NORTH CAROLINA REPORTS.

VOL. 37.

EQUITY CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1841

TO

JUNE TERM, 1843

(BOTH INCLUSIVE).

REPORTED BY

JAMES IREDELL.

(2 IRE. EQ.)

ANNOTATED BY

WALTER CLARK.

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*Elected 1842.

CASES REPORTED.

CASES CITED.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1841.

THE STATE ON THE RELATION OF EDWARD STANLY, SOLICITOR FOR THE STATE, v. JOSEPH McGOWEN.

1. A devise of funds "for the establishment of a free school or schools for the benefit of the poor of a county" is a valid devise, and is not such a perpetuity as is prohibited by the Constitution of this State or by the common law.

2. In the case of an express, direct trust, confessedly open and unexecuted, no length of time will operate as a bar to a demand by the *cestui que trust* against the trustee.

APPEAL from an interlocutory decree of *Bailey, J.*, at Spring Term, 1841, of Duplin Court of Equity, overruling a demurrer filed by the defendant.

The case commenced in 1836, by an information filed (10) in the Court of Equity of Duplin County, in the name of the State by Edward Stanly, solicitor in the Second Judicial District. This information alleged, in substance, as follows: That theretofore Alexander Dickson, late of the county of Duplin, deceased, being possessed of a very considerable real and personal estate, consisting of various descriptions, did, on or about 19 June, 1813, duly make and publish his last will and testament in writing of the date before mentioned, and therein and thereby, among other things, did devise and bequeath in manner and form following, that is to say:

"*Imprimis,* my will is, and so I direct, that all my just debts and funeral expenses be first paid out of my estate by my executor hereinafter named. It is my will and desire that all my lands be sold at public auction by my executors for the highest price that may be got, in the following manner, that is to say, the manor plantation, etc. (here the testator enumerates his different tracts of land and describes the manner in which they are to be sold). Item. I leave and bequeath to my nephew John Dickson, son of my brother, Robert Dickson, of Cumberland County, Blocker, Terry, my young negro wench named Amey and her increase to him and his heirs forever. Item. I leave and bequeath to my nephew John McGowen my negro woman named Nancy and her increase to him and his heirs forever. Item. I leave and bequeath to my nephew Jones Dickson $500, to be paid in notes, if so much in possession at the time of my death; if not, to be raised out of the sales of my estate and paid to him by my executors. The residue of my negroes is to be sold in the following manner, that is to say: old Lucy and her daughter Lucy and her son Frank and her increase hereafter to be sold in one lot and not separated; also Kit and her three youngest children that she may have at the time of my decease to be sold in one lot and not separated. Old Tarisman is to be well treated by my executors, and not let him want for anything. The negroes not herein named are to be sold separate to the highest bidder. The remaining part
(11) of my estate, consisting of horses, cattle, hogs and sheep, household and kitchen furniture, and plantation tools of every description, and all kinds of crops and produce, are to be sold in the same way as my other property. The money arising from the said sales is to be collected by my executors when due, as soon as may be. Should there be any money, bonds, notes or accounts on hand at the time of my decease, my executors are to account for them; and after paying out all expenditures that may have accrued heretofore or may hereafter accrue, the net proceeds are then to be kept and put by my executors to the use of a free school or schools for the benefit of the poor of Duplin County."

The information then proceeded to state that the said testator did nominate and appoint John Dickson, of Cumberland County, and Joseph McGowen, of Duplin, executors of his said will, as by the said will or the probate thereof, whereunto the said solicitor for greater certainty referred, and prayed might be taken as part of this information, reference being had thereto, would more fully appear. The information further set forth that after-

wards the said Alexander Dickson departed this life without altering or revoking his said will. Whereupon, at July Term, 1814, of the Court of Pleas and Quarter Sessions of the county of Duplin, the aforesaid will was duly admitted to probate, and at the same time the said John Dickson and Joseph McGowen qualified as executors thereto and took upon themselves the execution thereof, and by virtue thereof possessed themselves of the real and personal estate of the said Alexander Dickson to a very considerable amount, and much more than sufficient to satisfy all the just debts and funeral and testamentary expenses. The information further showed that afterwards John Dickson, one of the executors who qualified to the said will, died, and that thereupon the said Joseph McGowen became sole executor of the said Alexander Dickson, and that the said Joseph McGowen received or ought to have received into his possession the whole of the real and personal estate of which the said Alexander Dickson died seized or possessed or entitled to, and of the money or other funds, the proceeds of the sales of all or any part of the aforesaid real and personal estate of the aforesaid Alexander Dickson, and which said sales were made, or ought (12) to have been made, by the said Joseph McGowen and John Dickson, or one of them. And the information further set forth that, at January Term, 1817, of Duplin County Court, Daniel Glisson, Edward Pearsall, A. McIntire and John Hunter, having been appointed to settle the accounts of the executors of Alexander Dickson, did report that there was a balance remaining in the hands of the executors of $10,821.49, and the further sum of $1,800, being the amount of eighteen shares of the capital stock of the State Bank of North Carolina. And the information charged that the said executors joined and concurred in the report aforesaid, and that since that time the defendant had failed to make to the county court aforesaid any return or report whatever, and had failed to deliver in writing to the clerk of the said court a full and particular account of the property confided as aforesaid to his management by the testator, Alexander Dickson, and of the execution of the trusts in the aforesaid will contained; and the information further stated that the said solicitor had reason to believe that the property aforesaid had been mismanaged, through negligence or fraud, and that there was reason to apprehend that the said Joseph McGowen would convey the property or funds beyond the limits of the State of North Carolina, by which means the intention of the testator would be defeated and the *cestui que trusts* would be deprived of the benefit of their legacy under the will aforesaid. And the information

then prayed that the said Joseph McGowen might, upon oath, answer the aforesaid allegations, and might set forth a particular description and account of all the property of his testator which had come or might have come to his hands and of the proceeds of such part thereof as had been sold, and that he might be compelled to apply the same to the uses and purposes set forth and specified in the will aforesaid, and that he might be decreed to give security for the immediate and due performance of the trusts mentioned in the said will and for the safety and forthcoming of the estate, real and personal, found to be in his hands or which ought to have been in his hands, or, (13) in case he fail to do the same, that he might be decreed to pay and deliver over the same to such person as this honorable court should appoint to receive the same; and that the defendant might be held to bail to answer such judgment as might be recovered against him upon the hearing of the information; and that such other and further relief might be granted as the nature of the case might require and as to the court should seem meet.

This information was sworn to by the solicitor, and the defendant was held to bail, by order of the court, in the sum of $20,000.

To this information the defendant, by his counsel, filed the following demurrer, to wit:

The demurrer of Joseph McGowen, defendant, to the bill of complaint of the State of North Carolina, by and through Edward Stanly, Solicitor of the Second Judicial District, complainant. This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer showeth that the said complainant has not in and by his said bill shown any right or title to the discovery or account thereby sought, nor any right, title or interest in the real or personal estate of the late Alexander Dickson, deceased, of Duplin County, bequeathed or devised by his last will and testament, as set forth in the said bill of complaint, and hath no right to call this defendant as executor of the said last will and testament to account in this court; and for further cause of demurrer this defendant saith the legacy or trust declared in the said last will and testament, set forth in said bill, in behalf and for the use of a free school or schools for the benefit of the poor of Duplin County, is void for uncertainty and indefiniteness as to who are the person or

persons entitled to enjoy the same, or for the want of a known and competent devisee to take the same; and for further cause of demurrer the defendant saith that the said legacy or trust is void because it is a perpetuity; and for further cause of demurrer the defendant saith that the said legacy or trust is not such a charity as this court has jurisdiction over or can (14) enforce, and as to so much of the said bill as seeks a discovery or account of all and singular the real and personal estate and effects which were of the testator, Alexander Dickson, at the time of his death over and above and beside the money, bonds, notes or accounts on hand at the time of his decease, this defendant doth demur thereto, and for cause of demurrer saith that the said testator in and by his said will did not devise or bequeath to his executors, to the use of a free school or schools for the benefit of the poor of Duplin County, any other estate, property or effects which were of his at the time of his death, save the money, bonds, notes or accounts which were on hand at the time of his decease; and this defendant saith he is advised that, according to the true construction and meaning of the said testator, in and by his said last will and testament he only therein and thereby devised or bequeathed to his executors, to the use of a free school or schools for the benefit of the poor of Duplin County, the money, bonds, notes or accounts which were of his and were on hand at the time of his decease, and no more and no other of his estate, real or personal, effects or credits; and for further cause of demurrer to the said bill of complaint this defendant saith that it appears, by the complainant's own showing by his said bill, that this defendant qualified as executor to the said will at July Term, 1814, of Duplin County Court, and took upon himself the execution thereof, and possessed himself of the real and personal estate of the said Alexander Dickson to a very considerable amount and much more than sufficient to satisfy all the just debts and funeral and testamentary expenses; and, further, that at January Term, 1817, of Duplin County Court, a balance was reported by certain persons, in said bill named, appointed to settle the accounts of the executors of the said Alexander Dickson, deceased, as remaining in the hands of said executors, of $10,821.49, and the further sum of $1,800, being the amount of eighteen shares of bank stock, and that said executors joined and concurred in the said report, and, as it so appears by the complainant's showing, that this defendant had assumed the burthen of executing the said will more (15) than twenty years before the filing of said bill of complaint, and also that he concurred in said report more than ten

years before filing the said bill; this defendant is advised he ought not and cannot be called on for the account and discovery sought by complainant, after so great a lapse of time. Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to the said bill and all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer thereto; and he humbly prays to be hence dismissed, with his reasonable costs in this behalf sustained.

JOSHUA G. WRIGHT,
WM. A. WRIGHT,
Defendant's Solicitors.

Upon the argument of this demurrer, at Spring Term, 1841, of the Court of Equity of Duplin County, the court ordered and decreed that the demurrer be overruled. From this interlocutory decree the defendant prayed for and was allowed an appeal to the Supreme Court.

J. G. Bynum for the State.
W. H. Haywood, Jr., for defendant.

GASTON, J. We are decidedly of opinion that the demurrer in this case was properly overruled. There can be no question but that the purpose to which the testator has appropriated the funds, of which an account is demanded by this bill, the establishment "of a free school or schools for the benefit of the poor of Duplin County," is one approved by the law as a public charity; and it is too late to contend, since the decision in *Griffin v. Graham*, 8 N. C., 96, that the establishment of a permanent fund for charitable uses comes within the mischiefs of a perpetuity, or is prohibited either by our Constitution or the common law as such. It was held by the majority of the Court in that case that, independently of the Statute of Elizabeth, wherever there was a trust and trustee, with general or specific
(16) objects of charity pointed out, a court of equity in this State might, as a matter of trust, take cognizance of it in virtue of the ordinary jurisdiction of that court. But were it not so, no doubt can now be entertained, since express jurisdiction over such subjects has been conferred on the court, and the mode of exercising that jurisdiction has been directed by Laws 1831 (chapter 24, section 5) and 1832 (chapter 14, sections 2, 3, 4). (Rev. Stat., ch. 18.)

It seems to us also very clear, upon an examination of the will, that the testator has devoted to this public charity, not merely what might remain of the money, bonds, notes and ac-

counts that should be on hand at the time of his death, but the *net* proceeds of all his estate. The will commences with the injunction that his debts and funeral expenses shall be satisfied out of his estate by his executors. It proceeds to give particular directions for the sale of his various tracts of land, which he carefully enumerates and describes. It then makes a specific bequest of a negro to each of his nephews, Robert Dickson and James McGowen. The testator then gives a legacy of $500 to his nephew, James Dickson, to be paid in notes, if so much in possession at the time of his death, and if not, then to be raised out of the sales of his estate, and afterwards proceeds to give special directions as to the sale of the residue of his negroes, and of the remaining part of his estate, consisting of "horses, cattle, hogs and sheep, household and kitchen furniture of every description, and all kinds of crop and produce." He orders that his executors shall collect the money arising from the sales as soon as may be, and that "should there be any money, bonds, notes or accounts on hand at the time of his decease," the executors shall account for them, and concludes the dispositions of his will thus: "And after paying out all expenditures that may have accrued heretofore or may hereafter accrue, the net proceeds are then to be kept and put by my executors to the use of a free school or schools for the benefit of the poor of Duplin County." The construction set up on the part of the defendant is too absurd to receive our sanction. It supposes, in the first place, that the testator has ordered the great bulk of his property to be sold and made no disposition of the proceeds.
In the second place, that he has directed a free school or (17) schools to be established out of a fund, in regard to which he doubted whether any such would exist at his death, and which, at all events, he supposed would be inadequate to pay the legacy of $500 specifically charged upon it. No one, we think, can reasonably doubt but that by the term "net proceeds" he meant the net proceeds of the subject-matter of his will—all the property embraced therein; that is to say, all that should remain thereof after satisfying his debts, the previous legacies and the expense of executing the will.

The remaining ground of demurrer is equally unfounded. The trust admitted by the demurrer is an express, direct trust, confessedly open and unexpected. No length of time operates as a bar to a demand by the *cestui que trust* against the trustee founded on such a trust, and therefore no length of time can be pleaded or made the ground of demurrer to such a demand. *Falls v. Torrance*, 9 N. C., 490; *S. c.*, 11 N. C., 412; *Tate v. Greenlee*, 9 N. C., 486.

This opinion must be certified to the court below, with directions to proceed with the cause; and there should be a judgment here against the appellant and his sureties for the costs of this Court. Ordered and decreed accordingly.

PER CURIAM.

Cited: Holland v. Peck, post, 260; *Miller v. Atkinson,* 63 N. C., 541; *Peacock v. Harris,* 85 N. C., 151; *Hodges v. Council,* 86 N. C., 183; *Keith v. Scales,* 124 N. C., 511.

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(18)

ALEXANDER LITTLE v. SOLOMON MARSH.

1. If a bond, note or bill be given to the wife, or to the husband and wife, during coverture, the legal title vests in the husband, on his assent, and he may sue alone or join his wife.
2. So if a slave be conveyed to a wife during coverture, the legal title vests in the husband, if he assents to the conveyance, and possession of the slave for a length of time is evidence of such assent.
3. Where an injunction has been granted, and the defendant puts in an answer which is apparently deficient in frankness, candor or precision, or is illusory, the injunction will be continued till the hearing.

APPEAL from an interlocutory decree of the Court of Equity of ANSON, his Honor, *Pearson, J.,* presiding.

The complainant, Alexander Little, filed his bill against Solomon Marsh at Spring Term, 1841, of Anson Court of Equity. In this bill the complainant alleged that, at March Term, 1838, of Anson Superior Court of law, a number of judgments were obtained against one William Ashcraft, of the county of Anson, at the several suits of Richard Kingsland & Co. and others (particularly mentioning them), amounting to upwards of eight thousand dollars; that executions issued on the said judgments returnable to September Term, 1838, of the said Superior Court, and that the Sheriff of Anson County levied the said executions on the following negro slaves, as the property of the said James Ashcraft, viz., Clarissa and her five children, Sanford, Matilda, George, Ann and Harriet; and that the said sheriff did, on 12 September, 1838, sell said negroes at the courthouse door in the town of Wadesboro to satisfy said several judgments, and that the complainant became the last and highest bidder for the sum of $1,455. The complainant further charged that the
(19) defendant in the said executions, viz., the said James Ash-

craft, married the daughter of the defendant, Solomon Marsh, several years ago, and that upon the marriage of the said James Ashcraft with the daughter of this defendant, or in a short time thereafter, the defendant gave the said woman Clarissa, who was at the time a small girl, and who is the mother of the said Sanford, Matilda, George, Ann and Harriet that were sold by the sheriff as aforesaid, to the said James Ashcraft or his wife, and executed and delivered a deed of gift or bill of sale, or some other instrument of writing whereby the defendant, Solomon Marsh, conveyed all his interest and title in said negro girl Clarissa unto the said James Ashcraft or his wife; and that said negro girl Clarissa remained in the possession of the said James Ashcraft for fifteen or twenty years, during which time she had the five children before mentioned; and that the said James Ashcraft continued in the possession of the said negro slaves, exercising all acts of ownership over them, paying taxes for them and receiving credit in part on account of his interest and property in said slaves, until the said James Ashcraft became embarrassed in his circumstances, and until a short time before the levy and sale were made by the sheriff as aforesaid, when the said James Ashcraft and the defendant, combining and confederating together how to injure and defraud the creditors of the said James Ashcraft, came to an understanding and agreement of some kind whereby the said James Ashcraft surrendered up the possession of the said negroes to the defendant, Solomon Marsh, and at the same time surrendered up and delivered over to the said Solomon Marsh the deed of gift or bill of sale for the said Clarissa, the mother of the said children, which bill of sale or deed of gift, the complainant charged, had never been recorded. The complainant further set forth that the said James Ashcraft resided in the immediate neighborhood of the defendant ever since the marriage of the said James with his daughter, and that it was generally understood and believed in the neighborhood that the said slave Clarissa and her said children were the property of the said James Ashcraft; and that the said Solomon Marsh never pretended to claim (20) the said negro slaves from the time he gave them to the said Ashcraft until about the time the said executions were levied by the sheriff as aforesaid on said slaves, and that so far from claiming the said slaves as his (the defendant's) own property, the complainant was informed and believed that the defendant did, on some occasion when inquiry was made of him as to the title to said slaves, say that he expected the title to them was in one Joseph White, inasmuch as said White was security for the said Ashcraft, and he expected that the said White had taken a

deed of trust for said negroes to save him harmless, or words to that effect. The complainant further charged that after the levy made by the sheriff and before the day of sale, the complainant, upon learning that the defendant pretended to claim the said slaves, proposed to the defendant that if he, the defendant, would show to the complainant the deed of gift or bill of sale which the defendant had executed to the said James Ashcraft or his wife for said slaves, then, in case the writing did not convey the title to the said Ashcraft, or any title liable to execution for debts of said Ashcraft, the complainant would release the levy, so far as he was concerned, in the executions against said Ashcraft; but that the defendant refused to do so or to give the complainant any satisfaction in any manner as to the same. The complainant further set forth that he, together with Robert Strange and Thomas S. Ashe, Esquires, were counsel and attorneys for the plaintiffs in the executions against Ashcraft, and that they jointly gave the sheriff a bond of indemnity to sell the said slaves, and that the sheriff did sell the said slaves and that the plaintiff became the purchaser for the sum of $1,455, and took and now has the said slaves in his possession. The complainant further set forth that the defendant was present at the sale, and forbade the same; but the complainant was informed, and was informed so on the day of sale, that the defendant had procured one Jesse Llewellen, a man of property and a friend and neighbor of the defendant (who is now dead),

(21) to bid off the said slaves for him, the said Solomon Marsh, and that in consequence thereof the said Llewellen did bid several times for the said negroes, or some of them. The complainant further set forth that the said Solomon Marsh had since sued the complainant at law in an action of trespass *vi et armis*, claiming said slaves as his own and seeking to recover damages of the complainant for wrongfully selling the same. The complainant further charged that although the defendant, Solomon Marsh, did actually make, sign, seal and deliver a deed of gift or bill of sale for said girl Clarissa to the said James Ashcraft or to his wife, yet that the said deed of gift or bill of sale never was recorded, as required by law, and that the complainant was unable to avail himself of the benefit of his defense in a court of law for want of the said recording of the said deed of gift or bill of sale. The complainant then, after asking that the defendant might be required to answer on oath particularly and specifically all the matters charged in this bill, prayed that the said defendant might be compelled by a decree of the court to have the deed of conveyance made by the defendant to the said Ashcraft surrendered up to be recorded, or that

he might be compelled to convey all his title and interest in said negro slaves to the complainant, and that he should be perpetually enjoined from his action at law against the complainant; and that the complainant should receive such other and further relief as to the court should seem meet.

This bill of complaint was sworn to in due form. At the same term the defendant put in his answer. In this answer he admitted that he had understood there were several judgments obtained against James Ashcraft about the time charged in the bill, but the amount thereof, or by whom, the defendant did not know, nor did he recollect at what particular term of Anson court; and he supposed, but did not know, that executions issued on the said judgments. He also admitted that James Ashcraft several years ago married his daughter Eunice, and resides within a few miles of the defendant, in Anson. The defendant, for further answer, stated that after the said James Ashcraft was married and, he thought, after he had two children, and his wife was in much need of a nurse, the defendant, being the owner of a negro girl named Clarissa, then some ten or (22) twelve years old, placed the said girl with the defendant's said daughter to assist her in taking care of her children, and intending for his said daughter to have the services of the said Clarissa to her separate use, and for the said slave and her increase to be enjoyed by the children of the said Eunice; and to carry out this intention, some time thereafter—the defendant could not now state how long—he executed a paper writing to that effect, which he handed to his said daughter, therein conveying and securing the said slave Clarissa to the separate use of his said daughter (he thought) for life, and after her death, to her children equally. This paper writing was never delivered to James Ashcraft at all, nor in his possession, as this defendant believed, and he knew it was not intended that said Ashcraft should take any benefit under it; and defendant handed this paper writing to his daughter Eunice, he though about twelve or thirteen years ago; the defendant could not recollect the precise time, but he believed said paper was signed and handed to her about that time; and she retained the possession of it until about January or February, 1837, according to the best of the defendant's recollection, at which time the said Eunice handed back the said paper writing to the defendant, upon application; and the cause of the defendant's so applying to his daughter for it was that it was understood among the said slaves, to wit, Clarissa and her children, that the said Ashcraft was going to convey off to Mississippi all his own negroes, and he then had five valuable ones; and it was believed that in doing so he would also

run off privately with them, Clarissa and her children, and thereby Eunice and her children would be defeated of their claim to the property altogether; and to prevent this the defendant took back said paper writing, which (as he thought) was destroyed. He averred that he had it not in his possession and was not able to produce it, which he certainly would readily do, had he the said paper to produce; for it was no intention whatever of defeating any of Ashcraft's creditors which caused the defendant to take back the said paper writing; for the slave, Clarissa, and her children, were never liable, directly nor indirectly,
(23) for Ashcraft's debts, by the said paper writing which the defendant delivered to his daughter, as aforesaid. And the defendant further averred that at the time he took back from his daughter the said paper writing the said Ashcraft had five or more valuable negroes of his own, a considerable store of goods and much other valuable property and, the defendant believed, more than sufficient to have paid all his debts, if the same had been prudently managed. The defendant further stated that some time thereafter Clarissa and her children, under apprehension of being sent off to the South with Ashcraft's own slaves, as the defendant understood and believed, ran away of their own accord and came to the defendant's house, where they remained till seized by the Sheriff of Anson County and taken off and sold, as charged in the bill. And the defendant further stated that the said Ashcraft did send off his own slaves to the South, and they have never returned, as the defendant understood and believed. The defendant, further answering, stated that Ashcraft, when he married the defendant's daughter, had but very little property, if any, besides a horse, and, aided by his father, he procured a tract of land; and the defendant had but very few slaves, indeed, and was altogether unwilling to make title to a slave to him and opposed to putting one in his power or under his absolute control, though the defendant was willing and desirous to assist his daughter in taking care of and nursing her children, and his whole object was to secure the services of the slave Clarissa to the separate use of his daughter and for the said slave and increase to go to his daughter's children; and the said paper writing which he signed and handed to his daughter, as aforesaid, was to that effect, and so expressed upon the face of it, to the best of the defendant's recollection and belief; and the said slave Clarissa was not to be subject to the debts, disposition, or control of the said Ashcraft. The defendant, further answering, admitted that the slave Clarissa was permitted to remain at the house of the said Ashcraft from the time she first went there, as aforesaid, until she ran away, as

before stated, with her children and came to the defendant, and during the time she remained at Ashcraft's said Clarissa had four of the children stated in the bill; and defendant (24) said he thought it likely said Ashcraft might have paid taxes for the said Clarissa, but he did not know, and thought it most probable that said Ashcraft exercised some control over Clarissa and her children while at his house, for such was to be expected; but the defendant did not admit that said Ashcraft ever obtained any credit on account of having said slaves at his house, for no person ever could have relied with any certainty or had any assurance that said Ashcraft had any title or held any interest in said slave Clarissa and her children, for he never had any title or interest in or to said Clarissa and children. And the defendant denied that there ever was any combination or understanding between said Ashcraft and himself in regard to taking said Clarissa and her children back, as charged in the bill; and so far from it, the defendant stated that a misunderstanding and unfriendly feeling existed between the said Ashcraft and himself from the time he first set up merchandise in Anson until the present time, and the said Ashcraft had never been at the defendant's house on a visit since; and although he kept store for some years, the want of friendship was such that the defendant never traded nor bought goods at his store. And the defendant denied that the said slaves, Clarissa and children, and the said paper writing were surrendered up to him by said Ashcraft, as charged in the bill, but alleged, on the contrary, that the said slaves left Ashcraft's house in the nighttime, and Ashcraft was much displeased thereat, and came to the defendant's and said that he (Ashcraft) knew nothing of it, as the defendant had heard and believed; and the said paper writing was handed back by the said Eunice, as before stated, without the knowledge of the said Ashcraft, and the defendant admitted that the said paper writing was not recorded before it was destroyed, as aforesaid. The defendant denied that he ever informed any person, to his knowledge or belief, that the title to said Clarissa and children was in Joseph White, or any other person, nor does he recollect that he ever mentioned to any person that the title to the said slaves was in his daughter, or any other person, to the best of his recollection and belief, or say anything upon the subject or that the subject was (25) ever talked about. The defendant admitted that the complainant applied to know about or to see the title to Clarissa and children the day of the sale, and the defendant assured him that said Ashcraft never had a title of any kind to said slaves, and that his daughter had none then; he also admitted that Cla-

rissa and her children were sold by the Sheriff of Anson, at Wadesboro, some seventeen miles from the defendant's residence, and were purchased by the complainant at $1,455, or thereabouts, as charged. The defendant also admitted that he was present at the sale of the said slaves, and forbade the sale thereof, as he believed he had the right to do; but he denied most expressly that he employed Jesse Llewellen, or any other person directly or indirectly, to bid for said slaves for him or any other person. The defendant admitted that he had since sued the complainant for the said slaves, Clarissa and children, and that suit was now pending in Anson Superior Court of law. The defendant, further answering, averred that he fully believed that the whole cause of the said negroes coming into his possession was to avoid being sent off, and that was his entire object in taking up the paper writing before alluded to from his daughter, and not on account of any embarrassment under which the said Ashcraft was then laboring or with which he was threatened; for the defendant, in fact, knew but little about his circumstances, but knew he had much property, and fully believed him good for all his debts, and still believed he was; but the defendant's entire object was to prevent the said slaves from being sent off from the State and his daughter and children being deprived of their just rights, for the defendant never expected that said Clarissa and children would be made or attempted to be made liable for Ashcraft's debts. He further stated that four of Clarissa's children were born, as he believed, while she was at Ashcraft's house, and one named Harriet was born at the defendant's house after her return to him.

This answer was duly sworn to.

At this term a motion was made for an injunction to stay proceedings in the suit at law, which was refused by the court.

At Fall Term, 1841, the following interlocutory decree (26) was made: "On motion and argument, and it appearing to the court that since the last term a judgment has been obtained at law, in an action of trespass, by the defendant against the plaintiff for the sum of ....., and upon consideration of the bill and answer it is ordered, adjudged and decreed that the defendant be enjoined from taking out any execution upon his judgment at law until the further order of this court." From this interlocutory decree the defendant prayed an appeal, which was allowed upon condition that the defendant should not in the meantime take out any execution upon his judgment at law, but await the decision of the question in the Supreme Court.

Winston & Mendenhall for defendant.

Strange for plaintiff.

DANIEL, J. If the paper writing in this case was wit- (27) nessed—which the answer does not deny—it passed the title of the slave from the donor, by force of Laws 1806 (Rev. Stat., ch. 37, sec. 17), except that the ceremony of registration was required to give it full effect; and this title inured to the husband, at least for life (as remainders in slaves created by deed or writing after a life estate are good. Rev. Stat., ch. 37, sec. 22), unless the husband dissented therefrom; and his possession for twelve years is evidence that he did assent. 1 Prest. Touch., 142. If a bond, note or bill be given to the wife, or to the husband and wife, during coverture, the legal title vests in the husband on his assent, and he may sue alone, or he may elect to join his wife. 2 Leigh N. P., 1109, and the authorities there cited. The husband, being entitled to the instrument, could have had it proved and registered, under the Acts of Assembly giving further time for registering deeds, writings, etc., and then the husband's inchoate title would have been complete, at least for his life. The wife had no power to redeliver the paper writing to the donor. But it is said if the facts were so, Ashcraft would still have been but a trustee for the separate use of his wife and children, and the slaves would not have been liable to be taken in execution for his debts. If there was no doubt left upon the mind of the court that the paper writing contained that which the defendant in his answer says it contained, and contained that so expressed as to deprive the husband of any beneficial interest in the slave conveyed, we should certainly hold that the plaintiff was not entitled to the interference of a court of equity in his behalf. But the question in this case is whether Ashcraft took as a trustee or in his own right, and the answer of the defendant appears to us to be illusory and to want frankness, candor and precision. The defendant (28) admits that he took back the paper in 1837. If it were such as he states it, it might operate materially against the plaintiff or the creditors of Ashcraft. There was a strong inducement, therefore, for him to preserve the paper, if it was written as he would have us to suppose. But although he speaks with some degree of positiveness as to his *intent* in executing the instrument, he is vague and uncertain as to the language of the instrument which declares that intent. He describes it as having been made "to that effect," and "he thinks" it was to her separate use for life, and afterwards to her children. His answer is equally unsatisfactory as to the destruction of the instrument. His words are, "he thinks it is destroyed," "he has it not in his possession," etc. Spoliation is always looked upon by a court of justice with suspicion. The defendant, to be sure, was

not interrogated by the bill (as he yet may be) whether there was a subscribing witness, and who he was, nor in whose hands the defendant placed the paper after he got it back in 1837. He, however, is particularly cautious in not giving us any information on these points. Under all the circumstances we think the judge was right in directing an injunction until the hearing.

This opinion must be certified to the Court of Equity of Anson County, with instructions to proceed according to the same; and judgment must be entered for the plaintiff for the costs of this Court.

Ordered and decreed accordingly.

PER CURIAM.

Cited: Miller v. Washburn, 38 N. C., 165; *Deven v. Eller*, 42 N. C., 29; *Mosteller v. Bost, ib.*, 42.

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(29)

DAVID W. McREYNOLDS v. JOSHUA HARSHAW AND OTHERS.

1. Upon a motion to dissolve an injunction against a judgment at law, it is not proper to decree that the injunction be made *perpetual*, even as to a part of the judgment admitted by the answer to have been paid.

2. The proper course in such a case is to continue *till the hearing* the injunction as to such part, and dissolve it as to the residue, if according to the answer it ought to be so dissolved.

APPEAL from an interlocutory order, made in this case by the Court of Equity of CHEROKEE, at Fall Term, 1841, his Honor, *Manly, J.*, presiding. It was a bill of injunction to which answers had been filed; and at the said term the following decree was made, viz.:

"This case coming on to be heard upon bill, answer and exhibits, and after arguments of counsel being heard, it is ordered and decreed that the injunction in this case be dissolved, except for the sum of $300, with interest on that amount for twelve months, for which amount the injunction be made and decreed perpetual. Therefore it is further ordered that judgment be rendered against the complainant for the residue as mentioned in the pleadings. The question of costs reserved."

From which decree the complainant prayed for, and was allowed, an appeal to the Supreme Court.

The pleadings are fully stated in the opinion delivered in this Court.

No counsel for plaintiff.
Francis & Bynum for defendants.

RUFFIN, C. J. The bill was filed in July, 1841, and charges that in 1839 the plaintiff and the three defendants, Harshaw, Starrett and Hunter, entered into copartnership together, and as copartners made a contract with the Government to supply corn for some troops then quartered in Cherokee County, and to divide the profits and loss equally between the four; that the company furnished supplies to the value of $2,600, or thereabouts, and that the Government owed it that sum; that the capital advanced by the partners was about $2,000, of which the defendant Harshaw furnished, at one time, $400, and another time $600, and that for those two sums Harshaw took the joint notes of the plaintiff and of the defendant Starrett, which were intended merely as vouchers for Harshaw in the final settlement; and that the same defendant, Harshaw, also supplied corn to the value of $400, making, with the cash as aforesaid, the sum of $1,400 furnished by him; that of that sum, however, the plaintiff repaid $110 and also made other advances, in cash and otherwise, for the company, so as, in the whole, to amount to $690, and that the other two defendants made small advances each, of the amount of which the plaintiff is ignorant; that, owing to some difficulty between the contractors and the quartermaster, it became necessary to present the claim to the War Department at Washington, and that there also the adjustment was deferred; that during those delays the defendant Harshaw instituted actions at law in Macon Superior Court against the plaintiff and the defendant Starrett on each of their two notes, and also for the value of the corn furnished by Harshaw, and that the defendants in those actions agreed to confess and did confess judgments therein, provided the plaintiff at law, Harshaw, would stay the executions until the defendant Starrett could go to Washington, procure a settlement of the claim and the money due thereon, which he (Starrett) undertook to do and thereout to pay Harshaw such sum as, upon an adjustment between all the partners, might be found due to him. The bill further charges that Starrett paid to Harshaw the sum of $300 in part of the judgments, and that the plaintiff had paid the costs thereof; and that at the Spring Term, 1841, of Macon court, in the absence and without the knowledge of the plaintiff, the defendant Harshaw, upon an affidavit stating that Starrett had settled the account at the Department and been paid by the Government, procured an order of the court that executions might issue on the judgments for the sev-

(30)

(31)

eral debts; and the plaintiff at law has accordingly issued writs of *fieri facias* on them for the whole amount thereof, and without allowing credit either for the $110 paid by the plaintiff or the $300 paid by Starrett, and threatens to levy the money out of the plaintiff's property, and will do so, inasmuch as Starrett resides in Tennessee and has no property in this State; for which reason and because Starrett has not informed the plaintiff that he has received payment from the Government, and has so informed the defendant Harshaw, the bill charges collusion between those defendants to compel the plaintiff to pay the whole sum and forthwith, without the accounts between the parties being adjusted. The prayer is for an account of the partnership, an adjustment of the profits and loss, and payment to each out of the joint funds, if in the hands of Starrett, or when received, and in the meantime for an injunction against the further proceedings on the judgments at law.

The bill was sworn to, and, according to the prayer, the usual preliminary injunction was granted.

The defendant Harshaw alone answered. He admits that Starrett, about 10 September, 1840, paid him $300 on account of the debts due to him, and avers that he had been always ready to credit that sum, but was prevented by Starrett's saying that he could not then tell to which of the judgments it ought to be applied, and that he is willing it should be applied to either. The answer denies that any other payment had been made by either of the parties, and it also denies positively that there was a copartnership between this defendant and the other parties, or either or any of them. It states that the plaintiff and Starrett, as he understood from them, entered into partnership together and made a contract, on their joint account, with the quartermaster to supply provisions for the army, and not having funds of their own, they applied to this defendant to borrow money, and he lent them the two sums of $400 and $600, at different times, and took their notes therefor, and that they also

(32) agreed with him that if he had any corn to spare he might deliver it to the quartermaster under their contract and they would allow him the contract price; that he accordingly delivered corn to the value of $400, as ascertained by this defendant, and the plaintiff and Starrett, who confessed judgments therefor, and that all the executions were stayed, as mentioned in the bill. The answer further denies any combination or collusion with the other defendant, and states that the defendant Starrett had settled the claim at the Department and received the sum allowed by the Government, and that, having ascertained that fact, this defendant made the same appear to

the court of law and obtained an award of executions, and, furthermore, that the plaintiff knew of the intention to make the motion, and the same was opposed by counsel for him.

Upon the coming in of this answer the defendant Harshaw moved the court to dissolve the injunction, except as to the sum of $300 paid to him, as therein admitted. The injunction was dissolved accordingly; as to the sum of $300, with interest thereon from 10 September, 1840, the injunction was made perpetual and the question of costs reserved for the hearing, from which decree an appeal was allowed to the plaintiff.

The interlocutory decree appealed from is, we think, substantially correct. The bill states three grounds of relief, more or less extensive. The first is that due credits are not given for payments made on the judgments. Of that the plaintiff gets the benefit, as far as a payment is admitted. A second is that the executions have been taken out too soon, contrary to the agreement. To that two answers may be given: one, that the court of law was competent to decide that point, and has decided it against the present plaintiff; another is that the plaintiff is unable to deny that Starrett has received the money from the Government, and says only that he does not know that he has; whereas the defendant avers his information and belief that it has been paid, and it is not creditable that a just claim on the United States should be so long unadjusted, or that after adjustment the payment should be deferred. But the principal equity set up by the plaintiff is the partnership between (33) the parties, and that these were partnership contracts. Now, that is unequivocally denied by the answer; and, certainly, the circumstances of the case hang well with that denial. But, at all events, upon this motion the answer is to be taken, generally, as true; and that disposes of all the equity of this bill. We therefore think the injunction was properly dissolved.

In forming the decree an inaccuracy found admittance, which, for the sake of correct practice, and perhaps in some other cases for the sake of justice, ought to be noticed and corrected. We allude to that part of the decree which perpetuates the injunction for a particular sum admitted to have been paid. That was premature until the cause came to hearing. If the plaintiff had set down the cause upon bill and answer, this direction would have been right; but this was merely a motion of the defendant to dissolve the injunction, and the order on it ought to be only coextensive with the motion. When the cause comes to be heard, facts may be shown that would require other relief than that given. For example, the answer states that the sum in question was paid on a particular day, whereas it may have been a year

or two years before. The time of payment varies the rights of the parties, in respect of interest, at least, and therefore the plaintiff should have been allowed an opportunity of falsifying the answer by proofs. The proper order would have been to continue the injunction for that sum and the interest (according to the answer) to the hearing, and to dissolve it as to the residue of the judgment, and therefore to have granted, if required, execution from the court of equity against the plaintiff and his sureties for the injunction; and thus far, we think, the decree should be corrected. But as that was certainly not what the plaintiff felt to be the grievance which produced this appeal, the slight modification directed in the decree, which refers itself rather to the course of the court rather than to the merits of this cause, ought not to exonerate the appellant from paying the costs in this Court. The proper certificate will be sent to the court below.

Ordered accordingly.

PER CURIAM.

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(34)

MICHAEL AND THEODORE C. HEARNE v. KEVAN AND HAMILTON.

1. The assent of an executor to a legacy to himself may be implied from his conduct, showing that he held the property in his own right and not in his capacity as executor.

2. An assent to a legatee for life or years is an assent to him in remainder.

3. Where a testator bequeathed certain negroes to A until his daughter M attained the age of twenty-one years, and M married before she attained that age, but in the meantime the executor had assented to the legacy: *Held*, that the legal estate in remainder in these negroes was vested in M, and by consequence in her husband, and that after the death of M this legal estate might be levied on and sold under an execution against the husband.

APPEAL from an interlocutory decree of the Court of Equity of EDGECOMBE, at Fall Term, 1841, his Honor, *Dick, J.*, presiding, ordering the injunction which had been granted in the case to be continued until the hearing.

The pleadings and facts are sufficiently stated in the opinion delivered in this Court.

J. H. Bryan for plaintiffs.

B. F. Moore for defendants.

DANIEL, J. The bill was filed by Michael Hearne and (35) Theodore Hearne, plaintiffs, against Kevan and Hamilton, defendants, and the sole prayer of the bill is to enjoin the defendants from proceeding to sell under an execution which they have caused to be levied upon the undivided share of Danford Richards in certain negroes. Upon the bill and answer the facts appear to be as follows: Edward Hall, on 3 January, 1821, made his will. After providing for his wife, he devises and bequeaths to Lawrence H. Hearne lands, negroes and other personal property. The testator then says, "All the remainder of my negroes, after the death of my wife, I will and desire may be equally divided between my grandchildren, the children of Michael and Martha Hearne, to them and their heirs forever." The testator's wife died, and he then, on 28 January, 1821, added a codicil to his will, by which he devised and bequeathed that all the property which he had given in the original will to Lawrence H. Hearne "should be vested in Michael Hearne, with all the profits and interest thereof, until his son, the said Lawrence, shall attain lawful age. And I furthermore desire that the negroes which I have left to the other children of the said Michael Hearne shall be governed by the same circumstances." The will was admitted to probate at November Session, 1823, of Edgecombe County Court. Michael Hearne then (36) qualified as executor and took into his possession all the slaves and other personal estate. Michael Hearne at the death of the testator had five children, besides Lawrence, viz., Mary, Martha, Theodore, Joseph and Michael. Mary, in 1833, married Danford Richards, when she was upwards of fifteen years of age, and died a short time thereafter. Michael Hearne had kept the slaves in his possession, using them as his own, from 1823 to 1839. At February court, 1839, two of the four surviving younger children, viz., Martha and Theodore, filed their petition against the other two, stating in it that they were then of full age, and that they were all four tenants in common of the slaves bequeathed to them by their grandfather, and prayed a division. At the foot of this petition is the following entry: "We accept service of the foregoing petition and submit to any decree the court may make in the premises. Michael Hearne, guardian to Joseph E. Hearne and Michael Hearne, his minor children." The two plaintiffs in the petition had a decree, and eight of the sixteen slaves were allotted to them. Martha, on her marriage, conveyed her lot of these slaves to her brother Theodore as trustee in her marriage settlement. Richards, the husband of Mary, was not a party to the proceedings in the above-mentioned petition. Kevan and Hamilton, at August

Sessions, 1839, of Edgecombe County Court, obtained a judgment against Danford Richards for $2,974.20, and issued execution, and it was levied on the one undivided fifth part of the said sixteen slaves, as belonging to Danford Richards. The plaintiffs in their bill allege, first, that the executor of Edward Hall never assented to the legacy; second, that as Mary, the wife of Richards, died before she arrived at full age, the legacy had never vested in Richards, so that his creditors could take it in execution after the death of the wife; and, third, that a sale under the execution may cloud their title and involve them in expensive litigation. An injunction was granted. On the coming in of the answer, disclosing the facts as stated above, a motion was made to dissolve the injunction, which motion was overruled by the court, and the defendants appealed.

(37) First, it appears that Edward Hall, by his will, gave the one undivided fifth part of the slaves in question to Michael Hearne until his daughter, Mary, should arrive to the age of twenty-one years, then to the said Mary. The plaintiff Michael Hearne insists that he holds these negroes as executor, and we are disposed to believe that he never made an express assent to the legacy. But the law does not require an express assent; it may be implied from particular acts; and if an assent be to the particular tenant of a chattel, it will inure to the benefit of the remainderman, for the particular estate and the remainder constitute but one estate. Williams on Ex., 847. The executor's assent to his own legacy may, as well as his assent to that of another legatee, be either express or implied. It may be implied from his conduct; as, if an executor, in the manner of administering the property, does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character as executor, they are not evidence of his assent to the legacy. Williams on Ex., 850; *Doe v. Sturges*, 7 Taunton, 223. The testator says in his will, "I am but little in debt." The bill does not pretend that there were debts outstanding. The answer says there were no debts to pay. The same person, executor and particular legatee, had possession of the slaves for eleven years before the death of Mary, using them as his own. He makes no return to court of any inventory, account of sales, or account current of the estate. And again, he, in 1839, admits, by his acts in the petition, that the other four children had the legal estate in their legatory interest in the slaves. When did he assent to their legacies? There is no evidence as to the particular time when he did it. We must say that his acts are evidence that he assented to hold the slaves in his own right as legatee, and

that, too, before the death of Mrs. Richards. The remainder to her, therefore, was a legal, vested remainder in one-fifth of all the said slaves. Richards had a right to assign that interest, as by possibility it might have fallen into actual possession during the coverture. 1 Roper on Husband and Wife, 249; 2 Roper on Husband and Wife, 509-522. In *Knight v.* (38) *Leak,* 19 N. C., 133, we decided that a vested remainder in slaves might be sold, during the life of the tenant for life, under a *fi. fa.* against the person entitled to such remainder in right of his wife. But it is said that in that case the levy was during the coverture, and that if the wife dies before execution issues the property in remainder would belong to the administrator of the wife, and not to the husband by virtue of the marriage, and that the sheriff, then, could not sell it under an execution against him. In *McAlister v. Gilmore,* 36 N. C., 22, cited to support this position, the point was not raised or decided. It is further argued that if the wife had survived her husband the remainder would have belonged to her as a chose in action, and not to the executor of the husband; and therefore it is said if the husband survives and the particular tenant of the legacy, at the expiration of his estate, refuses to surrender it, the husband can get it only as the administrator of his wife. We have just seen that when an executor assents to the legacy to the particular tenant, the assent inures to the remainderman, so as to change both estates from equitable into legal estates, and that the particular estate and the remainder then constituted in law but one estate. Was not the possession, then, of the particular tenant, after the assent, the possession also of her in remainder? How can it be pretended that his possession is adverse to her, so as to make her interest a chose in action, before an actual reduction of the remainder into possession? If the wife were now alive, the creditors of Richards might levy and sell this remainder in the slaves. Shall the death of the wife change the rights of the creditors on this identical fund? We think not; and we are of the opinion that the defendants had a right to levy their execution on the undivided fifth of the whole of the slaves, or any number of them, which came to the five younger children of Michael Hearne from their grandfather, Edward Hall.

As to the allegation that a sale may cloud their title and involve them in expensive litigation, several answers present themselves. In the first place, the bill is not framed with (39) a view to the adjustment of the respective rights of the tenants in common, and is a creditor to wait until they choose to ascertain and settle them? In the next place, no facts are shown or alleged why a division may not be made as fairly and

as cheaply after an assignment by execution sale of Richards' share as before. The purchaser at that sale will succeed to his rights precisely, and to none other.

We think that the injunction should be dissolved with costs.

PER CURIAM.

Cited: Buffaloe v. Baugh, 34 N. C., 205; *Weeks v. Weeks*, 40 N. C., 121.

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(40)

REUBEN DEAVER AND OTHERS *v.* WILLIAM PARKER AND JOHN PARKER.

1. A purchaser of the Cherokee lands, under the Acts of Assembly of 1819, 1820 and 1821, does not acquire, before the full payment of the purchase money, such a title, either legal or equitable, as can be sold by execution.

2. Where one purchased at a sale under two executions the equitable interest of A in a tract of land, for one entire price and at one bid, and one of the executions was at the instance of a mortgagee for his mortgage debt, and another execution for a debt not included in the mortgage: *Held*, that the purchaser could not, in equity, claim to have the legal title conveyed to him, although he offered to pay the price bid, because the sale by execution for the mortgage debt by the mortgagee was void.

3. Where a purchaser of a tract of land has not for nine years paid any part of the purchase money, which by the terms of the contract was to have been paid immediately, nor has made any effort nor taken any step to perform his part of the engagement, he will not be entitled, in equity, to a specific performance of the contract by the other party.

THIS was a case transmitted by consent to the Supreme Court from the Court of Equity of HAYWOOD, at Fall Term, 1841, where, after the bill and answers had been filed, and depositions taken, and exhibits also filed, the case had been set for hearing.

The pleadings and proofs are stated in the opinion delivered in this Court.

Francis for plaintiffs.

J. G. Bynum for defendants.

(41) GASTON, J. By Laws 1819 (chapter 997), 1820 (chapter 1060) and 1821 (chapter 1115), directing the manner of selling the lands acquired by the State under recent treaties with the Cherokee Indians, it was enacted that every purchaser

should pay down at the time of sale one-eighth part of the purchase money and give bond and security for the payment of the balance in four equal annual installments; and that in no instance a grant should issue to the purchaser until the (42) whole of the purchase money should have been paid; and in case of failure to pay the whole when due, and if the money could not be obtained by a judgment on the bond, that the land should revert to the State and be liable to be sold again for the use and benefit of the State. By Laws 1823, ch. 1189, for the relief of such persons as became purchasers of the Cherokee lands sold under the authority of the State, it was enacted that any purchaser or the heirs of any purchaser of a tract so sold might assign and transfer his right, under the certificate of his purchase granted by the commissioners, by deed for good and valuable consideration; and such deed being proved or acknowledged and registered and filed in the office of the Secretary of State, with a certificate from the Treasurer that the purchase money of said tract had been paid to the State, it should be lawful for the Secretary to issue a grant therefor to the assignee, expressing in the grant that it was made to the grantee by virtue of the assignment of the original purchaser. On 18 October, 1820, James Allen became the purchaser of a tract of 100 acres, being section No. 7 in the Fourth District, and, after making payment of the eighth of the purchase money, executed bonds with security for the payment of the residue in four equal annual installments of $75 each. Allen afterwards (but it does not appear at what time or on what terms, nor whether he then made any *written* transfer) sold his interest under this purchase to William Parker, one of the defendants. On 23 September, 1823, William Parker purchased at the sale by the commissioners a tract of 65¼ acres, being the section No. 1 in the same district. It does not appear what was the price at which he bought, but after the payment of the one-eighth of the purchase money he gave his bonds with sureties to secure the payment of the residue. The two first of Allen's bonds were paid, but the two last remaining unpaid, and the land being liable therefor, Parker, who claimed to be entitled to the benefit of Allen's purchase, at December Term, 1828, of Haywood County Court, confessed a judgment to the State for the amount due upon those two last bonds, $172.74, with interest on $150 from 1 January, 1829. Whether *any* of the bonds (43) which Parker had executed to secure the payment of the purchase money of the tract No. 1 were then paid or not does not appear; but they were not *all* paid until *long* afterwards. Upon the judgment above-mentioned a *fi. fa.* issued, tested of

September Term, 1829, which was levied upon both these tracts as being the land whereon Parker resided and Parker's interest therein, and this levy was returned to court. From this same term of the court there issued also a *fi. fa.* against Parker for a fine of $20, imposed upon him because of a conviction for some offense, and for the costs of prosecution, on which the sheriff returned that he had received $20 in part and had levied on the same tracts for the residue. From December Term, 1829, a *venditioni exponas* issued to sell the lands returned as levied upon under the first-mentioned *fi. fa.*, and an *alias fi. fa.* to make the residue unpaid of the fine and costs in the case of the conviction. On .. March, 1830, under these executions, the sheriff exposed to sale the said Parker's interest in both the tracts, and it was bid off by the plaintiffs at the sum of $31, "over and above what was due the State thereon," and the sheriff executed a deed to the plaintiffs for both of them. The plaintiffs have not paid off the judgment, nor any part of it, nor paid any part of the debt to the State due for section No. 1; nor does it appear that they paid the sum of $31 so bid. The Legislature from time to time had been passing acts granting indulgence in the collection of bonds given for the purchase of Cherokee lands; but these acts not applying to judgments, William Parker, at the session of the General Assembly which was held in December, 1832, applied for indulgence in respect to the judgment against him, and a resolution was passed by the General Assembly authorizing and directing the Public Treasurer to permit William Parker to execute bonds with sureties in discharge thereof. Bonds were given by him accordingly, and these being finally paid off, on 28 August, 1839, a grant issued to James Allen for the tract No. 7, and he, by the directions of William Parker, in August, 1841, conveyed this tract to John Par-
(44) ker, son of William, and the other defendant in this action.

By some bargain or agreement between William and John, the latter paid off what was due the State because of William's purchase of the other tract, section No. 1, procured a grant from the State therefor in the name of William, on 5 January, 1837, and in the following month obtained a deed from William Parker transferring the title to him. This bill was filed early in 1839. It charges that the executions under which the plaintiff bought were levied upon William Parker's interest in the two tracts by his direction, that they were sold in his presence and with his assent, and insists either that the sheriff's deed made under such sale conveyed to the plaintiffs all the said Parker's interest therein, or that the plaintiffs became entitled thereto by

virtue of the purchase so made as being *in substance* a purchase from the defendant William, through the intervention of *his* agent, the sheriff. It alleges that the resolution of the General Assembly of 1832 was procured by the said William through fraud, for, by virtue of the sale as aforesaid, the judgment had in fact been satisfied, and either the plaintiffs or the sheriff were responsible to the State for the amount thereof. It states that the plaintiffs, immediately after the resolution aforesaid, appeared before the commissioner appointed by the Treasurer to take William Parker's bond, and offered to give their bond, with sureties for the amount of the judgment and interest, or to pay up the same, which offers were declined by the said commissioner; avers that they bought both the tracts for the sum of $31, over and above the amount of the judgment against William Parker, and proffering to pay the same into court, to be disposed of as it shall direct, prays that the defendants may be compelled to make unto the plaintiffs a proper legal title for the two tracts, surrender the possession and account for the rents and profits thereof. The defendants insist by their answers that the purchase was made upon the terms of paying off the demands of the State against both tracts and $31 besides; that not one cent was ever paid in any way for or on account of the said purchase, and that William Parker was com- (45) pelled, in consequence of this default of the plaintiffs, to make the best terms he could with the State in order to satisfy the outstanding judgment and the bonds which the State had against him, and having paid them off, through the aid of his son John, had a right to convey and cause to be conveyed the said lands unto his said son.

We see no grounds on which the plaintiffs are entitled to any relief. The interest which William Parker had in these tracts was not liable to be seized under execution, and of consequence did not pass by the sale and conveyance of the sheriff, acting in his official capacity. The legal title remained still in the State; the lands were yet the lands of *the State*, and the interest of Parker therein was not, within the sense of the statute of 5 George II., or our act of 1777, ch. 115, *his* "lands, hereditaments or other real estate." Nor was it embraced within the operation of the act of 1812, ch. 830, "concerning equitable interests in real and personal estate." The first section of that act, as has been repeatedly decided, comprehends those cases only where the whole beneficial estate is in the debtor, and nothing remains in the trustee but a *naked* legal estate. Nor is it comprehended within the enactments of the second section of that act. Were we to admit that this and the preceding section embraced cases where

the State was the mortgagee or trustee, and also that the interest of William Parker in these tracts was in the nature of an equity of redemption and therefore fell within the spirit of the provisions of the second section (questions on which we forbear to express an opinion), yet it could not be sold under an execution at the instance of the mortgagee for the mortgage debt. *Camp v. Coxe*, 18 N. C., 52. The acts directing the manner of making purchases of these lands show that they were *not* to be sold for a failure to make payment of the purchase money. The words are, "if the money *cannot* be obtained by *a judgment on the bond, the land shall revert to the State.*" Clearly, therefore, the sale of the Allen tract, regarded as a judicial sale, was inoperative.

(46) Whether a mortgagee can sell the equity of redemption in the mortgaged tract for *any other debt* was not decided in *Camp v. Coxe, supra*, nor in any subsequent case. Nor is it now necessary to determine the question; for the plaintiffs claim as for a single purchase at an entire price, and ask for a conveyance of both the tracts of land on the ground of having bought at execution sale the interest of William Parker in both, as constituting together the land on which he resided. A sale under the second section of the act of 1812 does not, as in the case of a sale under the first section, disturb the legal estate. The purchaser becomes but an assignee of the equity so bought; his rights are purely equitable, and his relief must be in equity only. And when he comes into equity for relief he must establish the case upon which he asks for relief. The plaintiffs offer to pay the price bid for the interest of Parker in *all* the land, upon having a title made for *all* the land.

The claim of the plaintiffs to be regarded as purchasers from William Parker, through the agency of the sheriff, is founded on the fact, which the evidence establishes, that he directed the sheriff to levy on the lands rather than on his personal goods. It is in the nature of a claim for the specific execution of a contract.

They bought, are ready to pay, and pray that the bargain may be decreed to be carried into full effect. To relief upon this ground there are several decisive objections. In the first place, all the evidence tending to show a contract shows (if any such there were) a different contract from that alleged. The deposition of the sheriff and his return on the *venditioni* relied upon by the plaintiffs concur with the statement in the answers to establish that the plaintiffs engaged to pay $31, besides satisfying what was due the State upon *both the tracts.*

In the next place, it would be monstrous to aid the plaintiffs

in compelling Parker to execute the alleged contract on his part, when they have been faithless as respects the performance of their part of the contract. An essential—the most essential—part of their engagement was to pay off the demands of the State then pressing upon William Parker, to meet which demands he assented to the sale of his interest in these (47) tracts. Up to this moment the plaintiffs have utterly failed to perform this engagement. They have not, in fact, paid any part of these demands. It is not shown that during the period of nine years which elapsed from the time of their alleged purchase they made any effort or took any step on their part to fulfill this engagement. The bill alleges, indeed, that after the resolution of the General Assembly of 1832, in favor of Parker, was passed, they offered to the commissioners specially appointed by the Treasurer to take *his* bond to pay or secure the payment of the amount *of the judgment.* But this allegation is not admitted by the defendants nor established by proof, and if it were true, the fact shows that they then knew Parker had lost all expectation of their discharging the judgment, and that they permitted him to go on, in the belief that no relief could be had through them, to make other arrangements for the satisfaction of this judgment. No offer to Parker, or to any one authorized to receive the money, was made to pay this part of the price until the bill was filed. No offer has ever been made to pay another part of the price, the debt due the State because of the purchase money of the section No. 1; and it is not shown that the plaintiffs have paid the sum of $31, which was bid, exclusive of the sums due the State. Such laches on the part of the plaintiffs (to use the mildest term which can characterize their conduct) deprives them of all plausible claim upon the interference of a court of equity on their behalf.

The bill must be dismissed with costs.

Decreed accordingly.

PER CURIAM.

Cited: Hunsucker v. Tipton, 35 N. C., 482.

(48)

JAMES QUINN v. JAMES W. PATTON AND OTHERS.

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

2. When the same solicitor who files the plaintiff's bill files also the answer of some of the defendants, costs will not be allowed to these defendants, though the bill be dismissed with costs as to the others.

THIS was a case removed to the Supreme Court by consent of parties at LINCOLN Court of Equity, Fall Term, 1841, the cause having been previously set for hearing upon the bill, answers, depositions and exhibits at that court.

The pleadings and facts are set forth in the opinion delivered in this Court.

No counsel appeared for plaintiff.
Waddell & Iredell for defendants.

RUFFIN, C. J. This is a bill of interpleader, filed 20 October, 1839, against five persons, and, on the pleadings, the case is this: The defendant Patton took a judgment for $2,871 against one True, by confession, in Buncombe County Court, which sat on the first Monday of July, 1839, and on 24 August following he delivered a *fieri facias*, issued thereon, to the plaintiff, then the Sheriff of Lincoln, who proceeded to seize under it seven horses and other articles as the property of True, but then in
(49) the possession of the defendant Clarke, which articles the sheriff sold, and by the sale raised the sum of $677.86½. Before the execution came to the hands of the sheriff, True had absconded from Lincoln, and divers of his creditors respectively took out original attachments, dated after the first Monday of July and returnable before a justice of the peace, and put them into the hands of Clarke, who is another of the defendants to this suit and was then a constable in Lincoln, and levied them on the horses and other articles, which the sheriff subsequently took out of his possession under Patton's execution. Three other creditors of True, namely, the defendants Slade, Cody and Unger, also sued out original attachments against his estate on different days in August, returnable to the county court of Lincoln; and the bill states that after the plaintiff had made his sale he was informed that these last attachments had been served

by one of his deputies on the same property, then in the hands of Clarke and subject to the attachments that had been served by Clarke. The bill then states that the plaintiff holds the said sum of $677.86½ ready to be paid to whomsoever he ought, but that he is likely to be injured in respect thereof, inasmuch as Patton claims the whole thereof under his execution, and the other defendants respectively claim parts thereof under their several attachments, and all threaten to prosecute actions against the plaintiff accordingly, and he is unable to determine to which of those parties he ought in law to account, for the following reasons: The said attaching creditors insist that the property was not subject to Patton's execution, because, first, the judgment was confessed by True upon the express condition that no execution should be issued before the following October Term, and it was so entered of record at the time of entering the judgment; and, secondly, that the execution was void in itself for the reason that it was tested in vacation—on the third, instead of the first, Monday of July. Whereas, on the other hand, Patton insists that the teste of his execution was incorrect by the mere misprision of the clerk, and hath been amended and made right by the order of the court of Buncombe; and he also
denies that there was any such stay of execution or an (50)
agreement therefor as is alleged by the other defendants;
and as to that point the said Patton avers the facts to be that after True had confessed judgment, he stated that the immediate service of execution would greatly injure him, and requested Patton not to take out one in less than three weeks, within which period he said he could and would pay $1,000 in part of the debt; and to induce him to do so Patton agreed that he would not take out execution before three weeks, and that if True should make the payment as promised by him, he would not take it out before the next term, but that this was an arrangement subsequent to the judgment and altogether voluntary on the part of Patton; that the clerk of the court was in the habit of issuing executions on all judgments, whether called for by the plaintiff or not, and that merely to prevent this being done in that case Patton's attorney told that officer not to issue an execution before October Term unless ordered; and the clerk, as a memorandum for himself in aid of his recollection, and for that purpose only, made an entry on his docket, "Execution not to issue before October." But that when True failed to make the payment, and Patton, after the expiration of three weeks, applied for an execution, the clerk, well remembering the directions given to him, did not hesitate to issue it, and thereupon, of his

own accord, altered his memorandum and made it conformable to what had been told him by adding the words "unless ordered."

The defendants have severally answered and presented the respective allegations and claims imputed to them in the bill; and the defendant Patton further insists that the plaintiff, having acted on his execution, cannot require him to interplead with the other parties.

The counsel for the defendant Patton has again presented the point made in his answer by moving to dismiss the bill upon the ground that the case is not a proper one for a bill of interpleader, and the opinion of the Court is that the bill must be dismissed. It would have been more correct had that defendant demurred instead of answering. But that goes only to the costs; and as the plaintiff has, in this case, been subjected to none by
(51) the party's answering, that he would not have been liable to upon demurrer, no harm has been done. As to the principal point, the case falls directly within the decision made a year ago in the suit of the present plaintiff, *Quinn v. Green*, 36 N. C., 229. The difficulties of the plaintiff arise merely on his official duty as sheriff on the legal priorities between the several defendants. Questions of that kind are more conveniently raised and decided at law than in this Court. If every adverse pretension to preference in the application of an insolvent's property among his creditors, claiming by executions or attachments, would authorize the sheriff to call upon the creditors to interplead, a judgment would seldom be satisfied but at the end of a suit in equity. It would change the whole jurisdiction, and the courts of law would in but few cases be able to compel the sheriff to do his duty upon the process issued to him.

The bill must therefore be dismissed with costs as to Patton. Costs would likewise be given to the other defendants but for the fact that they are represented by the same solicitor who drew the bill; from which it is inferred that those parties and the plaintiff were at a good understanding, and did not deem the controversy between them very serious.

Decreed accordingly.

PER CURIAM.

(52)

KENNETH McCASKILL v. ARCHIBALD McBRYDE AND ATLAS JONES.

Where there was a bill for an account against two, and a judgment *pro confesso* as to one, and in the course of the proceedings an order was entered that an account should be taken as to the latter "without prejudice," and an account was accordingly taken, and exceptions filed thereto: *Held*, that this order was contrary to the course of the court, and not an adjudication of the court, but entered by consent of the parties to speed the cause without doing injustice; and where it seemed that justice could not be done, unless the account was taken as to all the parties, the account taken under this order was set aside *in toto* and a new reference made as to all the matters of account prayed for in the bill.

This was a case removed to the Supreme Court from the Court of Equity of Moore, at Fall Term, 1841, on affidavit of one of the parties.

The proceedings and facts upon which the opinion of the Supreme Court is founded are set forth in the opinion of the Court.

Badger for plaintiff.
Winston & Mendenhall for defendants.

Gaston, J. This bill was filed by the plaintiff, who had formerly resided in this State and afterwards removed to Scotland, against McBryde and Jones, to have an account of the agency of William Martin, deceased, their testator, who, upon the plaintiff's removal, had been constituted a general attorney for the collection of his debts and transaction of his business in this State, and also an account of their own agency as (53) the plaintiff's attorneys in fact since the death of the testator. Jones, not residing within the State, was not served with a subpœna, but was made a party defendant by publication, and the bill as to him has been taken *pro confesso*. McBryde answered the bill, and the cause is now brought on to be heard. It is not questioned but that sufficient matter is stated in the bill to render this a fit case for an account. McBryde's answer contains no matter to bar an account, and Jones did not resist it. The account, therefore, must be taken as prayed.

In the course of the proceedings below an order was entered declared to be "without prejudice" for the taking of an account against Jones only. Such an account has been taken and several exceptions made thereunto on the part of Jones. It is prayed on the part of the plaintiff to hear the cause against this

defendant upon these exceptions. The order under which this account was taken is contrary to the course of the court, and not regarded as an adjudication of the court, but is viewed as a mere consent rule of the parties for speeding the cause, if it may be thus speeded without doing injustice. See *McLin v. McNamara*, 21 N. C., 408. In this case we are satisfied that justice cannot be done except by taking the accounts in the regular way, according to the course of the court, so that all the parties may be actors therein and it may be conclusively ascertained what is the true state of the accounts between the parties respectively.

The Court therefore sets aside *in toto* the account reported and directs a reference for taking all the matters of account prayed for in the bill.

Ordered accordingly.

PER CURIAM.

Cited: Attorney-General v. Carver, 34 N. C., 235.

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(54)

HENRY HOPPISS v. WILLIAM ESKRIDGE, ADMINISTRATOR, ETC., AND OTHERS.

1. The statute of distributions does not apply to the estates of *femes covert* dying intestate. The husband is entitled to administer for his own benefit, and if any other person shall administer, such administrator is considered in equity, with respect to the residue after paying the debts, as a trustee for the surviving husband or his representatives.

2. In equity *choses in action* are assignable for a valuable consideration and *bona fide*, such assignment being in the nature of an agreement by which the assignor is bound to give to the assignee the benefit of that which he has assigned.

3. But in equity as well as at law, a grant of land (except a release) is void as an act of maintenance if, at the time, the land is in the actual possession of another person claiming under a title adverse to that of the grantor.

THIS was a bill filed at the Fall Term, 1839, of CASWELL Court of Equity, to which the defendant Eskridge answered at Spring Term, 1840, and at the same term judgment *pro confesso* was entered against the other defendant, Lipscombe. At Fall Term, 1841, depositions having been taken, the cause was set for hearing and transmitted by consent to the Supreme Court.

A statement of the pleadings and material facts will be found in the opinion delivered in this Court.

Morehead for plaintiff.
W. A. Graham for defendant.

DANIEL, J. The bill states that Richard Eskridge, by his will, bequeathed several slaves to his wife for life, remainder to his daughter Martha; that Martha married Thomas (55) Lipscombe, and died, in the lifetime of her mother, the tenant for life; that subsequently the tenant for life died; that William Eskridge administered on the estate of Martha Lipscombe and sold the slaves; that Lipscombe, the husband, assigned by deed to the plaintiff all his equitable interest in the estate of his late wife in the hands of her administrator for the sum of $1,000. The bill is filed by the assignee against the assignor and the administrator of his late wife, Martha, for an account. The bill is taken *pro confesso* as to the defendant Lipscombe. The administrator answers and insists (1) that the estate in his hands belongs to the brothers and sisters of the intestate as her next of kin; (2) that the assignment was not *bona fide* and for a valuable consideration, but was affected with champerty; (3) that a portion of the money for which the slaves were sold is covered by a decree for alimony obtained by the present wife of Lipscombe against her husband, and to which himself, as administrator, and Hoppiss, the present plaintiff, were parties.

First. The principle is well settled that the statute of distributions does not apply to the estates of *femes covert* that shall die intestate, but that the husbands may administer and recover and enjoy the same, as they might have done before the making of the statute. If any other person administers, such administrator will be considered in equity, with respect to the residue, after paying the debts, as a trustee for the husband or his representatives. For, the husband surviving the wife, her whole estate vests in him at the time of her death, and no person can possibly be entitled to the rights of the wife but himself, so that her whole personal property belongs to him. 3 Atk., 527; Williams on Executors, 910.

Second. A person out of possession cannot *at law* convey anything to a stranger; he can only give a release to one in possession. *Underwood v. Lord Courstown,* 2 Scho. and Lefr., 65. But in equity *choses in action* are assignable for a valuable consideration and *bona fide* (*Townsend v. Windham,* 2 Ves., 6; *Whitfield v. Faucett,* 1 Ves., 332, 391), and especially equitable *choses in action,* as in this case; and such assignment is supported in equity on the ground that it is an agreement (56) by which the assignor is bound to give to the assignee the benefit of that which he has assigned. It is by agreement, in

most cases of *choses in action,* that the assignee takes. The covenant of the assignor is, in this Court, a disposition of the thing assigned that could be enforced against him. Upon principle, therefore, the right of the assignee of a *chose in action* is derived from his right to call upon the assignor for a specific performance of the agreement between them. He is entitled to whatever interest the assignor himself possesses or is capable of procuring. 6 Ves., 394; 2 Roper on Husband and Wife, 510. While we make these remarks it may be proper to state that the rule does not extend to lands; for every grant of land, except as a release, is void as an act of maintenance, if at the time the lands are in the actual possession of another person claiming under a title adverse to that of the grantor. Such assignments were offenses in England, both by the common law and under the statutes. 4 Kent Com. (3d Ed.), 446-450. And all agreements tainted with maintenance or champerty are void in equity as well as at law. *Wallis v. Duke of Portland,* 3 Ves., 494; *Powell v. Knowler,* 2 Atk., 224; *Stephens v. Bagwell,* 15 Ves., 139; *Wood v. Downs,* 18 Ves., 120; *Harrington v. Long,* 2 Mylne & Keen, 590. Champerty consists in the unlawful maintenance of a suit in consideration of a bargain for part of the thing or some profit out of it. But in this case the deed of assignment to the plaintiff appears on its face to be absolute and for the consideration of $1,000; the proof is that the plaintiff gave that sum, and there is no evidence of champerty offered by the defendants. The assignor is made a defendant, and he suffers the bill to be taken *pro confesso,* which, we think, is in this case an admission that the assignment was made as stated in the bill, or at least precludes the other defendant from raising the objection. The defendant acknowledges a balance in his hands belonging to the estate of his intestate of $1,480.10. Under all the evidence in the case, we are of the opinion that the plaintiff is entitled to a decree for that sum and also to a decree for an account, if he wishes it.

(57) As to the sum claimed to be deducted to satisfy the decree for alimony to the present wife of the defendant Lipscombe, there is no evidence of it filed with the papers in the case. If an account is to be taken it will be time enough to offer it before the master.

Decree for the plaintiff.

PER CURIAM.

(58)

JOHN C. ATKINS, EXECUTOR OF HENRY DELAMOTHE, *v.* FRANCIS J. KRON AND OTHERS.

1. Where a testator by his will gives to each of his heirs and distributees a certain portion of his estate, "*and no more*," these words will not of themselves exclude the heirs and next of kin from other portions of the estate not effectually given away to some other person, for as to such portions they take by law, independent of and even against the intent of the testator. Yet such words of exclusion may have an important bearing in the construction of other devises in the will, so as to prevent any restriction on the terms of another clause whereby an intestacy *pro tanto* might be produced.

2. Where A by will devised as follows: "I give the balance or residue of my property to my executor in trust for the benefit of my sister Q's grandchildren, by name of F, to be paid to any one of them who should apply for the same: subject, however, to the payment of the legacies, etc. But should no one of my sister Q's grandchildren or any one duly authorized legally to receive the above property in their behalf, apply within two years from the time of my decease, then the above property to revert unto Mary C. Kron's children and be distributed equally among them, subject to the legacies," etc.: *Held*, that the grandchildren of Q, being aliens, although they were entitled to the residue of the personal property, could not receive and hold any beneficial interest in the real estate, and that this, therefore, should go over, under the limitation, to Mary C. Kron's children; and this the more especially as the testator had plainly, in a previous part of the will, expressed his intent that no part of this real estate should go to his heirs at law.

3. Where a testator by his will directed that a "slave named David and his wife and their daughter Charity and her four children should be put in possession of a certain piece of land and there live together, provided that David and all his family support themselves without any cost to the estate; and in order that he may be able to accomplish this task, I desire that he should enjoy the product of that farm, with the labor of himself, his wife, his daughter Charity and Charity's children, until the children attain the age of twenty-one, and then that C's children be returned into the common stock, as every one of them attains the age of twenty-one," and the testator then gives David and his wife, for the support of their family, some provisions, a horse, etc., and directs that they shall remain in possession of that land during their natural life free from all incumbrances: *Held* by the Court, that the testator did not intend the emancipation of any of these slaves.

THIS was a bill filed, at Fall Term, 1840, of MONTGOMERY Court of Equity, by the plaintiff, as executor of Henry Delamothe, praying the advice and direction of the court (59) in the construction of the will of his testator. All the persons who claimed under the will, and also the trustees of the

University of North Carolina, were made parties defendant, and severally put in their answers, submitting to any decree the court might make in the premises. The case having been set for hearing at Spring Term, 1841, on the bill, answers, documents and exhibits filed, was by consent of parties transferred to the Supreme Court.

The material facts disclosed in the pleadings and proofs are stated in the opinion delivered in this Court.

This case was argued at length by

Strange for the grandchildren of Quenet.

Winston for Kron's children.

Mendenhall for the heirs and distributees of the testator.

W. H. Haywood, Jr., for the trustees of the University of North Carolina.

RUFFIN, C. J. Henry Delamothe, a native of France and naturalized citizen of the United States and a resident of Montgomery County, being seized of valuable real estate, and also entitled to a number of slaves and other considerable personal property, made his will, bearing date 10 September, 1838, and died shortly thereafter. By that instrument he devised to B. Delamothe, then his wife, a tract of land during her natural life, and bequeathed to her one-third of his slaves and other personalty. To two children, who had been born during the coverture, and to any others who might be born, the will gives "fifty cents each and no more." To F. A. Delamothe, a brother of the testator, residing with him, there are given some small specific legacies, the sum of $100 and an annuity of $150 per annum during his life. To Mary C. Kron, a niece of the testator and the wife of Francis J. Kron, he gives a legacy of $1,000 and also an annuity of $100 per annum during her life, and to each of their children then born or that they might afterwards have is given the sum of $1,000, to be paid to them respectively,
(60) with interest from the death of the testator, when they shall attain twenty-one years. At that time Mr. and Mrs. Kron had two children, who were born in this State, and are still infants; and no other has as yet been born.

Then comes the following clause: "I give the balance or residue of my property to my executor in trust for the benefit of my sister Quenet's grandchildren by the name of Forestier, to be paid to any one of them who should apply for the same; subject, however, to the payment of the legacies made in this will, and, moreover, obligatory to them to the payment of $100 yearly to their grandmother Quenet during her life, and after her decease the same sum of $100 to be paid to their own mother yearly also

during her life. But should no one of my sister Quenet's grandchildren, or anyone duly authorized legally to receive the above property in their behalf, apply within two years from the time of my decease, then the above property to revert unto Mary C. Kron's children and be distributed equally among them; subject, however, to the legacies herein mentioned." By a subsequent clause the testator directs that, after allotting his wife's share, his executors shall hire out his slaves, except one family, consisting of a man by the name of David and his wife and their daughter, Charity, and her four children; and in respect to that family he directs that they shall be put in possession of a certain piece of land and "there live together, provided that David and all his family support themselves without any cost to the estate; and in order that he may be able to accomplish this task, I desire that he should enjoy the product of that farm, with the labor of himself, his wife and daughter, Charity, and Charity's children, until the children attain the age of twenty-one; and then that Charity's children be returned into the common stock as every one of them attains the age of twenty-one." The will then gives David and his wife, for the support of their family, some provisions, a horse, some farming stock and utensils, and directs that they shall "remain in possession of that land during their natural life, free from all encumbrances," and the present plaintiff is appointed executor.

The testator's sister Quenet and her daughter, Mrs. (61) Forestier, were born and reside in Paris, in the kingdom of France, and Mrs. Quenet's grandchildren by the name of Forestier were six children of Mrs. Forestier, who were also natives of Paris and have ever resided there. Within two years after the death of the testator, an agent of Mrs. Quenet, Mrs. Forestier and of the six children of the latter, duly authorized by letters of attorney to receive the estates and interests to which those parties were respectively entitled under the will, applied to the executor for the same; Mrs. Quenet and Mrs. Forestier obliging themselves respectively to dispense the executor from retaining any part of the estate as a fund to secure the annuities to them, and authorizing him to pay the whole to the common agent, and reserving only the right of arranging personally with the legatees, Mrs. Forestier's children, to secure their annuities upon the funds sent to them in France.

This bill is filed by the executor against the testator's widow and her two children, against Kron and wife and their two children and against Mrs. Quenet, Mrs. Forestier, the six children of Mrs. Forestier, and the trustees of the University, and it asks a construction of the will, and that the plaintiff may administer

the estate and account under the direction of the court. The points upon which the assistance of the court is asked are (1) whether the reversion of the land devised to the wife for life vests in the heirs at law undisposed of, or is included in the residue given to the plaintiff in trust; (2) whether the alienage of the testator's sister, niece and greatnephews and nieces resident in France excludes them or either of them from the benefit of the dispositions in their favor in the personal and real estate of the testator or either of them; if so, whether the same belongs to the heirs at law, the trustees of the University, or goes over under the limitation to Mary C. Kron's children; whether the application to the executor on behalf of those French subjects by attorney is sufficient within the provision of the will, or ought to have been made by them or some of them personally, and by what mode the pecuniary legacies and annuities are to be raised or secured.

(62) All the defendants have put in answers, and submit the same questions raised in the bill.

The Court has no difficulty in pronouncing that the widow and children of the testator have no right to any part of the estate, except as particular gifts are made to them respectively in the will. The paper begins with a declaration that the testator means to dispose of the worldly goods which it has pleased God to bestow on him, and thus shows that he did not mean to die intestate as to anything. He then gives to the children born or to be born of his marriage fifty cents each and *no more,* and thereby informs us very plainly that he intended to exclude them from taking any other part of his estate. It is true that no exclusion of the heir or of those entitled to distribution, however positive and explicit, is effectual, *per se;* for they take by law, independent of and even against the intent, whatever the testator does not give to some other person, and therefore only an effectual disposition in favor of another can defeat the heirs and next of kin. Nevertheless, these expressions and the purpose of exclusion aid in the attempt to put the proper construction on other words in the will by which the testator endeavored to make a disposition of his property to another. They must prevent any restriction on the terms of another clause whereby an intestacy *pro tanto* would be produced, and oblige the Court to receive even doubtful words in a sense which, if possible, will give the property to some one and thus keep it from going to the heir. Here the language is not of dubious import, but clear enough, being that technically appropriate to the general gift of everything that may not be legally given to any one else in particular. "The balance or residue of my property" takes in everything,

personal or real, not otherwise disposed of. Especially this will must be so understood when it is thus clear that the testator meant that those who would by law succeed to his estate, if not disposed of, should not have any of it. Our opinion, therefore, is that in no event can those persons have any portion of this property; for the residuary clause is general and covers everything.

The material question is, Who are entitled under that (63) residuary clause? We have no doubt, in the first place, that the demand or application by the French donees by attorney meets the requisition of the will. All the testator meant by requiring them or some one of them to apply for payment was to save his executor the trouble of seeking out for those persons in France, if in existence, and enable him to settle with them in this country. Probably the testator had no certain knowledge which of those relations of his were alive, if any; for he is able to describe his grandnephews and nieces only by the general terms, "my sister Quenet's grandchildren." And from his uncertainty upon that point and the intention that his executor should not retain the estate indefinitely for the want of a certain owner, he directs the application by his foreign legatees to be made within the reasonable period specified. But there is nothing to show that such application was to be by them in their own persons. If it appeared that some such thing was in the testator's contemplation as the means of identifying those persons, there would be more in the argument. But we see nothing of the sort; for if those persons had come here it does not appear how they could have established that they were the legatees more than if they remained in France. It follows that the application necessary to give them the benefit of the donations to them may be made through any person appointed by themselves. Indeed, we think the words of the will itself expressly admit of the application by attorney, and show that the testator expected it to be made in that manner. After giving the estate to all of Mrs. Quenet's grandchildren and directing the *payment* to any one of them who should apply for the same, he afterwards adds, "should *no one* of my sister Quenet's grandchildren, or any one duly authorized legally to receive the above property in their behalf, apply, etc.," then over to Mrs. Kron's children, which shows that the person thus to be "authorized" to receive the property was *"no one"* of his sister's grandchildren, and therefore could have no authority but as the proxy of those legatees. So far, then, as the demand is concerned, the foreign legatees have entitled themselves; and in respect of the personalty, there is no doubt that, although aliens, they have capacity to take and

(64) hold for their own benefit, and therefore that the executor should pay over the same to their attorney, reserving what is proper for the satisfaction of the pecuniary legacies charged thereon.

With the real estate we think it is different. The opinon of the Court is that it goes over, under the limitation, to Mrs. Kron's children. If aliens can take land by devise, it is certain they cannot hold it or an interest in it against the sovereign or the grantee of the sovereign. Whether a devise to an alien will vest the estate so as to enable the sovereign to claim it against the heir at law or not, or whether, if it will, the trustees of the University can as grantees of the State claim it as "property escheated" are questions on which at present we do not propose to give an opinion. For admitting the affirmative of both propositions to be true, yet we think that the gift to the Krons is of such a character as to prevent the devise to the foreign relations taking effect for the benefit merely of the State or the University, or for any other purpose but for the benefit of those relations themselves. The gift over operates, like a conditional limitation, to make the first estate cease or to prevent it from arising, if it cannot legally be enjoyed by the testator's favorite relations, and vests it immediately in the second class of relations, who are next in his affections, and, in that event, are substituted by him for the former. Here, as we have already seen, the heirs at law are cut off entirely. Then follows a general gift to alien relatives, of whose number, names or even existence the testator seems not to have been certain and of whose capacity to take or enjoy he seems to have entertained doubts; for that is probably the meaning of the words "duly authorized"—to do what?—"legally to receive" the property. If the will had stopped there the land would have vested in those persons or such one of them as happened to be living, and then, of course, have gone according to the law regulating the rights of aliens in real estate. But it does not thus stop, but goes on to say that if those aliens, in the first place, shall not apply within two years, then certain of his domestic relations shall have what was given to the former.

Now, that of itself is strong to show the intent that the (65) application here spoken of should be an effectual application—one under which the devisees could get and enjoy the land. For why give to one person for the want of an application by a prior donee when, if the application were made, it would have no more real operation on the interests of the applicant than if it had been omitted altogether? And, in the second place, this view is strengthened by the phraseology already alluded to—"legally to receive"—for that indicates the doubt in

the testator's mind of their capacity, and teaches us that his purpose was really this: that his relations should have his estate at all events, and no other person under any circumstances while any of those relations existed; and that among his relations he gives to one class as preferred before another class; but if either they will not accept the gift within a reasonable period or cannot by law take and hold it, then the second class, who can enjoy it, shall take instead of the former. Such seems to us to be very clearly the meaning of this will. It provides by a second limitation for the event of the first limitation not taking effect, in fact and law, beneficially, within two years. Therefore it must be declared that the personalty belongs to the grandchildren of Mrs. Quenet and the realty to the two children of Mrs. Kron, subject, nevertheless, to the charges of the pecuniary legacies thereon.

This brings us to an interesting and intricate question, which is, How the pecuniary legacies and annuities shall be raised and secured? There could be no difficulty if the whole fund—personal and real—went in the event as the testator expected it would—that is, to the same persons. But as it turns out that by the will the former goes to one class of legatees and the latter belongs to another set of donees, the question arises whether the realty is liable to the payment of any proportion of the debts and pecuniary legacies until the personal estate be exhausted. Upon that question there was no argument at the bar. It is one which, we think, requires discussion, and therefore the cause is directed to stand over for argument on that point. In the meanwhile it seems proper we should say that the pecuniary legacies to Mrs. Kron and Francis A. Delamothe (66) and the annuities to them and others may safely and ought to be paid, provided the whole fund be sufficient to pay them all, by the executor out of any moneys in his hands. The whole estate is charged with those sums, and the legatees and annuitants ought not to be compelled to await the adjustment of the contest between the owners of the different funds liable for their satisfaction.

Upon the question respecting the slave David and his family, although the testator has expressed himself obscurely, we are of opinion that he did not intend their emancipation, and that they form, necessarily, a part of the residue of the personal estate disposed of by the will.

PER CURIAM. Declared accordingly.

Cited: S. c., 40 N. C., 207; *Trustees v. Chambers*, 56 N. C., 255.

CALVIN COX v. NOAH SMITHERMAN ET AL., ADMINISTRATORS, ETC.

1. Where a bill was filed against two as joint administrators upon a matter relating to the acts of their intestate, and they filed a joint answer, a deposition, taken on a notice given to only one of the defendants and in their absence, cannot be read in the cause, unless such notice had been previously authorized by a special order of the court.

2. It seems that in cases where the plaintiff can entitle himself to a decree against one defendant alone, separate from his codefendant, notice to that defendant may be sufficient to authorize the reading of the deposition as to him.

APPEAL from an interlocutory decree of his Honor, *Pearson, J.*, made at Fall Term, 1841, of MOORE Court of Equity.

The matter and grounds of the decree appealed from (67) are stated in the opinion delivered in this Court.

Winston for plaintiff.
Mendenhall for defendant.

RUFFIN, C. J. The defendants took joint administration of the estate of S. Smitherman, who died intestate, and they instituted actions on two bonds, which the plaintiff gave to their intestate in his lifetime, and obtained judgments; and thereupon the plaintiff filed this bill in the Court of Equity for Moore County for an injunction and to be relieved against the judgments. The defendants united in an answer, and after replication the plaintiff took a commission to take the deposition of a witness resident in Moore, and proceeded in the absence of both of the defendants to have it taken, after having given notice to the defendant Spencer alone and without any notice to the other defendant, N. Smitherman. Upon the return of the commission and deposition the court ordered the deposition to be suppressed, upon the ground of the insufficiency of the notice. The plaintiff subsequently filed a petition to rehear the matter, and therein also stated that the witness was the only one by whom he could prove the equity of his bill, and that the witness had died within ten days after the order was made, whereby it became impossible to take his deposition a second time. Upon the rehearing the court reversed the former order and passed the deposition to be read on the hearing. From that decision the defendant appealed.

The hardship on the plaintiff of losing his evidence by the death of the witness would incline us, as it induced his Honor, to admit the deposition, if it could be done without opening the

door to a general mischief. But, we think, it cannot be done. The act of 1782 (Rev. Stat., ch. 32, sec. 4) provides that "no such testimony" (by deposition) "shall be taken until at least twenty days' notice of the time and place of taking the same shall be given to the opposite party." The mode of executing a commission in private was thus abrogated, and it became the legislative policy to subject witnesses to the test of the presence of those against whom they testify and to their (68) cross-examination. This is a most important change in the proceedings of this Court, and in furtherance of the administration of justice in it. For which reason the Court ought not to restrain the operation of the words of the statute so as to weaken their natural sense, but should interpret them liberally, if they were doubtful, so as to give the full benefit of the act to every person whose interest can be affected by the testimony of the witness. The two defendants together constitute "the opposite party," and therefore there must be notice to both. We are not aware that it has ever before been held that, in a suit against two, a deposition may be taken on notice to one of them. It is against first principles that a person should be concluded when he has neither put an interrogatory to the witness nor had an opportunity of doing so. If, indeed, the plaintiff here could go on and entitle himself to a decree against that defendant by himself, to whom he gave notice, we should see no objection to it. But the objection is to reading the evidence against the other defendant who had no notice. We think it cannot be read against him; and if so, it can be read against neither. For the equity is set up in the bill on the alleged acts of the intestate, and not on those of the present defendants or either of them; and if the plaintiff could get a decree at all, it would therefore be against both of the defendants, enjoining any further proceedings on the judgments.

Cases were cited in the argument in which depositions had been allowed to be read after the death of the witnesses to prevent the defeating of justice. But those were cases of irregularity merely in the mode of taking the deposition, as if it had been written by the witness beforehand, instead of being written by the commissioner on the examination, or the like, and they have no application to the present question. If in England a commission were executed without affording the adverse party an opportunity of joining in it and exhibiting cross-interrogatories, it is not to be supposed that a deposition thus taken would, under any circumstances, be allowed to be read. That would not be harmless irregularity, but would go to the substance of the evidence and the degree of faith to be yielded to it. (69)

So in this State, we think, it is, if a deposition be taken without notice. The Court cannot decree upon an *ex parte* affidavit. The practice has always been to give notice to every party, or to have an order that notice to one or to the solicitor should be sufficient.

The opinion of the Court, therefore, is that the order appealed from is erroneous, and must be reversed, and with costs in this Court, and that the first order, whereby the deposition of the witness was suppressed, must stand. And this must be certified accordingliy to the court of equity below.

PER CURIAM. Ordered accordingly.

ARCHIBALD DUVALL v. JOHN DUVALL.

The bill dismissed in this case upon the failure of proof on the part of the plaintiff to sustain his allegations.

APPEAL from the decree of the Court of Equity of SURRY, at Fall Term, 1841, his Honor, *Bailey, J.*, presiding.

The pleadings and proofs are sufficiently stated in the opinion delivered in this Court.

Boyden for plaintiff.

No counsel for defendant.

DANIEL, J. The plaintiff executed to Thomas Duvall a single bill, under his seal, for $270, dated 2 October, 1826, pay-
(70) able ten days after date. The payee endorsed it to the present defendant on 19 October, 1826. At May Sessions, 1837, of Surry County Court the assignee recovered a judgment against the maker on the said bill. This bill in equity was filed, and an injunction obtained restraining the defendant from issuing execution. The bill charges that the bond was given to Charles Duvall in part of the purchase money of a tract of land; that subsequently the contract for the purchase of the land was rescinded, and that Thomas Duvall sold the land and executed a deed for the same to one White, and then agreed with the plaintiff to destroy all the bonds which he had taken of him for the purchase of the said tract of land, the bonds then being (as Thomas Duvall said) in the possession of a friend in the State of Kentucky. The bill further charges that the bond was endorsed after it was due. The defendant answered and says that he purchased the bond for $60 and a fine horse, and that it was

endorsed on the day it professes to be on its back; that he had no knowledge of the transactions between the maker and endorser relative to the land. He believed the bond to be justly due, and was informed by the endorser that it was given for the rents of land and for stock sold; that after he became the holder he sent the bond to the plaintiff for payment, and that he made two payments of $50 each, which are endorsed on the bond.

The injunction was continued till the hearing. The parties took testimony, and on the hearing the injunction was dissolved and a decree rendered against the plaintiff and his securities for the amount of the debt and costs. From this decree the plaintiff appealed.

We have examined the testimony in this case, and we are of the opinion that the plaintiff has failed to prove that the bond mentioned in the pleadings was given for part of the purchase of the tract of land which was subsequently sold to White. The testimony shows that the plaintiff had at several times given to Thomas Duvall notes and bonds for land sold, rents of land and money loaned. It appears from the deposition of James Duvall that this bond (after endorsement) was, in 1827, presented to the plaintiff for payment, and he then made no objection to it, and that there were then part payments made in (71) horses. Moore, the plaintiff's witness, is proved by two credible witnesses to be a man not worthy of credit on his oath. There is therefore an entire failure of proof to establish the equity set up by the bill, but denied by the answer. The decree is affirmed with costs.

PER CURIAM. Decree affirmed with costs.

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(72)

SARAH FREEMAN AND OTHERS v. JESSE C. KNIGHT, ADMINISTRATOR.

1. A testator bequeathed to A as follows: "I give to A $2,700 and notes—$2,676 of the money and notes embraced in this item have been paid to him—balance due $84, to be paid to the said A at my death": *Held*, that A was entitled to the $84, that being the sum finally and explicitly directed to be paid to him.

2. A testator bequeathed to B, his daughter, a girl named Franky; at the time of making the will Franky had an infant child. The child does not pass under this bequest, and no evidence can be received, extrinsic of the will, that Franky had been previously put in possession of the daughter, and that the child had been

born after she had been so put in the daughter's possession. If that fact had been stated in the will, the construction would have been different.

3. A testator directs that two negroes be sold "and the proceeds equally divided between my *legal heirs*": *Held*, that in this case the word heirs means those entitled to distribution of the personal estate, and therefore includes the widow of the testator, and also the children of a daughter who had died in the lifetime of the testator. If the bequest had been to the "heirs" simply, they would have taken in the proportion prescribed by the statute of distributions; but as the testator directs the property "to be equally divided" among them, the division must be *per capita*, the children of the deceased daughter taking each an equal share with the children of the testator.

4. A testator bequeathed as follows: "It is my will and desire that all my perishable property be sold at my death and the proceeds thereof I *lend* to Elizabeth S., M. B., E. K., J. F. and grandson A. W., to be equally divided amongst them, and at death I give the proceeds of my perishable property to the children of the said Elizabeth S., M. B., C. K., J. F. and A. W., to them, their heirs and assigns forever." Elizabeth died in the lifetime of the testator, leaving children: *Held*, that the testator meant a life estate to Elizabeth in one undivided share, and, at her death, a limitation of that share to her children, and the life estate having been removed by her death, the limitation to her children took effect.

5. Where there is a pecuniary legacy to one for life, remainder to another, the executor can only pay to the legatee for life the interest on the sum bequeathed.

6. But where there are particular bequests of chattels for life, the legatee is entitled to the possession of the chattels themselves, upon giving an inventory for the benefit of those ultimately entitled.

THIS was a bill filed at Fall Term, 1840, of EDGECOMBE Court of Equity, by the widow, children and some of the grand-
(73) children of Josiah Freeman, deceased, all of whom were legatees in the will of the said Josiah, calling upon the defendant, who is the administrator with the will annexed, for an account of the estate and for its distribution according to the directions of the testator. The administrator filed his answer, submitting an account of the estate and professing his readiness to pay it over to the plaintiffs, but stated that there were several difficult questions in the construction of some of the clauses of the will as to the relative rights of the several plaintiffs, which he was unable himself to determine, and he prayed the advice and judgment of the court on these questions, and their directions in taking an account and paying and delivering over the estate to the plaintiffs.

FREEMAN *v.* KNIGHT.

The cause was set for hearing at Fall Term, 1841, and transmitted by consent of parties to the Supreme Court. The opinion delivered in this Court discloses the matters of difficulty on which the advice of the Court was prayed, and it is therefore deemed unnecessary to insert at length a copy of the will.

Iredell for plaintiffs.
B. F. Moore for defendant.

GASTON, J. This bill was filed by the plaintiffs claiming to be entitled, under the will of Josiah Freeman, deceased, to the testator's personal estate, against the defendant, who is administrator with the will annexed, for an account. The defendant put in his answer, and the cause was set down to be heard on bill and answer, and then transferred to this Court for hearing. There is no objection made to the taking of an account, but the directions of the Court are prayed for in relation to sundry questions presented by the pleadings, and which should be settled before the account is taken.

The testator gives a pecuniary legacy to his son-in-law, Willie Summerlen, and his daughter Elizabeth, wife of the said Summerlen, in these words: "I give to my son-in-law, Willie Summerlen, and to my daughter Elizabeth, his wife, twenty-seven hundred dollars and notes. Twenty-six hundred and seventy-six dollars of the money and notes embraced in this (74) item have been paid to him; balance due, eighty-four dollars, to be paid to the said Willie Summerlen at my death." The question arises, What is the sum to be paid under this bequest? Is it the $84 therein stated as the balance, or $24, which would appear to be the balance after deducting from the gross amount of the legacy what had been advanced in payment thereof? We cannot say with any confidence where the mistake lies —whether in stating the sum already paid or the sum directed to be paid. There is an error somewhere, which it is not in our power to correct, and we hold that *the sum* which he finally and explicitly directs to be paid must be regarded as the legacy thereby bequeathed.

The testator bequeathes sundry negroes to his son-in-law, James Bridges, and his daughter Millicent, the wife of the said Bridges, for life, with limitations over to their children. Among these negroes is a girl Franky, who, at the time of making the will, had an infant child. It is stated as a fact that Franky had been put into the possession of Bridges by the testator some time before the birth of this child, and the question is raised, In whom is the property of this infant? It is very clear that

the bequest does not, *per se,* carry the child, because the bequest operates from the death of the testator, and then Franky and her child were two distinct subjects of property, and a disposition of *one* is necessarily confined to that one. We also hold that the bequest cannot be extended in its operation by any extrinsic matter not therein referred to, for the effect of such extension would be to make that pass by parol which the law will not permit to pass otherwise than by writing. We have held that where a testator gives by his will a negro, which he therein states to have been previously given by parol or to have been put into possession of one of his children, the bequest operates as a confirmation of the antecedent imperfect donation, and makes it valid *ab initio.* But this is a construction founded upon the language of the will. The extrinsic facts are noticed by the Court so far, and so far only, as they are referred to in the will, as explanatory of the testator's intention. It also seems to us that this child is not included in any other dispo-
(75) sition made by the will. The eleventh clause, which is set up as a general residuary clause, is not such. It directs a sale of all the testator's *perishable* property and a disposition of its proceeds, and we are satisfied from the context of the will this term, *perishable,* was used in the sense in which it is generally employed in common parlance and frequently used in legislative acts to designate such goods as are likely "to perish, consume or be the worse for keeping." See Rev. Stat., ch. 46, sec. 11, and ch. 54, sec. 13. The consequence must be that in regard to this negro child there is a partial intestacy, and it is to be disposed of under our statute of distributions. If there had been no disposition in the will of the mother of the child, the question would have arisen whether, under the act of 1806, Bridges and his wife might not have claimed both mother and child as an advancement. The late Chief Justice of this Court has decidedly expressed an opinion that the provision in the third section of the act, that when a person has put a slave in the possession of his child and shall suffer it to remain in such possession until his death, "he dying intestate," the slave shall be considered as an advancement to the child, applies not only in cases of intestacy properly so called, but also where he dies intestate in regard to that slave. However this may be, on which we explicitly decline to express our opinion, we hold that there is no room in this case for claiming the infant slave as an advancement, because the will does make a disposition of the slave so put into the possession of his son-in-law. The testator has not died *intestate* in regard to that slave.

The ninth clause of the will is in these words: "It is also my

will that Big Sam and Isaac should be sold and the proceeds equally divided between my legal heirs." Who are the persons thus designated? Is the wife one? Are the children of a deceased child included in the description? And if they be, do *they* take as designated persons *per capita,* or the share of the parent whom they represent? These inquiries would open a wide field for speculation, in which great ingenuity and learning have been exerted and expended, but that we feel ourselves bound to follow out the construction which in a very similar case was sanctioned by our predecessors in *Croom* (76) *v. Herring,* 11 N. C., 393. It was there determined that when a testator makes an immediate gift of personal property to "his heirs," he means a gift to those whom the law has appointed to succeed to the personal estate of dead men, who have made no appointment themselves." If so, it includes the widow, and it includes the children of a deceased child. We consider it as a consequence resulting from the adoption of this rule of construction, that where personal property is given *simpliciter* to "heirs," the statute of distributions is to be the guide, not only for ascertaining *who* succeeds and who are "the heirs," but *how* they succeed, or in what proportions do they respectively take. But as the donees claim, not under the statute, but under the will, if the will itself directs the manner and the proportions in which they are to take, the directions of the will must be observed and the guidance of the statute is to be followed no further than where the will refers to it—that is to say, for the ascertainment of the persons who answer to the description therein given. The testator has here directed the manner of distribution—the proceeds are to be "equally divided." The division directed by the will must be obeyed, and the children of the deceased child take equal shares with the widow and surviving children. It is needless to refer to authorities on this latter point; they are almost innumerable, and have overloaded the subject. The cases most nearly analogous to the present are in respect to gifts to "relations." Where it is made to them *simpliciter,* the persons to take and the proportions are to be determined by the statute. The leading case for this doctrine is *Roach v. Hammond,* Prac. Chancery, 401. But when the bequest is to relations "to be equally divided between them," it was settled, in *Thomas v. Hale,* Forrester, 241, the authority of which has been generally recognized ever since, that the distribution must be *per capita* among the persons included in the statute. Whatever might be thought of these distinctions, were the matter now a new one, to disregard them at this day would be *quieta movere.*

The eleventh item of the will is very inartificially ex-
(77) pressed, and we are called upon to declare its true construction. Its words are, "It is my will and desire that all my perishable property be sold at my death and the proceeds thereof I *lend* to Elizabeth Summerlen, Millicent Bridges, Emmeline Knight, Joseph John Freeman and grandson Augustus Whitehead, to be equally divided amongst them, and at death I give the said proceeds of my perishable property named in this item to the children of the said Elizabeth Summerlen, Millicent Bridges, Emmeline Knight, Joseph John Freeman and grandson Augustus Whitehead, to them, their heirs and assigns forever." Elizabeth died in the lifetime of her father, the testator, and it is asked of us to declare whether her children are entitled under the ultimate limitation in this clause to the share bequeathed to their mother primarily, and if not, what is to be done with it. The first bequest is for life only. This is apparent, not merely from the term "lend," but because of the disposition over made *at death* generally, which literally means the death of all the objects of that bequest. But these primary legatees take in distinct shares "equally to be divided between them," and there is no disposition of the share of one at his or her death (living the others) to any person else, unless it be found in the general limitation over. These considerations lead almost irresistibly to the conclusion that both where the testator refers to the death of the primary objects of his bounty and where he gives over the residue after death to the children of these same objects he is speaking of them distributively, and is to be understood as though he had added in each instance the term "respectively." We have indeed no right to interpolate a word to make out a meaning for the testator, but we may understand one without its being used, when the whole scope of the disposition shows that the purpose, which by that word would have been appropriately expressed, was entertained by the testator, but imperfectly communicated for want of skill. We hold, therefore, that by the death of Elizabeth Summerlen the bequest to her for life of an undivided share in these proceeds was put out of the way, and the limitation over of that share to her children took effect.

The defendant prays advice whether, with respect to
(78) pecuniary legacies which are bequeathed for life with remainder over, he is to pay them to the legatees for life, taking security for those ultimately entitled. This is not the proper course. In pecuniary bequests the legatee for life is entitled to the use only—that is, to the interest of the money; and if the executor pays over the principal money to such lega-

tee, he is accountable therefor to the ulterior legatee. Where there are particular bequests of chattels for life the legatee is entitled to the possession of the chattels themselves upon giving an inventory for the benefit of those ultimately entitled.

Augustus Whitehead and the widow are severally entitled to the crop planted and growing on the lands devised to them by the testator. *He* is also entitled to the turpentine made on the land devised to him since the testator's death; but each is bound to make compensation to those whose laborers were employed for him or her in tending the crop or making the turpentine. As to the turpentine made on the rented land, if the testator's interest in the land is not bequeathed by the will, it falls into the residue of the testator's perishable property, which is disposed of in the eleventh clause.

These are all the declarations which are called for by the parties in their pleadings. The accounts must be taken, and the cause reserved for further directions upon the coming in of the report.

Declared and ordered accordingly.

PER CURIAM.

Cited: Brown v. Brown, post, 310; *Richmond v. Vanhook,* 38 N. C., 587; *Hill v. Spruill,* 39 N. C., 246; *Brothers v. Cartwright,* 55 N. C., 116; *Hackney v. Griffin,* 59 N. C., 384; *Tuttle v. Pruett,* 68 N. C., 545; *Newlin v. White,* 84 N. C., 545.

(79)

ALLEN GUNN v. HENRY MCADEN.

1. Where a creditor, by way of composition with a debtor apparently in doubtful circumstances, without any fraud or imposition on the part of the latter, agrees to relinquish a portion of his debt in consideration that the debtor will give good security for the remainder, and the debtor accordingly procures his friends to be his sureties, and they are accepted by the creditor, the creditor cannot afterwards claim to be relieved from his part of the contract by which he stipulated to release a portion of the debt.

2. And the same rule applies when the debtor, under a similar agreement, in consideration of his creditor's relinquishing a debt he owes him, relieves him from responsibilities as his surety by substituting other sureties.

3. The payment by a debtor, or his own engagement to pay a smaller sum, will not discharge a debt for a larger sum, and the agreement to receive such smaller sum in satisfaction is but *nudem*

pactum; but where the undertaking of another person is also given, this forms a new, distinct and better security for the debt, and therefore is a satisfaction of the prior debt when so received.

THIS was a bill filed at Fall Term, 1838, of CASWELL Court of Equity. The defendant answered, and replication to his answer was entered, depositions were taken, and the cause having been set for hearing, was, at Fall Term, 1831, on the affidavit of the defendant, transmitted to the Supreme Court.

The material allegations of the parties and the facts proved are stated in the opinion delivered in this Court.

Graham for plaintiff.
(80) *Norwood* for defendant.

RUFFIN, C. J. In the latter part of 1835 the plaintiff and the defendant jointly purchased from one Lewis a number of slaves, at the price of $32,000, whereof one-half was payable down and the other half at a subsequent period, and in the meantime secured by the bond of these parties. Early in 1836 a sale was made of the same negroes to persons in Mississippi for the sum of $50,000, whereof $15,000 was to be paid at a short day, and for the residue the purchasers were to give their bonds at one and two years. Both the plaintiff and the defendant were present, and united in making the contract for this sale; but before the cash payment or any other act was done under it, the plaintiff returned to this State and left the defendant to complete the arrangement by receiving the first payment and getting the bonds for the others. Instead of doing so, the defendant made a new contract with the same purchasers, by which the price was to be $60,000, on a credit of one, two and three years, and he took their bonds accordingly. On 13 February, 1836, the defendant, then in Mississippi, addressed a letter to the plaintiff, at their residence in Caswell County, and therein informed him that he expected to enter into a new arrangement with the purchasers, upon which he regretted that he could not consult the plaintiff, and as he could not know the plaintiff's views, he stated (without mentioning what changes were proposed) that if any material change should be adopted it would be upon the responsibility of the defendant, who would hold himself bound to make good the original contract to the plaintiff. In the succeeding spring the defendant also returned to Caswell, and it was then agreed between the parties that the plaintiff would sell out his interest in the adventure to the defendant for the sum of $7,500 in ready money, the defendant being also

bound to pay the bond for $16,000 to Lewis, and certain (81) other debts for the money borrowed, with which the first payment was made to Lewis.

By the bill (filed in October, 1838), and by an amendment thereto, it is charged that the defendant, at the time of making this contract, concealed from the plaintiff the changes he had made in the sale of the slaves, and that the plaintiff was ignorant thereof. It is charged that at the time of making the contract the sums in which the parties were indebted were, first, that of $16,000 to Lewis, and, secondly, $10,000 to a bank in Danville in Virginia; and also that McAden was indebted to one Garland by bond for $4,300, which the plaintiff executed as his surety, and that it was a part of the agreement that the defendant should not only assume the joint debts as his own, but should discharge them immediately, or should give new securities therefor and thereby discharge the plaintiff from all liability for any of those sums and for that due to Garland. The bill further charges that the defendant failed to comply with the agreement in any respect, except that he paid $6,000 to Lewis upon the bond to him; that when the plaintiff agreed to become the surety to Garland he was told by the defendant that the debt was only $2,400, and in that belief he executed a blank bond, which the defendant fraudulently filled up with the sum of $4,300. That as the defendant did not pay the debt to the Danville bank at the maturity of the note, but was obliged to renew it, the plaintiff endorsed a note for the defendant's accommodation to renew it, and that at the same time the defendant, remarking that they could not always conveniently meet, and that the one or the other was often at a distance from home, requested the plaintiff to sign also another note in blank, to be used for a subsequent renewal, and, in confidence that it would be used for that purpose and for no other, the plaintiff signed a blank as requested; which last note, however, the defendant filled up with the sum of $10,000, and thereon procured a new and further loan from the same bank. The bill further charges that the defendant was largely indebted to other persons, and in the years 1836 and 1837 was greatly embarrassed, and that the plaintiff, finding himself thus responsible for the defendant for sums amount- (82) ing to about $35,000, became exceedingly uneasy lest, from the ultimate inability of the defendant to discharge his debts, he (the plaintiff) should be obliged to pay the same or some part of them, and because his own credit was suspected on account of his liabilities for the defendant; that he communicated to the defendant his uneasiness, and his anxiety to be discharged from those liabilities by the defendant's giving other sureties instead

of the plaintiff; that the defendant, being made thus aware of the plaintiff's solicitude upon the subject, took advantage of the danger in which he had involved the plaintiff and of his alarm thereat, and refused to give other security for the debts, or in anywise to indemnify the plaintiff, unless he (the plaintiff) would undertake to pay of those debts the sum of $7,500, out of his own pocket, and lose the same entirely; and that the plaintiff, having failed, after many applications, to get any other relief, was, in June, 1837, compelled to accept the terms proposed by the defendant; and in consideration that the defendant would give other sureties for the debts mentioned and discharge the plaintiff, he (the plaintiff) executed his covenant to the defendant that he would pay upon the debt remaining due to Lewis the sum of $7,500, and the defendant should be discharged from so much of that debt; that the plaintiff had paid $5,000 in part thereof and was sued for the residue, and would be compelled to pay that also, unless the defendant should do so. The bill then expressly charges that the plaintiff's covenant had no other consideration than that before set forth, namely, the agreement of the defendant to pay his own debts, or otherwise to exonerate the plaintiff from his liability therefor (which the bill admits has been done); and that the defendant was both legally and morally bound to pay those debts and indemnify the plaintiff, without taking from the plaintiff his said covenant or any other of a like nature, and that the defendant ought in conscience now to make such payments, notwithstanding the agreement aforesaid, which the plaintiff insists is unreasonable and unjust and ought to be set aside. The prayer of the bill is that the agreement may be rescinded as being a hard and un-
(83) reasonable bargain and obtained by taking undue advantage of the state into which the plaintiff had been incautiously drawn by the defendant, and that the defendant may be decreed to pay to the plaintiff the sum already paid by him to Lewis and to discharge him from the residue of the debt of $7,500. The answer admits the purchase and the sales of the negroes as before stated, and also the contract between the parties whereby the plaintiff sold his interest to the defendant at $7,500, paid in the spring of 1836. The answer admits that the defendant did not before this contract communicate to the plaintiff the particular terms of the second contract into which he had entered with the purchasers; but it states that he did inform him that the contract had been altered, and left it to the plaintiff to sanction it and come into it, with its advantages and hazards as they might turn out, or to abide by the first bargain; and that the plaintiff insisted on holding the defendant liable for

the first sale, but proposed to sell out to him for $7,500, which was agreed on. The answer then states that immediately thereafter the defendant fully disclosed the terms of the second sale, and again left it to the option of the plaintiff to adopt that sale on their joint account, or to take the sum of $7,500 for his interest; and the plaintiff, with a perfect knowledge of all the circumstances, then declared his preference for the latter, and thereupon the contract was closed and the money paid to the plaintiff, and the defendant engaged to pay the price the parties were to give for the negroes. The answer admits that as between themselves the defendant thereby became bound, as principal, for the debts of $16,000 to Lewis, and $10,000 to the bank in Danville, and that the plaintiff was bound therefor as surety only, and also that the plaintiff was the surety of the defendant to Garland for $4,300; but it denies positively that the defendant represented his debt to Garland to be only $2,400, or that the plaintiff signed a blank bond and trusted to the defendant to fill it up, and avers that the plaintiff knew the true debt and executed his bond jointly with the defendant to Garland after the bond was fully written. The answer also denies that it was any part of that agreement that the defendant should immediately pay off those debts or discharge the plaintiff (84) therefrom by giving other sureties or otherwise, and, on the contrary, it avers that the plaintiff was perfectly satisfied with his own profits on the speculation, and also, with the defendant, believed that his profits upon that and other speculations would be large and that consequently the plaintiff ran no risk by being the surety for the defendant, and that the parties accordingly, through the year 1836, gave notes as surety for each other.

The answer admits that the plaintiff endorsed notes in blank for the defendant, to be used in renewal of the note for $10,000 at the bank, and that one of those blanks was used, without the plaintiff's knowledge, by way of renewing another note of defendant's in the same bank for the same amount; but it denies that this was done with a fraudulent intent, or that the plaintiff was in any jeopardy therefrom at the time the parties came to their agreement of June, 1837, and gives the following account of that transaction, namely, that the defendant owed two debts, of $10,000 each, to the bank, on the note for one of which the plaintiff was the endorser, and the other, two other persons endorsed, one of whom was absent from home when his endorsement of a note for renewal was needed; that to supply his place the defendant's agent used one of the notes which the plaintiff had endorsed, with the intention, when it should be again re-

newed, to put in its place a note signed by the original sureties for that debt, as an officer of the bank said might be done. The answer states that the defendant immediately informed the plaintiff of the transaction, and offered to give him a full indemnity, if he required it, but the plaintiff said he wished none, and was perfectly satisfied; that the original endorsers returned, and the defendant offered his note with their names on it, to take up that on which was the name of the plaintiff, but the bank refused, as it was its practice not to give up a good name; that then the defendant procured his father (who was fully able to pay the debt) to put his name on the note, as endorser, before the plaintiff's, that thereby his liability might be prior to the plaintiff's, and furthermore offered any indemnity against
(85) loss to the plaintiff from that note, which the plaintiff, professing to be satisfied with the responsibility of the defendant's father thereon, again declined.

The answer further admits that, besides debts already mentioned, the defendant owed other debts, to the amount of $40,000, for which various persons were his sureties; but it states that notwithstanding the large amount of his debts—in all about $75,000—he considered himself, and was considered by the plaintiff and all others, perfectly able to pay all his debts, and that after doing so he would still be independent, until the spring of 1837, when the purchasers of the negroes in Mississippi failed to make their first payment, and the general commercial embarrassment, derangement of the currency and fall of property, which then occurred, rendered it doubtful how far those purchasers could fulfill their contract, and certain that there would be a considerable loss on their debt. The answer admits that this disappointment and others of a like kind alarmed the defendant, his creditors and sureties, and among them the plaintiff, and that the plaintiff in frequent interviews expressed to the defendant his claim, and his wish to be discharged from his liabilities, or to be counter-secured; but the answer denies that the defendant did anything to excite the plaintiff's alarms, or that he refused to give every explanation in his power to satisfy his mind, or that he took any unfair advantage of his fears or anxiety. It admits it to be true that the defendant was unable to raise money for the immediate discharge of the debts for which the plaintiff was bound, and that his other sureties, and also the defendant himself, who was desirous of dealing with equal fairness by all his sureties, were unwilling that the defendant should make an assignment of his estates for the separate benefit and protection of the plaintiff. But at the same time the defendant

laid before the plaintiff and his other sureties an accurate statement of his affairs, upon which, unless the loss proved very great upon the southwestern debts, there appeared more than sufficient assets to satisfy every creditor; and afterwards the plaintiff's fears appeared to be quieted under the prospect (which seemed to him reasonable) that the defendant would ultimately meet all claims upon him. But the answer states that the (86) uneasiness of the plaintiff again and again revived, and his applications to the defendant to do something for his relief were so incessant and urgent that the defendant determined to make a general assignment of his estate and effects in trust to secure and pay all his debts; preferring, however, those for which any person was his surety and putting all debts of that character on the same footing, with the only exception hereafter mentioned, and communicated that determination to his sureties, including the plaintiff. As to the exception alluded to, the answer states that as the defendant had paid to the plaintiff $7,500 as profit to him on their joint adventure, from which the defendant then, in 1837, would probably derive no profit, but sustain a heavy loss, he thought it just that as to that sum the plaintiff should be regarded as a general creditor, and as such be secured in the deed of trust, and not as a surety, and therefore that, in the assignment, he would secure all the debts for which the plaintiff was liable as surety, namely, about $35,000, in the first class, except the said sum of $7,500, and as to that sum last mentioned, that it should be secured among the general debts, as a second class. But the plaintiff doubted whether a sufficient sum would be realized from the defendant's effects in a reasonable time to discharge the debts of the first class, as thus arranged, and feared he might sustain a loss on that part of the debt over and above the said sum of $7,500, and, besides, admitted that it was but reasonable that the whole loss of their adventure should not be thrown on the defendant. For which reasons the plaintiff preferred being discharged at once and entirely from all the debt for which he was bound, except that sum of $7,500, and therefore proposed that if the defendant, instead of making the assignment as intended, would discharge him by giving other sureties for the debts, he (the plaintiff) would apply to the payment of one of the debts for which he was bound the sum he had so received as profit, and would acquit the defendant therefrom. To this the defendant says he did not accede for some time, for the reasons, first, that by his contract with the plaintiff he had made the adventure his own, and wished to pay (87) the whole debt, if his means should prove adequate, as he hoped they would; and, second, because he was unable to dis-

charge the plaintiff without involving other friends in loss in case his means should prove inadequate, and he did not know that he could procure other sureties, were he even willing to apply to any persons. But being repeatedly pressed upon the subject by the plaintiff, he finally assented to the plaintiff's proposal, provided any persons would agree to become his sureties whom the creditors would accept in the place of the plaintiff. The answer states that even then the defendant assured the plaintiff that he need not be uneasy respecting the debt for $10,000 at the bank, for which the note with the plaintiff's endorsement had been substituted for another, because, from the manner in which the plaintiff was rendered liable for that debt, the defendant felt bound to provide for it at all events, and that he had the means of paying it at maturity, and intended so to do; and the answer states that he so did, without renewing it again. With respect to the residue of the debts aforesaid, the answer states that the defendant made sincere efforts to get his friends to become bound instead of the plaintiff, and that it was only after his own exertions for a fortnight, and frequent conferences between the plaintiff and the defendant's other endorsers, and also with the defendant's near relations, who were desirous to serve him, that it was finally arranged that his mother-in-law and two brothers-in-law should assume the sum of $25,000 of his debts, including that for which plaintiff was liable; and to induce them so to do, that the defendant should convey to them adequate property in this State as a security, and also that his father should become responsible for other large debts which he owed; and that to this another brother-in-law, who was the defendant's surety for $20,000 more, also assented, although he was not secured by the assignment or otherwise, except by the personal responsibility of the defendant and the prospect of collecting the debts in the West. The answer avers that the defendant never would have entered into this arrangement unless it had met the approbation of all his sureties,

(88) and unless thereby he had become the better enabled to meet the debts for which his other friends were liable, and that neither those who were before bound for him nor those who now became bound for him would have approved of the arrangement or would have interposed in his affairs but for the belief, founded on the plaintiff's representations, that he freely acquitted the defendant from that sum of $7,500, because he conceived it as his interest to be discharged from his liability for the defendant even at that price, and because he thought it but just, under the circumstances, to refund that sum, which he had received as his share of the profits of a business on which

no profit was in truth made. The answer then states that in fact the defendant has been unable to collect the price of the negroes, and that from the insolvency of the purchasers, the loss on exchange, and various expenses, he has not merely made no profit (as is the case with the plaintiff) but has sustained a loss of several thousand dollars. From all which it is probable the defendant will be so far unable to pay all his debts that it was actually for the benefit of the plaintiff that he made the contract which the bill seeks to rescind; and the answer finally submits that the plaintiff may still elect to set aside both of their last contracts and stand upon the footing of partners with respect to the negroes, and of principal and surety in respect to the debts in question.

To the answer replication was taken; but the plaintiff has taken no evidence. The defendant has examined two witnesses, one of whom was one of the sureties under the agreement of June, 1837, for $25,816, for the defendant in place of the plaintiff, and the other was McAden's endorser for large sums without any indemnity. They prove that the agreement was not only consented to by the plaintiff, but was proposed by him, and urged upon McAden and the witnesses as an act necessary to the credit of Gunn, and that it was only after repeated interviews that the witnesses and the other persons who became bound for the defendant reluctantly yielded their assent, which they did finally for the reason that McAden's debts would be so much reduced, so that he would be the better able to meet the residue of his debts. The property which he conveyed has been sold for payment of his debts; but he still owes debts, and it (89) is generally believed that he has probably been rendered insolvent by his losses on the speculation spoken of.

Although the circumstance that the plaintiff had received a sum of money as the supposed profits of the partnership may have been one of his motives for coming to the agreement whereby he gave up that sum, yet the Court deems it unnecessary in this case to take it into consideration. If he relinquished it because the business turned out unprofitably, and he thought it wrong to throw the whole loss on his associate, to his ruin, we do not see that he could be relieved from an act done with his eyes open, and which, if not required by conscience on his part, has at least nothing in it against conscience on the part of the defendant. But this point is not relied on, for we think the bill cannot be sustained for other reasons. It may be inferred from the bill, and is established by the answer and proof, that through 1836 and early in 1837 the defendant was regarded by himself and others as fortunate in business and on the high road of pros-

perity. During that period it was not considered that responsibilities for him were hazardous. But it is equally clear that in the spring of 1837 a sad reverse in the defendant's affairs suddenly occurred, and his career was then supposed to have ended in certain or probable insolvency. The plaintiff, being then bound in heavy sums for him, became alarmed, and, naturally, endeavored by various means to secure himself from loss. For that he was not to blame. He might with propriety have obtained, if he could, any of the securities which he asked. But, on the other hand, we see nothing in the conduct of the defendant on those occasions that is to be censured. He was unable, by paying them, to discharge the plaintiff from the debts for which he was bound; and he acted but justly by other persons, who were also his sureties, in refusing to make an assignment of property for the benefit of the plaintiff exclusively. He offered to make a general one, with the provisions mentioned in his answer, and no objection can be taken to those provisions, while a right is recognized in a debtor to prefer one creditor before another. Besides, as the plaintiff had made a
(90) clear gain on the transactions out of which arose the larger debts for which he was responsible, the defendant, to the extent of the sum thus gained, might well distinguish between the plaintiff's claim on him and the merits of the residue of his claim on those of other persons, who had become bound for him, for his accommodation and without any interest of their own. Indeed, it does not appear that the plaintiff objected to the terms of the proposed assignment, if that was to be the kind of security provided for him. But for other reasons he preferred a different mode. It is evident the plaintiff had but little confidence that the defendant could collect the large sums due for the negroes, without which he would unquestionably be insolvent, and, consequently, that he doubted whether the assignment would be a good security for the residue of the debt after deducting the sum of $7,500. If that was not the state of his mind, it is inconceivable that he should not have eagerly embraced the offer of the assignment, which, according to its terms, would secure the whole debt, including the $7,500, if the estate and effects should prove of sufficient value. But in place of an assignment the plaintiff proposed a different plan, as more advantageous to himself, and he urged it upon the defendant and his friends for days and weeks, until they yielded to his importunities and adopted it. Looking upon the defendant as unable to pay his debts, he felt heavily the burden of a liability for $35,000 of those debts, both as a present prejudice to his credit and as a risk of an actual loss, ultimately, that would exceed

$7,500. For that reason it was that the plaintiff offered to give up at once that sum of $7,500 if the defendant's friends would at once exonerate him from the remaining sum of $27,500. If the plaintiff's timidity had been practiced on, and a fear of loss excited by falsehood or any unfair means, he would have an equity. But the bill does not allege nor intimate that the defendant's embarrassments were not real, or that the plaintiff's suspicions had been unduly alarmed by the defendant, directly or indirectly. There are, indeed, allegations that the plaintiff's confidence had been abused by the improper use of notes which he had signed in blank, so as to render him liable (91) for more than he intended. But those allegations are either denied in the answer or so explained as to show that the plaintiff acquiesced in the only act admitted, and that he did not in truth suffer from that. We must, then, hold that there was no imposition on the plaintiff respecting the defendant's condition, and that in June, 1837, it was at the least doubtful whether the defendant would be able to pay his debts, or how far short of it he would fall. Now, that being the case, we think it clear that the agreement of the creditor or a surety to compound with the debtor for a smaller sum promptly paid or secured by the debtor's friends is not an agreement without consideration, or hard and unreasonable, but that it is founded on considerations good in morals and law, and sufficient in this Court.

The plaintiff parted from a bad debt at more than its value; or, at all events, for a doubtful debt at what was thought to be its fair value. The payment by a debtor or his engagement to pay a smaller sum will not discharge a debt for a larger sum, and the agreement to receive such smaller sum in satisfaction is but *nudum pactum*. But it is otherwise when, besides the undertaking of the debtor, that of a third person is also given. Such an undertaking forms a new, distinct and better security for the debt, and therefore is a satisfaction of the prior debt when so received. *Steinman v. Magnus*, 11 East., 390. If this be so at law, much more is it in this Court. For after the plaintiff has put to a severe trial the affections of the defendant's family, and tortured the compassion of his friends and other sureties until they were induced to assume $27,500, for which the plaintiff was liable, and to acquit him absolutely therefrom, upon condition that he would pay a residue of $7,500, for which also he was then bound and which all parties supposed the defendant could not pay, it would be too much to say that such an agreement was not as obligatory on the plaintiff as on the other parties. In taking on themselves debts for which the plaintiff had been liable those persons thought they were buying the lib-

erty of their distressed friend; that by diminishing his
(92) embarrassments to the extent of the sum relinquished by the plaintiff they were putting him in a way to exert himself anew, and by subsequent acquisitions to discharge other debts, for which some of them were also liable. They would never have bound themselves but with those ends in view, and it would be a fraud in the plaintiff to frustrate them. Instead of the agreement being against conscience, and the defendant liable for this sum, notwithstanding the plaintiff's discharge to him, it seems manifest that if while the plaintiff was holding out the terms he did to the defendant's friends he had obtained from the defendant his express promise, or any other security for the residue of his debt, the court would not have allowed him to enforce it. It would clearly have fallen within the principle on which contracts in fraud of compositions by creditors are avoided. If one creditor contrive to secure to himself better terms than he, with the other creditors, agreed to take, it is a fraud upon the other creditors; and neither at law nor in equity will the security be sustained, even against the debtor himself. *Middleton v. Onslow*, 1 Pr. Wm., 768; *Cockshett v. Bennett*, 2 T. R., 763. Much less can the defendant be held liable for this money without any agreement on his part and against the deliberate agreement and deed of the plaintiff.

Between such persons the cases of hard and unreasonable bargains and of inadequacy of consideration, which were cited for the plaintiff, have no application. Here there is an adequate consideration in the liabilities incurred by third persons, and also because, from the impending insolvency of the defendant, the plaintiff's loss, but for this agreement, might have been and probably would have been greater than $7,500, and thus the plaintiff derived from the contract a direct pecuniary benefit.

It was a hard bargain in no sense but the one that every composition by creditors is hard on them. It is never submitted to but from necessity. But the plaintiff's loss arose, or it was reasonably feared that it would arise, from the defendant's insolvency, and not out of this agreement. The agreement may have prevented the loss from being greater. It was not an unreasonable composition, nor obtained by undue means.
(93) It was of the plaintiff's proposing, with all the knowledge of his risks and of the defendant's affairs, which the defendant himself had; was pressed by him for many days, and deliberately concluded by him, and, finally, was probably advantageous to him.

The foregoing remarks also answer the cases of contracts with expectant heirs, wards just of age, and between seamen and their

captains or owners. The law extends to those persons peculiar protection, because they are considered as being in the power or under the influence of those who thus deal with them. But here the parties are reversed. A debtor may be often compelled by his creditor, or his surety having the authority of a creditor, to enter into unequal and oppressive contracts, from which he ought to be relieved. But it is not generally true *vice versa*, and the debtor can seldom compel terms against the will of the creditor. And, in this particular case, the debtor, in fact, dictated no terms, and with difficulty, by the aid of his friends, complied with those insisted on by the plaintiff. The bill therefore stands simply on a principle that, as a man ought to pay all his debts, a composition must of necessity and under all circumstances be a harsh and unreasonable contract, and as such be set aside; a doctrine altogether novel and unfounded.

The bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

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(94)

DUNCAN McLAURIN, ADMINISTRATOR, ETC., v. SAMUEL WRIGHT.

1. To turn an absolute deed into a mortgage, the price must be grossly inadequate. But where the difference between the price given and the value of the property as estimated by witnesses is only such as may often arise in actual sales, a court of equity will not be authorized to declare a deed, absolute on its face, to be only a mortgage or security for money advanced.

2. The court cannot declare a deed, absolute on its face, to be a mortgage, simply on the testimony of a witness that a previous agreement had been made for a mortgage, when there is no evidence of imposition, and the party giving the deed at the time of its execution knew that he was executing an absolute deed and not a mortgage.

3. Such parol testimony can only be acted on when there has been a mistake or fraud in making the written conveyance different from the original contract.

THIS bill was filed at RICHMOND Court of Equity, Fall Term, 1837. An answer was put in, replication to it filed, and depositions taken. At Fall Term, 1840, the cause was set for hearing, and at Spring Term, 1841, by consent of parties, transmitted to the Supreme Court.

The pleadings and facts proved are stated in the opinion delivered in this Court.

Winston for plaintiff.

No counsel in this Court for defendant.

(95) RUFFIN, C. J. This bill was filed in July, 1837, and states that, on 16 January, 1836, Thoroughgood Pate, the intestate of the plaintiff, having occasion to raise money, applied to the defendant, Wright, to borrow the sum of $280, and that the defendant then lent him that sum, and that, to secure the same, Pate executed to the defendant a bill of sale for a female slave, named Edy, of the age of sixteen years, and then worth nine or ten hundred dollars, and also delivered the slave to Wright, who took her into possession and hath held her ever since. The bill states that notwithstanding the deed was unconditional and absolute on its face, it was not intended by either of the parties to be an absolute sale, but that it was expressly agreed between the plaintiff's intestate and the defendant that the former might nevertheless redeem the slave. The bill further states that Pate died intestate on 24 March, 1836, and the plaintiff was appointed his administrator, and the prayer is for redemption upon the usual terms.

The answer denies that the defendant lent any sum of money to Pate, or took the conveyance in the bill mentioned as a mortgage or security for money, or that it was so understood. It states that at the time specified in the bill two negro boys belonging to Pate had been seized by the sheriff on executions and were to be sold on the next day, and that Pate wished to raise money to discharge the debt by borrowing it or by selling the girl Edy, then about thirteen or fourteen years old, instead of selling the male slaves at public auction; that the defendant, wishing to own a girl, agreed with Pate to purchase Edy and to give for her the sum due on the process then in the sheriff's hands, supposed to be about $280; and, as Pate was sick at the time, the defendant agreed to pay the money the next day to the sheriff and have the boys discharged from execution; that thereupon Pate conveyed the girl to the defendant by a deed absolute in its terms and intended by both parties to be so, and the same day he took her into his possession, carried her to his house, and hath kept her hitherto. The answer states that the deed was written by D. McColman, and was attested by him and by George Wright and Cameron Wright; that the two latter are (96) since dead, and that if they were living the defendant could have proved directly by them that the agreement was for an absolute purchase. It admits that when McColman was called on to write the deed (for he was not present at the bargain) he inquired "how it must be written," and that Pate

replied, "Nothing but a mortgage." But the answer avers that the defendant immediately declared that not to be the contract, and that unless it was to be a sale and purchase he would have nothing to do with it, and that then Pate directed the draughtsman "to write a firm bill of sale, absolute in its terms," which was done accordingly. The answer further states that on the next day the defendant went to settle the demands the sheriff had against Pate, and found them, instead of $280, to amount to $311, and that he paid the same according to his agreement, and it avers that that was a fair price for the slave Edy at that time, though in a few months thereafter negroes rose, and she would have brought more than he gave for her.

The material evidence upon the question whether the negro was sold or pledged consists of the depositions of several witnesses taken by the plaintiff. The first is that of D. McColman. He states that the defendant was the nephew of Pate, and possessed his confidence; that he (the witness) and George Wright, since deceased, attested the bill of sale, in which the consideration was expressed to be about $280, and that the agreement between the parties was that Wright should pay the sheriff certain executions against Pate, which he did the next day, amounting to $311.50, and that Wright was to keep Edy until the money was returned. The witness states that Pate was sick at the time, and died in March following, and that when he executed the bill of sale he said to Wright that he was not afraid but that he would give up the girl at any time the money should be returned, to which the other replied, "Uncle, if you were dead I would not defraud your children." This witness also states that Pate was much in debt and pressed for money.

The other testimony taken before the hearing of the plaintiff relates entirely to the value of the slave. One witness, M. McColman, states that in August, 1836, the other slaves of Pate were sold by the present plaintiff as administrator, (97) and that at that sale Edy would have commanded seven or eight hundred dollars. Two other witnesses, Daniel Mallay and Samuel J. Gibson, state that in 1837 she would have sold for six or seven hundred dollars.

In this state the case was brought to hearing at the last term; but it was not decided, because we found a difficulty in coming to a clear conclusion as to the value of the slave Edy, upon which, in our opinion, the decision of the cause mainly depended. It is too late, after the judgment in *Streator v. Jones*, 10 N. C., 423, and many cases which have properly, as we think, followed it, to intimate that an unconditional deed is conclusive of an absolute sale. Facts and circumstances *dehors* may, notwith-

standing the form of the instrument, establish its true character to be but a security. Such facts and circumstances are enumerated in Butler's note, Co. Littleton, 205a, and were acted on in *Streator v. Jones*, and by ourselves in *Kimborough v. Smith*, 17 N. C., 558, and other cases. Among those circumstances inadequacy of price has been often said to be an important one; not that it will affect an absolute sale of itself and turn it into a pledge, when it was really designed to be a sale out and out. But when the question is whether the transaction was a sale or a pledge the price goes a great way towards satisfying the mind on one side or the other. A gross inadequacy of price—especially of a species of property in demand, and that generally brings its fair value in open market—argues strongly that security merely was meant or that the supposed vendor was oppressed or imposed on. On the contrary, a fair price and possession simultaneously taken and kept and no covenant to repay the money advanced have decided several cases which upon other circumstances were doubtful. *Poindexter v. McCannon*, 16 N. C., 373; *Munnerlin v. Birmingham*, 22 N. C., 358; *McDonald v. McLeod*, 36 N. C., 221. In this case the value of the slave is distinctly put in issue by the bill and answer; for the defendant not only insists on his absolute deed as showing, *per se*, an absolute purchase, but he sustains it in the point in which the plaintiff impugns it by averring that his purchase was a fair
(98) one and for full value. It is true, the subscribing witness contradicts the answer as to the terms of the agreement and the nature of the contract, and it is competent to hear and act upon such parol proof where there has been a mistake or fraud in making the written conveyance different from the original contract. But this witness gives no testimony touching such mistake or fraud. The answer is precise and positive that, although Pate at first mentioned a mortgage, the defendant refused to accept such a conveyance and required an absolute bill of sale, and that Pate assented thereto and directed the deed to be so drawn. Now, the witness does not contradict any part of that statement, nor in any manner account for his drawing and Pate's executing a conveyance in this form upon such an agreement as he says the parties made. Moreover, it is to be inferred from the statement of this witness himself that the deed was drawn and intended to be absolute; for why else should Pate have made the remark that he was not afraid the defendant would take advantage of him? If he had been supposing himself to be executing a mortgage he would not have thought the other could defraud him. The evidence of this witness, therefore, cannot authorize a decree, for it opposes nothing to the

written conveyance but a previous parol agreement or a declaration at the time inconsistent with it. Upon such evidence the Court has never controlled the operation of a deed imported by its tenor and sustained by the answer; for that would be to allow parol testimony *simpliciter* to contradict and vary a written instrument, contrary to the settled rule of the common law and to common sense.

The value of the slave was therefore an important inquiry in the cause. We should have thought, if the value had been satisfactorily shown to be, as alleged in the bill, nine or ten, or, as stated by the witnesses, eight or seven, or even six hundred dollars, that it afforded cogent proof that a security merely was intended by both parties, or, at least, that the former owner was led to believe that he was giving only a security. For half price, or less than half price for a negro—which, as property, is always salable—would be so gross a disproportion to what a seller might have got and probably would have (99) got, had a sale really been in contemplation, as to create a satisfactory presumption that a sale was not meant. But when the evidence on this point was looked into it raised some surprise to find that every witness, with probably as good an opportunity for knowing the value at the time of the conveyance to the defendant as at subsequent periods, had been examined and answered as to the value, not at the period of the transaction, but at particular days posterior thereto. One witness fixes the value six months and the two others a year or more after the deed. This was to be observed the more because the defendant on his oath stated so pointedly that he gave the full value at the time he bought, though soon afterwards the price of slaves became greater. As there was no direct evidence, except the answer, as to the value on 16 February, 1836, and it was not satisfactory to take it inferentially from the testimony stated, the Court deferred the decision and directed an inquiry upon the precise point of the value on that day. The master sent down a commission, which has been returned with the depositions of four witnesses taken on the part of the plaintiff, and some of them persons who had been examined in chief in the cause. Their evidence the master has reported, with his opinion thereon; from which it appears that at the time of the contract the slave, in the opinion of one of the witnesses, was worth $350, and in that of the other three $400, which latter estimate the master adopts, and to which neither party has excepted. That must now be assumed to be the real value of the slave, and, deeming it to be so, it puts a new aspect upon the case decisively adverse to the plaintiff. There can be no positive correctness in setting

a value on a slave. One man will give or take fifty or one hundred dollars more or less in the purchase of one than another man will; therefore the price is not to be too nicely calculated in reference to this question. We have hitherto said that to turn an absolute deed into a mortgage the price must be *grossly* inadequate. *McDonald v. McLeod*, 36 N. C., 221; *Lewis v. Owen, ib.*, 290. Here the difference is only such as often occurs in actual sales between the price which a purchaser is (100) willing to give and that which he would be willing to take if he were to sell again. The point to which we are thus brought is fatal to the bill, which must necessarily be dismissed.

PER CURIAM. Bill dismissed.

Cited: Elliott v. Maxwell, 42 N. C., 249; *Shields v. Whitaker*, 82 N. C., 521; *Porter v. Wright*, 128 N. C., 44.

WILLIAM SPIVEY AND OTHERS *v.* LEVIN SPIVEY, EXECUTOR, ETC., AND OTHERS.

A, by his last will, gave to each of his children, to wit, Hetty, Louisa, Levin, William, Elizabeth, Susannah, Moses and Calvin, certain negroes and other personal property, which he had previously conveyed to them respectively by deed. Louisa, being married, the property so given to her had, before the testator's death, been sold by execution for the debts of her husband. Hetty died in the lifetime of the testator, leaving seven children. In another clause of the will the testator devises as follows: "My will and desire is, those who have received a part of my estate will account to the balance of my children for what they have received; then it is my will and desire that all the balance of my property not given away shall be equally divided among the *heirs of Hetty*, Louisa, Levin, William, Elizabeth, Susannah, Moses and Calvin, to them and their heirs forever." The husband of Hetty held the property given to his wife in her lifetime as his own: *Held* by the Court, (1) that Louisa must account in the division directed by the last clause for the property advanced to her by the testator and sold for her husband's debts; (2) that Hetty's "*heirs*" or children must, in such division, account for the property received by their mother in her lifetime, and that the other children must likewise respectively account to Hetty's children for what they received; (3) that Hetty's children are entitled to claim only as a *class* and not *per capita*, and therefore take among them but one child's share.

This was a bill filed at September Term, 1839, of BERTIE Court of Equity, by the plaintiffs, who were part of the (101) legatees named in the will of William Spivey, deceased,

against Levin Spivey, executor of the said will, and the other legatees, praying for an account and settlement of the estate and payment of their respective legacies. Answers were filed, and the cause was continued under various orders until Fall Term, 1841, when, having been set for hearing, it was removed by consent of parties to the Supreme Court.

The points in controversy between the respective legatees are stated in the opinion delivered in this Court.

B. F. Moore for plaintiffs.
J. H. Bryan for defendants.

GASTON, J. It appears from the pleadings in this case that William Spivey, the testator, at the execution of his will and at the time of his death had seven children, viz., Louisa Hendrickson, Levin Spivey, William Spivey, Elizabeth Pruden, Susannah Shark, Moses Spivey and Calvin Spivey, and seven grandchildren, who were the children of a deceased daughter, Hetty Taylor. He had, some time previous to the execution of his will, given, by proper and effectual means of conveyance, negroes and other personal property to several of his children. The negroes and other personal property so given to his daughter Hetty are now held by her late husband as his own, and he disclaims all benefit under any of the provisions of the will. Those given to his daughter Louisa were sold for her husband's debts in the testator's lifetime.

This bill is filed against the executor for a settlement. All the persons interested under the will are made parties thereunto. And at the hearing questions were raised upon which our opinion is required.

These are so intimately connected as to depend upon the construction of the same clauses in the will, which it will therefore be proper to consider in connection. In these the testator declares as follows: "1. I give and bequeath unto Hetty Taylor four negroes" (naming them), "which she has already received, two cows and calves, and one bed, to her and her heirs forever. 2. I give and bequeath unto my daughter Louisa Hendrickson three negroes" (naming them), "one feather bed, (102) one cow and calf, which she has already had, to her and her heirs forever. 3. I give and bequeath unto Levin Spivey two negroes" (naming them), "one cow and calf, one feather bed, which he has already had, to him and his heirs forever. 4. I give and bequeath unto my daughter Elizabeth Pruden three negroes" (naming them), "which she has already had, to her and her heirs forever. 5. I give and bequeath unto my son

William Spivey one negro boy, George, and one feather bed, which he has already had, to him and his heirs forever." Then, after some specific devises, follows the fourteenth: "My will and desire is, those who have received a part of my estate will account to the balance of my children for what they have received; then it is my will and desire that all the balance of my property not given away shall be equally divided between the heirs of Hetty Taylor, Louisa Hendrickson, Levin Spivey, William Spivey, Elizabeth Pruden, Susannah Shark, Moses Spivey and Calvin Spivey, to them and their heirs forever."

The questions raised are, (1) Is Louisa Hendrickson to bring into account the negroes and other personal chattels stated in the will to have been received by her, and which have been sold for her husband's debts, before she can claim a share of this residue? (2) Are the children, as "heirs" of their mother Hetty Taylor, to account in like manner for what their mother has received? And (3) in the division of the residuary estate of the testator do these children take one share as a class representing their deceased mother, or do they severally share equally with the children of the testator? It seems to us clear beyond dispute that Louisa Hendrickson must bring into the common stock, in which by the fourteenth section she is to have a part, the value of the gift or advancement which in the second section the testator states she has already had from him. She is one of those who have received a part of his estate and who by that clause is to receive a share of "the balance of his property," when she "accounts to the balance of his children for what she has received." There is no doubt that the testator intended that the part of his estate which had been given to his daugh-
(103) ter Hetty should also be brought into the account. As to that, the will does not operate as a gift, but as a confirmation of a preceding gift declared to have been made, and the fourteenth clause embraces all who have thus received and, of course, all that has been so received. It is to be taken into account for the purpose of a distribution, and therefore the value thereof is to be brought into the common stock by some or other of those between whom that stock is to be apportioned. Among these is a class of individuals whom the testator designates as the "heirs of Hetty Taylor." It is in that character that he constituted them the objects of his bounty. It is as representing their deceased mother that he gives to them a part of the "balance of his property not given away"; and if an account is to be taken of the value of what Hetty Taylor has already received it must be for the purpose of affecting the share which they are to have of this "balance."

The expression in the fourteenth clause, "to account *to the balance of my children*," must be so extended by construction as to embrace the children of the testator's deceased child. If *they* are to account for the value of their mother's advancement to the "children" of the testator, they are to have the benefit of account directed to be made by these children. In other words, the accounts must be mutual between those who are to divide the common fund. And these views, as we think, are conclusive to show that the division is to be so made as to give unto them *a share* as a class. They are as a class to deduct the value of the advancements made to their mother in anticipation of her filial portion. Each of the testator's children is also to deduct, as preparatory to a division with them as a class and with each other, the part of the filial portion which he or she has received in anticipation, and when this is done there is to be an equal division between the respective parties accounting and accounted to for advancements. Although, therefore, the last words of the fourteenth clause, taken *per se*, import an equality of division *per capita*, yet, taken in connection with the context, they must be understood as directing an equality of division, in which the heirs of Hetty Taylor are to be regarded as an unit. They are to account and to be accounted with as representing (104) a child; they are liable to bring in the part of a child's portion which has been advanced and entitled to have the benefit in account of the parts of the portions which other children have received, and *then* are to receive as much in addition out of the residue as will give to them a full child's portion.

PER CURIAM. Decree accordingly.

Cited: Harris v. Philpot, 40 N. C., 329; *Henderson v. Womack*, 41 N. C., 441; *Bivins v. Phifer*, 47 N. C., 439; *Cheeves v. Bell*, 54 N. C., 237; *Ward v. Riddick*, 57 N. C., 24; *Burgin v. Patton*, 58 N. C., 437; *Lane v. Lane*, 60 N. C., 632; *Lee v. Baird*, 132 N. C., 766.

JOHN SELLARS v. WILLIAM ASHFORD.

1. Where there are joint administrators and one of them has paid out more than the assets he has received and files a bill against his coadministrator for indemnity, he cannot object to the allowance of commissions to this coadministrator for the services the latter has rendered, though by making such allowance there will be no assets of the estate remaining to reimburse him.

2. Where an administrator, at an execution sale for a debt due the estate, purchases negroes for the benefit of the estate and accounts for them specifically, he is entitled to commissions on the sum bid for the negroes in the same manner as if he had received so much money.

THIS was a cause transmitted to the Supreme Court from the Court of Equity of SAMPSON, at Spring Term, 1835, having been previously set for hearing.

The plaintiff and the defendant administered on the estate of Josiah Blackman, deceased, and certain creditors of the intestate instituted suits, both at law and in equity, against them for the recovery of their demands. The administrators then had assets more than sufficient to satisfy the recoveries that were (105) subsequently made from them, and therefore in those suits admitted assets generally. But pending those suits the next of kin of the intestate, Josiah, filed a bill against the plaintiff and defendant for an account of the estate and distribution, and therein a decree was rendered for considerable sums of money to be paid to the several next of kin, which were accordingly paid and refunding bonds taken. That decree was pronounced, while the suits of the creditors just mentioned were still pending, and therefore in the decree the administrators were allowed to retain a sum of money to answer such recoveries as it was supposed might be made in the creditors' suits. But no account was taken in either of the suits of the assets of the administrators respectively, so as to show whether the sum thus retained was in the hands of the present plaintiff or defendant; because in the creditors' suits the administrators had joined in defense and had confessed assets, and in the suit by the next of kin it was not deemed material, as the administrators had jointly administered and made themselves liable for each other's acts to creditors and next of kin. Afterwards the creditors effected their recoveries, and by executions levied much the larger part of the money from the plaintiff.

This bill was then filed, and, besides the facts above stated, it charges that the plaintiff paid to the next of kin, on their decree, all the assets that ever were in his hands, and that his coadmin-

istrator, the defendant, was possessed of all the assets of their intestate, and particularly the sums they were permitted by the decree to retain, as before mentioned, and ought to have paid therewith the recoveries which the plaintiff had been compelled to pay out of his own proper estate. The prayer of the bill is that the defendant may come to an account with the plaintiff touching their administration, and that out of the assets that may be found thereon in the hands of the defendant may be paid the balance that may appear to be due to the plaintiff for disbursements by him on account of the estate and in satisfaction of the said creditors over and above the assets which came to his hands. The defendant answered, and submitted to the account, but stated that the sums retained were not held by him, but by the plaintiff himself, and that the defendant was (106) actually in advance for the estate and should lose by his administration; and he insisted that if a balance should be found due from the estate to the plaintiff, yet that the defendant would not be liable therefor nor any part thereof, beyond the assets in his hands, but that the plaintiff ought to look to the next of kin to return what would make him whole.

There was a reference to the clerk to take the account as prayed for, and he reported that the plaintiff had paid more for the estate than he had received, and that, with a commission of 2½ per cent on the assets he had received, there was a balance due to him of $873.49; and that the defendant had received more assets than he had disbursed, and that after allowing him a commission of 2½ per cent on the assets, with which he was charged, there was a balance due from the defendant of $733.13, applicable towards the plaintiff's satisfaction.

To the report both parties excepted, and upon the exceptions the case was brought on to be decided.

The defendant's exceptions were allowed, but as they depended entirely upon matters of fact, it has not been thought necessary to report the opinion of the Court in regard to them. Deducting the sums excepted to and allowing his commissions as reported by the master, it appeared that he, too, had advanced for the estate more than the amount of assets he had received.

J. H. Bryan and *Badger & Strange* for plaintiff.
W. H. Haywood for defendant.

RUFFIN, C. J. The plaintiff has filed two exceptions, of which the first is unfounded in fact, and for that reason overruled.

His second exception is to the allowance of commissions to the defendant; which, however, is only 2½ per cent on the de-

fendant's receipts (as found by the report), and amounts to the sum of $100.87. To the extent of the charges to which the defendant's exceptions have been allowed (for overcharges of receipts by him on account of the estate), namely, the
(107) sum of $811.39, including interest, this exception is obviously well founded, and the credit of commissions must be reduced $20.28, being 2½ per cent on $811.39. But the objections to the residue of the commissions are not well founded. The first is that the defendant is not entitled to any commission, because there is no estate to pay it, inasmuch as the whole will not indemnify the plaintiff. But that reason will not suffice, for the plaintiff ought to have taken care not to exceed the assets in his hands, and if he has done so, it is his folly, and he cannot deprive the defendant of the compensation the law allows for his labor and responsibility. Another objection is that the sum of $1,364.50, on which commissions are counted, was the value of negroes bought by the defendant at a sale by execution for a debt due to the administrators, and which the defendant purchased for the benefit of the estate and delivered over specifically. But that is not like charging a commission on the value of slaves left by an intestate, as was the case in *Walton v. Avery*, 22 N. C., 405, but is the same thing as receiving the money from the sheriff. Nay, it is more, because the defendant ran the risk of being compelled to keep the negroes on his own account, and losing by them, though in this case it was advantageous to the estate. Therefore this exception must also be disallowed, except the sum of $20.28, as before mentioned.

But as the account, when corrected according to these directions, shows a balance due from the estate of their intestate to the defendant, as well as to the plaintiff, the Court cannot relieve the plaintiff upon this bill, in which the plaintiff could only be directed to be paid out of assets now found to be in the defendant's hands. The bill must therefore be dismissed, but without costs to either party, and each party must pay one-half of the expense of taking the account.

PER CURIAM. Decree accordingly.

(108)

JOHN MORRISON ET AL., ADMINISTRATORS OF BENJAMIN PERSON, v. NIEL McLEOD.

NIEL McLEOD v. JOHN MORRISON ET AL., ADMINISTRATORS OF BENJAMIN PERSON.

1. When, in an inquiry before a master on a matter of account, several witnesses are examined and give different estimates as to value or price, and he can make no discrimination among them either as to their integrity, intelligence or opportunities of knowledge or judgment, he may safely assume as his guide an *average* of their different estimates. But not in a case where such discrimination can be made. He must then be governed by the weight of the evidence.

2. When a mortgagee takes actual possession of the mortgaged premises he makes himself tenant of the land and subjects himself to the highest fair rent and becomes responsible for all such acts or omissions as would, under the usual leases, constitute claims on an ordinary tenant.

3. But if he commit an act of waste, such as clearing lands, etc., by which the value of the rent is temporarily increased, the mortgagor, in calling upon him to account, cannot make him responsible both for the acts of waste and for the enhanced rent arising from such acts.

UPON the hearing of these causes heretofore reported (22 N. C., 221), the conveyance to Person was declared to be but a security for the sum justly due from McLeod; and there was a reference to the master to take an account of the moneys advanced by Person, for the securing of which the conveyance was made, and of all debts contracted with him by McLeod, and of the rents and profits received and waste committed by Person or those claiming under him, with the usual directions to compel the production of books and examine the parties (109) on interrogatories. Under that order an account was taken and a report made to this term, and exceptions are taken thereto on each side.

Most of the exceptions are founded upon matters of detail in the account, involving no principle of law or rule of practice, and they are therefore omitted.

Winston, Badger and *Strange* for Morrison.
W. H. Haywood, Jr., and *Mendenhall* for McLeod.

RUFFIN, C. J. The remaining exceptions of Morrison and others, administrators of Person, and the fifth and seventh on the part of McLeod, relate to so much of the account as respects the rents and profits of the land received by Person and his representatives and the improvements and waste of the premises,

and they may be considered together. Person entered into possession in May or June, 1827, and the lands have been occupied by him and his representatives ever since. For the part of 1827 and for 1828 the master has fixed the rent at the rate of $56, and for every succeeding year, to 1841, inclusive, at $166 per annum. The waste is estimated at $337 and the improvements at $177, and deducting the latter from the former sum, the master credits McLeod, on 1 January, 1842, with the difference, to wit, $160. A number of witnesses were examined on each side, who made estimates of the crops made on the land, and their value, and gave their opinions as to reasonable rents before and after the improvements, and of the value of the improvements and amount of waste; and the master arrived at his conclusions on these points chiefly by making an average of the estimates of the witnesses. McLeod excepts because sufficient rents have not been allowed him. The other side excepts because the principle on which the master proceeded is wrong, and he ought to have been governed by the testimony that was most satisfactory to his own understanding; and also to the allowance for waste, and to the amount of the rents, which, it is insisted, should (110) be according to the value at the time Person entered into possession, or, at all events, according to what was made from the land.

The improvements consist, in part, of small repairs done to the dwelling and outhouses, and building a crib and stable; all done with wooden poles, and so much decayed during the occupation by and under Person as to be of little value now. The residue consisted in clearing about forty acres of fertile bottom land on a creek and bringing it into cultivation, and in clearing up and renewing the fencing on the plantation left by McLeod, which comprised sixty or seventy acres, of which about twenty-five or thirty were then in cultivation. The low grounds added greatly to the productiveness of the plantation, and, indeed, yielded the principal parts of the crops; but by continued cultivation and the ravages of freshets in the creek, that part of the land has been much exhausted and washed. Pending the present suit, the plantation has become out of repair, and the average estimate of the witnesses is that it would require the above sum of $337 to put it into good repair. But they all at the same time state that the houses, fences and plantation are in better repair, and would bring a better rent now than in 1827, when Person entered.

The master's mode of taking an average cannot be said, we think, to be wrong in every case, as was argued; although it may not be right in every case. It is not liable to the objection

urged against it of being within the principle on which verdicts have been set aside, where each juror fixed a sum and the aggregate was divided by their number, and the quotient taken for the damages. For it is the duty of each juror to assess such damages as the evidence demands of his conscience and understanding, and neither more nor less, except so far as his mind may be influenced by the reasoning of his fellows. That, however, is very different from the considerations which may justly influence a jury or master in weighing evidence. For suppose any number of witnesses, with equal intelligence and integrity and equal opportunities of knowing or judging (as far as can be discovered), to appear before a jury to depose to the value of a thing or to the amount of damages, and to give (111) different estimates. How can a decision be made but by splitting the differences between them? When there is an equal probability that the one is as much too low as the other is too high, is it not safe and reasonable to take the middle point between them? As much fault, we think, cannot be found with the principle as with the improper application of it. For it is never to be acted on unless there be quite an equality of credit to be given to each witness in every respect. If there be any means of discriminating between them, then the actual weight of the evidence of each is to govern. In this case, we suppose the master did not perceive any ground of discrimination between the witnesses, and therefore he took the mean of all their estimates. But as we think, after a perusal of the depositions, that there are differences between the weight to which the witnesses are entitled, and that the profits may (though not very satisfactorily) be ascertained with probable correctness without striking the average of which we have been speaking, we cannot follow the master in that respect.

It may be well in the first place to dispose of the item for waste. One of the objections taken to that is that the master has charged for permissive waste in letting the wooden houses and fences decay; for which, it is said, a mortgagee is not liable. Whatever may be the rule when a mortgagee enters into possession by receipt of the rents of premises occupied by tenants, we conceive that when he enters by taking the actual possession and occupies, himself, he makes himself tenant of the land and subjects himself to the highest fair rent, and becomes responsible for all such acts or omissions as would, under the usual leases, constitute claims on an ordinary tenant. But in this case the evidence is that in truth the plantation is in better repair than when Person took possession, and therefore the claim for waste is to that extent altogether unfounded. Then with respect to

the deterioration of the land by draining and working it, and by washing, there can be no doubt that the mortgagor is entitled to a just compensation. For the mortgagee has no power to make such improvements, as he may choose to call them; (112) and he cannot claim to be reimbursed by the other party for their value at the time of redemption. But, on the other hand, the mortgagor cannot claim compensation for such deterioration and also an improved rent in consequence of the opening of new and more fertile land, for the deterioration arises in the process of earning the rents. Here the mortgagor claims rent; and it is obviously his interest to do so, inasmuch as it arises annually, and, spreading itself through the whole period, prevents the accumulation of interest on the mortgage debt, and gradually extinguishes the debt; while the waste would be computed at the end of the term only and without interest. In our opinion, a mortgagee who personally occupies the premises exposes himself to the election of the mortgagor to have the account taken either way, as may be most to the advantage of the latter. If the premises are out on lease, it is but a small matter for the mortgagee to require the tenants to pay their rents to him; for the mortgagor's money is merely applied to his debt, and no actual injury is done to him, though he may be incommoded in his income. But when the mortgagee, instead of foreclosing, turns the mortgagor out at law and occupies, himself, without any agreement for rent, and, without any understanding with the mortgagor, cuts down timber, clears and wears out the land, the Court is obliged to see that such conduct tends to the oppression of the mortgagor, and that mortgagees would be constantly tempted thus to act, unless they were held to account strictly for all the profits they realized from the occupation of the land. It is this view of the case which satisfies the Court that Person is liable for an improved rent during his occupation, to be computed from the time he was compensated by the use of the land cleared for clearing it. But, as has been before observed, McLeod cannot have that rent and also damages for the injury to the land by impoverishing it, in the shape of waste. Therefore, the whole sum of $160, which is credited for waste, must be struck out.

Referred again to the master, with instructions according to the opinion of the Court.

PER CURIAM.

Cited: Walling v. Burroughs, 54 N. C., 23; *Pilkington v. Cotton,* 55 N. C., 240; *Jackson v. Hall,* 84 N. C., 493; *Hinson v. Smith,* 118 N. C., 506; *Green v. Rodman,* 150 N. C., 179.

JACOB BUFFALOW v. JOHN BUFFALOW ET AL.*

1. The court can make no declaration in its decree of a fact which is not in issue in the pleadings, nor pay any respect to evidence touching such fact. A rehearing upon the ground of such omission will not, therefore, be granted.

2. As when the defendant was charged as trustee of certain negroes for the plaintiff, and it is stated neither in the bill nor the answer that the defendant had sold them, and the decree was that he should convey them to the plaintiff and account for their hires—the allegation that he had actually sold them before the bill was filed is no ground for a rehearing of the decree.

3. A petition for rehearing states that on a reference to the master, preliminary to the decree, a witness had given material evidence for the petitioner, but that this evidence was accidentally omitted by the master in his report, and the petitioner was ignorant of the omission when the decree was entered. This is no ground for granting a rehearing.

4. When in a suit by a *cestui que trust* against a trustee for an account of the land held in trust a decree is made directing a report by a master "as to the profits, expenses, improvements and waste, spoil or damage to the land," this decree properly corresponds with the prayer of the bill and is not erroneous.

5. When a master makes a report according to the directions of the decree, an exception that he has reported on an improper or irrelevant matter cannot be allowed. The objection, if any, is to the decree of the court.

6. An objection to a bill for multifariousness must be insisted on by demurrer, and cannot be taken at the hearing.

THIS cause, in which there was a decree in favor of the plaintiff at June Term, 1839, and a reference to the master to take an account (see 22 N. C., 241), now came again before the Court upon a petition for a rehearing and also upon (114) exceptions to the report.

The grounds of the application for a rehearing and of the exceptions are stated in the opinion of the Court.

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

RUFFIN, C. J. Under the decree made in this cause at June Term, 1839, the master has made his report; and thereunto each of the defendants has excepted. And, by the consent of counsel, a petition for a rehearing has also been filed for the

*This case was determined at June Term, 1840, but was inadvertently omitted in the Reports of that term.

defendants, as of the term in which the decree was pronounced. By agreement between the counsel, the whole matter, upon the petition and upon the report and exceptions, hath been submitted together to the Court.

It is, of course, proper to dispose of the rehearing in the first instance.

The decree declared, amongst other things, that no consideration appeared to have been given or paid by Hutchins for the land, and therefore an account was directed of the rents, issues and yearly value of the land, and of the hire, profits and yearly value of the slaves mentioned in the pleadings; and after giving to the defendant Buffalow just allowances for any advances he may have made for Steel Buffalow, in case the balance on said account shall be in favor of the plaintiff, that the plaintiff would be entitled to a conveyance of the said land and of the said slaves and their increase, as well as payment of the said balance, or, in case the balance shall be against the plaintiff, then, on payment thereof, to have a reconveyance of the said land and slaves. And it was therefore referred to the master to take those accounts, and also an account of any waste, spoil or damage committed on the land.

A witness examined in the cause stated in his deposition that he purchased two of the slaves from John Buffalow before this suit was brought, and paid the full value for them.

The first error in the decree, as assigned in the petition, is that it declares the plaintiff entitled to a conveyance of
(115) those two slaves and to their hires and profits, instead of requiring him to take the purchase money and interest.

The decree is not erroneous in this particular, but is precisely what the court was compelled to pronounce. Primarily, the plaintiff is entitled to recover specifically the property which his father was induced by fraud to convey. So, on the other hand, the defendants were entitled to insist that the plaintiff should take such a conveyance, and not a money decree against them for the value. If, indeed, the fraudulent donee sold a part of the property, that circumstance may vary the relief which can be given to the plaintiff. We say *may*, because it does not necessarily follow that it *must* vary the relief. The sale may have been with notice, or not, for a price paid, and then the plaintiff would be entitled to a decree against the purchaser, and to that end to amend his bill so as to bring him in; or the plaintiff might waive that and take the decree offered by the other side for the price and interest. The only question is how these matters are to be brought forward. If the defendants state a sale in the answer, showing that the property is no longer liable to

the plaintiff's equity, then the Court must ascertain and declare the fact, one way or the other, as a ground of a decree, either for the slave or for the value. But the Court can make no declaration in the decree of a fact which is not in issue in the pleadings, nor pay any respect to evidence (if such it may be called) touching such fact. In the present case the bill does not allege the sale of any slaves, as it did of the land, and the answer is also silent upon the subject. The Court could not, then, find that the slaves had been sold, and the decree necessarily proceeded upon the presumption that they had not been. Neither party, however, was precluded from bringing forward the matter, notwithstanding the silence of the pleadings upon it. But that must be in some way which will enable the Court to have the fact ascertained; which, when the pleadings do not form an issue on it, must necessarily be by an inquiry by the master. Such an inquiry will be directed at the instance of either party, but ought not to be made unless upon the application of a party. The defendant might have thought it in his power and to be his interest to purchase both the slaves, and account (116) for hires rather than for the price he received and interest. It is impossible the Court can divine the motives which may actuate parties, or how their interests may incline them to act. It was the omission of the party not to attend to the drawing up of the decree and not to ask to have this matter embraced in the reference, and not an error in the Court not to declare a fact on the hearing which neither party alleged, or direct or not to direct an inquiry which neither party then wished or, at least, moved for.

The decree is next complained of because it finds that no consideration appears to have been paid by Hutchins for the land; whereas, in fact and truth, as the petition states, he paid a full price, and the same was proved in the cause.

Upon looking into the evidence to which the petition refers, it is found that upon certain inquiries directed by the court preparatory to the hearing, a witness—Utley—when under examination upon an inquiry on a different subject, namely, as to the value of the estates conveyed by the plaintiff's father to John Buffalow, states incidentally "that he sold the land to John Hutchings for $100." If it had been competent to take that evidence on that inquiry, it proves nothing to the purpose. One who sets up the defense that he is a purchaser must show that he paid the price and took a conveyance before he had notice of the other party's equity. The witness does not prove that the price was ever actually paid, much less when it was paid. The petition, however, further states that the witness did so prove, and

that the master, by mistake or inadvertence, omitted to set down his words, of which the party was ignorant when the decree was entered; and for confirmation thereof it refers to the testimony of the same witness before the master upon the inquiry under this decree itself. In this last examination Utley states that Hutchins paid him $50 in money, and also paid three judgments against him for a little more than fifty dollars. It would not be proper to omit the remark that this is not the subject of a petition to rehear. It suggests no error of the court as to the law or the facts disclosed in the decree. It seeks to correct an omission of the master or a mistake of the party, and (117) these are the subjects of a different method of proceeding. Moreover, the court could not take notice of the evidence last given before the master, because it was not only irrelevant to the inquiry before the master, but related to a fact which was not then in issue, but had been already determined otherwise by the court. But if the evidence was competent and relevant, it is not sufficient and does not prove the fact sought; for the witness retains his reserve as to the period of the payment, which might have been after suit brought or after the decree pronounced.

A third objection is that the decree directs an account of waste, spoil or damage to the land, though none such is charged in the bill.

Evidence was given before the master of waste in suffering the houses and fences to decay and fall down. But, in point of fact, the master has reported nothing therefor, but only for the actual value of the wood cut and taken away and used by the defendant, to the damage of the land. In reality, therefore, the defendant is charged only with the profit or gain made by him; for which, as one converted into a trustee for the plaintiff, he must be liable. But it is not perceived why, in a case of this kind, an inquiry may not embrace waste committed or permitted, although not particularly stated in the pleadings. In a bill against the owner of a particular estate to enjoin from future waste, or to obtain an account for past waste, as such, the charges will be more specific as to the waste done or apprehended. But when the object of the bill is to turn the party into a trustee for the plaintiff upon the ground of a fraud, and as such to have an account from him, the allegations are not precise touching the profits and issues, improvements or injuries to the property. An account of issues and profits is asked, without going into any bill of particulars, and under that general head it is usual to direct a reference as to the profits made or that might have been

made by the defendant, and as to permanent improvements erected by him or suffered by him to decay, and the like. This decree does not go beyond what is usual in this respect nor what, in our opinion, is proper.

The last objection is that the bill was filed by the (118) plaintiff, in the double capacity of heir at law and administrator of his father, against the defendant Buffalow in respect of the personal property, and against the defendant Hutchins in respect of the land. We are not prepared to say that this formal objection could in this case have been sustained, if taken in due manner and apt time. But we need not decide that point, because it is clear the objection comes too late. An objection for multifariousness must be taken by demurrer, and cannot be taken at the hearing. *Ward v. Cooke,* 5 Mad., 122; *Wynne v. Callender,* 1 Russ., 293. In the latter case one of three defendants demurred, and his demurrer was allowed; while against a second, who insisted on the matter in his answer, there was a decree, after time taken by the master of the rolls to consider the point and inquire into the practice. But in our case the point is not raised in the answer, nor was it urged, *ore tenus* even, on the hearing, and cannot now be a ground for refusing to the plaintiff the benefit of an equity ascertained on the proof.

Having thus gone through the reasons assigned in the petition, and finding none of them sufficient to impeach the decree, it must stand. But as there is little doubt that the defendant did sell two of the slaves to a *bona fide* purchaser, and that they are now beyond his reach, we do not think it improper to recommend to the parties to state an account upon the footing of that sale, and, by consent, to modify the decree accordingly. The Court cannot judicially act upon that sale, but would be gratified that the parties should do so at once, instead of the one proceeding to process of contempt against the other.

We do not find any difficulty on the exceptions. The defendant Buffalow excepts because the master charges him with the hires of the slaves said to have been sold by him, instead of the purchase money and interest. This is untenable; for the account is agreeable to the decree, and the error (if one) is not that of the master, but of the court.

The defendant Hutchins excepts, first, that he is not credited with the purchase money of the land and interest. It is very certain the plaintiff's father received no part of that price, and therefore this defendant is entitled to no credit as (119) against him. The matter is between the defendants themselves, and the plaintiff has no concern in it.

This defendant also takes two other exceptions: that he is charged too high a rent and that he is charged too much for waste or damage. But these also must be overruled; for the report is fully sustained in these respects by the proofs before the master.

PER CURIAM. Decree accordingly.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

JUNE TERM, 1842.

WILLIAM B. RUTHERFORD AND OTHERS v. JOSEPH GREEN AND OTHERS.

1. The act of 1823, ch. 1210 (Rev. Stat., ch. 38, sec. 7), which declares that "no inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized or shall be born within ten months after the death of the person last seized," applies only where the person last seized has died since the passage of that act.

2. It is at least questionable whether the administrator of an obligee in a bond conditioned to convey land to the obligee and his heirs can maintain an action at law on the bond.

3. In equity a valid contract for the conveyance of land is in itself an equitable conveyance, whereby the person to whom it is given is regarded as the complete owner, and is entitled at any time to call for a conveyance of the legal title.

4. Upon his death, intestate, without having obtained such legal conveyance, his equitable ownership descends to his heirs at law. And no arrangement by the administrator nor receipt by him of the penalty of the bond or of the value of the land can defeat this right of the heirs.

5. A purchase at a sheriff's sale only transfers the interest of the debtor, whatever it may be, subject to all equitable as well as legal demands of other persons.

(122)

THIS was a suit in equity commenced in the Court of Equity for RUTHERFORD, at Fall Term, 1839. After answers

had been put in, various orders made and testimony taken, the cause was set for hearing and transmitted by consent to the Supreme Court.

The facts disclosed by the pleadings and proofs are set forth in the opinion delivered in this Court.

Bynum for plaintiff.
Alexander for defendant.

RUFFIN, C. J. The bill was filed in November, 1839, and the object of it is to obtain a conveyance of four tracts of land adjoining each other, situated in the counties of Rutherford and Lincoln, and containing in the whole 740¾ acres, which the plaintiffs claim as the heirs at law of James Rutherford, deceased. It sufficiently appears in the pleadings and proofs that James Rutherford died, in November, 1819, without having been married, and leaving brothers and sisters, natives and residents of Scotland and subjects of the King of Great Britain, and also leaving Walter B. Rutherford, a son of Alexander Rutherford, one of the said brothers of the said James, which said Walter B. was also a native of Scotland, and came into this State and married here in the year 1816, and has ever since resided here without being naturalized; and that the plaintiffs are the issue of the said Walter B. Rutherford, born in this State, of his said marriage.

The bill states that in 1818, James Rutherford, for a price paid, purchased the land in question from Joseph Weir,
(123) who was then seized of it, as described in the bill and in a plat of survey thereto annexed, and that Weir then executed a penal bond for a large sum of money, with condition to be void on the conveyance of the land in fee simple by Weir to Rutherford, or his heirs, on request; that one Hogg became the administrator of the intestate James in 1823, and came into possession of his papers, and, among them, of the bond or articles in question, and that upon some agreement or combination between Hogg and Weir the former delivered the bond to the latter, from whom it has not been since obtained and by whom it was probably destroyed.

The bill then states that Joseph Weir died in 1828, leaving a widow and several children, who are made defendants in this suit, and also that Joseph Green, another defendant, is in possession of and claims a part of the land purchased by James Rutherford, but that if he has a sufficient conveyance for the same, he took it with notice of J. Rutherford's previous purchase, and cannot hold against the plaintiffs. The prayer is for a discov-

ery and production of the bond or articles, and for proper conveyances of the legal title from the defendants for the parts of the land, of which the title is in them respectively, and for general relief.

The widow and heirs of Weir answered together, and the defendant Green separately. Neither answer admits the bond from Weir to Rutherford, nor any knowledge, if there was such an one, that it covered the land in dispute. That of the Weirs states that, as they understood and believe, Hogg, as administrator of James Rutherford, instituted an action of debt against Joseph Weir on some bond, and that a compromise was made between them, on which Weir paid the costs and made satisfaction to Hogg for the contract and took it up; and they suppose that may have been the instrument on which this bill is founded, though of that they have no knowledge or information. Those defendants further say that they have not been in possession or enjoyment of any of the land claimed by the plaintiffs since the death of Joseph Weir, and they do not admit that the plaintiffs are the heirs at law of James Rutherford.

The answer of Joseph Green admits the plaintiffs to be Rutherford's heirs, as alleged by them, and that he was (124) seized of 640 acres of the land described in the bill and lying in Lincoln, which he claims in the following manner: He says that Joseph Weir entered into a recognizance which bound these lands to the State, upon which judgment was rendered, and the lands sold by the sheriff on an execution thereon issued, and were purchased by one Samuel Green, who took a sheriff's deed, and afterwards conveyed to this defendant, Joseph Green.

Both the answers further state that before the conveyance from Samuel to Joseph Green the plaintiffs filed a bill upon the same subject-matter against Samuel Green and the present defendants, the Weirs, in which there was a decree in favor of the defendants to that suit dismissing the bill; and they pray the benefit thereof as a bar to the present bill.

It may be as well to dispose of this last point at once by mentioning that the defendants have failed to establish it by offering any former decree in evidence. The truth is, the answers are mistaken on that point, as we happen to remember that the former suit alluded to was transferred to this Court for hearing, and that when it should have been heard, the counsel for the plaintiffs found that for some defect of proof he could not sustain the bill, and asked leave to dismiss it before the hearing, without prejudice, which was accordingly granted; and then, it seems, the present suit was brought. Clearly, if the former proceedings were before us, there is nothing in them that could

present an obstacle to the present bill; but as they have not been read, it is sufficient to declare that the defendants have failed to establish the fact stated in that part of their answers.

Upon the question of the right of the plaintiffs to inherit from James Rutherford, which is made in the answer of the Weirs, the Court entertains no doubt. The facts are clear that they are the nearest relations of the deceased, who are citizens of the United States, and that their father and all the brothers and sisters of the deceased are aliens. The matter of law is equally clear, as it was long ago decided in an ejectment brought upon the demises of the present plaintiffs. *Rutherford v. Wolf*, 10 N. C., 272. It was there held that the act of 1801 re-
(125) mained in full force, notwithstanding the general canons of 1808; and to that may now be added the legislative sanction, by the re-enactment of both those acts together, in the Revisal of 1836.

A question might have been made between the plaintiffs themselves whether some of them can claim parts of the land as being coheirs with the other plaintiffs. All of them are eight in number, so that it is probable some of them might not have been born before the act of 1823, ch. 1210, went into operation; and as to those born after, a plausible objection might be raised that they were not heirs. But we think there would not be much difficulty in the point, had the facts been stated to raise it. Before the act, all the brothers and sisters, although some of them were posthumous, would be admitted, as they came into life, to inherit. *Cutlar v. Cutlar*, 9 N. C., 324. This the statute of 1823 altered by enacting that no inheritance shall descend to any person unless such person shall be in life at the death or within ten months after the death of the person last seized. But we do not think the present case within that act, since James Rutherford, the *propositus*, died in 1819, and the descent from him was fixed by the law as it existed at the time of his death. The act, if the words were doubtful, ought not to be construed so as to affect the right to lands previously descended. But the language in this case is all future: "No inheritance *shall* descend to any person unless such person shall be in life," etc.; which clearly shows that its provisions are altogether prospective and do not embrace the case of a descent from a person before that time dead. We think, therefore, that all the plaintiffs are entitled to a conveyance if any of them are. And we have, accordingly, next to consider whether the plaintiffs have made out a case for the relief they ask, and we are of opinion they have.

Three witnesses establish the existence of the bond from Joseph Weir to James Rutherford very clearly. One of them—

Francis Alexander—states that at the request of those parties he surveyed the lands which by the bonds Weir obliged himself to convey to Rutheford, and he identifies it by annexing the plan of survey to his deposition, which survey he says was made before the bond was executed, but with a view to it. (126) This witness further proves that after the death of Rutherford, Hogg, as his administrator, brought an action against Weir on the bond, and that after it had pended some time, Weir paid to Hogg, in bonds on other persons, the value they set on the lands, and Weir took his bond up and probably destroyed it. Under such circumstances we cannot hesitate to declare that there was a valid agreement in writing, whereby Weir was compellable in this Court to convey the lands described by the witness to Rutherford and that it remains in full force. It is true, the plaintiffs do not give precise evidence of a particular price paid, or other valuable consideration moving from Rutherford. But it is sufficiently shown that there were pecuniary transactions between those persons, in the course of which a treaty for this purchase arose; and when this covenant or obligation was subsequently given, the inference is a natural one from the course of dealing that it was founded on an adequate consideration, which inference is to be deemed the stronger against Weir, from the fact that he unjustly, as against these plaintiffs, possessed himself of that instrument so as to deprive them of the power of using the instrument itself as evidence of the consideration which Rutherford had given. *Henderson v. Hoke,* 21 N. C., 147. And this is more especially a fair inference since, during the litigation with Hogg, Weir made no pretense that the contract was voluntary, or not founded on a full consideration, but actually paid to Hogg the full value of the land as estimated by them.

It was faintly, indeed, contended on the hearing that this obligation was a personal contract and that the administrator could maintain an action on it, and that therefore the payment to Hogg and canceling the instrument was a discharge of it. In the first place, it may be questioned whether the personal representative could have an action on the bond. Shep. Touch., 171; *Thrower v. McEntire,* 20 N. C., 493. But if he could at law, it is the settled principle of equity that a valid contract for the conveyance of land is in itself an equitable conveyance whereby the person to whom it is given is regarded in (127) equity as the complete owner, and is entitled at any time to call for a legal conveyance, whereby he may become legal owner also. *Ward v. Ledbetter,* 21 N. C., 496. That equitable

ownership descended in equity to the present plaintiffs, and of that inheritance no arrangement between Weir and Hogg could defeat them.

Another objection taken by the defendant Green is that he is entitled to the protection given to a purchaser without notice. This is founded on the evidence of Samuel Green, under a conveyance from whom this defendant derives title. He states that he became the purchaser of the land at a sale made by the Sheriff of Lincoln on the execution in favor of the State against Joseph Weir, as set forth in the answers, and that at the time he purchased he paid the purchase money and took a conveyance from the sheriff. He had no knowledge whatever of any claim but Weir's to any part of the land. If this were true, and if also it formed a defense to the bill, in point of law, we could not act on it in this case, since it is not relied on or in any manner brought forward or hinted at in the answer, and the deposition, being to a matter not in the issue in the cause, cannot be regarded. But if the answer had stated the point in the most formal manner, it would have been ineffectual, inasmuch as we hold that a purchase at a sheriff's sale, like every other assignment by act of law, only transfers the interest of the debtor, whatever it may be, and in the state it is in, subject to all equitable as well as legal demands of other persons. *Dudley v. Cole,* 21 N. C., 429; *Freeman v. Hill, id.,* 389.

The plaintiffs are therefore entitled to the decree establishing the agreement, and that the defendants severally convey to them the parts of the land of which they are respectively seized. What those parts are we do not clearly perceive upon the pleadings or plat. It is stated that the defendant Green purchased all that part of the land which lies in Lincoln County, and that it contains 640 acres; but the part thus claimed by him is not distinguished, either by laying down on the plat the line between the counties or otherwise, and hence an inquiry on
(128) that point must be made. The costs of the inquiry and also all other costs, as between the plaintiffs and the defendant Green, must be paid by him; but as against the other defendants, the heirs and widow of Weir, the plaintiff does not recover costs.

We must not omit to notice that the defendant Green states in his answer that before the commencement of this suit he had sold to different persons more than four hundred acres of the land. He has not, however, specified the parts or persons, nor on the hearing offered evidence of such sales, much less of conveyances, and therefore we cannot proceed upon the supposition of the existence of them. If the fact be as stated, it will be for

the plaintiffs to take their remedy, as they may be advised, either by adopting the sales and receiving the price from the defendant, or by bringing in the purchasers and claiming the land.

The plaintiffs declared entitled to recover, and inquiry ordered.

PER CURIAM.

Cited: Vannoy v. Martin, 41 N. C., 172; *Mills v. Abrams, ib.,* 460; *Giles v. Palmer,* 49 N. C., 387; *Cowan v. Withrow,* 111 N. C., 311.

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(129)

JOSEPH L. SIMMONS v. SPIER WHITAKER, EXECUTOR OF JESSE H. SIMMONS, AND JAMES HALLIDAY'S ADMINISTRATORS.

1. A court of equity will compel the executor of an insolvent testator, who is prosecuting a claim for money which had been held by his testator as a trust fund, to permit the *cestui que trust* to receive the money; and the executor will not, by so doing, make himself liable on account of that fund to the demands of other creditors.

2. A creditor cannot, in a bill against an executor for an account in his *own* name and for his *own* benefit, make another creditor a party defendant and compel him to desist from prosecuting his suit at law against the executor.

3. Such a bill may be filed by any creditor in behalf of himself and *all* or the *rest* of the creditors against an executor for an account of assets; and after such account is decreed, any one of the creditors, on petition or on motion on affidavit, may obtain an injunction against any one or more of the creditors attempting to proceed against the executor at law. All the creditors (on such a bill) may be compelled to come in and prove their debts before the master, and the assets will be paid in a course of *legal* administration.

THIS was a bill filed in HALIFAX Court of Equity, at Spring Term, 1841, in his own name against the defendants Spier Whitaker, executor of Jesse H. Simmons, deceased, and Redding J. Hawkins and his wife, administrators of James Halliday, deceased. At Fall Term, 1842, the defendants Hawkins and wife filed their demurrer to the bill, and at Spring Term, 1842, his Honor, *Settle, J.,* presiding, the demurrer was overruled and the defendants Hawkins and wife ordered to answer over. From this interlocutory decree these defendants, by permission of his Honor, appealed to the Supreme Court.

The nature of the bill and the grounds of the demurrer are sufficiently stated in the opinion delivered in this Court.

(130) *Whitaker* for plaintiff.
B. F. Moore for defendant.

DANIEL, J. The plaintiff, a creditor of the testator Jesse H. Simmons, has, in his own name and for his own benefit, filed this bill against the executor of the said Jesse for an account of the assets, etc. The administrators of James Halliday, another creditor, are made parties defendants. The bill (in addition to the debt due to the plaintiff in his own right) alleges that the plaintiff was master in chancery for Halifax County, and that Jesse, the defendant's testator, had acted as his deputy in the said office, and in that character had lent to one James Simmons $300, a sum of money belonging to the said office, and that the executor of the said Jesse had a large demand against the said James and had obtained a judgment against him for it, including the particular sum belonging to the master's office, borrowed by the said James as aforesaid. The bill further states that the estate of the said testator is insolvent, and that the administrators of Halliday are prosecuting their claim by an action at law against the executor of the said Jesse, and that the plaintiff is apprehensive that the said administrators will obtain a judgment and subject all the assets in the hands of the executor of the said Jesse and also the sum due from James Simmons, including the money borrowed by him from the master's office, before he (the plaintiff) can put his claim in a situation to receive any part of the said assets. The bill prays a decree for an account against the executor of Jesse H. Simmons, and that the assets be brought into court and distributed; and it prays that the court will enjoin Halliday's administrators from proceeding at law. Halliday's administrators demurred to the bill. The court overruled the demurrer, but allowed the said administrators to appeal from the decision to this Court.

First. As to the $300 and interest money received by James Simmons, the demurrer admits that it was trust money which belonged to the plaintiff's office and which the deputy, Jesse, permitted James Simmons to take and use. That money, with its interest, the executor has not as yet collected. He, it (131) is true, has obtained a judgment against James Simmons on account of debts due his testator's estate, which includes this sum of $300 and interest. But as this trust fund is identified, we think that it belongs to the plaintiff and that he may rightfully pursue and take it, and that the executor should permit him to receive it. The executor cannot be made liable for the amount of this judgment as assets until he has collected it or has negligently omitted his duty in collecting it. As the

$300 and interest never belonged to his testator, and it was included in the judgment by mistake, his (the executor's) permission of the right owner now to take it can never subject him to any loss on the score of negligence.

Secondly, the bill does not charge that the administrators of Halliday are particularly endeavoring to subject the executor of Jesse H. Simmons to that sum of money as assets which James Simmons obtained from the master's office. The said administrators are only endeavoring to obtain a judgment at law for their debt and to subject such assets to its satisfaction as properly belong to the estate of the testator. This they had a right to do without being made a party to a bill like this or to be enjoined by any case made in and by this bill. Had the plaintiff filed what is called in England the usual creditor's bill in behalf of himself and *all* or the *rest* of the creditors against the executor for an account of the estate of Jesse H. Simmons and had obtained an interlocutory decree *for an* account thereupon, then he or any of the said creditors or the executor might, by petition or motion on affidavit in the cause, have obtained an injunction against any one or more of the creditors who might have attempted to proceed at law against the executor. All the creditors would, after a decree to account in such a bill, be compelled to come in before the master and prove their debts there, and the court would, on the report of the master being made, have decreed the entire assets of the estate to be paid out to the creditors in a course of *legal* administration. But that course has not been pursued by the plaintiff, and we think that the court erred in overruling the demurrer of Halliday's administrators. This opinion will be certified, with directions that the decree be reversed and the demurrer sustained. See (132) Story Equity Pleader, 97, where the authorities on this subject are all collected.

PER CURIAM. Ordered accordingly.

Cited: Martin v. Harding, 38 N. C., 606; *Wilson v. Leigh,* 39 N. C., 99; *Washington v. Sasser,* 41 N. C., 337; *Washington v. Emery,* 57 N. C., 38; *Wadsworth v. Davis,* 63 N. C., 252; *Walton v. Pearson,* 85 N. C., 47; *Wilson v. Bynum,* 92 N. C., 724; *Guilford v. Georgia Co.,* 112 N. C., 43.

JOHN TURNER v. GEORGE KING.

Where it appeared to the satisfaction of the court that at a sale of the plaintiff's land by execution the defendant agreed to purchase the land, and that the plaintiff might redeem it by paying the purchase money and interest, and in consequence of this agreement bidders were deterred from bidding, and the land was sold greatly below its value: *Held*, that the plaintiff had a right to redeem by paying the defendant the purchase money and interest, and also such other sums as he might owe him on a general account.

THIS was an injunction bill, returnable to September Term, 1842, of JONES Court of Equity. At the coming in of the defendant's answer the injunction was dissolved, and the bill was retained as an original bill. After various orders and the taking of testimony, the cause was set for hearing at Spring Term, 1842, and then ordered, by consent of the parties, to be transmitted to the Supreme Court.

The facts set forth in the pleadings and those established by the proofs will be found in the opinion delivered in this Court.

John H. Bryan for plaintiff.

No counsel for defendant in this Court.

DANIEL, J. The plaintiff in his bill states that he was (133) seized in fee of two tracts of land; that writs of execution were issued against his property by his creditors; that one of the tracts was exposed to sale in 1818 and the other in 1819; that there was an express agreement and understanding between him and the defendant that the defendant should act as his friend in bidding off the said tracts of land, and that he would bid them off for the plaintiff, and not for himself, and that he was not to keep or claim the same, but upon the plaintiff's paying the said sums with interest the defendant was to claim no further interest therein; that the said agreement was known to the people at the sale, and competition was thereby stifled; that the defendant purchased the two tracts of land for $190, a sum far below the value of the lands. The plaintiff says that he has in various ways paid this sum and all other debts and demands which the defendant had on him; that notwithstanding, the defendant obtained a deed from the sheriff and has brought an action of ejectment to turn him out of possession. The bill prays for an injunction and for general relief.

The defendant in his answer admits that he purchased at sheriff's sale the two tracts of land mentioned in the bill, and

has taken a deed, and has brought an action of ejectment. But he denies that he made any agreement with the plaintiff to purchase the land for his benefit, or to suffer him to redeem on paying the purchase money with interest or upon any other terms. The defendant denies that the plaintiff has paid or that he (the defendant) has received payment and satisfaction for the purchase money and other just claims which he then held against him. The defendant says that the plaintiff is still largely indebted to him for moneys advanced before the sale of the land. The defendant has been permitted to put in a supplemental answer, and in it he states that the equity of redemption of the plaintiff (if he had any) has been sold by the sheriff under execution, and that he (the defendant) became the purchaser for the purpose of putting an end to this suit in equity, and not because he admitted or believed that the plaintiff had an equity of redemption in the lands.

There was a replication to the answer. (134)

As to the matter stated in the supplemental answer, it is unnecessary to inquire what would be the effect thereof if established, because the defendant has exhibited no proof to sustain it. Secondly, as to the agreement stated in the bill, that the defendant was to purchase the lands and let the plaintiff redeem, it is proved to the satisfaction of this Court by the deposition of many witnesses that the purchase was made for the benefit of the plaintiff, and that he was to redeem on repaying the purchase money and interest and also any balance that might be due the defendant on a settlement of their accounts. On this agreement being made known to the people attending the sale, two persons—Jarman and Harrison—desisted from bidding for the land, and the defendant was permitted to purchase lands worth $450 for the small sum of $199.20. The case made by the bill and that established by the proofs varies in nothing but in the amount of money the plaintiff was to pay to redeem. The attempt in the defendant to set up an irredeemable title after the agreement he entered into is such a fraud as this Court will relieve against. We think, and so declare, that the plaintiff is entitled to redeem on repaying the purchase money with interest and any balance remaining due on a general account to be taken.

Decree for the plaintiff that the defendant account, etc.

PER CURIAM.

Cited: Rich v. Marsh, 39 N. C., 398; *Vannoy v. Martin*, 41 N. C., 172; *Mulholland v. York*, 82 N. C., 513, 514; *Shields v. Whitaker, ib.*, 521.

(135)

WILEY WARD v. OWEN HUGGINS, ADMINISTRATOR, ETC.

An administrator *de bonis non* of a testator or an intestate is a necessary party to a bill calling upon the administrator of the deceased executor or original administrator of such testator or intestate for an account of the administration.

THIS was a bill filed in ONSLOW Court of Equity, at Fall Term, 1839, by the plaintiff against the defendant as the administrator of Charles Thompson, who was the administrator of Elizabeth Ward, claiming that the plaintiff was one of the distributees of Elizabeth Ward; that the said Charles Thompson owed him, as administrator of the said Elizabeth, on a settlement of his administration accounts, at least $500; that the said Charles had bought his note, amounting to about $100, and that the defendant, as administrator of the said Charles, had brought suit on the said note, and praying for an injunction against the said suit and also for an account of the estate of the said Elizabeth Ward. To this bill the defendant demurred because no administrator *de bonis non* of Elizabeth Ward was a party to the suit. At Spring Term, 1842, his Honor, *Battle, J.*, presiding, the demurrer was overruled and the defendant ordered to answer, from which interlocutory decree the defendant, by permission of his Honor, appealed to the Supreme Court.

No counsel for plaintiff in this Court.
John H. Bryan and *J. W. Bryan* for defendant.

DANIEL, J. The bill states that Elizabeth Ward died in 1836; that Charles Thompson became her administrator; that
(136) Thompson purchased a note which had been given by the plaintiff for the sum of $100. Thompson died in 1838, without making a settlement with the next of kin of his intestate, the plaintiff being one of them. The bill then charges that there was $500 residue of the estate of Elizabeth Ward in the hands of Thompson at his death; that the defendant as administrator of Thompson has obtained judgment on the said note of $100 and has issued execution on it. The plaintiff alleges in his bill that he as one of the next of kin of Elizabeth Ward is entitled to at least $100 out of the said assets which are now in the hands of the defendant as the administrator of Thompson, who was the administrator of Elizabeth Ward. The bill prays for an injunction and also for an account of the estate of Elizabeth Ward. The defendant demurred to the bill, and for cause of demurrer says that he as administrator of Thompson is not com-

pelled to account to any person but the administrator *de bonis non* of Elizabeth Ward. The judge overruled the demurrer, but consented to an appeal on that point to the Supreme Court.

In *Goode v. Goode*, 4 N. C., 684, it was decided that an account of the personal estate would not be decreed in favor of the next of kin of an intestate without making the administrator a party to the bill. This decision has uniformly been followed in this State. The administrator *de bonis non* of Elizabeth Ward is not a party to this bill. The judgment overruling the demurrer must therefore be reversed, with costs in this Court. Whether the Superior Court will continue the cause to enable the plaintiff to obtain administration and then amend his bill may be a question for its consideration when the cause shall be there again called.

Ordered that this opinion be certified to the court below.

PER CURIAM.

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(137)

MARGARET TYSON v. JOSIAH TYSON AND ELIZABETH A. TYSON.

1. Where it is necessary to ascertain whether a person is dead and at what time he died, and the court on the hearing of the cause are not satisfied with the proofs as to those points, they may direct an inquiry to be made by the clerk and master or a commissioner upon further proofs to be laid before him.

2. Ordinarily courts of equity do not decree between codefendants, but where a case is made out between defendants by evidence arising upon the pleadings and proofs between the plaintiff and defendants, the defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may then be decided between him and his codefendant, and the codefendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjusted between the defendants.

THIS cause was removed by consent from MOORE Court of Equity, at Fall Term, 1841, to the Supreme Court.

The object of the bill and the facts disclosed by the pleadings and proofs sufficiently appear in the opinion delivered in this Court.

Badger for plaintiff.

Mendenhall and *Iredell* for defendant.

GASTON, J. The bill in this case, which was filed on the last Monday of August, 1836, is brought by Margaret Tyson against

Josiah Tyson and Elizabeth Ann Tyson. It states, in substance, that the plaintiff intermarried with Josiah Thomas Tyson, the son of the defendant Josiah; that the plaintiff's husband has recently died, and that the defendant Elizabeth is his only child and heir at law. It charges that in the lifetime of her deceased husband one Henry McKenzie conveyed to him a certain (138) tract of land in Moore County containing about 124 acres, adjoining the lands of Archibald McBryde, Lauchlin Cameron and Swegn McDonald, and of which the plaintiff is unable to give a more particular description, in which tract the plaintiff is entitled to have her dower, and that her said husband died seized of no other land whereof she could be endowed. The bill further charges that the plaintiff has not been able to obtain the dower whereunto she is so entitled, by reason of the fraud and injustice of the defendant Josiah, for that the said Josiah, in the lifetime of her husband and when he was absent from home, obtained from the plaintiff, who had possession of her husband's papers, the deed of McKenzie for the land so conveyed, under the pretense that there was some defect therein and upon the promise that he (the said Josiah) would procure from McKenzie another deed for the said land in order to make the title of the plaintiff's husband effectual; that having thus obtained the possession of said deed (which had not been registered), the defendant Josiah, instead of fulfilling the promise so made, obtained from McKenzie a conveyance to himself in fee simple of the said tract, and either suppressed or destroyed the former deed, and thereupon claimed to be the absolute owner of the said land. The prayer of the bill is that the defendant Josiah may be compelled to surrender to the other defendant, the infant heir at law of her deceased husband, or to her guardian, the deed so fraudulently suppressed in order that the same may be registered, or, if the deed aforesaid be destroyed, may be compelled to make unto the said infant a proper conveyance of his legal title in the land conveyed thereby, and that the plaintiff may have her dower allotted therein, and for such other relief as the plaintiff's case requires. The answer of the infant defendant is in the accustomed form, submitting her rights to the protection of the court. The defendant Josiah Tyson in his answer does not admit the death of the plaintiff's husband, his son, but states that his said son was married to the plaintiff in 1831 or 1832, had by her one child, the defendant Elizabeth, then left the State (139) and enlisted in the army of the United States, and in August, 1834 or 1835, wrote a letter to the plaintiff, his wife, and that since "there has been no positive and certain account

of his death"; whereupon he prays that the plaintiff "may be held to the proof thereof." The answer further states that in 1831, before the marriage of the defendant's son, the defendant purchased two tracts of land in Moore County from Henry McKenzie adjoining each other, one containing 375 acres and the other one hundred and twenty-four or one hundred and twenty-five acres, and paid the entire purchase money for both, having bought them for his own use and benefit; that intending at some suitable time thereafter, should his son behave himself so as to deserve the defendant's aid, to secure to him a portion of these lands, the defendant took two several deeds from McKenzie for these tracts and caused the one for the smaller tract to be made in the name of his son; that both the said deeds were delivered to the defendant, and all this was done without his son's knowledge and without any intent of vesting any title in his said son in the smaller tract; that after his said son was married the defendant built a good house on the said tract and settled his son thereon, who resided there about twelve months; that in the winter of 1832, the defendant being absent from home, and a man of the name of Smith being desirous of purchasing both tracts, the defendant's son, in order to be enabled to give Smith information respecting the location and boundaries thereof, went to this defendant's house to procure the deed of conveyance therefor (he being then ignorant of the existence of two deeds), procured both the said deeds and carried them home, where they remained until he afterwards went off and enlisted; that Smith did not make the contemplated purchase, and defendant was unapprised of the possession of the deeds having been changed until after his son had gone off. The defendant further states that the sale of the two tracts by McKenzie had been made in pursuance of a power given to him as an executor by the will of his father, Murdock McKenzie; that in the said deeds the sale was represented as made by McKenzie in his individual capacity; that the defendant, being informed by Archibald McBryde that the deeds were on that account invalid, and being informed that they had been so removed to his son's (140) house, applied to the plaintiff for them and obtained them from her; that it is probable he did on that occasion mention the circumstance of the defects in them, but declares that this was not done by way of inducement to get the possession thereof, for he believed himself clearly entitled to that possession; that McKenzie being then about to remove to Alabama, defendant handed said deeds to James McBryde, the son of Archibald McBryde, who prepared one deed for both tracts and had the same executed, and thereupon, as defendant supposes, the two former

deeds, which had never been registered, were surrendered, for that defendant has never seen them since, and that in 1834 or 1835 he sold and conveyed both the said tracts to Elias Harrington.

To these answers there was a general replication; and the parties proceeded to take their proofs. Upon these proofs the cause was heard at the last term, and in regard to the principal matters therein controverted between the parties we had no difficulty in forming a decided opinion. It then appeared to us, as it yet appears, that the defendant Josiah, being about to settle his son upon his marriage, purchased the tract in question for *him*, had the deed in question made to *him*, received in *his* behalf the delivery of said deed, and kept the same for *him* in the said defendant's possession until January, 1832. It may have been that the son was not previously apprised of the deed having been so executed nor even informed that the purchase was made in his behalf, but there is not the slightest evidence that the deed was delivered to the defendant as an escrow, or taken by him under any declared intent that it should not operate to convey the title according to its import. Two witnesses present at the execution of the deed have been examined, Neil Cameron and Henry McKenzie, of whom the former proves that the deed was prepared by him, that it purported to convey the land to the defendant's son, was delivered in the witness' presence and by him attested, and the other testifies that although he does not remember to whom the deed was made, he does know that the defendant stated at the time that his son was about to be married and that he bought the land for his son.

(141) No defect is alleged to have existed in this deed except that it did not purport to have been made by McKenzie in his capacity of executor and by virtue of the power given to him as such in the will of his testator. This was at most but an informality and would not render the deed inoperative, so that there is no hesitation in declaring that under the said purchase and deed the plaintiff's husband acquired the equitable title in the tract of land referred to in the pleadings, which, under our act of 1828, ch. 14, entitles his widow to be endowed thereof, and would also have acquired the legal title, save only that the ceremony of registration was necessary to its completion. It is also equally clear that this deed has been suppressed and destroyed by reason of the defendant's unfair conduct in relation thereto. His answer almost admits it, for it states that he might, when applying for McKenzie's deeds, have represented to the plaintiff that he wished to have certain defects therein corrected, but denies that he made this allegation by way

of inducement for the surrender of them, and he believed himself entitled to the possession thereof; but it does not state that he claimed the surrender of his son's deed as a matter of right, nor that he made any other representation to induce the surrender of it. But if his answer had been an explicit denial of the plaintiff's allegation in this respect, it would have been contradicted by the testimony of two witnesses, Neil Cameron and Nancy Cameron, who swear that he applied to Mrs. Tyson for this deed because of the alleged defect in it, professing to act as her friend and to have the matter rectified for her benefit. The destruction of the instrument when the new deed was obtained from McKenzie is proved by James McBryde. There is no evidence of the conveyance alleged in the defendant's answer to have been made by him to Harrington before the filing of this bill.

It may not be amiss to remark that we do not think the view taken of the main controversy in this case at all affected by the testimony of the several witnesses who have been examined touching the negotiation of the plaintiff's husband with the Smiths for the sale of both these tracts of land and his obtaining the deeds for the purpose of ascertaining the location (142) and boundaries thereof. For if we give to this testimony the strongest effect which can be claimed for it by the defendant, it establishes no more than that the plaintiff's husband was then unapprised of his title by the deed in his father's hands, and this ignorance cannot divest or impair it.

In the defendant's answer the plaintiff is called upon for proof of her husband's death. The answer ought to have been excepted to as evasive and insufficient on that point, and the defendant should have been made to answer as to his information and belief; but as this was not done and the fact of her husband's death not admitted, it was necessary for the plaintiff to offer proof of the fact. For that purpose the depositions of Malcolm Buie and Angus McCaskill were read at the hearing. The first of these deposes that the supposed deceased left his family, as deponent believes, in the spring of 1831 and has never since returned; that it is understood and believed in the neighborhood that he is dead; that after he went away it was reported that the body of a drowned man was found at New York, and it was supposed to be Tyson's, but that it was afterwards reported (and that report obtained the more general credence) that he enlisted in the army and died after getting his discharge. The other deponent states that it was reported in the neighborhood that the deceased enlisted in the army under the name of Thomas A. Alexander, and that the deponent has seen a letter since he was enlisted, part of which was written by

him. This testimony not being entirely satisfactory as to the fact of the death or as to the time of it, we deemed ourselves justified in directing a special inquiry in relation thereto, and it is now reported to us by the commissioner as a fact that the said Thomas is dead, and that he died before the last Monday of August, 1836.

To this report exceptions have been taken by the defendant Josiah Tyson, first, for that the commissioner received in evidence sundry papers, certified from the auditor's office of the Treasury of the United States as communications to that office from its accounting agents, not upon oath and which are not evidence of the facts therein set forth, and, second, for
(143) that these, if evidence, tend to prove the death of one Thomas A. Alexander, therein named, and do not establish the identity of the person so named with the husband of the plaintiff. We do not hesitate to confirm the report, notwithstanding the exceptions; for, independently of the matters excepted to, there is satisfactory evidence to support the finding of the commissioner. It is proved by Mr. Deberry, the Representative in Congress from that district, that in 1833 or 1834 he received a letter from the defendant Josiah Tyson, requesting him to apply to the President of the United States for the discharge of his son from the army of the United States because of his low state of health, and communicating therewith a letter from the said Tyson to the plaintiff, informing her of his having enlisted under the feigned name of Thomas A. Alexander, of the place where he was stationed, of his very bad health and of his wish to be permitted to return home, and that these letters were referred to the War Department, where the deponent has applied for them and has received for answer that they cannot be found. And Mr. Deberry further testifies that at the close of that session or at the commencement of the next session of Congress the War Department accounted to him as the attorney of the plaintiff for the balance of pay due to her husband at his death and for the value of his effects, sold after his death under the orders and regulations of that Department. This testimony removes all reasonable doubt that could be entertained on the question.

It is our opinion, therefore, that the plaintiff is entitled to be endowed of the land in question. Ordinarily, courts of equity do not decree between codefendants; but it seems to us that this case falls within an established exception. Where a case is made out between defendants by evidence arising upon the pleadings and proofs between the plaintiff and defendants, it has been held that "the defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for

the same matter that may be then decided between him and his codefendant, and the codefendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjudged between the defendants." *Chamley v. Dunsarey*, 2 Sch. and Lef., 710, 718. The decision that the plaintiff is entitled to her dower necessarily affirms the right of the infant defendant, subject to the plaintiff's dower, in the land in question, and, as an infant, we feel it our duty to protect her rights while we compel her to perform her duty. We think, therefore, that the decree should be that the defendant Josiah should, by a proper deed, to be approved of by the clerk of the court, convey the land in fee, with covenants of warranty against himself and all claiming under him, to the infant defendant as land which in equity belonged to the said infant's father at his death, and thereupon a commission should issue to assign the plaintiff her dower. But inasmuch as the distinct boundaries of the land do not appear upon the pleadings, there must first be a reference to ascertain the same. The cause will be retained for further directions upon the coming in of the report.

(144)

PER CURIAM. Reference ordered accordingly.

Cited: Tyson v. Harrington, 41 N. C., 331.

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(145)

OSCAR AND KEMP P. WILLIS v. JOHN E. BUTLER.

The bill in this case dismissed for want of proof to support its allegations.

THIS cause was transmitted by consent to the Supreme Court from the Court of Equity of BURKE, at Spring Term, 1842.

The facts of the case are sufficiently set forth in the opinion delivered in this Court.

W. H. Haywood, Jr., for plaintiff.
D. F. Caldwell for defendant.

DANIEL, J. The plaintiffs were two of a firm of nine partners associated to work the Brindletown Gold Mine, in the county of Burke. By the articles of copartnership, the plaintiffs were to have one-fourth of the profits of the said mining operation. The company, in the years 1829 and 1830, employed

Butler to superintend and oversee the business and to receive all the gold made at the mine. He was to keep books and make entries in the same daily of the quantities of gold that was obtained each day from the mine, and he was at the end of each week to declare a dividend and pay the same respectively to each of the partners according to their shares. The bill charges that Butler during his agency kept fraudulent accounts, and that he has failed to account and pay to them (two of the partners) the just sum received by him for their use; that he is in arrears to them $20,000, or more. In support of the above main charge, the bill proceeds to state, first, that the mine was one called a surface mine; that Butler had under him a prime set of hands;
(146) that he worked them hard, on land unoperated on before, and he rendered an average account of but two pennyweights of gold to the hand per day; that his successor in the agency the next year, with an inferior set of hands, working over the same land and having but little fresh mining land, made from four to five pennyweights to the hand per day. Second, that the defendant was possessed of but little property in 1829, when he came into their employment; that his wages from the company and others up to the fall of 1835 was but $3,350. He then left the State for Red River, where, in 1836, he was possessed of property to the amount of forty or fifty thousand dollars. Butler in his answer says that his books and accounts of the affairs of the company were kept honestly and correctly; that all the gold made at the mine during his agency has been fairly accounted for and paid over to the company agreeably to his undertaking. He denies all fraud. He denies, first, that the mining land on which he operated was in its primitive state when he took possession of it, but he says it had been operated on, as he believes, in the spring and summer before he took possession by one hundred and fifty or two hundred hands. He states that the profits of the mine the two years he had it in possession were equal or nearly equal to that of his successor; that the method of saving labor and improving machinery had become much better known in the time of his successor than it was in his time, and that circumstance gave his successor the advantage. Second, he states that whilst he was a manager of gold mines in North Carolina, he had six slaves and three thousand acres of land; that he worked mines of his own in conjunction with others; that the profits of his slaves, mines and his own wages amounted to between five and six thousand dollars up to 1835; that he is now indebted $16,000, money loaned him by persons in Burke County, which money he has laid out in slaves and other property. He denies that he has in his pos-

session property to the value stated in the bill. He says that he has nineteen slaves of his own and twenty-three slaves in common with one Hall.

The plaintiffs put in a replication to the answer. (147)

The testimony taken in the cause is very voluminous. We have read it through and given it our attentive consideration. It proves that persons were appointed by the company and Butler to examine his books and accounts as agent and receiver; that all his accounts appeared to be correct; that the plaintiffs were there present, and appeared to be satisfied. The plaintiffs have received their shares of the gold according to said statements in the books. The charge in the bill that Butler had fraudulently withheld gold made at the mine which he ought to have brought into account is not supported by any evidence which has been taken in the cause, and each and every circumstance set forth in the bill to raise a presumption against the fair dealing of Butler (and which he had explained in his answer) is by the testimony also satisfactorily explained, and the statements in the answer are completely supported by the proofs in the cause. The bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

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(148)

JOHN CHAMNESS v. ANDERSON CRUTCHFIELD ET AL.

1. If a conveyance or other deed is by accident or mistake framed contrary to the intention of the parties in their contract on the subject, a court of equity will interfere to prevent one of the parties from taking an unfair advantage thereof.

2. But if such mistake or accident be not shown, the court will not grant relief upon a mere parol declaration at the time of executing the conveyance tending to modify or alter the terms of such conveyance.

THIS cause was removed by consent from the Court of Equity of CHATHAM, at Spring Term, 1842, to the Supreme Court.

The substance of the pleadings and the facts offered in proof sufficiently appear in the opinion delivered in this Court.

W. H. Haywood for plaintiff.
Waddell and *Iredell* for defendants.

GASTON, J. In the year 1797, the late General Davie purchased from the trustees of the University a body of lands sit-

uate on Varnal's Creek, Chatham County, of which one William Hendricks had died seized and which had escheated to the University for defect of heirs. Some short time previous to 6 January, 1810, having contracted or being in treaty with Anderson Crutchfield for the sale of these lands, he caused a survey to be made of them for the purpose of ascertaining their extent and boundaries with precision, and on that day, by his attorney duly authorized, he conveyed the same by definite boundaries, as ascertained by that survey, but subjoined to this specific description the following general words: "Including all the land owned by the said Davie on Varnal's Creek and waters," and de-
(149) scribing it also as containing by estimation 2,200 acres.

In the deed the bargainor, for himself and his heirs, covenanted with the bargainee and his assigns to warrant and defend the bargained premises against all lawful claims under the following provisos, viz.: "*Provided, nevertheless,* that if the above courses and distances should take in any lands held by any title prior to that from which the said Davie derived his title, then the said Davie is not to be accountable for it; *provided also,* that if the said courses and distances should not take in all the lands held or owned by the said Davie on the said Varnal's Creek and its waters, then the said Davie is to convey the same to the said Crutchfield, his heirs and assigns forever." On 6 February, 1810, Anderson Crutchfield, by deed of bargain and sale, in consideration of the sum of $130, conveyed unto Stephen Chamness a certain tract of land on Varnal's Creek containing by estimation 150 acres, with special and defined boundaries "including all this tract owned by the said Crutchfield," and thereupon Chamness entered into the possession thereof. Eighteen years afterwards, in making certain surveys for laying entries on alleged or supposed vacant land, it was discovered that in the survey made for General Davie the surveyor had by mistake left out a part of a small tract of which Hendricks had died seized and which belonged to General Davie under the conveyance from the trustees. Hendricks, it seems, had, on 17 June, 1778, obtained a grant from the State for a tract estimated to contain 213 acres, of an oblong shape, extending about 320 poles from east to west and about 190 from north to south. It was known that the lines of this tract comprehended within them an older grant to one Whitehead, and that as to the part so covered it conveyed no title to Hendricks. In surveying this tract as part of the body of lands belonging to General Davie, the surveyor ran from the southeast corner of the Hendricks patent north 84 poles, instead of 190, and stopped at the southeastern corner of the Whitehead patent; thence ran west 320

poles *along Whitehead's line* to the back line of the Hendricks patent; thence south and east to the beginning. Whitehead's north line extended but 160, instead of 320 poles, (150) so that in fact Whitehead's grant left for Hendricks' patent a piece of about 100 acres, of an oblong form, lying between the back line of Whitehead's patent and the back line of Hendricks' patent, which piece was overlooked by the surveyor and excluded from this survey. The conveyance from Crutchfield to Chamness comprehended all that part of the Hendricks patent then ascertained by the survey to be without the Whitehead patent, but did not cover the piece since ascertained to be without it nor make any reference thereto nor give any description of the land conveyed other than was to be found in its courses and *termini*, unless it be in the words hereinbefore mentioned, "including all this piece owned by the said Crutchfield." Within the courses and *termini* of the deed to Chamness there are upwards of 160 acres.

In 1830, John Chamness filed this bill against Crutchfield and the heirs of General Davie, and in it he alleges that in 1810, his father, Stephen Chamness, purchased from Crutchfield the Hendricks tract of land for $130 and took from him a conveyance therefor, pursuing the courses and distances which, according to the survey recently made, were supposed to embrace it; that at the time of making said conveyance the parties were uncertain where the lines of the Hendricks tract were; that it was known that the grant to Hendricks covered a part of Whitehead's land, and Crutchfield was not willing to pursue the courses of the grant for fear of selling more land than he owned, and thereupon it was expressly agreed between the parties that the said Crutchfield would make to the said Stephen a title for all the land within the Hendricks grant owned by him if the courses called for in the deed did not convey it. He also alleges that his father has since conveyed to him all the land comprehended within the Hendricks grant by its proper courses. The prayer of the bill is that the defendants may be decreed to convey to the plaintiff the part of the Hendricks grant which is not comprehended within the conveyance to plaintiff's father. The heirs of General Davie, who are nonresidents, have put in no answer to the bill, and publication is stated to have been made, and the bill is set down to be heard against them *ex parte*. (151) Crutchfield has answered, and in his answer does positively deny the agreement stated by the plaintiff; denies that he ever sold or intended to sell to the plaintiff's father any other land than that described and conveyed in his (the defendant's)

deed, and denies explicitly that he ever promised at any time to convey any other or more land than the land therein conveyed. To this answer there is a general replication.

To entitle the plaintiff to a decree it is necessary that he should clearly establish that his father actually contracted for and purchased from the defendant Crutchfield the whole of the land covered by the Hendricks patent except what might be taken away by Whitehead's older grant, and that by mistake the conveyance made in execution of that well-understood agreement failed to conform thereto. If a conveyance or other deed is by accident or mistake framed contrary to the intention of the parties in their contract on the subject a court of equity, upon the mistake or accident being established, will interfere to prevent one of the parties from taking an unfair advantage thereof. The allegations in the bill very indistinctly charge such a mistake, but rather seem to place the plaintiff's claim to relief upon the ground of a parol promise of the defendant at the time of executing the conveyance. It is clear, we think, that upon *that ground* the bill cannot be supported. The written executed contract must be regarded as declaring the whole contract then made, and such promises, if receivable at all, are admitted merely as evidence tending to show the equity, *dehors* the conveyance, arising from the misapprehension of the parties. It is exceedingly clear that such evidence is to be regarded with extreme caution, for otherwise the courts would violate in effect the rule, which they profess to hold sacred, that the operation of a deed or other written instrument shall not be abridged, enlarged or altered by parol testimony.

The witnesses mainly relied upon to make out the plaintiff's case are Stephen Chamness and John Teague. The depositions of the former have been taken twice, and of the
(152) latter three times by the plaintiffs, and the representations of each witness given on these different examinations are not the same. In the first deposition of Chamness (that of 1 October, 1832) he states that Crutchfield came to his house and asked witness if he did not wish to purchase a piece of land which he (Crutchfield) had bought from General Davie; that witness replied that he did, and thereupon Crutchfield requested witness to go and show him the land; that witness said that he did not know *exactly* where the right lines were, but thought he knew them *pretty near,* and went with Crutchfield on the land, but showed *no lines or corners.* The witness in this deposition proceeds to state that in a few days afterwards Crutchfield came again to his house to give him a bond to make a right to said land, and sat down and drew a bond to make him a right

to all the lands of Davie which lay between four lines, viz., Whitehead's line, Chamness' line and Stewart's two lines; that shortly after this Crutchfield came again to the witness' house to make him a deed, when witness observed that he understood that he (Crutchfield) had sold the land to Johnson, but Crutchfield replied that he had not, that he had then got *his deed and found out all the lines*, and there was more land and better land than Johnson had showed him; that while Crutchfield was writing the deed he said how he would begin and describe the land, and if the deed did not cover the land "described," he would make the witness a deed which would cover it, if there was 500 acres; that witness told him he (the witness) thought there were some older claims within those boundaries, and Crutchfield replied, if there were any of a younger date than Davie's, he sold them all, and that about the year 1818 or 1819, after a suit was determined with Johnson, Crutchfield and the witness did run round the boundaries of Crutchfield's deed and found some land included therein covered by older titles, which he agreed to throw away, and the balance was to belong to the witness. Towards the close of the deposition, it is added that the agent for the plaintiff insisting that the witness should give the distance of the four lines above referred to, they are accordingly set forth, and as they are set forth, comprehend *the whole* of the land which is described in the Hendricks patent. (153) In the subsequent deposition of the same witness (that of March, 1835) he begins with stating that in 1810 Crutchfield came to his house and sold him a tract of land, and thereupon he adds that they went over to John Teague's, and there Crutchfield drew a bond to make him a title for a tract which he had bought of General Davie, beginning at a black oak at Whitehead's and Horneday's corner, thence, etc., etc., *following the description of the land in Hendricks' patent;* that he afterwards came to the witness and took up the bond and executed a deed, saying if it did not cover the land "above described" that he would make another, and that afterwards (but he does not state when) he came again, and did not deny he had sold witness the land, but stated that the deed did not cover the land, and that he meant to keep it. There is less variance between John Teague's depositions. In them he states that Crutchfield and Chamness came to his house, as he understood, to draw a bond for title to a piece of land which the former sold to the latter. Witness does not pretend to state what were the contents of the bond, but while Crutchfield was writing heard Chamness say, "I buy all that tract of land lying between Stewart's line, Whitehead's line and John Chamness' line, be it more or less," when

Crutchfield said, "I sell you all the land lying between those lines, but I will not warrant against any prior titles." In one of his depositions he adds that Chamness said the deed must begin at the black oak, Horneday's and Whitehead's corner, and Crutchfield replied, "At any corner where it is right," and in another he states also that at the time Crutchfield remarked that he knew nothing of the quantity, quality or lines of the land. He states that afterwards he witnessed the deed; that he did this at Chamness' request; and we should certainly infer from the connection in which he speaks, with respect to the execution of the deed and the promise of Crutchfield, that the latter at the time of the execution promised that if the boundaries of the deed did not cover the land he had sold, he would make another; but in the deposition of 30 July, 1831, in answer to an express interrogatory from the defendant "When did I promise to
(154) make another deed?" his answer is, "Several years afterwards."

One other witness, Jesse Rosser, has been examined for the plaintiff, of whose testimony all we can make out as at all relevant to the case is that when a survey was had because of the dispute between Johnson and Stephen Chamness in relation to their interfering lines, which must have been about the year 1818, he heard the defendant Crutchfield say that he had sold to Chamness all the lands that belonged to General Davie which were not covered by older titles, at which time the witness says he was between fifteen and twenty-five years of age, and that in February, 1831 (since this bill was filed), he heard defendant Crutchfield tell Stephen Chamness that he had sold to said Chamness all the land described in his deposition, the boundaries whereof he sets forth, and these are the boundaries of the patent to Hendricks.

With respect to the last witness, it is testified by A. Fleming that he is a man of bad character and not entitled to credit. With respect to Stephen Chamness, it is testified by Daniel Smith that his veracity on oath is not entirely to be relied on. The last witness also testifies that he heard Stephen Chamness say, in August, 1830 or 1831, upon occasion of said Chamness' inquiring of the witness whether he had ever heard Crutchfield acknowledge that he had sold all between Whitehead's and Johnson's lines, that neither he nor Crutchfield knew anything of *this* piece of land until within a year or two before that time, and Mr. Snipes, who was the agent of General Davie in selling the land to Crutchfield, who caused it to be previously surveyed, who had surveyed the land conveyed by Crutchfield to Stephen Chamness at the time of the dispute of the latter with Johnson

and who had also surveyed an entry of said Chamness covering part of the piece in dispute, deposes that he never knew or heard of General Davie's title being supposed to cover it, or of any claim being set up by Stephen Chamness and his son thereto under the purchase from Crutchfield until about the time of the institution of this suit. Willis Teague, who is the first subscribing witness to *the deed,* has been examined for the defendant, and he declares that he saw the deed executed and attested it as a subscribing witness, and that he then heard noth- (155) ing said about any promise or agreement to make any other deed, though he also says, at a former occasion, if we understand him correctly, while the parties were writing he heard Chamness say, "If I buy the land, I want it all," and Crutchfield said, "Yes, I sell you all that belonged to General Davie." We think that all the testimony offered to show the execution of a bond for title and to prove its contents was in the present frame of the bill inadmissible. There is no allegation in the bill that any bond or other writing in the nature of articles had been executed between the parties, and the bill, had such been the fact, ought distinctly to have averred that matter in order that the defendant might answer thereto; and if he denied the allegation, or confessed or avoided it, a distinct issue might have been made up, to which the proofs should be taken. But no objection has been made to this evidence, and we have accordingly considered it. Our impression upon it is that there was a bond, but we have no reason to believe that it stipulated to convey any other land than was conveyed by the subsequent deed. We can place no reliance on the deposition of Stephen Chamness. Independently of the very suspicious shape in which he presents himself—first conveying the land to his son and then becoming the witness to establish his title—of his acting in the taking of the proofs in the character of his son's agent, and of the doubts expressed in regard to his veracity—his two depositions are directly at variance upon one circumstance in which his memory could scarcely fail him, or which, if his memory did fail him therein, shows that it is unsafe to trust to his recollection. In the first of them he distinctly declares that Crutchfield came to *his* house to give a bond for title and then sat down and wrote it; in the other, that the parties went to John Teague's to write the bond, and that the bond was there written. But besides this, it is morally impossible that his statement in regard to the contents of the bond can be correct. In both the depositions he undertakes to set forth the boundaries of the tract as *described in the bond,* and represents Crutchfield as binding himself to convey according to the boundaries of the original patent, (156)

which patent, it is admitted, was known to comprehend land to which there was an outstanding superior title.

Put his deposition out of the way and there is no proof which can plausibly justify a court in ordering the conveyance to be corrected. John Teague does not pretend to know the contents of the bond, and if the conveyance which was executed and accepted as conforming to the requirements of the bond did in truth conform thereto (and so we are bound to presume, until the contrary is shown), there would be no security for men's rights if the solemn and authentic memorials of their final agreement were to be shaken by the imperfect recollection of witnesses as to what passed in the course of the negotiation. There is a vague phrase, however, in the deed, which has been seized on by the plaintiff as a circumstance tending to support his representation of the contract. After the specific description of the land conveyed follow the words, "including all this tract owned by the said Crutchfield." But the phrase is too equivocal to furnish a satisfactory foundation whereon to build an argument either for or against the plaintiff's construction. There is nothing in the deed to show that by the words "this tract" is intended the tract granted to Hendricks. No *tract* is before mentioned, and there is no designation of the subject-matter of the conveyance other than by its estimated quantity and its metes and bounds. "This tract," therefore, can only refer to the piece of land so described, and the phrase cannot import that more than the land so described is conveyed or intended to be conveyed. It would seem rather (though this interpretation is little better than conjectural) to imply that even of the land comprehended within the metes and bounds described, the conveyance is to include only so much as is owned by Crutchfield. The truth probably is that until the conveyance was made from Davie's attorney to Crutchfield, he knew little of the extent or boundaries of the land in respect to which he and Chamness were treating. It appears that he applied to Chamness for information in regard thereto, and the latter gave it, but showed no *lines* nor *corners*.

He does not pretend to say that he pointed out *this piece* (157) as constituting a part thereof. Upon the whole evidence it is manifest that when the parties contracted and when the deed was executed this piece was not considered as forming a part of the thing bought and sold. It was not regarded in the estimate of value. Nothing was paid or received therefor, and the attempt now set up to obtain a conveyance of it has no equitable foundation on which to rest. We think the bill ought to be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

ROBERT ABERNATHY v. JOHN HOKE.

1. On a bill alleging that the plaintiff's negroes had been formerly sold at public auction and purchased by the defendant under an agreement that the plaintiff might redeem them by repaying the purchase money and interest, and that in consequence of such agreement being known the defendant was enabled to purchase at very inadequate prices, and praying that the plaintiff be permitted to redeem, the court cannot decree for the plaintiff unless upon proof of a distinct agreement to redeem or upon plain evidence of undue advantage taken of the plaintiff or imposition on him.

2. Mere proof of a friendly intention on the part of the defendant to favor the plaintiff by letting him have the use, upon advantageous terms, of such negroes as he might buy, or even of a purpose to let him have the negroes back if he should be able in a reasonable time to repay the price given and the interest, will not entitle the plaintiff to a decree.

3. A fair and full price given for property and no security taken for the sum thus advanced strongly implies an absolute and not a redeemable purchase.

THIS cause, at Spring Term, 1842, of LINCOLN Court of Equity, was ordered, on the affidavit of the defendant, to be transmitted to the Supreme Court for hearing. (158)

The facts of the case are set forth in the opinion delivered in this Court.

D. F. Caldwell for plaintiff.
Alexander for defendant.

RUFFIN, C. J. This suit is brought for the redemption of thirteen slaves which the plaintiff alleges the defendant holds as a security only for the sum of $954 with the interest thereon.

The bill was filed in November, 1837, and states that, being indebted to certain persons, the plaintiff, by way of security, conveyed to Robert H. Burton several tracts of land and also ten slaves, upon trust, to sell and out of the proceeds of sale to satisfy the debts; that on 8 April, 1827, the trustee offered the negroes for sale and sold them all for cash, and that at that sale the defendant purchased a female slave, named Sue, and her four children, Jane, Anthony, Rachel and Jefferson (who are mentioned by name in the deed), and also two others, Isaac and Mary, who were the issue of said Sue, born after the execution of the deed of trust, and that he gave for them the sum of $954. The bill charges that the plaintiff, finding that he would be unable to prevent a sale of the negroes, applied to the defendant

to attend the sale and purchase the negroes, and that the defendant, who had long professed particular friendship for the plaintiff, agreed that he would examine the property conveyed, and, if he thought it equal in value to the debts, that he would advance money to discharge the debts and take a conveyance of the property as a security; that accordingly the defendant, upon examination, was satisfied that the property was good for the debt, and declared that it should not be sacrificed, but engaged that he would attend the sale, pay the debts by buying the property, and leave it in the plaintiff's possession until he should be able to redeem it, which Hoke declared he would not speedily press him to do. The bill further charges that before the sale several letters passed between the parties on the subject, and particularly that Hoke wrote a letter to the plaintiff which contained a distinct agreement on his part to buy in the
(159) property on the terms set forth; that Hoke did attend the sale, and proposed, as had been agreed, that the whole property mentioned in the deed of trust should be offered in a lump and that he would bid the amount of the debt, but that the trustee declined to sell in that way, and that thereupon the defendant applied to the plaintiff for his letter, before mentioned, and tore it up, saying to the plaintiff that he would only be bound for such of the negroes as he might buy; that the trustee then proceeded to sell the twelve negroes, of which five were purchased by other persons, and the seven before mentioned were purchased by the defendant as aforesaid. The bill then charges that those seven negroes were worth at least $1,500, and from that sum to $2,000, and that several other persons who were present would have given much more for them if they had not understood that the defendant was bidding for the plaintiff's benefit and with a view to allow him time for redemption. The bill further charges that in pursuance of the agreement the plaintiff retained the possession of the negroes from the sale to November, 1831, at which time the defendant took into his possession those he had originally purchased and two or three others who had been born in the interval, and that he has kept them ever since, until they have increased to the number first mentioned and yielded large profits. The bill states that although the negroes sold for more than enough to satisfy the debts secured by the deed of trust, yet the plaintiff was shortly afterwards obliged to sell his lands and all his other property to pay other debts, and that he was prevented from applying for redemption sooner by his poverty.

The answer states that the plaintiff was largely indebted to many persons besides those secured by the deed of trust; that

among others he owed the defendant two debts, one for $91.52 and the other for $82.60, and another debt to the defendant and his partners of $378.87; that the plaintiff mentioned that it was the interest of all his creditors to attend the sale and make his property bring its value, otherwise they might not be paid, and he urged the defendant in particular to do so. The defendant admits that he attended the sale in the hope of securing himself in some way, and, with that view, that he pro- (160) posed to pay the debts mentioned in the deed of trust and take a conveyance of all the property to secure the payment of the sum so advanced, and of the debts aforesaid, to himself and to his partners, and that the same was refused; and he states that thereupon the negroes were set up for sale, the woman Sue and her four youngest children being put up in one lot and the others singly; that he (the defendant) bid for each lot, and purchased seven, at prices which together amounted to $954, and that he did not buy the others because other persons bid more than he thought the slaves were worth. He also admits that the plaintiff was very desirous of having the use of the woman Sue as a servant in his family, and requested the defendant, if he purchased her and her younger children, to leave them with him until the defendant should want them, which the defendant says he agreed to do, in case he should purchase them, inasmuch as he had no immediate use for them, and their services were about equal to their tax, victuals and clothing. The defendant further admits it to be probable that some correspondence by letter took place between the parties before the sale; but he says he cannot remember that there was any such correspondence, much less the contents of the letter from him to the plaintiff, or that he got the same back and destroyed it, as stated in the bill, and he denies that any such thing took place, according to his recollection or belief. And the answer denies positively that if such letter did exist that it contained any promise or agreement that the defendant would purchase the plaintiff's property, or any part of it, for his benefit and give him time to repay the purchase money and redeem it, or that such agreement existed by parol, or that there was any conversation or understanding between the parties to that effect before or at the sale or at any other time; and the defendant avers that all the allegations of the bill touching such right of redemption or any agreement therefor are unqualifiedly false, and that the defendant purchased for his own use exclusively. He denies that he consented the negroes might remain with the plain- (161) tiff with the view of preventing competition in bidding and his belief that it had such effect; but if it did, it must

have been owing to the conduct of the plaintiff himself, for the defendant said nothing of that intention to any person. He also denies that the negroes brought less from the manner in which they were sold; for all the children of the woman were sold separately except the four youngest, and they were too small to separate from the mother. The answer further states that in July, 1827, the defendant purchased at sheriff's sale a tract of land containing 100 acres, being one of the tracts conveyed in the deed of trust to Mr. Burton and that whereon the plaintiff resided, and that he afterwards (in July, 1828) purchased at sheriff's sale a tract of land adjoining the above, which was sold as the property of James Nixon, and that so far from any of the said purchases being made in trust for the plaintiff, or from his claiming any interest in the slaves or land, he (the plaintiff), in January, 1829, wrote and entered into an agreement with the defendant for the occupation of those lands by the plaintiff for three years upon a rent of $48, and for the use of the slaves without charging the defendant anything for keeping the negroes or being charged anything therefor by the defendant, but that the one party might give up or the other take the negroes whenever they might respectively choose. The answer further states that the price given by the defendant for the negroes was a fair and full price at the time, and that the sale was fair and open; that the defendant had no use for the negroes until the latter part of 1831, and then sent for them, and the plaintiff gave them up promptly and without then setting up any title or interest in them, or doing so at any time after the sale, until one or two months before the filing of the bill, late in 1837, when he was induced to apply for redemption by the increase in the family and the very high prices of slaves at that period.

To the answer replication was taken, and the parties proceeded to take voluminous proofs.

As exhibits the plaintiff put in his deed of trust to Burton, dated 20 July, 1825, and also a letter from the defendant to the plaintiff, bearing date 11 November, 1827, in the follow-
(162) ing words:

"DEAR SIR:—I have received yours by your son. I am really sorry that after so large a stretch as I have made in your property you can get no person that will do anything for you in balance. I have made a purchase in Spartanburg that I must meet when I come home, as Mr. B., from whom I bought, is moving to Georgia. But still, with all these difficulties, if you can get, as you state, Mr. Robert Burton and two more to

join in, I will be one of them to try and save the property, rather than it shall fall a sacrifice in the hands of those that would in no case favor you."

It is not requisite to set out all the numerous depositions taken in the cause, but only their material parts.

Hugh L. Wilson states that he was the crier at the sale, and just as he was going to sell the negroes, either the plaintiff or defendant called him to them, and Hoke said to Abernathy, "Cheer up, and do not be cast down; that he had befriended him, and was disposed to do it still. All he wanted was his own; to pay him his money and the interest and take his negroes back at any time." He says he does not recollect that Abernathy made any reply, and that he never heard any other conversation between the parties respecting the negroes; that Hoke bought Sue and three of her children—the price he does not recollect, but thinks upwards of $900, which he did not consider a fair price.

W. M. Black deposes that he was at the sale, but does not know the number or description of negroes purchased by Hoke, nor the prices; that in passing about, either before or after the sale, he came near Abernathy and Hoke, and heard the latter say to the former that he need not be uneasy about the property he had bought or was about to buy; that if it was seven or eight or ten years, so that he got his money and interest, it was all he wanted, which is all the witness knows.

S. J. Little states that he was at the sale, and that after the negro woman and her children had been cried some time, Hoke, Abernathy and Wilson went aside ten or fifteen (163) steps and talked together, after which they returned into the company, and the negroes were knocked down to Hoke. The witness states that the woman and her five children were sold in a lump, and brought perhaps three hundred or four or five hundred dollars, but that he thought they were worth over one thousand dollars. He says that in the evening he asked Wilson how it happened that this lot of negroes sold so much cheaper than the others, and he replied that Hoke had bought them to save them for Abernathy, who was to have them upon paying up the money and interest.

Samuel B. Abernathy says that he is the son of the plaintiff, and that at the sale a negro by the name of Mingo, who was the husband of the woman, was purchased for one Dogharty, and that the winter after, or the winter of the next year after, Hoke applied to Dogharty to purchase him. He then said he was to have bought him at the sale with the rest for the plaintiff, who was to redeem them at any time afterwards, and that his reason for not buying Mingo was that he went too high. Dogh-

arty observed that the plaintiff would never be able to redeem them, to which Hoke replied that he probably would, for, as he had failed once, he might take better care hereafter. Dogharty was then in debt to Hoke and soon after confessed judgment, and subsequently Hoke did buy Mingo.

Four witnesses, E. Davidson, A. McCorkle, W. Little and R. A. Brevard, state that Hoke bid for most of the negroes that were offered for sale, and that it was understood by them and, they think, the company, that there was some arrangement between Hoke and Abernathy under which the latter was to have some benefit from Hoke's purchases and probably the right of redemption. Abernathy requested Davidson not to bid, as he wished Hoke to become the purchaser. Whenever Hoke made a bid it excited a remark in the company that he was buying for Abernathy's benefit, and that such belief induced these witnesses not to bid as high as they otherwise would, though they cannot state the prices at which the negroes sold that day nor the lots in which they were offered, nor the purchasers; that Hoke (164) did not, as far as they perceived, contribute to the belief they entertained as to the purpose of his purchases; nor, as far as they know, had he any knowledge that such an impression at all prevailed; and they state that the price of negroes was then very low, especially at cash sales.

On the other hand, Mr. Burton, who made the sale as trustee, says that he heard of no such understanding between the parties, nor of an impression to that effect in the company; that many of Abernathy's creditors were present and bid, and that all the negroes, as well those purchased by Hoke as the others, brought full prices as negroes about that time sold; that such was his opinion at the time and the opinion generally expressed by others also. He states that Sue had nine children, of which five were sold separately, and of those Hoke bought two and that the other four were sold with their mother on account of their ages at $632. The negroes were all sold in the order requested by Abernathy; and when all had been sold except the last lot and it was found that a balance of the debts was to be raised exceeding $300, he requested that the young children should be set up with the mother. When sold they brought $301 more than paid the debts, and that surplus was paid by Hoke to Burton and by him to Abernathy, in cash, or to his other creditors on his orders, and that subsequently he (the trustee), by the directions of Abernathy, conveyed one of the tracts of land which remained unsold to one Little, and the other, containing 100 acres, on which Abernathy lived, he conveyed to Hoke, who had purchased it at sheriff's sale.

Ephraim Brevard, H. Fullenweider, John Boyd and John Killian depose that the price of slaves was depressed at the time of this sale, but that they were present at the sale and that these negroes sold remarkably high for their ages and appearance. Mr. Brevard became the purchaser of one of the children of Sue, and he also bid against Hoke for the girl Jane, bought by the latter, and was the last bidder for her except Hoke. Mr. Fullenweider also purchased another of Sue's children, and wished to buy others, but declined doing so on account of the high prices to which they were run. He says he would not give as much for Sue and her children as Hoke did, and that a (165) great many persons were in attendance who wished to buy negroes, but were prevented by the prices bid by Hoke and the other creditors of Abernathy. Boyd and Killian went to the sale with the intention of buying, but did not, as the negroes sold for more than they thought they were worth; and the former states a purchase made by himself from another person on much better terms. To the character of Hugh L. Wilson twelve persons are examined, who depose that he is unworthy of credit and has been so deemed for many years.

The defendant put in and proved the following letter to him from the plaintiff:

"DEAR SIR:—I have understood several people have it in contemplation to try to purchase some of the negroes you have here with me. As I know that necessity will be no inducement for you to sell, I hope you will refrain until I see you. I have no doubt, from the improvement that I have made and expect to continue to make, that application will be made for this plantation. I also want you to refrain from selling until I see you, which perhaps may not be until court. I have started a threshing machine which I find will be very useful in making manure. At this time there is the straw and chaff of more than three hundred bushels of wheat lying scattered for manure and constantly increasing. I shall have the threshing of more than one thousand bushels of wheat this season.

"Yours, etc., R. A.

"N. B.—A tract of land adjoining this will probably be sold by the sheriff at court as the property of James Nixon. The land is well timbered and of an excellent quality."

The foregoing letter is without date, but from the reference to the sale of Nixon's land it is admitted to have been written in the summer of 1828.

Henry Cansler, then the Sheriff of Lincoln County, proves that in July, 1827, he sold under executions the tract of 100 acres on which the plaintiff lived to Hoke for $599, and
(166) that in July, 1828, he also sold the Nixon land adjoining the other, and that Hoke purchased it for $302.50. This witness also proves the two contracts between the plaintiff and defendant, which follow, and that they were drawn by the plaintiff himself. The one is:

"An agreement between John Hoke and Robert Abernathy: Whereas the said Hoke did, some time since, purchase a family of negroes at public sale, formerly the property of said Abernathy, which negroes have continued with said Abernathy: Now he agrees not to make any charge for keeping them heretofore or hereafter, but has the liberty of giving them up to the said Hoke at any time he pleases. And the said Hoke agrees to make no charge on the said Abernathy for the time past, nor for the time he may let them stay with the said Abernathy; and the said Hoke is to take them at any time he pleases. In witness, etc., 18 February, 1829. "ROBERT ABERNATHY,
"JOHN HOKE."

The other is:

"Articles of agreement made between Robert Abernathy and John Hoke, both of Lincoln County. The said Hoke agrees to let the said Abernathy have the use of the plantation and machines whereon the said Abernathy lives for the term of three years, for which uses the said Abernathy doth bind himself, etc., to pay to the said Hoke the sum of $48 annually. It is to be understood that the said Abernathy is to receive no compensation for any improvements or repairs that may be done on the plantation or buildings; and in case the said Abernathy should die, the same use and privileges are to extend to his family by complying with the above terms. In witness, etc., this 18 February, 1829. "ROBERT ABERNATHY,
"JOHN HOKE."

The last deposition which it is material to state is that of David Hoke, who is a son of the defendant, and has been
(167) examined on the part of the plaintiff to prove the admissions of his father that the purchase was made to favor Abernathy, or that he was to have the liberty of redeeming them. The witness denies that he ever heard anything of the kind from his father, and says that his father sent him for the negroes in the latter part of 1831, and that the plaintiff gave them up without setting up any claim to them or right to redeem, and ex-

pressed the wish that the defendant would purchase Sue's other children from those who bought them, so as to get the whole family together.

If the Court were at liberty to decree for the plaintiff upon a conjecture that there was some friendly intention on the part of the defendant to favor the plaintiff by letting him have the use, upon advantageous terms, of such negroes as he might buy, or even that he had the purpose of letting him have the negroes back if he should be able in a reasonable time to pay the price he gave and interest, then the case made by the plaintiff might be deemed a plausible one for the relief he seeks. But we cannot take away from the defendant the benefit of his purchase but upon plain evidence of undue advantage taken of the plaintiff or imposition on him or upon proof of a distinct agreement for redemption, and upon the consideration of the evidence in the cause we are not able to discover any such ground on which the relief can be founded.

The plaintiff alleges that there was a contract for redemption explicitly made between him and the defendant before the day of sale, and that he once had a letter from the defendant which distinctly stated or recognized the contract, but that the defendant got it into his possession and destroyed it. But the answer unequivocally denies the whole statement, both in its substance and details. The defendant admits that something had passed between them before the sale upon the subject of his purchasing, but he denies that it had any reference to a purchase for the plaintiff or to a redemption of the negroes, unless in the single case that he might pay all the debts secured by the deed and take an assignment of it, with the view of securing the sum then advanced and his previous demands. But that failed because the trustee declined selling in that way and, more- (168) over, because, as appears by an exhibit and Cansler's testimony, the lands included in the deed of trust were then levied on by the sheriff for other creditors and were subsequently sold for their benefit. The answer then states positively that there was no other agreement or understanding for the defendant's getting a security, but that he purchased solely on his own account.

That statement of the answer the plaintiff controverts upon the grounds that such agreement was made in parol on the day of sale in the presence of Hugh L. Wilson, and that it is likewise established by the subsequent declarations of the defendant, and also that its existence and nature are to be inferred from the facts that the defendant purchased for inadequate prices and that the plaintiff retained the possession of the slaves after the sale for several years without accounting for the hire.

The only direct evidence of the agreement alleged in the bill is that of Hugh L. Wilson. He does establish it, if he is to be believed. But several circumstances concur to produce doubts of the correctness of his recollection or of his veracity. It is singular that he alone, and with a doubtful character, should have been selected out of a large crowd as the witness to whom these persons should confide their agreement, especially as there was no injunction on him not to divulge it, and he did, as it is said, make it known to at least one person that evening. But besides, his memory seems to be too unsafe to entitle him to full credence. He states that Hoke purchased Sue and *three* of her children, and that he gave for *them* about $900, which he deems not to be a fair price. He takes no notice of the other three children, which all agree, and the bill states, were purchased by Hoke; and so far from $900, or rather $954—the price actually given—not having been a fair one for Sue and the three youngest children, it is at least doubtful whether that sum was not the full value of the mother and the six children. But it is an unpleasant duty to discuss in detail questions of veracity, and therefore the subject may be dismissed with the remark that this witness is so entirely discredited by the many persons (169) who have been examined to his character that the Court is constrained to lay his testimony out of the case altogether. It is too unsafe to decree on the testimony of a person who is proved to be so wholly unworthy of belief.

That conclusion dispenses also with the testimony of S. J. Little, which was only material as tending to sustain the credit of the preceding witness. But in passing we cannot fail to notice how very uncertain the recollection of most persons is as to remote transactions in which they felt no interest. This witness states that he saw the parties privately conversing with Wilson after the sale of the woman and children had gone on for some time; whereas Wilson himself says that it was before the sale began that he heard the conversation. Moreover, Little says that the woman and her *five* children were sold together and brought between three hundred and five hundred dollars, though he thinks they were worth $1,000; whereas it is clear that the woman and *four* children were sold in a lot for $632 and that the other two were sold separately for $322, making in the whole $954. Nothing can exhibit in stronger contrast the superior effect and credit which the mind is obliged to yield to written documents above that due to the vague statements of persons in no wise concerned to understand correctly or to remember perfectly a remote transaction, and especially if it be one of which a doubt might have been entertained at the time as to its true character.

The foregoing observation is peculiarly applicable to the testimony of the witness Black, who deposes that he heard Hoke say to the plaintiff on the day of sale "that he need not be uneasy about the property, for that if he got his money and interest in eight or ten years it was all he wanted." If there was a credible witness who testified to a contract communicated in all its particulars to him the testimony of Black might materially support the other witness and induce the Court to decree, notwithstanding the remoteness of the transaction or other circumstances, against it. But as evidence in itself of the contract between these parties it is entirely inadequate. This person was not called to take notice of the terms of a contract the parties were then making. Nothing was communicated (170) to him intentionally. He casually heard a single sentence of probably a full conversation, to no other part of which is he able to depose. And even as to what he did hear, he cannot say whether it occurred before or after the sale, or respected negroes which the defendant had bought or was about to buy. It would be dealing most unfairly with the meaning of a person if a sentence or part of a sentence torn from the context and thus casually caught were to be the ground of a judicial decision.

The plaintiff's case is thus left to rest on the testimony of his son, Samuel B. Abernathy, who deposes to an admission of the defendant that he purchased this family of negroes for his father, who was entitled to redeem them at any time. This admission was not made to the plaintiff or with a view that it should be communicated to him or to furnish evidence of the agreement for the purpose of subsequently establishing it. But it was an incidental observation dropped in the course of a negotiation with a third person for the purchase of the husband of this woman. It might have been made with a view to influence that purchase, or from some motive that cannot now be made to appear. It would seem extraordinary, if there had really been a definite agreement for redemption by the plaintiff from the beginning, that the parties—and especially the plaintiff—should not have put it into some permanent form, or at least have called several persons, intelligent, disinterested, unconnected and of good character, to attest it, so that upon the death of one of the parties, or his denial, the existence and terms of the agreement could be established beyond doubt. But instead of that we find this attempt to prove it by the accidental acknowledgment of it in the presence of the plaintiff's son near a year or two years subsequently. It is, however, competent evidence, and might therefore be the ground of relief if it stood uncontradicted or was consistent with other unquestionable facts which

appear in the cause. But as little as we are disposed to refuse to this statement the faith that such words were spoken by the defendant, the Court cannot infer from them the conclusion that at or before the sale an agreement, a conclusive contract,
(171) was formed by these parties for the purchase and redemption of the slaves as charged in the bill. In the next place, if there had been such an agreement probably—most probably—there would have been some other evidence of it like that before suggested. Again, if there were some understanding or vague expectation of the sort, as perhaps may be collected from the testimony of this witness, the letter of the defendant to the plaintiff of 11 November, 1827, and the continued possession of the plaintiff, such notwithstanding, must have been terminated and the plaintiff's expectation absolutely abandoned in 1828. The price given by the defendant will not help the plaintiff; its inadequacy is not established. Four persons think the negroes might have brought more if there had not been an impression that Hoke intended to favor the plaintiff. But even these persons cannot state the values or actual prices, and were in truth not concerned to notice or remember them. On the other hand, the seller of the slaves and the creditors of the plaintiff, who were concerned that the property brought its value and who bid against the defendant and also purchased some of the negroes, say that all the negroes sold well, and that the defendant, particularly, gave more than they were willing to give for those purchased by him. Inadequacy of price, if existing, would furnish an argument for the plaintiff. On the contrary, a fair and full price given and no security taken for the sum thus advanced strongly implies an absolute and not a redeemable purchase. The price therefore furnishes another objection to declaring upon the testimony of S. B. Abernathy that the plaintiff had such right of redemption at the filing of his bill.

That he had not we feel obliged to declare upon the evidence of the defendant, independent of his answer, that being evidence of a character which makes an impression on the mind on which it reposes with confidence. It consists of written documents under the hand of the plaintiff himself. The first is his letter written in the summer of 1828. It is clear that the plaintiff was then reduced to destitution of property. His lands had been all sold soon after his negroes. The letter of the
(172) defendant of November, 1827, which the plaintiff read, shows that the residue of his property, consisting of his stock and household stuff, was then probably sold, and the bill, indeed, states the fact. How, after that, could he expect or hope

to redeem the negroes except out of the negroes themselves? That he had no such expectation is absolutely certain, if we are to judge from his own words in his own letter in the summer of 1828. He pretends not therein to any interest in the slaves more than in the land, which the plaintiff had then purchased, but treats them all as the defendant's own property, asking, merely as a favor, that he would not sell them till he could see him at court. He states that he is making such agricultural improvements on the farm as might induce the defendant to consider it his interest to retain it and allow him to occupy it, and he advises him to purchase an adjoining tract which was shortly to be sold, and which the defendant did buy. What can be inferred from this letter but that the plaintiff was asking as a favor that the defendant would make no such disposition of the property, real or personal, as would deprive him of the use of it? But it was the use of it as the property of the defendant and as a kindness to plaintiff, and not as the property, legal or equitable, of the plaintiff himself and upon a claim of right. Accordingly we find that the defendant bought the Nixon land and that in the beginning of the next year (1829) he let the lands to the plaintiff for three years and also came to an agreement for the slaves remaining with the plaintiff during the will of both. Those agreements are also in writing, so that their terms and objects cannot be mistaken. They were drawn up by the plaintiff himself, and they cannot be read without perceiving instantly that they are absolutely inconsistent with the notion of any interest in the land or negroes *then* being in the plaintiff or claimed by him. He stipulates to pay rent for the land $48—less, indeed, than the interest on the sum of $901.50, which the defendant gave for the whole tract. If the land and negroes had been held as a mere security would they not have been included in one agreement and the rent reserved equal to the interest on the price of the whole? Or if the negroes had been thus held would there not have been some ar- (173) rangement for paying the interest on the sum given for them? But nothing of that kind appears. On the contrary, the plaintiff treats them as exclusively the property of the defendant. They were, in point of annual value, worth, as servants in the plaintiff's family, about the expense of keeping such a family, then increasing. The plaintiff agrees to keep them without charge and without paying hire, and each party is to put an end to this agreement when he pleases, the plaintiff by sending the negroes to Hoke, and the latter by taking them away. The profit of Hoke upon the slaves was not the interest on the money he paid for them, but the increase of the slaves, which

belonged to him as owner. This agreement therefore removes the last remaining circumstance on which the bill is founded, namely, the continued possession of the plaintiff. That possession is explained, and it is seen that it was not continued because the plaintiff claimed the negroes or any interest in them, but that it was under the defendant and at his will. The absolute property of the defendant could not have been more distinctly acknowledged by any act or language from the plaintiff. Then to those documents we add the negative, but not less convincing, evidence that at no time during a period of upwards of ten years did the plaintiff set up to the defendant, though residing in the same county, any claim of this kind, nor, indeed, did he assert such a claim to any person. Such a perfect silence for such a length of time respecting a right of this sort, of such immense importance to the plaintiff, is contrary to all experience of the ordinary conduct of men, and, with the other circumstances and documents just mentioned, it overbears the feeble inference from the singular evidence of the defendant's declarations. We are obliged, therefore, to declare that the plaintiff's case is not made out by the proofs, and that his bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

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(174)

JOSEPH SCOTT v. JOHN SCOTT.

The plaintiff and defendant, being tenants in common of a tract of land, ran a dividing line, by consent, terminating at a certain point within the tract. The court now decrees that commissioners be appointed to run a line from such point to the outer line of the tract, so as to make a full and complete partition.

THIS cause was transmitted by consent to the Supreme Court from the Court of Equity of BURKE.

The bill was filed by the plaintiff at Spring Term, 1839, of Burke Court of Equity, alleging that the plaintiff and the defendant were tenants in common of a certain tract of land, and prayed for a partition to be made in the manner prescribed by the act of Assembly in such cases made and provided. The defendant in his answer objected to a decree, alleging that a division had already been made by the mutual consent of the parties. To this there was a replication. Proofs were taken and the cause set for hearing.

The facts are stated in the opinion delivered in this Court.

Alexander for plaintiff.
D. F. Caldwell for defendant.

DANIEL, J. The plaintiff and defendant were tenants in common of a tract of land. They had jointly occupied it until they respectively married, and then the defendant built a house on the east side or portion of the tract and the plaintiff built a house on the west side of the said tract, where each of the parties settled with their families. They afterwards required a surveyor by the name of Dobson to run a dividing line between them. Dobson did run a straight dividing line across from north to south. But both parties then disagreed to (175) that line. The plaintiff and the defendant then agreed to erect and keep in repair the fences which now divide and separate their respective fields and farms. Their fences or agreed lines extend across the creek and bottoms or lowlands of the said creek up to the hill lands on either side of the creek, as designated by the red lines on the surveyor's (Mr. Suddith's) plat. These red lines intersect the Dobson line on the north side of the creek at letter M and on the south side of the creek at the figure 5; from these two points to the outside lines of the tract, at E and F. The defendant insists that the Dobson line was agreed between them to be the dividing line and that they each had held and claimed up to it and no further for the last thirty years; that all the privileges taken by either of the parties beyond that line were by license obtained from the respective owners on each side of the said line. The plaintiff put in a replication to the answer. The depositions of many witnesses have been taken, and after examining them we are compelled to say that they do not prove that there was ever an agreed line between the parties (Dobson's or any other) from the termination of the red lines to the outside lines of the original tract at E and F, or to any other points in the outside lines. Partition by them of the original tract of land held in common has never been made, as appears to us. The evidence that the plaintiff asked leave of the defendant to set a machine house on the land at M and lying a little north of the termination of the red line in that direction is too weak a circumstance for us to establish the Dobson line as an agreed line from the terminations of the red lines to the outer boundary lines of the whole tract of land. Indeed, the defendant in his answer does not aver that the parties ever agreed upon a division which should extend entirely across the tract. We are of the opinion, therefore, that the plaintiff is entitled to a decree for partition so far as the same has not yet been completed, as prayed for in his bill.

PER CURIAM. Decree accordingly.

(176)

MARY McCAIN AND OTHERS v. SAMUEL HILL AND OTHERS.

In this case the Court decrees, upon parol proofs, that the defendant Hill and the heirs of Harris should convey to the plaintiffs a tract of land claimed by the defendant Hill under the said heirs, but which the plaintiffs alleged had been conveyed by the said Harris to those under whom the plaintiffs claimed, and that the deed of conveyance, never having been registered, had either been lost or surreptitiously destroyed by the said Hill, who had, at least, full knowledge of its existence.

THIS cause was transmitted to the Supreme Court from ROCKINGHAM Court of Equity, by consent of parties, at Fall Term, 1838.

The pleadings and facts proved are stated in the opinion delivered in this Court.

Morehead for plaintiffs.
Graham for defendants.

GASTON, J. This bill was filed in Rockingham Court of Equity at Fall Term, 1834, and charges that one John Byson sold and conveyed a tract of land in said county lying on both sides of Haw River, immediately above the High Rock Mills, to one Christopher Harris, and that shortly thereafter, about 1808, the said Christopher sold and conveyed all that part of the said tract which lies on the south side of said river to Peter Byson, then the proprietor of said mills, who thereafter used and held the same as a part of his said mill tract; that thereafter, about 11 November, 1811, Peter Byson sold and conveyed the said mills and all his land adjoining, including the piece so purchased of Harris, to Nathaniel Scales; that Scales conveyed one undivided moiety thereof to Joseph McCain, the hus-
(177) band of the plaintiff Mary; that the said Nathaniel and Joseph held the same in common until 1824, when the said Nathaniel died, having devised the undivided moiety so retained by him unto the plaintiff Mary, and that the said Joseph died in 1830, whereupon his moiety descended to the other plaintiffs, his heirs at law. The bill further charges that the deed aforesaid from Harris to Peter Byson was never registered; that the plaintiffs have made every inquiry and exertion to procure it, but have been unable to obtain it; that they believe it was left by Peter Byson, when he was about to leave this State, in a trunk with other valuable papers in the possession of the defendant Samuel Hill, who has suppressed or destroyed it and who, with a knowledge that said deed exists or once existed, sets up

title to the said land, claiming the same under some conveyance or pretended conveyance either from the heirs of said Harris or from some one claiming under the said heirs. The bill states that Peter Byson has long since died in a distant State; that Christopher Harris is also dead, and that the other defendants are the heirs at law of the said Christopher; that the plaintiffs are now able to prove the said deed from Harris to Peter Byson, but fear that hereafter they may not be able to do so; that the land thereby conveyed is woodland, of which there is no other occupation than by using the timber, which they and those under whom they claim have been accustomed to cut for the use of the mills ever since the conveyance by said Harris, and that the defendant Hill, under his claim as aforesaid, is also cutting said timber, and, because of this defect in their title, they cannot maintain an action at law for such trespasses. They pray that all the defendants may be compelled to answer the premises and to produce the said deed, if in existence and in their power, in order that the same may be duly registered, and if the said deed cannot be produced, that they may be compelled to perfect the title of the plaintiffs, and for general relief. The defendant Hill answered the bill. He therein denies all knowledge of the alleged deed from Harris to Peter Byson, declares that he has never seen it, nor does he believe that such a deed ever was executed. He admits that the said Byson, when about to quit this State, did leave in his possession a trunk con- (178) taining papers, but he declares that he never opened it until about 1822, when he did so at the request of Joseph McCain, to look for the said supposed deed; that the said McCain then searched among the papers for the deed, but found none such; that he understands the said McCain made many and extensive inquiries after the same, but being unable to find it, abandoned the pursuit under the impression that none such had been made. The defendant sets forth many circumstances inducing him, as he alleges, to believe that McCain had abandoned his title under said supposed deed, and states that thereupon, in 1830, he contracted to buy this piece of land from one Josiah G. Saunders, who alleged that he had bought from the heirs of Harris, paid him down $50, part of the purchase money, and agreed to pay the remaining part thereof—$350—when Saunders should execute or send to him a duly authenticated conveyance and also bring or send a duly authenticated conveyance from the heirs of Harris, and further states that in November, 1832, Saunders sent him a deed of conveyance purporting to have been executed by him, which defendant exhibits with his answer, and also a deed purporting to have been executed by the

other defendants, the heirs of Harris, which he states has not yet been duly proved to be admitted to registration, but which he will cause to be proved, and when so proved he will exhibit to the Court, and that he then paid Saunders the residue of the purchase money. The defendant avers, therefore, that he is a purchaser for value of the land in dispute without notice of the pretended equity of the plaintiffs. He admits all the other allegations of the bill, except that as to the allegation that Peter Byson conveyed the land in question he answers that he does not know that fact, and therefore does not admit it.

No answer was put in by the other defendants, and it being shown they were not inhabitants of the State, publication was made and the bill set down to be heard against them *ex parte*.

(179) Before the hearing of this cause one of the plaintiffs, Mary S. McCain, intermarried with James Watt, and another, Sally, intermarried with William Green, and the defendant Samuel Hill died, having devised the tract of land in dispute to his two sons, Charles P. Hill and Green Hill, whereupon a bill of revivor was filed in which the said James and William were joined as parties plaintiffs and the said Charles and Green made parties defendants, and the cause has been revived accordingly.

On the question whether the alleged conveyance was made by Harris we think the proofs are satisfactory. It is proved by William Taylor that he, being desirous of purchasing a small piece of this land, applied to Harris to buy it, but was informed by Harris that he had sold the land to Byson; that thereupon he applied to Byson, bought the piece of land from him, took a conveyance and immediately after entered into the actual possession and cultivation of it. This happened about 1807. Matthew Newell testifies that he knew of a negotiation going on between Harris and Byson for this land; that the former asked a dollar and a half and the latter offered to give a dollar and a quarter per acre; that he does not know that they concluded the bargain, but he knows that the parties afterwards had the land surveyed, and he was present with them at the survey. Byson used the land by cutting timber upon it. Charles Thacker testifies that he held a bond of Harris and applied to him for payment, when the latter informed him that he was about to sell the land to Byson; that the witness afterwards applied to Byson, who promised to pay the bond as soon as he should have received the deed; that having learnt from Harris that the deed was executed, he again applied to Byson and communicated this fact to him; that he admitted that he had received the deed, pointed to a paper on the table which he said was the deed, and paid the

bond to the witness. There is an attempt to discredit this witness by testimony respecting his character, but none of the witnesses introduced for that purpose, though they give him a bad reputation for honesty, declare him unworthy of credit. When to this testimony is added the admitted fact that ever since the time of the alleged conveyance in 1807, Byson, Scales, McCain and the plaintiffs have used this piece of land by cutting the timber thereon, and that there is no proof that from (180) 1807 to 1832 either Harris or his heirs set up claim thereto or in any way exercised dominion thereon, we must believe that the alleged conveyance was executed.

No deed is exhibited by the defendant Hill from the other defendants; and if it had been it is manifest from his answer that long before he contracted for the land he was well apprised of the claim set up by McCain, and that if he bought the land he purchased at his own risk. There is no proof that Saunders or himself paid anything for the land.

The plaintiffs have exhibited the deed from Peter Byson to Scales conveying a large body of land, and also the deed from John Byson to Harris, which last, it is admitted, comprehends the land in question. But we are unable by a comparison of the two deeds to ascertain to our satisfaction whether the former deed comprehends it. As this fact is not admitted, we deem it proper that an inquiry be directed to ascertain with precision the boundaries of this piece of land and whether the same be embraced within the deed made by Peter Byson to Scales. The commissioner must be authorized, if he deem it necessary, to cause a survey to be made, and to examine witnesses on oath, so as to enable him to execute this inquiry. The cause is reserved for further directions upon the coming in of the commissioner's report.

PER CURIAM. Ordered accordingly.

Cited: Hodges v. Spicer, 79 N. C., 227; *Jennings v. Reeves*, 101 N. C., 449; *Edwards v. Dickinson*, 102 N. C., 523; *Abernathy v. R. R.*, 150 N. C., 107.

(181)

BANK OF THE STATE ET AL. v. THOMAS J. FORNEY ET AL.

A devise to executors to hold certain property and its proceeds until the testator's six sons *should become free from debt*, and when that event occurred to make a division among them or set off to each respectively his proportion of the property as he became free from debt, does not convey such an interest to the sons as enables them to dispose of the property, or such as to subject it to the claims of creditors before the event or the occurrence of which they are to take possession of the property shall have first happened.

THIS bill was filed at Fall Term, 1841, of BURKE Court of Equity, in the name of the Bank of the State of North Carolina, and Isaac T. Avery, agent of the bank, against the defendants. To this bill answers were filed and replications thereto entered. At Spring Term, 1842, the cause was set for hearing upon the bill and answers and ordered to be transmitted to the Supreme Court.

The questions submitted by the pleadings are fully set forth in the opinion delivered in this Court.

Badger, J. H. Bryan and *D. F. Caldwell* for plaintiffs.
W. J. Alexander and *J. G. Bynum* for defendants.

RUFFIN, C. J. Jacob Forney died in the latter part of 1840, having previously made his will, bearing date 11 January of that year. He therein first gave to his wife sundry slaves and other things absolutely, and then one-third part of his lands and sundry other slaves for her life. The will then proceeds: "My will is that all the balance of my property shall be divided equally amongst my ten children and their heirs; the amount they have hitherto severally received to be estimated as a part (182) of their shares." The testator then specifies the value of the advancement to each child, for which he or she should account in the division. Then follow the clauses following: "The balance of my property, to wit, the tract of land on which I live, containing 3,000 acres, more or less, situate," etc., "and the following slaves, Cinda," etc., "and their increase and all other property of mine I give and bequeath to my executors hereinafter named, the survivors or survivor of them and the heirs of the survivor, in trust for the following purposes: At my death my executors shall take possession of the said property and divide it into ten equal shares, including the amounts above set forth as received by the several children, and making those amounts parts of their shares. After having thus divided

the property, real and personal, and equalized the shares, my executors or the survivor, etc., shall deliver to my daughter F. E. Tate and my son Daniel their several shares, to hold to them and their heirs forever; the remaining eight shares to remain in the hands of my executors, etc., and to be managed to the best advantage, so as to accumulate as fast as possible. And whenever my daughters Mary and Catherine shall marry or come of age a new division must be made and the shares of my said daughters, increased by the profits, if any, in their just proportion, shall be assigned to them and their heirs; and inasmuch as my sons, Thomas, Albert, Marcus, Isaac, Peter and James, are deeply involved in debt, and I have good reason to believe that if the property bequeathed to them were to vest in them at the time of my death it would be sacrificed at public sale without releasing them from their difficulties; and as my special desire is that they should be personally benefited by what property I may bequeath to them, I will and desire that the property remain vested in my executors, the survivor, etc., until they shall be released from their difficulties and free from debt; and when any one of them shall be free from debt he shall apply to my executors, the survivor, etc., who shall proceed to divide the property as before directed and allot to each one so free from debt his share, including the amount advanced to him as before stated, which shall inure to him and his heirs forever.
And thus in the same way shall every one receive his (183) share as he gets out of debt and applies for it, until all receive their shares. But if any one or more shall not get out of debt during his life, then his share to be allotted to his heirs living at his death. The property willed to my wife I desire to be disposed of in the same manner, the shares of those who can take being allotted to them forthwith and the shares of those involved in debt to be vested in my executors, the survivor, etc., upon the same trusts and conditions with the other property vested in them." The testator then appointed several persons his executors. In 1837 the two sons, Thomas and Albert, obtained a loan of $6,000 from the agency of the bank established at Morganton, upon a promissory note made by them and George Summey, as their surety, payable to Avery, the agent of the bank at that place. In 1839 a judgment was recovered in the name of Avery against all the makers of the note, and about the sum of $1,350, raised on a *fieri facias*, under which all the property of Summey was sold and also all that of the principals' that could be found in this State, unless it be an interest under their father's will. In March, 1841, those persons (Thomas and Albert Forney) having been arrested on a *capias ad satisfacien-*

dum, gave due notice to the bank and Avery, and were discharged under the act for the relief of insolvent debtors. In that proceeding they filed schedules, which took no notice of any interest derived under the will, but included some effects and debts in Mississippi subject to specific liens in that State, which the plaintiffs here allege have exhausted them.

The present bill is brought by the corporation and its agent, Mr. Avery, against all the defendants in the judgment at law and also against the executors of Jacob Forney, and charges that the debtors have no estate capable of being taken in execution, and prays to have the two sons Thomas and Albert Forney declared entitled each to one share or equal tenth part of the residue of the testator's estate and that the same should be applied to the satisfaction of the judgment.

The defendants severally answered, but it is only mate-
(184) rial to notice that the executors and trustees insisted that the sons had no interest under the will which they could convey or was subject to their debts.

Our opinion is that the bill cannot be sustained. It was said for the plaintiffs that this is a gift on a condition, in disguise, that the donee should not alienate the property, but hold it exempt from debts. If it were so we should hold it void as repugnant to the legal incidents of property; and trusts are governed in this respect by the same rules which govern legal estates. However anxiously the benefit of the donee personally may have been looked to by the donor, the policy of the law will not permit property or a trust to be so given that the donee may continue to enjoy it after his bankruptcy, or shall not have the power of alienating an estate fully vested in him. Whatever benefit the *cestui que trust* has in the property his creditors may reach either at law or in this Court. *Bradley v. Peixoto*, 3 Ves., 325; *Graves v. Dolphin*, 1 Sim., 66. When one has a vested interest absolutely in himself or in some one for him no restriction can be imposed which will impair the powers of the owner as long as his ownership continues or will repel his creditors. *Snowden v. Hales*, 6 Sim., 524. But property of every description may be so settled and *limited* that the person taking it shall hold *until* alienation or insolvency or bankruptcy, and upon that event that the estate should determine or go over to another person. Thus a stipulation or condition in a lease for the determination of the term on the bankruptcy of the lessee was held not to be against law or policy nor to be repugnant, but merely a limitation. *Hunter v. Galleirs*, 2 T. R., 133. In *Graves v. Dolphin*, *supra*, the Vice Chancellor said the testator might, if he had thought fit, have made the annuity determinable upon

the bankruptcy of his son; and in *Broador v. Robinson*, 18 Ves., 433. Lord Eldon said if property is given to a man for his life the donor cannot take away the incidents of a life estate; but a disposition to a man until he shall become bankrupt, and, after his bankruptcy, over, is quite different from an attempt to give to him for his life with a promise that he shall not sell nor alien. If that condition be so expressed as to amount to a limitation, reducing the interest short of a life estate, neither (185) the man nor his assigns can have it beyond the period limited. In *Doumutt v. Bedford*, 6 Term, 684, and 3 Ves., 148, it was held both in law and in equity that an annuity to B ceased on his bankruptcy which was given by a will distinctly; that B's receipt only should be a discharge for it, and that he should not alienate it, and that if he did it should determine. In *Lewes v. Lewes*, 6 Sim., 304, there was a trust to pay the rents to a son during his life for the maintenance of himself and his family, but so as he should not have any power to charge or alienate the same: *Provided*, that if the son should in any manner impede or frustrate the trusts of the will the rents should no longer be paid to him, but be accumulated by the trustees for the benefit of his children. The son conveyed his interest in trust for his creditors, and it was held that the rents should thereupon accumulate as directed by the will.

Those cases furnish examples of estates, actually vested and in the enjoyment of the lessee or donee, ceasing and reverting or going over to a third person upon limitations on the contingency of alienation or bankruptcy. There is nothing unlawful in it so as to render it, as a condition subsequent, void and the estate absolute. *Cujus est dare, ejus est disponere*. Much more is it competent for a testator to provide, as a condition going before the estate, that is to say, as a contingency on which the interest is, if ever, to arise, that the donee who is then insolvent should pay his debts or be able to pay them, either in whole or in part, before he should take anything. Such, we think, is the case here. Nothing is given to the sons but in the event of their becoming respectively free of debt. Until that event they can take no benefit under the will either from the capital or the profits; for it is clear the whole goes together as one fund to the sons or to the ulterior donees, according to the event. Both the express words of the will and the declared motive of the testator establish that the gifts did not "vest at his death" nor "*until* they shall be free of debt." Until the allotment of the shares of the two infant daughters the trustees hold expressly for accumulation, and their shares are to be as well of the profits up to that time as of the capital. After that (186)

event "the property is to remain vested in the executors," that is, as it was before; and they are, as the sons get out of debt and apply, to "divide the property as before directed," namely, including the profits. There is therefore to be no enjoyment of the profits distinct from the estate itself; and the plaintiffs' bill shows that the event on which the gifts to these sons were to vest has not happened, for this debt was contracted before the making of the will, and was, no doubt, one of the very debts to which the testator had reference, and it is admitted by the bill that the sons are yet insolvent. The bill must therefore be dismissed and with costs to the executors.

PER CURIAM. Bill dismissed.

Cited: Mebane v. Mebane, 39 N. C., 131; *Ashe v. Hale,* 40 N. C., 64; *McKnight v. Wilson,* 55 N. C., 494.

ALEXANDER McGALLIARD AND OTHERS v. DICEY AIKIN AND OTHERS.

1. Where upon a bill to enforce the specific execution of a contract for the conveyance of land it appeared that the contract was of long standing, that the plaintiff had not performed the acts which constituted the consideration for the contract, and at one time seemed to have abandoned it, the bill was dismissed with costs.

2. Nothing less than good faith and reasonable diligence will entitle a party to the peculiar relief afforded by a court of equity in enforcing the specific execution of a contract.

THIS cause was transmitted to the Supreme Court by consent of parties from the Court of Equity of BURKE, at Spring Term, 1842. It had been there set for hearing upon the bill, answers, exhibits and depositions taken in the case.

(187) The material facts are stated in the opinion delivered in this Court.

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

GASTON, J. The plaintiff files this bill as the assignee of John Aikin against the said John and the widow and children of Samuel Aikin, Senior, deceased, seeking the specific execution of a contract made between the said Samuel and the said John. The contract is in writing, bears date 14 August, 1813,

is sealed by the parties and has the form of a bond whereby the said Samuel, for various good considerations him thereunto moving, obliges himself to convey to the said John all the lands, goods and chattels whereof the said Samuel is possessed; and a condition is subjoined whereby the said John promises, in compensation for the above, that the said Samuel shall be permitted to enjoy undisturbed the possession of the premises during his life, and that at his decease the said John shall "take charge of the said Samuel's family, the four of the first wife's children to be supported in the necessaries of life, and the other part of the family; the said John is bound that, after the death of the said Samuel, his widow shall be put into possession of 100 acres of land, including the place where the said John lives, to be occupied and possessed during widowhood, and, on her marriage, to be put into the use of her two children, Elizabeth and Samuel, and when they come of age the said John shall make a free deed of said hundred acres to them." And the instrument declares "that in the testimony of the above witnessing the intent and meaning of the parties, they have thereunto subscribed their hands and seals and lodged the same in the hands of their friend, William Cuy," and the instrument is attested by the said William. The bill alleges that the four children alluded to in the said instrument were John, James, Peter and Jane, all of whom were idiots, and that John Aikin, one of the parties to said instrument, was at the date thereof married to Ann, a daughter of the said Samuel and a full-blooded sister of the said idiots; that one of their idiot children, Jane, died within a few years after the agreement; that in 1820 or 1821 (188) John Aiken removed from this State to Alabama and carried with him the three then surviving idiot children; that one of them, Peter, has since died; that the other two are yet alive, and that the said John Aikin continually maintained and supported the three children so removed by him while Peter lived, and hath, since Peter's death, supported and continues to support the other two free from any charge upon the said Samuel while he lived or upon his estate since his death.

The bill also states that at the time of the said agreement Samuel Aikin, the elder, was seized and possessed of three tracts of land in the county of Burke adjoining each other, the boundaries of which it particularly describes, and of a small personal estate; that he remained in the possession and enjoyment thereof until 1833 or 1834, when he died intestate; that he left surviving him his daughter Ann, the wife of John Aikin, the children of Mary Montgomery, a full-blooded sister of the said Ann, the two idiot sons herein last named (these being the issue of his

former wife) and a widow, Dicey, who was the wife of the said Samuel at the date of the aforesaid agreement, the two children of the said Samuel and Dicey therein mentioned, and five others who were born to the said Samuel and Dicey after the said agreement; that no administration has ever been sued out on his estate, but that the said Dicey and her children have held possession of the said tracts of land and of all the personal property of the intestate from the time of his death. The plaintiff further avers that on 14 June, 1838, John Aikin, for a valuable consideration, assigned to him all his interest in the estate that was of Samuel Aikin; that he (the plaintiff) has the title to and is seized of the tract of 100 acres referred to in the agreement; that he hath tendered to the defendants, Dicey, Elizabeth and Samuel Aikin, deeds of conveyance for the same, agreeably to the stipulations of John Aikin in the agreement with Samuel, and required a conveyance from the heirs at law of the said Samuel of the lands whereof the said Samuel was seized at the date of the agreement, and that this requisition has been (189) refused; and offering to secure in any manner that may be deemed effectual the performance of the covenant of his assignor for the support of the two surviving idiots, and, further, to convey the said 100-acre tract to the said widow and her two children, Elizabeth and Samuel, agreeably to the other part of the covenant of his assignor, prays that the defendants may be decreed to convey to him the three tracts of land whereof Samuel Aikin was seized as aforesaid and to account for the profits thereof since his death. To this bill the widow Dicey Aikin and three of her children have put in answers in which they allege that the pretended agreement was indeed executed at the time it bears date, but that the same was not intended by the parties to be a binding agreement or to be carried into execution, but was colorable and made to the intent merely to throw embarrassments in the way of certain creditors and others who were then prosecuting suits against the said Samuel; that John Aikin, as whose assignee the plaintiff claims, in 1820 or 1821, before his removal to Alabama, sold and conveyed away absolutely to the plaintiff the 100 acres of land mentioned in said agreement, and thereby disabled himself from performing the pretended covenant contained in said agreement on his part, for the assuring thereof to the widow and her two children at the death of Samuel Aikin; that although he carried with him when he removed to Alabama the three idiot children, he hath never afforded to them or either of them any support, but has thrown them on the parish in Alabama to be supported; that the said John hath never in any way acted under the said agreement or

claimed that the same was a valid or subsisting one, and, admitting that the plaintiff hath obtained an assignment from the said John of all his interest in the estate of the said Samuel for some trifling consideration, they deny that the court will, at the instance of the plaintiff, set up and cause to be specifically executed the said pretended agreement.

The infant heirs within the State put in the ordinary answer, disclaiming all knowledge of the matters in contestation. John Aikin, the assignor, who was a resident of Alabama, put in no answer, and as to him and the other nonresident defendants the bill has been taken *pro confesso*. (190)

We are of opinion that if either John Aikin or the plaintiff, his assignee, have rights under the alleged agreement he ought to be left to avail himself of the legal remedy thereon, and that the case made is not one which furnishes a sufficient ground for the interference of a court of equity. Waiving the consideration of other matters, it seems to us that if the agreement was one *bona fide*, intended by the parties to be executed, and the specific execution of which could have been demanded by either of them, the same has been long since abandoned on the part of the said John. It is admitted that he removed altogether from this State in 1820 or 1821, and that upon such removal he sold and conveyed away absolutely the tract of land whereon he was then settled, and which tract was to be, in part, at least, the equivalent for the entire estate of his father-in-law, agreed to be conveyed to him.

Now it cannot be doubted that if the agreement were then regarded as valid and still subsisting, John Aikin deliberately chose to forego the benefit thereof, preferring to convert the land which, under the agreement, was to be reserved for his father-in-law's widow and the two elder children of that marriage into money for the purpose of a profitable investment and comfortable settlement in a new and growing country. Nor is this unequivocal act of repudiation or abandonment of the agreement on his part met by proof of any one thing done by him in affirmance of that agreement. It is true that at the urgent solicitation of his wife he carried with him her three idiot brothers when he thus left the State; but this could not be done in execution of the agreement, for that contained no stipulation for their support until after their father's death; and two witnesses testify that this solicitation of Mrs. Aikin was backed by a promise of her father to pay him well for their support. There is no evidence of support having been given to these unfortunate beings after their removal to Alabama or after the

death of their father, in 1833 or 1834. Nor is there evidence of any claim having been asserted, under the agreement, by John Aikin.

(191) It is true that in 1838 he made an assignment to the plaintiff which was valid in law to pass his interest in the lands in question, and the plaintiff has it in his power, in consequence of having become the proprietor of the tract so sold by John Aikin, to execute that part of John's agreement. But the claim of the plaintiff is wholly unsupported by any peculiar equity on his part, and he can ask no more than to be substituted to the rights, such as they are, of his assignor. Now, nothing less than good faith and reasonable diligence will entitle a party to the peculiar relief accorded by a court of equity in enforcing the specific execution of a contract, even when it is unquestionably fair and in every way reasonable. If this contract be one of that description, on which we forbear from declaring an opinion, it is obvious, we think, that if the said John should attempt to set it up and pray for its enforcement because of an accident having put it into his power now to comply with it, the Court, after such bad faith and neglect on his part, would not be roused into action at his instance.

PER CURIAM. Bill dismissed with costs.

Cited: Scarlett v. Hunter, 56 N. C., 86.

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(192)

EDMUND C. BLOUNT, ADMINISTRATOR, ETC., v. NANCY BLOUNT AND OTHERS.

A by deed conveyed all his property to a trustee, and, after prescribing certain trusts to be executed, directs that after his death the trustee shall convey all that might remain of said property "in equal proportion to my wife, N B, and such child or children as may be living at the death of" the said bargainor. A had at that time one child, which soon after died, and at his death A left his widow, but no child surviving: *Held*, that on the death of A his widow was entitled to all the property remaining.

THIS was a case transmitted from the Court of Equity of PASQUOTANK, at Spring Term, 1842, by consent of parties, to the Supreme Court.

The facts and the questions involved are stated in the opinion delivered in this Court.

Kinney for administrator and Nancy Blount.
A. Moore for next of kin.

GASTON, J. In September, 1838, the late Josiah C. Blount executed unto the plaintiff his deed whereby, in consideration of many good causes him thereunto moving, and of the sum of $10 to him in hand paid by the plaintiff, he bargained, sold and conveyed to the plaintiff certain negroes, all his horses, mules, hogs and cattle, household and kitchen furniture, crop and provisions, to have and to hold upon the following trusts, that is to say, that the plaintiff should, so soon as conveniently might be done, sell so much of the said property as might be necessary to pay his (the bargainor's) debts and hold the balance and apply the profits thereof to the support of the bargainor and his family during his life, and after his death to convey whatever might remain of the said property in equal proportion to his wife, Nancy Blount, and to such child or children of (193) the bargainor as might be living at his death. At the time of the execution of this deed the bargainor had one child living. This child soon thereafter died, and afterwards, on 26 October, in the same year, the bargainor executed another deed to the plaintiff whereby, in consideration of $10 to him in hand paid by the plaintiff and of other good causes him thereunto moving, he conveyed (or declared that he conveyed) the same property, to have and to hold upon the following trusts, that is to say, so soon as could conveniently be done to make sale of so much of the said property as might be necessary for the payment of his debts and to hold the remaining property during the joint lives of the bargainor and his wife and apply the profits to the support of the bargainor and his family, and, after the death of his said wife, during the bargainor's life, to apply the profits to the support of the bargainor, and after his death for the use of his legal personal representatives or such other person as he should by his last will and testament direct. Both the deeds were duly proved and registered, but the last executed deed was first registered. Josiah C. Blount died in January, 1839, intestate, leaving his said wife surviving, but leaving no child. The plaintiff was duly appointed administrator, and has filed this bill, to which he has made the widow and the next of kin of his intestate parties defendants in order to obtain the directions of the court how he is to apply the property contained in the above deeds after payment of the debts of the intestate.

It is plain that the registration of the deed of October before the deed of September has no effect upon the operation of the instruments. The registration of a deed by law required to be

registered is in general but a perfecting ceremony which, when performed, relates back to the execution of the deed and gives it effect from that time. There is indeed a remarkable exception in the case of mortgages and deeds of trust. By the act of 1829, ch. 20, re-enacted in the Revised Statutes, ch. 37, sec. 24, no deed of trust or mortgage of real or personal estate shall be valid to pass property *as against creditors or purchasers* for a
(194) valuable consideration from the donor, mortgagor or bargainor, but from the registration of such deed. The present case evidently does not fall within this act.

Both the deeds are postnuptial settlements, and each may be regarded as voluntary so far as the present parties are concerned, and, as between them, entitled to its proper operation. Now, no power having been reserved in the first deed to revoke the trusts therein declared, the whole question turns upon the construction of that deed. The next of kin insist that the ultimate limitation in it must be understood as a limitation of *one moiety* to the wife and the other moiety to the child or children of the bargainor living at his death. But this cannot be without departing from the obvious meaning of the terms used. The trustee after the death of the bargainor is to convey whatever may remain "in equal proportion to my wife, Nancy Blount, and to such child or children of Josiah C. Blount as may be living at the death of the said Josiah C. Blount." The wife and such child or children of the said Blount as may be living at his death are the persons to whom the conveyance is to be made, and it is to be made "in equal proportions," that is to say, each of these designated objects of his bounty is to receive an equal part. It cannot be doubted that if two or more of his children had survived each would have been entitled to share equally with the widow. The birth of another child or of more children would lessen her part; the death of any of them increases it. As the trustee is ordered to convey to her *and* to such child or children as may be living at the death of the settler, and there are none such, she becomes upon that event the sole object of the settler's bounty and is entitled to all that remains after payment of his debts.

PER CURIAM. Declared accordingly.

(195)

DAVID McREYNOLDS v. JOSHUA HARSHAW.

1. A bill to enjoin a defendant from praying judgment and taking out execution upon an injunction bond, after the injunction has been dissolved, is a proceeding entirely unknown in equity practice, and cannot be supported on any principle.

2. Objections to the bond, if there be any, must be urged when the defendant moves for execution to issue.

3. When such a motion is made, and it is objected that the bond has been altered in a material part by the defendant's agent or that there is any other substantial reason why execution should not issue, the court may, in its discretion, continue the motion for the purpose of satisfying itself as to the facts.

4. The court may ascertain these facts either by affidavits or upon an issue to be tried by a jury or by an action at law upon the bond to be ordered by them.

THIS was an appeal from two interlocutory decrees made at Spring Term, 1842, of CHEROKEE Court of Equity, his Honor, *Bailey, J.*, presiding.

The questions presented are fully stated in the opinion delivered in this Court.

J. H. Bryan and *J. G. Bynum* for defendants.
No counsel for plaintiff.

GASTON, J. At the last term of this Court we had occasion to consider (*ante*, 29) an appeal which had been taken from an interlocutory decree of the Court of Equity for the county of Cherokee dissolving the injunction which the plaintiff had obtained upon the filing of his bill. A certificate was transmitted to the court below declaring the judgment of this Court that there was no error in the decree, and thereupon the plaintiff filed another bill in the court below called a supplemental bill, wherein he charged that soon after the interlocutory decree was made the Superior Court of Macon, wherein the judgments had been rendered, did, on the application of the (196) plaintiff, order the executions issued on the said judgments to be set aside; that the said judgments had become dormant, and that executions could not lawfully issue thereon until the judgments should be revived by *scire facias*. And it was further charged that the defendants threatened, nevertheless, to pray for a judgment on the injunction bond executed by the plaintiff and his sureties when the original bill was filed, and it was prayed that they should be enjoined from moving for said

judgment or in any other way enforcing the said bond. The court refused to grant the injunction thus asked, and from this refusal the plaintiff was permitted to appeal to this Court. The defendants thereupon prayed a judgment against the plaintiff and his sureties on the injunction bond, when an affidavit was offered of one of the sureties, averring that the said bond had been materially altered since its execution by one of the counsel of the defendants; that the subscribing witness to the instrument was a resident of the State of South Carolina, and that if an opportunity should be afforded of taking his deposition the affiant would be able to prove this alleged alteration. Upon this affidavit his Honor declined giving the judgment as prayed, and ordered the motion therefor to be laid over until the next term of the said court. From this interlocutory order the defendants prayed and obtained an appeal to this Court.

We do not see how a doubt can be entertained of the correctness of both the interlocutory orders complained of.

The supplementary bill, as it is called, is a perfect novelty. An injunction is a prohibitory writ specially prayed for, because of matter of equity, requiring this extraordinary interposition of a court of conscience, to restrain a party from doing some act *in pais* or from pursuing some proceeding in another court that is iniquitous but from which he cannot otherwise be effectually restrained. An application to a court to restrain one of its suitors from moving the court for any relief to which he believes himself entitled can scarcely be considered as seriously made. If the contemplated motion be one which under
(197) the circumstances of the case is not proper to be granted, these circumstances should be disclosed or brought to the notice of the court upon the motion itself. The ground of enjoining proceedings in other courts is because those courts, from the nature of their organization, cannot take effectual cognizance of the special matter which renders the proceedings therein iniquitous. But the court which is asked to enjoin proceedings because of equitable matter alleged is unquestionably competent, when it shall be asked to sanction those proceedings, to determine whether they be iniquitous or not—whether it shall give or withhold that sanction. Besides, there is not the slightest ground of equity in the supplemental bill. When the extraordinary remedy of injunction is asked for, the court is bound to take care that this restraint on the legal right of a citizen shall not be granted without effectual security being taken that he shall not be injured thereby. Upon an injunction to restrain the collection of money recovered by a judgment at law the

ordinary practice in England is to require as a condition precedent that the money be deposited in court. No doubt there are cases in which this practice ought to be observed with us. But in no case can an injunction issue to restrain an execution for a debt recovered at law (unless when the money is so deposited) without requiring of the complainant bond and sureties for the payment of the money into court upon the dissolution of the injunction. Rev. Stat., ch. 32, sec. 11. Such a bond has been given in this case. The injunction was dissolved, and the plaintiff charges it to be iniquitous to hold him to the performance of this obligation, because those for whose security it had been required *cannot* get a speedy remedy for their debt by execution in the court of law! This bond was intended as a cumulative remedy for the benefit of the judgment creditor, and the very circumstance which shows a special necessity for its exercise is set up as a reason why he should not be permitted to resort to it.

Equally unfounded is the complaint of the defendants with respect to the interlocutory order from which they have appealed. It is no more than the holding over of the motion of the defendants for further advisement, and under no circumstances that we are aware of can such a proceeding be the subject (198) of an appeal. The defendants, as it appears from the case made by his Honor, insisted that the act of the Legislature prescribes that injunction bonds, upon the dissolution of an injunction, shall be proceeded on "in the same manner and under the same rules, regulations and restrictions" as bonds on appeals from the county to the Superior Court (Rev. Stat., ch. 32, sec. 13) and in regard to *these*, that "judgment may be *instanter* entered up against the appellant and his sureties," where the appellant fails in his appeal. But the direction to render the judgment *instanter* certainly does not prohibit the consideration of any matter of defense against the prayer for judgment, and when the court has reason to believe that such matter does exist, it cannot be doubted but that the court may afford time to make it appear satisfactorily. The case does not call on us for an opinion in what manner the defense here alleged ought to be shown. It must be established to the satisfaction of the court, and this, we should presume, may be done by affidavits; or the court may in its discretion direct an issue to be tried by a jury to pass upon its truth or order an action of debt to be brought at law upon the bond. If it be ascertained that the bond has been altered in a material part by an agent of the defendants since its execution and without the assent of the obligors it will be the duty of the court to order it to be vacated.

It should be certified to the court below that there is no error in either of the interlocutory orders appealed from, and there ought to be judgment here for costs against the appellants respectively in their several appeals.

PER CURIAM. Ordered accordingly.

(199)

ROBERT BARNES v. JOHN W. CALHOUN.

1. The Court of Equity will grant injunctions to prevent undoubted and irreparable mischief; and it may thus act on the application of individuals, not only in the case of a private nuisance, but, where the individuals suffer special injury, in the case of public nuisances also.

2. But the court will only exercise this power in a case of necessity, where the evil sought to be remedied is not merely probable, but undoubted. And it will be particularly cautious thus to interfere where the apprehended mischief is to follow from such establishments and erections (as, for instance, a public mill) as have a tendency to promote the public convenience.

THIS cause was removed to the Supreme Court for a hearing, by consent of parties, at Spring Term, 1842, of EDGECOMBE Court of Equity.

The questions arising upon the pleadings and proofs are stated in the opinion of the Court.

B. F. Moore for plaintiff.

Badger, J. H. Bryan and *Whitaker* for defendant.

GASTON, J. The object of this bill is to enjoin the defendant from erecting a mill on a branch of a creek running through his land in the county of Edgecombe. The plaintiff alleges that the erection of the proposed mill would pond the water back and cause it to overflow a considerable part of his land, and prove utterly destructive to the health of himself and his family and highly injurious to that of several of the neighbors. The defendant admits that the erection of the mill will cause the water to overflow a part of the plaintiff's land, which he alleges to be unfit for cultivation; insists that the mill is called for by the wants of the community, and utterly denies that its erection will produce any injury to the health of the plaintiff or his
(200) family or to that of any of his neighbors. Thirty-eight witnesses have been examined, and we have not only heard all these depositions read, but have deliberately read them afterwards in our chambers. It is unnecessary to state them minutely, but the material facts which we collect from them are as follows:

The tracts of land of the plaintiff and the defendant are situated in the fork of a creek and on the south side of that branch of the creek on which it is proposed to erect the mill. Their dwellings are about 150 yards apart, each about half a mile from the run of the branch, the plaintiff's higher up the branch than the defendant's. At the proposed mill site, which is nearly opposite to the defendant's dwelling, a dam was raised upwards of fifty years ago by an ancestor of the defendant as preparatory to the erection of a mill, but he was prevented from completing his purpose by a want of means, or a supposed want of means, and the place left in the dam for the mill was never closed and the water consequently not ponded back by the dam. The mill, to be useful, should have a head of seven or eight feet of water, and to obtain this head the water must be ponded back about a mile and made to cover about thirty acres of land. This land is now low and wet, with a growth of gum and oaks, and more of it belongs to the defendant than to the plaintiff. The water, by being thus ponded, will be brought to within 700 yards of the plaintiff's dwelling, and in one place, where there is a short depression or ravine, to within 500 yards thereof. A good mill there erected would be a public convenience, especially to those neighbors who live on the north side of the branch, and seems to be generally desired by them; but doubts are entertained by several of the witnesses whether a mill can be made to stand permanently at that place.

On the question *how far* the erection of the proposed mill would prove injurious to the health of the plaintiff and his family or to that of his neighbors we are furnished with testimony of two kinds. The first consists of the opinions of witnesses derived, as they declare, from their observation and experience. Upon these it is impossible to arrive at any certain conclusion. Many declare their decided conviction (201) that it will be exceedingly pernicious to the health of the plaintiff's family and that of the neighbors, while an equal number, at least, express with great confidence the opinion that it will be perfectly harmless in this respect. Two medical gentlemen depose that newly-erected mill ponds generate poisonous miasma because of the decomposition of the trees killed by the standing water; that this miasma is far more injurious to residences on the north than on the south side of ponds because of the general prevalence of southerly winds in the summer season, and that physicians are not agreed as to the extent to which this miasma will reach, some holding that it will not be injurious beyond a quarter of a mile, while others teach that its deleterious effects will be felt two miles off.

Upon the whole we confess that the strong leaning of our opinion is with those who think that the apprehensions of the plaintiff are not without foundation. But we do not on that account feel ourselves authorized to grant the extraordinary remedy which he asks of us. We entertain no doubt of the right of this Court thus to act in cases of undoubted and irreparable mischief, and we hold that it may thus act upon the application of individuals, not only in the case of a private nuisance, but, where the individuals suffer special injury, in the case of a public nuisance also. *Spencer v. R. R.*, 8 Simons, 193. But it will only act in a case of necessity, where the evil sought to be prevented is not merely probable, but undoubted. And it will be particularly cautious thus to interfere where the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience. No one can read our statutory provisions on the subject of erecting public mills and declaring the remedy for persons injured by the erection of public gristmills or mills for domestic manufactures or other public purposes, and fail to see that the Legislature has manifested a strong disposition to favor them. It would ill accord with the duties of the ministers of law to act counter to the policy of the makers of the law.

(202) If the plaintiff, indeed, were without other remedy we should feel ourselves bound to interpose in his behalf; for the act contemplated by the defendant is an admitted wrong. The defendant has no right to overflow the plaintiff's land. But the plaintiff is not without remedy. He can prefer his petition at law, and on the trial he will be entitled to recover damages, not only for the direct injury of overflowing his land, but for the injurious effects therefrom resulting to health. And it is specially provided by the statutes referred to that if the annual damage be estimated by the jury as high as twenty dollars the plaintiff may by repeated actions compel the defendant to take down his mill.

This legal remedy will probably prove efficacious for every legitimate purpose, and to this remedy we must leave the plaintiff.

The bill must be dismissed, but, as we think, without costs.

PER CURIAM. Bill dismissed without costs.

Cited: Ellison v. Comrs., 58 N. C., 58; *Clark v. Lawrence*, 59 N. C., 85; *Dorsey v. Allen*, 85 N. C., 362; *Redd v. Cotton Mill*, 136 N. C., 344; *Durham v. Cotton Mills*, 141 N. C., 630; *Hickory v. R. R.*, 143 N. C., 452; *Pedrick v. R. R., ib.*, 509; *Durham v. Cotton Mills*, 144 N. C., 711.

(203)

EDWARD DAVIE AND WIFE AND OTHERS v. WILLIAM KING AND OTHERS.

1. A slave, acquired by a testator after the execution of his will and given by him to one of his children, by parol, passes under a general residuary clause.

2. The parol gift was void, and a bequest of "the residue" passes all the personal estate of the testator at the time of his death not otherwise specifically disposed of by the will.

THIS cause was transmitted by consent of parties to the Supreme Court, at Spring Term, 1842, of PERSON Court of Equity. The facts are set forth in the opinion of the Court.

P. H. Mangum for plaintiffs.
W. A. Graham and *Norwood* for defendants.

RUFFIN, C. J. In 1834 John Holloway made his will and testament, and therein, after many devises and particular legacies of slaves and other things, he bequeathed as follows: "The residue of my estate, if any, to be equally divided among all my children," and he appointed the defendant King and three others his executors. The testator died in 1840, and the will was proved by King and others, the executors, who properly administered the estate, as is admitted in the bill, except as to a certain slave called Grace. The bill is filed by some of the testator's children against the other children and the executors, and states, as to the said slave, that she belonged to the testator at his death, and was not specifically given away in the will, but formed a part of the residue of the estate, and ought to be divided among all the children equally; but that the defendant King had her in his possession, and, claiming her (204) as his own property, refused to account for her as a part of his testator's estate. The prayer is that she may be declared to be a part of the residue and distributed accordingly.

It is not material to mention the answers of any of the defendants except that of King, upon which the only question in the cause arises. He states that he married a daughter of one Halliburton, and that after the testator had made his will Halliburton gave to his son-in-law, Holloway, the slave in question, and that the latter never took her into his actual possession, but caused her to be sent directly from Halliburton's to the defendant King as a gift and advancement from Holloway to his

daughter, Mrs. King, and her husband, and that as such he (King) received her and had her in possession for more than three years before and up to the time of Holloway's death, claiming her as his own, and that the testator frequently during that period declared that he had given the slave to the defendant King. Upon those facts the answer insists that the testator did not consider Grace as a part of his estate and that by a proper construction of the residuary clause she does not pass under it, but that the testator died intestate as to her, and that thereby the parol gift to King became a perfect title upon the death of Holloway.

The Court is relieved from the duty of considering the latter point made in the answer, upon the effect, under the act of 1806, of intestacy as to a particular slave before put into possession of a child by the parent, upon which doubts may yet be entertained. *Stallings v. Stallings,* 16 N. C., 298; *Hurdle v. Elliott,* 23 N. C., 174. We are thus relieved, since there cannot be a doubt that the testator did not die intestate as to this slave. The answer notices the fact that Holloway acquired the negro after he made his will, and upon that, coupled with the parol gift to King and wife, the argument is founded that the testator did not intend to include this slave under the residuary clause. But it is clear law that a general residuary clause passes a personalty not otherwise effectually disposed of, although acquired subsequently to the execution of the will. In this respect (205) wills and testaments differ, a devise passing only such land as the party had at the time of making the will, while a disposition of personalty takes all the testator should have at his death. Which last is not upon any intention to pass a particular chattel not owned by the testator when he made his will, but it goes upon the general intention declared by him in the residuary clause not to die intestate as to anything. *Sorrey v. Bright,* 21 N. C., 113. This instrument therefore passes all that it would have done had it been executed immediately before the testator's death; and as the words, "the residue of my estate," are broad enough to take in this negro if she belonged to the testator, the only question is, Did she belong to him? Upon that there is no doubt. Both parties claim under him, and the defendant by parol gift, amounting only to a bailment, to hold at the testator's pleasure, capable of becoming a valid gift *ab initio* upon a condition (which has not happened) that the testator should die intestate. In a case not so strong as this (*McConnell v. Peebles,* 21 N. C., 601) we held that under a gift of "all my negro slaves," not only those in the testator's possession, but those previously given by parol to his children, passed. This

slave must therefore be declared a part of the residue of the testator's estate and the usual accounts and directions for a division among the children be ordered.

PER CURIAM. Decreed accordingly.

Cited: Benehan v. Norwood, 40 N. C., 109.

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(206)

SARAH E. DEVEREUX AND OTHERS v. BENJAMIN DUNN.

A devised as follows: "I devise and bequeath to my wife, S. E. D., and to my daughter, E. J. D., and their heirs forever, all my estate, real and personal, to be equal and joint heirs, to sell and dispose of the same, and to the survivor on the death of either of them; and should my wife bring forth a living child, being now in a state of pregnancy, I make such child equal and joint heir with my child E. J. D. and my wife S. E. D. I further appoint my wife, S. E. D., sole executrix, all my estate real and personal being at her absolute disposal during the minority of my child or children, she having the sole guardianship of said children." The testator died, and the child of which his wife was pregnant was afterwards born: *Held,* (1) that on the birth of the posthumous daughter the mother and her two daughters were devisees and legatees in common in fee, subject, at least, as between the mother and her daughter E. J. D., to an executory devise over to the survivor; (2) that the widow had no power under the will to sell the real estate; that the deed of the daughters, they being under age, would be either void or voidable, and, therefore, that a contract for the sale of the land could not be enforced.

THIS cause was transmitted, by consent of parties, to the Supreme Court, from the Court of Equity of BERTIE, at Fall Term, 1841.

The bill was filed at Fall Term, 1841, in the name of Sarah E. Devereux, Elizabeth J. Devereux and Georgiana Devereux, the latter being infants, who sued by their mother, the said Sarah, and alleged that in 1837 George P. Devereux, of the county of Bertie, departed this life, having first duly made and published his last will and testament in writing, whereby he devised to the plaintiffs a certain plantation in the county of Bertie and bequeathed them the negroes, stock and tools which were upon the same; and the plaintiffs further alleged that by the said will certain powers of sale were vested in the said Sarah E. Devereux; that in the execution of the said (207) power the said Sarah E. Devereux, in March, 1841, contracted to sell the said land, slaves, stock and tools to the defendant, Benjamin Dunn, by written articles, a copy of which was

annexed to the bill, in consideration of the sum of $25,000, to be paid in the manner stipulated in the said articles. The plaintiffs further alleged that the said Benjamin was perfectly willing to perform the contract and that the said Sarah was also perfectly satisfied therewith, but that the said Sarah and the said Benjamin were advised that the said Sarah might have exceeded the powers given by the said will, and the said Sarah was unwilling so to do, and the said Benjamin very reasonably might decline completing the said purchase until he was certain that the said Sarah had the power to convey to him a perfect and indefeasible title. The plaintiffs then averred that they were advised that the said Sarah had in and by the said will ample power to make the said contract of sale, and they prayed that the said Benjamin might specifically execute the same.

The defendant in his answer admitted the death of George P. Devereux, the execution and probate of his last will and testament and the contract between the defendant and the plaintiff Sarah, as stated in the plaintiff's bill, and averred his readiness to comply with this contract on his part provided the said Sarah was authorized by the will of the said George to make such contract, and provided he could receive a secure title to the property contracted to be sold to him.

The following is a copy of the will referred to in the bill and answer:

"I, George P. Devereux, of North Carolina, being in sound and disposing mind and memory on this 5 May, 1837, now revoke all my former wills and testaments.

"I give and bequeath to my ever dear wife, Sarah Elizabeth Devereux, and to my dear daughter, Elizabeth Johnson Devereux, and their heirs forever, all my estate, real and personal, after all my debts are paid, to be equal and joint heirs to sell and dispose of the same, and to the survivor on the death of either of them. And should my wife bring forth a living
(208) child, being now in a state of pregnancy, I make such child equal and joint heir with my child, Elizabeth Johnson Devereux, and my wife, Sarah Elizabeth Devereux. I further appoint my wife, Sarah Elizabeth Devereux, sole executrix, all my estate, real and personal, being at her absolute disposal during the minority of my said child or children, she having the sole care and guardianship of said children. Being now, as I apprehend, on the borders of eternity, I solemnly declare this to be my last will and testament, in presence of

"G. P. DEVEREUX."

(Attested by three witnesses.)

"Whereas, I, George P. Devereux, of the State of North Carolina, having made and duly executed my last will and testament in writing bearing date 5 May, 1837: Now, I hereby declare this present writing to be a codicil to my said will, and direct the same to be annexed thereto and taken as part thereof. And I do hereby give and bequeath to my dear wife, Sarah Elizabeth Devereux, and to my dear daughter, Elizabeth Johnson Devereux, and to any future issue of my wife, now *enceinte*, due proportions, equally to be divided of, in and to any and all lands, tenements, slaves and other personal estate which may come to me by devise, descent or gift from my father or any other source, to them and their heirs and assigns forever, and in case of either of them dying without a will, to the survivor or survivors of them, their heirs and assigns forever. In witness whereof I, the said George P. Devereux, have to this codicil set my hand and seal, this 5 May, 1837.

(Attested by three witnesses.) "G. P. DEVEREUX."

The cause was set for hearing upon the bill, answer and exhibits, the latter consisting of the will and the contract referred to, and was then transmitted to this Court.

Badger for plaintiffs.
No counsel for defendant. (209)

DANIEL, J. The bill is brought for a specific execution of an agreement entered into by the defendant and Sarah E. Devereux that the defendant would purchase the land, slaves and farming stock therein mentioned. The defendant is willing to complete the purchase if he can get a good title to the whole property. The complainants' title to convey the land rests upon the last will and testament of George P. Devereux, the late husband of the plaintiff Sarah E. Devereux and father of the other plaintiffs. The will is made a part of the case; and in construing it we will say, first, that on the birth of the daughter Georgiana the mother and her two daughters were devisees and legatees as tenants in common in fee; subject, at least, as between the mother and her daughter Elizabeth, to an executory devise over to the survivor on the death of either of them. Whether the words "and to the survivor on the death of either of them" extends to the share of Georgiana it is not now necessary to declare. Sufficient it is to say that Mrs. Devereux has not, under the words contained in this part of the will, "to be equal and joint heirs to sell and dispose of the same," power to make an absolute title in fee or such a title as this Court

will compel a defendant to take. The two infant daughters have *interests* in the estate, and any deed from them would be void or voidable. Second, the testator, after making his wife sole executrix, speaks as follows: "All my estate, real and personal, being at her" (his wife's) *"absolute disposal* during the minority of my said child or children, she having the sole care and guardianship of said children." We are unable to see from this clause any power given to Mrs. Devereux to convey for a longer period than her children respectively remain under the age of twenty-one years. The plaintiffs in no way can make a good and absolute title in fee to the land, so far as we can discover. The bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

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(210)

THE STATE ON THE RELATION OF THE WARDENS OF THE POOR OF BEAUFORT COUNTY *v.* WILLIAM B. H. GERARD.

A devised certain lands to his wife for life, and after her death to B. S. for life, and "after the death of B. S. to the poor of the county of Beaufort, on the express following conditions and no other, that is to say, that they shall never be sold, but be held as a stock belonging to said poor, subject to be rented, cultivated or leased, as the wardens or managers of the poor may deem most advisable, but never to be let for a longer term of time than seven years, and no more timber to be used than is necessary for the use of farming," etc.: *Held*, (1) that this devise did not vest the *legal* title to the lands in the wardens of the poor, either as individuals or in their corporate capacity, and that therefore they had no right to recover them at law; (2) that a devise to "the poor of a county" is a devise to "such a charitable purpose as was allowed by law" before the passage of our statute concerning charities (Rev. Stat., ch. 18), and is therefore embraced within the provisions of that statute, and that it is sufficiently definite to authorize a court of equity to enforce it; (3) that the *perpetuities*, forbidden by our Constitution, are estates settled for *private uses* so as to be unalienable, and do not include public charities.

THIS was an appeal from the decree of his Honor, *Settle, J.*, at Fall Term, 1841, of BEAUFORT Court of Equity, sustaining the defendant's demurrer and dismissing the plaintiff's bill.

The bill, which was filed at Fall Term, 1839, was at the instance of the Solicitor for the State in the Second Judicial District, by and at the relation of the wardens of the poor of Beaufort County, against William B. H. Gerard. The bill charged

that Charles Gerard, late of Edgecombe County and State of North Carolina, died seized and possessed of certain tracts of land lying in the county of Beaufort, and by his last will and testament, duly executed and admitted to probate in (211) the Court of Pleas and Quarter Sessions of the said county of Edgecombe, at November Term, 1797, devised and bequeathed unto his mother, Dinah Simon, to have and to hold for the term of her natural life, the said tracts of land which were particularly set forth in the said last will and testament and in the deeds and conveyances there referred to, copies of all which were appended to the said bill and prayed to be taken as part thereof; that by the said last will and testament he further devised the said lands, after the death of the said Dinah, unto Benjamin Simon for the term of his natural life, and after the death of the said Benjamin, "to the poor of the county of Beaufort on the express following conditions and no other, that is to say, that they shall never be sold, but be held as a stock belonging to the said poor, subject to be rented, cultivated or leased, as the wardens or managers of the poor may deem most advisable, but never to be let for a longer term of time than seven years, and no more timber to be cut than is necessary for the use of farming, etc."; that after the death of the said Charles Gerard, which took place some time in March, 1797, the said Dinah Simons remained in possession of the said lands until the period of her death, some time in 1818; that the said Benjamin died in the lifetime of the said Dinah; that in 1819 the wardens of the poor took possession of the said lands and rented them to divers persons for the period of seven years for the use of the poor of the said county, according to the intent and meaning of the said will, and that their lessees entered and took possession of the said demised premises; that shortly after the expiration of these several leases the defendant, William B. H. Gerard, entered and took possession of the said lands, claiming to be the heir at law of the said Charles Gerard and thereby lawfully entitled to the same, and has since continued and is now in possession of the same; that the relators hoped to be allowed by him to manage and lease out the said lands to the use of the poor, according to the intent of the will of the testator, and frequently requested of him that he would allow them so to do, but that he had absolutely refused to do so or to give any account of the rents and profits of the same, so that the charitable (212) intentions of the testator were likely to be wholly frustrated. The bill then prayed that the said charity might be established and the defendant be declared a trustee for the benefit of the poor of the said county of Beaufort, of the said lands,

subject to the control and management of the said wardens, according to the intentions of the testator as before set forth, and that he might render an account of the rents and profits of the said lands for the time he has had possession thereof, under the direction of the court, and might pay over the sum which might be found due to the said wardens to be applied according to the said will, and for such other and further relief, etc.

To this bill the defendant put in a general demurrer, and the plaintiff joined in demurrer. Upon argument the demurrer was sustained and the bill dismissed, from which decree the plaintiff appealed to the Supreme Court.

J. H. Bryan in support of the demurrer.
William B. Rodman for plaintiff.

(217) GASTON, J. We are of opinion that none of the grounds taken in support of the demurrer in this case can be sustained.

It has been insisted that if the lands which are the subject of this controversy have been devised to the wardens, either as individuals designated by that description or as a corporate body in our law, the case is one purely legal and furnishes no matter for the cognizance of a court of equity; and, on the other hand, if the devise be one to the poor of the county, it is utterly void because of its indefiniteness. We hold it to be perfectly clear that the devise was not made to individuals charac-
(218) terized by the description of wardens of the poor, nor can we construe the devise as one made to the wardens in their corporate or quasi-corporate capacity. To give the devise the first of these constructions would be not only to depart from the language of the will, but to violate the obvious intent of the testator that the subject-matter of the devise "should be under the direction of the persons who should from time to time be the trustees or managers of the poor." Nor will the language of the will warrant the exposition that the lands are given to the wardens in their political capacity. As has been well remarked, in the argument in behalf of the information, the gift is not to the wardens of the poor, but "to the poor of the county of Beaufort," and it is of lands of which the testator declares "that they shall never be sold, but be held as a stock belonging to the poor of the county of Beaufort" and "subject to be rented, cultivated or leased, as the wardens or managers of the poor may deem most advisable." In his contemplation the gift is to the poor—the property is to be the property of the poor subject to a power in "the wardens or managers" to make the property

beneficent to the poor. Besides, had the devise been directly made to the wardens in their political capacity it must have failed, because in that capacity they had not the ability to take by devise. There is no ground, therefore, for the objection that *here* was a plain remedy at law. It is true, as insisted by the counsel for the defendant, that as a direct devise to the poor of the county of Beaufort the devise cannot have effect. "The poor of a county," as defined by our laws making provision for their care, maintenance and support, are a fluctuating body, consisting of those who from time to time, because of age, infirmity or calamity, are unable to subsist of themselves and are are therefore declared the subjects of a public charge. It is to this fluctuating body the testator would fain give these lands; but as the law has not conferred on it an artificial character which renders it able to take donations, the gift as a direct gift cannot have effect.

But it by no means follows that the *purpose* of the testator's disposition shall therefore be frustrated. The lands, indeed, for want of capacity in "the poor of the county" to (219) take, descended to the heirs at law of the testator; but the declaration of the testator that they shall be held for the poor of the county of Beaufort, to be rented, leased or cultivated for them, raises a charitable use or trust, which the law recognizes as good and which will be established and enforced by the competent authority. It is unnecessary to inquire in this case whether the jurisdiction exercised by the courts of chancery in England in establishing a definite charity, where the conveyance or devise was defective because of the want of proper persons to take in succession, had its rise after the Statute of Elizabeth or was settled before that statute upon principles introduced into the English jurisprudence from the civil law. There can be no doubt but that it was the constant practice of that court before the colonization of America, and so continued down to the Revolution, to enforce such charitable dispositions. They were not permitted to fail because of the want of a trustee, and, in analogy to the rule of equity in other cases, the person on whom the legal estate devolved was declared in equity a trustee *pro hac vice*. There can be no reason to doubt but that the jurisdiction of the court of chancery in this State while yet a colony was modeled after and regulated by the rules of the court of chancery in the mother country; and by the act of 1782, establishing courts of equity in this State, it was declared that they should possess all the powers and authorities that "the court of chancery which was formerly held in this State under the late government used and exercised and that are properly

and rightfully incident to such a court agreeably to the laws in force in this State and not inconsistent with our Constitution." The Statute of Elizabeth was avowedly passed to redress the misemployment of lands, goods and stocks of money *theretofore* given to certain charitable uses, though the mode of redress directed was by its enactments made to apply to subsequent dispositions for such uses. This statute was in force in this State (*Haywood v. Craven,* 4 N. C., 360, 557, and *Griffin v. Graham,* 8 N. C., 96), and so remained, until it was superseded by our act concerning charities (Revised Stat., ch. 18), which
(220) was passed expressly for the same purpose, viz., to secure the faithful management of all property, real or personal, which had been or thereafter should be granted by deed, will or otherwise for such charitable purposes as were allowed by law. The English statute in its recital enumerated many different sorts of gifts theretofore made, where the things so given had not been "employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust and negligence in those that should pay, deliver and employ the same"; and this enumeration in the statute was afterward often resorted to by the courts to aid them in ascertaining whether the intent to which subsequent dispositions of property were made should be regarded as equally *charitable* with that recognized as charitable by their statute. Our act considering that what was a charitable intent or purpose had then been well ascertained, instead of an enumeration of charitable purposes, used the comprehensive term, "such charitable purposes as are allowed by law." There can be no question but that a gift to or for "the poor of a county" is such. The statute and the act are important, as regards the present inquiry, *only* because they declare the public will that such purposes are good purposes and ought to be protected and upheld. We confine our decision to the case of a charity where the objects thereof are definite, as they are in the case before us, "the poor of the county of Beaufort." In such a case we cannot doubt that a court of equity, in the exercise of a plain jurisdiction, will establish the charity and make the necessary decrees for causing it to be executed. Where the gift is to charity merely, or to undefined purposes of charity, whether a court of equity has then a power to interfere and to select the charity opens a field of inquiry into which we shall not enter until the occasion may demand it. The charge in the information that the defendant entered upon these lands claiming them as the heir at law of the testator is sufficiently explicit, and the demurrer admits it for the present. If he have any other claim, or if he be not the heir at law, it is

competent for him to allege such a matter in his answer. The objection that the declared trust would establish a (221) perpetuity and is therefore forbidden by our Constitution is untenable. The perpetuities thereby contemplated are estates settled for *private uses*, so as to be unalienable. *Griffin v. Graham*, 8 N. C., 96. This is a public charity.

The decree below must be reversed with costs, the demurrer overruled and the cause remanded for further proceedings.

PER CURIAM. Ordered accordingly.

Cited: Holland v. Pack, post, 260; *Bridges v. Pleasants*, 39 N. C., 32; *Keith v. Scales*, 124 N. C., 511.

WILLIAM WADSWORTH v. JOHN GOSS.

The plaintiff's bill in this case dismissed with costs, the allegations therein not being sustained by the proofs.

THIS bill was filed at Spring Term, 1836, of DAVIDSON Court of Equity. The defendant's answer having come in, the injunction obtained on the filing of the bill was dissolved, and the bill lay over as an original bill. Replication was made and depositions taken, when, at Spring Term, 1842, the cause was set for hearing and transmitted by consent of parties to the Supreme Court.

The allegations of the bill and answer and the facts established by proofs will be found in the opinion delivered in this Court.

Mendenhall for plaintiff.

Badger and *Waddell* for defendant.

GASTON, J. In April, 1836, the plaintiff, William Wadsworth, filed his bill in the Court of Equity for DAVIDSON and therein charged that in January, 1834, at a public sale made by the defendant, John Goss, as the executor of (222) Frederick Goss, deceased, the plaintiff purchased a negro slave named Dick at the price of $150, and, to secure the payment of the purchase money, executed his bond with sureties for that amount payable twelve months thereafter. The plaintiff further charged that at the time of the sale the said negro was diseased; that this fact was well known to the defendant, but fraudulently concealed from the plaintiff; that the negro lin-

gered of the said disease for two or three months after the sale and then died of the said disease; that the plaintiff, since the death of the said negro, applied to the defendant to rescind the sale and return the plaintiff his bond, but the defendant had not only refused to comply with this request, but threatened to put the said bond in suit; and thereupon the plaintiff prayed that the defendant might be enjoined from suing upon said bond and for general relief. On the filing of the bill an injunction issued to restrain the defendant from putting the bond in suit until the further order of the court. The defendant put in his answer to the said bill and therein denied positively that at the time of the sale he knew or had heard or believed that the negro was in any way diseased; averred that no one in the State was better acquainted with the said negro than the plaintiff, who for years before the sale and up to the time of sale was accustomed to see the said negro at his daily labor and to work with him, and declares that the defendant at the time of putting in the said answer, as he had continually done before, believed that the said negro was sound and free from disease at the time of the sale. Upon this answer the injunction was dissolved and the plaintiff had leave to hold over his bill as an original bill, and replied generally to the defendant's answer. The parties having taken their proofs, the cause was set down for hearing and transmitted to this Court.

We have examined all these proofs, and deem it incumbent on us to state that the plaintiff has utterly failed to establish thereby the case made by his bill. There is testimony to render it probable that the negro was sick at the time of the sale. He so declared, but neither the plaintiff nor the defendant, (223) both of whom, according to the testimony, heard these declarations, placed any confidence therein, and the plaintiff, according to all the witnesses, had far more numerous opportunities and better means of learning the condition of the negro's health than the defendant. There is no satisfactory evidence that this sickness, if it existed at the time of the sale, was a serious disease or occasioned the death of the negro, who continued to work for the plaintiff until a very few days before his death; and above all, there is no proof from which fraud or deceit in the sale can be inferred against the defendant. It appears that the plaintiff bought what he deemed a great bargain; that he was offered an advance on his purchase and that he refused to take it. The speculation has proved a bad one, but the loss must remain where the act of Providence has thrown it.

The bill must be dismissed with costs.

PER CURIAM. Decreed accordingly.

(224)

JOHN A. AVERITT v. MORRIS FOY.

The court will not decree against the defendant, in opposition to a positive denial in his answer, upon the uncorroborated testimony of a single witness.

THIS cause was transmitted from the Court of Equity of ONSLOW, at Spring Term, 1842, by consent of parties, to the Supreme Court for hearing.

The pleadings and proofs are stated in the opinion delivered in this Court.

J. H. Bryan and *J. W. Bryan* for plaintiff.

No counsel for defendant.

DANIEL, J. The plaintiff in his bill states that the defendant as administrator of one Burton hired to him a negro man and that he gave his note for the hire. The negro (he says) was hired as a sound and able-bodied slave. The slave appeared to be healthy at the time, but in truth he was permanently diseased, which was unknown to him (the plaintiff). He further states that the slave in a short time became useless from the said disease; that he returned the slave to the defendant, who accepted him and agreed to cancel the contract and surrender the note; that notwithstanding such agreement the defendant has brought suit on the said note and is now endeavoring to collect the same out of the plaintiff.

The defendant in his answer admits that he as administrator of Burton hired to the plaintiff the slave, in January, 1837, and took his note for the hire in February following. He denies that he had any knowledge at the time of hiring that the slave was afflicted with any disease or that he had been sick for a year or two before. He says that if he had known it he would have disclosed it. He denies that the slave was hired (225) as a sound and able-bodied negro. He admits that the slave was taken sick afterwards and was sent to him by the plaintiff; that he received him and endeavored to have him cured. But he positively denies that he made any agreement to cancel the contract and surrender the note.

The plaintiff replied to the answer; and he has taken the depositions of two witnesses. Amon Rochell deposeth that the defendant, in May, 1837, told him that the plaintiff had brought the negro back, and that he was willing to it, and had taken him back. He said that he had not given back the note to the plaintiff, but that he had acted so gentlemanly he intended to give

him his note for the hire of the said negro. The defendant said that he was giving medicine to the negro; that he thought he would be able to cure him and make the slave useful as a cooper to him. Some weeks after, the defendant again said that he intended to give up to the plaintiff the note he held for the said negro. This witness states that he believes that the negro was diseased when the plaintiff hired him; that he as patroller had several times visited the slaves of Burton in his lifetime, and this slave was unwell and complaining. On his last visit as patroller the legs of the slave were swelled.

Enoch Canady deposeth that he had been frequently at the house of Burton before his death, and this slave (Mack) was generally under complaint, and he has no hesitation in saying that the slave was diseased at the time of hiring.

That the slave was at the time of hiring permanently diseased is very probable. But the plaintiff has failed to prove that the defendant hired him as for a sound and able-bodied negro, or that he had any knowledge of the disease at the time; therefore the charge of fraud entirely fails. Secondly, the evidence of the witness Rochell does not prove an agreement by the defendant to rescind the contract and surrender the note. If it did, this Court cannot decree, against the positive denial in the answer, upon the uncorroborated testimony of a single wit-
(226) ness. The bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

JULIAN PICOT BY HIS GUARDIAN v. ROBERT ARMISTEAD AND WIFE.

A by his last will, after making several bequests, devised as follows: "The balance of my estate I dispose of as follows: I wish my wife, Marietta, to have the use of the same during her life or widowhood. If she marries, then I give her the one-half of this balance of my estate, to her and her heirs, the other half to my child or children living at my death. If my child or children should die before they arrive at the age of twenty-one or marriage, then I give their estate to my wife for life, remainder to my father for life, remainder to my mother for life, remainder to the survivor, in fee simple. For it will be seen that they, my children, will have some estate in possession on the marriage of my wife. Should my child or children either arrive at the age of twenty-one or be married, then I will that the one-half of my estate before given them be immediately delivered to them, their heirs and assigns." A died, leaving his wife and two children sur-

viving him. His widow married, and then one of his children died intestate, under age, and unmarried: *Held*, that the deceased child took, on the marriage of its mother, a vested interest in the share of the estate devised to it, subject to the ulterior contingent remainders; and that, upon its death, that portion of the estate which was realty descended to the surviving child, and that portion which was personalty was to be equally divided between the mother and the surviving child, in both cases subject to the ulterior contingent remainders: *Held further*, that there were no cross remainders by implication between the children, and that the remainders over to the wife, etc., could only take effect on the death of *both* the children under age and unmarried.

THIS cause was transmitted by consent from the Court of Equity of WASHINGTON, at Spring Term, 1842, to the (227) Supreme Court.

The plaintiff's bill, which was filed at Spring Term, 1842, of Washington Court of Equity, charged that Peter O. Picot, the father of the plaintiff, having made a last will and testament in due form of law to pass real estate, departed this life in 1833; that of the said will he appointed Julian Picot, Sr., the executor, who, at November Term, 1833, of Washington County Court, proved the said will and took upon himself the burthen of executing the same; that the said executor assented to the legacies given in and by the said will and delivered the legacies, to which she was entitled, to the legatee, Marietta; that the said testator at the time of his death left his father, Julian Picot, his mother, Hannah, his wife, Marietta, and the plaintiff, surviving him; that his widow, Marietta, in about two months after the death of her husband, gave birth to a daughter (Elizabeth), who died about twelve months thereafter; that Hannah Picot, the mother of the testator, has been dead several years, and that Marietta, the widow of the said testator, intermarried with the defendant, Robert Armistead, in 1841, both of whom, as well as Julian Picot, the grandfather of the plaintiff, are still alive. The bill further charged that the testator charged the debts that were due to him with the payment of the debts he owed and gave to his father, Julian Picot, whatever balance might remain of the debts which were due to him after paying the debts he owed; that the residue of his estate, which consisted of negroes and other personal property of the value of $10,000 and real estate of the value of $3,000, he bequeathed and devised as follows: "I wish my wife, Marietta, to have the use of the same during her life or widowhood. If she marries, then I give her the one-half of this balance of my estate to her and her heirs; the other half to my child or children living at my death. If my wife does not marry, then at her death my will is that the portion

given her for life be given to my child or children living at my death. If my child or children should die before they arrive at the age of twenty-one or marriage, then I give their estate
(228) to my wife for life, remainder to my father for life, remainder to my mother for life, remainder to the survivor in fee simple," a copy of which will was appended to the said bill and made part thereof. The bill further charged that the said Marietta, after the death of her said husband and before her intermarriage with her present husband, sold a large portion of the personal estate which was bequeathed to her during her life or widowhood, and after her said intermarriage received large sums for the hire of negroes, amounting in all to $800 or some other large sum of money; that by virtue of the said will, in connection with the marriage of the said Marietta and the death of the said Elizabeth, the plaintiff is entitled to one-half of the sales of the said property and hires of negroes, and that he had, by his guardian, since the said intermarriage, called upon the said Robert to account with and pay over to his said guardian one-half of the said sales of property and hire of negroes, which the said Robert refused to do, insisting that he in right of his said wife was entitled to three-fourths of the proceeds of the said sales and hire of negroes and that he was entitled to retain the remaining fourth, or the greater part thereof, in payment of expenses incurred by his said wife before her intermarriage with him, in boarding, clothing and educating the plaintiff. The bill charged that if any such expenses were incurred by the said Marietta she did not intend at the several times when she paid them off nor at any other time before her intermarriage with the said Robert to make a charge for the same against the plaintiff, and that if she did intend to charge and did actually charge the plaintiff therewith she ought not to be allowed them in this Court, forasmuch as the plaintiff had no income whatever out of which they could have been paid, the plaintiff having no interest in any estate whatever except what he derived under the will of the said Peter O. Picot. And the bill then prayed for an account, for a decree for what should be found due the plaintiff, and for general relief.

The following is a copy of the will of Peter O. Picot referred to in the bill:

(229) "STATE OF NORTH CAROLINA—Washington County—ss.

"My last will and testament is as follows: That my debts shall be paid out of the debts due me; then all the judgments, bonds, notes and accounts due me I will and bequeath to my father, Julian Picot, his heirs and assigns. The balance of my

estate I dispose of as follows: I wish my wife, Marietta, to have the use of the same during her life or widowhood. If she marries, then I give her the one-half of this balance of my estate to her and her heirs, the other half to my child or children living at my death. If my wife does not marry, then at her death my will is that the portion given her for life be given to my child or children living at my death. If my child or children should die before they arrive at the age of twenty-one or marriage, then I give their estate to my wife for life, remainder to my father for life, remainder to my mother for life, remainder to the survivor in fee simple. For it will be seen that they, my children, will have some estate in possession on the marriage of my wife. Should my child or children either arrive at the age of twenty-one or be married, then I will that the one-half of my estate before given them be immediately delivered to them, their heirs and assigns. I leave my wife the guardian of my children and my father the executor of my estate. Signed, etc., 15 October, 1832. P. O. PICOT."

(Attested by two witnesses.)

The defendants, Robert Armistead and Marietta, his wife, answered and admitted all the material allegations in the plaintiff's bill and insisted that according to the true construction of P. O. Picot's will, on the death of Elizabeth the whole of her share of the estate went over to the said Marietta, under the remainder limited in the said will, first for life and contingently in fee if she survived the father, Julian Picot.

A. Moore and *Iredell* for plaintiff.
Badger for defendant.

DANIEL, J. We are called upon to put a construction (230) on the last will of Peter O. Picot. We are of the opinion, first, that on his death his wife was tenant for life of the real and personal estate, remainder to the two children, and that these estate were subject to be changed and altered on the contingency of the subsequent marriage of the widow. The child *in ventre sa mere* (Elizabeth) was to be considered a child *in esse* and *living* at the testator's death. *Doe v. Clark*, 2 H. Blac., 379; *Mogg v. Mogg*, 1 Mer., 654; *Trower v. Butts*, 1 Sim. & Stu., 181; 1 Powell on Dev., 326 (marginal page Jar. Ed.). Secondly, the contingency happened—the wodow married the defendant Armistead, and then by force of the executory devise the wife took a moiety absolutely in the real and personal estate. "The other half" (in the words of the will) was to go to "his child or children living at his death." Thirdly, one of the tes-

tator's children (Elizabeth) died before the marriage of her mother with Armistead and before she arrived at the age of twenty-one years or married. The defendants claim the share (which would have belonged to Elizabeth if she had lived) under this clause in the will: "If my child or children should die before they arrive at the age of twenty-one or marriage, then I give *their estate* to my wife for life," etc. The complainant claims the said share, contending that there were cross remainders between him and his sister by implication. We are of opinion that the defendants have no right to the said share of the deceased child by force of the above-mentioned limitation in the will. For the testator intended that the moiety of his estate which he had given to his children should go over to his wife for life, etc., only on the event that *both* the children died before twenty-one years of age or marriage. These words, "die before *they* arrive at the age of twenty-one or marriage, *then* I give *their* estate to my wife for life," etc., connected with the fact that the surviving child is entirely omitted in the clause creating the ulterior limitation, go strongly to prove that such ulterior limitation was not to take effect during the life of either of the children.

Fourthly, was there among the children a cross limita-
(231) tion by implication? We think that there was not. The contingent executory devise to the children of a moiety of the testator's estate on the event of the marriage of the widow became vested on that event taking place. If the moiety to the children did not vest then, we would ask when could it ever vest? We think that it vested then, subject to be divested on the death of *all* the children before the age of twenty-one or marriage. Elizabeth being a child in law living at the death of the testator, the contingent executory devise of one-fourth to her on her death was transmitted by *the law* to her representatives. And on the marriage of the widow it became vested in the said representatives subject to be divested and go over on the event that *all* the children died before twenty-one and unmarried. The last event has not arrived, and it may never arrive. Why, then, take from the representatives of Elizabeth her share and turn it over to Julian? If Julian should die before twenty-one or marriage, then and not till then will the representatives of Elizabeth be compelled to give up her share to the ulterior devisees and legatees. To introduce cross remainders in such a case as this would be to divest a clear gift to Elizabeth upon reasoning merely conjectural; for the argument that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event happening to

the whole, however plausible, scarcely amounts to more than conjecture. 2 Powell on Dev., 625 (Jar. Ed.). That such an executory devise as this became a vested interest immediately on the event happening, and that there was not a cross limitation by implication among the children on the death of either of them has been expressly decided by *Lord Alvanley*, master of the rolls in *Machell v. Winter*, 3 Ves., 236, and although overruled by the chancellor on appeal (3 Ves., 536), he still held to his opinion (see *Booth v. Booth*, 4 Ves., 402). Afterwards, a case like the present in all its points (*Skey v. Barnes*, 1 Mer., 334) came on for a hearing before *Sir William Grant*. He held that the bequests vested immediately and that the share of the deceased child belonged to her representatives, subject to be divested and go over on the event of *all* the children dying before twenty-one or marriage. Mr. Jarman says, in his (232) edition of Powell on Devises, 630, that the case of *Skey v. Barnes* may, it is conceived, be considered to have fixed the rule of law on this important subject. The case of *Scott v. Bargeman*, 2 P. W., 68, was decided in favor of the surviving child on the supposition that the shares of the two deceased children were not absolutely vested. And *Lord Rosslyn* decided the case of *Machell v. Winter*, 3 Ves., 536, on the same notion, that the shares of the two grandsons, who died under twenty-one, were contingent and not vested estate. All the chancellors in England who have said anything on the subject admit that if the legacy or devise is *once vested* it will go to the representatives on the death of a child in such a case as this, and the surviving child would not take by way of cross limitation by implication. *Davis v. Shanks*, 9 N. C., 117, appears to be in collision with the decision we are now about to make. That case does not appear to have been argued, and the court in giving their opinion seem to have gone on decisions governing devises to several as tenants in common in tail, with a remainder over in fee to a third person on the event of *all* the tenants in tail dying without issue. In such a case cross remainders between the tenants in tail hold of necessity. The testator has shown an intention to disinherit his heirs, and he has declared in his will that the ulterior devisee in remainder shall not take anything in the land until *all* the tenants in tail shall die without issue. If, then, one of the tenants in tail die without issue that interest will go to the surviving tenants in tail by way of cross remainder by implication. *Clacke's case*, Dyer, 330; *Holmes v. Meynell*, Sir T. Ray., 452; *S. c.*, 2 Show., 135; *Gilbert v. Witty*, Cro. Ja., 655. These are the cases relied on by the court in *Davis v. Shanks* to support their decision. But when we come to examine these cases we

discover that they relate to quite a different subject from that which was then to be tried and decided and that they do not govern the case which was then before the court. All the cases relied on in the decision of that case related to the rule creating cross remainders between tenants in tail and had no bear-
(233) ing on a case like this.

Fifthly, the plaintiff is the sole heir and representative of his sister as to her real estate, and the personal estate of the child Elizabeth must go to her administrator to be distributed among her next of kin, who are her brother, Julian, and her mother, the present defendant. These representatives take the estates as above described subject to be divested and go over to the ulterior remainderman on the death of Julian under twenty-one and unmarried.

Perhaps the parties will be satisfied with this declaration and adjust the matters in dispute between themselves. But this Court will not take the accounts until an administrator of the deceased *child* be made a party.

By consent the cause was remanded to the court below.

Cited: Coffield v. Roberts, 35 N. C., 278.

CHARLES GREGORY v. ELIJAH MURRELL.

Where two persons engage in a common risk as sureties for a third, and one of them subsequently takes an indemnity from the principal debtor, it inures to the benefit of both.

THIS cause, having been set for hearing, was transmitted to the Supreme Court, by consent of parties, from the Court of Equity of ONSLOW, at Spring Term, 1842.

The pleadings and facts are stated in the opinion delivered in this Court.

John H. Bryan and *J. W. Bryan* for plaintiff.

No counsel for defendant.

(234) GASTON, J. The plaintiff alleges in his bill that he and one Mabry Pettaway and the defendant had become bound as joint sureties for one Asa H. Rhodes on a note payable to the president and directors of the Bank of the United States, at their branch at Fayetteville, in this State; that the said note

had been renewed by payments of installments made by the said Rhodes until it was reduced to the sum of $600, for which sum the last note was given; that this note became due on 5 May, 1833, and not having been paid according to its tenor, the same was put in suit against all the parties thereto, judgment thereon obtained and the said judgment and costs paid by the defendant and the plaintiff, each contributing the sum of $350.23. The bill further states that Rhodes became utterly insolvent and removed out of the State; that Pettaway died, John B. Thompson administered on his estate and that said estate is entirely insolvent. It further charges that on 11 September, 1833, Rhodes executed to the defendant a bill of sale for two negroes, Dinah and Clary, for the nominal consideration of $550, and avers that in truth no consideration passed from the defendant to Rhodes, but that the deed was executed purely and solely to indemnify the said defendant from loss because of his liability as a surety for Rhodes; and the prayer of the bill is that the plaintiff, who engaged in a common risk and has shared in a common loss with the defendant, may be declared entitled to share with the defendant in the benefit of said indemnity.

The answer of the defendant admits that the plaintiff Mabry Pettaway and himself were the joint sureties of Rhodes in the accommodation obtained by the latter in the United States Bank and the same was lessened by renewals on the note, whereupon judgment was obtained, and that the judgment was had and the same paid, as set forth in the plaintiff's bill; but the defendant saith that when the said note was given he advanced to Rhodes, to enable him to pay the installment then required before a renewal could be had, the sum of $210; that when he advanced this sum he purchased the two negroes, "valued at $550," for which sum he sold them in a few days (235) thereafter to Lot Ballard, and that the plaintiff knew of this purchase and sale by the defendant before he executed the last note as one of Rhodes' sureties; that he denies "the charge of never having given any consideration for said slaves or that said slaves were worth more than he purchased and afterwards sold them for." He further says that "far from being more than indemnified by the purchase of the negroes in question, he has actually been a loser by Rhodes." He denies the allegation "that the bill of sale received from Rhodes was intended *solely* as an indemnity," but says that "it was an absolute and *bona fide* bill of sale, made to carry into effect an absolute purchase," and further says that before and at the time of said purchase Rhodes complained to him of false reports which had been circulated to the injury of his credit, "and offered to the defendant

the slaves in question as a means of paying him for his advances." The defendant states that Rhodes sent off several valuable slaves to Florida before he left the State, and has since died there, leaving, as defendant has been informed, considerable property, and that defendant, not "having knowledge of the insolvency of Pettaway's estate, does not admit the same."

To this answer there was a general replication, and, proofs having been taken, the cause was transmitted here for hearing.

Upon the proofs it appears that the parties have mistaken the date of the note upon which they were sued. It bears date 5 October, 1833, is executed by Rhodes to Murrell, the defendant, and endorsed by him, the plaintiff, and Pettaway; and is made payable at the office of discount and deposit of the Bank of the United States ninety days after date. Durant H. Rhodes, who was present at the close of the bargain between the defendant and his brother, Asa Rhodes, for the negroes Dinah and Clary, certifies that the defendant was to pay for them $550, and in November following paid in part therefor $210, and that Asa Rhodes said that he intended to make Murrell safe and wished to make Gregory (the plaintiff) safe. Anthony H. Rhodes, another witness to the transaction, states that Asa Rhodes (236) said he wanted the negroes to go to that debt to save Murrell from loss on account of it, and if anything remained, to go to the benefit of Gregory. Benjamin White testifies that he has heard Murrell say that Rhodes had sold him the negroes for $550, and after saving himself harmless he had paid over the residue of the price to Rhodes; and Ballard, who purchased the negroes from the defendant at the price of $550 (the very sum named in Rhodes' bill of sale) declares that he was informed by the defendant that they were placed in his hands by Rhodes to save the defendant harmless on account of the surety note, and that if any surplus remained it was to be applied to the benefit of the plaintiff.

Taking this testimony in connection with the studiously vague and disingenuous answer of the defendant, we have not a doubt but that the slaves mentioned in the pleadings were conveyed to the defendant, if not wholly, yet certainly in part, as an indemnity, and in that indemnity, whatever be its extent, the plaintiff is entitled to share. When two engage in a common risk as sureties for a third and one of them subsequently takes an indemnity from the principal debtor it inures to the benefit of both. *Fagan v. Jackson,* 15 N. C., 263.

It does not appear whether the $210 which Durant H. Rhodes proves was paid to Asa Rhodes was or was not applied in renewal of a former note on which all the parties were bound. Nor is

it necessary for us now to determine how that fact is, as it is more properly a matter to be considered in taking an account. If it were so applied, then the amount of the indemnity received by the defendant and in which the plaintiff is to share—that is, the price of the slaves—will be diminished by that sum. If it were not so applied, then it will be a question whether the entire price of the slaves will not be taken as the value of the indemnity. No objection has been raised to a decree, either in the pleadings or at the hearing, because of a defect of parties. Asa Rhodes having left the State and died abroad, no objection would lie because he or his representative is not a party defendant. Nor will we of our own motion refuse to do what seems just between the present parties, because the representative of Pettaway is not before us. Although the defendant states that (237) he does not "know" that the estate of Pettaway is insolvent and "therefore" does not admit it, we cannot well doubt but that the plaintiff and defendant both *believe* it to be insolvent. Under this belief they have paid off the judgment equally between them, and neither has made any effort nor advanced any claim to get contribution to his loss out of that estate.

The Court declares that the defendant has received an indemnity from the common principal of the plaintiff and defendant because of their common liability for such principal, in which the plaintiff is entitled to share, and directs a reference to ascertain the amount of the indemnity so received and the portions of the common loss respectively sustained.

PER CURIAM. Decreed accordingly.

Cited: Hall v. Robinson, 30 N. C., 60.

(238)

CHRISTINA CRAWFORD AND OTHERS v. JOHN J. SHAVER AND OTHERS.

1. A devised as follows: "I give, devise and bequeath all my estate to my daughter C and my son T, to have and possess said real and personal estate during their natural lives, and after their death the said property, real and personal, to descend and be transmitted to their children. Should my son T die without leaving issue of his body, my will is that the property devised and bequeathed to him, after his death, shall be limited and vested in the children of my daughter C. My will and desire is that the negroes I have given to my daughter C and son T shall be hired out in the county of Rowan, and not without the county, and the

profits of their hiring shall be equally divided between them during their natural lives; and my further will is that neither my dwelling-house nor tract of land be rented out, on which I live, but any other tracts may be rented out as they may deem fit." At the date of this will, and at the death of the testator, his daughter C was a married woman: *Held*, that the wife, under the expressions of this will, did not take an estate to her separate use.

2. The Court will not force a construction to raise a trust for the separate use of the wife, nor gather the intention that a separate estate is limited for her, from terms that are ambiguous or equivocal.

THIS was an appeal from an interlocutory decree of his Honor, *Pearson, J.*, at Spring Term, 1842, of ROWAN Court of Equity, dissolving an injunction which had been obtained by the plaintiffs.

The facts presented by the pleadings are stated in the opinion delivered in the Supreme Court.

D. F. Caldwell and *Boyden* for plaintiffs.
No counsel for defendants.

GASTON, J. Thomas Mull, on 1 January, 1835, exe- (239) cuted a last will and testament, which after his death was admitted to probate, and the executor therein named having renounced the office of executor, administration on the estate of the deceased *cum testamento annexo* was granted to William D. Crawford, the husband of Christina Crawford, the daughter of the testator. By his will the testator devised and bequeathed as follows: "I give, devise and bequeath all my estate to my daughter Christina Crawford and my son Thomas Mull, Jr., to have and possess said real and personal estate during their natural lives, and after their death the said property, real and personal, to descend and to be transmitted to their children. Should my son Thomas die without leaving issue of his body my will is that the property devised and bequeathed to him, after his death, shall be limited and vested in the children of my daughter Christina Crawford. My will and desire is that the negroes I have" (given) "to my daughter Christina and son Thomas shall be hired out in the county of Rowan, and not without the county, and the profits of their hiring shall be equally divided between them during their natural lives; and my further will is that neither my dwelling-house nor tract of land be rented out on which I live, but any other tracts of land may be rented out as they deem fit." William D. Crawford and Thomas Mull, Jr., made a division of the slaves of the testator comprehended in

the general devise and bequest therein set forth, and afterwards Crawford, for the purpose of indemnifying some of the defendants from injury by reason of their liability for him as his sureties, executed a deed of trust to the defendant Shaver whereby he conveyed all his interest, whatever it might be, in the negroes bequeathed to his wife. A bill was filed in the name of Christina Crawford and her infant children, suing by their next friend, against the trustee and the *cestuis que trust* in this deed of Crawford, to enjoin a sale of these negroes upon the ground that in equity the same belong to the plaintiff Christina during her life, exclusively of her said husband, with remainder or a residuary interest thereinafter her death to her children, the other plaintiffs. The injunction was granted as prayed for, but upon the coming in of the answers of the defendants it was ordered that the injunction be dissolved so far as (240) to permit the trustee to sell the estate which William D. Crawford had in the negroes for and during the life of his wife, upon bond with sufficient surety being taken for the forthcoming of the same and the increase thereof at her death. From this interlocutory decree the plaintiffs prayed and obtained an appeal to this Court.

The appellants object to the decree for that by his will the testator has declared his purpose that the plaintiff Christina should have a beneficial interest for her life in the slaves in question independent of the control and exempt from the disposition of her husband, with remainder in the slaves to her children. But we can find no ground upon which this construction can be maintained. Marriage is at law an absolute gift to the husband of all the goods of which the wife was possessed in her own right at the time of the marriage and of such others as come to her during the marriage. In equity the wife may take and hold personal as well as real estate separate from and independent of her husband; but as equity follows the law, it must appear, either from the nature of the transaction or the terms of the conveyance, that the property is given to her separate use before his marital rights thereto can be excluded. There is nothing in the nature of the transaction (as in a case of a marriage settlement, where the husband is a party, or as in a case of a conveyance by a husband to the use of his wife) which manifests a necessary intent that she should take a separate property. And whatever expressions may be found in the will tending to raise an inference of such an intent, they fall far short of those which have been judicially determined to be insufficient for that purpose. See *Rudisell v. Watson*, 17 N. C., 430; *Gilliam v. Welch*, 15 N. C., 286. The Court will not force a con-

struction to raise a trust for the separate use of the wife nor gather the intention that a separate estate is limited for her from terms that are ambiguous or equivocal.

It must be certified to the court below that there is no error in the interlocutory decree appealed from.

PER CURIAM. Ordered accordingly.

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(241)

SAMUEL C. GAUSE v. JAMES C. HALE AND WIFE.

1. In construing marriage articles, courts of equity are not restrained by the technical rules which prevail in limitations of legal estates and executed trusts, but indulge in a liberal interpretation, so as to secure the protection and support of those interests which, from the nature of the instrument, it must be presumed were thereby intended to be secured.

2. Where articles were entered into before marriage, by which it was stipulated that when the marriage took place the lands and negroes therein mentioned should be conveyed to a trustee named in said articles, that they might be assured to the wife during her natural life, and, from and after her decease, to the use and behoof of the heirs of the said wife and husband, and in default of such issue then to the use and behoof of the said wife, her heirs and assigns forever: it was decreed, on the bill of the said trustee, after the marriage, and against the expressed wishes of the said husband and wife in their answer, that the husband and wife should execute conveyances by which there should be secured to the wife an estate during her life, free from the debts of the husband, and, during the coverture, exempt from his power, with a limitation to such children as might be born after marriage, equally to be divided between them, and in case of the death of any of them under age, or, if females, unmarried and under age, with limitations over to the survivors and survivor, and with an ultimate limitation over to the wife in case there should be no such issue of the marriage or none living at her death.

This cause was removed for hearing by consent of parties from the Court of Equity of BLADEN, at Fall Term, 1841, to the Supreme Court.

The facts and questions raised in the case are stated in the opinion of this Court.

Strange for plaintiff.

No counsel for defendant.

GASTON, J. On 11 January, 1832, articles of agree-
(242) ment were executed between James O. Hale of the first part, Ann Council Gause of the second part and the

plaintiff, Samuel C. Gause, of the third part, whereby, after reciting that the said Ann was seized in fee of certain lands in the county of Brunswick and possessed of certain slaves therein named, and that a marriage was about to be had and solemnized between the said James O. Hale and the said Ann, it was covenanted and agreed that the said James and Ann, in case the intended marriage should take effect, should and would by some good and sufficient conveyance settle and assure the said lands in and to the said Samuel to the use and behoof of the said Ann during the term of her natural life, and from and after her decease to the use and behoof of the heirs of the body of the said Ann by the said James lawfully to be begotten, and for the default of such issue, then to the use and behoof of the said Ann, her heirs and assigns forever, and for no other use, intent or purpose whatever; and that they should also, by like good and sufficient conveyance, settle and assure the before-named negroes in and to the said Samuel, to the use and behoof of the said Ann for and during her natural life, and from and after her decease to the use and behoof of the heirs of the body of the said Ann by the said James O. Hale, lawfully to be begotten, and for default of such issue, then to the use and behoof of the said Ann, her heirs and assigns forever, and to and for no other intent or purpose whatever. The contemplated marriage took effect, no conveyance was made, as stipulated by the marriage articles, and the husband ever since the marriage has remained in the use and enjoyment both of the lands and negroes, the subject-matter of said articles. In 1838, the said husband having sold one of the said negroes and negotiated for the sale of others, the trustee (Gause) filed this bill against Hale and his wife, wherein he prays that conveyances may be made under the directions of the court so as to carry into execution the true intent of the marriage articles and assure the land and negroes to the uses, trusts and purposes thereby contemplated; that it may be ascertained what negroes yet remain of those named in the articles and what issue they have had; that the defendant Hale may be compelled to substitute property of equal value to (243) the negro by him sold, which property shall be included in the assurance or assurances to be directed; that the plaintiff may in the meantime be secured against any further sales to be made by the said defendant, and for general relief. To this bill a joint answer was filed by Hale and wife in which the execution of the marriage articles is admitted, but they say that these were signed without noticing their contents; that it was represented to them that the object was to secure the property to Mrs. Hale, and if she had children by the marriage, to these

children; and if she had none, then to her husband *if* she should so choose; that they were entirely ignorant that any conveyances of the property were after the marriage to be made to the plaintiff or that he was to have any control over the property. The defendant Hale admits the sale of the negro woman Tinah, but excuses it on the ground of necessity, and both the defendants in said answer declare a strong repugnance that the plaintiff should be their trustee.

No evidence has been offered which supports the allegation (if such an allegation can be understood as made in the answer) that an imposition was practiced on the husband, and much less on the wife, in obtaining the execution of the articles, and nothing is shown, except the *opinions* of witnesses, that the plaintiff is an unsuitable trustee, wherefore the trusts declared or intended by the articles should not be effectually secured. In regard to *this* objection we would observe that these vague opinions weigh nothing; that he is the trustee designated in the articles, whose duty it is to see them carried into execution, and that should he hereafter prove incompetent or unfaithful he will, on a proper case shown in a regular proceeding for that purpose, be superseded and another appointed in his stead.

In construing marriage articles courts of equity are not restrained by the technical rules which prevail in limitations of legal estates and executed trusts, but indulge in a liberal interpretation so as to secure the protection and support of those interests which from the nature of the instrument it must be presumed were thereby intended to be secured. In the (244) present case these were the interests of the wife and of the issue of the marriage. The manifest object of the articles is to put these beyond the control of the husband. Conveyances must therefore be prepared by which there shall be secured to Mrs. Hale an estate during her life free from the debts of her husband and during the coverture exempt from his power, with a limitation to such children as may be born of the marriage, equally to be divided between them, and in case of the death of any of them under age, or, if females, unmarried and under age, with limitations over to the survivors and survivor and with an ultimate limitation over to Mrs. Hale in case there should be no such issue of the marriage or none living at her death.

There should also be a reference to inquire and report the slaves and the issue of the slaves, to be included in the settlement, and also the value of the slave sold by the defendant

James, and what property of equal value should be substituted in the place thereof, and the cause is to be retained for further directions.

PER CURIAM. Decreed accordingly.

Cited: Hooks v. Lee, 43 N. C., 161.

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(245)

WILLIAM D. BRADLEY, EXECUTOR, ETC., v. SUGARS JONES AND OTHERS.

1. A devised as follows: "I lend to my daughter P. J. one negro girl named Mary, her life, and after her death, to be equally divided among the heirs of her body forever": *Held*, that these words, if applied to real estate, would have created an estate tail at common law, and that where words in a will would create an estate tail in land at common law, they carry the absolute estate in a bequest of chattels.

2. A bequest of a "negro woman and all her children" does not include the grandchildren of the woman, born in the lifetime of testatrix.

3. A residuary clause in a will of "All the balance of my estate, that is not given, to be sold, and the money arising from the sale I give to A. B.," etc., does not include the specie and bank notes in possession of the testator at the time of his death.

THIS was an appeal from certain interlocutory decrees made by his Honor, *Settle, J.*, at Spring Term, 1842, of NORTHAMPTON Court of Equity.

The bill was filed at Spring Term, 1842, of Northampton Court of Equity by William D. Bradley, executor of Mary Jones, against Sugars Jones and others, and its allegations (so far as regards the questions brought to the Supreme Court) were that the said Mary Jones departed this life some time in 1842 after having duly made and published her last will and testament, which was proved in Northampton County Court at March Term, 1842, by which the plaintiff was appointed her executor, and that he qualified as such, and a copy of the will was annexed to and prayed to be taken as a part of the bill; that in and by the said will the testatrix bequeathed as follows: "I give unto my son Willie Jones' children one-sixth share in my negro woman Mary and all of her children. I give unto (246) my daughter Polly Carpenter one-sixth share in my negro woman Mary and all her children. I give unto my son Rich-

ard Jones and my son Allen Jones and my son Sugars Jones and my son William P. Jones one-sixth share apiece in Mary and her children"; that the said negro woman Mary had been bequeathed to the said testatrix by the will of her father, George Norwood, in the following words, to wit: "I lend to my daughter Mary Jones negro girl Mary her life; after her death, to be equally divided among the heirs of her body forever"; that in the will of the said testatrix there was also the following clause: "All the balance of my estate that is not given to be sold, and the money arising from the sales I give unto my son Sugars Jones one-fifth part of the same, and all the balance I give unto my son William P. Jones"; that there was found among the effects of the said testatrix specie and bank notes amounting to about $640, which were claimed by the said residuary legatees, and their claim was opposed by the distributees of the said Mary Jones, alleging that as to this fund she had died intestate. It was also alleged that the slave Mary mentioned in the will of Mary Jones had a grandchild. And the plaintiff as executor prayed that as there were conflicting claims under these two wills and he was ignorant as to the proper construction to be put on them, the court would advise how he should settle with the several claimants, and the proper parties were made.

The defendants answered and admitted all the material facts stated in the plaintiff's bill and submitted to any decree the court might make in the premises.

The case coming on to be heard upon the bill, answers and the wills referred to, his Honor declared that by the will of George Norwood the testatrix, Mary Jones, was entitled in absolute estate to the slave Mary and her children mentioned in the pleadings, and that said slaves are disposed of by the will of the said Mary; that the slave ..... the grandchild of the said slave Mary, did not pass by the will of the said testatrix under the clause bequeathing the said slave Mary and her children, but was disposed of by the residuary clause of the said will, and

(247) that by the said residuary clause all the property of the said testatrix (including the specie and bank notes) not specifically bequeathed by the said will passed to the defendants Sugars Jones and William P. Jones, and a decree was made accordingly.

One of the defendants prayed an appeal from so much of the decree as declared that the testatrix Mary Jones under the will of her father took an absolute estate in the slave Mary. Others of the defendants prayed an appeal from so much of the decree as declares that the grandchild of the slave Mary did not pass under the bequest of Mary and her children and also from so

much of the decree as declared that the specie and bank notes in possession of the testatrix at the time of her death passed to Sugars Jones and William P. Jones as residuary legatees, which appeals were allowed by the court.

No counsel for plaintiff.
B. F. Moore for defendants.

DANIEL, J. On this appeal there are three questions for this Court to determine. 1. What estate or interest did Polly Jones take under this clause in her father, George Norwood's, will, "I lend to my daughter Polly Jones one negro girl named Mary for her life; after her death, to be equally divided among the heirs of her body forever." The difference between this case and *Ham v. Ham,* 21 N. C., 598, consists in the words "equally to be divided among the heirs of her body forever." In *Ham v. Ham* the gift was to her daughter for life, then to her lawful heirs. In the case before us, if it had been a devise of land we think that Polly Jones would have taken an estate tail at the common law, and wherever words in a will create an estate tail in lands they will, in a bequest of chattels, carry the absolute estate. That the words made use of in Norwood's will would create an estate tail in a devise of land we think is established by the two cases of *Jesson v. Wright,* 2 Bligh., 2, and *Doe v. Harvey,* 4 Barn. & Cress., 610. Hays Real Estate, 100-115. We therefore approve of this part of the *decree.* 2. Mary Jones by her last will gave her "negro woman Mary and all her children" to certain legatees. The slave Mary had a (248) grandchild born in the lifetime of the testatrix. Did the grandchild of Mary pass to the said legatees under the words "and all her children"? A devise or bequest to the children of a man do not extend to his grandchildren. Grandchildren never take when there are children to answer the description. 2 Powell Dev., 298 (Jar. Ed.), and the cases there cited. If, therefore, when the persons to take are described as "children" and under that description a grandchild cannot take, if there be children, so we think that where the property bequeathed is described in the will "to be the children of my negro woman Mary" the grandchild will not pass to the said legatees. The grandchild of the slave Mary is therefore to be sold under the residuary clause and the money arising from the sale is to go to William Jones and Sugars Jones in the proportions declared in the will. We approve, therefore, of this part of the decree. 3. We do not agree to so much of the decree as declares William Jones and Sugars Jones to be the general residuary legatees of

the testatrix, Mary Jones. The words of the will are as follows: "All the balance of my estate that is not given to be *sold*, and the *money* arising from the sale I give to my son Sugars Jones one-fifth and all the balance I give to my son William Jones." William and Sugars are to have only the money arising from the proceeds of the *sale*, and not *all her money*. We think that the testatrix could not have intended that her specie and bank notes on hand at her death should be exposed to sale. She must necessarily have meant by the above words such property as was usually the subject of sale. William and Sugars are therefore only particular residuary legatees of that money which arose from the sales of all the salable property not disposed of by the will. The money on hand at the testatrix's death (viz., specie and bank notes) is undisposed of by the will, and it will be distributed among the next of kin. So much of the decree, therefore, as declared that the money on hand belonged to Sugars Jones and William Jones ought to be corrected according to this opinion. The costs of the cause in this Court are to
(249) be paid by the plaintiff out of the funds in his hands. No solicitor's fee to be taxed.

PER CURIAM. Decreed accordingly.

Cited: Swain v. Roscoe, 25 N. C., 203; *McCorkle v. Sherrill*, 41 N. C., 1778; *Alexander v. Alexander, ib.*, 231; *Pless v. Coble*, 58 N. C., 232; *Hogan v. Hogan*, 63 N. C., 225; *Harkness v. Harkey*, 91 N. C., 199.

JAMES RAINEY AND OTHERS v. RICHARD YARBOROUGH, ADMINISTRATOR, ETC.

1. To a bill brought by one surety against his cosurety for contribution, their common principal, or, if he be dead, his executor or administrator should be made a party defendant.

2. A surety has no right to call upon his cosurety in equity for contribution, without showing that he could not obtain satisfaction for the amount he has paid from their common principal.

THIS cause, after being set for hearing, was transmitted on the affidavit of the defendant from CASWELL Court of Equity, at Spring Term, 1838, to the Supreme Court.

The questions in the case are stated in the opinion delivered in the Supreme Court.

Graham and *Norwood* for plaintiff.
J. T. Morehead for defendant.

RUFFIN, C. J. In 1816 Thomas Boulden was appointed by a court in Virginia the guardian of several infant children named Glenn and entered into bonds in large penalties, with the usual conditions for faithfully accounting for the estate of the wards (seven in number), in which the present plaintiffs and Smith, the intestate of the present defendant, were his sureties. Boulden afterwards died, and Eustace Hunt administered on his estate. In 1831 Archibald Glenn, one of the wards, (250) having come of age, preferred a demand against Hunt as the administrator of Boulden and against the said sureties for a large sum as a balance due to him from his late guardian, and by an agreement between Glenn, Hunt and all the sureties of Boulden except Smith the matters in dispute in relation to the guardian account of Boulden and also in relation to the administration account of Hunt as administrator of Boulden were referred to the arbitrament and award of two persons. The arbitrators proceeded to hear the parties, and "awarded that there was a balance due from the estate of said Boulden, deceased, to the said Archibald Glenn of $5,533.35, with the interest thereon from 25 December, 1827." To this arbitration Smith refused to become a party, and after the award he refused also to pay any part of the sum, but died intestate, and the defendant, Yarborough, became his administrator.

The present suit is brought against Smith's administrator by the other sureties or their representatives, and charges that Boulden was indebted to his ward in the sum found, and that he died insolvent, and that Hunt had no assets to satisfy that sum or any part of it, and that those sureties were obliged to pay the whole of it and had done so, and the object of the bill is to compel contribution from the defendant of his intestate's aliquot part.

The answer brings forward divers points of defense, but particularly insists that Smith was not bound by the award, and refuses to admit that any sum was due from Boulden to his ward. A. Glenn, or that Boulden's estate was insolvent, or that Hunt had not assets to pay whatever, if anything, was due.

The case was submitted on the hearing a year ago and was allowed by the court to stand over, that the parties might have an opportunity of sending the cause back for the purpose of framing the pleadings properly, with the view to the determination of the real controversy. The necessity for the insertion of additional matter in the bill and making other parties is obvious.

In the first place, as Smith was not a party to the arbi-
(251) tration the award has no operation against him, but he is chargeable only upon an account to be taken in this cause of Boulden's guardianship. Moreover, the insolvency of Boulden's estate and the full administration of his assets by Hunt are not admitted nor even found in the award, and consequently those facts are now to be established in the cause. That, also, can be done only by taking the administration account in this cause. To the taking of each of those accounts Hunt, the administrator, is an indispensable party; for the plaintiffs have no equity against their cosurety until it be shown that they cannot obtain satisfaction from their common principal. It may be that Hunt has now funds for that purpose. Indeed, from the omission for a year on the part of the plaintiffs to take the steps indicated by the court we are led to suppose that between Mr. Hunt and themselves some understanding may have taken place and that they have in consequence abandoned this suit. But however that may be, it is certain they cannot get a decree upon their present bill; and as the defendant insists on the judgment of the Court being given, we do not feel at liberty to defer it longer, but must dismiss the bill for the foregoing reasons, and with costs.

PER CURIAM. Bill dismissed with costs.

Cited: Allen v. Wood, 38 N. C., 388; *Adams v. Hayes,* 120 N. C., 387.

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(252)

FRANCIS A. WADDELL AND WIFE v. JOHN L. HEWITT.

Where a bill is brought to enforce the payment of a sum of money secured by mortgage, by a sale of the mortgaged premises, and it turns out, upon a sale taking place, that the proceeds of such sale will not satisfy the amount ascertained to be due, and where the creditor has no means of recovering the balance at law, and especially where he has been deprived of his legal securities by the fraud or misconduct of the debtor, a court of equity will order execution to issue for the amount remaining unsatisfied.

UNDER the decree in this case (36 N. C., 475) at the last term the land therein mentioned was sold and did not produce enough to satisfy the amount ascertained by the master's report to be due to the plaintiffs. The plaintiffs' counsel now moved for an execution against the defendant to enforce the payment of the balance of the debt remaining due. This motion was opposed by the defendant's counsel.

Winston and *Iredell* for plaintiffs.
Norwood for defendant.

RUFFIN, C. J. Under the decree made at the hearing of this cause (36 N. C., 475) the master reported to the last term the sum due for principal and interest up to 1 January, 1842, for the three last installments of purchase money, for which the defendant was, by the agreement, to have given bonds payable 1 January, 1840, 1841 and 1842. The report was confirmed and a decree made in conformity thereto that unless the defendant should pay that sum by a certain day named, the land which the plaintiffs had conveyed should be sold for the (253) purpose of raising the same. A sale has been made and reported to this term, but the sum brought by it is inadequate to discharge the debt to the plaintiffs. They now move for further directions, and particularly for a personal decree against the defendant for the residue of the debt and execution thereof according to the statute.

We are of opinion that, in the state the case is, the plaintiffs are entitled to the directions they ask. The former decree established the agreement between the parties, and that the plaintiffs had executed it by making a deed, and that the defendant had accepted it. The deed was exhibited and proved in the cause, and it contains the usual clause of release for the purchase money. The answer admits that no part of the three last installments was paid and that no distinct security was given for them except the original agreement. Consequently the plaintiffs have no remedy at law for the purchase money. *Brockett v. Foscue*, 8 N. C., 64. That gives a jurisdiction to this Court. It is within the ordinary province of equity to relieve against such a mistake or fraud, as well as to compel a discovery of it. If the defendant had given his bonds or other securities on which the plaintiffs could have enforced the payment of the purchase money by action at law this Court would not interfere beyond directing a sale of the premises equitably mortgaged. *Fleming v. Sitton*, 21 N. C., 621. Here the plaintiffs have no such securities. They delivered the deed upon an engagement of the defendant, within a few days thereafter, to deposit Gibbs' bond and his own for the unpaid balance of the purchase money. That he failed to do, and the question is whether equity will allow him to avail himself of the release obtained by such means, and if not, what the decree against him should be. It is too plain to be questioned that equity will put the release out of the way. *Crawley v. Timberlake*, 36 N. C., 346. We are next to inquire as to the extent of the relief. That specifically asked in

the bill on this part of the case is that the defendant should assign Gibbs' bond and give his own bonds with sureties, and that in default of payment as the installments should fall
(254) due the same should be raised by a sale of the land, and to this was added a prayer for general relief. Now, it so happened that before the report and decree all the installments had become payable. If the defendant had offered his bond with proper sureties for any installment not due, the plaintiffs must have accepted it. But he made no such offer, and even now does not offer his bonds, but insists that the plaintiffs can have no further relief, upon the ground that they have no other security but the land. That we have already disposed of by saying that the plaintiffs shall not be prejudiced by the want of securities which they lost by surprise or by the fraud of the defendant. Then, do we fulfill our duty by decreeing that the defendant should now execute those bonds? Certainly not. The money is already due, and the sum has been ascertained to the satisfaction of the defendant himself, who took no exception to the report. This Court was competent and obliged to ascertain the sum due in order to know how much should be raised from the land, if it would bring so much. As there are no existing legal securities for the debt, but the plaintiffs have been deprived of them as stated, equity ought, upon the principle of preventing unnecessary litigation, or for general convenience and the interest of both parties, to decree directly the immediate payment of the money. To order the execution of bonds now would be nothing more or less than begetting suits, to be determined in other courts, for the very matter which this Court has already determined. The decree stands on the same footing with one granting relief as well as discovery in the case of a lost bond, which is a jurisdiction perfectly established.

Against this additional assistance, however, the defendant renews the objection made on the hearing that the plaintiffs have not had a survey made and executed a further deed. Besides what was said before upon it, we may remark that this matter is not even alluded to in the answer, and drops out incidentally in Mr. Lord's deposition, and it does not therefore appear that the defendant had requested such a survey or that the plaintiffs had refused. But there is at present a further and decisive answer to it, which is that the defendant has allowed the
(255) land to be sold under the decree, and has now no interest in a survey of it or its more particular identification.

The bill being sufficiently broad in its statements and prayers to embrace the case as it now appears upon the master's report, we think there must be an absolute decree against the defendant

for the money heretofore declared to be due, deducting therefrom the proceeds of the sale of the land, and that execution may issue therefor, as well as for the costs.

PER CURIAM. Decreed accordingly.

GEORGE HOLLAND AND OTHERS *v.* WILLIAM PECK, EXECUTOR, ETC.

A by will, dated in 1807, devised as follows, after directing the sale of certain bank stock upon the death of his wife: The executors "shall pay over and deliver the money arising from the sale for the benefit of the Methodist Episcopal Church, in America, whereof Francis Asbury is the presiding bishop; this sum to be disposed of by conference or the different members composing the same, as they shall, in their godly wisdom, judge will be most expedient or beneficial for the increase and prosperity of the gospel": *Held*, that this bequest being made to a multitude of persons in their aggregate capacity, which persons have not been incorporated by any act or charter of incorporation, and the object of the bequest being of so indefinite a nature that the Court cannot determine how it should be applied, the same is void, and that the testator therefore died intestate as to the subject-matter of this bequest: *Held also*, that the doctrine of the English courts of chancery in relation to charities, by which in certain cases they direct such bequests to be executed *cy pres*, is unsound in principle and cannot be adopted by the courts of equity of this State.

THIS cause was removed by consent from the Court of Equity of WAKE, at Spring Term, 1842, to the Supreme (256) Court, to be heard upon bill and answer.

The bill alleged, in substance, that William Holland, late of the county of Wake, departed this life on 4 December, 1809; that by his last will and testament, which was duly proved, he directed that the executors therein named should invest the sum of $5,000 in stock of the Bank of the United States; that the interest on the dividends thereof should be paid in certain proportions to his mother-in-law, Frances Rhodes, and his wife, Nancy Holland, during their natural lives, and then directed and bequeathed as follows, viz.: "I further will that upon the death of my beloved wife, Nancy Holland, my executors sell to the best advantage the bank stock, the product whereof is hereinbefore given to my beloved wife and mother-in-law, and the sum raised by the sale thereof it is my will and desire that my executors pay over and deliver for the benefit of the Methodist Episcopal Church in America, whereof Francis Asbury is at

present the presiding bishop; this sum to be disposed of by conference or the different members composing the same, as they shall in their godly wisdom judge will be most expedient or beneficial for the increase or prosperity of the gospel"; that William Peck alone of the executors named in the said will, and all of whom qualified as such, now survives; that in pursuance of the directions of the testator the said executors made the investment of the sum of $5,000 in stock of the Bank of the United States, and afterwards, on the expiration of the charter of that bank, the proceeds of the said stock were invested in stock of the State Bank of North Carolina and subsequently in stock of the Bank of the State of North Carolina, where it now stands in the name of the said Peck as surviving executor; that the said Frances Rhodes and Nancy Holland are both dead, the latter, who was the survivor, having died in 1839. The bill then alleged that the said William Holland left no children, and that the plaintiff William Holland and the intestates of the other plaintiff, Henry W. Miller, were his next of kin and entitled to distribution of his personal estate; and the bill then insisted

(257) that the bequest above cited to the Methodist Episcopal Church, as there described, was void both from the want of capacity in the legatees to take and from the uncertainty as to the objects to which the legacy was to be applied, and that therefore the said bank stock belonged to the next of kin and distributees of the said William Holland, there being no residuary clause in the will. And an account and decree for the amount was prayed against the said William Peck, surviving executor, etc. The defendant in his answer admitted all the facts stated in the bill and submitted to any decree the court might think proper to make.

Badger for plaintiffs.
Iredell for defendant.

GASTON, J. The testator has directed that upon the death of his wife his executors shall sell the bank stock into which he had in a former part of the will directed a portion of his estate to be converted, and "pay over and deliver the money arising from the sale for the benefit of the Methodist Episcopal Church in America, whereof Francis Asbury is at present" (was at the date of the will) "the presiding bishop; this sum to be disposed of by the conference or the different members composing the same, as they shall in their godly wisdom judge will be most expedient or beneficial for the increase and prosperity of the gospel." If this bequest of the proceeds of the stock is to be considered made

to the body therein described for their own benefit, as the former part of the clause would seem to declare, it is not to be questioned but that the bequest must fail for want of capacity in the legatees to take and enjoy what is so given. The Methodist Episcopal Church in America comprise a great multitude of individuals, of whom some are hourly passing out of existence and others coming into being, and, as an aggregate body, is incompetent to hold property of any kind unless by virtue of some charter or act of incorporation it be invested with that privilege as an artificial person. But it is manifest from the subsequent part of the clause that the bequest was made to this body as a mere instrument for carrying into effect an ulterior and higher purpose of the testator; that the (258) money, the subject of this bequest, might be disposed of by the governing minister of the church to such objects and in such manner as they should determine to be most conducive to the diffusion of the doctrines and precepts and influence of the holy gospel. It is therefore a bequest upon trust, and if the trust be one over which the constituted authorities of the country can exercise jurisdiction they will not permit it to be defeated because of incapacity in the designated trustees to take the property, but will fasten the trust upon the property and make or imply trustees or take other effectual means to cause it to be executed. But if the trust be one over which they cannot assume jurisdiction, then it necessarily fails; for, in the legal sense of the term, *that* can never be a trust which leaves anywhere an uncontrollable power of disposition. Such a power constitutes ownership.

It cannot be objected that the *end* sought to be accomplished by the testator is against law. In every country where justice, peace and good will among men are held in esteem religion must always command the highest veneration. Abstractedly from its intrinsic excellence, it must be known and acknowledged as the surest basis on which to rest the superstructure of social order. It cannot be, indeed, that every religious creed of every mode of worship should be equally acceptable to God or in its practical results equally beneficial to man. In many countries the lawmakers have undertaken to declare what is the true faith and to prescribe which is the rightful worship, and either prohibit all others as unlawful or tolerate them merely out of indulgence to human frailty. Where religion is thus established by law, of course, the courts cannot there recognize an appropriation of funds or property to the support of a prohibited religion as entitled to the protection of the law, nor will they even uphold such appropriation in aid of a tolerated religion further than

will accord with the limited indulgence which the law has granted to it. But with us it is incorporated into the very elements of our social organization "that all men have a natural and unalienable right to worship Almighty God according to the
(259) dictates of their own consciences," and "that there shall be no establishment of any one religious church or denomination in this State over any other," but "that all persons shall be at liberty to exercise their own mode of worship." It does not hence follow that religion is less the object of public veneration and regard with us than in those countries where a church is established by law, but that the State disclaims the right of pronouncing what church is orthodox, and extends its protection equally to every religious church and every religious denomination. Our Constitution does not treat the worship of God as indifferent, "either in reference to the welfare of individuals or to the common welfare, but assumes it to be a moral duty incumbent upon all men and their highest privilege as intelligent and accountable beings—a duty that is best performed, both as respects honor to God, the comfort of each man and the peace and order of society when that privilege is subject to no legal restraint" (*S. v. Jasper,* 15 N. C., 323), and a privilege which is most efficaciously secured and protected when it is thus solemnly recognized as the unalienable right of every individual.

The *end* or *object* of this bequest is not only not unlawful, therefore, but it is one entitled to the highest favor which, according to our system of jurisprudence, can be extended to a bequest for any public purpose, however beneficial. It is clearly within that class of cases which are termed gifts of charity. But while there is no difficulty in declaring that the object of the testator is a public, useful and beneficial object, and therefore the bequest a charity within the *legal* meaning of that term, yet it is apparent that the precise purpose of the testator in the bequest cannot be collected therefrom. The disposition of the money is directed to be made by the conference "as they shall, in their godly wisdom, judge will be most expedient or beneficial for the increase and prosperity of the gospel." The destination of the money is to the advancement of the gospel. But the means by which that end is to be effected are left entirely to the uncontrolled discretion of the conference. Is the money to be employed in building churches, in establishing schools,
(260) in paying ministers, in publishing books or in supporting the poor? These and many such as these would appear to be means tending to promote the spread and increase of the gospel, and any of these, had they been definitely expressed, might be regarded as specific charitable objects which the courts

could cause to be executed, although the trustees designated by the testator were unable to perform them. But here is property given upon a trust, charitable, indeed, but of an indefinite character, and the trustees named by the testator are incompetent to take or hold the property so given; and the question presents itself distinctly on which, though we have recently had occasion to allude to it, we have refrained hitherto from making up, much more from expressing an opinion (see *S. v. McGowen, ante*, 9, and *S. v. Gerard, ante*, 210), what is the disposition which by our law must be made of property so given?

It is certainly the general rule that where property is given upon a clear trust, but for uncertain objects, the subject of such trust is regarded as undisposed of, and the benefit of the trust results to those to whom the law gives the property in default of disposition by its owner. In the case of a trust there must be somebody in whose favor the court can decree a performance. If those for whom a trust is created are not sufficiently indicated or may not be permitted to have the benefit thereof, the trust is ineffectually disposed of by the owner and the law disposes of it for him. *Morrice v. Bishop of London*, 9 Ves., 405. But this doctrine does not obtain in England with regard to gifts for charity. It is there now settled upon authorities which it is deemed too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the indefiniteness of the object, but the particular mode of its application will be directed by the King in some cases and in others by the Chancellor. The cases have there gone this length, that if a testator has manifested a general intention to give to *charity*, it matters not how uncertain the objects may be, or whether the purposes directed be lawful or not, or whether the bequest can be carried into execution or not, according to the testator's wishes—in all these and (261) in the like cases the courts will sustain the legacy as a legacy to charity and execute it, as they call it, *cy pres*, that is, according to their notions of charity, or upon a direction from the Crown under the sign manual as to the charitable purpose to which it shall be applied. And these cases are understood to proceed upon the principle that where a testator has manifested an intent that his property shall be applied to a charitable purpose, charity, *at all events*, is the purpose of his will, and the courts will find out for him some charitable purpose if he has not sufficiently declared his, or substitute a charitable disposition of their own in lieu of that which he has declared but which the law will not execute. The principle is admitted to be unsound, and several of the decisions founded upon it are revolting

to common sense. But, wise or unwise, reasonable or absurd, the law is there so settled, and the judicial tribunals of that country are bound so to administer it, however repugnant it may be to their own sense of right.

But we have no instance in this State, or, as far as we are able to learn, in any of the States of the Union, where this extravagant doctrine on the subject of charities has ever been acknowledged, and surely the courts of this country ought to pause long before they adopt it. By affecting to consider charity as the substance and all else as but the formal part of a will, and compelling the testator to be charitable in our way, when we do not know in what way he purposed to be charitable or when the charity he purposed cannot be executed, we shall in effect be making a will for him where he is silent and altering it when his declared intention necessarily fails. Especially odious and dangerous would be the exercise of such a power in the case of the disposition of property to religious uses imperfectly defined. Where there is but one religion known to the law, and a religious hierarchy established by the law, there may be some consistency of plan in the declaration of more defined uses in cases of this description. But where all religious denominations are equal before the law, what guide is the judge to have when called on to make such a declaration? Is he to act accord-
(262) ing to his own faith or upon his own opinions of religious truth, or according to what he believes to have been the opinions or views of the testator? If according to the first, is it not almost certain that his declaration of the trust will make it a very different trust from what the testator intended? And if according to the latter, what certainty can he have that he knows, understands and follows them out? In the case before us the testator willed that the proceeds of this property should be applied to the increase and prosperity of the gospel as the Conference of the Methodist Episcopal Church in America should in their godly wisdom judge expedient for that purpose. In that wisdom he confided, and he did not purpose that the property should be disposed of otherwise than that wisdom might direct. To direct any other disposition would be to substitute our will for his.

But not only have the courts in this country as yet forborne from adopting this settled, but at the same time confessedly wrong, principle of the English law on the subject of charities, but this Court has on one occasion directly repudiated it. In *McAuley v. Wilson*, 16 N. C., 276, *Judge Henderson* remarks: "If there be any one who can compel the execution of the trust—that is, the application of the trust fund according to the direc-

tions of the devisor, then it is a valid trust, at least so much of it as is necessary to answer the intent of the founder. If there be more than is necessary for that purpose, the excess results to the heir at law or next of kin. For we do not, as they do in England, apply it to other objects of a similar kind by what is called the doctrine of *cy pres*."

It is the opinion of this Court that the bequest in question, being made for a multitude of persons in their aggregate capacity as a religious denomination in America, which persons have not been incorporated by any act or charter of incorporation, and to be disposed of as the ministers of that denomination shall deem most expedient for the increase and prosperity of the gospel, the same cannot be carried into execution, and is therefore void. The consequence necessarily is that the deceased, in regard to the subject-matter of this bequest, must be declared to have died intestate, and the plaintiffs, who are (263) admitted to be and to represent his next of kin, are entitled to have an account thereof from the defendant.

PER CURIAM. Decreed accordingly.

Cited: Bridges v. Pleasants, 39 N. C., 30; *Faribault v. Taylor*, 58 N. C., 222; *Keith v. Scales*, 124 N. C., 515; *St. James v. Bagley*, 138 N. C., 399.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1842.

WYATT CANADAY v. EMILY NUTTALL AND OTHERS.

1. A having a judgment at law, issued a *fi. fa.*, which was returned levied on certain property. He then issued several successive *venditioni exponases* which were returned "stayed by order of the plaintiff." A *fi. fa.* was then issued to another county, and returned "nothing to be found": *Held*, that, under these circumstances, A was not entitled to the aid of a court of equity against one alleged to hold fraudulently the property of the debtor, because it did not appear that the property mentioned in the *venditioni exponas* would, upon a sale, prove insufficient to discharge the plaintiff's demand.

2. Under a *fi. fa.* clause attached to a *venditioni* the sheriff cannot seize any property until he has sold the property specified in the *venditioni*.

THIS cause was transmitted by consent of parties from WARREN Court of Equity, at Spring Term, 1842, to the Supreme Court. The bill had been originally an injunction (266) bill, but upon the coming in of the answers in the court below the injunction was dissolved and the bill continued over as an original bill.

The material facts of the case are set forth in the opinion delivered in this Court.

Saunders for plaintiff.
Badger for defendants.

DANIEL, J. The plaintiff is the assignee of a judgment for $666.60, obtained in Granville County Court at May Term,

1838, by William D. Williams against Alexander Nuttall, Charles Nuttall and James Nuttall. The plaintiff states in his bill that executions have been issued on the said judgment to Granville and Warren counties and that the sheriffs returned the same *nulla bona*. He states that Emily Nuttall, the wife of James Nuttall, obtained a decree in equity by fraud against her husband for the sum of $1,500; that she issued execution on the same, and has sold and raised out of the property of her husband the sum of $782. The bill further states that James Nuttall had made a deed of trust of his property to secure William Robards and other creditors; that the debt to Robards was not satisfied; that the plaintiff paid $400 to Robards and took an assignment from him of all his interest in the said deed in trust; that James Nuttall ran off the negroes and wasted and destroyed all the other property covered by the deed in trust. The bill prays that the sheriff be directed to pay the $782 into the clerk's office and that the defendant Emily be enjoined from proceeding against the sheriff, and that the same money may, on the hearing of this cause, be decreed to the plaintiff in part satisfaction of his claims against James Nuttall. James Nuttall and his wife, Emily, have answered the bill. They admit the judgment mentioned in the bill and that the plaintiff is the assignee of the same, but they deny that the plaintiff paid Robards $400 or any other sum to remove the deed in trust on the property of James Nuttall. These defendants say that the debts secured by the said deed in trust have been satisfied
(267) by the sale of the property conveyed therein. The defendant James says that he believes that the execution issued on the plaintiff's judgment, returnable to August Sessions, 1839, was returned "satisfied." The defendants do not admit that the plaintiff has any claim, either under the deed in trust or the said judgment. They deny that the decree obtained by the said Emily against her husband was fraudulent as to his creditors; but they state that it was for a debt justly due to the said Emily under the following circumstances: The said Emily had been a tenant in common with others in a tract of land, and, for the purpose of division, the land was sold under a decree of a court of equity. Her part of the money arising from the sale had not been secured to her, as in law it should have been, but the same had been delivered to her husband, without any privy examination on her part, and he had made use of it, and for this money, which in law is considered as her land, she obtained against her husband the said decree, which is alleged by the plaintiff to be fraudulent as to her husband's creditors. There was a replication to the answer.

There is no proof in the cause that the plaintiff purchased from Robards any interest in the deed in trust or received from him any assignment of interest under the said deed. As to the other point in the cause, viz., whether the decree obtained by Emily against her husband was fraudulent or not as to the creditors of her husband, we think it unnecessary now to enter into the examination of it, because it appears in evidence that a *fi. fa.* issued on the plaintiff's judgment returnable to November Sessions, 1838, of Granville County Court, and the sheriff returned on the same that he had "levied on 1,375 acres of land and ten slaves as the property of Alexander Nuttall, and too late to make the money." Whereupon a *venditioni exponas* with a *fi. fa.* clause issued returnable to February Sessions, 1839, and was returned "Stayed by the plaintiff." A *venditioni exponas* issued to May Sessions, 1839, and was returned "Stayed by the order of the plaintiff." A *venditioni exponas* with a *fi. fa.* clause issued to August Sessions, 1839, directed to the Sheriff of Granville and a *fi. fa.* to the Sheriff of Warren. The (268) execution issued to Granville was returned "Stayed by the plaintiff." That to Warren was returned "Nothing to be found." In England a *venditioni exponas* with a *fi. fa.* clause ordinarily does not issue but in cases where the property taken under the original execution has been appraised at a value less than the debt in the execution. Arch. Forms, 165; Bingham Executions, 263. In this State the sheriff never causes property levied on by him under a *fi. fa.* to be appraised. Therefore here a plaintiff may issue a *venditioni exponas* with a *fi. fa.* clause in all cases where the property levied on remains to be sold. But the sheriff cannot seize any property under the *fi. fa.* attached to the *venditioni* until he has sold the property specified in the *venditioni*. *Allemong v. Allison*, 8 N. C., 325. The plaintiff on his execution to Granville, where the judgment was obtained, had seized property apparently sufficient to make his debt. He has prevented the sheriff from selling the same. Where was the necessity of his issuing a *fi. fa.* to Warren? The return of *nulla bona* on that execution, under all the circumstances in this case, did not bring him within the rule laid down in *McKay v. Williams*, 21 N. C., 398, and in many other cases, that before a judgment creditor can invoke the aid of a court of equity he must show that he cannot get satisfaction of his debt at law.

The bill is dismissed with costs, but without prejudice to the plaintiff's preferring another bill should he be unable to get satisfaction of his debt at law.

PER CURIAM. Bill dismissed without prejudice.

(269)

THOMAS J. SANDRIDGE v. JOSEPH SPURGEN, ADMINISTRATOR, ETC.

1. The act of Assembly, Rev. St., ch. 46, sec. 23, allowing to executors and administrators nine months from the time they qualify to plead to any original suit brought against them, does not apply to suits in equity.

2. An act of Assembly prescribing rules of practice does not apply to courts of equity, unless those courts are named in the act, or the proceedings therein be within the mischief for which the act was meant as a remedy.

3. In equity an executor is chargeable with assets only upon his admission of them or upon the report of the master that he has them.

4. The filing of a bill, or even a decree to account, does not bind the assets so as to prevent an executor from paying other creditors in equal degree, unless it be a bill in behalf of all creditors and a decree thereon for an account.

THIS was an appeal from an interlocutory order of the Court of Equity for RANDOLPH, at Fall Term, 1842, his Honor, *Settle, J.*, presiding.

The bill was filed in September, 1842, returnable to Fall Term, 1842, of Randolph Court of Equity, for the foreclosure of a mortgage of a negro slave, and the process on the bill had been duly served on the defendant as administrator of George Hoover, deceased, who had given the mortgage. At the return term, viz., the Fall Term, 1842, the following entries were made on the minutes of the court: "The defendant alleges that letters of administration with the will annexed were granted to him on the estate of his testator at August Term, 1842, of Randolph County Court, and that he is not bound to plead or answer until nine calendar months from that time. The plaintiff's counsel contends that the defendant is bound to plead, answer or demur at this term, and moves for judgment *pro confesso*. His
(270) Honor, after hearing the counsel both for the plaintiff and the defendant, doth adjudge that the defendant is not bound to plead, answer or demur to the plaintiff's bill until after the expiration of nine calendar months from and after his taking upon himself the office of administrator. From this judgment the plaintiff prayed for and obtained an appeal to the Supreme Court, giving bond, etc."

Swaim for plaintiff.
Mendenhall for defendant.

RUFFIN, C. J. On 7 March, 1842, George Hoover exe- (275) cuted to the plaintiff a mortgage of a slave to secure the payment of a sum of $500 and died in May following, having made a will, which was proved at August Term, 1842, of Randolph County Court, at which time administration with the will annexed was granted to the defendant. The plaintiff then filed this bill to foreclose the mortgage or to have the money raised by a sale of the slave. At September Term, 1842, of the Court of Equity for Randolph County, the defendant not having put in a plea, answer or demurrer, the plaintiff moved the court that he might take the bills *pro confesso* and set the cause for hearing thereon. But the defendant opposed the motion, on the ground that he was not bound to answer or plead until nine months after taking administration, and the court, being of that opinion, refused the motion, and the plaintiff appealed by leave of the court.

The point on which this appeal was taken arises on the act of 1828, ch. 8 (Rev. Stat., ch. 46, sec. 23). By the fourth section it is enacted that "no executor or administrator shall be bound or compelled to plead to any original suit brought against him in any court until the expiration of nine calendar months from and after his taking upon himself the office of executor or administrator." It was held by his Honor that this enactment embraced the present suit in the Court of Equity. But in that construction we do not concur. The language of the act in itself is appropriate to proceedings in a court of law, and it cannot embrace proceedings in courts of equity unless (276) those courts had been named in the act or the proceedings therein be within the mischief for which the act was meant as a remedy. Statutes which confer rights or regulate contracts must be observed by all courts. But those which regulate matters of practice or the course of proceeding have never been considered as applying to courts of equity unless mentioned. The reason is that those courts have a peculiar jurisdiction and a settled course of proceeding, subject to be modified, in the discretion of the Chancellor, according to the justice of each case, and it cannot be supposed that the Legislature intended to abrogate that discretion and alter the course of the court without plain words to that effect and directly applicable to the Court of Equity; for the Legislature knows full well that although equity professes to follow the law in respect to rights, it does not profess to follow the law in its remedies and course of proceeding, but quite the contrary. And therefore, when a statute undertakes to regulate the practice of courts it cannot embrace the courts of equity without plain words or an equally plain implication.

This act has no such language. Nor is there any such mischief in equity as that which existed at law and rendered this act necessary there. At law assets are admitted unless they are denied by plea; and the plea must truly state the condition of the assets at the commencement of the suit or at the time of the plea. And there can be no doubt but the purpose of the Legislature in extending the time for pleading was to give an executor the opportunity of learning the degree of the testator's indebtedness and ascertaining the assets, by a sale and other means, before he was called on to conclude himself by pleading. But in equity an executor is not chargeable with assets upon the silence of his answer as to them, but only upon an admission of them or upon the report of the master that he actually has them. *Mitchell v. Robards,* 17 N. C., 478. And the filing of the bill or even a decree to account does not bind the assets so as to prevent the executor from paying other creditors in equal degree, unless it be a bill on behalf of all creditors and a decree thereon (277) for an account. *Allison v. Davidson,* 21 N. C., 46. There could be no prejudice to the estate, therefore, or to the defendant, by requiring him to proceed immediately in the cause, nor any motive for not answering but the mere arbitrary purpose of delaying the plaintiff. No question of assets could, indeed, be made in this particular cause; for on a bill to foreclose there is no decree for the debt against the general assets, but only that the pledge become absolute or that at the instance of one of the parties it be sold and the proceeds applied in satisfaction. Whether regard be had to the words of the act or to the necessity which caused it, we think it equally clear that it cannot be construed to change the course of the Court of Equity, and the defendant should have been required, according to the act of 1782 (Rev. Stat., ch. 32, sec. 4), *"to put in his answer or plea, agreeably to the practice in chancery, or demur,"* unless, upon reasonable cause shown, further time had been allowed.

This opinion will be certified accordingly. The defendant must pay the costs in this Court.

PER CURIAM. Ordered accordingly.

Cited: Marsh v. Grist, 62 N. C., 350.

(278)

JOHN JAMES v. HENRY A. LEMLY AND OTHERS.

1. On the hearing of an injunction bill, when a reasonable doubt exists in the mind of the court whether the equity of the bill is sufficiently negatived by the answer, the court will not dissolve the injunction.

2. In such cases much must depend upon the sound discretion of the court to whom the question of dissolution is preferred.

THIS was an appeal from an interlocutory order of the Court of Equity of STOKES, at Spring Term, 1842, his Honor, *Dick, J.*, presiding, refusing a motion to dissolve the injunction which had been granted in this case.

The facts are set forth in the opinion delivered in this Court.

Morehead for plaintiff.
Waddell and *Iredell* for defendant.

DANIEL, J. The plaintiff states in his bill that one Mansell made his will and appointed Jacob Conrad and another his executors, and left a legacy to his daughter, the mother of the plaintiff and also the wife of one Henry Shore. He further states that in 1829 he, being in want of money, applied to his mother to aid him, which she agreed to do if Conrad, the executor of her father, would let her have any. Conrad advanced the money—$175—and took a bond from the plaintiff, with Henry Shore and his wife, Mary, as sureties, payable to the executors, the said Conrad alleging that it was necessary for him to take the bond in this way and retain it until he made a final settlement with Shore and wife, and then the said bond should be surrendered; and he (Conrad) was to have a credit for the amount in the said settlement. The plaintiff further (279) states that a short time thereafter the settlement for the legacy was made and that Conrad was credited for the amount of the said bond, but for some excuse or other the bond was not delivered up. The plaintiff, being informed by his mother and Henry Shore that the bond was paid and satisfied, gave himself no more trouble about it. In 1835 Conrad requested the plaintiff to take up the old bond, which had been made payable to him as executor, and give him three new bonds, payable to himself only, for the amount of the old bond and interest. The plaintiff then told him that the old bond was paid and satisfied. Conrad assured him that it was all right and that he would have nothing to pay, and he gave as a reason for his asking for the new bonds that the creditors of Shore were pressing him and

that it was necessary for him to hold some evidence of the amount advanced; and he moreover said that one Lehman and others had a bill in equity then pending against him and Shore trying to subject Shore's interest in the aforesaid legacy to their debts. Conrad pressed the plaintiff to execute the said three bonds, which he then had with him, ready written, particularly assuring him that he never should be compelled to pay them; that his object was to keep the bonds as vouchers to show how he had managed the funds of the testator. The plaintiff thereupon executed three bonds. The transaction thus remained up to the death of Conrad, which took place in 1839. The plaintiff further states that the defendants are the executors of Conrad, and that they, finding the aforesaid bonds among the papers of their testator, have brought suit on them at law against him, obtained judgments and are now pressing their executions. The plaintiff says that he has often informed the defendants of the truth of the transaction and insisted that the bonds should be surrendered to him. Such are the statements of the bill, which prays for an injunction.

The defendants in their answer states that they are the executors of Conrad; that they found among their testator's papers the three bonds mentioned in the bill; that they have obtained judgments on the same and issued executions. They state
(280) that they believe the debt to be justly due. They admit that Conrad became the executor of Mansell before 1829 and that Mrs. Shore was the daughter of Mansell and the mother of the plaintiff, and that she was a legatee under her father's will. And they state that Henry Shore, the husband, was indebted to Conrad in a sum much larger than the legacy coming to his wife; that Shore assigned the whole legacy to Conrad in part satisfaction. They further state that neither the original bond nor the three bonds substituted for it have been satisfied, and that they have the most conclusive evidence that the same are still due. They say that they have no knowledge of any agreement that the bonds were to be given up, as stated in the bill, or that he was allowed the same in his settlement. They state their belief to be that he might have made the debt payable to himself, so that it might be more easily and certainly collected.

The court refused to dissolve the injunction, and ordered it to stand over for the parties to take proofs, and the defendant, by permission of the court, appealed from this interlocutory order.

If Conrad only loaned the money to the plaintiff out of Mansell's estate why did he let it remain uncollected up to the death,

a period of ten years? There was no relationship or particular friendship between them. The defendants admit that Mrs. Shore's legacy was paid in no other way than by the assignment of it by Shore to Conrad in satisfaction of a debt which he owed Conrad. The deed or evidence of assignment, which must be in the defendant's possession, is not exhibited in the answer. We do not see the date or contents of that instrument. We must conclude, however, that it was made after the date of the first bond, which was executed by the plaintiff, with Shore and his wife as sureties. The defendants state in their answer that they have the most conclusive evidence that the debt is due. Then why not in their answer exhibit to the court that most conclusive evidence? Is it Shore's deed of assignment? We admit that a sight of that instrument might throw much light on the question. The amount of Conrad's debt against Shore, (281) the amount of the legacy, the amount of the debt paid by Shore by force of the assignment, the date of that assignment—all these material things are wanting, which would be great aids in the right understanding of the case. The foregoing circumstances, connected with the staleness of the demand, the fact of Conrad giving up a bond with sureties and taking other bonds without surety, the length of time which then elapsed before his death and nothing said about these bonds, the defendants being executors and answering only as to their belief, the inartificial state of the pleadings, all taken together raise a reasonable doubt upon the mind of the Court whether the equity in the bill is sufficiently negatived by the answer to authorize an order for the dissolution of the injunction. The defendants are amply secured if they should get a decree upon the hearing. A short delay will be to them but a very little injury. In cases of this kind, viz., whether the Court will dissolve an injunction on hearing the answer only or will order the bill to stand over for proofs, much must depend upon the sound discretion of the judge who is to decide the question. After all the consideration which we have given this case we are not prepared to say that the order made by the Superior Court is erroneous. Therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Miller v. Washburn, 38 N. C., 165; *Monroe v. McIntyre,* 41 N. C., 69; *Lowe v. Comrs.,* 70 N. C., 533.

(282)

JAMES SHEARIN AND WIFE v. THOMAS EATON'S EXECUTOR.

After a lapse of thirty-four years from the time a legacy became due and the parties entitled had capacity to sue, and of thirty years from the death of the executor, who was amply able to discharge the legacy, which was small, and lived in the immediate neighborhood of the legatee, who was poor, the Court *held* that these circumstances were sufficient proof to them that the legacy had been satisfied.

THIS case was transmitted to the Supreme Court by consent of the parties from WARREN Court of Equity, at October Term, 1842.

The facts are set forth in the opinion delivered in this Court.

B. F. Moore for plaintiff.

Badger and *W. H. Haywood* for defendant.

DANIEL, J. In 1790 Giles Carter made his will and appointed Thomas Eaton his executor, who in the same year qualified as such. The testator bequeathed as follows: "All the rest of my estate I desire may be kept together for the use of my wife and four children" (named Dolly, etc.) "until the said children come of age; when the eldest comes of age a division of the whole to be made." The widow died in 1795. In 1803, Dolly, then sixteen or seventeen years old, married James Shearin, then about eighteen years old. James Shearin and his wife are the (283) plaintiffs, and filed this bill against the executor of Thomas Eaton, in 1840, to recover her share of the said legacy. The plaintiffs in their bill state that in less than a year after their marriage they applied to the executor for payment of their legacy, and that the executor admitted that he held property that they were entitled to and that he would settle with them at another day, and that he in the said year purchased a horse for them as a part payment. The plaintiffs state that the executor never settled the claim, and died in 1810, after making his will and appointing his son, the defendant, his executor, who qualified. The plaintiffs further state that the present defendant frequently promised to settle and pay them their legacy, and this kept them from suing until about 1839, when he told them he would not pay, and they might go to law for their legacy. The bill prays an account, etc.

The defendant in his answer admits that his testator, Thomas Eaton, was the executor of Giles Carter, who died in 1790. He admits that a legacy was given by Carter's will to his daughter Dolly, as stated in the bill, and that she married James Shearin,

the other plaintiff, in 1803, and that his (the defendant's) testator died in 1810. The defendant then states in his answer that he fully believes, and therefore avers, that at and long before the death of the said Thomas Eaton the whole of the estate of Giles Carter had been settled and disposed of in a due course of administration. The defendant denies that he ever admitted or promised to pay the plaintiff's demand, and he insists that the claim of the plaintiff is, *from the lapse of time*, to be presumed in this Court to have been paid, satisfied, renounced or released, and he insists on such presumption.

A replication is put in to this answer.

In looking into the testimony it appears to us that Carter's estate was but small (he was the overseer of Eaton), and all his children were of tender years at the time of his death. The plaintiff Dolly was the youngest, and possessed no means of support but in this legacy. The widow and children lived on the land of Eaton. In 1804, after the marriage of Dolly, it appears that a horse and some other articles for house- (284) keeping were advanced to them. The executor lived six years thereafter. The husband was of full age four years before the death of the executor. The parties all lived in the same neighborhood. The executor was a man of wealth, and in the habit of paying his debts in a reasonable time. The time which has elapsed since the husband came of full age (1806) and before the filing of this bill has been thirty-four years. There is nothing in the depositions which tends to show an admission of liability by the executor or the present defendant from the time the husband came of age up to the bringing of this suit. The excuses set forth in the bill for not bringing the suit sooner, viz., that the executor, and the defendant afterwards, promised them from time to time to settle, etc., are all denied in the answer and are not supported by any proof. The demand is stale—the executor has been dead for thirty years, and his vouchers and accounts of the estate perhaps lost and his witnesses may be dead. Does the length of time (thirty-four years) raise a presumption of satisfaction? The plaintiffs insist that there is no such presumption, and rely on *Tate v. Greenlee*, *Falls v. Torrance*, and *Ives v. Sumner*. In *Tate v. Greenlee*, 9 N. C., 486 (a case confusedly and badly reported), there was, it appears, a lapse of but sixteen or seventeen years after a person able to sue came into *esse* before the suit was commenced. Miss Bowman, the legatee, was an infant without guardian. She married William Tate when she was under age. Fifteen years thereafter he commenced the suit against the administrator of the executor of his wife's father for her legacy, the executor having been then dead

but two years. Tate died a short time thereafter. The report states that the first moment the wife became a free agent she made herself a party to the suit. On a motion to *dismiss* the bill without reading the answer or the proofs the court refused the motion, but proceeded to the hearing of the cause. In *Falls v. Torrance,* 9 N. C., 490, the bill stated that the defendant had by his *declarations* induced a belief that he did not contest the complainant's right to the property. Under this circumstance the court refused a motion to *dismiss* the bill before an-

(285) swer and a hearing, although thirty-five years had elapsed.

If the allegation in the bill was true it repelled the presumption of satisfaction or abandonment. In *Ives v. Sumner,* 16 N. C., 338, the legatee was an infant, and she married John Sutton in 1805. She and her second husband filed the bill against the executor of her father for the legacy, in 1825, after a lapse of twenty years from the first marriage, when and during all the said time suit might have been commenced against the executor. The Court in giving the opinion say: "After such a lapse of time, although it forms no bar to the suit, it may be apprehended that exact justice could not be done if the parties were to go into a settlement of their accounts. This, however, must be done if the bond (release by John Sutton) introduced by the defendant does not interpose a sufficient bar." The Court then proceed to discuss the question as to the validity of the release, and they finally decided the cause in favor of the defendant on the ground that the bond given to the executor by the first husband operated as a release of the legacy. It is conceived that as there was a clear ground for the Court to decide the cause for the defendant on the second point in the case the first point (lapse of time) did not particularly exercise their judgment. Let that be as it may, the time which had elapsed in the case now before us was much greater, it being thirty-four years. During all this time there was a person in being (the husband) capable of commencing a suit for the legacy. This length of time taken in connection with all the other circumstances in the case induces us actually to believe and so to declare that this legacy has been satisfied. See *Ivey v. Rogers,* 16 N. C., 58, and *Petty v. Harman, ib.,* 191.

The bill must be dismissed and with costs.

PER CURIAM. Bill dismissed with costs.

(286)

AMOS JACOBS v. GEORGE W. LOCKE AND OTHERS.

1. Where one who contracts to sell a piece of land to another cannot make a legal title to the whole, his vendee may insist upon a specific execution of the contract so far as the vendor can execute it.

2. And the vendee must pay the vendor, for the part for which a good title is conveyed, the value of such part, proportioned to the price which was to have been paid for the whole—and not merely in proportion to the number of acres.

THIS cause was transmitted by consent of parties from the Court of Equity of IREDELL, at Fall Term, 1842, to the Supreme Court.

The facts of the case are stated in the opinion delivered in this Court.

No counsel appeared in this Court for either party.

GASTON, J. The bill was filed by Amos Jacobs, the plaintiff, against John Madison, of the State of Kentucky, and George W. Locke and several others, some of whom are infants and defend by their guardian, the heirs at law of Francis Locke, deceased, defendants, and it sets forth that in 1818 or 1819, before the passing of the statute entitled "An act to make void parol contracts for the sale of land and slaves," the defendant Madison purchased from the late Francis Locke a certain tract of land, in the said bill particularly described, containing 46¼ acres, at the price of $2 per acre, and in pursuance of such purchase, with the consent of the said Francis, entered into the possession of the said land, built thereon a house and cleared a part of the land for the purpose of cultivation; that the said Madi-
son paid at the time of purchase twenty-four or twenty- (287)
five dollars, part of the price; that in August, 1820, the said Francis died intestate without having made a conveyance of the land; that the said Madison sold the said land to the plaintiff at the price of $3 per acre, and he entered upon the land and further improved the same; that at the November Term, 1820, of Iredell County Court, Ross McLelland and Robert Simonton administered on the estate of Francis Locke; that the plaintiff paid to the said administrators the residue of the purchase money due from Madison, and the money so paid was by the said administrators applied to the satisfaction of debts due from their intestate; that in consequence thereof the said administrators, believing that they had power so to do, by

deed bearing date 15 June, 1823, conveyed the said land to the plaintiff, who was permitted to enjoy the same unmolested until long afterwards, when the defendants, the heirs at law of Francis Locke, instituted an action of ejectment against him and, having obtained a judgment therein, turned him out of possession and then brought an action for the mesne profits. And the prayer of the bill is for an injunction to restrain the prosecution of the said action and for a conveyance from the defendants, the heirs at law of Francis Locke, of their legal title to the land, and for general relief. Publication has been made as to the defendant Madison and the bill taken *pro confesso* against him. The other defendants put in their answers, and thereby, after admitting that they are the heirs at law of Francis Locke and as such have evicted the plaintiff from the possession of the land described in the bill and instituted their action for the mesne profits, they stated that the said Francis did at the time stated in the bill contract with the defendant Madison to sell to him at the price of $2 per acre, not the tract of land described in the bill, but a piece containing 70 acres, being part of a tract containing 90 acres adjoining his home place, retaining 20 acres of the said tract next to the home place, being valuable bottom land on the river, and that the defendant Madison paid him in part therefor a beef valued at $12, and no more; that Madison entered
(288) into possession under his purchase and so continued until he was compelled to leave the State because of a criminal charge against him; that after the said Madison went off the plaintiff undertook to buy from the administrators of the said Francis and took a conveyance for the tract of 46¼ acres described in the bill, which covers the 20 acres reserved by the said Francis, when he contracted to sell to Madison, and 26¼ acres of the 70 acres so contracted to be sold; that this purchase was made from the administrators as an original purchase, and not as being in execution of the contract made by the intestate with the said Madison; that upon this contract the plaintiff gave his note for $138, the consideration of the purchase, to the administrators, and one of them, Robert Simonton, passed the same off to one Francis Young in payment of the said Robert's individual debt, and that they were ignorant whether the administrators ever accounted with the estate of their intestate for the said note or the money thereby secured; and they averred that they never heard that the plaintiff pretended to set up a claim to the land in dispute through Madison until after the trial of the action of ejectment, and that the transaction between the plaintiff and the administrators of their ancestor took place without the assent of the defendants. Upon this answer the injunction which had

been awarded upon the filing of the bill was dissolved, and the plaintiff, praying leave to continue his bill over as an original, entered a general replication to the answer.

Upon the proofs there is no contrariety of testimony. It is established by many witnesses that in 1818 or 1819 the late Francis Locke sold to the defendant Madison a tract of land called the "Stewart place," and supposed to contain 70 acres, at the price of $2 per acre; that Madison paid twenty-four or twenty-five dollars and was to pay the residue of the price in his labor as a shoemaker in making boots and shoes out of leather to be furnished by Locke; that the leather was not furnished nor the labor done in Locke's lifetime, but Madison removed up and remained on the land until after Locke's death. It appears further that Locke died much indebted, and that after his death, some time at or before June, 1823, (289) many of the creditors had a meeting with his administrators for the purpose of a settlement, when it became a matter of consultation what was proper to be done in relation to the contract of sale with Madison respecting the said land. One of the administrators, McLelland, knew of the contract and of the payments made thereon, and all this was also known to and declared by George W. Locke, one of the defendants in this suit and who was present at the said conference. Madison and the plaintiff, who were both present, declared that the latter had purchased the interest of the former in the said land and was ready to make the payment remaining due on receiving a conveyance of the title. The defendant George W. Locke was perfectly willing that this arrangement should be made, and the creditors and administrators approved of it as one beneficial to the estate. But a difficulty arose in this, that one Solomon Jacobs claimed a part of the land so contracted to be sold as being held by him under a superior title and offered such proof of his lines by one Losenby that the administrators were unwilling to convey any more of the land than was left free from dispute as to title. It does not appear distinctly whether the defendant George W. Locke was a party to the arrangement ultimately made, but it was then agreed that the plaintiff as the assignee of Madison should take so much of the land sold, amounting to about 46 acres, as was uncovered by the claim of Solomon Jacobs, at the price of $2 per acre, pay to the administrators of Locke what remained due at that rate from Madison and take to himself a conveyance of the land. The plaintiff thereupon paid or secured to be paid to the administrators the balance estimated to be so due from Madison. They were charged therewith in their set-

tlement with the creditors of their intestate, and they, on 5 June, 1823, executed their deed for the land, describing it by metes and bounds as set forth in the plaintiff's bill.

Upon these facts it seems to us that the plaintiff ought to have some relief; but we are not prepared to decide on the (290) nature or extent of that relief until some matters be ascertained which do not yet clearly appear. He is the acknowledged assignee of Madison, and as such substituted to the rights which the latter acquired by his purchase from Locke. After that purchase, in the contemplation of this Court, Madison was the owner of the Stewart land and Locke retained the title as a security for the payment of the residue of the purchase money. Had that been paid by the plaintiff to the administrators of Locke, according to the terms of the contract he would have been entitled to a conveyance from the heirs of the entire tract. But he paid only for 46¼ acres, and he asks for a conveyance of the part so paid for, because, as he alleges, the vendor had not the ability to make title to more. Where a vendor cannot make a legal title to the whole of the land sold his vendee may insist upon a specific execution of the contract so far as the vendor can execute it. From the proofs it appears that the administrators of Francis Locke admitted that there was this defect of title, but the admission of the administrators in no way binds the heirs. They have, therefore, a right to have this matter investigated. Besides, it does not appear, supposing that there was a defect of title in the vendor to part of the land sold, what was the fair value of the residue as compared with the stipulated price of the entire tract. The administrators had not a right to remodel the contract of their intestate, but only to receive what was equitably due thereon, and it may be that the average value per acre of the part of the land to which their intestate had title and with respect to which the plaintiff prays a specific execution of the contract exceeded the average price per acre of the entire tract. We require to be definitely informed (1) what is the number of acres in the Stewart tract which the late Francis Locke sold to the defendant Madison and what the number of acres within the bounds of the tract conveyed by the administrators of Francis Locke to the plaintiff; (2) whether the said Francis Locke at his death had the ability to make a clear title to that part of the Stewart tract which was sold by him to Madison but is not included in (291) the conveyance to the plaintiff; (3) what was, at the death of Francis Locke, the fair price per acre of the land so conveyed as compared with the price per acre of the whole tract as sold. It is probable that the parties, being ap-

prised of the special matters respecting which we want precise information may by agreement between themselves furnish it without delay. But if they should not, the Clerk and Master of the Court of Equity of Iredell must be directed as commissioner to make the inquiry of these matters and report the result to the Court.

PER CURIAM. Ordered accordingly.

Cited: Wilcoxon v. Galloway, 67 N. C., 466; *Campbell v. Cronly*, 150 N. C., 463.

(292)

ELISHA WHITEHURST, ADMINISTRATOR, ETC., v. ANSON HARKER, EXECUTOR, ETC., AND OTHERS.

1. A bequest of *movable property or movables*, when there is nothing in the will to restrict the meaning of those terms, includes slaves and every other species of personal property.

2. Where there is a legacy of slaves to A for life, and after her death to B and two others, and the husband of B dies in the lifetime of the tenant for life, the shares of B on the death of the tenant for life will go to her in her own right, and not to the administrator of her husband.

THIS cause was removed by consent of parties from the Court of Equity of CARTERET, at Fall Term, 1842, to the Supreme Court. The bill was filed by the plaintiff as administrator with the will annexed of Eben Harker, deceased, to obtain the opinion of the court upon certain questions arising on the construction of the said will. The legatees and distributees of the said Eben Harker and also the administratrix of a deceased husband of one of the legatees were made parties defendant.

The questions about which advice was asked and the matters to which they relate are stated in the opinion delivered in this Court.

J. H. Bryan for plaintiff.

No counsel for defendant.

DANIEL, J. Eben Harker made his will, and, after several devises and bequests, the following clauses occur in his will: "I do give to my wife all my movable property that is not above mentioned during her natural life"; "and after (293) her (that is, his wife's) death I desire that all the movables of mine that I have not before mentioned for my three

daughters may be equally divided between my three daughters according to the discretion of my executors." The testator at his death was the owner of a slave named Rose, who was not particularly mentioned in his will. During the life of the testator's widow Rose had several children. The first question asked of the Court is, Whether these slaves passed by the will under the words "movable property." Slaves are personal property. Personal chattels are distinguished from real estate and chattels real by the mobility of their character. They are called personal because they can be moved from place to place with the person of the owner. If there were anything in the will to show that the testator used the word "movables" in a more restricted sense we should certainly so interpret it. But there is nothing indicative of its being so used, and it should be understood in its general sense, more especially as, if it be not so understood a partial intestacy will be the result. We are, therefore of opinion that the slave Rose and her increase passed by the aforesaid words in the will to the widow for her life and on her death to the testator's three daughters or their personal representatives. Second, Caleb W. Calloway, the husband of Sabra, one of the testator's daughters, died in the lifetime of the widow, tenant for life. The one-third of the slaves, Rose and her increase, on the death of the said particular tenant for life went, we think, to the said Sabra in her own right, and not to her as the administratrix of her husband. *Hynes v. Lewis*, 1 N. C., 131; *Poindexter v. Blackburn*, 36 N. C., 286; *Kornegay v. Carroway*, 17 N. C., 405; *Grey v. Kentish*, 1 Atk., 280 (edited by Saunders); *Gayner v. Wilkinson*, 2 Dick., 491; 1 Bro. Ch. Ca., 50; 1 Roper on Husband and Wife, 245. The decree will be drawn accordingly.

PER CURIAM. Decree accordingly.

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(294)

THOMAS J. LATHAM v. HOWARD WISWALL.

1. Where upon the petition of the guardian of a lunatic, under the act of Assembly, Rev. St., ch. 57, sec. 3, a court of equity directs a sale of the lunatic's property, no creditor of the lunatic can seize any portion of the property under an execution the *teste* of which is subsequent to the date of the decree.

2. Such a decree is substantially a decree *in rem*, and subjects the property to the control of the court, who will enjoin all creditors from interfering with it, except under the direction and with the sanction of the court.

3. Even a purchaser at a sale under an execution so sued out by a creditor, after the decree but before injunction obtained, will acquire no title to the property he purchases, so as to defeat the right of the Court of Equity to make such disposition as it may think proper of the lunatic's estate.

4. An amendment to an injunction bill, after it is sworn to, cannot affect an injunction which is ordered to issue upon the *bill as amended* and after it has been amended and resworn to.

5. The guardian of a lunatic may bring a suit in equity, either in his own name as guardian or in that of the lunatic.

6. Upon the petition of the guardian of a lunatic for the sale of his property, the Court of Equity may upon affidavit award an injunction without a bill.

THIS was an appeal from an interlocutory order of the Court of Equity of BEAUFORT, made at Fall Term, 1842, his Honor, *Manly, J.*, presiding. The bill was an injunction bill, and upon the coming in of the answer the defendant moved to dissolve the injunction which had been obtained by the plaintiff, which motion was disallowed by the court, and the injunction continued till the hearing. From this interlocutory order the defendant, by leave of the court, appealed to the Supreme Court. It appeared from the papers that after the bill had been sworn to it was amended, and the bill as amended was then sworn to, and upon this amended bill the judge had granted the injunction.

The matters stated in the pleadings are set forth in the opinion delivered in this Court. (295)

C. Shepard for plaintiff.
J. H. Bryan for defendant.

GASTON, J. At April Term, 1841, of the Superior Court of Equity for Beaufort, a petition was filed by Thomas J. Latham, the guardian of Daniel Latham, a lunatic, setting forth that the said Daniel, before he had become of unsound mind, had contracted debts to so large an amount that it would require all his estate to satisfy the just demands of his creditors, and that if the said estate be permitted to be seized on executions and sold under them it will be sold for much less than it is worth and a large part of it will be dissipated in the payment of costs, further setting forth particularly all the articles of personal property and the different parcels of real property constituting the estate of the said lunatic and showing that the said lunatic hath a wife and four infant children, who are utterly destitute of the means of support except as they may be furnished from the said estate, and praying that the court will be pleased to

order a sale to be made of all the said property by some fit person, to be appointed by the court, on such terms as the court may designate, and that the moneys raised by such sales be applied and secured to such trusts and for such purposes as the court in its judgment may direct. Thereupon the court at the same term was pleased to make an order that all the property of the said lunatic, except two chargeable female slaves, with respect to the support of whom a special provision was made, be sold by the petitioner, Thomas J. Latham, after giving twenty days' notice, on a credit of six months, taking bonds with good security for the sales thereof from the purchasers, and that he bring in the same at the next court. At the October Term, 1841, Thomas J. Latham, the guardian, made a report of his sales under this order, when, objections being taken there-
(296) to by Howard Wiswall, the defendant, as one of the creditors of the lunatic, and others, the court was pleased to set aside the sales so made and to order that the clerk and master of the court do, between this and the succeeding term, carry into effect the previous order for a sale pursuant to the terms of said order and make report to the next term. At the April Term, 1842, Thomas J. Latham as guardian to the said lunatic filed this bill, wherein he set forth the proceedings aforesaid upon the said petition and that the clerk and master had executed the order as directed by the court and was ready to make report of his sales, but he charged that the said Wiswall had, under an execution against the goods and chattels, lands and tenements of the lunatic, purchased at sheriff's sale since the preceding term of the court one of the tracts of land so ordered to be sold, and, having taken a conveyance from the sheriff, had instituted an action of ejectment against the said lunatic for the purpose of recovering the possession thereof, which action had been instituted in contempt of the said court and of the order of sale made therein as aforesaid. And the bill prayed for an injunction to restrain the defendant from the further prosecution of the said suit, and for general relief.

The defendant put in his answer, wherein, after admitting the proceedings upon the petition as set forth in the bill, he stated that William Cook, suing to the use of the defendant, instituted an action against Daniel Latham, the lunatic, by writ returnable to the May Term, 1841, of Hyde County Court, and at the August Term thereafter recovered a judgment therein for a large sum of money; that execution issued on said judgment returnable to the November Term following of the said court, directed to the Sheriff of Beaufort County, which was levied on the tract of land in question, and the said execution with the

levy endorsed thereon was returned to the County Court of Hyde, but no further process had issued thereon because the said tract was sold as thereinafter set forth. The defendant further stated that one Thomas B. Wingfield instituted a suit against the said lunatic by writ returnable to the June Term, 1841, of Beaufort County Court, and at the said term recovered a judgment for a large amount, upon which judgment a *fieri facias* (297) issued and was returned by the sheriff of said county to the September Term of said court, levied on the said tract of land. He further set forth that from the September Term aforesaid there issued a *venditioni exponas* to the said sheriff commanding him to expose the said land for sale to the highest bidder, in pursuance of which the sheriff sold the same on the Friday before the first Monday of December, 1841, and the defendant became the purchaser thereof at the price of $205, and on 24 February following the sheriff executed a deed to the defendant therefor. The defendant averred that the debts wherever the said judgments were rendered were just debts, and the said judgments were duly and fairly obtained; admitted that at the October Term, 1841, of the Beaufort Court of Equity, he did, as a creditor of the lunatic, being the beneficial owner of the judgment rendered in favor of Cook, apply to the court to set aside the sale of the lands made by the plaintiff as stated in his bill, because the said guardian was in truth, though not in form, the purchaser at the said sale; but insisted, nevertheless, that as neither he nor Wingfield was party to the proceedings on the petition no order therein made could affect their rights, and that therefore he was in no contempt for purchasing the said land under the said Wingfield's execution or for prosecuting his action of ejectment to recover the possession thereof, the title to which he had rightfully acquired under his said purchase and conveyance from the sheriff. Upon the coming in of this answer a motion was made to dissolve the injunction which had been granted on the filing of the bill. This motion was refused, and from the interlocutory order disallowing the same the defendant was permitted to appeal to this Court.

In every civilized community the State is bound to take care of those who, by reason of their imbecility and want of understanding, are unable to take care of themselves. In England, the country from which we have derived most of our legal institutions, the care of idiots and lunatics was devolved upon the King as one of his prerogatives and also as a duty he owed to his subjects in return for their obedience and (298) fidelity. How far or in what manner this royal office was exercised at common law, or whether it was first specially

declared by act of Parliament, it may not be easy now to determine, but it was certainly recognized and regulated at least as far back as the reign of Edward II. By the statutes 17 Edw. II., ch. 9 and ch. 10, it was ordained that "The King shall have the custody of the lands of natural fools, taking the profits of them without waste or destruction, and shall find them their necessaries, of whose fee soever the lands be holden, and after the death of such idiots he shall render them to the right heirs, so that such idiots shall not aliene nor their heirs be disinherited." And, "Also, the King shall provide, when any that beforetime hath had his wit and memory happen to fail of his wit, as there are many *per lucida intervalla*, that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustenation shall be kept to their use, to be delivered to them when they come to right mind, so that such lands and tenements shall in nowise be aliened within the time aforesaid, and the King shall take nothing to his own use; and if the party die in such estate, then the residue shall be distributed for his soul by the ordinary." In the case of the idiot the King was thus authorized to take the profits to his own use, and was charged with the duty of finding the idiot with necessaries and preserving the lands without waste or destruction for his heirs. The King was therefore said to have an interest accompanied with a trust in the estate of an idiot. But in the case of a lunatic he was a mere trustee to receive the profits and apply them to the competent maintenance of the lunatic and his household, to keep the lands without waste or destruction, to be rendered to the lunatic on his restoration to reason or to his heirs on his death, and to account to the lunatic on such restoration or with the ordinary after his death for the residue of the profits not applied to the necessities of the lunatic and his family. In neither of these cases was it practicable for the King in
(299) person to exercise the prerogative or perform the duties appertaining to the charge of lunatics and idiots, and therefore it became necessary to appoint bailiffs or committees to act for him. And in order to save the necessity of repeated applications to the Crown for the appointment of such bailiffs, as well as to insure the faithful performance of duty in those who might be appointed and to provide for the prudent and conscientious management from time to time of the estates of idiots and lunatics, it became the practice of the King to delegate all his authority in these matters, by a warrant under his sign manual, to the Lord Chancellor on his coming into office,

by virtue whereof the Chancellor had the complete superintendence, ordering and disposition both of their property and persons. No mention, indeed, was distinctly made in the statutes referred to of any other property but lands and tenements, but in the construction of them it was held beyond doubt that the custody of the committee and the administration of the Chancellor extended to all the estate of every description belonging to the *non compos*. With respect to personal chattels, as they were deemed of a perishable nature, the power of disposition and administration in the committee under the control and direction of the Chancellor were of the most extensive kind. But under no circumstances did the Chancellor deem himself authorized to order or sanction a sale of the lands or even a lease thereof except during the life or incapacity of the person under his charge. *Ex parte Dikes*, 8 Ves., 79. Such an act was considered forbidden by the express enactment, "so that such lands and tenements shall not be aliened." But by the statute 48 George III. (which was passed long since our Revolution), and by subsequent statutes, the largest powers are granted to the Chancellor to permit the land of a lunatic to be sold, let, mortgaged, charged or incumbered for the purpose of paying the debts or meeting the engagements of the lunatic or defraying the costs of the commission of lunacy and the proceedings under it.

In this country we meet with no special legislation on the subjects of idiocy and lunacy before the Revolution. Up to that time the law with us was the same with the then law (300) of England, and was here administered by or under the supervision of the Governor and Council, who exercised the powers of a court of chancery within the province. Almost immediately after the Revolution legislation began with us. By the act of 1784, ch. 228, the county courts were authorized to appoint guardians to idiots and lunatics, who were to give bonds for the faithful discharge of their duties and to have the same powers and be subject to the same rules and restrictions as guardians appointed to orphans. In each case under this act the appointment of guardian became one of pure trust. By the act of 1801, ch. 589, the county courts were authorized, when the personal estate of the idiot or lunatic was exhausted or insufficient for his support, to make orders for the sale or the renting of his real estate. By the act of 1817, ch. 948, the Superior Courts were authorized, upon the petition of the guardian of a lunatic or an idiot, to order the sale of any part of the personal or real estate if necessary for his or her maintenance or the discharge of debts unavoidably incurred for his or her maintenance. And, finally, by the Revised Statutes, ch. 57,

sec. 3, as a substitute for and in lieu of the act last mentioned, it was enacted "That whenever it shall appear to the satisfaction of the Court of Equity, upon the petition of the guardian of an idiot or lunatic, that a sale of any part of the real or personal estate of such idiot or lunatic is necessary for his or her maintenance, or for debts unavoidably incurred for his or her maintenance; or whenever the court shall be satisfied that the interest of the idiot or lunatic would be materially promoted by the sale of any part of the estate, real or personal, of such idiot or lunatic, it shall be lawful for such court to decree a sale thereof, to be made by such person in such way and on such terms as the court in its wisdom shall direct." And, furthermore, it is by this statute among other things provided "that the proceeds of the sale shall be exclusively applied and secured to such purposes and on such trusts as the court, when it ratifies the sale, shall specify and direct."

The decree of the court ordering a sale of all the estate
(301) of the lunatic does not set forth the grounds on which it proceeds. But it cannot well be doubted but that in making that order upon the petition of the guardian the court acted within the limits of its jurisdiction, and therefore this exercise of its authority must be respected. By this decree the court directed all the estate of the lunatic to be sold, and charged itself with the disposition of the funds to arise from such sales. Now this, its decree, will be thwarted, and this office which it has undertaken cannot be executed if individuals are allowed, by a resort to legal process against the lunatic, to seize, purchase and hold the property beyond the control of the court. The court must protect the property against all attempts to render futile its decrees. The objection made by the defendant, that he was not a party to the decree, cannot avail. If it could, an order of sale made upon the petition of the guardian might at any time, even after sale made, be disregarded by a creditor, for no creditor is in form a party to the petition. Such a decree is substantially a decree *in rem*, having for its object the conversion of the property into a fund more available for all having claims against the property, and placing such fund under the control of a court, which can examine and adjust all those claims according to right. After such a decree, as after a decree *quod computet* rendered against an executor or administrator on a creditor's bill filed on behalf of himself and all other creditors, the court will enjoin all creditors from interfering with the property taken into its hands, except under its direction and with its sanction. Upon the merits of the case we think the

injunction was rightfully awarded and that the motion to dissolve the injunction was rightfully refused.

The case does not present the question which has been attempted to be raised, whether the decree of sale would affect any pre-existing lien upon the property, for the *teste* of the *fi. fa.* and the judgment itself under which the land was sold were both posterior to the making of the decree. But there are some other objections, rather of a technical kind, which have been urged against the correctness of the proceedings upon this bill and which it is proper to notice. In the first place, it is objected (302) that the bill in its original form was an injunction bill; that an important amendment was allowed to be made in it after it was filed and sworn to, and that this course was irregular. Now, we are not called on to say what would be the effect of an amendment made in a bill after an injunction issued, but we cannot see how or why any previous amendment of a bill can affect an injunction which is ordered to issue upon the *bill as amended*, and after it has been amended and resworn to. Such was the case here. It was further objected that this bill was improperly brought by the guardian of the lunatic. We have had occasion to consider and overrule a similar objection in the case of *Shaw v. Burney*, 36 N. C., 148. In the present case there is the less ground for the objection, because here the injunction might rightfully have been awarded upon affidavit, in the case of the petition, without a bill. And lastly it is insisted, that however the court might have properly enjoined the judgment creditor from suing out or enforcing his execution against the property of the lunatic, yet after this execution had been sued out and a sale made under it without objection, there was no equity in depriving a *bona fide* purchaser of the title which he had acquired in the property. It is admitted that in most cases where courts of equity would, on a proper application, enjoin creditors from suing out executions, they will not, after execution executed, disturb purchasers in the enjoyment of property bought under them. These are cases where the ground for an injunction is because of an equity against the creditor personally, so that it becomes unconscientious in him to collect the judgment, and where the collection of the judgment is the mischief to be prevented. But the ground of interference here is not because of an equity confined to the creditor. His judgment may be, and for the present is presumed to be, for an honest debt, which may be collected without violence to conscience. The evil to be prevented is not the collection of that debt, but a disposition of the lunatic's property which may defeat the arrangements made for the disposition of it by the Court of

Equity. All attempts to defeat these arrangements by (303) the abuse of any legal advantages will be restrained. The court, for the maintenance of its jurisdiction over the property, will enjoin all persons from diverting it from the course of administration which it may prescribe. It cannot be pretended that there is any equity on the part of the defendant which should render him or his case an exception from the general rule. He was perfectly aware of the decree for a sale upon the petition before he bought under the execution. Nay, it was at his instance the sale made under the decree was set aside and a new one ordered. He cannot complain that the court will not suffer him to disappoint that order. If he has paid off the judgment creditor he can subrogate himself to the rights of the creditor and in that character apply to the court for satisfaction out of the fund which it has ordered to be created. Upon that application, no doubt, whatever is just will be done.

This opinion will be certified to the court below, with instructions that the motion to dissolve the injunction was properly refused, and the defendant must pay the costs of the appeal.

PER CURIAM. Ordered accordingly.

Cited: Harding v. Spivey, 30 N. C., 69; *Latham, Ex parte*, 41 N. C., 407; *Dowell v. Jacks*, 58 N. C., 419, 420; *Smith v. Smith*, 108 N. C., 372.

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(304)

RICHARD BOYD v. JOHN D. HAWKINS.

1. A trustee cannot, without the unequivocal assent of *cestui que trust*, act for his own benefit in a contract on the subject of the trust.

2. If he extinguishes an encumbrance hanging over the property confided to his care out of his own funds, he can only claim to be reimbursed for his outlays in this respect.

THIS cause was transmitted for hearing by consent of parties, at Fall Term, 1842, of WARREN Court of Equity, to the Supreme Court.

The facts of the case are stated in the opinion delivered in this Court.

Iredell for plaintiff.

Badger and *W. H. Haywood* for defendant.

GASTON, J. On 18 February, 1823, Alexander Boyd conveyed to Henry Fitts sundry tracts of land, among which was the tract

particularly described in the bill, and which is situate partly in the county of Granville and partly in the county of Warren, and sundry slaves, to be held under the said Fitts, his heirs, executors, administrators and assigns, upon trust to sell the same for the indemnity of Richard Boyd and Francis Thornton against heavy responsibilities which they had incurred for the said Alexander and as his sureties in the State Bank of North Carolina; and afterwards, on 20 July, 1824, with the assent of the said Alexander, Richard and Francis, the said Fitts assigned and conveyed all his estate in the trust so described to John D. Hawkins upon the said trust. The first-mentioned conveyance was registered, within the time prescribed by (305) law for the registration of deeds of trust, in the county of Warren, but not in the county of Granville; whereby the same became invalid in law, so far as it conveyed the part of the said tract lying in the latter county, as against the creditors of the said Alexander. The Bank of New Bern, one of Alexander's creditors, having obtained a judgment against him, caused their execution to be levied on the said part, under which it was sold and purchased by their attorney, William Robards, on 6 January, 1826, who immediately thereafter sold the same to the said John D. Hawkins. Richard Boyd, having been compelled to pay very large sums for the said Alexander upon the liabilities mentioned in the deed of trust, filed his bill against the said Hawkins, Alexander Boyd and Thornton, wherein he charges that he paid the same wholly out of his own effects or from such property of the said Alexander as he could subject to the payment thereof, without calling on the said Francis to contribute, and that he hath no right to require of the said Francis to contribute thereto, because the liabilities of the said Francis had been incurred at his, the said Richard's, request; that the said Alexander is indebted to him because of the said payments to an amount exceeding $20,000, and that the said Alexander has become hopelessly insolvent; and that the defendant Hawkins hath either sold the part of the tract of land aforesaid lying in the county of Granville, and hath received the proceeds thereof, for which he has never accounted to the plaintiff, or now holds the same as his own property. The prayer of the bill is that if the said defendant Hawkins hath sold the part of the said tract situate in Granville, he shall account to the plaintiff for the proceeds thereof, and, if he hath not sold the same, may be compelled to convey it to the plaintiff, and for general relief. The bill was taken *pro confesso*, and set down to be heard *ex parte* against the defendants Thornton and Alexander Boyd. The defendant Hawkins put in his answer, wherein he admitted

all the material facts charged in the bill, except that, in regard to the indebtedness of Alexander Boyd to the plaintiff,
(306) he says that "he is not able of his personal knowledge to answer how or to what amount the plaintiff is a creditor of the said Alexander, and therefore cannot admit nor will he positively deny the fact, especially as he is advised that it is a matter between the said Richard and Alexander, both of whom are parties to the suit." He avers that it was known before the conveyance was made to him by Henry Fitts of this tract of land that, because of the failure to register the deed of trust in Granville, the same was invalid as against the creditors of Alexander Boyd with respect to the part lying in the said county; that the said conveyance was made to him for the sole purpose of enabling him to prosecute a suit for the said Richard Boyd for the part lying in Warren; that William Robards purchased the piece in Granville, as the attorney for the Bank of New Bern, in order to secure the amount of their judgment; and that the defendant, having well ascertained that the title of the said Robards was valid against the deed of trust, proposed to and agreed with the said Robards to pay off the bank debt and costs and a fee to the said Robards if the latter would convey to him; that this was done accordingly, and that he made these payments out of his own proper moneys; and that the plaintiff, knowing of the whole transaction, hath never pretended to claim or ask the benefit of this defendant's said purchase. The defendant further states that there has been a suit in equity between the plaintiff and himself involving all the accounts of this defendant as trustee for the plaintiff under the assignment made to the defendant by Henry Fitts, and under various other deeds of trust executed to the defendant by the plaintiff, in which suit a final decree was rendered, and although the plaintiff (if he ever had a right to claim the benefit of this defendant's said purchase) might have claimed the same in the account taken in the said suit, yet he never pretended to do it, or, if he did, the same was disallowed, and submits to the court whether he can now be permitted to set up a right to the said land or the proceeds thereof. He further answers that he has not sold the land so purchased by him, and insists that if the plaintiff
(307) can make the defendant a trustee for him in the said purchase he is bound to refund to the defendant the money he hath advanced on the said purchase and hath paid for taxes thereon.

To this answer the plaintiff replied. Alexander Boyd died, and the suit was revived against his administrators and heirs, who were made parties defendants thereto.

Upon the hearing it was admitted that in the decree rendered in the suit referred to in the answer of the defendant Hawkins there is an express reservation to the plaintiff Boyd of his rights in respect to the matters now complained of, and this disposes of the defense set up in the nature of a plea because of a former decree between the parties.

We hold it to be clear that the defendant cannot take to himself the benefit of the purchase made from Robards. A trustee, without the unequivocal assent of the *cestui que trust*, cannot act for his own benefit in a contract on the subject of the trust. It is established upon the soundest principles that if he should so contract expressly for himself he shall not be suffered to turn the speculation to his own advantage. But in truth the defendant does not allege that he bought in Robard's title for himself, but merely that he paid the purchase money with his own funds. If so, he thereby extinguished an encumbrance hanging over the property which was confided to his care and can claim only that he shall be reimbursed for his outlays in this respect, as he may for any others properly made for the security or improvement of such property.

The plaintiff's specific prayer, if the land conveyed by Robards is not sold, is that the defendant Hawkins shall convey the same to him. But this he is not entitled to. The trust declared in the deed to Fitts, to whom Hawkins succeeded as trustee, was that the property should be sold to indemnify the sureties of Alexander Boyd for what they might be compelled to pay on his account. The bill alleges, and the representatives of Alexander Boyd confess, that the plaintiff has been compelled to pay very large sums because of his liability as surety, and is a creditor of Alexander Boyd by reason thereof to the (308) amount of more than $20,000. The plaintiff has therefore a right that the declared trust should be carried into execution for his indemnity, and this relief may properly be given under his general prayer.

A decree must be accordingly made for a sale, and there must be an account taken of what is due to the defendant Hawkins because of his advances and expenditures claimed in the answer. It is not alleged that he has received profits from the use or rent of the land. But if he has, these should be regarded as extinguishing *pro tanto* his demand.

PER CURIAM. Decree accordingly.

Cited: Taylor v. Heggie, 83 N. C., 247; *Gibson v. Barbour*, 100 N. C., 197; *Dunn v. Ettinger*, 148 N. C., 284.

(309)

WILLIAM BROWN AND OTHERS, EXECUTORS, ETC., *v.* NANCY BROWN AND OTHERS.

A by his will devised, among other things, as follows: "I devise that my lands, known by the name of the Lee and Dorch places and Stephen Brown place, and all the rest of my lands not disposed of, be sold or rented at the discretion of my executors to the best advantage of the heirs, and to be disposed of at the will of my executors, and the proceeds of the same, and my money, notes and crop and stock to be disposed of as the law directs": *Held*, that under this clause the personal property was to be divided among such persons and in such proportions as the statute of distributions would have prescribed, if the decedent had died intestate as to this property, but, as the property is taken under a devise in the will, advancements are not to be brought into *hotchpot*: *Held*, also, that the real estate was not directed by this clause to be converted *out* and *out* into personalty, and that it is devised to those who would have been the heirs at law of the testator if he had died intestate; and that here also no advancements were to be brought into hotchpot.

THIS bill was filed at Fall Term, 1842, of JONES Court of Equity, by two of the plaintiffs as executors of Isaac Brown, deceased, and by two others of his heirs and next of kin, against the defendants, who were the other heirs and next of kin. The object of the bill was to obtain the advice of the court upon a certain clause in the will of the said Isaac Brown. The defendants answered; and the cause, being set for hearing upon the bill and answers, was transmitted, by consent of parties, to the Supreme Court. The clause of the will upon the construction of which the doubts arose is recited in the opinion delivered in this Court.

J. H. Bryan for plaintiffs.
No counsel for defendants.

(310) DANIEL, J. Isaac Brown by his will devised and bequeathed to his wife and children, severally, lands and personal property. And he then concluded his will thus: "I desire that my lands known by the name of the Lee and Dorch places and Stephen Brown place, and all the rest of my land not disposed of, to be sold or rented at the discretion of my executors to the best advantage of the *heirs*, and to be disposed of at the will of my executors, and the proceeds of the same, and my money, notes and crop and stock to be disposed of *as the law directs*." The executors, in their bill, ask the court to put a construction on this residuary clause in the will and to declare

who are entitled to the property contained in it. We think that, as to the fund made up of the money, notes, crop and stock, it is plain that the testator has bequeathed it to a class of legatees who are to be ascertained by learning who would take under the statute of distributions. They are the persons whom the *law* would *direct* to take if Isaac Brown had died totally intestate. These persons take as legatees, including the wife, children, and the children of deceased children, at the death of the testator. The testator has not directed the fund to be *equally divided;* therefore, the persons to take as legatees, and the proportions they are to take must be determined by the statute of distributions; they do not take *per capita. Freeman v. Knight, ante,* 76; *Croom v. Herring,* 11 N. C., 393. Secondly, the testator has not directed that the lands mentioned in this clause should be converted *out* and *out* into money and mixed with the personal estate. He has only given his executors power to sell or rent, as may be for the best advantage of the *heirs.* The following words in the clause, "to be disposed of at the will of my executors and the proceeds of the same, and my money, notes, crop, etc., to be disposed of as the law directs," were only meant to give the executors power to make partition among the legatees and devisees, instead of expense being incurred in having the same done by commissioners ordered by court. The intention was that the executors should divide the lands and rents, or the money arising from the sales of the lands, if the executors should think proper to sell them, among the *heirs* in such proportions as they would take by the statute regulating (311) descents of real estate; and to divide the personal fund among such persons and in such proportions as are prescribed by the statute of distributions, if it had been a case of intestacy. The executors have not an arbitrary discretion. They are to dispose of both funds *"as the law directs."*

Thirdly. This is not a case in which advancements are to be brought into hotchpot. With respect to personal property it is clear law that there are no advancements in cases of partial intestacy. There would, therefore, have been no ground for requiring advancements to be brought into hotchpot in the present case, so far as the personalty is concerned, had this been a case of partial intestacy. But we hold, as has been heretofore stated, that there is in this will a disposition of the whole personal estate. It was determined in *Norwood v. Branch,* 4 N. C., 400, that the law was otherwise when there was a partial intestacy with respect to lands. We forbear from giving a direct opinion on the doctrine there asserted. It has certainly not been satisfactory to the profession, and, we have reason to know,

was afterwards disapproved of by those who made the decision. But, if that case be law, it does not apply when the testator has in his will made a disposition of all the proceeds of lands which have not been given away in specie.

The decree will be drawn accordingly.

PER CURIAM. Decreed accordingly.

Cited: Person v. Twitty, 28 N. C., 118; *Johnson v. Johnson,* 39 N. C., 11; *Bost v. Bost,* 56 N. C., 487; *Jenkins v. Mitchell,* 57 N. C., 210; *Pruden v. Paxton,* 78 N. C., 448.

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(312)

PETER PLEMMONS v. LEWIS FORE AND OTHERS.

1. An entry of land creates an equity which, upon the payment of the purchase money to the State in due season, entitles the party to a grant, and, consequently, to a conveyance from another person, who obtained a prior grant under a junior entry, with knowledge of the first entry.

2. It is not necessary that the first enterer should have paid the money to the State at the time of the second entry, provided it be paid within the period limited by law.

THIS cause was transmitted, by consent of parties, from BUNCOMBE Court of Equity, at Spring Term, 1842, to the Supreme Court.

The matters contained in the pleadings and proofs are set forth in the opinion delivered in this Court.

Clingman for plaintiff.
Francis for defendants.

RUFFIN, C. J. On 29 April, 1836, the plaintiff made an entry of "twenty-five acres of vacant land, lying in Buncombe County, on the west side of French Broad River, adjoining his own land and the lands of John Plemmons, William Carroll, Abner Guthrie and William Frisbie"; and, having paid the purchase money, he obtained a patent for the land on 30 September, 1837.

On 11 October, 1836, the defendant Gates made an entry of the same land in the following words: "Twenty-two and an half acres of land, lying in Buncombe County, on the west
(313) side of French Broad River, adjoining the lands of John Plemmons, Peter Plemmons and Lewis Fore"; and thereon a patent was issued to him on 24 August, 1837, and he subsequently conveyed to the other defendant, Fore.

The bill was filed in 1840, and states that the land was situate between a tract which the plaintiff owned and one which William Carroll had owned, and was then occupied by the defendant Fore, under a purchase from Carroll; and that, after the plaintiff had made his entry and its becoming known to Fore, they deemed it doubtful whether there was any vacant land between their tracts, as Fore claimed up to the line of the plaintiff's land before granted; that, for the purpose of settling the point, Fore employed a surveyor to run the line of their respective tracts, and that on 10 October, 1836, the survey was, in the presence of Fore and Gates, so far proceeded in as to satisfy the surveyor and all the parties that the land as entered by the plaintiff was vacant, but that before the survey was entirely completed the defendant Fore procured the other defendant, Gates, to make an entry of the same land in his (Gates') own name, but in trust and for the benefit of Fore, and that accordingly he did so, as above stated, on the next day, 11 October, 1836. The bill charges that both of the defendants had a knowledge of the plaintiff's entry of April preceding, and that Fore caused his entry to be made in the name of Gates only to render it more difficult for the plaintiff to prove his case, and that, in fact, Fore merely paid the fees and purchase money to the State and then took a conveyance from Gates without giving him anything therefor. The prayer is for a conveyance to the plaintiff.

Both of the defendants put in answers, in which it is admitted that Gates assigned to Fore the benefit of his entry, and, after the grant, conveyed to Fore without any remuneration, but from motives of friendship. But each of them denies that he had any knowledge that the plaintiff had entered the particular land now in controversy, and says that Gates entered *bona fide* for himself, and was induced to give it up to Fore because he was his uncle and because he had believed that he purchased (314) that as a part of the Carroll tract. The defendants further state that at the time Gates made his entry and when the patent was issued to him the defendants believed that the entry of the plaintiff was for a different tract, situate on French Broad River at the distance of a mile or more from the land in dispute, and adjoining the land of Abner Guthrie, while this tract does not adjoin Guthrie's.

The controversy between these parties turns chiefly on the matters of fact in issue, for upon the questions of law the case is clear. An entry creates an equity which, upon the payment of the purchase money to the State in due season, entitles the party to a grant, and, consequently, to a conveyance from another person who obtained a prior grant under a junior entry

with knowledge of the first entry. *Featherston v. Mills,* 15 N. C., 596. It follows also from Laws 1808, ch. 759, and 1809, ch. 771, which settle the days on which the purchase money shall be paid, that it is not necessary that the first enterer should have paid the money to the State at the time of the second entry, provided that it be paid within the limited period. *Harris v. Ewing,* 21 N. C., 369. Such was the case here. As to the other facts we are left in no doubt by the evidence. It appears that the plaintiff made two entries: one *on* French Broad, as mentioned by the defendants, and also that under which he claims in this suit. Of the latter as well as the former, the defendants both had notice on 10 October, 1836, as proved by two witnesses, who state that the plaintiff and others informed them of the fact on the land while the experimental survey was going on. Moreover, the public surveyor proves that he made both surveys under the respective warrants on the same day and in the presence of the plaintiff and Fore, and that he surveyed for the plaintiff first, because his was the prior entry and warrant, and that Fore, nevertheless, requested him to make out his plat and certificate immediately, to enable him to get a grant before the plaintiff. It was a fraud thus to endeavor to deprive the plaintiff of the legal title, which the law had assured him should be made.

(315) It is true the surveyor states that between the land owned by Guthrie and the vacant land granted to the plaintiff there is a narrow strip of land that had been previously granted. But that is mere matter of description, and in this case its inaccuracy is harmless, because there is no other piece that will answer the whole description, as far as appears, and enough of the description remains to identify this land. Of that, indeed, the defendant Fore had actual and full knowledge by the survey under the warrant; and it was his folly, after that, to pay the purchase money. There must be a decree for the plaintiff, with costs.

PER CURIAM. Decreed accordingly.

Cited: Allen v. Gilreath, 41 N. C., 257; *Stanly v. Biddle,* 57 N. C., 385; *Wilson v. Land Co.,* 77 N. C., 457; *Gilchrist v. Middleton,* 107 N. C., 678; *S. c.,* 108 N. C., 707; *McNamee v. Alexander,* 109 N. C., 245; *Kimsey v. Munday,* 112 N. C., 827; *Wyman v. Taylor,* 124 N. C., 428; *Berry v. Lumber Co.,* 141 N. C., 393; *Bowser v. Wescott,* 145 N. C., 70; *Lovin v. Carter,* 150 N. C., 711; *Barker v. Denton, ib.,* 725.

(316)

DAVID COVINGTON AND WIFE v. PRIOR MCENTIRE AND OTHERS.

1. A by his will bequeaths a female slave to his wife for life, and after her death to his daughter B: *Held*, that the well-established construction of such a bequest, that the issue of the slave born after the death of the testator and in the lifetime of the tenant for life goes to the ulterior legatee, is in no way affected by another clause in the same will in which the testator gives, after the death of his widow, another female slave to D, another of his daughters, and adds these words, "and also the increase of the above-named slave, from now, to go to the said D and the heirs of her body."

2. Under a bequest of a female slave to one for life and afterwards to another, the issue born during the lifetime of the tenant for life must go to the remainderman, unless it can be *clearly* collected from the will that the testator *excluded* the increase from the gift of the original stock.

THIS cause was heard at Fall Term, 1842, of CLEVELAND Court of Equity, his Honor, *Pearson, J.*, presiding, when a decree was pronounced in favor of the plaintiff. From this decree the defendants appealed to the Supreme Court. The facts of the case are fully stated in the opinion delivered in this Court.

No counsel for plaintiff.
Hoke for defendant.

GASTON, J. William McEntire died in March, 1832, having previously made his last will and testament, whereof he appointed Prior McEntire and his wife, Rebecca, executor and executrix, who, after the death of the testator, duly proved the (317) said will. By this will the testator bequeathed, among other things, to his said wife, during her life or widowhood, a negro woman *Binah*, and in a subsequent clause of the will disposed of Binah as follows: "I give and bequeath to my daughter, Rachel Covington, and the heirs of her body, at the decease of my wife or her widowhood, one negro woman named Binah." To the bequest of Binah to the widow the executor and executrix assented. The widow died in 1842, and upon her death Binah was taken possession of by the plaintiff David, the husband of the plaintiff Rachel Covington. But Binah's issue, born after the death of the testator and in the lifetime of the widow, of which four were then living, were taken into possession by Prior McEntire, as the surviving executor, and a claim made by the defendants that he should hold them for himself and the other

defendants and the plaintiff, if entitled thereto, in common, under the residuary clause in the will of William McEntire. This bill was then brought, and its prayer was that the defendant Prior McEntire might be decreed to assent to the bequest to the plaintiff Rachel, and deliver the said increase of Binah to the plaintiffs. The defendants answered together, and admitted all the allegations in the bill; stated that the children so born of Binah were in the possession of the defendant Prior McEntire, as the surviving executor of William McEntire; that it was contended by himself and the other defendants that, according to the true construction of the will, the issue of Binah did not pass under the bequest to the plaintiff Rachel, but passed under the residuary clause of the will, which will was appended to and made a part of their answers; that it had been agreed between the plaintiffs and the defendants that if *this* were the true construction of the will the plaintiffs should take one of the children of Binah (Catharine) and the sum of $55 as their full share thereof, and that the defendant Prior was willing and ready to dispose of the said negroes as he might be ordered and decreed by the court, and prayed such a decree as would settle the rights of all the parties and give him full protection. The
(318) cause was brought to a hearing upon the bill and answer, and a decree made declaring the plaintiffs entitled to the negroes and ordering the executor to deliver them to the plaintiffs. From this decree the defendant appealed.

It has been the settled law of North Carolina ever since the case of *Tims v. Potter*, decided more than fifty years ago, that where there is a limitation of a female slave to one for life, with remainder over to another, the increase of such slave, born during the life of the first tenant, go over with the slave herself to the person in remainder. *Tims v. Potter*, 1 N. C., 12, and 2 N. C., 234; *Glasgow v. Flowers*, 2 N. C., 233; *Erwin v. Kilpatrick*, 10 N. C., 456. This doctrine is not questioned on the part of the appellants, nor do they contend that the clause under which the plaintiff claims, taken *per se*, is not a complete gift of Binah, and consequently of her increase after the death of the testator, to the plaintiff Rachel. But they insist that it is competent for a testator, in the gift of the mother to the ulterior legatee, to make an exception of such increase, and that this exception, though not contained in the clause containing the gift, is to be implied from another clause in the will. In the clause referred to the testator, who had in a former part of the will bequeathed to his daughter Dulcinea a negro girl Nan, after the death or widowhood of his wife, adds these words: "and also the increase of the above-named Nan *from now* to go to the said

Dulcinea and the heirs of her body." And the argument is that had the testator intended to include the increase of Binah in the gift of Binah to his daughter Rachel, he would have been equally explicit in declaring that intent.

To this argument there are two answers, either of which is satisfactory. In the first place, the law holds that the increase are appurtenant to and form a part of the parent stock, and therefore become the property of the ulterior legatee, unless it can be *clearly* collected from the will that the testator *excluded* the increase from the gift of that stock. *Knight v. Wall,* 18 N. C., 125. Now, it is impossible that any words, however strong, in another clause of the will, declaring an intention to *include* the increase in the gift of another female (319) negro to another child, can be interpreted to overrule the legal meaning of the clause under consideration, with which it is in no way connected and to which it in no way refers. The expression in the one clause of what the law implies is but superfluous, and the omission to express it in the other leaves that clause to its legal operation. Further, in the clause respecting the disposition of Nan, the testator does not express merely what the law implies; for he makes therein a gift to the ulterior legatee, not only of the issue which the mother may have after his death, but of such as may be born before his death and after the execution of his will. But for the particular words of this clause these would not pass by the gift of Nan. *Jones v. Jones,* 4 N. C., 547; *Powell v. Cook,* 15 N. C., 499. We have not, therefore, the least doubt but that the plaintiffs are entitled to the negroes as declared in the decree below.

But another objection has been taken to that decree. It is objected that, supposing the plaintiffs thus entitled, they had a clear remedy at law, and, therefore, their case was not a proper one for the cognizance of a court of equity. It is stated in the bill and admitted by the answer that the executors of the testator assented to the bequest for life, and this assent operated, in law, as an assent to the ulterior bequest. We have, therefore, no doubt but that the plaintiffs might have treated the possession of the executor as a wrongful act, and have brought trover or detinue against him for the slaves. But we do not therefore feel ourselves bound to reverse the decree as erroneous. An objection that a court of equity ought not to take cognizance of a cause because there is adequate relief at law, if entertained at all after the defendants have answered in chief and thereby submitted the cause to the cognizance of the court, will be entertained with great reluctance. But this is not a case of merely passive acquiescence in the jurisdiction of the court. One of

the defendants had taken possession of the property *as executor*, claiming to hold as trustee for those, whoever they might (320) be, beneficially entitled under the will. *All* setting up a claim to this beneficial interest acquiesced in his holding in this fiduciary character, and united with him in praying the court, which has jurisdiction in matters of trust, to declare for whom in conscience he should be declared to hold. The assent to the bequest for life was treated by all as one limited to *that* bequest, and, so limited, the case became one appropriate for the cognizance of a court of equity. The decree in the court below must be affirmed, with costs.

PER CURIAM. Decree below affirmed with costs.

Cited: Lillard v. Reynolds, 25 N. C., 370.

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(321)

ELIZABETH FOSCUE v. JOHN E. FOSCUE, EXECUTOR, ET AL.

1. A limitation of slave by deed, after a life estate reserved to the maker of the deed, was, before the act of 1823 (Rev. St., ch. 37, sec. 22), void.

2. The possession of the trustee can never be deemed adverse to the *cestui que trust*, unless continued so long as to be evidence or to create a presumption of satisfaction or abandonment.

3. Where the same person having possession is a trustee for two different persons, claiming on opposing rights, neither can take advantage of the possession, merely as such, to bar the other, but the right of each, while the possession thus remains in the same trustee, must always depend upon the title.

4. When a trustee delivers to a person not having the right, the property he holds in trust, without consideration, in dereliction of his duty and in fraud of the known claim of the person having the right, the possession thus acquired from the trustee cannot be set up to defeat the person really entitled to the property.

THIS cause was transmitted by consent from the Court of Equity of JONES, at Fall Term, 1842, to the Supreme Court.

The facts are stated in the opinion delivered in this Court.

No counsel for plaintiff.

J. H. Bryan for defendant.

RUFFIN, C. J. On 3 February, 1805, Simon Foscue the elder executed a deed whereby he conveyed to his daughter Dorcas Foscue, then an infant and lunatic, and residing with him, four

slaves and other personal chattels at his death, making a reservation therein of an estate for his life in the slaves. After the execution of the instrument the daughter con- (322) tinued to be a lunatic and to reside with her father, who also retained possession of the slaves, until his death, which happened in the latter part of 1814. Shortly before his death the father executed his will and therein bequeathed to his daughter Elizabeth, the present plaintiff, a negro boy by the name of Norris, who was a child of one of the female slaves conveyed or intended to be conveyed in the before-mentioned deed, and born after the execution of that instrument; and the testator appointed his son, Simon Foscue the younger, the executor of his will, who proved it and took into possession the said slave Norris. Very soon afterwards Dorcas Foscue was found to be a lunatic, and the said Simon the younger was appointed her guardian, and so continued to be up to the time of his death, which happened in the latter part of 1830, and after he had made a will, of which he appointed the defendant John E. Foscue the executor, who duly proved the same, and also took into his possession the said slave Norris. One Hardy Bryan was then appointed the guardian of the lunatic, Dorcas, and, on 1 January, 1831, he received the said negro from John E. Foscue as a part of the property of the lunatic; and he hired him, with other slaves of the lunatic, from year to year, until his death in 1838. Upon that event the defendant Nathan Foscue was appointed the guardian, and so continues to be.

The bill was filed in March, 1835, against John E. Foscue as the executor of Simon Foscue the younger and Simon Foscue the elder, and against Dorcas Foscue, and Hardy Bryan as the guardian of the said Dorcas, and praying that the plaintiff may be declared to be entitled to the slave specifically bequeathed to her, and that the executor may be compelled fully to assent to the said legacy, and he and the other parties decreed to deliver the slave to the plaintiff and account respectively for the hires and profits received by the said Simon the younger and the other persons respectively, and now in their hands. The bill states that Simon the younger did at one time agree to deliver the negro to the plaintiff, but afterwards refused to do (323) so, and that thereupon the plaintiff brought an action of detinue for the said slave against him on 4 May, 1826, which was pending at the time of his death, and was revived against John E. Foscue as his executor, and in which the plaintiff was compelled to submit to a nonsuit for the reason that the defendant denied on the trial that the executor, Simon Foscue the younger, had assented to the legacy to the plaintiff, and she was

unable distinctly to prove it. This statement of the bill is supported by the record of the suit at law, and indeed is admitted in the answers, except that they still deny that the legacy to the plaintiff ever was assented to, and aver that the said Simon the younger did not hold the slave as a part of the estate of his testator, Simon the elder, but as belonging to the said Dorcas by virtue of the said deed. The defendant John E. Foscue also answers that Simon the younger applied all the profits of the slave during his lifetime to the use of his ward Dorcas, or that, after his death, this defendant accounted for them to Bryan, the succeeding guardian. Bryan's death occurred before an answer was put in by him for the lunatic; but the present guardian, Nathan Foscue, became a party in his stead, and answers that the profits, during the life of Simon the younger, were not accounted for by him nor by his executor to any person; and both of the defendants insist that the possession of the slave Norris by the different guardians of the lunatic was adverse to the plaintiff, and, having been so long continued, is a bar to her relief, even if the deed from Simon the elder was not sufficient to pass the title to the negroes therein mentioned. And, as to that instrument, it is contended for the plaintiff and set forth in the bill that it is inoperative because it was never delivered and because the interest thereby conveyed to the said Dorcas was *in futuro* after a life estate reserved to the donor.

By consent it was referred to the master, without prejudice to the hearing, to take an account of the hires and profits of the negro and to report in whose hands they were, or how and by whom they have been disposed of; and that officer has reported that Simon Foscue the younger received profits to the
(324) amount of $140, and that he did not lay out any part thereof to his ward's use, but had the same in his possession at his death, and that the defendant John E. Foscue did not account therefor to Hardy Bryan or to the present guardian, but that the estate of the said Simon the younger is indebted on that score the sum of $248.80, including interest up to September, 1840. And he further reported that the sum of $580.10 was received for hire by Hardy Bryan, and, together with the interest thereon, amounting in the whole to $725.23, was paid over by the administrator of the said Bryan to the defendant and present guardian, Nathan Foscue, who hath also, including interest up to September, 1840, received the further sum of $263.53 for hires in his time. The master submits the question whether these sums should bear interest or not. The cause having been transferred to this Court, was brought on for hearing and also on the report.

Upon the question of the title of Dorcas Foscue, derived under the deed of February, 1805, the Court cannot hesitate in declaring an opinion in favor of the plaintiff. It stands precisely on the principle on which was decided the case of *Foscue v. Foscue,* 10 N. C., 538, which arose on a similar deed made by the same person to two others of his children. In that case the Court held, as had been before done in the case of *Graham v. Graham,* 9 N. C., 322, that a limitation of slaves, after a life estate reserved to the maker of the deed, was, before the act of 1823, void. The title of the slave was therefore in the testator, Simon the elder, and the bequest in his will to the plaintiff was good and vested in her the right to the slave as a specific legacy.

Such being the state of the title, the Court is very clearly of opinion that nothing which has occurred since ought to defeat the plaintiff's right. According to the statements of the answer, Simon Foscue, the executor, never assented to the legacy to the plaintiff. Indeed, it is said he held adversely to her, as the guardian of Dorcas; and upon that supposition the defendant insists on the statute of limitations. In truth, the possession could not, properly speaking, be adverse to the plaintiff, because she had not the legal title, but it was in Simon Foscue the younger, as executor of his father, in trust for the (325) plaintiff. The possession of the trustee can never be deemed adverse to the *cestui que trust,* unless continued so long as to be evidence or to create a presumption of satisfaction or abandonment. Where the same person thus having the possession is a trustee for two different persons, claiming upon opposing rights, it follows that neither can take advantage of the possession, merely as such, to bar the other, but the right of each, while the possession thus remains in the same trustee, must always depend upon the title. There is every reason to believe that this trustee so intended to act, since he accounted for the profits to neither of the claimants, but held them subject to a decision upon the question of title between his two sisters—a decision not made in his lifetime. Such being the state of the case at that time, the defendant John E. Foscue, the executor of both testators, took possession of the negro; and as he was not the guardian of the lunatic, his possession can only be referred to his office of executor, and he ought to have delivered the slave to the plaintiff, or at least have kept him for her and defended her right, which was in fact the superior right. *Yarborough v. Harris,* 14 N. C., 40. Instead of doing so, he, without consideration and with the view, as must be inferred from the answer, of defeating the plaintiff's right, delivered the slave to the guardian of the other claimant. But the possession thus acquired

from the trustee, without consideration and in dereliction of his duty and in fraud of the known claim of the legatee, cannot be set up to defeat the legatee; but the executor and the fraudulent alienee of the executor are alike liable for the things or effects thus misapplied. The plaintiff is therefore entitled to a decree for the slave and for the hires against the parties respectively in whose hands they are, according to the report, to which neither party has excepted. Upon the question of interest, which the master refers to the court, we are of opinion that it is properly charged. Mr. Bryan actually accounted for that accrued in his time, and it was paid over to the present guardian; and no doubt the latter has, according to his office, kept that part of the estate, as well as the hires since he became guardian, (326) at interest. The decree should therefore be, that the sum of $988.76, with interest on $838.10 from September, 1840, be paid by the defendant Nathan Foscue, who may charge the same against the estate of the said lunatic in his hands as her guardian, and there must be a further inquiry as to the profits of the slave since September, 1840, up to the time at which he may be delivered to the plaintiff. There cannot at present be a decree for the payment of the sum found to be due from the estate of Simon Foscue the younger, namely, $248.80, with interest on $140 from September, 1840, because it does not appear that there are assets of his estate to answer the same, for they are not admitted nor found by the master. But unless the defendant John E. Foscue shall admit assets to answer that sum and the costs of this suit, the inquiry must also extend to that point.

PER CURIAM. Decreed and ordered accordingly.

Cited: Taylor v. Dawson, 56 N. C., 94; *Peacock v. Harris,* 85 N. C., 151; *Dail v. Jones, ib.,* 225; *Academy v. Bank,* 101 N. C., 489.

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(327)

IN THE MATTER OF MARY BOSTICK AND OTHERS.

If a public officer can be exonerated at all from his liability for moneys belonging to individuals which come into his hands in the course of his official duty, on the ground that they have been stolen from him, he certainly cannot be so exonerated upon his own affidavit only of the fact of such loss.

THIS was an appeal from an order made by his Honor, *Pearson, J.,* at Fall Term, 1841, of RICHMOND Court of Equity, in a case which thus appears upon the record:

MATTER OF BOSTICK.

MARY BOSTICK AND OTHERS, *ex parte.*

Petition for sale of land coming on to be heard, John Giles, esquire, attorney for the petitioner, moved that the clerk and master be directed to distribute the money arising from the sale of the land, which had been collected by the clerk and master. The order was so made. Afterwards, Mr. Giles stated to the court, in the presence of the clerk and master, that application had been duly made to the said clerk and master for the money according to the above order, and the clerk and master had paid over all, except the sum of about $400, which had not been collected, and the sum of $160.85, which the said clerk and master admitted he had collected, but refused to pay and account for, alleging it had been stolen from him.

These facts being admitted by the clerk and master, Mr. Giles moved for a rule upon the clerk and master, Erasmus Love, to show cause why he should not be ordered to pay over the said sum of $160.85. The clerk and master, in answer to the rule, filed an affidavit setting forth that, after the said sum of $160.85 was received by him as clerk and master, the same, without any negligence or default on his part, together with (328) other sums of money belonging to the office and some of his own money, was, on 20 March, 1840, stolen from out of a small trunk in his dwelling-house, where he kept his own money, together with the office money, and that he has never since been able to obtain restitution of the said $160.85, or the other office money, or his own money. Upon which grounds his attorney, Alexander Little, insisted that as clerk and master he was not liable. But the court was of opinion that he was liable to account for all moneys received by him as clerk and master, except where the moneys were destroyed by the act of God or taken by the public enemies of the country. It was therefore ordered by the court that the said Erasmus Love, clerk and master as aforesaid, pay over to the parties entitled the sum of $160.85. From which order the said Erasmus prayed for and obtained an appeal to the Supreme Court.

No counsel appeared in this Court for either party.

RUFFIN, C. J. As the case does not require it, the Court is unwilling to lay down a rule as to the care and diligence a public officer should use in the keeping of the moneys belonging to individuals which come to his hands in a course of official duty. For, supposing that he may be excused, though he lose them, not by the act of God or the public enemies, but by robbery or secret theft, yet, very clearly, the circumstances to show that

the fact did not occur by culpable negligence ought distinctly to be stated and established by competent evidence. Here there is neither such a statement nor evidence from a competent source. The party himself cannot, by his own oath, protect himself from liability for the sum which he received in the cause. This is not a proceeding for a contempt by way of imposing a penalty or punishment, in which the officer tenders himself to purge the contempt on oath; but it is an order simply to pay over (329) money received by him, and he wishes to be adjudged not liable for it on his own evidence only. We must say also, that if he could be heard, his statement is too meager to satisfy the Court. He says, it is true, that the loss was "without any negligence or default on his part." But that is a point about which persons may differ very materially. It does not appear whether the alleged theft was in the day or night; when the party and his family were at or from home; in what part of the house the trunk was, whether exposed or in a private place, or whether suspicion has fallen on any person in particular, or whether that person was or was not one of the party's household, and had given cause for suspicion as to his or her integrity. In fine, the clerk and master asks to be exonerated upon his own judgment of due diligence, without affording to the court any means of forming a judgment upon that point for themselves.

We see, therefore, no reason why the master should not remain liable for the sum of money which is the subject of the motion, and think his Honor was right in ordering him to pay it. This opinion will accordingly be certified to the Court of Equity, that the matter may be there further proceeded in.

PER CURIAM. Ordered accordingly.

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(330)

BENNETT HESTER, ADMINISTRATOR, ETC., v. HAMILTON HESTER AND OTHERS.

1. A being a man of large fortune, and having about seventy nephews and nieces, the children of eight brothers and sisters, after providing for his wife and making some small devises and bequests, bequeathed as follows: "Item. My will is, after the death of my wife and the negroes given her be taken out, that all the rest of my negroes, etc. (here mentioning the residue of his estate), be sold, and all the bonds, etc., and out of the proceeds arising therefrom my will is that I give £100 to my brothers' and sisters' children, to be equally divided amongst the children that are alive. I except (here the testator names five or six of his

nephews), for they are good for nothing." The residue of his estate, "if there be any overplus," is left to his brother Francis Hester's children: *Held*, that this was not a legacy of £100 to each of the grandchildren or to each stock of the grandchildren, but that each grandchild was entitled to only an equal share of the one sum of £100.

2. Extraneous evidence as to the amount of the testator's estate and the number of his legatees, upon a question of mere construction, cannot change the operation of legatory words which have a clear and precise meaning.

3. Extraneous circumstances, when admissible, are to be received with extreme caution, for the construction of every instrument is generally to be established upon what is to be found in the instrument itself.

4. Collateral evidence is not permitted to introduce an intention into the will which, with the aid of that collateral evidence, the will does not express.

5. Nor can an express and unequivocal disposition of property, in one clause of a will, be controlled by any inference, from the context, of a probable oversight or mistake of the testator in that disposition. His meaning, once explicitly declared, cannot be changed by any inference of a different meaning, unless such inference be necessary and beyond doubt.

6. A bequest by an uncle to his niece becomes lapsed by the death of the niece in the lifetime of the testator, and does not go to a surviving child of such niece, under the act (Rev. St., ch. 122, sec. 15), which only applies to the case of a legacy from a parent to his child.

7. A bequest "to some promising young man of good talents and of the Baptist order, to be selected by my executors," is void because of its indefiniteness. There is no person who can claim it.

8. Where a testator gives power to his executors to sell land, and no executors are named in the will, the administrator with the will annexed may exercise this power, under a proper construction of our act of Assembly. (Rev. St., ch. 46, sec. 34.)

THIS cause was transmitted by consent from GRANVILLE Court of Equity, at Fall Term, 1842, to the Supreme Court. (331)

The bill was filed by the plaintiff, as administrator with the will annexed of Benjamin Hester, deceased, to obtain the advice and direction of the court in the execution of his trust as such administrator, and the several claimants under the will were made parties defendants. The following is a copy of the will, which had been duly admitted to probate as a will both of real and personal property, at September Term, 1838, of Granville County Court, when the plaintiff was appointed and qualified as administrator with the will annexed:

GRANVILLE COUNTY—North Carolina.

I, Benjamin Hester, being in a low state of health of body, but in perfect state of mind, do make, constitute and ordain this my last will and testament; and knowing that it is appointed once for man to die, and in the first place I recommend my body to the earth and my soul to Almighty God who gave it, to be buried in a Christian manner; and as it has pleased God to bless me with some worldly property, I give and dispose of the same in the following manner and form, to wit: I give to my beloved wife, Mary Dyer Hester, during her natural life or widowhood, all my property, real and personal, stock, etc., during her natural life, and $500 in silver, to be delivered her on inventorying my property—my other money on hand to be put out in sure hands at interest, until after the death of my wife, and then to dispose of it as I hereafter direct. I also give to my wife twelve negroes, at her death to do with and dispose of as she may think proper—six males and six females, out of Harman and Amie's family—and if my wife should think at any time that the property is burdensome to her, she can, with the consent of my executors, sell any part she may choose, and put the money to interest while my wife lives. I also
(332) give to Robert Hester the land and plantation bought of William Shore and wife, with the area of land, to line run by Joseph Taylor and myself, joining Colonel Ridley's line and Hester's across the Ready Branch. I also give to Francis Hester, son of Francis, all that tract from Jackson's line to Ridley's plantation down to the line Bob Hester's, after death of wife. I give to Benjamin Currin the tract of land whereon he now lives, say, 200 acres. I also give to Alfred Hester, after death of wife, that tract of land called Howard's whereon he now lives. I also give William Hester, son of Francis, 200 acres of land lying on Bennett's Creek, adjoining the lands of George Knott and John Hunt. I also lend to Nancy Huddleston one negro girl named Mary, during her natural life—after her death I give to heirs of her natural body the said Mary and her increase forever. Item: I give to the Baptist Society the meeting-house and one acre of land and the privilege of the spring, so long as it is kept up for house of worship, and no longer. Item: My will is, after the death of wife and the negroes given her be taken out, that all the rest of my negroes be sold, and all my stock of horses, cattle, sheep and hogs, my household and kitchen furniture, and also all my land that I have not given away, and all my bonds and money on hand, and out of the proceeds arising therefrom my will is that I give £100

to my brothers' and sisters' children, to be equally divided amongst the children that are alive. I except John Hester, Jeremiah Hester and Benjamin Hester, sons, and Patrick O'Briant and John Bats, of Zachariah Hester, for they are good for nothing, and I give them five shillings each—after this done if there are funds left, my will is that $500 be raised and given to some promising young man of good talents and of the Baptist order, at the discretion of my executors. This being done and my just debts being paid, and there being an overplus left, my will is that it be equally divided amongst my brother Francis Hester's children. This being done, and after the death of my wife, my will is that my old man Shadrach be set free.

Interlined before assigned. ( )

Signed, sealed and delivered in the presence of us.

(No signature at the foot of the will nor subscribing witnesses.)

Item. I also give to my beloved wife one-half of my (333) household goods and furniture, to do with and dispose of as she may think proper. I also give $100 of my funds in hand to William B. Worrel; also my will is to give to Thomas Crocker $100; also my will is to give Brother Huggins, of Warren County, $100, to be paid them as soon as my will is proven and they qualify. I also give to Nancy Thomason one bond of eighty-odd dollars, to her and her heirs; I also give to Elizabeth Parham one bond of $60. After this being done, I want all my bonds collected, and my funds on hand, and put out at interest during my wife's lifetime, and then to be distributed as hereto directed. My will is that as there are some of my brothers' heirs owing me, and I have their notes, I wish that to be taken out of their ratable part of the £100, and then make the division, counting these notes as so much of their part. I also give to Francis Gordon my old Poll mare, now in foal. I also give to Alfred Hayes my one-eyed filly.

(Neither signed nor witnessed.)

It appeared that the testator was a man of large estate, and that his nephews and nieces, the children of eight brothers and sisters, amounted in number to about seventy. It also appeared that the notes, mentioned in the latter part of the codicil as due to the testator from some of his brothers' children, were of much greater amount than their ratable share of £100.

The doubts arising upon the construction of this will and the questions submitted to the court for their advice are stated in the opinion delivered in this Court.

Badger, Waddell and *Iredell* for the residuary legatees.
W. H. Haywood, Jr., for the other nephews and nieces.

GASTON, J. The most important question arising upon the interpretation of this exceedingly imperfect and almost unintelligible will is the construction of the bequest of "£100
(334) to the testator's brothers' and sisters' children." Three constructions are presented to us: the first, that it is a gift of £100 to each of these children; the second, that it is a gift of £100 to each family of children of a brother or sister; and the third, that it is a gift of one £100 to the testator's nephews and nieces, equally to be divided between them. The testator, who is admitted to have been a man of large fortune, commences his will by making a provision for his wife. He gives to her absolutely twelve slaves, and $500 in silver, and the beneficial use of all his other property, real and personal, for life. Then, after making some specific devises of land and a specific bequest to Nancy Huddleston of a negro girl for life, and after her death to the heirs of her body, he thus expresses himself: "Item. My will is, after the death of my wife, and the negroes given her be taken out, that all the rest of my negroes be sold, and all my stock of horses, cattle, sheep and hogs, my household and kitchen furniture, and also all my land that I have not given away, and all my bonds and money on hand, and out of the proceeds arising therefrom my will is that I give £100 to my brothers' and sisters' children, to be equally divided amongst the children that are alive. I except [here the testator names five or six], for they are good for nothing. After this is done, if there are funds left, my will is that $500 be raised and given to some promising young man of good talents and of the Baptist order, at the discretion of my executors. This being done and my just debts paid, and there be an overplus left, my will is that it be equally divided amongst my brother Francis Hester's children. This being done, and after the death of my wife, my will is that my old man Shadrach be set free." To this will is subjoined a codicil, wherein, after giving to his wife the half of his household goods and furniture absolutely, and a few other bequests to his friends, he proceeds thus: "After this being done, I want all my bonds collected and my funds on hand, and put out at interest during my wife's lifetime, and then to be distributed as hereto directed. My will is that as there are some of my brothers' heirs owing me, and I have
(335) their notes, I wish that to be taken out of their ratable part of the £100, and then make the division, counting these notes as so much of their part." The testator left sur-

viving him about seventy nephews and nieces, being the children respectively of his eight brothers and sisters. The fund out of which the legacy to these children is directed to be paid is amply sufficient for the payment to each of £100. Some of the notes referred to in the codicil as being due to the testator from some of his brothers' heirs are for much larger sums than the pittance of the £100 which they would be entitled to receive if the £100 is to be divided *per capita* among all the children of the testator's brothers and sisters.

Waiving all objections to the admissibility of extraneous evidence as to the amount of the fund and the number of the legatees, upon a question of mere construction, it cannot be doubted but that such evidence never can change the operation of legatory words which have a clear and precise meaning. The will is the law which the testator is permitted to make for the disposition of his property. He must be presumed to understand his own meaning, and where he does speak unambiguously those whose duty it is to execute this his law must understand him to mean what he has said. It is the intention which the will expresses that the law carries into effect, and collateral evidence is not permitted to introduce an intention into the will which, with the aid of that collateral evidence, the will does not express. Admitting, too, as we certainly do admit, that in construing any clause of a will we are not only at liberty, but are bound, to take into consideration every other part of it, to see if something be not there found which either directly or by plain inference qualifies or explains the sense of the clause to be construed, yet we hold it to be undoubted law that an express and unequivocal disposition of property cannot be controlled by any inference from the context of a probable oversight or mistake of the testator in that disposition. His meaning, once explicitly declared, cannot be changed by any inference of a different meaning, unless such inference be necessary and beyond doubt. It is not pretended that by an adherence to these rules courts will ascertain in every case what a testator actually does mean; but they are deemed, upon the whole, rules best calculated for ascertaining the meaning of testators, and there is no (336) medium between adherence to the established rules of interpretation and the arbitrary discretion of judges.

Now, the disposition to be construed is *per se* and to a certain extent perfectly explicit. "Out of the proceeds arising therefrom, my will is that I give £100 to my brothers' and sisters' children, to be equally divided amongst the children that are alive." Upon this there is nothing left for construction, unless it be, what is the time referred to at which the children, amongst

whom the division is to be made, should be alive. Fix that time when you may—at the death of the testator or at the time of the division—so as to determine which of these children are meant, and then the language is as precise as any that could be used. The sum given is £100. It is given to the children of the testator's brothers and sisters, and the sum so given is to be equally divided between those children alive at a particular time. The amount of the gift, the persons to whom it is given, and the manner in which these persons shall divide the thing given, are all stated. Every one of the children of his brothers and sisters, except those expressly excluded by the will, or who shall not be alive at the time prescribed by the testator, is to have an equal part with every other child in the division of this sum of £100, and no other interpretation can be adopted without doing violence to the language here used. There is no other part of the will which furnishes a necessary inference of an oversight or mistake of the testator in the language used. In the codicil, taking notice that some of his brothers' children owe him, he directs that the amount of their debts shall be deducted "out of their ratable part of the £100," and the debts to be deducted exceed their ratable part of £100, if no more than that sum is given to all of them collectively. Hence it is inferred that a greater legacy is given to each than the amount of his debt, because a larger debt cannot be deducted from a smaller legacy.

If the clause to be construed were really ambiguous this argument might be entitled to much weight; but it is much (337) easier and safer to give to the codicil an explanation which shall reconcile it to the plain text of the will than it is to overrule that plain text by a rigid adherence to the letter of the codicil. A direction that the testator's debtors, who are also his legatees, shall deduct their debts when they receive their legacies, is fully satisfied, when the first exceed the latter, by a deduction of them *pro rata*. But the codicil furnishes, if it had been wanted, a conclusive argument against the first and most enlarged construction contended for, for it directs that the sums to be deducted from the legacies to his brothers' and sisters' children shall be deducted from their *ratable share of the £100*. So that without doing violence to the codicil, as well as to the primary gift in the will, it must be held that no child of a brother or sister was to take more than a ratable part of that sum.

When we take into consideration the extraneous circumstances relied upon, and these when admissible are to be received with extreme caution (for certainly the construction of every instrument is generally to be established upon what is to be found in

the instrument itself), it does indeed appear most extraordinary that the testator could have entertained any doubt that so large a fund as he had provided might not prove adequate to the raising thereout of a legacy of £100.

It is so extraordinary as to open an almost unlimited field of conjecture how to account for it. One of these conjectures, and a *highly probable* one, is that there was an oversight or mistake of the testator in the amount of the legacy which he had given. But it is *possible* that he may have been in error as to the value of the fund provided, or have apprehended that the fund so provided might be greatly lessened by his debts. But be this as it may, we cannot say that these extraordinary doubts furnish an indubitable and necessary inference that he has given a larger sum than he did give. It is certain that he gave but £100. It is impossible that we can say, with all the explanation which this collateral matter furnishes, that he gave £100 to *each* of his brothers' and sisters' children when he directed that sum to be *divided* among them, and provided that such of (338) these children as owed him should deduct these debts out of their *ratable part* of this £100. Nor can we declare that he has given £100 to each set of children as a family, for his gift was of £100 to all of the children, without reference to families, and the division of this sum thus given to all is directed to be made "equally among the children that are alive." There is no help for it. There is but the sum of £100 given, and this sum is to be divided equally among the testator's nephews and nieces other than those excepted in the will, or who may not be alive at the time referred to. The true solution of all the difficulties in the case probably is that this imperfect instrument ought never to have been established as a will. It can scarcely be doubted but that it was an unfinished sketch, which the supposed testator had been unable to complete to his satisfaction, and was not designed in its then crude, imperfect form to take effect as his will. But it has been established as a will, and we are bound to take it as it is, with all its imperfections and absurdities, and apply in its construction the rules of law.

It is admitted by the pleadings that the widow of the testator dissented from the will and had her dower and distributive share of his personal estate allotted to her as if he had died intestate, and it is further agreed by the parties that since the bill was filed she has died. The time, therefore, has certainly arrived when the proceeds of the estate are to be disposed of as the testator has directed.

We are of opinion that all the specific *bequests* in the will and all the pecuniary bequests, with the exception of the £100, are

given immediately, and are excepted from the general disposition of the use of the testator's property to his wife for life. This is plainly declared as to all of them, except the bequest by way of loan to Nancy Huddleston, and after her death of a gift to the heirs of her body, of the negro girl Mary; and we think this intent is manifested, though not expressly, in this bequest also. It is found among several devises where the testator takes special care to state that they shall be postponed in enjoyment to his wife's death. The presumption fairly arises, where (339) he is silent in this respect, he intends an immediate gift. This construction supersedes the necessity of inquiring what effect is produced upon these bequests by the widow's dissent from the provision made for her by the will.

The direction by the testator that all his negroes, bonds and other property not given away should be sold, and the proceeds, after payment of his debts, be divided and disposed of as in the will recited, evidently contemplates a sale to be made by his executors, and therefore confers an authority on his executors to sell the lands. No executors, however, were nominated, and we are asked whether this power can be exercised by the administrator with the will annexed. Previously to the provision made in our Revised Statutes, ch. 46, sec. 34, it is very clear that an administrator with the will annexed could not exercise a power to sell lands conferred on executors. The statute of 31 Hen. VIII., ch. 4, which was the only statute then in this State modifying the common law on the subject, applied only to the case where part of the executors refused and the others were willing to execute the power. But the act in our Revised Statutes authorizes the administrator with the will annexed to sell when all the executors die or refuse to take on them the administration. The case of an administration with the will annexed where no executors were appointed is not within the letter of the act. But as it comes within the spirit of the act, and as the act is one of a remedial character, we are of opinion that the case is embraced within its purview. But unless there be a necessity for the sale of the land—or even of the negroes and other property—the plaintiff ought not to sell, for the ulterior devisees and legatees have elected to take the property in kind. Their answers are explicit to that effect.

Elizabeth Morris, one of the children of the testator's brother Francis, died in the testator's lifetime, leaving a child. It is clear that this child can claim nothing under a bequest of her mother. Admitting that if Elizabeth Morris had survived the testator she would have taken a vested interest in an undivided part of the bequest of the £100 (a point on which we express

no opinion), her legacy lapsed by her dying before the testator; and our act which declares that a devise or be- (340) quest to a child shall in the event of such child's death before the testator take effect and vest in the issue of such child, applies only where the devise or bequest is made by a parent.

The direction asked of us, whether the children who take the legacy of £100 are required to be alive at the death of the testator or at the death of the widow, is not shown to be practically necessary. No facts are stated which raise the question, and it is not proper that we should answer judicially to hypothetical inquiries.

The legacy of $500 to "some promising young man of good talents and of the Baptist order, to be selected by the testator's executor," is void because of its indefiniteness. There is no person who can claim it. Possibly it might be *intended* as a donation for a charitable use, which, had it been distinctly expressed, might have enabled the Court to give it effect. But if so, unfortunately this intent does not appear.

PER CURIAM. Decreed accordingly.

Cited: Crissman v. Crissman, 27 N. C., 501; *McCorkle v. Sherrill*, 41 N. C., 176; *Faribault v. Taylor*, 58 N. C., 222; *Thomas v. Lines*, 83 N. C., 197; *Gay v. Grant*, 101 N. C., 221.

(341)

TEMPLE ROBERTSON, ADMINISTRATOR, ETC., v. JOSIAH HOULDER ET AL.

1. When a chattel is given in remainder, the assent of the executor to the particular estate is ordinarily construed to be an assent to the gift in remainder. But there is no doubt that the assent to the former may be so qualified as not to extend to the latter.

2. Where slaves are directed by a testator to be left with his wife until out of the profits a certain debt is paid, and then to go to his children, and the executor permits the wife to hold the negroes, but does not assent to the legacy, he is responsible to the children, in default of the wife, for the hire and profits of such slaves between the period when the debt was paid off and the time of the delivery of the slaves to the children.

THIS cause was transmitted by consent from JOHNSTON Court of Equity, at Spring Term, 1842, to the Supreme Court.

The facts of the case are stated in the opinion delivered in this Court.

W. H. Haywood for plaintiff.
Badger and *J. H. Bryan* for defendants.

RUFFIN, C. J. Jacob Stevens made his will and died in 1829. He appointed the defendant Houlder executor, and by his will gave to his wife for her life certain lands, seven slaves, seven head of horses, all his stock of cattle, hogs and sheep, his crop of every kind, working tools and plantation utensils and carts; and, at her death, the land and negroes over to certain of his children, and the other property, after legacies of a few specific articles, to be equally divided among his six children. The testator then gave to each of his six children particular lands
(342) and negroes, among which gifts were devises of two tracts of land to his daughter Joanna and a bequest of seven negroes by name, and a horse.

The testator owed debts to the amount of about $2,000, among which was a debt of $1,000 due to Thomas Rice; and by his will he directed that all his property of every description should stay in the possession of his wife until she could raise money and pay that debt to Rice.

After probate, the executor delivered the negroes, twenty-three in number, to Mrs. Stevens, and also the other perishable chattels specifically bequeathed to her, which are found to have then been of the value of $1,600; and at the foot of an inventory thereof he took her receipt for the articles, and added as follows: "To be returned to the said executor whenever called for, to pay debts or divide among the heirs, agreeable to the said deceased's last will and testament." After applying the undisposed surplus of the estate to the payment of the testator's debts, other than that to Rice, there was a balance of them unpaid, and the executor received from the widow part of the perishable property, which he had before delivered to her, and sold it for the sum of $140.70¼, which he applied in discharge of the debts. Of the residue of that property Mrs. Stevens sold a part, to the value of $373.98, which she applied in payment of the debt to Rice, and she yet has a part thereof, to the value of $74.90; and the remainder has been consumed or perished.

The present plaintiff married the daughter Joanna, who died in 1836, leaving an only child of the marriage; and the plaintiff took administration of her estate.

The bill was filed in 1838, against the executor, the widow and the other children, and alleges that the debt to Rice had been long before paid, or ought to have been, out of the profits of the estates left in the management of the widow for that purpose; that she had surrendered to the other children the lands

and negroes given to them respectively, and retained those to which the plaintiff is entitled, so as to throw an undue proportion of that debt on the plaintiff; and it prays an account of the principal and interest of the debt, the payments (343) on it, and the profits of the property; and that the executor may assent to the legacies to the plaintiff's intestate, and he and the widow compelled to deliver possession of the negroes and land, and pay to him any surplus of profits over and above his fair proportion of the Rice debt, if such surplus be found—he, the plaintiff, offering to pay his proportion of the debt, if anything be still due thereon.

The defendants answered, and after the cause had been some time pending a decree was entered by consent, under which the slaves and land given to the plaintiff's wife were delivered to him on 25 May, 1841; and an inquiry was directed into a great many points respecting the values of the several gifts to the widow and children respectively, the amounts paid on the debt to Rice and when it was paid, and the profits of the estates made or that might reasonably have been made, the application thereof and the administration of the executor, and other points. The master made a report on most of them, and exceptions were taken on both sides. But it is unnecessary to go through them, or do more than advert to them generally, by saying that the plaintiff ultimately waived the whole benefit of the inquiry, excepting only for the hires of the slaves retained by the widow, from the time of the payment in full of the debt to Rice, thus giving up even the rents of the lands. That debt the master finds was paid on 27 February, 1834, by applying thereto the before-mentioned sum of $373.98, received by Mrs. Stevens for perishable property sold by her, and by the proceeds of crops made on the plantations and hires of negroes before that time; and to that part of the report there is no exception.

To that extent there can be no objection to the decree for the plaintiff against Mrs. Stevens. It may be that she was not obliged to sell any part of the property left to her for life for the purpose of aiding in the payment of the debt. But as she chose to do so, and thereby deprived the children, who were entitled to it after her death, of all chance of succeeding to it, and applied the proceeds to this particular debt, it must be taken as an agreement on her part to give up her life (344) interest and apply so much of the capital, in which all were interested, for the payment of this charge upon the whole estate. From the time the debt was paid the children were entitled to their land and negroes, for they were only left with her as long as they should be needed to raise money to meet that

demand; and therefore she ought to pay hire for the plaintiff's slaves from 27 February, 1834, until 25 May, 1841. The amount of that hire the Court cannot ascertain on this report, in which the master finds "the hire from the death of the testator to 25 May, 1841," to be $521. It must therefore be referred back for a report as to what part thereof is due for the particular period after the payment of the debt to Rice.

For the sum that may be thus found due from Mrs. Stevens the plaintiff asks that the defendant Houlder should be declared to be also liable. And the Court is of opinion that he must be so held. In his answer he insists that it was his duty to permit the widow to take possession of the property, the will so expressly directing, and that he had nothing further to do with it, and could not dispossess her and deliver the negroes to the plaintiff, but that he must look to the widow. Without determining the extent of the executor's duty in securing the interest of the children in this case, and whether it would be sufficient for him that he had assented to the legacies, including that to the children as well as that to the widow, we think here that he is liable because he never did assent to the legacies to the children, but expressly retained his dominion over the property. When a chattel is given in remainder the assent to the particular estate is ordinarily construed to be an assent to the gift in remainder. But there is no doubt that the assent to the former may be so qualified as not to extend to the latter. In this case, indeed, the executor assented to neither legacy, but merely parted with the possession to the widow as his bailee, taking her engagement to return the articles *to him* whenever required for the purpose of paying debts or for that of delivering to the children. The children could not, therefore, recover their
(345) slaves except through the executor, and as he retained the powers of an executor and a control over the property, he was in duty bound to take steps to ascertain when the debt to Rice was discharged, and thereupon deliver to the children their legacies. If, therefore, Mrs. Stevens should not be able to discharge the sum that may be decreed against her for the hire of the negroes, the executor must make it good; and they must, of course, pay the costs of this suit.

PER CURIAM. Decreed accordingly.

(346)

JOSIAH ROBERTS AND ANOTHER v. WILLIAM GREEN AND ANOTHER, EXECUTORS, ETC.

Where a testator bequeathed certain negroes to be hired out during the life of A and their wages paid to him at the discretion of his executors, and after A's decease the negroes were to be the property of A's daughter B, who was also to be entitled to any unexpended balance of the hires: *Held*, that one to whom both A and the husband of B had for a valuable consideration assigned all their interest in the said legacy was entitled to demand from the executors the possession of the slaves and whatever might remain unappropriated of their hires.

THIS cause was transmitted by consent, from the Court of Equity of ROCKINGHAM, at Fall Term, 1842, to the Supreme Court.

The facts are stated in the opinion delivered in this Court.

J. T. Morehead for plaintiffs.

No counsel for defendants.

DANIEL, J. The plaintiffs in their bill state that for a valuable consideration they are the assignees of a legacy in certain slaves, their increase, rents and hires, given by the last will and testament of Lucy Haynes to William Noblin and his daughter Lucy H. Noblin. The bequest in the said will is in the following words: "My two negroes Milly and James I give and bequeath to my great-granddaughter Lucy Haynes Noblin, daughter of William Noblin, my grandson. But my will and meaning is that the two above-named negroes be hired out during the natural life of my grandson William Noblin, and their wages paid to him *at the discretion of my executors*. And at his decease for the above-named negroes to be the property (347) of his daughter Lucy Haynes Noblin; and also, if there be any part of the wages of the aforesaid two negroes remaining in my executors' hands at or after the decease of the said William Noblin, my will and meaning is that it be carefully paid and delivered to his daughter Lucy Haynes Noblin." The bill states that the defendants, as executors of the said testatrix, hold the said slaves and their increase and hires; and that, although the plaintiffs have demanded the said slaves and their increase and an account of their hires, etc., still the defendants refuse, etc.

The defendants in their answer admit the legacy as stated in their bill. But they do not admit the assignment of the same to the plaintiffs by the legatees. They state that the hires of the said negroes have been legally accounted for up to 1842.

On examining the proofs and exhibits filed in the cause we

are satisfied, and so declare, that James Walker, who was at the time the husband of the legatee Lucy Haynes Noblin, and William Noblin, the other person interested in the said legacy, did for a valuable consideration execute deeds of assignment to the plaintiffs for the slaves and their increase covered by the said legacy and all the rents and hires of the same. The said deeds were executed on 10 December, 1841. The defendants are, as they truly say they are, but trustees of the fund. And we declare that the *cestuis que trust* of the said entire fund were William Noblin and Lucy Haynes Noblin, afterwards and now the wife of James Walker. The assignment, therefore, made by William Noblin and James Walker in right of his wife transferred the entire trust fund to the plaintiffs. It therefore becomes immaterial for us to inquire as to the extent of the *discretionary powers* of the executors mentioned in the will in paying the profits to William Noblin for life. We now are of opinion that the plaintiffs are entitled to a surrender of the said slaves and their increase, and also to an account of their hires, allowing all proper credits. The decree will be for the plaintiffs accordingly.

PER CURIAM. Decreed accordingly.

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(348)

LEVI STEPHENS, ADMINISTRATOR, ETC., v. JAMES W. DOAK AND OTHERS.

1. The slaves of a female ward will go to the representatives of her husband, though he married while the slaves were hired out by the guardian, and died during the term for which they were hired.

2. Where such slaves are held in common with others to whom the same person is guardian, and after the marriage, by agreement between the husband and guardian, the slaves are again hired out and the husband becomes the hirer of one and gives his note for the hire to the guardian, this does not affect the right of the husband or his representatives.

THIS cause, having been set down for hearing upon the bill and answers, was by consent of parties transferred from GUILFORD Court of Equity, at Fall Term, 1842, to the Supreme Court.

The facts of the case are stated in the opinion delivered in this Court.

No counsel for plaintiff.

J. T. Morehead for defendants.

STEPHENS *v.* DOAK.

RUFFIN, C. J. This is a bill for an account of the hires of a number of slaves and a division of the slaves, and that the plaintiff may receive one-fourth part of the hires and slaves. The cause was set for hearing upon the bill and answers, and transferred to this Court. Upon the pleadings the case appears to be as follows:

Levin Caulk died intestate, leaving a widow and three infant children, of whom one was a daughter, Elizabeth, who afterward intermarried with Ross, the intestate of the plaintiff. The defendant Doak administered on the estate of Caulk, and, after discharging the debts, held the slaves in question (349) subject to distribution among the widow and three children. He then became the guardian of the children in 1840, and by the assent of the widow the negroes remained undivided, and he (Doak) hired them out for 1841, for the benefit of the widow and his wards, and took bonds for the hire, payable to himself as guardian. During 1841 Ross intermarried with Elizabeth, then and still an infant, and in the beginning of 1842 it was agreed between Ross and the guardian that the negroes should not then be divided, but that Doak should again hire them for the benefit of the owners and take the bonds payable to himself as before. Under that agreement Doak hired out the negroes for 1842, when Ross himself hired one of them and gave his bond therefor to Doak, as other persons did. During 1842 Ross died intestate, and the plaintiff became his administrator and filed this bill against Doak, Mrs. Ross, Mrs. Caulk and the other two children. Upon those facts the defendants raised the objection that the husband did not reduce the negroes into his possession, and that upon his death they survived to Mrs. Ross.

The facts of this case are so precisely those of *Pettijohn v. Beasley*, 15 N. C., 512, that, independently of the agreement of Ross to the hiring of 1842, that case is decisive of this. But that agreement makes it still plainer, for, as to the share of his wife, it made Doak the husband's agent to make the hiring. It was faintly argued that giving his bond for the hire of one of the slaves made a difference. But it certainly does not, for it is nothing more than one tenant in common hiring a part of the common property and giving a security therefor to a common trustee for all the parties. The plaintiff must then have the decree he prays.

PER CURIAM. Decree for the plaintiff.

Cited: Caffey v. Kelly, 45 N. C., 50; *Fowler v. McLaughlin*, 131 N. C., 210.

(350)

ROBERT POSTON AND ANOTHER v. WILLIAM D. JONES.

1. In every lease of land the lessor is so far bound, by implication, for the title and enjoyment by the lessee that his right to the rent is dependent thereon; and, if the tenant be evicted from the demised premises, the rent is thereby suspended.

2. So if the lessor be evicted of a part of the land demised, by a stranger on title paramount, it operates as a suspension of the rent *pro tanto*, and the rent is apportioned and payable only in respect of the residue.

3. The rule is the same where the lessor himself is evicted before the term is to begin, and the lessee is kept out by superior title, so that he cannot enter under the agreement for a lease.

4. This defense may be made at law when the action is brought for rent reserved by the lease; but when the lessee cannot make his defense at law, as where he has given a bond or independent covenant for the amount of the rent, a court of equity will relieve him.

THIS cause, at Spring Term, 1842, of BUNCOMBE Court of Equity, was transferred by consent to the Supreme Court.

The facts are stated in the opinion delivered in this Court.

Francis for plaintiffs.
Clingman for defendant.

RUFFIN, C. J. From the pleadings and proofs we find this to be the case between these parties: In October, 1833, the defendant, by parol, leased to the plaintiffs, for 1834, a parcel of land containing sixty or seventy acres, at a rent of 350 bushels of Indian corn, to be delivered on 19 October, 1834; and to secure the same, the plaintiffs executed their covenant to the defendant. At the time of making the lease, an action of
(351) ejectment had been brought by Rebecca Poston for the same land, against the present defendant or some person holding under him, and a recovery was effected therein soon afterwards as to forty or fifty acres of the land, and the said Rebecca was put into possession the last of 1833. The plaintiffs afterwards leased from her the part thus recovered and entered therein under her, and at the same time they entered into the residue of the land under the demise from the defendant. When the rent became payable, the plaintiffs offered to the defendant a fair proportion thereof, to be estimated according to the relative quantity and quality of the portions of the land which they held under him and Mrs. Poston respectively; but the defendant refused to receive anything but the whole, and instituted an

action on the covenant therefor. The answer states that the plaintiffs knew of the action of ejectment, which appears to be true. And it further states that it was distinctly agreed between the parties that the plaintiffs should run the risk of a recovery in that action, and sustain the loss without recourse to the defendant. But of the truth of this allegation there is no evidence; and, on the contrary, a witness states that the parties repeated to him the terms of their contract, that is to say, as to the parcel of land intended to be leased and as to the rent to be paid, but that there was no such stipulation or conversation as this last as set forth in the answer. The bill prayed that the rent might be properly apportioned and for an injunction against further proceedings at law. Upon the coming in of the answer, on the motion of the defendant the injunction was dissolved; but the plaintiffs replied and the cause proceeded to proofs, and has been transferred to this Court for hearing.

The Court is of opinion that the plaintiffs are entitled to relief. In every lease of land the lessor is so far bound, by implication, for the title and enjoyment by the lessee that his right to the rent is dependent thereon; and if the tenant be evicted from the demised premises the rent is thereby suspended. So, if the lessee be evicted of a part of the land demised, by a stranger, on title paramount, it operates as a suspension of the rent *pro tanto*, and the rent is apportioned and (352) payable only in respect of the residue. Co. Litt., 148. Of course, the rule must be the same if the lessor himself be evicted before the term was to begin, and the lessee be kept out by superior title, so that he could not enter under the agreement for the lease. The rule is founded on that principle so consonant to natural justice, that one should not be compelled to pay for that which, although contracted for, he never got; which, while it is a rule of landlord and tenant, would *a fortiori* be adopted by a court of equity to which a party found it necessary to apply. Such necessity is laid upon these plaintiffs by the form in which they contracted. As a doctrine of the law, an apportionment of rent can be adjudged only when it is reserved on a lease and an action is brought for it as rent thus reserved. Such an action is founded on the relation of the parties as lessor and lessee, and the rent is due to the one in respect of the enjoyment of the land had by the other; and therefore an eviction by better title is an answer to the action. In this case the rent was not merely thus reserved, but was secured by an independent covenant for the payment of so much corn in gross; and from the method of pleading at law, it could not be there seen that this was a debt for rent, and therefore could not be apportioned

in the action on the covenant. But being in fact a debt of that sort, and the lessees having actually never enjoyed the premises in respect to which the rent was to arise, the principle of law and justice applies in this Court, in which the real purpose of the instrument may be inquired into, and ascertained to be a security for rent. That is the ground of a change of the jurisdiction in this case; and when it is found that this covenant is but a distinct security for rent reserved on a lease, then equity but follows the law in apportioning the debt upon this security as the law would apportion it if it had been sued for as rent reserved by the lease.

The defendant has failed to establish any special agreement of the plaintiffs to take the risk of the ejectment. It does not appear that anything of the kind was in the contempla-
(353) tion of either of the parties. Consequently, the case stands on the general doctrines already discussed, and the plaintiffs must have a decree. There must be an inquiry as to the quantity and annual value of the several parcels of land occupied by the plaintiffs under the defendant and Mrs. Poston, and the rent agreed on accordingly apportioned; and also an inquiry as to what sums, if any, the defendant may have recovered and received in the action at law for the debt, interest or costs, and also for the costs of this suit upon the dissolution of the injunction, that the proper decree may be made in respect of each of them.

PER CURIAM. Decreed accordingly.

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(354)

SIMEON P. LONG v. JOHN NORCOM AND OTHERS.

1. It is a general rule that a court of equity will not go beyond the income of a ward's estate for his maintenance and education.

2. But there is no doubt that the court may apply a part of the capital for a child's apprentice fee or otherwise putting him out in life; and that even for maintenance, as a matter of necessity, the capital may be applied, where, from the possession of property, the infant cannot be entitled to maintenance as a pauper, and, from mental imbecility or want of bodily health or strength, he cannot be maintained from the profits of his property nor put out apprentice and maintained by his master.

3. The Court of Equity has the power, though it may seldom be willing to exercise it, to take the capital of the ward and apply it for maintenance, either future or past.

4. In ordinary cases the court would not relieve a guardian who, without its previous sanction, had made expenditures for the maintenance and education of his ward beyond the income of the estate, though he might have acted from the best motives.

5. But the court will reimburse the guardian out of the estate of his ward when the expenditures were demanded by such circumstances, amounting, indeed, to physical necessity, as would have compelled any court to authorize them without a moment's hesitation.

THIS cause was removed from the Court of Equity of PERQUIMANS, at Fall Term, 1842, to the Supreme Court by consent of parties.

The facts are stated in the opinion delivered in this Court.

No counsel for either party in this Court.

RUFFIN, C. J. In 1829 the plaintiff was, by the County Court of Perquimans, appointed guardian to his infant brother, William Long, then about eleven years old, and so continued until the death of William, in 1838. The estate of the (355) ward consisted of a negro girl, which was allotted him in the division of the negroes belonging to his deceased father's estate, and charged with the payment of the sum of $95 to another child by way of equality of partition. That negro the plaintiff received, and also the sum of $123.50 from the father's executor, as the ward's share of the general personal estate, and thereout he paid the charge of $95 above mentioned. The bill states the guardian hired out the negro and annually returned his guardian accounts to the County Court; and that thereon a balance of $45.44 was due to the ward at the end of the year 1835, after defraying the expenses of the ward's tuition and the other charges on the estate. And it then further states that William Long was from his infancy of a feeble constitution, not capable of manual labor and therefore not fit to be put to any trade, and that as the ward was thus incapable of gaining a livelihood by bodily labor the plaintiff thought it his duty, as his guardian, to send him to school and give him such an education as to qualify him for some other employment, by which he might support himself; and that for these reasons, after keeping him at country schools for several years, he placed his ward at a respectable academy up the country during 1836 and 1837, at an expense considerably exceeding the current pecuniary income of his property. The bill further charges that the negro woman belonging to the ward, after becoming grown, had children, and by reason thereof no hires could be got for her after 1834, but that she and her family became chargeable, and in

1836 the sum of $27, and in 1837 the sum of $48 were paid for keeping them. And the bill further charges that, the health and constitution of his ward not becoming better at school, the plaintiff, at the earnest request of his brother and with the hope that it would essentially benefit his health and strengthen his constitution, consented that he should spend some time in the Western States, and supplied him with the necessary clothing for that purpose and money to bear his expenses. Upon all which (356) transactions the plaintiff claims a balance due him in principal money in January, 1838, of $669.74½. During 1838, William Long, the infant, died intestate, in Tennessee, and administration of his estate was granted to the defendant, who received from the plaintiff the negro woman and her four children, which she had while under the management of the plaintiff, and sold them for the sum of $1,487.50. The prayer of the bill is that the plaintiff may out of that sum be repaid his advances, which he avers were made in good faith by him for the reasons set forth in the bill, and were unavoidable and necessary.

The answer does not deny any of the material statements of the bill, but insists that in law the plaintiff had no authority to make expenditures for the ward or his estate exceeding the income, and that these were not proper, but extravagant expenditures, and therefore that they ought not to be reimbursed to the plaintiff.

By the consent of the parties it was referred, without prejudice, to the master to inquire what sums had been laid out by the plaintiff on behalf of his ward for his education and maintenance and the charges on his property, and what was proper to be allowed to the plaintiff for his disbursements on that account. From the master's report and the evidence taken by him it appears that William Long was from infancy sickly and of a feeble constitution, and incapable of bodily labor; that he was sent by his guardian to ordinary schools for several years, during which time the guardian charged only the small sums paid for tuition and nothing for board, though all his expenses during that period were worth $100 a year; and that he then sent him, in 1836 and 1837, as charged in the bill, to a good academy in Wake County, and for this latter period charged the sums paid by him for clothing, board and tuition. Thereupon the master reports a balance of principal money of $425.84 due to the plaintiff for such disbursements as the master thinks he ought, as guardian, to have made, including the charges on the estate; and upon that he computes interest up to the date of the report, making in the whole the sum of $525.28. In ascer-

taining this sum the master rejected the plaintiff's charges (357) for advances to fit out the ward for traveling to the West, besides some other small items. No exception is taken on either side to the report; but the case has been brought on to a hearing upon the pleadings and the report and evidence, and submitted on the question whether the guardian can maintain his claim for disbursements beyond the annual profits of the orphan's estate.

It is the general rule that the court will not go beyond the income of the child's estate for maintenance and education; and much less is the court inclined to authorize a guardian, of his own head, to encroach on the capital of the ward's property for those purposes. But we conceive it is wrong to say that those rules are so positive and strict as to admit of no exceptions. There is no doubt that the Chancellor has often taken a part of the capital for a child's apprentice fee or otherwise putting him out in life, and that even for maintenance, as a matter of necessity, the capital may be so applied when, from the possession of property, the infant cannot be entitled to maintenance as a pauper, and, from mental imbecility or want of bodily health or strength, he cannot be maintained from the profits of his property nor put out apprentice and maintained by his master. In such a case, while there is any part of the estate, it must be applied to keep the unfortunate infant alive. Our statute of 1762 preserves all the powers of the Court of Chancery over orphans and their estates, and by the act of 1827 that power is extended to the sale of any estate, real or personal, if the court thinks such sale to the interest of the infant. The County Court may not be authorized, under the act of 1762, to do more than apply the profits of one year to the deficit of a preceding year, but the Court of Equity hath power—though it may be seldom willing to exercise it—to take the capital itself and apply it for maintenance, either future or past. It is obvious that, if in any case that can be done, the present is a proper one in which to exercise the power. It is nearly as strong as any that can be conceived. The ward was supported by the guardian for the greater part of his minority without any charge for (358) clothing or board, doubtless from fraternal affection. But being totally disqualified by nature for any employment requiring bodily labor, there was actually a physical necessity for greater expenses than the income would meet, that is, regarding income as made up of annual profits in money. The court then would have been obliged to order a sale of the negroes for the purpose of maintenance, or authorize the guardian to make advances upon the credit of this growing property. The question is whether the Court shall now sanction such disbursements

as are deemed to have been proper, or refuse to do so upon the single ground that the guardian did not apply and obtain the previous authority of the court. And we are free to say that, hard as the case might be upon the guardian, making expenditures for maintenance and education from the best motives, we should, in an ordinary case, feel it our duty to let him suffer, rather than endanger the property of minors by allowing the guardian to act on his own discretion. If he chooses to advance beyond the income, he must not, in general, look to the court for assistance, but must depend on the sense of honor and justice of the ward, and his living to come of age. But we think the Court ought to sustain such expenditures, when they were demanded by such circumstances, amounting, indeed, to physical necessity, as would have compelled any court to authorize them without a moment's hesitation. This is not a case where the guardian thought he was merely promoting the ward's welfare by educating him for a higher walk in life than was suitable to his degree and circumstances; in such a case the guardian must be benevolent at his own expense, and not at that of the ward. But it is a case in which a guardian was endeavoring to save the ward's life by removing him to a healthy situation and there educating him, because he could be brought up to no other pursuit. That the expenditures were *bona fide* there can be no doubt. The plaintiff was the brother of the orphan and one of his presumptive next of kin, and made many expenditures on him gratuitously. Besides, there are other circumstances (359) which are very particular and take this case out of the common rule. In one sense these advances may be said to have been made out of the profits of the property, inasmuch as there was only one slave when the plaintiff became guardian, then worth probably $300, and they increased to five in number, and were sold by the administrator for $1,487.50. Here there is a profit of nearly three times the master's allowance to the plaintiff. But if the issue is not to be regarded as profits, properly speaking, but rather as the growth of the stock itself or increment of capital, yet it was for the interest of the infant, in a pecuniary point of view, that the guardian should make the necessary advances upon the faith of these accessions to the property, rather than by an application to the court to have the property itself sold. If this last course had been adopted and the price put to interest, there would have been an income of only $18 or $20, which would have been entirely inadequate, and required an order to apply the capital, and thus exhaust it. It was much more to the advantage of all concerned, either immediately or remotely, that the guardian acted as he did. Indeed,

we do not see that he might not have been allowed the advances for the outfit to Tennessee, upon the same principle on which he ought to get back physician's bills, for certainly the property is to be managed for the benefit of the owner, and not merely with an eye to the advantage of his heir or next of kin. But the master has not allowed that item nor several others, and the plaintiff submits to the report; and, therefore, the Court looks no further into it. But upon the particular circumstances of this case: since the court, if applied to, *must* have directed these expenditures in the first instance, as they were absolutely necessary; since, upon that application, the court could only have directed the money to be raised by a sale of the negro belonging to the orphan, which would then have yielded but an inconsiderable sum; since, by not applying to the court, the slave was kept until, with her issue, the value increased fivefold—so that, in fact, the pecuniary interests of the orphan were thereby greatly promoted, instead of being impaired—under these particular circumstances the Court feel justified in decreeing to the plaintiff the sum reported due to him by the master; and the defendant must also pay the costs, as a charge upon the assets in his hands. (360)

PER CURIAM. Decreed accordingly.

Cited: Hussey v. Roundtree, 44 N. C., 112; *Barnes v. Ward*, 45 N. C., 96; *Caffey v. McMichael*, 64 N. C., 508; *Hackney v. Arrington*, 99 N. C., 123; *Duffy v. Williams*, 133 N. C., 196.

PHILIP SNIDER v. PHILIP LACKENOUR AND OTHERS.

Where a party signs and seals a deed in the presence of witnesses, and it is afterwards at his instance proved and registered, this amounts to a delivery, though the execution was in the absence of the grantee, in whose possession the instrument was never actually placed.

THIS cause was transferred by consent of parties, at Fall Term, 1842, of the Court of Equity of STOKES, to the Supreme Court.

The facts are stated in the opinion delivered in this Court.

Mendenhall for plaintiff.
Morehead for defendants.

GASTON, J. The plaintiff, Philip Snider, filed this bill in July, 1841, against Philip Lackenour and Samuel and Eliza-

(361) beth, the wife of said Samuel, defendants. In it he charges that in 1814 he intermarried with Salome, the daughter of George Lackenour, by whom he had several children; that in 1832 the said George, intending to divide his estate among his children, conveyed to the plaintiff, by a deed of gift duly executed and registered, a female slave named Betty and her child David; that shortly thereafter the plaintiff's wife died, and the said George, repenting of the bounty which he had conferred on the plaintiff, contrived, by some means unknown to the plaintiff, to get the said deed out of the plaintiff's chest, where it had been deposited for safe keeping; that, thus having the deed in his possession and also the slaves which had been transferred by said deed, and supposing that thereby the title to said slaves had revested in him, the said George by his will undertook to dispose of the same in the following words, viz.: "My negro woman Betty and her child David I give unto my heirs, to have and to hold forever, conditioned that the above-named negroes are not to be sold out of their families, otherwise to do with the said negroes as they see cause; but it is my will not to misuse said negroes while they behave well, neither to hire them to any other person against any of my heirs' wills"; that the said George appointed the defendant Philip Lackenour his executor, and that said Philip, after the death of his testator, proved the said will and took upon himself the duty of executing the same. The plaintiff then charges that the defendant Philip tried for some years, both by persuasion and threats, to prevail on him to surrender his claim to the said negroes; that he represented to the plaintiff that the deed of gift was invalid, because it had never been delivered, and, if valid, that the title thereunder acquired was destroyed because the deed was lost; that he threatened to sue the plaintiff and break him up if he would not surrender his claim; that the other children of the testator joined in these efforts, and represented that unless such surrender was made the estate of the testator could never be settled; that the plaintiff's eldest son, Joshua, who was entitled under the will of the testator to a legacy, which the exec-
(362) utor refused to pay unless the plaintiff would comply with these applications, and also the plaintiff's brother-in-law, John Clause, were prevailed on by the said defendant to exert their influence over the plaintiff to induce him to relinquish his claim; that he, being an illiterate man and being thus importuned and alarmed, was prevailed upon to execute an instrument of writing, which had been prepared by the counsel of the defendant, a gentleman of high respectability, in whom the plaintiff reposed great confidence, and which that gentleman told him

he ought to sign, releasing all claim to the said negro woman and child and to the issue of said woman born subsequently to the date of the deed of gift. The plaintiff charges that this instrument was thus obtained from him by undue influence, menaces, misrepresentation and fraud, and states that afterwards a pretended sale was made of these negroes to the defendants Read and wife, who claim to hold the same thereunder, but in truth hold the same for the defendant Philip, and the bill prays that the said negroes may be delivered to the plaintiff, and an account ordered of their hires and profits; that the release of the plaintiff may be declared void and canceled, and that the original deed under which the plaintiff claims the negroes may be restored to him.

The defendants answered the bill. The defendant Philip states that the deed of gift to the plaintiff was prepared by the late George Lackenour, was signed and sealed by him, was attested at his request by witnesses, and, without being delivered to or even seen by the plaintiff, was by direction of the said George proven in court and registered; that afterwards the said George applied to the register for the deed, got it and kept it, together with the negroes therein named, in his possession until his death; that afterwards, when the said George was about to make his will and thereby to make a different disposition of the said negroes, he informed this defendant that the plaintiff had agreed to reconvey the said negroes to the said George's children; that after the death of the said George the defendant, as his executor, applied to counsel for advice, and was informed by him that it was proper that the plaintiff should execute a release of his claim to said negroes, and that the (363) said release was executed by the said plaintiff freely, without any undue influence, misrepresentation, menaces or fraud. The defendant, specially and particularly, denies each and every of the specific allegations in the bill tending to show such influence, threats, misrepresentations and fraud; alleges that he had no personal interest in obtaining said release, and in seeking for it was governed by no other motive than the desire of executing his duty as executor, and avers that by the consent of all interested a sale was made of the said negroes, subject to the conditions mentioned in the will, to the defendants Read and wife, and that such sale was made *bona fide* and not in trust for the defendant. This answer further states that by the will of George Lackenour a negro woman Milly is given to the plaintiff, who holds the same by virtue thereof, and who he contends will not therefore be permitted to impeach the dispositions therein made of Betty and her children, and shows that considerable

bequests were therein also made to the plaintiff's children, which would not have been made had not the testator regarded himself as having the right to dispose of Betty and her children as he has done by the will. The other defendants answer that they never knew of the deed of gift to the plaintiff, and had never heard of it until after they had purchased Bet and her children; that they purchased the said Bet and her children from the executor in April, 1834, with the full approbation of all the persons interested in the bequest of said negroes, who had arrived at age and of the guardian of the plaintiff's children who were under age; that the said Betty was a delicate, sickly woman, and a favorite of the testator; that their principal object in purchasing her was to fulfill the testator's humane intentions in regard to the said Betty; that they purchased absolutely and *bona fide* for themselves, and not under any trust, express or implied, for the defendant Philip; that they have had open, continued and notorious possession of the said Bet and her children ever since their said purchase; they deny all the allegations of undue influence, menaces, misrepresentation and fraud (364) charged in the plaintiff's bill; insist that they are the rightful owners of the said Bet and her children; insist upon the statute of limitations protecting their possession and pray to have the same benefit of it as though they had specially pleaded the same in bar.

Upon the proofs the following facts are established: The deed of gift from George Lackenour to the plaintiff was executed in the absence of the plaintiff, was attested in the presence of the donor by two witnesses, and at the request of the donor was proved and registered. We hold, therefore, unhesitatingly, that the defense set up that it was not delivered is in law unfounded. These acts are conclusive against the donor and those claiming under him that there was a valid delivery. Shortly before the death of George Lackenour he made known to the plaintiff his wish to make a disposition of property by his will for the benefit of the plaintiff, his own children, and his grandchildren, the children of the plaintiff, which could not be effected unless the plaintiff's claim under the deed of gift was relinquished. The plaintiff thereupon agreed to reconvey these negroes. This was not done in the lifetime of George Lackenour. But some years after his death, in pursuance of the plaintiff's promise made to the deceased, and for the purpose of having an effectual settlement of the estate agreeably to the dispositions of the will, the plaintiff, in December, 1838, or January, 1839, executed unto the executor, the defendant Philip, a deed conveying all his title, interest and claim in the said negroes to dispose thereof as the

will directs. This conveyance and relinquishment of title was executed freely and advisedly without any undue influence, importunity, threats or misrepresentation.

Upon these facts it is our duty to dismiss the bill with costs.

PER CURIAM. Bill dismissed with costs.

Cited: Newlin v. Osborne, 49 N. C., 159; *Ellington v. Currie,* 40 N. C., 23; *Phillips v. Houston,* 50 N. C., 303; *Gaither v. Gibson,* 61 N. C., 532; *Myrover v. French,* 73 N. C., 610; *Tarlton v. Griggs,* 131 N. C., 221.

(365)

JOHN A. GREEN, EXECUTOR, ETC., v. GARD THOMPSON.

A court will not annul dispositions of property because they are improvident or such as a wise man would not have made or a man of nice honor have consented to receive; but all the contracts of an individual, even his gratuitous acts, if formally executed and no power of revocation reserved, are binding, unless they can be avoided because of surprise, or mistake, want of freedom, undue influence, the suggestion of a falsehood or the suppression of truth.

THIS case was transferred to the Supreme Court from WAYNE Court of Equity, at Fall Term, 1842, by consent of parties.

The facts will be found stated in the opinion delivered in this Court.

J. H. Bryan for plaintiff.
Henry for defendant.

GASTON, J. The original bill in this case was filed by David Edwards, as complainant, against Gard Thompson, the defendant, and it prayed for relief against a conveyance and to have it set aside as having been obtained by the defendant from the complainant by surprise, imposition and fraud. David Edwards died, and John A. Green was permitted to revive the suit and to prosecute the same as party plaintiff. Upon the pleadings and proofs the facts appear to be these:

The testator of the plaintiff was, at the time of the transaction complained of, about seventy-five years of age. (366) He was illiterate and a man of feeble judgment, but of unusually vigorous constitution, and competent to and even shrewd in the management of his ordinary affairs. He had always been addicted to drinking, and, when drunk, was liable to be imposed upon by flattery or by playing upon his passions

and prejudices. He was a man of petulant disposition, violent temper and offensive manners, and lived alone, having driven off his wife by such cruel treatment as induced her to obtain a divorce from his bed and board, and caused his only son to leave him, against whom he cherished a strong resentment. He had grandchildren, the children of a deceased son who lived remote from him, and with them it does not appear whether he did or did not maintain any intercourse. The defendant had married his niece, and for her he was accustomed to express sentiments of regard, and with her he had for some time expressed a desire to reside. On 7 March, 1838, he and the defendant jointly executed an instrument under seal, purporting to be an indenture whereby, in consideration of the sum of $1 acknowledged to have been received from the defendant, and of the covenants therein contained, and of divers other good causes him, the said Edwards, thereunto moving, he gave, bargained and sold unto the defendant and his assigns forever ten negroes by name, two of whom were women and the others their children; five head of cattle and twenty-seven head of hogs; and whereby the defendant covenanted, at the defendant's own cost and charges and at the defendant's house, to maintain and keep the said Edwards with good and sufficient food, raiment and lodging during his life, and to furnish him with horse, sulky and boy to wait on him; and whereby it was also declared that if the said Edwards should prefer to reside with some other person, then he was to have the privilege to take the said negroes, cattle and hogs to keep during his life, all of which, at his death, were to return to the said defendant and his assigns. The property so conveyed was worth about $3,500, constituting rather more than half of what he was worth; but it yielded little or no immediate profit, as the expense of maintaining the negroes was equivalent to the value of their services. He retained a (367) tract of land valued at $850, a negro man and negro woman worth together $900, about $340 in cash, good notes to the amount at least of $190, two horses and a sulky. The instrument was prepared under his immediate instructions, after having been modified several times by his friends (who appear to have been entirely disinterested and to have possessed and deserved his confidence) in such a way as to make it consistent with his declared wishes. Care was taken to explain the meaning and operation of it to him before it was executed, and it was executed by him deliberately, while perfectly sober and in the full possession of his understanding, and, as far as appears, without the solicitation or urgency or unfair practices of any kind on the part of the defendant or any other person. After

the execution of the instrument he resided a few months at the defendant's house, where he was decently maintained and kindly treated; but in the course of the summer of 1838 he became dissatisfied, quarreled with the family, and refused to stay any longer there. The cause of quarrel need not be particularly stated. It was one disgraceful to him and reflecting no blame on any member of the family. After the quarrel he demanded his negroes, but having avowed his determination, as soon as they should be received, to run them off to Alabama, the defendant refused to surrender them. In September, 1838, he filed this bill, to which the defendant put in his answer, wherein he stated all the facts of the case with much candor, and, as far as the evidence taken enables us to judge, with great truth, and professing a readiness either to maintain the complainant at the defendant's house in the manner stipulated in the indenture or to surrender the property to the complainant, if any adequate security could be given that the same would not be made way with, insisted that the contract, as evidenced by the indenture, was fairly, freely and deliberately entered into, and claimed to have the full benefit thereof.

A contract like that which is here sought to be rescinded ought to be examined with great care. It is difficult to conceive of a situation in which one entrusted with the management of property could be more exposed to the artifices of imposition, especially in a contract for the disposition of that prop- (368) erty after death, than the condition in which we find the testator of the plaintiff at the time when this instrument was executed. Of advanced years, weak intellect, capricious temper, violent passions and vicious habits; deserted and justly deserted by his wife and only child, and in return hating with bitter hatred those who ought to have been the objects of his affection and the stay and solace of his old age; driven off by his offensive manners from an association with the good and decent part of his fellowmen—this cheerless, solitary being was well fitted to become the prey of flatterers, parasites, cheats and false friends. We should be inattentive to the plainest and highest obligations of justice if we did not extend to him all the protection which his hopeless state required, and did not watch over every transfer of property obtained from him with suspicious vigilance. And if we could see in the case under consideration that any arts or stratagems had been used to lead him into the arrangement complained of, or that it was probably effected under the influence of a misplaced confidence, or that it was made in haste and without full knowledge of its nature and consequences, or without an opportunity of free consultation with those compe-

tent to advise him and honest to give him faithful counsel—if we could declare it to have been obtained by what the law pronounces fraud, we should cheerfully interpose to give the relief asked. But we must not forget that the right to dispose of property at the will of the owner belongs to every man whom the law acknowledges to be *sui juris;* that the courts of justice must not arrogate to themselves the power to annul dispositions because they are improvident, or are such as a wise man would not have made, or a man of nice honor have consented to receive; and that all his bargains, nay, even his gratuitous acts, if formally executed and no power of revocation reserved, are binding, unless they can be avoided because of surprise or mistake, want of freedom, undue influence, the suggestion of a falsehood or the suppression of truth. *Villers v. Beaumont,* 1 Ves., 100; *Huguenin v. Basell,* 14 Ves., 273; *Pratt v. Barker,* 1 Sim., 1.

(369) The evidence is complete that here was no surprise, mistake or want of freedom, and that the instrument was framed in accordance with the deliberately formed and well understood purposes of the plaintiff's testator. There is no evidence of undue influence or deceit—unless such evidence be furnished, as the plaintiff's counsel insists it is furnished, by the very nature of the contract. Certainly there may be bargains so manifestly unequal and unfair as to furnish of themselves proof of imposition. Of this kind are sales where the inadequacy of price is so enormous as to shock the conscience. The plaintiff's counsel has endeavored to bring this doctrine to bear upon the case before us. He has urged that the sole consideration for the transfer of property to the value of $3,500 was the charge of maintaining this old man during the few and evil days that yet remained to him, and that this charge was out of all proportion to the value of the property transferred. But in the first place it is manifest that this was not the sole consideration of the conveyance. The deed declares there were other considerations, and none can doubt but that affection for his niece constituted one of them, and a conveyance of property to the husband was a natural and ordinary mode of showing affection for his wife. But, in the next place, it is difficult if not impracticable to institute a comparison between the charge as the defendant had engaged to execute it and the value of the property transferred. The charge was that he should be maintained *at the defendant's own house,* and some of the most respectable witnesses examined in the case have testified that *all* the old man's property would not by them be deemed a sufficient remuneration *for a maintenance so afforded.*

In the course of the argument much stress has been laid by

the plaintiff's counsel on the circumstance that the instrument makes a very insufficient provision for the maintenance of the old man if he should choose to remove from the defendant's house. In that event it merely provides for the restitution to him, during the remainder of his life, of the property conveyed, and *this*, inasmuch as the property was not immediately productive, would be rather an encumbrance than a bene- (370) fit. There is no part of the conveyance which may be so emphatically pronounced to be the unbiased and original suggestion of Edwards himself as this which has been made the subject of special exception. It was introduced into the instrument at his dictation by Mr. Washington, whom he consulted specially for that purpose, in lieu of a provision contained in a former deed, which had been drawn up by the present plaintiff, whereby an annuity was stipulated to be paid to him in case he should prefer to remove from the defendant's house. It may be that the provision preferred by him was not a wise one, but it may also be that he had reasons for preferring it which do not immediately strike us. Though old, he was of remarkably robust constitution and of vigorous health. He may have contemplated many years of life as probable, before the expiration of which several of the young negroes, that were to be reared at the defendant's cost, would become immediately profitable, and he might prefer, should such a state of things occur, to have it in his power to receive these profits rather than take the maintenance stipulated for in the deed. At all events, we see nothing in the provision so palpably absurd as to force us to the conclusion that the agreement containing it was that of a deceived man.

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

PER CURIAM. Bill dismissed with costs.

Cited: Harshaw v. McCombs, 63 N. C., 76; *Berry v. Hall*, 105 N. C., 163.

(371)

WILLIAM T. MACLIN AND WIFE v. ABSALOM B. SMITH AND OTHERS.

1. A testator, after giving certain property to his children in common, devises as follows: "I hereby direct that all the before-mentioned property given in common to my said four children be kept together for their joint benefit until one of my said children shall have arrived at the age of twenty-two years, and in the meantime the proceeds and profits of the same, after keeping up the plantation I have given them, to be devoted, or at least so much thereof as is necessary, to educating, schooling, clothing and boarding them and other necessary expenses of my said four children, until they shall arrive at the age aforesaid; and whenever any of my said children shall attain to the said age of twenty-two years it is my desire that at the end of the year at which he or she shall attain to their said age of twenty-two years his or her share of all the said property, real and personal, hereinbefore given to all of my said children in common, together with the increase and profits of the same, shall be set apart and allotted in severalty to his or her own use and benefit, the balance of the said property to be kept, etc.": *Held*, that the profits do not constitute a fund *strictly joint*, applicable to a specific purpose, without view to separate interests of the children therein; but that each child is entitled to an equal share of the profits, as well as of the principal property devised.

2. In the same will was the following devise: "It is my will and desire that my children be sent to such school as will enable them to acquire the best education and fit them to maintain an elevated sphere, affording to each the same opportunities, as near as may be": *Held*, that under this clause the guardian had a right to use, at his discretion if necessary, for the purpose of educating the children in the manner here directed, not only a fund set apart in a previous clause for their education and maintenance, but also the income of any other portion of the property devised to them, or even a part of the principal estate itself.

THIS cause, having been set for hearing upon the bill and answers, was transmitted, by consent of parties, from the Court of Equity of NORTHAMPTON, at Fall Term, 1842, to the Supreme Court.

(372) The bill was filed by William T. Maclin and Mary, his wife, and charged that in 1835 Absalom P. Smith died, having first duly made his last will and testament, whereof he appointed Absalom B. Smith executor; that the said will was duly proved and the said Absalom B. Smith qualified as executor—and the said will was prayed to be taken as a part of the said bill; that the said testator left surviving him the plaintiff Mary and the defendants Virginia, John and Octavius, his only children; that the testator by his said will devised and

bequeathed to his said children a large property, real and personal, which he directed to be kept together, by the executor or such guardian as might be appointed to them, until the oldest child should arrive to the age of twenty-two years, and in the meantime that the profits arising from the said joint property should be applied to the joint use and benefit of the said children, and that the expenses of each of every kind should be borne out of the same; and also directed that his children should receive liberal educations, so as to fit them to move in an elevated sphere of life; that over and above the said joint property the testator bequeathed to his said children a residuum of all his property undisposed of in other parts of his will, after the payment of his debts, equally to be divided among them, and free from any limitations or restrictions whatever; that he also devised to his said children and his widow a tract of land in Northampton County, called the Haynes land, equally to be divided among them, and not subject to any of the limitations annexed to the said joint property. The bill then charged that the defendant Absalom, as executor, received all the said property into his possession; that he paid off all the debts and demands against the estate; and that in 1838 he was appointed guardian to the plaintiff Mary and to the defendants Virginia, John and Octavius, who are infants; and that the said Absalom hath received large sums of money out of the profits of the joint estate, the rent of the Haynes land, and also an account of the residuum devised to the testator's said children; that in September, 1840, the plaintiff Mary intermarried with the plaintiff William; that previous to her intermarriage all her necessary expenses were paid by the said Absalom as her guardian, but that (373) since that time the said Absalom hath refused to allow anything for her support out of the proceeds of the said joint property, and that he hath refused to account and pay over what was due to her. The bill then prays an account and decree for the balance, and also that the Haynes tract of land may be sold, etc.

The material clauses in the will of Absalom P. Smith referred to in the bill are the following: "12th. It is my will and desire, and I hereby direct, that all the before-mentioned property, both real and personal, given in common to my said four children be kept together for their joint benefit until one of my said children shall have arrived at the age of twenty-two years, and in the meantime the proceeds and profits of the same, after keeping up the plantations I have given them, to be devoted, or at least so much thereof as is necessary, to educating, schooling, clothing and boarding, and other necessary expenses of my said

four children, until they shall arrive at the age aforesaid; and whenever any of my said children shall attain to the said age of twenty-two years it is my desire that at the end of the year in which he or she shall attain to the said age of twenty-two years his or her share of all of the said property, real and personal, before given to all of my said children in common, together with the increase and profits of the same, shall be set apart and allotted in severalty to him or her for his or her own use and benefit, the balance of the said property to be kept together for the benefit of the rest of my children until they attain their respective ages of twenty-two years, at the end of which year each is to draw his or her share of the said property in manner and form aforesaid." And the 19th clause is in these words: "It is my will and desire that my children be sent to such school as will enable them to acquire the best education and fit them to move in an elevated sphere, affording to each the same opportunities, as near as may be."

The defendant Absalom B. Smith answered, and in his answer, after admitting the death of the testator, the pro-
(374) bate of the will and his own qualification as executor, stated that he had received all the testator's estate into his possession and, having paid off the debts, was appointed guardian to the plaintiff Mary and the other three children, and of the latter was still guardian; that in both capacities of executor and guardian he had endeavored to comply with the provisions and trusts of the testator's will, and had made to the proper court regular and, according to his judgment, proper returns of his actings and doings; and he annexed to this his answer a complete and full account of every matter and thing in anywise connected with the plaintiff's demand. In regard to the devise and bequest in the 12th clause of the will, the defendant annexed to his answer an account of the net profits of the property therein contained during each year, and also an account showing the amount expended during each year on the several children; and he stated that by these accounts it would appear that some of the children had expended larger sums than others; that whether the expenditures of each ought to be equalized, so that no one should exceed the one-fourth of the profits, the defendant did not pretend to determine; that being of different ages, the proper schooling, clothing, etc., of some were necessarily more expensive than those of others. The defendant further stated that the plaintiffs now claim out of the profits aforesaid a sum sufficient to support the plaintiff Mary according to her condition and rank in society, and if this claim be allowed there will not be enough left to effectuate the trusts in

respect to the remaining children; that when the eldest shall arrive to the age of twenty-two the other children will be nearly or quite grown; so that the fund will be utterly insufficient to support them according to that rank and station which their fortune in expectancy will entitle them to assume. The defendant further stated, in relation to the 19th clause of the will, that whether, if to accomplish the purpose therein expressed the said fund should prove insufficient, as in the defendant's opinion it certainly would, he had any power or authority to touch any other fund, the defendant was at a loss to determine, as no provision is expressly made to that end; that perhaps it was not in the contemplation of the testator that this fund (375) would prove insufficient, for soon after his death it amounted to nearly $2,000 a year, but it was now reduced by decline in the prices of produce and other causes to little more than half that sum. The defendant stated that he had no objection to the sale of the Haynes tract of land, as prayed in the plaintiff's bill. The defendant further stated that he believed that the plaintiff Mary was indebted to him for an excess of advances beyond what she was entitled to, but averred that he was and had ever been ready to come to an account with the plaintiffs, and submitted himself to the direction of the court.

No answer was put in for the infant defendants. The cause being set for hearing, was transferred to the Supreme Court.

Badger for plaintiffs.
B. F. Moore for defendants.

GASTON, J. The bill is filed mainly to have a settlement of the accounts of the defendant Absalom B. Smith, as the guardian of the plaintiff Mary, and as executor of her deceased father, and the other children of the testator are also made parties defendants as having an interest in the taking of the accounts of the executor. Another object of the bill is to have a sale of certain lands which the children of the testator own as tenants in common. The defendant Absalom B. Smith has put in his answer and subjoined thereto his accounts, and the parties pray for the direction of the Court upon certain matters thereby presented, and it is understood that, with these directions, they will be enabled to settle the controversy between them.

The first question upon which the parties differ is whether the profits of the plantations, negroes and other property given by the testator to his children in common, all of which property is directed to be kept together for their joint benefit until the eldest arrive at the age of twenty-two years, and which profits

(376) are appropriated in the meantime, or so much thereof as may be necessary, to the education and maintenance of the children, constitute a fund in which each has an equal, undivided share, or a fund *strictly joint*, applicable to a specific purpose, without view to separate interests of the children therein. We have attentively considered the 12th section of the will, upon the construction of which this question depends, and examined in connection with it all the other parts of the will; and inasmuch as the testator has given several vested estates to his children in the property out of which the profits are to arise—as the profits go with the capital, as an accessary follows its principal, unless the contrary be directed, and as, upon the arrival of any child to the age of twenty-two, the testator directs "that his share of the property, together with the increase and profits," shall be delivered to him, we are of opinion that the purpose of the testator in postponing the division of the property and making an appropriation of the profits until the division was not to change the interests of the children in the profits, but to render the property more productive for the benefit of all and provide more conveniently for the application of the profits to the wants of each. Upon this point, therefore, the direction of the Court is that the children are entitled to equal shares in this fund.

In the 19th clause of the will the testator thus expresses himself: "It is my will that my children shall be sent to such school as will enable them to acquire the best education and fit them to move in an elevated sphere, affording to each the same opportunities, as near as may be." In the accounts submitted with the defendant's answer the charges for the maintenance and education of the plaintiff Mary not only exceed her share of the fund appropriated to the maintenance and education of the testator's children, but the entire income of the property left her by her father, and make her a debtor to the defendant. It is objected that these charges cannot be allowed, first, for that the testator has restricted the expenditures for her support within the limits of the fund provided for that purpose; secondly, (377) that the defendant, as her guardian, cannot break in upon the principal of her estate, unless it be in a case of urgent necessity; and thirdly, for that the charges are, on the face of them, extravagant. The first of these objections is, in our judgment, clearly untenable. The testator has, indeed, provided a fund which he thought would be fully sufficient for the purposes of her education and support, but he has not directly nor indirectly declared his will that these purposes shall be answered out of that fund exclusively; and, if it has proved inadequate, the

defendant as guardian, and independently of the explicit injunction above recited, had a right to apply the whole of his ward's income to her maintenance. Nor, under the circumstances of this case, do we admit the second objection to be well founded. Her father, from whose bounty all her property is derived, has ordered, by declaring it to be *his will*, that she shall receive the best education that could be given her, so as to fit her to move in an elevated sphere, and he has not qualified this command by any limitation that the cost shall not exceed her income. He could do with his own as he pleased, and having willed that this object shall be effected, he has willed that all the means which he has put into the hands of him in whom he confided to effect it, shall, if necessary, be devoted to that purpose. As to the objection that the expenditures are extravagant, we cannot pass upon it, upon inspection of the accounts; but we feel ourselves authorized to declare that if they have been made by the defendant in the honest exercise of his judgment, for the purpose of fulfilling the will of the testator, they ought to be allowed him.

The testator authorized and directed his executor to sell the plantation on Roanoke, which he bought of Eaton Haynes and Nathaniel Harris, provided the sum of $4,000 could be obtained therefor, and to divide the proceeds between his wife and four children equally, but if it could not be sold for that price he directed it to be rented for some years and the rent divided equally between his wife and four children, and, ultimately, if it could not be sold for that price, he gave the same in fee to his said wife and children. Efforts had been made in vain to get the limited price for it, and it was ascertained (378) that it could not be obtained. The widow of the testator having married again, a petition was filed in the County Court of Halifax, whereunto the said widow and her second husband, the children and the executor, were all made parties, and in that suit one-fifth of this land was set apart unto the said widow by metes and bounds, and all her claims upon the testator's estate were definitely settled. It is prayed by this bill that the remainder of this land be sold. On this prayer a decree has already been made. The bill further prays that the defendant A. B. Smith may be decreed to pay over to the plaintiffs the plaintiff Mary's share of the rents of this land. There is a direction in the will that all the property of the testator, not otherwise disposed of, be sold and the proceeds, together with his cash and the debts due him, be equally divided between his wife and children, and the bill prays that her share of this residuum be paid over to them. The Court will not now make the decrees prayed for in regard to this rent and residuum. Upon the

accounts, as exhibited, the defendant Absalom is in advance to the plaintiff Mary, and he has a right to be reimbursed these advances out of any of her funds in his hands.

The decision, which has been made, that the children are *severally* entitled to the fund set apart for their education and support, renders the controversy which has been raised, whether the provision for maintenance applies to the plaintiff Mary since her marriage, unimportant, except in one respect. If she should die under twenty-two, without leaving any child surviving her, there is a limitation over of her share in the profits (not so applied), as well as in the lands and negroes themselves, to her brothers and sister. We are not informed of her age. And as the defendant, in our judgment, is entitled to withhold whatever may be due to her on this account, until his supposed advances shall be satisfied, we deem it unnecessary for the present to express an opinion upon it. Th question may be again brought before us, if it becomes practically important.

PER CURIAM. Decreed accordingly.

Cited: Branch v. Branch, 58 N. C., 271.

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(379)

ANGUS MORRISON ET AL. v. DUNCAN M. KENNEDY, EXECUTOR, ETC.

1. A testator, by his last will, after several legacies, gave to his natural son all his lands "and also all my personal property of every kind and description," and appointed D executor of the said will and guardian of his son. Then by a codicil he provided as follows: "Having considered my negro man Simon, a slave, to be no part of the aforebequeathed property, I therefore constitute and ordain D the sole management and control over the said Simon. I also exclude Hilly, said Simon's daughter, as being no part of my property": *Held*, that neither of these slaves, Simon and Hilly, was disposed of by the will; that D, the executor, had no title to either in his own right, but that, being undisposed of, he held them as trustee for the next of kin.

2. To enable an executor to take in his own right under a will, there must be words purporting to vest the property beneficially in him or to confer on him the power of absolute disposition.

THIS cause having been set for hearing at Fall Term, 1842, of MOORE Court of Equity, was transmitted by consent of parties to the Supreme Court.

The matter in contest is sufficiently set forth in the opinion delivered in this Court.

Winston for plaintiffs.
Strange for defendant.

RUFFIN, C. J. The bill is filed by the next of kin of John Patterson, deceased, against his executor, claiming distribution of two slaves, Simon and Hilly, as not being disposed of in his will. By that instrument the testator, after several legacies to some of his relations, gave to his natural son, William S. Patterson, his lands, "and also all my personal estate of (380) every kind and description"; and he appointed the defendant, Duncan M. Kennedy, his executor, and the guardian of his said son. By a codicil he provides as follows: "Having considered my negro man Simon, a slave, to be no part of the aforebequeathed property, I therefore constitute and ordain Duncan M. Kennedy the sole management and control over the aforesaid Simon. I also exclude Hilly, the said Simon's daughter, as being no part of my property."

There can be no doubt that the effect of the codicil must be to take the two slaves mentioned therein out of the general gift of the personalty made in the will to the son, for the intention of the testator could not have been more expressly declared on that head. And the opinion of the Court is equally clear that no benefit to the executor was intended or can be collected from the language of the codicil, and consequently that he takes here, according to the general rule, in trust, and not for himself. As to Hilly: she is declared to be no part of the testator's property, and for that reason excluded from the operation of the will. He refuses to dispose of her at all, and consequently there is no gift of her to the executor. We think it is the same with respect to Simon. He is excluded from the property before bequeathed to the son, and that is all. He is given to no other person. But the testator adds: "therefore," that is, because I have taken him from my son and made no particular disposition of him, "I constitute D. M. Kennedy to have the sole management and control over him." It is argued that the word "control" imports a gift, as it excludes all interference from any other quarter. But we cannot think so. It signifies power or authority over the slave, and is nearly synonymous with the term "management," as here used, and does not purport to vest the property beneficially or to confer the power of absolute disposition. The cases that have heretofore been decided by the Court on this point have all turned upon express words of *dispo-*

sition by the executor *as he might think proper. Powell v. Powell,* 4 N. C., 727; *Ralston v. Telfair,* 17 N. C., 255;
(381) *Rawles v. Ponton,* 36 N. C., 334. Such language is indispensable to turn the executor, who by his office takes in trust, into a beneficial legatee. That the word "control" cannot do. But if it could, had it stood by itself, it cannot have that effect when connected with "management," which plainly shows that the testator had in view the executor's acts as executor and not as owner. That is further strengthened by what immediately follows with respect to Hilly: "I *also* exclude Hilly as being no part of my *property,*" from which it is fairly inferable that he had not intended to give Simon as property. It is extremely probable, we think, that the testator intended a covert provision for emancipation; but nothing of the kind is brought forward in either the bill or answer, and, therefore, we do not proceed on that ground in the decree. If that were true, it would only render it the clearer that the executor does not take beneficially; and that we think clear enough, without resorting to the supposition of the secret trust alluded to, and, therefore, that the two slaves must be declared to be undisposed of by the testator and to be held by the defendant in trust for the next of kin.

PER CURIAM. Decreed accordingly.

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(382)

REUBEN MOODY, JR., v. WILLIAM SITTON AND ANOTHER.

1. One who takes by assignment an unnegotiable instrument, or a negotiable instrument when it is past due, succeeds only to the rights of the assignor, and is affected by all the equities against him.

2. A decree cannot be had against an executor for money due by his testator unless he has admitted assets in his answer or has been fixed with them by a report of the clerk and master.

THIS was an appeal by the defendant Sitton from a decree of his Honor, *Bailey, J.,* at Spring Term, 1842, of HAYWOOD Court of Equity.

The facts disclosed by the pleadings and proofs are stated in the opinion delivered in this Court.

Clingman for plaintiff.
Francis for defendant.

RUFFIN, C. J. On 22 February, 1831, the plaintiff executed to the defendant Nelson Allman, of Georgia, his single bill under seal for the sum of $80, payable on 22 March following, with a proviso therein that it might be discharged by the delivery of the note of another person which the plaintiff then held. Shortly before the filing of the bill (which was in April, 1835) Sitton, originally one of the defendants, brought a warrant on the bond in the name of the obligee to his use, alleging that he was the equitable owner of the debt; and he therein obtained judgment for the principal sum and interest from the time it became due. The bill states that the bond was given for the price of a mare which the plaintiff conditionally agreed to purchase from N. Allman on the terms following: That if the plaintiff (383) should dispose of the mare upon a certain contract which he wished to make with another person, or should think proper to keep her, then the bond was to be obligatory on him; but if he should not dispose of her or like her, and should, within some few weeks, return the mare to N. Allman or to his brother, T. Allman, a resident of Macon County, then Allman, the seller, was to take her back and cancel or send the plaintiff's bond to him. The bill further states that the plaintiff did deliver the mare within the prescribed time to N. Allman's brother and agent, who received her and, as he believes, returned her to her former owner, who nevertheless did not send the bond to the plaintiff, but allowed suit to be brought on it as before mentioned. The bill further charges that when Sitton, who claims the debt, purchased the bond—which he did from one Margaret Welch, in September, 1834—he was informed of the consideration on which it was given, and that Moody did not owe it, and that he took under the expectation of getting the money from Allman and not from Moody, and without recourse on Welch; and that soon afterwards Allman paid Sitton $43, which he agreed to accept in discharge of the demand. The prayer of the bill was for an injunction and general relief.

Allman did not answer, and the bill was taken *pro confesso* as to him and set down for hearing *ex parte*.

Sitton answered that he purchased the note from Welch for a valuable consideration and without knowledge of the contract between the plaintiff and Allman, as mentioned in the bill; that Allman has since informed him that he did agree to surrender the bond if the plaintiff returned the mare, but that the plaintiff never did return her nor pay anything for her.

On this answer the injunction which had been granted on the bill was dissolved with costs, and under the decree Sitton received the principal money and interest up to that time accrued,

then amounting to $119.44, and the further sum of $40.18 for the costs. The plaintiff replied to the answer and pro-
(384) ceeded to take proofs; and then Sitton died, and the cause was revived against his executor, Walter Brown, and came on to be heard at Spring Term, 1842, of the Court of Equity, when his Honor decreed that the defendant Brown, as executor, should pay to the plaintiff the sum of $40.18 paid to his testator, Sitton, by the plaintiff as costs in this cause, and also the sum of $138.65, together with interest from that time on $80, part thereof, which Sitton received as the debt and interest on the dissolution of the injunction; and should also pay all the other costs of this suit. And it was further decreed that execution issue for the said several sums against the said Walter Brown. From which decree Brown appealed to this Court.

The proofs consist of two depositions. One witness states that Nelson Allman admitted to him that the plaintiff did deliver the mare to his agent, T. Allman, from whom he, N. Allman, received her. The other witness is Mrs. Welch, from whom Sitton got the bond. She states that she told Sitton that Moody did not owe the debt, and traded the note to him as one that did not bind Moody, but on which he would have to get the money from N. Allman; and that Sitton said he did not care for Moody, for Allman was good. The plaintiff also exhibited a receipt from Sitton to Nelson Allman, dated 17 November, 1834, for $45, expressed to be in full of a claim on him on a note given by R. Moody for $80.

We think that upon the merits of this controversy the decree is clearly right. As against Allman, it admits of no question, for as against him the bill was taken as confessed and the return of the mare admitted. Besides, a witness proves his explicit admission of the fact. It follows that it would be unconscientious in him to enforce the bond. The other defendant stands precisely on the same ground. Not to say anything of the express notice proved on him, he cannot recover, because he is affected by all the equities against Allman himself. *Coles v. Jones*, 2 Vern., 692. Sitton is not an assignee, but is obliged to sue in Allman's name. Indeed, the instrument is not negotiable; and if it were, it was overdue and dishonored when All-
man parted from it, and whoever got it from him would
(385) necessarily hold it as he held it—in other words, succeed only to his rights. But we think the decree was premature, being made without an admission of assets of Sitton by Brown and without a report fixing him with assets. This was, no doubt, a mere inadvertence, and probably arose from the circumstance that the defendant did not contest that point. It

does not concern the merits, nor can it even affect the costs in this Court, unless it should turn out, upon the inquiry, that the executor has no assets. But it is necessary that the orderly proceedings of the court should be observed; and, therefore, there must be an inquiry as to the state of the assets, unless that defendant should think it best not to incur that expense, and to admit to the amount of the recovery and costs in this case. In all other respects the decree is affirmed, for it could not be necessary that the court should refer it to the master to state the sums received by Sitton, which the records of the cause itself showed.

PER CURIAM. Decreed accordingly.

Cited: King v. Lindsay, 38 N. C., 81; *Long v. Barnett, ib.,* 636; *Miller v. Tharel,* 75 N. C., 154; *Brown v. Brittain,* 84 N. C., 554; *Havens v. Potts,* 86 N. C., 32; *Rice v. Hearn,* 109 N. C., 151.

(386)

ANDREW JOYNER v. ISAAC N. FAULCON AND WIFE AND OTHERS.

1. In taking the probate of the deed of a married woman by a judge out of court it is not necessary that the husband should personally acknowledge before the judge his execution of the deed. It is sufficient if his execution is proved by witnesses.

2. Nor is it necessary that the certificate of such probate should set forth that the deed was proved *before* the wife was privily examined, the whole probate appearing to have been taken at the same time.

CAUSE transferred to the Supreme Court from HALIFAX Court of Equity, on affidavit of one of the defendants at Spring Term, 1842.

The bill charged that in 1832 John T. Clanton and Fanny, one of the defendants, then the wife of the said Clanton, undertook to convey and settle by joint deed their entire real and nearly all their personal estate to and for certain uses, purposes and trusts, and in pursuance of such intention, on 24 February, 1832, a deed was prepared which was intended to be duly executed by both, so as to convey the real and personal estate of both; that by the said deed the plaintiff, Andrew Joyner, and two others were appointed trustees, and the legal estate of all the property therein mentioned purported to be conveyed to them; that the two others named declining to accept the office of trustee, the plaintiff alone undertook to act, and has since con-

tinued to act as trustee under the said instrument; that on 28 December, 1838, the said John T. Clanton departed this
(387) life without having made any last will and testament, and the plaintiff was appointed administrator of his estate. The bill further set forth that in the month of....., 1841, the said Fanny, widow of the said John, intermarried with the defendant Isaac N. Faulcon, and that the plaintiff had lately been notified by both the said Isaac and his wife aforesaid that the said deed in trust was never executed by the said Fanny in the manner prescribed by law for the transfer of the estates of *femes covert;* that her privy examination is so defectively certified as that the deed is in nowise obligatory on her as to her real estate professed to be thereby conveyed, contending at the same time that it is binding and in full force as to the said John T. Clanton; and that they had threatened the plaintiff with sundry suits at law concerning the real estate which belonged to the said Fanny, had demanded a division of the slaves and other personal property conveyed in the said deed according to the terms and conditions thereof, and had claimed and called upon the plaintiff to account to them, as their absolute right, for all the rents and profits of the said real estate since the death of the said John T. Clanton, independently of the trust deed aforesaid, and claiming the rents and profits of the other real estate according to the terms of the said deed. The bill then sets forth that at the time of the execution of the said deed of trust the said John was possessed in his own right of all the personal property therein mentioned, and also sets forth particularly the real estate therein mentioned which belonged to the said John in his own right and that which he held and possessed in right of his wife. The bill further stated that the children of John T. Clanton, who were the only other persons beneficially interested under the said deed, by their guardian, insisted that the said deed of trust was well executed and proved, so as to convey the real estate of the said Fanny, and required the plaintiff to execute the trust accordingly; but if the said deed were void as to the said Fanny, they then claimed that it was void entirely as to all the property thereby intended to be conveyed, and that they were remitted to the rights they would have
(388) had if the said deed had never been executed at all. The plaintiff averred that he was unable to decide between these conflicting claims, and prayed the advice and direction of the court; and he made the said Isaac N. Faulcon and his wife, Fanny, and the children of the said John T. Clanton, deceased, as also the two persons named as trustees, who had refused to act, parties defendant to his bill.

The defendants answered and admitted the allegations of the bill to be true, and the said Faulcon and wife on the one part, and the children of the said Clanton on the other, insisted upon their claims respectively as set forth in the said bill. And the cause was set for hearing upon the bill, answers and deed exhibited.

The form of the certificate of probate, endorsed on the deed of trust, is recited in the opinion delivered in this Court.

B. F. Moore for plaintiff.
Badger and *Iredell* for Faulcon and wife.
W. H. Haywood and *Whitaker* for Clanton's children.

GASTON, J. The question presented for our consideration is whether the instrument, which is referred to in the pleadings as the deed of John T. Clanton and Fanny, his wife, has been so authenticated as to render it valid to transfer her estate in the lands therein mentioned. The instrument purports to have been executed by both husband and wife, and has been registered upon the fiat of a judge of the Superior Courts, on the following probate and acknowledgment:

STATE OF NORTH CAROLINA—Halifax County.

Fanny Clanton, the wife of Dr. John Clanton, was examined separate and apart from her husband and privily by me, one of the judges of the Superior Courts of Law and Equity in and for the State aforesaid, when she acknowledged that she executed the within deed freely and voluntarily, and not by the force or persuasion of her husband or any other person. Henry Wilkes, the subscribing witness, came before me (389) and made oath that John T. Clanton and Fanny Clanton executed the within deed for the purposes therein contained. Let it be registered.

The provisions of law on which the decision of this question depends are as follows: "All conveyances in writing and sealed by husband and wife for any lands, and by them personally acknowledged before one of the judges of the Supreme or Superior Courts, or in the court of the county where the land lieth, the wife being first privily examined before such judge, or some member of the County Court appointed by the said court for that purpose, whether she doth voluntarily assent thereto, and registered according to the laws of this State, shall be as valid in law to convey all the estate and title which such wife may or shall have in any lands, tenements or hereditaments so con-

veyed, whether in fee simple, right of dower or other estate, as if done by fine and recovery, or any other ways and means whatsoever: *Provided, nevertheless,* that where any such conveyance as aforesaid shall be acknowledged by the husband, or proved by the oath of one or more witnesses, before a judge as aforesaid or County Court where the land lieth, and it shall be represented to the judge or County Court aforesaid that the wife is a resident of any other county, or so aged or infirm that she cannot travel to the said judge or County Court to make such acknowledgment as aforesaid, it shall and may be lawful for the said judge or County Court by his or their order to direct the clerk of the County Court where such land lieth to issue a commission to two or more commissioners for receiving the acknowledgment of any deed of such *feme covert* for passing her estate in any lands, tenements or hereditaments, and such deed, acknowledgment before them, after they have examined her privily and apart from her husband touching her consent, and certified by the County Court, to which the commission shall be returnable, shall by order of the County Court be registered with the commission and returns, and shall be as effectual as if personally acknowledged before the judge or County Court by such *feme covert.*" Laws 1751; Rev. Stat., ch. 37, secs. 9, 10.

(390) The objection mainly relied upon to the validity of the *fiat* for the registration of this instrument as the deed of the *feme* is that the execution of the deed was proved before the judge, who took her privy examination, when the law requires that it should have been acknowledged before him by the parties. The question occurs now for the first time, as far as we are apprised, for judicial decision. Whatever remarks may be found that seem to bear upon it, in the opinion of the Court delivered in the case of *Burgess v. Wilson,* 13 N. C., 306, it is manifest that the question was not there determined. In that case it appeared by the records of the court that on Monday, 2 November, 1812, an order was passed that Caleb Perkins be appointed to take the private examination of Sarah Burgess, a *feme covert,* touching the execution of a deed of bargain and sale to Dempsey Sawyer; and that on the succeeding day, 3 November, the deed was exhibited in court and proved by the oath of Caleb Perkins, the subscribing witness; and further, the said Caleb Perkins then reported to the court that in pursuance of the order of the preceding day he had taken the private examination touching her free consent to the execution of said deed, and that she declared that it was done with her free consent. The acknowledgment of the *feme* was not made in the court, upon a privy examination by one of its members within

the verge of the court, but out of court, before a single magistrate acting without commission. And the execution of the instrument was not proved until after the order under which the magistrate professed to act. It would be too much to assume that when there were these conclusive and manifest objections to the validity of this authentication of the instrument as the deed of Mrs. Burgess, the Court definitely passed on that now raised, which was the subject of incidental observation only. Besides, in the opinion delivered in that case, the opinion of the late *Chief Justice Taylor*, as expressed in *Whitehurst v. Hunter*, 3 N. C., 401, is mentioned with approbation; and in that there is an intimation, at least, that a probate of the deed before the court would authorize the receiving of the wife's acknowledgment. There it appeared that the deed had been (391) acknowledged by the *feme* in court, and that she was there privily examined, but it did not appear that the husband had joined in the acknowledgment or that the execution thereof was proved, and the Chief Justice held that the objection that the deed was not acknowledged by the husband, *nor proved to be his deed*, was fatal. And it was certainly supposed by this Court to be at least an open question when the late case of *Sutton v. Sutton*, 18 N. C., 582, was decided. It was there remarked that in certain defined cases "an examination before the commissioners, regularly taken, certified and returned, has then the efficacy of an examination before the judge or in open court. These cases are where the deed shall have been acknowledged by the husband or proved by the oath of one or more witnesses."

It may be conceded that this objection is well founded, if our attention be directed exclusively to that part of the legislative enactment hereinbefore recited which precedes the proviso. Looking no farther, the prescribed ceremonies are an acknowledgment of the deed by the husband and wife before the judge or in open court of the county, and a privy examination of the wife by the judge or some member of the court. And we hold it to be perfectly settled that no ceremonies other than those which the Legislature has prescribed can be substituted under an imaginative or even assured conviction that they would equally well answer the purpose of protecting the married woman against compulsion and imposition. But the Court is satisfied that when the rest of the enactment is taken into consideration it is manifest that a probate of the deed by a subscribing witness before the examining judge or court is declared equivalent to the acknowledgment mentioned in the preceding part. The language is explicit that upon *such probate* the judge or court shall

order a commission to issue, and a privy examination taken under such commission certified and returned, "shall be as effectual as if personally acknowledged before the judge or the court by such *feme covert.*" It would be doing violence to the unambiguous words of this provision to hold that a privy ex-
(392) amination of the woman before the commissioners—which is but a substitute for that before the judge or the court, and which the Legislature declares shall have the same efficacy with that for which it is permitted to be substituted—shall be valid to pass her lands, and yet the preferred mode be invalid. We say the preferred mode, because it is apparent from the very nature of the provisions, as has been declared by the Court in *Burgess v. Wilson* and *Sutton v. Sutton,* already cited, and *Fenner v. Jasper,* 18 N. C., 34, that the Legislature reposed higher confidence in the judge and the court than in the commissioners, and therefore permits the powers granted universally to the former to be delegated to the latter only when a special emergency requires it. No question can be entertained but that it is competent for the Legislature to explain or modify in a proviso language used in a previous enactment, and whenever a court can clearly ascertain the sense of the Legislature it must be governed thereby, although it should be shown that the legislative will might have been expressed in a more approved form. The duty of the court is to execute the will and not to criticise the language of the Legislature.

It has also been objected that it appears from the certificate of the judge that the acknowledgment of the *feme* was taken before the execution of the deed was proved. This objection we hold to be not founded in fact. The certificate states a single transaction. All therein mentioned occurred at the same time. And therefore it is immaterial what part of it is first mentioned in the certificate.

Upon the question submitted, the Court is of opinion that the deed has been duly proved and registered to pass the real estate of Mrs. Clanton.

The case is deemed to be a proper one for asking the advice of the Court, and it is declared that the expenses of the inquiry should be defrayed out of the funds in the hands of the trustee.

PER CURIAM. Decreed accordingly.

Cited: Etheridge v. Ferebee, 31 N. C., 317; *Beckwith v. Lamb,* 35 N. C., 402; *Freeman v. Hattey,* 48 N. C., 119; *Pierce v. Wanett,* 51 N. C., 168; *Robbins v. Harris,* 96 N. C., 559, 560.

(393)

MARY HAUGHTON, BY HER NEXT FRIEND, v. GEORGE W. BARNEY AND OTHERS.

1. Where the formal execution of a deed is proved the presumption arises that it was intended by the parties as a complete instrument, and this presumption cannot be overthrown but by clear proof that in truth there was no delivery, and that this was well understood at the time.

2. But where the attestation of the subscribing witness is *special* that the instrument was "signed and sealed" in his presence, the inference of a full execution does not arise, but the form of the attestation excludes the inference that he had also seen it delivered.

THIS cause, after having been set for hearing upon the bill, answers, proofs and exhibits, was transmitted from CHOWAN Court of Equity, by consent of parties, at Spring Term, 1842, to the Supreme Court.

The allegations of the bill and answers and the facts of the case are fully stated in the opinion delivered in this Court.

Moore for plaintiffs.
Kinney and *Iredell* for defendants.

GASTON, J. This bill was filed in the Court of Equity for the county of Chowan, on 27 February, 1836, in the name of Mary Haughton, plaintiff, an infant suing by her next friend, Elizabeth Pettijohn, against George W. Barney and wife, Louisa, Jonathan H. Haughton, Robert H. Booth, the executor of Jonathan Haughton, deceased, and Charles Haughton, the administrator of Thomas B. Haughton, and Richard B. Heath and wife and others, the heirs at law of the said Thomas B. Haughton, deceased, defendants. Its material allegations are that (394) the plaintiff is the only surviving child of Joseph M. Haughton, who died in 1834, and was such at the time of the death of the father of the said Joseph, Jonathan Haughton, who died in November, 1835; that the said Jonathan on 11 May, 1830, being seized and possessed of a large real and personal estate, and influenced by considerations entirely unknown to the plaintiff, conveyed by far the greater part thereof to the defendant Jonathan H. Haughton, his son, and the defendant George W. Barney, who was the husband of his daughter Louisa; that afterwards, on 14 November, 1830, the defendants Jonathan H. Haughton and George W. Barney, either in pursuance of the order and direction of the said Jonathan Haughton, who, notwithstanding the deeds of conveyance aforesaid to his said

son and son-in-law, exercised some control over the property thereby conveyed, or in compliance with a covenant or agreement made with the said Jonathan, did, at his instance, sign, seal and deliver a certain deed (a copy whereof is set forth) whereby the said Jonathan H. Haughton and George W. Barney, in consideration of the sum of $5, did bargain and sell unto Thomas B. Haughton a certain trust of land therein particularly described, which had formerly been conveyed to the bargainors by Jonathan Haughton, and fifteen negroes, to have and to hold unto the said Thomas, his heirs and assigns, in trust for the following purposes, that is to say, to pay out of the said property the sum of $125 annually, during the life of Sarah Haughton, wife of the said Jonathan, in part discharge of a decree, or a bond given in pursuance of a decree, in Chowan Superior Court, in a suit wherein the said Sarah by her next friend, John M. Roberts, was plaintiff, and the said Jonathan defendant, "the said money to be paid to John M. Roberts or Sarah Haughton, he or she giving a receipt for the same to Thomas B. Haughton; and it is meant that the said Thomas should attend to see that the same be paid out of the property so conveyed," after payment of said money, in trust to suffer the said Jonathan to occupy the land and all the negroes during his (the said Jonathan's) life, and after the said Jonathan's death
(395) to suffer Joseph M. Haughton to occupy the land and use the negroes during his (the said Joseph's) life; and, should the said Joseph leave any children of his body lawfully begotten, to hold the same in trust for said children; and should the said Joseph leave no children at his death lawfully begotten, then to hold the same in trust for Jonathan H. Haughton and Mary Louisa Barney, to them and their heirs, and to make conveyances as they shall direct. It is further alleged in the bill that this deed, at some time after its execution, passed into the possession of Jonathan Haughton, who kept it among his valuable papers; that about the time of the death of the said Jonathan it passed into the possession of the defendant Robert H. Booth, who, in violation of the rights of the plaintiff, has delivered the same to the defendant Barney, who has either destroyed or yet unjustly detains it; that when the said deed was executed the plaintiff's father was ignorant of her rights, and that the plaintiff herself, by reason of her infancy and destitute situation, has been unable to assert them; that in consequence either of the neglect of the trustee named in the said deed or of Jonathan Haughton or of the fraud or neglect of some of the other parties to it, the said deed has never been registered nor proved for registration; that no certain information

of the existence of said deed was communicated to the friends of the plaintiff until lately, and that as soon as they heard of the existence of it they applied to the defendant Booth, whom they supposed to have the possession of it, and were told by him that the same was in the possession of the defendant Barney, whose interest is in direct opposition to hers, and who falsely pretends that in consequence of an agreement between himself and some other person to the plaintiff unknown, the said paper ought not to be produced for registration. The bill further alleges that Thomas B. Haughton, the trustee, died in 1831 or 1832; that the defendant Charles was duly appointed administrator of his estate, and that the other defendants, particularly named, were the heirs at law of the said Thomas. It charges that after the death of the plaintiff's father, who during his life lived on the tract so conveyed in trust, the defendant Barney directed the mother of the plaintiff to seek a shelter elsewhere, in consequence whereof her said mother, being (396) much distressed in mind, in indigent circumstances, and withal entirely ignorant of the plaintiff's rights, abandoned the possession to the said Barney, who hath ever since continued to cultivate the same; and that the defendant Booth, upon the death of Jonathan Haughton, took possession of the slaves so conveyed, and hath ever since either hired them out or permitted his codefendant Barney to have the use thereof, whereby the plaintiff is entirely deprived of the benefit of the provision made for her in said deed. The prayer of the bill is that some fit person be appointed a trustee in the place of the said Thomas B. Haughton, deceased, to carry into execution the trusts in said deed declared; that the defendants Barney, Booth and Jonathan H. Haughton be decreed to deliver up the said negroes and their increase and the possession of the said land, and to account for and to pay over the hire, rent and profits thereof; that the defendant Charles Haughton be decreed to convey the legal title in the slaves aforesaid, and the other defendants be decreed to convey the legal title in the land aforesaid to the trustee so to be appointed upon the trusts in said deed declared; and for such other and further relief as the plaintiff's case requires.

All the defendants put in answers. Those of the administrator and the heirs of Thomas B. Haughton declare that they have no personal knowledge of any of the matters charged, claim no interest whatever in the property in dispute, and are ready to submit to and do whatever the court shall direct therein. The answer of the administrator, Charles Haughton, states also that about two or three years before the death of his intestate he

heard Jonathan Haughton express a determination to make the said intestate a trustee for his son Joseph's family, and that afterwards he heard the said Jonathan several times declare that the Pettijohn family, into which his son Joseph had married, should have no portion of his property.

The answer of the defendant Jonathan H. Haughton admits that the plaintiff is the sole surviving child of Joseph
(397) M. Haughton, deceased, and that this defendant and Mary Louisa, the wife of the defendant George W. Barney, are the children of Jonathan Haughton, deceased, and that at the time stated in the bill the said Jonathan conveyed to this defendant and his codefendant George the greater part of his property, real and personal, "leaving, however, a considerable estate, which he afterwards disposed of by will." The defendant states that when these conveyances were made, a bond was executed by him and Barney to his father, *solely* conditioned to secure his father the enjoyment of all the property so conveyed during his life, and declares that no other bond, covenant or agreement, either in writing or by parol, existed between the parties in relation to the said property or the conveyances which had been made thereof, and that his said father had not any right of control whatever over said property, except such as arose under said bond; admits that the land and negroes described in the bill are a part of the real and personal estate which had been so conveyed, but denies that the instrument, whereof a copy is set forth in the bill, and which contains the land and negroes aforesaid, ever was executed as a deed or as a completed instrument, and avers that it was designedly kept undelivered—more particularly, the defendant proceeds to state, that the late Jonathan Haughton, his father, entertained different projects of making provision for his son Joseph, sometimes expressing a desire to make him an annual allowance for life, sometimes to convey property to a trustee for him, and at other times to exclude him altogether; that at one of these times the paper-writing, whereof a copy is set forth in the bill, was drawn up and signed by this defendant and George W. Barney, in the presence of the said Jonathan, and at his house; that the said Jonathan wished to have the power of making any other provision he might prefer for his son Joseph; that he was distinctly informed by both of them "that if he executed the instrument then drawn up by having it then signed, sealed and delivered, he would not have this power; that it was well understood by his said father, the said Barney and himself, that the deed should not be delivered, and that accordingly it was not";
(398) "that this defendant and the said Barney were to deliver

it or to acknowledge the execution thereof at any time or place when they should by him be thereunto required; that the paper was left in the sitting room of his father, and this defendant, who before his father's death removed to New York, hath never seen it since, but understands that it is in the possession of the defendant Booth. This defendant adds that he personally informed his brother Joseph of the arrangement, as herein stated, made with his father, and that the execution of the deed by delivery would depend on his conduct and that of his family towards his father; states that his father entertained an unfavorable opinion of the wife of his brother Joseph, and that both before and after the death of his said brother his father told him that various causes of irritation had occurred tending to produce in *him* (his said father) the determination that none of his property should go, or have a chance of going, to his son's wife's family."

The answer of the defendant George W. Barney is so much in substance the same with the answer of Jonathan H. Haughton that it is unnecessary to set forth more of it than those parts wherein he mentions matters not contained in the answer of his codefendant, and those wherein he may state the same matters somewhat differently in point of expression or more fully as to their circumstances. Denying with his said codefendant that his father-in-law had any right of control over the property conveyed other than under the bond before mentioned, and denying that the paper-writing referred to in the bill was ever executed as a deed or any other completed instrument, this defendant states that at various times, both before and after the conveyances made of his property to his said codefendant and himself, he expressed to them a desire sometimes to make and sometimes not to make a provision for his son Joseph; at one time he suggested the plan of securing an annuity to his said son for life out of his estate, at another to convey property to a trustee for his said son, vacillating between these plans and a determination to give him nothing; that at one of these times the paper-writing aforesaid was drawn up and signed by this defendant and Jonathan H. Haughton; that it was well understood that it should not be delivered to the trustee (399) nor to any of the persons taking an interest under it, nor to any person for their benefit; but should remain a paper signed and sealed, but not delivered, until Jonathan Haughton should require of this defendant and Jonathan H. Haughton to assent to the delivery or acknowledge the execution thereof, and this the said Jonathan H. and this defendant promised to do at any time and at any place and before any persons when so required;

that the delivery was withheld when the paper was signed because Jonathan Haughton desired to have the power to substitute another provision for his son in lieu of that therein contained, or to withdraw it altogether, and this power he was informed he could not have if the deed should be completed; that the paper-writing was left in this state with the said Jonathan Haughton, and has never been since seen by this defendant until after the said Jonathan's death. The defendant states that some months and perhaps a year before the said Jonathan's death he informed this defendant that he had been looking in vain among his papers for this writing and was anxious to get it; that afterwards, and but a short time before his death, he desired this defendant to request Robert H. Booth to call on Malachi Haughton, Esq., with whom he had deposited many of his papers, "thinking the one he so much desired was among them; that some delay (as defendant understood) in the delivery of these papers occurred from the want of a written order," but this order being had, Booth obtained them; that after the death of Jonathan Haughton this defendant, understanding that the paper now in question was in his possession, asked to see it, kept it for a day or two, and then returned it. He further denies that *he* compelled the plaintiff's mother after the death of her father to seek another shelter, but declares that the plaintiff's grandfather, Jonathan Haughton, took possession of all the property, land and negroes, which his son Joseph had held, after his said son's death, and kept the same until he himself died; denies that the plaintiff's father and mother were ignorant of the writing in question, as is pretended by the bill, but insists that he had been apprised of it soon after it was made,
(400) and of his father's intention that it should remain incomplete; that a few weeks after his death she was informed of it, and states (but does not say *when*) that a copy of it was delivered to counsel, whom she consulted thereupon; he denies that the said paper was kept back from registration from the neglect of Jonathan Haughton, but avers that it was not registered because of the said Jonathan's determination that it should not be.

The defendant Booth in his answer states that two or three months before the death of Jonathan Haughton the said Jonathan executed his last will and testament, and thereof appointed this defendant executor; that this defendant wrote the said will; that at the time of his so doing the said Jonathan informed him that no portion of the property over which *he* (the said Jonathan) had any control should ever go to the family of his son Joseph, and also distinctly told the defendant that it was unnec-

essary to make any disposition of the land mentioned in the paper-writing, the subject of dispute, as it already belonged to Jonathan H. Haughton and George W. Barney by deed; that defendant knows of no circumstance inducing a belief that the said writing was ever delivered, but believes that it never was delivered, as stated in the answers of said Jonathan H. Haughton and George W. Barney; that two or three days before the death of his testator and in consequence of a written order from him, the defendant obtained from Malachi Haughton, Esq., a number of papers which had been deposited with him, and among them the instrument which the plaintiff now seeks to establish; that the defendant shortly thereafter called on his said testator to deliver them, but found him too ill to attend to business; that he kept them as his executor; that at the request of the defendant George W. Barney he handed to the said Barney the instrument in question, who kept it not more than two or three days and then returned it; that on returning it the said Barney requested this defendant to obtain legal advice respecting the operation of the said instrument, and advised him to give a copy thereof to any person who might apply in behalf of any supposed to be interested therein; that during the short time that the instrument was in Barney's hands the (401) mother of the plaintiff called on him for it, and he informed her where it then was, but assured her that he would procure it without delay and would then hand it, or at all events a correct copy thereof, to her; that no further application has been made to him; that he took the legal advice which Barney requested him to obtain; that in pursuance of that advice he has kept the instrument in his possession, and has it ready to be produced; that he has set up no claim to nor pretended to interfere with any of the property mentioned in said instrument, considering it as no part of the estate of his testator, but to have been conveyed by him in his lifetime to the defendants Jonathan H. Haughton and George W. Barney.

The instrument which the plaintiff prays to be established is exhibited. It corresponds in all respects with the copy given thereof in the bill, purports to be "signed and sealed" by Jonathan H. Haughton and George W. Barney in the presence of Jonathan Haughton. The will of the said Jonathan is also exhibited. It purports to have been executed on 18 August, 1835, and it was proved at the February Term following of Chowan County Court; it nominates George W. Barney and Robert H. Booth as executors, and, except a special provision therein made in respect to three of his servants, whom he professes to reward for their fidelity and attention to the testator

during his last illness, it gives all the testator's real and personal estate to be equally divided between the children of his son Jonathan H. Haughton, his daughter L. C. Barney and his deceased son, Silas M. Haughton, with limitations over to the survivors and survivor upon any of them dying without issue at their death, and, if the survivor die without issue, then over to his "aforesaid children then living, or to their heirs." And it contains this express clause: "I give nothing to the children of my son Joseph, nor do I intend it."

The plaintiff has taken the depositions of Malachi Haughton, Esq., of her mother, Elizabeth Haughton, and of her mother's sister, Sarah Pettijohn. Mr. Haughton states that Jonathan Haughton, some years before his death, deposited with (402) the witness several papers, among which was the one in question; that the witness told him this paper ought to be registered, and he replied that he wished to have an alteration made; and that the witness, a short time before or after the death of the said Jonathan, upon his written order, delivered these papers to the defendant Booth. Elizabeth Haughton testifies that she had understood from Jonathan Haughton that there was a deed conveying negroes and land for the benefit of Joseph Haughton's children, and shortly afterwards the said Jonathan informed her that Violet, one of these negroes, was dead, but that he would give another in the place of Violet; that at another time, speaking of the negroes that were at the plantation where Joseph Haughton resided in his lifetime, he said that he always intended that the negroes and plantation, at his death, should go to the children of Joseph Haughton; and that about a month before his death he sent for the witness and informed her that there was a handsome support provided for the surviving child of Joseph Haughton. This witness named the negroes which she understood from Jonathan Haughton were conveyed for the benefit of Joseph Haughton's children, and these correspond with the names of those mentioned in the contested deed. She does not state whether *these* were or were not the same negroes that were at the plantation when Joseph Haughton resided there, but she declares this plantation to be the same tract which, she understood from Jonathan Haughton, was conveyed for the benefit of his son Joseph's children. This witness also testifies that on the day of the funeral of her husband the defendant Jonathan H. informed her that there was a provision made for her children beyond his father's power, and if he survived his father he would see that they had justice done to them. She also testifies that shortly after the death of her husband the witness and the defendant Barney were conversing

about the conveyance, when he said that he and Jonathan H. Haughton had given the property in a deed of gift to her children, that he expected the deed was lost, but he was willing to give the property again and would do it. Sarah Pettijohn testifies that she heard Jonathan Haughton on one occasion tell her sister that he always intended the plantation and (403) the negroes for Joseph Haughton's children, and that she has heard him make similar remarks on other occasions. She also declares that she heard the observations made to her sister by the defendant Jonathan, as stated in her deposition, on the day of Joseph Haughton's funeral.

Witnesses have been also examined on the part of the defendants, but the only part of their evidence which is deemed of any moment is that of John Poplestan, who testifies to declarations of Jonathan Haughton, that neither his son Joseph nor any of the family of the Pettijohns, grandmother or aunts of the plaintiff, should ever have any of his estate.

Upon these exhibits and proofs the plaintiff insists that she has established the instrument, whereof a copy is given in her bill, as a complete deed. If the formal execution of this instrument had been proved, the presumption that it was intended by the parties as a complete instrument would have arisen, and this presumption could not be overthrown but by clear proof that in truth there was no delivery and that this was well understood at the time. But there is no evidence of a formal execution. The only persons present at the time of the transaction were the supposed grantors and Jonathan Haughton. *They*, in their answers responsive to the allegations of the bill in this respect, deny absolutely any delivery; and this bill was not filed until after Jonathan Haughton, who might have thrown light upon the transaction, was removed by death. It is true that he attested the instrument as a subscribing witness, and an inference might thence arise that he had seen it formally executed were it not that his attestation is *special*, that the instrument was "signed and sealed" in his presence, and thus excludes the inference that he had also seen it *delivered*. In the want of evidence of formal execution—in opposition to an express denial of such execution—the burthen is thrown upon the plaintiff of showing that, nevertheless, the instrument was designed by the parties to be a complete one. And the proof to this end should be very clear and cogent before it can overrule the precise and positive denials of this supposed intent in the answers of the defendants. They aver that so far from intending (404) the instrument, when signed and so attested and left with Jonathan Haughton, to be their absolute and finished deed, the

instrument was intentionally and advisedly left thus unfinished and imperfect, in order that it should or should not be consummated thereafter, as Jonathan Haughton might or might not require. And upon an examination of the evidence we think that, instead of contradicting, it confirms this representation.

It is manifest that, notwithstanding the forms of this transaction, the provision made or purporting to be made by this instrument for Joseph Haughton and his children was one proceeding in truth from Jonathan Haughton and not from his son and son-in-law. He had before conveyed to them the far greater part of his estate—upon what consideration we know not. The bill asserts that, notwithstanding these conveyances, he, by an understanding or agreement with them, retained the power of disposition over the property. This they deny, but they show by their conduct that although there might have been no agreement or understanding by which he retained a direct control over the property, he retained or possessed so much control over *them* as to obtain such a disposition of the property contained in this instrument as he desired. It was at his instance the writing was prepared, the instrument signed, sealed and left in his hands. Indeed, all the witnesses who have been examined with respect to a provision as intended or not intended for Joseph Haughton and his children speak of it as one to proceed from Jonathan Haughton. He, therefore, though not in form, was in effect a party grantor, and his possession of the writing after it had been sealed by the formal grantors and attested by himself raises but a very faint, if any, presumption that it was delivered to him or that he kept it for the trustee or for those who were to derive interests under it. He may well have taken and kept it, as the defendants allege that he did, as an instrument as yet imperfect and subject to his control, but which he could cause to be perfected if and when he pleased. Thus it is that (405) his conduct and, as a part thereof, his declarations have been resorted to in order to give a character to this possession.

There is no evidence that he ever delivered this instrument to the trustee or even apprised the trustee of its existence. Notwithstanding the first trust declared in it was to be an application *personally* by the trustee of the profits of the property to the payment of the decree against Jonathan Haughton, no act of the trustee making such application or any other act under the trusts declared is shown to have been done. From the time when the instrument was signed up to his death, a period of five years, it remained always in the hands of Jonathan Haughton or in those of his depositary, and it remained unregistered.

When apprised by Mr. Malachi Haughton of the necessity of registration to give it effect, he declined to have it registered, upon the ground that he designed to alter it. One can scarcely doubt upon these circumstances that he regarded the instrument as one not perfected and which he had the ability to cause to be perfected. It does indeed appear from the testimony of Mrs. Elizabeth Haughton that he spoke to her of "a deed" containing a provision for her children, but he might thus have spoken of this instrument, though wanting the perfection of delivery, without serious impropriety of language. There would be great danger of error in determining the character of the instrument from a general observation of this kind. The witness does not state the details of the conversation in which this remark occurred, nor for what purpose the information of the existence of such a paper was communicated to her. It does not appear that he informed her where the deed was or what he wished to be done in respect thereof. Nor can one lay very great stress on the representations which are testified by this witness and her sister, Mrs. Pettijohn, to have been made by Jonathan H. Haughton and George W. Barney, in relation to a provision for her child, which it was beyond the power of her grandfather to deprive her of. They amounted in effect to little more than assurances that if he should refuse to give validity to some provision they would, as they could, secure to the plaintiff the benefit of it. Why it is that they have not complied with these assurances does not indeed appear. It is to be (406) hoped that they have sufficient reasons for this seeming breach of good faith, but the plaintiff does not found and cannot found a claim to relief upon their promises.

The testimony as to the intentions of Jonathan Haughton to provide for the plaintiff corresponds with the statement made in the answers. These intentions do not seem to have been permanent. At different times he expressed, and no doubt entertained, different purposes in this respect, and in the last, most solemn act of his life, the making of his will, he has very emphatically declared that he gives nothing to the children of his son Joseph Haughton, and that he intends to give them nothing.

We feel ourselves obliged to declare that the plaintiff has not established the material allegation in her bill, that the defendants Jonathan H. Haughton and George W. Barney did sign, seal and deliver the instrument, which is therein referred to as their deed, and therefore we must dismiss the bill. But we think the case one in which a judicial investigation was proper, and we direct the bill to be dismissed without costs except as to the

administrator and heirs of the trustee. The plaintiff (or her next friend) must pay their costs. As they had a common defense and approved by the same solicitor, there will be but one solicitor's fee taxed to them.

PER CURIAM. Decreed accordingly.

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(407)

JEREMIAH HENRY v. JOSEPH LILES, ELIJAH LILES AND ANOTHER.

1. Possession of land is *prima facie* evidence of a title in fee and is notice, to one who is treating for the fee with a person out of possession, of the nature of the title of the tenant. It should put him upon inquiry.

2. In contracts for the sale of land a court of equity may leave a party to his action at law, where the vendor believed he could convey an estate when he agreed to sell it, but afterwards discovered that he had *no* title to it.

3. But where the vendor can make a title to a part, but not to all he has sold, the vendee, at his election, may compel him to convey the part to which he has a title, and to make a reasonable compensation or proportional deduction for the other part.

4. Upon decreeing a conveyance of land, on the bill of the vendee in a contract of sale, the court is, perhaps, bound, according to the universal usage of the country and the understanding of the profession, to direct the usual covenants of general warranty.

5. If the conduct of the vendee in a contract of sale is not fair, but he attempts by raising frivolous objections to delay and weary out the vendor, wantonly insisting on unreasonable conditions and assurances, and thereby baffling the vendor and leaving him at a loss to know what to do or to depend on, a court of equity will give him no assistance.

6. On a bill for specific performance a court of equity never decrees a collateral indemnity, not stipulated for, as a provision against a bad title, but it will see that the vendee is not compelled to take more land than the vendor can rightfully convey, and that he shall have a proper compensation for the deficiency.

THIS cause was transmitted to the Supreme Court from the Court of Equity of ANSON, at Fall Term, 1842, on affidavit of the plaintiff.

The facts appearing from the pleadings and proofs will be found in the opinion delivered in this Court.

(408) *Mendenhall* and *Winston* for plaintiff.
Strange for defendants.

RUFFIN, C. J. The bill was filed in August, 1838, and seeks the specific performance of a contract for the sale of a tract of land situate in Anson County. The defendant Joseph A. Liles resided in Tennessee, and constituted one Nelson P. Liles, of Anson, his attorney to sell and convey the land in question; and in November, 1835, he entered into a written contract with the plaintiff in the following words: "I have sold Joseph A. Liles' land, allotted to him in the division of my father's land, to Jeremiah Henry, say about 113¾ acres, for $300. The right to be made and the money paid when the lines are established." The bill then states that the lines of the land were afterwards ascertained by survey, and they are set out by metes and bounds; that Nelson P., the attorney, refused to make a conveyance to the plaintiff, and that he informed the defendant Joseph A. thereof by letter, to which he received an answer, dated in February, 1837, in which he confirmed the contract and promised that he (Joseph A.) would come to Anson in the course of the succeeding winter, and would himself execute a deed to the plaintiff, and requested that, in the meanwhile, the plaintiff would take possession of the land and cultivate it as though it was his own by a full title; that the plaintiff entered accordingly into the land and placed a tenant thereon; and that Joseph A. Liles did, in December, 1837, come into Anson, and, although the plaintiff offered to perform the contract on his part, he refused to convey to the plaintiff, and conveyed to the other defendant, Elijah Liles, who paid nothing for the land, or, if he did, had notice of the previous purchase of the plaintiff before he paid his purchase money and received his deed. The bill then states that an action of ejectment had been instituted against the plaintiff's tenant and himself on the several demises of the two defendants, J. A. and E. Liles; and it prays for an injunction and proper conveyances. Both of the defendants put in answers in which the contract with the plaintiff is admitted and also the correspondence mentioned in the bill. The answer of (409) Joseph A. Liles states that in December, 1837, he came to Anson, and went to the plaintiff's house and informed him that he had come for the purpose of making a title according to his engagement; but that the plaintiff insisted that, besides a deed, the defendant must give a bond with sureties to protect and indemnify the plaintiff against all loss or expense about the land, which bond this defendant admits he refused to give. The answer further states that, being anxious to end the business and return home, he sent to the plaintiff a request to come and see him at the house of Nelson P. Liles, where he was staying, and that he accordingly came, and that then this defendant "prof-

fered to make him a title for said lands in fee simple with general warranty, which the plaintiff refused to take, unless the defendant would give the bond and surety as before stated, and that the defendant refused to give, and then told the plaintiff that he was compelled to return home, and that he would sell the land before he slept that night, if he could; to which the plaintiff made no reply." The answer further states that, "believing the matter between the plaintiff and himself then at an end, he prevailed upon his uncle, the other defendant, to purchase the land, and that about the time he executed a deed to Elijah the plaintiff asked this defendant if he had sold his land, to which the defendant replied that he had and had received part of the purchase money, and the plaintiff expressed no dissatisfaction." The answer of Elijah Liles states that after the contract between the plaintiff and the agent, Nelson P. Liles, "the parties made a survey of the land contracted for, and that upon the survey it was ascertained that this defendant had an older grant which covered a part of the land, and that this caused for a time a suspension of the execution of a deed." The answer then states that this defendant was informed and believed that the other defendant, Joseph A., had offered to convey to the plaintiff with warranty, but that the plaintiff demanded also a bond with sureties as a collateral indemnity, as stated in the other answer; and "that Joseph A. refused to give (410) such bond, and told the plaintiff that unless he would take a deed and pay the money he would sell the land to some other person." The answer further states "that this defendant was informed of the meeting between the other parties, and understood that the contract was at an end between them, and so believed; and that when the other defendant applied to this defendant to purchase he did so at the price of $300, which he paid and received a deed; and that he made said purchase believing that the contract with the plaintiff was rescinded, and more for the purpose of accommodating his nephew than for his individual benefit. This defendant further states that, at the meeting which took place between him and the other defendant for executing the deed and paying the money, while they were engaged in the business, the plaintiff called and inquired of the said Joseph A. "if he had sold his land," to which the other replied, "I have, and have part of the money in my pocket," and that at this answer the plaintiff expressed no dissatisfaction. And this defendant declares that if the plaintiff had objected, he would not have completed the contract, for this defendant then believed the plaintiff's contract was at an end, and he still believes such was the fact." It does not appear that an injunc-

tion was granted, or what was done in the action of ejectment, or who has been or now is in possession; and at present the Court must suppose the plaintiff retains the possession, at least, of part of the land.

To the answers replications were put in and the parties proceeded to proofs. The letter of the defendant Joseph A. to the plaintiff, of February, 1837, is exhibited, and, besides the contents as stated in the bill, it contains this clause: "If you remain in the notion of the land, and Nelson won't make you a right, if life lasts I will come next fall and will see if I can't make you a right myself, and old Elijah will have to get the land by law; for I would see him buried before I would give him one foot of my land. I want you to hold the land, if Nelson won't make you a right, till I come." The deed to Elijah Liles is dated 30 December, 1837, and describes the land by the boundaries set forth in the bill and as containing 113¾ acres, and (411) has a covenant of general warranty, but with this clause following: "Though it is jointly agreed between the parties that nothing herein contained is binding as to the number of acres, further than the patents or old papers of the land cover lawfully." Several witnesses have been examined, from whose testimony, and particularly that of Nelson P. Liles, it appears that after the contract with the plaintiff a question arose whether the title to all the land was good, as Elijah Liles claimed from 20 to 40 acres of it, and on that account the execution of the contract was suspended until J. A. Liles could come in himself, though the plaintiff was to take possession, and did so. In the latter part of December, 1837, J. A. Liles arrived in Anson, and went from Nelson P. Liles' to see the plaintiff, and upon his return he said that the plaintiff wished him to have the land surveyed again; and the witness, Nelson P. Liles, advised him not to have a survey at his expense, but to make a deed with warranty at once. In a few days, say on 28 December, the defendant J. A. Liles wrote to the plaintiff that he did not think it necessary to have the land run again, but that he would make him a deed with warranty, and that he was anxious to go home, and wished the plaintiff to come and settle the business. The plaintiff immediately went to Nelson P. Liles', where Joseph A. Liles was, and the latter then repeated his offer to make a deed with warranty for all the land, but the plaintiff asked, in addition, a bond with surety for the title, which the other refused to give. After some conversation between them on the subject without coming to any agreement, Nelson P. Liles, the witness, remarked "that it was useless to say anything more about it, as the plaintiff asked a bond and surety, and the defendant Joseph A. refused to give it,

and there was an end of it." But the plaintiff thereupon replied "that he did not say he would not take a deed without bond and surety, but that he should ask bond and surety; and that then Joseph A. said "if it was not fixed then, it was likely it would never be, as he intended to sell the land before he slept, if he could"; whereupon the plaintiff replied to him, "that who-
(412) ever bought it would buy a lawsuit." Two days afterwards the plaintiff went back to Nelson P. Liles' and tendered the price, $300, to the defendant Joseph and demanded a deed, though he said he did not expect the other party would make it, as he had understood he had sold the land to Elijah Liles; and Joseph refused to receive the money, saying he had sold to Elijah and he could not take two men's money; and then the plaintiff said that whoever had bought the land had bought a lawsuit, and gave him notice that he, the plaintiff, was in possession and should keep it. At that time the defendant Joseph A. had received part of the purchase money from the other defendant Elijah, and afterwards, on the same day, he received the residue and executed a deed.

Upon this case it is to be observed, in the first place, that the defendant Elijah must abide by the decree that might be made against Joseph A. Liles, were the latter the only defendant. The possession of the plaintiff is *prima facie* evidence of a title in fee, and is notice to one, who is treating for the fee with one out of possession, of the nature of the title of the tenant. *Daniels v. Davison,* 16 Ves., 249. But there is no doubt of actual notice here, for the answer does not profess that Elijah was a purchaser without notice of the plaintiff's contract, but puts his case upon the fact, as he believed it, that it had been rescinded. As to that he should have inquired of the plaintiff, and it is his own fault to have relied on rumor, if it should turn out that there was no such rescinding of the contract.

Upon the point of rescinding, there is nothing to raise even a suspicion of it, whatever other reasons there may be for not decreeing the relief the plaintiff asks. That such an agreement as this may be rescinded by parol need not be questioned; but, certainly, it can only be by a new and distinct agreement, clearly proved by unexceptionable evidence. But these parties, undoubtedly, never came to any new agreement; nor did the plaintiff ever intimate a purpose of even renouncing his contract, much less come to a contract of that sort. On the con-
(413) trary, the parties disputed what were their respective rights under the contract; and when, in consequence of their not agreeing in that respect, the witness, N. P. Liles, said "that it was useless to say anything more about it, for the one

asked what the other would not give, and there was an end of it," the plaintiff replied "that he did not say that he would not take a deed without the bond." This reply shows conclusively that the plaintiff, so far from giving up, insisted on the agreement, for, lest the equivocal expression, "there is an end of it"—which might mean either that they might then and there dispute, as each seemed to be settled in his mind upon it, or that it put an end to the bargain itself—might be construed in the latter sense, the plaintiff promptly corrected such latter inference by denying that he intended to refuse a deed. There is, therefore, nothing like a rescinding or even abandoning this contract.

But the defendants say that as the right to specific performance is not absolute, *ex debito justitia*, but in the sound discretion of the Chancellor, the plaintiff is not entitled to it, because the defendant will thereby be decreed to convey, perhaps, thirty acres of land which, since the contract, it has been discovered he cannot do, as he has not the title; and because, by refusing a conveyance which the other party was willing to make for the whole with warranty, and insisting on new and oppressive terms, the plaintiff was trifling with his vendor, by delaying him of his purchase money and keeping him unreasonably, at a great distance and upon expense, from home.

As to the first reason, it is true the Court of Equity may leave a party to his action at law where the vendor believed he could convey an estate when he agreed to sell it, but afterwards discovered he had *no* title to it, as in the case of *Howell v. George*, 1 Mad., 9. But it cannot be maintained that a vendor is not to be compelled to convey any part of what he sold because he cannot make a good title to all; for both good sense and the law say that, if the vendee choose, he may take all the vendor can convey, with a reasonable compensation or proportional deduction for the part he does not get. *Wood v. Griffith*, 1 Swanst., 54; *Mortlock v. Buller*, 10 Ves., 316; (414) *Todd v. Gee*, 17 Ves., 280. But in this stage of the case the question does not arise. It does not appear yet that there is a defect of title to any part. The bill mentions nothing upon the subject; and should the plaintiff be willing to take the title as it is, without covenants from the vendor, there can be no objection to the decree. But it is certain, almost, that the plaintiff will require covenants, and according to the universal usage of the country and the understanding of the profession the court would, perhaps, be bound to direct the usual covenants of general warranty. But whatever may be the rule generally, it is clear that if a conveyance be decreed at all in this case it must

be with warranty, as it is manifest, not only from the evidence, but from the answers, that it was in the contemplation of these parties as a material part of the contract, although not mentioned in the written agreement. If, therefore, either party should wish to have the title ascertained, so as to see what the defendant may safely warrant, he can at the proper time have a reference to the master to inquire into the title and the other matters material to the decree, if a partial defect should be found. But the probability that the defendant has not a good title to some part, or even the certainty of it, forms no objection in his mouth to his conveying what he can, if the plaintiff is willing to take it.

Upon the second reason urged, we agree that, although the plaintiff may not have rescinded the contract nor abandoned it, yet if his conduct was not fair, but he attempted, by raising frivolous objections, to delay and weary out the defendant, wantonly insisting on unreasonable conditions and assurances, and thereby to baffle the vendor and leave him at a loss to know what to do or to depend on, then the Court should give him no assistance. Equity requires good faith and prompt action on the part of one who asks for specific execution from another. But the Court cannot perceive in the conduct of the plaintiff anything from which the imputation of such purposes can in fairness be made. The fact is that neither party acted with perfect
(415) propriety, legally speaking, probably for want of advice, for it does not seem that counsel was consulted on either side. But the plaintiff did nothing that an ordinary person, without advice, might not have done with good intentions, and with a view to having the contract performed in its spirit.

It appears that the vendor's father and uncle owned adjoining tracts of land, and that upon the death of the father a share of his land was allotted to the defendant Joseph A., after which and after a sale by his agent to the plaintiff, the uncle asserted that a part of the land thus allotted and sold belonged to him. Upon this claim the agent, being uncertain as to its extent and validity, declined making a conveyance, but referred the matter to his principal. Against that the plaintiff made no unreasonable complaint, but in a proper spirit acquiesced until the principal could be consulted. He was informed of this, and immediately, with considerable irritation towards his uncle for his unfounded claim, expressed a dissatisfaction with the agent at hesitating to convey, defied the uncle, and requested the plaintiff to take possession and hold the land against the uncle until he could come in and see "if I cannot make you a right myself." In this, too, the plaintiff acquiesced, and although not bound to take posses-

sion until the title was cleared, he did so, as well to oblige the vendor as to fulfill the contract. The plaintiff must naturally have inferred from this that the vendor asserted an indefeasible title to the whole, and meant, when he came in, to clear and establish it; for as to the mere matter of executing a deed, that could have been done as well while he stayed in Tennessee as when he came here. The sale had been for a round sum, $300, and it is clear the vendor insisted on the payment of the whole of it, and meant to obtain it by conveying the whole tract, inasmuch as he declared that he would see Elijah Liles buried before he would give him one foot of the land, unless he got it by law. When, therefore, the vendor came to this State with the avowed purpose of making "a right," had not the plaintiff some cause of surprise when the other party, without taking any step whatever to clear the title and show to what portion of the land his title extended, much less establishing a good title (416) to the whole tract, demanded that the purchaser should pay the whole price upon the execution of a deed with general warranty by himself, residing in a remote situation in another State? But what was the course of the plaintiff under those circumstances, which he had so little cause to anticipate? He proposed that the vendor should have a survey of the land, doubtless with the honest and proper view to determine the boundaries of the conflicting claims of Joseph A. and Elijah Liles, or to bring about an adjustment between those parties, so that he might have an undisputed title to the land that should be conveyed to him, whatever that might be, the whole or a part. Thus far there can be no objection to the plaintiff's conduct, for if Liles had filed his bill against the plaintiff to carry the agreement into execution, the court would have directed the same thing upon a reference as to the title. This proposition the vendor did not reject at first, but, upon the advice of his brother and agent, he did finally decline it, without even assigning a reason. Why he should have been so advised or have so determined it is difficult to conjecture, consistently with a fair intention in either of those persons. It could not have been that they were satisfied by the first survey that Elijah Liles' claim had no foundation, for, upon that very survey, Nelson P. Liles had entertained such doubts of his principal's title as had induced him to decline conveying, and the defendants now say that Elijah has title to part of the land, or at least, that he probably has. Then why should the vendor have refused an investigation into his title, which he had before asserted to be good and declared himself determined to maintain, though he then admitted it to be doubtful as to part? Especially, why should he accom-

pany that refusal with an offer, notwithstanding the doubtfulness of the title, to convey with warranty and with a peremptory demand on the vendee for an immediate acceptance of the deed and payment of the purchase money? It is painful to the Court to impute covert and sinister motives, when it can be avoided,

(417) and therefore we do not say that the object was to hurry the plaintiff, rather than lose his purchase entirely, into parting with his money for a bad title without due consideration, upon the inadequate security of a personal covenant from a person living abroad, or to induce him, in a moment of dissatisfaction on account of the defective title to part of the land, to give up his purchase altogether and leave the other parties at liberty to make another sale at the same price to the opposite claimant, and thus get rid of the difficulty in the title. The Court does not find that such was the object, and it might be that the sole purpose was to ascertain whether the plaintiff would be on or off the bargain; but we do say that it was not so obviously uncharitable to account for the conduct of the vendor in the former manner as to render the attempt of the plaintiff more fully to secure himself from loss a capricious, wanton or unjust requisition. It is true that the Court never decrees a collateral indemnity as a provision against a bad title. *Balmanes v. Lumley,* 1 Ves. and Beam., 224. And, therefore, strictly speaking, the plaintiff could not demand it, as it had not been stipulated for. But, on the other hand, the Court would see, as it could not give an indemnity, that the vendee should be compelled to take only the land to which the vendor could make a good title, and should have a proper compensation for the deficiency. Now it seems to us that the plaintiff was only desirous of doing substantially the same thing, and of complying yet more fully with the wishes and interest of his vendor. For although the plaintiff had no legal authority to call for the collateral indemnity of a bond with sureties, yet, on the other side, he had a right to have it ascertained how much land the vendor owned, and to have that conveyed to him at a proper valuation in proportion to the price agreed on for the whole. Now it did not suit the purposes of the vendor to settle the business on those terms; for he wished to convey all, whether the title was good or bad, and without investigation, that he might get the whole purchase money and go back with it to Tennessee. It was then, in truth, an accommodation to him for the plaintiff to depart from his strict right and agree to take a convey-

(418) ance, under this new state of things, to land to which the title would probably fail, and pay for it. And he certainly is not to be blamed for declining to accede to what, in the

view of the Court of Equity, must be considered a new provision in the contract, without some domestic indemnity from the loss of the money advanced on it and which he would not have been compelled to pay, according to the construction of the contract in its original form. It is true, the other side was at perfect liberty to refuse to give the indemnity, but it was not a hard or unreasonable condition to the modification of the contract asked from him, namely, that he should pay down the whole price and accept a deed as if the title to the whole was good, while the parties were aware that the title to one-fifth or one-fourth might not be good. We say it is true the party was at liberty to refuse to give the indemnity; but, upon doing so, the other party was at liberty also to recur to the contract as he first made it, and insist upon his rights arising thereon. These were, *at his election*, to take the deed for the whole tract with warranty, as stipulated for, or to take a deed for such part only as he could get a good title for and pay in proportion, or to reject the contract *in toto*, because the other party could not fulfill it, according to the intention in so material a matter. *Leigh v. Crump*, 36 N. C., 299. Now, instead of leaving to the plaintiff an election between any two of those methods of proceeding, the vendor declared that *he* would do but the one thing, that is, make a deed for the whole tract upon getting the entire price. Even that the plaintiff did not reject, but remarked "that he did not say he would not take a deed." But the defendant would allow no time for consultation or reflection, and declared "that if it was not fixed *then*, it would never be, for he meant to sell before he slept"; and he did sell that very day or the next. The plaintiff might, indeed, have been more explicit in requesting some delay for the purpose of making up his mind as to which course he would take. But it is probable he was not aware of his right of election. Certainly his failure to make an immediate declaration of his acceptance of the deed cannot be considered as trifling with or playing upon the vendor, especially when he distinctly told him that he insisted on his contract. (419) He was not obliged to accede to those terms at all, but might have rejected them absolutely and filed his bill for an inquiry as to the title and a conveyance accordingly; much less was he obliged to accede to them upon the spur of the moment. The urgency with which he was pushed to a decision was unseemly and suspicious, and the haste in declaring the contract at an end, without the concurrence but with the declared dissent of the plaintiff, and in making a new agreement with the vendor's uncle and upon better terms for the vendor—and all this, after the plaintiff had waited for two years upon the vendor to

come in and clear the title—shows the inclination, not of the plaintiff, but rather of the other party, not to execute the agreement in good faith.

We think, therefore, reserving liberty for either party to move for a reference as to the title, that the plaintiff is entitled to the usual decree for conveyances, to be approved of by the clerk, whereby the defendant Elijah shall pass all the title derived by him under the deed to him from the other defendant, and the latter shall covenant for the title; also the plaintiff shall be quieted in his possession by injunction, upon paying into court the purchase money, and interest while he has been in possession, for the use of the defendants, and to be paid to them upon their executing and filing in the office the deeds to be by them respectively made.

PER CURIAM. Decreed accordingly.

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(420)

ALEXANDER ANDERSON, ADMINISTRATOR, v. JOHN TAYLOR.

A partner, without a stipulation to that effect, is not entitled to compensation for any services in conducting the trade or settling the business of the copartnership beyond his share of the profits.

THIS was a bill filed by the plaintiff, as administrator of Aaron Lazarus, deceased, for the settlement of a partnership which had existed between the said Lazarus and the defendant Taylor to carry on a mill for planing lumber in the town of Wilmington. The bill was filed at Spring Term, 1842, of NEW HANOVER Court of Equity, and the defendant having answered, a reference was made to the clerk and master to state the accounts of the copartnership. Upon his report coming in, exceptions were taken on both sides, and the cause was transmitted for hearing to the Supreme Court.

The exceptions depended exclusively upon questions of fact, except one, upon which alone it seems necessary to report the opinion of the Court. The copartnership was dissolved in 1841 by the death of Lazarus. The defendant first claimed $900 a year, according to a stipulation in the partnership agreement, for his personal superintendence of the mill, in addition to his share of the profits. This claim was rejected by the court, upon the ground that by a subsequent agreement the defendant had relinquished, with the assent of his partner, the personal management of the mill, and engaged in other business which fully occupied his time. The defendant then excepted to the master's

report because he had not allowed him a reasonable compensation for settling the copartnership business after the death of Lazarus. Upon this exception the Court gave the fol- (421) lowing opinion, the case having been argued by

Mordecai for plaintiff.
J. H. Bryan for defendant.

RUFFIN, C. J. So, as connected with it, must also his second exception be overruled; that is, that the master, after rejecting the claim for salary, has not allowed the defendant a reasonable compensation for settling the business. But the rule is clear that without a stipulation to that effect a partner is not entitled to compensation for any services in conducting the trade, beyond his share of the profits. *Buford v. Neely,* 17 N. C., 481. Here, it is true, there was a stipulation for compensation, but, as we have already seen, that was abandoned or waived, and the services as there specified not having been rendered, so as to entitle the defendant to claim under the agreement, the case stands precisely as if the articles had been silent on the subject. The defendant did not act as managing partner, as contemplated in the agreement, but another person supplied his place, and afterwards he only acted as any and every partner would, simply from his interest in the concern.

PER CURIAM. Exception overruled.

Cited: Butner v. Lemly, 58 N. C., 149.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

JUNE TERM, 1843.

JOHN C. ATKINS, EXECUTOR OF HENRY DE LA MOTHE, v. FRANCIS J. KRON AND OTHERS.

Where a testator devised all his estate, real and personal, to certain persons, chargeable with the payment of a number of pecuniary legacies, and, owing to their being aliens, they were incapable of holding the real estate, but this was decreed to belong to other devisees, in the devise to whom both the real and personal estate were still charged with the payment of the legacies: *Held* (DANIEL, J., *dissentiente*), that the real and personal estate constituted a mixed fund, out of which the legacies, except those to aliens, must be paid *pro rata: Held, further*, that the pecuniary legacies to the aliens could not be charged at all upon the real estate, but must be paid exclusively out of the personal.

THIS case was before the Court at December Term, 1841, when all the questions presented, except one, were decided. The facts will be found at large in this volume of the Reports, *ante*, p. 58. The only facts necessary to state in relation (424) to the question reserved and now determined are these:
Henry De la Mothe, a naturalized citizen and resident of this State, being seized and possessed of a large real and personal estate in this State, died in 1838, having first made his last will and testament, in which, after bequeathing many pecuniary legacies, he devised as follows: "I give the balance or residue of my property to my executor in trust for the benefit of my sister Quenet's grandchildren by the name of Forestier, to be paid to any one of them who should apply for the same—sub-

ject, however, to the payment of the legacies made in this will, and moreover obligatory to them to the payment of $100 yearly to their grandmother Quenet during her life, and after her decease the same sum of $100 to be paid to their own mother, yearly, also during her life. But should no one of my sister Quenet's grandchildren, or any one duly authorized legally to receive the above property in their behalf, apply within two years from the time of my decease, then the above property to revert unto Mary C. Kron's children and to be distributed equally among them, subject, however, to the legacies herein mentioned." The executor filed this bill for the advice and direction of the Court in the execution of his trust. The Court decided that the trusts in favor of the Forestiers were void as regarded the lands, they being aliens, but were good as to the personal estate; and the question now arose, out of what fund the pecuniary legacies were to be paid, the personal property being amply sufficient for that purpose.

The case was argued at the last term by *Strange* for the Forestiers and *Winston* for Kron's children, and the Court, having taken an *advisari*, now delivered their opinion.

RUFFIN, C. J. When this case was formerly before the Court, *ante*, 58, a question was stated to have arisen whether the land, taken, under the construction given to the will, by the children of Mr. and Mrs. Kron, was to bear any portion of the legacies with the personalty. That question has been since argued and the subject deliberately considered by each member of
(425) the Court, and the result of our deliberation and consultation is that, in the opinion of a majority of the Court, the different parts of the fund, given or attempted to be given to the Forestiers, must contribute towards the pecuniary legacies (except those given to aliens) in proportion to the values of the real and personal parts respectively.

The natural justice of that rule seems to be obvious, and we believe the authorities are not in opposition to it. The testator gives the whole residue of his estate, of every kind, to certain favorite relations, and upon a particular event he gives the same residue to others of his relations; declaring, however, that the fund in the hands of each class of the donees should be subject to his pecuniary legacies. It has happened that neither disposition has taken effect as the testator intended, and doubtless expected, for the primary donees take the personal portion of the fund, but as they could not hold the real portion of it, that goes to the substituted class of donees. It would be shocking if the primary objects of the testator's bounty should not only lose

that part of the fund which the law, upon a principle of policy, will not allow them to hold, but should also, in effect, be deprived of that part of which the gift was valid, by having thrown on it all that was charged upon the whole fund. Upon that ground it was contended on behalf of the alien donees that, as the favorites of the testator, they should keep the personalty, exempt from legacies, until the land should be exhausted.

But we are not at liberty to go that length, although it can hardly be doubted, if the testator had been asked how the legacies should be raised in the event which happened, that he would have said, "Out of the land, for I did not mean the Krons to take anything which the Forestiers could, but that the latter should have all my estate except the sums of money I have given away in the previous parts of my will." But it must be admitted that intention, however naturally to be inferred from the circumstances, cannot be carried into effect for the want of words from the testator himself making the land the primary fund for this purpose. Neither can this be done by mar- (426) shalling, that is to say, by throwing the legacies on the realty, for that would be to give the aliens indirectly the benefit of a devise of the land which they could not take directly, or, at least, hold. That is the rule in England with respect to a bequest to a charity of money charged on both real and personal estate. The courts do not marshall by throwing the debts on the land and leaving the personalty for the charity. *Mogg v. Hodges*, 2 Ves., 52; *Makeham v. Hooper*, 4 Bro. C. C., 152. The same principle must apply to a gift of the like kind to an alien. But although the realty is not, as far as it will go, to bear the whole charge, yet it does not follow that it shall not answer for some part; and if so, then it is to be inquired, what part? It has been contended for those that get the land that it is to pay nothing because the personal estate is the primary fund for the payment of legacies, and a mere charge on the land, however explicit, will not place the land in front of the personalty nor subject it to contribution. Neither branch of the proposition is controverted, but each is fully admitted. On the other hand, it is undeniable that it is in the power of a testator to make those different portions of his estate pay his legacies in any order or proportions which to him may seem meet. The question upon each will is, whether that testator intended to charge the realty in aid of the personalty, or before it, or as contributory. Cases of both the former kinds are frequent in the books, where the one kind of estate goes to one set of persons and the other to another set, and though they are not all reconcilable, yet at this day it is not difficult in most cases to deter-

mine whether the land is charged as the primary or the subsidiary fund. But we do not find many cases in which the two kinds of estate have been held to contribute. Some such there are, however, and they seem to turn, not so much upon the actual intention of the testator that there should be contribution between the realty and personalty, as such, as upon the application of a principle of natural justice and a rule of equity to a case which was not foreseen by the testator, and about which
(427) he had, therefore, no particular or precise intention, but only a general intention, which, to be carried into effect, requires contribution.

Such a general intention is to be respected as governing the construction of the will, and to it a particular inconsistent intention must yield. Much more must the general interest govern when there is no particular intent one way or the other. When the personalty and realty are given to different persons, and the latter is charged, and merely charged with legacies, it is as clear that the two funds do not contribute towards the legacies as that the real is not the primary fund for their payment. In such cases there are not only two funds, in the sense that the estates composing them are different in their nature, but also in the sense that they are not given together, but severally and to different persons, and severally charged. In every mode of speaking of them they are two funds, as well for the purposes of raising a charge as any other. But when realty, or the proceeds of realty, and personalty are given together to the same person or persons charged with legacies the several parts have been held liable to the charge *pro rata* according to their respective values. In *Roberts v. Walker,* 1 Russ. and Myl., 752, the master of the rolls said that when a testator creates a mixed and general fund from real and personal estate and directs that fund to be applied to the payment of debts and legacies, the realty and personalty must contribute *pro rata,* and as in that case there was no disposition of the fund after the payment of the debts and legacies, the next of kin took what was left of the personalty and the heir did the same with respect to the realty. It seems not to have been always so understood. *Howze v. Chapman,* 4 Ves., 452; *Paice v. Archbishop of Canterbury,* 14 Ves., 364. For, as was observed in *Roberts v. Walker,* the attention of the Court was not before distinctly called to it in any of the numerous cases in which the facts would have raised the question. But this rule of contribution has been established and is now considered perfectly settled in reference to the gift to a charity of a mixed fund charged with legacies. *Attorney-General v. Earl of*
(428) *Winchelsea,* 3 Bro. C. C., 381; *Croslin v. Mayor of Liver-*

pool, 1 Russ. and Myl., 761; *West v. Shuttleworth,* Shuford on Mortmain, 237. And precisely the same rule has been applied to a devise of real and personal estate to an alien. *Fourdrin v. Gowdey,* 3 M. & K., 383. In those cases the gifts to the charity and to the alien failed, so far as they consisted of realty, and the heir of course took that part, but he took subject to his just ratio of the encumbrance. It is true there were directions there to sell the real estate, and the proceeds were given and blended with the personalty so as to make one fund, and it has thence been thought that the decisions turned on that circumstance. It is probable that a case of that kind, as the more striking, would be more likely to give rise to the rule than a gift of realty, specifically, in conjunction with personalty, and unconverted to any purpose except so far as the charge itself might have that effect. A direction for a sale, though it be but a conversion to the extent of the purposes to which the money is legitimately applicable, denotes that, as to those purposes, the money arising from the realty, being mingled with the personalty, was intended to be applied with the personalty, and therefore to be liable with it. But that does not seem in reason to flow from the direction, singly, to sell the realty as thereby making it and the personalty one fund, for they are in truth not one fund in the sense of the real estate being turned into personal estate, for then it would not come back to the heir, whereas the cases cited and many others show that the heir takes the money as land not disposed of. That is only one example of the mode of creating such a mixed and single fund. The real ground of the rule must be that the testator gives the whole, whether consisting of the produce of realty or personalty or of the realty itself and personalty, as one fund, charged with the legacies, and as the charge is upon that one fund, if it should chance afterwards to become severed neither portion becomes exonerated of the charge, but each must bear its aliquot share. But is a sale of the realty necessary to the composition of this one fund, as it is called, in reference to the charging of legacies on it? We see not why that denomination may not as truly be (429) given to it when the realty and personalty are charged together with the legacies and also given together to the same person or persons, and yet more when they are given over, or rather in the alternative, together once more. Such is our case. When personalty and realty are given separately to different persons a charge upon the realty does not change its liability, for there is no intention presumable that the two should bear the burden *pari passu* or in any manner different from the order in which the law makes personal and real estate liable. But

when the testator gives to the same person realty and personalty in mass, as the residue of his estate of both kinds together, expressly charged with legacies, can a reason be conceived—one at least founded on sense and principle—why he should intend that either estate should be applied to the charge, first or last? To the donee of the fund it cannot be material out of which part of it the money is to be raised; therefore, his interest is not at all concerned to produce an intention either way in the breast of the testator. On the other hand, there is a reason why he for whose benefit the charge was created should not be restricted to this or that part of the fund, but allowed to raise it out of any part which he can most conveniently get at. The reason is that he cannot know the state of the different parts of the fund, while the other party is in possession of perfect knowledge upon those points and has the control of the whole, and can pay out of any part he chooses; and it is his duty to pay promptly out of the one or the other, and not to embarrass the legatee as to the source from which he is to receive his money. Intending him to be thus paid at all events, the testator charged the whole fund, though consisting of several things; and the whole being in the same hands, the inference is very strong that the testator charged it as a *whole,* or, at least, each and every part of it alike. Had the gift to the Forestiers proved good throughout would not a bill have laid for the satisfaction of the legacies, without taking an account of the two estates separately? Would they have been permitted to interpose such an impedi-
(430) ment to the speedy redress of the legatees? We should have said to them, to what purpose, *cui bono,* is such an account to be taken under the directions of the Court? The legatee is entitled to his legacy at all events—and from you, in respect of the gift to you of the property charged therewith. The whole fund is in your hands, and if, as you say, there be personalty applicable to the legacy, there is nothing to hinder you from applying it to that purpose; and if you will not, the money shall be raised from the land which is visible and accessible and likewise charged. As the Court would act in such a case, so the testator thought in making the disposition. He did not contemplate the donation, as comprising different things, to be liable to the charge in succession or in different proportions. He could have no motive for framing a scheme of that sort. He, in fact, meant the donees of the things charged to pay the legacy, and as a security therefor he charged the combined fund as a whole, inasmuch as it all belonged to the same persons. In this sense the fund may be called a "mixed fund," or "one fund," as appropriately as if it were compounded of the proceeds of

realty and personalty. In *Bench v. Biles,* 4 Madd., 187, those terms were applicable to a fund of this character. The testator there gave all his real and personal estates to his wife for life, and after her death gave various legacies, and all the residue and remainder of his real and personal estates to his nephews. The question was whether the legacies were charged on the real estate. In deciding it *Sir John Leach* said: "It is truly stated that legacies form no charge on the real estate, to affect the heir or devisee, unless the testator has shown a manifest intention to that effect. The testator here gives all his real and personal estate to his wife for life, *blending them together for her use.* And he plainly continues, after her death, to *treat them as one fund;* the rest, residue and remainder of which, after payment of legacies, is to go to the nephews." And the decree was as prayed for. It is true the question there was whether the land was charged, as to which the case at bar admits of no doubt, as the will is express in two places. But the reason why the Court then held the land to be charged is the point mate- (431) rial to us at present. That was, that although the proceeds of land were not given, but the land itself, yet it and the personalty formed "one fund," because they were given together to the same persons, subject to one and the same charge. There was no question raised as to the order in which the land should be liable at all, because, as we suppose, the point was immaterial. Hence, without inquiring whether the personal estate was exhausted, there was a declaration at once that the legacy was charged on the land as well as the personal estate, and, no doubt, a decree that it should be raised forthwith out of either or both, for the reason that the two estates were "blended" by the testator, who in so doing treated them as "one fund." Similar phrases, "lands combined, mixed up and treated as one fund with personalty," are applied to similar cases and for the like purposes in *Edgell v. Haywood,* 3 Atk., 352, and *Cole v. Turner,* 4 Russ., 374. If, then, the gift of the realty to the Forestiers had been good as well as that of the personalty, there would have been, in a suit against them, no distinction between the different parts of the fund as to the order of liability, but the legacies would have been raised as well out of the one part as the other. Upon the failing, however, of the gift of the realty to them and its going to another, is it to become discharged or is the order or extent of its liability to be altered? Why should that be? There is certainly no intention of the testator to that effect discoverable. Indeed, he cannot be supposed to have had in view the failure of his gift to any extent, for a testator always conceives his dispositions to be effectual, however he may be mis-

taken. He had, then, no intention applicable to the case which has happened, as to the order or proportions in which the different parts of this fund should answer the common charge upon the whole. Consequently the charge, which was once well constituted, continues, and the heir, who would take if there were no gift substituted in the will for that which did not take effect, would take *cum onere*. But as the two parts of the fund, though not contemplated by the testator, are thus to go
(432) into different hands, there arises an equity among those several owners, as between themselves, upon which the burden must be apportioned, since it is not just that either, by the contrivance of the other or the caprice of the creditor, should have the whole sum raised out of his part of what was once the common or consolidated fund. That equity is equality which apportions the charge according to the relative value of the respective parts. Such was the rule in the cases of the charities and the alien before quoted, in which the heir, or the sovereign as standing in the place of the heir, took the fund illegally given. But this case is, if possible, stronger than that of an heir. The gift here is of the whole residue, expressly declared to be composed of realty and personalty, to the Forestiers in the first instance, upon the condition of their applying for it, and upon the contingency of their not doing so, then there is a gift of the very same *corpus* to the relations in this country, "subject, however," the testator carefully repeats, "to the legacies herein mentioned." The substituted donees are thus, according to the views entertained by the testator, to succeed to the whole fund precisely as those would who were to take first, and subject to the same charges. It turns out that each class of the donees get a part and only a part of their donations, and if the testator can be supposed to have had any intention respecting such a case, it must be presumed that he did not mean the substitutes to defeat the primary objects of his bounty by keeping to themselves their part free of charge and throwing the whole burden on what was left to those who were intended to be preferred before them. But it is the more probable conjecture that the testator did not foresee any such partial efficacy and partial failure of his dispositions, and therefore that he had no precise intention respecting this question, but only the general intention that all the fund and every part of it should be chargeable to the legatees, thus imposing the duty on the Court of apportioning the charge, according to the actual state of the fund, amongst its disjointed members. That duty is performed, according to the maxim of the Court, by an apportionment
(433) *pro rata*, according to their relative value. But when

charges on the joint fund are thus apportioned, it must be understood only of those which may lawfully be charged on the land. A legacy to a charity or an alien, charged on land, is void as a charge on the land, and sinks for the benefit of the heir or devisee and inures for that of the sovereign, who takes by escheat. *Jackson v. Sutton & Hurlock*, Amb., 487; *Wright v. Role*, 1 Bro. C. C., 60; *Fourdrin v. Gowdey*, 3 M. & K., 383. Consequently the annuity to Mrs. Quenet and Mrs. Forestier, which will continue during their joint lives and the life of the survivor, and that to Francis Augustus De la Mothe also, if he was not qualified to hold real estate at the death of the testator, are in effect exclusive charges on the personalty, and therefore there must be an inquiry as to the condition in that respect of F. A. De la Mothe. But the legacies, except those to the aliens, with the charges of administration and the costs of this suit, are to be borne ratably by the real estate and personal estate, as a charge on the whole thereof as one fund, and the master will apportion the said charges and legacies between the real and personal estates, forming the residue devised by the testator, in proportion to their respective values, for which purpose he will take an account of each of the said estates and their respective produce since the testator's death and set a value on each, reserving, however, the consideration how the proportion to be borne by the real estate shall be raised and to whom it shall be paid.

DANIEL, J., *dissentiente*. The testator devised the remainder of his property, consisting of real and personal estate, to the plaintiff, as his executor and trustee, to pay certain legacies and annuities (which are but legacies), and some of these legatees are aliens. There is no direction to the trustee in the will to sell the land and convert it into personal estate for the aforesaid purposes.

The funds are therefore not mixed, but consist of two species, one of real and the other of personal estate. The personal estate is, therefore, the primary and natural fund to pay these legacies and annuities, and the real estate is but (434) *charged*, and only to be resorted to in aid of the personal estate when that fund becomes exhausted. Even if the testator had directed his executor to sell or mortgage his real estate for the payment of his debts and legacies, that alone would not be evidence of his intention that the personal estate should be exempt from its primary liability, and it would amount only to a declaration that the real estate should be applied to the extent in which the personal estate, which by law is the primary fund,

should be deficient for those purposes. *Rhodes v. Rudge,* 1 Simons, 84, 85. Williams Exec'rs, 1048. If the testator had given the land in trust to pay debts and legacies by the sale of it, or the creating a term of years out of it for that purpose, still the personal estate would have to be first applied. For the land would not be directed by the court to be sold, or the term raised, if the personal estate could discharge the debts and legacies, as the produce of the sale of the land had not been directed by the will to be converted into personal estate for those purposes. *Inchiquin v. French,* 1 Cox, 1 Amb., 33; *Hancock v. Abbey,* 11 Ves., 186; *Tower v. Rouse,* 18 Ves., 32. Legacies to aliens, charged on land, or payable out of land, are void, so far as relates to the charge on or interest in the land, although the land was directed by the will to be sold and converted into money for the special object of paying debts and legacies. Aliens can no more take an interest in land, which this would be, than the land itself. *Fourdrin v. Gowdey,* 9 Cond. Chan., 95. In the aforesaid case the testator directed by his will all his property to be sold and converted into money and placed with his personal estate, and after charging this mixed fund with his debts and legacies, gave the residue to aliens resident abroad: *Held,* that the rule which is applicable to charitable bequests was now applicable in respect to the alien legatees. In England an alien friend, or a charity, can take a legacy only of pure personal estate. But neither of them can take a legacy arising from the produce of land or from any interest arising out of land. But if the fund is a mixed fund, arising from a (435) direction in the will to sell the land and mix the produce of the sale of the land with the personal estate to pay the debts and legacies, and some of the legacies are given to a charity or to an alien, then a particular rule is to be followed as to the payment of the debts and all those legacies which are not charitable or alien legacies. It is called the rule of equity in charity cases. What is that rule? Shelford on Mortmain and Charities, 217, says that when a testator directs his real and personal estate to be converted into money, and the *mixed* fund to be applied to certain *stated purposes,* and some of those purposes fail by lapse or otherwise, questions have arisen whether the remaining purposes, which are in their nature primary charges upon the personal estate, are to be satisfied out of that estate as far as it will extend, in exoneration of that portion of the mixed fund composed of the produce of real estate, for the benefit of the heir, or whether the remaining purposes are to be satisfied out of the real and personal parts of the said mixed fund *pro rata.* That debts and ordinary legacies are to be paid

out of the said mixed fund, in the proportion of the amount of the real and personal estate which has contributed to make up the said mixed fund, is now the established rule of the Court of Equity, and is the rule in charity cases before referred to. It is to prevent the whole personal fund being exhausted in favor of the heir to the prejudice of the right which the charity or alien legatees had in the *pure* personal estate to satisfy their legacies. The testator could not have intended that the heir should be so far favored as that this part of the mixed fund, which was made up of pure personal estate, should bear the entire burthen of all the debts and all the legacies, to its entire extinction, before the other fund, made of the sales of the land or which was directed by the will to be converted into personalty for specified objects, should be called in to the assistance of paying the debts of the testator and the other legacies. It will be seen that the testator does not mean in such cases to convert his land *out* and *out* into personalty, but he means to convert it to personalty for specified objects only; if, (436) therefore, any of the objects fail, the heir of the testator shall have so much of the produce of the land by way of resulting trust as would have gone to that object had it not failed. But of a mixed fund, before he shall have any of the money as land the fund shall pay debts and ordinary legacies of the testator in proportion to the respective values of the land and personal estate which made up that mixed fund. The Court can well see that such is at least the intention of the testator. *Hill v. Cock*, 1 Ves. & B., 174, 175; *Green v. Jackson*, 5 Russ., 38; Shelford, 205, 214. The master values the respective portions of the said fund, and after debts and ordinary legacies are paid out of it *pro rata* the heir will take the residue arising from the land, and the charity legatee, alien or next of kin, will take the residue arising from that portion of the said mixed fund which was raised out of the personal estate. *Curtis v. Halton*, 14 Ves., 437; *Mogg v. Hodges*, 1 Cox, 9; *Fourdrin v. Gowdey*, 9 Cond. Eng. C. C., 95; *Roberts v. Walken*, 1 Russ. & M., 752; *Dunk v. Fenner*, 13 Eng. Cond. C., 170; *Croslie v. Mayor of Liverpool*, 1 Russ. & M., 761; Shelford, 238. A direction by a testator that his land shall be sold and the produce converted into personal estate for a particular object, or out and out, is considered in a court of equity as done; what is ordered to be done is in equity considered as done. The only question that came up for the decision of the Court in the two cases of *Bench v. Biles*, 4 Madd., 187, and *Cole v. Turner*, 4 Russ., 376, was whether by the words of the will there stated the real estate was even *charged*, by implication, with the payment of legacies. The

question as to the rate of contribution from two parts of one mixed fund was not in issue in either of the said two cases. Therefore any words which fell from the Court in those cases as to what was meant by a mixed fund are not to be regarded when we are really speaking as to what is to be considered a mixed fund, within the rule of contribution from such a fund in charity cases. Shelford, who has recently written a treatise on mortmain and charities, has not referred us
(437) to a single case where the rule in cases of charities has ever been applied, except where the land was directed by the will to be sold and converted. I admit that it is said to be a question of intention of the testator whether the mixed fund was to contribute *pro rata* or not. But it seems to me that a mere *charge* on land, in aid of the personal estate in the payment of debts and legacies, is not a mixed fund at all, so as to call for an inquiry by the Court as to what was the intention of the testator. The intention on the part of the testator must be so expressed in the will as to convince a *judicial* mind that the fund then created was meant to pay the legacies *pro rata*. In the case before us that intention cannot be looked for in that manner, as it seems to me. I am therefore of the opinion that as the lands in the hands of the trustee are not directed by the testator in his will to be sold and converted, they are only *charged* in aid of the personal estate to pay the North Carolina legacies, and that the lands are not to be considered as even *charged*, in aid of the personal estate, to pay the legacies of the alien legatees, as aliens are not permitted to take legacies made up of the produce of lands in any manner.

Decree according to the opinion of the majority of the Court.
PER CURIAM.

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(438)

JOSEPHUS HEWETT v. JOAB OUTLAND.

1. Where a judgment at law has been assigned and the debtor pays the assignee, the assignor cannot afterwards, on account of any equities between him and the assignee, compel the debtor to pay the amount to himself.

2. If in any case an assignor can annul the operation of his assignment as an authority to the debtor to pay the debt to the assignee, it can only be done upon distinct personal notice from the assignor to the debtor that the former looks to the latter for the money.

THIS was an appeal by the defendant Outland from a decision of his Honor, *Pearson, J.*, at Spring Term, 1843, of NORTHAMP-

TON Court of Equity, disallowing a motion made by the defendants on their answers coming in for a dissolution of the injunction which had been obtained in this case. The bill was filed to enjoin the defendant Outland from collecting a judgment in Northampton Superior Court of Law for about $159, which had been obtained by the defendant Outland against the present plaintiff. The allegations of the bill were briefly these:

On 30 May, 1842, Outland assigned the judgment to the defendant Giles Futrell, in part payment for a negro then conveyed by him to Outland. The negro had been previously levied on by virtue of executions issued by a justice of the peace against the goods of Giles Futrell and the other defendant, Sanders Futrell, who was surety for the debts, and this was communicated at the time of the sale by Giles F. to Outland, between whom it was agreed that said Giles should collect the debt from Hewett and therewith pay the executions levied on the negroes. Instead of doing so, the said Giles in a few days assigned to Sanders Futrell the judgment against Hewett, in payment of a debt to Sanders, and he also executed a deed of trust of (439) all his other property to one Powell for the purpose of securing other sums which he owed Sanders. Under that deed the property has been sold for less than the debt mentioned in the deed, and Giles Futrell is insolvent. On 8 June, 1842, the constable was about seizing the negro and offering him for sale under the executions before levied on him, and in order to prevent it Outland was obliged to pay the debts due on the executions, which amounted to $210. On the first of October following, Hewett paid the judgment against him to Sanders Futrell and took his receipt. Subsequently thereto Outland sued out another execution on the judgment in his name and delivered it to the sheriff, with directions to levy the money and pay it to him, and when informed by the plaintiff (as the bill states) that he had paid the debt to Sanders Futrell, and requested to recall the last execution and acknowledge satisfaction of the judgment, he insisted that as he had not got a clear title to the slave the said Giles and Sanders were not entitled to the judgment, but that it belonged to him. The plaintiff then filed his bill, in March, 1843, against Outland, and Giles and Sanders Futrell, praying to be relieved in the premises and, in the meantime, for an injunction.

The answer of Outland admits the material statements of the bill. But it is therein alleged that on the day of the purchase of the negro this defendant and Giles Futrell informed Sanders Futrell of the terms of the contract, and the latter fully assented thereto, and perfectly understood that, according to the

agreement, the money due on the judgment against the plaintiff was to be applied towards discharging the encumbrance of the executions on the negro. This answer further states that on 30 June, he (Outland) heard that Giles was about to execute the deed of trust for the security of Sanders, and inquired of the latter as to the truth thereof, and expressed his anxiety that, for his safety, the executions against the negro should be satisfied or the debt secured, and received for answer from Sanders that he (Outland) might make himself easy, as there was enough of
(440) Giles Futrell's property to pay all his debts, and that he (Sanders) would discharge the executions so that Outland should lose nothing by his purchase; and, again, that after the execution of the deed, when Outland expressed his uneasiness to said Sanders, the latter showed him the assignment to himself of the judgment against the plaintiff, and said that he (Outland) was in no danger, and repeated his previous promises to take the debts on himself. That the sale under the deed of trust took place in the summer of 1842, and Sanders became the purchaser at very low prices, as he (Outland) considered himself secure by the engagements of Sanders and did not bid for the property; and that then Sanders Futrell refused to reimburse to him the money he had paid on the executions. The answer then states that this defendant (Outland), upon finding himself thus deceived, directed the sheriff to levy the debt from the plaintiff and pay the money to him (Outland), and that after he had given those directions, and after the sheriff had informed the plaintiff of them, he (the plaintiff) paid the money to Sanders Futrell, who gave to the plaintiff a receipt and a bond of indemnity for making such payment, and also gave the sheriff an indemnity for not levying the money on the execution then in his hands, and returning *nulla bona*. The answer then admits that Outland from the next term sued out an *alias fi. fa.*, on which the sheriff was about acting for his benefit when the plaintiff filed his bill, and the defendant insists that the plaintiff paid the money to Sanders Futrell collusively, and that by reason of the indemnity to the plaintiff and the agreements between him and Sanders Futrell this is, in effect, the suit of the latter, and, therefore, that there is the same equity against both of those persons. Each of the Futrells put in an answer, but as they are in nowise material to the present question between the other parties, it is unnecessary to notice them.

Bragg for plaintiff.
B. F. Moore for defendant.

RUFFIN, C. J. The Court is of opinion that the disso- (441) lution of the injunction was properly refused. The equity of the plaintiff is founded on the assignment of the judgment and payment by him in conformity thereto. Those facts are admitted in the answer. But it seeks to avoid their effect by setting up a distinct equity of this defendant against the other defendants upon certain transactions between them not apparent upon the assignment. If the matter of evidence be well founded in law, yet the injunction must stand until the truth of the facts be established on the hearing. For this reason alone the motion to dissolve might have been properly overruled. *Lindsay v. Etheridge,* 21 N. C., 36. But even if the answer be received as true throughout, there was no error in the order, as it seems to us. Outland has much cause of complaint against the other defendants, and has, doubtless, a redress against them. Still, it might be questioned whether he could treat his assignment as null as against them while he continued to hold the slave for which the judgment was in part the consideration.

But, without considering that point, he misconceived his rights, we think, in assuming, as against the present plaintiff, to be the absolute owner of the judgment after having assigned it, and complicating the plaintiff with the other defendants, so as, in effect, to render him responsible for their acts or on their promises. By the assignment the plaintiff at law became a trustee for the assignee. But he was not an ordinary trustee, for the assignee was not only the real owner of the debt, but also had an authority to receive payment. The assignor is a trustee in the sense that he is the legal owner, and that the assignee shall have the right to use his name to enforce payment, but not in the sense of its being his duty or his right to receive the money and account for it to the assignee as *cestui que trust.* By tolerating the assignment of a judgment and obliging the debtor to pay the assignee, as the creditor, equity must needs protect the debtor in making the payment. It is true the debtor is not charged with knowledge of the assignment of a demand that is not negotiable, and, therefore, he may rightfully pay his original creditor, until he knows that another (442) person has become his creditor. It is obvious that good faith to the debtor and ordinary diligence in attending to his own security forbid the assignee from trusting to rumor or other indirect method for conveying to the debtor information of the assignment, and require him to give, as from himself, direct and precise notice of the assignment, and that the payment must be made to him. After such notice the debtor is to look to the

assignee as his creditor, to whom the law expects and encourages him to make payment. By a parity of reasoning the assignor, if he claim any interest in the judgment against his assignment, must give to the debtor a notice as distinct and particular. It cannot be sufficient in such cases that something reached the debtor's ears which might have put him on inquiry, according to the rule respecting a purchaser from one affected by a trust. In that case *caveat emptor* is the rule, as he ought not to lay out his money where there is a ground to doubt the title and he may secure himself by covenants. But a debtor may be compelled to pay, and therefore may voluntarily pay, his creditor, until plainly informed that the debt belongs to another. If in any case the assignor can annul the operation of his assignment as an authority to the debtor to pay the debt to the assignee—a point not now necessary to decide—yet we think that it can only be upon distinct personal notice from the assignor to the debtor that the former looks to the latter for the money. It is bad faith towards the debtor to leave him in doubt to whom he is to make payment. Even payment to an ordinary attorney is good until certain information of the revocation of the authority be communicated to the debtor by the principal of the attorney. Much more must that hold when the power to receive is in the form of an assignment, and is apparently irrevocable. For the want of such a notice to the present plaintiff by or from Outland, we think he cannot impeach the payment made by the plaintiff, but must look to the other party to whom the plaintiff paid the money. It is true, as was said at the bar, the plaintiff might have made payment to the sheriff and left the other
(443) parties to contend for the money. But we do not think that varies the rule, which is applicable alike to the assignment of all securities that are not negotiable. The question is, who is the owner in equity, for in every case, we suppose, a debtor may pay the creditor without compulsion by suit or execution, whether the debt be due on note, bond or judgment.

The Court is likewise of opinion that the plaintiff lost none of his rights by taking an indemnity from Sanders Futrell for making payment to him. It was but a reasonable precaution against possible loss by a defect in the assignment, or by the expenses of litigation, in which he might be involved in the premises. The plaintiff has none of the funds of Futrell in his hands out of which Outland can ask to be satisfied, but only a covenant of indemnity against the consequences of paying his own money to the assignee of the judgment. This suit is, therefore, the plaintiff's own, and for his benefit solely, and it in nowise affects Outland's claim or redress against both or either

of the Futrells in another proceeding. For these reasons our opinion is that there is no error in the interlocutory order, which must be certified accordingly to the Court of Equity.

The defendant Outland must pay the plaintiff's cost in this Court.

PER CURIAM. Ordered accordingly.

(444)

ATTORNEY-GENERAL v. THE CAPE FEAR NAVIGATION COMPANY.

1. Under the Acts of Assembly relative to the Cape Fear Navigation Company and to the Board of Internal Improvements, the board had a right, under the act of 1823, 2 Rev. Stat., 272, to direct the application of the money subscribed as stock by that act, according to their discretion.

2. The State is not bound to pay interest, unless it specially contracts to do so.

3. There was no time specified in the act of 1823 within which the installments of the stock were to be paid, and, in the absence of any agreement, even if it were a case between private individuals, interest would not accrue until a demand was made.

4. Such a company has no right to retain dividends due to the State on stock subscribed, to answer a supposed and independent claim of theirs against the State, not acknowledged by her and not provided for by an appropriation.

5. Under the act of 1823, above referred to, the Board of Internal Improvements had a right to charge the salary and expenses of an engineer, employed in the improvement of the Cape Fear River, as a part of the sum to be advanced in stock by the State to the Cape Fear Navigation Company.

THIS case was removed from the Court of Equity of WAKE, at Spring Term, 1843, to this Court for hearing. It was an information filed by the Attorney-General in behalf of the State, in pursuance of an act passed in 1837, against the Cape Fear Navigation Company.

The facts, as disclosed by the pleadings, the proofs and the admissions of the parties, are set forth in the opinion delivered in this Court.

Attorney-General for plaintiff.
W. H. Haywood, Jr., for defendant.

RUFFIN, C. J. By several acts of the General Assem- (445) bly, prior to 1823, the Cape Fear Navigation Company

was incorporated for the purpose of improving the navigation of the Cape Fear River. Its capital stock was created by subscriptions by the State and individuals, and was divided into shares of $100 each, and the capital had been subscribed and all expended in works on the river, which, though they had improved the navigation to a considerable extent, yet left it imperfect in many places, so much so that the tolls paid but small dividends to the stockholders, and the value of the stock in the market fell one-half or more. In that state of things the company applied to the Legislature for assistance by a further advance of money, to be applied to the improvement of the navigation, and thereupon the act of 1823, 2 Rev. St., 272, was passed. That act directs that for the purpose of completing the navigation of the river Cape Fear from the town of Wilmington upwards, the president and directors of the Board of Internal Improvements should, on behalf of the State, subscribe to the stock of this company the sum of $25,000, to be paid in installments, not exceeding $10,000 in any one year, out of the fund set apart for internal improvements. But the subscription was to be made on certain conditions, as follows: *First,* that before it should be made the stockholders should, within a certain time, give their assent to a reduction of the capital stock from its nominal amount of $100 to the share to a sum to be fixed by them, not exceeding $50 to the share. *Second,* that the stock which the State then owned in the company should be reduced in the proportion of the stock of individuals; that the property then belonging to the company and the subscription thereby authorized should, respectively, constitute parts of the capital stock of the company, and the State should have and own as many shares as the subscription there authorized should amount to, according to such reduced capital. *Third,* that the president and directors of the company should consent in writing that the Board of Internal Improvements should have the sole and exclusive direction of the operation of the works, the making
(446) of contracts for the same, and all the improvements to be made on the river. Then are added these words: "The improvements in the navigation shall commence at Wilmington and regularly proceed up the river as far as the capital stock of the company shall admit." In March, 1824, the stockholders assented to the act, and sunk the stock one-half by reducing the share of stock from $100 to $50, and the president and directors gave their consent in writing, as required in the act. Thereupon the Board of Internal Improvements subscribed, on behalf of the State, for five hundred shares of the reduced stock, amounting in value to $25,000, and proceeded soon afterwards to expend

for work on the river between Wilmington and Fayetteville the sum of $12,143.13, to which expenditures no objection is raised by the president and directors of the navigation company. When the subscription was made no certificate of stock was issued to the State nor any evidence given of the stock to which the State became entitled thereby, except the books of the company themselves. But for some years the State was treated as a corporation in the premises, and dividends declared and paid into the Public Treasury as upon the five hundred shares of stock thus subscribed. At the passing of the act of 1823 the Board of Internal Improvements was organized under the act of 1819, ch. 2, and consisted of the Governor, as president *ex officio*, and six commissioners to be chosen annually by the Legislature, one from each of the then judicial circuits. It was constituted a corporation for the purpose of preserving and improving the fund for internal improvement thereby created, and disbursing such portions thereof as the Legislature might from time to time direct to be applied to any such purpose, and had authority to appoint a principal and assistant engineers, as, in their opinion, the public service might require, who should direct and superintend all the public works which the Assembly had or should authorize, and should receive such compensation as the board might allow, to be paid out of the revenue of the fund for internal improvements when adequate thereto. In 1831, by an act, chapter 21, it was provided that thereafter the (447) said board and corporation should consist of the Governor for the time being, the Public Treasurer, and one other person to be chosen annually by the Legislature, and this last-named person, whom the act calls superintendent, was required to investigate the condition of all the incorporated navigation companies, and the liability to the State of each, in which the State was a stockholder, and the board was to represent the State at meetings of the stockholders in all such companies.

In 1831, the residue of the State's said subscription, namely, the sum of $12,856.87, not having been expended or called for by the company, remained in the Public Treasury. In April, 1833, the president and directors of the navigation company communicated to the Board of Internal Improvements a resolution passed by them, that, in their opinion, the interest of the company required that the residue of that fund should be expended on the river below Fayetteville, and requested the attendance of the superintendent at the next general meeting of the stockholders on the first of June following, and pointed out certain improvements below Fayetteville which they desired to be made, and requested that one A. G. Keen, who had been in

the service of the company, should be employed to direct and carry them on, as he was an energetic man and a good practical engineer. The Board of Internal Improvements accordingly employed Mr. Keen as engineer to conduct the works. But being of opinion that a competent navigation had been made between Wilmington and Fayetteville, and that the interest of the company and the State required that the remaining fund should be laid out in works above Fayetteville, or such part of it as might be necessary to effect certain improvements upon that part of the river, the board did not accord with the resolution of the president and directors, that the money ought to be spent below, but undertook and carried on the works above Fayetteville, and expended in that manner, as is alleged, the residue of the State's subscription. In 1833 the board rendered to the company an account of those expenditures, to part whereof, viz.,

the sum of $1,375.53, the company objected, because it
(448) was the salary of Keen and another engineer, which it
was insisted was a charge that ought not to be thrown on

the company, but should be defrayed by the State. The point of difference not being adjusted between the Board of Internal Improvements and the company, the latter withheld the dividends on the stock of the State for the purpose of making that sum of $1,375.53 whole to the company, and in 1837 the Legislature gave directions to the Attorney-General to file an information against the company for settling the question. Accordingly the present information was filed, in which the various acts of incorporation and others amending them are set forth, and particularly that of 1823, and also the several proceedings had under the same, as hereinbefore stated, and it prays that the State may be declared to be a stockholder in the premises to the extent of five hundred shares for the said subscription of $25,000, as from the day the same was made, and that a certificate or proper evidence of stock may be issued to her therefor, and that the dividends declared to her, and not paid to her, or that ought to have been declared, in respect to the said stock, and have not been, but have been withheld, be paid to the State by the said company. The answer of the company admits that the certificate and dividends were withheld as alleged in the information, upon the ground that the sum of $1,375.53 for salaries to engineers ought not to be charged to the company, and it insists still upon that objection. And, besides, while it admits that at that time no other objection was made to those expenditures, and that the company offered to settle the accounts as stated by the Board of Internal Improvements, if the State would pay that sum of $1,375.53 out of her own funds, yet the answer now

insists further that the whole expenditure above Fayetteville was improper and unlawful and not binding on the company, and therefore ought not to be charged or allowed against the company. It states that the offer to settle on the part of the company was made both in ignorance of its rights and by way of compromise, and, therefore, ought not to conclude the company, unless in fact and law that be the proper mode (449) of settlement. That the charges were proper, that answer states, the company cannot admit, because the detailed accounts and the vouchers for the sums stated to have been paid are in the possession of the Board of Internal Improvements and have not been accessible to the company's officers. But if those payments were actually made, the answer states they ought not to be allowed in payment of the State's stock, for the several reasons following: That it was greatly to the advantage of the company that the lower portion of the river, between Wilmington and Fayetteville, should be improved, so as to have an easy and safe navigation throughout the year, and that until that was effected none of the funds of the company should have been diverted therefrom or laid out about Fayetteville; that the act of 1823 stipulates, and it was one of the terms on which the act was accepted by the company, that the navigation should be completed from Wilmington upwards, by commencing the improvements at Wilmington, and regularly proceeding up the river, as far as the capital would admit; that the navigation between Wilmington and Fayetteville was not completed, but might in many places have been yet further improved, and that the whole sum of $25,000 might judiciously have been expended below, and that therefore none of it should have been expended above Fayetteville; that in 1823 there were competent engineers appointed by the Board of Internal Improvements and in the public service whose duty it was to superintend these improvements, and upon whose agency and assistance, in advising, laying out and directing the operations on the river, the company relied, when it agreed that the Board of Internal Improvements should have the exclusive direction of the works; that before 1831 the public engineers had been discharged and the board had no skillful assistant, and in the operations of 1832, above Fayetteville, that the board disregarded the plans and recommendations which had been proposed by an able civil engineer, and employed as their agent A. G. Keen, who was an uninstructed and unpracticed engineer, and expended the large sums before mentioned without effecting any useful end, (450) and to the injury of works previously erected; and, finally, that against the expenditures above Fayetteville for any pur-

pose, and especially against those actually made, and against the employment of Keen as agent, the president and directors contended and protested before the expenditures were incurred. The answer further insists that the State's subscription was payable within two and a half years after it was made, and that for such parts as were not thus paid interest may be charged as a just set-off against the dividends claimed. As the amount of expenditures above Fayetteville, though not denied, are not admitted in the answer, the cause necessarily goes before the master for an inquiry on that head. But as there can be hardly a doubt that the accounts rendered by this public board were right, so far as to be founded on actual expenditures, and the navigation company is not disposed to contest that point, the cause has been argued on the latter points with the view of obtaining instructions to the master as to the principles of taking the accounts, or probably to enable the officers of the State and company to terminate the controversy without going before the master. In the argument those questions above were discussed which are raised in the answer, and upon each of them the opinion of the Court is in favor of the State.

Upon the original matter of difference, that is to say, to which of the parties the salaries of engineers and agents, employed in laying out or conducting the works, should be charged, the Court entertains no doubt. Like every other disbursement out of the subscription of $25,000 before the money was actually paid into the treasury of the company, it was, in the first instance, to be defrayed by the State, and then allowed as a credit in account with the company in part payment of the subscription.

The argument for the defendant, indeed, was not placed on any express provision of the act of 1823. But inasmuch as that act puts the work under the direction of the Board of Internal Improvements, and inasmuch as the act of 1819 gives the board the power of appointing engineers, whose duty it was to
(451) superintend all the public works, and inasmuch as the compensation of those persons was to be paid out of a public fund, it was inferred that engineers employed by the board upon this work were to be paid out of that fund also. But the Court cannot yield to that interpretation of either of those acts. By the act of 1819 the Legislature did not mean to provide an engineer for every navigation, canal, or turnpike company, and relieve them from all or any expense in procuring the services of such a person. The language of the act limits its operations to *public* works, that is, to such as had been or might be authorized by the Legislature for and on account of the State. We know that about that period many experimental sur-

veys were directed, so many and so extensive as to occupy the engineers employed for a long time. We believe it true that, at the solicitations of companies and of their respective local engineers, the Board of Internal Improvements often sent their engineers to view or review particular works or parts of works. But the State's engineer acted in such cases only as a consulting engineer and for the greater satisfaction of the company and its immediate officers, and without authority to direct or control. And we believe, too, that those services were gratuitously rendered or not, according to the importance attached to the work by the board, as one of public utility, and, if not gratuitous, they were compensated as might be stipulated in each case between the company and the board. It certainly was never thought that the public had undertaken to superintend all the enterprises of the numerous companies formed to effect some work of this character. Each company was left to its own direction, and to select engineers and agents for itself, and to choose between their plans, and they cannot, therefore, lay to the State the failure of their undertakings. The salary of the engineers employed in the case before us is as proper a charge against the company as the wages of any hireling or day laborers employed under him.

Upon the next point we do not stop to inquire into the purpose or conditions of the offer of the company to allow all the expenditures, except the engineer's salary, as concluding (452) the company, because, in the opinion of the Court, the objections to the expenditures are untenable, and the State is entitled to credit for them, such as may appear to have been made, independent of any such consent of the company. The franchise is granted to the company for the whole river, to its source, and the grant must be taken to have been founded upon considerations of general utility as well as the emolument of the private adventurers. It is obvious that the public interest must be promoted by making a navigation as high up the river as possible, at least as high as would, upon the whole river, return tolls that would adequately remunerate for the outlay. And it is also obvious that there might be a difference of opinion, probably founded on a difference of interests, between the community and the stockholders as to the point up the river to which the improvements should be carried, inasmuch as the difficulties of the improvements increase and the profits to be derived from those particular improvements decrease with the ascent up the stream. Indeed, as works of this character are generally of peculiar interest to persons residing on the projected line of navigation, the stock is often taken for the most part by those who are thus interested, among whom there may be a similar

contrariety of views, or their interests may lie higher or lower on the stream. When, therefore, in this case, there were works, taking Fayetteville as the mean point, above and below, in an unfinished condition after the expenditure of a large capital, and application was made to the Legislature to enable the company to complete those works by the further subscription of capital, it cannot surprise if that body should take the occasion to promote that interest which is peculiarly public, as far as might be compatible with justice to the private stockholders, and to provide as far as possible against the waste of the funds either by extravagance of expenditure or losses through undertakings injudiciously begun without funds for their completion; and to those ends should consent to subscribe, only on condition, that the money should be laid out, either in a manner specially (453) set forth in the act or generally under the directions of the Legislature or other agents of the State. Such appear to have been the motives for the act of 1823, and such, it seems to us, are its provisions. By it the sole and exclusive direction as to the improvements to be made and the contracts for affecting them is conferred on the Board of Internal Improvements, and that merely by force of the enacting words; but to render it yet more exclusive of the interference of the officers of the company the latter are required to renounce in writing any powers upon those points. But it is said that the act itself confines the board to a particular method of working, by requiring the improvements to *commence* at Wilmington and *regularly proceed up the river,* and that no money ought to be laid out above until the navigation be *completed* below; and that here the river is yet susceptible of improvement below Fayetteville. If the act gave any specifications of the improvements which the Legislature contemplated as completing the navigation, if it referred to any surveys or plans as guides to the board to which the execution was confided, we should hold that a departure therefrom was injurious to the company. But there are no such specifications or references, but only a general *direction* that the board should begin at Wilmington. It is, necessarily, then, left to the judgment and discretion of the board what improvements were necessary at the different points below and to what extent they must be carried to be complete before the field of operation *above* was entered upon. It was considered safe to leave this discretion to the board. It must necessarily reside somewhere. It had before been in the officers of the company, under the supervision of the stockholders, but had been transferred by them to the agents of the State. It is absurd to understand that the works were to be completed below in the sense that they should

be *perfect* before there should be any progress up the river. We understand the provision as directory to the board to finish what it might deem it necessary to begin lower down before anything above was undertaken. In other words, the work and mode of conducting it, as it had before been in the discretion of the directors of the corporation, was then to be in the (454) discretion of the Board of Internal Improvements, acting on behalf of the public, subject only to the general direction to commence below. If that board should abuse its powers injudiciously or wantonly or corruptly, it was open to the company to apply to the Legislature to restrain or remove them, reverse their decisions, or afford any other measure of redress. For, in truth, the board is a mere political agent, the creature of the Legislature, and subject in all points to its control, and confiding this matter to the discretion of that body was much the same, only more convenient, as retaining it in the discretion of the Legislature itself. Upon the last point the general rule is that the State never pays interest unless she expressly engages to do so. But it does not in this case appear that the money was due, or, consequently, that interest could accrue. By the subscription the State became a stockholder, inasmuch as no other period is fixed for her becoming so. It is not stated when the money was payable, according to the actual terms of subscription, and it is probable there were no installments designated otherwise than is mentioned in the act. According to that, the money was to be paid in sums "*not exceeding* $10,000 in any one year." Now, as this money was to be laid out on the river, and could not be applied to any other use, and as it was to be laid out under the direction and in the discretion of the Board of Internal Improvements, it would seem naturally to follow that it should be paid at such times and for such purposes as to the board itself seemed meet, with the limitation that not more than certain installments should be paid. As a bargain this would seem a hard one, with the advantage greatly preponderating on one side, and so it would be were the parties private persons only. But it is to be remembered that the State is the contracting party, and the board an impartial arbiter, having no interest except so far as the members were citizens, and, at all events, that if the board erred the Legislature would always be ready to correct the error and do justice to the citizen. Had the board unreasonably delayed the work or withheld the payment (455) of the subscription, that the proper measure of redress would, upon application of the company, have been promptly supplied, cannot be doubted. But the company cannot assume the power of self-redress by withholding the State's dividends

for a supposed and independent demand against her, not acknowledged by her and not provided for by an appropriation. But here it does not, in truth, appear that the company applied to the board, even, for an earlier expenditure or payment of the money, much less that such an application was made known to the Legislature; and, certainly, the State cannot be charged with interest not promised, before a specific demand. Having thus disposed of the questions made in the pleadings and at the bar, the Court has only to say further, that if the defendant wishes the inquiry as to the sums actually laid out by the board, it must be ordered, with instructions in conformity with the opinions here given.

PER CURIAM. Decreed accordingly.

Cited: Bledsoe v. State, 64 N. C., 397.

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(456)

JAMES SMITH v. SAMUEL BEATTY.

1. Weakness of mind alone, without fraud, is not a sufficient ground on which to invalidate an instrument.
2. Nor will old age alone, without fraud, have that effect.
3. But excessive old age, combined with weakness of mind, may constitute a ground for setting aside a conveyance.
4. A vendee who knows there is a gold mine on the land for which he is contracting is not compelled to disclose that fact to the vendor; but if he is interrogated as to his knowledge of a mine, and denies the knowledge of which he is possessed, this denial will make the transaction fraudulent.

THIS was an appeal from an interlocutory order of the Court of Equity of LINCOLN, at Spring Term, 1843, his Honor, *Dick, J.*, presiding, directing the injunction which had been obtained in the case to be continued until the hearing.

The plaintiff charged in his bill that he was a very old man—seventy years of age—and unable to make a contract; that he was addicted to drinking ardent spirits to excess, and that the defendant, well knowing his infirmities and that there was a valuable gold mine on the plaintiff's land, of which the plaintiff was ignorant, plied him with spirits, in the absence of his son with whom he lived and who usually took care of him and advised him in his affairs, and under these circumstances obtained from him a lease of his land for a term of five years from

August, 1842, at a rent of one-tenth of the gold that should be made on the land. The plaintiff further stated that the defendant pretended to him that he was only about to make an effort to discover whether there was gold on the land, when in truth and in fact he had at several times before picked up considerable quantities of gold on the surface of the said (457) land; and that when he was interrogated on the subject he denied that he had ever found gold on the land, and he was doubtful whether any could be there procured. The plaintiff further averred that the rent of the land is worth one-third of the gold made on it. The bill prayed for an injunction to restrain the defendant from working the land (which was granted by a judge out of court), and that the lease be decreed to be surrendered, as having been obtained by fraud.

The defendant in his answer admits the lease, but denies that the plaintiff was incapable to make a contract from old age or any other cause; denies that he was under the influence of ardent spirits when the lease was made; denies that he decoyed him from his son's to his own house to procure the lease, or that he used any means to intoxicate him, or that he was then intoxicated. He admits that he had, before the date of the lease, found between ten and twenty pennyweights of gold on the land, and says he told the plaintiff he had found a place on his land where he thought gold could be procured. He states that they then agreed upon the lease set forth in the bill, and it was attested by two respectable neighbors. He admits that the plaintiff lives with his son, but denies that he ever heard that he consulted his son on affairs, important or unimportant. He denies that he was ever asked, before the execution of the lease, whether he had ever found gold on the land, or that he ever said there was no gold on or in the said land. He denies that he leased the land merely to examine it for gold, and states that he did not know himself the value of the mine, a matter which it would be impossible for any one to ascertain by simply finding a few pennyweights on the surface, and that it is yet but conjecture what the mine will prove to be worth, though he admits it to be a good one at present. He further states that surface mines do not rent for one-half of the gold made, but that the customary range of rent for such mines is from one-sixth to one-fifteenth. He avers that he has tendered the plaintiff all the rent due him, and denies all fraud, etc. (458)

On the coming in of the answer the defendant moved the court to dissolve the injunction. The motion was refused, and the injunction ordered to be continued to the hearing of the cause. The defendant, by leave of the court, appealed from this decision.

Alexander, Hoke and *Osborne* for plaintiff.
Caldwell for defendant.

DANIEL, J. Weakness of mind alone, without fraud, does not appear to be a sufficient ground to invalidate an instrument. It is said that a court of equity will not measure the size of people's understandings or capacities. 1 Mad. Ch. Pr., 280. Excessive old age, with weakness of mind, may be a ground for setting aside a conveyance obtained under such circumstances. But old age alone, without some proofs of fraud, will not invalidate a transaction. 1 Mad. Ch. Pr., 283. The answer denies that the plaintiff was incapable to contract when the lease was made, either from old age or intoxication. A vendee who knows that there is a gold mine on the land is not compelled to disclose that fact to the vendor. But if he is interrogated as to his knowledge of such a thing, and he then denies any knowledge of the mine, this denial will make the transaction fraudulent. The defendant admits that he had picked up some gold on the land before the lease was executed, and he does not state in his answer that he disclosed that fact to the lessor. But he expressly denies that he was ever interrogated by any one on that subject or ever made any false representations concerning the gold so by him picked up.

The nature of the rent reserved in the lease clearly shows the lessor knew for what purpose the lease was taken by the lessee. It seems to us that the defendant has fully and fairly answered every material charge and allegation in the bill, and that
(459) he has expressly denied every charge which, if undenied, would authorize a court of equity to declare the lease fraudulent. We therefore think that the order made by the court below, continuing the injunction to the hearing of the cause, was erroneous, and that the injunction should have been dissolved.

PER CURIAM. Ordered to be certified accordingly.

Cited: Suttles v. Hay, 41 N. C., 127; *Hartley v. Estis,* 62 N. C., 169; *Bond v. Mfg. Co.,* 140 N. C., 383.

(460)

BARTHEUS J. CRAWLEY v. AUGUSTINE TIMBERLAKE.

1. A vendor of land cannot, after the contract, cut timber for sale, unless the privilege be reserved, although he is to retain the possession for some time.

2. But where a vendor is to retain possession of land, used for the purposes of agriculture, for another year, he may use the tract for cultivation as a judicious owner would himself do or would allow a tenant to do; and, therefore, if, according to the state of the property, the proportion of wooded and cleared land, and the course of crops or usages of agriculture in the particular part of the country, it would be prudent and proper to clear the land from which the wood was cut, the wood cut in that way might be sold by the vendor.

3. Ordinarily a court of equity will not compel a vendee to accept even a doubtful title, though protected by covenants from the vendor, unless he has agreed to take the title at his own risk.

4. But where the conduct of the vendee satisfies the court that he has intentionally renounced his right to the judgment of the court upon the title, and for some reason of his own has chosen to take a conveyance without examination of the title, though he has had full opportunity to make such examination, the court will decree a performance on his part without inquiring into the title.

5. This matter of waiver or renunciation is not a conclusion of law from any particular incident, but is a conclusion of fact deducible from all the acts of the parties, as evidence of the intention of the purchaser in acting as he did.

6. Where the contract was for a conveyance in fee, and the deed executed conveyed by mistake an estate for life only, the vendor will of course be decreed to execute a conveyance in fee before he can ask any assistance from the court.

THIS cause was removed to this Court by consent of parties, from CASWELL Court of Equity, at Spring Term, 1843.

The facts stated in the plaintiff's bill are as follows:

In November, 1835, the parties made a written contract whereby the plaintiff agreed to sell to the defendant a (461) tract of land containing 166 acres and situate in Caswell County, on which the plaintiff then resided, at the price of $1,700, payable on 25 December, 1836, at which time the plaintiff was to give the defendant possession and make him a good title. In December, 1836, the plaintiff let the defendant into possession, on the payment of $300, which was all he could make at that time. On 25 February, 1837, the defendant made a further payment of $833, and the plaintiff then made him a deed for the land, containing an acknowledgment of the payment of

the whole purchase money, the plaintiff being ignorant of the effect of that clause at law and expecting the defendant to pay him the residue of the price, and interest, as he might be able. But upon demand the defendant refused to make any further payment, and being sued therefor, he pleaded in bar the release contained in the deed. Besides the stipulation to convey the land, the plaintiff bound himself to have certain repairs of the dwelling-house on the land, that were then going on, completed.

In April, 1840, the plaintiff filed his bill praying that the release might be put out of his way and that an account might be taken of the purchase money and the payments made therefor, and that he might have a decree for the balance that might be found due to him in respect thereof.

The defendant pleaded the release in his deed, and upon that the cause was brought to this Court and the plea overruled. *Crawley v. Timberlake,* 36 N. C., 346. The defendant then answered, and the parties proceeded to proofs, and now the cause comes back, upon an order of removal, for hearing. The answer states that the defendant at the time he made the contract resided in Mecklenburg County, in Virginia, and did not know the boundaries of the land; that he wished to remove from Mecklenburg, and purchased the land from the plaintiff for a place of residence; that during the treaty the plaintiff represented to the defendant that the dividing line between North Carolina and Virginia, which is the northern boundary of the land in question, was (462) about forty or fifty yards to the north of the dwelling-house, and so included a parcel of land (which turns out to be eight or ten acres, according to the defendant's allegation) and a fine spring thereon and convenient to the dwelling-house, which was that used by the plaintiff and expected to be used by the defendant, and that without having the use of that spring the defendant will suffer great inconvenience; that on the south side of the dwelling-house a public road runs within a few yards, so that there is on that side no convenient situation for necessary outhouses for a family; and that unless the defendant had believed that the line forming the northern boundary had been as by the plaintiff was designated, as before stated, and included the land containing the spring and the area specified, he would not have made the purchase; that at the time the defendant paid the sum of $300 and took possession he did not know that the line did not run as it had been represented to him, but that he then believed that it did; that soon afterwards he learned from the neighbors, and believes, that the line did not so run, but that it ran within three feet of the dwelling-house and through some of the outhouses, and left out the spring, which belonged to

one Alexander Kent, and that the plaintiff had offered to purchase it from Kent, and could not. The answer then states that the defendant has not had a survey made of the land, and he cannot therefore state whether or not the tract contains 166 acres, exclusive of that contained between the line on the north and the line shown to him as aforesaid, but that at all events the loss of the spring and of the strip of land on the northern side of the tract very much impair the value of the land as a place of residence, and would have prevented the defendant from purchasing had he known the true state of the boundary and title. "But," the answer proceeds, "having sold his residence in Virginia, in consequence of his supposed purchase as aforesaid, and paid $300 of the purchase money after his removal, and before he was apprised of the imposition which had been practiced on him, he could not conveniently rescind the contract, though he determined to resist the payment of the amount promised, for the reason of the false representations afore- (463) said. This defendant did not call for a deed, but the plaintiff, anxious to consummate the imposition which he had begun, had it prepared and tendered it, with the acknowledgment of the full payment of the purchase money, and the defendant after paying the further sum of $833 received said deed." The answer further states that the plaintiff did not have the work done on the house, specified in the contract, and that the defendant had been compelled to pay about $30 for completing it; and also, that between the period of the sale and possession taken by the defendant the plaintiff cut a large quantity of valuable timber for sale, and sold the same for considerable sums, of all which the defendant had no knowledge until he came into possession. And for this reason and the misrepresentations of the plaintiff the defendant insists he can have no relief.

The answer further states that the defendant has discovered that the deed made by the plaintiff conveys only a life estate, and not the fee, and insists that for that reason also the plaintiff is not entitled to a decree.

Morehead & Kerr for plaintiff.
Graham for defendant.

RUFFIN, C. J. The deed which the plaintiff executed has not been exhibited by either party, so that the Court cannot declare how it operates, whether as a conveyance of the fee or of an estate for the life of the defendant. Supposing it to be the former, the Court is of opinion that the plaintiff would be entitled, without any further act on his part, to a decree for the

balance of the purchase money according to the contract, and interest from 25 December, 1836, subject to proper deductions for the repairs not made and for the waste committed, if any. As to the repairs, there is evidence *prima facie* to raise a claim for some deduction; and as to waste, there is evidence sufficient to direct an inquiry. But, in conducting that inquiry, (464) it is proper the master should have the benefit of the Court's instruction upon a point which might be raised on the evidence. On the part of the defendant it seems to be supposed that he may claim a deduction for all the sales of wood by the plaintiff during that year, without regard to the purpose for which it was cut; while the plaintiff insists that he is not liable at all, because the wood sold by him was cut from his new-ground, or land then cleared for cultivation. We think the true rule is between them. A vendor cannot cut timber for sale, after the contract, unless the privilege be reserved. On the other hand, if a vendor is to retain possession of land, used for purposes of agriculture, for another year, it must be assumed that he is to use the tract for cultivation as a judicious owner would himself do or would allow a tenant to do, and, therefore, if, according to the state of the property, the proportion of wood and cleared land and the course of crops or usages of agriculture in the particular part of the country, it would be prudent and proper to clear the land from which the wood was cut, we should hold that the wood cut in that way might be sold by the vendor. It may be for the benefit of the vendee to open the land and prepare it for cultivation, and, at any rate, it is one of the reasonable advantages reserved by the vendor in retaining the use for a period, and the sale of the wood as a part of the fruit of his labor employed in a reasonable use of the land. It stands, we think, much upon the same ground with the rule laid down respecting waste, as between a tenant for life and the remainderman, in *Shine v. Wilcox*, 21 N. C., 631. With those exceptions the plaintiff would be entitled to have the principal and interest due him computed, and an immediate decree therefor, provided he has conveyed in fee. For that position the reasons will be stated. A court of equity is always inclined to see that a vendee gets a good title, and will not compel him to accept one that is even doubtful, though protected by covenants from the vendor, unless he has agreed to take the title at his own risk, or by his conduct satisfies the court that he intentionally renounces (465) his right to the judgment of the court upon the title, and for some reason of his own chooses to take a conveyance without examination of the title. Of course, an agreement that the title is at the risk of the purchaser stands upon its own obli-

gation and needs no explanation. What may or shall amount to such a renunciation or waiver requires, perhaps, some observations in order that the opinion of the Court may be perfectly comprehended. Generally speaking, one would expect a purchaser, before he did anything in execution of a contract, to satisfy himself, in the first place, that the title he would get would be such as he had contracted for; and, therefore, when he takes steps under the contract, such as the payment of the price and entering into possession, a presumption arises either that he is satisfied as to the title or with the covenants he is to get for it. Hence, in a number of cases it has been held that if a purchaser take and remain in possession a considerable time after the abstract is delivered to him, making no objection to the title, he waives his right to an examination of the title, and, at the instance of the vendor, a specific performance will be decreed at once, without a reference as to the title. *Fleetwood v. Green*, 15 Ves., 594; *Margravine of Anspach v. Noel*, 1 Mad., 310. It is true that this matter of waiver is not a conclusion of law from any particular incident, but it is a conclusion of fact, deducible from all the acts of the parties, as evidence of the intention of the purchaser in acting as he did. Hence, nothing can be inferred from taking possession, if it be agreed that it shall not be deemed a waiver of objections to the title. So possession taken, by the agreement, at the time of entering into the contract of purchase has been held to argue nothing on this point, because one cannot be supposed to give up defects of title, of which he had and would have no means of information, until he should get the abstract. *Kirtland v. Pounsett*, 2 Taunt., 145; *Stevens v. Guffy*, 3 Russ., 171. But in *Burnett v. Brown*, 1 Jac. & Walk., 168, a purchaser, after the delivery of the abstract, which disclosed a reservation of the right of sporting not before communicated to him, entered into possession and paid (466) the greater part of the purchase money without objecting to the reservation, and he was considered as having waived the objection, though he afterwards took it, and he was compelled to performance without a reference and without compensation, though the seller's solicitor had, without authority, promised reasonable compensation when the vendee made known his claim for it. The cases which have been stated arose upon articles on bills for specific performance, and if in those cases it was decreed without deciding the purchaser's objections to the title or even hearing them, much more is the Court obliged to hold the defendant bound by his conduct in this case. He did not enter into possession as soon as the bargain was made, and without the opportunity of making surveys and examinations of the

title. He had more than a year to satisfy himself on those points, and then, without taking any step to ascertain whether a good title could be made to any part of the land, or whether the boundaries of the seller's conveyances would cover all the land shown to him upon the treaty, he, at the time appointed, sought to be admitted and was admitted into possession upon the payment of part of the purchase money, promising payment of the residue as soon as he could. He afterwards made further payments—in all, more than half of the purchase money—and has remained in the enjoyment of the estate ever since, and as far as he states or as appears to the Court, made no objection to the title or to the parcels until they were stated in his answer in this cause. He made no application to the plaintiff to rescind the contract or to allow a compensation in respect of any deficiency in the premises sold or represented to be sold. The case, thus viewed, is fully within the adjudications cited. For, if from any acts could be deduced a waiver of objections, these afford a satisfactory ground of inference and conviction. But this case is much stronger than any of those cited, in that, two months after possession taken and after the defendant had actual and exact knowledge of every objection he has been able since to raise, he made his second payment and took a deed as in
(467) execution of the contract. Under such circumstances we must hold that everything was waived but such remedy as the covenants of the deed would give, or for such matters as would not be within the deed, namely, the repairs or waste. *Clanton v. Burgess,* 17 N. C., 13. But such waiver, as a fact, is not left merely to inference from other facts.

The answer explicitly states that the defendant did not rescind the contract on account of his own convenience, although he was aware of the objections, and knew, therefore, that he could not be compelled to go on. But he chose to do so, and accepted a conveyance for the land, as the plaintiff said he had sold it to him, and gives as his reason, besides the convenience of having a residence, that the deed had the clause of release of the purchase money, of which he meant to pay no more, as he thought the sum he had paid an ample price. Such a declaration surely puts an end to all claim of the defendant to favor, or an inclination of a court of justice to relieve him from a full compliance with the contract on his part. The plain meaning of it is that because the plaintiff, as he conceived, had got a good bargain out of him, or, if he will, had taken some advantage of him, he (the defendant) was justified in getting any advantage he could over the other party, whereby he would not merely be relieved from the contract, or be justly compensated for deficien-

cies as estimated by an impartial tribunal of the country, but would get clear of the payment of a large part of the purchase money, and at the same time hold the land sold, or said by the other party to have been sold to him. For the sake of overreaching the vendor in the point of the purchase money, he made up his mind to take the deed as it was, for the land as described in it, and for the title which the seller could make, and he cannot afterwards, when equity deprives him of the release, say he did not get a good title. The plaintiff is not asking a decree for specific performance. He alleges that he has performed, and the defendant cannot deny that he gave the plaintiff reason to suppose that he was satisfied with his performance. The plaintiff asks only that a release obtained from him by surprise, expressing the payment of money which never had (468) been paid, should not conclude him, but that the defendant should pay him the money thus expressed to have been paid. The defendant now admits the surprise, that the money was not paid, and that he accepted the deed for the sake of the release, and thereby got the land conveyed without paying the money he contracted to pay, and when the other thought him still bound for it. It would seem that in such a case the only decree should be to declare the release to have been obtained by surprise, and that, notwithstanding the same, the money should be paid. The title cannot be gone into, for, having accepted it, however unworthy the motive, the defendant cannot retract his acceptance and now raise objections in which he before acquiesced. We have, therefore, not thought it necessary to look into the evidence upon the question of boundary or of the representations made by the plaintiff at the time of the contract. We are satisfied that all parties understood the Virginia line to be the northern boundary of the land, but we think it far from clear that the plaintiff represented that line to run at any particular place, or, if he had so represented it, that it would not in fact include the spring spoken of and the land to the north of the house. But in considering the equity of the plaintiff's case we assume that the allegations of the answer as to the title are true, and hold that, nevertheless, the defendant cannot in this way take advantage of defects that, with a perfect knowledge of them and with a view to his advantage therein, he once, with his eyes open, waived. This case has been thus far treated as if the deed were for the fee. It is said in the answer to be only for life, and it may be so, though we can perceive no reason why the defendant has not shown it to us, that it might be seen what it is. But should the answer give its true character, it would not affect the plaintiff's right to a decree for the residue of the pur-

chase money, but would only call for a decree that he should first execute another deed for the land, as described in the deed already executed, in fee simple, to be approved by the master. We presume that deed calls for the State line as the northern (469) boundary, or, at all events, that it sets out the boundaries correctly and satisfactorily to the defendant, since he accepted it, and the objection in the answer is not that the boundaries are not therein described as they were represented, but that they do not cover all the land it was represented they did. Therefore, the only defect in the deed is the mistake in the estate, which was a mere mistake of both parties. But as evidence of the defendant's waiver of objections to the title, a deed of the one kind is as strong as the other would be, taking the one made to have been so made by mistake, which the answer does not question. Still the plaintiff ought to be required to make another deed, such as he admits he was bound to execute, and says he had executed, in the same manner as he would be required to do if this were a bill for specific performance and it were decreed without a reference as to the title.

Therefore, if the defendant chooses, he may have a reference to the master to inquire whether the deed made to him does convey the fee simple, and, if not, to inquire and settle a proper one for that purpose for the same land. And there must be a reference to state the sum due the plaintiff in the premises, and what deductions are to be made therefrom, if any, by way of compensation for the repairs not made by the plaintiff according to the contract, and for waste in the improper cutting of timber or wood, and selling the same from the land by the plaintiff after the sale by him.

PER CURIAM. Decreed accordingly.

Cited: Mendenhall v. Parish, 53 N. C., 106; *Faw v. Whittington,* 72 N. C., 323; *Mayer v. Adrian,* 77 N. C., 94; *Hughes v. McNider,* 90 N. C., 253; *Jones v. Britton,* 102 N. C., 186, 187; *Bank v. Loughran,* 122 N. C., 671.

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REESE JOHNSON, BY HIS GUARDIAN, v. ANN KINCADE.

1. Idiocy or lunacy is an insuperable impediment to the contracting of marriage.

2. A court of equity in this State, under the powers conferred by the act of Assembly, Rev. Stat., ch. 39, has authority to pronounce a marriage null and void from the beginning for want of capacity in one of the parties, and to decree a *divorce* on that account, there having been a marriage *de facto*.

3. Whether a marriage, where one of the parties is an idiot, be void at the common law, and whether, therefore, it may be unnecessary to have its nullity declared by a judicial sentence, yet it seems fit and convenient that the invalidity of such a marriage should be directly the subject of judicial sentence.

4. An inquisition finding idiocy or lunacy is open to being rebutted by an opposing party. Whether, in this State, in the absence of opposing testimony, it is sufficient *prima facie* evidence on which to found a decree of nullity and divorce, *quære*. In England, it seems the ecclesiastical courts look on a finding of this fact as only a part of the requisite proof of unsoundness of mind, and demand direct evidence to be taken in the cause of that fact.

THIS cause, having been set for hearing at Spring Term, 1843, of ROWAN Court of Equity, was then, by consent of parties, removed to the Supreme Court.

It was a suit instituted in behalf of Reese Johnson by his committee against Ann Kincade, falsely called Ann Johnson, for the purpose of having declared the nullity of a marriage *de facto* between the parties. The bill was filed 15 October, 1841, and states that Reese Johnson was an idiot from his nativity, resident in the county of Rowan, and that just after he obtained the age of twenty-one years an inquisition was duly held upon a writ for that purpose, issued by the court of Rowan, at August Term, 1827, whereby it was found by the verdict of a jury that the said Reese was of unsound mind, and was and had been from his nativity an idiot, and that thereupon the said court appointed a guardian and committee of his (471) person and property, and took them under his care, and that the said inquisition and appointment of a committee was never reversed or superseded, but remained in full force up to the filing of the bill. The bill further states that the said Reese was entitled to a small property, which under the management of his committee had, after supporting him, accumulated to the value of about $3,000. And the bill then further charges that with the view of gaining some interest in the same, the defendant, Ann Kincade, in September, 1841, procured a marriage to

be celebrated between the said Johnson and herself before a justice of the peace in the town of Salisbury; that in truth the said Reese was, from mental weakness, incapable at the time of understanding the nature of the contract of marriage or performing any of the duties arising out of the relation created thereby, and that all that was well known to the defendant; that to effect her said end the said Ann confederated with one Samuel Owens and one Alpheus Howard, and that they, without any previous courtship or acquaintance between the parties, and carefully concealing their object from the knowledge of the committee and other friends of said Reese, brought or procured him to come with them from the country to Salisbury on a certain day in September, and Owens and Howard procured the license from the clerk, without allowing the party himself to go with them to the office, and immediately took him privately before a justice of the peace, to whom he was entirely unknown, and had the ceremony performed, then and there deceiving the magistrate as to the plaintiff's capacity, and obtaining the marriage by fraud and circumvention practiced on the plaintiff. The answer admits the marriage, and insists on its validity: It denies that the defendant at the time had any knowledge of the inquisition, or that the said Reese was under guardianship, and it insists that he was not an idiot, but had capacity to contract marriage, and, as evidence thereof, the answer states that she heard her husband say that he was a member of the Pres-
(472) byterian church, and further, that on the night of the day of the marriage one Blackwell, who married the sister of said Reese, and was well acquainted with him, came to the house in which the said Reese and Ann were, for the purpose of persuading him to leave her, and that upon that occasion the said Blackwell said to the said Reese that he had better read his Bible than live with the defendant. The answer further states that the defendant entered into the marriage from motives of affection for the said Reese, and not with the interested pecuniary purposes imputed to her; that the parties lived together harmoniously "for some time," and that the defendant believes they would have continued to do so but for the interference of his relations, who were desirous of securing his property to themselves; for that, on the occasion before mentioned, the said Blackwell failed to prevail on the said Reese to leave the defendant, and that he then declared to them that he would spend $1,000 to have them separated, and that Robert Johnson, an uncle, and the committee of said Reese would spend $1,000 more.

To this answer replication was taken, and the proofs having been completed, the case was set for hearing.

Caldwell for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The evidence satisfies the Court of the extreme mental weakness, at the least, if not absolute fatuity from birth, of Reese Johnson. The inquisition of 1827 has been produced, and it finds this person to be "of unsound mind, and that he has been so from his infancy." Pending this controversy there has also been a second inquisition, on which the jury, upon the testimony of witnesses and also upon the production and examination of the party in person, found him "to be an idiot, and that he was so from his birth." It is not necessary to say whether the inquisitions would or would not be sufficient *prima facie* evidence on which to found a decree in the absence of all opposing evidence. It is certainly open to being rebutted (473) by the defendant, and it seems that in England the ecclesiastical courts look on a finding of this sort as only a part of the requisite proof of unsoundness of mind, and demand direct evidence to be taken in the *cause* of that fact. Such additional evidence has been offered in this case. The depositions were not, indeed, carefully taken or happily expressed; but it appears from the testimony of several witnesses that the party was ignorant of the most common things in life: such as the parts of a dollar that are current, seed and harvest time of the usual crops of that part of the country, and the days of the week; and the witnesses give it as their opinion that he has been a natural fool or an idiot from birth. On the other hand, the defendant has produced no witness—none to speak as to the other party's capacity at the time of the marriage or before; none to show a previous acquaintance between the parties or any addresses paid to her, not even Howard or Owens, who attended upon the occasion and are charged to have participated in the alleged imposition, who ought to have been produced to repel that imputation, and to establish, if they could, that the marriage and the arrangements leading to it were the acts of Reese Johnson, as a reasonable man, and not the contrivances of the defendant and her supposed confederates. This was the more indispensable as the respectable gentleman who performed the ceremony states that the application to him was in Salisbury, by Howard; that he hesitated to name the parties, that in ten or fifteen minutes the parties came, and with them Howard and Owens and another person; that he had never seen Johnson before, and had only a few words with him just before the marriage, which took place at once, and that immediately after the marriage Owens said Johnson was *non compos mentis*, and that he (Owens) had

furnished money to pay for the license, and he appeared to be much diverted. When to all this are added the known estimate put on this person's understanding by his family, their distress at the occurrence, the immediate measures taken by the nearest members of it to rescue him from this connection and in-
(474) duce him to return to them, and the short period required to effect that end, one cannot hesitate to believe that the party labored under great weakness, if not nearly total want of understanding, and was incompetent to make any contract, and especially one of such great importance as marriage; and, furthermore, that it was essentially solicited, procured and celebrated clandestinely, whereby those concerned evinced a consciousness of the wickedness of bringing it about, and that it was necessary to their success to conceal their purposes from the relations and guardian of this unfortunate being.

Being satisfied that such were the facts in this case, it only remains to consider whether this marriage in fact is void in law, and whether this Court is competent to pronounce it null. Upon each of those points our opinion is clear in the affirmative. It cannot be doubted that idiocy or lunacy is an insuperable impediment to the contracting of marriage, as it is to the entering into any other contract. Whatever doubt may in a dark age have been dropped by writers on the law, the intelligent commentators of modern times and most able judges unite in holding that a competent share of reason is necessary to the validity of the matrimonial contract, for that it, as every other, depends on the consent of the parties, and, without understanding, consent cannot be given. 1 Bl. Com., 438; *Turner v. Myers,* 1 Hogg. Cons., 416, and the cases there cited by *Lord Stowell.* These authorities hold such a marriage void at common law, and by some it seems to have been thought unnecessary even to have its nullity declared by judicial sentence. However that may be, it is obvious that it is convenient and fit in respect to the decent order of society, the condition of the parties and the succession of estates, that the invalidity of such a marriage should be directly the subject of judicial sentence. Hence, although the common law deems it void, it has been the constant course in England for the courts having the cognizance of matrimonial causes to entertain suits for declaring its nullity, as in other cases of marriages void by reason of a legal impediment, as in cases of impotency, duress, incest, or the like. *Earl of*
(475) *Essex case,* 2 State Tr., 355. It has been thought by persons eminent in the profession that as there are no ecclesiastical courts, properly speaking, in this country, the Court of Equity, from necessity, succeeded here to the jurisdic-

tion of such questions. We are, however, spared the trouble of examining the point, since there cannot, we think, be a doubt that the jurisdiction is conferred by statute according to a fair and sound construction. The act, Rev. St., ch. 39, gives jurisdiction both to the Superior Courts of Law and to the Courts of Equity "in all cases of applications for divorce," and by the second section, taken from the acts of 1814 and 1827, it is enacted that when either party was and still is naturally impotent or has separated him or herself from the other and is living in adultery, "or any other just cause for a divorce exists," the injured person may obtain a divorce, either from bed or board or from the bonds of matrimony, at the discretion of the court. The act creates and confers a jurisdiction over all matrimonial causes, and includes necessarily, we think, the jurisdiction to pronounce the nullity of a marriage *de facto* for want of capacity. For although that case is not specially mentioned in the acts, and although the sentence in such case is not properly a divorce, whereby the bonds of matrimony are dissolved, but rather a sentence that the marriage never legally existed, and although, as we have before said, those large terms of the act of 1827 do not confer the arbitrary power of divorce, but must be restricted to the causes enumerated in the act of 1814, or others of a like nature, or to such enumerated causes as were grounds for holding a marriage void at common law and still in reason should annul it: yet the act embraces this case, as we think, because this is divorce in the same sense that a sentence of nullity for impotency is, and that is one of the cases mentioned in the act of 1814, and at common law the marriage of one deficient of understanding is, as we have seen, void.

In the case of the *Earl of Essex* the sentence found the fact of impotency, as presumed, because after three years' trial, after he was eighteen years old, there had been *nil* (476) *ad copulam*, and then proceeded to declare the law that such was cause of divorce *a vinculo matrimonii;* and thereupon it "pronounced and decreed the pretended marriage, so contracted and solemnized *de facto* between them, to have been and to be utterly void and to no effect, and that it ought to want and did want the strength of the law; and that the said Frances was and is and ought to be free and at liberty from any bond of such pretended marriage *de facto* contracted and solemnized; and we do pronounce that she ought to be divorced, and so we do free and divorce her, leaving the parties, as touching other marriages, to their consciences." Thus it is seen the nullity of the marriage is pronounced, but also a formal decree of divorce from that marriage, existing *de facto*, is also pronounced. So, it

seems, it must be also in a suit for nullity of the marriage of an idiot or lunatic, and therefore it may be deemed appropriately "an application for divorce," according to the words of the statute, in that part of it which confers the jurisdiction. For although impotency and want of capacity have this difference, that in the one case there is consent and in the other none, yet in each the sentence, in the first place, pronounces the marriage void, and there seems to be no incongruity in the one case more than in the other in proceeding further actually to divorce the parties. This construction is rendered the clearer by the language of the subsequent part of the act (section 9), by which the proper decrees are provided for the several cases in which the jurisdiction had been previously vested, which are, first, a decree dismissing the libel; or, secondly, a decree of divorce and separation from bed and board or from the bonds of matrimony; or, thirdly, *a decree that the marriage is null and void;* and then come the expressions, that "after a sentence nullifying or dissolving the marriage all the duties and rights and claims of the parties in right of said marriage shall cease." It is plain, therefore, that the act covers the case in which the parties contracted by show of marriage, but were never in law and truth married, for want of capacity, for which reason the sen-
(477) tence pronounces the marriage null and void, but, because there is a marriage *de facto,* the sentence proceeds to dissolve *that.* The Court therefore pronounces that the marriage in fact, solemnized between Reese Johnson and Anna Kincade, is in law null and void for the want, at the time of solemnizing the same, of mental capacity on the part of the said Reese, sufficient to understand the nature of and assent to such a contract, and that the said Reese ought to be and is set free and divoreed from the said Ann.

The Court also thinks it very clearly a case for costs against the defendant upon the ground of fraud and circumvention in effecting the marriage.

PER CURIAM. Decreed accordingly.

Cited: Crump v. Morgan, 38 N. C., 96; *Williams v. Williams,* 56 N. C., 448; *Smith v. Morehead,* 59 N. C., 363; *Setzer v. Setzer,* 97 N. C., 253; *Lea v. Lea,* 104 N. C., 606; *Sims v. Sims,* 121 N. C., 299.

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RICHARD H. WALKER ET AL. v. ROBERT A. CROWDER ET AL.

1. A father who had been appointed guardian to his children and given sureties as guardian, and who had received moneys belonging to his children and had become insolvent, made a deed of trust in April, 1838, conveying all his property to trustees for the payment of debts, in which, after preferring certain specified creditors, and reciting "that whereas the said R. A. B. (the father) may be and doubtless is now indebted to other individuals or companies in divers small amounts, or in amounts which are not now recollected, or the persons to whom they are due," provides among other things, stating how the creditors are to be preferred, as follows: "Thirdly, the debts on which the said R. A. C. or F. and C. have given a surety or endorser; fourthly, all other debts now owing by the said R. A. C. in equal proportion, if there be not a sufficiency to pay the whole": *Held*, that the children, or the sureties of their father as substitutes where they had paid the debts due the children, had a right to come in for a proportionable share of the property or surplus so secured by the deed of trust: *Held*, further, that when the grandfather of these children, by will dated in March, 1839, had directed certain property to be sold and the proceeds applied to the payment of the debts so due by the father to the children, and the balance to be given to the children themselves, that the children, or the sureties who had paid them, ought first to resort to this fund left by the grandfather before they applied for satisfaction out of the funds placed by their father in the hands of his trustees: *Held*, further, that the sureties of the guardian, who had paid the children, were entitled to be substituted to the rights and remedies of the children so paid.

2. The father, or his trustee, in the settlement of the guardian accounts, has no right to charge the children with the amount expended for their education, the father being of sufficient ability to maintain and educate them.

3. It was the duty of the father, if of ability, to maintain his children; and if not, he should have had the sanction of the proper court to an application of the children's property to that purpose.

4. The court will never make a decree, when one of the parties sues by a next friend and that next friend has, or may have, an interest in the suit, opposed to that of the infant. It will require another *next friend* to be appointed to attend to the cause in behalf of the infant.

5. There are some modern English cases in which it has been held that the maker of a deed of trust for the payment of debts may, under certain circumstances, revoke the purposes declared in the deed and direct other dispositions of the property, but this doctrine has not yet been recognized in this State.

THIS cause having been set for hearing upon the sev- (479) eral bills, answers, proofs and exhibits, was, by consent of parties, transmitted to this Court from the Court of Equity of CASWELL, at Spring Term, 1843.

The following facts appear from the pleadings and proofs to constitute the case:

In 1822, Henry Crowder, Mary Crowder, Giles Crowder and John Crowder, the four infant children of Robert A. Crowder, then of Mecklenburg County, in Virginia, became entitled to a sum of money under the will of an uncle, and in order to its collection their father was duly appointed by the County Court of Mecklenburg their guardian, and as such entered into bond in the sum of $20,000, with Thomas B. Puryear and another person, who is since dead, as his sureties, and then received the legacy belonging to his children. Afterwards, Robert A. Crowder removed to Caswell County, in this State, and brought his children with him. Becoming much embarrassed by debts, to a greater amount, as it afterwards appeared, than all his property would discharge, he on 3 April, 1838, executed a deed of trust for all his estate to Nathaniel J. Palmer and Edward H. Robertson, of Caswell, upon trust to sell and out of the proceeds thereof to pay his debts in the order therein named. The deed enumerates a great number of debts for certain sums due by judgment, bond, note or account to different persons, who are named, among whom the said Robertson, one of the trustees, is mentioned as a creditor and also as a surety for Crowder for several of the debts to other persons. The deed proceeds as follows: "And whereas the said Robert A. Crowder may be, and doubtless is, now indebted to other individuals or companies in divers small amounts, or in amounts which are not now recollected, or the persons to whom they are due: if so, whether they are due by bonds, bills, notes, accounts, judgments or other-
(480) wise, they are hereby intended and are to be as fully secured and paid out of the property herein conveyed or its proceeds as if they were specially named in this deed, my trustees, however, being satisfied that they are *bona fide* due and were contracted before or at the time of the execution hereof, and then they are fully authorized to pay the same, as the other debts particularly named. Now, in consideration of an honest desire of the said Robert A. Crowder to secure and pay all the debts before mentioned, or, if not mentioned, which may be by him now justly owing or contracted, and in the further consideration, etc." The deed then directs the order of payment as follows: First and secondly, judgments then rendered or that might be rendered during Caswell County Court, then sitting, and the expenses of executing the trusts. "Thirdly, the debts on which the said Robert A. Crowder, or Farly and Crowder have given a surety or endorser. Fourthly, all other debts now owing by the said Robert A. Crowder, in equal proportion, if there be not

a sufficiency to pay the whole." Mary Crowder, one of the children, intermarried with Lewis Webb and died, and her husband administered on her estate, and in 1838 Webb, as administrator of his deceased wife, and Henry Crowder, another of the children, who had then come of age, instituted in Virginia against Thomas B. Puryear an action of debt on the guardian bond, in the name of the justices to whom it was payable for their benefit as relators, and therein recovered in October, 1839, against Puryear, one of the sureties, the sum of $1,840.94. On 26 March, 1839, Godfrey Crowder, who was the father of Robert A. Crowder, and resided in Mecklenburg, made his will, which was proved in January, 1840, after the testator's death, and therein directed the remainder of his estate to be sold, and his executor, John Nelson, to apply a certain share thereof "to the payment of the legacies which accrued to Henry, Giles, Mary and John Crowder, children of Robert A. Crowder, from the estate of their deceased uncle, Henry Moody, and which is in the hands of Robert A. Crowder, as their guardian, so far as shall be necessary to discharge said legacies with the accruing (481) interest; and the balance, if any, I give to be equally divided between the said Henry, Giles, Mary and John Crowder, children of my son Robert A., by his first wife." The original bill in this case was then (May, 1840) filed, at the instance of Lewis Webb and Henry Crowder, against Palmer and Robertson and Robert A. Crowder, setting forth the foregoing facts, except the will of Godfrey Crowder and his death, and that they were unwilling to raise their judgment out of the property of Puryear, the surety, if they could have satisfaction thereof out of the estate of Crowder, the guardian himself; and they prayed an account of the trust fund created by the deed and to be let in for a due proportion thereof, as being entitled thereto under the provision in the deed for all debts contracted by Robert A. Crowder before the date of the deed and not therein named, and as being entitled in that class of debts for which the debtor had given sureties.

The trustees and Crowder answered. They state that the principal object of the deed was to secure the debts due to the defendant Robertson and others, for which he and others were sureties in Caswell, and to prevent the sacrifice of the property by forced sales on executions, which would soon be obtained, and that the general clause was intended to embrace *only* such *small* debts as might have escaped the debtor's memory, and not those from him to his children, for they were large and not forgotten, but were remembered, and were expected by him to be provided for by his father, Godfrey Crowder, by a donation in his will

for that purpose of such property as his father had intended for him, Robert A. Crowder, before his embarrassments; and they insist that the provision made in the father's will, as before mentioned, for his four grandchildren was intended to be in satisfaction of their claim in the premises, and that the children must take the same accordingly, if sufficient to cover their whole demand, or *pro tanto,* if not sufficient. The answers likewise claim a reasonable deduction for the education and support of the children by their father, not exceeding the interest
(482) accrued on the money in his hands. And the trustees submit whether, if the plaintiffs be entitled at all to a part of the funds in their hands, they are to be paid equally among the last class of creditors or are to be preferred as having debts for which the debtor had given sureties.

The bill was afterwards (October, 1841) amended, by consent, by making Thomas B. Puryear and the other two children, Giles Crowder and John Crowder, plaintiffs, the latter two being infants and suing by T. B. Puryear as their next friend; and is filed on behalf of these plaintiffs and all other creditors of Robert A. Crowder, and it makes John Nelson, the executor of Godfrey Crowder, a party defendant, and sets out the will of the testator as before quoted, and charges that the sum to which the children of Robert A. Crowder may be entitled thereunder was intended as a satisfaction of their respective demands on their father as their guardian, and calling on Nelson accordingly to account therefor, and submitting to receive under the deed of trust, as their debts, the balance due from their father to them, after deducting the legacy from the grandfather. The bill further states that after filing the original bill the plaintiffs therein, Webb and Henry Crowder, finding the delays that were likely to arise in the prosecution of this suit, raised upon execution against Thomas B. Puryear the money recovered by them at law, in Virginia, and those persons submit that Puryear shall be substituted for themselves in the claim under Godfrey Crowder's will, to the extent of indemnifying him for the sum so paid by him, if sufficient therefor.

To these proceedings Nelson made no defense. But in February, 1832, Thomas B. Puryear filed his bill in the Court of Chancery in Virginia, against Nelson, as executor of Godfrey Crowder, and against Webb and Henry Crowder, and also against Giles and John Crowder, and therein charged the appointment of Robert A. Crowder as guardian of his children, and that he gave bond with Puryear as his surety; that he wasted the estate of his wards and afterwards became insolvent, and that Webb and Henry Crowder instituted their action against Puryear for

the recovery of what was due to them; and that, with the view of protecting and indemnifying Puryear from loss (483) and insuring the payment of their estates in their father's hands aforesaid to the four children, Godfrey Crowder, their grandfather, made the disposition of his will in their favor, as before set forth; and it charges that the plaintiff therein (Puryear) had paid to Webb and to Henry Crowder their recovery, and was entitled to stand in their place in respect of the said legacy under G. Crowder's will, and also that he was entitled to have the shares thereof belonging to the two other children, Giles and John, applied in discharge of their father's debt to them, in exoneration of himself as surety therefor; and he prayed the proper accounts and relief in the premises.

To the bill all the parties defendant put in answers; that of John Crowder, who was still an infant, being put in by his brother Giles, who had then come of age. And on 20 May, 1842, it was therein declared that under the will of Godfrey Crowder, Henry Crowder and Lewis Webb, as administrator of Mary Webb, had a right to receive their due proportion of the fund directed by the testator to be applied to the payment of the debt in the said will mentioned to be due by Robert Crowder as the guardian of the said Henry, Mary, Giles and John; that the plaintiff Puryear had paid the said debt to said Henry and Mary, and that he was entitled to stand in their place. And it was decreed that Nelson, as executor, should accordingly account before a commissioner, who should ascertain the amount subjected by the will of the testator to the payment of the said children of Robert A. Crowder. The master afterwards reported the sum then in the hands of the executor and due to the four children, and that there would be a further sum of $861.84 (or $215.46 each) due to them on 10 February, 1833. And thereupon it was decreed on 15 October, 1842, that Nelson should pay to Thomas B. Puryear the sum of $902.94, with interest on $872.32, part thereof, from 10 February, 1842, till paid, that being the sum in the hands of the executor due to Henry Crowder and the late Mary Webb of the fund directed by the will of the testator to be applied to the payment of the (484) debt due to them by Robert A. Crowder, their guardian; and leave was reserved to the plaintiff Puryear to apply for further directions as to the other funds coming into the hands of the executor which may be subject to the payment of that debt.

After the foregoing decree in Virginia, the defendant Palmer (the other defendants, Crowder and Robertson, being dead, and Palmer being their representative) put in a further answer in this cause, in which he relies on the Virginia decree and the

facts ascertained therein, and insists that Puryear and the two children, Giles and John Crowder, shall look to that fund, as far as it will extend, before they can come on the funds in his hands, if they can do so at all.

By an exhibit recently filed it appears that an action was also instituted in Virginia against Puryear, on the guardian bond, for the benefit and at the relation of Giles Crowder and John Crowder, in which the debt to them was on 19 May, 1843, found to be $1,802.05, with interest at 6 per cent on $1,010.02, part thereof, from 1 January, 1839, "subject to a credit for $1,492.07 paid thereon 10 February, 1843, by John Nelson, executor of Godfrey Crowder, deceased."

Graham for plaintiffs.
Norwood for defendants.

RUFFIN, C. J. Although from various judicial proceedings in this case, and the circumstance that many of these were founded on matters which occurred since the original suit began, several alterations and amendments became necessary in this cause, which have rendered the statement of it somewhat perplexed and prolix, yet the questions for decision are not numerous, nor, we think, difficult. It seems to be clear that under the provisions of the deed of trust, the debts of the father, as guardian to his children, are secured and must be paid *pari passu* with others of the same class. It was a debt which existed at the time of the creation of the deed, and one for which (485) the maker of the deed had given sureties, and the language of that instrument is express that all debts of that character, "whether mentioned or not mentioned, are intended and are to be as fully secured and paid as if they were specially named in the deed." It is true, the parties say they were not in their contemplation, and they give the reasons why they were not. But that cannot control the express and positive provisions of the deed. There are some modern English cases in which, under certain circumstances, the maker of a deed of trust for the payment of his debts has been held at liberty to revoke those purposes and direct other dispositions of the property. We are not aware that the doctrine has been at all recognized in this country, and certainly it has not as yet in this State. But if it prevailed here it could not affect this case, inasmuch as a creditor—indeed, the principal creditor and surety of the maker of the deed, namely, Mr. Robertson—was a party to the deed, being one of the trustees, and the trustees accepted the office, sold all the property, and paid many of the debts. It is too late, after

that, for the party to stop the further execution of the trusts, were he to attempt it. But he has made no such attempt, but only states that in making the deed he had no purpose to include these debts, and for that reason contends they are not included by the terms of the instrument. We think they are, and that they are to be paid in the class next to the judgments mentioned in the deed.

The Court is likewise of opinion that the grandfather, Godfrey Crowder, intended the legacy to these children as a satisfaction, at least *pro tanto,* for their demand against their father and his sureties. He directs his executor to apply the fund "to the *payment* of the legacies, etc., which are in the hands of Robert A. Crowder as their guardian, so far as shall be necessary to *discharge* said legacies." Indeed, as he knew that his son was insolvent at the time he made his will, 26 March, 1839, his principal object in making the gift and in expressing himself as he did must have been to indemnify his son's surety, who was then sued by two of the children. We think, therefore, that the children were under the obligation in equity (486) to resort to that fund for their satisfaction before coming upon the father or his surety; for, under the will, they are to have, as a pure gift, what may remain after paying what their father owed them, and they cannot increase that fund by raising the money from the surety or their father which the grandfather intended his estate to pay. It follows that the grandfather's estate is thus made the primary fund for paying these debts, and that the children ought to resort to it in the first place, and that, if they would not, and had recourse to the surety, the latter has the right to stand in their place and receive their share of the fund provided by the grandfather. This has been definitely done in respect to the shares thereof belonging to two of the children, Henry and Mary, by the decree of 15 October, 1842, under which Puryear was then reimbursed the sum of $902.94, and he has probably received since the further sum of $215.46, each, from Nelson, on account of his payments to Henry and Mary's administrator. Why the decree did not also declare the other two children, Giles and John, bound to receive the same sums from Nelson, and require Nelson to pay them on account of their debts and in exoneration of Puryear as surety, we do not perceive, as they were all parties to the suit, and the accounts fully taken. But it is not material, since it seems probable those payments have been since made to them by Nelson, and have been allowed as a credit in taking their judgment against Puryear, and the whole can be shown before the master, should the parties find it necessary to go before the

master for an account. We presume, however, the parties can readily settle among themselves, after knowing the opinions of the Court upon the question raised. Upon this point that opinion is that only so much of the debt of Robert A. Crowder to his children as shall remain after applying thereto the fund provided by the grandfather forms a charge against the trust funds of the father in the hands of Palmer. Upon the ordinary principle of substitution, as applicable between the creditor and the principal and his surety, Puryear is entitled to stand, in
(487) respect of the balance of the debt thus forming that charge, in the place of Henry Crowder and Lewis Webb, whom he has fully paid; and, as regards the other two children, Giles and John, they will be entitled, or Puryear in their place, as it shall appear before the master that Puryear hath or hath not paid the debt to them, to such part of it as was not discharged out of Godfrey Crowder's fund. There can be no deduction on account of the education of the children. It was, by the settled rule of our courts, the duty of Mr. Crowder, as father, to maintain his children, if of ability; and if not, he should have the sanction of the proper court to an application of the children's property to that purpose. We doubt not that such is also the law of Virginia, for if it had not been the proper deductions would have been made in the suits brought by the wards in that State, in which the surety would be inclined to make every defense. But here the father seems to have had no lack of means, but to have possessed a competent fortune, until ruined by a mercantile partnership; and he never designed charging his children, as is manifest by his keeping no accounts against them. Besides, the grandfather's will covers the whole portions, interest as well as principal, and enough is got from that source to cover much more than all the profits of the wards' property, which is all that could be allowed for maintenance in any case; so there are many reasons why this deduction cannot be admitted. The Court can, however, only make these declarations, and cannot order the cause to a reference in the present state of the pleadings. At the time of filing the amended bill, Giles and John Crowder were infants, and the bill is filed in their behalf by Puryear, as their next friend. It seems that Giles Crowder hath since come of full age, and can prosecute the suit for himself. It may likewise be the case as to John, but it does not appear. If the case were sent in this condition before the master it would be the interest of Puryear to show that he had paid the whole debt due to John Crowder, in order to lay hold of his part of the fund in Palmer's hands, while he would, at the same time, be charged with the duty to the infant of showing

that he had not made such payment, if in truth, and as (488) it may be, he has not made it. The Court cannot permit a suit to be carried on in the name of an infant by a next friend who can have an interest in conflict with that of the infant. The cause, therefore, must stand upon these declarations until another next friend can be found or the party himself shall come of age. When that shall be the case it will be referred to take the usual accounts of the trust fund and the payments made thereout, with directions for allowing all creditors to come in under the decree and prove their debts in order to distribute the fund in conformity to the deed.

PER CURIAM. Cause ordered to stand over.

Cited: Ingram v. Kirkpatrick, 41 N. C., 474; *Haglar v. McComb.* 66 N. C., 351; *George v. High,* 85 N. C., 504; *Burke v. Turner, ib.,* 504; *Mull v. Walker,* 100 N. C., 50.

(489)

WILLIAM A. LASH, ADMINISTRATOR, v. SAMUEL T. HAUSER AND OTHERS.

1. Creditors of A recovered judgments at law for their debts against A's administrator, but it was found that the administrator of A had no assets. Judgments were therefore entered *quando.* Afterwards, on a bill filed by the next of kin of A against his administrator, it was declared by the court that certain negroes, which the administrator had in his possession and claimed as his own under a deed absolute on its face from A, were held by the said administrator only by way of mortgage as a security for a debt, and the administrator was decreed to deliver over the said negroes to the next of kin of A upon their payment of the debt and interest, and they were, in pursuance of such decree, delivered accordingly: *Held,* on a bill, now filed by the said creditors against the said administrator and the next of kin, that the negroes were subject to the claims of the creditors, after deducting the amount due to the administrator on the said mortgage.

2. These negroes, or the right of redemption, were not assets at law, and therefore the creditors are not concluded, by a judgment at law, that there were no assets, from now asserting their claims in equity.

3. The plaintiffs have a right to ask a decree in such a case against the next of kin, although it might not have been necessary to make them parties to the suit.

4. In the suit of the next of kin against the administrator, *it seems* the court should have directed an account of the intestate's debts before decreeing a distribution among the next of kin. Such is the practice in England.

5. Nor will the statutes of limitations bar the plaintiffs' claims, although more than seven years had elapsed before the bringing of this suit, because the plaintiffs had brought suit within the proper time and obtained their judgments, to be satisfied out of any assets that might thereafter occur.

THIS cause having been set for hearing, was transmitted to this Court from the Court of Equity of STOKES, at Fall Term, 1842.

The facts are stated in the opinion delivered in this Court.

(490) The bill is filed by the creditors of George Hauser, deceased, against his administrator and next of kin, for an account of his personal estate and for the satisfaction of his creditors thereout, and particularly that certain slaves may be declared equitable assets to that end. That cause was set for hearing upon the bill and answer and transferred to this Court. Upon the pleadings it appears that there are no assets of the intestate, unless the slaves above mentioned be assets, and as to them the case is as follows: George Hauser died intestate in 1819, and the defendant Christian Lash was appointed his administrator and took into his possession the effects and returned an inventory, and applied in a course of administration, by way of retainer or in payment of creditors, all the effects embraced in the inventory, after which there remained unpaid sundry debts to the present plaintiffs respectively, who had instituted suits at law on them, in which the administrator pleaded fully administered. The plaintiffs being unable to show at law any other assets, the issues upon the administrator's pleas were found for him, and the creditors, in 1819, took judgments *quando,* under the statute.

In 1828 George Hauser conveyed to Christian Lash five slaves by an absolute deed, expressed to be in consideration of $818 then paid. After the deed the slaves remained with Hauser until his death, but upon that event the defendant Lash took them into his possession, claiming them as his own property under the deed as an absolute purchase, and did not return them in his inventory as a part of the effects of his intestate. Some years afterwards the children who were next of kin of George Hauser filed their bill in the Court of Equity against Christian Lash for an account and distribution of the estate of the intestate, and particularly that the deed for the slaves might be declared a security only for the sums advanced by Lash to Hauser, and that, after satisfying the same, they might be declared a part of the personal estate of the intestate in the hands of the administrator and distributed.

After a tedious litigation that cause was heard in this Court in June, 1839 (22 N. C., 212), and there was a decree in conformity to the prayer of the bill and the proper ac- (491) counts ordered, and at June Term, 1841, after the master's report, it was finally decreed in that cause that the sum of $1,271.64, with interest from certain days therein mentioned, remained due to Lash from the estate of his intestate, which the plaintiffs in the cause were required to pay to him on or before 1 December, 1841, and that upon receiving the same Lash should surrender to them the slaves and their increase from March, 1818, and also execute a release to them of all claim to the slaves by virtue of the said deed. In September, 1841, the present plaintiffs filed their bill, and after stating the foregoing proceedings, alleged that the next of kin were about getting possession of the slaves from Lash and carrying them out of the State, with the view of defeating their father's creditors, and praying for an injunction and sequestration and for relief as above stated. By consent of the parties in the cause the negroes were delivered and released by Lash to the next of kin, and the latter gave bond in a large penal sum to perform the decrees that might be made in the cause.

Waddell for plaintiffs.
Morehead for defendants.

RUFFIN, C. J. The opinion of the Court is that the excess in the value of the slaves over and above the money that was due to Lash and secured by the conveyance was in his hands assets for the satisfaction of debts, and that it remains so in the hands of the other defendants, the next of kin, after reimbursing to them the money they have paid to Lash under the decree and the costs incurred by them in establishing the true nature of the conveyance to Lash. The principle upon which the proposition rests is a very plain one. There was a right of redemption in Hauser, which was a valuable interest, and ought therefore to be applied to the benefit of his creditors, at least in a court of equity. Wentr. Exrs., 186. Against this, how- (492) ever, several objections were urged on the part of the defendants. But they all seem easily answered. One was that the plaintiffs are concluded by the judgments on the administrator's pleas of *plene administravit* in the suits at law, and that as these slaves were then held by the administrator, they are not assets since come to hand. This objection rests on the assumption that the intestate's interest in the slaves could be reached at law, and might have been offered in evidence to dis-

prove those pleas. Without deciding whether, after such a judgment, assets strictly legal, which were in the administrator's hands at the time and by him concealed from the creditors, could be reached in equity upon the subsequent discovery of them by the creditors, we hold that in this case the judgments at law do not conclude the plaintiffs, because these slaves were not recognized at law as belonging to the intestate, but were deemed the legal property of Lash himself, and so were not assets in a court of law. Whether chattels conveyed by an instrument which upon its face plainly shows they were mortgaged or pledged can be in any case deemed legal assets, when the day of redemption had passed in the debtor's lifetime, we are not now called on to decide, though the authorities as well as the reason of the thing seem not to leave much doubt on the question. But certainly in no manner can a court of law hold that a chattel, conveyed absolutely by the deceased, remained his property for any purpose, unless, indeed, the creditor should establish that the conveyance was made to defeat creditors, and so was fraudulent and void under the statute. Neither party raises that point here, and we are to assume that, in respect to creditors at least, the transaction was fair. Being so, the interest of the intestate was a pure equity to have the conveyance, absolute in its terms, declared in that court to have been improperly obtained, or intended by the parties as a security, and that it should stand only as such. This interest was therefore equitable assets, and could not be taken notice of at law, and, as is admitted on all hands, was not then taken notice of. Consequently, the findings upon the administrator's pleas do
(493) not affect the plaintiff's rights in this Court in respect to those assets.

It was next said that the plaintiffs were not entitled to relief against the next of kin: *first*, because they had no equity to follow the assets into their hands, unless in a case of the insolvency of the administrator and a fraudulent collusion between him and the next of kin; *secondly*, because they were protected by the statutes of 1789 and 1715, barring actions against dead men's representatives. As to the first, it is sufficient to say that so far from this being a proceeding to follow the assets into the hands of the next of kin, it is one to obtain satisfaction out of the assets before they should get into those hands. Perhaps the plaintiffs need not have brought in the next of kin, and if they had supposed that in the former litigation the redemption had been shackled with the payment of too large a sum to Lash, they would probably have brought their bill against the administra-

tor alone to have the slaves declared equitable assets in his hands. But as there is no suggestion of the kind, it was obviously the more fair course to bring in all the parties and allow to the next of kin the benefit of the payment actually made or to be made by them for the redemption of the negroes, and for the costs of the long controversy they had carried on for the purpose of establishing an interest in the intestate, of which the creditors now claim the benefit. The next of kin did not demur because they were improperly made parties nor state the objection in their answer. On the contrary, they got clear of an order in the cause whereby the sheriff made a sequestration, took the slaves from the possession of Lash and prevented the next of kin from getting them, by voluntarily agreeing to perform the decrees in the cause if the parties would allow them to take possession. It is plain that they cannot set up such a possession as in itself defeating the creditor's satisfaction out of that property. Perhaps, indeed, it was the fault of the court not to have directed in that cause an account of the intestate's debts before decreeing a distribution amongst the next of kin. Though not usual with us, it is the established course in England, and under that decree the creditors prove their debts and re- (494) ceive payment out of the funds in court. *Gillespie v. Alexander,* 3 Russ. C. C., 130. That case also shows that, after distribution by a decree, the creditors may bring back the estate by a suit against the next of kin, who, and not the administrator, is chargeable to the creditors in such case. *A fortiori,* when no account of the debts was directed in the suit by the next of kin, creditors may, upon a bill against all the parties, claim satisfaction out of the assets while the fund is yet in court or in the hands of the administrator, though ordered to be paid over to the next of kin for division among themselves.

As for the lapse of time, there is nothing in it. The statutes bar if the creditors do not bring their actions. That was done here, and put an end to the operation of the acts. There is no presumption of payment upon such judgments as these; especially it must be so held when no such defense is set up. Therefore the plaintiffs are still entitled to have the fund administered in this Court as equitable assets of the intestate, and the necessary accounts of the clear amount of the fund and of the respective debts of the intestate must be taken.

PER CURIAM. Decreed accordingly.

Cited: Green v. Collins, 28 N. C., 151; *Leigh v. Smith,* 38 N. C., 448; *Gaither v. Sain,* 91 N. C., 307.

(495)

CHARLES DEWEY v. THOMAS B. LITTLEJOHN AND OTHERS.

1. Notice of a deed of trust, not registered according to law, raises no equity against a creditor.

2. A creditor *may* honestly obtain a security, by way of mortgage or deed of trust, for a debt known or believed to exist, though unliquidated, and a preference thus gained by one creditor over another for what may turn out to be due is not unfair.

3. So mere delay, either in settling or collecting the debt, will not of itself impeach the deed, since forbearance may arise from many motives besides that of giving a false credit to a debtor, and in many instances may be attributed to the most benevolent and praiseworthy motives.

4. Thus, where, upon a dissolution of copartnership between two brothers, a deed of trust was given by one to the other for an estimated balance supposed to be due, and no settlement was made nor any attempt to proceed under the deed was made for thirteen years, the creditor brother being in the meantime resident out of the State, *it was held* that the deed was not on that account fraudulent, the brothers both stating in their answer that the amount since ascertained to be due on a settlement was more than sufficient to cover the property secured by the deed of trust.

5. A man who is appointed to a public office, for the faithful performance of the duties of which he is bound to give sureties, may properly indemnify such sureties by a deed of trust on his property.

6. The circumstance that possession of the property conveyed by a deed of trust is to be retained by the maker of the deed until it is wanted for the purposes of the trust is not in itself an evidence that the deed is fraudulent.

7. If a sale under a deed of trust to sell for the benefit of creditors is, by the terms of the deed, to be delayed so long, or if the proportion in point of value of the consumable articles conveyed over those of a different character were such as to induce the court to believe that it was the object or an object of the deed to provide for the maker permanently or temporarily, and not for his creditors, the court would pronounce the deed void.

8. Where the parties to a deed of trust for the satisfaction of creditors do not definitely express the debts that are due or to become due, creditors have a right to demand an inquiry, and although they charge fraud in the deed and the charge is not established and their bill dismissed, yet they are not bound to pay any costs to the defendants.

9. An answer directly responsive to the bill must be received as true, in the absence of testimony contradicting it.

(496) THIS was a cause removed by consent from WAKE Court of Equity, at Spring Term, 1843. The bill was

filed, answers put in, replication thereto, and no proofs taken on either side. In this state of the cause it was set for hearing. The following facts were exhibited by the bill and answers:

The defendant Thomas B. Littlejohn became indebted to the plaintiff in 1839, by endorsing a bill of exchange, drawn by one Hunt, and the plaintiff recovered judgment thereon against him, T. B. Littlejohn, for $1,902.70, besides costs, at August County Court, 1840, of Granville. The plaintiff issued a *fieri facias,* which was returned *nulla bona,* to February Term, 1841, and then he filed this bill on 4 March, 1841.

For some years before 1827 a partnership existed between the two brothers, Thomas B. Littlejohn and Joseph B. Littlejohn, in merchandise at Oxford, and also in a tannery under the firm of Littlejohn & Locker. Thomas B. Littlejohn was also indebted on two notes to a bank in Raleigh, which Joseph B. Littlejohn had executed as his surety. By a deed bearing date 30 October, 1827, reciting the two debts, and also that on their partnership accounts T. B. Littlejohn was considerably indebted to J. B. Littlejohn, and that as he was desirous of securing the payment of all those debts, T. B. Littlejohn conveyed to John Nuttall several parcels of land in Granville and one negro slave, in trust to sell, when required by either of the parties, and pay those debts. This deed was duly registered in 1828. By two other deeds of the same date T. B. Littlejohn conveyed certain slaves to John Nuttall in trust to sell and pay certain debts for which Willis Lewis was his surety, and conveyed to Willis Lewis certain slaves in trust to sell and pay certain debts for which John Nuttall was his surety. The debts set forth in the two deeds last mentioned, it is admitted by the defend- (497) ants, have been long since paid. It is admitted, likewise, that the debts for which J. B. Littlejohn was the surety for T. B. Littlejohn, as mentioned in the first deed, were paid many years ago, and the deed is now set up as a security for such sum only as T. B. Littlejohn may owe the other party on their partnerships. On 29 February, 1836, Thomas B. Littlejohn became indebted to John A. Hicks in the sum of $2,500, for which he executed his bond, and Abram W. Venable joined therein as his surety; and for the further security of the debt and as indemnity to Venable, T. B. Littlejohn on that day executed a deed to Thomas B. Lewis for four negroes, Pleasant, Reuben, Robin and Davy, in trust to sell and pay the said debt. Afterwards Davy was sold, and his price with other sums of money, amounting in all to $1,350, applied in part payment of the debt, but still leaving a balance of $1,150 of principal, besides interest due thereon. This deed was registered on 18 May, 1840. The

bill charges that there was nothing due from T. B. Littlejohn to Joseph B. Littlejohn or their partnerships; that they lived near each other for several years after the execution of the deed and made no settlement nor took any account of the state of their concerns so far as to enable other creditors to know what sum the one owed the other, and, in fact, that J. B. Littlejohn removed to Tennessee a number of years past, leaving all the effects of the partnerships and the property conveyed in the hands of T. B. Littlejohn; from which circumstances the plaintiff charges that nothing was due to J. B. Littlejohn originally, or that he had released or abandoned all claim to any sum that might be owing to him, and therefore that the deed first mentioned was kept on foot as a subsisting security, fraudulently and for the mere purpose of deceiving and hindering the plaintiff and other creditors of T. B. Littlejohn.

The bill further states that by another deed bearing date 29 July, 1840, T. B. Littlejohn conveyed to John R. Hicks the same negroes, Pleasant, Reuben and Robin, and eight others, and also several parcels of land in Granville County and the town
(498) of Oxford; also two mules, three horses, twelve head of cattle, all his crops of corn, fodder and oats, and his household and kitchen furniture—the same being all his visible property—for the purpose of securing certain debts or pretended debts therein recited, that is to say, a debt to Thomas Brown on bond for $1,709, due 12 January, 1829; one to R. and R. H. Kingsbury for $743.76, by bond, and several others specified, and also for the purpose of securing Samuel J. Downey and Abram W. Venable from loss from any liabilities they have incurred or may hereafter incur as sureties for the said T. B. Littlejohn in his bond, given for the performance of his duties as Clerk and Master of the Court of Equity for the years 1838 and 1839, with power and direction to the trustee, upon being required by the parties therein secured, to sell the property and out of the proceeds pay, *first*, such moneys as Venable and Downey may be liable for as sureties on the official bond as aforesaid; *secondly*, the debt to Brown, and, *lastly*, all the other debts, with a proviso that, by consent of the parties, T. B. Littlejohn is to remain in possession until the trustee shall want the property for the purpose of a sale, and that T. B. Littlejohn shall surrender the possession when required for that purpose. This deed also recites that before mentioned as having been made to T. B. Lewis for the negroes Pleasant, Reuben and Robin, on 29 February, 1836, and conveys those slaves subject to the operation of that previous deed.

The bill states that the period when this last-mentioned deed, dated 29 July, 1840, was in fact executed was unknown to the plaintiff, and it charges that it was not executed, or, if so, was kept under the control of T. B. Littlejohn until after the plaintiff got his judgment, which was on the first Monday of August, 1840, and that none of the creditors accepted the deed before that day, and that without the concurrence of any creditor, T. B. Littlejohn, of his own head, wrote and executed the deed for the sole purpose of hindering and defeating the plaintiff; that if any of the creditors knew of the execution of the deed they and T. B. Littlejohn and Hicks contemplated that Littlejohn was to enjoy, consume and dispose of the property (499) in the same manner as if he were still the owner, and that the creditors assented thereto for the ease and favor of T. B. Littlejohn, and that he had kept and used the property ever since.

The bill further charges this intention the more for the reason that in fact Downey and Venable were not responsible for any default of Littlejohn in his office of clerk and master for 1838 or 1839, or for none before the execution of the deed, and because the deed provides for future defaults. The bill particularly charges that Brown removed many years ago to Scotland, and would not have left a debt so long uncollected and, especially, allowed the interest to run so long in arrear, and for those reasons charges that the said debt was pretended and not truly owing. The bill further charges that if the said debts were just, and there was no such original fraudulent purpose, yet that the creditors now indulged the debtor fraudulently and to the prejudice of the plaintiff, forasmuch as they do not sell enough of the property to pay their debts and thus leave the residue unencumbered and open to the plaintiff's execution. The bill is brought against Thomas B. Littlejohn, Joseph B. Littlejohn, the heirs and executors of Nuttall (who is dead), and the executors of Willis Lewis (who is also dead), Thomas B. Lewis and John R. Hicks, the trustees in the two deeds last mentioned, Venable, Downey, Brown and all the creditors secured in the deed of 25 July, 1840, and it interrogates them particularly upon the matter before alleged, and especially T. B. and J. B. Littlejohn, whether they had settled their partnership, and whether any and what sum is due thereon from the former to the latter; and also interrogates T. B. Littlejohn and Brown whether any part of the said alleged debt to the latter is really owing, and why the same was not sooner paid. The bill also interrogates T. B. Littlejohn, Venable and Downey, when a

default took place in the office of clerk and master, whose money was misapplied, and how, and when, and at what period it was disclosed to the parties.

(500) The prayer is that all the deeds may be declared fraudulent and void as against the plaintiff, and that he may have satisfaction decreed out of the property therein conveyed, and for general relief. The representatives of Nuttall and Willis Lewis did not answer, and the bill has been taken *pro confesso* against them. The answer of T. B. Littlejohn states the debts for which those persons, Nuttall and Willis Lewis, were sureties to have been paid long ago, and that releases were not taken, because they were not known to be necessary, or through mere inadvertence. As to the debts from Thomas B. to J. B. Littlejohn, the separate answers of both those persons state that in both of the firms J. B. Littlejohn had advanced a large capital; that they were conducted chiefly and almost exclusively under the management of T. B. Littlejohn, as the active partner; and that, although in October, 1827, no settlement had taken place, it was well known to both of them that T. B. Littlejohn was largely indebted thereon to J. B. Littlejohn; that a settlement could not well have been made at the time, as the concern then owed large debts and had a large amount of debts owing to them, but that from a rough estimate of the assets and the accounts of the respective partners they then believed that T. B. Littlejohn was indebted to J. B. Littlejohn in a sum not less than the utmost value of all the property conveyed by the deed, and certainly not short of $10,000. These answers state that before settlement could be made J. B. Littlejohn removed to Tennessee, in 1829, and has resided there ever since, and that owing to the want of opportunity for making a settlement one was not made until, by the filing of this bill, it was made necessary for J. B. Littlejohn to come to this State for that purpose, and that he accordingly came, and on 29 November, 1841, the parties stated their accounts and came to a settlement, a copy of which is annexed to the answer of J. B. Littlejohn; whereby it appears that at the execution of the deed there was a balance due to J. B. Littlejohn of about $17,000 of principal money, and that including interest up to November, 1841, the balance amounted to $24,933.48, after deducting large payments

(501) made in the meantime. The answers admit that some parcels of the land, particularly mentioned, had been sold, but they state that J. B. Littlejohn concurred in the sales and received such parts of the purchase money as had been paid.

J. B. Littlejohn admits that he did not press a settlement and payment of this claim, as he would have done in the case of a

stranger or if he had considered any person interested besides himself, and says that the delay arose from a desire not to distress his brother and from the belief that his debt exceeded two or three times the value of the property conveyed for its security, and that no other person had an interest in the execution of the trusts; and he denies that he released or ever intended to release the debt.

Both of the defendants aver their belief that the settlement is correct and that the balance appearing thereon is just and truly due, and they submit to produce their books and to have an account taken in this cause of their partnerships, if required.

The answer of T. B. Littlejohn further states that the deed to Hicks, dated 29 July, 1840, was executed and delivered to Abram W. Venable, therein named, on the day it bears date, and that it was proved and registered on the 30th day of the same month, as appears by the certificate of the register on the copy of the deed exhibited by the plaintiff to be true. This defendant, the trustee Hicks, Venable and Downey, and the other creditors who have answered, each for himself, state that the debts secured in that deed are justly due and fully owing: particularly, T. B. Littlejohn states that he had used money received in his office to the amount of $3,618, which he found himself unable to pay without the sale of some of the property conveyed in the deed, and that Venable and Downey, as his sureties for the years aforesaid, were liable therefor; that the debt to Brown was justly due, and that Brown, when he left this country, appointed the defendant Venable his agent, with directions not to press the collection of the money unless it should become necessary to its security; that such directions were given in consequence of a long intimacy and personal friend- (502) ship between Brown and T. B. Littlejohn. The answer of T. B. Littlejohn has annexed to it a schedule of the debts secured and the property conveyed, with an estimate of the value thereof, whereby the debts, without interest, appear to be $8,714.-73 and the value of the property $8,200; and it states that all those debts being justly due, and his property not more than sufficient to pay them, and believing that if the plaintiff recovered his debt, for which he was bound as a surety only, and raised the same out of his property, some of those debts contracted on his own account would go unpaid, he mentioned his fears to Abram W. Venable, his principal creditor and surety, and his desire to secure himself and his creditors; and thereupon, both at the instance of Venable and of his own accord, he executed the deed of 29 July, 1840, for the purpose of preferring those to whom he was justly indebted on his own account as

aforesaid, and for that purpose only; that some of the creditors mentioned therein assented to the deed at the time and that all the others did so immediately afterwards, and that there was no understanding or secret trust whereby any benefit whatever was intended to be reserved to himself personally or variant from the contents expressed in the deed, which he avers was in all respects *bona fide*. The answer of Venable corresponds with that of T. B. Littlejohn as to the debt of Brown and the responsibility of this defendant and Downey as sureties in the official bond, referring to the answer of Littlejohn for the particulars of his official default, of which the sureties have no personal knowledge. Venable states that the deed was delivered to him for the trustee, and that on the same day he delivered it to Hicks, the trustee, who accepted it. He likewise insists on the deed made to Thomas B. Lewis for his indemnity as the surety for the debt to John R. Hicks.

The answer of Downey states that Venable and Littlejohn informed him of the intention to execute the deed of 29 July, 1840, and he assented thereto, and denies any fraudulent
(503) purpose therein, and in all other respects concurs with that part of Venable's answer which respects Littlejohn's official defaults. The trustees, Thomas B. Lewis and Hailes state their respective executions of the several deeds to them and their belief that the debts mentioned in them were just and the deeds *bona fide* and not intended to defraud the plaintiff or any other person. Replication was taken to the answers, and the cause set down for hearing without any proofs having been taken on either side, and transferred to this Court for hearing.

Badger and *W. H. Haywood* for plaintiff.
Iredell for defendants.

RUFFIN, C. J. The admitted facts that the debts for which J. B. Littlejohn, John Nuttall and Willis Lewis were respectively sureties for T. B. Littlejohn have been paid many years past require the Court to put all the deeds of 30 October, 1827, out of the plaintiff's way, except so far as one of those to John Nuttall may be supported as a security for the balance that may be due from T. B. Littlejohn to his brother on their partnership dealings. So the deed to Thomas B. Lewis, dated 29 February, 1836, for the indemnity of Venable as surety for the debt to John R. Hicks, and not registered until 18 May, 1840, must likewise be declared not to be an effectual encumbrance on the slaves mentioned therein, for the want of due registration. The act of 1820 expressly enacts that a deed of trust not proved and

registered within six months shall, as against a creditor, be held utterly void, and the circumstance of the registration before the plaintiff got his judgment and execution makes no difference, as notice of a deed of trust not duly registered raises no equity against a creditor. *Davidson v. Cowan,* 16 N. C., 470. The case is, therefore, narrowed down to the questions that can be made upon the deed of 30 October, 1827, as a security for the partnership balances, and the deed of 29 July, 1840, (504) as a valid security for the debts mentioned in it. As far as the object of the bill is to have those deeds declared void as having been made with a fraudulent intent towards creditors, the Court must hold the bill unsupported. As to the first deed, it is to be remarked that the circumstance of the security being given by one brother to another for an unknown balance of accounts, represented to be large, as the parties believed, and the further circumstance that there was no attempt to settle and ascertain the balance for so long a period as thirteen years, during which time the alleged debtor continued to enjoy the estates conveyed, certainly furnished grounds for suspicion of the fairness of the claim and of the deed made to secure it, and well justified the plaintiff, as a creditor likely to be defeated by the deed, to call the parties to an explanation upon their oaths. But those circumstances are not absolutely conclusive of fraud, either as evidence that there was no debt owing or that the parties intended to deceive the world by the possession being so long with the debtor. For a creditor *may* honestly obtain a security for a debt, known or believed to exist, though unliquidated, and a preference thus gained by one creditor over another for what may turn out to be due is not unfair. So mere delay, either in settling or collecting the debt, will not of itself impeach the deed, since forbearance *may arise* from many motives besides that of giving a false credit to a debtor, and in many instances may be attributed to the most benevolent and praiseworthy motives. In the case before us the answers of both the parties, T. B. Littlejohn and J. B. Littlejohn, satisfactorily and fully repel, if to be credited, all those imputations of fraud. They establish, although the debt is not specified in the deed by its amount, that it in fact existed, and exceeded the value of all the property conveyed to secure it. They account for the debt not being ascertained at the time by the state of the business of the firms, and for the subsequent procrastination by the separation of the parties by distant residences, by their fraternal confidence and the natural unwillingness of the (505) creditor to distress the debtor. It furthermore is seen that all the property conveyed (except the slave, who died long

ago) was land, of which the possession merely is not evidence of title, and of the conveyance of which notice was given to creditors by due registration. Those statements of the answers must be received as true by the Court, as the case stands, for in all respects they are directly responsive to the allegations of the bill and are in no respect contradicted, even by a single witness. Upon the face of the pleadings, therefore, this deed cannot be declared to have been made with a fraudulent intent to deceive creditors nor to have been kept on foot for that purpose after the payment of all the debts intended to be secured thereby, but it must be declared to be still a valid security for such sum as may be really owing from T. B. Littlejohn to his brother on their copartnerships. With respect to the last deed, dated 29 July, 1840, the Court is led to the like conclusion, much for reasons of the same kind. The answers, being responsive to charges in the bill, are evidence for the defendants, while uncontradicted. They prove the justice of all the debts mentioned in the deed. In truth, the bill does not particularly question any one of them, except those to Brown and the alleged misapplications of money in the master's office. As to each of them the answer of Thomas B. Littlejohn is precise and positive. So is that of Venable in respect to the debt to Brown, with the collection of which he was charged, and for the security of which, with the other debts, he was active in getting the deed in question executed. No one but Littlejohn himself could answer directly to the conversion of the funds in his office, either as to the time or the amount, and he has given an explicit and positive statement as to both, in which the sureties, Venable and Downey, could only concur to the extent of their belief, and to that extent they do fully concur. Assuming the defaults to have occurred, and the other debts to exist, as being thus established, the Court does not perceive any sufficient ground for impeaching the deed.

There were, however, some objections stated in the (506) argument which it is proper to notice.

It was said that as a provision for an indemnity to the sureties in the official bond, it was against good morals and public policy, especially as it includes future as well as past breaches of duty. But we think there is no force in the argument. We see no reason why a person who is entering into a bond as surety for the faithful performance by an officer of his public duties, may not provide in any manner he can for his counter-security. The principal contracts at the time to repay to the surety any money the latter may be compelled to pay for him, and, therefore, he may superadd thereto any further or collateral security. If this may be done when the obligation

is contracted, it must be competent to do so whenever the party apprehends danger, and certainly when an acknowledged default has happened.

It was likewise said that as some of the property conveyed, as the crops, were perishable, and consumed in the use, and as the possession was to be retained by the debtor, the deed is thereby shown to be fraudulent, as appearing to be made for the ease or favor of the debtor.

If it so appeared we should not hesitate to pronounce the deed fraudulent. But the intent to secure any benefit, ease or favor to the debtor is peremptorily denied, and we do not think those provisions in the deed, when considered with other parts of it, do establish such an intent. The possession was to be kept by Littlejohn no longer than the property was required for the purpose of a sale, and as to the period or terms of making the sale he has no voice, but they are to be determined by the creditors at their will.

It is true that some of the crops might be consumed before the sale; but even that might be for the benefit of the creditors, as keeping the property together until the crops growing when the deed was made, in July, would mature and be gathered, and have had in view rather the convenience of the trustee than favor to the debtor. We need not, however, further consider the point at present, since our views are fully ex- (507) pressed on it in *Moore v. Collins*, 14 N. C., 137, and have been more recently repeated in *Cannon v. Peebles*, 24 N. C., 449. If the sale had been delayed so long, or if the proportion, in point of value, of the consumable articles over those of a different character was such as to induce the Court to believe that it was the object or an object of the deed to provide for Littlejohn permanently or temporarily, and not for his creditors, it would be the duty of the Court to pronounce the deed void. But it is seldom practicable, and seldom prudent, to have an immediate sale under such assignments; and until a sale, if to be in a reasonable time, as fixed in the deed or to be fixed by the trustee or creditors, it is more convenient to all parties that the possession should not be changed. We must presume the creditors will be governed by their own interest and not Littlejohn's ease, until the contrary appears, and especially when any view to his benefit is so positively denied. The Court must therefore declare that the plaintiff has not established the allegation in his bill, that the deed of 29 July, 1840, to John R. Hicks was fraudulent, and, consequently, it is supported as a valid deed and security for such sums and debts as may remain due to the several creditors or sureties therein provided for. But should the plaintiff

think proper to proceed no further in his suit, and to dismiss his bill upon the declarations thus made, he may do so without costs, for in the opinion of the Court he had a right, under the circumstances, to call for a discovery upon most of the points on which he asked it. The case, however, is one on which the plaintiff, supposing those two deeds to be fair, and subsisting securities, has a right to relief by having the encumbrances cleared from the property, and to that end to have such inquiries and accounts taken as will ascertain the sums really due on the claims provided for, so that they may be raised out of the property, if sufficient, and the plaintiff get satisfaction out of the surplus if any. Therefore, the plaintiff is allowed to have such inquiries upon any or all of those debts as he may
(508) choose, but if they should result against him they will probably be made at his cost.

The plaintiff declined to have the proposed inquiries made.

PER CURIAM. Bill dismissed, but without costs.

Cited: Hardy v. Skinner, 31 N. C., 194; *Moore v. Ragland,* 74 N. C., 346.

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(509)

ALFRED W. TOMLINSON v. ABSALOM B. BLACKBURN ET AL.

1. A man who buys property at an execution sale buys it only subject to the equitable claims then existing on it.

2. Where A had contracted by covenant under seal to buy a tract of land in fee from B. in which B had only a life estate at the utmost, his wife being entitled to the fee, and under an execution C bought all B's interest before he and his wife conveyed to A: *Held,* that A, although he had given notice to C of his contract with B, could not recover the land from C without paying him at least the value of B's life estate, although A after such sale by execution had paid B all he had contracted to pay.

THIS was an appeal from an interlocutory order of the Court of Equity of IREDELL, at Fall Term, 1842, his Honor, *Nash, J.,* presiding, refusing the motion to dissolve the injunction, which theretofore had been obtained in the case, and directing the injunction to stand over until the final hearing of the cause.

The facts disclosed by the bill and answers are stated in the opinion delivered in this Court.

Caldwell for plaintiff.

J. H. Bryan and *Boyden* for defendants.

TOMLINSON *v.* BLACKBURN.

GASTON, J. The substance of the plaintiff's bill is that on 4 January, 1841, he contracted with one Thomas J. Lazenby for the purchase of a tract of land, whereof the said Lazenby's wife, by whom the said Thomas had issue, was seized in fee; that thereupon Lazenby executed to him a bond in the (510) penal sum of $1,050, with condition to make a good and lawful title for the land as early as the same could be done, and *he* executed unto the said Lazenby *his* bond for the sum of $375, payable in good negotiable notes, and also another bond for $150, payable in a four-horse wagon, amounting together to $525, the stipulated price of the land. The plaintiff further states that on 17 February following a deed was executed in the name of Lazenby and wife, but which, because of some error or informality in the commission for taking her examination and in the return of the commission, operated in law as the deed of Lazenby *only*, whereby the said Lazenby and wife were declared to bargain and sell the said land to the plaintiff and his heirs forever, and thereupon the plaintiff entered into the possession thereof. The bill then states that at the February Term, 1841, of Iredell County Court, which was before the execution of the said conveyance, a judgment was obtained against said Lazenby; that an execution *tested* of that term issued to the sheriff and was by him levied upon said land; that a sale was made by the sheriff, notwithstanding the plaintiff gave notice of his equitable interest in the said land; that the defendants bought the land at said sale, and one of them (Blackburn) hath taken a conveyance from the sheriff and has since brought an action of ejectment to turn the plaintiff out of possession. The bill avers that the plaintiff, believing himself to be unquestionably the owner in equity of the land aforesaid, and supposing himself bound by the contract with Lazenby to pay the amount of his bonds to Lazenby, hath, *since* the sale as aforesaid by the sheriff, paid up the whole thereof, except about the sum of $25, and the deed previously executed has been so acknowledged by Lazenby's wife as to render the same effectual as her conveyance. In addition to this, which we deem the substance of the bill, there are statements of conversations between the plaintiff and the defendants jointly or severally, and conferences between the defendants, from which may be inferred a charge that the defendants had combined to run up the land at the sheriff's sale to a high price and to get the plaintiff to take it at that price as bid (511) off for him. The answer of the defendant Tomlinson disclaims his having had any connection with the other defendant in the purchase at the sheriff's sale or having any interest whatever in the land. That of the defendant Blackburn de-

clares that he did bid off, as the agent of the plaintiff; that he has offered to the plaintiff the benefit of the said bid, which the plaintiff hath refused; that he hath accordingly taken a conveyance from the sheriff and brought his ejectment because of his refusal, and he yet proposes to surrender his legal title to the plaintiff on being repaid the price he gave for the land and his costs. Both the defendants give their explanations of the conversations and conferences stated in the bill, repelling the charges of combination. Upon the coming in of these answers it was moved by the defendants to dissolve the injunction which had been granted upon the filing of the bill against the proceeding in the action of ejectment instituted by Blackburn. This motion was refused, and from the interlocutory order keeping up the injunction the defendants were permitted to appeal to this Court.

It seems to us that there is no equity in the cause made by the bill to warrant the injunction. At the *teste* of the execution under which Blackburn bought, Lazenby, the debtor, was seized of a legal estate as tenant by the curtesy initiate, for the term of his life, and this estate was liable to sale under that execution. If Blackburn purchased for himself, he acquired under the sheriff's conveyance that legal estate—subject, of course, to all the equities in relation thereto which bound Lazenby. *Dudley v. Cole,* 21 N. C., 429; *Freeman v. Hill, ib.,* 389. The plaintiff, who had then paid no part of the purchase money under his contract, had no right to demand a conveyance of this legal estate from Blackburn without paying to Blackburn either what it cost him or a ratable part of the price which the plaintiff had stipulated to give for the fee-simple interest. *Linch v. Gibson,* 4 N. C., 676; *Forth v. Duke of Norfolk,* 4 Mad., 507 (note).

(512) Blackburn, not Lazenby, was then the owner of the life estate, and Blackburn, not Lazenby, was equitably entitled to the price thereof, if the plaintiff chose to insist on the purchase. The plaintiff had his remedy against Lazenby on the bond to make a good title, or he might have rescinded the contract altogether and had his covenants delivered up. His voluntary act, after it had been ascertained that Lazenby could not convey the freehold because it had been assigned to Blackburn, in paying to Lazenby the entire price of the tract may have been done, as he alleges, under the supposition that Lazenby had a right to receive it. But this was a mistake, and he had no equity to throw the loss thereby sustained upon Blackburn, who in no manner caused the mistake. If, on the other hand, he chooses to regard Blackburn as having bought Lazenby's legal estate *for him,* nothing is as yet satisfactorily disclosed which

entitles him to an assignment of that estate upon more favorable terms than those which Blackburn agrees to accept. It is the opinion of this Court that the injunction ought to have been dissolved, and this opinion must be certified to the Court of Equity for the county of Iredell. The plaintiff must pay the costs of the appeal.

PER CURIAM. Ordered accordingly.

Overruled: Tally v. Reed, 74 N. C., 464, 469.

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(513)

JOHN McLURE v. ANTHONY BENCENI ET AL.

1. Where a creditor obtains a judgment in another State against a debtor residing there, and the property of the debtor is removed to this State, a creditor who attaches it in this State, without fraud and for a *bona fide* debt, shall hold it against such judgment creditor.

2. A creditor who has obtained a judgment at law in another State cannot receive the extraordinary aid of a court of equity in this State to enforce such judgment.

3. Courts of equity in this State will only lend their assistance in enforcing the satisfaction of judgments at law obtained in their own State.

THIS case was brought up by appeals of both the plaintiff and some of the defendants from interlocutory orders made at the Spring Term, 1843, of ROWAN Court of Equity, his Honor, *Nash, J.*, presiding. The following is a summary of the case:

The bill was filed on 8 January, 1843, and states that on 3d that month the plaintiff recovered a judgment in the Court of Common Pleas for Union District, in South Carolina, against Daniel Thomas the elder, for a debt of $890.74, besides costs of suit; that the plaintiff was a citizen of South Carolina, as are all the parties defendant, except Benceni; that at the time of rendering the judgment D. Thomas, the debtor, was in possession of three slaves, which were liable to be sold on execution for the debt and were of value sufficient to satisfy it, and that he had no other property in South Carolina out of which the debt could be raised. The bill further states that with the view of defeating the plaintiff of his debt by withdrawing those negroes from the reach of an execution on the plaintiff's judgment and by covering them with a pretended prior encumbrance in this State, Daniel Thomas the elder, Daniel Thomas

(514) the younger, James Thomas and Amanda Thomas (which three last-named persons are the children of Daniel the elder) and A. L. Hall, by concert among themselves and with Benceni, who resides in Salisbury, in North Carolina, secretly removed the slaves from South Carolina into Rowan County, and that Benceni immediately levied an original attachment on them as the property of Daniel Thomas the elder for a large debt alleged therein to be due from him to Benceni. The bill charges that the pretended debt to Benceni is not a true one, but altogether fictitious, and raised by the joint contrivance of the defendants for the sole purpose of baffling the plaintiff and hindering him of his debt. It also further states that the defendants, Daniel the younger, James and Amanda, set up a claim to the slaves under some pretended conveyance from their said father, sent them into North Carolina by the defendant Hall, and authorized Benceni to have them seized and held by him under their claim, also, and for their benefit; and thereupon the bill charges that the pretended conveyance from Daniel the elder to his children was voluntary and made without any valuable consideration, and was made many years past, when the children were in tender infancy, and was not proved or registered or made public; and that the father thereafter continued in the possession of the slaves, using them as his own up to the time of their removal into this State, a period of twelve years; and so, that the same was fraudulent and void as against persons giving credit to the father. The bill then charges several matters tending to impeach the justice of Benceni's demand on which he issued the attachment, and it prays a discovery from all the parties, that an account may be taken between Daniel the elder and Benceni, and, if any balance be found in favor of the latter, that it be paid, and, beyond such sum, that the negroes be condemned to the satisfaction of the plaintiff's debt.

The parties severally answered, and all of them denied any concert between Benceni and any others of the defendants. The answers of the children of Daniel the elder state that the (515) negroes did not belong to their father, but were their property, under a written conveyance made by their father in September, 1829. They state that the conveyance was not fraudulent nor in any manner intended to hinder or delay their father's creditors, but was *bona fide* intended as a reasonable provision for these defendants. They say that their father had then an ample estate, exceeding by the sum of about $10,000 all the debts he owed, and a number of other children; and that he, about that time, advanced some of his other children, who had come of full age, and, with a view of placing on equal foot-

ing with those children these defendants also, who were deaf and dumb, he gave to them the slaves in question, which were not of greater value than the advancement their father might necessarily make to them. They admit that the deed had not been recorded, and give as a reason therefor that another person, unadvisedly and without their knowledge, canceled it by tearing off the donor's name; but they say that it was a matter of notoriety. And they insist that the conveyance is, under those circumstances, valid in the law of South Carolina, where all the parties and the slaves resided. They deny that they removed the slaves from South Carolina by concert with or without the knowledge of their father; but they admit that they delivered them to the defendant Hall as their agent to bring them into this State, with the view of avoiding their seizure by the plaintiff and a tedious and expensive litigation with him. They say likewise that they have no knowledge of their father's debt to Benceni; but they deny that the negroes are liable therefor, or that they consented that Benceni should levy on or take them in any way, or suspected that he intended to do so until they heard that he had done it.

The answer of Hall disclaims any interest or claim in himself, and states that he was employed merely as an agent by Daniel Thomas the younger, for himself, his brother and sister, to bring the negroes into this State for them.

The answer of Benceni denies any concert between himself and any of the other parties, and states that he had no suspicion that the slaves were to be removed until he saw (516) them in Salisbury; that he then understood from Hall why they had been brought there, and believing that in law they were the property of Daniel Thomas the elder, and liable for his debts, he took out an attachment for a debt that person owed him and had the negroes attached and taken into the custody of the sheriff. The answer then sets forth the account on which the attachment was founded, on which a balance of $1,107.96½ appears to be due to this defendant, and, after explaining the matters charged in the bill as impeaching his demand, the answer states that balance to be justly due.

On the filing of the bill an order of sequestration was made and a writ issued, under which the sheriff held the negroes. On the coming in of the answers and on the motions of the defendants respectively to discharge that order and to set the negroes at large, the court granted the motion on behalf of Benceni and with costs, and refused the motion on the part of the other defendants, but continued the order until the hearing. And

thereupon the plaintiff appealed from the former part of the order in favor of Benceni, and the children of Daniel Thomas the elder appealed from the residue of the decree.

Alexander for plaintiff.
Caldwell and *Boyden* for defendants.

RUFFIN, C. J. The question raised by these appeals is whether the plaintiff has such an interest in the slaves in controversy or has stated such a case as authorizes the Court to interfere with the possession of them by the defendants, or to interrupt legal proceedings between the defendants themselves for the purpose respectively of asserting a title to the slaves in some of the defendants, or of asserting by another a right to satisfaction out of them for the debt of yet another of the defendants, by
(517) laying hold of the property and bringing it into this Court.

As between the plaintiff and Benceni separately there would seem clearly to be no ground for the interposition of the Court of Equity. They both claim as creditors of the same person, each insisting that the negroes are the property of that person and liable for his debts. Even if it were true that the negroes were brought into this State at the instance of Benceni in order that he might gain a preference over the plaintiff by attaching here before the other could seize in South Carolina, there would be nothing for the cognizance of this Court. It would be simply a case of legal priority obtained by a vigilant creditor, against which equity could not relieve at the instance of a less active creditor who had no specific title or lien on this property. But all agency on the part of Benceni in getting the negroes here is denied, and it seems he owes his priority to good luck rather than any foresight of his own. The plaintiff, therefore, has nothing but his own want of diligence to find fault with upon this part of the case. How far the Court of Equity might go in relieving at the instance of a creditor by judgment and execution against an attachment, upon the ground that the debt therein demanded was not real and that the process was sued out and kept on foot collusively for the purpose of covering the property and withdrawing it from the reach of just creditors, we do not think it necessary to say definitely. Probably the nature of the debt and the fraudulent purpose might be inquired into, in the same manner and for the same purpose as if the proofs, instead of being an attachment, were an execution on a fraudulent judgment. But in this case the debt appears to be due to Benceni in the first place, and, in the next, all concert between that party

and all the others is denied; and it is evident that, whether the debt be owing or not, Benceni really claims it as against his alleged debtor, and that his attachment is a *bona fide* litigation to obtain satisfaction out of this property as against all the other parties, plaintiff and defendants. There is then no principle on which the jurisdiction can be changed or an impediment thrown in the way of this defendant in prosecuting (518) his legal remedy and keeping all the advantages which he thereby has at law. Upon this ground alone, therefore, the Court would hold that there was no error in so much of the decree as the plaintiff appealed from, and order it to stand affirmed, with costs to Benceni. But, in truth, the cause, as between these parties, need not be determined on those particular circumstances, but falls within a general principle, on which the whole case must be decided against the plaintiff, as we think.

The general principle alluded to is this: that a creditor, by judgment in another State against a citizen of the same State, cannot come into this State for satisfaction out of the debtor's property situated here. We do not take notice of claim set up to the negroes by the children under the father's gift, because, assuming them to belong to the father, the plaintiff cannot reach them in this way. The proceeding is *primæ impressionis*. We are not informed of anything that can be made to serve as a precedent, though, doubtless, the case has occurred in very many instances where the debtor had no property in the State in which the judgment was rendered, but it was removed into or before was situate in another State; and attempts like the present would have been often made if they could have been carried through. It is true, the judgment of the court of one State is deemed valid and conclusive in the courts of a sister State. What was done under a judgment in the State in which it was rendered is sustained by them, if brought into litigation in the courts of another State. So the latter courts will aid in its execution when necessary to render it effectual. But they give such aid in its execution by receiving it as evidence of a debt, or of property, when it is made the direct subject of action or of defense in those courts, and in no other manner. At least, we are not aware of any case in which the court of one State has undertaken to give an extraordinary remedy to a creditor, by judgment in another State, merely on the ground that the laws of his own State did not furnish an effectual remedy. If such be the fact, he must look to his own domestic authorities to alter (519) and amend their laws, and not to the tribunals of another State to supply that want of an effectual remedy. But every country must be presumed a competent judge of the justice due be-

tween its own citizens, and to provide effectual means for administering it. Therefore, if these negroes be the property of Daniel Thomas the elder, and were subject to the plaintiff's satisfaction, it cannot be supposed that the law of South Carolina will not, in some manner, compel him to assign them to the plaintiff, or to some officer of the law to dispose of and apply the proceeds for the benefit of the plaintiff and his other creditors. So if the children of Thomas have done the plaintiff a wrong in removing the negroes, it is a wrong made so by the laws of South Carolina and perpetrated there by her own citizens, who must be taken to be duly amenable to her laws. Hence there is no reason for the interference of our courts between persons all whom are alien to our laws and tribunals and have access to their native institutions. It may be here observed that in this spirit is our attachment law conceived, which gives not that remedy against a person residing in another government to another person also residing in another government. We believe that a similar provision is found in the codes of all the States which give the process of attachment, and it proceeds on the idea that it is not incumbent upon one State to administer justice between citizens and inhabitants of other States, but recourse may be had to the country having jurisdiction over the persons. A judgment in another State cannot be enforced here by process of execution issued by our courts in the first instance, for the defendant has a right to contest the fact whether it be a judgment in another State or not. Therefore, it must be made the subject of an action here, and the demand become due by a judgment of our courts, before the party can have execution here. We entertain that jurisdiction because the party has come within the State, and we execute against him our own judgment. But as we cannot execute a judgment abroad by process here at law, so it seems necessarily to follow that a court of equity
(520) here ought not to condemn property that it can lay hold of for the satisfaction of such a judgment. Equity is ancillary to the law in aiding creditors by judgment and execution in our own courts, where it is necessary for their satisfaction. But then the persons and property are within the State, and no jurisdiction is arrogated over persons or things abroad. The interposition of the court is here invoked upon the same plea of necessity. But it is not a similar necessity, nor one that can be admitted to exist. The supposed necessity consists in a defect imputed to the law of the country to which all the parties belong in not providing against the power of a debtor to put his property out of the way of his creditor, or in not compelling him to produce it or make it subject to the debt,

or in not giving just redress against third persons who have aided the debtor in such his wrongful acts. It may be that the law of South Carolina is lame in all these particulars, and that help from some other quarter is necessary. But we cannot believe that by process against the body or some other means the creditor cannot have due redress in his own State. If, however, it should be otherwise, the necessity of the plaintiff's case calls for legislative assistance at home, and cannot instigate the judicial tribunals of this State to enforce a judgment not rendered here and against a person not resident within our jurisdiction.

Our opinion, therefore, is that so much of the decree as continued the order of sequestration against any of the defendants was erroneous, and ought to be reversed, with costs to the defendants. All which must be certified to the Court of Equity.

PER CURIAM. Ordered accordingly.

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(521)

WILLIAM DALTON AND OTHERS v. HAMILTON SCALES AND OTHERS.

Two brothers inherited land from their father, which was divided between them. They were also equally entitled to the reversion in another tract of land which had been allotted to their father's widow, Charlotte Detheridge, as her dower, and on which she resided. One of the brothers died intestate and without issue, leaving the other brother his heir at law. This brother afterwards died, leaving a will. By one clause of this will he devises as follows: "Having understood that it is the prevailing opinion among a number of people that I am the proper heir to the estate of my brother, Philemon Detheridge, deceased, and not knowing the law in such cases, and being desirous that my sister-in-law, Elizabeth Detheridge, should heir the same, and to prevent disputes that might arise concerning said estate, I give and bequeath to my said sister-in-law, Elizabeth Detheridge, widow of my brother Philemon, deceased, all my right, title and interest to that estate and every part thereof; and further, it is my will and desire that the above clause should be distinctly understood that it is my will and desire that my said sister-in-law, Elizabeth Detheridge, should heir that estate, and every part thereof, real and personal, notwithstanding the laws of my country might or would make me the proper heir to the same." In a subsequent part of the will the testator thus devises: "And, furthermore, it is my will and desire that my executor sell, at the death of Charlotte Detheridge, my lot or tract of land whereon she now lives, and whenever to the amount of $600 in the hands of the executor, I give and bequeath that much ($600) to I. A. J., T. H. J., G. D. J., J. J., C. T. J. and F. G. J., children of my uncle J. J., to be equally divided between them, giving each one hun-

dred dollars: and whatever money is then remaining in the hands of my executor, my will and desire is that it be equally divided between the children first named, Patsy Detheridge, Sally Dalton, William Dalton, Elizabeth Dalton and James Dalton, giving Patsy Detheridge one-sixth part": *Held*, that the moiety of the dower of land which had belonged to the deceased brother did not pass under the latter, but was included and devised in the former of these clauses.

THIS bill was filed in ROCKINGHAM Court of Equity, (522) and answers having been put in, the cause was set for hearing upon the bill and answers, and at Spring Term, 1843, of that court was ordered, by consent of parties, to be sent to the Supreme Court for hearing. The facts of the case were these:

George Detheridge, formerly of the county of Rockingham, died intestate many years since, seized of a large real estate, which descended to his two sons, Robert and Philemon, as tenants in common. Partition was made between them of all this estate, except a tract of 250 acres, which was allotted to Charlotte, the widow of George D. Detheridge, as her dower, and remained undivided. Philemon died intestate and without any lineal descendant, and Robert was his only heir at law. Robert died about 1817, and upon the construction of his will depends the decision of the controversy before us. In a part of this will the testator thus expresses himself: "Having understood that it is the prevailing opinion among a number of people that I am the proper heir to the estate of my brother, Philemon Detheridge, deceased, and not knowing the law in such cases, and being desirous that my sister-in-law, Elizabeth Detheridge, should have the same, and to prevent disputes that might arise concerning said estate, I give and bequeath unto my said sister-in-law, Elizabeth Detheridge, widow of my brother Philemon, deceased, all my right, title and interest to that estate, and every part thereof; and further, it is my will and desire that the above clause should be distinctly understood that it is my will and desire that my said sister-in-law, Elizabeth Detheridge, should heir that estate, and every part thereof, real and personal, notwithstanding the laws of my country might or would make me the proper heir to the same." In a subsequent part of the will the testator thus expresses himself: "And, furthermore, it is my will and desire that my executor sell, at the death of Charlotte Detheridge, my lot or tract of land whereon she now lives, and whenever to the amount of $600 in the hands of the executor, I give and bequeath that much ($600) to James A. Joyce, Thomas H. Joyce, George D. Joyce, Joseph Joyce, Char-

lotte T. Joyce and Felix G. Joyce, children of my uncle (523) James Joyce, to be equally divided between them, giving each $100; and whatever money is then remaining in the hands of my executor, my will and desire is that it be equally divided between the children first named, to wit, Patsy Detheridge, Sally Dalton, Robert Dalton, William Dalton, Elizabeth Dalton and James Dalton, giving Patsy Detheridge one-sixth part."

Charlotte Detheridge having died, the plaintiffs, who are entitled under the last-mentioned clause of the will of Robert Detheridge to the ultimate proceeds of "the lot" or tract of land thereby directed to be sold, filed this bill against the defendants, who are the heirs at law of Elizabeth Detheridge, the widow of Philemon Detheridge, claiming that the last-mentioned clause of the will of Robert Detheridge applies to and embraces within its operation the whole of the tract whereon the testator's stepmother then resided, and therefore *pro tanto* repeals and makes void the disposition unto Elizabeth Detheridge of the undivided half thereof, which had belonged to her husband, the testator's brother Philemon, or, if this be not the effect of such conflict between the two clauses, then the latter so modifies the former as to permit the said Elizabeth to take thereunder but an individual part in the moiety, which had been of her husband, in common with the plaintiffs. The defendants insist in their answer that upon the whole will it is apparent that the testator directed the sale of that moiety only of the tract which he held in common with his brother Philemon, and that the defendants are entitled exclusively to the other moiety under the gift to their mother of all the interest of the testator in the real estate of his said brother.

Morehead for plaintiffs.
No counsel for defendants.

GASTON, J. In the interpretation of wills it is the clear duty of the Court to give effect to each and every part of the instrument, and, if it be possible, to reconcile all seeming (524) repugnances between its different provisions. As the instrument is an entire act, intended to operate altogether and at the same moment, it is not to be admitted, unless the conclusion be irresistible, that the testator had two inconsistent intents, and has left a declaration of both these inconsistent intents as constituting a law for the disposition of his property. Now, nothing can be more explicit than the language of the testator in the gift to his brother's widow. Doubting, indeed, whether he was the heir of the deceased brother or not, and therefore cautiously

abstaining from calling any part of that property *his*, but describing it simply as "the estate of his brother Philemon," he declares, nevertheless, again and again, that if he be the heir to the estate of his brother, then he gives all his right and interest therein, and every part thereof, to his brother's widow, so that she shall heir the same and every part thereof, real and personal. When the testator subsequently proceeds to give directions with respect to the disposal of what he calls "*my* lot or tract of land whereon Charlotte Detheridge lives," it is impossible to suppose that he had forgotten the gift made to his brother's widow of his brother's moiety of that land, so far as he had or could pretend any right or interest therein, and it is exceedingly improbable that he meant to recall it either in whole or in part. Now, the two dispositions are perfectly reconciled by understanding the testator, when using the phrase "*my* lot or tract of land," as designating that which was *his* certainly as contradistinguished from that moiety or lot which he had already disposed of "as his *brother's* estate," and in respect to which he doubted whether it was his or not. The bill, we think, must be dismissed with costs.

PER CURIAM. Decreed accordingly.

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(525)

JOSEPH M. MEANS ET AL. v. ALEXANDER HOGAN ET AL.

1. Where the children of a person who had died intestate appoint an attorney to collect moneys which were due to their father in his lifetime, and he collects them accordingly, such attorney cannot, when he is called upon to account for what he has received, object that it belonged in law to the administrator of the deceased father.

2. Receiving the money as belonging to his principals, he cannot afterwards deny their right to it.

THIS cause, having been set for hearing in RANDOLPH Court of Equity, upon the bill, answer and proofs, was, at Spring Term, 1843, of that court, ordered by consent of parties to be transmitted to the Supreme Court to be heard.

Upon the hearing the following appeared to be the facts of the case:

In 1794 Thomas Lytle, of Randolph County, died, leaving some personal property and two pieces of land in that county, which by his will he bequeathed and devised to his wife, Catharine, for life, and after her death upon certain limitations over, which failed; so that there was an intestacy as to the remainder

after the death of the wife. The testator appointed several executors, of whom William Bell was the survivor, and he died in 1821, having made a will and appointed Robert Walker and William Welborn the executors. Catharine, the widow, died in 1812, intestate and without issue. Upon her death, Bell, the executor, took into his possession the slaves belonging to his testator and held them during his life, and at his death his executors, Walker and Welborn, took them. The testator, Thomas Lytle, left no issue, so that his personal estate undisposed of was distributable, one-third part thereof to his wife and the other two-thirds part amongst his next of kin, who were (526) his brother, Henry Lytle, his four half-brothers, and his half-sister Jane, intermarried with James Montgomery. The real estate also descended to the brother Henry, or to him and the half-brothers equally. John Means, one of the half-brothers above mentioned, died intestate in Pennsylvania, leaving six children his heirs at law and next of kin, namely, Nathan Means, James Means, John Means, Nancy Means and Joseph M. Means, and Jane, intermarried with Nathan Woods. On 19 January, 1829, Joseph M. Means and Nathan Woods and his wife, Jane, then residing in Pennsylvania, executed a letter of attorney to William Hogan, of Randolph County, in this State, authorizing him by all lawful means to ask, demand, sue for and receive in their names, or in his own to their use, such share and shares of the said estate, real and personal, that had belonged to the said Thomas Lytle as they, the said Joseph M. and Woods and his wife, were entitled to as two of the children of the said John Means, deceased, who was a half-brother of the testator, Lytle. And the present bill is filed by those persons, Joseph M. Means and Nathan Woods and his wife, Jane, against the executors of the will of said Hogan, who has since died, praying a discovery of the sums and estates to which the plaintiffs are respectively entitled or which came to the hands of said William Hogan as the attorney of the plaintiffs. The bill alleges that in 1823 a bill was filed in the Court of Equity by certain persons who were the children of the testator's brother Henry Lytle (then deceased) against Walker and Welborn, the executors of Bell, and against the original testator's half-brothers and sister, Benjamin, Adam and Andrew Means, and James Montgomery and his wife, in which an account and distribution of the said personal estate was sought, and under which the same was decreed. The plaintiffs state that they were not parties to the suit, but that such proceedings were therein had that a large number of slaves belonging to the estate were ordered to be sold by the master for distribution, and it was referred to the master to take

an account of the estate and to answer and report the
(527) persons entitled to the same and the proportions to which they might be entitled, and that in that manner the share of their father, John Means, deceased, in the personal estate was ascertained, and the said Hogan reported and declared in October, 1831, to be entitled thereto, as a purchaser thereof from the children and next of kin before mentioned of the said John Means, deceased, as also to the shares of Adam Means, deceased, and Jane Montgomery, deceased, under purchases from their respective next of kin. The bill further charges that it is not true that the plaintiffs made a sale of their share or any part of the estate to said Hogan, although it may be true that their brothers did, and also others who had an interest in the property; and they aver that Hogan, in respect to them, acted as agent only, for a compensation that might be reasonable. It also charges that at the sale of the negroes by the master Hogan purchased most of them at an undervalue, upon a representation that he was buying for the owners, and thereby kept off other bidders, and that in that manner he made large profits by a resale shortly afterwards, of which they claim the benefit. The bill further states that in April, 1830, a petition was exhibited in the Court of Equity by the said William Hogan and others, in which it was stated that the said two tracts of land which descended from the testator, Thomas Lytle, vested in his said brother, Henry Lytle, and his four half-brothers aforesaid, and that (amongst others) the children of the said John Means, deceased (including the plaintiffs), had conveyed their shares in the said lands to the said Hogan, being one equal undivided fifth part thereof, and praying that the land might be sold for the purpose of partition and the proceeds divided as therein set forth; and that upon the petition it was decreed, in April, 1831, that the master should sell the said land, and at the sale the said Hogan became the purchaser, and was allowed to retain out of the purchase money the share thereof belonging to the plaintiffs, who submit to affirm the sale and receive the purchase money and interest. The defendants put in their answer, and therein
admit the letter of attorney made to their testator by the
(528) plaintiffs, and also the several suits and other proceedings stated in the bill, and refer for more certainty to the original proceedings themselves. They state their belief that their testator did make a contract with the plaintiffs for the purchase of their shares of the estates, but they admit that they have no written or other evidence of such contract. They, however, insist on the reports and the form of the decrees in those suits, as establishing their testator's rights, and urge that, if

the plaintiffs will not be bound by them, as not having been parties thereto, they cannot take advantage thereof, but may litigate now as if no such previous litigation had existed. The proofs are not voluminous, except so far as they consist of the proceedings in the suits referred to in the pleadings, the originals of which, by the consent of the parties, have been laid before us. By them it appears that William Hogan claimed to represent in those causes the brothers and sister of the plaintiffs, and eight or ten other claimants, under powers of attorney from them respectively, in each of which, except that from the plaintiffs, it was stated to be irrevocable and upon a valuable consideration and for the use of Hogan himself. But that from the plaintiffs is in the ordinary form of a letter of attorney, and it is expressed that the acts thereby authorized are to be for the use and benefit of the principals. On 10 October, 1830, Hogan wrote to the plaintiffs a letter in the following words: "No doubt you have long expected to hear from me. I should have written but for the following reasons: (1) Your letter of attorney did not come to hand until nine months after it started from Washington City. (2) I was about setting out to Alabama, where I spent the winter, and on my return, I found my lawyer had omitted getting an order to sell the land. (3) I then came to the conclusion not to write until after our Superior Court, when I fully expected to obtain an order. But I am sorry to inform you that I was disappointed in consequence of the judge's requiring the newspapers to be produced, in which publication was made, and I could not then get them. Consequently I have to advertise again. But I shall no doubt obtain an order of sale next spring, after which you shall hear from me." (529)

Mendenhall and *Iredell* for plaintiffs.
Morehead for defendants.

RUFFIN, C. J. There is no evidence tending to impeach the fairness of the sales made by the master or of the conduct of Hogan in making his purchases. He was the largest owner of the property offered, and might fairly bid to enhance the price, and many others interested were present and submitted to have the report of the sales confirmed. On the other hand, the defendants have failed to establish a purchase by Hogan from the plaintiffs. Indeed, the Court is satisfied that the truth is otherwise. The difference in forms of the several powers of attorney is striking, and the presumption is that an attorney acts for the benefit of his principal unless the contrary is clear. But Ho-

gan's letter makes it plain that he had not purchased. If he had he would have taken more pains to secure the assignment than taking it in a letter of attorney, that should be nine months in reaching him, and, upon that delay, he would have made inquiries about it and applied for another. Besides, it is evident the interest and right remained in the principals, for that only could have made them wish for information of his proceedings or make it his duty to communicate it. The letter, indeed, mentions the land only, but that is in reference to an order for the sale of it. The agency embraced the whole estate, personal and real, as expressed in the power of attorney, and at the time the letter was written the money for which the negroes were sold was not collected nor the claimants ascertained. The meaning was that when the land should be sold he would write them at large upon the whole business. There is no intimation in the answer that Hogan had a distinct authority as to the personal estate, or had made a purchase of that prior to the letter of attorney of December, 1829. Nor are the plaintiffs con-
(530) cluded by the terms of the master's report and the decrees in those cases for payment to Hogan, as the assignee of the plaintiffs, for they were not parties to the suits. Yet we think that they may avail themselves thereof so far as to show what sums and on what account their attorney received for them. It is immaterial how their interest in the estate was ascertained, whether by litigation, arbitrament, or accounting between the parties; their attorney is liable to them for whatever he received for and as their shares of the estate. After receiving their money as theirs, he is not at liberty to deny their right to it, and to say, for instance, that the personal property belonged to their father's administrator and not to them. That would have been an objection that the parties who then had to pay might have urged. But if they chose to waive it, and to pay over the money to the attorney for his principals, the latter may compel the former to surrender it to them. The plaintiffs must, therefore, be declared entitled to such sums as their attorney received under their authority, and it must be referred to the master to inquire what they were, and to make the proper charges for interest if the master should think the plaintiffs entitled thereto, and also to make all just allowances for a reasonable compensation to the defendant's testator and for the expenses incurred in his agency.

PER CURIAM. Decreed accordingly.

Cited: McNair v. McKay, 33 N. C., 604; *Humble v. Mebane,* 89 N. C., 414.

(531)

ADOLPHUS D. JONES v. JOHN W. WILLIAMS ET AL.

A testator devised thus: "I leave all my property to remain in the hands of my wife for the use of the family until my two sons, E. D. J. and A. D. J., become of age, or she marries; and in either event, the property or money are to be equally divided." And then in another clause he says: "I leave my son A. D. J. the amount that E. D. J. expends in Philadelphia, more than an equal division would say, on account of the completion of his medical education." E. D. J. was then at a medical college in Philadelphia, and had been supplied by his father with $700 to cover the expenses of that session of the college: *Held*, that the legacy to A. D. J. in this last clause applied only to the $700 advanced in the father's lifetime to E. D. J., and not to any further sums that might be necessary or were expended by E. D. J. in completing his medical education.

APPEAL from the decree of the Court of Equity of ROCKINGHAM, at Spring Term, 1843, his Honor, *Battle, J.*, presiding. The bill was filed by the plaintiff for the settlement of his father's estate and the payment of such balance as might be found due to him. The defendants were the other legatees, who were also the executors of the father. The material facts relating to the question determined by the judge below will be found stated in the opinion delivered in this Court.

No counsel for plaintiff.
Morehead, Graham and *Kerr* for defendants.

DANIEL, J. G. W. Jones had a wife and two sons. He made his will and devised his property as follows: "I leave all my property to remain in the hands of my wife for the use of the family until my two sons, E. D. Jones and A. D. Jones, become of age, or she marries; and in either event the (532) property and money are to be equally divided." The testator then appoints his wife and two sons executors. His intention thus far appears to be equality of division between his wife and two sons. His eldest son (Erasmus) was then attending as a student the Medical College at Philadelphia, and he had been supplied by his father with $700, to cover expenses for that session of the college. The testator concluded his will with this clause: "I leave my son A. D. Jones the amount that E. D. Jones *expends* in Philadelphia, more than an equal division would say, on account of the completion of his medical education." What excess in favor of A. D. Jones on the division of the property did the testator mean by this clause in his will? The preceding clause shows that equality was his intention. And the last

clause, we think, shows the same intention as to the benefit he designed his two sons. He had placed a fund of $700 in the hands of his son Erasmus, who was then in a course of expending it, or the greater part of it, at Philadelphia, in obtaining or completing a medical education. The testator, therefore, must have meant such an amount of money as should be expended by his son by his (the testator's) authority at Philadelphia; he could not have intended by this clause any and whatever amount of money should ultimately be expended on Erasmus in completing his medical education at Philadelphia, by any guardian he might thereafter have. Such a construction would come too much in conflict with the provision he had intended for his wife; her share might then be very materially reduced, which we do not discover that he intended. We think that the decree made in the Superior Court was correct and that it must be affirmed.

PER CURIAM. Decree affirmed.

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(533)

ROBERT FOSTER ET AL. v. ROBERT N. CRAIGE ET AL.

Where a testaor authorized his executors to sell all his land, and, undertaking to act under that power, they sold land which the testator had acquired after the publication of his will: *Held*, that the purchaser, having no knowledge of that defect in their power, was entitled to be relieved in equity from the bond he had given the executors for the purchase money.

THIS cause, having been set for hearing upon the bills, answers and proofs, was at Spring Term, 1843, of DAVIE Court of Equity ordered, by consent of parties, to be transmitted to the Supreme Court. The facts are stated in the opinion delivered in this Court.

No counsel for plaintiffs.
Alexander and *Boyden* for defendants.

GASTON, J. This case was heretofore brought before us on an appeal from an interlocutory decree dissolving the injunction which the plaintiffs had obtained on the filing of the bill; and a report of it and our decision therein will be found in 22 N. C., 209.

The plaintiffs, after the dissolution of the injunction, had leave to amend their bill, and accordingly, on 18 October, 1839, they filed an amended bill, wherein and whereby they set forth, in addition to the matters contained in their original bill, that

the will of Anderson E. Foster was executed on 18 December, 1834, and that at the time of executing said will the said Anderson had no right to the tract of land which Robert Foster had purchased from the defendants, as executors of the (534) said Anderson Foster, and to secure the payment whereof the plaintiffs had executed the bond whereupon the defendants obtained the judgment as set forth in the original bill; and that on this account they are advised that the defendants had no authority whatever to sell the said land, but that the same descended to the heirs at law of the said Anderson. The plaintiff Robert particularly alleges that at the time of executing his said bond he was himself the legal and equitable owner of the one-fourth part thereof, and they both aver that at that time they were utterly ignorant of the fact that the execution of the will was prior to the testator's purchase of the land; they state that Elizabeth Nesbitt is owner of one other fourth part, that the children of Samuel Foster, deceased, own another fourth, and that the defendants Robert N. and Burton Craige, with two others, own the residuary fourth. The plaintiffs insist that inasmuch as the contract for the sale of the land was made under an entire misapprehension on both sides of an authority in the defendants to sell, the said sale ought to be declared null and the plaintiffs relieved from the payment of the bond given for the price of the land. The defendants, in their answer to the amended bill, admit the fact that their testator had not title to the land by them sold at the date of the will, but nevertheless insist that the executors, the defendants, had a valid power under the will to sell it. They further state that Anderson Foster purchased the land from John Foster; that at the sale by the executors Richmond Foster bid off the land; that Richmond and John entered into possession and made a crop, but in June of that year Richmond transferred his bid to the complainant Robert, who entered into the bond for the purchase money, with the complainant John as his surety. They deny that the plaintiffs were ignorant that the will was made before the testator bought the land, but declare that this matter was talked of in the presence of the plaintiff Robert, at the time of the sale, and when the deed was executed to him. They state that they refused to make a deed with general warranty, but were finally prevailed upon to execute a deed with the special (535) covenant, as stated in the original bill, to warrant the same "against the claim of them and their heirs, and all persons whatever, so far as they are authorized by the will of the said Anderson Foster, and no further," and aver that it was thereby intended not to bind themselves personally or in their private

capacity. They insist that as the plaintiff Robert has entered into the possession of the land and has occupied it without molestation, he should be regarded as having bought at his own risk, and is not entitled to be relieved from the consequences of a contract entered into with his eyes open. They admit that if the land was not authorized to be sold it descended as is set forth in the bill. The plaintiffs put in a general replication to the answer, and an order was made for commissioners to take testimony, and finally the cause was set down for hearing on the pleadings and proofs, and transmitted to this Court. There are no proofs except by exhibits, and these establish no more than what is substantially agreed by the pleadings. The facts of the case, so far as they are agreed or made to appear by the exhibits, are that on 8 December, 1834, Anderson E. Foster duly executed his last will, and thereby, after certain other devises and bequests, devised and bequeathed as follows: "The balance of my property to be applied to the payment of my just debts; should there be a surplus, it is my will and desire that it be equally divided among the heirs of my deceased brother, Samuel Foster, and the heirs of David Craige." On 31 August, 1835, the testator bought from John Foster the tract of land mentioned in the pleadings, and at the May Term, 1836, of the County Court of Rowan, where the testator in his lifetime usually resided, Burton Craige and Robert N. Craige, the executors therein named, caused the said will to be duly proved. On 14 February, 1837, the executors, claiming to have a power to sell this tract under the said will, exposed it to public sale, when it was either bid off by Robert Foster or by Richmond Foster, who afterwards transferred his bid to the said Robert at the price of $2,315, payable twelve months after date. A bond was
(536) thereupon executed by the said Robert, with Jehu Foster as his surety, payable to the said defendants as aforesaid, and they executed unto the said Robert a deed of bargain and sale for the land with the special covenant hereinbefore stated, the bond and deed both dated of the day of the sale. There is no evidence that the purchaser, when he bought or gave his bond, was aware of the fact that the will of the testator was executed before he became the owner of the land. The heirs at law of the testator are the plaintiff Robert, a brother; Elizabeth Nesbitt, a sister; the children of Samuel Foster, a deceased brother, and the children of David Craige, who are four in number, including the defendants, and who altogether inherit a fourth part of whatever land was not disposed of by the will.

It is perfectly clear that the clause under which the defendants undertook to sell this land did not in law apply thereto.

A man cannot by will prospectively devise or charge lands thereafter to be acquired. No title, therefore, passed by the deed of the defendants, unless it *may be* for their two-sixteenths of the land, nor is it in their power to make a title, nor have they tendered any conveyance from those who can make title. It is difficult to say what is the meaning of the singular covenant annexed to their deed, but it certainly cannot procure for the plaintiff any indemnity because of this defect in the title conveyed. It is certain that the purchase was made, and we have no doubt the sale also, upon the clear belief that the executors had a power to sell. There is therefore a radical mistake in the subject-matter of the contract. Whether the plaintiff Robert could have been relieved, if it had been shown that he knew the facts as they really were, and yet bought, relying upon his knowledge of the law, we need not inquire, for this is not shown. We regard the mistake as a mistake of fact. It is against conscience that he should be compelled to pay for what he has not obtained and the defendants permitted to receive and hold the price of what they have not conveyed. They did not pretend to sell as owners, but under a power. They had no power under the will to sell this land, and are under no obligation by (537) the will to account to any person for the proceeds of the land.

We hold it, therefore, to be a plain case for relief. But it does not appear, upon the transcript sent up, whether the judgment has been collected or not, or, if so, in whose hands the moneys collected now are. The defendants also are entitled to receive one-eighth part of the profits or reasonable rent for the loan since the possession was taken. We shall, therefore, for the present, make a declaration that the plaintiff Robert is entitled to have his contract of purchase set aside, direct the necessary inquiries to be made, and reserve the case for a final decree when the result of these inquiries shall be laid before us.

PER CURIAM. Ordered accordingly.

(538)

DANIEL STULTZ ET AL. v. JOHN KISER ET AL.

1. A testator gave to A "$1,150, which is in a bond for the store," and to B "$1,150, which is in a bond of him and A." The testator, at the time of his making his will, had a bond of A and B, who were partners, for $2,300 principal and on this bond interest had accrued both before and after the date of the will, and before the testator's death: *Held*, that this interest did not go to these legatees, but fell into the general residue. The bond itself was not given, but only certain sums in the bond.

2. The testator also gave to his wife "a negro woman named Violet, and if said negro woman should have any increase, and my wife thinks proper to have her sold, she is to have the interest of the money the said negro brings, to apply to whatever use she sees proper till her death"; to each of two daughters he also gives a negro girl, named, etc., "and her increase." All these female slaves had increase, some born before the date of the will and some between that day and the death of the testator: *Held*, that this increase did not go to the respective donees of the mothers, but went into the general residuum.

3. In some cases the addition of the word "future," or other like words of reference, will induce the court to expound the word "increase" to include children born after the execution of the will. But the word "increase," unexplained by any reference which may extend its interpretation, applies only to children born after the testator's death.

4. By a codicil to his will the testator declared, "As I have sold the tract of land which I willed to the heirs of my son John, I now will that the heirs of him have $700 each": *Held*, that this legacy to the children of John did not exclude them from a share of the residuary estate, which was directed by his original will "to be divided among his heirs as the law directs."

5. Upon a bill by trustees or executors seeking the advice of the court for their security, the court will not undertake to determine facts alleged by them to be controverted, but will only give an answer to questions arising upon the facts declared by the trustees.

(539) THIS cause, after having been set for hearing upon the bill and answers, was, at Spring Term, 1843, of STOKES Court of Equity, ordered by consent of parties to be transmitted to the Supreme Court. The bill was filed by the executors of Casper Stultz to obtain the opinion of the court as to the proper construction of the will of their testator, and all the legatees were made parties defendant, and put in their answers. The questions submitted and the facts on which they arose will be found stated in the opinion delivered in this Court.

Morehead for plaintiffs.
No counsel for defendants.

RUFFIN, C. J. The testator, Casper Stultz, made his will on 1 April, 1840, and amongst others he therein made the following gifts: "To my wife I give a negro woman, Violet, and if said negro woman should have any increase, and my wife thinks proper to have her sold, she is to have the interest of the money said negro brings, to apply to whatever use she sees proper, till her death, and at her death to be equally divided between my children as the remainder of my property hereinafter mentioned. I give to my daughter Anne, wife of Henry Shouse, a negro girl by the name of Caroline, and her increase, and $1,150, which is in a bond for the store, and the said Henry Shouse is to pay my wife $10 per annum during her life. I give to my daughter Christina, wife of John Kiser, a negro girl by the name of Maria, and her increase, and the plantation on which they now live, by said John Kiser giving my wife 20 bushels of corn and one good wagonload of hay per annum, as long as she lives, and at the death of both of them the said negro girl and her increase to fall to the heirs of Christina. (540) I give to my son Daniel four negroes, named, etc., and $1,150, which is in a bond of him and Shouse. Lastly, I will and bequeath that the remainder of my property be sold and equally divided among my heirs, as the law directs." By a codicil, dated 12 July, 1841, the testator says: "As I have sold the tract of land which I willed to the heirs of my son John, I now will that the heirs of him have $700 each, to be put to interest till they come of age, and the interest applied to raising and schooling said children, and the remainder, if any, paid to them with the principal, when they come of age." The testator died in December, 1841.

The bill states that before the making of his will the testator had been in partnership in merchandise with his son-in-law Shouse and his son Daniel, and had sold to them his interest for $2,300, for which he took their bond; and that at the date of the will some interest had accrued thereon, and that it and what subsequently accrued up to the testator's death remained unpaid. And one of the questions for the advice of the Court is, whether the interest in question belongs to the donees of the several sums of $1,150 in that bond or falls into the residue.

We think the interest is part of the residue. A bequest of a note or bond, being specific, carries everything due on it, whether principal or interest. The entire *corpus* is given. *Perry v. Maxwell,* 17 N. C., 507. It is very possible it might have been the purpose of the testator, by the gifts of the different parts of the principal money due on this bond to the respective parties, who gave the bond to extinguish the debt, as well the

interest as the principal. But we cannot say that he has expressed such an intention. He does not give an aliquot part, as an aliquot part, of the bond to the respective legatees, but only a certain sum of money *in* this bond. Whether the legacies be regarded as specific, to the extent of the sums named, or as demonstrative merely, we are not authorized to give more
(541) than the amounts of money *in numero*.

The bill further states that between the date of the will and the death of the testator the woman Violet, given to the widow, had a child, and also that the women given to Mrs. Shouse and Mrs. Kiser had four children each, some of whom were born before the date of the will and others between that day and the death of the testator. And the opinion of the Court is asked whether, under the several dispositions of the will, the issue of the women, or any of them, go with their mothers to the particular devisees respectively, or form part of the residue. Here again, though it may probably be defeating the testator's expectations, we must hold that the gifts of the mothers pass only the issue born after the death of the testator, and that the children born at any time before the testator died fall into the general residue. In *Jones v. Jones*, 4 N. C., 547, it was decided that a specific bequest of a female slave did not pass a child born after the execution of the will in the lifetime of the testatrix, because the will only spoke from her death. The word "increase," which this testator uses in each of these dispositions, will not remove the difficulty. We admit it to be equivocal in its sense, and there have been several cases in which, by the addition of "future," or other like word of reference, the disposition has carried the children born after the execution of the will. Indeed, in *Bullock v. Bullock*, 17 N. C., 307, and in another case, under the word "increase," coupled with words of reference to the possession by the donee of the mother at and before the execution of the will, the Court felt justified, upon the apparent intent, in holding that the legatee took the issue as well as the mother, of which the donee thus had the possession before and at the execution of the will. But there must be some expression in the will thus to carry back the operation of "increase" to a period anterior to the death of the testator. Unassisted, it passes only the issue born after that event. *Cole v. Cole*, 23 N. C., 460.

(542) The bill further states that the testator had a son named John, who died in the lifetime of his father, leaving two infant children, who are the persons mentioned in the codicil, to whom the legacy of $700, each, is given, and that a question has arisen whether that provision in the codicil does not exclude

those children from a share of the residue. Upon that question our opinion is clear in the negative. We are at a loss to conjecture a ground on which the doubt could be raised. Independent of the general principle that gifts by separate instruments are *prima facie* cumulative, unless in the one paper there be terms of revocation of the other, there are other reasons entirely convincing in this case that the legacies in the codicil and in the residuary clause of the will are cumulative. In the first place, they are of different natures, the one being a pecuniary legacy *in numero* and the other an uncertain residuary disposition. *Masters v. Masters,* 1 Pr. Wms., 423. And particularly, in the next place, the legacies in the codicil are given, not in substitution of all the provisions made by the testator for these two grandchildren, but are substituted, as is specially expressed in the codicil, for a particular provision for them in land which the testator afterwards sold. To each of his children he makes particular devises and bequests, and then gives them a share of the residue, by the general description of "my heirs," thereby including also the two children of his deceased son. For them he had also provided, by devising to them land; and afterwards selling it, he gives in its stead $700 to each of the grandchildren, thus leaving the residuary disposition in their favor in full force. *Ridges v. Morrison,* 1 Bro. C. C., 388.

The bill further states that "the plantation" on which Kiser lived at the execution of the will consisted of a tract of land containing 70 or 80 acres only, but that the testator had other lands adjoining, out of which he had a tract surveyed containing 179 acres, and including that of 70 or 80 acres, which he at one time intended to convey to Kiser; that he executed a deed therefor by signing and sealing it and having it attested, (543) but never delivered the same, but purposely withheld it, and that, after the death of the testator, Kiser contrived to get possession of the deed and had it registered. Upon which the bill states that most of the residuary legatees insist that the devise of "the plantation" carries only the smaller tract of 70 or 80 acres, and that the residue of the land covered by the deed is a part of the residue of the estate, and asks the advice of the Court thereon, and prays that Kiser may be compelled to surrender the deed and convey to such persons as may purchase the land.

The answer of Kiser denies that the testator did not deliver the deed, and says he delivered it to one of the plaintiffs for him (Kiser), whereby it became valid, as a conveyance, in the lifetime of the testator, and that the plaintiff, after the death of the testator, handed the deed to this defendant. And he insists fur-

ther, that at the date of the will he was, by his testator's consent, in possession of the whole tract of 179 acres, and cultivating different parts of it, as well without as within the 80-acre tract, and that the whole was used by him and known by the testator as his "plantation," and by the description the testator intended the whole to pass by his will. Some others of the defendants by their answers controvert the facts as stated by Kiser and affirm the allegations of the bill.

Upon these pleadings the Court cannot give an opinion on this last controversy, since, before the proper construction of the will can be declared, the facts in regard to the subject to which the will applies must be ascertained. Upon a bill by trustees or executors seeking the advice of the Court for their security we cannot undertake to determine the facts, because we only give an answer to the questions arising upon the facts declared by the trustee. Therefore, when he tells us in his bill that the facts are disputed, we can only say to him that he has
(544) come too soon for our opinion, and that he cannot get it until he shall lay the case before us as it is, upon which the Court is to declare the law. In the present state of the pleadings, therefore, we must decline giving any opinion on this point.

PER CURIAM. Declared accordingly.

Cited: Hurdle v. Reddick, 29 N. C., 89; *Love v. Love*, 40 N. C., 205; *Turnage v. Turnage*, 42 N. C., 128; *Joiner v. Joiner*, 55 N. C., 74.

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(545)

SAMUEL GREEN ET AL. v. PASCHAL B. BURT.

1. Where a bill is filed by *cestuis que trust* against their trustees for an account and settlement, the latter cannot avail themselves of the defense of a "stated account," when they admit at the same time that they afterwards discovered errors in that account, which they corrected, and that they paid according to that corrected account, and moreover that they have not yet fully accounted for all the property in their hands as trustees.

2. In taking the accounts, however, the master is to respect any partial settlement that has been made, so far as it extends, unless shown to be erroneous or to have been improvidently made.

THIS cause was set for hearing, and at Spring Term, 1843, of WAKE Court of Equity was transmitted, by consent of parties, to the Supreme Court.

The facts are stated in the opinion delivered in this Court.

Saunders for plaintiffs.
W. H. Haywood for defendants.

GASTON, J. Jesse Witherspoon, on 20 February, 1838, executed a conveyance to the defendants of all his property upon certain trusts for the payment of his creditors and the indemnity of his sureties, and some time thereafter died insolvent. The plaintiffs, who are of the number of the creditors and sureties to be provided for by the conveyance, have filed this bill against the trustees, alleging that the other claimants under the deed have either been satisfied by the defendants or have compromised with them, and that the trustees have sold enough of property and collected enough of the debts assigned them, or might have sold and collected enough, to discharge all the demands upon the trust funds, and demand an ac- (546) count from the defendants and the payment of what shall be thereon found due. The defendants have answered the bill. In the first part of their answer they set up, as a conclusive defense to the bill, that they have stated an account with the plaintiffs in the premises, which they aver to be, to the best of their knowledge and belief, a full, just and true account, and have settled with them accordingly. This account they aver to have been signed by the plaintiffs Norcom and Green, and to have been exhibited to and approved of by the other plaintiffs. Insisting upon this defense, as if it had been specially pleaded in bar, they nevertheless proceed to set forth a statement, exhibiting the amount of their sales and collections and of their disbursements, charges and payments, which they aver to have been made up by their attorney and counselor, to be signed by some and approved by others of the claimants, and which they declare contains, as they believe, no errors, except certain errors afterwards discovered to be errors against themselves, and that upon discovering these, and for the purpose of correcting them, they deducted a certain percentage from the sums which, according to that statement, were due to the respective claimants. They further admit that in this statement a parcel of uncollected notes and demands conveyed by the deed were no way noticed, but they aver that *these* are nearly if not utterly worthless, and that the defendants have not been guilty of neglect in failing to collect them, and they declare that they have proffered and now proffer to give these up to the claimants under the deed of trust.

We find it difficult to reconcile the different parts of this answer together. The latter seems to overrule the former part.

That account cannot be a "full one" which is admitted not to embrace all the matters of account. It cannot be a "just" stated account, if ascertained to contain important errors, which the defendants have, however fairly, undertaken subsequently to correct; and the payments according to the corrections *so made* cannot be held to be payments in full of the balances previously stated. But however this may be, there is a general replication to the answer, and no evidence whatever is offered by the defendants to prove their "accounts stated."

(547)

As the defendants do not object because the other persons interested in the trusts have not been made parties, we think there must be a reference to take the accounts as prayed for. If in taking these accounts it shall appear that a partial settlement has been in fact made with the plaintiffs, the commissioner will of course respect it, so far as it extends, unless shown to be erroneous or to have been improvidently made.

PER CURIAM. Reference ordered accordingly.

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(548)

JOHN EVERITT, EXECUTOR, ETC., v. WILLIAM K. LANE ET AL.

1. Where a testator gave to different legatees certain negroes by name, and then gave to another legatee "all the balance of my negroes which I am possessed of": *Held*, that this last was a specific legacy of slaves, as much so as if each slave had been named, and that the other legacies must abate ratably with this for the payment of debts in case of a deficiency of general assets.

2. A bequest to A of "five head of horses, one yoke of oxen, three pens of hogs, five cows and calves, and five sets of farming tools," is rendered specific by the addition to each class of the designation "her choice."

3. So a bequest of "one carriage" and "one set of blacksmith tools" is specific, when it is shown that the testator had but *one* carriage and *one* set of blacksmith tools. When upon the face of the will it appears that the testator meant to dispose of something in kind, in the application of the bequest to its subject-matter it may be shown that he had but one of that kind.

4. A legacy to the testator's widow of "one year's provisions" is not a specific but a general legacy.

THIS cause having been set for hearing at Spring Term, 1843, of WAYNE Court of Equity, was at that term transmitted, by consent of parties, to the Supreme Court, upon the bill, answers and report of the master.

The bill was filed by the plaintiff as executor of Charles Hopton, and the legatees in the said will mentioned were made parties defendant. The bill states that in March, 1838, Charles Hopton departed this life, having first published his last will and testament in writing duly attested to convey real and personal estate. The only material parts of this will are the following: "(1) I give and bequeath unto my brother William K. Lane 150 acres of land adjoining his own land, so as not to take any of my cleared land. Also one negro boy by the name of Jacob, to him and his heirs and assigns forever. (2) I give and bequeath to Barbara Ann Everitt one negro girl by the name of Lenar, to her and her heirs and assigns for- (549) ever. (3) I give and bequeath unto Lavinia Everitt one negro girl by the name of Lavinia, to her and her heirs and assigns forever. (5) My will and desire is that three of my negroes be sold, to wit, Bill, Burwell and Edmund. (6) I give and bequeath unto my beloved wife the following property, viz., all the balance of my lands and negroes which I am possessed of and all my household and kitchen furniture; one year's provisions; five head of horses, her choice; one carriage; one yoke of oxen, her choice; three pens of hogs, her choice; five cows and calves, her choice; five sets of farming tools, her choice; one set of blacksmith's tools, to her and her heirs and assigns forever." The bill goes on to state that the will was duly proved, and the plaintiff qualified alone as executor thereof, and took into his possession all the personal estate of the testator. The bill then represents that the provision made directly in the said will for the payment of the testator's debts was the sale of only three slaves, to wit, Bill, Burwell and Edmund, which the plaintiff had sold, and the proceeds of their sale amounted to $1,505.75; that in the legacy left to his wife in the sixth item of the testator's will were the following slaves, to wit, Salisbury, etc. (naming them to the amount of 21), and their increase, now amounting to five; that there were outstanding debts to a large amount due and owing by his testator, for the payment of which the provision made in the will was utterly inadequate; that by an account taken under the direction of the County Court of Wayne it appeared that there was a balance due to the plaintiff as executor of $10,061.38, which sum was now due him and should be paid out of the estate of the testator, and he prays he may be substituted to the rights of the creditors in all respects until he be reimbursed for the same. The bill further states that the plaintiff is not advised how this sum should be raised out of the personal estate; that William K. Lane, Barbara Ann Everitt and Lavinia Everitt claim that their legacies are spe-

cific, and allege that the legacy in the sixth item of the will to the widow is a residuary legacy; and that, therefore, their (550) legacies should not abate for the payment of the said sum until the said residuary legacy should be exhausted. And on the other hand, Philip Hooks (who hath intermarried with the widow of the said Hopton) and his wife contend that the legacy left the said widow is also specific, and should only abate in equal proportions with the other specific legacies left in the said will. The bill concludes with a prayer that the plaintiff may be advised as to the proper construction of the said will and as to the rights of the said legatees respectively, and as to the duty of the plaintiff in the premises, that by a decree of the court he may be advised as to the true nature and legal operation of said bequests; that the plaintiff may be substituted to the rights of the creditors, whom he has paid, until he be reimbursed, and that an account of his executorship may be taken under the direction of the court.

The defendants answered severally and admitted all the allegations of the plaintiff's bill, except that they knew nothing of his disbursements or the state of his accounts as executor, and joined in his prayer that an account might be taken under the direction of the court. They severally, too, set up the conflicting claims set forth in the plaintiff's bill.

A reference was made in the court below to the clerk and master, who reported that there was a balance due to the plaintiff as executor of $10,190.38 on 1 April, 1843. This report was confirmed by the Court.

Husted for plaintiff.

J. H. Bryan and *Mordecai* for defendants.

GASTON, J. The question submitted for our decision in this case is whether, there being a deficiency of assets to pay the debts of the testator, the legacies bequeathed to the defendants William K. Lane, Barbara Ann Everitt and Lavinia Everitt shall abate ratably with the legacy bequeathed to the (551) defendant Elizabeth Hooks, formerly the wife of the testator, or whether the burthen of meeting this deficiency shall be thrown exclusively on the latter. As it is indisputable that the legacies to the first-named defendants are specific, the solution of this question depends upon the inquiry whether the legacy to the testator's wife be specific also.

A legacy is specific where it is a bequest of a specific part of the testator's effects, so distinguished from the rest thereof that, upon the assent of the executor, the property in the thing be-

queathed vests in the legatee—an individual legacy, which cannot be satisfied but by the delivery of the identical subject. On examination of the bequests in favor of the defendant Elizabeth it will be found that all the things therein mentioned are enumerated as parts of the testator's property: "I give and bequeath to my beloved wife the following property, viz., all the balance of my negroes, etc.," and, with the exception of what may be comprehended under the description of "one year's provisions," they are as distinctly specified as the things which are named in the bequests to the other defendants. The gift of "the balance of my negroes which I am possessed of" is a gift of each of the testator's negroes not previously named. The bequest of "five head of horses, one yoke of oxen, three pens of hogs, five cows and calves and five sets of farming tools," is rendered specific by the addition to each class of things of the designation "her choice." See 2d Williams on Exrs., 739; *Richards v. Richards*, 9 Price, 219. The "one carriage" and the "one set of blacksmith's tools" intended by the testator are put beyond doubt by the admitted fact that he had but *one* carriage and *one* set of blacksmith's tools. When upon the face of the will it appears that the testator meant to dispose of something in kind, in the application of the bequest to its subject-matter it may be shown that he had but one of that kind to be disposed of. *Innes v. Johnson*, 4 Ves., 568. But that part of the legacy to his widow which is embraced within the terms "one year's provisions" cannot, we think, be deemed specific. If it refers to a *corpus*, it designates no particular part of that *corpus*, but gives (552) so much thereof as may be adequate for her subsistence for one year. It is true that in cases of intestacy, and in cases of testacy where the widow records her dissent from the will of her husband, the law assigns to the widow a year's provision out of her husband's estate in preference even to the demands of creditors. Rev. St., ch. 121, secs. 18, 19, 20, 21, 22. And it can scarcely be questioned but that this part of her legacy was given by the testator by way of analogy to the year's provision so assigned by law. But here she takes the "one year's provision" as of his bounty, therefore as a legacy, and of consequence subject to the payment of his debts. And being a legacy, it must be determined to be a specific or general legacy by the same rules which govern in discriminating between legacies in other cases. There should be a reference to ascertain the values of the respective bequests of personal property made by the testator, and it must be declared that the defendant Elizabeth is bound in the first place to satisfy the demand of the plaintiff to the extent of the value of the year's provision she may have

received, and that the residue of the plaintiff's demand is to be satisfied out of the other parts of the legacy to the said defendant and the legacies to the defendants William, Barbara and Lavinia, *pro rata*.

PER CURIAM. Decreed accordingly.

Cited: Johnson v. Johnson, 38 N. C., 428; *Dunlap v. Ingram,* 57 N. C., 184; *Biddle v. Caraway,* 59 N. C., 103; *Alsop v. Bowers,* 76 N. C., 170; *Battle v. Lewis,* 148 N. C., 151.

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(553)

CHARLES R. KEE, EXECUTOR, ETC., v. JAMES VASSER AND WIFE.

1. Where a husband permits his wife to have and make profit of certain articles of his property, either for her own use or in consideration of her supplying the family with particular kinds of necessaries, or where he makes to her a yearly allowance for keeping his house, the profits in the one case and the savings in the other will, in equity, be considered as the wife's own separate estate, although at law they belong to the husband.

2. Courts of equity in modern times have held that a wife cannot acquire separate property from her husband in her savings, except by a clear irrevocable gift, either to some person as a trustee or by some clear and distinct *act* of his by which he divests himself of the property. Where the husband acknowledged that the savings were the separate property of the wife—where they kept separate accounts at the stores, where bonds for money loaned were taken in her name in the presence and with the consent of the husband, and where he had borrowed money from her himself, these facts satisfy the requirements of the modern decisions, and prove that she was entitled to the money as her separate estate.

THIS cause, at Spring Term, 1843, of NORTHAMPTON Court of Equity, was set for hearing, and ordered, by consent of parties, to be transmitted to the Supreme Court. The facts will be found in the opinion delivered in this Court.

B. F. Moore for plaintiff.
Bragg for defendant.

DANIEL, J. The plaintiff in his bill states that the defendant Nancy was the widow of his testator, John Croker. That she, before and after the death of the said testator, got into her possession large sums of money and evidences of debt belonging to the estate of his testator, to the amount of $1,000 or up-
(554) wards; that the said Nancy has since intermarried with

the other defendant, James Vasser, and that the said Vasser has got into his hands much, if not all, of said moneys, and now refuses to surrender the same or in any manner to account with him for the same. The defendant Nancy Vasser in her answer states that she has surrendered to the plaintiff, as the executor of John Croker, everything of which she has had the possession or control, which in law or equity, as she is advised, he had any right or claim to. This defendant further states that the testator gave her two notes against two merchants, one against one Southall for $18 or thereabouts and the other against one Clark, for the purpose of discharging the separate account these men had against her in their stores; and that these were all the evidences of debt that this defendant ever had of the testator's; that she, being so advised, returned these notes to the plaintiff. This defendant saith that before she married Croker, who was a man of a large estate, she was a poor widow with two children, by the name of Whitehead. That he (Croker) gave her, to her own sole and separate use and benefit (to enable her to maintain the said two children), what money she could make by the use of her needle (she being a good tailoress), the sale of fowls, eggs, butter, and vegetables from their garden; that Croker always recognized this money as belonging to her, and they two kept separate store accounts; that in the course of many years (living between the Petersburg and Portsmouth railroads, and near to each) she was enabled to save the sum of about $350; that she was in the habit of loaning this money and taking the bonds in her own name, with the approbation of her husband. She further states that the present plaintiff has paid to her the purchase money (about $300) of a small tract of land which belonged to her first husband and afterwards became the property of Croker, and which Croker had sold to the plaintiff, taking the bonds therefor payable to her two Whitehead children. Both these sums, with what she has saved since the death of Croker, amounting in all to about the sum of $730, which the other defendant, James Vasser, admits came to his hands since the marriage, and he says that he has exe- (555) cuted a bond to pay $500 to each of the two Whitehead children when they come of age, and to furnish each with a horse, saddle and bridle. They deny receiving of Croker's estate any money or evidences of debt, except as above stated. There was a replication to the answers. We are glad to see that the testimony in this cause has been well taken. And we must say that it substantially supports the statements made in the answers. There are species of allowance to the wife by the husband, which may be classed under the head of pin money. It is

where he permits his wife to have and make of certain articles of his property, either for her own use or in consideration of her supplying the family with particular kinds of necessaries, or when he makes to her a yearly allowance for keeping his house. The profits in the first case and the savings in the other will, in equity, be considered as the wife's own separate estate, although, at law, they belong to the husband, upon the principle that all the personal property which a married woman acquires is that of her husband. A leading case on this subject is *Shaning v. Style,* 3 P. Will., 337. *Vide* also *Sir Paul Neal's case,* Pre. Ch., 44; *Mangey v. Hungerforce,* 2 Eq. Ea. Ab., 155; 2 Roper on H. and W., 138. After marriage the husband may permit his wife to carry on a separate *trade,* and all that she earns in the trade will, in equity, be her separate property and be applicable and disposable by her as such, subject to the demands affecting it. 2 Roper on H. and W., 171.

It is true that the courts of equity in modern times have laid down the principle that a wife cannot acquire separate property from her husband in her savings, out of a voluntary allowance from her husband, except by a clear irrevocable gift, either to some person as a trustee or by some clear and distinct act of his by which he divests himself of the property. 5 Ves., 79. See *Walter v. Hodge,* 2 Swans., 97; 2 Roper on H. and W., 140, note c (Jacobs' Ed.). In this case the proof is that Croker acknowledged at sundry times that the savings were the separate property of his wife. They had separate accounts at the (556) stores of their neighboring merchants; when a borrower of money applied to him for a loan, he said he had none to lend, but his wife had; the loan was made by her to the borrower in the presence of her husband, and the bond was taken for the same in her name and with his consent. The husband himself also borrowed money of his wife, to loan to his overseer, which money was by the plaintiff's consent returned to her since the death of the husband. The proofs in the case, in our opinion, come up to these requirements.

We are of the opinion that the bill is not supported by proofs, and it must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

Cited: McKinnon v. McDonald, 57 N. C., 8; *George v. High,* 85 N. C., 101; *Woodruff v. Bowles,* 104 N. C., 210; *Hairston v. Glenn,* 120 N. C., 343; *S. v. Robinson,* 143 N. C., 622.

(557)

BENJAMIN L. WESSON *v.* LEVI STEPHENS, ADMINISTRATOR OF CALEB LAWRENCE.

1. A delivery of a deed to a third person for the use of the grantee makes it effectual from the instant of such delivery, although the person is not the agent, but a stranger to the grantee, provided the grantee afterwards assents to it.

2. Where the grantor inserts in his deed a release for the purchase money, when he has not actually received it or taken a security for its payment, equity will give him relief.

THIS cause was set for hearing at Spring Term, 1843, of ROCKINGHAM Court of Equity, upon the bill, answer and proofs, and then, by consent of parties, ordered to be transmitted to the Supreme Court.

The following is the substance of the pleadings and proofs:

The plaintiff in his bill states that he sold in fee simple a tract of land to the defendant's intestate, lying in the county of Rockingham, adjoining the lands of P. L. Morgan and others, containing 235 acres, for the sum of $300, to be secured by bond payable 1 September, 1842; that he executed a deed of bargain and sale for the said tract of land and delivered it to P. L. Morgan for the use of the vendee, who thereafter accepted the said deed and took possession of the land; that the deed was written in the common form, and expressed in its face a full receipt and release of the purchase money; that the vendee omitted to execute the bond when he received the deed, he having no bond written, or pen and paper then and there to write it, but he promised to give it to the plaintiff's agent when he should see him again. The vendee shortly thereafter died, without ever giving the bond for the purchase (558) money for the said land. The bill prays that the administrator be decreed to pay the purchase money out of the assets of the vendee.

The defendant in his answer says that he has no knowledge of any contract made by his intestate with the complainant for the lands described in the bill; that he found no such deed for the land as that mentioned in the bill, among his intestate's papers or anywhere else. Defendant states that his intestate told him that he had made some improvements on the said land, but he denies that he ever took possession of the land. He denies all knowledge of Morgan's delivering any deed for the land to his intestate. He admits that he has assets.

P. L. Morgan deposes that the contract for the purchase of the land was made by the parties as stated in the bill; that the

plaintiff executed a deed in due form of law to Lawrence, the vendee, for the land; he was a witness to it, the deed was delivered by the vendor to him for the use of Lawrence, and he, the vendee, accepted the deed and promised to give a bond for the purchase money ($300), payable 1 September, 1842; that the vendee sent for the witness just before his death, to come and receive the bond, but died before he went.

John Richardson deposes that he saw Morgan deliver the deed to Lawrence; that it was done according to contract; witness then lived on the land, and requested to rent it of the vendee, who refused, stating that he was coming there to live himself.

A. Barham deposes that the vendee employed him to raise a house on the land, which he did. Lawrence told him that he had purchased the land for $300, payable 1 September, 1842.

Benjamin Barham proves nearly the same thing, and that the vendee died before the house was finished, and that his administrator paid for the work done on the house.

Graham for plaintiff.
Morehead for defendant.

(559) DANIEL, J. A delivery of a deed to a third person for the use of the grantee makes it effectual from the instant of such delivery, although the person is not the agent, but a stranger to the grantee, provided the grantee assents to it, which in this case he did. *Alford v. Lee,* Cro. Eliz., 54; *Garnons v. Knight,* Barn. & C., 671. The witnesses do not prove directly that the deed contained a release clause of the purchase money, but they say that the deed was "in due form." We must understand that it did contain such a release, and therefore that the plaintiff is entitled to the decree he prays.

PER CURIAM. Decreed accordingly.

Cited: Pritchard v. Sanderson, 84 N. C., 303; *Lawson v. Pringle,* 98 N. C., 452.

(560)

WILLIAM L. FRANKLIN v. JOHN ROBERTS.

1. A sale of a remainder in a male slave of middle age, expectant upon a life estate, will be viewed with suspicion in a court of equity, and relieved against if advantage be taken of the vendor's necessities by buying at a great undervalue.

2. But such a sale will not be disturbed if a full and fair price appears to have been given.

3. Where a person comes to redeem property conveyed to him by a deed, absolute on its face, the *onus* of proving an agreement to redeem lies on him, and where the answer, without evasion, plainly denies the right of redemption, the proofs must be clear, consistent and cogent, composed of circumstances incompatible with the idea of an absolute purchase and leaving no doubt on the mind.

THIS cause, after having been set for hearing at the Court of Equity for SURRY, at Spring Term, 1843, was then, by consent of parties, ordered to be transmitted to the Supreme Court, to be heard upon the bill, answer and proofs. The opinion delivered in this Court embraces the facts admitted by the pleadings or proved by the depositions.

Boyden for plaintiff.
Morehead for defendant.

RUFFIN, C. J. The plaintiff was entitled to a negro man slave, aged 38 years, in remainder after the death of his mother, who was a healthy woman, aged about 70 years, and resident of Surry County, and, being so entitled, he conveyed the slave to the defendant by a deed bearing date 20 March, 1834, and absolute in its terms, for the consideration of $150, and at the same time his mother gave the defendant her prom- (561) ise in writing that the defendant should, upon the same consideration, have the services of the slave from 1 August to 25 December, in each year during her life. Accordingly, until 1 August, 1834, Mrs. Franklin kept the slave, and then he went into the possession of the defendant, and so remained until Christmas, when he again returned to Mrs. Franklin. During the next spring the health of Mrs. Franklin began to decline, and she died in July following, viz., 1835, and then the defendant took possession of the slave, claiming him as his own. This bill was filed in March, 1839, and the object of it is to obtain a redemption and reconveyance of the slave, upon the ground that

the contract was not one of sale and purchase, but that the defendant in fact lent the plaintiff the sum of $150 and took the conveyances as a security therefor.

The bill charges that the plaintiff needed money and sought a loan of $150 from the defendant, and offered to secure it by a conveyance of the slave, who was worth $600, and that the defendant agreed thereto, if the plaintiff's mother would let the defendant have the negro for five months in the year, to keep down the interest until the money should be returned, and that his mother, with the view to relieve the plaintiff's necessities, was prevailed on to give her assent thereto. And the bill charges that the deed and agreement aforesaid, although unconditional in their terms, were executed upon the express agreement for the redemption of the slave upon payment of the principal money within ten years thereafter and the extinguishment of the interest by the labor of the slave from year to year as aforesaid, the value of which labor greatly exceeded the interest. The answer denies that the plaintiff ever applied to the defendant to borrow money, or that he lent him any, or that there was an agreement for the redemption of the slave under any circumstances. And it states that about 1 March, 1834, the plaintiff proposed to sell to the defendant his interest in the slave at the price of $100; that the defendant declined the proposal,

(562) upon the grounds of the risk of the negro's death before that of Mrs. Franklin, who was a woman of robust constitution, in good health, and residing in a salubrious region, and if he should ever survive her that he might come into possession at so distant a day and when so far gone in the decline of life as not to be then worth the price and intermediate interest thereon, and he so stated to the plaintiff; that a few days thereafter the plaintiff renewed his proposal, and the defendant again declined purchasing a contingent interest so remote and precarious. But at the same time he informed the defendant that he was willing to purchase the entire property in the negro, if he and his mother would take a reasonable price, or, if she would not sell out entirely, that defendant would give $150 for the plaintiff's remainder and the services of the negro for each year during her life after crop time, if Mrs. Franklin should, upon conference with her, assent thereto. The answer states further that the plaintiff then appointed to the defendant a day to come to his mother's to learn her mind and conclude their negotiation in one way or the other; that the plaintiff fully understood the defendant's proposal, and that on the appointed day the defendant attended at Mrs. Franklin's, and was then informed by the plaintiff and his mother that they agreed to the

sale upon the terms offered by the defendant; that the defendant then explained the contract distinctly to Mrs. Franklin, for fear she might become dissatisfied afterwards, and reminded her that the constant services of the slave might be necessary to her; but that, with the view of aiding her son, she persisted in her assent to the sale, as the defendant would not get the negro until after he had completed the working of her crop; upon which the bargain was completed, the purchase money in part paid and the residue secured, and the deed executed as an absolute and unconditional conveyance and without any agreement, understanding or intention on the part of any person that the plaintiff should have a right to redeem, and no such pretense was ever set up by the plaintiff until the death of his mother, at an earlier day than had been anticipated, suggested to him the thought.

The answer states the whole value of the negro not to exceed $400, and that, considering the ages and health of (563) Mrs. Franklin and the negro respectively, the remainder after her life estate was not worth more than $100. The parties proceeded to take proofs, of which but a small portion is of any weight. The file is loaded with numerous badly taken and unsatisfactory depositions to the character of witnesses whose testimony in the case is itself of little or no consequence. The material evidence relates to the value of the respective interests in the slave, and the terms of the treaty between the parties, as understood by the witnesses. Upon the former point there is a difference of opinion among the witnesses, and it is not wonderful that there should be, as it is not an easy matter to compute the value of a male slave at the meridian of life, who is not to fall into possession until the death of another healthy, though aged person. A few years and a slight accident might make the negro chargeable instead of valuable, and there are many persons of small capital, and others who need present labor, who would not purchase such an interest at all, or only at a very low price.

Hence a remainder of the kind is seldom the subject of traffic, unless the vendor be very needy, and, therefore, a sale of it should be viewed with suspicion, and relieved against if advantage be taken of one's necessities by buying at a great undervalue. But in this case the preponderance of the evidence as to the value supports the statements of the answer, as a large number of witnesses depose that they would not have given more than $100 for the remainder, and but one says he would. Besides, this bill does not seek to be relieved against this contract as a hard and unconscientious bargain for a remainder which the owner's distresses obliged him to sell, but it seeks redemption

as upon a pledge or mortgage, or an agreement for the same, which, notwithstanding the form of the conveyance, the bill alleges was positively stipulated for, and is framed with that view only. In such a case inadequacy between the sum advanced and the real value of the thing conveyed is a circumstance which, with others, furnishes evidence of the true
(564) agreement, whether for an absolute purchase or for a security. The *onus* is on the party who seeks to redeem, and, as has been often said, when the conveyance is absolute, and the answer, without evasion, plainly denies the agreement for redemption, the proof for the plaintiff must be clear, consistent and cogent, composed of circumstances incompatible with the idea of an absolute purchase and leaving no doubt on the mind. Inadequacy of price by itself cannot have that effect, if it were established in this case, for there are many real sales at an undervalue. Besides, it only furnishes an argument against the deed as constituting an absolute purchase, and must yield to direct proof of the intentions of the parties by persons cognizant of the treaty. In this case there is a mass of such direct proof. It comes from three persons who heard the first proposals at the defendant's house, and from two others who were present at the final bargain and are subscribing witnesses to the deed. All these depose directly that the whole dealing was for a sale; that at no time was a loan or pledge spoken of; that the defendant declined buying the reversion by itself, at $100, because he would not deal for a pure contingency, but wanted something sure, as stated in the answer. Besides those witnesses, four others say that the plaintiff, when he applied to the defendant for a redemption, admitted that there was no agreement for it, but said that as his mother had died so soon he thought the defendant ought either to let him have the negro back or pay him a further price. Against this evidence the plaintiff offers little, save the opinion of some persons that the interests purchased by the defendant were worth somewhat more than he gave. But upon that the Court could not declare it was not an absolute purchase, but must declare that it was, and so dismiss the bill; but, as the plaintiff was allowed to sue *in forma pauperis,* without costs.

PER CURIAM. Bill dismissed without costs.

Cited: Kelly v. Bryan, 41 N. C., 287; *Shields v. Whitaker,* 82 N. C., 521.

(565)

JOHN H. DRAKE v. JOHN RICKS ET AL.

Where upon a settlement made by a guardian of a ward with a succeeding guardian, the former gave the latter his bond for the balance found due to the ward, upon the latter agreeing to credit the bond with certain notes received from the administrator of the ward's father, which were alleged to be bad, upon the former guardian's delivering them up; and after the bond was due, the latter guardian paid the bond over to the ward, without having given the credit, and the ward collected the whole amount by suit at law: *Held*, that the former guardian was entitled, upon showing that these notes were worthless, to relief against the latter guardian to the amount of these notes, and to the same remedy against an assignee to whom the bond had been assigned after it was due, notwithstanding the former guardian had not tendered the notes for several years nor until after suit was brought against him.

THIS was a bill for an injunction to stay proceedings on a judgment at law and for relief, filed in NASH Court of Equity, and the injunction, on motion of the defendants, having been dissolved, the cause was continued over as an original bill. Having been set for hearing, it was, at Spring Term, 1843, ordered, by consent of parties, to be transmitted to the Supreme Court.

On the hearing the following appeared to be the facts:

Thomas Bryant administered on the estate of Guilford Atkinson, deceased, and in 1827 came to a settlement of his accounts with the plaintiff, who was then the guardian of Sally G. Atkinson, an infant child and next of kin of Guilford Atkinson. Upon that settlement Bryant paid the distributive share of the infant, partly in money and partly in bonds taken by him as administrator, which the guardian accepted without endorsement. In 1832 Drake resigned the office of guardian, and Bryant, who was the grandfather of the infant, was appointed in (566) Drake's stead, and on 6 August, 1832, they came to a settlement, and found a balance due the ward from Drake of $1,646.99, for which he executed his bond payable to Bryant as guardian. Drake had previously collected the bonds which he had received from Bryant as administrator, except three, namely, one on E. York, $14.44, due 25 December, 1826; one on John Taylor for $24, given in November, 1823, and another on John Taylor and E. York for $2.60, given in March, 1829. For those debts Drake claimed a credit in his settlement with the succeeding guardian, but the latter did not then allow it, because the bonds or judgments rendered on them could not then be returned to him, inasmuch as they were in the hands of the constable, to whom the bonds had been delivered for collection. But Bryant gave Drake his engagement in writing "that, as the

said debts had not heretofore been paid, I am to credit the said Drake's bond of this date for the whole amount of said claims, including compound interest thereon, or such part as may not be paid, if returned to me by said Drake." In 1837 the ward married, and her husband received from Bryant the plaintiff's bond, and transferred it by delivery to the defendant Ricks, who instituted an action of debt on it in the name of Bryant and obtained judgment thereon. At the trial Drake offered to return the bond of York and judgments on the bonds of Taylor, and claimed a credit for them, but the court held that they could not be allowed as payments or set-offs, as they had not been returned before the pleas pleaded, and the plaintiff at law refused to allow the credit or make any deduction. Thereupon Drake filed the present bill for relief and an injunction for the amount of those debts, according to Bryant's agreement, and therein alleges that the debts were lost to him by reason of the insolvency of Taylor and the removal of York from this State to Alabama, and offers to deliver the bonds and judgments as he had before done. Ricks and Bryant answered separately.

(567) The material parts of their answers are that York was solvent and did not remove to Alabama until 1828 or 1829, and that Taylor also was solvent up to that time, and that Drake might, therefore, have collected the debts with ordinary diligence, "and they insist that after so great a length of time, from August, 1832, to the trial of the suit at law in 1838, the plaintiff Drake cannot return the debts, but by his *laches* made them his own.

Upon the coming in of the answers the injunction was dissolved with costs.

In April, 1839, Drake obtained judgments before a justice of the peace against Taylor, on which several executions were issued and were returned *nulla bona*. And it is established by satisfactory evidence that Taylor was insolvent during the whole time Drake held his bonds. He was the brother-in-law of Bryant, and they lived near each other, and all his property had been sold. A son-in-law purchased his land and some of his slaves, and allowed him the use of them for the support of his family, and there is no evidence that he owned any property, except that at one time out of the proceeds of the crop he purchased a mare for the use of the plantation, but at what time does not appear, nor that it was known to Drake or his constable.

No counsel for plaintiff.

B. F. Moore for defendants.

RUFFIN, C. J. The equity of the plaintiff against Bryant extends to Ricks, who took the bond after it was due and, indeed, without endorsement. And as against Bryant we think the plaintiff is entitled to the relief he asks. For the grounds of that relief we need not go farther back than the agreement of 6 August, 1832. It appears, indeed, that at no time after 1826 was Taylor able to pay his debts. But however that may have been in fact, it is clear that when Drake gave his bond the parties considered that he had a right to return as money the debts which he had received as money and as so much of the ward's estate. It may be that Bryant was not strictly (568) bound to take them back. We do not trouble ourselves with that inquiry. He did agree to receive them, and there is no proof that he did not know the situation of the debtors, or that Drake represented his proceedings or the situation of the debts untruly. The only condition was that Drake was to return such as should not be paid. No payment was made, and it is very certain that since August, 1832, it has been out of the power of Drake to enforce the payment. Taylor has been all the time insolvent, and the answer states that York had before removed to such a distance as would render the expense of collection equal to the debt, or nearly so. This shows that the actual tender of the securities to Bryant would have been an idle ceremony merely, as they were worth nothing, and he must have known it. It is true that without a tender the defense could not be available at law. But in this Court the omission of it, whereby no prejudice arose to the other party, should not injure the plaintiff so far as to make him forfeit the amount of the debts, and can, at most, only affect the costs. The substance of the agreement, as we look at it here, is that as the debts which Bryant passed as good had not turned out to be so, he would take them back. For aught that can be seen, they are just as available to him now as they would have been had the securities been put into his hands the day after he signed the agreement to enter a credit for them if returned to him.

We do not, however, approve of the plaintiff's delay in closing the business, any more than the refusal of the other party to accept the papers when tendered, and as both parties were to blame, we do not think it a case for costs to either of them. The decree must, therefore, be for the sum which the plaintiff was compelled to pay on the dissolution of the injunction, with interest thereon from the day of payment, and for the costs then also paid by him, which must be restored to him; and there must be an inquiry to ascertain those sums.

PER CURIAM. Decreed accordingly.

(569)

JOHN CHESHIRE v. BURCH CHESHIRE AND OTHERS.

1. A court of equity has invariably entertained a bill by one, entitled to a personal chattel in remainder after a life estate, to have the property secured when it is alleged in the bill that it is likely to be lost by any means whatever.

2. And when the particular property has been converted into another species of property by the tenant for life, or those who claim in privity with him, the remainderman may elect to follow and take the fund in its changed form, as, for instance, when it has been removed out of the State and sold he may claim the proceeds of the sale.

THIS cause having been set for hearing in DAVIE Court of Equity, at Spring Term, 1843, was removed by consent of parties to the Supreme Court. The facts are stated in the opinion delivered in this Court.

No counsel for plaintiff.
Caldwell and *Boyden* for defendants.

DANIEL, J. The plaintiff's father, John Cheshire, in 1832, by will bequeathed two slaves (Peter and Dice) to his wife, Susannah Cheshire (the plaintiff's stepmother), for life, remainder to the plaintiff; and the executor assented to the legacy. The plaintiff in his bill states that the said Susannah, one of the defendants, in 1835 sold and conveyed an absolute estate in and to the said slaves to the other two defendants (Burch Cheshire being then insolvent), with an intention that they might run them to parts unknown, so as to cheat and
(570) defraud him of his interest in remainder; and that the defendants Burch Cheshire and Henderson, each well knowing the plaintiff's interest in the said slaves, confederated with the said Susannah to defraud him of his rights, and removed the said slaves and their increase out of the State and to parts unknown. The plaintiff in his bill prayed that the defendants might be decreed to restore the said slaves, and that his interest in them might be secured, and also for general relief. The bill was filed in 1836, against the tenant for life of the slaves, and also against the other two defendants. In 1837 the tenant for life died, and the bill was retained against the other two defendants. The defendant Burch Cheshire (who is a brother of the plaintiff, and married the other defendant's sister) in his answer admits that he purchased the slaves mentioned in the bill, absolutely, of Susannah Cheshire, for $960; that he knew of the plaintiff's interest in the same at the time of the

purchase, and that he took the slaves to the State of Alabama, and there sold them to one Ivey. He denies that the other defendant, David Henderson, was concerned with him in the transaction. David Henderson answers and says that he is ignorant of the matters charged in the bill in relation to the will of John Cheshire, Sr., and the provisions in the same. He further saith that he never purchased or offered to purchase the said negroes from Burch or Susannah Cheshire, either in this State or anywhere else. He says that he moved some of his own slaves to Alabama, in the fall of 1835, in company with three of his neighbors, and that Burch Cheshire went in company with him, and the said Burch carried with him the negroes aforesaid in the bill mentioned; that he (Henderson) lent him no assistance, except to haul a small bundle of clothes and occasionally a small quantity of provisions. He denies that he ran off the said negroes, or had any hand in running them off, but avers that they were removed by Burch Cheshire openly and publicly. He says that he had no hand in disposing of the said slaves in the State of Alabama, and that he had no participation in either the purchase or the sale of the said slaves; that he was not present when Burch Cheshire sold the said slaves, but (571) understood that he sold them to a man by the name of Ivey. He denies that he received the purchase money or any part of it, and he denies all fraud, etc.

There is a replication to the answers.

As to the defendant Burch Cheshire, the proof is clear that he knew of the plaintiff's remainder in the slaves, and that he combined with Susannah Cheshire, the tenant for life, to remove said slaves beyond the limits of this State with an intent to deprive the plaintiff entirely of any benefit he had in them. The purchase money paid to Susannah for the entire interest in the slaves was $960. She executed a bill of sale for the slaves to Burch Cheshire, a man well known to her to be entirely insolvent, who went in company with Henderson to Alabama, where the slaves were sold to the sister of a man by the name of Ivey, for $2,100. The next question to be considered is, What share or participation did David Henderson have in this purchase and sale? The proofs in the cause are satisfactory to the Court that Burch Cheshire had married Henderson's sister, that he was insolvent, and that he lived near Henderson in Mecklenburg County; that the plaintiff and Susannah Cheshire lived sixty miles off in Davie County; that Henderson came there twice very shortly before this transaction, making inquiries if there were slaves in that neighborhood that could be purchased. The proof is satisfactory that he well knew these

slaves, and knew both the plaintiff's and Susannah Cheshire's separate interest in the same, as he had been told of it, and he furthermore had heard the will of John Cheshire read over, by a man at whose house he stayed in Davie County. He had himself made proposals to purchase the life estate of Susannah and the remainder of the plaintiff; he had said that each of these persons asked as much for their separate interest as if the whole interest in the slaves belonged to each. Immediately thereafter

(572) Susannah Cheshire with Burch Cheshire, who had come into Davie County, carry the slaves to Burch Cheshire's house (near to Henderson's), just before Henderson was about to start his wagons and slaves to Alabama. Burch is insolvent, Henderson is wealthy; there is then paid to Mrs. Cheshire $960 for the absolute property in the slaves, a bill of sale is given to Cheshire, and Henderson witnesses it. Then Cheshire and the said slaves go on to Alabama in company with Henderson; Henderson's wagons carrying some of his clothes and some of his provisions, Burch having neither horse nor wagon. In Alabama the slaves were sold to one Ivey for $2,100, and a bill of sale for the same executed to Ivey's sister by Burch Cheshire, and Henderson being then present becomes the subscribing witness. Ivey's deposition has been taken, and he deposeth that he purchased the said lot of slaves for the aforesaid sum of both Burch Cheshire and David Henderson; that he paid the money to Cheshire, but Henderson said that he was to have a part of it, but how much or whether because he was concerned in the sale or because Cheshire owed him, Henderson did not say. All this testimony is sufficiently strong to induce us to declare that both of the defendants were purchasers of the slaves from Mrs. Cheshire, with full notice of the plaintiff's interest in the same. Where did the insolvent Burch Cheshire get $960 to advance to Mrs. Cheshire? There is no evidence on this score offered by the defendants. The inference is irresistible that Henderson (who before had been endeavoring to purchase these very slaves) advanced the money; in fact, that Henderson was the purchaser, and Cheshire, because of his insolvency, put forward to disguise the transaction, especially as on Cheshire's return to the State he is found equally insolvent and without money. If the defendants purchased only the life estate of Mrs. Cheshire, the plaintiff had a right to file this bill at the time he did to have his remainder secured. The defendants (with full notice of the right, when they purchased the slaves) are to be considered by this Court as standing in the same situation as their vendor.

(573) It is true that the assent of the executor to the legacy turned the particular estate and the remainder in the

slaves into *legal* estates. Whether or not the plaintiff might, at the time he filed this bill, have brought an action at law and recovered damages for an injury to his remainder, it is certain that a court of equity has invariably entertained a bill by the remainderman in a personal chattel to have the thing secured, when it is alleged in the bill that it is likely to be lost by any means whatever. Equity can, in such cases, give a more complete and substantial relief than a court of law can. And when the particular property has been converted into another species of property by the tenant for life, or those who claim in privity with him, the remainderman may elect to follow and take the fund in its changed form. Thus, when a factor was employed to sell clothes for cash, and he sold the articles on a credit, and died before receiving the money, it was held that the money belonged, in equity, to the factor's employer, and not to his executor. *Burdett v. Willet,* 2 Vern., 638; Swin. on Trusts, 201. We know that a *cestui que trust* may follow the fund, and take it in its changed form. And the principle applies not only to express trustees, but also to such as are clothed with the same character by construction of law, as if a person purchases an estate with another man's money entrusted with him. *Docker v. Somers,* 2 Myl. and Th., 664; Swin., 290. The defendants are unable to get back the slaves from the present holders, either in law or equity; therefore the plaintiff cannot get relief on the particular prayer in his bill. But he now elects to take the purchase money received by the defendants, and claims this under the prayer for general relief. And we are of the opinion that he is entitled to it, with interest on it from the death of Mrs. Cheshire. The defendants will be allowed a reasonable compensation for the trouble of carrying the slaves to Alabama and selling them and bringing back the money. It will be seen that we have regarded Ivey as a competent witness, notwithstanding the objection made to the reception of his testimony. We regard the objection as going to *his credit only,* for it does not appear that the conveyance was made (574) to him or that he claims the title to or has the possession of the slaves, and we do not see how he can derive any direct benefit from the decree that may be rendered in this cause.

PER CURIAM. Decreed accordingly.

Cited: McBride v. Choate, post, 613; *Hales v. Harrison,* 42 N. C., 299; *Jones v. Baird,* 52 N. C., 15; *Sanderford v. Moore,* 54 N. C., 208; *Haughton v. Benbury,* 55 N. C., 340; *Isler v. Isler,* 88 N. C., 580; *Hunter v. Yarborough,* 92 N. C., 71.

(575)

THOMAS W. HUDGINS, ADMINISTRATOR, ETC., v. BENJAMIN WHITE.

Where the bill is for the execution of a trust, and circumstances are disclosed which tend to show that the trust was created for the purpose of defeating creditors, yet if such fraud is not directly alleged either in the bill or answer, the court will take no notice of it, but will proceed to decree an execution of the trust, if properly established by proofs.

THIS cause having been set for hearing, was transmitted by consent from the Court of Equity of CHOWAN, at Spring Term, 1843, to the Supreme Court. The following case was presented by the pleadings and proofs:

In December, 1829, there were judgments against Jesse Hudgins, then of Gates County, to much more than the value of all his property, and sales were appointed to be made on the executions on 21st of that month. A few days before the sale the wife of Hudgins wrote to the defendant (who was her brother and resident in an adjoining county), giving him information thereof, and requesting him to attend the sale and purchase some necessary articles for the support of the family. She also mentioned to him that her husband had sold a negro for $250, "of which," says the letter, "I never saw a cent. But I want you to come and see if you can't get him to make something over to you for my support, for if he does not I shall have nothing to support my children. I depend on you as a friend." The defendant being confined by sickness could not go, but authorized another person to make such purchases as his sister should direct. Hudgins was a farmer in moderate circumstances and everything he had was sold, and the defendant's agent purchased, at very low prices, articles to the amount of $228.33, consist-
(576) ing of indispensable household furniture, provisions, a horse, cow and calf, some plantation utensils, including also a negro woman at the price of $55.01, and a negro boy named Wilson, about nineteen years of age, at the price of $41.01. The bill charges that it was agreed between Hudgins and White that the property should be bid off in the name of the latter and held in his name, but for the use of Hudgins and his family, and that Hudgins should then furnish as much money as he could towards paying for it, and the residue of the money be advanced by White, for which the property was to stand as a security. In a short time after the sale Hudgins paid White $70 on account of the purchase, and delivered to him some articles to the value of $26 more, and in August succeed-

ing White gave a receipt therefor to Mrs. Hudgins as having been received of her "in part payment of the chattel property" bought at the sale. The possession of all the property was retained by Hudgins until his death in 1835, and afterwards by his family until 1837. At this latter period the defendant was called on for payment of some medical bills for attending on the negroes, which Mrs. Hudgins was unable to pay, and the defendant then took the negro Wilson into his possession, and has retained him or hired him out ever since; still, however, not removing or interfering with the other property. The bill then states that the plaintiff had a judgment against Jesse Hudgins for a large debt due before December, 1829, which remains unsatisfied, and that there are no effects of Hudgins out of which it can be satisfied, save only those purchased as aforesaid by the defendant. In May, 1839, administration of the estate of Hudgins was granted to the plaintiff, and afterwards he filed this bill, in which he prays that the defendant may be decreed to surrender to the plaintiff the negro Wilson and pay over to him all his hires, and also release the other property bought by him.

The answer states that the defendant did not expect his agent to purchase the slaves at the sale, but only such things as were absolutely necessary for his sister and her children, but that as he had not restricted the agent, he felt obliged to (577) take and pay for the slaves as well as the other things. It denies that any communication passed between Hudgins and himself on the subject before the sale, or any other member of the family, except Mrs. Hudgins, as before mentioned. And it states that as to the furniture, provisions and other necessaries for living, he intended them as a provision for his sister and her children from himself, as far as they might not be able to pay for them, and that he gave the receipt for the sum of $96, paid to him, for the purpose of satisfying her that she should have those articles.

The defendant says he did not understand her as wishing to have the negroes, and that he did not intend to give her to understand that he would surrender them, and hence he expressed that the money was in part payment for the "chattel property," meaning thereby the other articles, besides the slaves. But the defendant admits that he did not take away the negroes until 1837, being willing that Hudgins and his family should have the benefit of their services, and that he then took away Wilson alone for the reasons before mentioned, and has since hired him out for $75 per annum.

There was a replication to the answer.

The depositions introduced by the plaintiff supported the allegations contained in the bill. There was other testimony, but it related principally to matters of account, should the court declare the trust established and order an account.

Iredell for plaintiff.
A. Moore and *Kinney* for defendant.

RUFFIN, C. J. Upon the circumstances as disclosed by the pleadings, there could be little hesitation in decreeing a redemption of the slaves, as well as the other things purchased
(578) by the defendant. But if it were possible to doubt upon the case, as made in the bill and answer, the proofs make the plaintiff's right manifest. It is stated by the defendant's agent that, at the time of the purchase, money was placed in his hands (about $70) belonging to Hudgins, towards paying for the purchases, and that, at the instance of Mrs. Hudgins, he bought the negroes for the benefit of Hudgins' family, as he did the other articles, and that he bought all very low in consequence of making it known that he was bidding for the defendant for the benefit of the family. The witness states that Hudgins used that money (the $70) in payment for his purchases. If to these circumstances be added the subsequent use and dominion over the negroes, there cannot be a doubt that the defendant meant the whole as a donation from himself, or at the most to hold the property as a security for his advances, with liberty to his brother-in-law to redeem. Indeed, the counsel for the defendant did not contest the right to redeem so much upon the ground that his purchase was absolute as because the bill shows that it was a fraudulent contrivance to protect the property from the creditors of Hudgins, under the cover of a purchase by the defendant, really (though secretly) in trust for Hudgins. If such were the case, the Court could give no relief to either party to the dishonest agreement, and it struck us at the opening of the case that the bill was drawn with that view, as no other motive for stating the plaintiff to be a creditor could be imagined. Upon a more careful reading of the bill, however, it would seem that the pleader was cautious not to make the needful allegation that the purchases were made upon the imputed trust with the intent to hinder or defraud creditors.

The acts themselves may be evidence of such an intent, but they may likewise have been innocent and truly and openly to constitute a security for the defendant's advances, with an open and honest trust beyond that for Hudgins; and without a direct averment of the covinous purpose it cannot be assumed or acted

on by the Court. The bill, therefore, does not state a case of fraud against creditors, and it is not necessary to (579) consider the effect on the right to redeem, if the bill had so stated. Nor does the answer place the defense on that ground, but solely on that of the defendant's purchases being absolute and for his own use, without any trust for Hudgins, or use in the property to him or his family, except as the defendant might gratuitously allow. To that defense the receipt of the money of Hudgins, as a payment for the articles purchased, is a complete answer, in connection with the other facts before spoken of. Therefore, the plaintiff, as the administrator of Hudgins, must be declared to be entitled to redeem on the usual terms, and there must be a reference to take the accounts.

PER CURIAM. Decreed accordingly.

(580)

NATHAN MOORE *v.* JOHN REED.

1. If a person, while he is in a state of intoxication, is imposed upon and induced to enter into a disadvantageous agreement, yet if, after he becomes sober, he ratifies such agreement by giving a bond or deed in pursuance thereof, the court will not interfere to relieve him.

2. Mere folly in making an agreement, without fraud, is no ground for relief in equity.

3. Where a person who has been induced by fraud or imposition to purchase property, afterwards parts with the property, so that he cannot put the vendor in *statu quo*, the court will not rescind the contract, except in some cases where the party was continuing under the same pressure of distress at the time of parting with the property as operated upon him at the origin of the transaction.

THIS cause having been set for hearing in ROCKINGHAM Court of Equity, at Spring Term, 1843, upon the bill, answer and proofs, was removed by consent of parties to the Supreme Court to be heard.

The facts stated in the pleadings will be found at large, 36 N. C., 419, a motion to dissolve the injunction which had been granted in this case having been determined at June Term, 1841, of the Supreme Court. The substance of the proofs upon which the cause was now heard is set forth in the opinion delivered in this Court.

Morehead for plaintiff.
Graham for defendants.

DANIEL, J. The substance of the bill and answer is stated in 36 N. C., 419.

(581) After the dissolution of the injunction the plaintiff retained the bill and replied to the answer. And it now comes on to a hearing on the proofs taken by the parties. We have examined all the evidence in the cause, and it proves that the plaintiff was but a farmer in the neighborhood, upon a small scale; that he had no skill in mercantile business; that he was very deficient in the knowledge of arithmetic and reading and writing. He went to the store of the defendants on a certain day in April, 1840, and was then perfectly sober, and he there drank some ardent spirits with several other persons, and although somewhat excited by drink, he was not so far intoxicated as to be deprived of his understanding. The spirits were furnished by the defendants in the ordinary course of their dealing, and not with a view to intoxicate the plaintiff or to induce him to enter into the contract, which he shortly thereafter did. After candlelight that evening the plaintiff, being in the store, proposed to sell A. Reed three slaves, when he was told by Reed that he had no money, but that he would purchase the slaves if the plaintiff would take goods in payment. Whereupon the plaintiff, after looking at the shelves which held the goods, and also at the goods that were behind and under the counter, offered to purchase the whole stock of goods then on hand, and the unexpired lease for a year of the storehouse. After some higgling between the parties a bargain was finally made and the price fixed at $2,300, to be paid in part by the said lot of slaves at $900, and the plaintiff's bond for $1,400, to be secured by a deed in trust on his real and personal estate. This being concluded upon, the plaintiff insisted that the bargain should be closed that night; and he thereupon entered into a written agreement in the penalty of $2,000 to complete the said contract. The plaintiff then, that night, took into his possession the key of the store. The plaintiff remained that night at a tavern close by the store, where he did not drink any spirits, and the next morning he arose and went to the store, and with the assistance of A. Reed proceeded to act as the owner and to sell goods to cus-

(582) tomers. And during that day, when sober, he executed to the defendant his bond for $1,400, and a deed in trust on his real and personal estate as a security for its payment, and also bills of sale for the slaves at $900. On the third day he delivered the slaves to the defendants. On the fifth day he

made an additional purchase of the defendants of a parcel of goods and merchandise not included in the first purchase. After he had acted in the business of merchant for three weeks he proposed to the defendant to rescind the contract, giving as a reason that a son of his, who lived in the western country, had written to him to come and reside there, and that he wished to do so. This proposition was declined by the defendants. The plaintiff continued in the business for the space of five or six weeks, when he either sold out to his son or he and his son sold the goods at vendue. The evidence, though not satisfactory to show the actual value of the goods so bought in the gross, renders it exceedingly probable that they were worth considerably less than the price given for them. On 17 September, 1840, this bill was filed, praying the court to rescind the contract, and for general relief. Whether a court of equity could have aided the plaintiff, if he had in a reasonable time after discovering that he had been imposed upon in the contract insisted on an abandonment thereof and applied to be released therefrom, is a question not now necessary for us to decide. For the subsequent acts of the plaintiff, when he was undoubtedly sober, did, in our opinion, sufficiently confirm and validate the contract. And if a person will enter into a hard bargain with his eyes open, equity will not relieve him, unless he can show fraud in the party contracting with him or undue means to draw him into the agreement. *Willis v. Jernagan*, 2 Atk., 251. Mere folly in making an agreement without fraud is no ground for relief in equity. *Millness v. Cowley*, 8 Price, 620. Again, the plaintiff had sold the property before he filed his bill, and thereby put it out of his power to place the defendants in *statu quo*. The Court is not disposed to rescind a contract in such a case, unless a plaintiff is continuing under the same pressure (583) of distress at the time of the sale as he was at the origin of the transaction, as in the case of expectant heirs dealing with their expectances for less than their value, under the pressure of distress. *King v. Hamlet*, 2 Myln. and K., 456; *Mill v. Morley*, 9 Ves., 478; *Gowland v. Defaria*, 17 Ves., 20; Drewry on Inj., 16, 18.

We think the bill must be dismissed.

PER CURIAM. Bill dismissed.

Cited: Freeman v. Dwiggins, 55 N. C., 165; *Berry v. Hall*, 105 N. C., 163; *Orrender v. Chaffin*, 109 N. C., 425; *Rodman v. Robinson*, 134 N. C., 515.

(584)

SAMUEL FLEMING AND OTHERS v. BENJAMIN BURGIN, SR., AND OTHERS.

1. Under the act passed in 1829, Rev. Stat., ch. 37, sec. 24, registration is an essential ingredient in a mortgage or deed of trust to make it that instrument or constitute it a deed or security as against a creditor or purchaser.

2. Therefore, notice of an unregistered mortgage or deed of trust constitutes no ground for relief in equity against one who takes a subsequent mortgage or deed in trust, and first registers it, unless the first mortgagee or trustee has been prevented from registering by the fraud of the other.

3. Where a statute declares that a deed or other instrument shall not be valid "at law," it does not mean simply that it shall be held invalid in a court of law only, but invalid in all courts. "At law" is not an expression which in a statute signifies merely a legal tribunal as distinguished from an equitable jurisdiction, but, generally, our system of jurisprudence, whether legal or equitable.

4. In these cases where notice of an unregistered deed will entitle the party to relief in equity, it must be clearly shown that such notice of the contents of the instrument, as to the subject and purposes of the conveyance and of the intention to rely on it as a conveyance, substantially reached the party, *in pais*, as would be derived upon those points from the registry itself.

THIS cause having been set for hearing at Spring Term, 1843, of the Court of Equity for BURKE, was then removed, by consent of the parties, to be heard in the Supreme Court. The following is a summary of the matters stated in the pleadings:

The bill is filed by Fleming and Lewis, and states that on 18 November, 1837, the defendant Benjamin Burgin the younger, of Burke County, being indebted to each of the plaintiffs, Fleming and Lewis, who also resided in Burke, and to sundry persons named, residing in Charleston, in South Carolina, in certain sums therein mentioned, did, for the purpose of securing those several debts, convey and assign by deed to the plaintiff
(585) Fleming certain slaves and other chattels in Burke County, in trust to sell the specific articles and collect the debts, and thereout pay all the debts in the deed mentioned; that all the creditors mentioned in the deed have been paid, except the plaintiffs, Fleming and Lewis; to the former of whom the sum of $1,000, or thereabouts, is due on sundry bonds and judgments, and to the latter about the same sum. The bill charges that the deed was executed in Charleston, and that the plaintiffs were, in consequence of that, unable to have it proved and registered in Burke immediately, but had the same done on

20 December, 1837. The bill then states that immediately after the executing of the deed to Fleming in Charleston, B. Burgin, Jr., returned to his residence in Burke, and on 4 December, 1837, there made to Benjamin Burgin the elder another deed of mortgage and assignment of the same slaves, chattels and debts, and also others, to secure to him the payment of the sum of $3,700, pretended to be due him. And the bill charges that the said debt was not truly due to B. Burgin, Sr., and that the deed to him was executed with the fraudulent intent to delay and hinder the creditors of B. Burgin, Jr., and particularly to defeat the deed before made to Fleming, and so is void as against them. And the bill further charges that B. Burgin, Sr., had express notice of the deed to the plaintiff before he took his mortgage, and that he fraudulently had his assignment proved and registered on 8 December, 1837, for the purpose of defeating the prior deed to Fleming, or postponing the satisfaction of the debts due to the plaintiffs until the debt to himself should be discharged out of the effects assigned. The bill also charges that the chattels and effects assigned to B. Burgin, Sr., are of value sufficient, if properly managed and accounted for, to discharge all the debts, as well those of the plaintiffs respectively as that to B. Burgin, Sr. The bill is brought against both of the Burgins, and the prayer is that the plaintiffs may be let in upon the effects preferably to the mortgagee, B. Burgin, Sr., and likewise that an account may be taken of the debt to that person, and if he should be entitled to the preferable (586) satisfaction, that, after his debt shall have been discharged, those to the plaintiffs may also be raised out of the effects.

Both of the defendants answered. B. Burgin, Jr., denies that he owed the plaintiffs the debts mentioned in the deed, and says that he owed Fleming not more than $350, but does not speak of the amount due to Lewis. He also denies that the deed of 18 November to Fleming was executed really as a security to be enforced for the debts therein named, and says that, being in Charleston with Fleming, who lived near him and knew his affairs fully, and being then much indebted to divers persons who threatened to arrest him, he was persuaded by Fleming to execute a conveyance for some property, which should satisfy the creditors residing there and induce them to allow this defendant to return home, after which the deed, having answered its end, might be destroyed. He further says that he was induced by his distresses and those persuasions to yield his assent to the proposed measure; and that, thereupon, Fleming prepared the deed, in which he untruly stated the debt to himself to be

larger than it was, as aforesaid, and this defendant executed it, solely with the view and for the purpose last mentioned, and with the distinct understanding with Fleming that the deed should not be registered or anywise put in force, but should be canceled as soon as this defendant should get home, and that he should then be at liberty to sell or otherwise dispose of his property as he might think best for the purpose of paying or securing any of his debts, and answering any other purpose he might have. He further states that he has in fact paid the creditors in Charleston, as he at the time intended, and that, being so authorized by the agreement between Fleming and himself, he executed the mortgage to the other defendant on 4 December to secure the debt mentioned to that defendant, the whole of which was just, and not to defeat the deed to the plaintiff; and that he then informed the other defendant, B. Burgin, Sr., that he had executed the deed to the plaintiff, and the circumstances under which and the purposes for which it was done, all (587) as by him before set forth, and that accordingly he was at liberty, notwithstanding the execution of the said deed to Fleming, to make any other disposition of his property which would promote his interest.

The other defendant, B. Burgin, Sr., states how the debt to himself arose, and that the whole of it was justly due, and that, finding the debtor in failing circumstances, he took his mortgage and assignment truly for the purpose of securing himself, and not for the purpose of defeating any creditor of B. Burgin, Jr. He denies that at the time of taking his deed he had any notice, directly or indirectly, express or implied, of the execution or existence of the deed to Fleming, except what he derived from the other defendant, and the information of that transaction, thus derived by this defendant from the other defendant, was as is set forth in the answer of that defendant, B. Burgin, Jr. B. Burgin, Sr., further states, in particular, that when the deed to himself was read, B. Burgin, Jr., informed him that he had made a mortgage to Fleming in Charleston, reciting among other things a debt of $350, and that he executed it for the purpose of making his creditors in Charleston easy until he could get away, and that it was agreed between Fleming and himself (B. Burgin, Jr.) that the former could surrender the deed as soon as they returned home, and this information, this party says, he believed at the time he received it and still believes, and therefore insists on his own priority. The answer then states that the defendant is unable to set forth what sums can be realized from the property and debts assigned to him,

and states the reasons why he is so unable, and it submits, if there should be a surplus after paying his debts, to apply it as the court should direct.

To these answers replications were entered, and the parties proceeded to take their proofs, which are noticed, so far as material, in the opinion delivered in this Court.

Caldwell for plaintiffs.
Alexander for defendants.

RUFFIN, C. J. The execution of the deed from the one (588) Burgin to the other at the period of its date and the justice of the debts thereby secured are fully proved, and indeed were admitted on the hearing. The case therefore turns on the effect which, notwithstanding the prior registration of that deed, notice, at the time it was taken, to the creditor of the previous deed, under which the plaintiffs claim, will have in postponing the last mortgage; and whether, if any notice will have that effect, the notice in this case was sufficient. The act of 1829, Rev. Stat., ch. 37, sec. 24, enacts that no deed of trust or mortgage shall be valid at law to pass any property, as against creditors or purchasers for a valuable consideration, but from the registration of such deed. The act, therefore, takes away the relation of the deed to the period of its execution which arose under the former statutes upon its registration in due time, by declaring that it shall be valid "but from the registration." We have a strong impression, also, that the Legislature intended to make the registration indispensable to the operation of the deed in all instances, not merely as a ceremony requisite in point of formality to make it evidence, but as entering into the constitution of the deed as an instrument set up against a creditor or purchaser from the mortgagor. The policy of the registry acts is, first, to give notice of conveyances and encumbrances, and, secondly, to exclude the necessity of parol proof upon the question whether another person had or had not notice. It was well known to the Legislature that, notwithstanding the former legal provisions on this subject, it had become a rule of the Court of Equity that notice of a prior unregistered encumbrance, which notice might be proved by parol, would give relief against a subsequent deed, first registered; and, consequently, that many persons kept their encumbrances in their pockets, and registered them only when they wished to use them, as they might do from the length of time allowed in the registry acts and in those giving further time for that purpose. From this practice many evils arose, as there might be vague rumors of encumbrances of which

there was no means of knowing the particulars. To rem-
(589) edy them the Legislature first passed the act of 1820, requiring mortgages and deeds of trust to be registered within six months, and enacting that if not so registered they should be held, as against creditors and purchasers, utterly null and void. Then followed the act of 1829, whereby the Legislature, not content that there should be any delay in registering, destroys all relation of the deed, and says it shall not operate until or "but from" its registration. It would seem that the Legislature could not more emphatically declare that the fact of registration was requisite to perfecting the deed as against the protected persons and that nothing should supply the place of it as against those persons. There is a constant suspicion of those instruments discovered, as pervading all our legislation concerning them, and in the acts subsequently passed to give further time for registering conveyances, deeds of trust and mortgages are uniformly excepted. We doubt not that fraud would take a case out of this act, as out of any other intended for the protection of particular persons. We mean a fraud committed by one in being the cause why the deed of another was not registered; for he who prevents an act from being done ought not to insist upon an advantage from its not having been done. But it is so easy to register a deed of trust or mortgage under the act of 1829, which allows it to be proved in the clerk's office and makes the delivery to the register registration (*McKennon v. McLean*, 19 N. C., 79), that it must be deemed the most gross negligence to omit it, and so strongly argues a purpose not to let the world have that exact knowledge of its contents which the law intended, as justly to raise a presumption that the deed never was relied on as a security, or that it had been abandoned. No stress can be laid on the expression in the act, "valid at law," as recognizing a validity in equity or as intentionally leaving it to a court of equity to support the deed without registration, inasmuch as the Legislature could not suppose a court of equity would defeat the policy of a statute by construction, more than a court of law would, and, moreover,
"at law" is not an expression which, in a statute, signifies
(590) merely a legal tribunal as distinguished from an equitable jurisdiction, but generally, our system of jurisprudence, whether legal or equitable. From the policy which certainly dictated the act, and the peculiar provisions of it, the Court is forcibly led to conclude that registration is an essential ingredient in a mortgage or deed of trust to make it that instrument or constitute it a deed or security as against a creditor or purchaser.

But if it were otherwise—and we do not find it necessary in this case to say, positively, that it is not—we hold that though notice may deprive a subsequent purchaser of the protection of the act, yet the notice here is not sufficient for that purpose. *Lord Hardwick,* in *Leneve v. Leneve,* 3 Atk., 646, laid down the rule, which has been since followed, that notice of an existing unregistered deed bound one who took a subsequent one and first registered it. That certainly tended to subvert the registry acts, as allowing parol evidence to show that knowledge of the deed *in pais* which could be derived from the registration, and it would effectually subvert them if, as in ordinary cases of notice of a prior equity, a notice of anything that would lead to inquiry were held to be sufficient notice. Fortunately, a case came before the same great judge which called for his opinion on that point. *Hine v. Dodd,* 2 Atk., 275. In it he informs us that as the act of Parliament was positive and made to prevent perjury from contrariety of evidence, he could not overturn the act upon suspicion of notice, though a strong suspicion, but only for apparent fraud. He says the only cases that had been decided were cases of fraud, though he adds that possibly there may have been others upon notice, divested of fraud, but then the proof must be extremely clear. He therefore qualifies the rule, that fraud is necessary, by the expression, "or clear and undoubted notice," which can mean no less than a full knowledge of the contents of the deed, and that the person omitted to register it merely from inattention or inability, and not because he has abandoned it and does not mean to register it at all. For in that case, though his Lordship declared "the answer loose," and that there were strong circum- (591) stances of notice, he yet dismissed the bill upon that part of the case. That the doctrine of that case is correctly understood as here represented is, we think, clearly to be collected from what has been said in subsequent cases, after the subject had been long and thoroughly considered. In *Wyatt v. Barwell,* 19 Ves., 435, the master of the rolls, after mentioning the doubts entertained of the propriety of having suffered the question of notice to be agitated against one who had registered his deed, proceeds to state what he considered the rule, thus: The courts have said we cannot permit fraud to prevail, and it shall only be in cases where the notice is so *clearly proved as to make it fraudulent* in the purchaser to take and register a conveyance in prejudice of the known title of another, that we will suffer the registered deed to be affected. Even with that limitation, he thought the efficacy of the registry acts considerably lessened, as no one can tell what may truly or falsely be

given in evidence, or what may be the effect of the evidence in the mind of the judge. But finally he concludes by saying that it is only by *actual* notice, *clearly* proved, that a registered conveyance can be postponed; and that even a *lis pendens* will not amount to notice for that purpose. Again, in the previous case of *Jolland v. Stainbridge,* 3 Ves. Jr., 478, the regret is expressed that the statute had been broken in upon by parol evidence, and the satisfaction of the judge that *Lord Hardwick,* as he understood him, had in *Hine v. Dodd* said that "nothing short of actual fraud would do." And what the master of the rolls deemed fraud in this case we cannot misunderstand when we find him saying, "it is clear that it must be satisfactorily proved that the person who registers the subsequent deed *must have known exactly* the situation of the persons having the prior deed, and, *knowing that,* registered *in order to defraud* them of that title he knew at the time was in them." These cases leave no doubt of the kind of notice or fraud on the prior encumbrance which will reinstate him in his preference. It is called sometimes "actual notice" to be clearly proved, and some-
(592) times "exact knowledge" of the situation of the parties.

From which it should seem to follow that such notice of the contents of the instrument, as to the subject and purposes of the conveyance and of the intention to rely on it as a conveyance, must substantially reach the party *in pais* as would be derived upon those points from the registry itself. We do not mean that information precisely correct as to everything conveyed or as to the amount of each debt secured would be necessary to give any effect to the deed, but that, at most, it could only be set up against the subsequent purchaser for such purposes as it was distinctly represented to him as intended to effect and effecting, and that such representations must at least be true as far as they go and convey something like the real contents of the instrument. Without information to that extent there can be no imputation of fraud by taking a deed in order to defeat the former one.

We think this case wholly wanting in evidence of a notice of that character. The plaintiffs have given no evidence upon the subject but that contained in the answer. On the other hand, the defendant B. Burgin, Sr., proves by the subscribing witnesses to his deed that, when it was executed, the grantor informed those persons and B. Burgin, Sr., that he had made the deed to Fleming in Charleston, but that it was not intended to operate, except to keep his creditors in Charleston easy until he could get away, and that it was agreed between Fleming and himself that the former should surrender the deed and not have

it registered. Now, that representation may be true or false without, in either case, impeaching the fairness of the conduct of the party in taking the subsequent deed. There is some reason to believe that it may be true, from the evasive and unsatisfactory answer of one of the subscribing witnesses to the plaintiff's deed as to an understanding of that sort. But, undoubtedly, the second mortgagee had reason to believe it true, not only because he was so informed by the party to the deed, but also because he knew that another subscribing witness to the plaintiff's deed lived in Burke and returned to that county with B. Burgin, Jr., and that the plaintiff might have sent the deed by him and had it proved and registered, but did (593) not. And it is remarkable, too, that the plaintiff has not examined that witness to repel, if he could, the allegation that it never was intended by him to register or set up his deed. But admitting the fact to be that he did intend to claim under the deed, it cannot affect the second mortgagee, since he was not informed of that intention, but was told directly the reverse, and had no reason to disbelieve his information, but swears that he did believe it, and took his deed under that belief, and of course not "in order to defraud" the plaintiffs, but merely to secure his own debt. If any state of information respecting the intended or even actual destruction of a deed, of which a rumor of the existence at one time has reached a party, will excuse one for taking a conveyance of the same property, it would seem that this should.

So far, therefore, as the bill seeks to have the deed to B. Burgin, Sr., declared fraudulent and void, as not having been given for a just debt and with intent to delay creditors, and so far as it seeks relief by having the mortgage to the defendant B. Burgin, Sr., postponed in favor of the assignment to Fleming, it must be dismissed with costs.

But as the property conveyed to the defendant may more than suffice to discharge his debt, so as to leave a surplus for the plaintiff, there must be, if they choose, a reference to take an account of the defendant's mortgage debt and of the sum now due thereon, upon payment of which the plaintiffs may have an assignment of the mortgage, or such other relief as may seem proper upon a motion for further directions, upon the coming in of the report.

PER CURIAM. Decreed accordingly.

Cited: Gilliam v. Reddick, 26 N. C., 371; *Womble v. Battle,* 38 N. C., 191, 197; *Robinson v. Willoughby,* 70 N. C., 364; *Blevins v. Barker,* 75 N. C., 438; *Todd v. Outlaw,* 79 N. C.,

237, 238; *Parker v. Banks, ib.*, 483; *Ijames v. Gaither*, 93 N. C., 361; *Bank v. Mfg. Co.*, 96 N. C., 305; *Weaver v. Chunn*, 9 N. C., 434; *Hinton v. Leigh*, 102 N. C., 32; *Duke v. Markham*, 105 N. C., 138; *Quinnerly v. Quinnerly*, 114 N. C., 148; *Bostic v. Young*, 116 N. C., 771; *Blalock v. Strain*, 122 N. C., 285; *McClure v. Fellows*, 131 N. C., 510; *R. R. v. Lumber Co.*, 136 N. C., 191; *Piano Co. v. Spruill*, 150 N. C., 169.

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(594)

JOEL AND SAMUEL HAUSER AND OTHERS v. JOHN C. LEHMAN AND OTHERS.

Where two joint executors sold a tract of land belonging to their testator, in pursuance of the directions of his will, and took from the purchaser a covenant for the purchase money, and it was stipulated in the covenant that any debts due from either of the executors to the purchaser should be deducted as payments, and the whole purchase money was exhausted by the debts of one of the joint executors: *Held*, that both the executors were equally responsible to the person entitled under the will to the proceeds of the land.

THIS cause was transmitted to this Court, by consent of parties, from STOKES Court of Equity at Fall Term, 1838. The facts will be found in the opinion delivered in this Court.

Boyden for plaintiffs.
Morehead for defendants.

GASTON, J. Henry Shore, formerly of Stokes County, died in 1819, having by his last will and testament, whereof he appointed the defendants Henry Shore and John Christian Lehman executors, directed his household furniture to be sold and the proceeds to be equally distributed among his five children, of whom Mary Barbara, the wife of Simon Peter Hauser, was one, and, in regard to her share, he directed that it should remain in the hands of his executors in trust for the children of the said Mary Barbara, the interest yearly for her use to be paid to her by the executors. He further directed, after the deduction of certain legacies, that his remaining property, consisting of bonds, book accounts, notes and cash on hand
(595) and money received by the sale of his household property, be divided in the same manner, and that the share of his daughter Mary Barbara be managed as before directed. He further declared his will to be as follows: "It is my will

that out of 1,000 acres of land which I am possessed of on Obion River, State of Tennessee, my son Henry Shore and my son John Christian Lehman (the executors aforesaid), for their trouble by attending on me in my old age, shall each of them have 150 acres extra, and the remaining 700 acres to be sold by my executors and the money arising from said sale to be equally divided among my five children (naming them), the share of the last mentioned (Mary Barbara) to be managed as directed in the third section, to remain with my executors in trust for the children of my daughter, Mary Barbara, and the interest of her share shall be paid annually by my executors to her, and for her own use, during her natural life. The executors proved the will, made sale of the household furniture, and sold the tract of land on Obion River to one Jacob Conrad, and this bill was filed by the said Simon Peter Hauser and Mary Barbara, his wife, and their children, against the executors and the said Conrad, in order to have an account from and decree against the executors because of the share of the proceeds of the sale of the furniture of the testator, and of his money, bonds, notes, and open accounts, wherein they are interested as aforesaid, and also a decree against the executors and Conrad also, because of their share in the price of the Tennessee tract of land. Conrad, since the filing of the bill, has died, and the suit having abated as to him, has been since carried on against the executors only. Accounts have been taken in the course of the cause in regard to the receipts, disbursements and payments of the respective executors, and no exception having been taken on either side to the master's report in relation thereto, the same will stand confirmed. One question is left for the consideration of the Court. It appears upon the pleadings, proofs and master's report that the executors sold to Conrad the whole of the Obion tract of land for the sum of $2,000, payable 1 January, 1822, and that the sum of $1,400, being the part of the price which was directed to be divided between the chil- (596) dren of the testator, has been received by the defendant Shore exclusively. As to *his* liability for the share of that money claimed by the plaintiffs, there is no dispute; but it is contended on the part of the defendant Lehman that *he* (Lehman) is in no respect responsible to the plaintiff on account thereof. The material facts in relation to this transaction are that the sale of the tract was made by the defendants jointly, and that after having secured the payment from Conrad for the price of the 300 acres specially devised to them, they took his covenant for the remaining part of the price of $1,400 and executed to him a conveyance in fee simple. In this covenant it

was expressly stipulated that all debts that might be due from the said Shore and Lehman, or from either of them, unto the said Conrad, should be deducted from and be allowed as payments on account of the said land. From day to day, and as Shore's pressing personal necessities called for help, Conrad supplied him with goods and occasional sums of money, until by 17 August, 1821, the amount of such supplies equaled the amount to be paid by the covenant, and on 2 January, 1832, a settlement was had between Conrad and Shore in the presence of Lehman, and Conrad's covenant surrendered as extinguished. When this was done Shore was in very embarrassed circumstances, and he is now believed to be insolvent. Upon these facts it is impossible to doubt the liability of Lehman for the waste of these funds. By the terms of the sale, in which he concurred, he enabled and tempted his coexecutor and cotrustee to commit this act of malversation. He must be answerable therefor, as much as he would have been for the misapplication by a stranger whom he might have authorized to receive the money of his *cestuis que trust* and, should he need it, to apply it to his own use.

PER CURIAM. Decreed accordingly.

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(597)

ASA BELL'S ADMINISTRATOR v. JOHN B. JASPER AND OTHERS.

1. The deposition of a defendant against whom a decree is prayed and who is interested in the event of the suit, cannot be read for his codefendants.

2. A party who is interested cannot be a witness, though it is admitted he is insolvent.

3. The question how far a party is a competent witness must always be raised at the hearing and when the deposition is offered to be read in evidence.

4. A preliminary order of court, suggesting that a defendant has no interest in the suit, is always necessary to authorize the reading of such deposition in behalf of his codefendants.

5. When, upon the petition of the sureties of a guardian under the act of Assembly, new sureties are ordered to be given, the obligation of the bond given by the new sureties extends to the *entire* guardianship, retrospective as well as prospective. Such a bond is at least an additional and cumulative security for the ward.

6. The right of contribution exists between cosureties when the principal is insolvent, and that, whether they are so by separate instruments or by the same instrument.

7. Where sureties are liable by virtue of different and separate penal bonds, each set of sureties is liable in proportion to the amount of the penalties of the bonds respectively.

THIS cause, having been set for hearing at Spring Term, 1843, of the Court of Equity for HYDE, was then ordered, by consent of parties, to be removed to the Supreme Court to be heard.

The matters in controversy are stated in the opinion delivered in this Court.

Badger for plaintiff.
J. H. Bryan for defendants.

DANIEL, J. In 1812 John B. Jasper was appointed (598) guardian to Patsey Jasper by the County Court of Hyde, and he executed a guardian bond in the penalty of $10,000, with James Cleaves, Asa Bell and Israel Wilkerson as his sureties. In 1819 the sureties to the said bond petitioned the court, under the act of Assembly (*vide* Rev. Stat., 312, sec. 20), and suggested in the said petition that the guardian was acting in such a manner with the estate of the ward that they were in danger, and they prayed the court that an order might be made that the property of the ward might be delivered over to them, or that the guardian should counter-secure them. The court, at February Sessions, 1820, ordered that the said guardian enter into a new bond in the penalty of $5,000, which order was performed by the guardian, and the new bond was drawn in the form of an ordinary guardian bond, and executed by Jasper as principal and William H. Russell, James Leath and D. W. Martin as his sureties. And the court then further ordered "that Asa Bell and others, the sureties of John B. Jasper, guardian of Patsey B. Jasper, upon the *old* bond, be released from that time from their liabilities." The ward married first a man by the name of Hawks; suit was brought by Hawks and wife against Asa Bell, one of the sureties to the first bond, to recover the personal estate of the ward; Hawks died; his widow then married Foy, and suit was continued against Bell in the name of Foy and wife, and at December Term, 1835, of the Supreme Court judgment was obtained for the sum of $4,100.65 and costs; the costs were $198.09; all which moneys were paid by Bell, at June Term, 1837, of the Supreme Court. The bill states that Jasper is hopelessly insolvent. But, nevertheless, a decree is prayed against him for the whole sum as principal debtor, and also against the sureties that are alive and the representatives of those that are dead, on both bonds, for contribution on the score

of Jasper's insolvency. The defendants answer and insist: (1) That the plaintiff had released Jasper, the principal debtor, which they contend is, in this court, a release to all his sureties.

(2) The sureties to the new bond state in the answer
(599) that the entire recovery against Bell, in the suit brought by Foy and wife against him, was for breaches of duty by Jasper as guardian during the time of the first bond, and when he (Jasper) was solvent, and before they became sureties. They insist that the bond which they executed was only intended to cover prospective breaches of duty by the guardian and not for those which antecedently had been committed. Richard M. G. Moore (the administrator of the two sureties, Wilkerson and Cleaves) denies that he has any assets of either of his intestates. Martin, a surety to the second bond, died after making a will, and devised his estate to his wife and an infant, Julia A. E. Hays. His executor refused to qualify, and his widow and the said infant took possession of Martin's estate, and are now in possession of it. The infant by her guardian answers and admits nothing in respect of the plaintiff's claim, but prays that the plaintiff be put to full proof, etc.

There is a replication to the answers.

The material allegations in the bill are all admitted by the answers of the adult defendants or proved by the evidence taken in the cause. There was an order made in the cause that the deposition of Jasper, one of the defendants, might be taken to be read for the other defendants as evidence, subject to all just exceptions. The question how far a party is a competent witness must always in such cases be raised at the hearing, and when the deposition is offered to be read in evidence. *Lee v. Atkinson*, 2 Cox, 413; *Franklin v. Colquhoun*, 16 Ves., 218; *Marcy v. Shaswell*, 2 V. and B., 401. In the bill Jasper is made a defendant and a decree is prayed against him; he is, therefore, primarily liable to the plaintiff. If he could be permitted to prove the loss of the deed of release relied on in the answers of the defendants he certainly could not be permitted to prove the execution and contents of the same, for he is directly interested in the event of the suit, and his being now insolvent does not alter the rule. Neither can the deposition of R. M. Moore, another defendant, be received in evidence for the other defend-

ants, as there was no preliminary order of the court to
(600) take his deposition. Such an order, suggesting that he has no interest in the cause, is in all cases necessary when the deposition of a defendant is intended to be offered at the hearing. *Mullany v. Delton*, 1 Ball and Beaty, 423; Chitty's Eq. Digest, 1015. The answers state that in the suit of *Foy v.*

Bell the master reported that Jasper had used or wasted his ward's money, to the amount of the decree then given against Bell, before the time the order was made in the County Court that additional security should be given by him. This is true. But the court ordered Jasper, as we think, to enter into a new guardian bond for the faithful performance of his duties of guardian from the time he was first appointed. Jasper was not then first appointed guardian; he had been appointed long before, and had received the entire estate of his ward before that order was made. The funds of the ward were then, in contemplation of law, in the hands of the guardian. The new bond is in the common form of a guardian bond. This was not intended to operate as collateral security or prospectively only; the least that can be said of it is that the obligors intended that it should operate as an additional and cumulative security to the ward for the *entire* guardianship of Jasper. The old sureties prayed the court to deliver the estate of the ward into their hands, but the interposition of the new sureties prevented that prayer being granted; had they not intervened the old sureties might have then brought Jasper to a settlement, and, he then being solvent, all might have been saved. The right of contribution exists between cosureties when the principal is insolvent, and that whether they are so by separate instruments or by the same instrument. *Mahew v. Crickett*, 2 Swan., 185; *Dering v. Winchelsen*, 1 Cox, 318; *Craythorne v. Swinburne*, 14 Ves., 160. But in what proportions are they to contribute? The sureties are not liable beyond the penalty of the particular bond each has signed. If Foy and wife had been damnified by the acts of the guardian to the amount of $15,000 or more, then the rule of contribution between these two sets of sureties would plainly be this: the sureties to the old bond would have to pay $10,000 and those to the new bond $5,000. And (601) the same proportions must be observed when the sum demanded for the breaches of the conditions of the two bonds is less than the penalty of the smallest bond. The contribution between cosureties, who are so under separate instruments, is to be in the proportion of the penalties of the separate bond which each set of sureties has signed. *Dering v. Winchelsen*, 1 Cox, 318. In this case the sureties to the old bond, including Bell, would have to bear the loss of two-thirds and the other sureties to the new bond one-third. Bell has paid all the loss, and, therefore, he is entitled to have his debt established against Wilkerson's administrator for one-third of two-thirds of said loss, and the same against Cleaves' administrator. But he has no assets. The plaintiff has not shown by proof that there are

any assets belonging to either of the said estates. And the bill must be dismissed as to him, unless the plaintiff wishes to have an inquiry as to the assets and the administration thereof, which he may have if he will. As to the other third of the plaintiff's loss, for which he should be indemnified by the sureties of the second bond, it becomes necessary to ascertain, in order to fix the liabilities of the defendants thereby sought to be charged, the value of the property which the defendants Susan Martin and Julia Ann Elizabeth Hays hold, that was devised to them respectively by Daniel W. Martin, deceased. And as to the said last-mentioned defendants, there must be an inquiry whether the amount recovered by Foy and wife against Bell was justly recovered. The cause will be retained for further directions.

PER CURIAM. Ordered accordingly.

Cited: Pool v. Cox, 31 N. C., 72; *Allen v. Wood,* 38 N. C., 388; *Jones v. Hayes, ib.,* 506, 509; *Bright v. Lennon,* 83 N. C., 187; *Dudley v. Bland, ib.,* 224; *Pickens v. Miller, ib.,* 547; *Holden v. Strickland,* 116 N. C., 192; *Machine Co. v. Seago,* 128 N. C., 161; *Fidelity Co. v. Fleming,* 132 N. C., 336.

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(602)

ROBERT W. LINDSAY AND OTHERS *v.* SAMUEL COBLE AND OTHERS.

Under the act of Assembly (Rev. Stat., ch. 46, sec. 28) authorizing the executors or administrators of deceased persons in certain cases to execute deeds of conveyances for lands sold by their testator or intestate, the person who claims to have such conveyance made must show that there was a valuable consideration for the engagement of the deceased, and that consideration paid or such acts done or offered to be done on the part of him demanding a conveyance as were equivalent under the contract of the parties to a payment of that consideration.

THIS cause was transmitted by consent of parties from GUILFORD Court of Equity at Fall Term, 1838, to the Supreme Court for a hearing. After having been delayed for a report and other causes, it came on for hearing at this term. The matters involved in the case are stated in the opinion delivered in this Court.

Mendenhall for plaintiffs.
Graham for defendant.

LINDSAY *v.* COBLE.

GASTON, J. In 1807 David Coble and Samuel Lindsay made a parol agreement whereby the former was to exchange with the latter three acres of land at the bend of Shockley's Creek, called the Falls, of which the said David was supposed to be seized in fee as part of a tract which had been conveyed to him by John Bell, for three acres situated lower down on said creek, belonging to said Samuel Lindsay. No obligation was taken from Lindsay for the performance of his part of (603) this agreement, but Coble, on 2 June, 1807, executed a bond to Lindsay in the penal sum of $500, with condition to convey the three acres in the bend whenever thereunto required. Lindsay entered into possession under this bond and erected a mill at the Falls, and died in 1814 without having executed any conveyance of the three acres which were to have been conveyed by him, or receiving any conveyance from Coble.

A few years after Lindsay's death the mill fell down, and the possession of the three acres at the bend was resumed by Coble, who afterwards put his two sons, Samuel and Daniel Coble, into the possession of that piece, together with the residue of the tract bought from Bell. In September, 1825, an ejectment was brought against them for the whole of this tract upon the demise of one Jane Welborn, and upon the trial of that ejectment, it appearing that the said Jane, while a single woman, was seized thereof in fee, and being so seized, had intermarried with one John Welborn, who, by a deed purporting to be the deed of the said John and his wife, but which, because she had not been privily examined thereto, operated as *his* deed only, "had conveyed to John Bell, who conveyed to the said David Coble," and it appearing also that the said John Welborn had died, whereby the estate so by him conveyed had expired, there was a verdict and judgment in that action for the plaintiff.

After this recovery Samuel Coble purchased the land from William Welborn, the son of the said Jane, who had obtained a conveyance thereof from his mother, and on 25 November, 1826, received a conveyance in fee simple from the said William. In the succeeding year David Coble died intestate, and his son, the said Samuel, obtained letters of administration upon his estate. The plaintiffs, who are the heirs at law of Samuel Lindsay, and who at his death were infants of very tender years, in April, 1834, filed this their bill against the said Samuel, claiming from him a conveyance of the three acres set forth as aforesaid in the bond of his intestate, which bond they had caused to be proved and registered under the (604) act of 1797, ch. 478 (Rev. Stat., ch. 46, sec 28), authorizing the executors or administrators of deceased persons in

certain cases to execute deeds of conveyance for lands sold by their testators or intestates. We think it very clear that the plaintiffs can have no decree against the defendant. Waiving every other difficulty in their way, one is insuperable. The act referred to authorizes and empowers an executor or administrator to execute a deed of conveyance, where the testator or intestate has given a bond for title, when the land has been *bona fide* sold by the deceased. To make this such a case it must be shown that there was a valuable consideration for the engagement of the deceased, and that consideration paid, or such acts done or offered to be done on the part of him demanding a conveyance, as were equivalent under the contract of the parties to a payment of that consideration. See *Hodges v. Hodges*, 22 N. C., 72.

The bill must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

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(605)

TRUSTEES OF THE UNIVERSITY v. EDMUND D. MCNAIR'S EXECUTORS.

Where a person boards and supports another from motives of charity, without any intention of charging for her expenditures, he cannot, when the object of his charity subsequently becomes possessed of property, charge her or her representatives with the amount so expended—either at law or in equity.

THIS cause was transmitted for a final hearing from the Court of Equity of EDGECOMBE, at Fall Term, 1842, to this Court.

The facts are stated in the opinion here delivered.

Badger and *Attorney-General* for plaintiff.
J. H. Bryan for defendant.

DANIEL, J. Catharine Darby, an indigent lady, in 1810 came to the house of the defendant, where she was kindly received, and lived on terms of friendship and equality with the family until 1824, when she died, leaving no issue. During all that time the defendant maintained her, but never made any charge for her board and maintenance or intimated a design to do so. A Mrs. Blount made her will and left C. Darby a legacy, and died just before C. Darby did. In 1832 the defendant administered on the estate of C. Darby, and as such took into his pos-

session the said legacy. The next of kin not making any application in seven years for the said fund, the plaintiffs, by virtue of an act of Assembly, claimed the fund, and have filed this bill to obtain it. The case now comes before us upon an exception by the defendant to the report of the master, (606) that he had not been allowed the sum of $60 per year for the board of C. Darby, from 1810 to 1824. In looking into the defendant's answer, his examination before the master, and the deposition of Mary Parker, it appears to us that Mr. McNair boarded C. Darby the time mentioned from motives of charity, kindness and benevolence, or, in other words, he gave her the board. The circumstance of the legacy coming to her afterwards does not, either in law or equity, authorize him now to raise this charge. We think that the exception must be overruled, and that the report must be confirmed and a decree entered for the plaintiffs accordingly.

PER CURIAM. Decreed accordingly.

Cited: Hedrick v. Wagoner, 53 N. C., 362; *Everitt v. Walker*, 109 N. C., 132.

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(607)

ROBERT B. DAVIS AND OTHERS V. SEMPLE DAVIS AND OTHERS.

1. Where, on a petition for a sale of land for a partition because it could not be actually divided, one of the defendants who had purchased several shares alleged that the partition could be made without prejudice to the interests of the cotenants, and the cause was set for hearing upon the petition and answer: *Held*, that, the answer being thus taken to be true, the court could not decree a sale, notwithstanding it appeared that by an actual partition neither of the cotenants would get more than twelve acres of land. The court cannot determine, as it is not stated, what would be the value of each lot when divided off, nor to what purposes, whether agricultural or otherwise, it might be applied.

2. *Prima facie*, each party is entitled to actual partition, and it is incumbent on him who asks for a sale to show that his advantage will be promoted by it and that no loss will be worked to any other party.

THIS was an appeal from the decree of his Honor, *Dick, J.*, at Spring Term, 1843, of MECKLENBURG Court of Equity, dismissing the petition of the plaintiffs. The facts appear in the opinion delivered by the judge in this Court.

Alexander and *Osborne* for plaintiffs.
Hoke for defendant.

RUFFIN, C. J. John Davis died intestate, seized in fee of a tract of land situated in Mecklenburg County and containing 99 acres. He left seven children and two grandchildren, who were the issue of a deceased daughter, to whom the land descended as tenants in common. One of the sons, Robert B. Davis, and the two grandchildren, filed a petition in the (608) Court of Equity against the other six children, and therein alleged that the land could not be divided without prejudice to the parties interested, and thereupon prayed that a sale should be decreed upon proper terms for the purposes of partition. The defendants answered that one of them, Semple Davis, had purchased from the other five of them their several shares, so as, with his own original share, to entitle him to six shares of the land out of eight. And he says, further, that he owns other land adjoining this tract which would be rendered of much less value to him if he did not likewise own his parts of the land descended from his father, and he states that partition might be made by allotting to the petitioners their two shares, together, and to him the six parts thereof to which he is entitled, in one body, without prejudice to the interests of either of the parties, but to the advantage of all of them. The case was set for hearing on the petition and answer, and on the hearing the court refused to decree a sale and dismissed the petition with costs, from which the plaintiffs appealed. No other decree, it seems to us, could have been made than the one that was made. The cause was heard without proof, and upon the answer, admitted to be true, and the court was obliged to take it, that actual partition could properly be made without prejudice to any party, and that a sale could not be made but to the prejudice of the defendant Semple. But it was insisted at the bar that the answer itself furnished a sufficient ground to decree the sale as prayed, inasmuch as the judges must understand that so small a tract of land could not be actually divided among so many persons without a prejudice to the owners, each of whom would get a little more than twelve acres in severalty, which in this State must be of little or no value for purposes of agriculture. We answer that the Court is not at liberty to make such an inference against the positive statements of the answer, touching the effects of a sale or partition of the land upon the interests of the several proprietors. But, furthermore, it does not appear that this land is valuable only for agriculture, in the common acceptation of the term. Its situation does not (609) appear nor its quality. It may have minerals on it, or it may be near Charlotte, or there may be many other circumstances which would render even so small a parcel as

twelve acres of value sufficient to render it proper to divide the land itself among the claimants, instead of selling it. *Prima facie* each party is entitled to actual partition, and it is incumbent on him who asks for a sale to show that his advantage will be promoted by it and that no loss will be worked by it to any other party.

PER CURIAM. Decree affirmed with costs.

Cited: Windley v. Barrow, 55 N. C., 66.

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(610)

MARY McBRIDE v. RICHARD CHOATE, ADMINISTRATOR, ETC., AND OTHERS.

1. An administrator in this State is only accountable for the assets of his intestate which were in this State at the death of the intestate.

2. A husband has no right to dispose by will of a remainder in a slave belonging to his wife after the expiration of a life estate.

THIS cause, at Spring Term, 1843, of SURRY Court of Equity, was transmitted by consent of parties to the Supreme Court for hearing.

The matters in controversy are stated in the opinion delivered in this Court.

Boyden for plaintiff.
Morehead for defendants.

GASTON, J. Moses Woodruff, of the county of Surry, died in 1817, having by his last will and testament bequeathed to his wife Elizabeth "the labor of his negro wench Sarah, so long as the said Elizabeth should live, and at her death the negro wench to his daughter Mary McBride." The executors, John A. Woodruff and John McBride, proved the will and assented to the legacy. Mary McBride was, at the death of the testator, the wife of John McBride, and so continued until some time after 1827, and before 1837, when her husband died, having by his last will, bearing date 2 October, 1821, made or attempted to make a disposition of the said Sarah, then in the pos- (611) session of his mother-in-law, to his three sisters-in-law, Lydia Pace, Hannah Moore and Phebe Bryan. In 1837 Elizabeth Woodruff died, and in 1839 this bill was filed by Mary McBride against Aaron Woodruff and Richard Choate, in which

she charges that in the fall of 1827, while Elizabeth Woodruff, the tenant for life, had possession of the negro woman Sarah and also of two children which had been born of the said Sarah after the death of the testator, one a boy of six and the other a girl of four years of age, a combination was made between the said Elizabeth, the defendant Aaron and one Isham Choate, to deprive and defeat the plaintiff of her estate in remainder in the said Sarah and her children. The plaintiff charges that in furtherance of this scheme the said Elizabeth, who was aged and very weak of intellect, by the persuasion of the said Aaron and Isham, who perfectly knew that she had but an interest for life in the said slaves, was induced to execute a deed purporting to transfer the said slaves absolutely and forever unto the said Isham, which deed was attested by the said Aaron, and recites a consideration of $300 as paid to the said Elizabeth; that thereupon the said Aaron clandestinely and in the night removed the said slaves out of the neighborhood to a place for that purpose appointed, where they were received by the said Isham, who carried them out of the State to his residence in Georgia, and thence to parts unknown, where they were sold. The bill charges that the removal of the slaves out of the State was conducted with such cunning and address that the plaintiff has been unable, until within a few months before filing the bill, to ascertain by whom the same was effected; that Elizabeth Woodruff died in the county of Surry in 1837, intestate and insolvent, and no administration has been granted on her estate; that Isham Choate died in Georgia recently, intestate, and there being personal effects of the said Isham in this State, administration of those effects has been granted here to the defendant Richard Choate, who hath possessed himself thereof to the value of $2,000. The bill further charges that the slaves, after
(612) they were carried away, much increased in number; that they and their increase are still in existence, but by whom held the plaintiff cannot ascertain, and that the late Isham Choate sold them absolutely and at a high price. The prayer of the bill is that the defendants may be decreed to pay to the plaintiff the sum at which the said slaves were sold, and the interest thereon since the death of Elizabeth Woodruff, the tenant for life.

The defendant Aaron Woodruff denies by his answer in the most positive and precise terms any participation in the alleged scheme to carry off the slaves referred to in the bill, or any knowledge thereof. The other defendant states in his answer that Isham Choate at his death owned two slaves in this State; that the defendant obtained letters of administration on the

estate of the said Richard here, took the said slaves into his possession, and sold them, and that these were the only effects of the deceased which came to his hands as administrator, and he then avers that he hath fully administered the said effects, and sets forth an account of his administration. He denies that the said Isham Choate carried off or sold the slaves, as charged in the bill, and insists that the plaintiff, at the death of the tenant for life, did not own the residuary interest of the said slaves, but that the same had vested in her husband while living, and was effectually disposed of by his will.

The proofs do not establish the charge in the bill against the defendant Woodruff. The only evidence which tends to implicate him is that of a single witness, Samuel Bangus, who deposes that after Isham Choate's death he saw among his papers in Georgia an instrument purporting to have been executed by Elizabeth Woodruff to said Isham for a negro woman and two children, and that this instrument purported to be attested by Aaron Woodruff, but he does not know that the signature was that of the defendant Aaron. As to him, therefore, the bill must be dismissed with costs. The proofs are satisfactory that Isham Choate got the negroes from Elizabeth Woodruff, carried them off clandestinely to Georgia, and thence removed them to New Orleans for the purpose of selling them, and that this was done with full knowledge that the said Eliza- (613) beth had but a life estate in them and with intent to keep to himself the full price thereof. It is clear that the plaintiff ought to have some redress for this injury, and it is just that Isham Choate's estate should refund this dishonest gain. But the defendant Richard is administrator only of that part of the estate which was, at the death of the intestate, in North Carolina, and according to the account exhibited hath fully administered it. The plaintiff is entitled to a reference, if she disputes the account, but if she admits it her bill must also be dismissed against this defendant. Should the plaintiff take the reference on the administration account, it will be proper to have a reference also to ascertain what was the price which Isham Choate received for the negroes, and whether these negroes or any of them or their increase born since the sale of them were alive at the death of Elizabeth Woodruff.

There is no weight in the objection made that the interest in remainder vested in the plaintiff's husband while alive, and after his death passed by his will. *Poindexter v. Blackburn*, 36 N. C., 286; *Hardie v. Cotton, ib.*, 61; *Revel v. Revel*, 19 N. C., 271.

It may be that in a case like this relief might be had at law, but for the reasons stated in the case of *Cheshire v. Cheshire, ante,* 569, it is a fit one also for the jurisdiction of a court of equity.

PER CURIAM. Decreed accordingly.

Cited: Weeks v. Weeks, 40 N. C., 121; *Plummer v. Brandon, ib.,* 194; *Parish v. Merritt,* 48 N. C., 40; *Arrington v. Yarborough,* 54 N. C., 75.

(614)

SAMUEL FLEMING ET AL. *v.* L. D. PERKINS AND B. BURGIN, JR.

Where upon a bill by a trustee, under a deed of trust for a slave for the satisfaction of debts, against one who claimed under a bill of sale for the same slave, registered before the deed of trust, but which the trustee alleged was taken with a full knowledge of the deed of trust and without consideration, the court, not being satisfied from the proofs either as to the *bona fides* of the deed of trust or as to the payment by the defendant of a valuable consideration for his bill of sale, ordered an inquiry by the master as to these matters, and that the maker of both deeds being now one of the defendants, might, at the instance of either of the contesting parties, be examined.

THIS cause, having been set for hearing at Spring Term, 1843, of BURKE Court of Equity, was, by consent of parties, transmitted to the Supreme Court to be heard.

The matters involved are stated in the opinion delivered in this Court.

Caldwell for plaintiffs.
Alexander for defendants.

RUFFIN, C. J. This is a bill filed for the purpose of setting up a deed of trust, made by the defendant Burgin to the plaintiff Fleming, in preference to a bill of sale for the same slave from Burgin to the other defendant, Perkins, upon the ground that the deed to the plaintiff was *bona fide* to secure just debts, and that Perkins had full knowledge of it when he took his conveyance. The deed to the plaintiff was made in Charleston, in South Carolina, on 18 November, 1837, and is the same (615) on which the bill was founded in *Fleming v. Burgin, ante,* 584. The deed of trust to the plaintiff was registered on 20 December, 1837, and the bill of sale to Perkins executed on 4th of that month. The bill states that Perkins

was fully informed of the contents and purposes of the deed to Fleming, and, with that knowledge, attested it as one of the subscribing witnesses. An answer was put in by each defendant, in which the execution and attestation of the deed as mentioned in the bill are admitted. But both of the defendants explicitly and positively deny that the deed was *bona fide* or intended to secure the debt to the plaintiffs or any others that are mentioned in it, and say that it was intended as a sham only, for the purpose of deceiving the Charleston creditors of Burgin and inducing them to allow him to leave that place and return home, and that it was distinctly agreed between Burgin and Fleming, at the time of executing the deed, that Fleming should hold it until Burgin could escape from his creditors there; but, upon his reaching Burke County, that he would surrender or cancel it, without registering it or enforcing it.

They further state that upon the execution of the deed Burgin was suffered to come to Burke, and that Perkins accompanied him and would have brought the deed and proved it if it had been intended that it should be registered, but that Fleming did not request him to do so, because he well knew that he had agreed not to enforce it, and that Burgin might, notwithstanding that deed, make such sales of his property as his interest might require. The defendant Perkins then states that, knowing the facts as before stated, and finding that Burgin was become insolvent, whereby he (Perkins) was likely to lose several debts which Burgin owed him, and other sums for which he was his surety, he purchased the slaves with the view of saving himself, at the price of $400, which was the full value, and which he paid on 4 December, 1837, and took a bill of sale, without any intention of defeating the deed to the plaintiff.

Neither party has proved his case to the entire satis- (616) faction of the Court. The positive denials to the answers, that the deed to Fleming was truly meant as a security for the debts named in it, and the direct averments in them that there was an express agreement at the time for its surrender as soon as it should have answered its purpose as a blind to the creditors in Charleston, are met by the testimony of but a single witness. He is *John Bright*, who is one of the persons secured in the deed as a creditor, and one of the subscribing witnesses, who has been examined after having released. He says that he considered it a *bona fide* transaction, and that Burgin stated that he intended to secure those debts in preference to all others. But upon being asked whether the deed was not made for the express purpose of keeping off the Charleston creditors till Burgin could get home and make arrangements with his friends,

and whether Fleming was not to give up the deed and Burgin be at liberty, when he reached home, to make any disposal of his property he might think proper, he answers, "If Burgin satisfied Fleming and Lewis, the deed was to be given up; as to the Charleston creditors, he knows nothing about them." The answer meets not the whole interrogatory, and is very unsatisfactory. But it, at least, raises a suspicion, not very slight, that the deed was not to operate to the full extent of its terms, but was meant as a deception to the creditors in Charleston, and only as a security for Lewis and Fleming, and not even for the witness himself. It creates a mistrust of the honesty of the deed, as not being intended to be enforced, at least in its present shape, and rather fortifies the answers. But, on the other hand, we are not satisfied with Perkins' proof of his being a purchaser. His answer does not state in what manner the price of the slave was paid, but the impression it is calculated to make is that it was in debts which Burgin owed him, or owed to others, and for which Perkins was bound, and which he then took on himself. But the evidence on this point is only the testimony of a witness that Burgin was indebted to the other defendant for several demands for services as a clerk in
(617) his store, for money lent, and bonds held on him in 1837, altogether amounting to about $400. It does not appear, except by inference, which may or may not be just, that those debts formed the consideration of the sale; that the securities for them were then surrendered or released, or that Perkins undertook then to pay for Burgin any sum to any other person on account of the purchase of the slave. We are not willing to decree, on the present state of our information on either of those points, as there is a great probability that it may be rendered more full and precise by an inquiry, as between the plaintiffs and the defendant Perkins, as to the real purpose of the deed to the plaintiff and as to the consideration of the defendant's purchase, and in making those inquiries the master shall be at liberty to examine the defendant, Benjamin Burgin, Jr., at the instance of either of the parties, and also any other witnesses who may be produced on either side.

PER CURIAM. Reference ordered accordingly.

(618)

JACOB A. McCRAW AND OTHERS v. W. DAVIS AND OTHERS.

A deed made by one who was in a weak state of mind, of all his property to his brother, in whom he had entire confidence, and who had great influence over him, and where a fair consideration is not clearly shown, will not be supported.

THIS cause was ordered to be transmitted to the Supreme Court from the Court of Equity of SURRY, at Spring Term, 1843, on the affidavit of the defendant. A statement of the case is embraced in the opinion delivered in this Court.

Graham and *Morehead* for plaintiff.
Boyden for defendant.

DANIEL, J. The complainants are a part of the next of kin of Samuel McCraw (who died intestate in the year 1819), and they have filed this bill against the administrator and the rest of the next of kin for a distribution of the personal estate of the intestate, which personal estate the plaintiffs charge to consist of the slaves Brice, Judy and her children, now in the possession of the administrator Davis. The intestate, by his father's will, was entitled to the said slaves and a tract of land worth $2,000, after the death of his mother; his mother died (619) in 1836. The bill charges that James McCraw, the brother of the intestate, obtained from him a bill of sale for Judy, on 22 March, 1817, and another bill of sale for Brice, on 12 December, 1818, and a bond for title to the tract of land on 26 June, 1818. James McCraw died intestate before 1830, and the defendant William Davis is also his administrator, and the other defendants are his children. The bill states that at the time the aforementioned deeds were executed Samuel McCraw had not a mind sufficient to contract, it having been destroyed by a long course of intoxication from ardent spirits, and that the said deeds were taken by James McCraw without any consideration, or that they were taken only to cover some small advances made by him in discharging debts for his brother Samuel. The bill prays that the bills of sale may be declared void, or that they be declared securities only for the small sums advanced by James McCraw for his brother, and that the residue of the property be decreed to be distributed among the next of kin. The answer admits all the statements in the bill, except the charge that Samuel McCraw was mentally incapable to contract at the dates of the bills of sale of the slaves, and the charge that they were executed without consideration, or that they were

taken by James McCraw as a security for advances made by him to his brother. The defendants state that they believe that the vendor then had a mind capable to contract, and that the deeds were executed by him absolutely and *bona fide* for a valuable consideration. There is a replication to this answer. The evidence in the cause is voluminous and in some points contradictory. We have looked through the whole of it, and on the point first made (mental incapacity in Samuel McCraw to contract at the times the bills of sale for the slaves were executed) we think that his mind then was reduced to the very lowest extreme of weakness from a long course of intoxication and an excessive use of ardent spirits; he was frequently in fits,
(620) in consequence of his drinking. He was in such a weak state of mind that McCraw had just before expressed his fear that some person or other would cheat him out of his property. Secondly, as to the consideration given for the slaves. Upon this point we have no proofs upon which we can rely. There is no evidence that money was paid or secured to be paid by James to Samuel as a consideration for these claims. The defendant Davis, the administrator both of Samuel and James, produces several notes of the former to the latter, some dated before these transactions and some bearing date after these transactions, and several evidences of debt of Samuel, purporting to have been paid by James; but there is nothing to show that these constituted the consideration or any part of the consideration for the slaves, or how much was truly due thereon. It is in evidence that James had the entire confidence of his brother Samuel and had great influence over him. The vendee, standing in the above relation to the feeble-minded vendor, who had just arrived at full age, strips him of his entire patrimony in both land and slaves, worth somewhere about $2,700 and he does not show what he paid therefor. There appears to us to have been both an absence of judgment in the person making the deeds and a degree of unfairness in the person accepting them. We therefore think that they cannot stand for anything more than a security for Samuel McCraw. See *Sir William Grant's* observations in *Cooke v. Clayworth,* 18 Ves., 17. In *Dunage v. White,* 1 Swanst., 137, the Court refused to carry into effect a deed of arrangement between the members of a family, principally on the ground that one of the parties was an habitual drunkard and was ignorant and incapable of understanding his legal rights without professional assistance, although he was sober at the particular time of executing the deed, the deed showing on the face of it that his rights were therein misrepresented.

See also, to the same point, Drewry on Injunctions, 19, 20. There must be a reference to ascertain the payment or advances made by James McCraw to Samuel McCraw, for which the administrator of James holds the said negroes as a (621) security.

PER CURIAM. Decreed accordingly.

THOMAS MITCHELL AND OTHERS *v.* WILLIAM WALKER AND OTHERS.

A commissioner to whom a matter has been referred by the court should state in his report all the evidence upon which the report is founded; otherwise, the report will be set aside.

THIS case had been referred by order of the court to a commissioner to make certain inquiries, and the report was now made. The defendant excepted because the commissioner had not set forth the evidence adduced before him.

No counsel for plaintiffs.
Alexander for defendants.

GASTON, J. The defendants have excepted to the report of the commissioner made in this cause, because he hath not reported therewith the testimony upon which it is made. (622) This exception must be allowed. The party against whom any matter referred to a commissioner hath been found is entitled to appeal from his judgment to the court; and it is essential, therefore, that the testimony heard by the commissioner upon that inquiry should be all put in writing and accompany the report.

PER CURIAM. Report set aside.

Cited: Cain v. Nicholson, 77 N. C., 412.

(623)

SARAH COOK v. MELVIN REDMAN ET AL.

1. A testator, having several children, bequeathed two shares of his estate to his son A. This son had previously promised his father that he would hold one of these shares for the separate use of a married sister, into whose husband's hands the father did not wish any of the property to pass: *Held*, that such a promise created a trust in the son which, after the death of his father, he was bound to execute, and that the sister, after the death of her husband, had a right to recover the property.

2. In such a case it is not necessary that a promise be made in express terms; silent assent to such a proposed undertaking will raise the trust.

THIS cause was transferred by consent from the Court of Equity of IREDELL, at Spring Term, 1843, to the Supreme Court. The facts are set forth in the opinion delivered in this Court.

Hoke for plaintiff.
Alexander for defendant.

GASTON, J. Thomas Redman, formerly of Iredell County, by his last will and testament, after several specific devises and bequests, and amongst others a bequest of negroes and other property to his wife for her life or widowhood, directed that the residue of his lands should be sold, and also the rest of (624) his property at the death of his wife, and the money divided among certain of his children and grandchildren therein mentioned, among whom was his son John, and to him he gave as follows: "I give and bequeath to my son John two equal shares of a legatee, with an addition of $30 for extra services by him performed." Thomas Redman died, and John Redman, one of the executors named in the will, acted as such, and afterwards died, having made his last will and testament, whereof he appointed Melvin Redman executor, who proved the will of his testator, and took upon him the office of executor. At the May Term, 1837, of Iredell County Court, the will of Thomas Redman was proved, and Hosea Redman was thereupon appointed by the court administrator of said Thomas, with the will annexed. In April, 1839, Sarah Cook, who was admitted to sue *in forma pauperis*, filed her bill against Melvin Redman and Hosea Redman, in which she charged that she was a daughter of Thomas Redman, and was living with her father at the time when he executed his will; that she had previously intermarried with one Henry Cook; that her husband, who was a man of idle, dissipated habits, had abandoned her and gone off

to Tennessee; that her father was desirous of leaving her a share of his property, but feared if he bequeathed it to her directly that it would fall into the hands of her husband and she would derive no benefit therefrom, and that, thereupon, it was agreed between her father, herself, and the said John, her brother, that her father should bequeath two shares to John, and he should hold one of them as a trustee for her sole and separate use; and that in furtherance of said agreement two shares were accordingly bequeathed to the said John in the manner set forth in the said will. The plaintiff further stated that her husband was dead, and she prayed that it might be declared that she was entitled beneficially to one of the shares so bequeathed to her brother John, and that his executor, the defendant Melvin, and the administrator with the will annexed, the defendant Hosea, might account to her therefor.

The defendant Hosea admitted by his answer the alle- (625) gations of the bill and professed his readiness to account with the plaintiff if the court deemed her entitled to an account upon those allegations. The defendant Melvin, by his answer, declared that he was ignorant of the truth of the matters alleged in the bill in respect to the trust for the plaintiff, with respect to one of the shares bequeathed to his testator by the will of Thomas Redman, and also ignorant of the death of Henry Cook, and prayed that the plaintiff might be put to proof thereof. To this answer the plaintiff replied.

On behalf of the plaintiff a number of witnesses have been examined, who testify to repeated declarations of John Redman that his father, at the request of his sister Sarah, and for the purpose of securing what was designed for her from the power of her dissipated husband, bequeathed to him an extra share for her, and desired him to let her have the benefit of it from time to time as she needed it, and that he intended to pay her out of the first money he collected.

This evidence, we think, establishes a promise and undertaking on the part of John Redman to the testator that the testator's wishes, in favor of his daughter Sarah, as declared to him, should be as fully executed as if the bequest were *formally* made to her; that this promise and undertaking, when made by one whose interests would be affected by the regular insertion of a bequest, will raise a trust which a court of equity will execute, is settled by several cases. *Chaymberlin v. Agar*, 2 Ves. and Beames, 262; *Mestaer v. Gillespie*, 11 Ves., 638; *Strickland v. Aldridge*, 9 Ves., 519; *Chamberlayn v. Chamberlayn*, 2 Free., 235. And it need not be shown that a promise was made in express terms; silent assent to such a proposed undertaking will

raise the trust. *Bryan v. Godfrey,* 4 Ves., 10; *Paine v. Hall,* 18 Ves., 475. The principle of these decisions is that in consequence of such promise the testator has been prevented from *formally* executing his intended purpose, and it would be an act of fraud in him who made the promise to avail himself of the omission so caused. The evidence of the death of Henry
(626) Cook is satisfactory. We declare, therefore, that John Redman was, in his lifetime, a trustee for the plaintiff with respect to one of the shares so as aforesaid bequeathed to him by his father, Thomas, and that, upon the death of the said John, this trust devolved upon his executor, the defendant Melvin, and that the plaintiff is entitled to have an account against him and the other defendant as prayed.

PER CURIAM. Decreed accordingly.

Cited: Thompson v. Newlin, 38 N. C., 343; *Reed v. Cox,* 41 N. C., 513; *Ferguson v. Haas,* 64 N. C., 778; *Henderson v. McBee,* 79 N. C., 222; *Shields v. Whitaker,* 82 N. C., 521; *Robinson v. McDiarmid,* 87 N. C., 462.

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(627)

LEWIS H. LOVE v. CARTER LEA, ADMINISTRATOR.

When the guardian of a ward who had resigned came to a settlement with a succeeding guardian, and, to secure the balance found due to the ward, executed a deed of trust of a slave and afterwards died, bequeathing this slave to the ward, and leaving sufficient other property to discharge his debts: *Held,* that this slave belonged in equity to the ward, and that the succeeding guardian had no right, without necessity, to cause the slave to be sold under the deed of trust, and in doing so and becoming himself the purchaser, although he gave a full and fair price, he acted without that *bona fides* which would entitle him in a court of equity to hold the property against his ward.

THIS cause was transmitted by consent from the Court of Equity of CASWELL, at Spring Term, 1843, to the Supreme Court.

The facts are stated in the opinion delivered in this Court.

Morehead for plaintiff.
Kerr for defendant.

DANIEL, J. The bill states that Samuel Love was the guardian of the plaintiff; that he resigned the trust, and the court appointed John Love guardian; that Samuel came to a settle-

ment with John as guardian, and executed to him a bond for the balance of the ward's estate, and that he (Samuel) gave a deed in trust of a female slave by the name of Minerva, to secure the payment of the bond; that Samuel Love made his will, and specifically bequeathed the said slave to the plaintiff, and died in 1829. Afterwards, in the same year, John Love, the guardian, caused the trustee to expose the said slave to sale, when he became the purchaser, and retained her until his (628) death, which took place in 1840. Minerva now has several children. The bill states that the general personal estate of the testator, Samuel Love, was amply sufficient to pay all his debts, including the said bond, and that there was no necessity for the sale of the slave, which was specifically bequeathed to the plaintiff; that the plaintiff came of age in 1840. The bill prays for an account of the guardianship, and that the said slaves may be surrendered to the plaintiff as a part of his estate.

The defendant in his answer admits that John Love was the guardian of the plaintiff, and that he, as administrator, is now ready to account and pay any demand which may be due him. He admits that the slaves mentioned in the bill are now in his possession; but he insists that they belong to the estate of his intestate, as his intestate purchased the same of one Gray and took a bill of sale for the same. He says that he is ignorant that the deed in trust to Gray was to secure a debt for the benefit of the plaintiff. He says that he has no knowledge of the legacy of the slave to the plaintiff, under the will of Samuel Love. There is a replication.

The main dispute in this case is as to the right and title of the slaves Minerva and her children. The evidence in the cause satisfies us that the deed in trust of the slave Minerva, from Samuel Love to A. Gray (trustee), dated 21 April, 1829, was executed to secure a debt of $185.65 to John Love as the guardian to the plaintiff; that Samuel Love made his will and bequeathed the said slave Minerva to the plaintiff, and afterwards died in the said year 1829; that the trustee, at the instance of the guardian, sold the slave, under the pretense of satisfying the said debt, and the guardian became the purchaser, and took a bill of sale from the trustee in his own name, dated 31 December, 1829. The executor of Samuel Love, in his deposition, states that the other legacies had to abate in paying the debts of his testator, but this legacy has never contributed anything in the said payments. In equity the slave Mi- (629) nerva belonged to the plaintiff. If the guardian could not find general personal assets of the testator to make the debt

of $185.65, coming to his ward, it seems to us that he acted improperly in having his ward's slave, worth more than $300, sold to pay said debt. But when we see with what expedition all this was done, and that the guardian became the purchaser himself, we are compelled to declare that, although he gave a full price for the slaves, the transaction is wanting in that *bona fides* which will authorize this Court to decree that he can rightfully hold them against his ward.

The defendant must, we think, be decreed to surrender the slaves Minerva and her children to the plaintiff, and to account for the hire and also the other estate of the plaintiff, and in the account he will be allowed all just credits for the purchase money, and for raising the negroes.

PER CURIAM. Decreed accordingly.

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(630)

WILLIAM GOOD v. THOMAS K. HARRIS ET AL.

Where a man, "professing to be in embarrassed circumstances and desirous of discharging his debts and to secure a maintenance for his family," executed a deed in trust for all his personal property to pay the debts, and then directed "that part of the said property may remain thereafter, the same to be held in trust for the *use*, maintenance and support of his wife and her children," and that "in case he should die before his wife, then the trustee to reconvey the surplus property with its accumulated value and quantity unto his widow and her children, if she should request it": *Held*, that on the death of the wife, the debts being paid, the husband was entitled to her share of the surplus, either by virtue of his marital rights or as her administrator, and that the children which she had by former marriages were not included in the provisions of the trust, but that all the remainder of the surplus belonged to the child she left by the husband who created the trust.

THIS cause was transmitted by consent from the Court of Equity of NORTHAMPTON, at Spring Term, 1843, to the Supreme Court. The facts are stated in the opinion delivered in this Court.

Bragg for plaintiff.
B. F. Moore for defendant.

DANIEL, J. The late wife of the plaintiff had been thrice married. *First* to a man by the name of Harris, and by him she had three children. *Secondly,* to a man by the name of Bradley, and by him she had one child. *Thirdly,* to the com-

plainant, by whom she had one child, James Good; and she died in 1840, when the plaintiff became her administrator. The plaintiff, during the coverture, "being in embarrassed circumstances and desirous of discharging his debts, and to secure a maintenancer for *his* family," executed to the (631) defendant Thomas K. Harris a deed in trust for all his property (which deed makes a part of the case), to pay his debts—"and whatever part of the said property may remain thereafter, the same to be held in trust by the said Thomas Harris for the *use*, maintenance and support of the wife of the said Good and her children." And in case Good should die before his wife, "then he (the trustee) to reconvey the surplus property, with its accumulated value and quantity, unto the widow of the said Good and her children, if she should request it." The debts of the complainant have all been paid, and there is now remaining in the hands of the trustee a considerable personal fund to be distributed. The defendants are the children of Mrs. Good by the three marriages, and the representatives of deceased children, who claim the said property in different ways and in different proportions, under the words in the deed *"her children."* The plaintiff claims, *first*, the whole fund as a resulting trust; *secondly*, he says that if he is not entitled to the whole fund, he is nevertheless entitled as the administrator of his late wife to a half, and his son to the other half of the said fund, or at least he is so entitled to one share with all the children of his late wife. The case now comes on for a hearing on the bill, answers and the exhibited deed.

If the trustee held this personal property in trust only "for the maintenance of the grantor's family," a doubt might fairly arise whether the objects intended to be benefited were not so imperfectly described as to make the trust void, and so it would result, for the difficulty that would attend the execution of such imperfect trusts is converted by the Court into an argument that no trust was intended. Lewin on Trusts, 78, 79, and the cases there cited. But the grantor, in the subsequent and conveying part of the deed, as it relates to this fund, declares that the trustee shall hold the same in trust "for the *use*, maintenance and support of *his* wife and *her* children." We here see that there are well designated *cestuis que trust* described in the deed. But although there is no express provision in (632) the deed that the wife should have a *separate estate* in the trust, yet it is manifest that was the intention, when we read the whole instrument. That results from the nature of the deed being a provision by a husband for his wife. *Steel v. Steel*, 23 N. C., 452. Besides, he directs the trustee, on the contingency

of his dying before his wife, that the property "is to be conveyed to her and her children, if she desires it." But it makes no difference whether the plaintiff takes his wife's share by force of his marital right or as her administrator, for it comes to the same thing in interest as to him. The next question is, What children are to take with him? We think that the child (James Good) of the grantor by his then wife only is to take benefit in the trust with the plaintiff. We think so, *first,* because the grantor, in the beginning of the deed, declares that he was about to secure a maintenance for *"his family."* The other children were not members of *his* family at the time of the making of the deed. Again, the grantor declared that he was in embarrassed circumstances; the property was, therefore, first to be applied to rid him of *debt,* and the remainder, whatever it might be, was to continue in trust for the support of his wife and her children. He expected other children, it is probable. To suppose an embarrassed man intended to include four other persons of no *kin* to *him* as sharers in this surplus with his wife and his own children by him is to suppose the grantor to have lacked common prudence and also the common sense of self-preservation. We think, therefore, from a full reading of the deed itself, he could not so have intended. We are of the opinion, and so declare, that the trustee, Thomas K. Harris, holds the funds mentioned in the pleadings in trust, one moiety for the complainant as the administrator of his late wife, Sylvester Good, and the other moiety in trust for the infant son of the said William Good and Sylvester Good, deceased, by the name of James Good. All costs will be paid out of the fund by the trustee.

PER CURIAM. Decreed accordingly.

Cited: McGinnis v. Harris, 52 N. C., 216; *Evans v. King,* 56 N. C., 388.

(633)

WILLIAM P. FERRAND ET AL., EXECUTORS, ETC., v. SARAH JONES AND OTHERS.

A testator, having a wife, two sons, and grandchildren by one of his sons, devised as follows: "3. It is my desire that all of my property, real and personal, that may be left after my debts are satisfied, I devise to my wife during her natural life. 4. I give to my son J. S. one dollar. 5. I give to my son J. S.'s children the sum of $600 out of the annual income of my estate, for the support and benefit of his children, to be paid annually by my executors. 6. I give to my son A. J. $600 annually. 7. At the demise of my wife I lend unto my son A. J. the one-half of my real and personal estate, including the piece I now reside on, and the lands adjoining it. If my son A. J. should demise without lawful issue, I then give the property to my son J. S.'s children, to be managed by my executors in that way they may deem proper to the benefit of his children": *Held, first*, that the annuities charged on the life estate of the widow are to be paid, though they exhaust all the income of the estate and leave the widow without the means of maintenance. *Secondly*, that the annuity to the children of J. S. being "for their support and benefit," is to be paid to those children that were in *esse* at the death of the testator; and the after-born children are to be let into the benefit of the annuity prospectively from their births. *Thirdly*, that on the death of the widow the annuities will cease, and A. J. will take one moiety of the estate, subject to the ulterior limitation upon his dying without issue. *Fourthly*, that the children of J. S. take the other moiety of the estate, on the death of the widow.

THIS cause was removed by consent from the Court of Equity of ONSLOW, at Fall Term, 1842, to the Supreme Court.

The bill was filed by the plaintiffs as the executors of William Jones, deceased, praying the advice and direction of the court as to its construction and execution by the executors. The following is a copy of the material parts of the will: "Item 3d. It is my desire that all of my property, real and personal, that may be left after my debts are satisfied, I devise to my wife during her natural life. 4th. I give to my son John (634) S. Jones $1. 5th. I give to my son John S. Jones' children the sum of $600 out of the annual income of my estate for the support and benefit of his children, to be paid annually by my executors. 6th. I give to my son Allen B. Jones $600 annually, and he is to remain with his mother to assist her and attend to her business during her life. In case that he does not comply with the above request, I then give him $300 per annum, to be paid by my executors annually. 7th. At the demise of my wife I lend unto my son Allen B. Jones the one-half of my real and personal estate, including the piece I now reside on, and

the lands adjoining it. If my son Allen should demise without lawful issue, I then give the property to my son John S. Jones' children, to be managed by my executors in that way they may deem proper to the benefit of his children." The bill stated in substance that the testator at his death left a widow, who is still alive, and two sons, Allen and John, the latter of whom had at that time several children, and that more had since been born to him; that the income of the estate was not more than sufficient to pay the two annuities of $600, and if applied to that purpose the widow would be left destitute of the means of support; and then prayed the advice of the court upon the several points arising on the construction of the will and their duty in the premises, which will be found in the opinion delivered in this Court. The different parties who were interested were made defendants, and put in their answers, and claimed according to their respective interests.

J. H. Bryan for executors.
Badger for the widow and A. B. Jones.
Iredell for J. S. Jones' children.

DANIEL, J. The plaintiffs, as the executors and trus-
(635) tees of the last will of William Jones, deceased, ask the Court to aid and direct them in the execution of the trusts therein contained. *First*, we think that the widow, Sarah Jones, by virtue of the third clause in the will, takes for and during her life, after the debts of the testator are paid, all the estate, real and personal, but charged with the two annuities of $600 each, to Allen Jones and the children of John Jones, as mentioned in the fifth and sixth clauses in the will. If the said annuities exhaust all the income of the estate in the hands of the trustees, and leave the widow without the means of maintenance, it is her misfortune not to have dissented from the will.

Secondly, the annuity for John S. Jones' children, being "for their support and benefit, to be paid *annually*," is to be paid to those children who were in *esse* at the death of the testator, and the after-born children are to be let into the benefit of the said annuity prospectively from their births.

Thirdly, on the death of Sarah Jones, the widow, the said two annuities will cease, because the *fund* is then to cease out of which they are to be raised. Allen Jones will then take, in remainder, one-half of the real and personal estate, subject to its going over to the children of his brother, John Jones, in case of his death without leaving issue. It would be unreasonable, and, as we think, against the intention of the testator, for him

to have a moiety of the entire estate after the death of his mother, and also a contribution of the annuity of $600, which then could only be raised out of the other moiety of the estate.

Fourthly, what is to become of the other moiety of the estate after the death of the widow? The testator had but two children, and he has shown a clear intention to disinherit one of them (his son John), as in his will he says, "4th. I give to my son John S. Jones $1." He has provided for Allen, his other son, by giving him half his estate after the death of his mother and the ceasing of his annuity. He has shown us before in his will that the children of his son John were collectively objects of his bounty equally with his son Allen, in respect of the annuities. If the children of John do not take the (636) other moiety of the estate in remainder, then there is nothing in the will that can indicate an intention of a *cesser* of their annuity at the death of the widow, which annuity is charged upon and to be paid "out of the annual income of the estate." That annuity, if continued to be raised, would exhaust, or nearly exhaust, the income arising out of the said moiety of the estate; and if there was anything over it would have to go to the two sons, as being the heirs at law and next of kin of the testator—one of whom he intended to disinherit and the other he had just provided for with half of his estate. When we read the preamble of the will we must see that the testator did not intend to die intestate as to any of his property, or that he meant to leave this moiety subject only to a charge of the annuity of $600 to John S. Jones' children. But it seems to us that he meant it to go to the said children, as a remainder, on the death of his widow. He says, "If my son Allen should die without issue, *I then give the property* to my son John S. Jones' children, to be managed by the executors to the benefit of the children." On the event of Allen dying without issue the testator intended that then the title to *"the property"* (meaning his whole property, and not that only that had been given to Allen), was to be in John's children. This expression of the testator raises a strong presumption that he supposed that the children were already to be considered the owners of that portion of the entire estate which was not included in Allen's remainder. By sticking to the strict letter of the sentence, and the adverb of time (*then*), and not looking through the whole will for the testator's meaning, the word *"then"* would seem to bring the two moieties of the entire estate to the children at one and the same instant of time, to wit, on the contingency of Allen dying without issue. *Then*, and not till *then*, are the children of John to take anything in the estate in remainder,

say the defendants John, Allen and the widow. But, we will ask, what is there in the will to limit the annuity given to the children, if it is not to be constructively limited, by their
(637) taking in remainder the estate charged with the payment of the annuity like that which was given to Allen? Their annuity otherwise would be a perpetual annuity, charged on this moiety of the estate. Again, great inconvenience would arise in getting in the estate for the children on the death of Allen without issue, if the other moiety in the meantime was to be distributed on the death of the widow, to the heirs and next of kin of William Jones; such an inconvenience could never have been contemplated by the testator. These defendants also contend that the words used by the testator ("I then give *the property*") only cover the moiety which was already given to Allen, subject to the contingency therein mentioned, and that the said words could not fairly be made to refer to any other property. We think otherwise. The said words constitute the beginning of a sentence in the will, and the testator was speaking as if he intended to say, "I then give *my whole property* to John S. Jones' children." The whole property should then be in them; raising an implication that he considered the other half was to be in them from the death of his widow. And, we think, from the provisions of the will, if the annuity is to cease then, that inasmuch as there would then be no provision for said children of John S. Jones, they are entitled to a vested remainder in fee to the other moiety of the real and personal estate of the testator. And that, if any of the children of John Jones should die before the tenant for life, then the prospective annuities would all survive to the surviving children of John S. Joues, and a personal representative of a dead child should not share with them in such annuities. But as to the vested estate which they take in remainder on the death of the tenant for life, the children of John, born at the death of the testator or which may be born before the time of the division of said estates (to wit, the death of Sarah Jones), and the real and personal representatives of any of the said children who may die before that time, are to take shares in the real and personal estate in said remainder, according as their rights and proportions may then appear to be.

(638) There must a reference to take the accounts as asked by the parties.

PER CURIAM. Decreed accordingly.

INDEX.

DEVISE.

1. A devise of funds "for the establishment of a free school or schools for the benefit of the poor of the county," is a valid devise, and is not such a perpetuity as is prohibited by the Constitution of this State or by the common law. *S. v. McGowen*, 9.

2. Where a testator by his will gives to each of his heirs and distributees a certain portion of his estate, "*and no more*," these words will not of themselves exclude the heirs and next of kin from other portions of the estate not effectually given away to some other person, for as to such portions they take by law, independent of and even against the intent of the testator. Yet such words of exclusion may have an important bearing in the construction of other devises in the will, so as to prevent any restriction on the terms of another clause whereby an intestacy *pro tanto* might be produced. *Atkins v. Kron*, 58.

3. Where A by will devised as follows: "I give the balance or residue of my property to my executor in trust for the benefit of my sister Q's grandchildren, by the name of F, to be paid to any one of them who should apply for the same; subject, however, to the payment of the legacies, etc. But should no one of my sister Q's grandchildren, or any one duly authorized legally to receive the above property in their behalf, apply within two years from the time of my decease, then the above property to revert unto Mary C. Kron's children and be distributed equally among them, subject to the legacies," etc.: *Held*, that the grandchildren of Q, being aliens, although they were entitled to the residue of the personal property, could not receive and hold any beneficial interest in the real estate; and that this, therefore, should go over, under the limitation, to Mary C. Kron's children; and this the more especially as the testator had plainly, in a previous part of the will, expressed his intent that no part of the real estate should go to his heirs at law. *Ibid.*

4. Where a testator by his will directed that "a slave named David and his wife, and their daughter Charity and her four children, should be put in possession of a certain piece of land, and there live together, provided that David and all his family support themselves without any cost to the estate; and in order that he may be able to accomplish this task I desire that he should enjoy the product of that farm, with the labor of himself, his wife, his daughter Charity and Charity's children, until the children attain the age of twenty-one, and then that C's children be returned into the common stock, as every one of them attains the age of twenty-one," and the testator then gives David and his wife, for the support of their family, some provisions, a horse, etc., and directs that they shall remain in possession of that land during their natural life, free of all incumbrances: *Held* by the Court, that the testator did not intend the emancipation of any of these slaves. *Ibid.*

5. A devise to executors to hold certain property and its proceeds until the testator's six sons *should become free from debt*, and, when that event occurred, to make a division among

DEVISE—*Continued.*

of this will he devises as follows: "Having understood that it is the prevailing opinion among a number of people that I am the proper heir to the estate of my brother Philemon Detheridge, deceased, and not knowing the law in such cases, and being desirous that my sister-in-law, Elizabeth Detheridge, should heir the same; and to prevent disputes that might arise concerning said estate, I give and bequeath to my said sister-in-law, Elizabeth Detheridge, widow of my brother Philemon, deceased, all my right, title and interest to that estate, and every part thereof; and further, it is my will and desire that the above clause should be distinctly understood that it is my will and desire that my said sister-in-law, Elizabeth Detheridge, should heir that estate, and every part thereof, real and personal, notwithstanding the laws of my country might or would make me the proper heir to the same." In a subsequent part of the will the testator thus devises: "And furthermore, it is my will and desire that my executor sell, at the death of Charlotte Detheridge, my lot or tract of land whereon she now lives, and whenever to the amount of $600 in the hands of the executor, I give and bequeath that much, $600, to I. A. J., T. H. J., G. D. J., J. J. J., C. T. J. and F. G. J., children of my uncle J J., to be equally divided between them, giving each $100; and whatever money is then remaining in the hands of my executor, my will and desire is that it be equally divided between the children first named, Patsy Detheridge, Sally Dalton, William Dalton, Elizabeth Dalton and James Dalton, giving Patsy Detheridge one-sixth part": *Held*, that the moiety of the dower of land, which had belonged to the deceased brother, did not pass under the latter, but was included and devised in the former of these clauses. *Dalton v. Scales*, 521.

24. A testator, having a wife, two sons, and grandchildren by one of his sons, devised as follows: "3d. It is my desire that all of my property, real and personal, that may be left after my debts are satisfied, I devise to my wife during her natural life. 4th. I give to my son J. S. one dollar. 5th. I give to my son J. S.'s children the sum of $600 out of the annual income of my estate for the support and benefit of his children, to be paid annually by my executors. 6th. I give to my son A. J. $600 annually. 7th. At the demise of my wife I lend unto my son A. J. the one-half of my real and personal estate, including the piece I now reside on, and the lands adjoining it. If my son A. J. should demise without lawful issue, I then give the property to my son J. S.'s children, to be managed by my executors in that way they may deem proper to the benefit of his children": *Held* (1), that the annuities charged on the life estate of the widow are to be paid, though they exhaust all the income of the estate and leave the widow without the means of maintenance; (2) that the annuity to the children of J. S. being "for their support and benefit," is to be paid to those children that were *in esse* at the death of the testator; and the after-born children are to be let in to the benefit of the annuity prospectively from their births; (3) that on the death of the widow the annuities will cease, and A. J. will take one moiety of the estate,