife have adversary interests in a suit between them, her domicile is where she actually resides. *Irby v. Wilson*, 581.

See Advancement; Deed, 3.

IDIOTS AND LUNATICS.

1. The jurisdiction in lunacy is strictly territorial, and a court of equity in this State can neither charge his land in another, nor its proceeds in the hands of his heir *here*, for his support. *Allison v. Campbell*, 152.

2. The estate of a lunatic cannot be subjected for his support by process either against him or his heirs, but can only be administered by an order of the court having jurisdiction in cases of lunacy. *Ibid.*, 153.

3. If a person contracts with a lunatic, in good faith, without taking advantage of his situation, and without knowledge of the lunacy, a court of equity, although the contract is legally void, will not interfere to deprive such person of the advantages he has obtained, without restoring to him whatever benefit the estate of the lunatic has received by the contract. *Carr v. Holliday*, 344.

INFANTS. See Deed, 2.

INJUNCTION.

1. When the defendant, in his answer to an injunction bill, admits its equity, but sets up matter in defense, the injunction will be continued to the hearing. *Lindsay v. Etheridge*, 38.

2. Upon the partial dissolution of an injunction the defendant in equity may have an execution there for the sum as to which the injunction is dissolved; but if, instead of that, he sues at law upon the injunction bond, he cannot afterwards, upon the total dissolution of the injunction, have an execution from the court of equity, his only remedy being upon his judgment at law. *Harrison v. Casey*, 322.

3. The abatement of a suit in equity for an injunction is not of itself a dissolution of the injunction. It requires an order of the court for that purpose, which order it is competent for the court to make, after an abatement by death. *Collier v. Bank*, 328.

4. Upon the abatement of an injunction suit in equity, the defendant, on motion, may have an order for the dissolution of the injunction, and thereupon a judgment upon the injunction bond against the sureties thereto. *Ibid.*, 328.

5. If the motion for the dissolution should be made at the second term, no notice thereof need be given to the plaintiff's representative; but if the defendant neglect to move at that term, it may be necessary that he should give notice of his motion, or that the order should be prospective, and be served on the plaintiff's representative. *Ibid*, 328.

INTEREST. See Executors and Administrators, 21.

JOINT DEFENDANTS.

Where a bill is filed upon a claim against two defendants jointly, and one suffers the bill to be taken *pro confesso*, and the other sets up a

JOINT DEFENDANTS—*Continued.*

defense which defeats the claim altogether, the bill must be dismissed as to both, though without costs to him who made default. *Andres v. Lee*, 318.

JUDGMENT.

1. A court of equity does not interfere with judgments because they are erroneous, either in fact or in law, but simply because they are unconscientious; and this as well when they are correct as when they are erroneous. *Dudley v. Cole*, 433.

2. A verdict and judgment at law for the same property sought to be recovered in equity is no bar, where the plaintiff's title is purely equitable. *Blue v. Patterson*, 458.

3. Matters of equitable defense against a judgment at law cannot be set up to prevent the removal of an encumbrance operating as an impediment to the satisfaction of it, but must be urged by a bill seeking relief against it. *Stainback v. Geddy*, 479.

4. A judgment against a person who has had no opportunity for defense is not entitled to respect in the courts of another country, unless, *it seems*, both parties were subjects of the country by whose tribunals it was pronounced. But where the defendant was the subject of another country, such a judgment has extra-territorially no validity, although strictly correct, according to the *lex loci*. *Irby v. Wilson*, 576.

See Assignment, 1, 2; Divorce; Jurisdiction, 2.

JURISDICTION.

1. The Constitution of the United States, in providing that full faith and credit shall be given to the judicial proceedings of one State in the courts of another, intended only to render the record of a suit *inter partes* conclusive; not to enable a State to assume jurisdiction of persons without her boundaries, and dispense with the service of process. *Irby v. Wilson*, 578.

2. The laws of this State giving jurisdiction in cases of attachment and non-resident defendants in equity, and for divorces, are objectionable, except when they merely authorize the condemnation of the property attached, or dispense with the necessity of making a non-resident a party. But this imperfection is not a reason why judgment obtained under similar laws in other States should not be enforced here. *Ibid.*, 580.

See Idiots and Lunatics, 1, 2.

JUSTICE. See Principal and Agent.

LACHES. See Specific Performance, 4.

LANDLORD AND TENANT.

A tenant, against whose landlord a judgment in ejectment has been recovered may, after such judgment and before eviction, purchase in the title of the real owner, and hold the possession of the land as his own, under his newly acquired title. *Clapp v. Coble*, 177.

LANDS.

1. Where an executor sold lands, and applied the proceeds to the payment of debts, under a mistake of his power, and the purchaser is evicted by the devisee, the land, in equity, will be subjected to indemnify the purchaser, to the extent to which his money was applied to his debts, over and above the personal estate. *Scott v. Dunn*, 425.

2. Where a testator directs land to be sold and the proceeds divided, it is not a conversion of the land into personalty out and out, but merely the appointment of a mode of division; and those entitled to the purchase money take as devisees, and not subject to the payment of debts until the personal estate is exhausted. *Newby v. Skinner*, 488.

3. The person entitled to the proceeds of land directed by a testator to be sold, may take the land itself without a sale, but it is regarded in equity as personalty, and if he die without changing its quality, it will be personalty, as between his heir and executor. *Ibid.*, 490.

See Clerk and Master—Devise.

LEGACY.

1. A legacy to the wife of the testator, payable two years and three months after his death, during which time land for a residence was devised to her, and the executor was directed to sell other land, so as to have the money ready to pay her at the expiration of that time, and which was expressed to be in lieu of her dower, upon her death before the time of payment, survives to her representative. *Ford v. Whedbee*, 16.

2. A legacy to one of the testator's next of kin "which will include every part of my estate intended for him," will not bar his claim to a share of the residue undisposed of. *Ibid.*, 21.

3. A legacy to a wife "until my youngest living child comes of age," and "if she dies before my youngest living child," etc., then "to be equally divided among my living children," but "if she lives until youngest child," etc., "she shall have an equal share of my estate as is mentioned," does not vest in the children until the youngest arrives at full age, or until the death of the wife. *Gill v. Weaver*, 41.

4. A legacy to two or more children with words of survivorship vests at the death of the testator, if the words will admit of that construction. But if a previous life estate be given, generally it does not vest until the death of the legatee for life. *Ibid.*, 42, 43.

5. When the proportion to which one of several legatees is entitled cannot be fixed at the death of the testator, words of survivorship refer to the time of division. *Ibid.*, 43.

6. If the *lex domicilii* of the testator avoids a legacy, it is not made valid by that of the legatee. *Sorrey v. Bright*, 115.

7. A lapsed legacy does not fall into a residue which is only partial in its nature, though it requires very special words to deprive a residue of its general character. Where a residue consisting of crop, stock and furniture was given, *it was held*, that a lapsed legacy of a slave did not fall into it, but was subject to distribution under the statute. *Simms v. Garrot*, 393.

LEGACY—*Continued.*

8. A legatee for life is entitled to the increase of cattle, and the interest of money. *Perry v. Terrell*, 441.

See Bequest; Residue and Residuary Clause; Tenant for Life.

LIMITATIONS, STATUTE OF.

1. Where an administrator made a mistaken distribution of slaves, and afterwards a decree was pronounced against him in favor of those really entitled, correcting the mistake, his bill filed more than three years after its discovery, seeking to recover the slaves from those to whom he had improperly assigned them, is barred by the statute of limitations. *Gatlin v. Darden*, 73.

2. A claim in equity against a joint owner of a chattel, analogous to one at law for a destruction of it, is barred by the statute of limitation, unless preferred within three years. And the pendency of a former bill, to which the parties were both defendants, will not repel it. *Saunders v. Gatlin*, 95.

3. The possession of a trustee, so constituted by act of the parties, is the possession of his *cestui que trust;* and no length of possession, as such, will bar; but if a party is sought to be constituted a trustee by the decree of a court of equity, founded on fraud or the like, his possession is then considered adverse, and the statute of limitations will be a bar. *Edwards v. University*, 325.

4. Where the plaintiff alleges a disability which is to exempt him from the operation of the statute of limitations, it is incumbent on him to prove that it was a *continuing disability*, from the time the cause of action accrued. *Ibid.*, 325.

5. When slaves were given by parol, and upon the death of the donee, intestate, were assigned to one of his next of kin, a possession of them by the latter for more than three years gives him a perfect title. *Powell v. Powell*, 379.

LIMITATION OF PROPERTY.

See Bequest, 1, 9, 11; Executory Devise, 1, 2.

LOST NOTES.

1. The owners of lost bank notes may in equity recover the amount upon offering bond and security to save the bank harmless from all claims for or on account of such notes. *Allen v. Bank*, 3.

2. Whether a recovery upon lost notes can be effected at law, *quere? Ibid.*, 3.

3. The cutting of a bank note in two, for transmission by mail, is not a *voluntary* destruction of it; and if, in the course of transmission, one of the halves be lost, the owner, upon producing the other half and offering an indemnity, may recover the amount of the whole note. *Ibid.*, 3.

4. The usage of a bank in paying to the holder of a half note only half the amount of the note is not sanctioned by law, and cannot be sustained. *Ibid.*, 13.

5. A bill filed two years after the loss of a bank note is not too late for relief. *Ibid.*, 14.

LOST NOTES—*Continued.*

6. A neglect to offer an indemnity before filing a bill does not destroy the plaintiff's right, but it will deprive him of a claim for damages and costs. *Ibid.*, 14.

MARRIAGE SETTLEMENT.

1. A post-nuptial settlement made in favor of a wife by a husband, in pursuance of an agreement before marriage, will, if variant from such agreement, be reformed in a court of equity; and consequently, if by accident or misapprehension of its legal import, the husband makes such settlement in accordance with the ante-nuptial agreement, when he designed after marriage to vary it, even with the consent of his wife, he cannot be relieved. *Koonce v. Bryan*, 227.

2. An ante-nuptial settlement in articles, is in equity, if registered, valid as a lien upon the property agreed to be settled, against the general creditors of the debtor, and of course is valid against one claiming in place of a creditor. Therefore a purchaser at execution sale of the property included in the settlement, is bound to execute it, although he may not have had notice of it at the time of his purchase. *Freeman v. Hill*, 389.

MONEY IN THE HANDS OF THE CLERK AND MASTER.

Money in the hands of the master, awaiting the final determination of a cause, can be paid only as directed by the decree, and if another person claims it, he must apply to the court to have it paid to him. *Arnold v. Arnold*, 113.

MORTGAGE.

1. A conveyance, in the form of a mortgage, securing a specific debt, but admitted by the defendants to be intended as an indemnity against the costs of a law suit, cannot be supported upon the ground that it is held as a means of enforcing the execution of an agreement for giving the defendant a part of the property recovered in that law suit. *Toler v. Pender*, 445.

2. Where A. contracted for land, and placed one-third of the purchase money in the hands of B., who completed the purchase, and then leased the land to A., reserving rent, at the rate of twelve and a half per cent upon the sum advanced by him, and gave a bond to A., to convey to him, at the expiration of the term, upon the payment of the advance and rent with interest on the latter, and A., was embarrassed, and made permanent improvements, *it was held*, that the arrangement was a mortgage to secure an usurious loan; and that a purchaser of A.'s interest at execution sale had a right to redeem. *Thorpe v. Ricks*, 613.

3. An execution purchaser of an equity of redemption need not make the mortgagor a party to this bill for redemption. *Ibid.*, 619.

4. A deed of bargain and sale, with a proviso avoiding it, upon repayment by the vendor, of the purchase money, is *prima facie* a conditional sale, and shall not in the absence of all fraud on the part of the vendor, be turned into a mortgage securing the purchase money as a debt. *Fleming v. Sitton*, 621.

MORTGAGE—*Continued.*

5. Upon a bill to foreclose a mortgage, a sale may be decreed, but an award of execution for the balance, after applying the proceeds, is erroneous. *Ibid.*, 623.

NEGOTIABLE SECURITIES.

See Assignment, 1; Lost Notes, 2.

NEXT OF KIN. See Distribution.

NOTICE. See Practice, 4.

PARTIES TO A SUIT.

1. Upon a bill seeking satisfaction of an equitable demand against a deceased debtor, from property in the hands of his donee, it was held that the administrator of the debtor was a necessary party. *Dozier v. Dozier*, 96.

2. Ordinarily conflicting claims between plaintiffs will not be decided in a court of equity. *Sorrey v. Bright*, 115.

3. A bill either to rescind or to enforce the specific execution of a contract for the sale of land, cannot be sustained against one who had guaranteed the contract without making the principal vendor or his representative a party. *Oliver v. Dix*, 158.

4. A defendant claiming a slave by reason of his having, under a mistake, paid for him to A., supposing him to be entitled, must, in a suit by the executor of B., under whose will A. is clearly entitled, make the administrator of the latter a party by cross-bill, before he can avail himself of that defense. *Blue v. Patterson*, 457.

5. A partner who claims the benefit in equity of a debt due the partnership as a set-off or satisfaction of his individual note, must make his copartner a party to his bill. *Gaither v. Caldwell*, 504.

6. All the residuary legatees are necessary parties to a bill seeking to subject the share of one of them to a debt; especially when the interest of each legatee is uncertain, depending upon the amount of advancements made them in the lifetime of the testator. *Bethell v. Wilson*, 610.

See Assignment, 2; Heirs, 1; Husband and Wife, 1; Mortgage, 3; Remainder, 7.

PARTNERSHIP.

1. A mercantile instrument given in the partnership name binds all the partners, unless the person who took it knew or had reason to believe, that the partner who made it was improperly using his authority for his own benefit, to the prejudice, or in a way that might be to the prejudice of his associates. *Cotton v. Evans*, 284.

2. But per DANIEL, J., dissenting. A person who takes a mercantile instrument in the partnership name, for the separate debt of one of the partners, cannot recover of the others, unless he can show that they had notice of and sanctioned it, whatever may have been his impressions as to the partner's being authorized to give such instrument. *Ibid.*, 284.

PARTNERSHIP—*Continued.*

3. The extent of the power and authority of each partner to bind the firm, stated and discussed by RUFFIN, C. J., and DANIEL, J. *Ibid.*, 284.

4. A debt due to an individual member of a firm cannot be set off in equity against a debt due from the firm, when the latter debt has been assigned for the benefit of *bona fide* creditors. *Ibid.*, 306.

5. The receipt of money by one partner in the partnership name does not bind the firm, after notice of a dissolution has been had by the person who paid it, or caused it to be paid. *Ibid.*, 307.

6. When a partnership owns land, a difficulty in the title to it is no objection, upon a dissolution and settlement of the partnership, to ordering a sale of such title as the partnership has. *Waugh v. Mitchell*, 522.

7. Lands purchased with partnership funds are not held by the owners as tenants in common, but as joint tenants, as copartners; and a bill for the partition of such lands, upon the ground of their being held in common, or joint tenancy simply, cannot be sustained, as there can be no division of partnership property until all the accounts of the partnership have been taken, and the clear interest of each partner ascertained. *Baird v. Baird*, 524.

8. One partner cannot demand an account in respect of particular items, and a division of particular parts of the property; but the account must necessarily embrace everything. *Ibid.*, 524.

9. Where the right to call for an account of a partnership is lost by lapse of time, and there are lands belonging to the partners, they may be taken as a clear surplus remaining, and equally divisible between the partners as joint tenants, provided it appear that the parties were equally interested; and provided further, that the lands continued to be treated by the parties as joint property. *Ibid.*, 524.

10. Upon a dissolution of a copartnership, a settlement of its accounts becomes indispensable and must include all debts due to the company, whether from its members or others, and all debts due from the company, either to the partners or strangers. But upon a partial division of capital, such a settlement is not indispensable. Whether upon an agreement for such a division, any one of the partners can be required to take his own debt in payment of his part of the capital, depends upon the fact whether the debt be then demandable. If it be, this may be insisted on, but if it be not, the agreed division of capital does not *per se* change the character of the debt. *Attorney-General v. Bank*, 553.

See Award, 1, 2, 3; Executors and Administrators, 3; Parties to a Suit, 5.

PLEAS AND PLEADING.

A plea to a bill of revivor, that the cause of action arose more than twenty years before the filing of the original bill, and that after the abatement of the original bill, the bill of revivor was not filed within the proper time, and that the same was therefore barred by the statute of limitation, and the length of time between the abatement of the original suit, and the filing of the bill of revivor, is double, and therefore bad. *Littlejohn v. Williams*, 343.

See Answer, Decree, Relief.

POWER.

Whether a power of sale, after the death of a tenant for life, can be well executed before that event, *quere?* But certainly it cannot when the words "after the death" apply to the sale, and are not intended as a mere limitation of the estate for life. *Davis v. Howcott*, 464.

PRACTICE.

1. An objection to the regularity of an affidavit annexed to a bill cannot be made on the hearing; it should have come before filing the answer. *Allen & Wycoff v. State Bank*, 7.

2. An affidavit sworn to before a master in chancery in another State, who was a commissioner appointed by this State is regular. *Ibid.*, 7.

3. A court of equity never passes judicially upon accounts involving adversary interests when the same person represents both parties. *Ford v. Whedbee*, 22.

4. In England it is the practice to require a copy of all the orders made in the cause to be served upon the party to be affected by them. But in this country, where the terms of the court are at certain and short periods, parties are charged with the knowledge of all the orders made in the cause, without the service of a copy unless specially directed. *Collier v. Bank*, 331.

5. If a defense, which may be pleaded, is relied upon in the answer, its validity can only be determined at the hearing. That part of the answer cannot be set down for hearing as a plea. *McLin v. McNamara*, 407.

6. The rules of practice as settled in *Bruce v. Child*, 11 N. C., 372, approved. *Ibid.*, 407.

7. An order of reference is a judicial act determining the cause, and cannot be *"without prejudice,"* but by consent, or when imposed as the terms upon which a favor is granted to the person asking it. *Ibid.*, 409.

PRESUMPTION.

1. Where a negro remains in the possession of the administratrix, who is also the widow of the intestate, for twelve or fifteen years, no presumption of satisfaction will arise from the delay against one of the next of kin, to prevent his claiming his interest in the negro; especially if it appear that he was under the belief that his infant child, and not himself, was entitled to the interest in the said negro. *Bird v. Graham*, 168.

2. Where no particular time is fixed for the execution of an agreement, but the most important particulars cannot be carried into effect until after the death of a person then living, no presumption of abandonment from delay during the life of such person, although some minor parts of the agreement can be executed during such lifetime. *Bailey v. Wilson*, 189.

3. A possession by the defendant of fourteen years, there being no administration upon the estate of the plaintiff's intestate for the first seven, is not sufficient to raise the presumption of abandonment. *Blue v. Patterson*, 459.

PRINCIPAL AND AGENT.

1. Where the justices of a county meet out of court, and in their public character offer a reward for the apprehension of outlawed slaves, they are not personally bound, although the county is not responsible upon their engagement. *Hite v. Goodman*, 364.

2. One who without fraud contracts in the name of another, but without his authority, is not personally liable upon the contract, unless he renders himself so, by express stipulation, or by the receipt of the consideration. *Ibid.*, 364.

PRINCIPAL AND ATTORNEY.

1. An instrument executed by an attorney for his principal may be signed by A. (the attorney) for B. (the principal), or B. (the principal) by A. (the attorney), but it must profess in its terms to be the act of the principal. *Oliver v. Dix*, 163.

PROPERTY IN CUSTODIA LEGIS.

When a slave dies in the custody of an officer of the court, during a litigation concerning it, the loss is to be borne by the party to whom the title is ultimately adjudged, especially when he had no right to the possession. *Arnold v. Arnold*, 111.

PURCHASER.

One who takes an assignment of property to secure a debt, and neither advances money nor releases his debt, is not a purchaser within the rule of equity, which protects purchasers without notice. *Harris v. Horner*, 455.

See Lands, 1.

REASONABLE TIME.

If an individual promise to pay money, or to do any other act, when it may be convenient for him, *it may be* that the courts would *set res magis valeat quam pereat*, construe convenience to mean ability, or a reasonable time. But where an engagement to do an act, from the terms of the contract, fixes a time *within* which it must be performed, but allows a latitude for its performance within that period, according to the convenience of the party who is to do the act, it would seem that the individual himself must be the sole judge of what his own convenience prescribes. *Attorney-General v. Bank*, 550.

RECEIPT.

A receipt from one of the next of kin, expressed to be for his part of the *personal estate*, but following a statement in which he is credited for his share of the "*perishable estate*" of the intestate, is not a receipt in full of the personal estate, so as to exclude him from claiming an interest in a negro belonging to the estate; particularly when it appeared that the sum for which he was credited was the same that each of the other next of kin received for their respective shares of the *perishable* estate, independent of their interest in the negro. *Bird v. Graham*, 168.

RECORDS OF OTHER STATES. See Jurisdiction.

REFERENCE. See Practice, 7.

RELIEF.

Relief will not be given upon a state of facts not set forth in the pleadings, and appearing only upon the proofs. *Gatlin v. Darden*, 74.

REMAINDER.

1. An unqualified assent by an executor to a bequest for life vests the title of him in remainder, especially where there are no debts to be paid, nor any trusts to be performed upon the expiration of the life estate, and in such a case, if the executor is entitled in remainder, he holds as legatee and not as executor. *Saunders v. Gatlin*, 93.

2. Where a residuary bequest, consisting in part of slaves, was given by a testator to his widow for life, and after her death to others, and to pay a balance of debt, the executor was permitted by the widow to retain the slaves till out of their hires he had discharged it, *it was held*, that the debt, was a charge upon both the life estate and the remainder in the slaves, in proportion to the respective values of those estates; and that consequently the widow, or as she had died after payment of the debt, her representative was entitled to the sum which it had been agreed the remaindermen should pay if they were liable to pay any portion of the debt. *Jacocks v. Bozman*, 192.

3. Whether in such case, independent of any agreement, the rule of apportiontment would be to require the life owner to keep down the interest, leaving the principal to be paid by the remaindermen, or to require the principal to be paid at once by each in proportion to the value of their respective estates. *Quere? Ibid.*, 192.

4. Where a slave was conveyed by deed to a trustee in trust for a married woman for life, with the power of appointing to whom the remainder in the slave should belong after her death, and she died without making or attempting any appointment, *it was held*, that neither the husband's representative, he having died before his wife, nor the representative of the wife, could claim the slave, but that the trust in the remainder of the slave resulted to the donor or his representative. *Harrison v. Battle*, 213.

5. Where one having a remainder in fee in land, went into possession and made permanent improvement at the request of the tenant for life, *it was held*, DANIEL, J., dissenting, that a court of equity would restrain the tenant for life from resuming the possession until he had paid for the betterments, although there was no note or memorandum in writing made of the transaction. *Baker v. Carson*, 381.

6. Where one having an interest for life in slaves, with a view of defeating those in remainder, sold them, and with the proceeds purchased others, the remainderman may affirm the sale, and subject those slaves to his claims; but he cannot recover specifically the slaves so purchased. *Black v. Ray*, 443.

7. To a bill affirming the sale, and seeking to charge the slaves for the purchase money, the personal representatives of the first taker are necessary parties. *Ibid.*, 443.

See Residue and Residuary Clause, 3, 4, 5.

RESIDUE AND RESIDUARY CLAUSE.

1. A general gift of the residue includes legacies not effectually disposed of, whether they fail by lapse or illegality, unless it is clear upon the will that the intention was different. *Sorrey v. Bright*, 115, 116.

2. And merely charging the residue with the payment of legacies will not, of itself, prevent those which fail for any cause, from sinking into it. *Ibid.*, 116.

3. As between the legatee for life and him in remainder, a residue of personalty other than slaves must be sold by the executor, and the proceeds invested so as to give the life owner the interest, keeping the principal for the remainderman. *Jacocks v. Bozman*, 194.

4. But this rule does not apply to a residue of slaves. They are not to be sold by the executor, but must be delivered in *specie* to the legatee for life, who is entitled to their profits during his turn, after which they and their increase go to him in remainder. *Ibid.*, 194.

5. In effect slaves given in a residue and unsold, stand as between the legatees for life and in remainder upon the footing of a specific gift. Where given in either way the executor may sell for debts; the difference as to his duties and powers being, that in the latter case he ought to apply to the respective legatees for contribution before a sale, and in the former he need not, because the gift is only of so many of the slaves as may remain in clear surplus. *Ibid.*, 195.

6. A testatrix, after a bequest of slaves, which was void, being for their emancipation, directed the balance of her estate to be sold, and after paying all her just debts, the surplus, if any, to be retained in the hands of her executor, and two-thirds of it to be laid out by him, for the clothing and support of her brother's children, and the other third to be for the use of the slaves, *it was held*, that the children of the testatrix's brother were only partial residuary legatees, and that she died intestate as to the slaves, and one-third of the residue besides them. *Pendleton v. Blount*, 491.

See Bequest, 4; Legacy, 7.

REVIVOR. See Abatement, 1, 2.

SALE. See Clerk and Master.

SATISFACTION. See Presumption, 1.

SHERIFF AND SHERIFF'S DEED. See Execution and Execution Sale; Frauds and Fraudulent Conveyances, 7.

SLAVES. See Advancement; Bequest, 2, 4; Executor *de Son Tort*, 1; Gift; Limitations, Statue of, 1, 5; Residue and Residuary Clause, 4, 5.

SPECIFIC PERFORMANCE.

1. Upon a decree for a specific performance, it is proper to order the articles to be canceled. But it is otherwise if the bill be dismissed. *Gilchrist v. Buie*, 361.

2. Defective conveyances to children are aided in equity. Mere inadequacy of price, in the absence of fraud or surprise, is no defense against a

SPECIFIC PERFORMANCE—*Continued.*

decree for a specific performance, especially when, in addition to the price, affection for a child entered into the consideration. *White v. Thompson*, 493.

3. Although at law the covenants of the vendor and vendee may be independent, yet in equity, upon a bill for specific execution of a contract for the purchase of land, a conveyance is never ordered until the purchase money is paid. *Oliver v. Dix*, 605.

4. Gross *laches* is a defense to a bill for a specific execution of a contract; but what will amount to it depends upon the circumstances of each case. A delay for nine years will bar a bill seeking the performance of an agreement to sell the life interest of an old person in a lot of slaves, and an account of their hire; for during the time delayed, the defendant has taken the risk of the life estate. *Strickland v. Fowler*, 629.

See Parties to a Suit, 3; Vendors and Purchasers.

SPOLIATOR.

Everything is to be presumed against a spoliator. *Henderson v. Hoke*, 148.

STATUTES CONSTRUED OR COMMENTED UPON.

1783. 1 Rev. Stat., chap. 42, sec. 13. *Harris v. Erving*, 369.

1784. 1 Rev. Stat., chap. 121, sec. 1. *Tate v. Tate*, 22.

1789. 1 Rev. Stat., chap. 63, sec. 11. *Johnson v. Cawthorn*, 32.

1806. 1 Rev. Stat., chap. 37, sec. 17. *Hinton v. Hinton*, 587.

1808. 1 Rev. Stat., chap. 42, sec. 10. *Harris v. Erving*, 369.

1810 and 1811. 1 Rev. Stat., chaps. 788 and 806. *Attorney-General v. Bank*, 545.

1812. 1 Rev. Stat., chap. 85, sec. 7. *State Bank, Ex parte*, 75.

1812. 1 Rev. Stat., chap. 45, sec. 4. *Henderson v. Hoke*, 119.

1812. 1 Rev. Stat., chap. 45, sec. 586. *Thorp v. Ricks*, 616.

1814. 1 Rev. Stat., chap. 870, sec. 1. *Attorney-General v. Bank*, 216.

1818. 1 Rev. Stat., chap. 85, sec. 8. *Bank, Ex parte*, 75.

1819. 1 Rev. Stat., chap. 50, sec. 8. *Oliver v. Dix*, 165.

1819. 1 Rev. Stat., chap. 50, sec. 8. *Neeley v. Torian*, 410.

1819. 1 Rev. Stat., chap. 50, sec. 8. *Trice v. Pratt*, 626.

1819. 1 Rev. Stat., chap. 50, sec. 8. *Baker v. Carson*, 381.

SURETY AND PRINCIPAL.

A surety against whom and the principal debtor, a judgment has been obtained, by paying the debt and taking an assignment of the judgment to himself, satisfies it, and reduces his claim to a simple contract debt, and can, on the footing of the judgment, have no relief in a court of equity. The proper course is to have an assignment of it made to a person not a party to the record. *Briley v. Sugg*, 366.

TAXES. See Acts of Assembly, 1; Bank of Newbern.

TENANT FOR LIFE.

1. A devisee for life is entitled to the crop growing at his death; as is a legatee for life to the increase of cattle, and the interest of money. *Perry v. Terrell*, 441.

2. A tenant for life may, in this country, clear land for cultivation, if necessary to his enjoyment of the estate, and if done with a due regard to the relative proportion of wood and cleared land which should be preserved upon it. *Shine v. Wilcox*, 631.

See Power; Remainder; Residue and Residuary Clause, 3, 4, 5.

TENANTS IN COMMON.

1. Where two decedents were joint owners of slaves, and the administrator of one having obtained possession, distributed them improperly, he is liable to account for their value to the next of kin of his intestate, but not to those of the other. *Saunders v. Gatlin*, 86.

2. A tenant in common in possession does not thereby become a trustee for his fellow. But constructive trusts may arise between them by reason of the confidence created by their relation. *Ibid.*, 92.

3. One tenant in common may purchase the interest of his cotenant, under an execution in favor of a third person, or of himself, against the other, for the sole debt of the latter, or under an execution in favor of a stranger against both for their joint debt. And such purchase, if fairly made, will be good in equity, as well as at law. *Baird v. Baird*, 524.

4. An actual ouster, or disseisin in fact, is not necessary to make the possession of one tenant in common adverse; and although the silent sole perception of the profits will not constitute an adverse possession, yet if continued without claim for a long time, every presumption necessary to support it will arise. But where one who has in fact but an undivided share, is exclusively in possession, under a conveyance for the whole, notoriously claiming to hold in severalty, the possession can no longer be regarded as common; more especially if the possession be taken under color of a conveyance for a share of one of the cotenants, though the conveyance may be ineffectual. *Ibid.*, 524.

See Execution and Execution Sale, 12.

TRUST.

1. If one buys an estate for another with the money of the latter, a trust results for him; but it is otherwise if he buys for himself with the money and by the consent of another. *Henderson v. Hoke*, 149.

2. And if one, to defraud his creditors, conveys property to another for the latter's use, a trust in land reserved by the latter in exchange for that property will not result to the former, neither can his creditors subject it at law to the payment of his debts. *Ibid.*, 149.

3. Where the plaintiff in equity seeks to effect the legal estate of the defendant with a trust for him, and the defendant sets up as a defense a distinct title in the same land, the court having decided that the plaintiff has an equity as to the first title, necessarily must determine which of them is the best. *Ibid.*, 150.

TRUST—*Continued.*

4. A joint trustee is to be charged with the funds belonging to his *cestui que trusts*, which ought to have come to his hands, or which did come to his hands, or which passed through them, or which have been wasted or misapplied by his cotrustee, by and with his concurrence. But *mere* passiveness in not withdrawing money out of the hands of his cotrustee, which had never been in his own, is not such a concurrence as to make him chargeable. *Worth v. McAden*, 199.

5. One who is trustee for the children of another as well as for his own, owes the same duty to each set of *cestui que trusts;* and cannot make any arrangement by which his own children are to be benefited in preference to those of the other. *Ibid.*, 210.

6. A mere power to appoint given to a *cestui que trust* is not an estate in the trust. *Harrison v. Battle*, 215.

7. The construction of limitations of *trust* estates will be the same as that of *legal* estates, unless a plain intent to the contrary appears. *Ibid.*, 215.

8. But a conveyance of personalty to a trustee, in trust for another for life, does not convey the whole estate to the *cestui que trust*, because it is plain that the parties did not so mean. *Ibid.*, 215.

9. A deed by a trustee, relinquishing his legal estate, but without conveying it to any person, is inoperative, and leaves the estate in him subject to all the trusts declared in the deed creating it. *Dick v. Pitchford*, 480.

See Assignment, 3, 4; Champerty; Execution and Execution Sales, 2, 3, 4, 5, 8, 9, 10, 11, 12; Executors and Administrators, 6, 7, 8, 12, 13.

USURY. See Creditor, 2.

VENDOR AND PURCHASER.

1. Whether the vendor of land has a lien upon it for the purchase money, and if any, its nature and extent, are unsettled questions in this State. But it is clear that if the lien does exist against volunteers and purchasers with notice, it does not against a creditor of the vendee, enforcing the collection of his debt, or a purchaser clothed with the rights of such a creditor. *Johnson v. Cawthorn*, 32.

2. A purchaser at a sale by a guardian, made by order of the county court, under the Act of 1789 (*Rev.* c., 312, sec. 5), has the right of a purchaser under execution. *Ibid.*, 35.

3. If, upon an agreement for the sale of land, the vendee has a right to the possession both as vendee and lessee, and on the expiration of his term refuses to complete his purchase, but tenders the rent, the vendor, by accepting it, waives the contract and forfeits his right to a specific performance. *Bryan v. Read*, 78.

4. Whether *laches*, on the part of the vendor in performing acts which he has stipulated for, will not bar his claim to a specific performance. *Quere? Ibid.*, 84.

5. On a bill for specific performance the vendee will not be compelled to take a title founded on a decree against an infant, because the latter may show cause against it when of age. *Ibid.*, 85.

VENDOR AND PURCHASER—*Continued.*

6. If two persons contract that one shall convey to the other the land of a third person, or that he will cause the owner to convey it, whether equity will entertain a bill for specific performance, or to rescind the contract, or whether it will not leave the parties to their remedies at law. *Quere? Oliver v. Dix*, 163.

7. In such a case, if the vendee has paid part of the purchase money, it is not seen how he can recover it back in equity. *Ibid.*, 164.

8. Where a vendee contracted for the purchase of land, and took possession, but neglected to pay the purchase money for nine months after it fell due, during all of which time the vendor held the bonds for the purchase money, and did not offer to surrender them, but recognized the contract as still subsisting, *it was held*, that having allowed the contract to subsist after the default, the vendor could not put an end to it, without a previous formal and reasonable notice to the purchaser to come forward and fulfill it, or he would not hold himself bound. And *it was held* further, that upon such purchaser's paying the money, he could demand a specific performance from the vendor; or call for the legal title from a person who had purchased with full notice of the contract. *Falls v. Carpenter*, 237.

9. If a vendor, after a default by the vendee, is still willing to complete the contract, and a third person interposes, and by misrepresenting the willingness of the vendee to fulfill the contract on his part, procures a conveyance to himself, *it seems* that the first vendee will have an equity against the second, independent of any he might have against the common vendor. *Ibid.*, 237.

10. Insolvency, whether existing at the time of the contract or occurring subsequently, does not of itself dissolve the contract, but if continuing so as to disable the purchaser from fulfilling his part of it, may authorize the other party, after request and default, to renounce it, and after reasonable notice may discharge him; or it may be evidence, with other things, of abandonment by the purchaser, but in that case liable to be repelled by other evidence. *Ibid.*, 237.

11. The increase of value is not such a charge in the subject-matter of a contract as is, of itself, a ground for rescinding or not enforcing articles. But if one of the parties refuse to perform, and there comes a change of circumstances, upon the strength of which he is desirous to go on with the bargain, and insists on it, he may be properly repelled, although he was not watching for that change. *Ibid.*, 237.

12. Time may be the essence of the contract in equity. Exact punctuality may be of great importance to the interests of a contracting party in many situations. In some it is obvious from the state of the property and other circumstances. In others we do not doubt that the instrument may be so formed as to show that it is a substantial part of the contract. In those cases the court can no more dispense with it than any other vital provision. But the parties themselves may; and it is in that sense true that time is not essential, but immaterial, when comparing its effect in that court with that at law. *Ibid.*, 277.

13. Default in respect to time is not a bar of itself, except in particular cases; but is only evidence with other things of abandonment, and of course may be rebutted. *Ibid.*, 279.

VENDOR AND PURCHASER—*Continued.*

14. Time may, in all cases, be made essential, but where it is, it does not follow that it is necessarily conclusive in equity, as it is in law. *Ibid.*, 279.

15. In equity time may be waived by a party, as may any other stipulation introduced for his benefit. A failure to avail himself of it, on the first fit occasion, and before or when the other party begins after a default to act again on the agreement, may amount to such waiver. *Ibid.*, 279.

16. When a purchaser seeks relief from a court of equity because he has purchased without notice, he must deny notice. So, when he sets up by plea or answer a purchase without notice as a bar to discovery or relief, to which a plaintiff is entitled, he must be equally explicit in denying it. But where a plaintiff would convert a purchaser into a trustee, and seeks to *charge* him because he bought with notice, if the allegation of notice is not admitted, the plaintiff is bound to prove it. *McGahee v. Sneed*, 333.

17. In a contract of sale, by which the vendors stipulated "to make a sufficient title, as far as their claim extends in said land," the words, "a sufficient title," were held upon the whole instrument to mean "a sufficient deed" to assure the estate, if they had one, notwithstanding "a quitclaim deed" was by the articles agreed to be given for other lands. *Gilchrist v. Buie*, 346.

18. Upon a bill for a specific performance, in England, the vendor is bound to show a good title, but is not compelled to covenant for one apparently good, beyond his own acts and those claiming under him. But in this country *it seems* that the vendee has a right to covenants of general warranty. *Ibid.*, 356.

19. A vendor has no equitable lien for the purchase money against a creditor of the vendee who claims under an execution sale. *Harper v. Williams*, 379.

20. A purchaser at sheriff's sale is affected with all the equities which bind the person whose interest he buys, and in fact is not within the rule which protects a purchaser without notice. *Dudley v. Cole*, 436.

21. Upon an executory agreement for the purchase of land, the payment of the purchase money constitutes the vendee, in equity, the owner, and he has a right to a conveyance from every person having the legal title, with notice of his claim. Thus, where A. purchased land of B. and took a bond to secure his title, and subsequently sold to C., who paid the purchase money which came to the hands of B., and took a bond for title from A.; and the latter, to defeat the claim of C., surrendered to B. his bond, B., having notice of C.'s equity, is bound to convey to him. And if C. has received any part of the consideration for the surrender of the bond by A. to B., that is no defense to C.'s bill, but must be brought forward as the foundation of a distinct suit. *Ward v. Ledbetter*, 496.

See Contract; Purchaser; Specific Performance.

VOLUNTARY. See Bond; Creditor; Family Arrangement.

WARRANTY.

1. No warranty is implied in the sale of patent right, and therefore the purchaser of such a right cannot, in the absence of fraud and without express promise, recover of his vendor the price paid for it, upon its turning out to be invalid. *Hiatt v. Twomey*, 315.

2. In assignments of interests vesting in grant, if there be no fraud, the purchaser must depend, in case they prove of no value, wholly upon his covenants. *Ibid.*, 318.

3. The purchaser of chattels under an executed contract can claim redress against his vendor for a defect of title only where there is an express or implied warranty or a deceit; and ordinarily the affirmation of title by the vendor at the time of the sale is equivalent to a warranty, but not where the vendor is out of possession and there is an adverse claim to the chattel, made known at the time to the vendee, and especially where the vendor, notwithstanding his affirmation of title, says expressly that he sells only such as he may have. *Andres v. Lee*, 318.

WASTE.

Permitting cleared land to grow up in secondary growth is not waste. *Shine v. Wilcox*, 633.

WILL.

A will of personalty regularly proved cannot be impeached in the court of equity as having been obtained by undue means. *Blue v. Patterson*, 458.

See Bequest.

WITNESS. See Evidence, 2.