# NORTH CAROLINA REPORTS

## VOL. 36

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CASES IN EQUITY ARGUED AND DETERMINED

IN

# THE SUPREME COURT

OF

# NORTH CAROLINA

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FROM JUNE TERM, 1840, TO JUNE TERM, 1841, BOTH INCLUSIVE

---


REPORTED BY

**JAMES IREDELL**

(1 Ire. Eq.)


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ANNOTATED BY

**WALTER CLARK**


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| 2 " | " | 3 | " | 11 " " | " | 33 | " |
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| 1 Murphey | " | 5 | " | 13 " " | " | 35 | " |
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| 4 " " | " | 15 | " | " Eq. | " | 45 | " |
| 1 " Eq. | " | 16 | " | 1 Jones Law | " | 46 | " |
| 2 " " | " | 17 | " | 2 " " | " | 47 | " |
| 1 Dev. & Bat. Law | " | 18 | " | 3 " " | " | 48 | " |
| 2 " " | " | 19 | " | 4 " " | " | 49 | " |
| 3 & 4 " " | " | 20 | " | 5 " " | " | 50 | " |
| 1 Dev. & Bat. Eq. | " | 21 | " | 6 " " | " | 51 | " |
| 2 " " | " | 22 | " | 7 " " | " | 52 | " |
| 1 Iredell Law | " | 23 | " | 8 " " | " | 53 | " |
| 2 " " | " | 24 | " | 1 " Eq. | " | 54 | " |
| 3 " " | " | 25 | " | 2 " " | " | 55 | " |
| 4 " " | " | 26 | " | 3 " " | " | 56 | " |
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| | | | | Phillips Law | " | 61 | " |
| | | | | " Equity | " | 62 | " |

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# JUDGES

OF THE

# SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. THOMAS RUFFIN, CHIEF JUSTICE.
HON. JOSEPH J. DANIEL. HON. WILLIAM GASTON.

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ATTORNEY-GENERAL:

JOHN R. J. DANIEL, ESQUIRE.
HUGH McQUEEN, ESQUIRE.

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REPORTER:

JAMES IREDELL.

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CLERK:

JOHN L. HENDERSON.

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DEPUTY CLERK:

EDMUND B. FREEMAN.

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NOTE—The cases determined at June Term, 1840, and reported in this volume, were prepared and published by William H. Battle, Esq., before his elevation to the Superior Court Bench. The remaining cases were prepared by the present Reporter.

## JUDGES SUPERIOR COURTS OF NORTH CAROLINA.

| | |
|---|---|
| Hon. Thomas Settle | Rockingham Co. |
| Hon. Romulus M. Saunders | Wake Co. |
| Hon. John M. Dick | Guilford Co. |
| Hon. John D. Toomer | Cumberland Co. |
| Hon. Frederic Nash | Orange Co. |
| Hon. John L. Bailey | Pasquotank Co. |
| Hon. Richmond M. Pearson | Davie Co. |

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## SOLICITORS.

| | |
|---|---|
| David Outlaw, 1st District | Bertie Co. |
| William H. Washington, 2d District | Washington Co. |
| Jno. R. J. Daniel, 3d District (Atto. Gen. ex-officio) | Halifax Co. |
| Jno. F. Poindexter, 4th District | Stokes Co. |
| Alexander Troy, 5th District | Richmond Co. |
| James R. Dodge, 6th District | Wilkes Co. |
| James W. Guinn, 7th District | Macon Co. |

# A TABLE OF THE NAMES OF THE CASES REPORTED IN THIS VOLUME

# CASES CITED.

# EQUITY CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

# NORTH CAROLINA.

## JUNE TERM, 1840.

( 9 )

NEWMAN WELLS et al., Admr. of ANTHONY HARMAN, v. JOHN GOODBREAD, Admr. of DAVID DICKEY.

If a plaintiff in a suit at law be taxed with more costs than he is legally bound to pay his remedy is by a motion in the court of law for a retaxation of the costs, and he cannot, after neglecting to avail himself of this remedy, have relief in equity.

If an administrator be sued upon notes and bonds of his intestate pending an action previously commenced against him upon a covenant of his intestate, he should plead the pendency of the action on the covenant, and that the assets would be liable in the first instance to the recovery in that action, if effected, and no assets *ultra*. And if he neglects to avail himself of such defense, he cannot afterwards have relief in equity.

THE bill stated that David Dickey brought an action of covenant against the plaintiffs as the representatives of Anthony Harman, deceased; and in his declaration assigned five several and distinct breaches of the covenant declared on; that he afterwards died, and Goodbread, as his administrator, revived and carried on the suit; that Dickey first, and then his administrator, summoned many witnesses to establish and support the several breaches of covenant assigned in the declaration; that the cause remained in the courts of law for many years; and at length Dickey's administrator established but *one* of the several breaches set out in his declaration, and had a verdict and ( 10 ) judgment for the damages assessed on that and full cost, which included the witnesses summoned on the other breaches, as well as on the one upon which he prevailed. The bill then stated that pending the action by Dickey's administrator all the assets of Harman had been exhausted by actions brought on notes and bonds against his representatives. The bill prayed an injunction against the judgment, which the judge granted. The answer of Dickey's administrator came in, denying some

of the facts stated in the bill, and insisted that the plaintiffs might have had relief at law by proper pleading if the facts stated in the bill were true. On a motion in the Superior Court to dissolve the injunction the court decreed accordingly, and the plaintiffs appealed.

No counsel appeared for either party in this Court.

DANIEL, J., after stating the case as above, proceeded as follows: We are of the same opinion as the judge was who decreed a dissolution of the injunction. We think the injunction at first was improvidently granted. If the plaintiffs were taxed with more costs in the suit at law than they were legally bound to pay, their remedy was by a motion in the court of law for a retaxation of the bill of cost. If the plaintiffs, as the representatives of Harman, were sued on notes and bonds subsequently to the commencement of Dickey's action on the covenant, they should have pleaded the pendency of that action, and that the assets would be liable in the first instance to Dickey's recovery, if effected; and no assets *ultra*. Where a party has a plain remedy at law and neglects to avail himself of it, he has no right to ask relief in equity. The decree must, we think, be affirmed with costs.

PER CURIAM. Decree accordingly.

*Cited: Champion v. Miller,* 55 N. C., 196.

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( 11 )

JOHN SIMPSON v. NATHAN KING, EXR. of LETTUCE FOSTER.

A bequest in the following words, "I have one bond on John, given 3 January, 1837, for $300, I will and bequeath to my son J. L's children," will pass a bond on John Simpson for $300, dated 13 January, 1837, where it appears from testimony *de hors* the will that the testator had but the one bond.

A suit in equity for a legacy due to minors must be brought in their name and not in that of their guardian, though where the legacy is a debt against the guardian and one object of the bill is to obtain an injunction against its collection he may also be a party.

THE plaintiff, John Simpson, was indebted to Lettuce Foster in the sum of $300; and, as the bill alleged, he went, on 3 January, 1837, to her house for the purpose of giving her his bond, but did not, in consequence of the nonattendance of a person who was to be his surety. On 13 January, 1837, the parties met

again, and Simpson executed to Mrs. Foster his bond for that sum, with Thomas Garrett as his surety.

On 25 February, 1837, Mrs. Foster made her will, and therein bequeathed, amongst other things, as follows: "I have one bond on John, given 3 January, 1837, for three hundred dollars, I will and bequeath to my son John Lea's children." She appointed the defendant King her executor, and died in April following.

The bill stated that it was the intention of the testatrix to bequeath by that clause of her will the bond given by the plaintiff and Garrett as above mentioned; and that she gave to Garrett, who wrote the will for her, particular instructions to that effect, and that she did believe when she executed the will that it contained a proper and accurate description of that bond, and alleged that it was owing altogether to a mistake of the writer and of the testatrix that it did not, as the plaintiff was able to establish by proof.

The plaintiff was afterwards appointed the guardian of the children of John Lea, all of whom were infants; and he then applied to the executor to deliver to him as guardian the said bond, as that bequeathed to his wards. But the executor refused to do so, and instituted an action at law on the bond against Simpson and Garrett, and obtained judgment. ( 12 ) Whereupon the present bill was filed, praying that the bond might be declared to belong to the plaintiff's wards, and the defendant be enjoined from proceeding on the judgment, the plaintiff submitting to give his acquittance as guardian for the legacy.

The answer admitted that the bond was not needed to pay debts, but insisted that the bequest was void for uncertainty, inasmuch as the will did not sufficiently state by whom the bond was given, and likewise that this bond would not pass because it was dated on the 13th and not on 3 January, 1837; wherefore the bond was a part of the undisposed surplus of the estate, and it became the defendant's duty to collect the money for distribution. The answer denied all knowledge of the intentions of the testatrix, except as appearing in the will, and of any mistake in drawing the will; and insisted that it was not competent to explain the will by parol testimony.

The deposition of Garrett, who wrote and witnessed the will, established all the facts stated in the bill as to the intention of the testatrix and her instructions, and his own mistake in omitting the name of Simpson as the obligor, and in changing the

date of the bond from the 13th to 3 January. To the reading of this deposition the counsel for the defendant objected.

The plaintiff exhibited the inventory returned by the defendant, on which it appeared that the testatrix owned about twenty slaves which were disposed of, and perishable property which the defendant sold to the value of $368.83, and cash $5. The inventory then proceeded: "One bond executed to Lettuce Foster by John Simpson and Thomas Garrett, due 13 January, 1837, for $300"; and it stated no other bond or debt owing to the testatrix.

*W. A. Graham* for the plaintiff.
*J. T. Morehead* for the defendant.

RUFFIN, C. J., having stated the case as above, proceeded as follows: As we find in the answer, will and inventory sufficient and full grounds for holding that the bond in dispute
( 13 ) was not only intended to be given, but is given in the will, it is unnecessary to say anything on the objection to Garrett's testimony. We lay the evidence out of the case, therefore, and proceed upon the others.

This is not the case of a description so imperfect and vague as to be senseless and incapable of execution. Although the name of "Simpson" be omitted as the obligor, yet the bond is sufficiently identified without that by other parts of the description. Nor will the bequest be defeated by the difference in the dates of the bond as mentioned in the will, and as actually existing, provided that notwithstanding that contradiction the bond is embraced by other parts of the description, and is from them so completely identified that it is impossible to be mistaken as to the bond that was meant. Thus, we think, it is here. The case is but an example, under the common rule, that when a deed or will once sufficiently identifies the thing by its known name or by other means, and then superadds unnecessarily to the description, such further description, though inaccurate, will not vitiate the previous and perfect description. *Proctor v. Pool,* 15 N. C., 370. It is our duty to execute the intention of the will, if it can be discovered; and although no part of the description is to be rejected in the first instance, but the whole reconciled; yet, if that cannot be done, certainly an unnecessary and inaccurate part of the description must be disregarded rather than the whole disposition should fail; provided the thing claimed be found to agree with those parts of the description that are retained, so that there can be no mistake in saying from

them that this is the thing. The testatrix gives to her grandchildren a bond. The only question is, what bond? Whatever difficulties there might be in determining that question, if there were several bonds left for this sum and given by persons named John, in this case there is no such difficulty. The words of the will, read with the knowledge of the admitted fact that the testatrix had but a single bond, point infallibly to that one. She says, *"I have but one bond"*; and she had one, and *but one*. If the will had stopped there this bond would have gone to the legatees as properly as the words "all my bonds" ( 14 ) would have carried this and any others she might have had. But the will further and correctly describes it as a bond for $300; and thus further and sufficiently identifies it. That identity is not lost, because the testatrix truly adds that it is "on John," without saying "Simpson"; since that part of the description does not point to another instrument, but is merely defective in itself. Nor will the identity fail, although she further and untruly adds that the bond was "given on 3 January," whereas it was given on the 13th of that month; for the previous description is not rendered uncertain by this further description, which turns out unquestionably to be a mere mistake, since it is equally inapplicable to this or any bond held by the testatrix. In fine, as the testatrix had but one bond in the world, *that* must pass under the bequest of a bond for the amount mentioned. It must be accordingly declared that the bond belongs to the plaintiff's wards.

The Court has thought it best to make this declaration, inasmuch as the construction of the will involves the merits of the controversy, and no objection was made in the argument to the form of the bill; so that, we suppose it probable that parties would adjust the business, after obtaining the opinion of the Court on that point. We cannot, however, proceed further in the case in the present state of the pleadings. The bill is brought by the guardian, in his own name, for a legacy to his wards. The suit ought to be in the name of the wards. It is true that here the legacy consists of a debt owing by the guardian, and that one object of the bill is to obtain an injunction against a judgment for the debt. That might have authorized the present plaintiff to become one of the parties, but it does not dispense with the necessity of making the legatees themselves plaintiff. The equity does not belong to the debtor who happens to be guardian, but to the wards; and the injunction is only a mode of relief arising out of that equity. The case must therefore stand over for further directions, in order, should the parties not settle

it between themselves, that the plaintiff may take the proper steps to make the other parties.

PER CURIAM. Direct accordingly.

*Cited: Banner v. Simms,* 40 N. C., 397; *Knight v. Bunn,* 42 N. C., 79; *Joiner v. Joiner,* 55 N. C., 72; *Kent v. Bottoms,* 56 N. C., 72; *Mortgage Co. v. Long,* 113 N. C., 126; *Peebles v. Graham,* 128 N. C., 227.

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( 15 )

DAVID W. STONE, Exr. of SARAH STONE, v. JOSEPH B. HINTON, et UXOR, et al.

Where a testatrix directed her negroes to be sold in families, not to speculators, but to persons purchasing for their own use, and "the money arising from the sale" to be invested in bank stock, the interest on the stock to be paid two-thirds to her sister and one-third to her brother during their lives, and then the stock to be paid to another person. *Held*, that though there was no direction in the will to that effect, yet the testatrix intended a sale of the negroes on a credit; that twelve months was a reasonable term of credit; that the interest on the purchase-money accrued from the day of sale to the time of payment was "money arising from the sale," to be invested with the principal in stock, and that the legatees of the interest on the stock were not entitled to the interest accrued on the purchase-money before the investment.

A bequest of a slave to one for life, and at the death of the tenant for life to be sold or made free if his conduct should in the opinion of the tenant "merit such a distinction," will not give to the legatee a larger estate than for life.

Where a testatrix in her will bequeathed certain bank stock to her nephew, G. D., and in a codicil declared as follows, "I desire that in case the education and tuition of G. D. is withheld from me, not having confidence in those that now direct his ways, I give the bank stock before named and disposed of to be divided between the said G. D., S. E. D. and E. M. D."; and it appeared that the testatrix did not have the direction or control of the education and tuition of her nephew, G. D., from a time anterior to the making of her will to her death. *Held*, that the contingency mentioned in the codicil had happened upon which the stock was to be divided between G. D. and the two other named legatees.

THE bill was filed in October, 1839, and stated that Mrs. Sarah Stone, late of the city of Raleigh, died in the summer of 1838, leaving a will, made in June, 1834, wherein were contained the following clauses:

"I consider the most benevolent plan that I can pursue towards

my negroes will be the following: I desire that they shall all be sold in families; that husband and wife, where I own both, and their small children, shall be put up together. They shall not be sold to speculators, but to persons for their own use." "Happy, Penelope's daughter, I leave to my sister during her life, and to be sold at her death, or to be made free if her conduct should merit such a distinction, in the opinion of my ( 16 ) sister." "The money arising from the sale of the above negroes shall be vested in bank stock. My sister, Margaret G. Hinton, to receive two-thirds of the interest; and my brother, Thomas B. Dashiel, one-third, during their lives. At their death, the bank stock to be given to Grayson Dashiel, the eldest son of my brother, Thomas Dashiel."

To this will the testatrix, in July, 1835, added a codicil, in the following words:

"Feeling and knowing at all times the uncertainty of life, I desire that, in case the education and tuition of Grayson Dashiel is withheld from me, not having confidence in those that now direct his ways, I give and desire the bank stock before named and disposed of to be divided between the said Grayson Dashiel, Sarah Ellen Dashiel and Elizabeth Mary Dashiel; the two latter-named persons are the children of my youngest brother, George Warren Dashiel." If Grayson should die without heirs, his portion to be divided between Sarah Ellen and Elizabeth Mary Dashiel. The bill then stated that the plaintiff, who was named executor in the said will, and had qualified thereto, had sold the slaves, required by the will to be immediately sold, upon a credit of twelve months, with interest on the purchase money from the date; and that, as the term of credit was about expiring, he was desirous, as soon as he could collect the money due on the sales, to invest it in bank stock, according to the directions of the will; but that a difficulty was likely to arise in the execution of the said trust, for that the defendant, Joseph B. Hinton, whose wife was the sister of the testatrix named in the will, insisted that nothing was to be invested in stock but the principal sum for which the sales were made, and not interest accruing on such sales from the time when they were made, up to the day of payment, and claimed that two-thirds of such accruing interest should be paid over to him as due to his wife as profits, interest and income. The bill further stated that the said Joseph B. Hinton insisted that, under the clause of the will in relation to the negro, Happy, she passed to his wife and had consequently vested in him absolutely, and not merely for the life of his wife, and he had expressed a design to sell the

( 17 ) said slave. But the plaintiff alleged that he was advised that in both of these claims of the defendant, Hinton, he was wrong, and the plaintiff could not safely yield to his demands.

The bill further stated that Grayson Dashiel, the legatee named in the will, came with his father and mother to the residence of the testatrix, in the year 1829 or 1830, and remained with her, as members of her family, about the space of two years, when he and they left her and never returned to her house, nor was the said Grayson ever after under the direction and control of the testatrix. Whether the said Grayson was entitled to the whole principal of the bank stock, according to the will, or whether the case had arisen under the codicil, entitling the said Sarah Ellen and Elizabeth Mary Dashiel to take with him, the plaintiff alleged that he was unable to decide, and that he was advised by counsel that it was a question of doubt and difficulty, on which he ought not to determine. The bill then prayed that the rights of the parties and the duty of the plaintiff, upon all the questions above stated, might be declared by a decree of the court; and that, should the defendant, in the opinion of the court, be entitled only to an estate for the life of his wife in the negro, Happy, he might be decreed not to sell or remove her; and that proper and adequate security might be taken, under the direction of the court, that she might be forthcoming at the expiration of the life estate.

The answer of the defendants admitted the facts set forth in the bill, but insisted upon their respective rights under the will of the testatrix.

*Badger* for the plaintiff.
*W. H. Haywood* for the defendants.

GASTON, J. Upon the questions which have arisen between the plaintiff and the defendants, Joseph B. Hinton and wife, the Court is of opinion with the plaintiff.

The testatrix directed by her will certain slaves to be sold, the money arising from the sale to be vested in bank stock, and the interest of that stock to be paid two-thirds to her sister, Mrs. Hinton, and one-third to her brother, Thomas B. Dashiel,
( 18 ) during their lives, with certain limitations over after their death. The executor has sold these slaves, allowing on some of them a credit of twelve months, taking bonds from the purchasers drawing interest from the day of sale. And upon these facts it is contended by the defendants, Hinton and wife,

that only the principal money secured by the bonds is to be invested in stock, and that the interest which accrues on the day of payment is divisible as that of the bank stock would have been had the price of the slaves been instantly, on the sale, paid in cash and converted into stock. The will is silent as to the terms and conditions of sale; but we hold that the testatrix did intend a sale upon credit. This is the universal usage of the State; and where the will intimates nothing variant from this usage, it is fair to suppose that the will was made with an implied reference to it. This custom is either founded upon or has caused the enactment of the statute which makes it imperative on executors or administrators who sell to pay debts, or to make division of the personal estate of their testators or intestates, to give *not less* than six months' credit for enhancing the price of the property. See Laws 1794 (1 Rev. Stat., ch. 46, sec. 11). A credit of twelve months on the sale of slaves is usual, and it cannot be deemed unreasonable, where the testatrix has forbidden that they be sold to speculators or to others than those who might buy for their own use. Such purchasers have usually to look to their annual crops for the means of meeting their engagements. Believing that the testatrix contemplated a sale upon credit, and entertaining the opinion that the credit allowed was not unreasonable, we hold that the amount which the purchasers are to pay upon the expiration of the term of credit, in whatever form such payment may be reserved or secured, is in the language of the will, "the money arising from the sale."

On the second question raised between these parties, we are at a loss to see upon what ground a larger *estate* in the negro girl, Happy, is claimed by Mr. and Mrs. Hinton than for the life of the latter. The case of *James v. Masters,* 7 N. C., 110, where this Court held that the legatee took but an estate for life, was one far more favorable to a claim of the absolute ( 19 ) property than that arising upon the bequest now under consideration. The *power* which the testatrix has conferred on Mrs. Hinton, directing the girl to be sold or set free at her death, in no way enlarged *her estate.*

Upon the other question whereon advice is prayed, the Court is of opinion that, inasmuch as it is admitted upon the pleadings that the testatrix did not have the direction or control of the education or tuition of Grayson Dashiel from a time anterior to the making of the will of the testatrix until her death, the contingency mentioned in the codicil thereof, upon the happening of which the interest in the bank stock bequeathed in the body of the will to said Grayson, became, according to the terms of the

codicil, divisible between the said Grayson and Sarah Ellen and Elizabeth Mary Dashiel, has occurred. The dissatisfaction which the testatrix declares in the codicil with the manner in which his education and tuition were *then* conducted furnishes a clear exposition of the sense in which she uses the phrase, "in case the education and tuition is withheld from me." She intends that the conditional and prospective disposition made in the codicil shall depend upon the *fact* whether the training of this youth shall continue as it then was, with those in whom she had not confidence, or be brought under her guidance and direction. In the sense of the testatrix, it was *withheld* from her, because she had it not.

The plaintiff is to pay the costs of the suit out of the fund.

PER CURIAM. Decree accordingly.

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( 20 )

WILLIAM THIGPEN et al. v. JAMES J. HORNE et al.

In equity a distinct appropriation and delivery over by a debtor of his *choses in action* for the benefit of one of his creditors is an assignment of them, and will prevail against a subsequent assignment by deed of all his *choses in action* to another creditor; for, as in neither case is the assignment a transfer of the legal interest in the *choses in action*, that which is in equity an assignment first in point of time will prevail.

An assignment by deed of all a debtor's *choses in action* for the benefit of one of his creditors will not entitle that creditor to claim money not the proceeds of such *choses in action* paid subsequently by the debtor to another creditor.

UPON the pleadings and proofs in this case, it appeared that on 27 April, 1837, the defendant John Atkinson executed to the plaintiffs, as trustees of sundry creditors of the said John, and for securing the payment of debts due to these creditors, a deed, whereby he assigned to the said plaintiffs a large quantity of produce, several specific articles of personal property, and then, by general words, "all the goods, wares and merchandise in his store, and all his book debts, bonds and notes, of whatever description, and judgments." In the month of December, 1831, the said John had intermarried with Mrs. Esther J. Tyson, a widow lady, possessed of considerable personal estate. Before this marriage all her personal property was duly conveyed, with the consent of the said John, to the defendant James J. Horne, as a trustee, to hold for the use of the said Esther until the marriage,

and from and after the solemnization thereof, then in trust, to permit her, notwithstanding her coverture, to take all the profits thereof to her separate use, with a power in the said Esther to dispose of the whole of the said property by instrument in nature of a deed or will; and in the event of no disposition being made by her, to hold to the use of the said Esther's then child, and of any other which she might have. In 1834 or 1835 the defendant John, being desirous to raise money to carry on his mercantile operations, proposed to his wife to sell some of the negroes included in her marriage settlement, to which she assented, upon condition that the money so raised should be deemed a loan from her to him, to be repaid at a convenient time thereafter, and to be reinvested in other ( 21 ) negroes. The negroes were accordingly sold by the said Atkinson and his wife, and the money so raised was appropriated to his mercantile engagements, but never refunded or reinvested. A few days before the execution of the assignment to the plaintiffs, the said Atkinson, conscious that his embarrassments were becoming insuperable, delivered unto John A. Vines (Horne, his wife's trustee, then residing at a considerable distance) a number of notes and other claims, to be collected for and applied in part satisfaction of this debt, due to his wife; and some time after the execution of said assignment to the plaintiffs, the said Atkinson made a formal assignment of these and others to the said Horne, and paid over to him the sum of $265 in cash, which, with the choses in action so transferred, covered the amount of the said debt.

The plaintiffs, by their bill, insisted that the assignment to them was prior to the assignment of Horne, and required that he account to them for the choses in action thus transferred to him, and the money paid therewith.

*The Attorney-General* for the plaintiffs.
*Iredell* for the defendants.

GASTON, J., having stated the case as above, proceeded as follows: The plaintiffs and Horne are both trustees, and both represent creditors of the defendant Atkinson. Neither of the assignments, as it regards the choses in action, transfers the legal interest—and in equity a distinct appropriation and delivery over by the debtor of the choses in action, for the benefit of his creditor, is an assignment thereof. The Court therefore declares that the defendant Horne is entitled to retain so much of these choses in action, or of the proceeds thereof, as were

actually delivered to John A. Vines before the execution of the assignment to the plaintiffs, but must account to them for the residue thereof.

As to the money, the plaintiffs have no claim thereto, unless it was the proceeds of the choses in action or other property embraced in their assignment.

There must therefore be an inquiry, to ascertain which of the choses in action assigned to Horne were delivered to
( 22 ) Vines before the date of the assignment of the plaintiffs, and whether the money paid over to Horne was in whole or in part of the proceeds of property assigned to the plaintiffs.

PER CURIAM. Decree accordingly.

*Cited: Miller v. Tharel.* 75 N. C., 152; *Bresee v. Crumpton,* 121 N. C., 124.

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CHARLES McALISTER, Admr. of ELIZABETH McALISTER, v. JOHN T. GILMORE.

Where a testator after giving to his wife for life a certain plantation and negroes directed in a subsequent clause that his estate should be kept together on his lands and plantation ("not left to his wife") for a particular time, and that the profits which had accrued during that time should be divided between his daughter E. A. and his grandson J. T. G., and then in several distinct sections proceeded to limit his estate, real and personal, in and among his family upon the happening of certain contingencies; and then in another section devised and bequeathed as follows: "I further will that at the death of my wife all that estate left her during her natural life, both real and personal, be equally divided between my daughter E. A. and her children, and my grandson J. T. G., provided he shall have attained the age of twenty-one years, to them and their heirs forever." *Held*, upon its appearing that the daughter died without children in the lifetime of the tenant for life, but after the grandson had attained the age of twenty-one years, that the remainder in the property given to the wife for life was not affected by any clause of the will but the last, and that by that clause a moiety of the remainder in the slaves vested in interest in the daughter, either immediately upon the death of the testator or, at least, upon the coming of age of the grandson, so that upon the death of the daughter her husband was entitled to claim the same as her administrator.

THE bill charged that Joseph Thomas died some time in 1819, leaving a will, in which were contained the following clauses: "2d. I give and bequeath to my beloved wife, Hannah Thomas, for and during the term of her natural life, the following prop-

erty, viz., old Primus, etc.; also that part of my plantation that I bought of Mr. Beard," etc. "Item 8th. I will and desire that all my estate, both real and personal, not already ( 23 ) devised, shall be kept by my executors on the lands and plantation (I mean that part not left to my wife), to tend and carry on," etc. "I further will that should my daughter, Elizabeth McAlister, breed and raise children, that the net proceeds of my estate be equally divided between my grandson, John T. Gilmore; my daughter, Elizabeth McAlister, and her children; my daughter, Elizabeth McAlister, and her children to receive their parts of the proceeds of the mills and lands annually, and that my grandson, John T. Gilmore, receive his proportionate part of said proceeds when he shall have arrived to the age of twenty-one years, and not before. Item 9th. I will and desire that should my grandson, John T. Gilmore, die before he attains to the age of twenty-one years, then I give and bequeath to my daughter, Elizabeth McAlister, all my estate, both real and personal, to her and her heirs, forever. Item 10th. I will, further, that should my daughter, Elizabeth McAlister, die without children before my grandson, John T. Gilmore, arrives to the age of twenty-one years, then I give and bequeath to my grandson, John T. Gilmore, all my estate, real and personal, which has not been already devised. Should my grandson, John T. Gilmore, die after that he may have arrived to the age of twenty-one years, without children begotten in wedlock, then and in that case I give and bequeath all that part of my estate left to him, to be equally divided between my brother, William Thomas', children, viz.," etc. "Item 11th. Should my grandson, John T. Gilmore, attain to the age of twenty-one years, and my daughter, Elizabeth McAlister, and her children, or either of them, be living at that period, then I will and desire that all my estate, both real and personal, be equally divided between my grandson, John T. Gilmore, my daughter, Elizabeth McAlister, and her children, consisting of the following negroes and lands, viz.," etc. "Item 12th. I further will that at the death of my wife, Hannah Thomas, that all that estate left her during her natural life, both real and personal, be equally divided between my daughter, Elizabeth McAlister, and her children, and my grandson, John T. Gilmore, provided he shall have attained the ( 24 ) age of twenty-one, to them and their heirs, forever." The bill then stated that John T. Gilmore arrived at the age of twenty-one years about the year 1825, and that Elizabeth McAlister died, without children, about the year 1830, and that the plaintiff, her husband, administered upon her estate. It was

further stated that the executors had assented to the bequest to the widow for life, and that she had taken possession of the slaves and other property bequeathed to her; that she was still living, and had sold her interest in the said slaves to the defendant, John T. Gilmore, who was about to remove thence beyond the limits of the State. The plaintiff insisted that, under the will of Joseph Thomas, the remainder in the slaves bequeathed to the widow for life vested in his intestate and the defendant, and that in the events that had happened he was entitled, as the administrator of his wife, to one-half the said slaves, and prayed to have them secured to him. The defendant put in an answer, which admitted the material facts stated in the bill, but insisted that he was solely entitled to the remainder in the slaves, after the life estate in his grandmother, the testator's widow.

No counsel appeared for the plaintiff in this Court.
*Badger* and *W. H. Haywood* for the defendants.

DANIEL, J. Upon this state of the case, there can be no doubt, and we so declare, that the remainder in the slaves and their increase (which had been bequeathed to Hannah Thomas for life) vested in moieties in Elizabeth McAlister and John T. Gilmore. Whether the said legacy vested in interest immediately on the death of the testator, or on John T. Gilmore's arriving at the age of twenty-one years, it is now unnecessary to decide, as Gilmore arrived at twenty-one years of age before the death of Elizabeth McAlister. But our attention has been called to the eighth, ninth, tenth and eleventh sections of the will. On reading those sections, we have no hesitation in saying that they relate entirely to other portions of the testator's property and do not touch or relate to the property given by the testator to his wife for life and then in remainder (by the twelfth clause) to Elizabeth McAlister and John T. Gilmore. By the eighth
( 25 ) section the property (not left to his wife) is to be kept together for a particular time, and then a direction how the profits which had accrued during that time should be divided between Mrs. McAlister and John T. Gilmore. The ninth, tenth and eleventh sections proceed to *limit* the said property in and among his family, upon the happening of certain contingencies. The *property* referred to in these sections, we think, does not include the interest in remainder of the slaves left by the testator to his wife for life. This may be collected from what the testator has said in the eighth section (*"not left to my wife"*), as well as the express enumeration and designation of the property

intended to be covered by the eleventh section, at least by the schedule appended to the foot of that section, which schedule does not include the slaves given to his wife for life. We think that the twelfth section is an independent clause, intended solely to dispose of the property given before to his wife for life. The plaintiff is entitled to have his moiety of the slaves secured, etc.

PER CURIAM. Decree accordingly.

*Cited: Hearne v. Kevan,* 37 N. C., 38.

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MACKEY GREGORY v. NATHANIEL J. BEASLEY, Admr. of MARY L. GREGORY, et al.

Where a testator bequeathed all his personal property to his four children, A, B, C and D, to be equally divided between them when his son A arrived to the age of twenty-one years, "and if one or two or three should die under age or without lawful issue for all the property to go to the surviving ones forever." *Held*, that upon the death of D, a daughter, before her arrival at full age, but after A had attained twenty-one years old, her share would go over to her brothers then living; and that neither the child of a sister who had died after attaining full age nor the next of kin of the testator was entitled to any part of it.

SAMUEL GREGORY died some time in 1824, leaving a will, in which he bequeathed as follows:

"I give unto my four children, Maria, Frederick, Mackey and Mary Lucilla Gregory, all my property, to be equally divided when my son, Frederick Gregory, arrives to the ( 26 ) age of twenty-one years old; and if one, or two, or three, should die under age or without lawful issue, for all the property to go to the surviving ones forever."

Frederick Gregory arrived at full age in March, 1835, soon after which, upon a petition filed for that purpose, the slaves belonging to the testator's estate were divided into four lots or shares, and the report thereof was confirmed at the February Term, 1836, of Chowan County Court. Maria married the defendant Beasley, arrived to the age of twenty-one years, had issue (a daughter, now alive), and died in January, 1834. Mary Lucilla Gregory died under age and without issue, in May, 1838. The widow of the testator married and had issue (a son, now living), Mackey Gregory, the brother of the intestate. Mary Lucilla filed this bill against her administrator and also against the

representative of Maria Beasley, the next of kin of the said Mary Lucilla and Frederick Gregory, in which he claimed to be entitled to one-half of the share of the slaves allotted to the said Mary Lucilla, admitting that his brother, Frederick, was entitled to the other half. Answers were put in by the defendants, admitting the above facts to be true, and insisting upon the interests of the parties, respectively.

The cause was submitted, without argument, by

*M. Haughton* for the plaintiff, and
*A. Moore* for the defendants.

DANIEL, J., after stating the case as above, proceeded as follows: There are three sets of claimants upon the share that fell to the intestate, Mary Lucilla Gregory—first, the two surviving brothers; secondly, the two surviving brothers and the defendant, the administrator of the deceased sister, Maria; thirdly, the next of kin of Mary Lucilla, under the statute of distributions.

The executory devise being good in law, the next of kin, as such, have, we think, no right to any of the share. It is very probable that the testator, if he could have foreseen the events which have happened, might have limited a part of this
( 27 ) fund to the child of Maria. But this Court can only construe wills; it is not allowed to make them for testators. The testator has said that if one, or two, or three, of his children should die under age or without issue, "for all the property to go to the *surviving ones forever.*" The meaning is that all the property, or original shares of one, two, or three of his children dying before coming to age or without issue, should go over to the child or children *then* surviving. The expression, *"surviving ones,"* shows this to be his meaning.

We do not subscribe to the argument, made by the defendant's counsel, that the testator meant, if either one, two, or three of his children should die before the time of division, viz., before Frederick arrived to the age of twenty-one years, then *only* the interest of the person so dying should go over to the survivors; but not if any died *after* the time of division. We can find nothing in the will to tie up the contingency only to the time before the division. We think that the testator meant that the property which he gave to each of his children should be divested and go over to the survivors if any of the four children should die without issue before they arrive at the age of twenty-one years. This opinion is perhaps fortified by the fact that the testator must have known that when Frederick should come to

the age of twenty-one years his daughter, Mary Lucilla, would only be twelve years old. Yet he says (in the clause) that if either die under age and without issue, the property is to go to the survivors, which tends to show that he did not mean to limit the contingency up to the time of the division only, but afterwards, also, if the event should occur. Mackey and Frederick, being the only children surviving at the death of their sister, *Mary Lucilla,* are entitled to the said share in moieties.

PER CURIAM. Decree accordingly.

*Cited: Threadgill v. Ingram,* 23 N. C., 579; *Skinner v. Lamb,* 25 N. C., 157.

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( 28 )

SIDNEY S. PERRY et al. v. JAMES D. NEWSOM, Admr. of BURWELL PERRY, et al.

If the putative father of bastard children procure a private act of Assembly to be passed to alter their names and to legitimate them and the act, after reciting that they are his illegitimate children, declares that they shall be legitimated and made capable to take, possess, enjoy and inherit any estate, either real or personal, which may be devised or descend to them in as full and ample a manner, to all intents and purposes, as if the said children had been born in lawful wedlock, it makes the children legitimate to the person who is recited in the act to be their father, though there is no express declaration that they shall be legitimated to him.

The agency of the father in procuring such an act to be passed cannot affect its construction, but it may be material to give effect to it and make it operate on his property.

Whether the Legislature can, by a private law, before the death of the owner of an estate, annul the capacity of one person to succeed and confer it on another without the consent of the owner—*Qu?* But if it can, it is not presumed to have so intended without an explicit manifestation of such intent. On the contrary, the general principle is that private acts are in the nature of assurances at common law, and therefore that their operation is meant to depend on the consent of those persons who are *in esse* and whose estates are the subjects of the acts.

THE bill stated that Burwell Perry died some time in 1839, intestate, possessed of a large personal estate, and that the defendant Newsom became his administrator, and that the complainants were the illegitimate children of the said Burwell Perry by the defendant _____ Perry, with whom he intermarried after their birth; that prior to the passage of the act hereinafter mentioned, they bore the maiden name of their mother,

though they were always acknowledged and treated by the defendant's intestate as his children; and that he, at the session of the General Assembly held in the year 1828 procured the following act passed:

"AN ACT TO ALTER THE NAMES OF SIDNEY S. GAY, SAMUEL C. GAY, MARY G. GAY AND FABIUS H. GAY, OF WAKE COUNTY, AND TO LEGITIMATE THEM.

"*Be it enacted, etc.,* That Sidney S. Gay, Samuel C. Gay, Mary G. Gay and Fabius H. Gay, the illegitimate chil-
( 29 ) dren of Burwell Perry, shall hereafter be known and distinguished by the names of Sidney S. Perry, Samuel C. Perry, Mary G. Perry and Fabius H. Perry, and by that name shall be made capable to sue and be sued, plead and be impleaded within any court within this State, and by that name shall be legitimated and made capable to take, possess and enjoy and inherit any estate, either real or personal, which may be devised or descend to them, in as full and ample a manner, to all intents and purposes, as if the said Sidney, Samuel, Mary and Fabius had been born in lawful wedlock; any law to the contrary notwithstanding."

The complainants alleged that, by the force of this act, they became, in law, legitimated as the children of the intestate, and were to be regarded as if born to him in lawful wedlock, and were entitled to succeed to his estate, real and personal, as his only children, heirs at law and next of kin; and they prayed for an account and distribution of his estate.

To this bill the defendant demurred, and, the demurrer being sustained and the bill dismissed, the plaintiffs appealed.

*Badger* for the plaintiffs.
*W. H. Haywood* for the defendants.

RUFFIN, C. J. The act under which the plaintiffs claim cannot be read without receiving a vivid impression that it was meant to legitimate these persons as the children of Burwell Perry. It states them to be "the illegitimate children of Burwell Perry," and then alters their name from Gay to Perry, and by this last name they are made legitimate and capable to take and inherit any estate, either real or personal, in as full and ample a manner as if they had been born in lawful wedlock. It seems to us that there can be but one answer to the questions: As whose children are they legitimated? From whom may they take and inherit property? It would have been more formal and

professional to have written the act that they should be deemed the legitimate children of Burwell Perry and might succeed to him. But if the act had been so drawn, though the expression would have been more precise, yet the sense would not have been plainer than it is now; for certainly the legiti- ( 30 ) macy enacted must take the place of the illegitimacy recited. This is a necessary implication from the recital; else why make such a recital at all? It is on this point that the present case differs from that of *Drake v. Drake,* 15 N. C., 110, in which it did not appear whose illegitimate offspring the persons were deemed by the Legislature to be. But here that fact is affirmed and necessarily controls the construction of the act and renders its meaning obvious. When thus rendered, it is our duty to execute the law, whether it be a public or private statute; for the difference between them is not in their obligation, but only in the rules of construction. The latter is never carried beyond its letter or plain implication. Here we think the implication a necessary one, from the language of the act, unaffected, of course, by the agency of the father in procuring it to be passed.

But, although the agency of the father can have no influence on the construction of the act, it may be material to give effect to it and make it operate on his property. We do not mean to say positively that the Legislature cannot make one who is out of the line of descents succeed to an ancestor against the consent of the ancestor, instead of him who would be heir, according to the general law. Perhaps if the power of disposition by the ancestor in his lifetime be not restricted, and as the law gives the capacity to inherit, it may not be beyond the power of the Legislature, by even a private law, passed before the death of the owner, to annul the capacity of one person to succeed and confer it on another. But if that can be done, it is not to be presumed to have been intended, without an explicit manifestation of such intent. On the contrary, the general principle is that private acts are in the nature of assurances at common law, and, therefore, that their operation is meant to depend on the consent of those persons who are *in esse* and whose estates are the subjects of the acts. Whatever difficulty there might be upon the question of legislative power in the case supposed, of a legitimation against the will of the ancestor, it does not exist in this case. The bill explicitly states the father's consent to the act, and it is admitted by the demurrer; and consequently his ( 31 ) estate is bound, not merely by the force of the statute, but by that and his own act and consent together.

The decree must be reversed and the demurrer overruled, and

the cause remanded for an answer and other proceedings in the court below. The cost in both courts must be paid out of the assets of the intestate.

PER CURIAM. Decree reversed.

*Cited: Lee v. Shankle,* 51 N. C., 315.

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JAMES NELSON, Exr. of ANNIS MOORE, v. JOHN MOORE et al.

Where a testatrix bequeathed "that all the balance of my property shall be divided between L. G., A. N., M. F., and A. and I. A. B. to draw one share; also M. and N. H. to draw one share. *Held*, that the testatrix intended the residuum of her property should be divided into five equal shares, of which one share was to go to the two B's and one other share to the two H's, and the three remaining shares to the three other named legatees. *Held, further*, that I. A. B., one of the legatees, having died before the testatrix, his moiety of a share lapsed and went to the next of kin of the testatrix, because all of the legatees, whether taking whole shares or moieties of shares, would have been, if they had lived, not joint tenants but tenants in common of the fund.

THE bill states that Annis Moore, being possessed of considerable personal estate, died some time in the year 1834, after having made a will, in which she gave divers specific legacies, and then bequeathed as follows:

"It is also my will and desire that the balance of my property shall be divided between Lucinda Godley, Annis Nelson, Marina Forest and Annis and John Alexander Brinkley, to draw one share; also Marina and Nancy Hardie, to draw one share."

The bill then stated that Annis Nelson died before the testatrix, leaving a son by the name of William M. Nelson, who was entitled to her share, under the said residuary clause; and that John Alexander Brinkley had also died before the testa-
( 32 ) trix, whereby the legacy to him became lapsed. The bill was filed by the plaintiff, as the executor of the said Annis Moore, against her legatees and next of kin, and prayed the advice of the court as to how he should pay over the residue in his hands, alleging that the guardian of Marina and Nancy Hardie, who were infants, insisted that the said residue should be divided into two equal shares, of which his wards were entitled to one, and the other legatees and next of kin to the other; while the latter contended that it should be divided into five equal

shares, of which Lucinda Godley was entitled to one share, Marina Forest to one share, William M. Nelson (son of Annis Nelson) to one share, Annis Brinkley to one moiety of one share, and the next of kin of the testatrix to the other moiety of that share, and Marina and Nancy Hardie were entitled to one share.

The defendants, in their answers, admitted the facts stated in the bill, and contended for the construction most favorable to their respective interests.

No counsel appeared for the plaintiff in this Court.
*The Attorney-General* for the defendants.

DANIEL, J. The Court is called upon to put a construction upon the residuary clause in the will of Annis Moore, and also to decide upon the rights of the parties, according to the facts admitted in the pleadings. We are of the opinion that, by a fair interpretation of the said clause, as stated in the bill and admitted in the answers, the testatrix intended the *residuum* of her property should be divided into *five* equal shares. *One* share was to go to the two Brinkleys, and *one other* share to the two Hardies, and the *three* other shares to the three other named legatees, viz., Lucinda Godley, Annis Nelson and Marina Forest. This construction, we think, necessarily follows, when we see the word *"and,"* the first copulative conjunction, placed immediately preceding the christian names of the *two* Brinkleys, and the words, "to draw *one* share," placed immediately following the names of the said two Brinkleys. Then comes the bequest to the *two* Hardies, in these words, "also Marina and Nancy Hardie to draw *one* share."

The testatrix having directed *"shares"* of this fund to be allotted to some of the said residuary legatees, the ( 33 ) whole fund must necessarily be supposed to have been intended by the testatrix to be first *equally divided* into five shares, and then two of these five shares to be again divided between the Brinkleys and Hardies. This being so, made the legatees take in distinct shares. Mrs. Nelson, one of the legatees, having died before her mother, the testatrix, and having left a son, William Nelson, one share of the five will belong to him, by virtue of the act of Assembly (1 Rev. Stat., ch. 122, sec. 15). John A. Brinkley, one of the two Brinkleys who was to have *one share,* having died in the lifetime of the testatrix, the question now is whether his *moiety of one share* survives to the other legatees, or whether it lapses and goes to the next of kin of the testatrix. We are of the opinion that all the residuary legatees,

whether taking whole shares or moiety of shares, would have been, if they had lived, not joint tenants, but tenants in common of the fund; therefore the *moiety* of the *one* share bequeathed to the said John Alexander Brinkley *lapsed* and now belongs to the next of kin of the testatrix.

PER CURIAM. Decree accordingly.

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THOMAS SHEPHERD v. ISAAC TRUITT et al.

A bill filed by a creditor charging that his debtor was a partner in a particular firm, and that he had purchased his debtor's interest therein under an execution against him, and calling for an account of the partnership, cannot be sustained upon proof merely of a fraudulent sale or transfer of some of the goods to the firm by the debtor, because such sale or transfer will not make him a partner therein.

IN 1835 a mercantile firm was formed and did business at Franklin, in Macon County, under the name of Joseph Welch & Co. It was composed of the following known and open partners, namely, James Truitt, Robert Hall and Joseph Welch.

(34) In August, 1835, Isaac Truitt went to Charleston, in South Carolina, to purchase goods for the firm, and in its name and with its means he made purchases to a considerable amount. At the same time he made purchases in his own name and upon his own credit, to the value of about $600, and these last goods were packed and marked in his name and so arrived at Franklin, in wagons, with the others. Upon their arrival they were all taken in possession by James Truitt, Hall and Welch as the effects of Joseph Welch & Co., and were put into their store together for the purpose of sale; so that, the particular goods purchased in the name of Isaac Truitt could not, as the plaintiff alleged, be identified.

The bill stated that Isaac Truitt was then much indebted, and, indeed, insolvent; and that for that reason he was not held out as a partner in the firm of Joseph Welch & Co., but that he was in fact a secret partner, and that the goods bought and sent in his name formed a part of the capital stock of the firm put in by Isaac Truitt. It then charged that Thomas Shepherd was a creditor of Isaac Truitt, and "directed the sheriff to levy his execution on the interest of said Isaac in said store, and that the said Isaac's interest was accordingly exposed to sale and purchased by the plaintiff" in September, 1835. The bill was filed

against Isaac Truitt, James Truitt, Hall and Welch, and charged that they denied that Isaac Truitt was a partner in the firm, and consequently refused to come to any account with the plaintiff. The prayer was that the defendants might discover the terms of the contract of copartnership, and that there might be an account and the plaintiff paid what might be found due to him thereon.

The answer stated that Isaac was indebted to James Truitt, and that it was agreed between them when Isaac went to Charleston to purchase the goods for the firm that he should also make the purchase, as above mentioned, on his own credit, and that James would take those goods in discharge of his debt, and that when they came they were received by the firm and credit for the value thereof given on the books to James Truitt, and not to Isaac. All the defendants distinctly denied that Isaac Truitt was a partner or had any interest in the firm of ( 35 ) Joseph Welch & Co.

There was evidence that the members of the firm were desirous that it should not be known that any of the boxes were marked with the name of "Isaac Truitt"; that the sheriff levied on one of these boxes of goods, but it was nevertheless opened and the goods put into the store with the others. Afterwards, the sheriff, without disturbing the possession of any of the goods, put up to sale at the store the interest of Isaac Truitt in the store, and the plaintiff purchased it, at $400. The plaintiff examined several witnesses, and amongst them the clerks in the store, as to the interest of Isaac Truitt therein, but neither of them gave testimony that he was a partner or in any manner contradicted the answers on that head.

No counsel appeared for either party in this Court.

RUFFIN, C. J., having stated the case, as above, proceeded as follows: The proofs in the case can, at the utmost, only raise a suspicion of the fairness of the transfer of the goods from Isaac to James Truitt or the firm. But if that be admitted to be fraudulent, it still could avail nothing in this suit. The plaintiff did not purchase those articles, in particular, as the goods of Isaac Truitt; and, on the contrary, his bill states that those articles are in fact unknown. If he had bought them he would probably have brought trover. The sale was of a different kind. It was of the interest of Isaac Truitt in the store as a partner, and the scope of the bill is to establish that he was a member of the firm and to have an account, showing his interest therein, and to give the plaintiff the benefit thereof, under his purchase.

Now, a fraudulent sale or transfer of some of these goods did not make the vendor a partner in the business. To notice no other objection, therefore, the plaintiff must fail, for he has not proved that Isaac Truitt was in any way, either openly or secretly, a partner. Bill dismissed, with costs.

PER CURIAM. Bill dismissed.

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( 36 )

MARTHA WILCOX v. LITTLEBURY WILCOX et al.

As a petition to rehear a cause does not *per se* stay proceedings on the decree sought to be reheard, and when it is allowed affords to the court an opportunity of correcting any injustice it may inadvertently or erroneously have committed, it is almost a matter of course unless the application be unreasonably delayed, not only to receive a petition, but upon it to rehear the cause.

It is proper for a court to refuse to rehear a decree rendered by consent, because it is in truth the decree of the parties; but if a decree be the finding and judgment of the court upon the bill, answer, proofs and exhibits in the cause, an interlocutory order subsequently rendered by consent upon the footing of that decree will not prevent the impeaching of the decree for error.

Where under a marriage settlement the property of the wife was conveyed to a trustee upon trust "to pay to or to authorize and empower the husband to take and receive from time to time during his life, as the husband of his said wife and not longer, or after he shall so cease to be, the interest, profits and annual produce of the said property, to and for his own use and that of his said wife, but so that the same is in no wise to be subject to his debts. *Held*, that the wife was entitled to a decent support and maintenance out of the means placed in her husband's hands only so long as she remained living with him, unless he turned her away or by intolerable ill-usage compelled her to leave him.

ON 22 February, 1828, a marriage having been agreed upon, and being about to be solemnized between Littlebury Wilcox and Mrs. Martha Hudson, the said parties executed an indenture with Samuel Johnston, a trustee for that purpose selected, whereby all the property then belonging to Mrs. Hudson was conveyed to the said Johnston, his executors, administrators and assigns, in trust for her, the said Martha, until the intended marriage should take effect; and from and after the solemnization thereof, upon trust, "to pay to or to authorize and empower the said Littlebury to take and receive, from time to time, during the life of the said Littlebury, as the husband of the said Martha, and not longer or after he shall so cease to be, the interest, profits and

annual product of the said property, to and for his own use and that of the said Martha; but so that the same is in nowise to be subject to the debts of the said Littlebury." And by the said settlement it was agreed that the said Martha should have power, during the marriage, to make a last will and testa- ( 37 ) ment, and thereby dispose of the said property at her pleasure; that the settlement thereby made and intended to be made for the said Martha was in full recompense and bar of dower or a distributive share out of the estate of the said Littlebury; that the trust thereby raised should terminate at the death of the said Martha, and in the event of her dying without making any last will or testament the property thereby conveyed should go to and vest in the next of kin of the said Martha. Shortly after the execution of this indenture, the said parties married, and lived together thereafter as man and wife until about 1 October, 1835, when Mrs. Wilcox left her husband and home and took up her abode with her friend, Mrs. Shine, with whom, except on occasional visits to her husband's residence, she has continued to dwell ever since. In October, 1836, Mrs. Wilcox, by her next friend, Mrs. Shine, filed her bill in the Court of Equity for the county of Halifax against her husband and Samuel Johnston. This bill was subsequently amended, and, as so amended, stated the marriage settlement and the subsequent marriage of Littlebury Wilcox and Martha Hudson, and charged that Johnston, the trustee, had declined to act as such and for some time had been removed to parts unknown; that since the marriage, her husband had enjoyed the annual interest and profits of the property so conveyed in trust to the said Johnston; that part of the said property consisted of negro slaves and of the issue of some of these slaves born since the marriage; that she had been informed and believed that her said husband was about to take the slaves away to the South himself, or was offering them for sale to a person or persons whose avowed intention it was to carry them out of the jurisdiction of the State; that she apprehended some disaster of this kind to the said slaves, to be caused by the defendant, "from whom she is separated and cannot live on terms of peace, on account of the ill treatment of her said husband"; that during her separation he had furnished her with a few articles only, and those of very inconsiderable value, for her livelihood, and that these were wholly inadequate for her reasonable support and comfort; "whereas she is advised that, although ( 38 ) the rents and profits of the property conveyed were properly receivable by him, yet that he held the same for the joint

support of himself and the plaintiff, and that on a separation, under the circumstances alleged, she was and is entitled to such part of the yearly profits of the property conveyed by the marriage settlement as was and is necessary for her decent maintenance and support." The bill prayed "that the defendant, Littlebury, may be enjoined and restrained from sending away or selling the interest he hath in the said slaves; that the plaintiff may be decreed a decent support since her separation from him, and such further relief as her case requires; that another person be substituted as a trustee in the place of the defendant Samuel, and that a writ of sequestration issue to keep and preserve the said slaves." The defendant Samuel Johnston was not served with process, but made a party by publication, and as to him the bill was taken *pro confesso* and set down for hearing *ex parte*. The defendant Wilcox answered the bill. In relation to the charge of designing to make away with the negroes, he positively in his answer denied that he entertained or ever had entertained any such purpose, and in relation to the plaintiff's claim to support he declared that she separated from him without any reasonable cause—not because of his ill treatment, but from an influence over her, exerted by others for interested purposes and against his wishes; submitted that he was not bound to furnish her with any support while thus living apart from him, but insisted that he had, nevertheless, from time to time, supplied her wants as far and as fully as he could prevail upon her to make them known.

To this answer there was a general replication. At the Fall Term, 1837, upon the hearing *ex parte*, as to Johnston, it was ordered that Andrew Joyner and Rice B. Pearce be appointed trustees in the place of the said Johnston. At the Spring Term, 1839, the cause coming on to be heard upon the bill as taken for confessed as against the defendant Johnston, and as between the plaintiff and the defendant Wilcox, upon the bill, answer, proofs and exhibits, it was decreed as follows: "His Honor doth declare that the defendant did claim that the slaves referred to in the bill were subject to his entire control; that he had a right
( 39 ) to remove them out of the State and to sell them, and that he, the said Wilcox, did intend to remove and to sell the same; and the court doth declare that, upon the true construction of the marriage agreement referred to in the pleadings and exhibited in the cause, the said defendant hath no right to the possession of the lands and slaves therein mentioned, but only to receive, during the joint lives of himself and the plaintiff as man and wife, the increase and yearly issues and profits thereof, and

that the said increase and yearly issues and profits do exclusively belong to the defendant, but are receivable by him for the joint use of himself and the plaintiff; and that until a reconciliation shall be effected between them and they shall again reside and live together, the plaintiff is entitled to be allowed, out of the issues and profits, a suitable sum yearly for her maintenance and support, and that the said allowance should be made for the time past in which they have been separated, as well as any separation which may take place after a reconciliation shall have been effected; and the court doth declare that, on failure of the defendant to pay, upon request, into the hands of the trustees, for the separate use of the plaintiff, such sum as may become due for such support and maintenance, the said trustees shall resume the possession of the said property, manage and control the same, and, after deducting all proper charges and allowances and retaining for the use of the plaintiff such sum of money as may from time to time become due for such support and maintenance, to pay over the residue thereof to the said defendants; and the court doth further declare that the plaintiff had a right to require, and ought to have, adequate security of the defendant that the said slaves will not be removed out of this State, but will be kept at all times within the jurisdiction of this court, will be surrendered when required by the trustees or survivor of them, and will be forthcoming at the expiration of the defendant's interest therein, and to be then surrendered to the person entitled to the same, under the marriage settlement aforesaid; therefore it is ordered and decreed that the master ascertain and report to the next term whether and how long the plaintiff and the said defendant have been living separate and apart; whether, ( 40 ) during such separation, the defendant had contributed anything, and, if so, how much and to what amount, towards the plaintiff's support and maintenance; whether they are now reconciled and again living together as man and wife; what is the value and increase of the estate mentioned in the said marriage agreement, and what yearly sum will be a proper allowance for the support and maintenance of the plaintiff during her past and any future separation from the defendant. And it is ordered and decreed that the defendant Wilcox do execute and deliver a deed of release and assurance of all his interest in the said property to A. Joyner and R. B. Pearce, the trustees heretofore named by the court, upon the trust declared in the said marriage agreement, the form of the said deed to be settled by the master; and that said defendant pay all the costs of the suit;

and the court reserves further directions until the coming in of the master's report."

At the succeeding term of the court, in the fall of 1839, the following orders were made, viz.: "The master having made his report to this term, and the defendant being desirous to have time to except thereto and to procure further testimony, and having moved therefor, it is, by consent of parties, ordered that defendant have time until the next term to except to the said report, and that the parties may take further depositions and file exhibits, and that the plaintiff may amend her bill; and, also, it is by the like consent ordered that the defendant, before the first day of the ensuing court of Halifax, pay into the office of the clerk and master, for the use of the plaintiff, $400, and on failure execution may issue therefor; the said sum to be considered as a payment on account of the sum stated in the report."

At the Spring Term, 1840, the defendant Wilcox prayed for leave to file a petition to rehear the decree rendered against him at the Spring Term, 1839, and that the cause should be reheard before his Honor, which motion was refused. From the disallowance of this motion the defendant prayed an appeal to the Supreme Court, and this prayer was granted; but at the same term, exceptions having been filed to the report of the master, and the proofs on both sides being completed, the cause
( 41 ) was finally set for hearing, and, on motion of the plaintiff, was ordered to be transmitted to the Supreme Court.

*The Attorney-General* for the defendant.
*Iredell* and *Badger* for the plaintiff.

GASTON, J., having stated the case as above, proceeded as follows: It does not appear for what reason the court refused permission to the defendant to file his petition for a rehearing. As such a petition does not *per se* stay proceedings on the decree sought to be reheard, and, when it is allowed, affords to the court an opportunity of correcting any injustice it may inadvertently or erroneously have committed, it is almost a matter of course, unless the application be unreasonably delayed, not only to receive a petition, but upon it to rehear the cause. It is said here, however, that the court properly refused the leave asked for, because it was in effect to obtain a rehearing of a decree rendered by consent. We do not think so. The decree to which the petition distinctly refers is that of the Spring Term, 1839, which purports to be in no respect founded on consent, but to be the finding and judgment of the court upon the bill, answer,

proofs and exhibits in the cause. We can very well understand the propriety of the court refusing to rehear a decree rendered by consent, because it is in truth the decree of the parties, and in such a decree, *"stat pro ratione voluntas,"* their will is a sufficient reason. But we do not see why an interlocutory order, subsequently made upon the footing of that decree, although rendered by consent, will prevent the impeaching of the decree for error. Such *decree* remains, nevertheless, the decree of the court, and, until it is suspended or reversed, must be executed either voluntarily or compulsory. Facilities given to its execution ought not to bar a becoming and regular inquiry into the merits of the decree itself.

Considering, therefore, that the defendant Wilcox is entitled to be heard here, in relation to the matters adjudged by the decree, which he sought below to have reheard, as well as upon the matters presented by the report and exceptions, ( 42 ) we have heard the cause *de novo.*

Upon such hearing we have come to a conclusion differing greatly from that which was declared below. We agree thus far with his Honor that the defendant has not only claimed to have a right to sell his interest in the slaves comprehended in the marriage settlement—a claim perfectly well founded, we suppose—but has thrown out threats of a purpose to sell them out of the State. We do not agree to the declaration that the defendant actually purposed or intended to remove them. We believe that these were idle threats, made in vexation after his wife had left him, and for the purpose of being repeated to her. Nevertheless, as they have afforded her a ground for claiming that her solicitude about the slaves should be quieted, we acquiesce in the propriety of requiring some security from him against a removal of the property without the State. As he is confessedly a man of unembarrassed fortune, a simple injunction to this effect is all that is now necessary.

In the court below, the claim of Mrs. Wilcox to a decree against her husband for maintenance and support during her separation from him was not put upon the ground that such separation had been compelled by his ill treatment; nor, in our judgment, could it have been placed upon that ground. Neither the pleadings nor the proofs will justify a declaration that she was compelled to leave him because of his ill treatment. No objection, indeed, has been taken on either side to the proofs, if proofs they may be called, of the matters of disagreement between the parties, and of the causes why they live apart; and for the satisfaction of the parties we have heard these proofs

fully and considered them with care. We feel it incumbent on us, however, to say that none of them were properly admissible. Perhaps a charge can scarcely be brought by a woman against her husband more indefinite than that of "ill treatment," comprehending, as it does, every offense against the law of connubial love, from the slightest inattention to the most brutal outrage. So vague an imputation cannot be the foundation of a judicial sentence. Besides, it cannot for a moment be pretended
( 43 ) that every act of improper conduct on the part of a husband will authorize a wife to leave her proper place—his side and his home; and if she alleges that he has been guilty of such gross misconduct as to justify this seeming revolt from her duty, she must so charge the misconduct, that it may be judicially seen, when the fact is ascertained, whether it be of that character which induces a forfeiture of his right to her society, and that he may have a full opportunity of answering distinctly to the misconduct charged, and of explaining or disproving it. It would be a waste of time, if not worse, to attempt any analysis of the complaints and recriminations of the parties—the neighborhood rumors, the various surmises and conjectures and opinion of the witnesses—relative to the misunderstandings and separation of this married couple, with which, and with little else beside, their depositions are filled. We pronounce the testimony as inconclusive and unsatisfactory as the charge is vague. It lays no solid foundation whereon to adjudge which of the parties was to blame, and therefore renders it probable that neither was without fault. It is indisputable, however, that she separated from him, and we are obliged to say that she has not shown any sufficient cause for that separation.

The claim of the plaintiff must then rest on this: that under the marriage settlement the profits are settled to the common use of the husband and wife, and that she has, therefore, such a distinct beneficial interest in these profits as to entitle her to a portion thereof, independently of her husband, and, whenever she chooses, to live apart from him. We cannot acquiesce in these views. No part of the profits of the property is settled to the *separate* use of the wife. The whole are receivable by the husband, and, though the object or purpose for which they are limited is the use or benefit of his wife as well as of himself, they are receivable by him as *her husband* and applicable to her use as *his wife*. There is no intimation of any purpose in this marriage variant from that perfect union of persons which the law contemplates in such a connection. These profits are given to him, that he may the better comply with his duty to provide for

his wife; but he is not bound to provide for her when she disclaims his protection and refuses to abide under his ( 44 ) roof. It is revolting to the best interests of domestic morality and public policy to put upon the settlement a construction which would amount to a prospective provision for separation, and offer inducements for the violation of the plainest and most sacred duties. The plaintiff is entitled to a decent subsistence, in proportion to the extent of the means placed in her husband's hands, but it is while she remains under his wing, where she has plighted her troth to stay. If, indeed, he had turned her away, or, by intolerable usage, compelled her to leave him, then, as *he* has rendered the performance of *her* duties impossible, his obligation to support her and her claims on him for subsistence would not thereby be impaired.

Our opinion, therefore, is that the interlocutory decree, which the defendant Wilcox prayed to have reheard, ought to be reversed as erroneous. And, upon the whole matter, this Court declares that, because of the apprehensions of the plaintiff in regard to the safety of the negroes comprehended in the marriage settlement, excited by the defendant's threats to sell them out of the State, the plaintiff is entitled to an injunction, restraining the defendant from removing the said slaves or causing them to be removed beyond the jurisdiction of this Court, and approving the order whereby A. Joyner and R. B. Pearce have been appointed trustees in the place of Samuel Johnston, the Court directs that the plaintiff's bill in respect to all the residue of the matters therein contained be dismissed.

The plaintiff or her next friend must pay the costs of taking the account. The residue of the costs must be paid by the defendant.

PER CURIAM. Decree accordingly.

*Cited: Brown v. Wilson,* 41 N. C., 561; *Braswell v. Morehead,* 45 N. C., 28; *Vaughan v. Gooch,* 92 N. C., 527; *Kerchner v. McEachen,* 93 N. C., 455; *Jackson v. Jackson,* 105 N. C., 438; *Massey v. Barbee,* 138 N. C., 89; *Bunn v. Braswell,* 139 N. C., 138.

( 45 )

JOHN WHITE v. ELEANOR GREEN et al.

If a cause be set down for hearing, upon the bill, answer and exhibits, a deed which is filed as an exhibit is evidence for the plaintiff, though it be not admitted in the answer.

A bequest for emancipation prior to the act of 1830, 1 Rev. Stat., ch. 111, sec. 57, is inoperative, as is also a bequest of property, to the slaves directed to be emancipated, and if there be no residuary clause in the will, the slaves and the property bequeathed to them, will form an undisposed surplus, and be a fund for the satisfaction of the testator's debts and general legacies, unless there be an exemption of the residue, or the charge be fixed, by plain words or as plain implication, on other property exclusively.

A bequest for certain slaves to be emancipated, after the death of the testator's wife, does not give to his wife an estate for life, by implication, in the slaves; and it seems that the doctrine that a gift by will to A. after the death of B. is a gift for life to B. by implication, does not, under any circumstances, apply to personal chattels.

It is a general rule that specific legacies do not abate with or contribute to general legacies; but if a general legacy be expressly charged upon a specific legacy, it is otherwise; or if a general legacy be given and there never was any fund to pay it, except the specific legacies, owing to the fact that everything is given away specifically, then the general legacy must be raised out of the personal estate, although specifically bequeathed; and this, though there may be a surplus which may be applied to the satisfaction, in part, of the general legacy, in consequence of some of the bequests being void.

ARTHUR GREEN died some time in 1830, leaving a will, in which were contained the following among other clauses: "Item 1st. I lend unto my beloved wife, Eleanor Green, during her natural life, all my land and plantation where I now live, including house and all the household furniture, and everything appertaining thereto, and all the kitchen furniture, stock of horses, hogs, cattle and all and every other stock that I may die possessed of, being in and upon the aforesaid plantation, together with all the corn, fodder, wheat, etc., all the negroes, to-wit, Esther, Frank, Edney and her child, Louisa; Eliza, Jim, Moses, Amy, Agnes, David, Allen, Jacob, Tom, Esther (the second), Harriet and Polly. The above property remains as above stated, except that which of the same may hereinafter be named.

Item 2d. After the death of my beforementioned beloved
( 46 ) wife, Eleanor Green, I give and bequeath the whole of the same abovementioned property, to be equally divided between my beloved niece, Patsy Powell, and my wife's grand-

daughter, Mary Ann Watson, to them and their heirs, forever, the negroes and their increase included. Item 3d. It is my wish and desire that my trusty negroes, Ben and Nancy, for their long, faithful and meritorious services, should, at the death of my wife, be liberated and freed of their bondage, and that I desire my friend, Henry Garrett, to attend to the same and see that they be so liberated and freed. It is my desire that the aforesaid Ben and Nancy should, at the death of my wife, have a part of the tract of land which, etc.,; also, I give and bequeath to them one cow and calf, one sow and pigs and a certain bay mare, called Jim, to them and their heirs, forever." "Item 5. I give and bequeath unto my beloved brothers, Joseph J. Green and Hardy Green, to be equally divided between them, all my portion of my father's estate which I may heir and is as yet undivided, to them and their heirs, forever. Item 6th. I give and bequeath to my wife's son, William Watson, the sum of five hundred dollars, to be paid to him by my executor, out of such moneys as he may think best. And, last of all, I leave my friend, Henry Garrett, to this my last will and testament, my executor, to carry into effect the same in the best way and manner in his judgment he may think fit."

The bill then stated that the executor named in the will qualified thereto and assented to the bequest to the widow for life, and that she had remained in possession of the negroes ever since, without any control being exercised over them by the said executor; that the testator died, leaving personal estate, other than the negroes above mentioned, to a much greater amount than was sufficient to pay all the debts against the estate; that all the debts had been paid and the executor had left the State insolvent. It stated, further, that the testator's niece, Patsy Powell, had intermarried with one William Webb, who conveyed all the interest to which his wife was entitled in remainder, in the negroes mentioned in the bequest, to the testator's widow for life, to the plaintiff, by a deed, a copy of which was filed and ( 47 ) prayed to be taken as a part of the bill.

The bill then charged that William Watson, to whom the legacy of $500 was given, had died intestate, and Rice B. Pearce administered upon his estate, and that, for the purpose of raising the said legacy, the said Rice, combining with the testator's widow and executor, was about to sell several of the negroes mentioned in the bequest to the widow for life, under a power of attorney from the executor, which, it was insisted, he had no right to do, as the legacy of the negroes was a specific one, and that to Watson was general, and there was a sufficiency of the

personal estate other than the negroes to pay it. The prayer of the bill was for an injunction and for general relief.

The defendants, who were Mrs. Green (the testator's widow), Henry Garrett (his executor) and Rice B. Pearce (the administrator of William Watson), all answered the bill, and in their answers admitted the death of the testator, and that he left a will containing the clauses mentioned in the bill. They also admitted the qualification of the executor, but denied that he had ever assented to the legacy to Mrs. Green. They admitted that, at the death of the testator, there was on hand a considerable estate which might be called perishable, consisting of horses, stock of other descriptions, corn, fodder, etc.; and they stated that there was owing to the estate about $80, and there was on hand, in cash, $20, and that the debts against the estate amounted to about $230. The defendant Pearce stated that, before he had legal notice of the injunction which had been granted upon the filing of the bill, he had, as the agent of the executor, for the purpose of satisfying the legacy of his intestate, sold three of the slaves, mentioned in the bequest to the widow for life, for the sum of $705, and that he then held the bonds given for the purchase money. The defendant insisted that the legacy to Watson was a charge on the whole personal estate, and that the executor had a right to raise it by a sale of the negroes instead of the other personal estate given to the wife.

The cause was set for hearing upon the bill, answers and exhibits, and, upon the hearing, at Halifax, on the Spring Circuit of 1839, his Honor, *Judge Bailey,* pronounced the
(48) following decree: "This case now coming on to be heard on the bill of injunction, answer of the defendants and exhibits filed in the cause, the court doth declare that the complainant, White, is entitled to the share of the negroes bequeathed by Arthur Green to his niece, Patsy Powell, and that the testator, Green, died intestate as to his two negroes, Ben and Nancy, as well as the property bequeathed to them. The court doth further declare the legacy given by the testator to William Watson to be a general legacy, and the negroes bequeathed to Patsy Powell to be specific, and that the legacy to William Watson is no charge on the negroes given to Patsy Powell and Mary Ann Watson; and it appearing to the court that the defendant Pearce, as agent of the executor, Garrett, has sold the negroes mentioned in his answer, which negroes are a part of the negroes given specifically to Mary A. Watson and Patsy Powell after the death of the defendant Eleanor Green, and taken bonds for the payment of the purchase money, which money is yet uncollected:

It is therefore decreed that the injunction heretofore granted by this court against the defendants Rice B. Pearce, H. Garrett and Eleanor Green be made perpetual, with costs, to be taxed by the master; and, as to the bonds for the negroes sold by the defendant Pearce, it is ordered that the said Pearce deliver the said bonds to the master, or the money therefor, with interest, and that the master collect the money therefor, if in his opinion necessary, and invest the same on good personal security, and pay over the interest annually to the defendant Green, and hold the principal money, subject to the trusts in the will of Arthur Green." From this decree the defendants appealed.

*Badger* and *B. F. Moore* for the defendants.
*Whitaker* for the plaintiff.

RUFFIN, C. J. On the part of the defendants, several objections have been taken to the decree. The first is, that there is no proof to sustain the declaration that the plaintiff was the purchaser from Webb of the legacy to his wife. But we think otherwise. The will of Green and the deed from Webb to the plaintiff are filed as exhibits, and the cause was set down ( 49 ) to be heard upon the bill, answers and exhibits. Now, although the answers do not admit the plaintiff's purchase, and the deed to him has not been proved in the cause, yet setting the cause down to be heard on the bill, answers and exhibits makes the deed evidence for the plaintiff, as the answers are for the defendants.

It is next insisted that the decree is erroneous in declaring the testator to have died intestate as to the negroes directed to be emancipated, and as to the property bequeathed to them. But we are of opinion, with his Honor, that the will, as to those matters, is inoperative, and therefore that those things are not disposed of. The will was made before the passage of the act of 1830. (See 2 Rev. Stat., ch. 111, sec. 57.) Slaves have not capacity to take by will, and a legacy to them is, like the direction for their own emancipation, void; and as there is no residuary clause, this property is an undisposed surplus. *Sorrey v. Bright,* 21 N. C., 113, and *Pendleton v. Blount, id.,* 491. That is a proper fund for the satisfaction of the legacy to William Watson, upon the general principle that debts and pecuniary legacies are payable out of the surplus not given away in the first instance. It may be well, however, to notice here two other positions, respecting this fund, taken for the defendants.

It is said that the testator cannot be supposed to have intended

to charge this sum of $500 on the negroes whom, as far as he can, he emancipates, nor upon the pittance provided for them out of the personal estate after his wife's death; and it is thence inferred that the charge is upon the other parts of the personalty. It is, no doubt, true that the testator had no actual intention to make these negroes liable for the legacy to his step-son, and was not aware that the provisions of his will in their favor were mere nullities. But, without any particular charge upon it, and independent of any intention, the law throws the burden upon this residue, unless there be either an exemption of the residue or the charge be fixed, by plain words or as plain implication, on other property exclusively. We have no such exemption here.

( 50 ) Had the testator known that his direction for emancipation must fail, we cannot see that he would have preferred that this fund should not pay his debts and general legacies, but go to his next of kin, to the disappointment of his specific legatees.

Then it is said, again, that this fund is not immediately applicable to those purposes, but only the remainder after the death of the wife, because she takes a life estate in these negroes, under the will. We cannot think so. In the first and second clauses the testator gives to his wife for life his land, household and kitchen furniture, his stock of horses, cattle, hogs and sheep, crops of different kinds and provisions on hand, all specifically, and sixteen negroes, by name, and after the death of the wife, to P. Powell and M. A. Watson, equally to be divided between them. Then, in the third clause, he directs that his negroes, Ben and Nancy (now mentioned for the first time), should, at the death of his wife, be liberated, and desires his friend, H. Garrett, whom he appoints executor, to attend to the same; and he further gives to those slaves, at the death of his wife, a small piece of his land and some trifling articles of personal property. It may be admitted, as a probable conjecture, that the testator did not mean those favorite negroes to be separated from the others and from their old mistress during her life. But there is no such plain demonstration of any intention on the point as will authorize the court to decree whose property they are, upon the footing of an intention in the testator, instead of leaving them to be disposed of by the law. There is no express gift to the wife; and if she takes at all, it must be by implication. Now, we do not know a case in which the doctrine that a gift by will to A, after the death of B, is a gift to B for life, by implication, has, under any circumstances, been applied to personal chattels. It belongs properly to estates of inheritance. With

respect to them, it is settled that a devise to the testator's *heir*, after the death of A, implies an estate to A for life, from the absurdity of the heirs taking before A dies, as he must do unless A take. But where the devise is to one who is not heir, after the death of A, then it is equally well settled that A takes nothing, but the estate goes in the meantime to the heir at law. In the cases of *Hutton v. Simpson*, 2 Vern., 723, and *Willis v. Lucas*, 1 Pr. Wms., 472, this doctrine of an estate by im- ( 51 ) plication was extended to a devise to one of several co-heirs after the death of the testator's wife, though certainly the implication is much less cogent than in the case of a sole heir. And in the cases quoted at bar (*Doe v. Summerset*, 5 Bur., 2608, and 2 Wm. Bl., 692, and *Goodright v. Hoskins*, 9 East., 306) terms for years were made the subjects of a similar implication. The latter case turned upon very peculiar words and circumstances, and can by no means be deemed authority for the general proposition that a bequest of a term to A, after the death of B, gives the intermediate estate for B's life to B instead of the testator's executor. One bequeathed a term to his son, A, until B, a son of A, should attain twenty-one, and no longer; but in case B should die in his minority, then to C and D, two other sons of A, or either of them attaining the age of twenty-one, as aforesaid; and the testator desired that the premises might be quitted and delivered up by A accordingly. The question was whether B, who attained twenty-one, was entitled, and it was held that he was. The court relied much on the direction to A to deliver up the possession, namely, when B came of age; and it was asked, to whom, unless to B? That circumstance does, indeed, point to B's taking at twenty-one; but, alone, it is obviously inconclusive, since A ought to deliver the possession to whatever person was entitled by the will or by the law. But that probability was strengthened by the devise over upon the death of B *before* twenty-one, since there is something much like an absurdity in such a devise over, under those circumstances, unless B should take, *if he attained that age*. But there is nothing of that kind in this will, which does not speak of the possession until the period of emancipation, but simply makes a disposition of the slaves after the death of the wife, which is quite consistent with their being undisposed in the meanwhile. The case of *Doe v. Summerset* was decided by two judges only, and is so shortly stated in both books as to furnish no satisfaction as to the ground of the decision, except that the Court said the implication need not be a necessary one. The facts were: that the owner of a term for years, determinable on the lives of his

daughter, B, and of another person, C, bequeathed to his
( 52 ) daughter, D, after the death of B, during the life of C; and it was held that B took for life. Perhaps the two daughters were solely the next of kin of the testator, and the case may have gone on something like the principle in *Hutton v. Simpson* respecting the devise to one of two co-heirs. But it does not appear what reason brought about the judgment; and certainly the right of the executor interposes itself against any implication in favor of the daughter, B. Besides, this case directly contradicts that of *Horton v. Horton,* Cro. Jac., 74, in which it was held that a devise of a term to a son, after the death of his mother, did not imply an estate to her, since the executor, and not the son, would by law take such part of the term as was not disposed of. That reason seems to us to have great force in it, and to be decisive, unless in cases in which there may be, as in *Goodright v. Hoskins,* very special provisions. But in this case, besides the general rule, as we understand it to be settled in *Horton v. Horton,* the provisions of the will tend to an opposite construction. All that the testator gives to his wife is given in one sentence, and for life, including a number of slaves. Then, we ask, if he intended her also to have these two for life, why their names are not found with those that are expressly given to her? It would have been then easy for him to add that, after her death, such and such should go to his nieces, but these two, Ben and Nancy, should be liberated; and from the absence of such a provision, there arises quite a fair presumption on the other side that the testator did not intend his wife to take these negroes for life. We think, therefore, that the two slaves were, upon the death of the testator, assets to pay debts and legacies, and that their reasonable hires since, and their present value, are, as a part of the residue, applicable to the legacy to Watson.

But if the residue be insufficient to pay that legacy, after discharging the debts, the questions remain, whether the legacy shall fail *pro tanto,* or whether it shall be raised out of the other parts of the estate. His Honor held that the legacies to the nieces were not at all liable, because they are specific and do not abate with or contribute to general legacies. That, we
( 53 ) know, is the general rule; but there is an exception to it, within which, we think, this case falls. If a general legacy be expressly charged upon a specific legacy, then, of course, it is payable thereout. So, if a pecuniary legacy be given, and there be no fund to pay it, or, rather, if there never was any fund to pay it, except the specific legacies, owing to the fact that

everything is given away specifically, the necessary construction is that the general legacy is to be raised out of the personal estate, although specifically bequeathed; for it is not to be supposed the testator meant to mock the legatee. *Sayer v. Sayer,* Pre. Ch., 393; Rop. Leg., 255 (3d Ed.); *White v. Beattie,* 16 N. C., 87 and 320. This will descends so minutely into the enumeration of articles that it is nearly to be inferred from the will itself that it disposes or professes to dispose of all the property the testator had. But the answers, which are to be taken to be true, remove all doubt. They state that the testator left nothing and had nothing, at the making of the will, applicable to the payment of this legacy but such as he has given specifically. He left cash and debts due to him to the amount of about $100, but he owed a larger sum. This we think a sufficient ground, of itself, for holding the specific legacies liable, without recurring to the direction of the executor to pay the pecuniary legacy "out of such moneys as he may think fit." Those words, however, strengthen the inference of the charge, because "moneys" could not mean cash on hand (of which there was only about the sum of $20), but meant cash to be raised by the sale or hiring of "property."

Nor will this construction be affected by the circumstance that it has so turned out that there is a surplus applicable to the money legacy, in consequence of the bequests for emancipation being void. The question is as to the intention of the testator at the making of the will, at which time he did not anticipate any fund from this source. It is the good fortune of the specific legatees that this surplus now unexpectedly exists, because, as far as it goes, it discharges them; but its deficiency, if any, they must make good, since the testator, indeed, expected them to pay the whole.

The decree must therefore be reversed, so far as it declares the legacy to William Watson not to be payable out of the specific legacies in any event; and a declaration must ( 54 ) be made in conformity to this opinion. It must then be referred, to ascertain the sum due on the pecuniary legacy, and to take an account of the residue of the testator's personal estate (including therein the slaves, Ben and Nancy, and their reasonable hires and profits since the death of the testator), and what debts of the testator have been paid, and out of what funds, and what remain to be paid, and of the charges of the administration, so as to show what sum the executor now hath, or ought to have, applicable to that legacy. If it should thence appear that the legacy can be paid without recourse to the specific legacies,

the plaintiff can then be relieved as his bill stands; but if those legacies should be found subject for the whole or any part of the legacy, the plaintiff will be under the necessity of bringing in the other persons liable to contribution.

PER CURIAM. Decree accordingly.

*Cited: Bennehan v. Norwood,* 40 N. C., 108; *McCorkle v. Sherrill,* 41 N. C., 179; *Kilpatrick v. Rogers,* 42 N. C., 45; *Robertson v. Roberts,* 46 N. C., 77; *Biddle v. Carraway,* 59 N. C., 101; *Hastings v. Earp,* 62 N. C., 7; *Heath v. McLaughlin,* 115 N. C., 402.

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( 55 )

ALBERT G. ANDERSON, Administrator of Mary Anderson, v. ELISHA FELTON et al., Executors of Nathan Thatch et al.

Where a testator, after giving his manor plantation to his son, and two other plantations to his four daughters, and providing that all his lands should be rented, and his negroes hired out until his youngest daughter became fifteen years old, and that his children should "be educated and boarded out of the estate," proceeds as follows: "I likewise will that at the time my youngest daughter, S. T., arrives to the age of fifteen years, all my negroes, money and perishable estate, shall be divided between all my children. In case any of my children should be married before S. T. arrives at fifteen years of age, then my will is that his or her board shall be stopped, and no further charge be paid for him or her until S. T. arrives to fifteen, when he or she shall receive his or her proportionate part." *It was held* that the legacies to the children were not vested, but contingent upon their living to the period when the testator's youngest daughter should arrive to the age of fifteen years, or, in case of her death, to the time when she would have arrived at that age had she lived, and that only those of the children who were alive at that period, could take.

FROM the pleadings in this case, it appeared that Nathan Thatch died in the year 1832, leaving a will, in which, after providing for the payment of his debts and the working of the then growing crop, he devised and bequeathed as follows: "I will that all my perishable estate be sold. I will that all my lands be rented out and all my negroes be hired out until my youngest daughter, Sarah, becomes fifteen years old; and I will that my children that have not been educated be educated and boarded out of the estate; and I will that my mother be supported out of my estate during her natural life, and that my two plantations near Bethel M. House shall belong to my four daughters, Rosanna, Mary, Jane and Sarah, and I also give the plantation

that I now reside on to my son, Benjamin Thatch. And I likewise will that at the time my youngest daughter, Sarah Thatch, arrives to the age of fifteen years that all my negroes and perishable estate shall be divided between all my children, and money likewise to be divided. In case that any of my children should be married before Sarah arrives at fifteen years of age, then my will is that his or her board shall be stopped and no further charge be paid for him or her until Sarah arrives to fifteen, when he or she shall receive his or her proportionable part." The testator had no wife at the time when his ( 56 ) will was made, and left no widow surviving him, but his five children were all living at his death. Mary, one of the testator's daughters named in his will, intermarried with the plaintiff in December, 1835, and shortly thereafter died, some time in the year 1836. Sarah, the youngest daughter, died shortly after the death of the testator, intestate, unmarried and before she had arrived to the age of fifteen years, at which age she would have arrived, had she lived, in October, 1838. The plaintiff, after the death of his wife, took out letters of administration on her estate, and in March, 1839, filed this bill, in which he claimed that the legacy of the "negroes and perishable estate" and "money" to the children of the testator was a vested one, and that after the time when the youngest daughter, Sarah, would have arrived at the age of fifteen years, had she lived, the said negroes, money and perishable estate were divisable among the children then living and the representatives of those who had theretofore died. The answers, admitting the facts, as above stated, to be true, insisted that the legacy was contingent, and that as the plaintiff's intestate had died before the period at which the property was to be divided, she was entitled to no share thereof.

*W. A. Graham* for the plaintiff.
*M. Haughton* for the defendants.

RUFFIN, C. J. With every disposition to the contrary, we find ourselves obliged to hold the legacies in this will not to have been vested. There are no words of gift of the personalty, except by inference from the direction to divide; and as to the period of division, and consequently of gift, the will uses terms of strict condition—"*at* the time my daughter, Sarah, arrives to fifteen, and *when* he or she shall receive," etc.

To take the case out of the well-known general rule, several circumstances were relied on by the plaintiff's counsel. It was

first argued that, as immediate estates in the land are devised, and as it and the negroes are to be hired out by the execu-
( 59 ) tors for the same period and for the same purpose, the whole ought to be looked on alike as having been given presently, but to be divided at the future day. But to that we cannot accede. As to the land, it is given immediately, which shows the testator knew how to make such a gift when so minded; but it is not to be divided when Sarah shall be fifteen, for the testator himself makes the division between his daughters and his son; and as to the tract given to the daughters, there is no period of division between them designated. But there is no gift of the personal estate distinct from the provision for its division, which is to be made equally between all the children, and for the first time *at* the time Sarah should be fifteen. We cannot, therefore, infer a gift before that time. Consequently the legatees must be living at that time, so as *then* to answer the description of "children," or they cannot take. *Sansbury v. Reade,* 12 Ves., 75; *Ford v. Rawlins,* 1 Sim. & Stu., 328.

As the testator died without leaving a wife, and intended his children should share equally, or nearly so, in his personal estate, it is possible that he deemed it unnecessary to make an express bequest, and considered they would, by law, succeed immediately. If this was so, then his directions refer simply to the enjoyment and postpone the period for that, from considerations of convenience. But this can be nothing more than conjecture; and we find no case that warrants a different construction of such expressions as are here used, when applied to legatees who are or who are not the next of kin of the testator.

Nor have we any difficulty from the notion that, as to the share of one dying before Sarah's age of fifteen, the testator is made to die intestate, though he intended the contrary. He is not intestate in that case. The gift is not to these persons *nominatim,* if living at Sarah's arrival at fifteen, but it is to the testator's *children* as a class *at* that period. The will, then, disposes of the whole personal property, unless all the children should be dead before that period, and in that event there would be a total intestacy, or, rather, the whole disposition would fail, be-
( 60 ) cause the testator did not contemplate that event and provide for it.

The provision for maintenance will not bring the case within that exception to the general principle which is founded on a gift of the intermediate interest or profit to the same legatee to whom the future legacy of the capital is given. That does not apply if the maintenance is not to absorb the whole amount of

profit, or if it be not restricted to that as the only fund. *Pulsford v. Hunter,* 3 Bro. C. C., 416; *Hanson v. Graham,* 6 Ves., 249; 1 Rop. Leg., 497. Here the intermediate profits are not given to the children as distinct from the capital nor for the purpose of maintenance. The maintenance is merely *a charge,* which may not consume the profits, or it may greatly exceed it, and in that case the capital must supply the deficiency. Besides, the maintenance itself was to cease upon the marriage of a child before the division.

Upon the whole, we can lay hold of nothing in the will to control the words of condition. The circumstance that the testator contemplated the marriage of one or more of his children before Sarah's age of fifteen, and that, notwithstanding such children would take nothing in the event of their deaths before that period, although they might leave a child, had its weight and induced us to pause in adopting the construction. But it is not sufficient of itself. It shows either that the testator had an unnatural intention or that he did not think of the death of a child, leaving a child, before the day for division. The latter is more probable, but in neither case would the court be justified in rejecting his words or refusing to carry into effect his intention, as collected from the established interpretation of his language. The opinion of the Court is that only those children take who were living when Sarah would have been fifteen.

PER CURIAM. Decree accordingly.

*Cited: Devane v. Larkins,* 56 N. C., 381, 382; *Myers v. Williams,* 58 N. C., 365; *Bowen v. Hackney,* 136 N. C., 190.

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( 61 )

HUMPHREY H. HARDIE, Administrator of Jesse Cotton, Sr., v. GODWIN COTTON et al.

Where a testator left to his wife for life his manor plantation and certain slaves, and gave to each of his children specific legacies of slaves, and directed "all the negroes which he had given away or lent," and also "all those which he had not given away" to be kept on his lands and worked upon certain specific terms, and added, "as my children shall come to the age of twenty-one years, or marry, it is my desire that they shall have the legacies already given away," and then proceeded as follows: "It is my will that my wife and children shall have the use of my plantation, lying on Roanoke, until the year 1808; and if my wife should die before that time, it is my desire that an equal division of all my

estate that is not given away should take place among my children then living at my wife's death or the time above stated—that is, land, negroes," etc. *It was held* that as the wife and children all survived the year 1808, if the last clause of the will operated upon the negroes lent to the wife for life, the legacies of the remainder in them to the children vested at that period; but *it was further held* that the clause in question, in the events which happened, did not operate upon those negroes; that there was an intestacy as to them, and they vested in the executor in trust for the next of kin upon the death of the testator, subject, however, in case the wife had died before 1808, to have been divested and divided, under the will, among the children then living.

If a man marry a woman having an interest as next of kin, in slaves bequeathed for life, and die after the death of the tenant for life, but before reducing the slaves into possession, his wife, and not his representative, will be entitled to them.

THE bill was filed in March, 1840, by the plaintiff, as administrator *de bonis non,* with the will annexed, of Jesse Cotton, Sr., to obtain the advice of the court in executing the will of the testator, who died in the year 1802, having devised and bequeathed as follows:

"Item. I lend unto my well-beloved wife the land and plantation whereon I now live, during her natural life, and the plantation utensils, etc.; also I lend unto my well-beloved wife, during her natural life, the following negroes: Jacob, Truce and Patt, and their increase." And then, after making several specific bequests to his children, the testator proceeded: "It is my will and desire that all my negroes that I have given away and lent should be kept together on my lands, and put under the
( 62 ) care and direction of my son, Lewis Cotton, for which service and trouble it is my desire to give him the one-fourth of everything he can raise and make until he marries; also the negroes which I have not given away to be included among them; and in case any accident should befall my son Lewis, it is my desire that my son Cullen should take his place, if my executors think he is competent to manage the estate, and turn it to the same advantage that my son Lewis has done; and that my son Lewis shall have the care of the estate until my son Cullen come of the age of twenty-one years; and as my children shall come of the age of twenty-one years, or marries, it is my desire that they shall have their legacies already given away. Item. It is my will and desire that if any of the children's legacies or negroes should die before the residue of my estate is equally divided among them, that it should be made good out of the property that is still remaining, not given away. Item. It is

my will and desire that my wife and children shall have the use of my land and plantation lying on Roanoke River, for six years, or until the year 1808; and if my wife should die before that time, it is my desire that an equal division of all my estate that is not given away should take place and be equally divided among my children then living at my wife's death, or the time above stated, after paying all my just debts: that is, lands, negroes, etc."

The bill stated that the testator left surviving him his widow and eight children, all of whom continued alive until after the year 1808; that the widow died in the month of December, 1838, before which time five of the children had died, four of whom only left children; that at the death of the widow, three only of the children were alive, and that of the four who had died leaving children, three only had children then living; that of the three children of the testator alive at the death of his widow, one (a daughter) had intermarried with a man by the name of Higgs, who died in January, 1839, without having reduced into possession the share of his wife in the remainder of the negroes limited to the testator's widow for life. The bill then represented that three different modes of dividing and distributing the property in his hands, which consisted of the slaves that had been given to the testator's wife for life, had been ( 63 ) urged—that is, one for a division into three shares, another for a division into six shares, and a third for a division into eight shares; and the direction of the court was asked as to which mode was correct. The advice of the court was also asked whether Mrs. Higgs or her husband's representative was entitled to her share of the said negroes.

The defendants, who were the living children and the representatives of the deceased ones, answered the bill, and, admitting the facts stated in it, contended for their respective interests.

No counsel appeared for the plaintiff in this Court.
*Iredell* for the defendants.

RUFFIN, C. J. The subject of this controversy is the remainder or reversion in the slaves lent by the testator to his wife for life. The cause has not been argued, and from the pleadings it appears to be the opinion of all parties that the will disposes of the remainder in the slaves to the testator's children as a contingent interest. The question made is whether the remainder vested in those who were living in 1808—that is to say, all the children—or only in those three who survived the wife.

If we thought that the last clause in the will operated on this remainder, yet we should be of opinion that the legacies became vested in 1808. In the previous parts of the will the testator lends to his wife his manor plantation, these slaves and other things, and gives to each of his children specific legacies of slaves and other articles. He then directs "all the negroes which he had given away or lent," and also "all those which he had not given away," to be kept on his lands and worked upon certain specified terms; and he adds, "As my children shall come to the age of twenty-one years, or marry, it is my desire that they shall have the legacies already given away." Thus far the negroes not specifically bequeathed remain to be the subjects of a residuary clause, or to be left undisposed of. Then comes the last clause, as follows: "It is my will that my wife and children shall have the use of my plantation, lying on Roanoke,
( 64 ) until the year 1808; and if my wife should die before that time, it is my desire that an equal division of all my estate that is not given away should take place among my children then living at my wife's death, or the time above stated—that is, land, negroes, etc." There are two questions upon this part of the will—the one, what part of the property is disposed of therein? The other, to what person is it given? Upon the second, we think it plain that the gift is to those children who might be living at the period of the division, and that period is the year 1808 or the death of the wife, whichever should the sooner happen. As the family was to have the use of the land as a joint fund until 1808, and no longer, the division cannot be postponed beyond that year. It must take place then, at all events. Then the other parts of the clause must be taken as providing for an earlier division in a certain event. The testator had no object in keeping his estate together after the death of his wife; therefore he declares that if he should die "before that time"—that is, the year 1808—there should be an equal division among the children then living at his wife's death. If he had stopped there, the construction would seem to be unavoidable that the wife's death, here meant, was that mentioned just before, namely, her death *before* 1808, and not at any indefinite period. But the testator goes on to remove every doubt that might be raised on the phraseology—"then living at my wife's death," if it stood alone—by adding, "or the time above stated"—that is to say, the same year, 1808. "Then living," therefore, refers to the one or the other of those periods, and, of course, to that which should arrive first. Consequently all the children would take, as none died until 1817.

But to us it appears that, in the event that has happened, the will does not operate at all on these negroes, except as they are charged with making good the slave bequeathed to one of the children which died. We have just said that the division specified in this clause is one which must be made in 1808 at the latest. Therefore no property is within the purview of this part of the will but such as the testator meant should *then* be divided among his children at all events. Now, we think it indubitable that he did not mean the negroes which he had ( 65 ) lent to his wife for life should then be divided, if she were still living. The wife was not to be left destitute after 1808, for the loan is for her life, however long that may be. Hence his language is, if his wife should die *before that time,* 1808, then *"all his estate* not given away should be divided among his children." But if she should not die until after 1808—which has turned out to be the fact—then the will is silent as to the reversion of the negroes bequeathed to her, and consequently there is an intestacy as to them. As a surplus undisposed of, it vested in the executor, in trust for the next of kin, upon the death of the testator; subject, however, in case the wife had died before 1808, to be divested and divided, under the will, among the children then living.

As to the question between Mrs. Higgs and the administrator of her late husband, there is no doubt. Being in the nature of a distributive share, not received by the husband, but remaining *a chose in action* at his death, this interest survives to the wife. *Carr v. Taylor,* 10 Ves., 578.

PER CURIAM. Decree accordingly.

*Cited: Burch v. Clark,* 32 N. C., 173; *Poindexter v. Blackburn, post,* 288; *McBride v. Choate,* 37 N. C., 613; *Arrington v. Yarboro,* 54 N. C., 75.

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POMEROY, WILSON & BUTLER v. LOVICK LAMBETH et al.

If a mere tenant at will, or tenant from year to year, who is under no mistake with regard to the nature of his title, make improvements and lay out his money upon the estate without the request of his landlord, neither he nor his creditor has any equity against the landlord for such improvements.

THE plaintiffs, who were merchants in the city of New York, sold to the defendant Lovick Lambeth a parcel of goods, for

which he failed to pay, and they thereupon sued him at law, and recovered a judgment against him for $1,292.46, with interest and cost. Execution was issued upon this judgment and
( 66 ) the sum of $500 collected under it, the sheriff returning *nulla bona* as to the residue. The bill charged that the defendant Joseph Lambeth, the father of Lovick, made a gift to his son, by parol, of an unimproved tract of land, worth about $200; that Lovick married and settled on the land as his own property, his father assuring him that he would make him a title thereto whenever he (the son) should request it. The bill further charged that Lovick made large improvements, in buildings, upon the land, out of his own funds, and that he gained credit in the world by being thus possessed of the said property; that his father encouraged him in making the improvements, and that the land, with the improvements, was worth $2,500. The prayer was that the land might be sold, and after deducting the original price of the land the balance of the purchase money might be applied to the satisfaction of the plaintiffs' judgment.

The answer of the two defendants admitted that the legal title to the land in question was in Joseph Lambeth, but denied that Joseph ever made any parol, written or other gift of the land to Lovick or gave him any promise or assurance that he ever would convey to him the said land. The defendants stated that Joseph had often declared, openly and publicly, that he never would make him a deed for the land; that Joseph said he intended to will the land at his death to Lovick or his children, but in the meantime he should retain the title for his own maintenance and benefit, if he should ever think proper to use it. They admitted that Lovick had made improvements, in building, on the land, but not to the extent as charged in the bill, but they denied that Lovick had obtained any credit in consequence of having the possession, as it was publicly understood and known that Joseph would not give him a title. They also denied that Joseph ever encouraged or advised Lovick to improve the land by building upon it; on the contrary, they said that he frequently cautioned him against it. They stated further that the improvements were not worth more than the rents, and that the tract of land, with its improvements, was assessed in the year 1837 at $1,000.

To this answer the plaintiffs put in a replication and
( 67 ) took testimony, which is adverted to in the opinion of the Court.

*W. A. Graham* for the plaintiffs.

No counsel appeared for the defendant in this Court.

DANIEL, J., after stating the pleadings, as above, proceeded as follows: The evidence proves that the land has been increased in value by the improvements placed on them by Lovick Lambeth. The land is now worth from $1,250 to $1,500. But the plaintiffs have failed to prove that there was any gift, by parol or otherwise, by Joseph to Lovick, or that Joseph ever encouraged or advised Lovick to make the improvements. Lovick says in his answer that his bankruptcy arose from losses at sea. There is no charge in the bill that the improvements were made out of the funds of Lovick with a view to defraud his creditors, or were subsequent to the plaintiff's debt. If Joseph should bring his action of ejectment, there is nothing in the pleadings or evidence to raise an equity in behalf of Lovick to have compensation for these improvements. There was no gift of the land or request by Joseph to improve, nor did Lovick make the improvements under any mistake, inadvertence or ignorance of his title. We admit that when a person stands by and induces another to lay out money upon his property, under a supposition that he has a right, he will be bound by the *facts* as he causes them to be understood. *East India Co. v. Vincent,* 3 T. R., 462; *Stiles v. Cowper,* 3 Atk., 692; *Jackson v. Cator,* 5 Ves., 688. But there is no relief, upon general equity, from expenditure by the tenant under the observation of the landlord, but not under any specific engagement or arrangement. *Pilling v. Armitage,* 12 Ves., 84. Lovick Lambeth was under no mistake with regard to the nature of his title; he was but a tenant at will, or a tenant from year to year, making improvements and laying out money upon an estate in which he had no permanent interest. He may be guilty of great imprudence, but he has no equity against the landlord for such improvements, and, as he has none, we are unable to see that his creditors have any.

The bill must be dismissed, with costs.

PER CURIAM. Bill dismissed.

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( 68 )

ROBERT T. CHEEK et al. v. WILLIAM DAVIDSON et al.

Where an action was brought at law against the sureties to a guardian bond given to secure the estate of four wards, in which the breach assigned was that the guardian had wasted the estate and failed to account for, and pay over to, the wards their property; and the defendants confessed what they called a partial judgment, when it was agreed by the parties that the plaintiffs' additional claim should be referred to arbitrators, and their award to be made a rule of court. *It was held* that a paper

returned by the arbitrators, in which they made no award upon the matters referred to them, but only a statement, from which it appeared that they attempted to take the separate accounts between the guardian and his four wards *ab initio*, taking no notice of the partial judgment, and awarding no sum definitely against the defendants, was a calculation made to aid the court in its ulterior proceedings, rather than a definite award; and that a bill could not be sustained in equity to give the plaintiffs the benefit of it as an award.

ALEXANDER GRIER was appointed guardian to the plaintiffs, four in number, and executed one bond, with the defendants as his sureties, for the faithful performance of his duty to his four wards. He then wasted much of the estate of his wards and became insolvent, upon which an action of debt was brought on the bond, against the sureties only, and the breach assigned was that the guardian has wasted the estate and failed to account for and pay over to the wards their property. To this action the defendants plead that the conditions of the bond had been performed; and thereupon a reference was made by the court to the clerk, under the act of Assembly (1 Rev. Stat., ch. 31, sec. 119), to take an account and report the amount due the wards. The clerk accordingly made his report, which was in part excepted to by the defendants; but at the Fall Term, 1831, of the Superior Court of Mecklenburg, where the suit was pending, the defendants (as the records state) came into open court and confessed a "partial and interlocutory judgment for $2,335.78." The court then ordered, by consent of the parties, that the residue of the claim of the plaintiffs, covered by the exceptions, should be referred to James M. Hutchinson and Washington Morrison, with leave to choose an umpire, and their award to be a rule of court. The arbitrators filed a paper, which, after stating
( 69 ) the name of the suit and its reference to them, proceeded: "who report and award that there was due the petitioners, at the division of the estate, on 21 December, 1821, per clerk's report, the sum of $2,778.03." The paper then goes on to show the state of the accounts between the guardian and his four wards, *ab initio*, showing that the guardian was in advance to one of his wards, but was indebted to the other three in different sums. It then concludes thus: "We also report and award that the said guardian, Alex. Grier, has expended money in the purchase of necessaries for and the payment of debts against the widow, Mary Smart, the mother of the petitioners, since the division of the estate, to the amount of $570.69, and which are embraced in the exceptions, and which were paid by him, under the decree of the court of equity, allowing her $125

per year during her natural life, and which the defendants are entitled to a credit for." Upon this paper being filed, a motion was made for a final judgment according to the award, which was refused by the court, on the ground that the former judgment in the cause, at law, put an end to all controversy in the cause, and there was an entry on the record of the suit which concludes thus: "Dismissed at the costs of the defendants."

This bill was filed by the plaintiffs to have the benefit of the supposed award decreed to them in the court of equity. The defendants, in their answers, admitted the facts stated in the bill, but contended that a court of equity had no jurisdiction of the case. They also relied on the act of Assembly (1 Rev. Stat., ch. 65, sec. 7), barring demands against the sureties of guardians after three years.

*Badger* and *Alexander* for the plaintiffs.
*D. F. Caldwell* for the defendants.

DANIEL, J., after stating the case, as above, proceeded as follows: If four separate actions of debt—one for each ward—had been brought on the guardian bond, as might have been done by virtue of the act of Assembly (1 Rev. Stat., ch. 54, sec. 6), then the clerk could have taken the separate account of each ward with the guardian, and a proper judgment might have been rendered in each case. Instead of such a proceeding, the wards brought but one action on the bond, and assigned ( 70 ) for breach thereof that the guardian had failed to settle and pay over to all or any of them their property. It appears that there never has been any judgment rendered for the plaintiffs on the bond for the penalty to be discharged by the payment and satisfaction of any damages found, either by a jury or the report of the clerk. The defendants (the sureties) confessed to the plaintiffs what they called a partial judgment, and then it was agreed by the parties that the plaintiffs' additional claim, as to so much of the clerk's report as has been excepted to by the defendants, should be referred to arbitrators, and their award was to be made a rule of court. Arbitrators have not made any award upon the matters referred to them, but returned a statement, from which it appears that they attempted to take the separate accounts between the guardian and the four wards *ab initio*. One of them they bring in debt to the guardian, while it would appear that the guardian is indebted to the other three wards in different sums of money. They go on to state that the guardian is entitled to a credit of $570.69 for advances to the

plaintiffs' mother; but how this credit is to be applied to the different claims of the wards, the arbitrators leave us in the dark. To this paper, returned into court, the two arbitrators have signed their names, but in it there is no notice taken of the partial judgments, and there is no sum definitely awarded against the defendants. It appears to be a calculation, made to aid the court in its ulterior proceedings in the cause, more than a definite award. Without deciding whether the case stated in the bill could be supported in this Court (if made out), we think the bill must be dismissed for the want of any award made to sustain the case stated in the bill. Whether the plaintiffs can now proceed at law on the bond is not for us to decide. The bill must be dismissed.

PER CURIAM. Bill dismissed.

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( 71 )

WILLIAM BOON, Administrator of Josiah Leak et al., v. JACOB REA, Administrator of Henry Leak et al.

Where a testator, after giving several pecuniary legacies, directed that his slaves, together with all his stock and other property of every description, should be sold, and the remainder of the monies arising therefrom, after paying the several legatees, should go to E. L.; and in a codicil adds as follows: "I desire that all the negroes before mentioned that are left to be sold, instead of credit, must be sold for cash down; and as soon as the money that is raised out of my estate, to be paid over to the legatees as soon as collected." *It was held*, that certain bond and notes which the testator had, and of which no particular mention was made in his will, were, after the payment of his debts, to be applied in discharge of the general legacies; and that the latter were not to be paid exclusively out of the sales of the negroes, stock, etc., the remainder of which was given to E. L.

HENRY LEAK, by his will, after giving several specific legacies, in slaves, etc., and several pecuniary legacies, bequeathed as follows:

"Ninthly. It is my will and desire that all the remainder of my negroes, not given away, to be sold—those not above the ages of ten years to be sold with their mothers—together with all the stock and other property of every description, and the moneys arising from such sale, after paying over to the several legatees, etc., as above mentioned, I hereby give and bequeath unto Elizabeth Leak all the remainder."

The testator afterwards added a codicil to his will, the first clause of which was as follows:

"I desire that all the negroes, before mentioned, that are left

to be sold, instead of credit, must be sold for cash down; and as soon as the money that is raised out of my estate, to be paid over to the legatees as soon as collected."

The testator had due to him at the time of his death several bonds, notes and other evidences of debt, of which he made no particular mention in his will. The administrator, with the will annexed, out of these bonds, notes, etc., paid the debts of the testator, and retained for his commissions as administrator, leaving a balance of this fund of $182.90. The plaintiffs, as the next of kin of the testator, claimed this balance as property undisposed of by the will. The defendants contended that it was to be applied in paying the pecuniary legacies, and that the property left to be sold, by the ninth clause, was intended ( 72 ) by the testator to go in *aid* of this balance to pay general legacies, and the remainder of the fund was to go to Elizabeth Leak, and that the testator did not intend to die intestate as to any of his property.

*B. F. Moore* and *Badger* for the plaintiffs.

No counsel appeared for the defendants in this Court.

DANIEL, J., after stating the case, as above, proceeded as follows: There is no dispute but that the debts of the testator were properly paid by the administrator out of the bonds, etc., left by him. And we are of the opinion that the property mentioned in the ninth clause of the will was directed to be converted into money for the benefit of Elizabeth Leak, after the satisfaction of the general legacies. There is nothing in the phraseology of this ninth clause to induce us to say that the general legacies were intended to be paid exclusively out of the produce of the sales of the property mentioned in it. But it is said for the plaintiffs that the codicil shows that was the testator's intention. We do not think so. By the codicil the testator directs the slaves before mentioned in the ninth clause to be sold for *"cash down."* The codicil then proceeds thus: "and so soon as the money that is raised out of my *estate,* to be paid over to the legatees, as soon as collected." The ready money to be raised by sale of the slaves is not expressly directed immediately to be paid over to the legatees, but the money that is to be raised out of his *"estate,"* and that as soon as *collected.* The codicil, instead of restricting and fixing the property mentioned in the ninth clause of the will as the only and exclusive *fund* for the payment of the general legacies, shows that the general legacies were to be paid out of his *estate* generally, viz., out of all such of his personal estate as had

not been specifically given away by the will. The testator knew that his bonds, notes, etc., would not be sufficient to pay his debts, expenses of administering on his estate, and his general legacies; therefore he charged the fund mentioned in the ninth clause in *aid* to effect the payment of the legacies, and the remainder of that fund, which should not be exhausted in
( 73 ) *aid*, etc., was to go to Elizabeth Leak.

We are of the opinion that the bill must be dismissed.

PER CURIAM. Bill dismissed.

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JAMES J. McKAY v. JOHN MELVIN et ux. et al.

Where an agreement in writing was made for the purchase of a tract of land, by which the vendee was to take possession of the land immediately, and the vendor was, "when thereto requested," to deliver him a deed therefor, upon the receipt of which the vendee was to give his three several promissory notes, payable at one, two and three years thereafter; and the vendee took possession of the land immediately, according to the agreement, but the vendor died without giving a deed or receiving the notes for the purchase money. *It was held*, upon a bill subsequently filed by the vendee for a specific execution of the contract, that he should pay interest on the instalments of the purchase money, as if the notes had been given in a reasonable time after the date of the agreement.

THE bill was filed to enforce the specific performance of an agreement for the purchase of a tract of land, entered into between the plaintiff and Patrick Kelly, the ancestor of the defendants. By the terms of the agreement, which was made in writing, under the seals of the parties, on 26 October, 1835, the plaintiff was to take possession of the land immediately, and Kelly was, "when thereto requested," to deliver to him a deed, with the usual covenants, sufficient in law to convey a perfect title in fee simple to the said land; and the plaintiff on his part covenanted that, in consideration of the premises, "and on delivery of the deed aforesaid, he would execute unto the said Kelly his three several promissory notes, of $1,000 each—the first, payable one year thereafter; the second, two years thereafter, and the third and last, three years thereafter; the said third and last to bear interest one year before it became due and payable." The plaintiff took possession of the land immediately, according to the agreement; and a short time thereafter Kelly died
( 74 ) intestate, before any demand was made upon him for a deed or the plaintiff had executed any notes. The defend-

ants, who were the heirs at law, and the administrator of Kelly, admitted the agreement, as stated in the bill, and the death of Kelly shortly thereafter, and expressed their willingness to convey the land if the plaintiff would comply with the agreement on his part by paying the purchase money, with interest.

No counsel appeared for either party in this Court.

DANIEL, J., after stating the case, as above, proceeded as follows: It appears to us that if there be any dispute in this case, it is whether the plaintiff shall pay interest on the purchase money, and, if so, at what time the interest shall begin to run. By the agreement, the plaintiff took possession in October, 1835. In equity he was then the complete owner of the estate. The death of Kelly (an act of providence) was the reason that the title deeds and notes were not given in a short time after the plaintiff took possession. It seems to us to be equitable and just that interest should be calculated on the installments of the purchase money as if the notes and been given in reasonable time after the date of the agreement. We think that 1 January, 1836, would have been a reasonable time within which the notes might have been given, according to the agreement, if the death of Kelly had not prevented it. Therefore the plaintiff is entitled to a decree for a specific performance; and the heirs at law of Kelly will execute deeds of release and quitclaim to the plaintiff of the lands of which he has taken possession, and deeds of bargain and sale in fee of any lands mentioned in the agreement and which are not in his possession. These deeds will be executed under the direction of the master of this Court, *provided* that the plaintiff first pay to the administrator of P. Kelly or pay into the office of this Court the purchase money, with interest, as follows: $1,000, with interest on the same from 1 January, 1837, and $2,000, with interest on the same from 1 January, 1838. If the purchase money and interest is paid, as above directed, on or before the tenth day of the ( 75 ) next term of this Court, the decree for the plaintiff will be drawn up and entered; otherwise the bill will stand dismissed, with cost.

PER CURIAM. Decree accordingly.

THOMAS McLIN v. ROBERT McNAMARA, Administrator of Stephen Ferrand.

Where the bar of the statute of limitations against an account of ten years' standing is repelled by an admission that the account is open, and a promise to settle it, the length of time, will not of itself, operate as a bar; but it may, connected with other circumstances, be sufficient to induce the court to require evidence of the claim so clear, consistent and natural as to amount to positive and almost conclusive proof.

Whether the receipts of a wagoner for goods sent to a factor are, after the death of the wagoner, competent to prove the delivery of the goods to the factor—*Qu?* but if they are competent for that purpose they can only raise a probability of the delivery of the goods, which may be repelled by opposite probabilities, as, that accounts appear to have been rendered by the factor which the principal withholds, and which, if produced, would include the articles sent by the wagoner, and would be better evidence of the delivery to the factor.

Where one person sold to another certain articles of furniture, and afterwards sent him goods to sell as his factor, and ten years afterwards, the factor, in reply to his principal calling upon him for a settlement, acknowledged that the account was open, and promised to settle it. *It was held* that the sale of the furniture was not an isolated transaction which would be barred by the statute of limitations, but formed an item in the account when the parties proceeded in their other dealings, and that, therefore, the letter of the factor repelled the effect of the lapse of time as to this as well as to the other parts of the demand.

Where one transaction between two persons becomes an item in account between them in consequence of their subsequent dealings as principal and factor, and as such is taken out of the operation of the statute of limitations by the acknowledgment and promise of the factor to settle the account, interest cannot be claimed on the first item, unless it can be claimed on the transactions between the parties as principal and factor, and that cannot be done where there are circumstances of laches and unfairness on the part of the principal. Under such circumstances, interest is allowable only from the time of bringing the suit.

( 76 ) THE bill was filed in August, 1832. It stated that, in October, 1819, the defendant's intestate, Dr. Stephen L. Ferrand, then residing in Salisbury, delivered to his brother, William P. Ferrand, who resided in the neighborhood of New Bern, a memorandum of sundry articles of furniture which he wished William to purchase for him in one of the Northern cities and have sent to him; that William could not conveniently go to the North at the time, and proposed to the plaintiff, then resident in New Bern and extensively engaged in trade, to take the order and fill it, as he was then about going to the North, informing him that he could not pledge himself that his brother

Stephen would take the articles, but that he believed he would if they were elegant and at prices which would afford a reasonable profit to the plaintiff. The bill further stated that the plaintiff, being well acquainted with Stephen L. Ferrand, believed that he could execute the commission to his satisfaction, and, accordingly, notwithstanding the risk of a rejection, he purchased in Philadelphia many of the articles contained in the list, and imported them into New Bern; and that during the succeeding winter he forwarded those articles, and others of equal quality which he had before purchased and had on hand for sale, by wagons, to Stephen L. Ferrand, at Salisbury, and at the same time delivered to William P. Ferrand a bill, with the prices, for the information of his brother. The bill stated that those prices were but a moderate advance upon the cost, so as to yield but a slight profit, as the plaintiff was ready to show by the original bills or invoices. To the bill was appended a copy of the account of the furniture, at very high prices, amounting to $944.85. The bill stated that, upon the arrival of the furniture, Dr. Ferrand refused to accept it, being dissatisfied both with the costly character of it and also with the prices, as too high even for furniture of that character, but that, after some delay, he did accept it, "without stipulating for any alteration of price."

The bill then further stated that, at the times of sending the furniture, the plaintiff also sent various articles ( 77 ) of merchandise, to be sold upon account of plaintiff, and that at various times afterwards, up to October, 1824, he sent up to said Stephen large quantities of groceries, which he undertook to dispose of for the plaintiff, and of which an account was annexed to the bill, without any prices affixed.

The bill stated that Dr. Ferrand from time to time remitted sundry sums, which the plaintiff was ready to admit, but no particular credits were admitted. It further stated that, notwithstanding all the exertions of the plaintiff to bring about a settlement, the account of the mutual dealings was never adjusted, and that "the said Stephen never once furnished any regular account of sales of the large amount of articles sent to him for sale," but occasionally, when they met, or by letter, promised to come to New Bern and there make a settlement in full. The bill then stated three letters between those parties—one from the plaintiff, dated 24 July, 1829, in which he says: "From your last letter I have been expecting you down from time to time, until my patience is exhausted. Will you, upon the receipt of this, forward me the account of sales of the balance of the articles you had on hand when you were here last, together with the balance

of your account, in cash or a check? The accounts between us have really remained unsettled longer than I could have wished." Also one from Dr. Ferrand, dated 4 October, 1829, in which he says: "Your letter I received some time since, but have been unable to answer it, from great bodily indisposition. As to money, there is none here; and I should like to have a settlement with you, to know if I am in due to you; and for the purpose of doing so, I shall visit New Bern in the winter, where I expect to remain several months." That on 26 April, 1830, the plaintiff again wrote to Dr. Ferrand as follows: "Your favor 5 October, 1829, came to hand, in which you say that in the winter you will visit New Bern for the purpose of settling the accounts existing between us. As the winter has passed, and not hearing from you since on the subject, I am really at a loss to know how to account for it. Will you be so good on the receipt of
( 78 ) this (as to send) the remaining account of sales, and say that I may draw on you for the balance?"

The bill then stated the death of Dr. Ferrand in November, 1830, and the administration of the defendant on his estate, and it did not appear that anything more passed until the filing of the bill. The prayer was for the production of all letters between the parties, the invoices and accounts of sales of the various articles sent for sale, and that a proper account of all the mutual dealings between the plaintiff and Stephen L. Ferrand might be taken.

The answer stated that the defendant had no such knowledge of the transactions to which the bill related as would justify him in admitting or denying any of the allegations, except to admit that there were dealings between the parties between 1819 and 1824, as he found among the intestate's papers sundry receipts, drafts, etc., evidencing payments of money to complainant or to his order, which he begged leave thereafter to exhibit. All knowledge of the letters stated in the bill was also denied.

Upon the hearing of the cause it was referred to the master to take an account of the matters of account stated in the pleadings. The master made his report to this term, and therein charged against the defendant the furniture at the price of $944.85, with the further sum of $1,133.60 for interest thereon for twenty years from 30 December, 1819, making, for principal and interest due therefor, the sum of $2,078.45. The report also charged the further sum of $3,217.42 for sales of merchandise on account of the plaintiff, charged at prices proved to have been average prices at New Bern about the periods these parcels were sent. The report credited the defendant with a commis-

sion of $160.84 on the sales, and with sundry payments between May, 1822, and May, 1827, so as to show a balance due to the plaintiff upon the whole account, including the price of furniture and interest, of $1,832.08, with which it charged the defendants.

An account was filed in the cause by the plaintiff, purporting to be the account between the plaintiff and Dr. Ferrand, and to have been stated by a clerk of the plaintiff, now deceased, and showing a balance on 2 May, 1825, of $2,295.92½, in which there were the following entries: "This due on ( 79 ) account sales rendered on 14 May, 1822," $701.49½; and "amount of sales of sundry articles made out this day, the balance due," $2,187.51. This latter account of sales was annexed thereto in the handwriting of plaintiff's deceased clerk, and showed the sales at Salisbury at prices considerably lower than the articles were charged at in New Bern.

Besides the merchandise charged by the master to the intestate the plaintiff also claimed for other parcels alleged to have been sent for sale on the plaintiff's account; and to charge the defendant therewith the plaintiff proved the receipts of sundry wagoners, expressed to be for the goods; and that they were to deliver them to Ferrand in Salisbury; and that the wagoners were now dead; and, in one instance, a witness further proved that he met one of those wagoners near New Bern on his way up the country, and was told by him that he was loaded for Dr. Ferrand; and that the witness himself proceeded to New Bern, and thence to Salisbury, also with goods from the plaintiff to Ferrand; and that near Salisbury he met the same wagoner, and was then told by him that he had delivered his load to Ferrand. In another instance the plaintiff proved that in the wagons with part of the furniture he sent, in March, 1820, a barrel of sugar and bag of coffee which, as well as the furniture, Ferrand refused to receive, and that the wagoner then stored all his load with a merchant in Salisbury on account of the plaintiff. The master refused to charge those articles to the defendant for want of evidence of the delivery to Ferrand.

The plaintiff excepted to the report for those refusals of the master, and insisted that the evidence was insufficient. The defendant excepted because the master included the furniture bill in the account and because he allowed interest thereon.

*Badger* for the plaintiff.
*D. F. Caldwell* and *J. H. Bryan* for the defendant.

RUFFIN, C. J., after stating the case as above, proceeded as follows: When this case was before the Court on the
( 80 ) hearing there was much reluctance felt to ordering an account; but as the answer admitted some dealings between the parties of the kind stated in the bill, and the letter of Ferrand of 5 October, 1829, made it satisfactorily appear that an open account in respect to those dealings then subsisted between the parties and contained a promise to settle it, we were obliged to put out of the plaintiff's way the obstacle of the statute of limitations. Nevertheless the circumstances under which this claim is preferred renders its justice so extremely doubtful as to entitle it to no favor, and to impose on the plaintiff the burden of offering the clearest and most conclusive proof of every item before he can be permitted to charge it against the defendant. The length of time, indeed, is not such as to amount to a bar of itself; nor, as the account certainly remained unclosed as to something, can the length of time, connected with the other circumstances, authorize us wholly to deny the plaintiff the benefit of such evidence as does plainly establish the delivery of articles to the factor. But there is enough to render the Court jealous of the claim and very cautious in not admitting any charge but upon evidence so clear, consistent and natural as to amount to positive and almost conclusive proof. Now the receipts of the wagoners do not constitute evidence of that kind. It is not material that we should determine in this case whether those receipts are evidence between these parties as acts done in the ordinary course of business by persons since dead, for if they be competent they can only raise a probability of the delivery, and their operation to that extent is repelled by opposite probabilities that seem undeniable. The counsel for the plaintiff said, in the argument, that the inference from the receipts and death of the wagoners at this period was so fortified by the default of Ferrand in not rendering accounts, whereby the plaintiff could have seen whether the wagons had or had not delivered their loads, that the court ought to act on it and charge the goods, though it may not positively appear that they came to Ferrand's possession. The argument adopted the statement of the bill in this particular without adverting to the plaintiff's letter of April, 1830, in which he asks for the "remain-
( 81 ) ing" account of sales, or to the document put in before the master, whereby it appears that two accounts of sales were rendered. So far therefore from the fact, as actually existed, supporting the argument, it is opposed to it. The statement of the bill seems, indeed, to be credible. That a merchant

should sell goods to the value of nearly $1,000 to another person, and for three or four years afterwards forward to him large quantities of merchandise at different times and take no security for the goods sold, nor get payment, nor get an acknowledgment for the consignments, nor any account of sales for more than ten years from the commencement of the transactions, is certainly possible. But it is so entirely against prudence and all experience that a court cannot act on the assumption of the truth of the story without violating rational convictions to the contrary. There must have been divers statements between these parties, though probably the more recent transaction remained open. At all events it appears, probably without the design of the plaintiff, that some accounts were rendered, particularly one in May, 1822, which was two years after the delivery of the furniture, on which only $701.49½ was due. This account and all others that may have been stated, and all material correspondence after May, 1825, the plaintiff has withheld, as he has also the original invoices of the furniture, which he promises in the bill to produce as evidence that the prices charged by him were but a moderate advance on the cost. Unfairness of this sort furnishes presumptions that these accounts contain facts that would be destructive of the claim as that the prices charged the plaintiff were immoderate, or those at which the factor sold were much reduced, or that the furniture had been included in the account of May, 1822, or other facts that would reduce the amount of the demand, by showing payments or otherwise. If those accounts were thus rendered they would include the articles to which the wagoner's receipts relate, and therefore be better evidence than the receipts, inasmuch as the former would be direct to the point on which the latter would afford but a remote and circumstantial inference. These considerations lead us to believe that in decreeing at all for the plaintiff we run some hazard of working wrong; but, ( 82 ) at all events, we cannot give him a decree for anything which he does not establish by unequivocal and unsuspected evidence. The plaintiff's first and second exceptions, which relate to the merchandise, of the delivery of which the receipts of the wagoners are the only evidence, are overruled.

The defendant's first exception, that the master has charged the furniture as an item in his account, must be overruled. The use of the furniture by Ferrand is proved by the witnesses, and also the selling price in this State of such furniture. As an isolated transaction the sale of the furniture would not make a case for the jurisdiction of this Court; and, moreover, all remedy

in respect of it would have been barred by the statute of limitations. But that part of the dealings necessarily formed but an item in account when the parties proceeded in their other dealings; and, therefore, the letter of Ferrand repelled the effect of lapse of time as to this as well as the other parts of this demand.

But if the plaintiff, by connecting together these transactions of sale and agency, avoids the operation of the statute of limitations as to the articles sold, he must submit to the consequences of that connection by not claiming interest on that part of the account unless he be entitled to claim it on the transactions between the parties as principal and factor. That this plaintiff ought not to have such interest the Court deems clear from the circumstances to which we have already adverted. He keeps back the accounts rendered by the factor. He was as much to blame as the factor in not closing the dealings before such long delay had occurred. Upon the failure of the factor to settle the plaintiff neglected to bring suit until the factor's death, and very nearly three years from the last letter of the factor. The truth is that it must be supposed the first payments were meant to be on account of the furniture, as it appears that the payments exceed the value of the other merchandise, and the plaintiff would not have trusted a person with his goods as agent who neglected for more than five years to pay anything on his own purchases. The balance of principal money due on this account is therefore probably for the proceeds of the goods sold
( 83 ) for the plaintiff, and under the circumstances of laches and unfairness on the part of the plaintiff in not producing the invoices to show the cost, and of want of diligence on the part of Ferrand, our opinion is that interest ought to be computed on that balance from suit brought, but not before. Wherefore the defendant's second exception is so far allowed, and the plaintiff's third exception is disallowed.

Also, since the defendant has been charged by the master the highest prices, and the plaintiff has kept back the account of sales upon which the agreement for compensation of the factor, at least as to the rate, would probably appear, we think the master did right in allowing Ferrand a commission. Consequently the plaintiff's fourth and last exception is likewise overruled. Master allowed $20 for report; defendant to pay the costs of suit.

PER CURIAM. Decree accordingly.

STARKEY SMITH v. SAMUEL S. B. SMITH et al.

If a bill be filed for the specific execution of an agreement for the purchase of land, alleged to be evidenced by a written memorandum, and the allegation be not sustained by the proof, the plaintiff cannot, under the prayer for general relief, obtain compensation for improvements upon the lands.

THE plaintiff, in his bill, stated that his father, William Smith, in 1829, agreed by parol to sell him a certain tract of land therein described in consideration of the sum of $80 and the plaintiff doing his father's shoemaking during his life. That in pursuance of this agreement and with the consent of his father the plaintiff entered upon the land and improved the same by building houses upon it to the value of $200; that he paid the price in money and shoemaking, and that his father, in December, 1833, executed to him the following ( 84 ) receipt and agreement:

"Received of Starkey Smith, 11 December, 1833, eighty dollars in full for the land where the said Starkey Smith now lives, commencing at David Mitchell's corner, near my fence where I now live, then splitting the land between the two roads to Miss Wright's line; all the land east of that I have sold to my son Starkey. "WILLIAM SMITH."

The plaintiff then stated that his father died without ever having executed to him a deed for the land. The prayer of the bill was for a specific execution of the agreement and for general relief.

The defendants, in their answers, admitted that their father, William Smith, permitted the plaintiff to take possession of the tract of land mentioned in the bill, and they also admitted that he had made improvements thereon by building, etc.; but they denied that their father ever executed the receipt or agreement set forth in the bill, or that the plaintiff ever paid any money for the land. They also denied that their father ever intended to sell or give the land to the plaintiff in any other way than by a last will and testament, which he never made. A replication was filed to the answers and much testimony was taken on both sides, the result of which is stated in the opinion of the Court.

*W. A. Graham* for the plaintiff.
*J. T. Morehead* for the defendants.

DANIEL, J., after stating the case as above, proceeded: It is proved to our satisfaction that the body of the paper-writing

set out in the bill as the agreement is in the proper handwriting of the plaintiff. Three witnesses depose that they were acquainted with the handwriting of William Smith, and that the signature to the paper-writing is in the proper handwriting of the plaintiff's father, William Smith. Two witnesses testify that the father had, in conversation with them and others, said that he had agreed to sell the land to the plaintiff. The plaintiff has failed to prove that he ever paid a cent of money or that he ever was possessed of money at any one time to the
( 85 ) amount set forth in the receipt. On behalf of the defendant one witness deposes that he was acquainted with the handwriting of William Smith, and that the signature to the supposed agreement is not in his handwriting. Many witnesses depose that the plaintiff frequently, and at divers times and places, immediately after the death of his father and for years afterwards, said that he had not the scratch of a pen in writing from his father for the land; that he had no right by any writing for the land; he appeared uneasy on account of his home. When the dower of his mother was laid off the plaintiff was present and made no objection that the land in dispute should be included to make up the quantity out of which she was to take dower. The paper now attempted to be set up as an agreement was not shown by the plaintiff to any person until long after the death of his father. The father made a will and died in January, 1835. The will did not have the necessary number of witnesses to pass lands. In this will the lands in dispute were attempted to be devised to the plaintiff. Taking together all the evidence and circumstances in the case we must say that we are not satisfied that William Smith ever affixed his name to the paper as evidencing an agreement on his part to sell or as a receipt for the purchase-money of the land. There are too many circumstances in the case tending to show that the plaintiff either signed his father's name or that he wrote the receipt and agreement over the genuine name of his father found on some blank piece of paper. We cannot think that any agreement is proved, certainly not sufficiently proved, so as to call for a decree for a specific performance.

Upon the hearing the plaintiff's counsel set up a claim for compensation in case the Court should deem the alleged purchase not proved. In answer to that claim it is sufficient for us to say that under the prayer for general relief none can be granted but such as is warranted by the case made in the pleadings, and the sole ground upon which the bill asks any relief is upon the particular purchase, alleged to be evidenced by a written memo-

randum, which allegation is not sustained to our satisfaction. If the plaintiff can make any case at law, either for damages or compensation, this decision will not stand in his ( 86 ) way.

The bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

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NOAH SMITHERMAN et al., Administrator of Samuel Smitherman, v. LEWIS KIDD et al.

If a note be lost, the acceptance of a negotiable instrument expressly in payment of it amounts in law to a satisfaction, and may be so pleaded, and the debt being thus extinct at law there can be no relief in equity upon the last note.

If a bond be lost, whether the acceptance of a negotiable instrument under seal from the principal obligor expressly in payment of it be a satisfaction at law or not, the obligee cannot recover in equity on the lost bond against the principal obligor or his surety, contrary to his agreement.

THE bill stated that in 1834 the defendants, Lewis Kidd and Moses Kidd, gave to Samuel Smitherman, the intestate of the plaintiff, a bond or note—but which the plaintiff did not know—for the sum of $325, payable on 25 October, 1834. But from the answers, exhibits and proofs the case appeared to be that Lewis Kidd gave a bond or note to Smitherman for the sum of $200, payable as mentioned, and that Moses Kidd also executed it as the surety of Lewis, and that a few days afterwards Lewis alone gave a second bond or note to Smitherman for $125, payable at the same time. These papers Smitherman delivered without endorsement to one Long, as his agent, to present and receive payment thereon; but Long absconded without presenting them or receiving payment, and either destroyed or carried off the instruments. On 4 May, 1835, Smitherman represented to the Kidds the loss of the papers, and requested them to execute others in their stead. Moses, the surety, refused to become further bound, but Lewis, the principal, readily assented, as Smitherman agreed to accept his bond in satisfaction ( 87 ) of the others and to give a discharge from and indemnity against them. Accordingly Lewis Kidd then gave his bond to Smitherman for $325, with interest from 25 October, 1834, and Smitherman gave to him two papers, one of which purported to be a receipt, not under seal, of the bond for $325, "in full of

the two notes" before described; and the other purported to be an agreement, not under seal, to indemnify the parties from loss by reason of the former notes, if they would resist the payment should it be demanded by Long or any other person. The bill offered an indemnity and prayed a decree against the two Kidds upon the instrument as stated in the bill.

*Winston* for the plaintiffs.
*Mendenhall* for the defendants.

RUFFIN, C. J., having stated the case as above, proceeded as follows: Not to advert to the inaccurate description in the bill of the instruments on which the defendants were in fact chargeable, and to the several objections that arise thereon, there are other substantial difficulties which prevent a decree for the plaintiff. As the bill leaves it uncertain whether the first securities were bonds or notes, we are obliged to take it most strongly against the plaintiff, upon whom it laid, to remove the doubt. Now, it is clear at law that the acceptance of a negotiable instrument, expressly in payment of a simple contract debt, does amount to satisfaction, and may be so pleaded. If, then, the securities were notes, the plaintiff has no debt in law, and consequently has nothing for which he can ask a decree in equity.

But, supposing the securities to have been bonds, still the plaintiff is not entitled to any relief on them here. It is true that at common law one bond is not a satisfaction of another, both being instruments of the same dignity. If it be admitted that the law remains the same, although bonds are now negotiable, yet in this case the plaintiff can derive no benefit from that rule of law. The rule is *strictissimi juris*, and founded upon reason purely technical, which have no relation to the principles of equity. In this Court the agreements of
( 88 ) parties are respected, without regard to their being under seal or not; and there cannot be a decree upon a former instrument directly in opposition to a subsequent agreement made upon a just consideration. If this plaintiff can maintain actions at law upon those instruments as lost bonds let him do so. For the present at least we have nothing to say against it. But when he seeks to change the forum and to get a decree in this Court for his debt, upon the ground that he cannot recover it at law, he cannot have the relief if it be in the teeth of an agreement so reasonable and plain as is established in this case. What more could a creditor ask when he has lost his security than that the debtor should give another, and thus save him

from the difficulty and expense of proving the loss and contents of the instrument at law, or the delay and expense of resorting to a court of equity? If the debtor comply with such a request of the creditor it is obviously an adequate consideration for an agreement on the part of the creditor not to enforce the first security and to rely solely on the second.

By discharging the principal debtor, Moses Kidd, the security is also discharged in the view of this Court. The plaintiff cannot have a decree against either of the defendants, but his bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

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( 89 )

ROBERT RYAN et al. v. JONATHAN PARKER et al.

If a vendor receive in payment for the sale of land the bond of a third person made payable to himself, which is afterwards altered by his assent so as to destroy it at law, he cannot have relief in equity against the obligor, although he was ignorant of the legal effect of altering the bond. Nor can he, or his assignee who purchased the bond with full knowledge of the legal objections to it, have any relief in equity against the vendee who gave it in payment, though the latter made the alteration in the bond, and represented it to be good.

THIS bill was filed at the September Term, 1838, of GUILFORD Superior Court. The plaintiffs were Robert Ryan and Samuel Sullivan, and the defendants Robert Parsons, James Parsons and Jonathan Parker, and the case made by the bill was as follows: In 1827 the defendant Parker purchased a tract of land from the plaintiff Sullivan at and for the price of $600; and it was agreed between the parties that Sullivan should receive in payment of part of the purchase money a note, to be executed by the defendant Robert, with the defendant James as his surety, for the sum of $95, payable to the said Sullivan two years after date, which note the said Parker expected to obtain from the said Robert, who was his debtor. On or about 4 October, 1827, the said Robert and James executed their sealed note, at the request of said Parker, for the sum aforesaid, payable two years after date, but payable to Samuel *Soliman* or order. This note was offered by the said Parker to Sullivan, but the latter, who was illiterate and unable to read, on hearing the note read, refused to receive it because of this mistake; when the said Parker, alleging that it was a mere clerical error and that he could take the liberty to correct it, caused the name Soliman to

be altered into Sullivan, and thereupon the plaintiff Sullivan, confiding in the assurances of Parker that the note was not injured by the alteration, received it from him in payment for the land. After this note or bond became due it was presented by Sullivan to the makers, who refused to pay it, and on 29 August, 1831, he, for a valuable consideration, assigned it to the plaintiff Ryan. Robert Parsons became insolvent and left the State, and Ryan brought an action on the bond against
( 90 ) James Parsons, who pleaded the general issue and succeeded on that plea, because of the alteration of the instrument without his consent. When this action was brought or decided did not appear. The bill prayed that, there being no remedy at law, the court would decree that the defendant pay the said note and the interest thereon, and for such other relief as the nature of the case required.

The bill, under an order for publication, had been taken *pro confesso* and set for hearing against the nonresident defendant, Robert Parsons.

The defendant James Parsons, by his answer, justified himself for relying on his legal defense against the note attempted to be set up because, as he alleged, of culpable negligence in Sullivan and Ryan in not attempting to procure payment from the principal, Robert Parsons, while he was solvent; and insisted that on the matters shown the note which he executed had been destroyed, and that there was no claim therefor against him in law or equity.

The defendant Parker, by his answer, declared that the note in question was received by him as and for a note payable to Sullivan, and as such was delivered over by him to the plaintiff Sullivan without alteration and without any suspicion on his part that there was any error in it; and alleged that afterwards, and without any agency on the part of the defendant, though in his presence, the alteration was made by direction of the plaintiff Sullivan. The defendant further insisted that if the plaintiff had, or either of them had, any claim against him, there was a plain remedy at law therefor, and also insisted upon the protection against this demand afforded by the lapse of time since the same arose.

*Mendenhall* for the plaintiffs.
*J. T. Morehead* for the defendants.

GASTON, J., having stated the case as above, proceeded as follows: Upon the proofs the case, as stated in the bill, is fully

established. But upon the case so established we find ourselves unable to make any decree for the plaintiffs.

It is clear that there is no ground on which relief can be had against either Robert or James Parsons. Sup- ( 91 ) posing the claimant to be Sullivan and not Ryan, there never was any contract between *him* and these defendants except such as was testified by the bond; and as *that* has been altered without their consent, and with the privity of Sullivan, the same is destroyed in law. It being thus destroyed, and it being Sullivan's only ground of claim against them, he is, as to them, without remedy.

It is not quite so clear that there ought not to be relief against the other defendant, Jonathan Parker. Having, though perhaps unintentionally, deceived an illiterate man as to the character of a worthless paper taken from him, and upon the faith of his representation as of value, there seems to be a plain obligation of conscience upon him to make indemnity for the injury thereby sustained. But upon the rules which govern the administration of judicial equity we find ourselves precluded from helping the plaintiffs.

This is substantially the bill of Ryan, and in form Sullivan should have been made a defendant thereto. Now, if it be admitted that Sullivan had an equity to be relieved against Parker, either because of the unpaid part of the price of his land—supposed to have been paid, but in truth not paid, by reason of the worthlessness of the note received on account thereof—or because of the representations or assurances upon which he induced Sullivan to receive this worthless note as one good in law and valuable in fact, how has this equity been transferred to Ryan? He claims as purchaser of a bond which he took with full notice of the legal objections thereto. Under the purchase he is entitled to no more than the bond and all the remedies, legal and equitable, belonging to the ownership of it. Upon that bond Parker was in no way liable. But if this could be regarded as Sullivan's bill then, without expressing an opinion whether having taken the bond with a full knowledge of all the facts attending its alteration, *he* can be heard in any court to allege that he was ignorant of the legal consequences of such alteration, it is manifest that if he can there is no ground for his coming into *equity*. *His* demand, if to be sustained at all, is a plain legal demand against Parker to recover the unpaid price of his land or damages for the deceit put ( 92 ) upon him. Either of these actions would have been long since barred at law; and as early as the year 1829, when pay-

ment was demanded of the altered note and was refused because of the alteration, Sullivan knew all that he knows now. No equity has since arisen by the discovery of a theretofore concealed fraud, and he must not be allowed to evade the legal bar, arising from lapse of time, by a mere change of forum.

The bill must be dismissed, but the case is not one in which the defendants can be allowed costs.

PER CURIAM. Bill dismissed.

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( 93 )

JOHN G. WILLIAMS, Administrator, etc., of Samuel L. Wiggins et al., v. BENJAMIN MAITLAND et al., Executors of Thomas Walker.

Executors and administrators will not be held responsible for paying debts against their testator's or intestate's estate which they might have avoided by advertising for creditors under the act of 1789 (see 1 Rev. Stat., ch. 46, sec. 16, and ch. 65, sec. 12) and pleading the act in bar of their recovery, if the debts so paid were honestly due; but the executors and administrators ought in prudence to comply with the requisitions of the act; and if by failing so to do they subject the estate to the payment of *what it does not owe*, they and not the estate shall bear the loss.

If the executor of a surety for a firm, upon the insolvency of a known partner, pay the debt, he shall not be charged with it in account with his testator's estate, because of his not bringing a suit for the recovery of the debt against another person supposed to be a partner, where there is no good reason to believe that the fact of that person's being a partner could be established by proof; and more especially ought he not to be so charged where such supposed partner was generally deemed to be insolvent.

Where it is shown that a part of the effects of an estate inventoried by two co-executors has been wasted, and a part of the debts which, by due diligence, might have been collected has been lost to the estate, *quere* as to the extent of each executor's liability? But where the debts are actually collected by one executor only, and the product of the sales of the estate, whether the sales were made by one or both of the executors, is received by the same executor, and there is no waste unless it be from the misapplication by that executor of the funds thus rightfully in his hands, it is well settled that a *devastavit* by him shall not charge his companion, who has not actively contributed thereto.

Before a decree, one defendant in equity may, as a matter of course, upon a proper allegation for that purpose, obtain an order for the examination of his co-defendant as to matters in which the latter is not interested, saving to the plaintiff all just exceptions. This order will not be discharged upon a suggestion, that from the answer of the defendant to be examined, he appears to have an interest, but the objection must be reserved until the deposition is offered in evidence, when it will be a good exception that

the witness examined has an interest in the matters examined to adverse to the exceptant; and if this appear, his deposition cannot be read. But it is not a good exception that he has an interest in any other matters embraced in the cause, unless it can be seen that these matters will be affected by his examination.

After a decree, it is not a motion of course for one defendant to examine another, and a special ground must be laid for it. And it seems to be such a special ground, after a decree against two co-executors to account, that one sought to be examined had alone received the money of the estate.

It must be a plain case of neglect of duty which makes an executor responsible for a loss by holding on to stock in a steamboat company *bona fide* and in the exercise of his best judgment. Nothing more than perfect honesty and reasonable diligence ought to be required of trustees; and it would be against conscience to require of an executor an indemnity against his testator's estate sharing in the loss which befell all, or nearly all, who adventured with him in the speculation.

Where a guardian died indebted to his ward, and some years afterwards a judgment was recovered against his executor for the amount, to satisfy which the testator's slaves were sold at a less price than they would have brought had they been sold for the satisfaction of the debt soon after the testator's death. *It was held* that the executor, if he could be held responsible at all for the unforeseen and indirect calamity of a depreciation in the price of the slaves, could not be so held where no fraud was alleged or pretended, and it was not shown that he knew of the existence of the debt and the necessity for the sale before the matter of the claim was put into the train of judicial investigation, or that there was any delay in getting a decision upon the claim.

ON 23 August, 1833, Sarah M. Wiggins, by her guardian and next friend, S. B. Carraway, filed her bill of complaint in the court of equity for the county of WASHINGTON against John Walker, Benjamin Maitland and Jordan Walker, which said Benjamin and Jordan were the executors of Thomas Walker, deceased. By this bill the plaintiff charged that Samuel Lee Wiggins, formerly of said county, died on 18 April, 1818, having first, viz, on 30 September, 1816, duly made his last will and testament, whereof he constituted Lewis Whitfield, Thomas B. Haughton, Thomas Walker, John Walker and Gabriel Stewart executors; that the said will at the May Term, 1818, of the county court of Washington, was duly admitted to probate; that of the executors therein named all but Thomas Walker and John Walker refused the appointment; and that, thereupon, the said Thomas and John took upon themselves the office aforesaid, and qualified as executors accordingly. The bill further stated that in and by the said will, after some specific (94)

devises and bequests, the testator devised and bequeathed unto his wife his manor plantation and adjoining lands, and all his negro slaves and perishable estate during her widowhood or, at farthest, until his eldest child should come of age; and gave and bequeathed unto his son, Lewis Whitfield Wiggins, and to the child his wife was then pregnant with, or to the survivor of them, all the remaining part of his estate, real and personal, after the expiration of his wife's loan therein; that the plaintiff was the child in said will referred to as being then unborn, and was born shortly thereafter; that the said Lewis W. Wiggins died in the lifetime of the testator; that the widow of the testator, the mother of the plaintiff, intermarried with S. B. Carraway on ____ January, 1828; that John Walker, who had been appointed by the will testamentary guardian of the plaintiff, resigned the appointment, and at July Term, 1832, of the county court of Lenoir, S. B. Carraway was appointed her guardian in place of the said John. The bill charged that the testator left a large estate, which came to the hands of the said Thomas and John Walker, who managed the same in a very negligent and improvident manner, by omitting to make sale of property for the payment of debts when property was of great
( 95 ) value, and sacrificing it when its price had depreciated; that after the payment of the testator's debts and satisfaction of his specific legacies there was a residue left in the hands of the said Thomas and John to which the plaintiff was entitled; that some time in 1818 the said John became greatly embarrassed, and his said embarrassments being well known to the said Thomas the latter thereafter principally managed the estate, and received, or ought to have received, a large proportion of the estate which they managed jointly; that the said John on 8 September, 1821, executed a deed of trust whereby he conveyed to the said Thomas all his estate of every description; that the said John thereupon became and has ever since been insolvent, and that the property so conveyed, being more than sufficient to satisfy the debts due to the said Thomas, there remained in his hands a surplus applicable to the payment of what might be found due from the said John to the plaintiff. The bill further stated that Thomas Walker had died, having previously made a last will, whereof he constituted the defendants, Benjamin Maitland and John Walker, executors, who had proved the same and taken possession of the said Thomas's personal estate to a very large amount; and it charged that the said Thomas and John, in the lifetime of the said Thomas, received, or ought to have received, a large amount of debts due to their

testator; and that a large amount of money, effects and estate of the said testator had come into the hands of the said Benjamin and Jordan since the death of the said Thomas. And the plaintiff, by her said bill, prayed that the said John Walker, Benjamin Maitland and Jordan Walker might come to an account with the plaintiff in relation to the personal estate of her father and of the profits thereof; that they might be decreed to pay unto her what, upon taking such an account, should appear to be due unto her as his residuary legatee, and for such other and further relief as the nature of her case required.

At the September Term, 1833, John Walker put in his answer, wherein he admitted that the plaintiff was the only surviving child and residuary legatee of Samuel L. Wiggins; that the said Samuel did give and bequeath as in the bill charged; that he and Thomas Walker alone qualified as executors to the will of the said Samuel; that the widow of his testator ( 96 ) intermarried with S. B. Carraway, as stated in the bill, and that subsequently the defendant resigned the appointment of testamentary guardian to the plaintiff, and the said S. B. Carraway was appointed guardian in his stead. The defendant further declared that for some time after his testator's death he had the principal and almost exclusive management of his testator's estate, and to his answer annexed an account of his administration thereof, and averred the said account to be correct with the exception that therein he had taken a credit for a commission on the sum of $2,616.24, a payment made by his co-executor Thomas in discharge of a balance due from the testator Samuel to Lawrence Wiggins, unto the defendant, the guardian of the said Lawrence. The defendant denied the charges of negligence and mismanagement contained in the bill; admitted that in September, 1821, he executed a deed of trust of his property to secure a debt due personally to Thomas Walker, and also a debt due to the Edenton Bank; but protested that the property fell short of discharging these debts. The account annexed was a copy of an account settled by him as executor of S. L. Wiggins with auditors appointed by the county court on 23 August, 1827, and exhibited a balance due from the defendant personally to the estate of his testator of $148.45.

At the same term the defendants, Maitland and Jordan Walker, filed their separate answer, and therein made the same admissions as were made by John Walker; and further admitted that Thomas Walker had died and they had proved his will as his executors. The defendants stated in their said answer that they personally knew nothing of the administration of Samuel

L. Wiggins's estate, but had understood and believed that their testator interfered very little therewith; that nearly all the property was received and the debts paid and the business transacted by John Walker, to whose separate answer they referred; that the only information which they possessed of the particular business of the estate transacted by their testator Thomas was derived from an account which they annexed to their
( 97 ) answer, purporting to be an account settled on 10 August, 1827, between the said Thomas and auditors of the county court, and exhibiting a balance then due him from the estate of $2,041.88; that they had understood and believed that in order to satisfy this balance in part the said Thomas sold certain negroes of the estate on 11 February, 1828, for the sum of $1,768.25, and that the residue of said balance never had been satisfied. They further answered that on 8 September, 1821, John Walker executed a deed of trust to Mason L. Wiggins to secure a debt due by note to the said Thomas of $2,442.10, and also a debt of $1,849.30 due the bank at Edenton; that sales of the property were made by the trustee; that they fell short of satisfying the trust debts, and that there remained $1,000 unpaid of the said note of the said John to the said Thomas. To these answers the plaintiff replied generally, and an order was made without prejudice whereby it was referred to the master to take an account of the estate of Samuel L. Wiggins that went jointly into the hands of Thomas Walker and John Walker, and also of what went into the hands of each of them respectively, and also of their joint and respective disbursements, with leave to take testimony and to report what was done by them to the plaintiff. Before the execution of this order was completed it was ordered at the instance of the defendants, Maitland and Jordan Walker, that they have leave to take the deposition of John Walker subject to such exceptions as might be made at the hearing, and the execution of the order of reference was yet unfinished when the said John died; and the plaintiff Sarah intermarried with John G. Williams, who took out letters of administration *de bonis non,* with the will annexed, on the estate of Samuel L. Wiggins, and at the Fall Term, 1836, became party plaintiff to the proceedings by a bill of revivor, and caused the same to be revived accordingly. At the Spring Term, 1839, the master made his report, which was very full and elaborate, and found in substance that except in a very few instances John Walker and Thomas Walker acted severally in the management of the estate of their testator; it ex-
( 98 ) hibited an account of the said Thomas with the said

estate upon which a balance was stated in favor of the said Thomas for the sum of $277.32; and because of the abatement of the suit against John Walker it stated that the master had forborne from proceeding to state his account with the estate. To this report the plaintiff filed a great number of exceptions, and then the cause was, by consent, removed to the Supreme Court for hearing. The exceptions, together with the facts upon which they were founded, will be found stated in the opinion of the Court.

*M. Haughton* and *J. H. Bryan* for the plaintiffs.
*Iredell* and *A. Moore* for the defendants.

GASTON, J., after stating the case as above, proceeded as follows: Upon the argument it was admitted by the counsel for the defendants that the fourth exception taken by the plaintiff was well founded. That exception is, for that the master has erroneously debited the estate of Samuel L. Wiggins in account with Thomas Walker, as executor, with the sum of $12 and the interest thereon; which sum was paid for a survey of land made after the death of his testator. Without, therefore, inquiring into the matter of the exception, and because of this admission, the Court doth sustain the said exception.

At the same time the counsel for the plaintiff waived the third, twelfth, eighteenth and twentieth exceptions. These, therefore, are regarded as withdrawn, and the Court hath in no way passed upon them.

With respect to the matters embraced within the remaining exceptions, the Court hath minutely inspected the testimony which has been referred to as bearing upon them and deliberately considered it. Upon each of these exceptions it has not been enabled to come to a conclusion with the same confidence, but it has not found any one sustained to its satisfaction. All these exceptions, therefore, are overruled.

Our views upon them will be briefly stated.

The first exception is, for that the master hath erroneously debited the estate of Samuel L. Wiggins with the sum of £2 2s. 3d., paid in discharge of an account of Horace Ely. The proof of payment of this account by the executor, Thomas Walker, is full and uncontested, but the objection that ( 99 ) the estate ought not to be charged therewith is for that the account itself was not a just one. In support of this objection the plaintiffs rely on a due bill given by Wiggins to Ely, dated 28 March, 1816, for £3 6s. 1d., professing to be for a bal-

ance found due upon a settlement of accounts between them up to 1 January, 1816, and upon the fact appearing on the face of this disputed account that all the items therein charged, with the exception of the last item for the laying of three grubbing hoes, £1 10s., on 3 January, 1816, are antecedent to the date of the said settlement. The settled account on which the note or due bill was given does not appear, so that we cannot *certainly* know the items of which it was composed. It does appear, however, that the deceased, Mr. Wiggins, dealt extensively with Mr. Ely as his merchant, and the disputed account is exclusively for *blacksmith's work* done at the shop of the latter. Although this circumstance alone would not repel the conclusion that this account, except as to the last item, was comprehended in the settlement upon which the due bill was given, yet it comes in aid of the testimony of Mr. Ely before the master that it *was not embraced* in that settlement and was wholly due from Wiggins at his death. We cannot say, therefore, that Thomas Walker committed a *devastavit* in paying it.

The second exception is, for that the master hath debited the estate with sundry payments made by Thomas Walker, on account of a judgment of David Clark against the executors of S. L. Wiggins, amounting to the sum of $362.06. The facts in relation to the subject-matter of this exception are few and not disputed.

On 1 May, 1815, the late S. L. Wiggins became indebted on a bond for the sum of $88.20, payable to David Clark on 1 January thereafter, which bond he executed jointly with Charles Blount at the request and as the surety of the said Blount. On this bond, in November, 1822, an action was brought by the obligee, and after many delays judgment was obtained. This judgment, Charles Blount having become absolutely in-
(100) solvent, was paid off by Thomas Walker, as executor of Wiggins. The objection of the plaintiffs is for that it was the duty of the executors under our act of 1789, 1 Rev. Stat., ch. 46, sec. 16, and ch. 65, sec. 12, to advertise for creditors to prefer their claims: those within the State before the expiration of two years, and those without the State within three years after the qualification of the executors; and when sued after the expiration of such time by a creditor, to plead the advertisement and lapse of time in bar of his recovery.

We are very certain that the doctrine as thus laid down has never yet received the sanction of the courts of justice in this State. In a large number, perhaps a majority of cases of executors and administrators, advertisement is not *so made* as to en-

able them to set up a bar of the act of 1789, and we are yet to learn that it has ever been held that the payment of a *just debt*, which might have been evaded had the advertisement been made in due form and the executor or administrator had chosen to plead the statute against it, was adjudged a *devastavit*. Certainly executors and administrators ought, in prudence, to comply with the requisitions of the act in question, and if, by failing so to do, they subject the estate to the payment of *what it does not owe*, they and not the estate should bear the loss. But the legatees or next of kin cannot, in conscience, object to a payment, whether voluntary or compulsory, made by the representative of the estate, of what was justly due therefrom. In equity, as respects legatees or next of kin, the estate consists only of what remains after satisfaction of the creditors. That an executor is not bound to plead a statute of limitations against the claim of an honest creditor, we have been accustomed to regard as the undisputed law of our State, handed down to us from its first settlement. The counsel for the plaintiffs supposes that a mistaken notion has prevailed on this subject, and in support of that supposition refers us to some incidental remarks made by *Mr. Justice Bayley* in the case of *McCullock v. Dawes*, reported 9 Dow. and Ry., 40 (22 Eng. C. L., 386). These remarks must be understood with reference to the circumstances of the case then under consideration, a claim by open account (101) against the estate of a deceased man, *more than twenty years old;* and which, without clear evidence to the contrary, must be presumed to have been paid. An executor who did not resist such a claim would justly render himself liable over to those who were interested in the testator's property. The payment of such a claim would properly subject him to the charge of unfaithfulness to his *cestui que trust*. In Williams's Treatise on the Law of Executors and Administrators, among the latest and best upon the subject, it is laid down that an executor is not bound to plead the statute of limitations to an action commenced against him by a creditor of the testator, nor will equity compel him to plead it upon a bill by the residuary legatee; and the most authoritative references are given in support of these positions. See 2 Williams on Exrs., 1110. And in *Shewen v. Vanderhorst*, 1 Russ. and Myl., 347 (4 Eng. Con., ch. 458), where the late Master of the Rolls and the late Lord Chancellor held that after a decree was pronounced against the executor by which the estate was taken out of his possession and vested in the court for the purposes of distribution, and the accounts ordered to be taken and the assets administered in the master's office, the

common law power of the executor to waive the bar of the statute was gone, and any persons parties to the suit might set it up, it is most unequivocally recognized that until such a decree rendered the executor has an honest discretion to plead or not to plead the statute.

There might, perhaps—we do not know, however, if it be so—there might, perhaps, be some objections to the sums paid because of costs unnecessarily incurred. The exception, however, is placed *solely* on the principle that it was the duty of the executors to protect the estate from the payment of the debt, because they might have barred a recovery of it under the act of 1789, and this principle we do not admit.

The fifth, sixth and twenty-first exceptions relate to one and the same subject, and may properly be considered together. The material facts, as found by the report, may be briefly stated as follows: On 4 December, 1817, Samuel L. Wiggins, at (102) the request of Abraham Howett, personally became a surety or endorser on a note purporting to be made by Abraham Howett & Co., payable eighty-eight days after date at the Edenton branch of the State Bank, to John B. Blount, cashier thereof; which note was shortly after discounted at the said bank at the instance of the said Abraham Howett, and the proceeds thereof received by the said Abraham. Before the day of payment arrived Abraham Howett became insolvent and left the country, and a few weeks after the day of payment Samuel L. Wiggins died. It was not known who besides Abraham Howett composed the firm of Abraham Howett & Co., but it was suspected by the executors of Wiggins that a certain William L. Chesson was a member thereof; and in the hope of being able to establish this fact and to save the estate of their testator they caused a suit to be brought by the bank in the name of Blount, the cashier, against said Chesson, as one of the makers of the said note. Upon the trial they were unable to show Chesson a member of the firm, and therefore the plaintiff was nonsuited. Howett being insolvent and run away, and being unable to fix the liability of the note upon any other person, Thomas Walker paid the amount of the note and interest, and the master has credited the said Thomas and debited the estate in account with the amount of the payment thus made. The plaintiffs object to this finding of the master upon many grounds. In the first place, they insist that there is no evidence that such a note ever was given, because the best testimony, the note itself, is not exhibited. The defendants, Maitland and Jordan Walker, have both made affidavit before the master that they have been

unable to find the original note, after making diligent search therefor; know not where it is to be obtained, and believe that it is lost. According to the matter by them alleged the original, if in existence, ought to be among the papers of their testators unless it was left in the bank after payment as a canceled note. The agent of the bank entitled to the custody of such papers has sworn that he has it not, and that many papers of the bank, and amongst them canceled notes, have been destroyed by fire. The way is thus fully opened for secondary evidence; and the secondary evidence is *plenary*. It is then ob- (103) jected that the payment of the note is not proved except by an *ex parte* affidavit of John B. Blount, which is denied to be evidence; and if payment be proved, it is not shown to have been made by *Thomas* Walker. But this objection fails. John B. Blount died before the filing of this bill. The sworn statement, if not admissible as *testimony*, is admissible as his *receipt;* but the actual payment of the money and its payment by Thomas Walker is proved in Thomas Cox's deposition. The main objection then remains, which is, that when the note in question was executed William L. Chesson and Abraham Howett constituted the firm of Abraham Howett & Co.; that the said William was solvent, and it was the duty of the executors of Wiggins, and especially of Thomas Walker, who paid the note, to compel restitution of the money from Chesson. The only evidence offered by the plaintiffs in support of the allegation that Chesson was a partner of the firm is that of William L. Chesson himself. He states that he and Abraham Howett constituted the firm of Abraham Howett & Co. from about 25 November, 1817, until the latter part of January or first of February, 1818, when the partnership was dissolved; and further states his belief that he was able to pay and might have been compelled to pay a debt of $1,500 to $2,000 at any time since 1819. The witness does not state that the fact of his being a member of this short copartnership was notorious, nor, indeed, intimate that it was known to any but the persons constituting the firm. He does not insinuate that the action brought against him upon the note, and which he states was brought as he believed for the benefit of Wiggins's estate, was not prosecuted in good faith. Though he was examined twice in relation to the suit, and it is impossible to reconcile the two statements completely to each other—a discrepancy which we are disposed to attribute to his indistinct recollection of the circumstances attending a transaction that had occurred sixteen years before—it is apparent from these statements that he did not on the trial *admit the fact* that

he was one of the firm of A. Howett & Co. He says that in order to *prove* that fact they introduced Mr. Wills, the (104) printer of a newspaper in Edenton, with his file of the paper containing notice of the co-partnership; but Wills could show no authority from the witness for making the publication. We must infer, therefore, that the fact was denied by him on the trial, and that it was not proved against him.

But, besides this, we have the testimony of John S. Smallwood who, in December, 1817, sold the witness Chesson a large stock of goods. He informs us that in about a month thereafter Chesson offered to the witness, in payment of the goods, three notes of Abraham Howett & Co., amounting to $3,600; and on witness demanding to know who composed this firm was told by Chesson that it consisted of Abraham Howett and Sylvanus Howett, and in a few days afterwards he received the same information from Abraham Howett. The witness refusing to receive these notes Chesson then offered him the notes of Abraham Howett & Co., payable to Chesson, and by him endorsed, which witness did receive. It is further testified by this witness that Chesson lived in his employment as a clerk for four or five months in the summer of 1818, and the witness never heard from the said Chesson that *he* was of the firm of Abraham Howett & Co., nor did witness know it or know of any one who did. If it be admitted, therefore, that Mr. Chesson was in truth one of the firm liable on this note as principals, it is indisputable, we think, that the knowledge of the fact was industriously *concealed* so that no imputation of negligence can rest upon Thomas Walker for being unable to prove it; and unless he had good reason to believe the fact could be established by proof there was no obligation on him to run the estate of his testator to costs by bringing an action against Chesson. This is our conclusion if the solvency of Chesson was unquestionable. But upon this point we have no doubt that whatever may have been his actual ability to pay a demand of this amount, to the world the prosecution of such a demand appeared a *hopeless chance* until after his intermarriage with Miss Bozman, which did not take place until between 1824 and 1826. Under all the circumstances it would be plainly iniquitous to make Thomas (105) Walker's estate lose the money so paid by him in discharge of a debt of his testator.

The 7th, 8th, 9th, 10th, 13th, 14th and 19th exceptions all relate to one and the same subject, viz., whether the estate of Thomas Walker be not chargeable because of receipts found by the master to have come exclusively into the hands of John

Walker, his co-executor. It appears that both John and Thomas qualified as executor of their testator at the May Term, 1818, of Washington County Court; that at the August Term following, John Walker, in person, returned an inventory, not subscribed by anyone, but purporting to be an inventory taken by Thomas and John on 25 July, 1818; that afterwards, at February Term, 1819, he returned an account of sales, signed by the said John only, and purporting to be an account of sales of the perishable part of the property belonging to the estate of Samuel L. Wiggins on 12 November, 1818; and at the same term a further account of sales, subscribed by both John and Thomas, of sales made on 14 January, 1819; and at the same term a list of notes and bonds belonging to the estate of the deceased, subscribed by both the said executors. And it is insisted by the plaintiffs that these documents establish that these articles of property and choses in action came into the hands of both the said Thomas and John, and that the estates of both of them are, and each of them is, chargeable therefor in account with the residuary legatee and administrator *de bonis non* of their testator. We have not found it necessary to declare what liability would *prima facie* attach to the estate of Thomas Walker by reason of the documents thus relied on by the plaintiffs, because the proof is satisfactory that *all the* proceeds of the property in question (except as to the sums which have been charged by the master to the debit of Thomas Walker, and as to which his executors have not excepted) did come directly and exclusively into the hands of John, without the agency or concurrence of Thomas. If it had been shown that a part of the effects inventoried had been wasted, and a part of the debts which by due diligence might have been collected, had been lost to the estate, the inquiry as to the extent of each executor's liability would have presented itself under a different aspect. But when the (106) debts are actually collected by one executor only, and the product of the sales of the estate, whether the sales were *made* by one or both of the executors, is received by the same executor, and there is no waste, unless it be from the misapplication by that executor, of the funds thus rightfully in his hands, it seems to be the ordinary case in which it is well settled that a *devastavit* by one of two executors shall not charge his companion, who has not actively contributed thereto. One has as much authority to receive the assets as the other, and there is no obligation on either to prevent his companion from getting them into possession, under the penalty of becoming responsible for his misuse thereof. *Ochiltree v. Wright,* 21 N. C., 337. The fact that these

assets did thus come exclusively into the possession of John is positively testified by him, and there is a mass of evidence tending to corroborate his testimony. But it is denied that in this case and for this purpose he is a competent witness. As a suit in equity frequently joins persons together as defendants who have several interests, it is a matter of course, before a decree made, for one defendant, upon a proper allegation for that purpose, to obtain an order for the examination of his co-defendant as to certain matters in which the latter is not interested, saving to the plaintiff all just exceptions. This order will not be discharged, upon a suggestion that from the answer of the defendant to be examined, he appears to have an interest, but the objection must be reserved until the deposition is offered in evidence. It will then be a good exception that the witness examined has an interest in the matters examined into; and if this appear, his deposition cannot be read. But it is not a good objection that he has an interest in any other matters embraced in the cause, unless it can be seen that these matters will be affected by his examination. *Murray v. Shadwell,* 2 Ves. & Bea., 404. Now the interest which forms the subject of exception to a witness always means an interest adverse to the exceptant. It would be a singular objection to the reception of testimony that he who testifies has an interest which may bias him in (107) favor of the objector. The witness himself may demur to an examination against his interest; but this is an objection purely personal. See *Nightingale v. Dodd,* Ambler, 583. After a decree, it is not a motion, of course, for one defendant to examine another, and a special ground must be laid for it. *Lord Eldon,* however, thought that, after a decree against three trustees to account, who were all answerable *prima facie,* it was a clear special ground for obtaining such an order that the two sought to be examined had alone received the money. *Franklyn v. Colquhoon,* 16 Ves., 218. So that, in our judgment, there is no ground for the objection by the plaintiff to this defendant's testimony. In addition to what has been already remarked, there is a sufficient reason for overruling the 19th exception, for that the same is immaterial and, whether sustained or disallowed, leads to no practical results.

The 11th exception is for that the master erred in not crediting the estate of Samuel L. Wiggins, in account with Thomas Walker, as executor, with the value of five shares of steamboat stock in 1819, and the interest thereon. The facts in relation to the subject-matter of this exception are truly stated in the master's report, and it is upon these facts the plaintiffs found their

exception. Shortly before the death of Mr. Wiggins, a company had been formed for running a steamboat between Edenton and Plymouth, and Mr. Wiggins subscribed for five shares of stock therein, each share $100. On 30 November, 1818, about which time the boat commenced running, John Walker, who, until his insolvency, was the principal manager of the estate, paid $450 because of his testator's subscription, and in October, 1819, paid the residue of the subscription, $50, with $2 interest thereon, and received, in the name of the executors of S. L. Wiggins, a certificate for five shares of stock. No dividends were ever declared on the stock, and the capital of the company, after running the boat some years, was wholly sunk. On 13 April, 1820, John Walker set up the shares for sale at auction, but, failing to get a bid which he thought himself warranted in receiving, no sale was made. One sale of five shares of stock is proved to have been made, in 1821, by a proprietor, at the price of $26 the share, and no others are shown to have been made, (108) nor is the market price thereof otherwise proved. If it were clear, upon these facts, that John Walker was liable because of the failure to sell this stock before its worthlessness had been ascertained, there might be a question how far such liability could be raised against Thomas, who does not seem to have taken charge at all of this portion of his testator's property; but it ought to be a plain case of neglect of duty which holds an executor responsible for a loss by holding on to property of this description, *bona fide*, and in the exercise of his best judgment. We ought not to demand from trustees more than perfect honesty and reasonable diligence. It would be against conscience to require of the executors of Mr. Wiggins an indemnity against *his* estate sharing in the fate which befell all, or nearly all, who adventured with the testator in this steamboat speculation.

The facts in relation to the subject-matter of the 15th exception are not very fully stated. The exception is for that the master ought to have credited the estate of Samuel L. Wiggins and debited that of Thomas Walker with the sum of $863, the difference between the value of certain negroes in 1818 and in 1821, when they were sold. All the facts disclosed in the case are that the testator, who died in April, 1818, had been the guardian of Lawrence B. Wiggins; that at the Spring Term, 1821, a decree was obtained in the court of equity for the county of Washington, and a bill filed in the name of the said Lawrence by his then guardian, John Walker, against the said Thomas, as the executor of Samuel L. Wiggins, and that the negroes were sold immediately thereafter to pay that decree. It

is not denied but that the amount decreed was justly due, nor that the sale was necessary, nor that it was fairly conducted and for a full price. But it is said that, had the executors used due diligence, they might have ascertained, soon after their testator's death, that he was indebted to the estate of his ward, and that a sale of some of the negroes would be necessary to pay off this debt; that in 1819 there was a very sudden fall in the price of slaves; that in consequence of this fall the slaves sold for $863, less than they would have brought in 1818 or
(109) beginning of 1819, and that this loss should fall on the executors. Waiving the inquiry whether, if the case of the plaintiffs were fully supported, he could claim an indemnity against this unforeseen and indirect calamity, we hold that, no fraud being alleged or pretended, plaintiffs must make out a plain case of *breach of duty*. The plaintiffs have not shown to us that the existence of this debt and the necessity of the sale were known before the matter of the claim was put in the train of judicial investigation, or that there was any delay in getting a decision upon the claim.

The 16th exception, which objects to any allowance being made of commissions to Thomas Walker on his receipts and disbursements, is disallowed, because, in the judgment of the court, nothing is shown in the conduct of said Thomas to destroy his claim to a reasonable commission.

The plaintiffs cannot be permitted to insist upon their 17th exception, because the credit objected to was distinctly admitted before the master.

The master's report is, therefore, in all things, except as to the matter of the 4th exception, confirmed by the Court.

The account, being modified in consequence of the allowance of that exception for $12 and $12.78 interest, exhibits a balance then due to the defendants of $252.34.

It is admitted that there is no specific property belonging to the plaintiffs which has not been delivered. It follows, then, that the bill of the plaintiffs must be dismissed, and, as we think, with costs to the executors of Thomas Walker.

PER CURIAM. Bill dismissed.

*Cited: Leigh v. Smith,* 38 N. C., 448, 449; *Jones v. Blanton,* 41 N. C., 120; *Barnawell v. Smith,* 58 N. C., 172; *Oates v. Lilly,* 84 N. C., 645; *Mendenhall v. Benbow, ib.,* 648; *Halliburton v. Carson,* 100 N. C., 107, 109; *Pate v. Oliver,* 104 N. C., 466.

## RULES

The Court finds it necessary to modify the rules of proceeding which were adopted the term before the last.

The clerk shall hereafter make out his docket so as to arrange all the causes—State, equity, and law—according to the circuits from which they have been respectively brought, beginning with the Seventh and proceeding in inverse order to the First. And, unless a different arrangement be made, by consent of the bar, as provided in the rules referred to, the causes will, after the eighth day of the Court, be taken up in the order in which they may thus stand on the docket. It is nevertheless to be understood that a State cause may be taken up out of its order, when the Attorney-General shall require it; and that, for special reasons, to be judged of by the Court, it may assign a particular day for the argument of any cause.

It is also ordered that one notice of the taking of an account, in any cause pending in this Court, or making of any inquiry before the clerk thereof, or a commissioner for that purpose appointed, shall be hereafter deemed sufficient for proceeding thereon.

## MEMORANDUM

At a meeting of the Governor and Council, held at the Executive office on 27 August, 1840, WILLIAM H. BATTLE, of the city of Raleigh, and Reporter of this Court, was apointed a Judge of the Superior Courts of Law and Equity for this State, *vice* JUDGE TOOMER, resigned.

# EQUITY CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

# NORTH CAROLINA.

## DECEMBER TERM, 1840.

HENRY TATUM and JAMES NELSON v. DUDLEY TATUM and ALLEN TATUM, Administrators of Herbert Tatum, deceased, and against the said Dudley Tatum in his own right.*

Where A., owing a debt, makes a conveyance of personal property, without consideration, the sureties to that debt, who have been compelled to pay it, and have afterwards established their claim at law against such debtor, are entitled to be substituted to the rights of the creditor in this Court, and to have a decree for the sale of such property to satisfy their demand—all the other property of the debtor being exhausted.

Where the sureties had brought an action upon such claim against the administrators, the donee of the property being one of the administrators, and the plea that they had fully administered was found in their favor, this is no bar to the bill of the sureties to subject this property, when the administrators do not rely upon the verdict and judgment at law as a defense, but admit in their answers that the property in question was not considered by the jury in their computation of assets.

Whether the verdict and judgment at law would have been a bar, but for these admissions, *Quere?*

Nor it is any objection to the plaintiff's recovery in this case that they proceeded against the lands, which proved insufficient to satisfy their demand.

THIS was a case which had been set for hearing in GUILFORD Court of Equity, upon the bill, answers and exhibits, and transmitted, by order of that court, to the Supreme Court.

The bill, which was filed at Spring Term, 1835, charged that Herbert Tatum died intestate, in 1829, and (114) that letters of administration on his estate had been duly granted to the defendants; that the said Herbert, for some time before his death, was greatly indebted; that the plaintiffs, together with Allen, one of the defendants, had, in August, 1829,

*This case was decided at June Term, 1838, but for some reason has not been heretofore reported.

become sureties for the said Herbert in a guardian bond which he had given as guardian to certain wards; that these wards had afterwards recovered a judgment against the said sureties for about the sum of $359, on account of a breach of the said bond; that the amount so recovered was paid jointly by the sureties, and a receipt was taken in the name of the plaintiff Henry; that Henry then brought a suit against the administrators of Herbert to recover the sum so paid, and at February Term, 1832, of Guilford County Court, obtained a judgment therefor, but the plea of *"fully administered"* was found in favor of the administrators; that the plaintiff Henry then proceeded against the real estate, but could only obtain by the sale thereof a portion of the debt, to-wit, the sum of $173; that the balance of the debt remained unsatisfied, there being no personal property in the hands of the administrators which could be treated as assets, nor any real estate remaining in the hands of the heirs. The bill further charged that the said Herbert Tatum, two days before his death, to-wit, on 31 August, 1829, executed a deed of gift to the defendant, Dudley Tatum, for two negro slaves, Sam and Rachel, without any consideration, except that of natural affection; that the said Herbert at that time was not only indebted to others, but also owed the debt which the plaintiffs were compelled to pay as sureties, and the bill charged that this conveyance was fraudulent and void as to creditors, and that the plaintiffs had a right to be substituted in the place of the creditors, whose demands they had paid, as above set forth, and, after alleging a demand and refusal, prayed that the said Dudley Tatum might be decreed to pay the plaintiffs their claim, to-wit, two-thirds of the debt before mentioned, or that the slaves, Sam and Rachel, might be decreed to be sold for the satisfaction thereof.

The defendants, in their answers, admitted all the material facts stated in the plaintiffs' bill, except that they did not
(115) admit that the said Herbert died insolvent, but averred that if his lands had sold for a fair price, there would have been enough to discharge his debts. They submitted whether, as the plaintiffs had elected to go against the real estate of the said Herbert, they should now be permitted in this Court to pursue the negroes, mentioned in their bill, in the hands of the defendant Dudley. They also relied upon the general acts of limitations, and also upon the act, passed in 1820, in relation to the possession of slaves (1 Rev. St., ch. 65, sec. 18).

*W. A. Graham* for the plaintiffs.
No counsel for the defendants.

DANIEL, J., after stating the case, proceeded as follows: There is no allegation that the plaintiffs, by any misconduct or management, caused the lands to sell for less than their real value. We must take it, therefore, that the lands brought what they were worth at a ready-money sale.

The plaintiffs, in this Court, are subrogated to all the rights of the creditors, whose debts they have been compelled to pay. They have certainly a right to satisfaction, in some way, out of the slaves transferred without consideration by the debtor to Dudley Tatum, by force of the statute of 13th Elizabeth and our act of Assembly (1 Rev. Stat., ch. 50, sec. 1), as all the rest of the personal and real assets liable to debts had been exhausted. It has been doubted, however, whether the plaintiffs were not estopped to consider the two slaves as assets of the intestate, inasmuch as the plea of *plene administravit* was, at law, found against them, and *non constat* but that the two slaves were taken into consideration as assets by the jury and were covered by that finding. But it is apparent, upon the answers, that the two slaves were not brought to the consideration of the jury as assets of the intestate when they found the issue for the defendants. And the defendants have not set up the verdict and judgment at law as a defense, either by plea or in the answers, against an investigation in this Court, whether these negroes are not in truth assets and, as such, liable to the satisfaction of the plaintiffs' judgment. The plaintiffs are, we think, entitled to a decree that the two slaves mentioned be sold for the satisfaction of their debt. (116)

The circumstances of their having first pursued the land is no bar to their now proceeding against these slaves, as the land proved insufficient to satisfy the debt.

We are at a loss to see that the statutes of 1715 (1 Rev. Stat., ch. 65, sec. 3) and of 1820 (1 Rev. Stat., ch. 65, sec. 18), relied upon in the answers, have any application.

PER CURIAM. Decree accordingly.

*Cited: Martin v. Harding,* 38 N. C., 605.

(117)

ANTHONY ARMISTEAD, Administrator, v. LEVIN BOZMAN'S heirs, legatees and distributees, and ASA HARDISON'S heirs, legatees and distributees.*

When it appeared from the records of the court that A B was appointed guardian to C D, and gave bond with E F and G H as his sureties, *it was held* that the principal and sureties intended to execute a guardian bond in such form and substance as would have been good at law (notwithstanding the defendants in their answers deny such intention), and that the bond drafted by the clerk (which was afterwards declared to be a nullity at law) was drawn wrong, through the mistake or ignorance of the clerk.

*It was further held* that this was a mistake of fact and not of law, and that as in this case, the paper writing purporting to be a bond had been declared at law a nullity in consequence of its being made payable to the justices of the county when one of the obligors was himself one of the justices, the ward for whose benefit the bond was intended to be taken had a right to call in this Court upon those who signed as sureties as well as upon the principal, and make them answerable for whatever might appear to be due the ward on a settlement of the guardian accounts to the same extent to which they would have been liable at law if the bond had been good and available at law.

The proper construction of the act of 1715, limiting claims against deceased persons' estates (1 Rev. Stat., ch. 65, sec. 11), is that the seven years do not begin to run on the death of the debtor unless there be a creditor who has a right at that time to claim his debt or demand. If the debt or demand is not then due, the seven years do not begin to run.

Where a case is set for hearing upon the bill, answers and exhibits, the court will consider the exhibits as proof offered by consent, notwithstanding there is no replication to the answers, which deny the fact intended to be established by the exhibits.

It is not necessary in this case to have the personal representatives of the deceased sureties, parties defendants, because there is now no living personal representative, and the defendants in their answers admit that they have received, as heirs, legatees or distributees, all the property of the deceased, and submit to account for it, if they are liable at all.

THIS bill was filed, returnable to the Spring Term, 1831, of WASHINGTON Court of Equity, in the name of Anthony Armistead. At that term the death of Anthony Armistead was (118) suggested and leave given to his personal representative to file a bill of revivor, which was done, returnable to the

*This case was argued, and the opinion given at——Term——, but the final decree upon the coming in of the Commissioner's report was not rendered until December Term, 1838. It has not before been reported.

next term, at which last term the answers of the defendants were filed. No replication was put to the answers. At Spring Term, 1833, the cause was set for hearing upon the bill, answers and exhibits, and transmitted, by order of the court below, upon the affidavit of the plaintiff, to this Court for trial. The material allegations in the bill and answer, together with the proof upon which the court relied, are set forth at length in the opinion of the Court, delivered by his Honor, *Judge Daniel.*

*Devereux* for the plaintiff.
*Badger* and *Iredell* for the defendants.

DANIEL, J. The bill states that, at December Session, 1811, of Washington County Court, Gabriel L. Stewart applied to be appointed guardian to the plaintiff's estate, Anthony Armistead, then an infant; that said Stewart proffered and tendered Levin Bozman and Asa Hardison as sureties to the guardian bond, who declared their willingness to enter into the proper engagements as such, and were approved by the court. The court thereupon appointed Stewart guardian, and made an order that he and the said sureties should execute, according to law, a guardian bond, for the benefit of the ward, in the penal sum of £1,250. The bill further states that the clerk of the court prepared a paper writing as for a guardian bond, which was executed by the said Stewart, Bozman and Hardison. The bill states that it was the *intent* of the court, and also of Stewart, Bozman and Hardison, that the bond should be in the form prescribed by law, but, from ignorance and mistake in the clerk, the draughtsman thereof, the same was made payable to "James Jones, Esq., and the rest of the justices assigned to keep the peace for Washington County"; that Bozman, being one of the justices for said county, was therefore both obligor and obligee in the said bond; and the paper writing, which was intended by the parties to be a good and legal guardian bond, was pronounced a nullity in a court of law, in consequence of the mistake of the clerk in drawing it in the form and manner aforesaid. A copy of the bond (119) makes a part of the case. The bill states that Stewart acted as guardian of his ward, Anthony Armistead, until 8 October, 1827, when the ward came to full age; that Stewart had become insolvent, and had failed to account for the property, money or effects of the ward, on his coming of age or at any time since. Bozman died on 8 December, 1823, seized and possessed of a large real and personal estate. Hardison died in the year 1819, seized and possessed of real and personal estate. This

bill for an account was filed against Stewart and the heirs at law, legatees and distributees of the two sureties. The administrators or executors of the sureties having died, and no other personal representative having been appointed, since the filing of the bill Stewart has died insolvent, intestate, and has no personal representative. This bill was filed by Anthony Armistead, the ward, against the present defendants, on 24 February, 1831; it abated by Armistead's death, and was revived, by leave of the court, by the plaintiff, his administrator, on 15 July, 1831.

The defendants, by their answers, do not admit that Stewart was appointed by the court guardian to Anthony Armistead, nor do they admit or believe any of the circumstances attending the execution of the bond, as set forth in the bill, to be either true or probable. They do not believe or admit that Bozman and Hardison were formally offered to and approved by the court as sureties for Stewart, and that the said Bozman and Hardison declared their readiness to enter into the proper engagements as such; nor do they believe or admit that the court directed Stewart, Bozman and Hardison to execute a guardian bond according to law, for the benefit of Armistead; nor do they admit that the clerk drew the bond mentioned in the bill as for a bond so directed to be drawn according to law; nor do the defendants admit or believe it to be true that it was the intent of the court, Stewart, Bozman and Hardison that the bond should be in the form prescribed by law; nor was it by the ignorance or mistake of the clerk that the bond was drawn in the manner set forth in the bill; nor did the court, Stewart or the sureties place (120) any confidence in the skill or correctness of the clerk; nor did they intend the bond to be in any other form or payable to any other persons than those set forth in the written paper purporting to be a bond. The defendants in no manner or ways admit that there was any mistake. They believe that the clerk draughted the bond in this form according to the intent of the court; that the sureties did not intend to sign a bond in any other form, and that they are not liable to account, either in law or equity, to the plaintiffs. The heirs, legatees and distributees of both Bozman and Hardison rely on the act of 1715, barring claims against deceased persons' estate (1 Rev. Stat., ch. 65, sec. 11), seven years having elapsed since the death of each of their ancestors before the filing of the present bill.

The plaintiffs omitted to file a replication to the answers of the defendants, but the cause is set down for hearing "on the bill, answers and exhibits (see Exhibits 1, 2, 3, 4)," and sent to the Supreme Court for trial.

It seems to us that the act of 1715 (1 Rev. Stat., ch. 65, sec. 11) is not a protection to the defendants against the plaintiff's claim for an account. The plaintiff had no claim upon the defendants until the ward arrived at full age and the guardian failed to account. That time did not happen until 8 October, 1827, and a bill was filed by the ward on 24 February, 1831. The ward shortly thereafter died, and at Spring Term, 1831, his death was suggested, and an order made, giving leave to his personal representative to file a bill of revivor, which was done on 15 July, 1831. To give operation to the act of limitations, there must not only be a creditor, but there must be a claim—a right in the creditor to demand a debt or challenge the possession of property which is wrongfully withheld from him. The plaintiff's intestate, although a creditor, could not claim possession of his property until he arrived at full age. By a correct interpretation of the act of 1715, the seven years do not begin to run on the death of the debtor, unless the creditor has also a right at that time to claim. A strong case has been put, proving this construction to be correct, to-wit, where a debtor, having given a bond, payable ten years after date, dies immedi- (121) ately, if the time was to be computed from the death of the debtor, the creditor might be deprived of his debt, without any *laches* or default in him. This point in the case seems to be settled against the defendants by a decision in this Court (*Godley v. Taylor*, 14 N. C., 178).

Secondly, it is contended on behalf of the defendants that, as there is no replication taken to the answers, all the statements therein must be taken as true; that the case, in fact, comes on for hearing only upon the bill and answers. It is certainly true, as a general rule, that if an answer be not replied to, it is to be considered as true. *Wright v. Nutt*, 3 Bro., 340; 2 Mad. Ch. Pr., 336. That is, where the order, bringing on the cause to a hearing, clearly sets it down only on bill and answer. But in this cause the entry on the record is: "Ordered that this cause be set for hearing on the bill, answers and exhibits. See the exhibits, sent herewith, marked Nos. 1, 2, 3, 4." This shows that the plaintiff did not mean to admit the truth of the answers, and that the defendants so understood him, or they would not have consented that such an order should have been made. It is a very clumsy practice, we must admit. The defendants consented, it is presumed, because it was known that it was a rule of the court that when, by mistake, a replication has not been filed, and yet witnesses have been examined, the court will permit a replication to be filed *nunc pro tunc*. Mitf., 256; Mad.

Ch. Pr., 276. The exhibits were certainly intended by the parties to be brought to our notice as evidence in the cause; and if they show to us that a mistake has been committed, the evidence must have its effect, notwithstanding what is stated in the answers. Exhibit No. 3 is in the following words:

"STATE OF NORTH CAROLINA—Washington County.

"Court of Pleas and Quarter Sessions, December Term, 1811.

"Appeared in open court Gabriel L. Stewart, for the guardianship of the orphans of Robert Armistead, deceased, viz., John, Robert, Thomas and Anthony Stewart, and gives bonds for each, in the sum of £1,250 each, and gives for security Asa (122) Hardison and Levin Bozman, Esquires."

We are induced to think, from this exhibit, notwithstanding what is said in the answers, that Stewart and the ancestors of the defendants intended to execute a guardian bond in such form and substance as would have been good at law. The court, whose duty and interest it was to take a good and sufficient bond, cannot be presumed to have intended to dispense with such a bond; neither can it be presumed that the court gave special directions that the bond should be drawn by the clerk in the manner the one prepared by him was drawn. Neither does the evidence satisfy us that the form in which the guardian bond was drawn was the form in which guardian bonds were usually taken, according to the course of the court. Stewart applied for the guardianship, and tendered to the court Hardison and Bozman as his securities. The court cannot be presumed to have intended to do an illegal or an useless thing. It cannot be presumed that they all intended that Stewart should get possession of his ward's estate without giving that security which the law required. It was the duty of the court to judge of the fitness of the guardian and of the ability of the securities, and to fix the sum for which the penalty of the bond should be given. On the clerk devolved the duty of preparing the bond. The paper writing draughted by him as a bond was, in law, a nullity. It was, in our opinion, drawn wrong through the mistake or, rather, through the ignorance of the clerk. Exhibit No. 2 is a copy of the bond. It does not appear from it that it was taken in or shown to the court. Looking through the bill, answers and exhibits, we are forced to the conclusion that the court, guardian and his securities intended and agreed that a proper and legal guardian bond should be prepared by the clerk, which the guardian and his securities intended and agreed to execute, and which they believed they had executed. We see nothing to induce us to conclude that the bond

was drawn according to the course of the court or that this particular form was directed by the court. The mistake, as it seems to us, was one of fact, and not one of law.

In the third place, will a court of equity, after the mistake is made to appear, set up the instrument as a bond (123) against the sureties? Will this Court make the sureties liable, who were never at any time liable at law? On this point we have not been clear of doubt; but upon mature consideration we have come to the conclusion that both justice and the law are with the plaintiff. Where the intention is manifest, a court of equity will always relieve against mistakes in agreements (2 Atk., 203; 1 Ves., 317); and it will, even against a surety who was never bound at law. *Crosby v. Middleton,* Prec. in Ch., 309, which overrules what was said by the Chancellor in *Ratcliffe v. Graves,* 1 Vern., 196, that he would not charge the sureties further than they were answerable at law. In *Weser v. Blaikley,* 1 Johns. Ch., 607, it was held that where a bond given by a surety for the guardian of an infant was taken by the surrogate in the name of the *people,* instead of the infant, as the act of Assembly in the State of New York required, a court of equity would correct the mistake and consider the bond of equal validity as if taken in the name of the infant. The Court said "that where the intention is manifest, it will always relieve against mistakes in agreements, and that as well in the case of a surety as in any other case. It would be intolerable that such a mistake should prejudice or destroy the rights of the infant." *Huson v. Pitman,* 3 N. C., 332, was a bill in equity to be relieved against a surety to an appeal bond which had not been drawn according to law, through the mistake of the draughtsman. He had omitted the clause obliging the surety to pay the debt, etc. The court decreed for the plaintiff, on the ground of mistake in drawing the bond. The foregoing authorities have brought us to the conclusion that the parties in this case are liable in equity to this demand.

It has occurred to us that it might be an objection that the plaintiff has not made the personal representatives of Bozman and Hardison parties. It was not taken in the argument, and, if valid generally, we think it no bar here. Those representatives are dead, and the answers admit that the whole estates have come to the defendant's hands, and expressly submit to account in respect of the property, if they are chargeable (124) at all in this Court upon the bond.

There must therefore be a reference for the necessary accounts.

PER CURIAM. Decree accordingly.

*Cited: Butler v. Durham,* 38 N. C., 591; *Davis v. Davis,* 41 N. C., 420; *Sikes v. Truitt,* 57 N. C., 363; *Herndon v. Pratt,* 59 N. C., 331; *Daniel v. Grizzard,* 117 N. C., 111; *Banking Co. v. Tate,* 122 N. C., 317; *Copeland v. Collins, ib.,* 623.

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DAVID MOFFITT v. HUGH MOFFITT'S Administrators.

An administrator is entitled to call upon the personal representatives of a deceased co-administrator, where it appears there has been no settlement between them, for an account of their joint administration, and for this proper share of the commissions received by such co-administrator.

THIS bill was filed, returnable to Fall Term, 1838, of RANDOLPH Court of Equity, and at that term the answers of the defendants were filed, replication thereto taken, and commissions to take depositions ordered. At Spring Term, 1840, the cause was set for hearing, and transmitted to this Court, by consent. The facts of the case appear in the opinion of the Court.

*Mendenhall* for the defendants.
No counsel appeared for the plaintiffs.

GASTON, J. Upon the pleadings, it appears that the plaintiff and the intestate of the defendants, in the year 1835, made a final settlement, as administrators of William Wilkinson, deceased, with the next of kin of the said William, in which settlement they were allowed to retain a considerable sum for their commissions. The plaintiff charges that the whole of these commissions came to the hands of the intestate of the defendants, who died without accounting therefor to the plaintiffs; and also that the said intestate, upon the settlement, and for the purpose of completing it, applied to his benefit the sum of $68, which were the proper moneys of the plaintiff. The defendants deny
(125) that their intestate received more of the commissions than he was entitled to, or used the moneys of the plaintiff as charged, and further insist that, if he did, there was a settlement afterwards between the parties of all matters growing out of this joint administration. The proofs are full that, up to September, 1837, which was but a short time before the death of the intestate of the defendants, the said intestate distinctly admitted that he and the plaintiff had not come to an account with each

other in relation to their said joint administration, and that they were to have a settlement thereof. The plaintiff, therefore, is entitled to the account which he prays for. The commissioner will inquire what was the ratable proportion of the commissions to which the plaintiff was entitled, and by whom said commissions were received, and also examine the respective demands of the parties against each other, connected with their joint administration, and take an account accordingly.

PER CURIAM. Decree accordingly.

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(126)

## LEVIN SPIVEY and Wife v. WILEY JENKINS.

Where a bill is filed against one of the sureties to a guardian bond to recover an amount due by the defalcation of the guardian, upon the ground that the bond has been destroyed by fire, and it appears on the pleadings that the principal is dead, insolvent, and has no personal representative, it is no objection to the bill that a personal representative of the principal is not made a party defendant.

Nor is it any objection that the other surety is not made a party when it is charged, and so appears, that he is beyond the jurisdiction of the court.

The ordinary practice of courts of equity, where one of several parties is out of the jurisdiction and the others within it, is to charge the fact in the bill that such person is out of the jurisdiction, and then to proceed against the other parties; and this practice is not changed in our courts by the operation of the act of Assembly, 1 Rev. Stat., ch. 32, sec. 4.

THIS bill, which was filed returnable to Spring Term, 1833, of HERTFORD Court of Equity, charged that one John Nichols was, about 1824, duly appointed by the Court of Pleas and Quarter Sessions of Hertford County guardian to the plaintiff Margaret, then an infant, who has since intermarried with the plaintiff Levin; that one Joseph P. Howard and the defendant, Wiley Jenkins, were the sureties of the said John Nichols for his guardianship; that the said John, Wiley and Joseph executed a bond in due form of law in Hertford Court of Pleas and Quarter Sessions, which bond was accepted by the court and filed among its records, and was for the faithful performance, on the part of John Nichols, of the duties of guardian of the plaintiff Margaret, and contained all the proper covenants for the performance of the duties of a guardian. The plaintiffs alleged that they were unable to state to whom the bond was made payable, or

what was its amount, as it was destroyed, with the other records of Hertford County, by the burning of the courthouse in 1830 or 1831. But they charged that the said bond was made payable to the proper parties required by law—the justices then on the bench and composing the Court of Pleas and Quarter Sessions of said county—and was for an amount more than sufficient to cover all the property which belonged to the plaintiff
(127) Margaret, and that the said bond was made and executed in every respect according to the formalities of law. The bill then charged that the said John Nichols, after his appointment as guardian, received into his possession a large estate belonging to the plaintiff Margaret, out of which he made great profits, etc., and for which he never accounted. The plaintiffs then stated that the said John Nichols was dead, intestate and insolvent, and that no administration had been taken out on his estate, and that Joseph P. Howard, the co-surety, with Wiley Jenkins, has removed beyond the jurisdiction of this court; that the plaintiffs had applied to the said Wiley Jenkins and requested him to come to a settlement of the guardianship of the said John Nichols, and to pay to the plaintiffs what should be found due to them, but the said Wiley had refused to do so. The bill therefore prayed that the said Wiley might be decreed to come to an account and settlement of the said guardianship and to pay to the plaintiffs what should be found due to them, etc.

The defendant, Wiley Jenkins, in his answer, denied in the most positive terms that he ever was surety for John Nichols, as guardian to the plaintiff Margaret, or that he ever signed any bond, with Joseph P. Howard or any other person as sureties, for the faithful discharge on the part of the said Nichols of his duties as guardian of the said plaintiff. He averred that he did not even know whether John Nichols had ever been appointed guardian of the plaintiff, and, if he had been, whether he ever executed any guardian bond. To the answer there was a general replication, and, depositions having been taken, certain issues were submitted to a jury. The jury found that the defendant, Wiley Jenkins, was the surety to the bond of John Nichols, as guardian to Margaret Baker, now Spivey, and Susan Baker; they also found that the penalty of the bond was sufficient to cover the amount due the complainant—say $1,500; they further found that the guardian bond of the said John Nichols was destroyed, with the records of Hertford County, by the burning of the courthouse. On a reference having been made to the clerk and master, and an account taken, he reported a balance
(128) due the claimants, and the cause was set for hearing.

At the hearing in the court below the defendant's counsel moved to dismiss the plaintiff's bill, because Joseph P. Howard, the co-surety, was not made a party, and, further, because the personal representative of John Nichols was not also made a party defendant. This motion was overruled by his Honor, *Judge Pearson,* the presiding judge, and a decree entered for the plaintiffs. From this decree the defendant appealed to the Supreme Court.

*Iredell* for the plaintiffs.
*A. Moore* for the defendant.

GASTON, J. The only objections urged against the decree which has been rendered below are because of an alleged defect of parties. The first objection is for that the representatives of Nichols, the principal obligor, have not been made defendants. This objection is clearly untenable, for in the amended bill, which has been taken *pro confesso*, it is distinctly charged that Nichols has died insolvent, and that he has no personal representative. The other objection is for that Howard, the co-surety of the defendant, has not been made a party defendant. We are of opinion that this objection also must be overruled, because the bill charges—and the allegation is not denied—that Howard is without the limits of the State. The ordinary practice of courts of equity, where one of several parties is out of the jurisdiction and the others within it, is to charge the fact in the bill that such person is out of the jurisdiction, and then to proceed against the other parties, although the former has not been brought in. The court cannot, indeed, render and decree against *him;* but if the case be of that kind in which a decree may be rendered against the defendants in the court without impairing the rights of the absent party, the court will proceed to hear the cause as between the litigant parties, and to decree accordingly upon the merits. See *Smith v. Mine Co.*, 1 Sch. & Lef., 240; *Haddock v. Tomlinson,* 2 Sim. & Stu., 219; *Elmendorf v. Taylor,* 10 Wheat., 162; *West v. Rundall,* 2 Mason, 181. The doubt, if any, whether this practice ought to obtain here, is because of the statutory provision in this State, by which our courts of equity are (129) authorized to make an order requiring a defendant residing without the limits of the State, and on whom process has not been served, to appear therein on an appointed day, and if he fail to comply with such order, after due publication thereof, to order the plaintiff's bill to be taken *pro confesso* against him and make decree thereon as shall be thought just. But the

decree thus rendered is not absolute. If the plaintiff should seek to enforce it against the property of the absent defendant, he is obliged to give security to abide such order touching the restitution thereof as the court may make, if the defendant should appear and petition to have the cause reheard. Should the defendant, within two years after rendering the decree, come within the State, the plaintiff must serve him within a reasonable time with a copy of the decree; and the defendant may, within twelve months after service of a copy of the decree, and, if he has not been so served with notice, may at any time within three years after rendition of the decree be permitted to answer the bill exhibited, and cause such proceedings to be had in the case, so far as he is concerned, as though no decree had been rendered and the cause had then been originally instituted against him. 1 Rev. St., ch. 32, sec. 4. The relief which can be obtained under the provisions of this statute against a nonresident is so imperfect and inconclusive that our courts have not deemed the possibility of obtaining it as furnishing a sufficient reason for refusing redress to a plaintiff against a defendant directly subject to their jurisdiction, to which redress the plaintiff shows himself entitled, because he has not also made parties to his bill persons residing without the limits of the State who have an interest in the object of the suit. The point was directly decided at an early day after the enactment of the statute, in *Ingram v. Lanier*, 2 N. C., 221, was recognized by this Court in *Vann v. Harget*, 22 N. C., 31, and must be considered as now fully settled.

PER CURIAM. Decree affirmed, with costs.

*Cited: Jones v. Blanton*, 41 N. C., 119; *Etheridge v. Vernoy*, 71 N. C., 186.

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(130)

CHARLOTTE SHIRLEY v. BRYAN WHITEHEAD, Executor of Jonathan Dew.

Where the plaintiff alleged that the testator of the defendant had, in his last illness, made her a gift of a bond, which was not endorsed, and that he had made this gift in consideration of her nursing and attending to him, and also because of his former co-habitation with her; and where it appeared that for some months before his death she had attended upon him, and had access to his papers. *Held*, by the court, that to establish such a gift, the evidence must be full and satisfactory; and that the policy of the law preventing fraudulent testamentary dispositions from being set up would be frustrated if such gifts were estab-

lished upon vague, slender or doubtful evidence. In the present case the court refused, upon the proofs, to decree for the plaintiff.

THIS was a bill filed by the complainant, *in forma pauperis* (by order of a judge), returnable to the Fall Term, 1838, of HALIFAX Court of Equity. At the Fall Term the answer of the defendant was filed, replication taken thereto, and an order for commissions. At Fall Term, 1839, the cause was set for hearing. At Spring Term, 1840, an issue was submitted to the jury, which they found in favor of the plaintiff. This verdict was set aside by the court; and at Fall Term, 1840, it was ordered, by consent, that the issue submitted to the jury be withdrawn, and that the cause be transmitted to the Supreme Court for hearing. The facts disclosed in the pleadings and proofs are stated in the opinion of the Court.

*Daniel* for the plaintiff.
*Badger* for the defendant.

GASTON, J. The object of this bill is to compel the defendant to pay over to the plaintiff a sum of money which the defendant, as executor of Jonathan Dew, deceased, collected from Frederick Pitman upon a bond executed by the said Pitman to the said Dew, and the beneficial interest whereof is alleged to have been transferred to the plaintiff by the obligee in his lifetime. The plaintiff charges that Jonathan Dew died in July, 1836, having previously executed his last will and testament, whereof he appointed the defendant executor; that the deceased for many months before his death was so severely afflicted with rheumatism as to be confined constantly to his (131) chamber and generally to his bed; that he had no white person dwelling with him, and stood in need of better nursing and more assiduous attention than he could expect from his slaves; and that the plaintiff, who had some seven or eight years before borne an illegitimate child to the said Jonathan, was induced, at his earnest request and while he was in this destitute and afflicted state, to take up her abode in his house; that during this period she nursed him with the utmost fidelity and took upon herself the charge of his household concerns, and that some time in the month of March or April preceding his death, and while she was thus residing with him, the said Jonathan, "expressing his belief that he would not live long," and "in consequence of her faithful services in attending to him and his affairs during his illness," and "in fulfillment of the promises and as-

surances which he had repeatedly made to make some compensation to her because of past cohabitation," gave to the plaintiff the sum of two hundred dollars in money and the note in question, which is described as bearing date 27 August, 1835, for the sum of $450, payable with interest from the date. The plaintiff avers that the provision for her was thus made because when he intimated an intention to provide for her by will she had expressed her wish that whatever bounty he might be disposed to bestow should be put directly into her possession, and states her belief to be that he omitted to endorse the bond either because he was ignorant that an endorsement was necessary to transfer the legal interest therein, or his excruciating pains made him forget to do so. The bill then states that after the death of the said Dew the defendant, who had proved his will, having learned that the plaintiff held the said bond, demanded the same from her, and this demand being refused, charged her with having stolen the money and bond aforesaid, and caused her to be apprehended and bound in recognizance to answer said charge; that he had afterwards abandoned the prosecution, but had prevailed on Pitman to pay him the amount of the bond on his executing a discharge therefor and an indemnity against the plaintiff's demand.

(132) The defendant's answer admits the death of Dew and the probate of his will, and the receipt of the money upon the bond by the defendant as said Dew's executor. He admits that the plaintiff was the mother of an illegitimate child of which said Dew was reputed to be the father; and while he denies the services rendered to him by the plaintiff, admits that she made his house her abode during his long illness. He states that he had been in the habit of free communication with his testator up to his death in relation to his pecuniary affairs, and from the knowledge thereby acquired asserts his entire conviction that he never intended to give and never did give to her the bond in question; declares his belief that she took the same dishonestly; says that under the influence of this belief he instituted the prosecution against her, and that he desisted therefrom not from any doubt he himself entertained of her guilt, but because the officer of the State was of opinion that the evidence was insufficient to warrant a conviction for felony.

To this answer there is a general replication, and the cause is brought to a hearing upon the proofs.

Although there are some expressions attributed to the testator at the time of the alleged gift tending to show that it was made in contemplation of death, yet we must understand the plaintiff

as setting up in her bill an irrevocable gift, taking effect immediately, and wholly independent of the contingency whether the donor should or should not recover from his then illness, or whether the donee should or should not survive the donor. Indeed, it is not easy to conceive how a donation *mortis causa* could be established by any proof in a case like this where the testator was not surprised by sickness, but lived for months afterward, and had abundant opportunity to make his testamentary dispositions in the regular and ordinary way. An absolute and immediate gift is not, indeed, so unsusceptible of proof, but it cannot be established unless the evidence be full and satisfactory. In vain has the law prescribed solemn forms, and anxiously provided other safeguards to prevent a testamentary disposition from being fraudulently set up after the death of the supposed donor, if upon slender, vague, doubtful evidence of an absolute donation on the bed of sickness those who have the custody of the dying man and his effects may establish the owner- (133) ship thereof in themselves as soon as the breath is out of his body. It is impossible that such a gift as is here alleged should not be regarded with strong suspicion, and property would be utterly unsafe were it to be sustained on proof that did not produce full conviction. Certainly there is no such proof. There is no direct testimony to the *act of* giving. No witness pretends to have been present at such an act; no one speaks even of having heard the testator speak of such an act. The nearest approach to such testimony is to be found in the deposition of the plaintiff's sister, Louisa Shirley. She states that as much as two or three months before Dew's death she was with the plaintiff in the room where the sick man lay, and there heard the plaintiff say that he had given her two hundred dollars and Pitman's bond; and she states further that he was awake and she *supposes* he was within hearing of what was said. When, where, in what manner this gift was made, whether it was absolute or upon the contingency of death is not stated. Not a word is uttered by the sick man. Nothing is said in regard to the state of his bodily sufferings or of his mental capacity at the time. And the witness only *supposes* that he may have heard her sister's remarks. We cannot hesitate a moment in declaring that this testimony furnishes no evidence of the alleged gift. The other depositions for the plaintiff, if they prove anything, show only that before Dew's death she had the bond in her hands and pretended it was given to her. We say if they prove

anything, because they are the depositions of persons whose claims to credit are very questionable.

PER CURIAM. Bill dismissed.

*Cited:* *Newman v. Bost,* 122 N. C., 532, 536.

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(134)

EDMUND SUTTON and Wife et al. v. REBECCA CRADDOCK.

Where A is tenant for life of slaves, and B and C entitled to remainder after the death of the tenant for life, the latter cannot compel the former to give *security* for the forthcoming of the slaves at the expiration of the life estate, unless they show to the court that there is some danger of their being deprived of their estate in remainder by some act or contemplated act of the tenant for life.

THIS was a bill filed returnable at the Spring Term, 1837, of SAMPSON Court of Equity, to which an answer was put in at the same term. Replication was filed to the answer and commission ordered to take testimony. At Fall Term, 1840, the cause was set for hearing and ordered to be transmitted to the Supreme Court. The facts disclosed by the pleadings are stated in the opinion of the Court.

*Strange* for plaintiff.

No counsel for defendant.

DANIEL, J. Hinton J. Craddock, by deed dated 20 May, 1833, conveyed unto the defendant, his mother, during her life or widowhood the slaves mentioned in the plaintiff's bill, remainder to her three daughters, Mary Sutton, Sarah and Penny Craddock. The bill is filed by two of the daughters with their husbands, charging the defendant with an intention and declarations made to sell the slaves to speculators, and cause them to be removed out of the State. The bill further alleges that the defendant has but a small estate, totally inadequate to indemnify them for their loss if she should remove the slaves beyond the jurisdiction of the court. The bill prays that the slaves may be sequestered, and that the defendant may be decreed to give security for their forthcoming on the determination of her particular estate.

The defendant's answer admits the title of the slaves as stated in the bill and also their names; but she denies any intention

to remove them or cause them to be removed. She denies ever having made any declaration that she intended to sell the slaves to speculators or anybody else, or that she has made any attempt to remove or cause to be removed said slaves (135) beyond the jurisdiction of the court.

The plaintiffs have offered no proofs to sustain that part of their bill which charged the defendant with declarations of an intention to sell the slaves and cause them to be removed out of the State. But the plaintiffs insist that the defendant shall be held to security for the forthcoming of the slaves on the determination of her particular estate. The limitation of the slaves in remainder by the deed would have been effectual as an executory devise if contained in a last will, therefore it is good by force of the act of Assembly passed in 1823 (Rev. St., ch. 37, sec. 22). The statute does not require security to be given by the tenant for life; and it is stated in the books that if personal chattels are bequeathed to A for life, remainder to B, A will be entitled to the possession of the goods, upon signing and delivering to the executor an inventory of them, admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder. *Slaning v. Style,* 3 P. W., 336; *Luke v. Bernett,* 1 Atk., 471; *Bill v. Kinoston,* 2 Atk., 82. The old practice of the court of equity was to require the tenant for life to give security for the protection of the remainderman, but such security is not now required except a case of danger is shown. *Toley v. Burnell,* 1 Bro. C. C., 279; Williams on Executors, 859; *Covenhouse v. Shaler,* 2 Paige, 123. In the present case the plaintiffs have shown no cause of danger, therefore their prayer cannot be granted. We are of the opinion that the bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

*Cited: Howell v. Howell,* 38 N. C., 525.

(136)

## THOMAS G. WALTON et al. v. JAMES ERWIN.*

An *ex parte* order of the county court, under the act of Assembly (Rev. St., c. 54, s. 22), allowing commission to a guardian is not

*This case was determined at June Term, 1840, but from some cause was not included in the Reports of that term.

conclusive in a litigation between a ward and a guardian in this Court.

The jurisdiction of the county court on the subject of commissions to guardians is not conclusive, but like other matters of account between guardians and wards has always been exercised by the courts of equity.

Where a guardian had received nearly the whole of his wards' estate in notes, made payable to him as guardian, by the administrators of those of whom the wards were distributees, had held these notes until he resigned his guardianship after a period of six years, had collected but little interest on the notes, and had them paid over to a succeeding guardian. *Held*, that two and one-half per cent. was an ample commission.

Possibly there may be cases in which the office being troublesome, and the guardian faithful, and dying or giving up his office upon some necessity, the court may give to the former guardian a full commission, and also reasonable compensation to his successor; but the case ought to be remarkable in its circumstances to justify such a proceeding.

THIS was a bill filed in BURKE Court of Equity by the plaintiffs Thomas S. Walton and Margaret, his wife, and Sarah L. Murphy, Harriet F. Murphy and John H. Murphy, infants, by the said Thomas, their guardian, against James Erwin, who had formerly been the guardian of the said Margaret, Sarah, Harriet and John, calling for an account of his guardianship. The defendant put in his answer, and at Spring Term, 1840, of Burke court of equity, the cause was set for hearing and transmitted to the Supreme Court. It appeared from the pleadings and proofs that the defendant, James Erwin, was, at January Term, 1832, of Burke County court, duly appointed guardian to the plaintiffs Margaret, Sarah, Harriet and John, and that he continued to act as such until October, 1838, when he resigned his guardianship, and the plaintiff Thomas S. Walton, who had intermarried with the plaintiff Margaret, was appointed guardian to the other three wards. It further appeared that soon
(137) after his appointment as guardian the defendant received from the administrators of John Murphy, the father, and James Murphy, the grandfather of his ward, about eighty thousand dollars in bonds, which were made payable to the defendant as guardian before they were paid over to him by the administrators. He also received certain sums in cash, of no great comparative amount, and also negroes and lands of his wards, which he hired and rented out. He had, however, accounted with the complainant Walton, the husband of one and guardian of the other wards, for all he had received except about $35 accidentally omitted in their settlement, and had paid over to the said subse-

quent guardian (after deducting his commissions) bonds to the amount of nearly ninety thousand dollars, being the bonds (principally) which he had received from the administrators aforesaid, with the accumulated interest, the defendant having collected very few of the bonds, and those he paid over to the said subsequent guardian, being good bonds, and having borne, during the time he held them, compound interest under the act of Assembly. The only ground of complaint, as appeared upon an investigation of the accounts (with the exception of the $35), was that the defendant had charged excessive commissions as guardian. The defendant in his answer set forth a full account of his guardianship, admitting the mistake of $35; and as to the commissions he alleged that they were no more than were due to him for his care, trouble and responsibilities, and particularly relying upon an order of the county court of Burke allowing him the commissions he had charged, to-wit, five per cent on receipts and five per cent on disbursements; and which order, as defendant alleged, was conclusive on the subject of commissions. The order made at January Term, 1839, of Burke county court was as follows:

"Ordered by the court that R. C. Pearson, James C. Smyth, Isaac T. Avery and J. J. Erwin be appointed a committee to audit and settle the accounts of James Erwin, guardian of the minor heirs of James and John Murphy, deceased, and that said guardian be allowed five per cent on receipts and five per cent on disbursements by way of commissions for his trouble in the management of said guardianship, and that they (138) report thereof to the next court.

Any other facts that may be material are set forth in the opinion of the Court.

*W. A. Graham* for the plaintiffs.
*Badger* for defendant.

RUFFIN, C. J. The Revised Statute, ch. 54, secs. 10, 11, requires guardians annually to exhibit accounts on oath of the estate of the children committed to their care, and directs that the justices of the court of pleas and quarter sessions shall annually hold an orphans' court for the purpose of receiving and examining those accounts. By the twenty-second section the court may make proper orders respecting the guardian's disbursements and expenses, and allow him commissions. From these provisions it is inferred by the counsel for the defendant that the county court is the proper tribunal to settle the com-

missions of a guardian, and it is insisted that the decision of that court is conclusive since it is obvious that a suit *inter partes* is not contemplated in the act.

It would indeed be a subject of just regret to find that the *ex parte* order of any judicial body had been made by an act of the Legislature conclusive on those whose interests were injuriously affected by it. It is so contrary to the general course of legislation in this State as to render such a construction inadmissible unless the words be peremptory. We think there is no such legislative intention upon the subject before us.

This is not a case in which the order is conclusive, because it is the act of a court of exclusive jurisdiction. The jurisdiction of the county court upon the subject of commissions to guardians is not exclusive. It is placed in the act on the same footing with the power to charge a guardian or to make any other allowance to him; and the court of equity has always exercised jurisdiction between guardian and ward in relation to their accounts generally. Indeed, the very act of 1762 concludes with a saving of "the power of the court of chancery in any matter or
(139) thing relating to orphans or their estates." In a suit in that court against the guardian for an account it has never been known that the guardian was sent to the county court for an allowance; but it has always been made, in the first instance, in the court of equity.

But, generally speaking, every act of a court of competent, though not exclusive jurisdiction, is final in law; and therefore it is said this order is not re-examinable in any other court. We admit that this Court cannot review the order and correct it as an appellate court might. We cannot address ourselves to the county court as an inferior tribunal on this occasion. But at the instance of one party in an adversary suit before us we can control the other party from making an injurious use of an *ex parte* order for an excessive allowance obtained from the county court by surprise. In *Walton v. Avery*, 22 N. C., 405, we held that to be a sufficient ground for entertaining a similar suit between next of kin and administrators; and a guardian stands, we think, precisely on the same ground. The argument drawn from the constitution of the orphan's court by the act as to the conclusiveness of the order of that court goes too far. The act directs the same court "to examine into all accounts of guardians so exhibited to them"; and it might thence with like reason be inferred that if the orphans' court passed an account *ex parte* the ward would be concluded by the account as there stated. But such a supposition has never been before advanced.

The great purpose of the act was to make the guardian furnish evidence against himself, as well to enable the court to see from year to year whether he was wasting or improving the estate and, therefore, whether he ought to be removed or continued, as also to supply the ward with ready proof on the final settlement; but the guardian's accounts, although passed by the court, have never been pleaded as a bar to the bill of the ward for a general account. They would be evidence, at least to some extent, that the court, for instance, approved of disbursements for the ward's education as suitable to his degree and estate and the like. But if it be alleged that the disbursements were not in fact made, or that the guardian did not charge himself with all the estate he did receive or might have received, his (140) accounts and the orders on them have never been considered as protecting him. The reason is plain why they should not be so considered. From the very nature of an *ex parte* proceeding an omission or unjust allowance is evidence of surprise or imposition on the court. When, therefore, the ward calls the guardian to account in the court of equity, that court must put such *ex parte* proceeding aside, at least so far as an improper use of it is sought; for it is one of the established grounds of its jurisdiction to relieve against surprise as well as fraud. On this principle we should hold the ward not to be concluded, and that he is now, with both parties before a court, at liberty to show that an unreasonable commission was claimed and allowed.

But in this case it is manifest that the order was, in a legal sense, obtained by surprise. It was made in January, 1839, and gives five per cent on the receipts and disbursements, without any account having ever been returned or even made by the guardian. There were no means before the court of forming a proper judgment, and hence the order must be attributed to surprise or undue influence as an *ex parte* motion.

With respect to the rate of commission we have no hesitation in giving our opinion that it is excessive. In estimating what is proper it is assumed that the defendant was a competent and faithful guardian, and that he has fully accounted for the estate of his wards except only the small sum of $35, being part of the rents of 1839, which by mistake was omitted in the account stated by the committee, and except also the sum involved in this controversy respecting commissions. In other respects the accounts seem to be correct, and the bill states no other ground of complaint. But with these admissions in favor of the defendant we yet think that an unreasonable allowance was made for his services, as they are stated by himself in his answer.

The defendant was guardian about six years only. He received the estate, chiefly in good bonds from the administrators of the father and grandfather of his wards, without litigation or difficulty of any sort. The administrators, by an arrangement with him, took the bonds payable to him as guar-
(141) dian, which was a great convenience to both parties, an accommodation to the debtors, and probably the means of securing debts for the wards which would have been lost if sued for. On those bonds the defendant collected only the sum of $3,735.94 for interest, and then resigned his office and paid over to the husband of one of the wards and the second guardian of the other three the same bonds, on which there was then due the sum of $17,235.71 for interest accrued thereon while the defendant held them. It is not imputed to the defendant as a fault or an error that he suffered the interest to accumulate, for as the debts drew compound interest legally the wards did not suffer loss thereby. But the facts are in themselves material in estimating the commission, since that is to be a compensation for the time and trouble of the defendant in managing the plaintiffs' estate. From them we see that almost for nothing more than holding the bonds belonging to his wards for six years, and ascertaining in an agricultural community that the debtors and their sureties continued solvent, and stating his account finally and handing over those very bonds, the defendant claimed and was allowed five per cent on the sum of $90,312.75, amounting to $4,515.61, or upwards of $750 salary *per annum* over and above all his expenses. We should fear, if we sustained this allowance, that hereafter the instances would be more frequent than even now in which the offices of administrator and guardian would be undertaken solely with the view to render them places of profit in the nature of a regular employment, instead of from those motives which ought to actuate those who assume them. The emolument of the guardian, we are sure, was not the object of the Legislature, but only a mere compensation for time and trouble. That seems to us to have been much exceeded in this case.

Besides we think the allowance wrong in principle for another reason: it is the largest that can be made to any guardian and ought, therefore, only to be made when the highest is merited—where the management of the estate of the ward has been long and troublesome and the guardian has completed his
(142) duties. We need not say that the court is restricted to allow but five per cent to all the guardians of the same minor. Possibly there may be cases in which the office was

troublesome and the guardian faithful, and died or gave up the office upon some necessity, and yet the court may give to the former guardian a full commission and also reasonable compensation to the successor. But the case ought to be remarkable in its circumstances to justify such a proceeding. In the case here the defendant voluntarily relinquished the office in the midst of its duties, when three out of four of his wards were still infants requiring guardians. To make a full allowance to him would manifestly encourage guardians not to perform the duties of their office but to retire from them. It is true that a guardian may not, like an executor, be required to execute the office until all its duties shall have been completed, yet if, after undertaking to manage the estate and superintend the education of an orphan, he be inclined to stop halfway, he ought to be satisfied with being permitted to stop without claiming, also, all the compensation he could have had if he had worked on to the end. The ward ought not unnecessarily to be taxed with commission after commission on the capital of the estate, as one guardian may resign after another. If the remuneration of the first guardian be not measured, so as to leave something for his successor, either no second guardian can be procured or the ward must pay twice or oftener for what the law meant he should pay but once.

Upon the whole, therefore, and taking the services of the defendant to be as detailed in the answer, we think two and a half per centum, or one-half the allowance in the county court, to-wit, the sum of $2,257.80½, both an adequate and liberal compensation for the time, trouble and responsibility of the defendant, and there must be a decree accordingly, and for the omitted sum of $35 and the costs.

PER CURIAM. Decree for the plaintiffs accordingly.

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(143)

## SAMUEL J. PROCTOR v. SAMUEL W. FEREBEE.

A testator by his will devised, among other things, as follows: "I leave all my lands not given away, to be sold at six and twelve months credit; after my debts are paid, the residue of my estate to be divided between my wife, daughter and son." and he appointed an executor "to sell his lands before mentioned," and to execute his will in all respects. *It was held* that the testator intended a sale of his real estate at all events, either to create a fund for the payment of debts, in room of a part of the personal estate, or for a division between the wife, daughter and son;

and that, therefore, in this Court, the fund is considered as converted, *out and out*, into personalty.

*Held further*, that where, in this case, the executor had refused to qualify, and an administrator with the will annexed had sold the lands, and a court of law had decided that he had no power to convey a legal title, yet as the administrator had disposed of the proceeds of the sale according to the directions of the will, the heirs at law of the testator were but trustees for the purchaser and should be decreed to convey to him the legal title.

THIS was a bill filed by the plaintiff against the defendant in PASQUOTANK Court of Equity, to which there was an answer by the defendant, and which, at the Spring Term, 1840, of that court, was set for hearing and ordered by consent to be transmitted to the Supreme Court.

The facts, as exhibited by the bill, answer and proofs, appeared to be these:

Thomas P. Williams died about October, 1799, having first made a last will and testament, executed in due form to pass real estate, which was admitted to probate in the County Court of Currituck, where he resided. Of this will he appointed Malachi Sawyer executor, who refused to qualify, and letters of administration with the will annexed were duly granted to Thomas C. Ferebee, who qualified and took upon himself the execution of the said trust. The testator, in and by his said will, devised, among other things, as follows:

"I leave all my lands not given away to be sold at six and twelve months credit; after my debts are paid the residue of my estate to be divided between my wife, daughter and son before mentioned."

In another part of the will the testator adds:

"I nominate and appoint Malachi Sawyer, Esq., of
(144) Camden County, my whole and sole executor to this my last will and testament, to make sale of my lands before mentioned and to execute this instrument of writing in every respect whatever."

Thos. C. Ferebee intermarried with Elizabeth, the daughter of the testator, and after his qualification as administrator, with the will annexed of the testator, filed his bill in the Court of Equity for the district of Edenton, praying for a sale of the lands belonging to the testator not specifically devised. The said court decreed a sale of the same to be made by the said administrator. Of the lands thus decreed to be sold there was a tract lying in the county of Camden (and particularly described in the bill). The said tract was offered for sale under this decree, and Enoch Sawyer, being the highest bidder, became

the purchaser thereof, and received a deed in fee therefor from the said Thomas C. Ferebee as administrator as aforesaid. The said Enoch Sawyer subsequently conveyed the said land in fee simple to Frederick B. Sawyer. The said Frederick B. Sawyer died, leaving the mother of the plaintiff his only heir-at-law, and the plaintiff is the heir-at-law of his mother. The plaintiff's bill further charged that the said Frederick B. Sawyer in his lifetime commenced reclaiming the land included in the said tract, which was, at the time of his purchase, unimproved swamp land, and considered to be of little value; that by the labor and exertions of the said Frederick and his heirs the said land had been reclaimed and become of great value. The bill further alleged that by the will of the said Thomas P. Williams the lands before mentioned were, in equity, converted into personalty; that the administrator with the will annexed had credited, in his account with the estate of his said testator, the proceeds of the sale of the said land, and had actually applied them, in a due course of administration, to the payment of the debts of the estate, or had paid them over according to the directions of his said will. The plaintiff further charged that he and those under whom he claimed had the actual possession of the said land for twenty years and upwards, during which time they had greatly improved the same. The bill further charged that the tenant of the plaintiff, being (145) in the possession of the said land, the said Samuel W. Ferebee, defendant in this suit, commenced an action of ejectment against him in Camden Superior Court of law, which suit was ultimately decided in the Supreme Court (see *Ferebee v. Proctor,* 19 N. C., 439) in favor of the lessor of the plaintiff; that the said recovery was effected upon the technical ground that the said Thomas C. Ferebee, as administrator, was not authorized to sell and convey the legal title to the said estate, and that the said Samuel, after his said recovery at law, entered into the possession of the said estate and refused to convey it to the plaintiff, and the bill called for a conveyance, etc.

The answer of defendant admitted all the facts above stated, except that it insisted that the recovery at law was not upon the ground stated in complainant's bill but upon the ground that the wife of Thomas C. Ferebee, the heir-at-law of Thomas P. Williams, was not a party to the bill in equity mentioned in the plaintiff's bill.

*A. Moore* for the plaintiff.
*Kinney* for the defendant.

RUFFIN, C. J. After the judgment of this Court in the action of ejectment between these parties at June Term, 1837, the lessor of the plaintiff went into possession of the premises recovered. Proctor, the defendant at law, then filed this bill against Ferebee, and therein states the will of Thomas P. Williams and all the other matters touching the titles of the respective parties to the land in controversy in that action, in substance as the same appear in the report of the suit at law (*Ferebee v. Proctor,* 19 N. C., 439). But the bill further states that Thomas C. Ferebee, the administrator of Thomas P. Williams, and husband of Peggy Williams (heir of Thomas P. Williams) and father of the present defendant, received the price bid for the land and carried the same into his account as administrator, and applied the same in part to the payment of the testator's debts, and paid over two-thirds of the residue thereof to the testator's widow and to his son Samuel as their shares, under the bequests in the will, and retained the other
(146) third part as the share of his wife Peggy, under the same bequest. The prayer is that the defendant may be decreed to restore the possession, convey the legal title and account for the rents and profit.

The answer admits all those facts as set forth in the bill, but it insists that the recovery at law was effected upon the ground that Mrs. Ferebee was not a party to the suit brought by Thomas C. Ferebee, her husband and administrator of Thomas P. Williams, deceased, for the sale of the land; and for the same reason that the present defendant, who claims as her heir, cannot, in this Court, be bound by the decree therein or anything done under it.

We must remark that the defendant is mistaken as to the ground of the recovery at law. The Court expressly declined questioning the operation of the decree on the interest of Mrs. Ferebee merely on the ground that she was not a party to the suit. It was so declined because, if she had been a party, the decree could not have affected her legal title, for the reason that a decree in equity does not profess and cannot *per se* divest a title at law, but only obliges a person who has the title and who is mentioned in the decree to convey as therein directed. In that case Thomas C. Ferebee was decreed to convey; but as the title was in the testator's heirs, and not in him, his conveyance passed nothing, and the title remained as before—in the heirs of the testator. That was the reason why the judgment in ejectment was given, for as the present defendant's mother had not

conveyed he was, upon the death of his father, entitled in possession to an undivided moiety of the land.

Whether in this Court the defendant can retain the benefit of that judgment depends on different principles. Upon the admitted facts we think it clear he cannot.

Upon the construction of the will we before expressed the opinion that a sale of the land was not only to be made in case it became necessary in aid of the personal estate for the payment of debts, but that the intention was positive that there should be a sale at all events, either to create a fund for the payment of debts in room of a part of the personal estate, or for a division between the wife, daughter and son. We now see no reason to doubt the correctness of that opinion, but think (147) it sufficiently established by the reasons then stated. Consequently in this Court the fund is considered as converted *out* and *out* into personalty, because the testator intended that it should be so converted.

In this aspect of the case, then, the defendant's mother had the legal estate upon an express trust to turn the land into money and pay the proceeds into the hands of the personal representative of the testator, to be by him applied, first, to the payment of his debts and then, secondly, to be divided among three persons, of whom she was herself one. Now, admitting that it is competent for persons thus entitled to the proceeds of the sale of land to elect to take the land itself, or that only so much shall be sold as will satisfy the debts, yet nothing of that kind occurred here. On the contrary, the parties agree that a sale was necessary for the payment of debts, and part of the proceeds of the land was so applied. Indeed, two of the three legatees, Mrs. Williams and Samuel Williams, expressly elected that there should be a sale of the land, and in their answer in the suit in equity joined in the prayer for it. But here the defendant objects that his mother was not a party to that suit, and therefore her share is not bound by the proceedings. If she had been a party the decree would indeed have included her, as it does those who were parties *proprio vigore*, without regard to the truth of the facts stated in the pleadings or declared in the decree. But in this case it is not material that Mrs. Ferebee should have been a party to that suit, nor is it necessary to recur to that proceeding even to bind Mrs. Williams or Samuel Williams, or for any other purpose in this cause. It may be dismissed from our consideration altogether and there will yet remain enough to compel the relief to the plaintiff. It is admitted that the widow and son received their

shares of the proceeds of the sale. They therefore must be regarded as concurring in or confirming the sale by that act independent of the decree. Then, as to the share of Mrs. Ferebee, it is to be recollected that in the view of this Court that is personalty, and by consequence at the disposition of the husband. The wife could make no election to the prejudice of the husband.

(148) On the contrary, the husband, having received the purchase money and paid to other persons such parts as they were entitled to, kept his wife's share as a personal legacy belonging in law to himself, as in truth it did.

Thus the case is that of a sale of land by the *cestui que trust,* who are here looked upon as the owners, and the receipt of the purchase money by them, upon the strength of which the purchaser calls on the trustee for the legal title. Of course, nothing remains but for the trustee to convey as asked. The plaintiff is therefore entitled to be restored to the possession, and there must be the usual decree for a conveyance, to be approved by the master, and for an account of the rents and profits and of the costs adjudged to the present defendant as lessor of the plaintiff in the suit at law, and the defendant must pay the costs of this suit.

PER CURIAM. Decree for the plaintiff accordingly.

*Cited: Benbow v. Moore,* 114 N. C., 270, 277; *Holton v. Jones,* 133 N. C., 401; *Duckworth v. Jordan,* 138 N. C., 527.

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DANIEL SHAW, Guardian of Penelope Green, a lunatic, v. JAMES BURNEY, JAMES LAWSON and WILIE THOMPSON.

A suit in equity to recover what belongs to a lunatic may be brought either in the name of the guardian or committee, or in the name of the lunatic by his guardian or committee.

Where A delivered to B, but without endorsing it, a bond for six hundred dollars upon the contract of B to support her during her life, and educate her son, and A remained but three months in B's family, when, from disagreement with B's wife, A left the family, apparently with B's consent, and B never afterwards contributed to the support of A nor to the education of her son. *Held,* that B could not, in conscience, claim to be a *bona fide* purchaser of the bond for a valuable consideration, and he was therefore decreed to surrender the bond or account for its value to the guardian of A, who had been subsequently declared a lunatic.

SHAW v. BURNEY.

THIS was a bill filed in BLADEN Court of Equity in the name of Daniel Shaw, as guardian of Penelope Green, a lunatic, against the defendants, praying to have a certain bond delivered up to the plaintiff, or that the defendants may (149) account to the plaintiff for the principal and interest. The defendants answered, depositions were taken, and at the Fall Term, 1839, of Bladen Court of Equity the cause was set for hearing and ordered to be transmitted to the Supreme Court. Upon the pleadings and proofs the following appeared to be the case:

James Burney, one of the defendants, executed a bond for six hundred dollars to Penelope Green, of whom the plaintiff is guardian. Wilie Thompson, her son-in-law, one of the defendants, agreed, with the approbation of her father and brother, to board and maintain her during life and educate her infant son, for the said bond. She placed the bond in the possession of Thompson, but did not endorse it. She moved to the house of Thompson in March, 1836. In June of the same year she and her daughter, the wife of Thompson, disagreed; the daughter asserting that they could not live in the same house together; that she had told her husband so before he brought her. Thompson offered to build her a house on his land and supply her with all necessaries, but she declined, giving as a reason that there would be no peace with her daughter as long as she was on the land, Mrs. Thompson having said frequently that she would leave her home if Mrs. Green remained. Thompson then assisted her and her child back to her father's, but stated to her that he would come for her whenever she was willing to return. In June, 1836, she wrote an order to Thompson for the bond above mentioned. He admitted he held it, but declined to send it to her. In August, 1836, she, by inquisition, was found to be a lunatic, and the plaintiff Shaw was appointed her guardian. Thompson was never at any expense or trouble with her or her son after she left his house. Thompson admitted to a witness that the high temper of his wife was the cause of the disturbance. In June, 1836, when the bond was due and carrying interest, Thompson passed it without endorsement to the defendant James Lawson. There was no proof that any valuable consideration was paid for it by him. Lawson let Burney, the obligor, and one of the defendants, have the bond, and took from him two promissory notes to its amount. These notes are (150) now held by Lawson and remain unpaid, and Burney has destroyed the bond.

No counsel for the plaintiff.
*Strange* for the defendants.

DANIEL, J. First a motion is made by defendants to dismiss the bill, because it is brought in the name of "Daniel Shaw, guardian of Penelope Green," etc., when it should have been brought in the name of the lunatic, by Shaw, as her committee. Actions at law in behalf of lunatics can be brought in no other name than theirs; they must not be brought in the name of the committee. Stock on *Non Compos Mentis*, 33; *Cocks v. Darson*, Hob., 215; Nay., 27; Pop., 141. And they appear by guardian or attorney according as they are within age or not. *Ibid.* But in equity this incapacity to sue or defend is more considerable. In this Court, after an inquisition has taken place and a committee has been appointed, the joinder of the name of the lunatic, though usual, is merely a formality. Stock, 33; Wyatt's Pr. Reg., 272; *Ridler v. Ridler*, 1 Eq. Ca. Ab., 279; *Ortley v. Messere*, 7 Johns Ch., 139; Calvert on Parties, 303. In England the practice is to bring the bill in the name of the committee, as is done in the present case. Either way will be good. The motion is therefore overruled.

Secondly, as to the merits of the case, Mrs. Green had the legal title to the bond. She never endorsed it, and that legal title still continues in her as to the money due on the bond. Thompson contends that he is the assignee of the bond in equity. If he had purchased the bond *bona fide* and for a valuable consideration this Court would protect his purchase. 2 Vern., 595; 1 Mad. Ch. Pr., 545. But it seems to us that it would be against conscience for him to insist on retaining six hundred dollars and interest for the three months board of Mrs. Green and her son. He says that he has always been ready, able and willing to comply with his part of the agreement. From the evidence

(151) Thompson could not have completely and faithfully complied with his part of the agreement without much domestic unhappiness. In what kind of peace or comfort could Mrs. Green have lived at his house? It seems to us from the whole case that there was a tacit understanding among the parties that if Mrs. Green did not wish again to return to the house of Thompson that the contract should be considered as rescinded, for Thompson has never since put himself to any trouble concerning the board of Mrs. Green or the education of her son. When she sent for the bond he did not set up any title to it, but seemed reluctant to send it. We think that Thompson cannot in good conscience ask this Court to declare that he is a

*bona fide* purchaser of the bond for a valuable consideration. As Thompson has not established a title as equitable assignee of the bond Lawson, of course, has no claim in law or equity. Burney admits that he gave the bond and that he has paid but a very small portion of it. We are of the opinion that after a just allowance shall have been made for the board of Mrs. Green and her son whilst they remained with Thompson the plaintiff is entitled to a decree for the residue of the principal and interest due on the bond, and it must be referred to the master to inquire as to a proper allowance; and also, after deducting the sum that may be allowed, to state the balance due for the money mentioned in the said bond.

PER CURIAM. Decree accordingly.

*Cited: Latham v. Wiswall*, 37 N. C., 302; *Crump v. Morgan*, 38 N. C., 102; *Sims v. Sims*, 121 N. C., 299.

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(152)

LUCY GRIFFIN v. JAMES PLEASANT, Administrator of William Pleasant et al.

Where there are several co-defendants in equity who have a common interest, the declaration of one of them is evidence against the others.

Where the allegations in the plaintiff's bill, denied by the defendants, are not supported by the proofs that the court can decree in favor of the plaintiff, yet if the defendants appear not to have been full and candid in their answers, but to have suppressed some facts which they feared might operate in the plaintiff's favor, the bill will be dismissed without costs.

THIS was a case transmitted to this Court for trial from CASWELL Court of Equity. The allegations of both parties and the proofs are fully stated in the opinion of the Court.

*Norwood* for the plaintiff.
*J. T. Morehead* for the defendants.

GASTON, J. This bill was filed on 11 April, 1837, in the Court of Equity for the county of Caswell, by Lucy Griffin against James Pleasant, the administrator with the will annexed of William Pleasant the elder, John Pleasant, Dolly Pleasant and others, the next of kin of the said William. The plaintiff charges

in her bill that in 1811 a boy slave was born, the property of the said William, to which was given the name of Wesley, and this boy was, by the said William and under a parol gift, put into the possession of the plaintiff, the daughter of the said William and then the wife of William Griffin; that in 1817 her husband removed with his family from the county of Caswell to the county of Rockingham, carrying with him the said negro boy; that it being feared that the said boy might be seized for her husband's debts he was, by the agreement of the plaintiff and her brother John, one of the defendants, carried back to her father's, in Caswell County, and that soon thereafter her father executed and delivered to her said brother John a deed of gift or bill of sale of the said boy, or other sufficient instrument to pass title, the precise nature whereof she knows not, whereby the said boy was conveyed, either directly to her or to the said John, as a trustee for her sole and separate use; that her sister Dolly, one of the defendants, was a sub-
(153) scribing witness to the said instrument, and that the said instrument was deposited by the said John after its delivery in his chest at his father's house, where he and all the other defendants who were then unmarried resided. The bill further sets forth that the plaintiff's husband afterwards died, and that subsequently, in 1836, her said father died, having previously made a last will and testament which, since his death, was duly admitted to probate; and the executor therein named being dead, administration with the will annexed was granted to her brother, the defendant James. The plaintiff further charges that on 20 September, 1836, since the death of the testator, the defendant John executed unto her a deed wherein he recites that a deed had been made by his father transferring to him the said slave in trust for the plaintiff, and whereby the said John conveys unto her the said slave and all his (the said John's) interest therein. The plaintiff then complains that subsequently to his conveyance, and while she was in the quiet possession of Wesley, the defendants James and William tortiously took him from her under pretense that she had no title, and shows that thereupon she instituted her action of replevin against them in the Superior Court of law of Caswell County by a writ returnable to the last term of said court; that the said James and William, upon the said writ being executed, delivered to the sheriff their bond with surety, payable to the plaintiff, conditioned as the law directs for the performance of the final judgment in the said action; and thereupon were permitted to retain and yet do retain the said slave. The plaintiff charges

cuted to him a good and lawful right to a negro boy Wesley, for the use and benefit of his sister Lucy, then the wife of William Griffin, and declares that in order to carry into execution what he knows and believes was the intention of his deceased father he thereby conveys to the said Lucy all the right, title and interest in said boy conveyed to him by his said father. The execution of this instrument is proved by both the subscribing witnesses, who testify that they were present when the plaintiff asked the defendant John to make her a right for the negro man Wesley, which her father had conveyed to him for her benefit; that he answered that if he had known that she wanted such a conveyance he would have given it to her before; that thereupon she handed to him the instrument, which had been previously prepared, and he read and signed it; and that he further said she ought to have the negro, for his father had made the right to him, in trust for her benefit, with an understanding that he would make a right to her at his death. And one of the witnesses adds that he further said that his father had given him the right in trust for her; that the chest in which he kept his papers had been broken open and that he had not seen the writing since. Now if this testimony is to be credited, and we see no reason why it should not be, then is the explanation which he has attempted to give of the language of this instrument exceedingly lame. It may indeed be that he did not carefully examine nor fully understand all the expressions in the instrument; but he cannot pretend that these give a character to the transaction, materially different from the account of it then related by himself, nor that his signature was procured by misrepresentation or fraud.

(158) But he is not the only defendant, and it is not quite clear that his declarations, verbal or written, are any evidence against his co-defendants. The bill does not show that *he* has any common interest with *them*. It does not state what testamentary disposition of this negro was made by the elder William Pleasant, nor is his will exhibited in evidence. But we do receive it as evidence (though not with full confidence) because we *infer* from what the defendant William states in his answer about the undivided shares in this negro that he was bequeathed, either by express terms or by general words, to all the testator's children, or has become theirs by reason of his partial intestacy.

A witness for the plaintiff, John Miles, testifies that since *this suit was pending* he heard the defendant John say that Lucy had had the negro in possession, and that if she did not recover

plaintiff set up title to the slave he was solicitous to know under what instrument such title was set up, and in order to find out, if he could, *jocosely* proposed to Martha Griffin, the plaintiff's daughter, not to give her $500 if she would deliver the bill of sale to him, but to get it from her mother, and they would go halves in the negro. He adds that it is absurd to suppose that he could in earnest have made such a proposition as that stated in the bill, as he is personally interested in only the one-eleventh undivided part of said slave.

All the defendants severally swear that they do not know what became of the instrument, whatever it might be, which was executed unto John Pleasant; say that they suppose it must have been long since lost, as not being deemed of value; deny that any of them have it or have intentionally destroyed it; state that their father lived twenty years after its execution; that during all that time the plaintiff never set up any title to the negro, nor asked for any conveyance of the title from their father; that *he* during all that time claimed, held and possessed the negro as his own; that he occasionally lent the use of the negro to his other children as they needed it, and that the negro was in his possession up to the day of his death. They deny any gift or conveyance from their father to the plaintiff by parol or otherwise.

To these answers a general replication was entered, and the parties, having completed their proofs, removed the cause by consent to this Court for a hearing, where it has been heard accordingly.

The case made by the bill is not a plain case for relief. The gravamen of it is that the defendants have withholden or destroyed a deed whereby the negro Wesley was conveyed either directly to the plaintiff, then the wife of William Griffin, or to the defendant John, in trust for her sole and separate use. If a deed of the former character were made then the entire legal interest passed thereby to the plaintiff's husband, and *she* has no right to require the surrender of the deed, or if it be destroyed, a conveyance of the title to her. But if we are to understand the bill as charging that a conveyance of the negro was made to the defendant John, in trust for the plaintiff (157) as though she were a *feme sole*, it is to be seen whether this charge is established by proofs. Were the controversy solely between the plaintiff and the defendant John perhaps we should find less difficulty in coming to a conclusion. His deed of 20 September, 1836, has been exhibited. It recites that in the life-time of his father, William Pleasant, Sr., the said William exe-

possession of the boy and bring him back to the defendant's father; and that in pursuance of this authority he went to Rockingham, found the boy Wesley in the possession of an officer, and producing his authority demanded the boy, but the officer refused to surrender him until the execution was satis-
(155) fied; that this was done and the boy brought back to Caswell and delivered to his father, who repaid him the money so advanced, and continued in the possession of the boy ever afterwards until his death, notoriously claiming and holding the boy as his absolute property. He states that the instrument which he carried to Rockingham was the only one ever executed to him by his father in relation to the said negro; that to the best of his recollection and belief the name of his sister, the plaintiff, was not therein mentioned; that the said instrument after his return was probably, as he supposes, deposited in his chest, but that what has become of it or where it is he is utterly ignorant, for that he paid no attention to the preservation or custody of it since his return, not deeming it a paper of any value.

This defendant admits that he did, at the request of the plaintiff, execute an instrument which she brought to him and which she represented had been written "to stand against a bill of sale said to be lost"; that he was told that his attaching his signature thereto could not subject him to any cost or trouble; that he was unable to make out distinctly, being a very indifferent scholar, the contents of the paper; that it was not read over by any person present, and that if this instrument speaks of any paper executed to him by his father different from that set forth in his answer it does not speak the truth, and his signature thereto has been obtained by imposition.

The defendant Dolly Pleasant states in her answer that she never witnessed but one instrument of writing executed by her father; that this was done when her brother John was about going to Rockingham to reclaim the boy Wesley; that she does not know nor ever did know the contents of it, but that when she attested it she was told by the parties that it was an instrument to authorize John to bring home the boy; and that she has no reason to believe nor does she believe that her sister's name was mentioned in the instrument.

The defendants James and William say that after the death of their father the boy Wesley ran away; that they found him in the employment of one William Warren; took him home and now claim him as part of their father's estate. The de-
(156) fendant William admits that after he heard that the

that she has applied to the said John and to the other defendants, who resided with her father at his death, for the deed so executed by her father to the said John, to deliver the same to her in order that it might be perfected by registration, but that on various pretenses they have refused and declined to comply with this application; that the said John, admitting that the deed was so delivered to and deposited by him, declared that it has been lost or taken from his chest without his knowledge, and that he knows not where it is; that the said Dolly admits that it was delivered to the said John and attested by her as a witness; that the defendant William has offered $500 (154) to her daughter, Martha Griffin, to get the said deed and deliver it to him; and she further charges that some of the said defendants, all of whom are interested in depriving her of this muniment of her title, either now have the deed and fraudulently withhold it from her, or have voluntarily destroyed it to prevent its registration, and thereby destroy her title. The prayer of the bill is that all the defendants shall answer to the matters charged; that they may be compelled to produce before the Court and deliver to the plaintiff the said deed, if yet in existence, or if the same has been destroyed, that the defendant James, the administrator as aforesaid, may be decreed to execute a conveyance of the title to her, and for such other relief as the nature of her case requires.

All the defendants, except John Rascoe and his wife Martha and Martha Vaughn, who reside beyond the limits of the State, have answered the bill. As to these nonresident defendants the bill has been taken *pro confesso*.

The defendant John declares in his answer that no deed or bill of sale or other instrument for the conveyance of title to him or to the plaintiff of the boy Wesley was ever executed by the deceased to his knowledge or belief, nor does he know or believe that a parol gift was made to the plaintiff as by her charged. He states that the boy was permitted by his father to stay with William Griffin and his wife, and went with them when they removed to Rockingham; that after this removal this defendant's father understood that the boy was levied upon under execution for Griffin's debts, and procured the said John to go to Rockingham in order to release the boy from this levy and bring him back to him, this defendant's father; that on that occasion his said father executed an instrument to the said John, the precise purport of which he cannot recollect, but which he knows was intended to be a mere warrant or authority to the said John, in behalf of his father, to claim and take

he could, and she should have him; and afterwards heard him say that "he had a bill of sale or some writing conveying the title or *to go after him.*" Nothing can show more clearly the danger of relying too confidently on the accuracy with which witnesses give the tenor of casual conversations than the deposition of this witness. Everything seems to substantiate the allegation of a writing conveying the title of the negro to John except the few last words, or *"to go after him."* If John said *this* it was consistent with what he has sworn.

George Smith is introduced by the plaintiff to testify to a conversation which he had with the defendant William when returning with him from the April Term, 1837, of Caswell County Court. In consequence of the accidental omission of some very material words in the deposition, we cannot be certain that we have collected the meaning of the witness. We understand him to say that in this conversation William stated as a fact that his father, after John's return with the negro from Rockingham, conveyed the right of the negro to John in trust for the plaintiff, but the deposition will also admit of the sense that he stated that it was alleged that his father so conveyed the negro. But we place no reliance on this testimony. Independently of the ambiguity of the deposition, the witness is shown to be unworthy of credit, and it can scarcely be deemed possible that, after the defendant William had taken the negro from (159) the plaintiff as part of his father's estate, after he had been sued for the act, had undertaken to justify it by averring that the negro was part of his estate, and but a few days before he put in the present answer on oath, he should have declared that it was not a part of that estate, but belonged to the plaintiff. We either misunderstand the witness or he misunderstood or misrepresented the defendant.

The main reliance of the plaintiff for the support of her case is on the testimony of Margaret Warren and Martha Griffin. The former, without any explanation of the circumstances leading to the conversation, neatly and roundly states that, about a year before old Mr. Pleasant died, she heard him say (no other person being present) that he had given John a bill of sale of Wesley for Lucy, but what had been done with it he did not know. Martha Griffin, who is the plaintiff's daughter, deposes that, in July, 1836, very shortly before her grandfather's death, she heard him say that he intended soon to make his will, and then his sons, with whose management he seemed dissatisfied, should see how he would dispose of his property, remarking that Wesley belonged to her mother, for he had several years before

given John a bill of sale of him in trust for her mother's benefit, conditioned to make her a good title after his death; that she had frequently heard her grandfather say that Wesley belonged to her mother *after his death*, and has frequently heard her uncle John say that he had a bill of sale of Wesley for her mother's benefit; that the bill of sale was in his chest; that the lock of his chest was injured; that he did not know whether the bill of sale was there, but that he would make search for it; that her uncle William, since her grandfather's death, asked her whether her mother had found it, and stated that he would give her $500, which was more than she could get from her grandfather's estate; that she has heard her aunt Dolly say that there was a bill of sale, to which she was one of the subscribing witnesses, and *Brice Collins the other*, and that if they should take her to the courthouse she would swear it was sham work; and, further,

(160) that she was at her grandfather's, in 1829, when her uncle James returned from the West, and was looking over John's papers, and he said, "There is a bill of sale for Wesley."

Now, upon this testimony, if it were unimpeachable and uncontradicted and unexplained, it would be difficult for the plaintiff to get a decree. The bill, in the point of view wherein we are now regarding it, charges a conveyance *of the slave* to have been made to John for the sole and separate use of the plaintiff, then the wife of William Griffin—such a conveyance as passed the entire legal interest to him and secured the whole beneficial interest to her as though she were a *feme sole*—and alleges this to have been done by way of consummating or perfecting an invalid gift to her by parol theretofore made. Does *this* testimony show such a gift? Ann Warren's statement is of a conveyance to John simply in trust for the plaintiff. Even the recital in John's deed to her is of such a conveyance. Now, if this were the purport of the deed, its operation would be to vest the whole beneficial interest in the late William Griffin. To prevent *his* taking, there must have been terms in the instrument to *exclude* him. But the residue of this testimony shows, or tends to show, a conveyance, not immediately in trust for the plaintiff, whether exclusive of her husband or not, but upon a trust for her *after her father's death*. Such certainly seems to be the result of Martha Griffin's representation on the subject. This would be a trust variant from that stated in the bill.

But this testimony is neither unimpeached nor uncontradicted. The witnesses, Ann Warren and Martha Griffin, we are obliged to say, are shown to be persons of such tainted character that if

their testimony is not altogether undeserving of credit, it is to be received with much caution. It comes in conflict, too, with the answers of at least eight defendants who must have been cognizant of such a conveyance, if it had been made, and who, nevertheless, on oath, deny it. But, besides, there were twenty years from the date of this pretended conveyance until the death of the elder William Pleasant, and eleven of these after the plaintiff became a widow and resided in her father's neighborhood, and during all this time he used, enjoyed and claimed the negro as his own. The testimony of William Bigelow (161) and John Vaughan indisputably establishes this. No claim of any title is in the meantime set up by the plaintiff. On 4 July, 1836, he entered into negotiation with Bigelow for a sale of Wesley, and this was only broken off by his death. We hear of no inquiry in the meantime, after the alleged conveyance, or of any interest expressed in relation to its preservation, or of any effort to perfect it by having it acknowledged or proved for registration. All this seems to us irreconcilable with the supposition of there being a valid document of title in the plaintiff to property of such great value to one in her straightened circumstances. It seems to us a little extraordinary that Brice Collins, who is mentioned in Martha Griffin's deposition as the other subscribing witness with Dolly Pleasant to the alleged deed of old Mr. Pleasant, and who has been brought forward as a witness for the plaintiff as to other matters, has not been examined on this point. We cannot with confidence pronounce how the facts were, but upon the whole we have come to a conclusion, which, while it gives some plausibility to the plaintiff's claim, denies to it a sufficient foundation. Two respectable witnesses have testified that the mother of Wesley died soon after giving birth to the infant; that the elder Mr. Pleasant offered the infant to any of his children who would undertake to rear it, and that they all declined the offer, except the plaintiff, then the wife of William Griffin. Thus Wesley came into Griffin's possession, and by Griffin was carried off to Rockingham. In his embarrassment the boy was seized for debt, and his father-in-law, being advised that the title was yet in him, sent John to save the property from Griffin's creditors. He no doubt gave John some instrument, in writing, authorizing him to demand possession of the negro. These transactions, constituting a very important occurrence in the family, were, of course, known to all of its members; and it was understood that the object of their father's interference, of their brother John's mission, and of the instrument of writing was to save Wesley for the benefit of their sister. They knew

that Wesley was promised to her, and regarded him as intended for her and to be hers at their father's death. Not long
(162) before the old man's death, it is in proof by William Miles, a witness for the plaintiff, that he spoke of getting Mr. Anderson to write his will, and professed a determination thereby to bequeath Wesley to John and the plaintiff. The notion that the negro was to be Lucy's, having become connected with the act of the instrument executed to John, and the old man having died without bequeathing the negro, as was expected, an effort was then made, in support of this vague claim of the plaintiff, to give it a stronger character by converting the instrument into a *conveyance* in trust for the plaintiff. A little too much zeal in some of the witnesses, some inaccuracy of recollection in others, and perhaps a willful distortion of the facts in one or more of them, have imparted to the effort the plausibility it wears; and even that has derived strength from the want of candor in the defendants, who, it appears very plain to us, have kept back all that they feared might operate in the plaintiff's favor, which they believed could be suppressed without committing perjury.

But, whether this view be correct or not, we do not find ourselves justified in declaring that the plaintiff has established her case, and therefore we direct the bill to be dismissed, but we do not give the defendants, or any of them, a decree for costs.

PER CURIAM. Decree that the bill be dismissed, but without costs to any party.

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(163)

JOHN B. LOVE v. SALLY BELK et al.

A sold B (of whom the defendants are heirs) a tract of land for a certain consideration, received the consideration and signed, sealed and delivered a deed for the land to B in fee simple. Before the deed was registered or proved, A and B rescinded their contract. A returned to B the consideration he had received, and B promised to redeliver the deed to him, but did not do so. A then sold the land to C (the present plaintiff) and made him a proper conveyance for it. B dying soon after, his heirs caused the deed to him to be proved and registered, brought a suit, and ejected C out of his possession.

*Held by the court*, that A and B, before the deed was perfected by probate and registration, had a right to rescind their contract; and that if, after this was done, B or his heirs caused the deed to be proved and registered, it was a fraud upon A or his subse-

quent assignee, and that the heirs should stand as trustees for such assignee and be compelled to convey to him their legal title.

*Held, also*, that no proof of fraud or imposition on the part of C, the assignee, in inducing A, the owner of the land, to make the assignment could be available to the defendants, the heirs of B, but that such proof could only be relevant in a suit between C, the assignee, and A, the assignor, or his heirs.

*Held, further*, that although proof of the recission of the contract between A and B had been offered and received in an action of ejectment between B and C, yet that such proof was not properly admissible on such trial, at law, as it did not affect the legal title of B, but that in this Court it was admissible and relevant to show a trust in B or his heirs, and that, therefore, the verdict in the ejectment suit was not a bar nor an estoppel to the plaintiff in this Court.

THIS was a bill filed in MACON Court of Equity by the plaintiff against the defendants, the widow and heirs at law of Darling Belk, deceased. Answers were filed, replication entered, and the depositions taken, when, at Fall Term, 1840, of the said court, the cause was set for hearing and transmitted to the Supreme Court.

*Badger* and *Francis* for the plaintiff.
*J. G. Bynum* for the defendant.

GASTON, J. An action of ejectment was heretofore instituted by the defendants, the heirs of Darling Belk, deceased, to recover from the plaintiff a tract of land which had been reserved unto the Indian chief, Yonah, or the Great Bear, in the treaty with the Cherokees of 27 February, 1819, and which was (164) alleged to have been conveyed by the said Yonah, first, to the said Belk, and afterwards to the plaintiff. In this action there was a judgment rendered in the Superior Court against Love (the plaintiff in this bill), who appealed therefrom to this Court, and here, at December Term, 1834, the judgment of the Superior Court was affirmed. The possession having been surrendered in pursuance of this judgment, and an action of trespass for the *mesne* profits having been brought, Love, on 13 October, 1835, filed this bill against the heirs and against Sally Belk, the widow of the said Darling Belk, in which he prays that the plaintiffs in the said action for the *mesne* profits may be perpetually enjoined from the prosecution thereof; that the conveyance from Yonah, under which the heirs of Darling Belk set up title to the land, may be cancelled and annulled; that the defendants may be declared trustees in regard to the said land for the plaintiff, and may be decreed to convey to him all the right and

title which they claim or can claim under the said conveyance of Yonah, and that they be decreed to refund to the plaintiff the costs incurred by him in the prosecution of the suit at law. The bill charges that the plaintiff purchased of the said Yonah part of said tract, on or about 25 November, 1822, and the residue thereof on or about 8 September, 1824, at which times, respectively, the said Yonah duly executed conveyances therefor, which have been proved and registered according to law. The plaintiff admits that, antecedently to either of his purchases, and, as he believes, on or about 1 November, 1819, the said Yonah sold to Darling Belk the whole of his reservation and executed a conveyance therefor; but the plaintiff charges that afterwards it was fully agreed between the said Belk and Yonah that the sale aforesaid should be rescinded and the parties restored to their respective rights; that Yonah should refund whatever had been received on account of the said Belk's purchase, and that Belk should surrender to Yonah the deed so by him executed and which had not been registered nor proved for registra-
(165) tion; and avers that, in pursuance of said agreement, Yonah did refund all of the purchase money, but Belk fraudulently imposed upon Yonah by delivering to Yonah another paper as and for the deed which he had engaged to surrender, and that the said Belk died in November, 1820, without having surrendered the deed.

The plaintiff charges that, after the death of Darling Belk, the deed aforesaid was, in the presence of Alfred Brown, the administrator of said Belk, and whose name was subscribed as the attesting witness to the execution of said deed, brought by Sally Belk, the widow of the said Darling, and by her exhibited to Robert Love, the clerk of the County Court, and that she then stated that the contract of sale between her husband and the Big Bear had been rescinded, but that her husband, without the Big Bear's knowledge, had kept the deed, and she then proposed to the said Robert to give him one-half of the land if he would assist her in getting it under the deed. The plaintiff also charges that the said Sally made similar statements and proposals to other persons; and afterwards, with a full knowledge that the contract of sale between Yonah and her husband had been rescinded and that the said deed ought to have been surrendered, and that her said husband had cheated Yonah by a pretended surrender of it, caused the said deed to be proved and registered as a valid and subsisting deed. The plaintiff alleges positively that Darling Belk, as late as 8 November, 1820, which was but a very few days before his death, declared to *him* and acknowl-

edged to others that the sale to the said Belk had been rescinded; and charges that, in consequence of the knowledge thus communicated, as well as otherwise acquired, he purchased from the said Yonah, with full assurance that the said Yonah was the undoubted proprietor of the land. The heirs of Belk, being then infants, answered by their guardian, Joseph Welch. In this answer they aver that the allegations contained in the bill, relative to the alleged fraud of their father in not surrendering the deed which he had obtained from Yonah, but surrendering another paper as and for said deed, which it is falsely alleged he engaged to surrender, were urged by the plaintiff on the trial of the action of ejectment, and, after a laborious and patient investigation, were found to be untrue. They declare that (166) in the summer of 1819 their father contracted with Yonah for the purchase of his reservation, and agreed to give him therefor $200 and to maintain him during his life upon the land; that the $200 were paid to Yonah in two horses; that Yonah executed a bond to make title for the land, and their father procured a deed to be drawn therefor by the late Felix Walker; that before this deed was executed their father, having heard that Yonah could not by law convey his interest in the reservation, and having communicated this information to Yonah, he and the said Yonah did, in September, 1819, rescind the sale; their father surrendered the bond for title which had been given as aforesaid, and Yonah returned the horses received in payment; that afterwards their father had a conversation with Felix Walker, who informed him that the treaty gave Yonah a complete title to the land included within his reservation, and that Yonah had the right in law to convey it; that in consequence of this information on 1 November, 1820, their father made a purchase a second time from Yonah, upon the same terms as before; paid the two hundred dollars, partly in money and partly in store goods, and Yonah thereupon executed the deed, which had been prepared by Walker and which had been in Belk's possession up to that time. They represent that the deed purports to have been executed on 1 November, 1819, but it was actually executed 1 November, 1820; and that the cause of this error is because Mr. Walker, when he prepared the instrument, inserted the date of the year in which it was expected that the deed would be executed, but left blanks for the insertion of the day and the month, and that at the time of the actual execution these blanks were filled but the date of the year, 1819, was left unaltered; and they allege that the deed was actually executed on 1 November, 1820, at the house of their father, in the presence of their mother,

Sally Belk, of Alfred Brown, who attested the same, and of Nicey Brown, the wife of the said Alfred. They deny explicitly the charge that their father delivered to Yonah, as and for this deed, any other paper; but say that after the rescission (167) of the first contract he returned to Yonah the bond to make title, as it was his duty to do, and declare that the second contract, as evidenced by the deed made 1 November, 1820, never was rescinded nor intended to be rescinded between the parties; but that, on the contrary, a very few days after its execution and when their father, under his said purchase, was about to take possession of the said land, and had actually procured assistance to erect a house thereon, he was kicked by a horse and died next day of the injury thereby inflicted. They further state that after the death of their father Alfred Brown, who administered on his estate, carried the said deed to Robert Love, the father of the plaintiff and clerk of the county court, for the purpose of having the same proved; that the said Robert informed Brown that the deed was invalid for that Yonah could not sell his reservation, but nevertheless proposed that he (Love) would take the deed to Buncombe Superior Court and consult the lawyers there respecting it; that the deed was therefore left in the hands of Robert Love; that said Love afterwards informed Brown that he had been advised by Mr. Wilson, a lawyer of reputation, that the deed was no account, and advised Brown to recant the bargain with Yonah and endeavor to get back the property paid by his intestate for the land; that Brown and Yonah, the deed being still in Robert Love's possession, did make a verbal agreement to annul or rescind the sale; and Brown procured from Yonah thirty-five or forty bushels of corn in part for the price so received by Yonah, but was never able to get anything more; that some time afterwards Brown was informed that he had no authority to rescind the sale, and that he had acted improperly in undertaking so to do, and in consequence thereof applied to said Robert Love for the deed; that the restoration thereof was for a long time delayed and refused under various pretenses, which the defendants allege to be false; but that finally, after an action of detinue had been brought therefor in behalf of these defendants, the same was given up to their guardian, who caused it to be registered.

These defendants do not admit that the plaintiff paid Yonah any consideration for the bond, and charge that when (168) he contracted with and took his deeds from Yonah therefor he had perfect knowledge of the existence of the deed to their father, and had seen it while in possession of his father.

They deny absolutely the charge that their father at any time after 1 November, 1820, ever told the plaintiff or any other person that the contract of sale was rescinded, although they admit that he may have so declared, antecedently to that day and in reference to the first contract, which had in truth been rescinded; and further deny that their mother and co-defendant, Sally Belk, ever made the declarations which in the bill are charged to have been made to Robert Love in relation to the rescinding of the contract and retention of the deed by her husband.

They also insist that the plaintiff procured the deeds under which he sets up claim to the land in dispute to be executed by Yonah or the Big Bear by fraud, for that he caused the said Yonah to be made drunk, and while in that situation obtained from him the said deeds without any adequate consideration; the plaintiff at the same time perfectly knowing that the said Yonah had fairly sold and conveyed the land to their father, and that the contract of sale evidenced by said conveyance had not been rescinded or released. They also insist that the judgment rendered in the suit at law is a bar to the relief sought by this bill, because every ground now insisted on as furnishing a claim for such relief was urged by the plaintiff and attempted to be proved on the trial of the issue in that suit, and was conclusively determined against the plaintiff. The defendant Sally Belk answers separately, and states that she is the widow and relict of Darling Belk, and was personally privy to and cognizant of the transactions between Yonah and her husband, in relation to their dealings with respect to the land, which is the subject matter of this controversy. In express terms she sets forth the contract of sale made between them about the last of June or 1 July, 1819, the delivery of the horses by Belk in payment of the consideration; the execution by Yonah of a bond to make title; the rescinding of the contract on or about 1 September, 1819, in consequence of erroneous information that Yonah could not convey; the receiving of more cor- (169) rect information on that point from Felix Walker afterwards, who had prepared the deed of conveyance before the rescinding of the contract; the making of a new or second contract on or about 1 November, 1820; the execution thereupon by Yonah of the deed of conveyance previously so prepared, which was done in her presence and attested by Alfred Brown, all fully corresponding with the allegations as hereinbefore stated in the answer of her co-defendants. This defendant says that she knows that between 1 September, 1819, when the first

contract was rescinded, and 1 November, 1820, when the second was made and the conveyance executed, Yonah returned to her husband the two horses and some other things (whether all or not she is ignorant) which he had received as payment for the land; that upon the day the second contract was made and consummated no horses were received by Yonah, who declared that he did not want horses for he could not keep them out of his corn; that Yonah was paid partly in cash and partly in goods—that is to say, blankets, a big coat, pantaloons, homespun, shawls and various other articles; that her husband on Monday, and, as she believes, the 17th of the same month, while preparing to start with Alfred Brown and seven Indians for the purpose of building a house for himself and family on the land so bought by and conveyed to him, was accidentally kicked by a horse and died of the wound on the next day; that she is certain that from the time of the execution of the conveyance by Yonah until this fatal accident occurred her husband and Alfred Brown were constantly at home and busily engaged in pulling each other's corn; that the plaintiff did not come there during that time, and that her husband did not have and could not have had with the plaintiff the conversation which the bill charges to have taken place on 8 November, 1820; that her husband's residence was among the Indians, and that a door only separated the partition between her room and the store-room where he was doing business when not actually engaged in pulling corn, as before stated; and that she is satisfied that her husband never did, and therefore denies that he ever did inform the
(170) plaintiff or any other person after the said 1 November that the sale was rescinded. The defendant further denies that she brought the deed of conveyance to Robert Love, or exhibited it to him, or made any communication to him of any sort respecting it, or made to him or any person whatever the proposals falsely charged in the bill; and denies that she ever had the said deed in her possession. The defendant further insists that the plaintiff imposed upon Yonah in getting deeds of conveyance from him, who was made drunk by the said plaintiff, and being ignorant of the English language, and the witnesses to these deeds not being able to explain the contents thereof to him, was easily cheated therein. She also refers to and adopts the answer of her co-defendants, and insists on all the matters of defense therein set up and relied upon.

Upon the coming in of these answers the injunction, which had issued when the bill was filed, was, upon motion of the counsel for the defendants, dissolved; and thereupon the plaintiff

prayed and had leave to hold over his bill as an original, and a general replication was put in to the answers. Commissions thereupon issued to both parties, and their proofs having been completed, the cause was set down for hearing and transmitted to this Court to be heard.

The first deed exhibited by the plaintiff purports to convey all that part of Yonah's reservation which lies on the northeast side of the Tuckaseegee River, estimated to contain 400 acres, in consideration of the sum of three hundred dollars, thereby acknowledged to be paid, is dated 25 November, 1822, attested by Daniel Bryson, Thomas Rogers and Thos. Watson, was proved in court by Thos. Rogers at June Term, 1823, and registered on 19 February, 1824. The second deed purports, in consideration of the further sum of two hundred and fifty dollars, thereby acknowledged to be received, to convey to the plaintiff the residue of said reservation, is dated 8 September, 1824, is attested by W. Reid, Robert Shipp and James R. Love, was proved at March Term, 1826, by the said Shipp and Love, and was registered on 25 April, 1826. The instrument which the pleadings on both sides represent as a deed of conveyance from Yonah to Darling Belk, and which is ex- (171) hibited as such by the defendants, appears on its face to have been executed on 1 November, 1819—it was attested by Alfred Brown, was proved by him at the April Term, 1827—and was registered on 8 May thereafter, and purports to convey to the said Belk all of Yonah's reservation for the sum of two hundred dollars.

It is not questioned nor can it be questioned but that the case stated by the bill is one which entitles the plaintiff to the interposition of this Court. If after the *execution* of the alleged conveyance from Yonah to Belk, but before the solemnities of probate and registration had been complied with, so as to give the deed full legal operation, the contract of sale was rescinded, the consideration repaid or agreed to be repaid by the vendor, and a distinct engagement made by the vendee to surrender the deed for cancellation, the vendor, whose legal title was not yet completely divested, remained the owner of the lands and had full right to sell and convey the same to another. The withholding of the deed, the surrender of another paper as and for the deed, and the subsequent probate and registration so as to impart operation to the deed from the time of its execution, and thereby destroy the title at law of the purchaser from the vendor after the rescinding of the contract, make out a clear case of

fraud peculiarly fit for the jurisdiction of a court of equity and calling for all the redress which such a court can afford.

The execution of the deeds by Yonah to the plaintiff is not put in issue by the pleadings. The answers fully admit *that fact,* but insist that an imposition or fraud was practiced on Yonah by the plaintiff in procuring the deeds. The answer of Sally Belk does not state in what the fraud consisted further than it alleges that the plaintiff made him drunk and thereby was enabled to practice upon his ignorance with greater felicity; but the answer of her co-defendants is more specific in charging that the plaintiff gave a very inadequate consideration for the land, the subject matter of the conveyances. We are of opinion that this objection, however well founded it may be in fact, is one which it is not competent for the defendants to take,
(172) and the truth of which it is therefore unnecessary for us to consider. The plaintiff claims, as the owner of a tract of land formerly belonging to Yonah, that there should be removed out of his way a legal impediment to the assertion of his title therein and to his enjoyment thereof, interposed through the bad faith of Belk and of the defendants claiming through Belk. It is necessary for him to show that he has acquired Yonah's estate in that land, and this he does show by the exhibition of a conveyance operative in law to pass that estate, and authenticated by the solemnities required by law to give it effect. If, indeed, such conveyance were obtained, as the defendants allege the deeds of the plaintiff were obtained, for an inadequate consideration from an ignorant Indian at a moment when his feeble judgment was rendered yet more feeble by intoxication purposely induced, certainly the court would withhold its aid from the perpetrator of the fraud seeking assistance against his victim or those coming in under him; nay, would be ready to render to the person injured or his representatives every relief in their power against the fraud or the consequences of it. But Yonah is dead, and Yonah's heirs, if he have any, are not before the Court, and need not be before the Court because they have no interest in the *present* controversy and cannot be prejudiced or benefited by any decree made therein. If Yonah was not fairly treated in his dealings with the plaintiff until those who may have succeeded to *his* rights choose to complain thereof and claim to have his conveyances to the plaintiff set aside because of such imposition, they must *stand,* and consequently, as against all other persons, must have the operation which properly belongs to them. It is frequently said indeed that a court of equity will not be quickened into action by nor

extend relief to volunteers or persons claiming as purchasers for an inadequate price. But this doctrine in its full extent applies only to cases where the aid of such a court is invoked to create a trust or equity as resting in contract or arising from an imperfect conveyance, and not where its protection is demanded for trusts or equities originally well constituted, and which have been assigned by a complete instrument effectual to transfer them. *Patton v. Clendenning*, 7 N. C., (173) 68; *Dawson v. Dawson*, 16 N. C., 93; *Ex parte Page*, 18 Ves., 140. The property which has passed under such a conveyance must be protected. The owner of it can demand protection from any court competent to afford it, and every court is bound to yield such protection according to the nature of its jurisdiction and the nature of the wrongs menaced or committed. No one can be heard to say that the property passed, but under such circumstances as to place it and its owners in respect of it, out of the pale of the law.

We do not understand the answers as containing an allegation that Yonah was *incompetent*, by reason of drunkenness, to execute the deeds to the plaintiff, or an allegation of any fraud in *the act* of execution. Certainly if such allegations were intended to be insisted on they ought to have been distinctly stated in the answers. We deem it, however, not amiss to add, for the satisfaction of the parties, that if such allegations be supposed to be contained in the answers we are clearly of opinion they are not proved. Certainly the price was a very inadequate one, but there is no proof that Yonah was at all intoxicated at the time of making the deeds; and, although it is not to be believed that through the medium of the interpreters used he could be made to understand the import of the particular words contained in the deeds, the proofs are satisfactory that he knew his bargain, that the deeds conformed to it, and that he deliberately executed them in order to carry that bargain into effect.

It is insisted in the answers and the objection has been pressed at the hearing that the facts alleged in the bill as constituting the claim of the plaintiff to relief, were all urged by the plaintiff on the trial of the issue in the action of ejectment; and that by the judgment in that action it is established that the facts so alleged did not exist. Certainly where a matter proper for investigation in a court of law has been there investigated, according to its established rules, or where a matter, strictly of legal jurisdiction and which ought to have been urged as a defense in an action at law, has not been so brought forward, and there are no circumstances of fraud or unconscientious (174)

advantage which require that the verdict or judgment should be put out of the way, a court of equity will not take it upon itself to re-examine what in such action has or ought to have been investigated. That court has not jurisdiction to review what was properly tried or triable at law; but the matter now sought to be investigated could not have been investigated in the action at law, because it constituted no ground of defense in that action. The rescinding of the contract between Yonah and Belk after the execution of Yonah's conveyance, the engagement of Belk to surrender the deed of conveyance, the withholding of that deed and the delivery of another paper as and for the deed did not in law annul the deed or reconvey the land. These facts, if they existed, constituted a gross fraud upon Yonah, and one very proper for the consideration of a court of equity.

If Belk or those claiming under Belk afterwards, in further prosecution of this fraud, caused the deed to be registered, such registration nevertheless had relation in law to the execution of the deed, and thereby communicated to it legal operation from the time of its execution. If Yonah had not conveyed to Love, and the action of ejectment had been instituted against *him,* he could not have set up these matters as a defense in that action. The plaintiff, by Yonah's conveyance, succeeded to Yonah's estate and Yonah's rights. His title was postponed in law to that derived by Belk under Yonah's prior conveyance, and his claim to have that conveyance put out of the way is not because that conveyance has been canceled or annulled, but because in conscience it *ought* to have been canceled or annulled and ought not to have been registered. The sole question therefore remaining to be determined is whether the case stated in the bill be established by the proofs. That there was a contract of sale between Yonah and Darling Belk some time in 1819; that upon this contract property was transferred by the latter to the former in payment or part payment of the land sold; that this contract was subsequently rescinded by the parties, and that the consideration so paid was returned by the vendor, are
(175) facts about which there is no controversy. The substantial issue between the parties is whether the deed was executed to carry into effect *this contract* or to carry into effect a second contract made about 1 November, 1820, and which has not been rescinded. Upon this a vast mass of testimony has been taken on both sides, all of which we have deemed it our duty to consider attentively, although we do not think it necessary to state it in detail.

The deed exhibited by the defendants bears date 1 November,

1819. If that be the date which it ought to bear the issue is necessarily determined against the defendants. The language of the deed is also inconsistent with the state of things at the time when defendants allege that the deed was executed. The subject matter which it purports to convey is described as Yonah's "reservation of 640 acres, *hereafter* to be laid off and run and marked according to the provisions of the treaty"; all of which was done and the certificate of survey actually issued, at least as early as May, 1820. Strong, however, as is the internal evidence afforded by the deed, it certainly is not conclusive. An explanation of this discrepancy between the date of the deed and the day of its execution, and between the language of the instrument and the circumstances at that day, has been given in the answer by Sally Belk: and if this explanation *be true* it satisfactorily accounts for these discrepancies. But unless there be *sufficient* proof of its truth the issue must be determined against the defendants. The answer of this defendant avers the matters therein stated as of her own knowledge, and being responsive to the allegations of the bill in this respect, it is to be regarded as strong and direct proof. This proof is strengthened by the equally positive testimony of her brother, Alfred Brown, and of his wife, Nicey Brown, which testimony corresponds with the answer fully and in every particular. Nor ought this minute correspondence between the answer of the defendant and the depositions of these witnesses to create any suspicion, or at least any strong suspicion, of the truth of the representation. It is not at all unlikely that the facts stated, if they did occur, should be known to all of them; it was natural, after the controversy had arisen, that they should frequently converse with each other respecting these facts; and therefore it is not extraordinary that their statements (176) should be expressed nearly in the same language. But, on the other hand, it must be conceded that such exact conformity is not a circumstance to repel suspicion of a fabrication, if there be evidence *aliunde* to excite it. When there is a conspiracy to pervert the truth the conspirators are obliged to come to an explicit understanding with each other as to the extent of that provision; and this concert almost necessarily molds and fashions the very terms and phrases employed in carrying the conspiracy into effect. And we are obliged to say in the present case we see no medium between adopting as true the representation made by this defendant and these witnesses or rejecting it *in toto* as a base fabrication. There is no room for *honest mis-*

*take* in any of the matters they so positively set forth, and *falsus in uno, falsus in omnibus.*

Five witnesses at least directly contradict the defendant Sally Belk. Holloman Battle testifies that after the death of her husband she showed him the deed and wanted him to undertake to get the land by it, and proposed to share the gains of the transaction; that he then read the deed and observed to her that it was written by Felix Walker, which at first she denied, but afterwards admitted; that he commented on the language of it (land "hereafter to be run out") and expressed his opinion that she had better burn the deed for that undertaking to set it up would only run her to expense; that some days afterwards he asked her how *she* came by the deed, when she informed him that her husband and the Bear had made a bargain for the land, but had afterwards "rued"; that the property given for the land had been returned and her husband was to have given up the papers, but that he had kept back the deed expecting some day or other to hold the land by it, and that the witness declared that he would not be concerned in attempting to set up the deed, and advised her not to attempt it. Jacob Shuler deposes that after her husband's death she showed him the deed; offered to sell it to him for $50; admitted that she knew the contract had been rescinded, but said that if any money could be made by the deed she was determined to make it. Colonel Robert
(177) Love declares that soon after her husband's death she brought the deed to him and proposed to give him half the land if he would get it for her under the deed; and, on being told by him of the general rumor that the sale of the land had been rescinded, she admitted that the fact was so. David McCay testifies that after the trial of the ejectment suit she complained that Welch (the guardian of the children), after gaining the land, was about to keep it for himself; and on that occasion declared that her husband on his deathbed had directed the papers be given back to the Bear, for that they had "rued their bargain"; and said that she believed that he died under the impression that this had been done. Samuel Sanders gives us an affidavit made by her before him as a magistrate shortly after this conversation, in which she fully repeats this declaration. Not one of these witnesses is attempted to be impeached in any manner, except that Sanders's character for veracity is assailed by a single witness, Gideon Morris. It is impossible under these circumstances to place *any* reliance upon her or her answer.

Alfred Brown's character for truth is strongly impeached, and according to the majority of the witnesses examined on the

subject he is unworthy of credit. Besides minor considerations, his testimony is materially and directly opposed by that of Mark Coleman. This witness testifies that he came to the house where Belk died a few moments after his death. From the other testimony we collect that this event occurred at his father's house, in the neighborhood of his own residence, on or about 22 November, 1820, in consequence of an injury received from a horse on the preceding day. The witness assisted in laying out the corpse and afterwards went with Brown to Belk's store to get plank for a coffin. They then conversed on the subject of the state of the affairs of the deceased, and particularly respecting his contract with the Big Bear for his land; and Brown then told him that the contract was rescinded. He was present afterwards on the day when Brown and the widow started for court to administer on the estate, when Brown showed him the deed and bond; stated that the reason for rescinding the sale was because of the general opinion that the Bear could not (178) make a lawful right; and said further that he should carry the papers to court and take advice upon them.

There is then a crowd of witnesses of whom *ten* at least must be taken to be unimpeachable, for no attempt has been made to discredit them, who testify positively to Belk's uniform public declarations, some down to *two* days and the rest to a *week or ten days* before his death, that he had rescinded the bargain with the old Bear; that he had not given back the deed, but had deceived the old fool by giving another paper instead of it; that the old Indian would die before long and then he would see whether he could not hold the land under the deed. And in addition to all this we have the testimony of Belk's mother and sister, Ferribee Belk and Rebecca Woodfin, which if believed is conclusive. They both state in substance that the deed was written in their presence, before the land was run out and in watermelon time, by Felix Walker, and that in the course of a few months thereafter they heard from Belk of its execution. This establishes the date of it—1 November, 1819—to be correct. They were both present when Belk died at his father's house; and they say that after he had received the fatal blow, which was to hurry him off to the grave before "the poor old Indian," and after he felt that death was at hand, he gave express directions for surrendering the deed to the Bear, and declared that he had no claims to the land. Attempts have been made to discredit these two witnesses. A majority of those, however, who have been examined as to their credit, express a decided opinion that from her general character the old woman

is worthy of belief, and it is in evidence from the sheriff of the county that when Welch, the guardian of her grandchildren, was about to summon her as a witness in the suit at law, she then declared substantially to him what she now testifies, and on that account was not summoned.

The witnesses are about equally divided as to the credit due to Rebecca Woodfin. We would not therefore place great reliance on her testimony, but supported as it is by the evi-
(179) dence of her mother and by Sally Beck's declaration and affidavit to the same effect, we cannot reject it as unworthy of belief. Upon the whole we must say upon the proofs that the contract of sale between Yonah and Belk was rescinded after the execution of the deed conveying the land; and that this deed was fraudulently retained, instead of being surrendered, as Belk had engaged should be done. It is quite probable, we think, and there is much in Rebecca Woodfin's deposition and those of other witnesses *tending* to establish the fact, that there were subsequent negotiations between the parties with a view to another contract; but there is nothing to show that another contract was finally made, much less that the old deed was redelivered, or was regarded as redelivered, or that any other deed was afterwards executed. And we hold that the plaintiff, as the assignee of Yonah, has a right to require that the deed thus fraudulently kept back, and which by reason of its registration fraudulently obtained, overreaches and defeats Yonah's conveyance to him, should be put out of the way of that conveyance and of his rights thence derived.

The decree will be that the defendants be declared trustees of the legal title which they have or may have in the land in question for the plaintiff, and do forthwith deliver the possession thereof to him; that an account shall be taken of the rents and profits thereof and by whom the same were or might have been received since the possession was yielded by the plaintiff, and also of the costs which have been recovered and received from the plaintiff by the defendants or any of them upon the suits at law; that such of the defendants as are of age do, by proper conveyance to be settled by the clerk of this Court, release all their estate and interest in the land to the plaintiff; and the defendants not of full age shall, after attaining the same and within six months after being served with a copy of this decree, convey and release in like manner, and that the cause be retained for further directions upon the coming in of the report.

PER CURIAM. Decree accordingly.

*Cited: Davis v. Inscoe,* 84 N. C., 400; *Austin v. King,* 91 N. C., 290; *Jennings v. Reeves,* 101 N. C., 449.

(180)

GEORGE KISSAM v. JOHN EDMUNDSON, CHARLES SHIELD and the wife and children of John Edmundson.

A debtor upon being applied to by a *bona fide* creditor to secure him by a deed of trust on his property refused to secure any part of the debt unless the creditor would transfer one-half to a trustee for the benefit of the debtor's wife and children, and that the half so transferred should also be secured by such deed. The creditor, though reluctantly, consented; the transfer was made and a deed of trust executed according to such agreement. *Held*, that this was tantamount to a reservation by the debtor himself of so much of his property for the use of his wife and children, and was, therefore, fraudulent and void as against other creditors.

Whether the trust in favor of the creditor for the one-half of the debt retained to himself is not also void because of his being a party to such arrangement. *Quere?*

THIS was a bill filed in HALIFAX Court of Equity, and after the answers were put in, depositions taken and the cause set for hearing, the case was transmitted to this Court. The facts are stated in the opinion of the Court.

*Badger* and *B. F. Moore* for the plaintiff.
*Iredell* for the defendants.

RUFFIN, C. J. In November, 1837, the defendants, Edmundson & King, as partners in merchandise, were indebted to the present plaintiff in the sum of $1,000, and to the defendant Beasley in the sum of $3,536.23, and to sundry other persons in sums which together greatly exceeded the whole value of their joint effects, and also of the separate effects of the two partners. Beasley being informed of their insolvency by Edmundson, and applied to by him to take the stock of merchandise in discharge of his debt, readily assented to do so. But when the parties met to carry into effect the agreement Edmundson retracted his offer, but proposed by an assignment to a trustee of sufficient property to secure to Beasley one-half of his debt for Beasley's own benefit if he, Beasley, would agree that the other half, which was also secured by the same assignment,

should be in trust for the separate use of the wife of Edmundson and for his children. To this arrangement Beasley at first strenuously objected, and urged Edmundson to secure (181) to him, Beasley, his whole debt. But finding that Edmundson obstinately persisted in his refusal to secure the debt or to secure any part of it but upon the condition above mentioned, Beasley finally yielded to the proposition of Edmundson. The parties were then about to secure the whole debt of $3,536.23 in the name of Beasley, as if the same still belonged to him, and thus leave it to him to account with Edmundson or his wife and children for the one-half. But Edmundson again objected, and required the debt to be divided at once; and to that also Beasley yielded, as the only means of saving any part of his debt. Accordingly a new note was executed to Beasley for the sum of $1,768.12, and also a note for the like sum of $1,768.12 was executed to the defendant Shield, who was selected by Edmundson, and agreed to receive and hold the money in trust for Edmundson's wife and children, as stipulated between those other parties; but of this trust nothing appeared in the note or subsequent assignment, nor was it disclosed by any written instrument. Immediately thereafter Edmundson executed a deed of trust to the defendant Nichols for all his property, both real and personal, and all debts due to him and his interest in the firm, in trust to receive and satisfy, in the first place, a debt of $800 due to one Little; secondly, the said debt of $1,768.12 due to Beasley; thirdly, the said sum due on the note to Shield; and then sundry sums due to other enumerated and classified creditors, among whom the plaintiff Kissam is not included. This deed was executed by Edmundson and Nichols only, and not by Beasley or Shield; nor does it appear that any other creditor besides those two was privy to it.

Within a short time thereafter the plaintiff recovered a judgment for his debt against King and Edmundson, and issued a *scire facias,* which was returned *nulla bona;* and then the plaintiff filed this bill against Edmundson and King, Nichols, Beasley, Shield and the wife and children of Edmundson, and therein (submitting that the other debts mentioned in the deed except those to Beasley and Shield are true debts, and and that the plaintiff is willing they should be paid) prays that the (182) deed may be declared fraudulent and void as against the plaintiff, so far as it purports to secure the said two sums to Beasley and Shield, and more especially in respect to the debt to Shield, as being substantially a voluntary settlement by Edmundson, an insolvent debtor, on his wife and children; and

that the plaintiff's judgment may be satisfied out of the effects in the hands of Nichols, after paying off the debts mentioned in the deed other than these two.

There is no material difference as to the facts of the case as they appear upon the bill and the answers. But Nichols, the trustee, has been examined as a witness upon the answers, and upon his deposition the case is very satisfactorily made out as above stated.

If the sum secured to Shield for the benefit of the wife and children of Edmundson is legally to be regarded as a provision made for them by Edmundson himself, it is very certain that it cannot be raised out of his property to the disappointment of his creditors, and the deed must be deemed ineffectual, so far, at the least, as it was intended as a security for that sum. A conveyance after marriage by a debtor to his wife and children, or in trust for them, is unquestionably fraudulent and void as against prior creditors, and that without regard to the amount of the debt or the circumstances of the party making the conveyance. *O'Daniel v. Crawford,* 15 N. C., 197; *Read v. Livingston,* 3 John. C. C., 481; *Jackson v. Seward,* 5 Cowen, 67. Much more is that true where there is an admitted insolvency of the settler and the assignment includes all his effects.

The only doubt that can be raised on the case is whether this provision for Edmundson's family be *his* bounty or that of *Beasley.* Upon that question our opinion is, notwithstanding the form into which the transaction was put, that it is substantially and essentially a gift from Edmundson to his wife and children.

The objection to that position or conclusion is that Edmundson really owed the whole sum to Beasley; and the law allows a debtor to prefer one creditor before another, and it is not material to the general creditors whether the money thus actually due be paid to one person or to another. In other words, the argument is that it was lawful for Beasley to do what (183) he willed with his own; and in giving a part of his debt to Shield or to Edmundson's family, he did no wrong to the present plaintiff. This mode of presenting the case we admit to be plausible; but we think it more specious than sound. It is not denied that a creditor may, like a relation or any other compassionate person, give out of his debt or any property belonging to him a bounty to the family of his unfortunate debtor. But then it must be really a gift from the creditor and not from the debtor himself. It is not sufficient that the sum secured was altogether a true debt. If that were sufficient then the deed would be good though it secured half the debt to the creditor

and the other half to the debtor, or to a trustee for the debtor. But certainly in this last case the conveyance is fraudulent. Why? Because, as is mentioned in *Twine's* case, although the debt be a true debt, yet if the debtor is to have the benefit of it or of the property conveyed to secure or satisfy the debt, the conveyance is taken, not to have been made for the satisfaction of the debt, but in truth and reality for the ease and favor of the debtor. Therefore the whole is a nullity. It is not doubted that a creditor may lawfully be compassionate and bountiful to his debtor by giving up a part of his debt before he receives payment or after he has received his debt, by applying a part or the whole of it in relief of the necessities of his indigent friend. But it must be the act of him who was the creditor, and independent of any arrangement between the debtor and creditor at the time or as a part of the contract to convey property, either as a security or in apparent payment of the debt. Whatever benefit is secured, either openly or covertly, by such a deed to the maker of it out of the effects conveyed by him, is obviously inconsistent with the professed purpose of conveying to satisfy or secure the debt to the creditor; and for that reason is *mala fide* and void.

Now, how does the present case differ from that just supposed of a provision for the debtor himself? It is said there is an essential difference in this: *that* in the one case there is an interest reserved to the debtor, and *that* at least is liable (184) for his debts; and in the other the property goes at all events from the debtor and in discharge of his just debts, be it payable to whom it may. But it is clear that a deed in which an interest is secured to the debtor, unless as a mere resulting trust, is void *in toto* under the statute, and not merely in regard to that provision in favor of the debtor. *Riggs v. Munay*, 2 John. C. C., 565; Hobart, 14; and therefore the debtor's interest under the deed is not the only thing subject to his creditors. As to the consideration that in the other case all property is gone from the debtor, it is true; but to whom does it go? Why, to the very persons to whom every husband and father wishes his property to go—to his wife and children. If it had been secured to the debtor he would have desired it chiefly to enable him to do directly what has been done indirectly, namely, provide for his family. Admit that Beasley might, of his charity or caprice, have transferred to his debtor's family one-half of his debt, and that an assignment to secure the two debts after the transfer is as valid as one to secure the whole to Beasley would have been; yet we cannot regard this transac-

tion as a donation from Beasley to Mrs. Edmundson and her children. It is preposterous to call it so. A bounty is a voluntary act. It was indeed a bounty to those persons. But to whom do they look as the author of it? Whom do they thank for it? Most unquestionably not Beasley. They understood the truth of the case, and are not such dupes as to suppose themselves indebted for this provision to anything but to the power the husband and father had over his creditors in giving or refusing to him a preference over other creditors, and to the use he made of that power. The gift was not, therefore, the gift of Beasley—not his free gift. It was forced from him, or purchased from him, by making his transferring one-half the debt to the debtor's family the condition and the price of getting any part of it for himself. The question is, will the law allow such a use to be made of the right to give a preference among creditors? We think not. The rule has been carried far enough in permitting preferences to be effected by voluntary assignments. It is too late to question that power; and generally the exercise of it is sustained without inquiring into the debtor's motives (185) for particular preferences. But that must be understood of preferences between real creditors, and cannot be applied to the case of one who is made to appear to be a creditor, without giving any value and by the mere contrivance, art or bounty of the debtor himself. To uphold such a transaction as this would not be to treat the preference we are speaking of as founded on the equity of the creditor to save himself, or even as the privilege of the debtor to be exercised for the benefit of the preferred creditors; but it would be to convert it or to suffer and entice insolvent debtors to convert it into a *valuable interest in themselves*, as a means of directly providing for their families, and in so doing of indirectly providing for themselves.

A court of justice is not to be duped by the mere language parties may use. We are to look at what was said and done—both, and to understand the whole in its substance as the parties understood it at the time. It is said the gift of the debt was made by Beasley, and that it must be so as it was his debt, and nobody else could give it. But that is a view limited by the forms of the transaction; whereas, forms signify nothing upon an occasion of this sort. Beasley gave the debt, but at whose instance, to whom and from what motive? He gave it at the *instance of the debtor* to the debtor's family, and as the only means of receiving anything from the debtor for himself. Is it not plain that substantially this was not a gift by Beasley to the wife and children, but a gift to them by Edmundson himself?

Beasley bargains with the debtor that *he* will put up with half of his debt, and as to the other half—which, in respect of his own interest, was extinguished—he stipulates with the debtor that instead of totally extinguishing it he will keep it on foot for the benefit of the debtor himself or any person he may designate. He then nominates his wife and children, and upon the surrender of the former note he, the debtor, executes a new note for one-half the sum to a person in trust for his own wife and children. Yet it is said *he* did not give them this sum of money, but that Beasley did! The Court cannot be so blind as not to see through so simple and shallow an artifice as this, nor (186) be so insensible to good morals among the trading classes and to the tendency of such a transaction to break down the security of creditors, and to put them completely in the power of the debtors, as to hesitate in declaring that in law such a provision cannot stand, and that the deed is void as against the plaintiff so far as it is a security for the debt in question. It is true Shield and those whose interests he represents are not themselves guilty of any fraud; but, then, they are mere volunteers who gave nothing for this debt, but acquired their interest entirely by the fraud and dishonesty of the person who made this conveyance as a security to them. Though innocent themselves they cannot derive a good title through that person, but must take it tainted with his fraud. At the bar it was also urged that the deed was void as a security for the residue of the debt to Beasley himself; and, indeed, that it was void as an entire deed in respect to all the deeds mentioned in it, if the plaintiff had impeached it to that extent. Perhaps it will be found difficult, upon principle or authority, to exonerate Beasley from the consequences of his privity in that part of the case which taints the deed and renders it void, to some purpose at least. But as it is obvious that he was more sinned against than sinning, and was innocent of any actual intent to injure any person, but aimed to save himself, the Court would most reluctantly pronounce the deed ineffectual as a security for his half of the debt; and will at least defer doing so until the question has been further considered, and it shall be found necessary to the justice due to this plaintiff. At present it is to be hoped there will be no such necessity. The trustee does not give in his answer an account of the trust fund; but it is intimated that when got in it may be sufficient to satisfy all the debts mentioned in the deed and leave a small surplus, which of course would be applicable to the plaintiff's judgment, whether the deed stood or not. If the fund should realize those expectations then, after putting

out of the way the debt due on the note to Shield, the means will be ample to pay the plaintiff without interfering with Beasley's right to have his debt satisfied out of the fund. Therefore, after declaring that no part of the fund in the hands of Nichols, the trustee, shall, as against the plaintiff, be (187) applied to the debt to Shield, the decree must direct an inquiry and account of the trust fund and of the debts paid or payable thereout, so as to enable us to see what sum will be applicable to the plaintiff's demand. Should there be sufficient without intercepting what would, according to the deed, go to Beasley, we need not consider the question just alluded to as the deed is, at all events, good between the parties, and Beasley can call for any funds in the hands of the trustee not claimed by another creditor.

PER CURIAM. Decree accordingly.

*Cited: Hafner v. Irwin,* 23 N. C., 497; *Palmer v. Giles,* 58 N. C., 77.

## GEORGE KING v. JOSEPH KINCEY.

The plaintiff by an absolute deed or bargain and sale conveyed a tract of land to the defendant. At the time of the execution of the deed the defendant agreed that the plaintiff might have the land back, provided he repaid the purchase money and interest within two years, or, if he could, within that time, sell it to one who would give a higher price. Both parties spoke of it as a sale, and the price given was the full value of the land. *Held,* that this agreement amounted only to a contract for the resale of the land within two years, and did not constitute a mortgage.

THIS was a case transmitted to this Court from the Court of Equity of JONES County, where at the Fall Term, 1840, it had been set for hearing upon the bill, answer, exhibits and proofs. The facts are stated in the opinion of the Court.

No counsel for the plaintiff.
*J. H. Bryant* for the defendant.

DANIEL, J. The plaintiff filed this bill on 29 November, 1833, to enjoin the defendant from proceeding in an action of ejectment against him, and also to redeem what he alleges to be a mortgage of the land to the defendant. The plaintiff alleges

that he, being distressed for money to pay his debts,
(188) agreed to mortgage to the defendant the land, 220 acres,
worth $3,000, for the sum of $1,300; that being an illiterate man it was agreed between them that the defendant should have the mortgage deed prepared; that instead of a mortgage deed he had prepared an absolute deed of bargain and sale with a covenant of warranty. The plaintiff proceeds to state that he, being much distressed with his debts, and having no other person to aid him but the defendant, and then having great confidence in his word, did, on 25 September, 1829, execute the said deed, under a parol agreement made at the time, that he might redeem the land in two years; that on 25 November, 1833, he tendered to the defendant all the money due to him on the said mortgage, but he refused to accept it or to reconvey the land, and brought a suit at law to oust the plaintiff of his possession.

The defendant in his answer says that the plaintiff offered to mortgage the land to him for a loan of money, but he expressly and distinctly refused to make any such agreement, but told the plaintiff that he would purchase the land absolutely. Whereupon an agreement for the absolute sale was entered into between them, and they both went to a mutual friend to have the deed prepared, which was accordingly done, and the deed was distinctly read over to the plaintiff, and he executed the same well understanding its purport. The defendant admits that he did agree with the plaintiff to resell the land to him in two years for the same sum of money, with interest, or to convey it to his appointee, if such appointee would give a larger sum. But he denies that the deed by him taken was ever intended to be a mortgage to secure any debt or demand which the defendant had on the plaintiff. The defendant says that the price by him paid for the land ($1,300) was a full and fair price for the same; that he afterwards leased the said land to the plaintiff for two successive years, expecting that he might avail himself of the agreement for a resale; that the plaintiff, failing to comply with the agreement to repurchase within the time limited, he, at the expiration of the two years, occupied and cultivated himself all
the land except the dwelling-house and some lots of land
(189) near it, which he, out of humanity, let the plaintiff occupy,
as he had then no other place to move to. Since he took possession of the land he, the defendant, has made large improvements in clearing, ditching and fencing. The defendant denies that the plaintiff is illiterate; he denies any circumvention or undue advantage taken of the plaintiff to obtain the said

absolute deed of bargain and sale. To this answer a replication was put by the plaintiff.

There has been a great deal of testimony taken in this cause; many witnesses have been examined, and among the rest Emanuel Jarman, who wrote the deed. He says that King and Kincey came to his house, and both parties requested him to write a warranty deed for the land, which he did. King said he had sold his land to Kincey. Kincey said at the time of receiving the deed that if King would refund the sum given for the land within two years from that time he would return the land in a quitclaim deed. Witness understood this to be a part of the contract. F. H. Jarman, the subscribing witness, states that King then and at that time said he sold the land to Kincey; asked his father to write the deed. It was done; they executed it, and he witnessed it. Kincey then stated that he had bought the land to save himself, and when King paid him his money and interest he would give the land up to him again. Several of the witnesses depose that King told them that he had sold the land to Kincey, but that he had two years to get it back by paying the same money or selling it to any other person at a higher price than Kincey had given for it. There is proof that King knew how to write and read writing. He knew what he was doing when he executed the deed. There is no proof that Kincey circumvented him or imposed on the weakness of his understanding to get him to execute an absolute deed, when he intended a mortgage. As to the value of the land there has been a number of witnesses examined. Of those on the part of the plaintiff some say it was worth $1,300; one says it was worth $2,000. Of those on the part of the defendant three say it was worth only $1,000; several say (and they are good farmers and men of standing in the neighborhood) that the price given ($1,300) was a full and fair price for the fee simple (190) in the said land. Upon the whole case, therefore, we are of the opinion that a mortgage was not intended by the parties at the time of the execution of the deed; but that the defendant agreed by parol to resell to the plaintiff or to his appointee in two years from the date of the deed, for the same sum to the plaintiff, or to his appointee, if he would give a larger sum. From all the testimony we think $1,300 was a fair and full price for the land at the date of the deed. There is nothing in the evidence to show that the parties contemplated a mortgage. There is nothing to show that the plaintiff was taken in or oppressed by the defendant. The plaintiff did not make application to repurchase the land in the time agreed upon, and he now

has no right to complain. The bill must be dismissed with costs.
PER CURIAM. Decree accordingly.

*Cited: Elliott v. Maxwell,* 42 N. C., 249; *Sykes v. Boone,* 132 N. C., 207.

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GEORGE W. BROWN et al. v. JAMES J. LONG et al.

Where a plaintiff obtains a judgment at law which becomes dormant, it is not necessary to revive it in order to enable him to apply to a court of equity for its aid in procuring satisfaction of the judgment.

It is generally necessary to issue an execution at law before coming into this Court for its aid: *first*, because, where the object is to clear the title of property, alleged to be subject to execution, from encumbrances, etc., the execution must be issued that it may create a lien on that specific property; *secondly*, that it may appear from the return of *nulla bona* that the defendant has no property which can be reached by an execution of the law. But no further execution is necessary where the defendant had been once taken on a *ca. sa.* and discharged under the insolvent debtor's law; and where he admits in his answer to the bill that he has nothing tangible by an execution, but only *choses in action* held in trust for him.

THIS case came originally before this Court upon demurrer, which was overruled. See 22 N. C., 138. The cause was then remanded, and the defendants Long, Hardie and Har-
(191) grove answered, and the other defendants let the bill be taken *pro confesso* against them and set for hearing *ex parte*. Having been set for hearing in ROWAN Court of Equity upon the bill, answers, judgment *pro confesso,* exhibits and interlocutory order, the case was, at the Fall Term, 1840, transmitted to this Court for a determination. The only ground upon which the defendant now resisted the plaintiff's recovery was that the judgments at law of Campbell & Brown against Long, sought to be enforced by this bill (see former case), were dormant at the time the bill was filed, and that Campbell's judgment is still so.

*Iredell* for the plaintiffs.
*J. H. Bryan* and *Boyden* for the defendants.

RUFFIN, C. J. It appears upon the pleadings that the plaintiff Brown gave to the plaintiff Campbell his bond with surety for the amount of the debt of Long, one of the defendants, to

Campbell, for which Brown was Long's surety; and that thereupon Campbell assigned the judgment at law to the plaintiff Cowan, in trust for Brown. It is admitted by the defendants who have answered that Josiah Huie and Robert Huie were respectively indebted to Long by bonds in the sums mentioned in the bill, and that he, Long, endorsed the bonds to the defendants Hardie and Hargrove, in trust for himself and to enable them to collect the debts for his benefit. It is also admitted by them that the defendant Long has no visible or tangible property. But Long states in his answer, and such is the fact, that at the filing of the bill both the judgment obtained by Campbell and that obtained by Brown against Long were dormant; and although, pending this suit, the latter has been revived, Campbell's judgment is still dormant, and for these reasons he insists that there can be no relief here in respect to either of the judgments.

An order was made by consent in the Court of Equity of Rowan County that the master in that court should collect the moneys due on the bonds of the Huies, and hold the same subject to the decree of the court, and the cause was set for hearing and sent to this Court. (192)

But a single question arising in the present state of this case, which is whether the plaintiffs are precluded from the relief to which they would otherwise be entitled, because the judgments at law were dormant when the bill was filed, and one of them is yet so? Upon the consideration of it our opinion is against the objection made by the defendants.

We agree that the creditor must show himself to be so by judgment, for it is only after he has established his debt at law that he can claim the interposition of this Court to aid him, either by making his execution at law effectual or by giving him relief by decree in this Court in the nature of an execution. *Rambaut v. Mayfield,* 8 N. C., 85. But here the debts have been reduced to judgments, and thus their justice conclusively established. It is true no execution could regularly issue on them while dormant; but even then there is not such a presumption of satisfaction as to render an execution, if issued, void. It is only irregular and may be set aside at the instance of the party. *Oxley v. Mizle,* 7 N. C., 250; *Dawson v. Shepherd,* 15 N. C., 497. Much less can it be assumed in this suit that the judgments are satisfied, or that the whole debts do not remain justly due, when the debtor himself, after admitting the original debts and judgments, does not pretend in his answer that he has ever paid one cent upon either. The arrangement between Campbell and

Brown does not amount to payment, for to avoid any possible inference of the sort an assignment is taken to a third person, which has been held sufficient to keep the security on foot. *Hodges v. Armstrong*, 14 N. C., 253; *Sherwood v. Collier*, 14 N. C., 380.

Then, with regard to issuing an execution on a judgment before coming into this Court, we agree likewise that it is generally proper and necessary, and that for several reasons. Where the object of coming into a court of equity is to ascertain encumbrances, to set aside conveyances as fraudulent, or otherwise clear the title of property which the creditor alleges is liable to be sold under execution at law, the suing out of an execution before filing the bill is indispensable to create a specific (193) lien on the particular property in respect to which relief is sought. But if the property out of which the satisfaction is sought be an equitable right merely or any other right, which cannot be reached by a legal execution, it is vain to issue the execution so far as respects the creation of a lien, for if issued it could have no such effect. It is, however, ordinarily proper, even in such a case as the last, to take out an execution; but for a different purpose, namely, to establish, by demanding property from the debtor and a return of *nulla bona*, that satisfaction cannot be had at law out of any other effects of the debtor, and for that reason that the creditor was compelled to come into a court of equity for satisfaction out of such of the debtor's effects as that court only can reach. A court of equity never interposes in behalf of a mere legal demand until the creditor has tried the legal remedies and found them ineffectual. Then and not before this Court lends its extraordinary aid. *McKay v. Williams*, 21 N. C., 398; *Rambaut v. Mayfield*, 8 N. C., 85. But in the present case the necessity for the action of this Court sufficiently appears, without resorting to further executions at law. The debtor was once taken in execution, and obtained his discharge as an insolvent; and he now admits that when this bill was filed and when he answered he had nothing tangible nor any effects but these equitable demands, due on notes assigned by himself, and held in trust for him. What useful purpose could a further execution answer in such a case? None whatever. It could create no lien, nor could it establish as clearly as it is established by the answers that the creditor could not obtain satisfaction at law, or by means of any execution but such as this Court can supply.

We therefore think the defense must fail, and declare the plaintiff Brown entitled to satisfaction of the principal money

and interest and the costs due on the two judgments, out of the moneys arising from the bonds of the Huies; and it must be referred to the master to inquire and report the sums due in respect thereof; and, also, the master of the Court of Equity for Rowan County must be directed to pay into this Court the moneys arising from the said bonds of Josiah Huie and Robert Huie, as he may collect the same, to be applied as far as necessary to the satisfaction of the plaintiff's said (194) demands and the costs of this suit.

PER CURIAM. Decree accordingly.

*Cited: Frost v. Reynolds,* 39 N. C., 500; *Kilpatrick v. Means,* 40 N. C., 222; *Powell v. Watson,* 41 N. C., 95; *Bridges v. Moye,* 45 N. C., 173; *Murphrey v. Wood,* 47 N. C., 64; *Bryan v. Brooks,* 51 N. C., 580; *Brittain v. Quiett,* 54 N. C., 330; *Hanner v. Douglass,* 57 N. C., 266; *Dixon v. Dixon,* 81 N. C., 327; *Hinsdale v. Sinclair,* 83 N. C., 340; *Bank v. Harris,* 84 N. C., 209.

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ELI SHERRILL et al. v. JAMES HARRELL et al.

Where, in an injunction case, there is a probability, from the facts stated in the bill, and not denied by the answer, of the plaintiff's sustaining his claim for relief, a motion to dissolve the injunction upon the coming in of the answers ought not to be granted.

It is not proper to say, "the case *coming on to be heard* upon the bill, answer, exhibits, etc., it is ordered and decreed that the injunction be continued *until the hearing*," because here is an absurdity in terms, and a cause can only be *heard* when it is regularly set down *for hearing*, according to the course of the court. A motion to dissolve is a mere motion in the progress of the cause, preliminary to its hearing.

THIS was an appeal from an interlocutory order of the Court of Equity of LINCOLN, made in the cause by his Honor, *Pearson, J.*, overruling a motion to dissolve the injunction which had been granted, and directing the injunction to be continued until the hearing. The facts, so far as they are relevant to this question, are stated in the opinion of the Court.

*Saunders* and *Hoke* for plaintiffs.

*W. J. Alexander* for defendants.

GASTON, J. This case has been brought before us by an appeal from an interlocutory order of the county of Lincoln, refusing to dissolve and continuing until the hearing of the cause an injunction which had issued upon the filing of the bill.

The bill and the answers are very voluminous, and it is not necessary for the purpose of deciding or of showing the grounds of our decision upon the subject-matter of this appeal to set them forth in detail. It will be sufficient to state that (195) upon the bill and the answers it appears that a weak-minded though not insane man, of handsome fortune and little indebted, entered into a contract with one of the defendants, who was his connection by marriage and in possession of his unbounded confidence, not a man of large estate, and considerably involved in debt, by which he conveyed away nearly all that he had on earth—the house in which he lived, his plantation, negroes, stock and furniture of every description—in absolute property upon a simple engagement, without security, to afford him subsistence during life. It also appears that immediately after this contract was executed differences arose between the parties which led to repeated attempts on the part of the grantor to have it annulled; that in the course of these negotiations the defendant exercised all the powers over the plaintiff's will, which followed upon this change of dominion in the property, such as removing the negroes, taking away the provisions and bargaining for the sale of the house and plantation; that under these circumstances he and the two other defendants, who were cognizant of all that was done, succeeded in obtaining from the imbecile and distressed man *at least* three negroes and bonds for $2,400: the only consideration for all which was his liberation from the oppressive contract. Now it is not for us to anticipate how these matters shall appear when the cause shall be brought to a hearing, and we are reluctant to express any opinion which may prejudice the case of the defendants. But we have no difficulty in saying that notwithstanding all the matters averred in the answers enough of the bill stands undisputed and unexplained fully to justify the order for retaining the injunction until the hearing. There is such a sufficient probability of the plaintiff's sustaining his claim for relief as to forbid a motion which, if successful, might render any decree then obtained by him altogether unavailing.

We deem it fit to notice a confusion in the statement made up for this Court which, if it corresponds with the entries and orders below, may tend to inconvenience. The transcript states that a motion was made to dissolve the injunction, and then

proceeds thus: "The case coming on to be heard upon the bill and answers, exhibits filed and argument of (196) counsel, it is ordered and decreed that the injunction be continued until the hearing." Here is an absurdity in terms. How can the court order the injunction to be kept up until the hearing of the cause when the cause is already heard? A motion to dissolve the injunction does not bring on a hearing of the cause. It is a motion made in the progress of a cause and preliminary to its hearing. The bill, answers and exhibits may be read upon that motion, with a view to the determination upon it. But *the cause* is not to be heard until it has been set down for hearing; and it is not to be set down for hearing until a full opportunity has been had, according to the established course of the Court, of putting it into a state fit for an adjudication upon its merits.

A certificate will be sent to the court below in conformity to this opinion, and there must be judgment here against the appellant for the costs.

PER CURIAM. Decree below affirmed.

*Cited: Miller v. Washburn,* 38 N. C., 165.

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JOHN BIRD, Administrator, etc., v. MARGARET GRAHAM et al.

Lapse of time constitutes no *bar* to the claim of the next of kin against an administrator, but only raises a presumption that satisfaction has been made, or the claim to it abandoned.

The farthest the Court has gone in raising this presumption is where there has been an interval of *twenty years after the time appointed for settlement with the next of kin*, and there has been no claim made, no explanation given of the delay to claim, and no circumstance appearing to show the trust yet unclosed.

THE bill in this case was filed in the Court of Equity of MONTGOMERY. After the case had been set for hearing in that court it was transmitted to this Court, in which a decretal order declaring the rights of the plaintiff was made at December Term, 1835; but the Court then declined to make a final decree for the want of necessary parties, and remanded the cause for that purpose. These parties having been made and (197) having filed their answers the case was returned to this Court for a final determination. All the facts will be found in

the report of the case, 21 N. C., 169; and the grounds on which this Court now decides are stated in the opinion delivered.

*Mendenhall* for the plaintiff.
*Winston* for the defendants.

GASTON, J. At December Term, 1835, a decretal order was made in this cause, declaring that the plaintiff, as administrator of Charlotte, his deceased wife, was entitled to one undivided sixth part of the female slave Oney, formerly the property of Robert Graham, the father of the said Charlotte, and of the increase of said Oney. But at the same time we declined rendering any final decree, notwithstanding the parties then before us had waived all objections for want of parties, because we deemed it indispensable that the persons actually holding these slaves should be brought before the Court. The reasons which induced us to make this declaration are set forth in the opinion published, 21 N. C., 169. The bill has since been amended by making all the necessary parties thereto, and it is now brought on to a hearing as against the new defendants, and for a rehearing as against the original defendants, to whom we have granted leave to have the former decretal order re-examined.

It is unnecessary to consider any of the special matters of defense set up by the new defendants because these are affirmative allegations on their part, in avoidance of the plaintiff's claim, and the answers containing them have been put in issue by a general replication, and no proofs whatever have been taken to support the allegations. But they all rely mainly on the ground of defense taken by the original defendants, under whom they set up title, that the plaintiff was paid and satisfied in full for this claim in a settlement with the administrator of Robert Graham in 1812; and on another, to-wit, that according to the established course of the Court a bill for an account
(198) by the next of kin against an administrator will not be entertained after a lapse of twenty years *from the death of the intestate*. We do not so understand the course of the Court. Lapse of time constitutes no *bar* to the demand of an account by the next of kin against the administrator; but it may raise a presumption that an account has been rendered and satisfaction made, or the claim to satisfaction abandoned. The farthest that we have gone in raising such a presumption from lapse of time is where there has been an interval of twenty years after the time appointed for settlement of the next of kin, and there has been no claim made, no explanation given of the

delay to claim, and no circumstances appearing to show the trust yet unclosed. Upon the pleadings it does not appear that such an interval elapsed in the present case. But if it did, we have already stated in the opinion referred to, the circumstances disclosed by the defendants which have brought us to the conclusion that the plaintiff has neither been paid for his share of Oney nor has abandoned his claim therefor. We see no cause to change that opinion, nor do we deem it necessary to repeat the reasons upon which it is founded.

The decretal order as heretofore rendered is therefore confirmed, and a similar decree must be rendered against the new defendants. The plaintiff must also be declared entitled to an account of the hires and profits of the slaves, but such account is not to be carried back further than to the time of filing the original bill. In thus restricting the account the Court is influenced by these considerations. We have heretofore stated our belief that the negroes remained in Mrs. Graham's possession until the division, by the general acquiescence of all interested. And when the division was made, leaving out the plaintiff, it was in fairness incumbent on him to give prompt notice of his claim to those who received the negroes as the next of kin, and probably under the supposition that there was no other claimant. Upon the taking of this account the commissioner will of course give to the defendants the benefit of all just allowances.

PER CURIAM. Decree accordingly.

*Cited: James v. Matthews*, 40 N. C., 29; *Glenn v. Kimbrough*, 58 N. C., 174; *Whedbee v. Whedbee, ib.*, 393; *Thompson v. Nations*, 112 N. C., 510.

(199)

## JOHN GUNTER v. JOHN THOMAS.

Where the plaintiff does not prove to the satisfaction of the court that his contract has been obtained from him by mistake or by imposition, misrepresentation, fraud or surprise on the part of the defendant, this Court cannot relieve him, although they may believe he has been hardly dealt with.

That the plaintiff entered into his agreement to avoid a controversy at law; that he was ignorant of the law, and was alarmed by the defendant issuing against him a writ of *ne exeat*, when it does

not appear that the defendant sued out that process with an improper object, constitutes no ground for relieving him from a contract voluntarily and deliberately entered into.

THIS was a bill filed at September Term, 1836, of MOORE Court of Equity. The answer of defendant was filed, replication entered, depositions of witnesses taken, and then the cause was set for hearing, and on affidavit of plaintiff removed to the Supreme Court for hearing. The facts are set forth in the opinion of the Court.

*Winston* for the plaintiff.
*Badger* and *Mendenhall* for defendant.

GASTON, J. The material facts stated by the plaintiff in his bill, as constituting his claim for relief, are that in November, 1819, he was appointed administrator of the estate of Benjamin Thomas, of Moore County, then lately deceased, and guardian of his five infant children, among whom and a married daughter and the widow of the intestate all the personal estate was distributable; that on 13 February, 1822, he paid over to the widow and to the defendant John Thomas, one of the wards who had attained full age, and to the husbands of such of the girls as were married, the sum of $142.39 each, as the true amount of their respective distributive shares; that at February Term, 1824, he resigned the guardianship of his remaining wards and thereupon paid over to John Thomas, who was appointed guardian in his stead, the same sum for each of them; and that in this he thought he had honestly discharged his duty as administrator and guardian, each of the settlements having been made under the supervision of auditors appointed by the county court.

(200) But the bill charges that afterwards John Thomas and the rest of the next of kin of his intestate filed a bill in equity against the plaintiff for an account; and he, "becoming old and being very unwilling to engage in law, and conscious of having managed the estate with good faith," agreed, before answering the bill, with the defendant John Thomas to refer the matter to Alfred Oliver and William McLane; that they made a report exhibiting a balance due from the plaintiff of more than six thousand dollars; and that this, their report, was set aside by the court. The plaintiff states that the large amount so reported due by the above-named referees, arose in part from a claim of the following kind: In the lifetime of his intestate a man of the name of Aughtry had taken charge of a stallion belonging to his intestate, and had executed a bond in

the penal sum of $1,000, conditioned for returning the horse at the end of the season in good order, and to account for half the money which should be received for his services. Aughtry had returned the horse just before his intestate's death, but in bad order, and had not accounted for the use of the horse; and after the plaintiff administered he settled with Aughtry and received from him one hundred dollars in full satisfaction for all claims, and which the plaintiff deemed a full compensation; but the referees hold him chargeable for the penalty of the bond and compound interest thereon. And the plaintiff states that the amount so reported was swelled improperly because of the rejection of vouchers offered by him, which were legal and ought to have been allowed. The bill then proceeds to charge that upon the suggestion of the defendant John that the plaintiff was about to remove his property out of the State, a *ne exeat* was issued in that suit, and he was commanded to give bond with surety in the sum of eight thousand dollars, conditioned not to remove the said property; that after this process came to the sheriff's hands, and before it was executed, he and the defendant referred the whole matter in dispute to the arbitrament of Stephen Berryman and Cornelius Dowd, Jr.; that these arbitrators, some time in 1834, entered upon the performance of the duty assigned them, and had proceeded therewith so far as to reject many charges and claims against the plaintiff contained (201) and allowed in the former report, and thereby to reduce largely the balance formerly reported against him, when John Thomas stated to him that if the arbitrators reduced that balance much he would not abide by their award, and proposed that they should settle the controversy between themselves, to which he agreed; that "being without counsel, since the *ne exeat* issued, and being very much frightened by that process; ignorant about law; fearing from the defendant's conversation that he would be finally stripped of everything, for that he would have to pay the whole penalty of the Aughtry bond with compound interest, and this would take everything he was worth: in this state of alarm and confusion he stupidly and ignorantly agreed to give the defendant, and in pursuance of the agreement did execute two bonds, one for the sum of $3,000, payable in notes on 22 November, 1835, and the other for $1,316, payable 22 November, 1834; and the defendant engaged to have the bill dismissed at his proper costs, and to procure from all the parties plaintiffs thereto receipts in full and refunding bonds, and thereupon executed to the plaintiff a bond in the penal sum of $8,000, conditioned for the faithful performance of this engagement.

The bill sets forth that afterwards he entered into a new agreement with the defendant, whereby he engaged to deliver to the defendant eight negroes, at the agreed price of $2,400, and to convey to him a certain tract of land which it charges to be worth at least $2,000, in satisfaction and discharge of the said bonds; and it declares that in pursuance of this new agreement he executed and delivered a bill of sale for the negroes, and that he *tendered* a conveyance of the land, upon defendant's delivering the receipts and refunding bonds, according to *his* engagement. The plaintiff charged that defendant refused to do this; alleges that the negroes are worth more than $2,400; that defendant and a brother of his have entered into possession of said tract of land, and declares that when the plaintiff made this last agreement with the defendant he did not believe he was indebted to the defendant or to his brothers and sisters, but that he entered into the same for the purpose of being
(202) freed from any controversy because of the bonds which, in an unguarded moment, when unfit from alarm and confusion to know and assert his rights, he had executed unto the defendant. The plaintiff admits that the bill in equity has been dismissed as agreed upon, although he complains of a disingenuous attempt to throw on him a part of the costs; and that the defendant has given him a credit upon the bond of $3,000 for $2,400, the price of the negroes so conveyed to him by the plaintiff, and complains that he has brought suit to compel payment of the residue, and also of the other bond, upon which no credit is endorsed. The prayer is that the bill of sale for the negroes may be canceled, and the negroes redelivered; that the action on the bonds may be enjoined, and that an account may be taken under the direction of the court of the estate of Benjamin Thomas, for which the plaintiff ought to be held responsible, he, the said plaintiff, thereby engaging to pay unto the persons entitled whatever might be found due from him upon taking said account, and for general relief.

The bill was filed in June, 1836, and John Thomas, who was the only defendant thereunto, put in his answer on 1 September following. The principal matters therein set forth are that the bill in equity referred to by the plaintiff was filed *bona fide* for the purpose of obtaining a fair and full settlement with the plaintiff in relation to his administration and guardianship, and under a full belief that in conscience a large sum was due from him to the claimants; that at the request of the now plaintiff, without waiting for an answer, the matters in dispute were, by a rule of court, referred to several persons chosen by the parties;

that these not being able to attend to the business, Alfred Oliver and Wm. McLane were, by the full consent of all parties, substituted in their stead, and that these found a balance due from the present plaintiff to the then complainants of $6,053.70; and that this report was set aside at his instance because not made by those named in the rule of court. With respect to the particular grounds of complaint stated in the bill against this report, or the account therein set forth, the defendant says that it is not true that the plaintiff was therein charged with the penalty of the bond given by Aughtry. He says (203) that in the account of the plaintiff returned to court the plaintiff debited himself with $160, the sum for which he sold the horse, and for $100 received of Aughtry; and that in the account returned by Oliver and McLane he is charged with the additional sum of $240, because of the impaired value of the horse when returned, for which Aughtry ought to have been compelled to make satisfaction; and he denies that any proper or legal voucher of the plaintiff was rejected by the said referees. Defendant says that at the term when this report was set aside the plaintiff urged that the matters in dispute should be referred to the arbitrament of Cornelius Dowd, Jr., and Stephen Berryman, to which the defendant assented; that the arbitrators entered upon the business, and were about making the balance nearly the same (a little less) as had been done before, when plaintiff proposed that they, the parties, should settle the matter themselves; and after various propositions for that purpose on the part of the plaintiff the defendant agreed, for himself and the other complainants in the suit, for whom he acted as agent, to receive the sum of $4,316 in full satisfaction of all demands; and in execution of that agreement the bonds or notes mentioned in the bill were executed by the plaintiff, and the defendant executed to him a bond in the penal sum of $8,000, with condition to indemnify the defendant against the claims of his principals, the other complainants; that blank receipts for these to sign were at the time written by Mr. Dowd, under whose supervision the whole business was conducted, and who prepared the notes of the plaintiff as well as the bond executed by the defendant; that he has since had all these receipts signed as was agreed upon, and has tendered them to the plaintiff, who refused to receive them, and yet retains in his possession the defendant's bond of indemnity.

To the best of his recollection, he says, there was no stipulation in the condition for procuring refunding bonds as alleged in the bill. He denies that this settlement was pressed upon the

plaintiff or that it was obtained from him by operating on his fears, or that the plaintiff did it unadvisedly or in haste;
(204) and insists that it was done freely and deliberately, without alarm or confusion on the part of the plaintiff, and after ample time for full consideration. The answer further states that the plaintiff, declaring an intention of removing to the western country, and professing a desire to be enabled to pay off his notes, did, upon making the settlement, cause his property to be advertised for sale, and the defendant offered to take the sale notes, payable at one, two and three years, in discharge of the plaintiff's notes; but afterwards, before the day of sale, the plaintiff proposed to make sale of a portion of this property to the defendant, and defendant finally agreed to buy eight negroes, at the price of $2,400; that the plaintiff thereupon executed a bill of sale for the said negroes, and according to the agreement between them he credited the price thereof on the larger of his bonds; that at the same time he offered to buy the tract of land mentioned in the bill at the price of $1,500, which he avers to be its value, but plaintiff not being willing to accept that price no bargain was then made for the land; that afterwards, upon defendant ascertaining that one of his brothers, Benjamin W. Thomas, was willing to take the land from him at the price of $1,616, he offered the plaintiff that price therefor, and a sale of the land was then made accordingly at the price of $1,616. That it was agreed by all the parties that the land should first be surveyed by the county surveyor; that the survey was accordingly made; a deed for the land from the plaintiff to said Benjamin, prepared by the surveyor and executed by the plaintiff; but the notes not being present a credit for the price of the land was not endorsed thereon; that an agreement having been entered into between the said Benjamin and the defendant, whereby the latter was to have a part of the land at the sum of $600, it was arranged that this part should be laid off and marked before the next county court, and the deed should remain with the plaintiff till then, at which time it was to be proved and registered and a deed from Benjamin executed to the defendant for his part. The answer alleges that the land was run off and marked, as agreed between the said Benjamin and himself; the notes delivered to Benjamin with directions to enter the additional credit on plaintiff surrendering the
(205) deed so retained by him; that the said Benjamin presented the said notes, required the said deed and offered to enter the said credit, but the plaintiff refused to surrender the deed or to take the credit, and instituted an action of ejectment

to recover possession of the land which had been formally delivered by the plaintiff to said Benjamin. The defendant offers to credit the further sum of $1,616 upon the notes, upon the plaintiff surrendering the deed wrongfully so detained.

There was a general replication to the answer, and many depositions have been taken on both sides. The most material of these will be stated.

The account as taken by the first referees is not exhibited nor the items thereof shown. All that we know of it, besides what may be collected from the pleadings, is that it stated a balance against the plaintiff of $6,053.70, and that whatever errors it might contain there is no evidence to show any dishonesty or partiality in those by whom it was made out. It is in proof that the arbitrators, Berryman and Dowd, did enter upon the performance of their allotted duty, for which they had been chosen by both the parties, and had before them the account made out by the former referees, which was a very long one; that after having proceeded through about half of it they ascertained, to their satisfaction, errors in it against the plaintiff to the amount of $1,737, which would be sufficient to reduce the balance therein found to the sum of $4,316. This fact was communicated to the parties, and thereupon the defendant offered to the plaintiff to take that sum and allow time for the payment of it, provided plaintiff would agree to put the arbitrators to no further trouble; and at the same time stated that if this proposition was not acceded to he should insist on the arbitrators going through the accounts, and he would acquiesce in the result, whatever it might be; but in that event would grant no further indulgence for payment than the law should allow; that the plaintiff required time until the next day to decide on the proposition, and defendant readily agreed not only to this but to any further time which plaintiff might desire for that purpose; that before the next day *one* of the arbitrators, Mr. Dowd, (206) proceeding in the meantime with his investigation of the papers, was induced to believe that there were further errors in the account of the referees injurious to the plaintiff, amounting to about $1,000, and distinctly announced this fact to both of them on the succeeding day; that the defendant declared that he would abide by the proposition made the preceding day, or if this were not accepted he should take whatever might be found due, be it little or much; that the parties retired to confer with each other and, returning, announced that they had concluded an agreement, and that according to this agreement Mr. Dowd wrote the note for the plaintiff and a bond of indemnity for

the defendant, which were thereupon executed. With respect to the sale of the negroes, it is in proof that this was some time after deliberately made upon an agreed price, and that credit, upon the execution of the bill of sale, was entered in the presence of the parties for the price aforesaid, and although there is some discrepancy in the opinions of the witnesses as to the value of the negroes, we are not authorized to say that the price was *not* a fair one. We have no evidence in the case as to the price agreed upon for the land. It is in proof that it was surveyed by the county surveyor, accompanied by the plaintiff and defendant; that after this the surveyor, at the request of the parties, prepared a deed, but which was not then executed because the defendant requested that the execution of it might be deferred until his brother, Benjamin W. Thomas, should return from Fayetteville; that then a survey was made of a part of the land which it was understood the defendant was to take of his brother Benjamin, to whom the plaintiff was to make a deed for the whole; that after this survey, and at the request of the plaintiff, the defendant and the said Benjamin, the surveyor wrote the deed from the plaintiff to said Benjamin, which was executed by the plaintiff; and that afterwards this deed was handed back to the plaintiff, to be kept by him until he and the defendant should come to a final settlement and exchange or cancel their papers, which was appointed to be done on a subsequent day at a different place. And it is also in proof that after the
(207) day was so appointed and before the institution of this suit the said Benjamin offered, in behalf of his brother, the defendant, the receipts which had been prepared by Mr. Dowd, signed by the complainants in the suit in equity, and desired to have his deed for the land returned; that the plaintiff offered to give up the deed if his notes were surrendered; that the said Benjamin offered to give up one of the notes and endorse so much on the other as in addition to the credit already given would amount to what he understood from his brother to be the price of the negroes and land, which would leave a balance of about $300 yet due from the plaintiff; and that in consequence of this disagreement the deed was not returned, nor the credit entered on the notes, nor the notes surrendered.

There is little further evidence that can affect the determination of the cause unless it be of boasts on the part of the defendant, of a most disreputable character, that he had, by his superior management, gotten more from his uncle than he could have obtained at law.

We have a strong impression that this transaction has been

a very unfortunate one for the plaintiff, and that the defendant has made unjust gains thereby, much to the plaintiff's injury. But, notwithstanding this impression, we are unable to discover any satisfactory ground upon which we can interfere to afford him relief. The object of the bill is to have his own contract rescinded, and it is not easy to see any distinct ground *alleged* to warrant such a prayer. He does not ask for relief on the ground of imbecility of intellect. He states, indeed, that he is unacquainted with law and legal proceedings; but such is the case of the vast majority of the community, who therefore are under the necessity, when they want information on these subjects, to apply for advice to professional men. The bill does not allege the existence of any confidential relation between the parties, which induced a reliance of the plaintiff on the representations of the defendant; nor does it set forth any representations of the defendant inconsistent with truth. The plaintiff declares that he was very much frightened by a process called a *ne exeat*, which had been issued against him; but it is not pre-
tended that this process was falsely sued out *for the pur-* (208)
*pose* of exciting terror; and until the nature of it is more distinctly shown we must assume that it was such process as under the circumstances of the case it was proper for the then complainants to ask for and for the court to order. The real cause of his alarm appears to have been the very large balance reported against him by the first referees. If he really believed that little or nothing was due from him such a report, although set aside, might indeed occasion serious uneasiness; but unless it was obtained by some unfair practice or management, or unless it was unfairly availed of to terrify and alarm him, it cannot be regarded as placing him in a state of moral duress. But upon the proofs the case, with respect to the alleged alarm and confusion, is weaker than the bill makes it. The bill charges that the plaintiff's alarm was increased by the threat of the defendant not to abide by the award, if the arbitrators much reduced the heavy balance found against him in the former report. No such threat appears to have been held out. On the contrary, both the arbitrators testify that the defendant unequivocally and repeatedly avowed his determination to abide by the award, whatever the result might be, if the parties did not come to a settlement. The only semblance of a threat was that in case a compromise was not made, and the arbitrators had to close the business, he should collect the balance which they might award him by the regular course of the court. And certainly a declaration that he would use his rights in this respect

cannot be characterized as a menace. Besides, if there was confusion or alarm on the part of the plaintiff there was no importunity or precipitation on the part of the defendant. Full time was given. more was offered, for deliberate consideration of the terms proposed. Before acceptance of them he was fully apprised, by one of the arbitrators, that his researches rendered it probable that the result of the arbitration, should it be conducted to a close, would be much more favorable to him than the proposed compromise. And there were both of the arbitrators at hand, men of business, undoubtedly disposed to do him justice, of whom he could ask for information on any particular point whereon he needed information to enable him to
(209) come to a prudent conclusion. But if we should allow that at the time of entering into the agreement of compromise he was alarmed or surprised into an unequal bargain, there seems to have been no confusion or want of free volition when this bargain was subsequently acted upon by a sale of the negroes. He states in his bill that he then believed that he did not owe what he had engaged to pay, but nevertheless preferred to do so rather than to engage in a controversy on the subject, and therefore concluded to execute the bargain in part by this sale of property. Now, if it clearly appeared that the original bargain had in fact been procured by imposition, by terrors improperly excited or unfairly availed of, by misrepresentation of any kind, by taking any advantage of ignorance or error, it may be admitted that this subsequent act, in execution of the bargain, would not have operated in this Court as a confirmation thereof unless it was seen when it was done the party was cognizant of his right, or of the facts on which his right depended, to vacate and annul the bargain. But where this does not distinctly appear such subsequent conduct is material to explain and give a character to the motives which operated in the forming of the original bargain. We are obliged to say that the plaintiff has not made out a case of fraud, mistake or surprise such as by the usages of this Court authorizes us to liberate him from his engagements.

Nor can the bill be upheld, as the counsel for the plaintiff has tried to uphold it, as one properly brought to surcharge and falsify an account stated. What is the account which it is the purpose of the bill to unravel? Not that taken by the first referees, for this account has been set aside *in toto;* not an account stated by the arbitrators, for they *stated* no account. They were going on with the investigation of the matters of charge and discharge between the parties, with the view to stating an

account, when they were discharged from further proceeding thereon by the act of the parties. Not an account stated by the parties themselves, for they never *attempted* to state any account, but agreed, the one to give, the other to accept, a gross sum in full satisfaction of whatever might be due, be it more or less, and without undertaking to ascertain the amount (210) due.

The bill prays for no relief in respect to the contract for the sale of the land, and is wholly silent in relation to any conveyance having been made thereof. That, therefore, is not a matter here in litigation.

Upon the whole, we deem it our duty to dismiss the bill; but, for obvious reasons, we make no decree for the defendant to recover his costs.

PER CURIAM. Bill dismissed without costs.

*Cited: Harshaw v. McCombs*, 63 N. C., 76; *Berry v. Hall*, 105 N. C., 63.

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WILLIAM GRAHAM, Administrator of Elizabeth McKnight, v. ALEXANDER and GEORGE TORRANCE et al.

It is too late for the next of kin to file a bill for an account against the administrator of an intestate after the lapse of fifty-six years from the death of the intestate—of forty-six years from the coming of age of the party entitled to the account—and of thirty-five years after the death of the surviving administrator by whom the account ought to have been rendered.

These facts are in themselves sufficient to bar relief sought independent of the other circumstances relied on.

THIS was a bill filed at Spring Term, 1836, of IREDELL Court of Equity, by William Graham, administrator of Betsy McKnight, against Alexander and George Torrance, executors of Ann Torrance, deceased, and Margaret Torrance and Samuel McKnight. The material allegations of the bill were that Adam Torrance died in 1783, intestate, and possessed of a large personal estate; that Ann, the widow, and Hugh Torrance, the eldest son, administered on the estate and received it into their possession; that Hugh soon after died and the whole burden of the administration devolved on the said Ann; that the administration account never was settled; that the said Ann kept possession of the estate until 1803, when she died, without having made

any division thereof; that the defendants Alexander and
(211) George Torrance were her executors; that the plaintiff's intestate was one of the distributees of Adam Torrance, and never had received her portion of the estate; that she died in 1830, intestate, and the plaintiff is her administrator; and the bill calls for an account of the estate, and that the representatives of the administratrix may pay over, etc. The proper parties were made. There was also a charge about certain negroes, which is mentioned in the opinion of the Court, but which did not affect the main question presented.

The defendants Alexander and George, executors, etc., in their answer relied upon the lapse of time, and also stated that the said Adam Torrance was killed at the battle of Ramsour's Mill, in 1779; that administration on his estate was granted to his widow Ann and his son Hugh in the following year; that in 1781 the British army in their progress through this State burnt the house and all the papers therein, including the papers of the administrators; that the plaintiff's intestate, Betsy, resided with her mother, the said Ann, until she was thirty years old; that she then married one McKnight, and that neither she nor her husband ever set up any claim to an account from the said Ann of the intestate Adam Torrance's estate; and then the defendants answered specially as to the negroes. The defendant Samuel McKnight answered and disclaimed all interest in the suit. The defendant Margaret answered as to the negroes. A replication was filed to the answers and depositions taken. After several orders the case was set for hearing and sent to the Supreme Court.

*W. J. Alexander* and *Boyden* for the plaintiff.
*D. F. Caldwell* for the defendants.

RUFFIN, C. J. It is not necessary in so plain a case that the facts should be minutely detailed. We think it *clear* that the plaintiff cannot have an account of the estate of the intestate, Adam Torrance. He died in June, 1780, and the bill was filed in October, 1836. Between June, 1780, and February, 1781, a sale was made by the administrators; and from the depreciation of the currency of the period the personal estate, includ-
(212) ing debts, may probably have amounted to something less than £200 *specie*, to be divided between the widow and eight children. In February, 1781, the British army in its march through this State passed the family residence and burned it and the furniture and books of accounts, and destroyed most

of the other property. Elizabeth, the intestate of the plaintiff, was an infant at her father's death, and was brought up and supported by her mother, the administratrix, with whom she resided until she came of age in 1790, and afterwards until her marriage in 1801. It does not directly appear that the administrator, Hugh Torrance, or after his death that Mrs. Torrance came to an account with Elizabeth of her father's estate and paid her share of it. But there is a strong presumption of fact in the affirmative. Both parties have examined Adam Torrance, a son of the intestate Adam, and he says that from the destruction of the British and the depreciation of the paper currency the net estate, after paying debts, amounted to but little, but that for his share of that the administrator settled with him and, as he understood in the family, though he does not know it, he settled also with the other children. At all events this witness or any other does not mention ever having heard Elizabeth at any time, either before or after her marriage, complain of not having received her share to her satisfaction. But whether such a settlement actually took place or not is not very material. The plaintiff comes too late with his bill for an account, after the lapse of fifty-six years from the death of the intestate, of forty-six from the coming of age of the party entitled to the account and of thirty-five after the death of the surviving administratrix, by whom the account ought to have been rendered. These facts, not to say anything of the state of the times and the loss of papers by fire and accident, are in themselves sufficient to bar the relief sought.

The plaintiff attempted to account for this *laches* by representing that McKnight understood the negroes received from his mother-in-law in 1801 were given by her in absolute property and received by him in satisfaction of his wife's share of her father's estate; whereas they have been recovered by the mother's executors upon the ground that they were not (213) thus given, but only lent for life. But this does not answer the difficulty at all. In the first place, there is no evidence of any such understanding of the transaction on the part of McKnight, or that those negroes had any connection with his wife's share of her father's estate. In the next place, we must take it now that the negroes were not transferred to McKnight, either in payment or as an absolute gift to his wife, but on a loan to himself. If so, he, being a party to the transaction, could not have misunderstood its character and been thereby misled as to his rights in respect to his wife's distributive share of her father's estate. It may be possible and probable that the

jury were mistaken in the trial at law (*Torrence v. Graham*, 18 N. C., 284) as to the real purpose of the mother when she put the negroes in her daughter's possession. But, if so, the effects of that error cannot be evaded in the method here adopted. The transaction was altogether independent of her duty to account with the next of kin of her late husband and intestate. The plaintiff is not, therefore, entitled to any relief in respect to the estate of Adam Torrance, deceased; and his bill, so far as it seeks the same, must be dismissed with costs.

The bill likewise alleges that the will of Mrs. Torrance does not dispose of the negroes, whose value has been recovered in the action of trover from this plaintiff, by her executors, and that the intestate Elizabeth, who survived her mother, is entitled to a share thereof as one of her next of kin, and prays an account in respect thereof also. To this the defendants do not make any objection on the score of multifariousness, but have answered and submitted to account and, indeed, paid into court a certain sum as and for the share of the money in their hands belonging to the plaintiff as administrator. The plaintiff is, therefore, entitled to an account upon this part of the case, and he may either take out of the office the sum paid in for him and put an end to the suit, or if not satisfied with the account of Mrs. Torrance's estate rendered by her executors he may have a reference in the usual form to have those accounts taken and his intestate's share ascertained under the direction of the court.

But that he will do of course at the risk of the costs in
(214) case he fails to shew himself entitled to more than was paid in.

PER CURIAM. Decreed accordingly.

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EPHRAIM PIERCY v. WILLIAM PIERCY et al.

The surety for an appeal in an action at law from the county to the Superior Court cannot have the case re-examined in a court of equity upon the allegation that the verdict and judgment at law were unjust, unless it also appears that by concert and collusion between the plaintiff and defendant at law such unjust judgment was suffered for the mere purpose of charging the surety when the principal was not really chargeable by reason of his insolvency.

Or unless he alleges a ground upon which the defendant at law himself could have had the judgment re-examined in a court of equity.

PIERCY *v.* PIERCY.

Where a defendant appeals from the county to the Superior Court, and then dies, whereupon the suit is revived against his executor or administrator, and the debt or demand established against the latter, but the plea of fully administered is found in his favor, the sureties for the appeal are bound for the amount of the debt or demand so ascertained, and judgment must be rendered against them accordingly, although the plaintiff only takes judgment *quando* against the executor or administrator, or sign judgment and pray process against the heirs or devisees.

THIS was a bill of injunction filed at the Fall Term, 1839, of YANCEY Court of Equity. Answers were put in and at September Term, 1840, upon motion of the defendants, *Bailey, J.*, ordered the injunction to be dissolved. From this interlocutory order there was an appeal by permission to the Supreme Court. The facts are fully stated in the opinion of the Court.

*Edney* for the plaintiff.
*Saunders* for the defendants.

RUFFIN, C. J. In 1823 Blake Piercy, now deceased, gave his bond to his son William, one of the defendants, for the sum of $100, loaned to the father. In 1826 William went (215) to live on a farm of his own and his father sent three negroes to assist him, two of whom worked for the son nearly a year, and the third two years. In 1829 the father, being then nearly seventy years of age and infirm, and his three sons, namely, Ephraim, the present complainant, William and Seaborn, came to an agreement for the division of the father's estate amongst the sons by which a plantation and other property to the value of nearly $2,000 over and above the shares of the other two sons were allotted to the plaintiff Ephraim, and in consideration thereof he was to pay the debts of the father, and also comfortably provide for and maintain his father and mother during their respective lives. To that effect the plaintiff then entered into a covenant with the father. After this the defendant William applied to Ephraim for payment of the bond given to him by his father; but Ephraim alleged that it had been paid by the father, and refused to pay it. William then instituted an action against Blake Piercy on the bond, and on the pleas of payment and satisfaction obtained a verdict and judgment. On the part of the defendant in the action it was managed by the present plaintiff Ephraim, and from the judgment he prayed an appeal to the Superior Court and became one of the sureties therefor, and obtained another. The parents became dissatisfied with the provision made for them by their son Ephraim and

left his house and went to reside with their other son William; and there the said Blake continued to reside until his death, intestate, in 1837, pending the appeal in the Superior Court. He had also instituted an action against Ephraim on his covenant to support him and his wife, which was also pending at his death. This last suit the present defendant William conducted on behalf of his father. Over and above this demand on the covenant the said Blake left no effects at his death. For the purpose of reviving and carrying on both of those suits the defendant Keenon, at the instance and request of William Piercy, administered on the estate of the intestate Blake and made himself a party to each of the actions; but he attended no further to them and left them to be conducted by William Piercy and Ephraim Piercy respectively, as the persons

(216) most conversant with and most concerned in the suits.

Upon the trial in the Superior Court of the action brought by William on the bond for $100, there was again a verdict and judgment for the plaintiff and also a judgment against the sureties on the appeal, of whom Ephraim Piercy was one; and execution issued thereon.

Ephraim Piercy then filed this bill against William Piercy and Keenon, and thereby charged that the hire of the negroes exceeded in value the amount of his father's said bond, and were applied in part to the satisfaction of the bond, and the residue of the hires were given by the father to the defendant William; that in truth the bond was given up to the father, but that after their parents went to live with William (which the bill attributes to undue influence of William for the unfair purpose of compelling Ephraim to pay large sums on his covenant) the father was induced in his dotage to redeliver the bond to William and to acknowledge that it had never been paid. The bill further charges that the plaintiff refused to enter into the arrangement for a division of the property and into the covenant to pay his father's debts until an account of those debts was stated; that accordingly they were stated by one Lewis, an accountant, in the presence and with the assistance of Blake Piercy and his son William and other two sons, and amounted to about $500, but that this debt on the bond for $100 was not included in that account nor mentioned by the defendant William as existing, and has been since brought forward for the purpose of unjustly or fraudulently charging the plaintiff on his covenant to pay the debts of his father. The bill further charges that the defendant Keenon is insolvent, and that by combination with the other defendant, William, he refused or

failed to plead the want of assets, although no assets have come to his hands, and by such plea he could have prevented the plaintiff at law from getting judgment against him, the administrator, and as a consequence against the present plaintiff and the other surety for the appeal; and also that a verdict was found upon the plea of payment in the suit at law upon the evidence of the father's acknowledgment before mentioned, which was untrue in fact and unfairly obtained (217) in the extreme dotage of the father, and by practicing on his infirmities, for the purpose of charging the present plaintiff on his said covenant.

The prayer of the bill was for relief against the judgment, and upon the exhibition of the bill the usual preliminary injunction was granted.

Both of the defendants have answered. The answer of Keenon admits that he offered no new plea upon being made party to the suit, because he was advised that it was not material that he should, and he understood that the present plaintiff was the person really interested in the suit and would attend to it in all respects, so as to protect himself if it could be done.

The answer of William Piercy denies that the hire of his father's negroes was applied or was applicable to the bond sued on, and says that he settled with his father for those hires and fully satisfied him therefor, and that no part of the bond had been in any manner paid or satisfied, but the whole principal and interest are justly due to him. He denies that the bond had ever been given up to him, and says that at the time of dividing his father's property, this debt was known as one which the plaintiff then understood he was to pay. He admits that at the trial at law he gave in evidence the acknowledgment of his father that the bond had not been paid, but denies that such acknowledgment was unduly obtained or was false in itself, and says that it was voluntary and often made by his father, and was in fact true. He admits that he received his parents into his house and there supported them for several years, but he denies that he did so for the purpose of injuring the plaintiff, or that he induced them to leave the plaintiff, or that he had any other motive for his conduct in this respect than the discharge of his filial duty. The answer then insists that the question whether the bond had been paid was a matter triable at law, and had really been fully and fairly tried upon the issues joined in the suit at law and under the management of the present plaintiff, who had the said Lewis and several other witnesses examined to support the issue on the part of the defendant

(218) at law, and failed therein both in the County and Superior Court, and therefore that there is no ground for invoking the aid of this Court.

On the coming in of the answers the defendant William moved to dissolve the injunction, and it was dissolved with costs; and the plaintiff, by leave of the court, appealed to this Court.

We do not perceive any ground of fact or law upon which the injunction could have been continued. It is to be remembered that the creditor is not seeking to charge the plaintiff in this Court on his covenant to pay his father's debts. If he were the plaintiff might well insist that he was no party to the suit at law, and that whether the debt was due from the latter or not he ought not to be charged with it because it was not among those which were stated to be owing by his father and which he agreed to pay. The answer, indeed, says that it was so stated to the plaintiff, and upon this motion we must take this explicit response to the bill to be true. But if it were otherwise, and that debt had not been known by or mentioned to the plaintiff so that as between these parties the plaintiff might not be bound by his covenant to pay it, yet if it had not been paid by the father it remained a debt of the father, notwithstanding the defendant William, from forgetfulness or other cause, omitted at that time to mention it. Consequently the father was still liable in an action against him on the bond, although the present plaintiff was not liable on his engagement then entered into. The father's liability was triable and determinable at law, and has been tried and determined twice against him. Now, the liability of the plaintiff in this suit does not arise on his original contract with his father but on his new engagement for him as surety for the appeal. This is an engagement to pay according to the result of that suit, and it is no answer to the plaintiff at law for the surety for an appeal more than for bail to say that the verdict and judgment were unjust, unless by concert and collusion between the plaintiff and defendant at law such unjust judgment were suffered for the mere purpose of charging the surety where the principal was not really chargeable by
(219) reason of his insolvency. But the bill charges no such collusion between the defendant William and his father. On the contrary, the charge is that the defendant imposed on his father in his dotage and thus procured unfounded confessions. But even in that form the charge is wholly and directly denied. Upon this part of the case, therefore, there is no ground for relief to the plaintiff. As between the parties of record at law the question of payment was both fully open and has been

fully tried at law, and this Court cannot re-examine it. There is no intimation of collusion on the part of the father, and the charge of collusion between the two defendants here does not relate to this part of the case. The pleas of payment and satisfaction were put in by the father, or rather by the plaintiff in the father's place; and it is not pretended in the bill that the administrator interfered to prevent the present plaintiff offering on those issues all the evidence he chose, and the answers state that the whole management of the suit was left to this plaintiff. Collusion being thus out of the case there is no ground on which the surety for the appeal can have the case re-examined here, if the party defendant to the suit could not himself have it re-examined on the same ground. But there is a charge of collusion between the present defendants respecting another part of the case. It is charged and not denied that Keenon is insolvent, and that he administered at the instance of William Piercy for the purpose merely of having the suits between the father and his sons revived, and without any intention on his part of interfering in the suits, and it is admitted that his intestate left no effects and that he did not plead "no assets." Upon this it is contended for the plaintiff that he ought to be relieved because, by pleading the want of assets, there would have been a judgment in favor of the administrator upon which the sureties to the appeal would have been discharged. We should think the plaintiff entitled to the relief he asks if the administrator could have been admitted to plead, as it is thus supposed he ought, and if the effect of a verdict in favor of the administrator on that plea would discharge the surety. But upon
those points the plaintiff, as we think, labors under a (220) mistake.

We believe it is common in this State for executors and administrators, against whom a suit originally brought against the testator or intestate is revived, to plead fully administered or other pleas to protect themselves as executors or administrators.

How the practice arose we are not informed, and it is contrary to the course in England. *Smith v. Harman*, 6 Mod., 142; 1 Salk., 315; 2 Saund., 72, note O. But we do not now propose to consider the propriety of our practice, but for the purposes of this cause admit that the administrator might have so pleaded. Still the surety for the appeal would not have been discharged, although there would have been judgment to a certain extent in favor of the administrator. If in a suit revived against an administrator he may plead as in a suit brought originally

against him then, in the revived suit, any judgment may be rendered for the plaintiff which, upon the same pleas and verdict, would be given in his favor in an original suit against the administrator. Therefore, upon a plea of fully administered and a verdict in affirmance of it, the plaintiff might, according to our law, sign judgment for his debt *quando* or sign his judgment and pray process against the heirs. In either case there is a debt ascertained and adjudged to the plaintiff, for which, according to the terms of his bond, the surety for the appeal is liable. The absurdity of holding otherwise will at once appear from this consideration, that it would discharge the surety upon the ground of the principal's inability to pay, whereas the danger that he was or might become insolvent was the very reason for requiring a surety who is to pay the recovery if the principal either will not or cannot pay it. The present plaintiff has been in no degree injured by the omission of the administrator to plead the want of assets, since if he had so pleaded the plaintiff would have been liable in the same degree and to the same extent as he now is upon the judgment rendered against him.

It must therefore be certified to the court below that
(221) this Court sees no error in the interlocutory decree, and the plaintiff must pay the costs in this Court.

PER CURIAM. The interlocutory decree dissolving the injunction confirmed.

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NORMAN McDONALD et al. v. DANIEL McLEOD.

Where a bargainor executes a deed, absolute on its face, and asks a court of equity to declare it a mortgage, he must show that the real intent of the parties was that it should only be a *security*, and that it put on the form of an absolute deed by reason of the ignorance of the draftsman, or from the mistake of the parties, or because of undue advantage taken of the necessities of the debtor.

Solemn instruments between parties able to contract must, in the presumption of every court, declare the truth in regard to the subject matter of their contract until error, mistake or imposition be shown.

Where the instrument given was an absolute bill of sale for a slave, where the sum paid was not grossly disproportionate to the value of the slave, where it did not appear that the agreement on the part of the defendant that the plaintiffs might have the slave on repayment of the purchase money, was made before or at the

time of the execution of the bill of sale—where the defendant had refused to take a mortgage, and seven years had elapsed without any claim on the part of the plaintiffs, the court would not consider the bill of sale as a mortgage, and dismissed the plaintiff's bill calling for such a decree.

THIS was a bill filed in MOORE Court of Equity, at Spring Term, 1837. Answers were put in, replication made, depositions taken, the cause referred to the clerk and master, a report made and confirmed, and the cause set for hearing and removed to the Supreme Court at the Fall Term, 1840. In the Supreme Court a petition was filed to rehear the interlocutory order referring the case to the clerk and master, and the petition was granted. The facts of the case are stated in the opinion of the Court.

*Strange* and *Winston* for the plaintiffs.
*W. H. Haywood, Jr.*, for defendant.

GASTON, J. This bill was filed by Norman McDonald and John McDonald against Daniel McLeod in the court (222) of equity for the county of Moore, on 7 February, 1837; and its object is to let in the plaintiffs to redeem a negro slave named Joe, which the bill alleges to have been conveyed by them to the defendant as a security for the repayment of a sum of money lent to them by him. The plaintiffs state in their bill that in February, 1829, having occasion for the sum of $700 to pay judgments obtained against them by one David Kennedy, they made application to the defendant for a loan of money, and the defendant thereupon advanced and lent to them the sum of $400; and for the purpose of securing the repayment they delivered the negro slave Joe, then of the age of twenty-two years and of the value of $600, and at the same time executed and delivered to the defendant a bill of sale for the said negro. The plaintiffs charge that it was not intended, either by them or the defendant, by the execution of the said bill of sale, absolutely to sell the said slave, but on the contrary it was at the time of the transaction expressly declared and agreed by and between the parties thereto that the plaintiffs should, notwithstanding the said bill of sale, be at liberty to redeem the said slave at any time they thought proper on repaying the said four hundred dollars. The plaintiffs complain that they have repeatedly applied to the defendant to come to a settlement with them in regard to this transaction, and have repeatedly offered to pay whatever sum might be found due to him thereupon, and required the redelivery of the said slave; and, particularly, that

in November, 1836, the plaintiff Norman tendered to the defendant the whole sum of $400, and demanded restitution of the slave, but the defendant unconscientiously refused to comply with any of these requisitions; and they therefore pray that an account may be taken of what is due to the defendant for principal money in respect of said loan, and of what may be due to the plaintiffs because of the hire or value of the services of the said negro while held by the defendant, and that
(223) the defendant may be decreed to redeliver and reconvey to them the negro so deposited with him, and for further relief.

The defendant's answer was filed in August, 1837, and sets forth that some time in 1829 the plaintiffs did apply to the defendant to borrow money, and offered to give a mortgage upon the negro man Joe as security for its repayment, but the defendant refused to lend on mortgage of the negro; that the defendant proposed to purchase the said negro if the plaintiffs would take a fair price therefor; that the plaintiffs assented to this proposition and the sum of $400 was agreed upon as the full price of the negro; that the defendant paid this sum to the plaintiffs, and they thereupon executed an absolute bill of sale of the negro to the defendant. He avers that he paid the full market price of negroes of that description, and that the sum paid was understood and expressed to be in absolute payment for the negro, but states that after the money was paid and the bill of sale executed Norman McDonald, one of the plaintiffs, asked of the defendant whether if the said Norman should within a reasonable time pay the defendant $400 he, the defendant, would not let him have the negro, and that in answer to this inquiry the defendant declared that he would not come under any obligation to do so, but would act thereupon as he should think proper. The defendant further states that he has resided constantly within eight miles of the plaintiffs; that from the time of his purchase of the slave in 1829 until near the close of the year 1836 the plaintiffs never demanded nor set up any claim to the slave, and that then, when negroes were selling at very high prices, the plaintiff Norman tendered the money and made the demand set forth in the bill. To this answer there was a general replication. At the succeeding term, March, 1838, the cause was continued, and at September Term, 1838, set down for hearing. At the same time, however, there appears to have been an order whereby it was "referred to the clerk and master to take an account as to the hire of the negro and report to next court." To the succeeding term (March, 1839) a report was

returned wherein the master states that he had notified the parties to attend, and that one of the plaintiffs did (224) attend accordingly; that he finds that the plaintiffs received of the defendant $400 on 15 February, 1829; and that calculating interest on this sum and applying the price of the annual hire of the negro, which he finds to be $67.50, first to the extinguishment of the interest on the sum and afterwards to the discharge of the principal, he finds that on 15 February, 1839, there was a balance in favor of the plaintiffs of $171.60. The transcript of the record informs us that the report was filed and confirmed and the cause set down for hearing. At the succeeding terms of March, 1839, September, 1839, and March, 1840, the cause was continued for a hearing, and at September Term, 1840, was ordered to be removed for a hearing to this Court.

Upon the opening of the case here it was insisted by the counsel for the plaintiffs that the reference ordered below was a peremptory adjudication by the court that the defendant was liable to an account as mortgagee for the hire of the negro, and that the report of the master under that order of reference having been confirmed it was thereby conclusively established that not only the entire sum advanced by the mortgagee and the interest thereon had been refunded, but that the defendant was indebted to the plaintiffs by reason of the excess of hires as found by the master, and that nothing remained but to fashion the decree of this Court so as to effectuate the interlocutory decrees aforesaid of the court below. Although a doubt could scarcely be entertained but that the reference, report and proceedings thereon were intended or supposed by the parties, according to the loose practice formerly very prevalent in the courts below, not to decide the great question of mortgage or no mortgage on which the controversy depended, but simply to speed the cause and put it in a state for an immediate final decree in case the court, upon a hearing, should declare the plaintiffs entitled to relief as mortgagors, the established rules of practice of courts of equity would have probably compelled us to acquiesce in the soundness of the position taken by the counsel for the plaintiffs. See *Bruce v. Child,* 11 N. C., 377; *McLin v. McNamara,* 21 N. C., 409. We have been relieved, however, from all difficulties on this subject by a petition for (225) a rehearing of the interlocutory decrees below, which we very readily granted, and we now proceed upon the pleadings and proofs to examine the claim of the plaintiffs to relief.

The proofs offered as bearing on the question whether the negro was sold or pledged are few.

In behalf of the plaintiffs it is testified by their brother, Swain McDonald, who it would seem (though he does not distinctly so declare) was present when the transaction was consummated, that "Norman McDonald wished a condition for redemption to be inserted in the bill of sale, but defendant absolutely refused, saying that such a condition would make it a mortgage and that he must have a firm bill of sale, but that whenever said McDonald would pay him back the money he would let McDonald have the negro." He afterwards repeats with a slight modification that "the McDonalds still wish to have a condition to redeem in the bill of sale, but defendant refused and said he would have nothing to do with a mortgage, but that whenever they paid the money they should have the negro back." Sarah Carter testifies that she was present at Norman McDonald's some eight or nine years past, when said Norman and his brothers John and Swain and the defendant were round a table counting money, that after the money was counted the defendant, addressing himself to Norman McDonald, said, "this is your money," upon which McDonald answered, "the negro is yours until I return you the money," and the defendant replied, "to be sure or certain," she cannot recollect which. The plaintiffs offer, also, the depositions of Daniel McKethan and Archibald McCollum in relation to the value of Joe at the time of the alleged mortgage. The former states that the negro was as likely as any of his age in the neighborhood and that the witness would have given $500 for him, but he does not know that he would have sold for that sum, where not personally known, and the latter supposes he ought to have sold for $500. The defendant has taken no testimony.

We are unable to discover any satisfactory ground upon which the plaintiffs entitle themselves to the relief of this Court.

(226) It is not questioned but that a deed, absolute upon its face, may be shown by extrinsic facts to have been executed as a security for the payment of money, and to have put on the form of an absolute deed by reason of the ignorance of the draftsman, or from mistake of the parties, or because of undue advantage taken of the necessities of the debtor. In examining transactions between borrowers and lenders and between necessitous men and their creditors courts of equity, aware of the unequal relation of the parties and of the facility by which the former may be surprised into improvident arrangements, and of the moral coercion which the latter can exercise over their apparent freedom of action, are particularly attentive to any circumstances tending to show an inconsistency between the

form of an act and the intent of the parties, and will take great pains when their suspicion is thus excited to get at the substance of what was done or intended to be done by them. But unquestionably it is a conclusion of reason, and therefore must be the presumption of every court, that solemn instruments between parties able to contract declare the truth in regard to the subject-matter of their contract until error, mistake or imposition be shown.

The defendant admits that the application of the plaintiffs was for a loan of money to be secured by a mortgage of the slave, and although he declares that this application was rejected, nevertheless the application itself indicates a state of things between the parties, a negotiation for a loan, which calls for the scrutiny of the Court into the transaction which followed upon it. If the sale, or apparent sale, which then took place had been for a price grossly disproportionate to the value of the slave, this would have been a material circumstance to show either that the absolute deed was intended to operate only as a security for repayment of the money then advanced, or was obtained by a fraudulent misrepresentation that it should be used only as such a security. But the evidence does not establish a gross disproportion. The answer, which is evidence for the defendant in this respect, because directly responsive to the bill, positively states not only that the sum paid was agreed upon by the parties as the full price, but that it was in (227) fact the full market price of the slave. Nor is *this* statement disproved. The value of the *slave* is necessarily a matter more or less of opinion, and is not susceptible of very precise ascertainment. The only witnesses examined as to this point are those introduced by the plaintiffs and were selected, as we may well presume, because their opinions were known to be favorable to a high valuation. Neither of these state what at the time of the transaction was the general price of slaves like the one in question. One of them declares indeed that he himself would have given $500 for Joe, but adds that he does not know that such a price would have been given by any person to whom the slave was not personally known; and the other expresses his opinion that Joe ought to have commanded $500. Now if we should allow *this* to be the value of the negro, it is exceedingly improbable that any person would have advanced $400 as a loan, and looked *only* to the negro as security for its repayment. The plaintiffs do not represent themselves as entering into any *engagement* to refund the money, and pretend that they were at liberty to repay it *any time*. If the slave died the

defendant was to have no means of compelling repayment, and if he lived the plaintiffs might redeem when they pleased.

If such a contract were indeed made the defendant might set up a plausible claim to be relieved from it because of imposition. Nor can we disregard the circumstance that the conduct of the parties can scarcely be reconciled to the view of the transaction which is pressed on us by the plaintiffs. The defendant for seven years, under an absolute deed, exercises the rights of absolute owner, and the plaintiffs during this time are not heard to intimate any claim to the property. Nor is the conclusion to which an examination of the extrinsic circumstances accompanying the sale or apparent sale evidently leads us, much, if at all, weakened by the direct evidence on which the plaintiffs rely. The principal evidence is that of Swain McDonald, their brother, and this is very deficient in precision and fullness. It does not state the *details* of the transaction nor at what period of it the conversation passed to which he testifies, whether the
(228) desire expressed by his brother Norman to have a condition of redemption in the bill of sale was before the deed was prepared, or was stated by way of objection to its execution, or was made known after its execution, and whether the declaration of the defendant that Norman or the plaintiffs might have the negro again on paying the money back was before the *bargain* was concluded or afterwards. One fact, however, is explicitly stated by him, that the defendant declared that he would not assent to such a condition being added to the deed for that it would convert the deed into a mortgage, and he was determined to have nothing to do with the mortgage. After such a declaration it will not readily be inferred that *in effect* the agreement was for a mortgage. Indeed this testimony, as well as that of the witness Sarah Carter, is consistent with the account given of the transaction by the defendant except that the witnesses make his reply to the proposal of an agreement for a repurchase more unequivocal than it is represented in the answer of the defendant.

Whether such an agreement was in truth made and if made, within what time the condition of repurchase was to be acted on, are inquiries into which we need not enter, for the bill is founded solely upon a ground which the plaintiffs have failed to establish, that the negro was mortgaged as a security for money borrowed.

PER CURIAM. The bill dismissed with costs.

*Cited: McLaurin v. Wright,* 37 N. C., 97, 99; *Kelly v. Bryan,* 41 N. C., 287; *Shields v. Whitaker,* 82 N. C., 521; *Watkins v. Williams,* 123 N. C., 174; *Porter v. White,* 128 N. C., 44.

(229)

JAMES QUINN v. JOSEPH GREEN et al.

A sheriff who has seized property under execution, which is claimed by other persons besides the defendant in the execution, cannot sustain a bill in equity requiring these persons and the plaintiff and the defendant in the execution to interplead, so that their respective rights may be ascertained.

In a bill of interpleader, the plaintiff must always admit a title as against himself in all the defendants. A person cannot file such a bill, who is obliged to state that, as to some of the defendants, the plaintiff is a wrongdoer.

THIS was a bill in equity, filed in the Court of Equity of LINCOLN, at September Term, 1839. The allegations and prayer of the bill are set forth in the opinion of the Court. Two of the defendants demurred generally to the bill, and the demurrer coming on to be argued at Spring Term, 1840, of Lincoln Court of Equity, before his Honor, *Settle, J.,* it was decreed that the demurrer be sustained and the bill dismissed. From this decree the plaintiff appealed to the Supreme Court.

*Saunders, Alexander* and *Hoke* for the plaintiff.
*Boyden* for the defendant.

RUFFIN, C. J. The plaintiff, being sheriff of Lincoln County, received a writ of *fieri facias* for $2,498.23, with interest and costs, recovered by the defendant Green against the defendant Johnson, as administrator of Timothy Chandler, deceased. The plaintiff placed the execution in the hands of one Maury, one of his deputies, who seized under it two slaves, which were found in the possession of the defendant Morris, and also six other slaves and some cattle and household furniture which were found in the possession of the defendant Elizabeth Chandler. The seizure was made by the direction of the creditor Green, who pointed out the slaves and other articles to the deputy sheriff as property belonging to the estate of Timothy Chandler, derived from Elizabeth Chandler by their intermarriage and his subsequent possession. Morris, alleging the two slaves that were taken out of his possession to belong to him under (230)

an appointment by Elizabeth Chandler under a power in the will of one Arthur Graham, a former husband of the said Elizabeth, instituted an action of detinue for those slaves against Maury and Green. James Graham, as administrator of one William Graham, deceased (who was a son of the said Arthur Graham, deceased), also claimed the other six slaves under a provision in the will of the father, Arthur, and brought an action of detinue for them against the same persons. A third action, namely, trespass, was brought against the same parties, Maury and Green, by Elizabeth Chandler, who claimed property in part of the slaves and other articles and the right of possession of the whole, and denied that any part was of the estate of her last husband, Timothy Chandler. The deputy sheriff delivered all the effects seized to his principal, the present plaintiff, and he was required by the creditor Green to proceed to a sale, and also by Johnson, the administrator of Timothy Chandler, who insisted that the slaves and other things did belong to the estate of his intestate. The sheriff then filed this bill as a bill of interpleader against Green, Johnson, administrator of T. Chandler, and against the plaintiffs in the three actions at law, that is to say, Morris, James Graham, administrator of William Graham, and Elizabeth Chandler, in which he acknowledges the possession in himself of all the property seized by his deputy, and submits to deliver to either or any of the defendants or otherwise to dispose of it as of right he ought, and in the meanwhile prays for an injunction against further proceedings in the suits already brought at law, and also to restrain the creditor Green from taking any steps at law to compel him to sell, or amerce, or otherwise punish him for not selling.

To this bill the defendants Green and Johnson, administrator, demurred, and the other defendants put in answers setting forth the nature of their respective claims and submitting to interplead with the other parties. But when the cause came on to be argued on the demurrer between the plaintiff and the two defendants, who had put it in, the judge of the court of equity was of opinion that the case was not a fit one for a bill (231) of interpleader, and therefore sustained the demurrer and dismissed the bill as against those two parties. From that decree the plaintiff appealed to this Court.

In support of the bill the counsel for the plaintiff has been unable to adduce the authority of any adjudication. His only reliance is a *dictum* of *Lord Mansfield* in *Cooper v. Sheriff of London*, 1 Bur., 37; in which he mentions a bill filed in chancery by the sheriff in a case of disputed property as one of the modes

in which a sheriff may be relieved from danger or indemnified from loss. That, however, could not be a question in that cause, and indeed the doctrine belonged to another jurisdiction, and therefore, although laid down by an eminent judge, is not authority. We are saved the necessity of discussing the question on elementary principles by having a case in equity deciding it in opposition to that opinion of *Lord Mansfield*. *Slingsby v. Boulton,* 1 Ves. & Bea., 334, was a bill of interpleader by a sheriff similar to the present, and on the motion for an injunction *Lord Eldon* inquired for an instance of such a bill by a sheriff, and none being cited he declared the sheriff to be concluded from stating a case of interpleader because in such a bill the plaintiff always admits a title against himself in all the defendants. He said a person cannot file such a bill who is obliged to state that as to some of the defendants the plaintiff is a wrongdoer.

If in this case the property was in the plaintiffs in the actions that have been brought at law, the sheriff was a trespasser in seizing it, and he did it upon the responsibility of answering for the act as a trespass. Against that risk he should have provided by taking a bond of indemnity from the execution creditor. He cannot escape from responsibility by turning over the owners of the property on the creditor. On the other hand, if the property was really subject to the debt it was properly seized, and the creditor is entitled to have it sold, notwithstanding unfounded actions or claims by third persons. The sheriff having thus made himself liable to one or other of the parties by misfeasance or nonfeasance is not a mere stakeholder, but his interest is directly involved in any decision that can be made on the claims of the other parties. (232)

The decree must therefore stand affirmed and with costs in both courts.

PER CURIAM. Decree accordingly.

*Cited: Quinn v. Patton,* 37 N. C., 51.

GEORGE K. SHUTT and Wife v. ARCHELAUS CARLOSS.*

A guardian who permits his female ward to marry under the age of fifteen years cannot, for that reason, be held accountable as trustee for the wife after the marriage and after he has delivered over the property to her husband.

The guardianship ceased upon the marriage, for the statute (Rev. Stat., c. 71, s. 7, and c. 34, s. 47) does not declare such marriage void, but only subjects the husband, *upon conviction*, to certain penalties and to the loss of his wife's property.

A guardian is not bound to have a marriage settlement made in favor of his female ward under any circumstances, even when she has a large estate and is about to marry a man of slender fortune.

Nor is he answerable in pecuniary damages for marrying his female ward "in disparagement."

Inequality of fortune never constituted "disparagement." Thereby was contemplated some personal or social defect or disqualification, etc.

Compensation cannot be allowed, independent of his commissions, to a guardian for his *time* and *trouble*, but these are to be considered in fixing the *quantum* of his commissions.

THIS was a bill filed by the plaintiffs against the defendant in CHATHAM Court of Equity. The defendant put in his answer, to which there was a replication; a reference to the master and a report were made and exceptions filed to the report. At Spring Term, 1838, the cause was set for hearing and transmitted by consent of parties to the Supreme Court. The facts as (233) appearing from the pleadings and proofs are stated in the opinion of the Court.

*W. H. Haywood* for the plaintiff.
*Badger* and *Manly* for the defendant.

GASTON, J. Thomas Stokes, of the county of Chatham, died intestate in 1811, leaving three children, Jordan, Sylvanus and William B. Stokes, and administration on his estate was granted to the defendant. William, the eldest of the children, died shortly after his father, leaving a widow and one child, Hannah H. Stokes, and the defendant also administered on his estate. Hannah H. Stokes being an infant, the defendant, after the death of her father, was appointed her guardian. On 22 January, 1824, she intermarried with Robert Carloss, son of the de-

*This case was decided at December Term, 1838, but has not before been reported.

fendant, who died intestate in October, 1827, leaving the said Hannah and three infant children surviving. In October, 1830, she intermarried with George H. Shutt, and on 7 March, 1831, they filed this bill.

The bill alleged that at the time of the intermarriage of the plaintiff Hannah with her first husband she was not quite fourteen years of age, she having been born on 14 March, 1810; that the said marriage was procured by the influence and management of the defendant; that Robert Carloss at the time of the marriage had little or no property, but was dependent on his father, who had considerable landed and personal estate; that no settlement of any kind was made upon her at the time of the marriage; that upon the marriage he received from her guardian a large part of her estate, and either wasted it or so encumbered it with his debts that the same had been lost to her; that upon his death administration of his effects was granted to the defendant, who as such administrator had taken possession of part of the property which had been hers, claiming it as the property of the said Robert. The complainants insisted in the first place that the defendant, having suffered or procured the said Hannah to be married at such a tender age, without the consent or advice of the court and without any settlement, was bound to make good whatever loss she had sustained, particularly as the marriage was with his own son, and (234) therefore was to be held to account with the plaintiffs as guardian of the said Hannah up to the time of her last marriage. And they further insisted that the first marriage of the said Hannah having taken place before she was fifteen years of age, without a certificate from the defendant, her guardian, that she attained the age of fifteen years and had his permission to marry, and this being known to the defendant, her first husband acquired no right by the said marriage to any part of her property real or personal by reason of the provisions of an act of the General Assembly of this State passed in 1820, entitled "An act concerning the marriage of female infants"; and that all the estate, both real and personal, which she had at the time of that marriage ought to be delivered over to the plaintiffs by a decree of this Court. They complained of the defendant refusing to come to an account with them concerning his administration of the estate of Thomas Stokes, and of his guardianship aforesaid, and of the loss sustained by the plaintiff Hannah by reason of her first marriage, or to render any account of his guardianship during the time she was the wife of his son, and to make good to them the debts of his said son paid out of her estate; and

prayed that all proper accounts might be taken, that the defendant might be decreed to stand as a trustee of all the plaintiff Hannah's property during her coverture with Robert Carloss and up to the time of her marriage with the plaintiff Thomas, and account for the same, and the rents, hire and profits thereof, and make good all losses which she had sustained by reason of her first marriage, and make good all the debts of her first husband paid out of her estate, and for general relief.

The defendant in his answer set forth an account of his administration of the estate of Thomas Stokes, as the same appeared of record in the county court of Chatham, taken by order of said court, on the petition of Sylvanus and Jordan Stokes by commissioners for that purpose appointed, whereby it appeared that there was a balance due to him of $706.20, and averred that the said account was true and just. He stated also that in conformity with the decree made upon that petition and confirming that report he settled in full with the said
(235) Sylvanus and Jordan. The defendant further stated that William B. Stokes at the time of his death had no property but what was coming to him from the estate of his father, Thomas Stokes, and died excessively indebted. And he referred to the account current of his administration of the property which was allotted to him as the administrator of William in the division of Thomas Stokes's estate, as the same was returned to the county court of Chatham and was there of record, and averred that the same was correct. He also averred that he had settled in full with Hardy Christian and Ruth, his wife, which said Ruth was the widow of William B. Stokes, for her distributive share in William B. Stokes's estate. The defendant further averred that after the marriage of the plaintiff Hannah with Robert Carloss the defendant delivered over to the said Robert all the property of his said wife, and had a full settlement of his accounts as her guardian, upon which settlement a balance was found in his favor of $382; declared that this balance was just and true, and said that it was understood and agreed between himself and the said Robert when this settlement was made that the defendant should not require payment of the said balance, but relinquished his claim therefor to the said Robert and his wife by way of advancement to the said Robert, his son. The defendant did not admit that the plaintiff Hannah at the time of her intermarriage with the said Robert was under the age of fifteen years, and especially denies that at the time of the said marriage, if in truth she was under that age, he knew that she was so or that his son knew it; but, on the contrary,

saith that he did then believe her to be over the said age, which belief was founded on her appearance, she being a well grown and stout young woman. He admitted that he had administered on the estate of Robert Carloss and had paid off his debts, a large proportion of which had been contracted in building a dwelling-house and making other permanent improvements on the real estate of the plaintiff Hannah. To this answer the plaintiff put in a general replication, and at the September Term, 1832, the following order was made: "By consent of parties, without prejudice in any form to either party on any of the matters alleged or insisted on, the master (236) is directed to state the accounts of the defendant: (1) as administrator of Thomas Stokes, deceased; (2) as administrator of William B. Stokes, deceased; (3) as administrator of Robert Carloss, deceased; (4) as guardian of Hannah Shutt, the plaintiff, and report said accounts to the next term. The master is directed further to report what was the age of the said Hannah when she married Robert Carloss, and the time of such marriage; the value of her estate and the value of said Robert's estate at their said marriage; and particularly the master is directed also to report the value, nature and condition of said Hannah's estate in Virginia and Tennessee, with any other special matters which either of the parties shall require of him connected with this suit." This order of reference was renewed from term to term until September Term, 1836, when the master made his report, to which were annexed long and detailed accounts of the administration by the defendant of the estate of Thomas Stokes, and also of the estate of William B. Stokes, and also an account of the defendant as guardian of the plaintiff Hannah until her intermarriage with Robert Carloss in 1824, when the master stated that all her property was then delivered over to the said Robert. The master reported that on the account of the defendant as administrator of Thomas Stokes there was a balance due to the defendant of $819.91; that on his account as administrator of William B Stokes there was a balance in his favor of $389.17½; and that on his guardian account there was a balance due him of $394. The master's report found that the plaintiff Hannah at the time of her marriage with Robert Carloss was under the age of 14 years, and was worth in real and personal property the sum of $9,800, and that Robert Carloss was then worth a horse, bridle and saddle, and perhaps a few hundred dollars in cash, and that at the death of the said Robert the condition of the estate of the said Hannah was not materially changed. The master further reported that

he did not state the defendant's accounts as administrator of Robert Carloss for the reason that the defendant averred
(237) that he was not ready to go into that account, and it was not insisted upon by the plaintiffs.

To this report several exceptions were taken by the plaintiffs and one exception by the defendant. And the parties having completed their proofs the cause was set down for hearing and transmitted to this Court, where it has been heard as well upon the equity arising upon the pleadings and proofs as upon the several matters included in the exceptions of the parties.

It appears from the proofs in the cause as well as upon the finding of the master that the plaintiff Hannah at the time of her marriage with the defendant's son was under the age of fourteen years. It does not appear that this fact was known either to the father or the son, and the defendant's positive averment that he believed her to be over fifteen years of age is so confirmed by the testimony with respect to her womanly appearance at that time that the Court yields credence to it. He knew, however, that she was very young, and might so easily have ascertained by inquiring of her mother whether she had or had not attained the age of fifteen; that his neglect to make that inquiry is nearly equivalent to knowledge of the fact that she was under that age. There is no proof that the defendant employed any arts or exercised his influence as guardian to bring about the marriage. When it took place she was residing with her mother, and without the consent and against the will of her mother ran away with Robert Carloss to be married. It sufficiently appears, however, that the defendant was well aware of the intended marriage and made no effort to prevent it. We hold, therefore, that the marriage took place with his connivance, if not direct approbation. It was an unequal marriage in point of fortune. The husband had scarcely any property, and she was worth nearly ten thousand dollars. His father, however, was a man of considerable estate and respectable standing in society, and the young man had reasonable expectations of fortune from him at a future day. He had recently arrived at age, and, notwithstanding a propensity for dissipation, which had begun to manifest itself, and which greatly increased after marriage, was of industrious habits, and supported himself
(238) by his industry. This dissipation did not produce that extravagance which usually results from it; for he did not impair the estate, of which he acquired possession by marriage. He improved his wife's land, and the debts which he left were almost exclusively contracted in making these improvements.

There is no proof that he treated his wife ill or that they lived otherwise than happily together until his death. Three children were the fruits of this union, all of whom, for aught that appears, are still living.

The main question for us to decide is whether, upon these facts, the defendant can be declared a trustee of the estate of the plaintiff Hannah after her said marriage, and therefore bound to account to the plaintiffs for said property, notwithstanding his having delivered it over to her first husband. It is only on this ground that the bill of the plaintiffs can be supported. Whatever opinion may be entertained as to the delicacy or propriety of the defendant's conduct in sanctioning a marriage of his ward at that tender age with his own son, even though he may have thereby rendered himself liable to punishment, this Court, acting as a court of equity, has no jurisdiction over him in regard to the matters complained of except to inquire whether he has faithfully accounted for her estate committed to his care. Now we are unable to see any satisfactory ground on which this question can be determined in the affirmative. Upon the marriage of the defendant's female ward with an adult husband the defendant's office of guardian ceased. Hargrave's Co. Lit., 88, b. note; *Mendez v. Mendez,* 1 Ves. Sen., 91; *Roach v. Garvan,* 1 Ves. Sr., 157. And upon the marriage the husband became the owner of all her personal property in the hands of the defendant, and seized in her right of all her real estate.

The first ground taken in the bill why this Court should hold the defendant accountable as guardian, notwithstanding his office had expired and he had delivered over the property and accounted for his management thereof to the owner, is that having permitted a marriage so unequal in point of fortune to be contracted by his ward, without the consent of the proper court and without exacting a settlement from the husband, he is bound to make good the loss of property she (239) has thereby sustained. This ground we think clearly untenable. It is not pretended to have been ever adjudged that a guardian is *bound* under any circumstances to require a settlement of his ward's property upon her before he permits her to marry. The novelty of the position assumed is an exceedingly strong objection to it. Innumerable cases have occurred of marriages by female wards, and many of them have no doubt proved indiscreet and unfortunate. Perhaps in not one in a thousand has any settlement been made, and as yet we have heard of no attempt but this to render the guardian liable because of the omission to require one. She has, on reaching

twelve years of age, the legal ability to contract marriage independent of any one's will. The consequences of marriage on her property are defined by law, and however expedient it may be *sometimes* to guard against these consequences it has not been made the duty, and probably it ought not to be made the duty, of any one to guard against them by marriage settlements. It is only in a very artificial state of society that these can become common or be regarded as generally useful. It has been argued that our act of 1762 (Rev. St., ch. 54, sec. 18) makes it the duty of the courts, on receiving information that a guardian is about to marry his ward "in disparagement," to remove him from the guardianship; that this is a distinct recognition with us that the permitting of such a marriage is a breach of duty; that the marriage of the defendant's ward to his son was one of this character; and that it is a principle of universal application that he who by a breach of duty has occasioned a loss should, to the extent of his ability, repair that loss.

Before examining this argument particularly it occurs to us as not a little extraordinary if the lawmakers contemplated such a liability upon guardians as that now contended for, that in defining their duties, in acts where minute details are found—such as in regard to the mode of selling their perishable estate, the keeping of their stock, the lending out of their money, hiring of slaves, renting of lands and payment of the taxes, disposition of the lightwood, boxing of the pine trees and sale of the
(240) timber on their lands—it has not been distinctly and plainly declared. But upon the argument it may be remarked, in the first place, that the law is indeed solicitous to prevent a marriage being made in "disparagement," and chiefly so because it belongs to that class of evils which once done admits of no remedy or redress. What pecuniary measure can be resorted to for ascertaining the injury from an ill-assorted marriage? And if one could be found how wisely the law would act, in a case where a woman had thus married, in allowing the husband to put into *his* pocket the damages recovered because of this grievous wrong to *her?* The ancient law sternly prohibited what is termed "in disparagement," both by *magna charta* and the Statute of Merton. Yet we are told by the highest authority "that no action can be brought upon this statute inasmuch as it was never seen or heard that any action was brought upon the Statute of Merton for this disparagement against the guardian for the matter aforesaid, etc.; and if any action might have been brought for this matter it shall be intended that at some time it would have been put in ure." Little-

ton, sec. 108; Co. Lit., 81, b. Besides, inequality of fortune never constituted "disparagement." Thereby was contemplated some personal or social defect or disqualification such as deformity, lunacy, disease, villenage, alienage or corruption of blood. Co. Lit., 80, 81, 82. In no sense *analogous* to the ancient import of the term could the marriage of the female plaintiff with her first husband have been deemed a marriage in disparagement. It brought no disgrace on her or her kin; did not put her or them below their proper station. As to the charge in the bill that the guardian neglected to ask the advice of the court in relation to the marriage before he permitted it to take place, this we suppose has been charged because of some vague notion that this is required in England of all guardians. We find nothing to warrant that doctrine, and certainly an application to court for advice on that subject is wholly unknown in our usages. In England the court of chancery exercises a very high control over the marriage of what are there termed *wards of court*, and filing a bill in their behalf makes them wards of court. Marrying an infant ward of the court without the previous consent of the chancellor is there a contempt (241) of the court, and the court is enabled by imprisonment of the husband and others concerned in the contempt to compel what it deems a proper settlement to the wife. If an infant ward of the court be suspected of intending to make an improper match the chancellor will grant an injunction to restrain all communication with the infant by letter or otherwise. When an infant ward of the court is committed to the care of any person the chancellor may require from the committee a recognizance that such infant shall not marry without the leave of the court, and if the infant should so marry, though without the privity or knowledge or neglect of the committee, the recognizance is nevertheless forfeited. Whether these or other extraordinary powers of a like kind *can* be claimed by any court in this country over the marriages of those who are competent by law to contract marriage, by making them "the wards of such court," we need not stop to inquire. But in England they are exercised only over marriages of "wards of court," and there is no pretense that here the female plaintiff was ever constituted such.

The next ground upon which the plaintiffs rest their claim to hold the defendant accountable as still remaining guardian of the plaintiff Hannah after her first marriage is, for that the said marriage was contracted in violation of the act of 1820, entitled, "An act concerning the marriage of female infants."

(Rev. St., ch. 71, sec. 7, ch. 34, sec. 47.) By that statute it is made an indictable offense punishable by fine for a man to marry a female infant under the age of fifteen years except in the case where her father shall be alive and shall have, previously to the marriage, given his written consent thereto. It is also enacted that when the husband shall be convicted of such offense it shall be the duty of the court before whom the conviction may be had to appoint one or more trustees to take charge of the property belonging to the female so married, and the whole estate, both real and personal, vested in her at the time of such marriage, and all the right, title, etc., shall be vested in and belong to the trustees so appointed by the court; and they shall have power to take the same and if necessary to sue
(242) therefor in their proper names; to hold the estate so received and recovered in trust for the sole and separate use of the said female during the continuance of the marriage, and upon the termination thereof, if she survive, then to convey the same to her absolutely; but if she do not survive to convey the same to her children, and in default of children to such persons as would have been her distributees and heirs-at-law according to the nature of the estate in case she had died unmarried. And it is further enacted that the husband convicted of such offense shall in no case be permitted to hold, use, enjoy, sell or dispose of any part of the estate to which she was entitled at the time of the marriage; that all sales and dispositions made by him of such property before such conviction should be null and void, and that he shall not in case of the death of his wife be entitled to administration of her estate, nor to a distributive share thereof, nor to curtesy therein. It is manifest upon the least careful examination of the act that it does not invalidate the marriage if the female was of the legal age to consent, which the common law had fixed at twelve years. It is further manifest that *all* the penalties thereby denounced are necessarily dependent upon conviction of the special offense created by the act, although after conviction, like other forfeitures, they are made to relate back for some purposes to the time of commission of the offense. The marriage of a female infant over twelve and under fifteen as effectually puts an end to her guardianship as her marriage over fifteen; but in the former case upon a conviction of the husband the trustees and not the husband become entitled to her property. But it is said that although this act be in its forms penal, and cannot be carried into direct execution but in the way specially pointed out by the Legislature, yet so far as its object is protection to the property of infants a court

of equity will lend its aid to render such protection effectual. We fully assent to this proposition and hold it to be the duty of the court for this purpose to exercise all its powers, preventative or remedial, to the full extent of its jurisdiction. It shall not permit if it can help it the forfeiture, to the benefit whereof the infant is entitled, to be evaded by any subtle contrivance or combination; but will hold all therein con- (243) cerned trustees, to the full extent of their improper interference, for the infant. But, nevertheless, as the benefit claimed is to result from forfeiture, and that forfeiture cannot arise but upon conviction, we are unable to see how any court, in a case where not only a conviction has not taken place but where it cannot take place, and this state of things has been produced, not by any fraud, stratagem or combination, but by the act of God, can derive to itself a power of action, legal or equitable, under this act. The aid of the court has not been invoked to promote or secure the beneficial operation of this statute in behalf of the female plaintiff. The bill is framed *diverso intuitu*. We are not called upon to say what may be the liabilities of a guardian who by delivering over the property of his female ward to one who has married her under the age of fifteen years, and who has been convicted of the offense, has rendered that conviction inoperative to secure to her the beneficial effects of the statute. We are not considering a case where a female thus married applies to the court to have her property protected before conviction of the offense in order to prevent alienations which may be prejudicial to her. We are not acting upon a claim made by a husband offending against the statute to obtain possession of his wife's property, nor even asserting the right of one privy to that offense to hold such property beneficially for himself. The defendant here pretends no such claim. The case before us is in truth that of a second husband, in his wife's name, seeking our aid to get this property as against the creditors of the first husband and the children of his wife by her first marriage; and asking this extraordinary aid after that marriage had continued uncomplained of for more than three years, and after four years had passed since the death of the first husband. We cannot see any equity in such a case for enforcing a penal act beyond its enactments and its true spirit.

The exceptions taken to the report of the master are now to be considered. The first exception taken by the plaintiffs is in the nature of an application to recommit the report because it is incomplete. It is that the master has not reported, as directed by the order of reference, the value, nature and condition

(244) of the estate of the plaintiff Hannah in the State of Virginia. In the order referred to as having been made by consent and without prejudice this was indeed direct. But we do not need the information intended to be had thereby to enable us to decide upon any matter put in issue by the pleadings; and we ought not to recommit the report in order to have an immaterial matter ascertained. The exception is therefore overruled.

For the same reason the second and third exceptions must also be overruled. What may be the nature or value of the said plaintiff's real estate in Tennessee, or what the state of the defendant's accounts as administrator of Robert Carloss are matters wholly foreign from what is now in dispute between the parties.

The fourth exception is for that the master hath allowed the defendant in the account of his administration of the estate of Thomas Stokes the sum of $608 for his expenses, without proper vouchers to warrant the same. If the item thus excepted to affected the decree to be rendered in the cause we should be obliged to recommit the report in order that the master might inform us, either by reference to the vouchers or otherwise, upon what evidence he made the allowance. The exception admits that it was made upon vouchers, but denies their sufficiency; and we are without the information to enable us to decide upon this appeal taken from his judgment. But the exception, were it to be allowed in full, cannot affect the decree. The accounts of the administration of Thomas Stokes's estate and of William B. Stokes's estate are but preliminary to the account between these parties upon which the decree depends, that is to say, the account of the defendant as guardian of the female plaintiff. Upon the account of the defendant as administrator of Thomas Stokes the master hath found a balance in favor of the defendant of $819.09. In the account of the defendant as administrator of William B. Stokes he hath credited the defendant with one-third of this balance, because William B. Stokes was entitled to one-third of Thomas's estate; and he makes the balance in favor of the defendant as administrator of William B.
(245) Stokes $399.18. And in the guardian account he gives the defendant credit for two-thirds of the balance against William's estate, because two-thirds thereof belonged to his ward and makes a balance on the guardian account in favor of the defendant of $394. Suppose this exception allowed, and add to its amount $18, which is embraced within the sixth exception, making the sum of $626, it would lessen the credit of the defendant in his account as administrator of William B. Stokes by

one-third thereof, or $202, and his credit in the account as guardian of the plaintiff Hannah with two-thirds of this last sum or $134.66, leaving yet a balance due to the defendant as guardian of more than $250. Now, provided there be a balance on this account in his favor, the amount thereof is immaterial, for whatever it may be the defendant has relinquished it as an advancement to his son.

The fifth exception of the plaintiffs is, for that the master has not charged the defendant with rents of lands in the State of Tennessee from the year 1814 up to the filing of the bill. So much of this exception as seeks to charge the defendant as guardian because of rents since the year 1824 cannot be sustained, because the guardianship charged in the bill terminated by the marriage of the plaintiff Hannah with Robert Carloss in that year. But it must be wholly overruled, for upon examining the proofs in the cause we do not find that the defendant did receive rents from those lands.

The sixth exception, so far as it is applicable to the account of the defendant as administrator of Thomas Stokes, has been disposed of. It is a good exception to the account of the defendant as guardian of his ward Hannah for the sum of $40, which was allowed to the defendant for his *time* in traveling to Tennessee on the business of his ward. Compensation for the time and trouble of a guardian cannot be allowed in that form. These are to be considered in fixing the quantum of his commissions. But the allowance of this exception is of no use to the plaintiffs for there will still remain a balance against them.

The exception taken by the defendant to the master's report it is not necessary to examine. (246)

It follows that the bill of the plaintiffs must be dismissed. We do not award costs to the defendant because of our decided disapprobation of that part of his conduct which relates to the marriage of his son. But the plaintiffs must pay the costs of the reference. So far as we have been enabled to judge the defendant has managed the estates under his charge with skill, diligence and ability. He made his settlements regularly with the proper persons and under the sanction of the proper authorities, and has caused his accounts to be filed where they were accessible to all interested therein. After a laborious and critical examination but one error in them has been established, and that rather an error of form than of substance; unimportant in amount, and when corrected leaving a balance in his favor.

The plaintiffs we think ought to bear the expense of this unnecessary and harrassing re-examination of these accounts.

PER CURIAM. Decreed accordingly.

*Cited: S. v. Watts,* 32 N. C., 375; *Ludwick v. Stafford,* 51 N. C., 111; *Fowler v. McLaughlin,* 131 N. C., 210.

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(247)

TEMPLE ROBERTSON et al. v. PATIENCE STEVENS et al.

Where real estate was devised in fee to a woman, who afterwards married, but it was directed in the will that the possession should be retained by A., a third person, and the rents and profits received by him until a certain debt was paid. *Held*, that the interest of this possessor could not be regarded as of a higher character than a term or chattel interest, that the possession of a termor is the seizin of him who hath the inheritance, and that in such a case the wife having had issue born during the marriage, the husband is entitled to be tenant by the curtesy.

To determine whether a bill is multifarious, the inquiry is not whether each party is connected with every branch of the cause, but whether the bill seeks relief in respect of matters which are in their nature separate and distinct. A bill is not multifarious where all the plaintiffs have an interest on one side and all the defendants have a common interest on the other in the decision of the main matter of controversy.

Election may be enforced against *femes* covert and infants between two inconsistent rights, where there is a clear intention of him under whom one of them is derived, that *both* shall not be enjoyed, and when it is against conscience to enjoy both.

THIS was an appeal, by leave of the court, from an interlocutory decree of the Court of Equity of JOHNSTON, made at Spring Term, 1840, by his Honor, *Nash, J.*, overruling a demurrer which had been filed to the complainants' bill. The allegations of the bill and the causes of demurrer are set forth in the opinion of the Court.

*W. H. Haywood* for plaintiffs.
*Badger* and *Bryan* for defendants.

GASTON, J. This is an appeal from an interlocutory decree in the court below, overruling a demurrer put in by the defendants to the bill of the plaintiffs. The bill, which was filed by Temple Robertson and Everett Robertson, against Patience Stephens, Jacob A. Stephens, Everett Stephens, Henry Stephens,

John Allen and his wife, Manda, Gaston Lockhart and his wife, Rachel, sets forth that Jacob Stephens, formerly of Johnston County, died in 1829, seized of a large real and possessed of a large personal estate, leaving surviving him his (248) wife, the defendant Patience, and the defendants Jacob, Everett, Henry, Manda and Rachel, his only children by the said Patience; that before his death the said Jacob duly executed his last will, with all the solemnities to pass real as well as personal property, which has been duly proved and recorded, and therein and thereby devised unto his daughter, by a former wife, Joanna Stephens and her heirs, a certain tract of land whereof he was possessed at the date of his will, and continued possessed until his death. The bill further states that the said Joanna, in the month of December, 1830, intermarried with the plaintiff Temple, and by that marriage had issue, the plaintiff Everett, and afterwards, in December, 1831, died; that in the will of Jacob Stephens there is a clause in the following words, "My will and desire is that all my property of every description that I am possessed of stay in the possession of my wife until she can raise money and pay a certain debt that I owe to Thomas Rice for land to the amount of $1,000"; and that by virtue of this clause in her deceased husband's will the defendant Patience upon his death took possession of the tract so devised by the testator to his daughter Joanna, and she and the defendant Jacob, acting under her authority, have ever since cultivated the land, deriving large profits therefrom; have cut down the timber growing on it, and otherwise greatly wasted and impoverished it, notwithstanding the debt to Rice had been long since paid, and notwithstanding the plaintiff Temple had before offered to pay off the part of said debt with which the tract aforesaid was by the will chargeable. The bill proceeds to state that the plaintiffs have applied to the said Patience and requested her to account with them for the rents of the said land and the waste thereon committed, and to surrender the possession thereof; but she hath refused to comply with such request upon the pretense that nothing passed by the devise of the said land unto Joanna, the late wife of the plaintiff Temple, and mother of the plaintiff Everett.

The bill shows that at and before 1807 one Everett Pearce, the father of the defendant Patience, was seized of the said land in fee, and being so seized he duly devised the (249) same unto Jacob Stephens (then the husband of the said Patience) and the said Patience for their joint lives with remainder to the survivor for life, with remainder to their children in fee, and the said Patience and the other defendants now

set up and insist upon the legal title in the said land so derived under the said will, and the plaintiffs are therefore unable at law to recover the possession of the land or to call the said Patience to account for the rents thereof or the waste thereon; but the plaintiffs are advised and do insist that the said Joanna, under the devise aforesaid in her father's will, acquired the entire equitable estate in the said land, and upon her death the same vested in the plaintiff Temple as tenant by the curtesy with remainder in fee to the plaintiff Everett, the only child and heir-at-law of the said Joanna, for they charge that in and by the said will the said Jacob Stephens devised and bequeathed unto the said Patience, his widow, and the defendants, his children by the said Patience, other valuable lands whereof he was seized and divers valuable slaves and other personal chattels; and that the said Patience and the said defendants, the children of the said Jacob and Patience, have elected to take and do enjoy the lands and personal property so devised and bequeathed to them respectively, and therefore cannot be allowed to disappoint the said will and deprive the plaintiffs so claiming under the said Joanna of the land so devised to her in the same will; or that if the said Patience and the other defendants have not yet elected whether to take the lands and personal property so devised and bequeathed by the said Jacob under the said will, or to claim and hold the tract of land devised therein to the said Joanna under their legal title, in opposition to the said will, they ought now to make and will be required to make such election. The prayer of the bill is to have the possession of the land surrendered and for an account from the defendant Patience, or if an election has not yet been made that the defendants may be required to make their election, and for general relief. The

(250) appellants contend that the demurrer ought to have been sustained, and rest their arguments upon three grounds.

In the first place they insist that upon the matters set forth in the bill it is apparent that the plaintiff Temple hath no interest in the subject-matter thereof, and is improperly joined as a party plaintiff. They argue that he claims to be tenant by the courtesy of the land devised in fee to his wife, but he cannot so be unless his said wife was actually seized of the land, or rather had such enjoyment thereof as in an equitable estate is equivalent to an actual seizin at law, and this seizin was prevented because of the possession of the defendant Patience during the whole time of the coverture. The possession is alleged in the bill to have been holden under the clause sub-

jecting the profits of the testator's estate, so far as might be necessary, to the payment of the debt to Rice. Now it seems to us very clear that if the legal fee had passed under the will to Joanna, such a possession would not have interrupted her actual seizin of the freehold. The interest of the possessor could not have been regarded as of a higher character than a term or chattel interest, and the possession of a termor is the seizin of him who hath the inheritance. See *Guavare's case* cited, 8 Coke, 96 a. And in analogy to this it was laid down by *Lord Hardwicke* in *Roberts v. Diswell,* 3 Atk., 609, that in the case of a trust estate for payment of debts the husband may be tenant by the curtesy, for it is only a chattel interest in the trustee, and the first taker hath the freehold over.

The next objection to the bill is that it is multifarious, for that it improperly joins distinct claims against different persons. In order to determine whether a bill is multifarious the inquiry is not whether each party is connected with every branch of the cause, but whether the bill seeks relief in respect of matters which are in their nature separate and distinct. *Vann v. Hargett,* 22 N. C., 35. Tried by this test it seems to us that this bill is not liable to the objection of multifariousness. Both the plaintiffs have an interest on one side, and all the defendants have a common interest on the other in the decision of the main matter of controversy, the right of Joanna Stephens in the land devised to her, and all may therefore be joined in a bill brought to decide it. It has also been objected that some (251) of the defendants are *femes coverts,* and cannot make an election. There are matters, certainly, in respect to which *femes coverts* are in equity as well as at law under a personal incapacity to act, and one of these is a case of "election." Thus where land is by the law of the court converted into money or money into land such notional conversion will not be compelled if the *cestui que trust,* the absolute owner, elect to take the property in its original character. Such an *election* a *feme covert* or an infant has not the capacity to make. But election between two inconsistent rights, where there is a clear intention of him under whom one of them is derived that both shall not be enjoyed, and where therefore it is against conscience to enjoy *both,* it is every day practice to enforce against *femes coverts* and infants. See *Gratton v. Howard,* 1 Swans., 409, and 1 Roper Hus. and Wife, 22; *Darlington v. Pultney,* 2 Ves. Jr., 544, and 3 Ves. Jr., 384; *Wilson v. Townshend,* 2 Ves. Jr., 693.

On the whole we see no error in the interlocutory decree from which the appeal has been taken. This opinion will be certified

to the court below, and the appellants must pay the costs of the appeal.

PER CURIAM. Interlocutory decree below affirmed with costs.

*Cited: McQueen v. McQueen,* 55 N. C., 20; *Earnhardt v. Clements,* 137 N. C., 94.

(252)

HENRY L. PLUMMER et ux. et al. v. GEORGE BASKERVILLE et ux.

A deed, whether for valuable consideration or not, but good and effectual at law, except for want of registration, and which is lost before registration, will be set up in equity and a decree made for another conveyance by the bargainor or his legal representatives.

But before such a deed can be made, the plaintiff must clearly prove that such a deed once existed, its legal operation and its loss.

In the case of a decree thirty years old, proof of its execution is dispensed with. But to render such a deed admissible there must be some account of its proper custody, and also evidence that the party has been in possession under it. And the proof of execution is only dispensed with here on the ground that the attesting witnesses may be dead.

There is no legal presumption, nor ought there to be an inference in fact, from the mere circumstance of a person attesting a paper writing as a witness, that such witness was aware of the contents of the paper, and is therefore bound by it, when it affects his interest.

The force of circumstantial evidence depends on the number, tendency, agreement and conclusive nature of the circumstances in themselves which may be adduced to establish a conclusion, and also on the important fact that there are not opposing circumstances, equally undeniable, which are inconsistent with that conclusion; and further, that nothing in the party's power appears to be withheld which, if produced, would show the facts on which the conclusion is founded to be different, or authorize an opposite deduction from them.

THIS was a bill in equity, filed in WARREN Court of Equity, at Fall Term, 1831. The defendants answered, replication was taken to the answer and the cause, having been set for hearing at ---- Term, ----, of that court, was by consent removed to the Supreme Court. The pleadings and facts proved are fully set forth in the opinion as delivered by the Supreme Court.

*Haywood* for the plaintiff.
*Miller, Winston* and *Saunders* for defendants.

RUFFIN, C. J. This bill was filed 29 September, 1831, and states that in December, 1796, two grants were issued by this State to John Willis, late of Warren County, each for 2,500 acres of land, situate in the western district, now (253) the State of Tennessee, on the fork of Deer River, and described by metes and bounds in the bill; and that Willis for a valuable consideration sold both of the tracts to William Falkener the elder, late of Warrenton, and as the plaintiffs believe executed a regular conveyance therefor; that, never having seen the deed nor any copy thereof, the plaintiffs are unable to state what was the amount of the consideration, but that at the date of the conveyance, which they believe to be in 1798, Willis was indebted to said Falkener by bonds and on accounts in a large sum, amounting to upwards of $2,500, and that no part thereof has been discharged except by a conveyance of said lands, and that Willis had no other means of satisfying the debt; and that Willis made and Falkener received the conveyance aforesaid in satisfaction and discharge of his debt. The bill then further states that William Falkener the elder, on 20 October, 1798, conveyed the said two tracts of land to his son William A. K. Falkener, in trust for the satisfaction of certain of his creditors, and also, by another deed of the same date, subject to the last-mentioned conveyance, did convey both of the said tracts to William, the son, and his heirs; which two conveyances the plaintiffs charge were made with the knowledge, consent and approbation of Willis, who attested the same as one of the subscribing witnesses thereto. The bill further states that some time in that year, 1798, William, the son, transmitted to the house of Smith & Rodman, composed of Willet Smith and Thomas Rodman, of Philadelphia, who were among the creditors of William, the father, and named in the trust deed, the said original grants, together with the conveyance of the said Willis, the deeds from William, his father, to himself and a power of attorney from William, the son, authorizing Smith & Rodman to sell the said two tracts of land in order to assure them and the other creditors in the deed of trust mentioned of the payment of their demands against the father; that no sale was ever made because William, the son, paid all those demands, and that after having done so he required the restitution of the papers; and that in 1812, in pursuance of said requisition, all were returned except the deed of John Willis and the power (254)

of attorney from William, the son, but instead of those was sent a certificate of Willet Smith, one of the firm of Smith & Rodman, made before a notary public and setting forth and declaring that the deed from John Willis to William Falkener and the said power of attorney had been lost. The bill then charges that there can be no doubt but that Willis did make the conveyance as stated, for that since 1798 he, Willis, never pretended but always disclaimed any interest in said lands, and in fact, in 1802, being utterly insolvent, took the oath of insolvency and was duly discharged from imprisonment as an insolvent. The bill further states that, as the plaintiffs suppose, the deed was registered in Warren County, where it was made and the parties resided, but that they have been unable to find the same either there or in Tennessee; and they aver that the book of the register of Warren containing the deeds registered between 1797 and 1802 has been destroyed by fire; and therefore the bill charges that both the deed and the registration thereof have been lost so that neither can be produced. The bill then states the death of William Falkener, the son, in March, 1819, intestate, leaving the plaintiff, W. Falkener, and Sarah his two infant children and heirs-at-law; that Sarah while an infant intermarried with the other plaintiff, Henry L. Plummer, and the plaintiff William was still an infant at the filing of the bill; and that in the latter part of the year 1819 old Mr. Falkener, the grandfather of the plaintiffs Sarah and William, also died; and that in 1806 John Willis died insolvent and intestate, leaving an only child, Elizabeth, now the wife of Geo. D. Baskerville, who are the defendants in this suit. The bill further states that Baskerville and wife have taken possession of the two tracts of land, claiming them as having descended from Willis to his said daughter; and that for want of legal evidence of the conveyance from John Willis to the eldest Mr. Falkener the plaintiffs are unable to bring an action at law to recover the land. Whereupon the bill (after many minute interrogatories upon the matters charged in it as to the knowledge, information or belief of the defendants respectively) proceeds to pray that the
(255) defendants should be decreed to surrender to the plaintiffs the possession of the lands, to execute to them a new conveyance in fee simple therefor, and to account for the profits.

The defendants put in an answer of which the material facts are as follows: The defendants admit the deaths of William Falkener, the father, and of William, the son, at the times stated in the bill, and that the plaintiffs William and Sarah are the children and heirs of the latter, and of the ages stated in the bill.

They also admit the insolvency of John Willis; that he took the oath of insolvency and died intestate, as charged in the bill, and the defendant Elizabeth is his only child and heir and the wife of the other defendant; and they admit that the grants issued to John Willis as charged. The answer then sets forth that the defendants do not admit nor do they believe that John Willis ever did sell the lands to William Falkener; nor do they admit or believe that Willis was indebted to said Falkener in any manner; that the defendants have no personal knowledge upon these subjects, and had not heard of the grants until after the death of William, the son, their existence and his possession of them became known by their being found among his papers; and that their information touching these matters was derived principally from the late Governor James Turner, who died before the filing of this bill, and who was well acquainted with the Messrs. Falkeners and John Willis, resided for many years in the same village with them, and had every opportunity of acquiring a knowledge of their dealings, and married the widow of Willis and mother of Mrs. Baskerville. By him, shortly after the death of William A. K. Falkener, the defendants were informed that it was his (Governor Turner's) belief, founded on his personal knowledge of the dealings of Willis and William Falkener, the elder, that the former was not indebted to the latter, and if said Falkener did receive the grants from Willis it was not upon a sale to him but for the purpose of raising money by a sale in Philadelphia, where Falkener was well known and Willis was an entire stranger, in order to carry on the operations of a gaming table called A. B., with which Willis was in the habit of traveling about, for the benefit of himself and Falkener. The answer avers the belief of the defend- (256) ants in the correctness of the foregoing information. The defendants further say that they have no knowledge of the genuineness of the deeds from Falkener, the father, to his son; that the defendant George had seen one of them, which purported to be attested by John Willis, but whether in his proper handwriting he is altogether ignorant as he never saw said Willis and has no knowledge of his writing; and they do not therefore admit that the deeds were attested by Willis, or if they were that he was apprised of their contents, or that either of them includes the lands described in the grants. The answer further states that the lands lie in what is called the western district of Tennessee, to which the Indian title was extinguished a year or two before the death of William Falkener, the son, and that the price of lands in that part of the country, though

before very low, became suddenly high and the lands much in demand; and that about that time John C. McLemore, of Tennessee, a well known dealer in lands in the western district came to Warrenton to endeavor to purchase lands of that description, and inquired of said Falkener and of others in his presence in regard to the owner of the lands granted to said Willis, but the said Falkener made no reply and did not intimate any claim to them. The answer further states that the register's books of Warren County from 1799 to 1803 were burnt, and not those from 1797. And the defendants say that they were informed by Mrs. Turner that she repeatedly understood from her first husband, the said Willis, in his lifetime, that he intended to convey his western lands to his daughter Elizabeth; that the defendants have no knowledge that he did make such a conveyance, but that if he did it might have been and probably was registered in the book that was burnt; and that, as the same must have been made some years before he took the oath of insolvency, the said Willis was enabled thereby with a clear conscience to relieve himself from confinement.

There was replication to the answer, and the parties proceeded to take proofs. As exhibits the plaintiffs deposited the grants to Willis and also the deeds from old Mr. Falkener to his son mentioned in the pleadings. Those deeds bear
(257) date 28 October, 1798, and purport to be witnessed by Thomas Gloster and John Willis, and were proved and registered in May, 1819, upon evidence of the handwriting of the subscribing witnesses, both of whom were then dead. The first of those deeds assigns and conveys twenty-two slaves belonging to William, the father, his remaining stock in trade, dwelling-house and lot, all his cattle, horses and other stock, nine lots in Warrenton, all his household and kitchen furniture and plantation utensils and bonds, book debts and other dues, and "likewise two tracts of land unto me belonging which are lying or situate in Cumberland or Davidson in the western territory, the particulars whereof I cannot describe, not having the plats now in my possession, together with every other kind of property, if any I have, not here enumerated"; upon trust to pay thereout certain debts due from William, the assignor, to Smith & Rodman, of Philadelphia, and other creditors mentioned to the amount of about $10,000. The second of those deeds, after reciting the former, conveys the same property described in a schedule annexed to the son for his own use and benefit, after satisfying the trusts in the previous deed declared; and in the schedule the Tennessee land is mentioned thus, "likewise two

tracts of land lying or situate in Cumberland or Davidson, in the western territory." And William, the son and assignee, thereby covenants that he will pay the debts owing at that time by his father "as well in conformity to the said deed of trust as to an original assignment bearing date 5 August, 1797."

By the deposition of James Somerville, taken by the plaintiffs, it appears that the witness was very intimate with the younger Falkener for nine or ten years preceding his death, but had no recollection of having heard him talk much about his business, though he once heard him say he had valuable lands in the west if he could get them. This witness took administration of the estate of W. Falkener, the son, at May court, 1819, and states that in examining his intestate's papers he found among them the grants and deeds above mentioned, or they were delivered to him by the elder Falkener as belonging to his deceased son, and that he immediately made it pub- (258) liely known that the grants were in his possession in order that it might be ascertained whether the lands belonged to the heirs of Willis or the heirs of his intestate Falkener. This witness further states that he found among his intestate's papers the letters and documents hereafter mentioned, which he identifies, of which the genuineness is established by many other witnesses so far as respects the handwriting of the persons whose productions they purport to be. These documents are, first, a letter written from Philadelphia on 16 May, 1797, to William Falkener, the elder, by Smith & Rodman, in the following words: "We have duly received your favor per Mr. Macon, *with sundry papers enclosed respecting certain tracts of land*, of the value of which you request us to make some inquiry here. We are entirely ignorant of this kind of property, and equally so with respect to the persons who are most likely to purchase it; and having constantly endeavored to avoid all kind of land business we hope you will pardon us if we decline appearing in this. From what we have been able to learn, however, there is no sale here for this kind of property." The writer then proceeds to request a payment upon their demand against the other party. Second, another letter from Smith & Rodman to the same person, dated 25 April, 1798, as follows: "Your circular letter of the 11th inst. is received; the contents of which we have perused with concern, not only on our own account, but much upon yours. As we have been daily flattering ourselves with the hope of a remittance from you our disappointment has been severe. If the step you have now taken was not to be avoided it will be of little purpose to animadvert on our situation with you.

As our disposition towards you has always been liberal, as we are deeply concerned in your ultimately discharging our debt, and, above all, as we really have confidence in the uprightness of your intentions, we shall not hesitate to come into the measures you have proposed to your creditors provided you will agree to make us secure as far as you have the power to do so. To this end we have to propose *that you will take the trouble to have the enclosed powers of attorney* (which you sent us (259) last spring), together with the signatures of the witnesses thereto, fully acknowledged before some proper authority, and transmit them to us thus proved in order that we may hold the property in trust until you have discharged our debt; upon which we will immediately agree to any reasonable propositions which will contribute to your accommodation."

Smith & Rodman afterwards instituted an action in the Circuit Court of the United States for their demand, in which Edward Graham, Esq., of New Bern, was the plaintiff's attorney, and John Haywood, Esq., of Franklin, the attorney of the defendant. On 27 July, 1802, William Falkener, the son, before judgment, paid to Mr. Graham bonds and cash to the amount of £693 13 6, Virginia currency, and the suit was dismissed. In the meanwhile Smith & Rodman had become bankrupt, and James Smith, Jr., and James Paul had been appointed their assignees.

The third and fourth documents annexed to Mr. Somerville's deposition are two letters from John Haywood, Esq., to William Falkener. The one is dated 11 January, 1804, and is as follows: "Please state your account since January, 1799, and the payments I have made. I will then add my account and send it to you with the balance in money either before I go or after I return from New Bern. *I shall try to remember your grants.*" The word was first written *deeds*, but the pen was run through that and *grants* substituted. The other is without date and as follows: "To my surprise both Mr. Graham and Mr. Wood say *they have not nor have ever seen the 5,000-acre grants.* You had better write to the plaintiffs in the suit against you immediately."

The fifth is a letter to William, the younger, from James Smith & Son, written from Philadelphia, and dated 23 January, 1806. Its words are: "In answer to your favor of the 15th inst. we inform you that in a small box which we did not know had anything in it *we found two patents for land in North Carolina for 2,500 acres each in the name of John Willis*, which appear as if they might have been lodged with Smith & Rodman

as a security. If these are the papers you wish you shall have them delivered to your order, or we will enclose them to you if you desire it, provided we are assured of the debt (260) having been paid. The account remains open in the books, and as a number of orders were given to those to whom they were indebted which we know nothing about you can perhaps inform us how this has been paid and to whom."

The sixth of these documents is a letter from Mr. Graham, of New Bern, to William Falkener, the son, dated 24 February, 1806, in which he says: "Yours of the 18th inst. is received. I am glad to hear *that you are in a fair way to regain possession of the title deposited with Smith & Rodman as a security for what your father owed them.* The enclosed will afford that assurance which seems to be required as a prerequisite to the surrender of the papers." And therewith Mr. Graham sent a statement of the debt of William Falkener to Smith & Rodman, amounting to £693 13 6 Virginia currency, with his own receipt therefor as of 27 July, 1802.

The next document is a letter of James Smith & Son to the same person, in the following words: "Yours of the 5th inst. we have just received, *and agreeable to your request we now enclose you the two patents* which we are sorry we did not know of when personally applied to some time ago." This letter is without date, but is postmarked "Phila., 12 March," and the postage is charged thereon "1 1-4 oz. $1."

The next in order is a letter from the same persons to the same, dated 23 April, 1810, as follows: "Willet Smith, of the house of Smith & Rodman, handed me a letter which you addressed to him on the subject of your father's debt to that house, and *with respect to some papers left in their hands as security.* I was some time ago appointed assignee under the bankrupt law of the estate of Smith & Rodman, and I cannot find that this sum, due by your father, has ever been paid. There is no credit on the books and Willet says he has never received it nor given any order for it. I wish you would be so obliging as to make inquiry of the attorney at New Bern and know to whom he paid this money, if he ever paid it. I shall be glad to hear from you as soon as convenient; and, in the meantime, I have written to Willet Smith, who lives in New Jersey, to come to town and *make search for the grants of land you speak* (261) *of,* which I have never been able to find among their papers. If these cannot be found you may depend on my getting Willet to make the certificate you require and forward it."

The next document is a certificate made by Willet Smith be-

fore a notary public, 23 December, 1812, as follows: "This is to certify all whom it may concern that William Falkener, of Warrenton, in North Carolina, about 1798, put into the hands of Smith & Rodman, of Philadelphia, merchants, two grants for land of 2,500 acres each, accompanied with a bill of sale from John Willis to said Falkener for said land and a power of attorney from said Falkener to Smith & Rodman, authorizing them to dispose of said land; that some years after that transaction the said grants of land were returned to the said William Falkener, but that the bill of sale from Willis to Falkener and his power of attorney to Smith & Rodman could not then be found, nor have they ever been able to find the same, they being mislaid or lost."

The next and last document produced by this witness on this part of the case purports to be a draft of a letter found among the papers of William Falkener, the son, from him to James Smith, Jr., dated 25 January, 1819, in which he says: "You informed me that if Mr. Willet Smith could find the deeds made to my father by John Willis and the power of attorney from the former to Smith & Rodman they should be forwarded to me. In the hope that they may be found, and that from my long silence you may have thought they were not wanted, I again write, requesting that should that be the case they may be forwarded. If not found, I earnestly entreat that all the papers may be particularly examined. It is of great consequence to me to find those deeds from Willis to Mr. Falkener, and any expense or trouble which you or Mr. W. Smith may be at I will cheerfully pay."

The witness Mr. Somerville also states that among his intestate's papers he found an account in the handwriting of his intestate in the following form:

"MR. JOHN WILLIS TO WILLIAM FALKENER, DR.

(262)

| | £. | s. | d. |
|---|---|---|---|
| 1801, September 30th. To balance of account interest with T. B. G. & Co | 174 | 10 | 2½ |
| Account with William Falkener | 335 | 11 | 2¼ |
| Account with William Falkener, Jr | 27 | 11 | 11¾ |
| Account with William Falkener, Jr | 42 | 2 | 2½ |
| Bonds and interest | 150 | 2 | 11 |
| Tavern account | 15 | 10 | 11 |
| Virginia currency | £745 | 12 | 5" |

Cr."

And that, accompanying the same were, in the handwriting of the said William the younger, the accounts mentioned in the foregoing summary, drawn out at large. They purport to be open accounts for dealings by John Willis as a customer in the respective stores of Thomas B. Gloster & Co., William Falkener and William Falkener the younger. That of Thomas B. Gloster & Co. began 25 April, 1793, and continued down to 8 May, 1795, and amounted to £119 6 6¾ principal money, which with the sum of £55 3 7¾ for interest computed to September, 1801, made the above sum of £174 10 2½. That of William Falkener the elder began March 15, 1795, and continued to 8 January, 1799, and amounted to £274 6 8, which with $61 7 6¼ computed for interest to September, 1801, made the sum of £335 14 2½. Those of William Falkener, Jr., began 29 April, 1799, and continued to 17 July, 1800, and with the interest thereon, computed also to September, 1801, amounted to the sums mentioned in the above general account. The item of "bonds and interest" consisted of bonds given by Willis to Thomas B. Gloster & Co. for money lent in October, 1794, and March, 1795, and to other persons which appear to have been assigned to or taken up by one or the other of the Messrs. Falkener, and on them interest was also computed to September, 1801. On the general statement *below* the debits the word "Cr." is written, but no credit is set forth; and on the other several accounts mentioned there is no credit given for the price of this or any land, or indeed for anything except for the small sum of £1 5 3, (263) paid in cash 5 January, 1795. The firm of Thomas B. Gloster & Co. consisted of Gloster and the elder Mr. Falkener, and did business up to about May, 1795, when Gloster retired, and Falkener took the whole to himself.

The same witness also produces an account between William Falkener and one William Christmas, who was a resident of Tennessee, and appears to have been the agent of Falkener as to some lands claimed by him in that State. In the account Christmas charges Falkener with the following items:

To cash paid for recording a deed in Tennessee_____$ 1.35
To cash paid for your land tax in Tennessee for 1799___ 6.04

On this account Christmas gave a receipt in full, dated 31 March, 1801, and at the same time he gave a receipt for $20, put into his hands to pay Falkener's land taxes in Tennessee.

Next follows a letter from the same William Christmas to William Falkener, and likewise found and produced by Mr. Somerville, dated Nashville, 10 July, 1802. In that letter the following passages occur: "I received yours by Col. C., and

several others at different times. In answer to your former dates I have twice written by post, which I expect have miscarried. I now inform you your landed interest in this country stands in an ugly point of view. One thousand acres of your land only was advertised for sale for the federal tax. Col. Overton advised me to let it be sold as you had no deed recorded in this country, and that I should become the purchaser, and then let it be sold for the State tax and again become the purchaser and relinquish to you; and by these means he thought the title might be good in you. I took his counsel and did purchase, though only 100 acres was sold, which satisfied the tax. I now relinquish to you the aforesaid land I have purchased or may purchase while I have money belonging to you in my hands. I have yet between $12 and $15, nearly enough for two years taxes. I have not the courses of your land, and as
(264) there is no record here I cannot say what it is worth as I do not know the land. *I once brought to this country a deed of yours, and as it could not be recorded here for want of the necessary proof I returned it to you again and did not keep a copy. You will therefore please send me the courses of each tract by which I likely may ascertain the land and nearly its value.*"

The foregoing documents were all read upon the hearing, but upon an understanding between the counsel that they were read subject to all just exceptions; and in the argument the counsel for the defendants insisted that they were not evidence against the defendants but, as coming from the ancestor of the plaintiffs, they were evidence against the plaintiffs.

By the depositions of several persons resident in the village of Warrenton from 1790 to the bringing of this suit, and well acquainted with John Willis and the elder and younger Falkener, it is established that Willis was an imprudent, dissipated and intemperate man and lost his credit early in life, and as soon as 1798, and became insolvent. Gloster married his sister, and there was a close and intimate friendship between Willis and the elder Mr. Falkener, who was very kind to Willis and let him have the necessary articles from his stores when no other merchant would, but to what amount the witnesses could form no opinion except the late Judge Hall, who stated that he was under the impression each of those persons had told him it was to no great extent. That gentleman also states that at the time of this transaction, as alleged, land in the western district, to which the Indian title was not extinguished, was of very incon-

siderable value, and that he did not recollect to have heard either of the Mr. Falkeners set up any claim to these lands.

But two witnesses, Richard Davidson and John C. Johnson, of whom the latter was the brother-in-law and one of the administrators of William the son, state that they were particularly intimate with William Falkener for many years before his death, and conversed freely with him upon the subject of his property, and often heard him say that he had lands in Tennessee which his father purchased from John Willis, (265) but that he had a difficulty in getting the title papers and had sent to Philadelphia to procure them; that he always spoke of the conveyance from Willis as an absolute conveyance to his father in consideration of debts due from Willis to his father, and never spoke of it in any other way or of having any other lands in Tennessee.

Robert Park, another witness for the plaintiffs and a brother-in-law of Willis, to an interrogatory on the part of the plaintiffs, "Did you hear Mr. Willis for many years before his death speak of the land in controversy, and particularly that he had conveyed to any and what person?" answers, "I have heard him say he had land in the western country. I do not recollect that I ever heard him say he had conveyed it to any person. I do not recollect the time I heard him speak of his western land. I had very little intercourse with him before his death. We were as friendly as brothers-in-law usually are for three or four years after his marriage with my sister, which I believe was about 1793." To an interrogatory on the part of the defendant "whether about the period John Willis took the insolvent debtor's oath and for some time before the faculties of his mind, and particularly his recollection and his capacity for business, were not greatly impaired by his general habits and course of life?" the witness answers, "I cannot say with any degree of certainty how long before his death his mind had become impaired, but it was a considerable time, I believe several years before his death that he was incapacitated for business from insanity, a situation brought on by intemperance in drinking. I do not recollect that at the time he took the oath of insolvency he was or was not considered insane, but he was habitually intemperate a considerable time before that."

William Person states that he procured the warrants and grants for Willis and was intimately acquainted with him and William Falkener the elder, and never heard either of them speak of Willis having conveyed the land to Falkener. He never heard the latter speak of the lands at all. He, the witness,

applied to Willis to purchase the lands, but Willis re-
(266) fused and gave as a reason that he had placed them in the hands of William Falkener, Sr., to sell for him in the Philadelphia market. He further states that John Willis became insane, the insanity being brought on by dissipation. "I do not recollect at what time it became apparent, but it was several years before his death; three or four years, as I believe; fully three. His habits of intemperance were of long standing. When he took the oath of insolvency and for a short time before he was incapable of business, as I believe, from personal transactions and conversations with him." To the question on the part of plaintiffs "whether he had not capacity to remember, when required to render a schedule of his property, that he owned 5,000 acres of land," the witness answers, "I believe that at the time he had no mind at all or was in a state of insanity. It immediately preceded his confinement for insanity, I think."

Jacob Mordecai states that as a merchant at Warrenton he had dealings with John Willis from 1791 to 1804; that his credit was always slender, but was a little better after his marriage with Miss Park until 1797, when he failed and was deemed unworthy of credit, though considered honest. Until 1804 witness was in the habit of seeing Willis almost daily and thought him generally to be in his perfect senses. The witness, as a justice of the peace, in conjunction with another magistrate, administered the oath of insolvency to him in March, 1802, and discharged him, and he was then both sane and sober, as the witness thought. In 1804 he became notoriously insane and was confined until his death. To the question on the part of the defendants, "do you not believe that during the above period there were times at which he, Willis, was not in his proper mind?" the witness replies, "during the whole period of my acquaintance with John Willis he was of a reckless, frolicsome, jovial disposition. After the withdrawal of his wife from him, which was a few years before his attack of lunacy, he became very intemperate, and I have no doubt his mind was at times, when under the influence of liquor, as much or more deranged than men of his habits usually are."

Philip C. Pope states that at some time between 1813
(267) and 1819 John C. McLemore, of Tennessee, came to Warrenton and asked the witness and William Falkener the younger if they knew anything in relation to the lands supposed to belong to John Willis in Tennessee, to which the witness replied that he did not, though he would be glad to know as he had married a granddaughter of the elder John Willis, and

might be interested in them; but Mr. Falkener made no reply whatever.

The late Mr. Grundy, of Tennessee, states that the lands in controversy were within the Indian Territory until 1818; that no State tax was imposed on them until 1819; and no tax by the United States at any time.

Thomas Rodman died about 1829 or 1830 in Philadelphia, but had spent much of his time after his bankruptcy in India.

Willet Smith died in July, 1839, in Camden, in New Jersey, in which State he generally resided after his failure. The year before his death the plaintiffs gave notice to take his deposition in Philadelphia, but he did not attend, and notice was again given to take it at a place in New Jersey, but without its being taken.

James Smith, Jr., one of the assignees of Smith & Rodman, died in Philadelphia in 1834 or 1835; and James Paul, the other assignee, died in May, 1839. In the latter part of 1839 the sons of those two persons thoroughly examined their papers for deeds from Willis to Falkener and for the letter books of Smith & Rodman, but could find no such documents.

The perusal of the pleadings and proofs in this cause cannot well fail to produce the impression that if the plaintiffs do not succeed it will not be so much from the injustice of their demands being established as from the defect of that kind and extent of proof which authorizes the Court affirmatively to declare its justice and enforce it.

The bill is founded on the allegation of an executed absolute conveyance, constituting a legal title with the exception of the ceremony of registration, and lost; so that it cannot be set up for the want of registration. The object of the bill is to be relieved from loss by that accident by requiring the (268) defendant, as the heir of the person who made the lost deed, not to take advantage of that accident but to execute another. The equity cannot be denied if the facts on which it is founded be established. There should be a decree for the plaintiffs without regard to the consideration, provided it was such as would render the deed effectual in law, for the jurisdiction is simply to set up a legal conveyance which was good in itself and has been lost, and the inquiries are confined to the points of its existence, legal operation and loss. *Tolar v. Tolar*, 16 N. C., 456.

It may at once be stated that sufficient inquiry appears to have been made for this instrument, if it ever existed, to authorize the declaration of its loss. Still it is incumbent on the plaintiffs

to show its existence at one time and its contents. At law the existence of an instrument as a genuine one is shown by proving its execution according to the nature of the instrument, that is to say, by the subscribing witness, if there be one, or by proof of handwriting. This is ordinarily true in equity also. *Goodees v. Lake,* 1 Atk., 246. It cannot be otherwise, for in reason as well as in law things which do not appear must be regarded as if they did not exist. After it be thus shown that the instrument existed its operation and effect may be established by proving the contents by the best evidence in the party's power, such as an examined copy, the registry of it or the oral testimony of witnesses who can state the contents or the admission of its contents by the person executing it. But in this case all those ordinary proofs are wanting. There is no evidence of execution coming from a subscribing witness; there is no evidence of any witness who ever saw such a paper as that stated in the bill, much less that it was attested by any particular person, and that the witness knew the signature either of John Willis or of the attesting witness. Nor indeed has any witness been examined who states more upon this point than that he had heard either from the elder or the younger Mr. Falkener that Willis had made a deed for this land in discharge of the debt he owed Falkener, but without any further particulars as to price
(269) or a witness cognizant of any treaty of purchase or attesting the conveyance. It is obvious that the plaintiffs have alleged, and therefore undertake to establish, a case difficult of proof, even under favorable circumstances and where the facts are recent, and the difficulty of making satisfactory proof becomes extreme after the lapse of forty years and the death of the parties and of nearly all their neighbors and friends, who might and probably would have knowledge on the subject of controversy. It was said in the argument that such disadvantages naturally lead to defects in the proofs, and therefore that these ought not to be as fatal as if they grew out of a transaction to which more direct or full proof would be in the party's power. The inference drawn was that the Court ought in such a case to be satisfied with less proof of the truth of the ancient alleged facts. To that inference we cannot yield our assent. The modes of proof may be different, but they must be equally satisfactory to the mind. There are, for example, old transactions of which the law dispenses with direct proof on account of their age, and in place of proof puts up with presumptions. Thus, instead of the production of a conveyance by one who has been a very long time in possession of land, not acknowledging

to hold under the former owner but openly claiming and treating it as his own, the law presumes a conveyance to the possessor and its loss. But here there is no possession of the land. It is true there could be none, for the Indians occupied the territory. The want of possession is, indeed, not evidence in this case that such a deed was not made. But the plaintiffs have to show affirmatively that it was made, and long possession is stringent proof of the conveyance. That there was no possession then, from whatever cause it may have arisen, does deprive the plaintiffs of the benefit of possession as affirmative evidence of such conveyance to their ancestor. In the case too of a deed thirty years old proof of execution is dispensed with. But it is the generally received opinion that to render such a deed admissible there must be some account of its proper custody, and also evidence that the party has been in possession under it, for it is the accompanying possession of the land that establishes the authenticity of an ancient deed. *Jackson v. Blansnaw,* 3 John., 292. At all events, the rule applies only to a produced (270) deed, of which the proof of execution is dispensed with on the presumption that the attesting witnesses are dead. 1 Stark. Ev., 330. It has no application to the doctrines of presuming or proving the existence of deeds. In this case, therefore, there are none of the common grounds for dispensing with proof of the execution of an ancient deed or for presuming a deed further than its existence may be established by direct or circumstantial evidence, satisfying the mind of the very fact in the same manner as such evidence would be demanded upon any other question. The presumption from lapse of time is, then, really against the plaintiffs, because, in the nature of things, the truth is likely to be obscured, the facts forgotten and material witnesses dead and the Court misled by specious appearances, all in proportion to the longer or shorter time intervening between the happening of a transaction and the investigation of its existence and consideration and purpose. As the plaintiffs come late to establish their case it may be true that they cannot do it as clearly as they once could. That is their misfortune. But still the Court must have proper and full proof, such as will produce the conviction that long ago as it is said this deed was executed, yet in fact it was then executed and was an absolute conveyance. The cause depends upon the inquiry whether such proof is found in this case.

Aware of the great deficiency of the usual and requisite proofs given of an instrument, which the party alleges to have been lost and seeks to supply, the draftsman of the bill, after stating

the existence of the deed, proceeds to admit and account for deficiency of that kind of evidence, and endeavors to substitute evidence of a different kind as tending to establish its existence. It is stated that the plaintiffs cannot prove the execution of the deed, nor produce a copy of it, nor show the consideration stated, nor its contents in particular. But it is charged that Willis was indebted to Falkener to more than the value of the land, and was not able to pay, and never did pay the debt except as the price of this land, and that the land was purchased
(271) by taking it in satisfaction of debts. The bill then states "that there can be no doubt that Willis did make the conveyance," and that for several reasons: that Mr. Falkener had possession of the grant and conveyed the land with the privity of Willis, who attested the deeds, and that Mr. Falkener, the son, also claimed it up to his death, and was for many years in search of the deed from Willis as that under which he claimed; that the title papers had been deposited with the house of Smith & Rodman, of Philadelphia, for the security of a debt, and that they declared this deed was lost; that the registry of the deed was burnt, which prevents the production of a copy, and that Willis did not claim the land after 1798, and that in 1802 he in the most solemn manner disclaimed it by taking the oath of insolvency.

Upon the allegation that the register's book between 1797 and 1802 was burnt the plaintiffs have offered no evidence, and according to the answer the book destroyed was that from 1799 to 1803. This circumstance is therefore out of the case; and it must be taken that there was no registry of such an instrument, inasmuch as in May, 1797, this deed, according to the plaintiffs' allegation, was in Philadelphia, and never got back.

Although no witness professes to be sufficiently acquainted with Willis's handwriting to form a judgment satisfactory to himself whether the signature as an attesting witness to the deed from Mr. Falkener to his son be that of Willis or not, yet our opinion does not proceed on that, and the case may be treated upon the admission that he is the witness. Formerly privity was imputed to an attesting witness. Men may have been much more particular in those days than in ours as to the subject-matter of deeds witnessed by them; and if witnesses generally were in the habit of ascertaining the contents of a deed before attesting it there might be some reason to infer the fact against all. But in practice few persons ask much less peruse for themselves to learn the provisions of the instruments they are about to attest. There is therefore no just inference in fact

of the knowledge of the contents, and now there is no such legal presumption. Sug. Ven., 547. But the terms of these deeds would have afforded Willis no certain information (272) upon the point. There are no metes nor bounds, no reference to the conveyance or person under whom he claimed, not even the river mentioned on which the lands lie, nor the number of acres. There is nothing in the description to identify the particular land, and if Falkener had claimed no other land in Tennessee, still Willis had no means of knowing that or that the lands meant were granted to himself. But there is evidence, which will be more particularly considered subsequently, that Falkener had deeds for two other tracts of land in that State, and consequently that it ought not to be inferred that Willis supposed his lands the subject of the deeds he witnessed.

With respect to the indebtedness of Willis to Falkener it is to be observed that there is no legal evidence thereof except as to the bonds and notes for £150 2 11. The accounts are unsupported by any proof of the delivery of the articles. The only evidence is the statement of Mr. Somerville that the accounts as stated are in the handwriting of the younger Mr. Falkener, and were found among his papers. It does not even appear that these accounts have been compared with the original entries in the books, all of which were in that gentleman's possession. Besides that there is the testimony of several persons of the village that Willis had dealings in the stores, but to what amount no one intimates except Judge Hall, who says he was told by Willis and Falkener both "that it was to no great extent." To so material a part of the plaintiffs' case the proof is, therefore, far from satisfactory. But let it be admitted that here it is sufficient to show dealings and some indebtedness, and that the evidence goes to that extent. Yet there are several things connected with these accounts as stated that seem irreconcilable with the supposed conveyance made, if at all, between December, 1796, and May, 1797. The inference the plaintiffs draw is that as Willis must be supposed to have conveyed to some person before March, 1802, it is to be presumed it was to Falkener because, among other reasons, he owed Falkener and had no other means of payment but this land, on the credit of which alone he must have been trusted, except so far as motives (273) of friendship might at times dictate some assistance. Upon an inspection of the accounts it is seen that at the supposed date of the deed Willis had contracted only for the debt of Gloster & Co. and not quite £100 of the amount to the elder Falkener, and about one-half of the bonds, making together not

quite £300. Now when he made the conveyance, if he did make it, it seems agreed that he had nothing left and was absolutely insolvent. Why then should the two Falkeners, especially the son, have supplied him with goods and paid debts for him after that to the amount of more than £300 Virginia money, that is to say, between January, 1797, and July, 1800? At this latter period the dealings stopped short. Why did they not stop when by making the deed Willis had paid all he could then pay or, as was obvious, would ever be able to pay? If the deed was absolute then there is the extreme improbability that without a penny left and with the worst habits he should have been further trusted for about $1,000. On the other hand, if he mortgaged the land or, as is more readily conjectured, he appointed Falkener his attorney or, at his suggestion, appointed Falkener's correspondents and creditors his attorneys to sell the land, it is natural that Falkener should have trusted him. The value of the land was unknown and there would be an understanding either that the land should be a security for all advances or, at any rate, the money would pass through Falkener's hands and he could indemnify himself. But a still more material consideration arising out of the accounts is that there is no credit for the land at any supposed price. It is not pretended that Falkener paid cash for the land. Falkener had none to spare it seems, and Willis is not known to have received any. Nor is it suggested that there were other debts between these parties except these, and they go back to the beginning of 1793. Consequently if there was a sale the price ought to appear in these accounts. But it does not, and its absence without explanation most strongly repels other evidence and all idea of an absolute conveyance. It is true that if the existence of the deed could be clearly established there would need no further proof of
(274) the consideration but the contents of the deed itself. But here the existence and contents of the deed are not directly established, and the dealing of the parties to the supposed instrument form the evidence or part of the evidence on which it is insisted that the instrument did exist. And in that point of view this is the most material part of the case. The bill brings it forward as such, and every one must perceive that it is so. But when it is found that the statement of the bill on this head is a total mistake, that the debts were not paid, but the bonds retained by the creditor and the account kept open and without any credit for the land, is not the inference of an absolute deed from the indebtedness of the bargainor or from any other evidence merely circumstantial, most materially weak-

ened, perhaps entirely rebutted? But further, the interest on each of these debts is computed as if the whole was due up to September, 1801, and the whole brought into a general statement. From these undoubted facts what presumptions are proper? It cannot be that these debts were satisfied by the land four years before the making of the general statement, as is charged in the bill. Are they not rather those before spoken of, either that Falkener was to sell the land or have it sold for Willis and pay himself, or that it should stand as security for existing and future advances? If Willis had sold, this statement was useless; at all events that part of it which was made up of the debts that were to be paid by the land was wrong. But if he had not sold then it was in the common course of business that the creditor should let Willis see that he had taken up the worth of the land and could get no more credit on it. Accordingly he received no further supplies. Every one must form the opinion from the circumstances thus connected with the debts that the statement was made to effect an adjustment between the creditor and debtor at or after the period of the statement, and consequently that there is an insuperable impediment to the belief that four years before there had been a sale of this land in discharge of these debts or such part as had then been contracted.

Notwithstanding the conclusion that seems so necessarily to follow from the considerations immediately preceding the circumstance that the oath of insolvency was taken by (275) Willis, relied on in the bill, was correctly and ably pressed in the argument. This fact is beyond question. From it was deduced, first, that Willis had, before taking the oath, conveyed the land to some person; and, secondly, that he had conveyed to Falkener because there is no evidence of a conveyance or a dealing with any other person, and there is evidence of some transaction between these persons in respect of the land. We think there is no just reason to think that Willis did convey to any other person except only the inference resulting from the oath of insolvency, in case it should not appear that he made a deed to Falkener, which is arguing in a circle. The answer, indeed, states that his widow informed the defendants of his declaration of an intention to give the land to his daughter. But the declaration itself is not proved, much less that in conformity to it he either did convey or said that he had conveyed. On the contrary Mr. Person states that though intimate with him he never heard him speak of such a conveyance, but he did say he had put the lands in the hands of Mr. Falkener, Sr., to sell for

him in Philadelphia, and for that reason he refused to treat with the witness for the sale. But though he did not make a deed to his daughter or any other person it does not follow that he made one to Mr. Falkener. There is no declaration of Willis that he had conveyed to Falkener more than any other person. He may have done so, either to Falkener or to another. But there must be evidence of such a conveyance in particular before the Court can establish it. It is not enough that the former owner disclaimed the land in the most solemn manner imaginable. Another person can claim only by showing the existence, in fact, of a conveyance to himself. In itself the oath of insolvency is inconclusive of any such conveyance having been made, and more particularly of its having been made to Mr. Falkener. It is indeed a circumstance of very great moment in a chain of circumstances tending to establish a conveyance by the insolvent. But it is inconclusive in several ways. The oath may have been taken corruptly. Though not corrupt, it may have been false. In either case the party continued
(276) to be the owner. It is acknowledged that neither of these suppositions is to be lightly admitted, for it is both the fair and the legal presumption that the party did not swear falsely and especially not willfully. But if after such oath no one can produce a conveyance, nor its existence at any time be legally established, then, however painful or uncharitable, the conclusion cannot be resisted that the oath was at the least not true. It comes back, then, in every case to the inquiry whether the party who claims that the insolvent had sold to him can show or establish the deed. Here the effort is to do it by circumstantial evidence only. But the force of such evidence depends on the number, tendency, agreement and conclusive nature of the circumstances in themselves which may be adduced to establish a conclusion, and also on the important fact that there are not opposing circumstances, whose existence cannot be denied, which are inconsistent with that conclusion. In such a case he who has the affirmative to maintain must not expect belief to be yielded when circumstances are thus irreconcilable. We will not venture to say that there was no sale or conveyance to Mr. Falkener. There may have been, and the very assertion of the fact by an honest man will gain a belief in its truth in the mind of one who knows the claimant. But judicially we cannot proceed on such a ground, but only on competent and sufficient proof. We have already considered a circumstance in this case which seems to stand opposed to every supposition of an absolute conveyance. We mean the state of the accounts

as appearing upon the creditor's own papers. We cannot assume that Willis intended to give the land to Falkener. Then, if there be *no* evidence of the payment of any price, there was no sale. Consequently there was no conveyance of any sort. But if there was it is at least as probable, and more so, that it was a security as that it was absolute, inasmuch as after the conveyance the party conveying was still trusted largely for a time, and that could have been upon the credit of this fund only; and further, there never was an adjustment of accounts, as upon a sale, at all events not before September, 1801, nor, as far as appears, afterwards. The supposition of such a security being intended or of an agency to sell is fatal to this bill, as much (277) so as finding that there was no conveyance of any sort.

For the bill proceeds not at all on the footing of a security, but exclusively on that of an absolute deed; and it could do no less since Mr. Davison and Mr. Johnson, to whom alone Mr. Falkener in any degree explained his claim, state that he said the deed was absolute and in consideration of the debts to his father. If this account of the consideration appear not to be true what is the inference? Why that there was no deed or only a security intended. If the latter was the true character of the transaction it furnishes, to a considerable extent, a solution of the difficulty arising out of the oath of insolvency, without imputing to the party corruption or any other impropriety than one with the habits and in the condition of this unhappy man might have fallen into, without violating or alarming his conscience. Seeing upon the statement of September, 1801, the accumulated debt of £745 12 5, he was probably thoroughly convinced that the land was not worth the sum and could never pay the debt. Therefore, as he might conceive, substantially he had no interest in the land and might safely take the oath, especially as it would be natural for Mr. Falkener at *that* time to agree to take the land in discharge of his debt, as he could get nothing more. But that also would be inconsistent with the bill, which affirms an absolute deed in 1798, or rather in 1797, that is to say, before any communication with Smith & Rodman. It is true we have nothing from Willis himself that he conveyed by way of security; and if it clearly appeared in any way that he certainly made a conveyance of some sort his silence as to its being a security would materially repel such a presumption. But it does not thus appear that he did convey at all, and therefore the question is, if he did convey whether he more probably did so absolutely or by way of security. The circumstances arising out of the accounts are in themselves strong to show that it

could not be an absolute deed. As to the silence of Willis respecting the security it is to be remarked that he was also silent as to having conveyed absolutely; which, upon the suppo-
(278) sition that such a deed was made, is very extraordinary. That a man who had no other property should not in the course of five or six years once mention to his friends or family that he had parted with 5,000 acres of land is very singular. Yet there is no such declaration, although the inquiry is made by the plaintiffs of several witnesses, particularly his brother-in-law, Mr. Park, and his next neighbor, Mr. Person. Indeed the total oblivion, as far as affirmatively appears, into which his mind seems to have sunk upon the subject of his property, whether he retained it entirely or had conveyed it absolutely or as a security, denotes such a disregard of matters which interest mankind as perhaps affords more satisfactory evidence of a state of mind not perfectly sound than the mere opinion of any witness. This circumstance, with the direct evidence upon that point, must leave an impression greatly weakening the influence which the oath of insolvency *per se* might have. It does not appear that at the juncture of taking the oath Willis was in a situation to prevent the magistrates from administering it. Mr. Mordecai thinks he was at the time both sane and sober; and no one speaks to the contrary at that very juncture. But he also says that Willis was always reckless, and he and Mr. Park and Mr. Person state that he was for a long time before taking the oath habitually and excessively intemperate, tending rapidly to insanity, and terminating in it in 1804, as stated by Mr. Mordecai; "for a considerable time, he believes several years, before his death," as stated by Mr. Park; and "for three or four years before his death," as stated by Mr. Person. Indeed the last witness is positive he was insane at the time of taking the oath. We cannot expect precise accordance as to dates from the most accurate persons after so long a time. But from his habits the opinion of the witnesses taken together, and from the final issue of his reason being overthrown at a subsequent period not distant from that of taking the oath, we are satisfied that the condition of this man was such as to add another circumstance to those already mentioned to detract from the effect that would naturally follow from taking the oath of insolvency in ordinary cases.

We cannot attribute much virtue to the possession
(279) of the patents in a case presenting the points of doubt hitherto adverted to. Such a possession consists with the supposition of an absolute conveyance, or a security, or a mere

agency to sell, for in either case the grants ought to go forward. Therefore this circumstance, like the preceding one, is inconclusive of a sale, and leaves the questions of the character of the conveyance or of its existence to be determined by the other relevant circumstances.

But it is said that the conveyance of the land by the father to the son, and the pledging it by one or both of them to Smith & Rodman, were acts of ownership which, connected with the claims of ownership, show that the paper executed by Willis was an absolute deed. It is important then to ascertain, if it can be ascertained, whether the father did convey this land to his son. If he did not, then all the subsequent claims of the son, however formal, must fall to the ground, since they are put in the bill and rest in fact on the allegation that these lands are included in the deeds of October, 1798. These deeds are for "two tracts of land unto me belonging, which are lying or situate in Cumberland or Davidson, in the western territory, the particulars whereof I cannot describe not having their plats now in my possession." The argument for the plaintiff is that Mr. Falkener owned no land in Tennessee unless he owned this, and therefore he did own this. The conclusion is not logical, for he may have owned neither this nor any other. But admit that he did own two tracts of land in that territory, as stated in the deeds, yet it is to be determined whether these are the two. In the first place there is no description showing an identity between the lands granted and those deeded. It is naturally to be supposed if these are not the two tracts mentioned in the deeds that they would also have been mentioned as particularly as the other two, since it is difficult to conceive a more vague description than that of the two tracts found in the deeds. In the next place, the father intended to convey all his property to his son, as is indeed stated in the deeds. Indeed the arguments on the opposite sides agree in this, that Mr. Falkener in October, 1798, owned but two tracts of land in Tennessee, (280) but they thence draw very different conclusions. The plaintiffs say that because he claimed but two tracts they must be the Willis lands; the defendants say that for that reason they could not be the Willis lands since he owned and claimed two other tracts. For this position the defendants' counsel relies on the documents coming from Christmas, the Tennessee agent of Falkener. It is nearly certain that Christmas never had the deeds executed by Willis if any such there were, for they were, according to the plaintiffs' allegations in Philadelphia so soon after the period when they must have been executed that there

was not time to send them to Tennessee and back at that day. Besides, it could hardly be that Christmas would have had one deed from Willis proved and failed to get the other proved also, as it is to be supposed both would be attested by the same witnesses. But this point seems to be placed out of doubt by the account of Christmas of March, 1801, and his letter of July, 1802. The land on which he paid the taxes must have been those included in the deeds mentioned by him, of which one had been recorded and the other not for want of proof, and he asks for the boundaries of "each tract." Therefore he had two tracts under his care. Were they these or either of them? It would seem not, almost to a certainty; for the lands spoken of by Christmas had in 1799 been assessed for taxes, which he had paid, and then again next year were assessed for a Federal and State tax under which he allowed them to be sold to complete the title. The lands thus assessed must have been within what was called the settled parts of the State, for only on lands to which the Indian title was extinguished was a tax of either kind levied. Mr. Grundy states explicitly that these lands on the Forked Deer were occupied by the Indians until 1818, and were not taxed by the State until 1819, and never by the United States. If this be so, and it seems unquestionable, it would seem that Mr. Falkener owned two other tracts besides these, and therefore that he did not own these. If he had he would have conveyed four instead of two, as mentioned in the deeds.

But if the probabilities be equal on opposite sides of this
(281) question the plaintiffs must yield it, as on them is the *onus*.

Besides there is another fact bearing on this part of the case deserving of notice. The force of circumstantial evidence depends not only on the consideration that the facts on which the presumptions are founded are ascertained, but also that nothing is withheld which if produced would show the facts to be different or authorize an opposite deduction from them. Now it appears from one of the deeds of October, 1798, that the assignment then made was not the first for the same purposes. Indeed Smith & Rodman's letter of April, 1798, shows that Mr. Falkener had addressed a circular to his creditors proposing terms and advising them of an assignment of some sort. The second deed of October, 1798, explains this by reference to "an original assignment dated 5 August, 1797," whereby the son obliged himself to pay his father's debts. This was after Willis is said to have conveyed. Where is that original assignment? Why is it withheld without any account being given of it? That went

back nearer to the period of Willis's deed, if there was one, and may have described the Tennessee lands more particularly. If it did, are we not to suppose the plaintiffs would have produced it if it would cover the Willis lands? On the other hand, if it mentions no land in Tennessee would there not arise a rational presumption that Willis had not conveyed to Falkener before August, 1797? We repeat that we are not concluding from this positively that Willis never made such a deed, or that it would so appear from the assignment of 1797; but we must point out the considerations that tend in our judgment to impair the force of the facts relied on for the plaintiffs as circumstantial evidence of that supposed deed, and among them we cannot judicially find that the deeds of October, 1798, do cover the lands granted to Willis, because the description is too vague to identify them, and probably the lands thus described might be other tracts and not these; and this the more especially because the plaintiffs' ancestor had another deed which almost certainly related to the same subject and would therefore elucidate it, but they do not submit it to our view nor show any reason why they do not. Therefore we cannot see our way to declare that these are the lands which the elder Mr. Falkener con- (282) veyed to his son by the deeds mentioned in the pleadings.

Supposing however that point to be doubtful on the face of the deeds and on the evidence hitherto discussed, it remains to be considered whether there are other acts of the parties calculated to remove the doubts. It is said there are, and that they consist of the claims and endeavors of Mr. Falkener to recover the supposed deeds. With the view of showing those claims and efforts the declarations to Davison and Johnson and the correspondence with the several persons whose letters were read are relied on. To that extent we incline to think they are evidence merely as facts which evince inquiry and claim, and not as evidence of the truth of the statement in the letters. The periods of the declarations in question are not distinctly stated. But we presume they must have been subsequent to the application in Philadelphia, because in the conversations with his friends Mr. Falkener said he had sent there to inquire for the deed. When was that? His own letters are not exhibited except what purports to be a copy of one in 1819. We can therefore collect the substance of Mr. Falkener's letters only from those in reply. How do they represent the matter? Can it be inferred from them that such a paper was ever sent to Smith & Rodman? It does not appear that any papers were ever sent to them, even admitting the contents of the letters to be true, except those car-

ried in May, 1797, by Mr. Macon, then attending Congress in Philadelphia. But there does not appear to have been such a deed among them. The letter acknowledging the receipt of them merely speaks of "sundry papers respecting certain tracts of land," and then declined an agency to make sale of them. But when that house became willing to lay hold of the lands as security in consequence of Falkener's circular in 1798, they then mention the character of the papers, and request him to have "the enclosed powers of attorney (which you sent us last spring) fully acknowledged" and returned to them to be held as a security for their debts. These reached Mr. Falkener, but it does not appear that he ever returned them to Smith & Rodman.

Probably he did not, for if the land was Willis's it ought (283) not to have been hypothecated for Falkener's debts, and if it had been conveyed by Willis to Mr. Falkener and by him to his son in August, 1797, for the benefit of all his creditors, he ought not and would not have sent to Smith & Rodman powers which would have amounted to a peculiar security for them. In the absence of evidence it cannot be inferred that those papers ever went out of the possession of Mr. Falkener again. Why are they not produced? Smith & Rodman's letters do not mention a deed from Willis to any person, nor specify by whom the letters of attorney were made. If made by Falkener it can hardly be doubted they would have been exhibited if yet in existence, and there is nothing to show the contrary. If made by Willis it might be expected they would be kept back because they would afford a strong implication that he made no deed of conveyance. Indeed in not one of these documents is a deed from Willis mentioned except in the *certificate* of Willet Smith. In that it appears for the first and the last time. James Smith speaks only of "grants." If such a deed had been forwarded by Falkener with the grants when he inquired for the latter would he not also for the former? And if such an inquiry had been made it cannot be supposed that James Smith would have taken no notice of it. Yet in the letter of January, 1806, he states that he had found the two patents in a small box, and in that of March following he says, "agreeably to your request we now enclose you the patents." Up to that time it does not appear that an inquiry had been made for any paper but the grants. How too can we account for the deeds being separated from the patents? No reason can be assigned for taking some of the papers from the others unless for the purpose of sending some of them home for probate. But we have seen what sort of papers were sent home, powers of attorney and not conveyances.

If there had been a deed from Willis to Falkener why was it not as necessary to have that proved as the letters of attorney from Falkener? We have before seen that there was no reason to suppose that it had been proved. There is then nothing upon these papers that can enable us to say that such an instrument was sent to Philadelphia, and it is not pretended (284) that there was any paper executed by Willis that was not sent there. If Willet Smith's statement was a deposition it would be very unsafe to decree on it. He states that the grants were returned. That was true, but he did not know it as he lived in New Jersey and James Smith sent them. He says there was a bill of sale from Willis to Falkener and *a* power of attorney from Falkener which were not returned; whereas, in the letter of April, 1798, with the papers before him, they are called "powers of attorney" and not *a* power; and moreover, the powers of attorney were sent to Falkener, and it does not appear they were afterwards put into the hands of Smith & Rodman.

But there are, we think, several circumstances which raise fair legal presumptions against the plaintiffs. Among them is the delay of Mr. Falkener to institute proceedings to establish the deed as soon as he discovered the loss, when in all probability there were witnesses living who, if there was such a deed, could have given direct evidence of it. It does not appear that Mr. Falkener, the father or son, ever mentioned the name of any person as a subscribing witness to the alleged deed. Why did they not? It is not probable that in 1806, when the grants were sent to him, all cognizant of the matter had died or that he had himself forgotten. Gloster lived several years afterwards, and he could at least have stated whether *he* understood these lands to be those mentioned in the deeds of October, 1798, and what Willis said when he attested those deeds respecting the lands granted to himself. Yet no inquiry was made of Gloster for any *public and open* claim set up to the land by Mr. Falkener, as is stated by the witness Pope, and is to be inferred from the testimony of the witnesses generally. Furthermore, it appears that Mr. Macon, who carried the papers to Philadelphia, lived in the same county with the parties for several years after the present suit was brought, and no attempt was made to get his evidence. It may be that he had forgotten the circumstance, but in such a case as this he ought to have been required to state even that. And it is yet more remarkable, if possible, that Willet Smith, who it is said had the custody of the paper lost, and from whose declaration of its loss that fact is (285) sought to be inferred, should have lived to 1839, with his

residence known to Mr. Falkener from 1810, and that his testimony to these important facts should not have been taken, if in truth he could have proved them. How can parties expect a court to decree on mere circumstances and many of them not consistent with themselves, while they fail to bring forward direct evidence so completely and so long in their power?

Upon the whole we must say that whatever may have been the real transaction the plaintiffs have not established by proof that John Willis executed an absolute deed of conveyance to William Falkener, as alleged in the bill, for the lands in controversy. It would be too much to declare the existence of such an instrument when its execution is in no manner proved, either by witnesses to it or by a person saying he had seen it, or even by a single declaration of the supposed bargainor, and when there has been and could be no corresponding possession, besides many other circumstances to render it at least probable that no such instrument was in fact ever executed.

PER CURIAM. Bill dismissed.

*Cited: Hill v. Johnson*, 38 N. C., 438; *Smith v. Turner*, 39 N. C., 441; *Walker v. Coltrane*, 41 N. C., 82; *Hodges v. Spicer*, 79 N. C., 227; *Brendle v. Herron*, 88 N. C., 386; *Davis v. Higgins*, 91 N. C., 387; *Loftin v. Loftin*, 96 N. C., 100; *Land Co. v. Board of Education*, 101 N. C., 41; *Mock v. Howell, ib.*, 49; *Edwards v. Dickinson*, 102 N. C., 523; *Harding v. Long*, 103 N. C., 7; *Abernathy v. R. R.*, 150 N. C., 106.

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(286)

WILLIAM POINDEXTER, Administrator, etc., et al. v. WINIFRED BLACKBURN et al.

A legacy given to a married woman, or a distributive share falling to her during coverture, and not received by the husband, or disposed of by him in his lifetime, survives to the wife.

The increase of the stocks of horses, cattle, etc., belong to the tenant for life; and so do also the crops left by the tenant as the fruits of his industry, and likewise at his death, the growing crops as emblements.

THIS was a bill filed in STOKES Court of Equity at April Term, 1840, and at the coming in of the answers at October Term, 1840, the cause was by consent set for hearing upon the bill and answers and transmitted to the Supreme Court. The

facts and the questions submitted by the bill and answers will be found in the opinion of the Court.

No counsel for the plaintiff.
*J. T. Morehead* for the defendant.

RUFFIN, C. J. Gabriel Waggoner made his will in 1825 and died. By it he devised to his wife Mary the plantation on which he resided for her life, and also bequeathed to her for life six slaves by name, and the use of his stock of every kind and his household and kitchen furniture, and after her death he gave five of the said negroes by name and their increase to Nancy Waggoner, one of his daughters, and the remaining negro called Hannah, and all the stock, household and kitchen furniture "and all other property there found that is not named in this will "to the testator's two daughters, Nancy Waggoner and Winifred Blackburn, the wife of William Blackburn. John Holland and George Fulse are the executors and took probate of the will. In 1829 Nancy, the daughter, died intestate and without having been married. She left surviving her Mary, her mother, and her sister Winifred Blackburn, and also the issue of a deceased sister, named Susannah Madeiras, who were Thomas Madeiras and Alfred Madeiras, sons of the said Susan- (287) nah, deceased, and Louisa Barron and Susannah Barron, which Louisa and Susannah were the children of Betsy Barron, a daughter, then deceased, of the said Susannah Madeiras. William Poindexter took administration of the estate of the intestate Nancy. In 1839 Mary, the widow, died intestate, and at her death she left surviving her daughter, Mrs. Blackburn, and her grandchildren and great grandchildren above mentioned, namely, Thomas Madeiras and Alfred Madeiras, the sons of her deceased daughter Susannah Madeiras, and Louisa Barron and Susannah Barron, the daughters of the said Betsy Barron, deceased. William Poindexter also took administration of the estate of Mary the widow.

It does not appear that at the death of the widow any of the stock or furniture which were given to her for life remained specifically. But she left on the plantation a crop raised or growing thereon, and also stock purchased by her or the product of that given to her by the testator. Those articles the executors of her husband claim, to be sold and disposed of under the will, namely, to be equally divided between Mrs. Blackburn and the representative of Nancy Waggoner. But Poindexter sold the

same as administrator of Mary, the widow, and holds the proceeds for distribution amongst her next of kin.

After the death of Mrs. Waggoner Poindexter, as administrator of Nancy Waggoner, also sold the five slaves bequeathed in remainder to her with their increase, and holds the proceeds subject to distribution. Holland and Fulse then also sold the negro Hannah, which was given in remainder to the daughters Nancy and Winifred.

To Mrs. Blackburn, Thomas Madeiras assigned his distributive share of the estate of his deceased aunt, Nancy Waggoner, and to Phillip Barron he assigned his share of the estate of his deceased grandmother. William Blackburn, the husband of Winifred, died in 1832 intestate, and administration on his estate was granted to John Blackburn and Madison Blackburn. They now claim the legacy given by the testator to Mrs. Black-
(288) burn, and also her distributive share in her sister Nancy's estate, as having vested in their intestate as husband, whereas she claims each as having survived to her.

The bill is filed by Holland and Fulse, the executors of Gabriel Waggoner, and by Poindexter as administrator of his two intestates against Mrs. Blackburn and the administrators of her late husband, and also against Alfred Madeiras and Phillip Barron, and against Susannah Barron and Louisa and her husband John Lowry, praying that it may be declared, first, to which estate the crop and stock left at the death of Mrs. Waggoner belong, that of herself or of the testator; second, whether the legacy and distributive share of Mrs. Blackburn belong to her or to the administrators of her late husband; third, who are the next of kin of Nancy Waggoner, deceased, and in what proportions they take, and particularly whether her mother, Mary, was entitled to any and what part of her estate, and whether Susannah Barron and her sister Louisa are entitled to any and what part thereof; fourth, who are the next of kin of Mary Waggoner, deceased, and in what proportions; and particularly whether the said Susannah Barron and Louisa are entitled to any and what part of her estate. The defendants have answered and submit to any decree the Court may deem just.

There seems to be so little difficulty in solving the questions propounded in the bill that we are somewhat at a loss for a reason for its having been filed.

The most important point in its consequences to the parties is that between Mrs. Blackburn and her husband's administrators, and upon that there is no doubt. A legacy given to a married woman or a distributive share falling to her during cover-

ture, and not received by the husband or disposed of by him in his lifetime, survives to the wife. These points have been so recently ruled by us that we need only refer to the cases of *Revel v. Revel,* 18 N. C., 272; *Hardie v. Cotton, ante,* 61. The administrators of the husband can get nothing in the premises.

Any of the articles given specifically by the testator and remaining in specie at the death of the widow Mary belonging to the daughters Nancy and Winifred under the will. (289) But the increase of stocks of horses, cattle and so forth belong to the tenant for life; and so do also the crops left by her as the fruits of her industry, and likewise the growing crops, as emblements. The proceeds of all these articles are to be distributed in the course of administration amongst Mrs. Waggoner's next of kin. Those next of kin are the intestate's daughter and only surviving child, Mrs. Blackburn, to whom one-half of her mother's estate belongs; her grandsons, Thomas Madeiras and Alfred Madeiras, to each one-third of one moiety; and her great-granddaughters, Louisa and Susannah, one-third of one moiety between them, or to each one-sixth thereof. These persons all represent Betsey, a deceased daughter of the intestate Mary. By the act of 1766, ch. 79 (Rev. St., ch. 64, sec. 1), lineal representation is unrestricted, and therefore all lineal descendants of an intestate succeed to shares of the estate, subject to the proviso that if the kindred be of unequal degrees then those more remote must claim by representation; and all the children of a deceased person can, together, get only what the parent, if alive, would have taken.

By the act of 1766 no representatives are admitted amongst collaterals after brothers' and sisters' children. Consequently Susannah Barron and Louisa, her sister, take no part of the estate of the intestate Nancy Waggoner. *Pett v. Pett,* 1 Salk., 250; 1 Ld. Raymond, 571. By the express terms of the last provision in the act the previous right of the mother, after the death of the father to succeed to the whole estate of a child, dying without wife or child, is cut down to an equality with every brother and sister and the representative of them. So that Nancy's estate is divisible into three shares, of which one belongs to the administrator of her mother, one belongs to her sister, Mrs. Blackburn, and the remaining one-third belongs to her two nephews, Thomas and Alfred Madeiras, as representing their mother, equally to be divided between them. Of course the original shares of Thomas Madeiras belong to his respective assignees as stated in the pleadings.

The costs of the complainants respectively in this suit must be

(290) paid out of the assets in their hands respectively, and each defendant must pay his or her own costs.

PER CURIAM. Decree accordingly.

*Cited: Mardree v. Mardree*, 31 N. C., 304; *Whitehurst v. Harker*, 37 N. C., 293; *McBride v. Choate, ib.*, 613; *Arrington v. Yarborough*, 54 N. C., 75, 78; *Woodley v. Gallop*, 58 N. C., 140; *King v. Foscue*, 91 N. C., 119.

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## DARM LEWIS *v.* JOHN OWEN and EDWARD LEWIS.

Conveyances which are absolute on their face must be held to be absolute unless there be cogent and clear proof to the contrary, and something like mistake or fraud or undue advantage in getting such a conveyance established, as well as some evidence that the parties have acted in the business as upon a mortgage.

But the form of the deed is not conclusive. The argument from it may be answered by a variety of circumstances—as: if the price was grossly inadequate; or, though the inadequacy were not gross, if the state of the possession indicated a continuing interest in the apparent vendor, or if what was called the purchase money was secured by the bond of the vendor, or interest was paid, or the like.

The answer of a defendant directly responsive to the allegations and interrogatories of the bill is evidence for him, which must stand unless overborne by the testimony of two witnesses or its equivalent.

The plaintiff in equity cannot read the deposition of one defendant against another when he whose deposition it is proposed to read has an interest to subject his co-defendant.

And the plaintiff cannot in any case read the deposition of a defendant, unless it has been taken under a special order of the court obtained for that purpose.

Examining a party is an equitable release to him as to the matter to which he is examined.

If the party examined be the one primarily liable to the plaintiff, and the other defendant only secondarily, the plaintiff necessarily gives up his claim against both by the examination of the former.

THIS was a bill filed in BLADEN Court of Equity, to which answers were put in, and replication having been entered and depositions taken the cause was, at Fall Term, 1840, set (291) for hearing, and by consent of parties transferred to the Supreme Court.

No counsel for the plaintiff.
*Badger* for the defendant.

RUFFIN, C. J. This bill was filed in October, 1837, for the redemption of a negro slave named Tom, conveyed, as alleged in the bill, by the plaintiff to the defendant Owen as a security for the sum of $375, lent by that defendant to the plaintiff. The bill states that in January, 1829, the plaintiff was in great need of money and applied to Owen to borrow $325, offering as a security for the loan to mortgage the slave mentioned, who was a favorite slave of the plaintiff and of much greater value than that sum; that Owen replied that he would not take a mortgage from his own brother, but that he would take an absolute deed for the negro, and that whenever the plaintiff should refund the money advanced he, Owen, would reconvey the slave, and that Owen observed that men were apt to underrate their necessities, and advised the plaintiff to take up a larger loan, and accordingly the plaintiff received from Owen the sum of $375; that the plaintiff thereupon executed to Owen an absolute bill of sale of the slave, and delivered him into his possession, but with a perfect understanding and agreement between them that the plaintiff might redeem the negro whenever it should be in his power to refund the sum loaned.

The bill further states that some weeks afterwards the defendant E. Lewis, a brother of the plaintiff, applied to Owen to exchange the slave Tom for a slave named Jupiter, belonging to said Edward, and that Owen informed E. Lewis that he was bound to permit the plaintiff to redeem Tom, but expressed a willingness to make the exchange if the plaintiff would consent and provided the said Edward would agree, in case the plaintiff offered to redeem, to surrender Tom to the plaintiff and take back Jupiter in his stead, to all which Edward Lewis assented; that thereupon, at the request of those parties, the plaintiff executed to Edwards Lewis an absolute bill of sale for Tom, but with the understanding of all concerned that (292) his right to redeem should not be thereby impaired; and that Tom then went into the possession of E. Lewis, and hath remained there ever since.

The bill further states that the plaintiff had been unable to refund the sum borrowed before November, 1836, but that at that time he did raise the sum of $375 and tendered the same to Owen, and required him to reconvey the slave Tom to the plaintiff and deliver him into his possession and account for the hires and profits of the slave while held by Owen or by E. Lewis

under Owen, which hires amount to more than the money borrowed and interest thereon; but that Owen refused to do so, and denied that there was an agreement for redemption and insisted that his purchase was absolute.

The bill after many minute interrogatories, to which each defendant is required to answer, proceeds to pray that Owen may come to an account with the plaintiff for the said principal money and interest thereon, and for just hires made or that might have been made by Owen or Edward Lewis, and that upon payment to Owen of the balance, if any, that may be found due on such account, the plaintiff may be let in to redeem his said slave, and Owen decreed to reconvey said negro to the plaintiff, and for general relief. The bill contains no prayer for any relief against Edward Lewis.

Both of the defendants put in answers. That of Edward Lewis admits his belief of the truth of the statements of the bill in regard to the transactions between the plaintiff and Owen, and also directly admits the truth of those statements which relate to the transaction to which he, Edward, was a party. He says that Owen informed him that he had agreed to let the plaintiff redeem Tom, and that it was then agreed between the three that the exchange should be made of Tom for Jupiter, and that the plaintiff should make to said Edward a bill of sale for Tom instead of the one to Owen, upon the understanding that the plaintiff might redeem Tom, and that if he was able
(293) to do so Edward Lewis should give up Tom to the plaintiff, and Owen should return Jupiter to him, Edward.

The answer further admits that the plaintiff made an absolute bill of sale for Tom to him, Edward, and that he took possession of him and hath had ever since, and that his general hire averaged $65 or $70; and that he then conveyed Jupiter to Owen absolutely and put him in his possession. The answer then states that this defendant has always been and now is ready and willing to perform the contract on his part, and to give up Tom to the plaintiff and take back Jupiter if Owen will return him or be answerable for his value.

The answer of Owen admits that in January, 1829, the plaintiff applied to him for a loan, but of what sum he does not recollect, and offered to mortgage the slave Tom as a security. The answer then sets forth that this defendant refused to lend the money, and that thereupon the plaintiff said he was obliged to sell the negro to pay his debts, and proposed to sell him to Owen for $500, which the plaintiff stated some other person had offered for the negro, but that Owen, thinking the price too high, re-

fused to give it; and the plaintiff, saying that the negro wished to be sold to this defendant, finally agreed to take the sum of $375, which he, Owen, then paid to the plaintiff, who thereupon made to Owen an absolute bill of sale. The answer then states that after the transaction was closed, as just mentioned, the plaintiff asked as a favor that Tom might remain at his house a few days to help in some work, to which the defendant readily assented; but that, preferring to provide another hand for him rather than allow the plaintiff to retain possession of the slave he had sold and conveyed to him, he, Owen, in a short time stated this difficulty to plaintiff and gave him $20 to enable him to hire another hand and required him to send Tom home to him, Owen, which was done immediately. The answer then states explicitly that "no mortgage was contemplated, no money lent or borrowed, no agreement for a mortgage but a sale to the defendant at the price of $375, and a bill of sale executed which expressed truly the transaction as an absolute purchase by the defendant." The answer proceeds then to admit that "hearing the plaintiff express much regret at parting (294) from the slave, and satisfied that the price was full value he, this defendant, told plaintiff he would permit him to redeem the negro. But this was a voluntary declaration after everything was concluded, for at the execution of the bill of sale there was no contract or understanding that the bill of sale should operate otherwise than on its face it purported. But that, having told the plaintiff he might redeem, he felt bound in honor and morals by his declaration, and that he would at any time while he held Tom have permitted his redemption."

The answer then sets forth that within a few days after he took Tom into his possession the plaintiff and his brother Edward, the other defendant, applied to this defendant to let Edward have Tom in exchange for the boy Jupiter, mentioned in the bill; that Tom was then about thirty years of age and a strong hearty man, and much more able to do heavy work than Jupiter, who was about seventeen years old; but that the defendant, to oblige those persons, assented to the proposal, supposing that ultimately Jupiter might be as useful to him as Tom, though he was not then so much so, and certainly not worth more than the money he had given for Tom; that after coming to an agreement it was thought unnecessary to have three deeds when two would answer, and he therefore surrendered to the plaintiff the bill of sale he had made to him, Owen, and thereupon the plaintiff executed another absolute bill of sale to the other defendant, Edward Lewis, for Tom, and

said Edward made a like deed to Owen for Jupiter, both of which were attested by a person who, after proving them, died, and was the only person present besides the parties. The answer then stated that after those transactions had been consummated this defendant stated to Edward Lewis, in the presence of the plaintiff, that it had been his, Owen's, intention to let the plaintiff redeem Tom if he could. But it denies positively that there was one word said at any time about the redemption of Jupiter under any possible circumstances, and avers that this defendant would not have consented to the exchange upon any such terms.

(295) And as to the redemption of Tom if the plaintiff could have, according to the course of the court, claimed the same against this defendant before the said exchange (which the defendant avers he ought not), the answer insists that by that exchange and the conveyances executed to carry the same into execution, that became a matter in regard to the slave Tom altogether between the plaintiff and the other defendant, and could not concern this defendant.

The answer further sets forth that the parties lived near to each other in the county of Bladen, and that the defendant kept Jupiter on his plantation there until the year 1834, and that then, with the knowledge of the plaintiff and of E. Lewis, he removed him and a large number of other slaves to a plantation in Mississippi, on which he remained until the winter of 1836, when the defendant sold the plantation and negroes; and that during all that period and up to the month of November preceding the filing of the bill neither the plaintiff nor the other defendant intimated any claim to Jupiter or any demand in the premises against this defendant, and none would then have been made, as the defendant believes, but for a sudden and very great rise in the price of slaves.

In support of his case the plaintiff has taken some proofs. Daniel McLain states that in January, 1829, the plaintiff mentioned to him that he would be compelled to sell Tom and he, the witness, offered him the price of $500 for the negro; but the plaintiff declined the offer and said that Owen had told him a few days before to bring him the negro and that he would let him have money to answer his purpose and give him a chance to redeem the negro.

David Lewis states that he attested a bill of sale from the plaintiff to Edward Lewis for Tom, and understood from those parties, but not from Owen, that Owen had agreed that on the payment of a certain sum of money by the plaintiff to Owen he would deliver Jupiter to Edward Lewis, and on such de-

livery Edward Lewis would deliver Tom to Owen for the plaintiff.

The plaintiff also took the depositions of the defendant Edward Lewis, and in them he repeats substantially the statements of his answer. The depositions were taken without any order for the examination of the party, and for that (296) reason and because the witness is interested in the matter to which he is examined the other defendant objects to the reception of his evidence.

On the part of the defendant Owen it is proved satisfactorily that in 1829 there was a depression in the price of slaves, and that $400 was the usual price of prime men; that the value of Tom was between four and five hundred dollars, but that $400 was the full value if not more than the full value of Jupiter, and that this defendant's preparations to carry Jupiter and other slaves to Mississippi were notorious in the neighborhood, and must have been known to both the Lewises. In November, 1836, Jupiter would have sold for $1,000.

We have seldom had a case with fewer claims to the favorable consideration of the Court than the present seems to be, either regarded upon its merits or in the state to which the plaintiff has brought his case from the mode of conducting it.

If we inquire into the character of the transactions whether they were purchases or securities, and upon all the evidence in the cause there seems to be only the most slender grounds for even suspecting them to be of the latter kind. In the first place the conveyances were absolute, and that of itself is conclusive on this point, unless there be cogent and clear proof to the contrary, and something like mistake or fraud or undue advantage in getting such a conveyance is established, as well as some evidence that the parties have acted in the business as upon a mortgage. Where the inference from the form of the written contract is confirmed by the answer the impugning evidence must indeed be very strong. In the present case the answer of Owen is full, positive and precise; that his contract for each slave was a purchase and not a security, and on those points it is directly responsive to the allegations and interrogatories of the bill, and is therefore evidence for that defendant which must stand unless overborne by the testimony of two witnesses or its equivalent. Here there is but the testimony of a single witness, Edward Lewis, and he having a strong bias and (297) a plain interest in the question. The form of the deed is indeed not conclusive. The argument from it may be answered by a variety of circumstances, as, if the price was grossly

inadequate or, though the inadequacy were not gross, if the state of the possession indicated a continuing interest in the apparent vendor, or if what was called the purchase-money was secured by the bond of the vendor or interest was paid or the like, then the Court will scrupulously scan the whole transaction and prevent the oppression of a needy and distressed man. Now, admitting that an argument might have been made for the right of the plaintiff to redeem his slave from Owen upon the admissions of the answer, had the case rested upon the original contract between the plaintiff and Owen, yet it is impossible there can be any obligation upon the defendant Owen to give up to the other defendant the slave Jupiter, or in any manner to answer in respect to him to the plaintiff. There is an absolute deed with a denial by the defendant of any understanding to qualify it; a full price for the absolute purchase; immediate possession taken in accordance with the deed; no covenant or security for the money advanced; possession continued eight years, and the negro sent to a distant State with a knowledge of the pretended mortgagors and without any objection from them. These are facts which are not and cannot be questioned; and they are perfectly inconsistent with the claims set up by the plaintiff and the other defendant. The case really carries the air of collusion between the plaintiff and the defendant Edward to charge the other defendant, Owen, chiefly if not entirely for the benefit of his co-defendant. Upon the face of the bill the plaintiff cannot have *his* relief against Owen; at all events not in the first instance. The bill admits that Owen restored to the plaintiff the title the plaintiff conveyed to him, and that the plaintiff then conveyed by a new deed to Edward Lewis, but it says it was understood between the three that the plaintiff might still redeem, and that upon his doing so Owen should return Jupiter to Edward Lewis. Now suppose all that to be true, from whom is the plaintiff to redeem; to get his reconveyance; (298) to look for an account of the profits? Plainly from Edward Lewis alone, for in him is the title, and he alone has had the possession of the slave and the benefit of his labor. He does not claim under Owen, but directly under the plaintiff. Therefore there is no ground of relief to the plaintiff against Owen; but if any one can claim such relief it must be Edward Lewis, and he alone. As to the slave Tom the question lies exclusively between the two Lewises, and Owen has no concern in it.

But the case is not even as strong for the plaintiff upon the merits as it would appear to be from the manner in which it has

hitherto been considered. For the evidence of Edward Lewis must be rejected, and when that is put out of the case there may be said to be no evidence left. There are several objections to the reading of his deposition.

He has an interest to subject his co-defendant. He admits in his answer that the plaintiff has a right to redeem the negro from him, and submits that he may do so. But he sets up a claim in that case to have his slave Jupiter back. It is obvious that this last is the real question in the cause, and that it is exclusively between the two defendants. To establish the agreement on that head surely Edward Lewis is incompetent, since he is to have the benefit of it.

But there is another sufficient objection to his deposition, which is that there was no order for his examination. Without an order the plaintiff cannot read the deposition of a defendant, even to points, on which the witness has no interest. *Mulvany v. Dillon,* 2 Ball. & Bra., 413.

But if all this was otherwise the plaintiff has excluded himself from relief against Owen by having given up his right to a decree against Edward Lewis. As has just been said it is obvious from the nature and state of the case that the plaintiff's decree ought and must have been against the defendant Lewis, that *he* convey Tom to the plaintiff and come to an account. Now, although there may be a decree against a defendant upon matters distinct from those on which he was examined as a witness, yet examining a party is an equitable release as to the matter to which he is examined, and no decree touching such matter can be made against the witness. Here the plaintiff has examined the witness to his whole case. It fol- (299) lows that if no decree can be made against him none can be made against another party, who is bound to answer only after the witness, who is thus discharged. If the party examined be the one primarily liable to the plaintiff and the other party only secondarily, the plaintiff necessarily gives up his claim against both by the examination of the former. *Thomson v. Harrison,* 1 Cox's Ca., 344; *Meedbury v. Isdole,* 9 Mod., 438.

In whatever light therefore the case be viewed it is not made out, and the bill must be dismissed with costs to the defendant Owen.

PER CURIAM. Decree accordingly.

*Cited: McLaurin v. Wright,* 37 N. C., 99; *Jones v. Hays,* 38 N. C., 506; *Burton v. Stamper,* 41 N. C., 16; *Elliott v. Maxwell,* 42 N. C., 249; *Wilson v. Allen,* 54 N. C., 26.

## WILLIAM LEIGH v. WILLIAM E. CRUMP.

The specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court. An agreement to be carried into execution there must be certain, fair and just in all its parts.

Although an agreement may be valid at law, and, if it had been executed by the parties, could not be set aside because of any vice in its nature, yet if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy.

When the plaintiff agreed in writing to sell to the defendant a tract of land by the following description, viz.: "A tract of land lying in the county of Northampton, containing one thousand acres more or less, bounded by the lands of Shirley Tisdale, Mrs. Sally Pope, Herod Dukes and others," for the sum of $2,000, and the defendant in his answer alleged that the tract contained only 600 acres and agreed to take the land upon a proportionate abatement of the price, and where it was apparent that both parties, at the time of the contract, supposed it to contain 1,000 acres, the court *held* that if there was such a disproportion in the quantity (the other description not being by metes and bounds, nor either party practicing any imposition on the other), the plaintiff could not have a decree for specific performance without a proper abatement in the price, and the matter was referred to the clerk and master to report on these facts.

(300) THIS was a bill filed at NORTHAMPTON Court of Equity, and which, after an answer had been filed, replication entered and depositions taken, was set for hearing at Fall Term, 1840, of that court, and by consent of parties transferred to the Supreme Court. The allegations and proofs are stated in the opinion of this Court.

*Badger* for the plaintiff.
*Iredell* for the defendant.

GASTON, J. The plaintiff states in his bill that on 10 October, 1837, he and the defendant entered into a contract under their respective seals whereby the latter agreed to purchase and the former to sell a tract of land by the following description, viz: "A tract of land lying in the county of Northampton, containing one thousand acres, more or less, bounded by the lands of Shirley Tisdale, Mrs. Sally Pope, Herod Dukes and others," and for the price of $2,000, one-half part thereof to be paid on 1 January, 1839, with interest from the day of the agreement, and one-half on 1 January, 1840, also with interest as aforesaid, and that by the said contract the plaintiff bound himself to execute a con-

veyance for the land on 1 March then next ensuing, or on failure to do so, to pay the defendant for the work he might do on the land, and the defendant bound himself on the execution of the conveyance to make and deliver to the plaintiff bonds for the payment of the purchase-money. The plaintiff charges that upon the execution of the contract the defendant entered into possession and hath ever since continued in the possession of the land, and that on 1 March, 1838, the plaintiff was ready to execute and offered to execute a conveyance as he had engaged to do, but the defendant would not comply with his part of the contract, refusing to give bonds for the purchase-money; and the plaintiff prays that the Court will compel the defendant specifically to execute his engagement. The defendant's answer admits the execution of the written contract and his entering into possession of the land, as set forth in the bill, and denying that the plaintiff ever tendered a conveyance or ever exhibited to him the draft of a conveyance for the land, (301) nevertheless confesses that the defendant had announced to the plaintiff his refusal to pay or secure the price set forth in the written contract, because he had, since the execution thereof, ascertained that the said land, instead of containing one thousand acres as therein stated, did not contain more than about six hundred acres; that both before and at the time of entering into the contract, the plaintiff informed him that it did contain one thousand acres; that the price of the land was fixed with reference to that quantity; that in reliance upon this representation of quantity and under the belief that the land contained this quantity the defendant entered into the contract, and states that the defendant had offered, and by his answer he repeats the offer, to execute the engagement on his part, with a deduction in the price because of the deficient quantity. To this answer there is a general replication.

Upon the proofs it appears that the land, which was the subject-matter of the contract, contained about 700 acres. In one of the documents under which the plaintiff denies his title it is stated as containing about 700 acres, and in another as containing about 1,000 acres, and when the plaintiff bought it was represented as containing 1,000 acres, more or less. No proof has been made that the plaintiff made the positive assertion as to quantity which is alleged in the answer. The only testimony offered for that purpose is that of a single witness, who deposes that in the negotiation between the parties he heard the plaintiff say either "that there was a thousand acres" or "it was said that there was a thousand acres," and "that he asked

two dollars per acre or thought it ought to be worth two dollars per acre."

We entirely acquit the plaintiff of intentional misrepresentation; and we hold that the defendant has not shown that the plaintiff made any representation in relation to the number of acres of which the tract consisted variant from that which is set forth in the written contract. But we do hold that at the time of the contract it was supposed by both the parties, although neither had any precise information in relation thereto, that the number of acres which it contained was about
(302) 1,000, and that at all events it did not vary much from that quantity. The plaintiff, upon the refusal of the defendant to execute his engagement, might have brought an action at law to recover damages for the breach of his covenant; and certainly there is nothing in the disappointment of the defendant in regard to the quantity of the land which could operate as a *bar* against such a recovery whatever might be its effect upon the amount of the damages. But he has preferred to ask the aid of a court of equity to carry the contract into execution. The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court. An agreement to be carried into execution there must be certain, fair and just in all its parts. Although it be valid at law, and if it had been executed by the parties could not be set aside because of any vice in its nature, yet if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy.

If the *certainty* of this agreement depended wholly upon the words therein used describing the land, the execution of the contract would labor on that account under serious difficulties. The only description of the land is that it lies in Northampton County, contains one thousand acres, more or less, and is bounded by the lands of persons therein named and *of others* not named. But the parties appear to understand from the exhibits filed what is the tract that was the subject of their bargain, and the defendant sets up no special objection on this account. But this general vagueness of description renders more important the allegation, such as it is, in regard to quantity. Where there has been an accurate and precise description in the contract *by metes and bounds,* from which the true quantity either distinctly appears or could easily be ascertained, a reference to a supposed quantity might not perhaps be deemed very material; but in *that* before us the quantity constitutes a prominent part of the de-

scription, and approaches as near to certainty as any other part of it. With respect to a tract of land so described there is great difficulty in laying down a rule what deficiency (303) in the estimate of quantity shall excuse the purchaser in refusing to execute the contract or justify the Court in withholding a decree for executing it. Certainly a small difference, such as might reasonably result from a difference in measurement or judgment, would not be held a valid ground for denying a specific performance, while it must be obvious to every one that there may be a deficiency so striking as to render the demand of a specific performance unconscientious, without any abatement of price because of the deficient quantity of land. For, although the land was neither bought nor sold professedly by the acre, it cannot well be doubted but that in agreeing upon the price for the entire tract regard was had on both sides to the quantity which both supposed the estate to consist of, while a rateable abatement of price, therefore, would probably leave both in nearly the same relative situation in which they would have stood if the true quantity had been originally known, the decreeing of the entire price against the purchaser would be substantially to make him pay for what he did not get.

The deficiency in this case is so large that we think the plaintiff ought not to be aided by us unless he will allow compensation therefor. And as the defendant assents to execute the agreement upon such compensation being made we direct a reference to ascertain what is the precise deficiency in the number of acres which the plaintiff is able to convey of the land referred to in the pleadings, and what is a fair deduction from the stipulated price of the entire tract at its estimated quantity because of such deficiency. The commissioner is to be provided with all the necessary powers to order a survey, compel the production of title papers, take testimony of witnesses and examine the parties on interrogatories.

PER CURIAM. Decree accordingly.

*Cited: Henry v. Liles*, 37 N. C., 418; *Gentry v. Hamilton*, 38 N. C., 379; *Cannady v. Shepard*, 55 N. C., 229; *Lloyd v. Wheatly, ib.*, 270; *Wilcoxon v. Calloway*, 67 N. C., 466; *Mayer v. Adrian*, 77 N. C., 94; *Ramsey v. Gheen*, 99 N. C., 218; *Anderson v. Rainey*, 100 N. C., 335; *Lowe v. Harris*, 112 N. C., 479; *Boles v. Caudle*, 133 N. C., 533; *Tillery v. Land*, 136 N. C., 549; *Soloman v. Sewerage Co.*, 142 N. C., 444; *Lumber Co. v. Leonard*, 145 N. C., 51; *Rudisill v. Whitener*, 146 N. C., 410.

(304)

EDWARD DAVIS and Wife et al. v. WILLIAM CAIN'S Executor et al.

A testator bequeathed in one clause of his will, as follows: "Having heretofore given and conveyed to my daughter Ann Davis and her husband Edward Davis a large and valuable real estate, besides sundry personal chattels, I do now hereby confirm the same. And I do hereby devise to my son William Cain in trust for the *separate and sole use* of my daughter Ann Davis and her children the sum of $4,000, which sum of money shall be laid out by the said William, his heirs, executors, etc., in such ways as he or they may deem best for my said daughter Ann Davis and her children, and for their sole and separate use and benefit." After giving to other persons some legacies of slaves he again devises as follows: "All the rest of my slaves not before given or devised I give and bequeath to my son William Cain, my son-in-law Willie P. Mangum, my daughter Polly Southerland and my son William *in trust* for my daughter Ann Davis and her children, to be equally divided between them, share and share alike." In a subsequent clause, after directing his debts, etc., to be paid, he says: "And the balance remaining thereafter, I give and bequeath to my son William Cain, Willie P. Mangum, Polly Southerland and to my son William in trust *for the sole and separate use* of my daughter Ann Davis and her children, to be equally divided among them, share and share alike." The husband, Edward Davis, claimed by virtue of his marital rights all the interest bequeathed to his wife in these several clauses. *Held* by the Court, that all the interest bequeathed to Ann Davis, the wife, in these clauses, was *to her sole and separate use*, and that the husband was excluded, though if the second of the above-mentioned clauses had stood alone, the construction as to that would have been different.

Though the intention in a devise to a wife to exclude the husband must not be left to inference, but must be clearly and unequivocally declared, yet when that intention is clearly ascertained by the Court it will be carried into execution, though the testator may not have expressed himself in technical language.

*It was held also* upon the construction of the same clauses, that on the death of the testator each of the children of Ann Davis took an immediate equal interest with their mother in the legacies so bequeathed.

A bequest of "twenty-five shares of the capital stock of the State Bank of North Carolina," the testator owning at the time that number of shares in the bank, is a general, not a specific legacy. If the testator had said "*my* twenty-five shares," etc., the legacy would have been specific.

(305) THIS was a bill filed in ORANGE Court of Equity by the complainants as legatees of William Cain, deceased, against the executors and other legatees of the said William and other persons, who were appointed trustees for certain purposes by the will of the testator. The cause came on for hearing at the Fall Term, 1839, before his Honor, *Bailey, J.*,

who made a decree therein from which an appeal was taken to the Supreme Court. The questions raised related to the construction of several clauses in the will of the testator, and are fully stated in the opinion delivered in this Court.

*Mangum* for the plaintiffs.
*Graham, Badger* and *J. H. Bryan* for the defendants.

DANIEL, J. The claim of Edward Davis, in right of his wife, to the legacy under her father's will, rests wholly on the construction which the Court may make on the three following parts of the will: On the second page of the will the testator says, "Having heretofore given and conveyed to my daughter Ann Davis and her husband, Edward Davis, a large and valuable real estate, besides sundry personal chattels, I do now hereby confirm the same. And I do hereby devise to my son William Cain, in trust *for the separate and sole use* of my daughter Ann Davis, and her children, the sum of $4,000, being part of the sum paid by me to Dr. Thomas Hunt for the repurchase of the land, etc., which sum of money shall be laid out by the said William, his heirs, executors, etc., in such ways as he or they may deem best for my said daughter Ann Davis and her children, and for their sole and separate use and benefit." On the third page of the will, after giving some legacies of slaves to other persons, the testator says: "All the rest of my slaves not before given or devised I give and bequeath to my son William Cain, my son-in-law Willie P. Mangum, my daughter Polly Sutherland, and my son William, *in trust* for my daughter Ann Davis and her children, to be equally divided between them, share and share alike." On the fourth page of the will, after directing his executors to sell the residue of his estate and pay his debts, pecuniary legacies and the charges of administering, the testator says: "And the balance remaining thereafter I give and bequeath to my son William Cain, Willie (306) P. Mangum, Polly Sutherland and to my son William, in trust *for the sole and separate use and benefit* of my daughter Ann Davis and her children, to be equally divided among them, share and share alike." Mrs. Davis had eight children, all alive at the death of her father, the testator.

When the testator first mentions the Davis family in his will he then declares that he had before given to Davis and his wife a large real and personal estate. This declaration was made not merely with a view of confirming the said gift, but to show Davis that he ought not to complain, that the property then

about to be settled on his wife and children should be so done in exclusion of himself. There is but one trustee, and the whole fund contained in the three aforementioned parts of the will is bequeathed to that trustee in trust for Ann Davis and her children. The testator in his bequests of two parts of this fund says it is in trust for their *sole and separate use.* In the immediate bequest of the balance of the slaves the testator has omitted to say that it was in trust for the *sole use* of Ann Davis and her children, but he has only said *in trust* for Ann Davis and her children. If this clause stood alone, and there was nothing else to explain the intention of the testator, the husband would be entitled to that portion of the slaves held in trust for his wife. But when we look at the other parts of the will we see that the testator had declared that he had before given Davis a large estate, and he had also bequeathed in his will portions of this personal fund in trust for her sole and separate use, both before and after the clause disposing of the slaves. The entire trust fund is composed of several parts of the personal estate of the testator. From the whole will taken together we think it is plain that the testator intended that every part of the fund in the hands of the trustee should be held for the *separate use* of his daughter and her children. The reason the testator three times mentions his daughter, Mrs. Davis, and her children is that other legatees with her and her children had to be provided for out of some of the undivided mass of the personal estate. In designating the other legacies and legatees the writer of (307) the will omitted to repeat the words *to her sole and separate use* when the balance of the slaves were spoken of in the will. We admit that the law is that the intention to exclude the husband must not be left to inference, but must be clearly and unequivocally declared. 1 Mad., 207; *Wills v. Sayers,* 4 Mad., 409; *Massey v. Parker,* 2 Mil. & K., 181; *Kensington v. Dallard,* 2 Mil. & K., 188. We are of the opinion that Davis is clearly intended to be excluded from taking any of the testator's estate. If the meaning be certain to exclude the Court will execute the intention, though the settler may not have expressed himself in technical language. *Darley v. Darley,* 3 Atk., 399; *Stanton v. Hall,* 2 Russ. & M., 180; Lewin on Trusts, 150. The marital claims will be defeated if the gift be to the wife for her "sole and separate use." *Parker v. Brooks,* 9 Ves., 483, or "to her *sole* use," *Adamson v. Armitage,* 19 Ves., 416, 1 Mad., 199, 1 Younge, 562. We are of the opinion that Edward Davis, in right of his wife, takes nothing under the last will of William Cain, deceased.

Second. Edward Davis, as administrator of two of his children who have died since the death of William Cain, claims two-ninths of the fund in the hands of the trustee. This claim is now resisted by the defendant. He contends that the Court should put such a construction on this will as, he says, will carry into effect the intention of the testator; and that cannot be done, he says, without permitting Mrs. Davis to take an estate for life to her sole and separate use in the entire fund held in trust, remainder over to her children. His counsel cited *first* Chambers and Atkins, 1 Cond. Eng. Ch., 195. That was a case on the construction of a marriage settlement; the £6,666 stock was in the hands of the trustee to pay the dividends to the husband during the joint lives of the husband and wife; but in case the husband survived the intended wife, then upon trust to reassign and transfer the fund to the husband, his executors and administrators to the use and benefit of him, the husband, and any child or children of the said intended marriage. The husband did survive with three children of the marriage. The three children filed their bill against the father and the trustee to have a declaration of their rights in the trust fund. (308) The question was, did the father and the three children take as joint tenants? The *Vice-Chancellor* said if that had been the purpose of the settlement the trustees would not have been directed to transfer the trust fund to the surviving parent, his or her executors or administrators; but would have been directed *to hold upon trust* for the benefit of the surviving parent and children. So in this case William Cain, the trustee, is not directed to transfer but to *hold* for the equal benefit of Mrs. Davis and her children; and therefore the case cited is not an authority for her to take all for life, remainder to her children. The next case cited was *Morse v. Morse,* 2 Cond. E. Ch., 511. Testator gave to his daughter and her children £5,000; £3,000 to be paid in a year after his death and £2,000 after the decease of his wife, and he appointed a trustee of those sums for his daughter and her children. The Court declared the £5,000 to be a trust for the daughter for life, and after her decease for all the children, whether born in the testator's lifetime or after her decease. The Vice-Chancellor made this decision upon the very peculiar circumstances of the case. It is clear, he said, that the testator did not intend an immediate payment of the two legacies and there would be an inconsistency with respect to them if the mother did not take life interests, for then different classes of children would become interested in the two portions of the legacy. He therefore put such a construction upon the

words of the will as to make all the children participators in the legacy. The case before us is very different, none of the legatees are to wait on or for any particular event; they all take their undivided shares of the trust fund immediately on the death of the testator. When a legacy is given to a descriptive class of individuals, as to children in general terms, and no period is appointed for the distribution of it, the legacy is due at the death of the testator. The rights, therefore, of these legatees were finally settled and determined at the death of the testator. Roper on Leg., 48. We are of opinion that Edward Davis, as administrator of his two deceased children, is (309) entitled to recover two-ninths of the fund in the hands of the trustee, William Cain.

Third. The testator bequeaths thus: "I give to my daughter Polly Sutherland the following personal property, to-wit, my negro man Plato, twenty-five shares of the capital stock of the State Bank of North Carolina, the sum of $2,000 in money, etc." The testator was the owner of twenty-five shares of capital stock in that bank. But on the day of his death the bank had declared a dividend of its capital stock. The testator's stock and dividend of stock remained in the bank untouched by him. He declared before his death that the dividend of the capital stock was a part of the legacy intended for his daughter Polly Sutherland. The legacy is not specific. If he had said *my* twenty-five shares of bank stock it would have been a specific legacy. 1 Roper, 73. But he has not so expressed himself, and mere private opinion or conjecture that he intended the stock he then held will be insufficient for the purpose of making the legacy specific. The legacy to Mrs. Sutherland as to the shares of stock is a general legacy. Being a general legacy, of course the executor might have been required by the legatee to purchase the prescribed number of shares. As that was not done, the executor must pay the sum they would have cost. As to that the facts are that the bank was about winding up, and between the making of the will and death of the testator had declared dividends of its capital. Upon inquiry we learn that this was not done by passing the dividend to the credit of each stockholder on his account as a customer of the bank and subject to his check as ordinary deposits. But the dividend remained in bank to the credit of each stockholder on a book of dividends, to be paid only on the receipt of the stockholder and on the production of the certificate of stock, so that the payment might be made to appear thereon by writing a memorandum thereof on the face of the certificate. Hence the dividend, after it was

declared, remained in bank *as a part of the stock* until it was actually received by the stockholder. Consequently a share of stock after a declaration of dividend was, as before, $100; and although some of the stockholders might have received their dividends, yet as long as a single one had not the share, properly speaking, was of the original amount, and the (310) donee of it might require that a *full* share should be bought for her and not a share which had been half paid. Now, in this case, there was no payment to the stockholder, Mr. Cain, of his dividends, as it is clear the money was received without his knowledge and against his will, as far as he had any will. Therefore this is to be considered as still part of the stock and a proper measure of the value of the shares to which Mrs. Sutherland was entitled. It turns out in this case that she received all the dividends of capital on the shares in her father's name except the first. By declaring her entitled to the money drawn by her brother and herself for the first she will get the value of twenty-five full shares as they stood at her father's death, and accordingly she is declared to be so entitled, and to that extent the decree must be reversed. The costs to be paid out of the trust fund.

PER CURIAM. Decree accordingly.

*Cited: Miller v. Bingham, post,* 425; *McGuire v. Evans,* 40 N. C., 272; *Graham v. Graham,* 45 N. C., 298; *Moore v. Leach,* 50 N. C., 90; *Phillips v. Hooker,* 62 N. C., 197.

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NATHANIEL J. PALMER v. JOSEPH YARBOROUGH et al.

When a man conveys certain property in trust to pay a particular debt, and the surplus after such payment to be returned to him, and at the same time expresses his intention by parol, that three other creditors shall be paid out of this surplus, and he will give orders to that effect as soon as he has had a settlement with such creditors, this is no defense to a bill filed against this trustee for an account by a second trustee to whom the same property was conveyed a day afterwards in trust for the payment of other creditors.

An answer cannot be put in for a defendant by one who calls himself his agent and attorney in fact, but who is not made a party by the bill.

THIS was a bill filed in CASWELL Court of Equity. A subpœna and copy of the bill were served on each of the de-
(311) fendants except Thomas R. Richmond, and as to him service was acknowledged and an answer filed by A. D. Richmond, who was no party to the suit, but styled himself "agent and attorney in fact for Thomas R. Richmond." The cause, having been set for hearing at Fall Term, 1840, of Caswell Court of Equity, was transferred by consent to the Supreme Court. The points involved will be found in the opinion delivered by this Court.

*Norwood* for the plaintiff.
*J. T. Morehead* for the defendant.

DANIEL, J. Yarborough, on 21 June, 1837, executed a deed to Richmond in trust to sell the property and pay a debt due from the grantor to one Williams, and then pay the surplus to the grantor or his assigns. The property mentioned in the deed is particularly described, among which are two slaves named Parmelia and Dorothy. On 22 June, 1837, Yarborough executed to the plaintiff, as trustee, a deed of trust to sell and pay a specified number of his creditors. This deed covered all the property described in the aforementioned deed to Richmond, but the slaves Parmelia and Dorothy are not in this deed particularly named; but after describing certain property it contains these words, "and all other property, either real or personal, which the said Joseph Yarborough may now be in possession of." These words, we think, carry the two slaves Parmelia and Dorothy. Both deeds were duly registered, and that to the plaintiff on the day after it bears date. The defense set up is that Yarborough intended to have secured by the deed to Richmond three debts to other creditors, who are not named therein, and was prevented from doing so by not having the amount of the debts, and that he then declared his intention to secure them, when he could come to a settlement with the creditors, by giving orders on the trustee to be paid out of the surplus; in fulfillment of which intention he gave orders to those creditors at days subsequent to his deed to Palmer. This defense, we are
(312) obliged to say, cannot be sustained. What might have been the effect of an agreement between Yarborough, those creditors and the trustee, to the purpose intended by Yarborough, we need not now say, because it is not pretended there was such an agreement. As a mere intention on the part of the debtor it could have no operation until carried out by some

formal and legal act on his part; and from the power to do such an act he cut himself off by executing the deed to the plaintiff.

We are of the opinion that the plaintiff would, under the facts which appear in the cause, be entitled to a decree for an account if the trustee Richmond was before the Court, but he is not. An answer is put in for him by a man who says he is his agent and that he transacted the business for him as Richmond, the trustee, was out of the State. This agent is not made a party by the bill, and his answer cannot be noticed by us. We have, however, said this much on the supposition that a declaration made by the Court on the construction of the deeds might probably be all that was wanted by the parties at present.

PER CURIAM. Decree accordingly.

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(313)

JOHN S. WADE et al. v. JOHN M. DICK et al.

If a trustee, under a misapprehension of right founded upon his own judgment, or even it would seem upon the judgment of counsel (except, perhaps, in some very peculiar cases), part with the possession of property to persons not entitled, it is his misfortune, but public policy requires that he should be the sufferer, because he is regarded as having acted incautiously, although innocently.

But a trustee is clearly protected by a judgment against him of a competent tribunal in regard to the subject matter of such judgment; and it seems that this protection should be extended to him in regard to other property similarly situated which he disposes of in acquiescence of such judicial determination—it being well understood that he is not cognizant of error or surprise therein, or any unfairness in procuring it.

Every decision of a competent court must be deemed to be according to the law and the truth of the case until the contrary is shown.

Where a bill makes unfounded charges of fraud, but the plaintiffs were infants when the matters which the bill seeks to investigate occurred, and they had an apparent cause for demanding an investigation, and may have been misled into the imputations by false rumors, although the bill is dismissed, it will be without costs.

THIS was a bill filed in PERSON Court of Equity at Spring Term, 1836. The cause, having been regularly set for hearing at Fall Term, 1839, was transferred by consent of parties to the Supreme Court. The statement of the case is included in the opinion delivered in this Court.

*Badger* and *Norwood* for plaintiffs.
*Graham* and *Bryan* for defendants.

GASTON, J. The plaintiffs are John G. Wade, Edmund Wade, Tinsley Wade, Thomas Wyatt and Jane, his wife, Polly Wade, Reuben Long and Sarah, his wife, Robert Wade and James Wade, and the defendants are the executors of James Williamson and of Samuel Painter, deceased, which said Samuel and James had been the executors of John Gwinn, deceased. The bill was filed 14 March, 1836, and charges, in substance, that John Gwinn had purchased at an execution sale against Robert Wade a parcel of negroes, and the said Robert being connected (314) with the said John by marriage, their wives being sisters, having a large family of children for whom the said John had a great regard, and being wholly insolvent, the said John permitted the negroes to remain with him, taking acknowledgments from him that he held by hire from and as tenant of Gwinn; that afterwards, in 1816, Gwinn died, having duly executed a last will whereof he appointed Williamson and Painter executors, and wherein he makes the following disposition in regard to these slaves: "I will and bequeath the following negroes (naming them) to John G. Wade, Edmund Wade, Tinsley Wade, Jane Wade, Polly Wade, Sally Wade, Robert Wade and James Wade, children of Robert Wade and Anne, his wife, to be equally divided among them when James arrives to the age of twenty-one years; the above-named negroes, my property, though in the possession of Robert and Anne Wade, and such is the disposition I choose to make of them; and I request my friend, James Williamson, to act as trustee to the above-named negroes, for the use of Robert and Anne Wade's above-named children"; and it alleges that the plaintiffs, John, Edmund, Tinsley, Jane, Polly, Sarah, Robert and James, are the legatees so named and described in the will aforesaid. The bill charges that after the death of Gwinn his said executors permitted the negroes to remain with Wade as their testator had done until a short time before Wade's death in the year 1819; that then Wade, being wholly insolvent, and Williamson, one of the executors, being a creditor of his and desirous of satisfying his demand out of the negroes so bequeathed to the plaintiffs, suggested to one Duncan Rose, who was also a creditor of the said Robert to a small amount, that Wade had acquired the title of said slaves by his long possession; that thereupon the said Rose obtained a judgment against Wade for about $50, sued out execution and had it levied on one of the slaves named

Burwell; that at the sale Rose bought Burwell, and Williamson thereupon, in the name of himself and his co-executors, instituted an action of detinue against Rose, under the pretense of asserting the beneficial rights of Wade's children to the negro Burwell; that this was a fraudulent contrivance (315) on his part to destroy their title; that he hastened on the trial of the suit, and by withholding the proper evidence, contrived to have a verdict and judgment rendered for the defendant; that immediately thereupon he procured one Jones to take out administration on the estate of Wade, sued Jones as such administrator for a stale demand against his intestate, levied an execution on the remaining negroes except two, and purchased them in at the sheriff's sale far below their value, having stifled competition by declaring that he was purchasing them in for the plaintiffs. The bill states that in 1835 Williamson died, and these negroes so bought by him, after his death, came to the hands of the defendants, his executors, together with a large amount of assets; that Painter, the co-executor of Williamson, had also died, leaving a valuable personal estate, which came to the hands of the other defendant, the said Painter's executor; and states that the plaintiffs have delayed hitherto calling for any account of these matters because they were advised it was not competent for them to do so until James Wade had attained twenty-one years. The prayer of the bill is that another trustee be appointed for the plaintiffs, for an account of the hires and profits of the slaves and for general relief.

The executor of Painter disclaims all personal knowledge of the transactions, alleges that his testator lived in Virginia and took no part in the management of Gwinn's estate, and insists that the executors of Williamson are solely responsible to the plaintiffs.

The executors of Williamson answer that they have no personal knowledge of any of the transactions which occurred before the death of their testator, but allege that the slaves in question were not the property of Gwinn, or if in truth he had any formal or colorable title thereto the same was held in trust for Wade, and for the purpose of defrauding and hindering Wade's creditors from obtaining satisfaction of their debts. They deny the fraud charged to their testator in relation to the proceedings of Rose or the suit prosecuted against him, but aver that Rose, without any intimation from or concurrence of their testator, had his execution levied upon one of the negroes, because the same were Wade's negroes and liable to the (316) satisfaction of his creditors; that at the day of sale their

testator attended and publicly forbade the sale, claiming the negroes as the property of Gwinn bequeathed to the plaintiffs; that Rose having indemnified the officer the sale proceeded and Rose bought; that thereupon, without delay, their testator sued out a writ of detinue in the name of himself and his co-executors, returnable to the February Term, 1820, of Person County Court; that he prosecuted this suit earnestly and in good faith; that it came on for trial at the December Term, 1821, of said court, when the jury found a verdict for the defendant on the plea of non detinet, and the court gave judgment accordingly, and that this verdict was rendered upon full proof that the negroes which Gwinn bequeathed to Wade's children, of which Burwell was one, were in truth the negroes of Wade, and liable for his debts. The defendants further say that, convinced by this investigation that the negroes belonged to Wade's estate, their testator gave up all claim to them; that thereupon Robert Jones was appointed administrator of Wade's estate, and for the purpose of paying off the debts of the intestate under an order of court sold three of the negroes, viz, a negro woman Rachael and her two children, Hannah and Esther, on 20 April, 1822, and that their testator became a purchaser of them as highest bidder at public sale at the price of $631.50, which they aver to be not only a fair but a very high price, and they deny the charge that he in any manner stifled competition or gave out that he was purchasing for the plaintiffs. They admit that they have been informed that he had a demand against Wade which was prosecuted to judgment, but deny that the sale took place under execution. They further say that on 17 August, 1822, the administrator, under a like order of court, sold another of the negroes named Russel, who was purchased by John G. A. Williamson, who afterwards sold him to their testator, and that these are the only negroes of those named in the will of Gwinn which ever were in the hands of their testator since his abandonment of claim as executor and the administration of them
(317) as the property of Wade, and these the testator hath held and claimed notoriously and, until now, undisputedly, as his absolute property. The defendants further say that in 1823, for the purpose of closing his administration and for the purpose of making distribution between the widow and children of Wade, the administrator, under an order of court, made sale of the two other negroes, Will (or Buck) and Ben; that these were bought by Thomas Woody, "one of the plaintiffs," at the price of $1,112.50; and that shortly thereafter all the plaintiffs settled with the said administrator and received their parts of these

proceeds in their character of next of kin of Wade. It may not be amiss to remark here that it is a mistake in this answer, and a similar one is to be found in the commissioner's report, to represent Woody as one of the plaintiffs. He intermarried with Elizabeth Harriet Wade, who was not a legatee in Gwinn's will, and not with Jane Wade. The latter intermarried with Thomas Wyatt. The defendants, in their answer, deny that the plaintiffs delayed bringing suit during the life of their testator because of the pretended advice that it was not competent for them to demand their negroes or an account until the plaintiff James should arrive at twenty-one years, and they say that the bequest of the negroes was direct to them and vested an immediate interest in them, although a postponement of the division was directed until the arrival of James at age; they allege that John G. Wade was of age in 1815; Edmund, another of the plaintiffs, in 1819 or 1820, and there was nothing to prevent the plaintiffs, if they conceived themselves aggrieved by any of the acts whereof they now complain, from bringing forward such complaint while the matter thereof was fresh and the truth could be ascertained. They insist that their testator, in all his conduct which the plaintiffs arraign, acted with perfect integrity and good faith, claim for him and his estate the benefit of the act of limitations, barring actions of detinue and trover, if not prosecuted within three years after cause of action accrued, of the act of the General Assembly giving a title to slaves to the possessor against whom such action has not been prosecuted within the limited time aforesaid, and contend that he is not precluded from the benefit of these acts because of his being made a trustee in the said will for the plaintiffs, for that (318) by a proper construction thereof the same were not bequeathed to him in trust for them, but he was merely requested to render any services to them in his power as their friend.

A general replication was taken to the answer and proofs have been offered on both sides. The court also, upon the hearing, being desirous of procuring some more detailed information than the proofs exhibited, directed of its own motion a special inquiry. This has been made and considered with the proofs in the cause.

The transactions brought under judgment in this case occurred many years ago, and in respect to a part of them it is impossible to obtain now precise and certain information. There are some, however, with respect to which we can pronounce with much confidence. There is no proof that the late Mr. Williamson procured Jones to administer on the estate of Robert Wade;

that charge that he endeavored to stifle competition at the sale of the negroes at which he purchased; that the sale was made upon executions at his instance; that he bought professedly for the plaintiffs and at an under value, is in all its parts unfounded. The proofs are full that the sale was made by the administrator under an order of court; that it was conducted in all respects fairly, and that Williamson purchased for himself and at high, certainly full, prices. The charge also that he suggested to Duncan Rose that Wade had acquired title to the slaves in question by adverse possession, that he instituted the suit in bad faith and as a cover to conceal his purpose of applying the property of the plaintiffs to the satisfaction of his stale demands against Wade, and that he withheld evidence in order to prevent a decision of that suit against Rose, is unsupported by proof. The suit appears to have been honestly brought and honestly conducted under the direction of respectable counsel, and Rose positively repels any collusion or understanding whatever between him and his adversary, either in relation to his selling the negro Burwell, as the property of Wade, or the suit brought in consequence thereof. Dismissing therefore (319) these charges, we are brought to other matters in respect to which there is less certainty, that is to say, first, upon what ground was the suit of the executors of Gwinn against Rose determined? And, second, was it decided in conformity to law and right? Upon the proofs we collect that in December, 1801, James Williamson obtained a judgment in Person County Court against Robert Wade by confession for the sum of £588 7 0 and costs; that a *fi. fa.* issued thereon and was levied on certain negroes and other personal property of Wade; that upon this *fi. fa.* the sheriff returned that he had sold to James Williamson a negro boy, Frank, and some other articles, and had sold to John Gwinn negro woman Mary for £5 1 6, negro boy Anthony for £58 0 6, and negro woman Rhoda and child for £185 0 6, and thereon was endorsed a receipt from Williamson for £487 1 9 in part of his judgment, that being the amount of the sales after deduction of £13 18 4 for the costs of the suit; and the sheriff executed a paper-writing, unattested however, and without seal, bearing date 18 January, 1802, in the nature of a bill of sale to Gwinn for the negroes so purchased. This instrument was registered upon the acknowledgment of the sheriff at ____ Term, 1808. The only direct testimony as to the occurrences at the sale comes from Mrs. Wade, the widow of Robert Wade and mother of the plaintiffs, who states that when her husband was sold out Mr. Gwinn bid off Rhoda and her

child Jane, and on the evening of the day told her husband if he wished to keep them to do so until he called for them; that she saw no money paid but that after the sale the deputy sheriff, her husband, Mr. Gwinn and Mr. Williamson retired to themselves to have a settlement. We have no information from any quarter about the negro woman Mary and the negro boy Anthony, which Gwinn bought at the same time; but we must presume that these were carried off by him. From the testimony of this witness it appears that Mr. Gwinn gave the young slave Jane to her daughter and eldest child, Elizabeth Harriett Wade, and sold Joe, one of Rhoda's children afterwards born, to Mr. Williamson. During the life of Gwinn Rhoda and the rest of her children remained with Wade, were called by him Gwinn's negroes, and from year to year notes for small (320) sums for their hire were given by Wade to Gwinn. After Gwinn's death such of them as were fit to be hired out were hired out by Wade under the direction of Williamson, and the rest of them remained with him and the family until Wade's death, which happened about the end of the year 1819. Shortly before his death, Duncan Rose, who as one of the firm of Rose & Chambers had a demand against him of about eighty or eighty-five dollars, having received information from Wade himself that the negroes were his in truth, but covered for him by the pretended purchase of Gwinn, prosecuted this demand to judgment and levied the execution on Burwell, one of the negroes; when the officer came to levy Wade produced the bill of sale from the sheriff to Gwinn; whereupon the officer, before he would sell, required from Rose a bond of indemnity. This was given; the sale took place in January, 1820, and Rose bought, and Williamson instantly sued him.

After Wade's death and until the decision of this suit Williamson hired out two of the negroes, Buck and Ben, as appears from an account current exhibited by the plaintiffs, in which he charges himself, in account with the children, with the amount of the hire of Buck and Ben for the years 1820 and 1821, and takes credit for necessaries furnished them and for the expenses and costs of *their suit*. The plaintiffs exhibit, also, a letter from Williamson to Mrs. Wade, dated 12 February, 1821, while this suit was pending, in which there are direct references to it. He commences by complaining that after he had hired Ben he understands that she had hired him to another person, and states that if that is the way in which things are to be done "he must give up all the papers of Mr. Gwinn and the lawsuit go as the *direct of the court*"; then, after stating

that the man to whom he has hired Ben will yet take him if she can get him back, and if not, that he must try "what the law will say to that," he remarks that "he has *offered up* all the business to Mr. Woody (the husband of her daughter Elizabeth) but *he* will not take it, and that Mr. Painter is out of the State, so as to get his advice," and proceeds to make some in-
(321) quiries about the boy that Rose claims, and then puts an inquiry in these words, "and should the children gain the negro and Mr. Rose appeals to equity who will answer the bill I am at a loss to know." There is no evidence on either side of the occurrences at the trial. Rose states that he had previously given all the necessary instructions to his attorney, and had been told by his attorney if his presence should be required he should be called. He either resided at the village where the court was held or had a shop there, which required his attendance during court. He was called and went to the courthouse, and on arriving there learned that the cause had been tried. He is under the impression from what he has heard that he gained the suit upon the statute of limitations. It appears from the record that the defendant pleaded non detinet, the statute of limitations and release, and the jury rendered a verdict for the defendant "on all the issues." There was no motion for a new trial or an appeal, and at the same term administration was granted on the estate of Wade to Robert Jones, on his entering into bond with James Woody and Moses Chambers as sureties. Jones, the administrator, forthwith took into his possession all the negroes, except Burwell, that had been claimed and held for Wade's children, and made return thereof in his inventory to the succeeding March Term of the court. At that term there was an order of court for the sale of Rhoda and her children, Hannah and Esther, and these were bought at public auction by Williamson, who alleged as a reason for giving such high prices that he owned Joe, one of Rhoda's children, and had a favorable opinion of the family. At June Term following there was an order of sale for another of these negroes, Russel, and he was bought by a son of Mr. Williamson's; and at November Term, 1823, there was an order to sell the remaining two negroes, Will (or Buck) and Ben, and these were sold and bought by James Woody. The administrator made return to court of all these sales and exhibited his account of debts paid and disbursements, and in November, 1825, the balance found due upon that account was distributed over and paid unto the widow of Wade and the plaintiffs, of whom John, Ed-
(322) mund and Tinsley were then of age. Jane acted by her

husband, Thomas Wyatt, and the remaining plaintiffs, Mary, Sarah, James and Robert, were represented and acted by the said Thomas Woody, their guardian. At the time of the sale by the administrator of Wade to Williamson, John, the eldest of Wade's children except Elizabeth, who was not a legatee in Gwinn's will, was about the age of twenty-one, and when this bill was brought, James, the youngest, had not quite attained that age. By the will of Mr. Gwinn all his estate, real and personal, was given to his wife with the exception of Rhoda and her children.

From these facts the inference is not to be resisted that the action against Rose was decided upon the ground that the negroes which had been bought by Gwinn, left with Wade and bequeathed to Wade's children, were, with respect to Wade's creditors, the property of Wade, and therefore liable to be taken in execution for his debts. It was upon this ground Rose had undertaken to seize one of them, and had indemnified the sheriff for selling. It was to try this question that the action was brought. The length of time during which Wade had been permitted to enjoy the labor and profits of the negroes was no doubt insisted upon as a material circumstance to show the alleged fraudulent trust for him, but it could not be set up *per se* as a bar to Gwinn's action or that of his representatives. Now if it could be shown that this decision was against right an interesting question might arise whether Williamson, acting honestly under the belief that it was right, and thereupon surrendering all the negroes to the administrator of Wade, would not be protected in so acting. If a trustee under a misapprehension of right, founded upon his own judgment or even, it would seem, upon the judgment of counsel (except perhaps in some very peculiar cases), parts with the possession of property to persons not entitled it is his misfortune, but public policy requires that he should be the sufferer. See *Doyle v. Blake*, 2 Sch. & Lef., 243; *Voz v. Emery*, 5 Ves., 141. In such a case he is regarded as having acted incautiously although innocently. But it is well worthy of consideration whether an imputation of want of caution can rest upon him for acqui- (323) escing in the correctness of a judicial sentence pronounced by a competent tribunal of his country, it being well understood that he is not cognizant of error or surprise therein or any unfairness in procuring it. Williamson is clearly protected by that judgment against the demands of the plaintiffs to account to them for Burwell, the immediate subject of the action in which the judgment was rendered, and it would require some

strong reasons to show that after a judicial decision involving the right of all the negroes he was bound in caution to stand the suits of the creditors who upon that decision would undoubtedly come upon him as executor *de son tort* of Wade for the other negroes. But we do not determine that question, for we feel ourselves bound to hold that the judgment in that suit was right. In the first place, this is the presumption of law. Every decision of a competent court must be deemed to be according to the law and the truth of the case until the contrary is shown. The plaintiffs were represented in that cause by the executors of Gwinn, their trustees, and it must be held by us until the contrary is shown that it was then rightly decided that the plaintiffs were not entitled to the negroes bequeathed by Mr. Gwinn against the creditors of their father. The contrary of this presumption is not shown. If the facts which we have ascertained do not prove that Gwinn's title was nominal and set up for the benefit of Wade, they do not disprove it. If he honestly purchased Rhoda and her child for himself and not under a trust for Wade, and paid his money therefor, he had a right to allow Wade, as long as he pleased, the benefit of their labor. But as it is every day experience that when embarrassed men are "sold out" contrivances are resorted to "to cover their property" under formal alienations to their friends, and as the truth, in regard to such fraudulent alienations, can seldom be eviscerated but by a minute and scrupulous consideration of all the circumstances attending the transaction, too much stress ought not to be laid upon the mere forms that Gwinn was the highest bidder and received the evidence of title. It may have been, notwithstanding, that he either bought with Wade's money or
(324) was under engagement to hold for Wade after indemnifying himself for what he had paid, and had so indemnified himself. The circumstances that Mary, Anthony and Joe had been appropriated to his use, that he gave one of Rhoda's children to Wade's eldest child, that he permitted Wade to have the uninterrupted use of Rhoda and her other children for fourteen years, that in his will he bequeaths them and nothing else to the other *children of Wade,* with directions that they shall be kept together for *twenty years more,* that is to say, until James Wade, then but a year old, shall attain full age, the request that *one* of the executors, James Williamson, who was privy to the circumstances under which he bought and the manner in which the business was arranged upon that purchase, should act as trustee of the negroes which he chooses thus to dispose of, the conduct of Williamson in permitting Wade to

hire out such of them as were fit to be hired, and as far as we can discern to receive the hires, the production *by Wade* of the sheriff's bill of sale when a creditor attempts to levy, all these have a tendency at least to prove that Wade by the understanding of the parties was the beneficial owner.

We think the letter exhibited by the plaintiffs greatly strengthens this inference. If there was a man then living who knew fully the true character of this transaction it was Williamson. It was on a judgment rendered at his instance and by confession that Wade was sold out, and the sale took place as soon after the rendition of the judgment as it well could; the court was in December and the sale in January. Everything that was then sold was bought either by himself or Gwinn. He was present at the settlement with the sheriff on account of the purchase, and endorsed on the *fi. fa.* his receipt of the money in part of his judgment, and is not only one of the persons selected by Gwinn as deserving of his general confidence and therefore fit to be his executor, but for some reason or other as peculiarly fit to act as trustee of this property for the use of those to whom Gwinn bequeaths it. In this letter, which throughout manifests not only displeasure with the widow's conduct, but great perplexity because of the "lawsuit" and a desire to get rid of his entanglements and devolve them on the other, who (325) was connected with her and the children, he states one matter on which he is anxious to *get information;* "if the children gain the negro and Rose appeals to equity who will answer the bill I am at a loss to know." Now this cannot mean that he wants *legal* information from her on the subject. It would be a strange quarter to apply to for information of that character. And it seems to us exceedingly difficult to give it any meaning but one, and that is, "if Rose files the bill to investigate the alleged fraud or trust upon the supposition of which he sold the negro, and an answer must be put in *upon oath,* what is to be done then? *Who* is to answer that bill? I know not." But these are not the only considerations which tend to strengthen the presumption that the decision in the suit was according to the truth. The suit was tried in open court, and involved a matter calculated to excite public attention. The eldest son of Wade was not then indeed of age, but was actually a clerk in the employment of Rose & Chambers. Woodley, who had married the eldest daughter and whom Williamson had been anxious to substitute as the person to carry on the suit, was at the court, for he joined with Chambers as a surety in the administration bond of Jones. Now it seems morally impossible, if the judg-

ment had been against right, that an impression to that effect should not have been made and some proof now offered to show it. Woodly and Chambers have both been examined in this suit, but they testify nothing on this point. Instead of any complaints against the judgment there seems to have been an immediate and universal acquiescence in its justice. The executors renounce all claim upon the property as that of their testator or his legatees. An administrator of Wade is appointed by the court, and one certainly approved of by Woodly. The creditors of Wade forbore from harrassing the estate. It was disposed of upon the most advantageous terms upon credit. All the creditors were satisfied, the balance due to the family of Wade ascertained, those of ability to act received their portion of it,
(326) and those not of age had a guardian appointed who must have known the whole transaction. He received their parts, and they afterwards received them from him. And after this complete settlement no attempt was made to break in upon it and no complaint uttered against it until 1836, after both of the trustees of the plaintiffs were dead. The excuse assigned for this apparent acquiescence on the part of the plaintiffs is unfounded both in law and fact. There can be no question but that the bequest passed a present interest to the legatees, and the bill *was* filed before the youngest child had attained full age. It will be noted that this acquiescence is not regarded by us as a waiver of an ascertained right or ratification of an act confessedly wrong, but simply as matter of evidence upon the inquiry whether there has been a violation of right.

Having arrived at the conclusion that the decision of the court against Rose rightly adjudged that the negroes claimed by the plaintiffs under the will of John Gwinn belonged to their father's estate, so far at least as his creditors were concerned, we have no difficulty in dismissing their bill. The property has been applied so far as was necessary for the satisfaction of these debts, and none can doubt but that the mode pursued and of which they complain has been most beneficial to them, by causing these debts to be discharged without a sacrifice, and thus securing to them a surplus which could not otherwise have been realized. If the executors of Gwinn had held on to the property and allowed themselves to be sued as executors in their own wrong of Wade, the plaintiffs would probably have lost all.

We are relieved from the necessity of considering the *defenses* set up because of the statutes referred to in the answer, and we therefore forbear from intimating an opinion in regard to them.

The bill must be dismissed. We have doubted whether it

ought not to be dismissed with costs because of the unfounded charges of fraud which it prefers. But most if not all of the plaintiffs were infants when the matters occurred which the bill seeks to investigate, had an apparent cause for demanding an investigation, and may have been misled into these imputations by false rumors. Upon the whole we dis- (327) miss it without costs to either party.

PER CURIAM. Bill dismissed, but without costs.

*Cited: Wood v. Sugg,* 91 N. C., 96; *Culp v. Stanford,* 112 N. C., 669.

## MEMORANDUM.

At the session of the General Assembly 1840-1841 the Hon. WILLIAM H. BATTLE, who had been temporarily appointed by the Governor and council, was elected a judge of the Superior Courts of law and equity.

At the same session MATTHIAS E. MANLY, Esq., was elected a judge of the Superior Courts of law and equity in the place of the Hon. EDWARD HALL, whose commission had expired.

At the same session HUGH MCQUEEN, Esq., was elected Attorney-General in the place of JOHN R. J. DANIEL, Esq., whose commission had expired.

# EQUITY CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

# NORTH CAROLINA.

## JUNE TERM, 1841.

(329)

WILLIAM W. CARSON and LOGAN CARSON, Administrators with the will annexed of John Carson, v. GEORGE CARSON.

A. devised as follows: "I give and bequeath all my estate, real and personal, to my son L. C., to the support of him and his brother G.; that is, that G. gets no more than what support him equal to L. C. should he not be extravagant." *Held*, that the legal estate in all the property vested in L. C., but a moiety of the beneficial interest belonged to G.

THIS was a bill filed at March Term, 1841, of BURKE Court of Equity by the complainants, as administrators with the will annexed of John Carson, deceased, praying the court to put a proper construction upon the said will, that they might be governed thereby. The bill alleged that the said John Carson had duly made his last will and testament, and that the same was duly admitted to probate, both as to real and personal estate, in the following words, to-wit: "In the name of God, amen. I, John Carson, do make this my last will and testament. I give and bequeath all my estate, real and personal, to my son Logan Carson, to the support of him and his brother George, that is, that George gets no more than what will support him equal to Logan, should he not be extravagant." The bill then alleged that the testator died seized and possessed of a very large real and personal estate, and that doubts had been entertained and claims interposed in consequence of those doubts as to the proper construction of the will: (1) Whether the whole (330) of the said property vested in the said Logan, subject only to the charge of supporting the said George; (2) whether the said Logan and George are tenants in common of the said property or whether the said Logan holds a moiety thereof in trust for the said George; (3) whether the said Logan and George are mere trustees and hold said property for the next of

kin of the deceased; (4) whether the said Logan is a trustee and holds said property in trust for the next of kin, subject to his and George's support; and (5) whether the said Logan and the said George are entitled merely to their support out of said property during their lives. And the bill prayed the advice and direction of the court in these matters. The answer of George Carson, who was alone made a party defendant, filed at the same term, admitted all the facts stated in the bill and submitted to any decree the court might make therein. The cause was set for hearing by consent upon the bill and answer, immediately, and also by consent transmitted to the Supreme Court.

*D. F. Caldwell* for the plaintiffs.
*W. J. Alexander* for the defendant.

GASTON, J. The object of this bill is to obtain a judicial construction of a will so obscurely expressed that it is impossible to pronounce with confidence upon the intention of the testator. It is indeed sufficiently manifest that the whole legal interest in the testator's property was given by the will to his (331) son Logan. It is also apparent that the beneficial interest in this property was, to some extent and in some mode, designed to be apportioned between his sons Logan and George. The legal estate was not given to Logan for his benefit only, but for or to "the support of him and his brother George." This was the end and purpose of the donation. So far, therefore, it would seem that George was as much the declared object of the testator's bounty as Logan, and if nothing else can be found in the will to contradict this inference or to show a different intent the will must be so construed as to secure to each an equal share of this bounty. The part of the will which follows purports to be explanatory, but unfortunately the attempted explanation is the part, of all others, the least intelligible. It is thus expressed, "that is, that George gets no more than Logan if he be not extravagant." To whom do these latter words refer? If to George, is *he* to have more than Logan provided he be extravagant? If to Logan, in what degree is George's share to be enlarged because of Logan's extravagance? It is impossible to collect with reasonable assurance from the explanation subjoined any information as to the purpose of the testator in the previous part of the will, and therefore the inference already drawn therefrom remains unaffected by that attempted explanation. It must be declared that the defendant George is entitled to a moiety of the beneficial interest in all the testator's property.

PER CURIAM. Declared accordingly.

(332)

NATHANIEL JONES, Administrator of Hardy Jones, v. WILLIE T. JONES.

Where a bill is filed for the settlement of co-partnership accounts, and a reference is made to the master to state accounts, he has a right to examine into and report the existence and the terms of the co-partnership, for otherwise he cannot correctly state the accounts.

When, on such a bill, the defendant admits an advance of capital on each side, an agreement for its management, for the payment of the charges out of the joint funds, and for a dividend of the profits, this is an admission of a co-partnership.

When, in a co-partnership, there is no specific agreement as to the division of losses and profits they are to be divided equally.

Where there is no allegation or interrogatory in the bill to which the defendant's answer is directly responsive, as when the defendant alleges a payment about which nothing is alleged or asked in the bill, the defendant's answer is not evidence for him.

It *seems* that, without some express stipulation to that effect (untainted by usury), a partner cannot charge interest on his advances when he is to participate in the profits.

THIS was a bill transferred from JOHNSTON Court of Equity to the Supreme Court at Spring Term, 1841. The facts as appearing on the pleadings, proof and exceptions to the master's report are fully stated in the opinion of this Court.

*C. Manly* for the plaintiff.
*W. H. Haywood, Jr.*, for the defendant.

RUFFIN, C. J. The bill alleges that in September, 1836, the plaintiff's intestate and the defendant formed a co-partnership to purchase and sell slaves on speculation on the following terms: Hardy Jones was to advance the sum of $3,350 and the defendant one-third part as much as capital; and the defendant was to invest the same and carry the slaves to the southwest for sale, pay all expenses out of his own pocket and divide (333) the profits equally between the parties; that accordingly Hardy Jones advanced the said sum, and that the defendant purchased slaves on the joint account and sold them in Alabama and made great profits, and that Hardy died in August, 1837, before receiving any part of his capital or profits or any settlement having been made between the parties. The bill is brought by the plaintiff as administrator of Hardy Jones, for an account of the partnership and payment of the sum found due from the defendant.

The answer denies the agreement to have been such as that stated in the bill. But it admits that Hardy Jones did advance the sum of $3,350, for which the defendant gave him a note; and that it was agreed between them that with that sum and the sum of $1,377 (which the defendant had) slaves should be purchased and sold by the defendant, and that after defraying all the expenses of the business out of the joint funds and reimbursing to each of the parties the sum advanced by him the surplus should, as profits, be divided. The answer then states that the defendant made a purchase and sale of negroes, and about May or June, 1837, paid to the intestate the sum of $2,200 in part of the capital sum of $3,350, for which the defendant gave his note, and which he says he considered was loaned to him, and that the defendant then paid the further sum of $1,000 as Hardy's one-half of the profits, after deducting the expenses, with which Hardy expressed himself satisfied, and upon the receipt of which each party considered the accounts of the partnership settled, and that the defendant remained indebted only on his note for the balance due thereon. The answer further states that the expenses were $501.65, but that in the settlement the defendant had credit only for the sum of $149 on that account as he did not insist on more against the said Hardy, who was his uncle and friend, and that therefore he had overpaid the intestate. And the answer then states that for these reasons and because there was no written agreement of co-partnership between the parties the settlement was not reduced to writing nor any receipt taken for the said sum of $1,000, the payment of which, however, the answer positively avers.

By consent the parties made a reference to the master (334) to state the account between them, but without prejudice.

The master made his report and the defendant took exceptions thereunto, and the cause was then removed to this Court. It is now brought on upon the report and exceptions.

The master finds the partnership and that the capital of the plaintiff's intestate, to-wit, $3,350, has been paid, either before or pending the suit, and that the profits amounted to $2,800, after deducting all expenses, of which one-half belonged to the intestate and the other half to the defendant. In ascertaining the proofs the master did not go into a particular account of the cost and of the proceeds of the sales of the slaves, nor of the expenses, but charged the gross sum before mentioned upon the testimony of several witnesses of the declarations of the defendant that he made that amount of profit. The defendant's first exception is that the master has not allowed the defendant credit

for the sum of $397.65 for necessary expenses. Upon looking into the depositions we find the master's report fully supported by the evidence on which the master acted. It is proved by three witnesses, and these witnesses of the defendant, that immediately after his return from the southward, in May, 1837, he stated to each of them distinctly that after deducting all expenses he made $2,800 *clear*. If the plaintiff was satisfied with this the defendant cannot complain that the master did not inquire further into the particulars on which the profits would appear; besides, the defendant gave no evidence to the contrary. The second exception is that it was not referred to the master to inquire into the existence and terms of the partnership, and therefore that he has exceeded his power in finding them; and that, moreover, he has so found without sufficient or proper evidence. No part of this exception, we think, can be sustained. If there be not a co-partnership the proper mode of contesting its existence would have been to bring the cause on for hearing, which might have been done as the reference was without prejudice. But it cannot be reached in the manner here attempted, by bringing on the case for further directions on the master's report and exceptions; for a reference to take the accounts in this case necessarily imports that the partnership is established, since that is the only account sought. And in (335) taking it the master must inquire into the terms, that is to say, the capital to be advanced and the services to be rendered by each, and the division of the profits, in order to ascertain the balance between the parties. Therefore the reference to the master obliged him to assume, for the purposes of reference, the existence of a co-partnership, and to enable him to state the account truly between the parties to ascertain the terms of it. But in reality the point is not disputed between the parties; and if the question were made upon a hearing of the cause it would be decided against the defendant upon the answer. That distinctly admits an advance of capital on each side, an agreement for its management, for the payment of the charges out of the joint funds, and for a division of the profits; and all this can amount to no less than a partnership. It is true in one part of the answer it is said that the defendant considered the sum advanced by Hardy Jones was lent to the defendant; but that is not stated as any part of the agreement between the parties, but only as an inference of the defendant from the fact that he gave his note for that sum. That, however, does not convert the transaction into a loan when it is seen from other parts of the answer that it was not in fact a loan of money on interest, but

was an advance of capital for carrying on a joint business. It does not, indeed, appear in the proceedings when the note was payable; so that the transaction is open to the objection that the intestate was, by the forms under which the parties acted, getting both interest on his capital and profits on his investment. Certainly that would not be allowed. If the intestate resorted to this method, namely, the forming of an apparent partnership as a cover to evade the statute of usury, the Court could give his administrator no relief. But no such defense is even intimated in the answer. On the contrary we must take the case to have been that the parties meant no shift but a real partnership, and therefore there could be no usury in it. *Gilpin v. Enderby*, 5 Barn. & Ald., 954. The only question then would be whether the intestate, receiving a part of the profits, could also claim interest on his advance, even if the note taken (336) for it would by its terms carry interest. And upon that we should clearly think not (*Brapley v. Holmes*, 2 Molloy., 1) at least till the parties settled and a balance was found due to the intestate from the defendant, which was not paid, and for which the note was considered as standing as a security from that time. But there is no exception presenting the case to the Court in either of those aspects; and that under consideration merely draws into question the existence of the co-partnership, as to which the answer contains an explicit admission of what the Court must hold to be a co-partnership.

The third exception is that the master has divided the profits equally between the parties, without evidence how they were to be divided according to the agreement. The answer to this is, in the first place, that in the absence of a stipulation in the articles the law divides losses and profits equally between partners, upon the ground that equality is equity; and, in the next place, that the answer states that such was the agreement in this case.

The fourth exception is that the master has not given the defendant credit for the sum of $1,000 as having been paid to the intestate in full of or on account of his profits, as stated in the answer. Of such payment no evidence is given by the defendant unless the answer be evidence for him. But we think it is not. There is no allegation in the bill nor interrogatory upon the supposed payment under consideration to which that part of the answer can be deemed responsive. The plaintiff does not make the defendant his witness on that point, and therefore is not bound by his answer. But the defendant brings forward the fact as matter of avoidance and distinct discharge

of an admitted liability, and in such a case the rule is settled that the answer by itself does not establish the discharge; but it must be proved *aliunde.*

The exceptions must therefore all be overruled and the report confirmed, and a decree accordingly for the plaintiff with costs.

PER CURIAM. Decree accordingly.

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(337)

JOSEPH McD. POWELL, by his Guardian, v. DRURY JONES and WILLIAM ROLES.

When one takes, by assignment, a note, due and payable to the guardian of an infant, as guardian, and not in payment or discharge of any debt or demand due by the infant, he is held in equity to be answerable to the infant either for the note or for the amount of it.

And this assignee is thus answerable to the infant, though the latter may have obtained a judgment against the sureties on the guardian bond embracing this note and though the said sureties may have been indemnified by the transfer of property in a deed of trust to secure them against loss.

An executor or administrator cannot, according to the rules of equity, make a valid sale of the assets of his testator as a security for, or in payment of his own debts.

THIS was a case removed by consent from the Court of Equity of WAKE to the Supreme Court. The facts of the case are sufficiently stated in the opinion delivered in this Court.

*W. H. Haywood, Jr.,* for the plaintiff.
*Winston* for the defendants.

DANIEL, J. The bill states that Roles had been the guardian of the plaintiff, and in that character he had loaned $419.56 (money of his ward) to Elizabeth J. Powell, and took her note with surety payable to himself as guardian; that Roles has become insolvent and has left the State, and has failed to settle his accounts with the present guardian of the plaintiff or deliver over the note aforesaid, but has assigned the said note to Jones, the other defendant, who at the time had notice that it was held by Roles as guardian to the plaintiff, and that it upon its face was payable to him, Roles, in *that* character.

The bill states that the said note was not assigned to (338) Jones for any debt due him by or on account of the plain-

tiff. The prayer is that Jones be declared a trustee and be decreed to account for the said note. Jones, in his answer, admits that Roles was guardian as stated in the bill, and that he has left the State and is now insolvent. He admits that the said note as mentioned in the bill was payable to Roles as guardian of the plaintiff. He admits that Roles assigned the said note to him whilst he, Roles, was guardian of the plaintiff. Jones states that at the time of the assignment of the note Roles was largely indebted to him and had been so for several years; that the said note had been taken by him in part satisfaction of said debt, and that Roles has been credited for the same. Jones further states that the plaintiff has obtained a judgment against the sureties of Roles on the guardian bond, and that the said sureties are solvent and well able to pay the said judgment, and that the claim now in controversy was included in that judgment. He says that Roles, before he left this State, executed a deed of trust in favor of the sureties to his guardian bond, which deed of trust covered property sufficient to indemnify the sureties against all and every demand which could be brought against them. Jones states that the plaintiff never demanded the note of him before he filed the bill. There is a replication. Jones admits that at the time he took the assignment of the note he knew that Roles was a trustee for the plaintiff and that the said note composed a part of the trust fund. The legal title to the note certainly passed to him by the assignment; but there is no rule of this Court better established than that such an assignee shall be considered and stand as a trustee for the original *cestui que trust* to the amount of the fund thus obtained. At law it has been laid down that an executor or administrator may make a valid sale of the effects in satisfaction of his own private debt, although the purchaser knew the goods sold were the goods of the testator or intestate. But in equity it seems to be now established that the executor or the administrator can make no valid sale or pledge of the assets as a security for or in payment of his own debt, on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the (339) breach of duty. Williams on Executors, 612, *and the authorities there cited.* It seems to us that the two cases of *Lockhart v. Phillips, post,* 342, and *Bunting v. Ricks,* 22 N. C., 130, are decisive against the defendant upon this point of the case. In the latter case we held that if one assists an officer of a court in misapplying the proceeds of an ordinary negotiable note held by the officer in trust for others by taking an assign-

ment of the note to himself, even for value then paid, he will be affected with notice of the breach of trust and in this Court held liable to the *cestui que trust.*

Second. Jones insists that as the plaintiff has a judgment against the sureties of his guardian for this demand, he ought not to have a decree against him for the same demand. This is no answer we think. The judgment has not been satisfied. It is like the ordinary case at law where the drawer and endorser are sued in separate actions at the same time, or where the co-trespassers are sued separately, the plaintiff may have two separate judgments for the same demand, but he can have but one satisfaction. He may elect to have satisfaction out of which he pleases. The note in this Court belongs to the plaintiff, and he is entitled if he chooses to relieve the sureties by taking that property from Jones. We said in *Bunting v. Ricks* that the sureties of an insolvent trustee will be entitled in equity to all the remedies and securities that were in the power of the *cestui que trust* or creditors against one who co-operated in the breach of trust, and this even before they had paid to the *cestui que trust* or creditors the amount misapplied by their principal. The plaintiff will be doing only an act of justice to the securities to obtain satisfaction out of the note in question.

Third. It is said that the sureties to the guardian bond have a sufficiency of property held for their indemnity against the judgment, and that the plaintiff ought to be forced to follow his judgment against them for satisfaction rather than go against Jones. There is no cross-bill filed to enable the Court to ascertain the amount of the fund left, if any, for indemnity to the sureties. The plaintiff does not admit it, and it would not be reasonable to compel him to go before the master (340) for an inquiry under the present state of the pleadings. Jones, we think, must be compelled to surrender the note in question or account for its avails. If there is a fund intended for the indemnity of the sureties Jones perhaps may reach it by an original bill or in some other way. The plaintiff is entitled also to a decree for his costs.

PER CURIAM. Decree accordingly.

*Cited: Fox v. Alexander, post,* 342; *Exum v. Bowden,* 39 N. C., 287; *Gray v. Armistead,* 41 N. C., 78; *Goodson v. Goodson, ib.,* 242; *Harris v. Harrison,* 78 N. C., 219; *Fidelity Co. v. Jordan,* 134 N. C., 241.

STEPHEN FOX et al. v. MOSES W. ALEXANDER et al.

Where a man takes a bond by assignment from the guardian of an infant, the bond being payable to the assignor as guardian, the assignee is considered in equity as holding the bond in trust for the infant, and must account for it accordingly; and the sureties on the guardian bond have the same right as the ward when they have paid the surety money; they then stand in place of the ward.

THIS was a bill in equity, in which it was alleged that Robert J. Dinkins was the guardian of Rufus K. Dinkins, an infant, and gave bond with the plaintiffs as his sureties; that in 1834 he, the said Rufus K. Dinkins, recovered a judgment against the said Robert J. Dinkins and the said Stephen Fox and others, plaintiffs in this suit, for the sum of $1,517.24 and costs of suit, which sum has been collected by execution and paid by the plaintiffs; that the said sum was recovered against them and paid by them as sureties to the said guardian bond; that the said Robert J. Dinkins was dead and insolvent; that
(341) in his lifetime he transferred to the defendant Moses W. Alexander a bond payable to the said Robert J. Dinkins as guardian of the said Rufus K. Dinkins, and executed and due by the other defendants mentioned in the bill; that the defendant Alexander well knew that the said Robert J. Dinkins was insolvent, and received the said note payable to him as guardian aforesaid in discharge of a debt due from the said Robert J. Dinkins individually. And they prayed to be substituted in place of the ward, whose securities they were and whom they had paid, and that the said plaintiffs might be indemnified as far as they could be out of the said note, etc.; and that the defendant Alexander be enjoined from receiving the said money; that defendant Alexander admitted that he knew the said bond or note was payable to the guardian of R. K. Dinkins, and that it was paid him in discharge of an individual debt from the guardian, but denied that he knew the guardian was insolvent. On the hearing the injunction was ordered to be continued, from which order the plaintiffs prayed and obtained an appeal.

*W. J. Alexander* for the plaintiff.
*D. F. Caldwell* for the defendant.

DANIEL, J. The defendant Alexander at the time he took the assignment from Robert Dinkins of the bond mentioned in the pleadings, knew that it was held by the said Robert as guardian to his ward Rufus K. Dinkins. The bond on its face was made

payable to "Robert Dinkins, guardian of Rufus K. Dinkins." The guardian became insolvent and is now dead. The defendant, by the rules of a court of equity, became a trustee to the ward for the amount of the bond. The plaintiffs, as sureties to the guardian bond have been compelled to pay the ward the amount of this debt. They have a right therefore, in a court of equity, to stand in the place of the ward and follow the trust fund and recover satisfaction to that amount, now in the hands of the defendant Alexander or in the master's office. The plaintiffs have a superior equity to that of the defendant Alexander. The decision of the judge we think was correct, and it is in accordance with *Bunting v. Ricks*, 22 N. C., 130, (342) and *Powell v. Jones, ante*, 337. This opinion will be certified, etc., and the appellant must pay the costs of this Court.

PER CURIAM. Decree accordingly.

*Cited: Exum v. Bowden*, 39 N. C., 285; *Gray v. Armistead*, 41 N. C., 78; *Graves v. Williamson, ib.*, 321; *Harris v. Harrison*, 78 N. C., 220; *Holden v. Strickland*, 116 N. C., 192; *Fidelity Co. v. Jordan*, 134 N. C., 241.

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ELIZA LOCKHART et al., per Guardian, v. WILLIAM H. PHILLIPS et al.*

A guardian of infants having bonds payable to him as guardian of the wards, transferred them without endorsement to one of his creditors as a security for his own debt, and became insolvent. *Held*, that the assignee, having notice that the debts belonged to the wards, acquired no right by the assignment, and a court of equity will restrain him from collecting the debts and compel the debtor, who is made a party to the bill, to pay the amount to the infants.

In such a case, full costs are awarded against the guardian and the assignee.

THIS was a bill filed at Fall Term, 1839, of ORANGE Court of Equity. Answers were put in, replications made and the cause set for hearing and transmitted to the Supreme Court. The facts are set forth in the opinion delivered in this Court.

No counsel appeared for the plaintiff in this Court.
*W. A. Graham* for the defendant.

*This case was decided at June Term, 1839, but has not heretofore been reported.

DANIEL, J. Campbell and Parish, two of the defend-
(343) ants, executed two bonds to the master of the court of equity for the purchase-money of a tract of land sold by order of the court. Phillips (another defendant), by permission of the court obtained possession of the bonds as the guardian to the plaintiffs. Phillips prevailed on the obligors to take up the two bonds thus given to the master and execute to him, as guardian to the plaintiffs, two other bonds for the same amount. Phillips then either sold, without endorsement, or mortgaged these bonds to Dr. Thomas Faddis. Faddis had notice at the time of his purchase that Phillips held the bonds in trust as guardian of the plaintiffs. Phillips has become insolvent or nearly so, and the securities to his guardian bond are also insolvent. The bill is filed to restrain Campbell and Parish from paying to Faddis and Faddis from collecting or transferring the bonds, and for the payment of the money to the plaintiffs. All the material allegations in the bill are admitted in the answers. We are of the opinion that as Faddis purchased the bonds with notice of the trust in favor of the plaintiffs, his equity is not equal to that of the plaintiff's, which is prior in time and prior in right. We are of opinion that they, Campbell and Parish, pay to the plaintiffs the purchase-money due on the said bonds; and that Phillips and Faddis and all claiming under them be restrained from enforcing the collection of said bonds at law, and that plaintiffs recover costs of the defendants Phillips and Faddis. The decree will be for the plaintiffs accordingly.

PER CURIAM. Decree accordingly.

*Cited: Powell v. Jones, ante,* 339; *Hill v. Johnston,* 38 N. C., 439; *Graves v. Williamson,* 41 N. C., 321; *Liles v. Rogers,* 113 N. C., 202.

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(344)

THOMAS DAVIS v. WILLIAM and ELIZ. McNEIL, Executors, etc.

Where a bill of injunction has been filed against two executors, and there is no necessity for the severing in their answers, separate costs should not be allowed to each.

If such has been the judgment in the court below, upon the dissolution of the injunction, and the case being continued as an original bill afterwards comes up to this Court, and the bill be dismissed, no attorney's fees will be allowed to be taxed for the defendant.

DAVIS *v.* MCNEIL.

THIS was a bill in equity, filed in CUMBERLAND Superior Court at Spring Term, 1841. Answers were put in and other pleadings had until the Fall Term, 1840, when the cause was removed to the Supreme Court. The facts and state of the pleadings are sufficiently disclosed in the opinion of the Court.

No counsel appeared for either party in this Court.

DANIEL, J. The defendants, as the executors of Daniel McNeil, obtained against the plaintiff judgment at law on two bonds. The plaintiffs filed this bill and obtained an injunction restraining execution on the judgments. The plaintiff, in his bill, states that the two bonds were given by him to Daniel McNeil for two years rent of a sawmill and timber lands for the use of said mill; the mill being then out of repair the said McNeil was to put it in repair; that McNeil neglected to repair, and before the expiration of the first year of the term, and before he had used the mill or cut any timber from the land, the mill fell down and became a total ruin. The bill states that the parties then entered into a new arrangement, as follows: McNeil was to find timber and materials at the site of the old mill for the construction of a new mill, and was to furnish laborers. And the plaintiff, who is a millwright, was to conduct the work and to be paid for the same, and to have (345) and use the mill and the timber on the land for a space of time equal to the unexpired residue of the aforesaid term of two years. And it was expressly agreed that if the mill was not repaired or rebuilt as aforesaid the plaintiff was to be discharged from all liability on the aforesaid two bonds. The bill states that McNeil neglected to furnish timber, materials or hands for the rebuilding; that they then came to a final agreement that each should be discharged from both the aforesaid contracts, and the plaintiff particularly should be discharged from the payment of the two bonds. The defendants answer and state that the plaintiff gave the bonds for the two years rent of a grist and sawmill; that the mills were in repair at the commencement of the lease, and that the plaintiff agreed to keep them in repair during the term; that he took them into his possession and made considerable profits; that the dam was broken by a freshet in the stream in consequence of the negligence of the plaintiff's millers. They deny that their testator ever agreed to rescind the contract and surrender the bonds or discharge the plaintiff from the payment of them. The injunction was dissolved. The answer was replied to and the bill retained as an original bill. The plaintiff

has taken depositions and has now brought on the cause for a hearing. We have examined the depositions, and they entirely fail to establish the case made by the bill. There is no proof in the cause that McNeil ever agreed to discharge the plaintiff from the payment of the two bonds. The bill must be dismissed with costs; no attorney's fee in this case to be taxed against the plaintiff as he paid two attorneys' fees on the dissolution of the injunction, when there was no necessity for separate answers by the executors.

PER CURIAM. Decree accordingly.

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(346)

BARTHEUS S. CRAWLEY v. AUGUSTIN TIMBERLAKE.

The plaintiff filed his bill, alleging that in a deed he had given to the defendant for a tract of land he had, through mistake, surprise and ignorance, and without consideration, inserted a release for all the purchase money, when he had only received a part, and that the defendant had pleaded this release at law, and the plaintiff prayed for a discovery and for relief on the grounds stated. To this bill the defendant pleaded in bar the release itself. *Held*, that this plea was not good, because neither the plea nor an answer accompanying it denied the grounds on which the plaintiff sought to be relieved from the release.

It is yet doubtful, in this State, whether a vendor of land has any, and if any, what lien, as against the vendee, for the purchase money.

THIS was an appeal from the decree of his Honor, *Pearson, J.*, at the Spring Term, 1841, of CASWELL Court of Equity. The defendant pleaded to the plaintiff's bill, the plaintiff demurred to the plea and the presiding judge overruled the demurrer, sustained the plea and directed the bill to be dismissed. From this decree the plaintiff appealed to the Supreme Court. The nature of the pleadings, involving the points decided by this Court, is sufficiently disclosed in the opinion delivered by the Court.

*James T. Morehead* for the plaintiff.
*William A. Graham* for the defendant.

RUFFIN, C. J. On 11 November, 1835, the plaintiff and defendant entered into articles whereby the plaintiff agreed to sell to the other party a tract of land lying in Caswell County and containing 160 acres, at and for the price of $1,700, which the defendant agreed to pay on or before 25 December, 1836; upon

which payment being made the plaintiff obliged himself to convey to the defendant in fee and let him into possession.

Before and during February, 1837, the defendant made payments on the contract amounting altogether to the (347) sum of $1,133; and then the plaintiff executed and delivered a deed in fee to the defendant, who thereupon took possession of the land and has been ever since in the enjoyment of it.

The bill states that the deed was prepared beforehand by a person who expected that the whole purchase-money would be paid, and who also believed it to be proper and necessary to the operation of the deed that the whole consideration and its satisfaction should be stated in the instrument, and that for those reasons he inserted therein a clause acknowledging the receipt of the whole purchase-money by the plaintiff; and also that the plaintiff, not knowing the legal effect of such a clause, executed and delivered the deed to the defendant without receiving any more of the purchase-money than $1,133 as aforesaid, and believing that the defendant was liable and would pay him the balance thereof and the interest thereon. But the defendant has refused to make any further payment, and to an action at law for the balance pleaded the said deed as a release, which caused the plaintiff to be nonsuited and defeated of the recovery of the money still justly due in respect of the said land and the sale to the defendant.

The prayer of the bill is that the defendant may set forth and discover what payments he made in discharge of the purchase-money; and whether a balance and what remains due on that account to the plaintiff; and whether the plaintiff intended to give up such balance or any part thereof without receiving payment; and whether it was at the time of its execution believed by the parties that the deed in its present form would extinguish the plaintiff's demand or was so intended to do; and whether, if such be its effect, the plaintiff did not, in the belief of the defendant, execute the said deed in ignorance of such effect and by mistake; and that the plaintiff may have an account and a decree for the balance that may be found due to him in the premises, to be paid by the defendant or raised out of the land, and for general relief.

The defendant by plea set forth the deed made by the plaintiff (as the same is stated in the bill) and insisted (348) on the acknowledgment of the receipt of the purchase money contained therein as a release. And on the argument of the plea it was held by the court that equity could not give relief against the acquittance and release contained in the deed; and

therefore the plea was allowed and the bill dismissed. From the decree the plaintiff appealed.

If this cause were before an English chancellor there would be no hesitation in overruling the plea upon the ground of the vendor's lien, which is familiar doctrine in that country. It is founded on the principle of justice that upon a sale and conveyance the purchase-money not being paid the vendor is a trustee for the other party, and he must of course answer as to the matter which converts him into a trustee. As long ago as *Copping v. Copping*, 2 Pr. Wms., 291, it was held that a receipt for the purchase-money made no difference if the money was not actually paid; and as there was no proof nor allegation there of the payment of the purchase-money the court, notwithstanding the receipt, would not send the point to a master for an inquiry.

The same opinion was entertained by *Lord Redesdale* in *Hughes v. Kearney*, 1 Sch. & Lef., 132, in which a promissory note payable to a trustee was taken for a balance of the purchase-money and an acquittance for the whole inserted in the deed, and yet the land was held bound for that balance. Thus the estate is deemed a security for the purchase-money, whatever form the transaction may assume, and it so remains except in those cases in which the vendor is supposed to have given up this by taking another and a distinct security.

If this equity is to be recognized here, even as between vendor and vendee, a point that perhaps cannot be said to be entirely settled, it disposes of the case for the plaintiff, for every plea admits the bill and interposes other and particular matter in bar. We do not however find it necessary to consider of this equity further in this case, for if an equitable lien does
(349) not hold with us to any purpose, the plea is nevertheless bad for other reasons.

It may be taken that the scope of the bill is the limited one merely of getting rid of the release as having been inserted ignorantly in the deed and its execution obtained from the plaintiff by surprise, inasmuch as it was not founded on the consideration imported in it, namely, the payment of the purchase-money, nor any other valuable or meritorious consideration, and there does not appear to have been any intention in the plaintiff to abandon or extinguish his demand thus obviously just. To a bill stating such a case and seeking to have a release, a release thus obtained, put out of the plaintiff's way, the question is whether the defendant can by way of plea oppose that very re-

lease as a bar; that is to say, the release nakedly? We think very clearly not.

It is true that to a bill which seeks relief against a release, a plea of the same release may be good. It is so if upon the bill there appears matter upon which it is fit the release should be supported in equity as well as at law, as in *Griffith v. Mauser,* Hardr., 168, where the bill itself stated a valuable consideration for the impeached release, and therefore a plea of the release *per se* was allowed. But the bill gives no such color or support to this release, and, on the contrary, states as grounds for impeaching it that it was obtained without consideration and without due information and deliberation on the part of the plaintiff and in ignorance of its operation, and *for those reasons* the plaintiff claims to be relieved. A plea of the release nakedly in such a case, and not noticing at all those circumstances and defects imputed by the bill to the release, manifestly evades the charges of the bill and leaves the gist of the equity untouched. It is perhaps not entirely settled in what way as the most proper those circumstances of fraud or surprise, when alleged in the bill, are to be met by the defendant. As the nature of a plea, generally speaking, is to admit the bill and allege some short point upon which if issue be joined and found for the defendant the cause is at an end, it has been doubted whether a plea should be extended to the particular circumstances stated in avoidance in the bill, and whether those matters be not the proper subjects of an answer. *Bayley v. Adams,* 6 Ves., 586. (350) Yet by some it seems to have been thought that every plea must be perfect in itself so as to contain a complete bar to the bill, and therefore ought to contain a full negative averment touching the particular circumstances on which the claim for relief against the instrument rests. It seems, however, at least necessary, according to *Lord Eldon's* opinion in *Bayley v. Adams,* that those charges must be met by general averments in the plea and that supported by particular denials in an answer, so that in some way all the equitable grounds for impeaching the release shall be denied. Here there is no answer, and the plea has no averment, either particular or general, as to any one of the facts stated as the grounds of the plaintiff's equity. A court of equity does not sustain these shorthand bars such as a release, a stated account and the like, unless they be pleaded as not only existing instruments, but also as being fair and true and proper to be equitably enforced. In a plea on an account stated, if error or fraud be charged, they must be denied, as also in an answer; and if error or fraud be not

charged, yet the defendant must by the plea aver that the account is just and true to the best of his knowledge. Mitf. Pl. (Jeremy's Ed.), 260. So if an award be pleaded to a bill to set aside the award and open the accounts, charges of fraud or partiality must be denied in the plea and that supported by an answer showing the arbitrators not to have been partial or corrupt. So, with respect to this particular subject of a release now before us, *Lord Redesdale* states, *id.*, 263, that the plea of release *must* set out *the consideration* upon which it was made if it be impeached in that point; and this for the very sufficient reason that the release, if founded on a bad consideration or not on a sufficient one, ought not to protect the party from discovering such consideration or want of consideration. In other words, the release, unless fairly obtained and on a proper consideration, ought not to preclude the court from going into the case and dealing out justice to the parties according to its real facts. *Roche v. Morgell*, 2 Sch. & Lef., 721.

Here, as respects the unpaid balance of the purchase-
(351) money, the release is without any consideration and appears to be founded on mistake and surprise, as alleged in the bill. Whether those allegations be true or not the defendant must admit or deny, and as his plea takes no notice of them he must answer and make a discovery on those points. The decree made below must therefore be reversed with costs in the Court, and the plea overruled with costs in the court below, and the case remanded to be further proceeded in according to what may be just and right.

PER CURIAM. Decree accordingly.

*Cited: Waddell v. Hewitt*, 37 N. C., 253; *Womble v. Battle*, 38 N. C., 199; *Melvin v. Robinson*, 42 N. C., 83; *Mendenhall v. Parish*, 53 N. C., 106; *Hudson v. Critcher, ib.*, 486; *Collett v. Frazier*, 56 N. C., 82.

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BENJAMIN WHICKER v. MATTHEW CREWS.

Where a negotiation for the purchase of a tract of land was pending for several months, and the plaintiff had sufficient opportunities of informing himself as to its localities and boundaries, he cannot bring a bill to be relieved against the purchase, especially when he has no proof of misrepresentations by the defendant.

SPAINHOUR *v.* WALRAVEN.

THIS was a suit in equity which, after having been set for hearing in STOKES Court of Equity, was transmitted by consent to this Court for a final decision. All that is necessary to be known of the case is to be found in the opinion delivered in this Court.

*James T. Morehead* for the plaintiff.
*Boyden* for the defendant.

GASTON, J. The object of this bill is to rescind a con- (352) tract for the purchase of a tract of land in Stokes County, because of misrepresentations respecting its location and boundaries made by the vendor, the defendant, in the course of the negotiation, whereby the plaintiff, as he alleges, was grossly deceived and grievously injured. The defendant positively denies the misrepresentations charged; and upon the proofs the plaintiff has utterly failed to establish them. It is needless to go through these minutely. It is enough to say that it appears that the negotiation was pending for many months, that in the course of it the plaintiff had abundant opportunities of informing himself accurately respecting all the localities of the land, and that its boundaries were truly pointed out to him by persons to whom the defendant had referred him for particular information before the contract was brought to a conclusion.

The bill must be dismissed with costs.

PER CURIAM. Decree accordingly.

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ELIJAH SPAINHOUR and Wife et al. v. JOHN H. WALRAVEN et al.

Where land was sold at public auction by an executor under a power in the will, for half of its value, and the sale acquiesced in, and made in accordance with the feelings of those interested, a bill cannot be supported to set aside the sale when they become subsequently dissatisfied.

THIS case, having been set for hearing at the Court of Equity of STOKES, at the Fall Term, 1840, was by consent of parties transmitted to the Supreme Court. All that is necessary to be known of the case is disclosed in the opinion of the (353) Court.

*Boyden* for the plaintiff.
*James T. Morehead* for the defendant.

GASTON, J. John Jacob Shaul, formerly of Stokes County, by his last will, whereof he appointed the defendant George F. Wilson executor, authorized and directed his executor to make sale of the testator's lands, and directed the proceeds of such sales to be equally divided between his five children, Rebecca, Samuel, Elizabeth, Jacob and Mary. After the death of the testator the executor made sale of the lands as directed on a credit of twelve months, and at such sale the defendant Walraven, who had married the defendant Mary, the youngest daughter of the testator, purchased two pieces, one of sixty and the other of forty-eight acres, at the price of $1.21 per acre. The defendant Walraven thereupon gave bond and surety for the payment of the purchase-money, and Wilson, the executor, entered into an obligation to Walraven to convey the land on payment being made therefor. About the time the bond became due this bill was filed by the children of John Jacob Shaul, other than Mary, against Walraven and wife and Wilson, the executor; and the object of it is to have the said sale set aside upon the ground that by collusion between Wilson and Walraven it was so conducted as to enable the latter to buy the land at a grossly inadequate price, to the great injury of the plaintiff. It is not necessary to notice most of the specifications in which the alleged fraud is charged to consist, as in regard to them there is an utter failure of proof. It is shown, however, that the price at which the land was purchased was less than half its value, and that the widow of the testator had previously to the sale expressed her desire that the defendant Walraven might buy it cheap, as in that event he had promised to move to that place, at which she wished to reside with her daughter. But it is also shown that these declarations were known to her (354) other children; that they were present at the sale; that one of them, the plaintiff Samuel, joined Walraven as surety in the bond for the purchase-money; that Spainhour, the husband of the plaintiff Rebecca, expressed his gratification that Walraven had bought and bought so cheap, and that no dissatisfaction was expressed by any of the persons interested until a disagreement which, months afterwards, arose on other subjects, so as to leave little or no doubt in our minds but that the cause of the land selling so far below its value was the well understood desire of all interested as a convenient arrangement that the wishes of their mother in this respect might be grati-

fied, and not any collusion between the defendants Wilson and Walraven. We think the bill ought to be dismissed and dismissed with costs.

PER CURIAM. Bill dismissed with costs.

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WILLIAM RAWLES and Wife et al. v. MUNGO T. PONTON, Executor, etc.

A testator devised as follows: "I also leave in the possession of my executor my slave Hillman, to be disposed of as he may deem proper, to remain with him until he arrive at eighteen years, at which time I hereby vest him with authority to sell him to the best advantage, and the money arising from such sale to be equally divided among my present grandchildren." *Held*, that the executor was not bound to account for the hire of this negro till he reached the age of eighteen years.

THIS was an appeal from a decree of his Honor, *Settle, J.*, at the Spring Term, 1841, of NORTHAMPTON Court of Equity. The facts, so far as they have relation to the judgment of this Court, are stated in the opinion delivered. (355)

*B. F. Moore* for the plaintiff.
*S. Whitaker* for the defendant.

GASTON, J. We are called upon by this appeal to revise the decretal order overruling certain exceptions taken by the defendant to the master's report.

Among the claims presented by the defendant as the executor of Jesse Dupree, for disbursements on account of his testator's estate, was a judgment rendered against him and paid off by him of $465.2½. The master refused to allow the whole amount of this claim, but credited the defendant on account thereof with the sum of $223. The material facts in relation to the subject-matter of this exception are these: The defendant qualified as executor of the will of Jesse Dupree at November Term, 1822, of Halifax County Court. On 21 April, 1823, he accepted service of a writ returnable to May Term, 1823, brought against him as the executor of Dupree by James C. Fawcett and Eaton Turner, and at the May Term, 1823, he put in the pleas of general issue, payment and set-off; and there was a verdict and judgment *at the same term* for the plaintiffs for the sum of $465.2½. The defendant himself, in the interval between that

and the succeeding term, took out an execution returnable to August Term, 1823, on which was endorsed by the clerk of the court, "Amount $465.2½. Deduct $245.22 as set-offs allowed." Upon this execution the defendant obtained, since this suit was brought, a receipt of Fawcett for the whole amount of $465.2½ as having been paid at August Term, 1823, and when examined before the master declared himself unable to say how much money he had in fact paid. Under these circumstances we think the master very properly refused to credit the defendant for more than the *balance* endorsed to be collected on the execution. It is manifest that the parties to this proceeding had arranged among themselves what was truly due, and the writ, judgment and execution were intended to clothe this arrangement with the forms of an adversary suit. Hence a verdict and (356) judgment at the appearance term and the execution delivered, not to the sheriff, but the defendant himself. We cannot doubt, therefore, that the endorsement on the execution of the amount of set-offs to be allowed was a part of the same arrangement, and the balance was the sum truly due to Fawcett and Turner, and the sum actually paid by the defendant.

The next exception is to the hire of the boy Hillman, with which the master has charged the defendant. The will of the defendant's testator in relation to the boy Hillman has the following clause: "I also leave in the possession of my executor my slave Hillman to be disposed of as he may deem proper, to remain with him till he arrives at eighteen years, at which time I hereby vest him with authority to sell him to the best advantage, and the money arising from such sale to be equally divided among my present grandchildren." Hillman arrived at the age of eighteen years in the fall of 1835, but was not sold until two years afterwards. The master charged the defendant with hire for Hillman from 1828 until he was sold, and the defendant excepted because of the hire charged between 1828 and 1835, claiming that under the will he was entitled beneficially to the use of Hillman until the boy reached the age of eighteen. His Honor allowed the exception to a very small part of this charge, so much as covered the time while the boy remained with the defendant, but overruled it as to the rest of the hire charged, because it was in proof that the defendant received hire for the boy. We are of opinion that this exception should have been sustained altogether, because under the clause of the will already recited the use of the boy until eighteen was given to the defendant. This construction is not only justifid by the words of the clause (see *Ralston v. Telfair*, 17 N. C., 257, and *Powell v.*

*Powell*, 6 N. C., 326) but is strengthened by other considerations. If the beneficial interest in the slave until his attaining eighteen be not given to the defendant, then in respect to that interest there is an intestacy, for no other disposition thereof is to be found in the will. Besides, there is a remarkable difference in the language used in the clause in question and in those where it is plain that the executor was designed (357) not to take the use beneficially. "I give to my grandson Thomas B. Browning my negro Sam to him and his heirs forever, to be hired out annually for *his support and schooling*, as may seem most proper by my executor." Again, "I give to my granddaughter Ann B. Browning Sarah and Jim to be hired out annually *for her support and schooling* and as to my executor may seem advantageous." It can scarcely be questioned, we think, if the power of disposition given to the executor over the boy Hillman until eighteen was designed to be in trust for any person or persons, but that the testator would have used some words indicative of that intent.

So much of the decree of the Superior Court as overrules this exception is erroneous and must be reversed. And the residue of the decree is affirmed. The costs of this Court must be defrayed by the parties respectively.

PER CURIAM. Decree accordingly.

*Cited: Morrison v. Kennedy*, 37 N. C., 381.

(358)

## STEPHEN FOX v. WILLIAM H. HORAH.

When a corporation is dissolved, unless the Legislature has otherwise directed, the real property which had belonged to it and remains undisposed of reverts to the donor or grantor; the personal property, as having no owner, goes to the sovereign for the benefit of the public; but *choses in action*, such as debts, etc., become extinct because there is then no one to demand the money, etc.

None of the provisions of the act of 1831, Rev. St., c. 26, directing what proceedings may be had against corporations in certain cases, apply to cases where the corporation has expired by the limitation of its charter.

Where a note was made payable to the cashier of the State Bank, as trustee, for the use and benefit of the bank by whom it was discounted, and the bank charter afterwards expired by its own limitation before the note could be collected, it was *held*, that although the cashier, having the legal title, might sue on the note

and recover judgment at law, yet in equity the bank had the sole right to the money secured by the note, that this right became extinct on the dissolution of the corporation, and that a court of equity, therefore, on application of the maker of the note would grant a perpetual injunction against the collection of the judgment.

THIS was a bill filed in MECKLENBURG Court of Equity. The plaintiff had obtained an injunction from a judge out of court, and at Fall Term, 1840, of the said court, a motion was made by the defendant to dissolve the injunction, and his Honor, *Settle, J.*, upon hearing the motion, ordered the injunction to be dissolved with costs. From this decree the plaintiff, by leave, appealed to the Supreme Court. The facts of the case are stated in the opinion delivered in this Court.

*Alexander, Saunders* and *Boyden* for the plaintiff.
*D. F. Caldwell* and *W. H. Haywood, Jr.*, for the defendant.

GASTON, J. A loan of money was obtained by one John
(359) G. Hoskins from the late State Bank of North Carolina by the discount at the Salisbury branch of said bank of a note executed by said Hoskins as principal and Stephen Fox and William W. Long as sureties, payable at said branch to William H. Horah, cashier thereof. Upon this note an action at law was brought by Horah in the County Court of Mecklenburg against Hoskins, Fox and Long, which action was by successive appeals of the defendants carried up to the Superior Court of that county and thence to this Court, and a judgment was ultimately obtained by the plaintiff, after a deduction of sundry payments, for a balance of $468.19 with interest on $385.62, part thereof, from the February Term, 1839, of Mecklenburg Superior Court. Pending this action in the Superior Court the charter of the bank expired by its original limitation, and an attempt was there made to set up this occurrence as a legal defense; but the defense failed because, in the language of this Court, "the legal interest in the debt was in Horah, and the action properly brought by *him*, and whether *he* was a trustee for the bank or any other person was an inquiry with which a court of law had no concern." *Horah v. Long*, 20 N. C., 416. Therefore Fox, the present plaintiff, filed this bill against Horah in which, after setting forth the death and insolvency of Hoskins and also the insolvency of Long, and charging certain payments or equitable payments to have been made to the bank and its attorneys in full discharge of the debt, he insisted that the debt for which Horah had obtained a judgment was due to the bank;

that its charter had expired; that thereby the said debt, if any part thereof remained unpaid, was extinguished; that Horah was not entitled beneficially to the same or any part thereof; that it is unconscientious in him to collect it for his own benefit, and praying for an injunction. Upon the filing of the bill an injunction was granted pursuant to the prayer. The defendant put in an answer wherein he denied the payments alleged to have been made, and admitted the expiration of the charter as charged, and insisted that he being the legal owner of the judgment had a right, notwithstanding such expiration of the charter, to collect the same, and declared his purpose (360) when it should be collected to apply the proceeds to the satisfaction of outstanding demands against the late corporation and the stockholders thereof. Upon the coming in of this answer the defendant moved for a dissolution of the injunction with costs. The courts so decreed, and from this decree the plaintiff prayed and obtained an appeal to this Court.

One at least of the questions arising upon this appeal is not free from difficulty, and so far as we can learn is now for the first time presented for judicial decision. Certain it is that neither our own researches nor those of the counsel have furnished any adjudications which have a direct bearing upon it. To enable us therefore to come to a just conclusion we must go back to principles in some degree elementary to endeavor to ascertain them with precision and apply them, when ascertained, to the case before us.

The late State Bank was formed by an association of individuals under authority of acts of the Legislature by which they were constituted a body corporate and politic to continue until 1 January, 1835. Though the several acts by which the institution was created or its powers, duties and duration declared were public acts, the corporation itself was a private corporation. *Bank v. Clark*, 8 N. C., 36. As such it was an artificial person existing only in contemplation of law, and having those capacities which its charter conferred upon it, either expressly or as incidental to its existence. Among these was the capacity to hold property of the description mentioned in its charter as an individual, continuing its existence and preserving its identity, notwithstanding all the changes by death or otherwise, among the natural persons of whom that body politic was formed. This capacity, and others by which a corporation is enabled to maintain its personality and identity, are sometimes spoken of as constituting a kind of "legal immortality." It is certain, however, that the capacity to enjoy property in succession exists

only so long as the corporation exists; that if by its charter the duration of the corporation be limited, and if that duration be not extended by the sovereign authority, the corporation
(361) dies when the allotted term of its existence has run out, and that before the expiration of this term the corporation may lose its existence by forfeiture of charter, because of ascertained delinquency or by a dissolution of the connection, by which its members had been compacted into one artificial person. We believe that the rules of the *common law* governing the disposition of the property which the corporation held at the moment of death are well settled, though differing according to the character of the property upon which they operate as being either realty, personalty or *choses in action*. The real estate remaining unsold reverts to the grantor and his heirs "because (in the language of *Lord Coke*) in the case of a body politic or incorporate the fee is vested in their political or incorporate capacity, created by the policy of man, and therefore the law doth annex a condition in law to every such gift and grant that if such body politic or incorporate be dissolved the donor or grantor shall re-enter, for that the cause of the gift or grant faileth." Co. Lit., 136. Goods and chattels, by the common law, were deemed of too transitory and fluctuating a nature to be susceptible of reversionary interests after an estate for life, and on the death of a corporation they do not revert to the grantor or donor but, being *bona vacantia* or goods wanting an owner, they vest in the sovereign, as well to preserve the peace of the public as in trust to the employed for the safety and ornament of the commonwealth. *Choses in action* are under the operation of a different rule. They were rights of the corporation to demand money in the hands of persons by whom it was withheld. They derive their existence from contracts or *quasi* contracts, by which the relation of debtor and creditor was created. When the creditor corporation died and there was no successor, no representative, the relation of debtor and creditor ceased, and the debt became necessarily *extinct*. None but the creditor had a right to demand the money, and when his right is gone the money becomes to all purposes the money of the possessor. These rules of the common law, except so far as they have been modified by the acts of our Legislature, and
(362) excepting also those cases in which by the charters of incorporation special provision is made in regard to the corporate property, are the law here.

Very important alterations however have been made by our Legislature, but it is manifest that these have no application

to the case where a corporation expires by having lived out its allotted term. The act of 1831, ch. 24 of the Revised Code, re-enacted in the Revised Statutes, ch. 26, directs how an information may be filed against a corporation existing *de facto*, in order to procure a judicial decision that it has forfeited its charter or has been dissolved by the surrender of its franchises or by any other mode, and declares that on a final judgment rendered against the corporation of forfeiture or dissolution the consequence shall not be to extinguish the debts due to or from the corporation, but that the court rendering such judgment shall appoint a receiver, and the receiver so appointed shall have full power to collect in his name all debts due to the corporation, to take possession of all its property, and to sell, dispose of and distribute the same in order to pay off the creditors of the corporation and afterwards to reimburse the stockholders, under such rules, regulations and restrictions as the court rendering such final judgment shall direct. These provisions in every part of them contemplate cases where the termination of the *legal existence* of the corporation is the consequence of a judicial sentence against it. Where a corporation has lived out the term prescribed by its charter it is *de facto* defunct. No judicial sentence can be rendered against it. There were, besides, peculiar reasons demanding this special interposition of the Legislature in cases of what might be termed *premature* death of the corporation. So distressing are the consequences which according to the common law rule resulted from a judicial death or dissolution, where the corporation was one that had carried on extensive operations, that the most flagrant violations of charter, the most culpable neglects to make the necessary election of officers, delinquencies of every kind and degree might be committed, and the public authorities would not dare to bring the questions of forfeiture or legal dissolution forward for judicial determination. But *these* provisions, by removing such distressing consequences, give (363) freedom of action to the agents of the community, while they remove from the managers of corporate institutions the sense of impunity that might render them regardless of law. But the consequences of a regular death by the mere efflux of time could be anticipated by all, provided against by all, and legislative interposition against them was unnecessary.

There can be little or no doubt therefore that if the debt in this case had been contracted with the corporation, directly and by name, and the judgment thereon rendered for the corporation, the debt and the judgment would have been to all intents

extinguished by the death of the corporation, and the collection thereof could not have been enforced by any legal process. But according to the terms of the original contract the plaintiff became bound to pay the money to the defendant. This constituted him and not the bank the *legal* creditor of the plaintiff. As such he has obtained his judgment, which is not extinguished by the death of the corporation and which he has the undoubted power to collect by legal process. And this brings us to the direct consideration of the great question in the case, is it against conscience in the defendant to collect it?

In presenting this inquiry we may dismiss from our consideration the purposes to which the defendant professes an intention to apply the money when collected. It is not to be questioned, we think, that on the expiration of the charter the debts of every kind due *from* the bank were extinguished as completely as the debts due *to* it. The stockholders *as such* were not responsible for those debts, and the expiration of the charter did not throw upon them any such responsibility. There are therefore no outstanding demands against the late corporation, or those who were stockholders therein, which in law or equity can claim to be satisfied out of the money which the defendant seeks to collect. If he collects it he cannot be compelled to account therefor to any one, and may therefore keep it to his own use. We can pay no respect to a pretended trust the performance or nonperformance of which is dependent upon the will of the supposed
(364) trustee. If the defendant can rightfully collect this money it is because he has a right to collect it for his own benefit.

After much consideration we are of opinion that he has not a right to collect it for his own benefit. In the contemplation of a court of equity the debt of the plaintiff, so long as it existed, and whether in the form of a note or judgment, was a *debt to the bank*. The money was borrowed from the bank and the note given in such form as the rules of the bank prescribed, to secure to the bank repayment of the money so borrowed. The defendant was bare agent or trustee to collect and receive the money for the bank. It never was intended by the contracting parties, the debtors on the one side or the creditor on the other, that he was to derive any benefit from the transaction. It would be, we think, to sacrifice justice to technicalities, substance to form, to regard the defendant as ever having been the creditor of the plaintiff. And if he was not it is against conscience that he should avail himself of the forms of law to compel payment of what never was and is not now due to him.

The rights and duties which spring from the relation of trustee and *cestui que trust* are such as ordinarily do not affect third persons. Not being charged with the obligation of protecting those rights or of enforcing those duties, they are not usually responsible for infidelity on the part of the trustee. But when they deal with a trustee in that capacity they may and often do contract obligations with the *cestui que trust* himself. If, for instance, in this case the defendant had been removed from his office of cashier and the plaintiff, with knowledge of that fact and that the note was retained in bank, had paid it to the defendant and taken his release, it cannot be doubted but that the bank might in equity have compelled the plaintiff to pay the note to them. Yet the removal of the defendant from office would not have changed the *legal title* in the debt. Suit upon the note, if it had not been paid, must still, notwithstanding such removal, have been brought in the name of the defendant. But a court of equity would have made the plaintiff liable to the bank because, by reason of the discount of the note, the bank became his creditor, and because the removal would have been a notification that his creditor willed the payment not to be made into the hands of one who had been (365) selected as trustee because of an office which he then held but now no longer filled. If, the moment before the bank charter expired, the corporation had released the debt to the plaintiff, this would have extinguished it in equity, and the defendant would not have been permitted to collect it. That court in these, and in all cases where it may be material to ascertain who is the creditor, will pronounce according to the truth of the transaction, disregarding mere forms. The bank was in truth the creditor. The note and the judgment were but *securities* belonging to the bank and proper to be enforced to compel payment to the bank of what was due to it. No one could rightfully put these securities in use but by the presumed or expressed direction of the bank. Upon the death of the bank without succession or representative this debt became *by law* as completely extinguished as it could have been by a release from the corporation. While there was a debt and a creditor the trustee could not rightfully enforce the securities but for the payment of the *debt* to the *creditor*. After the extinguishment of the debt he cannot rightfully enforce the securities, because there is *no debt* to be paid and no creditor to be satisfied.

In the course of the argument the defendant's counsel pressed upon us with much earnestness *Burgess v. Wheate*, 1 Eden, 177. The point there decided by *Lord Keeper Northington*, with the

concurrence of the master of the rolls, *Sir Thomas Clark,* but against the opinion of *Lord Mansfield,* was simply that the crown, claiming by escheat, had not a right to compel a conveyance from a trustee, the trust being determined by the death of the *cestui que trust* without heirs. Assuming that decision to be correct it must be upon the strict technical doctrine that there cannot be an escheat while there is a tenant to render the feudal services. Upon this it was mainly rested by the lord keeper and the master of the rolls. Another ground was indeed taken that a court of equity will not grant a subpœna against a feoffee for one who is not in privity with the feoffer, and therefore the crown, not claiming thus in privity, could not have the (366) aid of the Court. This latter ground, however, has been substantially repudiated by subsequent adjudications. In *Middleton v. Spicer,* where the testator had devised *chattels real* to be sold and given the proceeds to his executors in trust for a charity, which trust was void because of the statute of Mortmain, and there were no next of kin to be found, *Lord Thurlow* made these impressive remarks: "I do not see how this case is distinguishable *in principle* from Burgess and Wheate. The devise vests the *legal property* in the executor. The question results whether the executor, being appointed only as a trustee, can take as highly as an occupant at common law. Where there is a trustee the general rule of this Court is that he can have no other title. Burgess and Wheate was determined upon divided opinions, which continue to be divided, of very learned men. The argument of the defect of a tenant seems to be a scanty one. Whether that case is such an one as binds *speciatim,* or affords a general principle, is a nice question." On a subsequent day, after having fully advised on the case, he decided that the executors being trustees could not by *any possibility* take a beneficial interest, that being thus excluded from the beneficial interest, and no relations to be found, the creditors were as much trustees for the crown as they would have been for any of the next of kin, if these could have been discovered. *Middleton v. Spicer,* 1 Bro. Ch. Ca., 207. The authority of this case was distinctly recognized and its principle followed out by *Lord Rosslyn* in *Barclay v. Russell,* 3 Ves., 424, and by the vice-chancellor, *Sir John Leach,* in *Henchman v. Attorney-General,* 2 Sim. and Stuart, 498. (1 Con. En. Chrs. 556.) The decree in this last case was indeed reversed on appeal. (See 3 Mylne and Keene, 485, 10 Eng. Con. Ch. Ca., 261); but the reversal was upon a ground not at all impugning the authority of *Middleton v. Spicer.* There is little doubt, therefore, that at this day in Eng-

land Burgess and Wheate would not be followed except *speciatim* in a case of proper escheat, and then upon the argument, "scanty" as it is, that upon *feudal* principles there can be no *escheat* except for the defect of a tenant to render the feudal services. See also 4 Kent Com., 423, 4. (367)

Perhaps neither the case of *Burgess v. Wheate* nor those in which the doctrine there asserted was revised have any very close application to the question under consideration. It is not now an inquiry whether the plaintiff can call upon the defendant to execute an alleged trust annexed to property in the defendant's hands. The plaintiff does not seek to disturb the defendant in the enjoyment of any possession he holds upon a claim that the plaintiff has succeeded, either in the *per* or the *post*, either through or after the corporation, to the beneficial interest of the original *cestui que trust*. The State alone can set up such a claim; and if the property were *in the defendant's hands* we do not see why it would not be a valid claim. But the plaintiff asks of the court to prevent the defendant from taking away plaintiff's money to which defendant has no right. And he asks this of the court as a court of equity, because a court of law is unable to look beyond the judgment and pronounce that the defendant is not a creditor. At law the judgment is absolute and conclusive evidence of title in the defendant to money withheld by the plaintiff. In equity it is but a security for the collection of money, which ought not to be enforced except in the furtherance of the purposes for which it is held. But it seems to us that the general principles emphatically laid down by *Lord Thurlow* in the case of *Middleton v. Spicer*, before referred to, have a strong bearing upon the subject of our inquiry. "Where there is a trustee the general rule of this Court is that he can have no other title." Again, "the executors being trustees cannot *by any possibility* take a beneficial interest." Admit that in the case of an escheat the trustee may be permitted to insist that the extinguishment of the trust shall operate for his benefit, the case of an escheat is then avowedly an exception from the general rule, which forbids a trustee to claim in contravention of the condition in which he took the legal interest. Is there any sufficient reason why another exception shall be made as is contended for by the defendant in this case?

It is urged that although the defendant has no equitable title to this money, neither has the plaintiff, and (368) therefore the Court ought not to interfere, but suffer the law to prevail. Now, without repeating what has been before

stated, that the extinguishment of the creditor's equitable right annihilates the equitable debt so that plaintiff *no longer owes,* and therefore in equity has a perfect right to this money, it is enough that he does not owe it to the defendant to give him an equity against the defendant. The money is yet in the plaintiff's hands, and he has a right to keep it against all the world unless it be required from him by one to whom it is due or in behalf of one to whom it is due. *Melior conditio possidentis.*

It is also insisted that the plaintiff acted against conscience in resisting the claim, when preferred against him in behalf of the creditor, and delaying the suit until the charter expired and the debt was extinguished. If this be so, it does not follow that the defendant, by reason of such misconduct, became entitled to the debt thus wrongfully extinguished. The corporation might, before its charter expired, have assigned this debt to the defendant or to any other person, and thus have kept it in existence against the plaintiff. But the corporation did not so will. It preferred to die in quiet and permit its claims and its injuries to die with it. No one can now assert the former or redress the latter.

But the resistance made by the plaintiff to the suit at law, while prosecuted by the defendant for the bank, may be deserving of consideration in one point of view. The defendant may have incurred expenses in the prosecution of that suit against which he ought to be indemnified; and while the plaintiff asks equity he should be compelled to render it. We have doubted, therefore, whether the injunction ought not to be dissolved so far as respects the collection of the costs of the suit at law. No suggestion, however, of that kind was made upon the argument, and it seems to us that the question of these expenses is not now properly before us. The answer does not set up this equity, nor even aver that the defendant has paid of his own moneys or made himself personally liable to pay these costs; and it may be that they have been paid by the bank. As
(369) the cause must be remanded he will have an opportunity, in such mode as he may be advised, of bringing this equity if it exist to the notice of the court below, where no doubt it will receive due attention.

It is the opinion of this Court that there is error in the interlocutory decree appealed from, and that upon the defendant's answer the injunction theretofore granted ought not to have been dissolved. The defendant must pay the costs of the appeal.

PER CURIAM. Decree accordingly.

*Cited: Malloy v. Mallett,* 59 N. C., 345; *Bank v. Tiddy,* 67 N. C., 171; *Von Glahn v. DeRossett,* 81 N. C., 472; *Bass v. Nav. Co.,* 111 N. C., 446; *Wilson v. Leary,* 120 N. C., 93; *Broadfoot v. Fayetteville,* 124 N. C., 485.

HARMAN HOWLETT'S Heirs v. JOHN THOMPSON'S Executor et al.

In ascertaining whether a deed given by A to B for a tract of land was intended to be a full and absolute conveyance of all A's interest, or only as a security for money advanced by B to A, a great disproportion between the value of the land and the sum paid for it is strong evidence that the deed was given as a security merely.

When a party seeks to exempt himself from an equitable lien on land which he has purchased, on the ground that he was a purchaser without notice, he must show that he not only received a deed for the land but that he also paid the purchase money before he had notice of the lien or trust.

THIS was a suit transmitted from the Court of Equity of GUILFORD, at Fall Term, 1840, to the Supreme Court, by consent of parties. The pleadings and proofs in the cause are fully set forth in the opinion delivered in this Court. (370)

*Mendenhall* for the plaintiff.
*J. T. Morehead* for the defendant.

GASTON, J. The bill in this case was filed, returnable to March Term, 1829, of Guilford Court of Equity, by Harman Howlett against John Thompson, Pleasant Bevil and James Johnston, but at the appearance term the name of James Johnston as a defendant was permitted to be stricken out. All the original parties have died pending the suit, and as revived it is a suit between the heirs of Howlett, plaintiffs, and the executor of Thompson and the heirs of Bevil, defendants. The bill charges in substance that James Johnston, as the agent of the executors of Col. Robert Lindsay, had, in November, 1818, with the view merely of securing the payment of certain judgments of the said executors against Harman Howlett, amounting with principal, interest and costs to the sum of $101, bid off at that price at

execution sale a tract of land of the said Howlett containing 200 acres, and of far greater value, under an engagement to permit the said Howlett to redeem the said land by refunding the purchase-money and interest; that in December, 1818, or January, 1819, Johnston called on Howlett to refund the money, and that the latter, to enable him to comply with this demand, was induced to enter into a contract with the defendant Thompson, according to which the latter lent him the sum of $100 at an annual interest of $12.50, with a stipulation that Thompson would receive payment of the interest in labor, and that to secure the repayment of the sum lent, with the interest above, said Thompson should get an assignment of Johnston's purchase of or title in the land; that this contract was communicated to Johnston by both the parties and carried into execution; the $100 were advanced by Thompson upon the agreed terms, and Johnston relinquished to Thompson his interest in the land under the purchase at execution sale upon an express understanding that Thompson should hold the title in the
(371) land, which land was then fully worth $500, as a security for the repayment with 12 1-2 per cent interest on the money lent. The bill charges that for some time Howlett paid the interest so stipulated, but Thompson, nevertheless, having procured the legal title to the land, brought an action of ejectment against him, and having obtained a judgment in said action came with the sheriff, armed with a writ of possession, to turn him out of doors, at a time when his wife was confined to her bed; and then and there, under the said writ and by threats of turning the said Howlett out of doors, extorted from him a bond or note for the sum of $15 as rent for said land for a year, which bond the bill alleges that Howlett has paid. The bill further charges that Thompson seemed for a time satisfied in having thus extorted from Howlett this acknowledgment of tenancy, and demanded no further rent nor received any further interest, but recently sold and conveyed the said land to the defendant Pleasant Bevil, who it is charged had full notice of all the matters in the bill; and they, the said Thompson and Bevil, have instituted an action of ejectment against Howlett to dispossess him, and obtained judgment therein at the February Term, 1829, of Guilford County Court. It sets forth that he is ready and willing to pay whatever is justly due from him of principal and interest upon the money lent, and prays that execution on the judgment in ejectment may be enjoined, that an account may be taken of what is justly due upon the said loan, and that on payment thereof he may be permitted to

redeem, and for general relief. The answer of the defendant Thompson states that, having understood that James Johnston, who had purchased the land of Howlett at execution sale, was willing to part with the same to any person who would advance the amount bid for it, he made application to Johnston and thereupon entered into a contract with *him* whereby he agreed to pay to said Johnston the sum aforesaid, and Johnston agreed to convey to him the land, and that this contract was fully carried into execution. The answer denies that he made any contract whatever with Howlett for advancing the money at 12 1-2 per cent interest and holding the land as a security, or that he purchased the land at the instance or for the (372) benefit of Howlett, but avers that he purchased absolutely for himself. The answer denies that Howlett has paid Thompson 12 1-2 per cent interest or anything by way of interest on the money falsely charged in the bill to have been advanced; admits that Howlett has occasionally worked for him, but says that he also furnished Howlett with many articles at different times, and believes that upon this running account there is a balance of $20 or $30 due Thompson. The answer admits that at November Term, 1821, he instituted an action of ejectment against Howlett, and at November Term, 1822, obtained judgment, and says that he did not sue out the writ of execution until 28 January, 1823; that he then went with the deputy sheriff to have the same executed, when Howlett proposed to rent the land for a year, and this proposition being accepted he gave Thompson his note under seal for the sum of $15, payable on 28 December then next ensuing, for the rent of the land the said Howlett then lived on; but the answer denies that the said note was paid or that Thompson ever obtained any subsequent rent for the land, and says that although he considers Howlett as having continued his tenant at the same annual rent, and justly owing the same, he has forborne to press him therefor because of his inability to pay it. The answer says that Thompson at last sold the land to Bevil at $400, and gave Howlett notice to quit and deliver up possession to Bevil; that this was not done, and Bevil thereupon instituted an action to gain the possession. The answer of Bevil sets forth that on 14 October, 1826, while Howlett was in possession of the land, as was believed by Bevil, as the tenant of Thompson, the said Bevil bought the land of Thompson at the price of $400, half of which he paid a short time thereafter and the other half, which was payable at twelve months, remains yet unpaid. This defendant denies that at the time of his purchase he had any

knowledge of Howlett's pretended equity or claim in or to the land; declares that at the time of the purchase Thompson assured him that Howlett would give up the possession at New Year's day, and that the title was good, and says that (373) afterwards (but does not state whether before or after payment of half the purchase-money) Howlett laid claim to the land and wrote many letters to him concerning the same which he refused to receive, believing Howlett's object was to take some advantage of him. This defendant admits that he brought the action of ejectment on the separate demises of Thompson and himself, and insists that there is no injustice in availing himself of the judgment therein rendered to obtain the possession of his land.

Upon the coming in of these answers the injunction to restrain the issuing of the *habere facias possessionem*, which had been granted on the filing of the bill, was dissolved with costs. To the answers of the defendants there is a general replication.

Notwithstanding the explicit denial by Thompson of the agreement alleged in the bill, we feel ourselves bound by the proofs to declare that agreement established. The testimony of James Johnston to that point is very distinct and positive. He declares that after he had purchased Howlett's land at execution sale in November, 1818, he agreed with Howlett to give up the land if the latter would pay the money bid therefor before Johnston was called on for it by the sheriff; that this was not done, and about the Christmas following he went in company with a surveyor to survey the land, when Howlett supplicated for further indulgence, and represented that Thompson was about to lend him the money to pay for the land; that witness told Howlett if Thompson would agree to let him have the land upon easy terms the witness would, notwithstanding some trouble and expense already incurred, let Thompson have it for $110; that a day was appointed for the three to meet, and they accordingly did meet on 7 January, 1819, when the following arrangement was made: The witness was to receive $110, of which $100 was paid down by Thompson, $5 by Howlett and the remaining five promised to be paid by Howlett in a few days, the witness to transfer the title to Thompson and Howlett to repay the $100 so advanced by Thompson *in cash* with interest thereon at the rate of 12 1-2 per cent per annum, the interest payable in labor on 1 April next, and receive a convey- (374) ance of his land. Upon this distinctly understood agreement the witness shortly thereafter made the conveyance to Thompson, and declares that he never would have permitted

Thompson or any other person to have the land at that price but for the purpose of befriending Howlett. This testimony is confirmed by that of other witnesses and by the circumstances of the case.

William Hutchinson deposes that about a week before the April Term of Guilford County Court succeeding this transaction he heard Thompson say either "that he had let Howlett have a hundred dollars to redeem his land from Johnston," or "that he had paid one hundred dollars to Johnston for Howlett's land"; that Howlett was to repay the money at the court, but he expected it would not be done, but that it would answer if repaid by the next succeeding court; and that at the same time he stated either that he had a deed or was to have a deed for the land, to hold until the money should be repaid him.

Mary Bevil deposes that she has often heard Thompson say that he had lent Howlett $100 to redeem his land, and that she has heard him tell Howlett if he would pay fifty dollars he (Thompson) would wait for the residue until Howlett could make it.

In addition to this testimony the vast disproportion between the value of the land and the price alleged to have been paid for it by Thompson is a very important consideration. There is, indeed, no precise testimony as to its value, but we must take it to have been worth at least the sum for which it was sold to Bevil. Now, independently of Johnston's express declaration on oath, it cannot for a moment be supposed that he would have conveyed the land to Thompson at one-fourth of its value had he not regarded Thompson as taking the title but as a security for the money advanced for Howlett. Towards the latter he felt himself under the obligations of humanity and honor to show indulgence, but Thompson had no claims on him for a sacrifice of interest. It appears, also, from an exhibit filed by the defendant that after making the pretended absolute purchase on 7 January, 1819, Thompson took no step whatever to assert a title to the land until more than two years thereafter, during all which time Howlett continued to occupy and (375) enjoy it. On 17 October, 1821, he sued out a declaration in ejectment on the several demises of Johnston and himself, which demises are laid as of 12 December, 1820; and having obtained judgment at November Term, 1822, sued out a writ of possession. Armfield, the deputy sheriff whom he accompanied when going to execute this writ, has been examined for the defendants and proves that at the time the note for the year's rent was given Howlett's wife was lying sick, and Howlett was ap-

prised before the note was given that they had come to put him out of doors. And from that day Howlett was permitted to enjoy the land without paying any rent or securing the payment of any rent, notwithstanding the belief of Thompson that he was unable to pay, until after the land was sold to Bevil.

It is exceedingly difficult to reconcile this conduct with that of the undisputed legal and equitable proprietor of the land; but it is reconcilable with that of one who, while he believed he had contrived to secure the title to himself, was conscious that this had been done at the expense of fair claims on the part of the occupant.

One deposition has been taken for the purpose of proving notice in Bevil previous to his purchase. But we deem it unnecessary to examine into the effect of this testimony or into the credit of the witness. There is *no proof* whatever of the *payment* of the purchase-money, or of any part of it, by Bevil; and even of that part which alone his answer alleges to have been paid the answer does not aver the payment to have been made *before the notice*, which he admits that he obtained of Howlett's claim shortly after the purchase.

The plaintiffs are entitled to have an account taken of the amount of money which may be due to the executor of Thompson for the principal and lawful interest of the $100 advanced for their ancestor on 7 January, 1819, deducting the payments made thereon, if any, whether as payments of interest or principal; and to be let in to redeem the land as having been in effect mortgaged for the repayment thereof. There should also
(376) be an account of the costs incurred in the two suits at law by the parties respectively, showing by whom the same have been paid or who remain liable for the payment thereof; and there must also be an account of the rents and profits received by any of the parties defendant since the dissolution of the injunction.

PER CURIAM. Ordered accordingly.

*Cited: Blackwell v. Overby*, 41 N. C., 45; *Durant v. Crowell*, 97 N. C., 373; *Porter v. White*, 128 N. C., 44.

## ANDERSON HERRON v. GEORGE CUNNINGHAM.

The plaintiff alleges in his bill a contract which he cannot prove; but the defendant in his answer sets forth a contract in relation to the same transaction, upon which the plaintiff might have had relief if he had alleged it in his bill. *Held*, that the plaintiff cannot recover upon these admissions of the defendant, as they show a contract different from that for which he sought the aid of the court of equity, especially where the defendant does not submit to any decree.

THIS was an appeal from a decree of his Honor, *Battle, J.*, pronounced on the hearing of this cause before him at Spring Term, 1841, of HAYWOOD Court of Equity. The pleadings and proofs are stated in the opinion of the Court.

No counsel appeared for either party in this Court.

RUFFIN, C. J. In 1835 the Legislature granted certain lands, situate in the county of Haywood, to the justices of the county court in trust for the county, and to be sold for the benefit of the county upon terms to be determined by the county court. In 1836 the lands were offered for sale, and among the terms established by the court a right of preemption was allowed to persons then living on the tracts, but upon what particular conditions is not stated in the pleadings or proofs. (377) At the sale the defendant Cunningham became the purchaser of 115 acres of land (of which Robert Herron was an occupant) at the price of 37 1-2 cents per acre, of which he paid one-fourth down and gave his three bonds for the other three-fourths, payable in one, two and three years; and Robert Herron also executed those bonds as the surety of Cunningham.

The bill states that the plaintiff is the son of Robert Herron, and that the latter was entitled to the preemption of the said land, and before the sale transferred it to or waived it in favor of the plaintiff; but that the plaintiff was an infant at the time and the commissioners refused to receive his bid, and that thereupon he applied to Cunningham to purchase the land for him, the plaintiff; and that Cunningham, with the consent of the plaintiff's father, agreed to do so and to allow the plaintiff to make the payments, and when they should have been made, to convey the land to the plaintiff. The bill further states that Cunningham accordingly bid off the land as the agent of the plaintiff and for his benefit, and that immediately afterwards the plaintiff put into Cunningham's hands the money to make the payment required down, and subsequently and before the

second installment of $10.78¼ fell due, he also put into his hands money to pay that. The bill then charges that Cunningham denied having made a contract with the plaintiff or that it was obligatory on him by reason of the plaintiff's infancy, and had subsequently agreed with the plaintiff's father, Robert Herron, for the purchase of the equitable title from him, and hath since obtained a deed from the county and refuses to convey to the plaintiff, although the latter has offered to pay the residue of the purchase-money. The prayer is that the defendant Cunningham may be declared a trustee for the plaintiff, and that an account may be taken of the sum due for principal and interest of the purchase-money, and also of the rents and profits received by Cunningham, and that upon payment of the balance, if any, by the plaintiff, the defendant may be decreed to convey to him.

The answer states that Robert Herron, who was en-
(378) titled to the preemption, was considerably indebted and insolvent, and in consequence thereof he stated to the defendant on the day of sale that although he wanted the land he could not bid it off because his creditors would immediately seize it, and therefore he requested the defendant to purchase it for him. This the defendant admits he agreed to do, and to convey the land to Robert Herron upon his paying the purchase-money; and he states that thereupon the said Robert drew from his pocket one-fourth of the purchase-money and delivered it to the defendant, and the defendant made the purchase and paid the first installment on that day, and gave bonds for the others as already stated. The answer denies that the defendant made any contract with the plaintiff to purchase for him, or that anything whatever passed between them before or at the sale on the subject. But it states that after the sale was completed and Robert Herron and the defendant were returning home together the former asked the latter whether he would not be willing to make the title to his son Anderson, the present plaintiff, provided he paid the purchase-money, and the defendant replied that he would. The answer then admits that before the first note fell due the defendant received from the plaintiff ten dollars to be paid on that note, but states that before the time of payment arrived Robert, the father, after having often done so before, proposed to sell the land to the defendant, and that they finally agreed upon the following terms: That the defendant should pay the three notes to the county, should return to the plaintiff the sum of ten dollars received from him, and should pay to Robert, the father, fifty dollars for the equitable right; and that

he accordingly made the payments to the county and to the father and offered it also to the plaintiff, who refused to receive it. The answer insists that the beneficial interest in the premises was in the said Robert Herron and never belonged to the plaintiff.

Replication was taken to the answer and the parties proceeded to take their proofs, and on the hearing in the Court of Equity for Haywood it was declared that the defendant purchased the premises at the sale made by the commissioners for the plaintiff, and was a trustee for him, and there was a decree that the defendant should convey to the plaintiff upon the (379) payment of the balance of the purchase-money and interest; and the defendant appealed.

Very voluminous depositions have been taken and sent up in the record, but it is not deemed necessary to advert to them particularly, as but a small portion of them is material to the point on which the cause turns, as it strikes us.

The plaintiff has taken the deposition of his father, and if the Court were at liberty to yield full faith to it we should consider the statements of the bill established. The witness denies that he was in debt or afraid from any such cause to purchase in his own name; and he says that before the sale he relinquished to his son, and that the only reason why the son did not purchase was because he was an infant and could not give bond; that such being the case they, the father and son, together applied to the defendant to become the purchaser in his name, but for the benefit of the son, and that the defendant agreed to do so and did so, and agreed to convey to the son upon the purchase-money being paid. The witness also states that to enable the defendant to make the purchase he, the witness, advanced to him the first installment, which he gave to his son because he had worked for money to pay the father's debts. The witness further states that this contract was made in the presence of no person but himself; and he admits that during the next year he sold the land to Cunningham and received $50 for his right; but he says he had no right and did not claim any in the land, and that Cunningham bought at his own risk.

The material difference between the contract stated in the bill and by this witness and that stated in the answer is that the former is an original, distinct and complete agreement between the plaintiff personally and the defendant that the latter should purchase for the former and with money advanced by the plaintiff, and on a declaration of the truth of that allegation the decree is founded; whereas the statement of the answer is

that the money advanced to the defendant at the purchase was the money of the father, was advanced by the father, and the contract of the defendant was altogether with the father
(380) and for his benefit; and therefore that if the plaintiff have any right he must have derived it under the father subsequent to the sale. It is obvious that those contracts are different, being made with different persons. Now Robert Herron is the only witness who speaks of such a contract between the defendant and the plaintiff; and even he admits that the son did not pay the money, but that he paid it. This single witness could not overrule the positive denial of the answer on this point were there nothing particular against the witness. But, besides the shock given to his credit by his admitted sale of the very land in dispute to the defendant, his character is stated by many witnesses to be such as not to entitle him to belief on his oath. And above all, another witness, who is unimpeached, states in conformity with the answer that on the evening of the day of sale, as the parties were returning home from the sale, Robert Herron applied to the defendant to know if he would not as willingly convey to the son as to the father. We are obliged, therefore, to reverse the declaration that the defendant purchased for the plaintiff, and to declare that he purchased for the plaintiff's father; and consequently the plaintiff cannot have a decree, because there is nothing in his bill to show how the title, thus placed in the father, was derived by him. The defendant admits a case in the answer on which, perhaps, if stated in the bill and admitted or proved the plaintiff might have had relief, but we cannot anticipate what defenses the answer might have set up to such a case if made in the bill; and the answer does not submit to any decree in favor of the plaintiff upon the transaction as stated by the defendant. The allegations and proofs of the plaintiff do not, therefore, correspond as they ought to do to enable us to relieve him without danger of surprise on the other party. A bill cannot be founded on a contract made with the plaintiff and the decree founded on a contract made with another person and coming to the plaintiff by assignment.

The decree must, therefore, be reversed and the bill dismissed with costs in this Court; but, for greater caution, without
(381) prejudice to any bill to be brought by the plaintiff hereafter.

PER CURIAM. Bill dismissed without prejudice.

*Cited: Grant v. Burgwyn*, 88 N. C., 100, 101.

JAMES PARKER v. RICHARD HINSON.

Where the allegation of the plaintiff is that his father gave to him, while he was yet a tender infant, by deed of advancement, nearly all his property—real and personal—leaving scarcely anything for his own support or that of his wife or of the children he might thereafter have, the proofs to support such an allegation, before it will receive the countenance of the court, must be stringent and entitled to full confidence.

THIS was a suit in equity which, being set for hearing at Spring Term, 1841, of WAYNE Court of Equity, was transmitted by consent of parties to the Supreme Court. The pleadings and proofs are stated in the opinion of this Court.

*John H. Bryan* for the plaintiff.
*W. H. Haywood, Jr.*, for the defendant.

GASTON, J. The plaintiff, in his bill, which was filed on 2 March, 1839, charges that the late James Parker, of Wayne County, died 16 March, 1818, leaving the plaintiff, his only child, and a widow, Tabitha Parker, the mother of the plaintiff; that some three or four years before the death (382) of the said James, being perfectly solvent and desirous to secure to the plaintiff, by way of advancement, a portion of his property, he executed unto the plaintiff, then an infant of tender years, a deed of gift for several negro slaves, named Annaky, Hannah, Mima and George; that the said deed was attested by two witnesses, Henry Hobson and Richard Grant, and was delivered to the said Hobson for the use of the plaintiff; that one of these witnesses, Hobson, died in the lifetime of the plaintiff's father; that the said deed was never registered, but has been fraudulently suppressed or destroyed; that, thirteen or fourteen years after the death of the plaintiff's father, the plaintiff's mother intermarried with the defendant, and that in the month of December, 1837, she died, and that since her death the plaintiff for the first time heard of the deed of gift aforesaid, Grant, the surviving witness thereto, having, at the earnest request of his said mother, concealed from him the knowledge thereof so long as she lived. The plaintiff charges that, upon the marriage of his mother with the defendant, the said negroes, or some of them, and the issue thereof, came into the defendant's possession, who had personal knowledge, or the means of personal knowledge, of the existence and suppression of said deed, and prays that the defendant may answer all the matters charged in the bill, and that the plaintiff may have such relief as the nature of his case requires.

The defendant states in his answer that he intermarried with the mother of the plaintiff on 20 February, 1831; that she was then possessed of three negroes, viz., Annaky and Mima, named in the bill, and Handy, a child of Mima, holding and claiming the same as her absolute property; that Mima has since had several children, the names and ages of which he sets forth, and that the defendant has continually held the said Annaky, Mima and Handy from the time of his said intermarriage, and the children of the said Mima from the time they were born, as his absolute property, and that until December, 1838, he, the defendant, never heard of any deed of gift having been executed or having been alleged to be executed by the late James Parker to the plaintiff. The defendant denies that such a deed ever was (383) executed, and declares that the plaintiff, shortly after the death of the plaintiff's mother, claimed the negroes in question as having been bequeathed to him by his father's will, and afterwards, on finding that his claim could not be enforced, set up the unfounded claim brought forward in his bill. The defendant further alleges that the plaintiff's father, by his last will and testament, bequeathed the negroes, Annaky and Mima, to the plaintiff; that the said will, after the death of the testator, was duly proved, and the widow dissented therefrom; that she afterwards filed her petition against the administrator, with the will annexed, in order to obtain so much of the testator's estate as would make the provision for her in the will equal to the slaves to which she would have been entitled of said estate in case her husband had died intestate; that upon said petition she obtained a judgment for the sum of $600, or thereabouts; that execution issued upon said judgment, which was levied upon the slaves, Annaky and Mima, and that at a sale made by the sheriff in pursuance of the said execution she purchased Annaky and Mima, and that, after said sale, Handy, the child of Mima, was born. The defendant also avers that the plaintiff, at the time of filing his bill, was upwards of thirty years of age, and insists that the defendant has title to the said Annaky, Mima, Handy and the issue born since of the said Mima, not only by virtue of the purchase aforesaid by the said widow and his subsequent intermarriage with her, but because of her and his long-continued adverse possession thereof, and prays to have the benefit of the act of Assembly, made to quiet title to slaves in those who have been in possession for three years or more, and also the benefit of the act limiting the time of bringing personal actions.

To this answer there is a general replication. The first question presented upon these pleadings is whether there was, in

fact, such a deed of gift executed to the plaintiff by his father, as is charged in the bill. In support of this allegation, the plaintiff mainly relies on the testimony of Richard Grant. The substance of his testimony is that he and Henry Hobson were witnesses to a deed of gift from the late James Parker to the plaintiff, his child, and only child, for a tract of land (384) bought from William Grant, called the Walnut Hill plantation; a negro woman, named Annaky; a negro child, Hannah; another named George, and another named Mima, and a horse and saddle, so far as he recollects; that this deed was delivered to Hobson for safe-keeping, for the benefit of the plaintiff; that, about two years after the death of James Parker, his widow, who was the half-sister of the witness, showed the deed to a lawyer, who died before the institution of this suit, and was told by him that if the deed came to light she could not keep the negroes another day; that she, on the same day, consulted with the witness what she should do with the deed, and he told her that it was "best perhaps not to destroy said deed"; that she observed to the witness that she had his child to raise, and that it was as much for his interest as hers to destroy it; that in his presence, accordingly, she burned the deed, and requested him to say nothing about the deed, and that he never did until after her death. He adds that, on one occasion after her marriage, she wanted him to state the case to a lawyer, in order to learn whether the deed of gift would hold the negroes, or whether they would belong to her husband; but does not say whether he complied with this wish. The plaintiff also relies on the testimony of Sally Burn and Jesse Anderson. The former states that she had *repeatedly*, in James Parker's lifetime, heard him say that he had given to his son a deed of gift for Annaky and her children; that she had heard Henry Hobson say he had written the deed; that she had heard Mrs. Parker say, after her first husband's death, there was such a deed; that Parker told her the cause of his giving the deed "was to quiet the fears of his wife, lest he should give the negro, Chaney, to his illegitimate child, Smithy Grant," and that she has heard the plaintiff speak about this deed while his mother was alive, and that the negroes were always called his. Jesse Anderson deposes that he has heard the plaintiff's mother speak of the little negroes she had, as being raised by her for the benefit of her son; that on one occasion, when a negro child was born, she told him to go and look at his little negro; that on one occasion, after she was (385) married to the defendant, the plaintiff whipped some of them, and she said she had a good mind to send them home to him, as she was unfit to raise them, and that he had repeatedly

heard the plaintiff claim the negroes as being his *at his mother's death.*

On the part of the defendant, a number of witnesses testify that the general character of the witness Grant as to veracity is so bad that he is undeserving of credit upon oath. The plaintiff has attempted to meet this testimony by that of others, who declare that, for aught *that they know,* they would believe him, but who at the same time admit that his general character is such as is represented by the discrediting witnesses.

It appears from an exhibit introduced by the defendant that the will of James Parker, and a codicil thereunto annexed, were proved at the August Term, 1819, of Wayne County Court, and administration, with the will annexed, granted to Henry Roberts, and that the dissent of the testator's widow from the said will was entered of record. By the said will, which was witnessed by Henry Hobson, who appears to have been dead at the time of the probate, the testator gives all his lands to his son, bequeaths to him four negroes. Annaky, Hannah, Mima and George, with an exception that his wife shall have the use thereof until his said son shall arrive at twenty-one years of age or marries; bequeaths to her one horse, a riding chair, and harness; leaves to her, for life only, a still and a beaufet, and during her widowhood a mahogany table and desk; and he bequeathes to Smithy Grant five dollars. The will bears date 22 December, 1809. By the codicil, which is dated on 7 January, 1815, to which Hobson is not a witness, the testator further bequeaths to his said son one negro girl, named Chaney, and her increase. It also appears from the same exhibit that the widow did file a petition and obtained a judgment, as set forth in the answer, and it is testified by James Roberts, the administrator, with the will annexed, that she purchased Annaky and Mima at the sheriff's sale under execution, which issued to enforce the collection of that judgment. According to the testimony of *all* the
(386) witnesses, the plaintiff arrived at full age about 1828, and he has always lived in the immediate neighborhood of his mother. It is proved by Lot Hays, John Roberts, John B. Crawford, Major Uzzell, Bright Best and Henry Sasser that the plaintiff's mother, since her purchase of Annaky and Mima, and the defendant Hinson since his intermarriage with her, held undisputed, open and notorious possession of the said Annaky and Mima, and of the issue of Mima from their birth, claiming the same as their property, and that, until after the death of Mrs. Hinson, neither they nor any of them ever heard of the alleged deed of gift, or of any claim or pretense of claim of the plaintiff to any of these negroes. Crawford testifies that in 1828 or 1829

the plaintiff's mother, being then a widow, made a will, disposing of the said negroes, and that the plaintiff complained of that disposition in regard to Mima and thought it hard she was not given to him, as she had been, by his father's will. It is also proved that the plaintiff's mother had negroes, George and Hannah, in her possession, but that she held these avowedly as the plaintiff's negroes, and that they have been delivered up to the plaintiff. And John Everett and Bright Best testify that when the plaintiff, after his mother's death, first set up a title to the negroes in dispute, he claimed them under his father's will.

Upon this view of all the material proof in the cause, we feel ourselves bound to hold that the plaintiff has not established his allegation that a deed of gift for Annaky, Mima, Hannah and George was executed to him by his father. That allegation is intended to be understood, and by us must be understood, as of a deed operating directly to transfer the property from the donor to the donee, unconditionally and absolutely. The fact charged is one extremely improbable—that a man, having one infant child, with a view simply to its advancement in life, should strip himself almost to destitution, retaining scarcely any property whatever, either for his own support or for that of his wife, or the children he might thereafter have. Before such a fact can be believed, the proofs must be stringent and entitled to full confidence. On Richard Grant's testimony we can place *no* reliance. His own tale stamps him with foul disgrace, in (387) combining with a mother, by destruction of the title deed of her son and his nephew, to rob him of his undoubted property. But if it were not of this description, we cannot trust in *him*, whose character is shown by his neighbors *una voce* to be that of a man regardless of all moral obligation. Throwing this testimony aside, there scarcely remains for the plaintiff any deserving of serious consideration. Mrs. Bunn proves entirely too much. She has not only *repeatedly* heard the late James Parker speak of his having made a deed of gift for the negroes, Annaky, Mima, Hannah and George, to the plaintiff, but has heard the plaintiff's mother admit it; has heard Hobson say he wrote the deed; and undertakes to give us the reason why Parker said he made the deed. It was to quiet his wife's apprehension lest he should give the negro girl, "Chaney, to his illegitimate daughter, Smithy Grant." And yet—most strange!—the great purpose contemplated by the deed is wholly unattended to; for, according to the plaintiff's bill and the testimony of his main witness, the deed includes Annaky, Mima, Hannah and George, but does not include Chaney. But this is not all. This witness also declares that the negroes at Mrs. Parker's and at Hinson's were always

called the plaintiff's, and that she had heard the plaintiff himself, in his mother's lifetime, claim them under the deed. It is charitable to presume that Mrs. Bunn speaks of the negroes or their children, which were at Mrs. Parker's, other than Annaky, Mima or the issue of Mima, and which were unquestionably called the plaintiff's negroes, and perhaps charity calls upon us also to doubt whether this good lady's memory has not been so confused by the multitude of communications that have been poured into her ears by the plaintiff's father, the plaintiff's mother, Daniel Hobson and the plaintiff himself, that at length she has fancied that the gift which, in truth, was made, was a gift by deed, and not a gift by will. Upon examining the will, we shall see that it does give to the plaintiff the four negroes, Annaky, Mima, Hannah and George, which, as far as we can learn, were all that the testator then owned; that to quiet his wife's apprehensions he cuts off Smithy Grant with a legacy of five dollars, and that afterwards, when Chaney is born, he (388) gives her also to the plaintiff by the codicil. It is not necessary to comment upon that part of the witnesses' testimony, which declares that the plaintiff, in his mother's lifetime, talked about and claimed under this deed. This representation is repudiated by the whole frame of the plaintiff's bill, is contradicted by a number of witnesses, and tends further to show that she had mistaken the *will* for a *deed*. As to the deposition of Jesse Anderson, before we allow to it *any* force, it becomes indispensable to ascertain whether the little negroes spoken of in it were Mima's children, or the children of a mother indisputably belonging to the plaintiff. There is nothing in the deposition or in the other proofs of the cause to enable us to solve this doubt.

Without examining the grounds of defense specially taken by the defendant, we must dismiss the bill, because of a failure to prove the case herein made. And, as the claim of the plaintiff is founded upon an unsupported charge of fraud, we hold ourselves bound to dismiss the bill, with costs.

PER CURIAM. Bill dismissed with costs.

(389)

WILLIAM WATSON and Wife *v.* JOSIAH B. COX *et al.*

A woman, previous to her first marriage, had settled to her sole and separate use certain negro slaves; her first husband died; the widow married a second time, and her second husband, having had possession of the said slaves, shortly afterwards died intestate, leaving one child; the widow being about to marry a third husband, made a marriage settlement and, being under the impression, and so advised by her counsel, that the negroes secured to her separate use in the first marriage settlement continued hers notwithstanding her second marriage, and would continue to her separate use during her third marriage, she settled upon her son by her second marriage *all* her distributive share of his father's estate. These negroes and the distributive share, as she then supposed it to be, constituted nearly all her property. After her third marriage, it being determined by the Supreme Court that the negroes included in her first marriage settlement went absolutely to her second husband and constituted a part of his personal property, she and her husband filed this bill for relief. It was held by the court that they were entitled to relief on the ground of mistake, but to what specific relief the court would not now say, as the case came before them upon a demurrer to the plaintiff's bill.

A bill in which several defendants are charged is not multifarious when the object of the bill is single in respect to the transaction out of which it arises to the subject matter and to the relief; and when, though each defendant is not connected with the subject of dispute in the same matter, yet each is connected with the whole subject, and therefore properly brought before the court, that one suit may conclude the whole subject.

THIS was an appeal from the decision of his Honor, *Judge Dick*, made (*pro forma*) at the Spring Term, 1841, of CUMBERLAND Court of Equity, sustaining the several demurrers of the defendants to the plaintiffs' bill, and ordering the same to be dismissed. The allegations of the bill and causes of demurrer are stated in the opinion delivered by this Court.

*Strange* for the plaintiffs.
*W. H. Haywood, Jr.*, for the defendant.

RUFFIN, C. J. In contemplation of a marriage between Abner Branson and Susan R. Cox, they entered into arti- (390) cles, in 1830, between themselves and Isaac B. Cox, whereby it was agreed that Branson would, when required, convey to Isaac certain slaves then belonging to the intended wife, to be held by him to the sole and separate use of the wife. Soon after the marriage, Branson died, without having executed any settlement. Subsequently, Mrs. Branson, the widow, intermarried with Isaac W. Grice, and they had one child, Isaac W. Grice the

younger; then Grice, the father, died intestate, leaving surviving him the said Susan R., his widow, their said child, and other children which the said Isaac W., the father, had by a previous marriage. The defendant, P. Murphy, administered on his estate, and, claiming them as a part thereof, he took into his possession some of the slaves mentioned in the articles. Mrs. Grice also claimed them, under the articles, as her separate property; and for her benefit an action at law was brought in the name of the administrator of her first husband, Branson, against Murphy, for the slaves in his possession, and there was judgment therein for the plaintiff. Murphy then filed his bill in the court of equity against Mrs. Grice, Cox and Branson's administrator, and therein claimed all the slaves and other personal property mentioned in the articles as having vested in Grice, the second husband, on his marriage, and to that effect a decree was made in that cause in June, 1839.

Pending the suit last mentioned, in contemplation of a third marriage between Susan R. Grice and her present husband, Watson, a settlement was executed by and between those persons and the same Isaac B. Cox, whereby the same negroes (which are named) that were, according to the articles between Miss Cox and her first husband, to have been settled to her separate and sole use, are, as being then the property of Mrs. Grice, settled and conveyed to Cox, as a trustee, in trust for the sole and separate use of the intended wife; and, by way of better providing for and advancing Isaac W. Grice, the infant and only child of her preceding marriage, she thereby, also, with the consent of the intended husband, conveyed and assigned to the said Cox "the distributive share of the said Susan in and to the per-
(391) sonal estate of her former husband, Isaac W. Grice, in trust and for the use and benefit of Isaac W. Grice, her child by her late husband.

The bill is filed by the last husband, Watson, and his wife, against Isaac W. Grice, the son; Cox, the trustee, and Murphy, the administrator of Grice, the father, and seeks to correct the settlement in respect of the assignment of the said distributive share, so that the infant son shall not have the said slaves, or their value, as part thereof, but that the slaves mentioned in the settlement, and thereby intended to be settled and secured to the mother, should be assigned to her in the division of the estate of Grice, or made good to her out of her said distributive share, and that Murphy, the administrator, shall convey and pay to her or her trustee accordingly; and the bill prays further for general relief.

The case made in the bill, on which the relief is sought, is that

Mrs. Grice, now Mrs. Watson, was advised by counsel and did believe that, by virtue of the articles between herself and her first husband, the personal property thereby secured to her separate use during her first marriage continued to be so secured upon and during her second marriage, and did not vest in her second husband, Grice, without any new marriage articles or settlement between them, and that she was assured by counsel that no decree would be made in the suit brought by Murphy in equity which would deprive her of the benefit of the recovery made against him for her use in the previous suit at law; that the said negroes and her said distributive share in Grice's estate constituted nearly all she had as the means of subsistence, and that, as she has lost the slaves, so far as they were considered her exclusive property, she will be left entirely destitute if the assignment of her distributive share should be enforced against her to the whole extent of her interest in Grice's estate, including the said slaves as part thereof. From all which the bill alleges that it must be manifest that the assignment in favor of the son was founded on a mistake; and it avers that it was founded on a mistake of the parties in supposing that the distributive share and the said slaves belonged to the mother in distinct rights, and that she could assign the former to (392) her child, without including the slaves, but reserving and settling them for her own use.

To this bill each of the defendants put in a demurrer and assigned two causes: the one, that there was no equity on which to found any relief against the defendants respectively; the other, that the bill was multifarious. On argument of the demurrers, the court dismissed the bill, with costs, and the plaintiff appealed.

Against the decree it has been argued that the demurrers, as respects the point of multifariousness, ought to have been overruled, because they are insufficient, inasmuch as *combination*, charged in the bill, is not denied. The doctrine is so stated by Lord Redesdale in his Treatise, and is adopted in 2 Mad. Eq., 204, in accordance with old cases. But it seems to have been so far drawn into doubt in subsequent cases that we do not feel inclined, unnecessarily, to put our decision on that point. We think the demurrer will not lie on that ground here, because, in our opinion, the bill is not multifarious. The object of the suit is single. It is so in respect to the transaction out of which it arises, to the subject matter, and to the relief. It is true that each defendant is not connected with the subject of dispute in the same manner, but each of them is connected with the whole subject of dispute, and by that means connected with each other,

and therefore properly brought before the court, in order that the suit may conclude the whole subject. Of course, the infant, for whose benefit the assignment was made, must be a party. So must Cox, his trustee and also the trustee of Mrs. Watson in the settlement. So, we also think, may Murphy be made a party, as in him is the legal title of the subject in controversy, and the controversy is, which of the other parties ought in this Court to be allowed to call on him for it? We do not say that he was an indispensable party, for probably the others might have litigated their rights without him. But he is not an improper party, in any sense, much less in that *of making* the bill multifarious. The bill does not set up separate and distinct claims against the respective defendants, but it is only for a single matter,
(393) namely, a distributive share of an intestate's estate, consisting partly of particular slaves, in respect of which the plaintiffs ask that a certain assignment by the plaintiffs may be put out of their way, wholly or in part, so that they may have a right by decree of the court to receive from the administrator the share, instead of the son, who gets it if the assignment stands. The effect of the bill is that the administrator, who is a trustee for the next of kin or assignee, may not dispose of the distributive share to either until the right be determined, and then to pay according to that determination. We think, therefore, that ground of demurrer fails.

Having disposed of the objection to the framing of the bill, we next are to consider the question of the plaintiff's equity. Upon that it seems impossible to hesitate. The bill alleges positively an entire mistake in the mother and her intended husband as to the nature of her title and of the extent to which the assignment of the distributive share would go in covering the negroes intended to be reserved to the mother and so expressed in the settlement itself. The deed itself therefore shows on its face the existence of the mistake. But it is not material at present to consider that, inasmuch as the mistake is averred in the bill, and the demurrers admit it. Now, there is no head of equity better settled than that it will relieve against mistakes. Whether that relief can be carried as far as the bill asks, by having the particular slaves mentioned in the settlement assigned to the son as a part of his own share or his mother's, and then by him transferred to her, or, otherwise, to have their value made good out of the distributive share of the mother, if sufficient therefor, it is unnecessary now to say. The only question at present is whether the plaintiff be entitled to any relief. If so, the case ought to proceed to a decree on the merits.

The decree in the court below must therefore be reversed and

the demurrers overruled, with costs, in this Court, and remanded for further proceedings in the court of equity.

PER CURIAM. Demurrer overruled and case remanded.

(394)

SOLOMON HARKEY, Administrator of Catharine Harkey, v. JACOB HARKEY.

Where, upon a bill to set aside a deed obtained by a son from an aged mother on the ground of fraud, imposition and incapacity of the grantor, the court decided there was not proof to support the allegations and, therefore, they dismissed the bill, yet they dismissed it without costs, because suspicions were excited by some part of the testimony as to the fairness of the defendant's conduct in procuring the deed.

THIS was a bill filed in CABARRUS Court of Equity in July, 1838, to set aside a deed for negroes, executed in the year 1825, by the plaintiff's intestate to the defendant, who was one of her sons. The grounds alleged for this relief were the incapacity of the intestate and fraud and imposition on the part of the defendant. The defendant denied the fraud, imposition and incapacity imputed by the bill, and averred that there was a fair and *bona fide* consideration for the deed, which he set forth in his answer. He also relied upon the lapse of time from the date of the deed to the filing of the plaintiff's bill. Replication having been made and depositions taken the cause was set for hearing, and at Spring Term, 1841, removed, on the affidavit of the plaintiff, to the Supreme Court. The testimony was voluminous and need not be here inserted, as the Court decided it to be insufficient, in point of fact, to sustain the plaintiff's bill.

The case was argued at length with great zeal by the counsel on both sides, and the reporter regrets he has not room to insert their arguments.

*W. J. Alexander* and *D. M. Barringer* for the plaintiff.
*D. F. Caldwell* for the defendant.

DANIEL, J. This bill was filed in 1838 to set aside a deed executed by the intestate to the defendant in the year 1825, conveying all her dower and personal estate, then of the value of eight or nine hundred dollars. The bill charges that at the time the deed was executed Catharine Harkey was, from her great age and imbecility of mind, incapable of making a contract or disposing of her property; and that the defendant, well knowing

the same, by artful and fraudulent contrivances, procured her to execute to him the said deed. The prayer is that the deed be set aside and that the defendant be decreed to account. The defendant in his answer admits that his mother, Catharine Harkey, was a very old woman when she executed the said deed to him. But he denies that she labored under such mental imbecility as not to be able to make contracts. He avers
(396) that she well understood what she did. He denies any fraud on his part or artful contrivance to procure the said deed. He says that his mother, after advancing three of her other children with a slave each, was left possessed of dower in a small tract of land much worn by cultivation, a negro woman and three small children, a very small live stock and some household furniture; that she agreed to convey the same to him in consideration of his taking care of her and maintaining her the balance of her life; that upon these considerations she executed the said deed and he executed to her a covenant for maintenance, and that the negro woman should at all times wait on her, and that he would pay $150 to three of her other children. All which covenants, he says, he has faithfully executed. He further saveth that his mother lived ten years after the date of the deed, and that she was palsied for four or five years before her death and required almost constant nursing and attention by him or some of his family. The plaintiff has replied to the answer. There has been a good deal of testimony taken in this cause. On examining it some suspicion is raised as to the fairness of the defendant's conduct in getting the deed. But, nevertheless, we are compelled to say from the whole evidence that the plaintiff has not established the case stated in his bill. It appears that Catharine Harkey was an illiterate, ill-natured and fractious old woman. But the evidence proves that she had mental capacity sufficient to make a good and legal contract, and that the writer of the deed (a man of great respectability) explained to her at the time the contents and the legal effect of the deed. She then, it appears, freely executed the deed. From the date of the deed (1825) up to 1831 she continued in the constant practice of a midwife in the neighborhood, and during that time made no attempt to impeach the transaction. From that time (1831) to her death she was palsied and required constant attention and waiting on. It is in proof by two witnesses that the maintenance and trouble to which the defendant had been put was worth the property conveyed to him in the deed. We are of opinion that the
(397) bill must be dismissed, but without costs.

PER CURIAM. Decree dismissed without costs.

SARAH BETHUNE et al. v. JAMES L. TERRY.

The court decides, upon the parol proof in the case, in opposition to the defendant's answer, that there is a defeasance to an absolute bill of sale for a negro by the plaintiffs to the defendant, by which the defendant was to reconvey the negro on being repaid the sum he had advanced the plaintiffs, and decrees that the plaintiffs may redeem the negro upon paying the principal advanced and interest thereon, deducting the hire of the negro since he came to the defendant's possession, and orders an account upon that principle.

THIS was a case transmitted by consent of parties from RICHMOND Court of Equity, Spring Term, 1841.

*Winston* for the plaintiffs.
No counsel for the defendant.

GASTON, J. This bill was filed in April, 1837, and therein it is charged by the plaintiffs that in the month of November, 1834, the defendant, a constable of the county of Richmond, had in his hands executions against their property in favor of Smith and McNair for the sum, as he stated, of about $525; that the plaintiffs, being very much pressed to raise the money to meet these urgent claims, borrowed of the defendant the said sum upon an agreement to pledge for the repayment thereof a negro slave, Isaac, then of much larger value; that in (398) execution of this agreement they executed to him a bill of sale, and the defendant executed unto them a bond or other instrument of writing in nature of a defeasance; that the defendant represented to them that it was necessary he should keep both the writings, and they, being women wholly ignorant of law and fully confiding in this representation, permitted him to retain both; that they have since repeatedly offered to repay to him the sum so advanced by him and claimed to redeem the negro, but he hath rejected their offers and unconscientiously suppresses the defeasance, and claims the negro Isaac as his absolute property. The prayer of the bill is to be let in to redeem the negro on the foot of the mortgage.

The defendant, by his answer, avers that he purchased the negro Isaac from the plaintiffs, out and out, for the sum of $525, which he declares was the full value of the slave at that time; that in pursuance of this contract they executed to him an absolute bill of sale, which he has ready to produce; and that there never was any understanding or agreement whatever between him and the plaintiffs in relation to a loan of money or a mortgage of the negro, or a privilege of redemption upon repayment

of the price. He declares that he had in his hands as an officer six executions on justice's judgments in favor of Smith and McNair, amounting to the sum of $770; that he did not levy those executions, but simply informed the plaintiffs that he would have to collect them unless the plaintiffs made some arrangement with Smith & McNair; that thereupon they proposed to sell to him the negro Isaac, but he and they did not then agree upon the price; that shortly afterwards he called on the plaintiffs to communicate to them instructions which he had received from Smith & McNair not to press the collection of these executions until further orders; that the plaintiffs represented they would be obliged to sell the negro Isaac, and urged upon him to buy; that they first asked $575, then $550, and finally agreed to take $525, which defendant consented to give if Smith & McNair would wait with him for the money until he could sell his cotton; and thereupon it was arranged that the (399) plaintiffs should call at his house the next day to complete the contract. The defendant says that this was done accordingly and the bill of sale executed without one word having been uttered then or before in relation to a mortgage or loan of money; that upon the delivery of the bill of sale no money was paid the plaintiffs or security given them for the payment of any money, it being the understanding of the parties that payment was to be made by applying the sum of $525 towards the satisfaction of Smith & McNair's executions; that the following week the plaintiffs informed him that they had been advised by Smith & McNair that they ought to have some security for the payment of the purchase-money lest he might die in the meantime and they lose the value of their negro; that thereupon he executed a note to them for $525, dated 5 December, 1834, and attested by Angus McInnis, which note he delivered to them and which was kept by them until about 1 February following, when he paid Smith & McNair the $525, applied the same as a credit upon the executions in his hands, received back from the plaintiffs his promissory note aforesaid, and delivered the only remaining unsatisfied execution to Smith & McNair, who placed it in the hands of another officer, John C. Knight, by whom the balance due thereon, about $40 or $60, was collected from the plaintiffs. The defendant avers that he never executed unto the plaintiffs any bond or writing of any kind in the nature of a defeasance, and this note, so attested by Angus McInnis, was the only writing made by him to the plaintiffs, and this writing he has now in his hands ready to produce. The defendant avers that soon afterwards the value of negroes began to rise in the market, and continued to do so

during 1835 and 1836; that during all this time complainants set up no pretense of a right to redeem or made any offer to redeem until the fall of 1836, when they for the first time asked him *as a favor* to take from them $500 in South Carolina bills, sent them by their mother, and their own note for $25 and let them have the negro back; and that this occurred in the presence of a witness, and not a pretense was set up of any right on their part to redeem. There is a general replication to the answer. (400)

Upon the proofs we hold that the plaintiffs have established that the slave Isaac was pledged to the defendant as a security for the repayment of the sum of $525 agreed to be advanced, and shortly thereafter advanced for them, by the defendant. In the first place it is clearly proved by two witnesses, whose credit is not attempted to be impeached, that after the execution of the bill of sale and for the purpose of explaining the agreement of the parties upon which the bill of sale was given a defeasance, or instrument in nature of a defeasance, was executed by the defendant Angus McInnis, who has been twice examined, testifies positively that at the defendant's request he went with the defendant to the house of the plaintiffs to attest an instrument about to be given in order to show that they had a right to redeem the boy Isaac; that when they got to the house defendant produced the instrument and read it; that the contents thereof the witness cannot recite, but "that there was something mentioned therein of giving the complainants the right to redeem the boy whenever they paid the defendant the money"; that defendant executed the instrument and at his request the witness attested it; but that witness is ignorant of what afterwards became of the instrument. Upon his cross-examination (on one of the occasions upon which his deposition was taken) he admits that to the best of his recollection he never attested but one instrument in relation to the dealings between these parties. Elizabeth McInnis is equally positive in stating that some time after the bill of sale had been given the plaintiffs requested the defendant to give them some instrument of writing to show their right to redeem the boy, and defendant agreed to give it; that this was put off from time to time under various excuses, but finally he did write one which he read to the plaintiffs, and got Angus McInnis to attest it. This witness adds that upon one of the plaintiffs stating that they ought to have possession of said writing the defendant replied "that they would get *all* the papers together," and put this writing in his pocket-book and walked away with it.

The defendant avers that the writing thus executed (401) and *thus attested* was not of the character of a defeasance, but was merely a note for the payment of the $525; that he took up the note when he paid the money and has it ready to be produced. But he does not produce it; he keeps it back. The inference is irresistible that he keeps it back because it is of the character which the witnesses assign to it. In the next place his answer is shown in other respects to be undeserving of credit. He declares that the amount of the claims of Smith & McNair in his hands was about $770, and yet adds that after he had paid in part satisfaction of them $525 the residue, about $40 or $60, was afterwards collected for Smith & McNair by John C. Knight. Besides, he has examined McNair in order to prove the payment to the firm of the sum of $525, and he states that the whole amount of the claims in defendant's hands was between $550 and $600. He also declares in his answer that no offer was ever made to redeem the boy nor pretense of right to redeem him set up until the fall of 1836, when the plaintiffs asked as a favor to be permitted to return the money and take back the boy. Now Mr. Leak proves that shortly after defendant got the boy the plaintiffs applied to him to help them with a loan of money in order to redeem the boy, and witness agreed to do so upon being secured; and adds that at this stage of the conversation the defendant came by and was *called up*, when witness pulled out his pocketbook and offered to pay him the amount for which plaintiffs alleged that the negro was pledged, and the defendant then refused to receive the money, alleging that he had bought the negro. McInnis proves the tender of $525 made by Sarah Bethune, one of the plaintiffs, in the fall of 1835 or 1836, in his presence, and a refusal of the defendant to receive it; and adds that in the month of January preceding, that is to say, either January, 1835, or January, 1836, he, at the request of the plaintiffs, offered to pay the defendant the $525 and "take his bargain," to which the defendant replied that "he would not give his bargain to any man, but if the plaintiffs would come with the money themselves they might get him at any time." The latter part of this witness's testimony is confirmed by Mr. Covington, who (402) states "that in the spring after Terry got the boy (which fixes the time spoken of by the former witness to be January, 1835, and not January, 1836) he, having heard that McInnis had been to the defendant with the principal and interest to redeem the boy, observed to defendant, 'you did not give up your negro'; the defendant said, 'no, I give up my bargain to no man,' but added, 'whenever *they* will bring me money of their

own I will give up the boy; the work of the boy is good for the interest of the money.'" Besides all these two witnesses, Elizabeth McInnis and Malcolm B. McNair, testify that the actual agreement between the parties was distinct and positive, that the plaintiffs were to mortgage the boy Isaac as a security for the repayment of the sum of $525 to be loaned to or advanced for them by the defendant; and that afterwards when, in alleged execution of this agreement, he procured from them a bill of sale, it was done under an explicit assurance that they might have the boy back at *any time* upon refunding the money; and one of them adds that upon the plaintiffs stating that it might be a considerable time before they could raise the money the defendant replied, "no matter how long it would be all the better for him as he would have the use of the negro until the money was tendered." The plaintiffs are entitled to redeem upon paying any balance that may be due from them because of principal and interest of the money advanced, after the deduction of the reasonable hire of the negro since he came to the possession of the defendant. And to ascertain whether there be any such balance, and if so what it is, the ordinary accounts are directed to be taken.

PER CURIAM. Decree accordingly.

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(403)

JOHN A. MEBANE and Wife v. ALEXANDER W. MEBANE, Administrator, etc.

Where a bill is filed to impeach a settled account on the ground of error in the account, the errors alleged must be positively and specifically stated.

THIS was a bill filed in GUILFORD Court of Equity, at Fall Term, 1837, and having been there set for hearing was, at Spring Term, 1841, transmitted by order of that court to the Supreme Court. The pleadings and proofs are stated in the opinion of this Court.

*J. T. Morehead* for the plaintiffs.
*W. A. Graham* for the defendants.

RUFFIN, C. J. Thomas Sutton died intestate in Bertie County and left two daughters and a son, all infants; and John E. Wood married the elder daughter, and in 1816 was by the county

court appointed guardian of the other two children. They were entitled to valuable estates in lands and slaves, besides a considerable sum of money remaining in the hands of the administrator after the payment of debts; and Wood received the whole. In the division of the land the share allotted to the younger daughter, Celia Sutton, was charged with the sum of $4,379.54 in favor of the shares of Mrs. Wood and the brother. In the latter part of 1819 the plaintiff Mebane, then of Orange, and since of Guilford County, married the ward Celia while at school in Orange, and without the approbation or knowledge of her guardian, who proceeded to hire out her slaves and lease her land for the next year. These circumstances produced an unfriendly feeling between Mebane and Wood, and there was no intercourse between them until near the end of 1820. Mebane then went to Bertie and he and Wood attempted to adjust
(404) their differences and settle the accounts between Wood and his late ward, Mrs. Mebane; but they were unable to agree as Wood claimed a large sum to be due to him. They then, as the bill states, selected Mr. Reynolds, a respectable member of the bar, to examine Wood's vouchers and demands and to ascertain what the balance due was and in whose favor; and they agreed that this should be done in the absence of the parties, inasmuch as Mebane knew nothing respecting the estate. Some days afterwards Reynolds informed the parties that he had found a balance due from Mrs. Mebane to Wood, in right of his wife and his other ward, William Sutton, of $1,064.64 on 1 January, 1821. Upon receiving this information Mebane executed his bond for that sum, payable to Wood as guardian of William Sutton, and also executed a release of all demands against Wood as the late guardian of his wife. The plaintiff executed those papers without reflection, as the bill states; and being surprised at the balance found he immediately asked Reynolds and Wood for the accounts on which that balance arose, and was answered by Reynolds that he could not then lay his hands on the accounts and calculations, but that he would endeavor to do so and would deliver them to the plaintiff; and was assured by Wood that if Reynolds should detect any mistake made by him or if the plaintiff could point out any when he should see the accounts it should be corrected. And the bill states that being thus put off at that time the plaintiff was never able to get a copy of the account nor any information how the result had been arrived at by Reynolds.

Wood died in 1835, and Reynolds about the same time; and in 1836 the defendant, having administered on Wood's estate and been informed by the plaintiff that he would not pay the

bond instituted an action on it and recovered judgment, and in August, 1837, the present bill was filed praying that the bond and release should be set aside, and the settlement between the parties opened and a new account taken of Wood's guardianship, and in the meantime for an injunction against the judgment at law. The bill states that the plaintiff, by reason of the distance at which he and Wood resided apart, did not often see Wood and could not conveniently come to a settlement (405) with him; but that during Wood's life he, the plaintiff, did several times apply personally to Wood, and oftener by mutual friends, to cancel the bond, or at least come to a new account, and that Wood, although he would not give up the bond and said that it was not convenient to enter at those times upon a new settlement, always promised that he would do so at a convenient time, and assured the plaintiff that he need not be uneasy, and at one time said that the bond would probably never come against the plaintiff. The bill then states that Wood made no return of the hires, rents and interests of Mrs. Mebane's estate for the year 1820, and charges that in that respect there was error in any account that Reynolds might have stated, and charges further that the plaintiff never received those profits in any other way if not in the settlement made by Reynolds.

The answer states that Mr. Reynolds was selected by the plaintiff as respectable counsel to make the settlement on behalf of the plaintiff, and expresses the defendant's belief, founded on the information of Wood, that the settlement was a fair and just one, and that the balance for which the bond was given was truly due. The answer admits that the plaintiff often expressed his dissatisfaction at the amount of the debt, and a wish to re-investigate the matter, and sometimes applied to Wood to do so. But it denies that the plaintiff could ever point out an error, or that Wood admitted any or ever agreed to open the settlement, or not to enforce the bond, though he frequently declared that if an error could be detected he would correct it, and also that he would not press the collection of the money from the plaintiff until it became necessary to call it in for his ward at his arrival at full age. The answer states that the defendant is unable to furnish the accounts stated by Reynolds, and that he does not admit or know of any error therein, and insists on the release executed by the plaintiff as a bar to any relief, and especially after the lapse of upwards of sixteen years since the transaction now impeached, and after the death of both Wood and Reynolds.

Upon the coming in of the answer the injunction which had been granted on the bill was dissolved, and the plain- (406)

tiff then held his bill over as an original and replied to the answer and took some proofs.

Publication having been made the cause was set down for hearing and transferred to this Court.

The proofs taken by the plaintiff are not material, and consequently the cause must be decided upon the case as made by the bill and answer. The object of the bill is to impeach the settled account on which the bond and release mentioned in the pleadings were founded. To say nothing of the staleness of the application the plaintiff's case is radically defective in his not having stated in the bill and established an error in the settlement. The bill charges that there were errors; but that is a mere inference from the amount of the balance found unexpectedly to the plaintiff and from the circumstances that the guardian did not in 1821 return the hires and rents of 1820. The plaintiff could not on his oath state that those hires and rents were not taken into the account, because he admits that he has no counterpart of the account; and, indeed, states that he could not get a copy although he applied for it. Now, in bills to surcharge and falsify or to impeach a settlement, it is the established rule that error must be specifically pointed out to prevent surprise on the defendant. Here the plaintiff is unable to do so except by conjecture, for the reason that not having a copy of the account and not having been present at the settlement he does not know what was or was not included therein. It is the misfortune of the plaintiff not to have filed his bill in the life of Wood for a discovery of the items, or while Mr. Reynolds was living and could have proved them. As they alone had a personal knowledge of the facts sought the plaintiff has deprived himself of the advantage he might have had by his delay in bringing suit until their death; a delay not at all attributable to ignorance, as the plaintiff suspected the mistake at once. It is impossible for us to see an error in the settlement under such circumstances, and without some error established the settlement and bond cannot be disturbed. Nothing better than conjecture is offered as to the only one suggested, namely, the omission to credit (407) the plaintiff with the profits of his wife's estate for 1820; and even that conjecture is vague and unsatisfactory. It rests on the circumstance that Wood made no return of them as guardian. But it is very natural that he should make no return after his guardianship had ceased and he had settled with the ward's husband and taken his release, and the more especially if in the settlement he had accounted for the demand in question. Moreover, it would require pretty clear proof to induce the belief that Mr. Reynolds could have omitted so ma-

terial and obvious a credit. It is indeed possible, but the fact must be established affirmatively by evidence before anything can be done for the plaintiff.

The bill must therefore be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

*Cited: Costen v. Baxter*, 41 N. C., 199; *McAdoo v. Thompson*, 72 N. C., 409; *R. R. v. Morrison*, 82 N. C., 143; *Grant v. Bell*, 87 N. C., 44; *Suttle v. Doggett, ib.*, 205.

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JOSEPH HARRISON v. JOSEPH HOWARD.

Instruments, deliberately executed, professing to contain the agreement of parties may be rectified in equity for fraud or mistake, but it must be upon clear proof.

THIS case was transmitted from SURRY Court of Equity at Spring Term, 1841, to the Supreme Court by consent. The pleadings and proofs will be found in the opinion of this Court.

*J. T. Morehead* for the plaintiff.
*Boyden* for the defendant.

GASTON, J. The daughter of the plaintiff had intermarried with one Morris Richards, of the county of (408) Surry, a soldier of the Revolution, who as such drew a semi-annual pension of $40 from the government of the United States. Richards was in scanty circumstances and embarrassed with debts; and his creditors had been occasionally permitted by him to draw this pension and pay themselves in part or in whole out of its proceeds. The defendant Howard had a demand against him and got possession of his certificate, and was arranging or had arranged with him for obtaining a letter of attorney to draw the pension. Under these circumstances the plaintiff, on 10 May, 1837, executed his obligation to the defendant in the penal sum of $203, with condition that whereas the defendant held a note of the said Richards for the sum of $115.29 if the plaintiff should cause to be paid to the defendant on 1 March thereafter $30, provided the said Richards should live, and every six months thereafter cause to be paid the sum of $20 until Richards' note should be fully paid off, then the obligation should be void, otherwise in full force and virtue. In September, 1838, the plaintiff filed this bill wherein he charges,

in substance, that it was an essential part of the agreement between himself and the defendant that the plaintiff should not be bound to make the payments stipulated for in the condition of the bond unless the said Richards should permit him to draw the pension money; that it was declared by the defendant, who drafted the bond, that this part of the agreement was sufficiently manifested and expressed by the proviso therein, "if the said Richards should live"; and that upon this assurance and upon the belief that the bond did manifest this essential part of the agreement the plaintiff executed it. The bill further charges that although at the time he executed this bond he had a full expectation that the said Richards would authorize him to draw the pension yet that the said Richards had refused to do so, and the defendant is about to enforce from the plaintiff the collection of the instruments due according to the literal terms of the condition, contrary to the true intent of the agreement. Upon the filing of the bill a temporary injunction was granted.

(409) The defendant answered the bill and therein positively denied that it was a part of the agreement that the plaintiff's obligation should in any manner depend upon Richards permitting him, the plaintiff, to act as his attorney in drawing the money, and averred that the bond was executed by the plaintiff with a perfect knowledge that it contained no such agreement; and that the only explanation asked or given with respect to the form of the instrument was an inquiry from the plaintiff whether the words "provided the said Morris Richards should live" ought not to be repeated after every installment therein provided for, to which inquiry the defendant answered that in his opinion the mention of it once was quite sufficient. The defendant also stated that at the time of taking the bond he fully believed that the plaintiff would be authorized by Richards to draw the money if the plaintiff desired it, but that he regarded this matter as one with which *he* had no concern, and further expressed his confident belief that if Richards has refused to give such authority it was because Richards had reason to believe that the plaintiff did not desire to have it. Upon the coming in of the answer the injunction was dissolved and the bill held over as an original bill. Replication was filed to the answer and proofs were taken on both sides. There can be no question of the meaning of the bond. The plaintiff is thereby bound to make the payments at the times and according to the installments stated if Morris Richards be alive. By no intendment can a further condition be understood, "if also he shall permit the plaintiff to act as his attorney in drawing the pension money." The ground of relief for the plaintiff, if he have any,

must be that this further condition was a part of the agreement, and was omitted in the instrument through the fraud or unskillfulness of the defendant, who acted as the draftsman. The plainest instruments may be rectified in equity upon clear proof of fraud or mistake, but as solemn writings deliberately executed must be regarded ordinarily as containing the well advised and final agreement of the parties in relation to the subject-matter thereof, they will not be meddled with but upon such clear proof. We deem it unnecessary to enter upon a minute examination of the testimony exhibited in this cause, but will (410) briefly state the most material parts of it to show that it falls very short of the proof necessary to sustain the bill.

The only witness whose testimony is much relied on for that purpose is Mrs. Richards, the wife of Morris Richards and daughter of the plaintiff. She states that she was not present when the instrument was signed but came into the room after it was signed and while it was lying on the table; that Joseph Howard then read it over to the plaintiff who told Howard that he wanted it put into the writing "if Morris Richards lived and *he* should draw the pension"—that he asked defendant twice to have this put into the writing; that defendant observed "it would make no difference for he would be certain to draw the pension"; that the defendant then shoved the certificate into the plaintiff's hands and put up the bond. Now if this testimony be regarded as unexplained or uncontradicted by any other evidence it does not establish the plaintiff's allegation. It shows that he was aware that the condition which he wanted was not in the writing. It shows further that defendant did not pretend that the writing *implied* any such condition, but that defendant insisted that the plaintiff did not need any such condition because he would be certain to draw the pension. How this fact was the plaintiff was better qualified to judge than the defendant, and if *he* had doubts upon it there was still time for him to stop the completion of the agreement. But he received the certificate and did not object to the defendant putting up the bond.

Morris Richards has also been examined but declares that although present when the bond was executed he was so hard of hearing as not to understand it, and does not pretend that he heard the agreement of the parties.

It is to be remembered that the defendant's answer, directly responsive to the allegations of the bill, is full in denying the alleged fraud or mistake. It is manifest too that Mrs. Richards is much irritated against the defendant because of certain treatment of her husband which is not put in issue by the bill, and

which, if true, gives her very well founded cause of anger. (411) It is in proof also that she has taken a decided stand against him in this cause, and has declared that if she could prevent it he never should get payment of his claim. The subscribing witness to the bond has also been examined on the part of the defendant, and testifies that it was executed deliberately, but says nothing of any condition suppressed or misrepresented. There is no proof of weakness of intellect on the part of the plaintiff, and there is not a little room left for the belief that Richards' refusal to give the plaintiff authority to draw the money was *formal* rather than *real*. The money, or at least a portion of it, when drawn, has passed through his hands.

PER CURIAM. Bill dismissed with costs.

*Cited: Braddy v. Parker,* 39 N. C., 432; *Harding v. Long,* 103 N. C., 7.

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JAMES MOORE v. WILLIAM E. ANDERSON.

If the consideration of a bond be against law, the obligor may make that defense at law and can have no claim on that account for the interposition of a court of equity.

THIS suit was transmitted from ORANGE Court of Equity, at Spring Term, 1841, to the Supreme Court by consent. The pleadings and proofs will be found stated in the opinion of this Court.

*William A. Graham* for the plaintiff.
*Norwood* for the defendant.

GASTON, J. This bill purports to have been brought against William E. Anderson and the heirs of William Gillies, deceased, and the heirs of James Freeland, deceased, but no persons (412) are named as being such heirs, nor are any such persons in any manner brought before the Court. It must be regarded, therefore, simply as a bill against Anderson.

The object of the bill was to enjoin Anderson from suing out execution upon a judgment which he as administrator of William Gillies, the surviving partner of William Gillies and James Freeland, had obtained against the plaintiff upon two bonds which the plaintiff had executed to said Freeland and Gillies.

The substance of the equity alleged in the bill is that these bonds were given as the consideration of a tract of land of which

one Isaac Bracken was then in possession, and which had been purchased by Freeland & Gillies at an execution sale; that at the time of the contract Freeland & Gillies bound themselves to eject Bracken by process of law, and when so ejected to put the plaintiff into possession and give him a valid title for the land; that Freeland & Gillies brought an ejectment suit for this purpose and failed; that the plaintiff himself then entered upon the land and was sued by Bracken for the trespass and compelled to pay a heavy amount of damages and costs; but that in 1820 he entered again unaided by Freeland & Gillies and has remained in the undisturbed possession ever since; that both Freeland and Gillies have died without any communication between them and the plaintiff since his contract, and that after their death the defendant, as administrator of the surviving partner, brought suit upon the bonds and obtained a judgment. Upon this bill an injunction issued as prayed for.

The defendant answered the bill. His answer stated that the contract between the plaintiff and Freeland & Gillies was that the plaintiff should take their title, such as it was, and recover the land if he could at his own risk and costs; that Freeland & Gillies made him a written conveyance; that it was understood that the plaintiff should have a reasonable time to try whether he could not eject Bracken before payment of the notes should be pressed; that accordingly the plaintiff did bring an action of ejectment, and this was brought on the demises of Freeland & Gillies because, at the time of the conveyance to (413) the plaintiff, Bracken was in adverse possession; that in the said action of ejectment he failed, and to prevent the execution for the costs, which amounted to upwards of three hundred dollars, being levied upon the lands of Freeland & Gillies, they being the parties liable of record, the entire amount of these costs was paid off by them, and that afterwards the plaintiff got into possession under his purchase from Freeland & Gillies, and Bracken abandoned further claim thereto. Upon the coming in of this answer the injunction was dissolved and the plaintiff held over his bill as an original.

It is now brought on to a hearing. Not a proof of any kind has been produced on the part of the plaintiff, while on the part of the defendant the whole of the case as above stated by them is distinctly proved, except that it is left in some doubt whether the plaintiff took in fact a conveyance from Freeland & Gillies or rested only upon their agreement to make him a conveyance.

We see no ground on which the plaintiff can hope for relief. If the consideration for which the bonds were given be against law he had an opportunity of making that defense at law, and

has no claims to the interposition of a court of equity on that account.

He has substantially obtained all that he bargained for; and having now had undisturbed possession of the land for twenty-one years under his bargain, which amounts to a title at law, can with an ill grace ask to be exonerated from the payment of the price which he stipulated to pay. If he has not obtained a conveyance from Freeland & Gillies, and wants one, he should at least have shown that he requested such a conveyance from them or one of them, or from their heirs since their death, or should not seek it of those who have the power to execute the conveyance.

PER CURIAM. Bill dismissed with costs.

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(414)

ABRAHAM PEEPLES et al. v. ALLEN E. D. TATUM et al.

A creditor cannot in equity charge third persons with fraudulently holding the property of his debtor until he has first established his debt by a judgment at law, and endeavored by execution to satisfy that judgment.

THIS suit was transmitted from GUILFORD Court of Equity, at Fall Term, 1840, to the Supreme Court by consent of parties. The pleadings are stated in the opinion of this Court.

*J. T. Morehead* for the plaintiff.
No counsel for the defendant.

DANIEL, J. The plaintiff's testator was surety to one Herbert Tatum in a bond for money. The obligors died and the obligee brought suit on the bond against the representatives of both obligors. The administrator of the principal obligor had their plea of fully administered found in their favor. Whereupon the plaintiffs, as executors, were forced to pay the sheriff, in February, 1832, the sum of $113.53. The bill charges that administrators and heirs at law of Herbert Tatum have no assets out of which the said debts can be satisfied; that Herbert Tatum at the time the said bond was executed was possessed of a large real and personal estate, and was deemed good for his debts, but after this debt was contracted he made voluntary gifts and large advances to his children, both in real and personal estate; that the two defendants have been thus advanced, one as a son and the other as a son-in-law. The bill charges that the said

voluntary gifts of real and personal estate of H. Tatum were fraudulent and void as to his creditors, and prays that the property thus given may be subjected to the satisfaction of the aforesaid debt.

The two defendants answered. Beason admits that H. Tatum made gifts to him as his son-in-law after the (415) date of the bond of real and personal estate. He says it was done *bona fide;* that the donor at the time was possessed of other property sufficient to pay all his debts. He does not admit that the plaintiffs have paid the said debt, and he contends that they should have established their claim against the administrators of H. Tatum. The other defendant, A. Tatum, admits the advancement to him of two slaves after the date of the bond, but he says it was *bona fide* as his father was then in possession of real and personal property sufficient to satisfy all his debts. He states that his brother and himself were the administrators of his father, and that the assets have been exhausted in paying the debts, and also the lands which descended to the heirs. This defendant does not admit that the plaintiffs have paid the debt, as stated in the bill.

The plaintiffs, by their own showing, have satisfied the judgment obtained by the bond creditor against the representatives of the two obligors; but that does not make them judgment creditors. *Briley v. Sugg,* 21 N. C., 366. The plaintiffs should have first established their claim at law by a judgment, and proceeded to execution against the assets in the hands of the administrators or the heirs-at-law. The administrators might perhaps have a good defense, or they and the heirs-at-law might have assets to satisfy the demand. In *Rambaut v. Mayfield,* 8 N. C., 85, a creditor of D by bond filed his bill against D and M, charging that D had fraudulently conveyed property to M sufficient to pay his debt, and prayed a recovery, account and satisfaction. The Court dismissed the bill because the plaintiff had not reduced his debt to a judgment and actually issued execution. The same law is laid down in the following cases: *Angel v. Draper,* 1 Vern., 399; *Shirly v. Watts,* 3 Atk., 200; *Hendricks v. Robinson,* 2 Johns. Ch., 296. The admission here made by one of the administrators does not authorize us to dispense with the rule.

PER CURIAM. Bill dismissed.

*Cited: Bridgers v. Moye,* 45 N. C., 175; *Brittain v. Quiett,* 54 N. C., 330.

(416)

HENRY C. ENNIS v. JAMES T. LEACH.

The law never compels a trustee, who sells under his trust, to enter into any covenants in his deed, except a covenant against his own encumbrances.

But it is his duty to procure a good title to be made before he can exact the purchase money, when at the sale he has declared that a good title should be made.

THIS was a bill filed by the complainant at Spring Term, 1839, of JOHNSTON Court of Equity. The bill alleged in substance that in September or October, 1838, the defendant, James T. Leach, offered at public sale six certain lots in the town of Smithfield; that the same were exposed to sale generally without any exception as to title and with an understanding on the part of the plaintiff and others, and with an express assurance to the plaintiff individually by the said defendant, that good and indefeasible title would be made to the purchaser in fee simple, with covenants of warranty on the part of the said James T. Leach; that under this understanding and assurance the plaintiff bid off the said town lots for the sum of $74.65, which the plaintiff averred to be the full value of the said lots; that the plaintiff, before he received any deed for the lots, gave his note for the said sum with security payable six months after date, which was according to the terms of the sale; that afterwards, on the same day, the said defendant refused by any deed to warrant the title to the said lots or to redeliver to the plaintiff his said note, but offered to execute a deed which purported to convey only the interest of John S. Powell in the same; whereas the plaintiff believed John S. Powell had no legal interest therein whatever. And the bill prayed that the said James T. Leach might be decreed to make good and sufficient title to the premises with warranty, or to deliver up the said promissory note to the plaintiff.

(417) The defendant in his answer admitted the sale of the lots at public auction, and averred that he sold them merely as a trustee, acting under certain deeds of trust from John S. Powell, and that he set up and sold only the interest which John S. Powell had in them. He denied that he affirmed that a good and indefeasible title in fee simple would be made to the purchaser, or that he had agreed or given any assurance that he would warrant the title to the property. He also averred that the plaintiff knew the title of John S. Powell as well as the defendant did. He also averred that he had tendered to the plaintiff a deed conveying all the interest of the

said Powell, and he was now ready to deliver the same, but had refused to execute a deed by which the defendant should bind himself in a general covenant of warranty as to the title.

Replication was entered to the answer and depositions taken. It seemed from the proofs that the defendant said at the sale of the lots that he would make a good title to the purchaser. The lots themselves were sold by the defendant, who it was well understood was the trustee of John S. Powell. It also appeared that John S. Powell had previously contracted for the purchase of the lots from the husband of a woman to whom they belonged, and had paid the purchase-money for them, but he had never received a legal title as no conveyance had been executed by the wife with the solemnities required by law for the conveyance of land by *femes covert*. The cause was then set for hearing, and at Spring Term, 1841, transmitted to the Supreme Court.

*John H. Bryan* for the plaintiff.
No counsel for the defendant in this Court.

DANIEL, J. In this case three witnesses prove that the defendant said at the sale of the lots of land mentioned in the pleadings that he could make a good title to the purchaser. The plaintiff became the purchaser and gave his bond for the purchase-money. It appears from the exhibits that there is a defect in the title to the lots, inasmuch as the deed from Mr. Smith and wife has not attached to it the certificate of the private examination of Mrs. Smith taken according to law to pass her interest. We think that it is the duty of Leach, the (418) vendor, to procure a proper deed to be executed, which will pass the fee in the said lots of land from Smith and wife. It appears that the defendant sold the lot as a trustee. The law never compels a trustee to enter into any covenants in his deed except a covenant against his own encumbrances. The demand of the plaintiff that Leach should execute to him a deed with a covenant of warranty is therefore inadmissible. The decree will be that the defendant shall, before 15 February next, procure a deed to be executed by Smith and wife to the plaintiff, which deed shall be approved by the master, sufficient in law to extinguish the title in fee in the said Smith and wife in and to the lots of land mentioned; and the cause will be retained for further directions.

PER CURIAM. Ordered accordingly.

NATHAN MOORE v. JOHN REED and others.

On a motion to dissolve an injunction, usually the court can look at nothing but the answer and the exhibits filed and admitted by the answer. If the facts and circumstances which make the plaintiff's case are denied, the injunction falls of course.

The summary remedy on injunction bonds, given by the act of Assembly (1 Rev. St., c. 32, s. 13), upon the dissolution of the injunction apply only in cases of injunctions to restrain executions on judgments at law. In other cases of injunction the proper remedy is by a suit at common law on the bond.

After a bill and answer have been filed in court it is irregular to grant an injunction in the case upon a petition to a judge in vacation. If an injunction is desired because of any new matter arising, such matter should be disclosed by a supplemental bill.

THIS was an appeal from an interlocutory decree made by his Honor, *Pearson, J.*, at Spring Term, 1841, of ROCKINGHAM Court of Equity. The decree was, on motion of the de-
(419) fendant, that the injunction granted in this case be dissolved and that the defendant recover of the plaintiff and his security, Levin Moore, the sum of $1,000, the amount of the injunction bond. The pleadings are stated in the opinion of this Court.

*James T. Morehead* for the plaintiff.
*W. A. Graham* and *Norwood* for the defendant.

DANIEL, J. The bill is to set aside and cancel a contract made with Anselm and John Reed for the purchase of a stock of goods and of a term in a storehouse at the price of $2,300; but, as the plaintiff says, actually worth but $1,263. The plaintiff states that he is an illiterate man and that at the time the supposed contract was entered into by him he was so very drunk that he did not know what he was doing; that the next morning, when he got sober and when he was informed by the defendant A. Reed what he had done, he proposed to rescind the said contract. But Reed refused and threatened him with the penalty of $2,000, which they said was stipulated by a writing entered into to complete the contract, but which writing was unknown to the plaintiff. Being illiterate and ignorant of business and of the law, without a friend to advise him and under great fear and alarm of being entirely ruined by the enforcement of payment of the said penalty of $2,000, he, in compliance with what the defendant stated to him had been the contract, executed to them a bill of sale for three slaves, priced at $900, a bond for $1,400 and a deed of trust to J. J. Reed as trustee upon his lands and other

property, to secure the payment of the said bond when it became due, and he took possession of the store. For and on account of the aforesaid fraudulent contrivances the plaintiff, by his bill, prays that the said contract may be decreed to be rescinded, his slaves returned and the bond and deed of trust canceled, and that the defendants be compelled to take back their goods. The bill also prayed an injunction to restrain the defendants from negotiating the bond or selling the plaintiff's property under the deed of trust.

The defendants answer. A. Reed says that he was the acting partner in the firm; that the plaintiff came to the (420) store on 14 April, 1839; that he proposed to sell the defendant a negro woman and her two children for $900, which this defendant refused unless he would take goods or promissory notes. The plaintiff then asked the defendant what he would take for his goods and the lease of the storehouse as they stood. Defendant refused to sell them in that way, telling the plaintiff that he could not accurately estimate the value by several hundred dollars; that the goods had never been invoiced since the business commenced, sixteen and one-half months before. The plaintiff then took an examination of the contents of the shelves and in the space under and behind the counter. He said he wished to set his son up in business; it would be a good school for him, and if he purchased he should place his son there. After chaffering for a length of time he offered to let the plaintiff have the goods and lease of the storehouse for $2,300, and take his three negroes in part payment at $900 and his bond and security for $1,400, payable at the expiration of the lease. Defendant stated to the plaintiff that it was a haphazard business with him and that he would prefer to take an inventory of the goods; that the plaintiff should have them at ten per cent on the cost. The plaintiff after much hesitation and again looking through the store agreed to accept the offer. The terms of the bargain was then distinctly recited by the defendant, and the plaintiff gave his full assent thereto. The plaintiff then insisted that the defendant should draw up in writing a memorandum of the agreement, in which they should bind themselves for its performance. Defendant proposed to put it off until the next morning, but the plaintiff insisted that it should be then done. He drew the memorandum in which each party was bound for its fulfillment in the penal sum of $2,000, which they both signed, and J. J. Reed became the witness. The defendants, A. Reed and J. J. Reed, aver that the plaintiff was then sober; that drunkenness was not exhibited either in his conversation or in his actions, before or after the conclusion of the contract; that

the plaintiff on being invited remained all night; he slept in a room with J. J. Reed, and in the morning commenced a (421) conversation about the trade. The defendant A. Reed denies that the plaintiff that morning or for weeks after expressed to him any dissatisfaction with his said purchase, but avers that he went to the store and commenced selling. The plaintiff in the morning proposed that John Reed, the other partner, should be sent for and the writings then completed, which was accordingly done, and the writings completed and executed. He avers that the plaintiff was then sober, nor was he impelled by any species of duress or fraud to complete the said contract, but he did the same willingly and eagerly. A. Reed says that he then destroyed the memorandum made the night before, the plaintiff saying it was then of no further use after he had executed the writings, which had been thus formally drawn up; that the plaintiff took possession of the store and goods, and on the 19th day of the same month again purchased of the defendants an additional stock of molasses and iron which the defendants had in another house; that the plaintiff brought and delivered the slaves according to the contract. The defendants deny that the plaintiff is illiterate, but say he signs his name as well and has as good an education as common laboring men. They deny that he is a drunkard or ignorant, but say that he possesses ordinary shrewdness and is keen at a bargain. The defendants say they cannot tell with certainty the value and quantity of the goods, but that John Reed on his arrival in the morning said to his son (A. Reed) "you have made a bad bargain"; and the defendant John says that he then thought so and yet believes so. Defendants aver that it was six weeks after the contract when the plaintiff and an ignorant and awkward clerk, ignorant of prices, made an inventory; that it was after the plaintiff had taken possession and been trading for six weeks that he first proposed to rescind the contract. The defendant J. J. Reed, the witness and trustee, in his answer, denies that the plaintiff was intoxicated at the time of the contract. The defendants deny all fraud and combination.

This answer was filed at Fall Term, 1840. The plaintiff then replied. Afterwards in the vacation, to-wit, on 24 December, 1840, the plaintiff petitioned a judge to grant him a writ (422) of injunction to restrain the defendant from selling under the deed of trust, and the injunction was granted. At Spring Term, 1841, the defendants moved to dissolve the injunction, and the court did dissolve it, being of the opinion that the answer of the defendants denied the equity of the plaintiff's bill. The court thereupon decreed that the defendants recover

against the plaintiff and his surety, Levin Moore, the sum of $1,000, the amount of the injunction bond; from which decree, with the consent of the court, the plaintiff appealed.

On a motion to dissolve an injunction usually the court can look at nothing but the answer and the exhibits filed and admitted by the answer. The plaintiff calls upon the defendant to testify whether the facts and circumstances stated in his bill are not true. If the defendant in their answer deny the facts and circumstances which make the plaintiff's case the injunction of course must fail, as the proof fails. We have examined the bill, answer and proceedings in this case, and must say, with the judge who decided below, that the answers of the defendants have denied all the facts and circumstances which make up the equity of the plaintiff's bill. But there is one part of the decree which, we think, is erroneous, it is in decreeing $1,000 against the plaintiff and his surety on the injunction bond. The act of assembly (Rev. St., ch. 32, sec. 13) directs that on a dissolution of an injunction the bond shall be proceeded on in the same manner and under the same rules and restrictions that bonds given upon appeals from the county to the Superior Court are proceeded on. It is obvious from the reference to appeals from the county court, as well as from the antecedent sections of the act, that this provision can only apply to injunctions to restrain executions on judgments at law. There has been no judgment at law against the principal. The defendants' remedy on the injunction bond is not by a motion under the statute but at common law. The decree against the plaintiff and his surety for $1,000 will be reversed; the residue of the decree dissolving the injunction is affirmed.

We take the opportunity of remarking that the course which was pursued in this case of granting an injunction after bill and answer, upon a petition presented to a judge in (423) vacation, seems to us irregular. If any new matter had occurred raising an equity to support an injunction such matter should have been disclosed by a supplemental bill.

This opinion will be certified to the court below.

PER CURIAM. Ordered accordingly.

*Cited: Pendleton v. Dalton*, 64 N. C., 332.

ANNIE MILLER v. LEMUEL BINGHAM et al., Executors, etc.

An express trust is not, as was formerly held, a *chose in action*, but in equity is considered a present interest, an estate in possession. Therefore, where such a trust is in a *feme*, in personal property, and she marries, the whole interest of the wife vests in her husband immediately and absolutely, and on his death, before his wife, belongs to his personal representatives.

The possession of the trustee is in equity the possession of the *cestui que trust*.

The doctrine applies, even where the trustee is to hold the property, and pay over only the annual rents, profits, etc.

The court will not, however, of course divest the trustee of the management of the trust property, and deliver possession to the *cestui que trust*. This must depend upon the intention of him by whom the trust was created.

Where property is conveyed to a trustee in trust for *the sole and separate* use of a woman then married, and she survives her husband and marries a second time, the wife no longer holds the property to her *sole* and *separate* use, but her whole interest, if it be personal property, vests in her second husband.

THIS was a case transmitted by consent from the Court of Equity of DAVIE, at Fall Term, 1840, to the Supreme (424) Court for hearing. The pleadings and facts are set forth in the opinion of this Court.

*D. F. Caldwell* and *Iredell* for the plaintiff.
*Waddell* and *Barringer* for the defendants.

DANIEL, J. Maxwell Chambers, the father of the plaintiff, bequeathed as follows: "I give and bequeath to my son Edward Chambers, as trustee of my daughter Anne Chambers (wife of Henry Chambers), the following negroes, Beck, etc.; to have and to hold to my said son Edward in trust and for the benefit of my daughter Anne Chambers and her heirs forever. It is my wish and request that my son Edward will pay over to my daughter Anne the profits arising from the said negroes, semi-annually, for her support and comfort." In a codicil to the will the testator says: "My intention in the devise of the five negroes, to-wit, Beck, etc., to my son, Edward Chambers, as trustee of my daughter, Anne Chambers, my intention is this: I give the five negroes, Beck, etc., to Edward Chambers to hold in trust, and for the *sole benefit* of my daughter Anne, to support her during her life, with the profits arising from the labor and hire of the said five negroes and their increase. And if my daughter Anne should have lawful issue living at the time of her death, then I devise and order

that the said Edward Chambers, trustee of my said daughter Anne, shall deliver and convey absolutely, at the death of my said daughter, the said five negroes and increase to the said lawful issue of my said daughter Anne, living at the time of her death. And if my daughter, Anne Chambers, should die without having issue, that then my son Edward shall convey the said five negroes and increase in equal shares to my heirs, or shall sell the negroes and divide the money in equal proportions among my heirs." Henry Chambers died, and his widow, the said Anne, married George Miller. The trustee died, and George Miller was appointed trustee by the court of equity, and took into his possession the said slaves. George Miller then died, and the defendants are his executors. Anne, the widow, claiming as *cestui que trust*, has filed this bill for an account of the rents and hires of the said slaves since the death of Miller, her last (425) husband. The defendants have answered, and claim the rents and hires of the negroes as belonging to the estate of their testator.

That the slaves were well settled by the will to the separate use of Anne Chambers, and excluded any right of her then husband (Henry Chambers), is very clear. *Davis v. Cain, ante,* 304; *Rudisill v. Watson*, 17 N. C., 430. But there is nothing in the will of Maxwell Chambers to show that he anticipated a second marriage of his daughter, and he did not attempt to provide against such a contingency. The equitable interest in the slaves was given to the plaintiff for life. In this Court the trust in a thing is the estate in that thing. The plaintiff, therefore, had a right to make an assignment of her interest in the slaves. On her second marriage, therefore, her interest passed to her husband. The second husband took the slaves into his possession. If, however, he had not taken them into his actual possession, and they had been in the possession of any other trustee under the will, still such a possession would not have been adverse to the husband, for the actual possession of the trustee is but considered as that of the person beneficially entitled. Indeed, the estate of the trustee exists entirely for the benefit of the *cestui que trust*. Where the trust is express, as in this case it is, there can be no adverse possession between the trustee and *cestui que trust*. It is not, however, of course, to divest the trustee of the management of the trust property and to deliver the possession to the *cestui que trust* for life. It must depend on the intention of the settler, or him by whom the trust was created. *Tidd v. Lister*, 5 Mad., 429; *Dick v. Pitchford*, 18 N. C., 480. A chose in the possession of the trustee of the *feme*, therefore, is not a *chose in action*, but it is a chose in possession, and

will on her marriage (if a chattel) pass to her husband. *Granbery v. Mhoon,* 12 N. C., 456; *Pettijohn v. Beasley,* 15 N. C., 512. A trust is not, as it was formerly held, a *chose in action,* but a present interest—an estate in possession. *Mitford v. Mitford,* 9 Ves., 98, 99; *Burgess v. Wheate,* 1 Eden, 223, 224; Lewin on Trusts, 523. The circumstance of the trustee being
(426) directed to pay the rents and hires *semi-annually* does not alter the case. In *Benson v. Benson,* 9 Cond. Ch., 201, the testator directed the interest of £10,000 to be for the separate use of his daughter, Jane Lane, the wife of J. Lane, for her life, free from the debts of her husband, to be paid to her at the end of every six months. The husband died, and his widow married again. *Held,* that the trust for the separate use ceased on the death of her first husband, and that the second husband was entitled to the interest. The same doctrine was laid down by the Court in *Knight v. Knight,* 9 Eng. Cond. Ch., 199. These two cases are decisive against the plaintiff on all the points in the case. The bill must be dismissed, with costs.

PER CURIAM. Bill dismissed, with costs.

*Cited: Beall v. Darden,* 39 N. C., 81; *Harris v. Harris,* 42 N. C., 116; *Apple v. Allen,* 56 N. C., 124; *Bridges v. Wilkins, ib.,* 345; *Carson v. Carson,* 62 N. C., 58; *Cheatham v. Rowland,* 92 N. C., 344; *Alexander v. Davis,* 102 N. C., 201; *Fowler v. McLaughlin,* 131 N. C., 210.

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SARAH SPACK et al. v. JOHN LONG et al.

Guardians of lunatics are responsible for compound interest in the same manner and to the same extent as guardians of infants; and bonds, etc., payable to them as guardians, bear compound interest in the same manner as bonds payable to the guardians of infants.

AN account having been heretofore directed in this case (see 22 N. C., 60), and the master having now made his report, exceptions were taken by one of the defendants, and these exceptions now came on to be heard. The nature of the exceptions
(427) and the evidence in relation to them are stated in the opinion of the Court.

*Boyden* for the plaintiff.

*J. T. Morehead* for the defendant.

GASTON, J. When this cause was heretofore before us (see 22 N. C., 60), we directed an account to be taken of what was or ought to be in the hands of George Long, as guardian or executor of his father, Frederic Long, and that an account should also be taken of what might be due from John Long, former guardian of the said Frederic. This has been done by the commissioner, and no exception is made to his report by the defendant George, and, therefore, as to said defendant, the report must be confirmed. Several exceptions, however, have been taken thereunto by the defendant John.

The first exception is to so much of the commissioner's report as finds the defendant John indebted in the sum of $505.75, because of the personal funds which came to his hands as guardian and were not paid over to his successor. The exception takes three distinct grounds. In the first place, it is insisted that the commissioner erred in charging the defendant with annual interest upon the balance in his hands while he was guardian, because that guardians of lunatics are not, like guardians of minors, chargeable, in account with their wards, with compound interest. The liability of the guardian of a minor for compound interest results from the duty imposed upon him to lend out any balance in his hands upon bond, with security, and to account for the interest annually. *Branch v. Arrington*, 4 N. C., 230. This was the rule before the act of Assembly was passed directing that bonds, notes and other obligations taken to one as guardian should bear compound interest. Laws 1816, ch. 925; Rev. Code (Rev. St., ch. 54, sec. 13). Now, as the act authorizing the appointment of guardians to lunatics enacts that such guardians shall have the same powers to all intents, constructions and purposes, and shall be subject to the same rules, orders and restrictions as guardians of minors, there can (428) be no question but the same duty rests upon them of making profitable to their wards the annual balance that may be on hand, and, of course, that they are subject to the same rule of accountability. This would be the case, in our judgment, even if they had not the facilities of collecting interest given to the guardians of minors by the act of 1816. We think, however, that, by a fair construction of the law, guardians of lunatics are entitled to the benefit of the facilities given by the act, equally with all other guardians.

It is next insisted that the commissioner erred in charging the defendant compound interest after his guardianship ceased and while his brother George acted as guardian. Now, the decree that John shall account is based upon the declaration that John exercised a control and influence over George, so as to prevent

the latter from calling him to account. And as the latter is insolvent, it is just that the former shall be responsible to the same extent as the latter would have been had he performed his duty in this respect.

It is objected that the commissioner has made no allowance to John for the charge of maintaining his lunatic father while he acted as guardian. As we concur *in the main* in the conclusion which the commissioner has drawn from the evidence, that the charge of maintaining the lunatic ought to be defrayed out of the profits of the real estate held by John, we hold that no credit, because of that charge, should be given to John in this account. The first exception is therefore overruled.

The remaining exceptions are so connected with each other that they may all be considered together. Before Frederic Long became a lunatic, he settled property upon several of his children, but it does not appear that he gave any absolutely to his son John or Henry. By his will, however, which was never afterwards revoked, he devised to Henry the land which is called in the report and spoken of by the witnesses as "the old place," and put him in the actual possession of part thereof, with
(429) license to use and enjoy its profits. He devised also another tract, with an adjoining mill, to John, and put him in possession thereof and encouraged him to clear the land, which was then a forest, and to establish a settlement on it. After the father became a lunatic, John purchased from Henry the land devised to *him*, and it is in evidence that, until this time, John and Henry maintained and supported their father without charge. Now, we agree with the commissioner that it is a fair presumption of intent on the part of the father when this arrangement was made with these sons that he should have what he might need for his maintenance or support out of the profits thus permitted to be taken by them from property of which he had given them possession, but whereunto they had no present title, and the whole charge of maintaining the father after he became a lunatic ought, we think, to fall upon John from the time he succeeded to George's interest in the land whereof George had been put in possession. But we do not concur with him in charging John any further because of rents. We have many reasons for disallowing such charges, but mainly and especially because, on examining the mass of depositions, affidavits and examinations on which the commissioner reports, there can be found *no* satisfactory data upon which to state an account of rents and profits on the one side, and reparations, expenditures and charges on the other. The testimony seems to be

almost universally that of opinion, and of opinion not a little influenced by the prejudices and wishes of those who testify.

We direct, therefore, all *the other matters* of account stated as to the defendant John, except the account for the personal fund which passed through his hands, and of which we have already expressed our approbation, to be corrected, by charging him only with the amounts, respectively, for which George, after he became guardian, has been credited for and because of the maintenance of the lunatic, and with interest thereon down to the present time, allowing him all the credits which have been found by the commissioner to which no exception has been taken by the plaintiffs.

To this extent these exceptions are allowed, and beyond this they are overruled. (430)

PER CURIAM. Order accordingly.

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AMOS T. JONES et al., by Guardian, v. LUNSFORD A. PASCHALL, Administrator, etc.

A devised, among other things, as follows: "It is further my will and desire that all my children—those of my first wife—to-wit, B, C and D, and those of my second wife, to-wit, E and F shall be equally provided for in property, and their estates, upon their arrival at full age respectively, to be as nearly equal as may be; and whereas, under the will of Amos Gooch, deceased, the three children of my first wife will be, at my death, entitled to the tract of land on which I now live, and which is valuable, it is my will and desire that my executors select three good men to value the said land on which I live, and then to value of my slaves, remaining after my wife's share is set off, a sufficient number to be equal in value to the said land, and that said slaves so valued be set apart by my executors, and it is my will and desire that they belong absolutely to my two children E and F, and that they be kept together undivided until the said E and F shall arrive at full age and then be equally divided between them." The testator, in a previous part of his will, had given E and F the remainder in two tracts of land, after the death of his widow; and the only other devise in his will to any of his children was that the rest of his negroes and all the residue of his estate should be equally divided among all his children, after taking out what he gave to his widow. *Held*, that under the clause recited, the children E and F took absolutely the negroes so directed to be valued and allotted to them independent of what they were entitled to under the other clauses of the will, notwithstanding they would thus obtain a larger portion than the other children.

JONES *v.* PASCHALL.

THIS was a bill filed at the Spring Term, 1840, of GRANVILLE Court of Equity. The bill alleged that Thomas Jones died in 1837, seized and possessed of a large real and personal (431) estate, having first duly made his will and testament, sufficient to pass lands, which was duly proved at _____ Term, _____, of Granville County Court; that the executors therein named having refused to qualify, administration with the will annexed was duly granted to the defendant, Lunsford A. Paschall, who received into his possession all the personal property of the testator; that among other devises in the said will was the following: "It is further my will and desire that all my children, those of my first wife, to-wit, Amos T. Jones, Ruffin Jones and Duffy Jones, and those of my second wife, to-wit, Loton Jones and Thomas Jones, shall be equally provided for, in property and their estates, upon their arriving at full age, respectively, be as nearly equal as may be; and whereas, under the will of Amos Gooch, deceased, the three children of my first wife will be at my death entitled to the tract of land on which I now live and which is valuable, it is my will and desire that my executors select three good men to value the said land on which I live, and then to value of my slaves remaining, after my wife's share is set off, a sufficient number to be equal in value to the said land, and that said slaves so valued be set apart by my executors; and it is my will and desire that they belong absolutely to my two children, Loton and Thomas, and that they be kept together, undivided, until the said Loton and Thomas shall arrive at full age, and then be equally divided between them." That the complainants were the three children of the testator mentioned in the said will by the first marriage, and two of the defendants were the children therein mentioned of the second marriage; that the true construction of the clause referred to was, not that the two defendants, Loton and Thomas, should have all the negroes so valued, but that the land and negroes should be valued as mentioned in the said clause, the value of the land and the negroes added together and divided into five equal parts, and, so far as the negroes were concerned, that two of those parts should be given to Loton and Thomas, and the other three parts to the complainants, according to which mode of division, the complainants retaining their land, the children would all be equal in property, as intended by the testator, as far as it concerns (432) that clause. The bill then stated that the administrator had put a different construction on this clause, and refused to settle, and prayed an account, etc.

It appeared from the will, which was annexed to this bill and made a part of it, that in a previous clause the testator had given

to the defendants, Loton and Thomas, the remainder in two tracts of land after the death of his wife, and that, excluding the clause in dispute, the only legacy to the three children by the first marriage was in the residuary clause, where he gives to each of his five children the rest of his negroes and all the residue of his estate, to be equally divided among them. The answers of the defendants admitted the facts stated in the bill. The administrator stated that he was ready to account and pay over, but could not do so with safety until the court had placed the proper construction on the will, and Loton and Thomas, the other defendants, submitted to whatever decision the court might make, claiming the negroes in question, however in opposition to the plaintiffs.

At Spring Term, 1841, the cause was set for hearing, and transmitted to the Supreme Court.

No counsel appeared for either party in this Court.

GASTON, J. It is difficult, perhaps impracticable, to give to the section of the will, which we are called upon to expound, any construction which may not contravene the words of one or other part of it. The first clause, "It is further my will and desire that *all* of my children, those of my first wife, to-wit, Amos Jones, Ruffin Jones and Duffy Jones, and those of my second wife, to-wit, Loton Jones and Thomas Jones, shall be equally provided for in property, and their estates upon their arriving at full age, respectively, be as nearly equal as may be," *per se* obviously imports an intention on the part of the testator of individual equality, that each child shall be as nearly equal as practicable in point of property. But the latter clause of the section declares, in terms which will admit of no other construction, that the property contemplated in that section shall be so valued and allotted that the *two* children of the second wife shall receive as much as shall be equal in value to the *whole* of that which at his death will accrue to the *three* (433) children of the first wife. The equality thereby effected is an equality between the *classes*, not between the *individuals*. The words are as explicit as possible: "and whereas, under the will of Amos Gooch, deceased, the *three* children of my first wife will be at my death entitled to the tract of land on which I now live and which is valuable, it is my will and desire that my executors select three good men to value *the said land* on which I live, and then to value of my slaves (remaining after my wife's share is set off) a sufficient number to be *equal in value to the said land*, and that said slaves so valued be set apart by my executors;

and it is my will and desire that they belong absolutely to my two children, Loton and Thomas, and that they be kept together, undivided, until the said Loton and Thomas shall arrive at full age, then be equally divided between them." In this conflict, or apparent conflict, between the first and last clauses of this section, we hold it proper to assign to the latter the controlling influence, and this for several reasons. In the first place, this is the *enacting or disposing* part of the section. Nothing is done—no property is given or allotted—in the section until we come to this clause. All the preceding parts do but constitute the proem or recital introductory to what is finally directed to be given or allotted in the concluding clause. The testator declares a wish or desire of equality in property between his children, then states a fact which may thwart his purpose unless he make a special provision to meet the case, and finally proceeds to declare directly and specifically what disposition shall be made of his property in order to effect his purpose. Now, it is a rule of good sense, as well as of law, that a recital or preamble, however important, as explanatory of an ambiguous enactment or disposition which it introduces, cannot be permitted to *overrule* the enactment or disposition if it is free from ambiguity. It is a key to unlock the cabinet where the will of him who gives the law in the prescribed case is to be found, but it is not the cabinet in which that will is deposited. In the next place, the language of the final or disposing clause is more unequivocal and
(434) unyielding than that in the introductory clause. The former can admit of but one interpretation. Whatever is given by it, is given by name to his two children, Loton and Thomas, absolutely. The gift is of as many negroes as shall be equal in value to the value of the tract of land whereon he then resided; and he expressly recognizes that this tract is, at his death, to be enjoyed by "the three children of his former wife." The *two*, Loton and Thomas, are to have as much as the other *three*. By no gloss, by nothing less than an explicit declaration to the contrary, and that made under such circumstances as to entitle it to higher reverence, and therefore to be regarded as annulling to that extent the precise disposition actually made in this clause, can it be held that Loton and Thomas shall receive but *two-thirds* of the value of the land which is to be enjoyed by the other three. Now, while it is admitted that the more obvious construction of the first or introductory clause is of an intended equality between the children as *individuals*, its language is not absolutely repugnant to the inference of an intended equality between them as *classes*—that is to say, "the children of his first wife, to-wit, Amos Jones, Rufus Jones and Duffy Jones,"

on the one side, and "those of his second wife, to-wit, Loton Jones and Thomas Jones," of the other. Moreover, although the declaration of the testator's will for a *certain equality* between his children is made with direct reference to the disposition, contained in that section only, it is, nevertheless, a declaration of an *existing motive* at the moment of making his will. As such, it must have had some influence upon all the dispositions therein contained. Now, although these children are constituted residuary legatees and devisees, and therefore take equal shares of whatever is not specifically given away, there are special and exclusive gifts to the two children, Loton and Thomas, which *cannot be controlled* by the words in this clause, and which demonstrate that at the time of making the will the testator did not intend an exact individual equality, that he was not under the influence of *that motive*, and that, therefore, in describing his general purpose of equality in the clause in question, it was a purpose which would permit each of the two chil- (435) dren, Loton and Thomas, to have a larger portion of property than either of his three elder children. The special and exclusive gifts to which we refer, and for which there are no compensating gifts to his other children, are of the two tracts on Green's Creek, subject to the widow's life estate, with a special appropriation of $500 to their improvement. These certainly Loton and Thomas do take, and by taking these they are by the act of the testator made richer than either of their brothers. And, finally, if the first clause could be deemed entirely *dispositive* and as completely certain as the last—and they cannot be reconciled to each other by any exposition—then the former must give way to the latter, upon the principle that in a will the last declaration of a testator's purpose must prevail. It must be declared, therefore, that the construction contended for by the infant defendants, Loton and Thomas Jones, is the true construction of this will.

PER CURIAM. Declared accordingly.

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(436)

DUNCAN CAMERON and GEORGE MORDECAI, of Executors John Rex, v. THE COMMISSIONERS OF RALEIGH et al.

A., by will, dated in 1838, devised his slaves to trustees, to be removed as soon as practicable to Africa and there settled in some colony under the patronage and control of the American Colonization Society, with a proviso that in case any of the said slaves should

refuse to be so removed, the slave so refusing should be sold and the proceeds of the sale should be added to the fund created for the removal and support of such of the slaves as should be removed with their consent. He then devised as follows: "It is my will and desire that the land and plantation—about three miles west of Raleigh—and the several lots of land comprising my tan-yard establishment, together with all my crop, stock of every kind, plantation tools and carriages, implements for tanning and currying, household and kitchen furniture belonging to me at the time of my death be sold by the said (trustees) or the survivor of them, and the proceeds of such sale shall constitute a fund to defray the expenses incidental to the removal of my slaves to some colony in Africa under the patronage and control of the American Colonization Society and for the establishment of said slaves in such colony after their removal to the same." The testator then devised all the residue of his estate in the State of North Carolina to the same trustees for the purpose of erecting and endowing an infirmary or hospital for the sick and afflicted poor of the city of Raleigh. It was held—*First*, that a stock of leather which the testator had in his tanning establishment at the time of his death passed under the clause devising certain property to be sold and the proceeds to constitute a fund for the removal and establishment of his slaves; *secondly*, that not only so much of the fund provided by this clause as is *necessary* for the removal of the slaves, but the *whole* fund is appropriated for their removal, and also to their comfortable settlement in Africa, and that none of it falls into residuum; *thirdly*, that this devise is good as a devise to a charitable purpose, and it is not against the policy of this State to permit the emancipation of slaves, provided they be removed and be kept removed out of the State.

THIS was a cause removed from WAKE Court of Equity, at Spring Term, 1841, to the Supreme Court, by consent of parties.

The pleadings, so far as they are necessary to show the (437) object of the bill and the points in dispute, are set forth in the opinion of this Court.

*John H. Bryan* for the plaintiffs.
*George W. Haywood* for the Commissioners of Raleigh.

GASTON, J. The late John Rex, of the city of Raleigh, by his will, duly executed, after devising to his nephew, John Rex, of Montgomery County, Pennsylvania, a tract of land, situate in that county, devised all his real estate in the State of North Carolina unto Duncan Cameron and George W. Mordecai and the survivor of them, upon certain trusts therein afterwards particularly declared. He then bequeathed unto the said Duncan Cameron and George W. Mordecai, and the survivor of them, all his slaves, in trust, to cause the said slaves, as soon after the testator's death as practicable, to be removed to Africa and there settled in some colony under the patronage and control of the

American Colonization Society, with a proviso that in case any of the said slaves should refuse to be so removed, the slave so refusing should be sold, and the money arising from the sale should be added to the fund created for the removal and support of such of the slaves as should be removed to Africa with their consent. The testator proceeded to declare his will as follows: "It is my will and desire that the lands and plantation, about three miles west of Raleigh, and the several lots of land, comprising my tanyard establishment, together with all my crop, stock of every kind, plantation tools and carriages, implements for tanning and currying, household and kitchen furniture, belonging to me at the time of my death, be sold by the said Duncan Cameron and George W. Mordecai, or the survivor of them, and the proceeds of such sale shall constitute a fund to defray the expenses incidental to the removal of my slaves to some colony in Africa under the patronage and control of the American Colonization Society, and for the establishment of said slaves in such colony after their removal to the same." The testator then gave to the same devisees, and the survivor of them, all the money belonging to him, all the debts due him, and all the residue of his estate not therein devised and appro- (438) priated, in trust, to and for the erection and endowment of an infirmary or hospital for the sick and afflicted poor of the city of Raleigh, upon a lot of twenty acres adjoining the said city, which he thereby appropriated to that purpose, and directed that when the constituted authorities of the city should appoint trustees capable in law of holding the same, then his said devisees or the survivor of them should convey the said lot of twenty acres and the fund accruing from the money belonging to him, the debts due him, and the residue of his estate, as above described, unto the said trustees so to be appointed, in trust for the erection and endowment of such hospital. And the testator further constituted the said Duncan Cameron and George W. Mordecai executors of his will. The testator died, the executors proved the will, entered immediately upon the performance of the trusts thereby imposed, and caused all the said slaves, with the exception of a negro woman, Winney, who would not consent to leave the State, to be removed to the colony of Liberia, in Africa, a colony under the control and patronage of the American Colonization Society, where they are now residing as free persons. The constituted authorities of the city of Raleigh have appointed trustees capable in law of holding the property appropriated for the erection and endowment of the hospital; and the Legislature, to enable the said trustees more efficiently to execute the trust reposed in them, has by a special act constituted them

and their successors a body corporate and politic, by the name of "The Trustees of the Rex Hospital Fund." This bill is filed by the plaintiffs, the said Cameron and Mordecai, for the advice of the Court upon certain questions of alleged difficulty in the construction of the will, and also that they may have a settlement of their accounts, under the direction of the Court, and to it are made parties defendants the Commissioners of Raleigh, the said trustees and the negroes so removed to Africa. The commissioners and trustees have answered the bill. The negroes, not being in the State, were made parties by publication, and as to them the bill was taken *pro confesso*. A partial decree has been made. Nothing now remains for the action of the Court,
(439) except the questions upon which their advice has been prayed.

The first question is whether a stock of leather which the testator had in his tanning establishment at the time of his death constitutes a portion of the fund appropriated for the removal of his slaves to Africa and their establishment there, or falls into the other fund provided for the erection and endowment of the hospital. Upon this question, we are of opinion that the stock of leather does constitute a part of the first fund and does not fall into the second. Stock, as meaning a personal capital set apart for use or profitable employment, is confessedly of various kinds, such as agricultural, mercantile, manufacturing or vested in public or corporate funds. The expression used here is "stock of every kind," and it is used in the same sentence in which the testator disposes of his plantation and his tanning establishment. No reason can be discovered why terms so broad, used in this connection, can be restrained to stock belonging to the plantation, and excluded stock belonging to the tannery. No argument in favor of such a construction can arise from the testator having expressly named his implements for tanning, because in the same sentence he has named also his plantation tools. We are not at liberty to look out of the will for its meaning; and if we were, we cannot hold that the greater or less amount of this stock ought to affect the interpretation of the will.

The negro woman, Winney, who refused to go to Liberia, had been purchased by the testator upon a credit, and the price was unpaid at his death. The executors rescinded the contract with the seller, returned the slave and took in the testator's note. And it is asked of us whether the amount of this note ought not to fall into the first fund. We answer this question in the affirmative. The debt which the testator owed for the purchase of Winney was chargeable on the *residuary* part of the estate given to the hospital fund; and the value of Winney, if she refused to be

removed, belonged to the colonization fund. She did refuse, and the transaction was substantially a resale, and the produce of such resale must be appropriated as the testator has (440) directed.

The remaining question arising upon the pleadings is whether the whole of the fund appropriated to the removal and settlement of these negroes is given for the beneficial use of the removed negroes, to be applied to their support and advancement and as their property, or whether it is only subject to a charge for their removal to Africa and the first necessary expenses incidental to their settlement in a new country, and after satisfying these expenses does not fall into and pass with the general residue. In the answer of the commissioners of Raleigh it is insisted that the testator only charged his estate with the expenses of removal and settlement, and that the whole sum remaining in the hands of the plaintiffs after defraying such expenses falls into the hospital fund. Two grounds are taken in support of this claim. The first for that the negroes at the time of the testator's death were slaves and incapable of taking property, that a trust for them or for their emancipation was illegal and void, and therefore results to those who would have been entitled if no such disposition had been attempted. It is true that as slaves at the death of the testator they were incapable of taking a beneficial interest under the will, and that this bequest cannot be upheld except on the ground of a devise or gift to a charitable purpose. The validity of a disposition of property, either by deed or will, to "charitable purposes" is acknowledged by our act of 1832, ch. 4, re-enacted in chapter 18 of the Revised Statutes, by which provision is made for compelling the executors or trustees of a charitable fund to account therefor. No definition is given in the statute of charitable purposes, but we see no cause to doubt that liberation from slavery, when not forbidden by law or inconsistent with public policy, is a purpose of this kind. Our law and our policy alike forbid the manumission of slaves to reside amongst us, but they never did forbid the removal of them to a free country in order to their residence there as free people. Indeed, in Laws 1830, ch. 9—see chapter 101 of the Revised Statutes—it is the declared policy of this State to promote and encourage their emancipation so that they be but removed and kept removed without the State. As a fund, therefore, devoted to a chari- (441) table purpose, not inconsistent but in accordance with public policy and applicable within a reasonable period after the testator's death, we see no valid objections to the appropriation. The second ground taken in support of the claim in the answer

is that the whole fund is not appropriated to the purpose of removal and settlement, but only so much as is *necessary* for those purposes. We are clearly of a different opinion. The testator has expressly directed the whole fund to be so applied, and there is no reason to restrain such application. "Settlement" implies, where the fund is sufficient, comfortable settlement, and there can be no question but that the whole of the fund may be expended without going beyond such a provision. The objects of the testator's bounty are now free and capable of using, enjoying and applying what may remain of the fund appropriated for their settlement in Liberia.

PER CURIAM. Decree accordingly.

*Cited: Thompson v. Newlin,* 38 N. C., 341; *Cox v. Williams,* 39 N. C., 18; *Thompson v. Newlin,* 41 N. C., 389; *S. c.,* 43 N. C., 45.

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WILLIAM WHITE et al. v. ASHA WHITE et al.

A. devised to his wife, whom he also appointed his executrix, one thousand dollars during her life, and after her death to go to his children. The wife purchased negroes with this money, and they greatly increased in value. *Held*, that the children, the remaindermen, had no right or interest whatever in these negroes, but that they belonged absolutely to the wife. The remaindermen had only a right to the thousand dollars after the death of the wife. Upon a bill stating that this sum could only be raised out of the negroes, the court would, during the life of the wife, decree that they should be held as a security for the capital sum.

THIS was an appeal by leave of the court from an interlocutory decree made by his Honor, *Nash, J.*, at Fall Term, 1841, of WASHINGTON Court of Equity, dissolving the injunc-
(442) tion and annulling the order of sequestration theretofore made in this case. The question involved is fully stated in the opinion of this Court.

*J. H. Bryant* and *Heath* for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. In 1823 William White died, having made his last will, and bequeathed to his wife for life the residue of his estate with remainder to his four children, Joshua, Peggy, Solomon and William the younger, and he appointed Mrs. White and another to execute his will. The widow proved it, and with a sum of money belonging to the estate she purchased in 1824

three slaves, and took a bill of sale to herself. This bill was filed in 1839 against Mrs. White, Joshua, Peggy and Solomon by William the son and by Pettijohn, who claims as assignee of Solomon, and it charges that Mrs. White made the purchase as executrix and trustee and for the benefit of her children as well as herself; that the negroes have increased to ten, and that the widow has disposed of five of them without the assent of the remaindermen, and threatens to dispose of the others for her own purposes, and to send them out of the State and beyond the reach of those entitled in remainder. The prayer is for an injunction against the removal of the slaves and for a sequestration until security be given for the production of the negroes at the death of Mrs. White, and to abide the decree in the cause.

The defendant answered. The material answer is that of Mrs. White, which denies that she purchased as executrix or trustee and exhibits the bill of sale to herself, and it avers that she purchased for herself exclusively and hath always claimed and treated the negroes as her own. It admits that the money with which she purchased was a part of her husband's estate, but states that the interest of her children therein is not at all in jeopardy, and that she is well able to pay to them at her death the whole principal money, and insists that they are entitled to no more and that the slaves belong to her. An injunction and sequestration were granted on the bill; and on the coming in of the answers and on the motion of Mrs. White the (443) sequestration was discharged and the injunction dissolved, his Honor declaring his opinion that Mrs. White was the absolute owner of the slaves. From that decree the plaintiffs were allowed an appeal.

The appeal being from an interlocutory order presents for the consideration of this Court but the isolated point decided by his Honor. In disposing of that it is also to be taken that Mrs. White did not expressly nor did she intend to purchase as executrix, but intended to become the owner of the slaves in her own right. Supposing that to be so the argument for the plaintiffs is that the money invested in the slaves was a trust fund in the hands of Mrs. White, as executrix, for the benefit of herself and her children, and therefore that the original trust to which the fund was subject attaches to the slaves in which it has been invested, which are to be substituted for the money. The principle we admit is a sound one in morals and in the law of this Court, that an executor or other trustee cannot convert one species of property into another to the prejudice of the *cestui que trust*, nor to make a gain to himself. He cannot use the trust fund for his private profit, but, although he must bear the

losses, the legatee or other *cestui que trust* has an absolute right to charge the trustee with interest on the money used, or at his election to adopt the purchase and take the thing in which the money has been invested, with all the profits. *Burdett v. Willett,* 2 Vern., 638; *Chadworth v. Edwards,* 8 Ves., 46; *Ryall v. Ryall,* Ambl., 413; *Newton v. Bennett,* 1 Bro. Ch. Ca., 361; *Treves v. Townshend,* 1 Bro. Ch. Ca., 384. But that principle does not appear to us to reach the case before us. The doctrine has no other foundation than this, that the person who as *cestui que trust* of the original fund claims the property in which it has been invested was, in the view of the court of equity, the owner of the fund, and therefore entitled to the profits of it as well as the capital. For that reason it does not seem to apply here. If the testator had directed the money to be laid out in slaves for the use of his wife for life, and afterwards to go to his children, then certainly the plaintiff's claim could not be controverted.

So if the legacy had been of slaves for life and then over,
(444) and they had been exchanged for other slaves or sold and their proceeds reinvested in slaves by the tenant for life, there would be more strength in the plaintiff's demand; such a claim to substitution, to a greater extent at least than charging the last slaves as a security for the value or price got for the first, was deemed doubtful in *Black v. Ray,* 21 N. C., 443. But there are weighty considerations for a chancellor's inferring everything against a tenant for life of slaves, at least of female slaves, who sells them. The act tends so manifestly to the loss of the remainderman, who is legally entitled to the issue born during the life estate, that it seems almost an inevitable conclusion that the tenant for life converted the original stock into another, either honestly, for the benefit of all concerned, or dishonestly, to increase the profits of the life estate at the expense of the ulterior estate; and in either case there is much room for insisting on the equity that a change of form shall not diminish the interest of the remainderman, and that he may claim either the first or the last stock of slaves at his election. If a legatee for life be not willing to raise negroes for the remainderman he ought not to accept the legacy. When therefore the question shall come distinctly before the Court, in due time and in a proper case, whether the remainderman of slaves ought not to have that election, we shall be well inclined to listen favorably to the argument for the remainderman, and so to regulate the relief as far as we can find ourselves sustained by authority or principle as to give to the remainderman the full benefit of the bounty to him, and take from the tenant for life all inducement to dispose of the subject of the legacy improperly.

But the present is not a case like those we have been considering. The subject is a sum of money; and it is not left in the hands of the executrix to be invested for the benefit merely of others. But during her life she is herself to have it, and after her death it is to go over. The remaindermen have therefore the capital only given to them, and all the profits during her life belong to the executrix herself. All therefore that the remaindermen can justly ask is that at the death of the tenant for life the principal money be paid to them. They may (445) indeed, in case the money be in jeopardy from the insolvency of the executor or person having the fund, or from its being improperly invested, ask also to have it so secured that it may be forthcoming at the proper time, and if need be that it be declared a charge on any estate in which it may have been invested. But this bill is not framed with any such view. On the contrary, it claims the slaves themselves as the equitable property of the remaindermen of the money with which they were purchased, and seeks to have their delivery specifically, at the death of Mrs. White, decreed. Such a property we think the remaindermen have not. We do not find a case to give color to the claim. It is well known that the increase of slaves is a substantial part of their profit. Now the profit of the purchase ought to go to the person to whom the profit of the money belonged with which the purchase was made, and this upon the principle of the rule on which the plaintiffs build their claim. They say the negroes are theirs because they were bought with their money. Then they are only theirs as far as *their* money goes, which is to the extent of the principal sum at the death of Mrs. White. If they had stated that they could not get that except out of these negroes, and had asked that they should be declared a security for the capital, there would have been but little hesitation in granting the prayer. But it would be extremely unjust to the mother to allow the remaindermen to lie by for fifteen years, when the negroes have grown in value from four to five hundred dollars to as many thousands, and then insist upon having the purchased slaves and all their increase, which in effect would be to get all the profits of the legacy given to the wife. As the plaintiffs have no right whatever in those profits during Mrs. White's life they cannot engraft on the property in the slaves their right in remainder to the money invested in them, because that would be to give them much more than the money and for an act of the tenant for life which was not intended to injure and has not injured the remaindermen, but was done for the lawful and fair purpose of increasing the profits, to which she was entitled.

We must therefore declare that we see no error in the (446) decree made in the court of equity, and direct it to be so certified to that court. The appellants must pay the costs in this Court.

PER CURIAM. Ordered accordingly.

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JOSEPH WEBB v. CHARLES GRIFFITH, Executor of Daniel Webb.

In this case the court, upon the facts, pronounces that the plaintiff is not entitled to the account he seeks, and dismisses the bill with costs.

THIS was a cause transmitted from ROWAN Court of Equity, at Spring Term, 1841, to the Supreme Court by consent of parties. The pleadings and proofs are stated in the opinion delivered in this Court.

No counsel for the plaintiff.

*D. F. Caldwell* and *Boyden* for the defendant.

GASTON, J. The bill in this case was filed in February, 1839. It charges that some time in 1829 the plaintiff, "having fallen into great difficulties, caused in some degree by an irregular course of life," was induced by his brother, the late Daniel Webb, to break up housekeeping and remove to *his* house; that at the same time he was persuaded by his said brother to execute to him (the said Daniel) a conveyance of two negro men, Stephen and Rufus; that for these negroes no consideration whatever was paid, and that the conveyance was made upon trust that the said Daniel would pay the plaintiff's debts to the amount of their value; that the said Daniel held them for four years, and then, without having paid or accounted for their hire or services, reconveyed the same to the plaintiff; that about (447) 1829 he sold to Joseph and John Irwin a tract of land at the price of $1,230, and for the purpose of satisfying the fears of Joseph Irwin, who expressed an apprehension that the said Daniel might have some claim upon the land the said Daniel joined in the deed of conveyance, and the purchase-money was received by the said Daniel upon an express trust to be applied to the plaintiff's use in the payment of his debts and otherwise; that at the time of going to live with the said Daniel the plaintiff carried with him several head of cattle and hogs, corn, wheat and bacon, which were used in the family of

the said Daniel under a like trust to account; that the plaintiff also carried with him a wagon and team of four horses under a like trust to account, of which the said Daniel had the use of four years, and that he also carried a set of blacksmith's tools under the same confidence, which the said Daniel received and finally kept. The plaintiff charges that the said Daniel did not discharge the said trust by paying the debts of the plaintiff or applying the money or property to the plaintiff's use, nor ever accounted for the same; that the said Daniel is dead, and the defendant at the last term of Rowan County Court proved his will as executor, and he therefore prays that the defendant may be compelled to account with the plaintiff for the services of the said negroes and horses and the money and other property so received by his testator in trust for the plaintiff, and to pay over what may be found due upon taking such account.

The defendant's answer denies that his testator ever received any money or other property of the plaintiff in trust for the said plaintiff; and says further that if the testator ever received or held any property in trust for the plaintiff it was upon a fraudulent trust to cover the same from the demands of the plaintiff's creditors, the execution whereof cannot be enforced in a court of equity. The defendant further insists that if any money or other property of the plaintiff came to the hands of his testator the same was fully accounted for unto the plaintiff or to his creditors long since; saith that the plaintiff emigrated to the State of Tennessee in 1834 or 1835; that he had resided with defendant's testator from the year 1829 until about a year before said emigration, when he married and (448) moved away and made one crop; that the plaintiff was very largely indebted when he came to his brother's house, and all these debts were paid off, and as defendant believes by the sale of the land to the Irwins, by the profits of his property while at his brother's house, and the sale of one negro woman to R. H. Kilpatrick; that any benefit which the testator could have derived from the use of the plaintiff's wagon and team or any other property of the plaintiff, used by his testator, was far less than the expense of boarding and supporting the said plaintiff while there; that no pretense of any such trust is now alleged, or of any claim to an account against his said brother was ever advanced by the plaintiff while he resided in North Carolina or after his removal to Tennessee, during the life of his brother; that the testator died in December, 1838, when the plaintiff came to this State and contested his will; that having failed in this contest he set up the present claim, which the defendant insists is wholly unfounded and iniquitous, and which, if it ever

existed, is barred by the statute of limitations, whereof the defendant specially prays the benefit.

The answer having been replied to and proofs taken upon both sides the cause was removed to this Court for a hearing upon the pleadings and proofs.

There is no direct evidence of any such trust as that alleged in the bill. It appears from the exhibits produced that on 6 April, 1829, the plaintiff executed an absolute bill of sale to his brother Daniel for the two negroes, Stephen and Rufus, the consideration whereof is stated to be $550, and that Daniel, on 27 September, 1834, executed a reconveyance of those negroes to the plaintiff for the consideration as recited in the bill of sale of $600. No evidence is offered on either side explanatory of these instruments. It is in evidence that the plaintiff, about this time or shortly before, was greatly harrassed with debt and had a portion of his crop sold at execution. One witness, to whom Daniel Webb applied to become surety for the plaintiff, inquired of the plaintiff the amount of his embarrassments, and was informed that his debts were between three and four (449) thousand dollars. It is in proof that when the plaintiff was broken up he went to Daniel Webb's and carried with him not only the two negroes above mentioned but a negro girl, three beds and a table, two wagon loads of corn, about 1,000 pounds of pork, 300 pounds of beef, 100 pounds of lard, a wagon and four horses and a set of blacksmith's tools; that he married about the year 1833 or 1834, and moved off soon afterwards to an adjacent plantation, and then carried away with him all the property aforesaid but the blacksmith's tools which he left behind, and the provisions, which were consumed by him and the family. It is in evidence that Daniel Webb, in March, 1829, as the agent of the plaintiff and for the purpose, as he alleged, of trying to pay the plaintiff's debts, contracted to sell a tract of land to Joseph and John Irwin at the price of $1,230; that the purchasers required of Daniel to join in the conveyance and he did so; that the money was paid in the presence of both, but received by Daniel for the avowed purpose of being applied to the payment of the plaintiff's debts; that in January, 1833, the negro girl who had been carried to Daniel's, but was not included in his bill of sale, and her infant children were sold by the plaintiff in person to Kilpatrick for the sum of five hundred dollars; that the plaintiff alleged that this sale was necessary for the payment of his debts; that the plaintiff and his brother Daniel were both present at the time when the money was paid, and the witness thinks, but he cannot positively so affirm, that the money was taken by Daniel. It is also in proof

that on 18 October, 1834, shortly before the plaintiff removed to Tennessee, he sold the negro boy Rufus, one of the two conveyed to Daniel and by him reconveyed to the plaintiff, to John S. Carson for the price of $400, and this money was paid into his own hands; that he then made a public sale of his furniture, cattle, hogs and other perishable articles, and moved off with three negroes, a wagon and four horses and a carry-all to Tennessee, and no complaint has ever been heard in the neighborhood of his leaving any debts unpaid. A female witness who lived in Daniel's family testifies that she has at different times heard the plaintiff ask Daniel for money to pay off debts, particularly the Burris debt, for which his land was sold, (450) when Daniel replied that he could not trust him with the money but would pay off the debts himself. There is no evidence what was the original amount of the Burris debt on account of which this witness says the land was sold in March, 1829, except that it appears that in October, 1832, Burris had a decree against both the Webbs for $200 and interest; that execution thereon issued, and that on 4 January, 1833, about which time the plaintiff sold the negro woman and children to Carson, this decree, with interest and costs, amounting all together to $287.92, was paid by one or the other of the defendants in the execution. The female witness above referred to states that the plaintiff generally worked on the plantation or in the blacksmith shop while at his brother's, and although he occasionally drank freely was not habitually drunk; that the negroes, horses and wagon which he brought with him were employed and used on the plantation, but that during the whole time the plaintiff resided there she never heard of any claim set up by him because of the services of the negro or use of the property. Other witnesses represent the plaintiff as occasionally riding about when residing in his brother's family, and are ignorant whether he rendered any labor on the plantation. A single witness testifies that shortly before Daniel's death he observed that the blacksmith's tools which had been left there belonged to the plaintiff, and states that these have been sold by the executor as the property of his testator for thirty dollars and some cents. Two letters are exhibited by the defendant written by the plaintiff from Tennessee, one dated 28 June, 1835, the other 23 May, 1836. They are written in an affectionate, brotherly style, express a desire that the testator would remove to Tennessee, but contain no intimation of any unsettled demands existing between them.

It is not improbable that the conveyance of the negroes, though absolute in its form, was intended as a security for some pur-

pose well understood between the parties, and this purpose having been answered, that the same were reconveyed to the plaintiff. But we are not authorized by any evidence to declare a trust, and if there were one we are wholly unable to
(451) ascertain what was the trust. In regard to any trust which entitles the plaintiff to claim an account because of the supposed profits received by the defendant's testator from the use of the wagon and horses or of the other articles of property carried by the plaintiff to testator's residence when he removed thereto, and while he lived as one of the testator's family, there is an utter defect of proof. The testator did undoubtedly receive money of the plaintiff as *his agent*, and the plaintiff might have demanded an account of this agency if it remained unsettled, and he required such an account within the time prescribed by law for bringing actions of account. But we are satisfied that this matter of agency was settled between the parties. It is very improbable if it remained unsettled when the plaintiff married and removed from his brother's residence, obtaining a reconveyance of the negroes and carrying away his property with him, that he would not have asked for a settlement. Still less can it be believed that he would have finally left the State without any intent, as we can discover, to return thereto and have made no attempt to close this matter of account if it were yet open. And his silence ever afterwards during his brother's life in relation to any such unsettled account removes any reasonable doubt which we can entertain about it. We have no hesitation therefore in refusing the account asked of this agency. It may be that the blacksmith's tools, left by the plaintiff at his brother's house and disposed of by the present defendant since the death of defendant's testator, were the property of the plaintiff. If so the sale thereof constitutes no bar against the plaintiff's recovery of them from the possessor, and may give him a right to sue the defendant for their value in an action of trover or for the price received in an action of assumpsit, but it furnishes no substratum for this bill.

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

PER CURIAM. Bill dismissed with costs.

(452)

ANDREW M. STEEL et al. v. NANCY STEEL et al.

A husband and wife having parted and become afterwards reconciled, Steel, the husband, by deed, conveyed to Mebane certain slaves, lands, etc., "in trust that said Mebane should hold the said land, slaves, etc., to the use of Nancy, the wife, for and during her natural life, and after her death to the use of her children by the said Steel; and the said Mebane, in execution of the trusts hereby intended to be created, may lease out the lands and hire out the negroes aforesaid and sell the household and kitchen furniture, stock of cattle, horses and sheep, or any part thereof, and place the money out at interest, or apply the same towards the maintenance of the said Nancy during her life; it being the object and intention of the said Steel to settle in the hands of the said Mebane a decent maintenance and support for his wife, Nancy, over and above her claims to dower and to secure an interest in the property aforesaid in remainder to the children of the said Steel on the body of the said Nancy begotten." *Held*, that by this deed the wife took, in equity, an estate in the property to her *sole* and *separate* use. It necessarily follows, when a husband makes a conveyance to a trustee for the use of his wife, that it is for her *sole* and *separate* use.

If there be an express gift to the husband by the wife of her separate estate, or if one can be implied, as from the receipt of him of the income of her estate by her direction or permission, and employing it in the support of his family, including the wife; in such cases the wife cannot charge the assets of the dead husband for the money thus received and applied; or, at most, for not longer than the year next before his death.

THE case came up from ORANGE Court of Equity. The facts are stated in the opinion of the Court.

*Norwood & Graham* for the plaintiffs.
*Waddell* for the defendants.

RUFFIN, C. J. Differences having arisen between Joseph Steel and his wife the friends of the parties interposed and effected a reconciliation in June, 1812; and they afterwards cohabited together until his death, intestate, in 1818. As a part of the arrangement Joseph Steel, "for and in consideration of an agreement heretofore entered into for the purposes here- (453) inafter mentioned, and of the sum of," etc., conveyed to David Mebane in fee a part of the tract of land on which he resided, including his dwelling house and farm houses and containing 150 acres, three slaves and other personal chattels therein mentioned, "upon trust, nevertheless, that said Mebane should hold the said land, slaves, etc., to the use of Nancy Steel, wife of the said Joseph, for and during her natural life, and after her death to the use of her children by the said Joseph; and the

said Mebane, in execution of the trusts hereby intended to be created, may lease out the lands and hire out the negroes aforesaid, and sell the household and kitchen furniture, stock of cattle, horses and sheep, or any part thereof, and place the money out at interest, or apply the same towards the maintenance of the said Nancy during her life; it being the object and intention of the said Joseph to settle in the hands of the said Mebane a decent maintenance and support for his wife Nancy over and above her claims to dower, and to secure an interest in the property aforesaid in remainder to the children of the said Joseph on the body of the said Nancy begotten." Upon the execution of the deed Mebane took possession of the estates and effects and hired them to Steel, the husband, for a year, and took his bond with surety for the hires and rents; and he so continued to do from year to year as long as Steel lived. Steel made no direct payment on the bonds, but at his death they were held by Mebane, the trustee; nor is any communication made to appear between any of those parties on the subject of such payment. The intestate left four infant children who are the present plaintiffs, and administration was taken of his estate by the same David Mebane and Mrs. Steel, his widow, who made sale of the personal property, not including any part of that conveyed to Mebane. At that sale Mrs. Steel purchased, among other things, a negro named Allen. In 1823 she was also appointed the guardian of all her children. In June, 1825, an account current of the estate was stated by the administrators upon which appeared a balance of $279.67 in favor of the estate and in the hands of Mebane, which balance he then paid
(454) to Mrs. Steel as guardian, and took her receipt therefor.

In that account the administrators were charged with the price of the negro Allen, as sold to Mrs. Steel, and were credited with the bonds before mentioned, which were given by Steel to Mebane for rents and hires as a disbursement.

The intestate's children have brought this bill against Mebane and Mrs. Steel, in which they elect to have the sale of the slave Allen declared void, and claim him and his hire; and they pray for an account of their father's personal estate, and insist that the deed to Mebane did not create a separate property in the wife, but only an ordinary trust for her, which vested in the husband; and also insist that the bonds for rents and hires ought not to be set up against their father even if the deed did create such separate estate, because, as they allege, their mother resided with her husband and was supported by him. The bill also charges various acts of neglect of duty in Mrs. Steel as guardian and the improper application of the funds of the wards, and

prays an account against her as guardian. Mrs. Steel by her answer states that she gave the full value of the slave Allen, and has always considered him as her property; but submits to surrender him if the court deem it proper; and after offering explanations of several of the charges in the bill she submits to account as prayed. But both of the defendants state that the deed by the husband was intended to settle the property to the *sole* and *separate* use of Mrs. Steel during her life, independent of all control of the husband; and insist on that construction. They also state that the bonds for rents and hires were taken for the use of the wife by the trustee in the discharge of what he supposed to be his duty, and that being outstanding at the death of the husband they were considered the property of the wife and delivered to her as such, and by her were used in paying for her purchases at the administrator's sale. The answers were replied to and the settlement and a copy of the administration account filed as exhibits, and the cause was set down for hearing and transferred to this Court without further evidence.

The cause must of course go before the master to take the guardian accounts, of which there has been no settle- (455) ment. So it must likewise in respect of the administration account, for the plaintiffs are not concluded by the acquittance given by their mother as their guardian for the balance appearing upon that account. In the first place the guardian was one of the personal representatives herself; and in the next place the plaintiffs have established at least one error in that account, namely, that arising out of the supposed sale of the negro Allen, for the delivery of whom and for his hires the defendant Mebane will be liable to the plaintiffs in case the other defendant, Mrs. Steel, should be unable to answer them. And in the third place it is probable the plaintiffs may establish other errors therein, and especially that their father's bonds for hires and rents ought not to be credited to the defendants.

But before sending the case to the master the parties have asked for such directions as will enable the master to know whether the property conveyed by Steel to Mebane is to be regarded as Steel's or his wife's; and we will proceed to consider that question, which is indeed the principal one in the case. As husband and wife are but one person in law no separate property can be held by the latter independent of the former and of his creditors, much less can those persons contract with and convey to each other. But it has long been settled in courts of equity that personal chattels may be so given to the wife as, in exclusion of the husband, to belong to her alone in the same manner as if she were single. This is effected generally by a

conveyance to a trustee for the sole and separate use of the wife. But it is not essential that the conveyance should be to a trustee, for if the intent be clear that the wife shall enjoy as a *feme sole* the husband, who takes the legal interest by marital right, will be converted into a trustee for her. *Bennet v. Davis*, 2 P. Wms., 316; *Parker v. Brooke*, 9 Ves., 583. It is likewise established doctrine, at least in England, that husband and wife may make an immediate gift to each other. As an instance of a gift from the wife to the husband may be mentioned that for which the plaintiffs here contend, namely, when she authorizes or permits him to receive the profits of her separate estate and apply
(456) them through a course of years to the support of their family. *Powel v. Hawley*, 2 Pr. Wms., 82; *Milnes v. Bush*, 2 Ves. Jr., 488. So gifts from the husband to the wife are supported in equity when they are clearly established. It is indeed difficult to establish them satisfactorily, as it is necessary to show a clear intent and an act done to divest the husband of an interest and vest it in the wife. *Elliott v. Elliott*, 21 N. C., 57. But when such intent and act are shown the gift has been supported. *Lucas v. Lucas*, 1 Atk., 270. As if the husband transfer stock held by him into the name of his wife or of himself and his wife. *Rider v. Kidder*, 10 Ves., 760; *George v. Bank of England*, 10 Price, 646. Now in all instances of such direct gifts to the sole use of the wife, if allowed at all, they *must* be supported as gifts to the sole use of the wife, and the husband is her trustee. Atherly on Marriage Settlements, 331. That is necessarily so, for in that way only can the gift be effectual. It must be inferred, therefore, that the parties intended to create a separate property for the wife. The same reason seems equally to apply to a conveyance of personal chattels by the husband to a trustee to the use of the wife; for, ordinarily, if the wife be entitled as *cestui que trust* to the present profits of personal chattels, she is regarded in equity as the owner in possession, and consequently they immediately vest in the husband. *Murphey v. Grice*, 22 N. C., 199. Therefore the maxim *ut res magis valeat quam pereat*, which is a sound principle of construction, applies to such a trust when created by the husband, and makes it one for the separate use of the wife. Unless it have that operation it has none at all and is a futile ceremony, merely to pass the equitable estate through the wife to the husband, from whom it emanated. Hence Mr. Roper (2 Roper on Husband and Wife, 157) in speaking of the clauses and expressions that are sufficient to raise a trust for the separate use of the wife says, "that whenever it appears, either *from the nature of the transaction*, as in the instance of a settlement in contemplation of marriage

*where the husband is a party*, or from the whole context of the instrument, that the wife was intended to have the property to her *sole* use, that intention shall be carried into (457) effect in equity." Clearly he conceives that a settlement to *the use* of the wife by the husband, or to which he is a party *per se*, has the character of a settlement to the *separate use* of the wife, though it be not so fully expressed. In that opinion he seems to be entirely sustained, not only by the reason of the thing but also by the adjudication he cites. That is the case of *Tyrrell v. Hope*, 2 Atk., 558, in which a clause containing a stipulation by the husband "that the wife should receive and enjoy the profits of an estate of hers" created a trust in the husband to her separate use. As was pertinently asked there, to what end should the wife receive the profits if they became the husband's the next moment? So, in this case, why should a trust be created for the wife by the husband which *ipso facto* became a trust for the husband? But besides this being a trust created by the husband himself, when we consider the circumstances under which the deed was executed and the mode in which all parties acted under it, and the particular language employed to declare the objects of creating the trust, there can be no doubt as to the intention of the parties or the construction that must be put upon the instrument. In the first place the object was to make *a certain* provision for the wife and the children of the marriage as against the acts of the husband, which was supposed by the parties and their friends to have been rendered necessary by the causes which led to the family dissensions that had existed. In the next place the husband leased and hired the property from the trustee, which is altogether inconsistent with the idea that the parties supposed or intended that the profits belonged to the husband in any way. Next must be noticed the recital in the deed that it was made "in consideration of an agreement heretofore entered into for the purposes hereafter mentioned." Then, after declaring the trusts for the wife and children, follows a power to the trustee to sell all the property except the land and slaves, and apply the interest of the proceeds or the capital—of course during the coverture as well as after the death of the husband—*to the maintenance of the wife:* "It being the object and intention (as stated in the deed) to settle in the hands of the trustee a decent (458) maintenance and support for the wife, and to secure an interest in remainder to the children." In *Dorley v. Dorley*, 3 Atk., 399, *Lord Hardwicke* thought a gift to the husband or a trustee for the wife's livelihood sufficient to repel the husband's claim and give the interest to the wife as a *feme sole*. "Main-

tenance and support" by themselves are equally strong, and much stronger when the property is *settled* (away from the husband) *in the hands of a trustee,* whose express duty it is made to provide a decent support for the wife, not merely out of the profits, but if need be out of part of the capital. It seems therefore to be past contradiction that a comfortable provision for the wife *personally* was intended, and that it should be as effectually *settled on her* as that for the children was *secured to* them; that is to say, that both should be beyond the control of the husband and father. Every purpose of the parties would be frustrated by not considering the deed as creating a separate estate in the wife. With respect to the rent and hires the facts do not sufficiently appear to enable the Court with entire confidence to determine whether the husband's estate should be charged with them or not. The general rule is if there be an express gift to the husband by the wife of her separate estate, or if one can be implied as from the receipt by him of the income of her estate by her direction or permission, and employing it in the support of his family, including the wife, that in such cases the wife cannot charge the assets of the dead husband for the money thus received and applied, or at most for not longer than the year next before his death. *Pawlet v. Delaval,* 2 Ves., 667; *Squire v. Dean,* 4 Bro. c. c., 326; *Peacock v. Monk,* 2 Ves. Sr., 190. Here the husband did not *receive* the rents, but he had the pernancy of the profits in fact and gave his bonds for the amount and for five or six years paid nothing on those bonds. At present we will not say that the nonpayment of the bonds by the husband is equivalent to a receipt of rents from other persons, though there would seem to be essentially little or no difference, and the case is very much like that of pin-money in arrears. If no other act was done by way of asserting a continuing
(459) claim to the money but merely the keeping the bonds by the trustee, as if neither the wife nor trustee by her direction demanded payment nor a renewal of the bonds, there would be much reason to suppose either that the wife had given the money to her husband or, rather, that she was satisfied with the manner in which he was employing it for the benefit of herself and her children. But we are not willing to determine the cause on that point singly, because it is probable that on an inquiry facts will be ascertained which will put the question beyond doubt one way or the other. As the deed included the family mansion and all its furniture and the stock of horses, cattle and sheep, it is apparent that it was expected the wife should have the use thereof as that most beneficial as well as agreeable to her by the continued residence of the family on the

land. We collect from the deed and the sale of the husband's property after his death that probably the settlement covers the principal part of his estate, and therefore that it might be that the immediate support of the wife and family was to be drawn chiefly from this property. Now if the family could not have lived without the use of this property, and if by the use of it the husband did maintain them, the wife's acquiescence in the nonpayment of the bonds with money is accounted for, and upon a principle which shows that she considered herself paid and never intended and never ought to have demanded any other payment. Now the bill charges substantially that such were the facts. But although not denied, that is not admitted in the answers, which merely say that after the husband's death the defendants considered the bonds the wife's property and treated them accordingly. It is not stated that there was no communication on this subject between the husband and wife; that she did not agree that she would not and that her trustee should not call for payment; or that the use of this property was not necessary to keep the family together and maintain it decently, or that the husband could, without ruin or inconvenience, have maintained his family as he did and also paid his rents and hires. It is therefore desirable to have an inquiry on those points that we may know how the defendants account for requiring *no* payment from the husband during his life,
and if there was any reason for it except that the husband (460)
maintained the family to the value of the rents and hires,
and that they were necessary for their proper maintenance. On the contrary all presumptions of a gift may be repelled by its appearing that the wife did not acquiesce but sought payment, though ineffectually, or otherwise asserted her rights as a creditor of her husband, in which event her present claim would seem to be the more reasonable. The Court therefore directs an inquiry as to all these facts, with liberty to the parties to have any special matter stated which in their view may affect the decision, and with liberty also to have the parties examined on interrogatories.

PER CURIAM. Ordered accordingly.

## WILLIAM WILLIAMS, JR., *v.* ADEN POWELL.

Where a guardian purchases land of his ward, soon after he becomes of age, at a grossly inadequate price, the guardian having sought the purchase and taking advantage of the imprudence and thoughtlessness of the young man, the contract will be rescinded in a court of equity upon a bill filed for that purpose against the guardian.

Between persons standing in that relation to each other, only fair and equal bargains ought to be supported.

Unequal contracts between a guardian and his late ward, just come of age, are set aside upon a ground of public utility and to prevent fraud, not merely to *redress* it.

THIS was a case transmitted from JOHNSTON Court of Equity. The facts are stated in the opinion in this Court.

*W. H. Haywood, Jr.*, for the plaintiff.
*J. H. Bryan* for the defendant.

RUFFIN, C. J. John Williams died intestate in 1824, seized and possessed of a large real and personal estate in Johnston County, and leaving seven infant children, of whom the (461) plaintiff was one. Of all of them the defendant Powell was appointed the guardian in 1826, and as such took into possession the land descended to them from their father, lying on both sides of Neuse River. One Isaac Williams administered on the personal estate of John Williams and, alleging that he had exhausted the personal estate in paying the debts of the intestate and that there remained a balance of $981.83 due to him, the administrator, on his administration account, the said Isaac, in March, 1831, filed his bill in the court of equity against the present plaintiff and his brothers and sisters as the heirs of their father, praying satisfaction of his said demand out of the real estate descended. The suit was defended by Powell, as the guardian of the children of John Williams, upon the ground that the land was not legally chargeable to the administrator and that the sum demanded was not due, or but a small part of it. On 20 May, 1831, the plaintiff came of full age, and having in the meantime contracted for the sale thereof to the defendant Powell he, by deed bearing date 5 September, 1831, in consideration of the sum of $600, conveyed to the defendant all the share of the plaintiff of and in the lands descended from his father, with general warranty. When the plaintiff came of age he instituted suit by petition against the infant wards of Powell for partition of the lands and the allot-

ment of the plaintiff's share to him. The sale to the defendant was made pending that petition, which was afterwards proceeded in, so that in May, 1833, 479 acres on the north side of the river and 216 1-2 acres on the south side of the river were allotted in severalty as the share of the plaintiff, and the defendant took possession thereof, claiming the same under his said purchase. In March, 1837, the suit of Isaac Williams against the plaintiff and the other heirs of his father was compromised and a decree entered therein by consent for the sum of $500, of which one-seventh part was by the decree to be paid by Powell, as representing or standing in the place of the plaintiff. The present bill was filed on 30 August, 1838, and the object of it is to have the contract rescinded and a reconveyance of the land to the plaintiff upon the payment of the sums advanced by the defendant after deducting the profits made by him. The (462) bill states that besides being the guardian of the plaintiff and his brethren the defendant had married their mother, and thus had, as a father, the immediate personal care and control of the children, and commanded the confidence of the plaintiff and entire respect for his opinions. It charges that the defendant was particularly desirous of owning the plaintiff's land and knew its value, and had formed designs before the plaintiff came of age of purchasing it from him at an under value as soon as he should attain twenty-one; that to enable him the better to succeed in those views the defendant represented to the plaintiff and in the family at large the claim of Isaac Williams, the administrator of the plaintiff's father, to be ruinous to the heirs although, as the plaintiff has since discovered, the defendant knew the small amount of that demand in comparison with the amount of the estate, and was well advised by able counsel that probably even that could not be recovered.

The bill further charges that before the plaintiff came of age and afterwards, until the sale, the defendant advised him to remove out of the State to the West, well knowing that the plaintiff could not do so without making sale of his land to get the means for removing, as that was his only property. And that ultimately the plaintiff, being influenced by the advice of the defendant, which he then thought disinterested, and much alarmed also by the representations made by the defendant of the encumbrances aforesaid, which the defendant artfully magnified, agreed to make the sale and conveyance to the defendant at the price of $600, which the defendant paid, and upon the receipt of which the plaintiff left the State and has since resided abroad until shortly before the compromise made in March, 1837, whereby the plaintiff's proportion of the encumbrance,

including interest up to that time, was ascertained to be but little over $70. The bill further charges that the price given by the defendant for plaintiff's interest in his father's lands was grossly inadequate; that it was worth more than double the sum, even if the encumbrance had been such as the defend-

(463) ant represented it; but that the plaintiff, from his want of knowledge of the lands and of experience upon such subjects, and from his confidence in the fairness and friendship of his stepfather and late guardian, was induced, without further inquiry into those points, to sell at the inadequate price mentioned. The answer denies that the plaintiff was under the influence of the defendant or had any particular respect for his opinions, and states that the plaintiff was notoriously insubordinate and beyond the defendant's control. It further states that the plaintiff determined to remove to the West and without any advice from the defendant; and that he was anxious to sell his land that he might raise money for his outfit, and offered it to several persons before he came to the defendant; that not being able to sell to any one else the plaintiff then offered his portion to the defendant, and that the defendant advised him not to sell but to go to work on the land and wait until the decision of the suit against the heirs, when the title would be clear and he could sell to greater advantage, but that the plaintiff declared that he was then determined to sell at some price or other; and the defendant, having no doubt that the plaintiff would so sell, was induced to make the purchase himself. The answer states that besides the consideration of $600 expressed in the deed the defendant was also to pay such sum as might be decreed in the suit against the heirs against the plaintiff on his share. The answer further states that the defendant feared that Isaac Williams would recover his claim, and that he occasionally spoke of it in the family, but in so doing he only expressed the apprehension really felt by him, and not for the unworthy purpose of alarming or deceiving the plaintiff; so far from it the defendant avers that he repeatedly advised him not to sell. The answer further states that after he had taken the deed the defendant was informed by counsel for the first time that a dealing with his late ward so soon after he came of age might perhaps be impeached, and thereupon he sent a message by a mutual friend to the plaintiff proposing to rescind the contract, which the plaintiff refused to do. The answer then insists upon the lapse of time, and relies on the statute of limitations.

Conveyances between persons standing in the relation

(464) in which these parties did are justly the objects of suspi-

cion in courts of equity. An undue influence, either from a blind confidence on the side of a youth just of age or awe and fear of a former guardian, must often enter into the considerations which lead to such contracts, and in most cases it is almost impossible by evidence to make those considerations, though actually existing in the bosoms of the parties, distinctly appear. But it would be a public mischief to encourage dealings between persons thus situated by allowing the conveyance to stand, unless actual unfairness should in each case be clearly established, as is the rule between persons standing on an equal footing. But contracts with an heir for his expectancy, or with a young remainderman, entitled after the death of his father, for his remainder, or by a guardian with his ward just upon his coming of age, are all put upon the same footing and set aside upon a ground of public utility, and to prevent fraud and not merely to redress it. *Twistleton v. Griffith*, 1 Pr. Wms., 711; *Wiseman v. Beake*, 2 Vern., 121; *Hylton v. Hylton*, 2 Ves. Jr., 547. Undue influence, produced by the attachment of the ward or obtained by flattery of the guardian, is not always necessary to vitiate the transaction. There are many other ways in which a guardian may obtain an unequal bargain—from his particular knowledge of the estate and its encumbrances, of the temper and plans of his ward and of his necessities. Therefore in such cases the guardian must, in support of his purchase, show that the ward acted freely, without any control or influence of either kind, and that the offer came from the ward and without any contrivance of the guardian to draw him into making it, and that the guardian did not even take advantage of an offer imprudently made by the ward, at least without fully communicating all the guardian knew that might enable the other party to judge correctly of his interests. In other words, only a fair and equal bargain between such persons ought to stand. When then the guardian seeks the purchase and obtains it for much less than the true value, the Court cannot hesitate to treat the conveyance merely in the light of a security for the money advanced by the purchaser, as if he were (465) a mortgagee. Any substantial inadequacy of price in such a case amounts to undue advantage. *Peacock v. Evans*, 16 Ves., 517; *Gowland v. DeFaria*, 17 Ves., 23; *Medlicott v. O'Donnell*, 1 Ball and Beat., 165.

In the present case the evidence does not establish any particular control or influence held over the plaintiff by the defendant, at least not through the medium of affection, for they were rather on bad terms than otherwise. But it is clear to the points that the plaintiff was a wild, thoughtless and thriftless

youth, and was known and declared so to be by the defendant who, believing that the plaintiff would sell his patrimony at any price he could get in order to get a little ready money, took advantage of the plaintiff's impatience and imprudence and purchased it at a great under value, probably at a fourth or fifth of the actual value. Much of this is indeed to be collected from the answer, in which the defendant endeavors to excuse himself upon the ground that the plaintiff was determined to sell at all events, and that if he did not buy some one else would, and in which the defendant does not express even his own belief that he gave a fair price or anything like it; but upon the depositions the case is put beyond doubt. It is the opinion of three witnesses that the land assigned as the share of the plaintiff (695 1-2 acres) is worth from $4 to $5 per acre, and it is stated that the dower of Mrs. Powell covered about half the land (216 1-2 acres) lying on the south side of the river; and a brother of the plaintiff sold his share after the division for about $3,000. Besides this inadequacy of price, gross as it is, it appears by the testimony of Daniel Boon that he owned land adjoining the plaintiff's tract on the south side of the river and was desirous of buying that part from the plaintiff, and in a conversation with the defendant so informed him; that both the defendant and the witness, from their knowledge of the plaintiff's character, expected he would sell his land, and they agreed with each other that Boon should buy for both and he keep that on the south side and the defendant have that on the north at $800; or if the defendant should make the purchase that Boon should have the part he wished on the same terms. Another wit-
(466) ness, William B. Allen, states that he also owned land adjoining the lands of the plaintiff's father on the south of the river and wished to get them, and three or four months before the plaintiff made his deed and immediately after he came of age that the defendant informed the witness the plaintiff intended to sell his share in his father's land and that he wished to buy it, but that the plaintiff would sell to any other person on better terms than to the defendant, and therefore he proposed to the witness to make the purchase on their joint account, so that the witness should take the land that might be allotted on the south of the river and the defendant would take that on the north side and allow the sum of $1,000 for it. These witnesses establish a case of gross inadequacy of price; that instead of advice to the plaintiff not to sell there was an industrious seeking of the bargain by the defendant and a plan to draw the plaintiff into a sale to the defendant without his being aware of it; that there was an unfair contrivance to prevent

competition in the purchase by uniting secretly with those who most probably wished to buy upon an agreement to divide; and that finally the defendant got all the land for about two-thirds of the price he had authorized the witness to give for the two-thirds of the land the defendant wanted. When to this are added the circumstances that a part of the plaintiff's land was a reversion after his mother's dower, and that the whole was subject to an encumbrance of which it does not appear the plaintiff knew anything except from the defendant, who admits he spoke of it with apprehension in the family and does not prove that he spoke truly of it as it was; the plaintiff's case is nearly as strong a one for relief as can be imagined. The answer states indeed that the defendant offered to rescind the contract, but that the plaintiff refused. But although the defendant states his proposition to have been made through a mutual friend he has failed to furnish the testimony of that friend or any other person to establish the facts, and therefore they cannot be admitted. The statute of limitations is not a bar, for the bill was filed within seven years from the making of the deed by the plaintiff, and that alone is decisive. There must be a decree for the plaintiff and a reference to take the proper (467) accounts.

*Cited: Lee v. Pearce,* 68 N. C., 83; *Harris v. Carstarphen,* 69 N. C., 419.

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## WILLIAM DAVIDSON v. JOHN WOODRUFF.

When a surety sues a co-surety, who has guaranteed him, for the whole amount of the debt, which the former has paid for the principal, the principal is excluded from being a witness for the co-surety to prove a payment by himself to the surety, who sues, on the ground of interest, for in addition to his liability to either for the debt he is also liable to the co-surety for the costs incurred in the suit against him.

THIS was a cause removed from MECKLENBURG Court of Equity, at Fall Term, 1838, to the Supreme Court, on the affidavit of the defendant. The pleadings and proofs are stated in the opinion of this Court.

*Barringer, D. F. Caldwell* and *Alexander* for the plaintiff.
*Boyden* for the defendant.

RUFFIN, C. J. In 1832 the plaintiff and the defendant, Woodruff, for the accommodation of John Sloan, endorsed a note made by Sloan for the sum of $1,635, which was discounted at bank for the benefit of Sloan, who received the money. When application was made to Woodruff to endorse the note, he refused; and upon his doing so, the plaintiff, Davidson, also requested him to give his endorsement, and agreed that he would guarantee the payment by Sloan, and thereupon Woodruff endorsed. Before the note fell due, Sloan became insolvent, and Woodruff paid the amount. He then instituted his action against Davidson on his guaranty, and in May, 1833, recovered a judgment for
(468) the principal and interest due on the note. At that time all the parties lived in the village of Charlotte, in Mecklenburg County, but soon afterwards Woodruff removed to New Jersey. The bill was filed in December, 1836, and states that at the rendering of the judgment the plaintiff was much embarrassed with debt and had conveyed his property, which was large, to trustees, to secure the payment of those debts, which circumstance prevented the plaintiff at law, Woodruff, from getting satisfaction on the executions issued on his judgment; but that, recently, before the filing of the bill, Davidson had discharged the encumbrances on his estate, and that Woodruff then caused an execution to be levied and was about to sell; that, under these circumstances, he then applied to Sloan to know the state of the affair, and for the first time learned from Sloan that, prior to the recovery of the judgment against Davidson, namely, in April, 1833, Sloan had made payments to Woodruff and transferred to him debts and demands against other persons to a greater value than the sum paid by Woodruff on Sloan's note, and that those payments and transfers were made and accepted on the express condition that Woodruff should not proceed at law against Davidson, either as co-surety or upon his guaranty, until he had used diligent efforts to collect the demands transferred and had failed therein. The bill then states that amongst the claims thus received by Woodruff was an order drawn by Sloan on one Charles Elms for $100, in favor of Woodruff, and also "the interest of said Charles Elms in the estate of one George Barnett, deceased, late of South Carolina, which interest was of the value of $2,000"; that there were also many other claims, of which the said Sloan took a list or schedule, which, as Sloan informed the plaintiff, he had lost, and that therefore the plaintiff cannot specify any other of said claims or their value. The bill then charges that Woodruff concealed from the plaintiff the payments and assignments aforesaid, and the agreement with Sloan, with the intent to prevent him from making a defense at

law, and that the plaintiff was wholly ignorant of any of those matters until a very short time before the filing of the bill, and that the plaintiff is informed by Sloan, and believes, that Woodruff has either received, or might with reasonable (469) diligence have received, a larger sum on the assignments from Sloan than would have satisfied his judgment. The bill therefore seeks a discovery of the debts assigned, what has been received on them, and the steps taken on them, and their present condition, and for an injunction and general relief.

The answer of Sloan admits all the charges of the bill. That of Woodruff admits the statements in the bill in reference to the endorsing of the note, the plaintiff's guaranty, Sloan's insolvency, and the taking of the judgment at law; but it denies positively and directly that Sloan ever made any assignment or conveyance of property or securities in satisfaction or security of the judgment or the demand on which it is founded, except an order on Elms, or that this defendant ever made any agreement with Sloan, upon that or any other consideration, not to sue the present plaintiff on his guaranty and collect the money from him. The answer admits that Sloan proposed to place in this defendant's hands some demands, to be collected and applied to the payment of his debts, among which was one relating to the estate of one George Barnett. But this defendant denies that he knows the character or value of that claim or of any one of the others, or that he ever agreed to take them. On the contrary, the answer states that this defendant only consented to show them to his counsel and take his advice on them, being willing to accept them, if worth anything, and that he did show them to his counsel and was informed that they were bad and not collectable, and was advised not to take them; and that thereupon this defendant desired the counsel (a gentleman of the bar, since dead) to return the papers to Sloan, and it was done. The answer admits that Sloan gave this defendant an order on C. Elms for $100 on account of this debt, but it denies that Elms paid anything on the order, and states that he (this defendant) left it, with other papers, in this State when he removed to New Jersey; and the answer then avers that the order on Elms was the only claim ever received from Sloan by this defendant, and denies that this defendant ever concealed from the plain- (470) tiff any part of the transactions between him and Sloan.

Upon the coming in of the answers, the court dissolved the injunction as to all except $100, being the amount of the order on Elms, and, as to that sum, directed the plaintiff to have credit on the judgment, to which the defendant submitted. The plaintiff then replied to the answer of Woodruff, and the cause stood

over as upon an original bill, and, proofs having been taken, the cause was set for hearing and transferred to this Court.

Among the plaintiff's proofs is the deposition of Sloan, the principal debtor, taken under an order, subject to all just exceptions. It is objected to, on the part of the defendant, and the first question in the case is upon that objection. In the opinion of the Court, Sloan is not a competent witness between these parties to establish satisfaction made to his co-defendant. He could not have been a witness on the trial at law for that purpose, because his liability to Davidson was for more than that to Woodruff. To the former he would be liable for the debt and the costs of the action paid by his surety, while to the latter he is liable for the debt only. Now, the present proceeding is but a new trial in another forum, upon the ground that the plaintiff lost his defense at law.

The other material evidence is an order of Sloan on Elms to pay Woodruff the sum of $100, and a receipt, dated April, 1833, given by Woodruff to Sloan for that order, to be applied to Sloan's note, taken up by Woodruff, and the deposition of Charles Elms. It does not appear from which side the order on Elms comes—whether Elms produced it, or whether it was found among the papers of Woodruff or those of his deceased counsel. It has on it an acceptance by Elms, but no receipt from Woodruff, nor any cancellation.

The witness, Elms, states that, in 1821, or 1822, or 1823, he was very largely indebted for merchandise to one Goodman, of Charleston, in South Carolina, and confessed judgment thereon for upwards of thirty thousand dollars, and, by way of collateral security, assigned to the creditors bonds and notes to an amount somewhat exceeding $20,000; that Goodman collected upon the assigned claims about the sum of $10,000, and that, after
(471) applying the sum and other payments made by the witness, there remained a balance due on the judgment of $9,000 or upwards; that Goodman himself failed in 1825 and made an assignment to a trustee for his creditors, but that Goodman and his trustee wrote to him (Elms) that they still held of the assigned claims about $10,000 or $12,000, and that if Elms would pay $1,000 on the debt to them they would acknowledge satisfaction of the judgment against him, and also resign to him all the remaining and uncollected notes or securities. He then states that in the latter part of 1832, being indebted to John Sloan about $2,500, and also to Robert Watson upwards of $2,000, he transferred to Sloan and Watson as a security for their debts all his interest in the debts originally assigned to Goodman, and handed them over the letter from Goodman and

his trustee, and also transferred or assigned to them "a bunch of promissory notes in the hands of Thomas McClure, in Chester, South Carolina, amounting to about $1,200, subject to the payment of about $50," and also transferred all the interest in the estate of George Barnett, late of South Carolina, deceased, which Elms had on the husband of a sister of said George, and that said estate consisted of land and a wagon and team and other chattels, of the value altogether of $2,000, but that the mother of said George had a life estate in the land, and that she and the rest of the family removed to Tennessee in 1833. The witness then enumerates several of the debts transferred to Goodman, which he thinks were good, but he is unable to say whether any of them were among those which Goodman had not collected and still held, as stated by him and his trustee.

This witness then states that he accepted and afterwards paid, in 1833, to Woodruff the order drawn on him by Sloan for $100. When Woodruff presented that order, the witness states that Woodruff consulted him on the other papers which Sloan had offered to give him, and asked him whether the papers he (the witness) had let Sloan have were good or not, and was informed by the witness that some of them could be collected if proper exertions were made; and that Woodruff subsequently informed the witness that he had got Sloan's rights to these papers and was to use all exertions to collect them before he (472) could go on Davidson, the plaintiff.

The other evidence consists of the depositions of two persons, who say that the father of George Barnett had a lease for years of some Indian lands, containing between 200 and 300 acres and worth $3 or $4 per acre, and that he left a widow and six children, and George claimed the land after the death of the widow, and if he was so entitled, his estate would be worth perhaps $1,500; but that he died in 1831, and the mother and the family, except Mrs. Elms, removed before 1833 to the western part of Tennessee, where the mother carried all the personal property, and where she is still living.

Upon this evidence the Court is constrained to say that the plaintiff is not entitled to relief against the direct and precise denials in the answer that Woodruff had received any money on the supposed assignments to him, or that he had ever received from Sloan such assignments or any such security, excepting only the order for $100. The contrary is not pointedly stated in Elms' deposition. He does not profess to have any personal knowledge of the transaction, whatever it was, between Sloan and Woodruff. He only speaks, from recollection, of what he thinks Woodruff said, after consulting him in respect of the

claims he had transferred to Sloan and Watson. He was not only not present at the negotiations between Sloan and Woodruff, but he does not profess to have seen any assignment by Sloan, nor even his own assignment to Sloan and Watson, in the possession of Woodruff. It is easy, therefore, for him to mistake the statement by Woodruff of Sloan's proposition or offer as a statement of a final arrangement. Besides, the witness, although not excluded by interest, is under a strong bias to make these claims effectual to Sloan in payment to Woodruff, because thereby he may with a better face insist on them as a payment from himself to Sloan and Watson. There are other circumstances of strong suspicion that the witness either mistook the statement of Woodruff or misrepresented it. In the first place, the delay in filing this bill and setting up the supposed assignment, forcibly corroborates the statement of the answer.

(473) It is said in the bill that the plaintiff was not informed of the alleged assignments until just before the bill was filed. Admit it; and there seems to be the stronger reason for holding the information, thus received by him, to be untrue. It would be hardly credible, upon explicit and unbiased evidence, that Sloan should have had such a transaction with Woodruff, and made the alleged stipulation to protect his friend, Davidson, until Woodruff had failed, after a trial, to receive his debt out of the claims assigned, and, yet, that he should not for nearly four years have informed that very friend of the care he had taken of his interest, although the parties lived in the same village. The silence of Sloan upon that point, to say nothing of that of Elms and Woodruff, affords a strong presumption that, although he may have offered such a transfer, yet it was never completed. Then that presumption is further fortified by the circumstance that no one of the claims supposed to have been assigned is traced by any other person to Woodruff's hands, nor any dealing showed with one of them by him at any time, nor even an inquiry made by him, except from Elms. He could have no motive to accept them merely to suppress them.

Moreover, if such an assignment had been made, we cannot doubt that some permanent acknowledgment of the receipt of the papers by Woodruff, and of the terms, would have been taken. We find that Sloan took a receipt for the $100, not which he paid, but for which he gave an order on Elms, and yet it is suggested that he assigned demands to the amount of many thousand dollars, to the surplus of which he would be entitled, without the smallest scrip to show it. Again, the worthlessness of the claims, obvious to any man of even a slight knowledge of business, repels the belief that Woodruff could have entered into the supposed

agreement or, indeed, accepted the assignment upon any terms interfering with his immediate recourse on Davidson. The value of the claims for $10,000 or $12,000, held by Goodman's assignee, may be readily inferred from the acknowledged facts that they had been so held for ten or twelve years, and that no doubt, in answer to an inquiry from Elms as to the state of the debt he owed them, they inform him that for (474) $1,000 they will not only give up those claims, but also the judgment against Elms himself, on which a balance of upwards of $5,000 was due. To use the mildest term it is not probable that Woodruff would undertake to pay those persons the sum of $1,000 for the sake of getting possession of securities in South Carolina on which persons residing there had not been able to realize a cent in so long a period. The same may be said of what the witness calls a "bunch of notes" in the hands of McClure in South Carolina, on whom does not appear, for $1,200 pledged for $50, but at what time does not appear. The very circumstance of pledging notes to such an amount for so paltry a sum as $50, and without specifying the debtors, assures one that they could not have been worth looking after, especially as no evidence is given that a single one of the debtors or of those whose notes Goodman held was, in 1833 or at any time since, solvent. The evidence is equally deficient in establishing such a value for Elms's share of Barnett's property as would induce the belief that it was worth prosecuting. His father's will is not shown to establish his right to the land. But even if it belonged to him after the death of the mother and he died intestate and owed no debts, the share of Elms and wife would be worth only between two or three hundred dollars, for the possibility of recovering which Woodruff would have hardly undertaken to go, first, to South Carolina and then to the western district of Tennessee.

Impunged as the testimony of a single witness Elms is, by those concurring circumstances, and corroborated as the statements of the answer are by them, the latter must, according to the law of this Court, prevail.

We cannot believe or say that the alleged assignments were made to the defendant Woodruff, and therefore as to everything except the sum of $100, already decreed to the plaintiff, the bill must be dismissed, and with costs to the defendant Woodruff.

PER CURIAM. Decree accordingly.

(475)

FRANCIS N. WADDELL and Wife v. JOHN L. HEWITT.

When two parties meet to conclude a contract for the purchase of land, and, the deed being present, one says, "I offer this deed to you," and the other replies, "I accept," this amounts to a delivery, although the deed does not pass from the hand of the one to that of the other, but remains in the possession of a third person, the friend and agent of each.

THIS cause was transmitted by consent of parties to the Supreme Court for hearing, from ORANGE Court of Equity, at Spring Term, 1841. The pleadings and proofs are to be found in the opinion delivered in this Court.

*Winston & Iredell* for the plaintiffs.
*Norwood* for the defendant.

RUFFIN, C. J. In the latter part of the year 1838 the plaintiff, F. N. Waddell, made a parol contract with the defendant for the sale of a plantation situate on the Cape Fear River near Wilmington, of which the plaintiff and his wife in her right were seized in fee. The price was $4,000, payable in four equal installments, of which the first was to be paid on 1 January, 1839, upon receiving a deed, and the other three to be paid on 1 January, 1840, 1841 and 1842; and for the same the defendant was to execute his bonds with approved personal security. Under this contract the defendant took possession immediately, with the consent of the plaintiff, and on 1 January, 1839, he paid to the agent of the plaintiff in Wilmington (the plaintiff himself residing in Orange) the first installment of $1,000. At that time the plaintiff was absent from the State on a journey to Louisiana, and it was agreed between his agent and the defendant, in order to avoid any inconvenience or risk to the defendant from the death of the plaintiff, that the agent should not pay over the money until the plaintiff should return, and together with his wife make the defendant a deed. The plaintiff did return in the succeeding summer, and on 15 August, 1839, he and his wife executed a conveyance to the defendant by
(476) bargain and sale, which they duly acknowledged before a judge, so as to make the deed effectual against the wife, and the plaintiff sent it to his agent with directions to deliver it to the defendant and to receive his bonds, according to the contract, for the residue of the purchase-money. The agent, W. C. Lord, shortly thereafter offered the deed to the defendant, who objected to it on the grounds that Mrs. Waddell had not joined her husband in the warranty, and that it did not describe the

lands by corners, course and distance, but only by its name, "Buchoi," and by calling for the lines of the adjoining proprietors. For these reasons the defendant declined receiving the deed. After further conferences the defendant requested Lord to let him have the deed to lay before counsel, and for that purpose the deed was delivered to the defendant, who after consulting counsel still expressed his dissatisfaction, and returned the deed to Lord as the plaintiff's agent.

The controversy between the parties is whether the deed in question was subsequently accepted by the defendant so as thereby to execute the parol contract of sale or not. The bill states that it was thus accepted in December, 1839, and that thereupon the defendant, in discharge of the second payment, gave to the plaintiff a bond on one Gibbs, and offered his own two notes for the remaining installments; but that, upon the plaintiff mentioning that he was entitled to sureties on those two notes, the defendant said he would procure them and return the notes when completed to Lord, the agent; that in the meanwhile it was agreed that the defendant should leave the deed in the possession of Lord as a security to the plaintiff for the compliance of the defendant. The bill then states that upon the completion of this arrangement the plaintiff returned Gibbs's bond to the defendant upon the understanding that the defendant's own note should be fully executed by the sureties in a few days, and that then all three should be redelivered together. And the bill further charges that by the direction of the defendant the deed was kept by Lord as a security to the plaintiff until the residue of the purchase money should be paid or secured, as stipulated. The defendant, however, did nothing more in the business; and in the month of January following he (477) gave notice that he should not give his notes, and abandoned the premises and instituted suit against Lord for the $1,000 that had been paid.

The bill was filed in February, 1840, and prays that the land may be declared to be a security for the three last installments of the purchase money, and that the defendant may be decreed to perform his agreement by assigning and delivering Gibbs' bond and executing his own notes, with sufficient sureties, and that, in default of payment of the moneys then due, or as they might fall due, the same should be raised out of the land by sale or otherwise, and for general relief.

The answer, after admitting that Lord had delivered the deed to the defendant to enable him to have the opinion of counsel on it, and that he returned it to Lord with objections, denies that the deed was ever delivered to the defendant in any other man-

ner or for any other purpose, or that he at any time expressed himself satisfied with the deed, or accepted or agreed to accept it. The answer denies that the defendant passed Gibbs' bond to the plaintiff as a payment, and states that, at the time alluded to, the defendant informed the plaintiff of his objections to the deed, but stated to him that, upon getting a good deed, he was ready to direct the $1,000, then deposited with Lord, to be paid over, and to give Gibbs' bond, due 1 January, 1840, for the second payment, and to execute his own bonds for the residue, and that Waddell said he would take Gibbs' bond if it would answer as a payment to certain creditors of his in Wilmington, and requested the defendant to put the bond in his possession, that he might submit it to those creditors. The answer states that Gibbs' bond was delivered to Waddell for that purpose, and for that only; and that, after going out with it, he returned and said that it would suit, and then gave it back to the defendant; and it is then further stated that Lord wrote two notes for the residue of the price, and that the defendant signed them and took them for the purpose of procuring their execution by
(478) some person as his surety.

The answer avers that no part of the contract was then considered as completed, but that the understanding was that Waddell should make another and proper deed, and that as soon as the defendant should be satisfied as to the title, he would deliver Gibbs' and his own bonds, and not otherwise. And the answer further denies that the defendant delivered the deed to Lord as a security for the plaintiff, or that he ever had it in his possession, excepting only for the purpose of submitting it to counsel. The answer then insists that as the contract was not in writing, it is void and cannot be enforced, under the act of 1819.

The deed of August, 1839, is identified by and annexed to the depositions of William C. Lord and Alexander Anderson, who are the material witnesses in the cause. The former, after stating the terms of the original contract, the offer of the deed to the defendant by him as the agent of the plaintiff, and the refusal of it in the summer or autumn of 1839, as already set forth, then deposes that, upon information given by him of that refusal to Waddell, the latter came to Wilmington in December, 1839, and had several interviews with Hewitt, in the presence and at the office of the witness, upon the subject of the execution of their contract; that at first Hewitt insisted on his former objections to the deed then in the possession of the witness; but that, after several conferences, Hewitt agreed to accept the title and deed as it was. After having done so, Hewitt requested the plaintiff to take a bond on R. Gibbs for the next payment; and to that

the plaintiff, after ascertaining that he could use the bond without loss, assented on his part. Hewitt then requested the witness to write notes for the two remaining payments, to be executed by Hewitt and one Godwin, to whom the defendant said he would apply to become his surety, and the witness did so, and Hewitt signed the notes and took them to obtain Godwin's name.

The witness further states that Waddell informed the defendant that he had at home the title papers for the land, from which he could obtain the metes and bounds, and agreed that he would at any time furnish them to the defendant, that he might have the land surveyed, and also would at any subsequent (479) time execute such further title as Hewitt might wish. Hewitt then expressed himself satisfied, and said he was glad the matter was arranged, and sorry he had put Waddell to the trouble of coming from Orange. Waddell then expressed the wish to return home, and said that, as the business was then settled, he supposed it was unnecessary for him to wait for Hewitt's return from Godwin's, who lived in the country, to which the other party assented. The defendant then delivered to the witness Gibbs' bond in payment, and promised to bring him the other notes, duly executed, in a few days; and Waddell, after directing the application of the bond of Gibbs and the other funds, left Wilmington for his residence. Three or four days afterwards, the witness states that Hewitt came to him, without having obtained Godwin's signature, and proposed to give another person for his endorser, to which the witness assented, and the defendant went away for the purpose of getting the signature of this last person. In the course of a few hours, however, he returned to the witness, without the signature, and, after again alleging that the title was not good, declined doing anything further in the matter; upon which the witness, after stating to him that Gibbs' bond had been received as a payment only on the understanding that the other two bonds should be executed by good sureties and delivered, returned Gibbs' bond to the defendant and gave him notice that he would be looked to for a payment in cash, on the first of the next month, of the $1,000 that would be then due.

Alexander Anderson states that Waddell was indebted to him and another person in Wilmington, and that in December the plaintiff and the defendant came, together, to him to ascertain whether the note of R. Gibbs would be received by his creditors as a payment from Waddell; that Hewitt stated that he was then making Waddell a cash payment on the purchase of the Buchoi plantation, and that said bond was equal to cash, as Mr. Gibbs had promised to pay it on the first day of January next ensuing,

or out of the first rice he sent to market; and that, upon the statement being made by Hewitt, the witness agreed that, (480) should Waddell offer that bond, it should be received; and then the parties went away on their return to Lord's.

The testimony of Mr. Lord sustains, we think, the statements of the bill upon the point of the delivery of the deed to the defendant, or, rather, of his acceptance of it, as being in the hands of Lord for him, which is tantamount to a delivery to himself personally. Were not the statements of the answer upon this subject in opposition to those of the witness, there would be no hesitation in declaring the fact to be as stated by the witness. It is, however, the settled law of the Court that the answer, so far as it is responsive to the bill, is evidence for the defendant, unless upon its face it be false, or contradictory, or evasive, or be contradicted by two witnesses, or, at least, by one, corroborated by circumstances. It might, indeed, be questioned whether this case comes within the rule. The bill is not brought for specific execution of a contract of sale, but rather to enforce a security, by way of a kind of equitable mortgage, created by the deposit of this deed with the plaintiff or his agent. The gist of the case, therefore, is the deposit of the deed, and its delivery and acceptance only come in incidentally. But, supposing the case to come fully within the rule alluded to, as probably it does, it seems to the Court that, judicially speaking, and giving to the answer all the weight it can claim upon artificial principles, the decree must be according to the statement of the witness, and not according to that of the party. In this point of view, it is essential to ascertain whether the deed was accepted; for if it was not, the contract, as an executory parol one, is void, under our statute of frauds. We think there was a delivery and acceptance, though certainly the point might be clearer than it is.

Lord states precisely and positively that the defendant, as the result of the conferences in December, 1839, accepted the title and deed as it was. Now, this was in the office of Lord, and with a knowledge that the deed had been already acknowledged by the vendor and his wife, and that Lord had it there for the use of the defendant. Each party expressed himself as considering their preceding misunderstanding *settled,* and pleased that it (481) was settled. Now, the only misunderstanding that had existed was whether the defendant should accept *that* deed. When he determined to accept it, the deed being then present, and promised to make a payment in Gibbs' bond in anticipation of the installment that would be due the succeeding month, nothing less can be understood than that the parties then considered that Waddell had done all in relation to that deed

that he was to do or could do. When Waddell said, "I offer this deed to you," and the other replied, "I accept it," it amounted to a delivery, although it did not pass from the hand of the one to that of the other. It was out of Waddell's hands and control, and must therefore be considered as delivered. It is true that Lord was Waddell's agent, but after that transaction he was not his agent to deliver the deed, but merely to keep it, as a deed belonging to Hewitt, for the purpose of compelling Hewitt to pay or secure a balance of the purchase money. The answer, indeed, denies that the defendant did pass Gibbs' bond to the plaintiff, even conditionally. But it admits there was a proposition to that effect, and that notes were drawn for the defendant and his sureties to give. Why was that done? The witness says it was because the defendant was satisfied and had accepted the deed and was proceeding to fulfill the contract on his part. The answer says it was only to be in readiness to do so when the plaintiff and his wife should afterwards make a deed that would satisfy him. Which of the two accounts seem most probable—most likely to gain credence? Why at *that* time propose a mode of paying an installment due within a few days, and propose notes for the other installments, if nothing was to be done until a further deed should be made, when, according to the defendant's objection, no satisfactory deed could be made until there had been a survey, and, to effect that, the vendor would have to return to Orange for the title papers, and then again to Wilmington? But the answer is not only contradicted, with respect to the bond of Gibbs, by the testimony of Lord, but also by that of Anderson. He deposes that Hewitt stated explicitly that he was *then making a payment* to Waddell, and that he considered Gibbs' bond equal to cash. Upon this point, then, both of the witnesses agree; and the fact is a very important (482) one as a test of the credibility of the answer, and also as showing the intention of the parties and the real transaction between them; for, as the dispute had been whether the defendant should accept the deed which had been made, when we find him afterwards making a payment on the contract and into the hands of the very person from whom, as the agent of the vendor, he had refused to take the deed, it furnishes a strong presumption, independent of the positive testimony of the witness, that the defendant changed his mind, did accept the deed, and that the possession was retained by Lord afterwards merely as a restraint upon the defendant's power of alienation and a temporary security to the vendor until the vendee should give notes as stipulated. But it was said that Lord states the plaintiff was to do other things, and that, according to the last agreement, he

bound himself to furnish the boundaries, and, after a survey, to make a proper conveyance, and that it does not appear he has done anything of the kind. These stipulations of the plaintiff however, do not at all conflict with the averment that the defendant accepted the deed that was made, but they rather sustain it. They amount to a new agreement for *further* assurance, and imply that in the meantime the vendee had accepted and held under the assurance already made. When, upon the application of the defendant for the boundaries of the land, and for a conveyance in conformity to a survey, the plaintiff shall refuse compliance, it will be time enough for us to declare the consequences. Merely as evidence of the manner in which the parties regarded what had been done, an agreement of the kind last mentioned imports, not that what had been done was null, but that it should stand and be confirmed, if requisite, by whatever was needful to its confirmation.

It must therefore be declared that the deed from Waddell and wife was delivered to and accepted by the defendant, and that it was left by him in the hands of the witness, Lord, for the benefit of the plaintiff, F. N. Waddell, and as a security for the fulfillment of the contract of purchase on the part of the defendant;

(483) and that the land is, in this Court, to be regarded as a security for such part of the purchase money as may remain unpaid, and the same, if not paid by the defendant within a reasonable time, must be raised out of the land, by sale or otherwise; and it must be referred to the master to inquiry of the sums due in the premises, together with the interest thereon.

PER CURIAM. Ordered accordingly.

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